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), *et al.* Petitioners, for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.	Index No. 651786/2011 Assigned to: Kapnick, J. **Motion Seq. 29-33**

STEERING COMMITTEE'S CONSOLIDATED REPLY MEMORANDUM OF LAW IN SUPPORT OF ORDERS TO SHOW CAUSE[1]

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[1] For efficiency and to decrease the overall page volume, the Steering Committee respectfully submits this single Consolidated Reply Brief which addresses all five pending motions to compel (Mot. Seq. 29-33), rather than submitting five separate reply briefs of up to 15 pages each.

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Cases

The Steering Committee of Intervenor-Respondents and Objectors respectfully submits this consolidated reply memorandum in support of: (1) the "RRMS Motion" (Mot. Seq. 30); (2) the "At Issue Motion" (Mot. Seq. 31); (3) the "Common Interest Motion" (Mot. Seq. 33); (4) the "ETI Motion" (Mot. Seq. 29); and (5) the "Conflict Waivers Motion" (Mot. Seq. 32).[2]

PRELIMINARY STATEMENT

Throughout the discovery process, the Steering Committee has sought to ensure that the Intervenors and this Court have the information relevant and necessary to evaluate the settlement and process leading to it. Without the Steering Committee's efforts and the Court's direction, the information that has been developed thus far would have never seen the light of day and the assertions in the Verified Petition would have stood unexplored and untested. The present motions to compel are focused and brought solely because the information requested is needed for Intervenors to have a "full and fair opportunity" to "object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement,"[3] and for the Court to have sufficient information at the end of the day to evaluate the expansive findings sought by the settlement proponents in the Proposed Final Order and Judgment ("PFOJ"). Notably, the State Attorneys General of New York and Delaware likewise ask this Court to

[2] The Steering Committee submits this memorandum on behalf of all Intervenors except: the Delaware Department of Justice; the New York State Office of the Attorney General; the Federal Housing Finance Agency; the National Credit Union Administration Board; the Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; the Washington State Plumbing and Pipefitting Pension Trust; the Knights of Columbus and the other clients represented by Talcott Franklin P.C.; Cranberry Park LLC; Cranberry Park II LLC; City of Grand Rapids General Retirement System; City of Grand Rapids Police and Fire Retirement System; Retirement Board of the Policemen's Annuity and Benefit Fund of the City Of Chicago; and The Westmoreland County Employee Retirement System.

[3] PFOJ ¶ e (Doc. No. 7).

compel much of the information sought by the Steering Committee "to assure the Court the settlement is in fact all its proponents say it is."[4]

In contrast, the Bank of New York Mellon ("BNYM"), the Inside Institutional Investors, and Bank of America have resisted producing meaningful discovery relevant to the expansive findings they ask this Court to make from the moment this proceeding returned to this Court. Beginning with BNYM's March 12, 2012 letter to the Court asking for a ruling limiting the scope of discovery, to its April 3, 2012 motion seeking the same relief, and at each subsequent hearing along the way, BNYM and the other settlement proponents have strenuously objected to *any* discovery beyond BNYM's self-selected production in November 2011. Notably, BNYM contended that this disclosure contained all the Intervenors needed to know to evaluate whether the proposed settlement is fair, an assertion that is obviously false. Meaningful discovery began only after this Court made clear that the scope of discovery in this case would be "much broader, I am sorry to say to the petitioners, a much broader scope than you think that it is" and further stated that the findings sought by petitioners in the PFOJ are "quite expansive."[5] It was not until nearly *two months after* the Court made these comments that BNYM finally produced its communications with Bank of America and communications among all three settlement proponents.

The settlement proponents continued, however, to withhold communications between the Inside Institutional Investors and Bank of America notwithstanding that the bulk of the settlement negotiations occurred between those parties. Finally, in late October 2012, Bank of America produced those communications, but only after the Court made clear that if it is to sign

[4] Doc. No. 496 at 2 (Memorandum of the State Attorneys General addressing three of the five orders to show cause).

[5] Ex. R-1 at 101:23-25; 103:9-10.

"a very, very comprehensive order approving, rubber stamping after the fact [the] negotiations" the Court will "have to see things."[6] The Inside Institutional Investors' claim that the settlement proponents have "permitted" discovery of settlement communications "by agreement" is thus revisionist history.[7] The settlement proponents' production of meaningful discovery has only been on the heels of the Steering Committee's request for information necessary to evaluate the PFOJ's findings and this Court's clear guidance reinforcing the necessity of that discovery.

Once the settlement proponents finally began providing meaningful discovery, the fact discovery phase of the case moved quickly. Less than six months passed between when BNYM finally began producing settlement communications and the close of fact discovery. In the span of only a few months, Intervenors deposed twenty-seven witnesses. BNYM's and the Inside Institutional Investors' repetitive cry that the Steering Committee is "waging a war of attrition and delay" rings hollow in light of the record that has been developed to date.[8] Had BNYM and the Inside Institutional Investors wanted this process to move more expeditiously, they could have fully disclosed from the beginning the information that has now been developed in the record as well as the additional information being sought in the subject motions.

SUMMARY OF ARGUMENT

The information sought by the Steering Committee through the present motions is relevant, non-privileged (or subject to a privilege exception), and necessary to evaluate the broad findings sought by the settlement proponents in the PFOJ. For example, BNYM undoubtedly considered the communications between the Inside Institutional Investors and BNYM when deciding to enter the settlement agreement. Likewise, BNYM's Corporate Trust personnel have

[6] Ex. R-2 at 123:20-24.

[7] Common Interest Opp. at 1.

[8] RRMS Opp. at 1.

testified that [redacted] There can be no question the communications with counsel will shed light on BNYM's conduct and decision-making, yet they continue to be withheld. BNYM has also withheld documents relevant to the expert advisors' opinions that BNYM admits were critical to its decision to enter the proposed settlement. Assuming that the Petitioners expeditiously produce whatever documents and deponents are ordered by this Court, the granting of the focused discovery that the Steering Committee seeks will not upset the remainder of the case schedule.

As the Court recognizes, this case is unlike any other prior Article 77 action and unlike other situations in which judicial approval of a settlement is sought. No underlying litigation was ever brought, or even seriously developed, before a settlement was entered. Billions of dollars in claims would be extinguished. Hundreds (if not thousands) of certificateholders who did not have a place at the bargaining table would be bound. Of the parties who were at the bargaining table, none represented the Intervenors. The one party who had the legal obligation to do so, the Trustee, was [redacted] At the same time, BNYM asks this Court to bless every aspect of its actions and the actions of its counsel.

The discovery requested in the Steering Committee's motions to compel is narrow and specific. Without it, Intervenors will not have a "full and fair opportunity" to object, nor will the Court have sufficient information to evaluate the expansive findings sought by the settlement proponents in the PFOJ. The Steering Committee respectfully requests this Court grant the additional discovery sought.

ARGUMENT

I. The Request for the RRMS Documents Is Reasonably Calculated to Lead to the Discovery of Relevant and Material Evidence That Cannot Be Obtained From Another Source [RRMS Motion, Mot. Seq. 30]

The Steering Committee seeks documents responsive to the September 14, 2012 subpoena to RRMS including: (1) documents RRMS relied on in forming the opinions in the two RRMS reports; (2) drafts of the reports prepared by RRMS, notes and calculations; (3) time records, invoices, and bills for work performed by RRMS; and (4) prior reports prepared by RRMS concerning mortgage-backed securities ("RRMS Documents").

A. The Reliability of the RRMS Reports Is Relevant

BNYM's response to the request for the RRMS Documents expresses exasperation over Intervenors' legitimate attempts to understand a settlement that has the consequence of erasing billions of dollars of value from Intervenors' investments. The opinions provided by RRMS (the "RRMS Reports") were a pivotal component of the Trustee's decision to enter into the $8.5 billion settlement.[9] BNYM cannot seriously be exasperated by the Steering Committee's honest interest in answering the basic question of whether the RRMS Reports were reliable. The answer to that question is relevant and material to numerous issues: (1) whether the Trustee was negligent in ascertaining pertinent facts[10]; (2) whether the Settlement Agreement was the result of factual and legal investigation by the Trustee, *see* PFOJ ¶ h; (3) whether the Trustee

[9] Indeed, the Verified Petition makes it abundantly clear that BNYM's determination that the settlement payment is reasonable is based *solely* on its review of the RRMS reports regarding the settlement amount. *See* Verified Petition, ¶ 63-67. Furthermore, Loretta Lundberg—the Managing Director of the BNYM Corporate Trust Division who signed the Verified Petition—testified in her deposition in response to a question of whether the Trustee performed any independent analysis of the RRMS reports that "[w]e did not perform … any separate calculations. That's not our area of expertise. That's why we relied – we hire experts." Ex. R-8 at 455:12-15.

[10] BNYM agrees that this issue is relevant. *See* Doc. No. 228 at § I.B (observing that under the Pooling and Servicing Agreements, the Trustee may exercise its discretion so long as it does not act in bad faith and is not negligent in ascertaining the facts).

appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled, PFOJ ¶ i; and (4) whether the Trustee acted in good faith when it relied upon the RRMS Reports. To answer any of these questions, Intervenors and the Court must first have access to the necessary discovery to fully understand any weaknesses and inadequacies of the opinions on which the Trustee relied.

BNYM argues that the Steering Committee must put forth evidence that the Trustee knew that the RRMS Reports lacked credibility in order to demonstrate the relevance of discovery into the reports' credibility. *See* RRMS Opp. at 7.[11] BNYM thus refuses to provide discovery on the trustworthiness of its expert advisors' opinions unless and until Intervenors can present evidence that the Trustee knew the opinions were not trustworthy. This is senseless and proves the relevance of the material that BNYM seeks to withhold. Intervenors cannot determine whether the Trustee unreasonably relied upon opinions that lacked credibility without access to discovery on whether those opinions did indeed lack credibility.

Regardless, there is evidence to support the conclusion that a reasonable Trustee would have known that the RRMS Reports were dependent on unsupportable assumptions. For example, Mr. Lin wholly adopts the breach and success rates from Bank of America's experience repurchasing loans from Fannie Mae and Freddie Mac. Ex. 12 to RRMS Br. at 4, 8. But as Freddie Mac's former general counsel testified, [redacted]

[11] Citations to the memoranda filed in support of the orders to show cause appear as "[RRMS, At Issue, Common Interest, ETI, or Conflict Waivers] Br. at __", and citations to the memoranda filed in opposition appear as "[RRMS, At Issue, Common Interest, ETI, or Conflict Waivers] Opp. at __." Citations to exhibits previously filed with the affirmations in support appear as "Ex. __ to [RRMS, At Issue, Common Interest, ETI, or Conflict Waivers] Br.", and exhibits previously filed with the affirmations in opposition appear as "Ex. __ to [RRMS, At Issue, Common Interest, ETI, or Conflict Waivers] Opp."

[redacted] Ex. R-10 at 262:5-16; 260:20-23; Ex. R-11 at 57:13-17 (agreeing that [redacted][12] Mr. Lin effectively ignored the damages calculations performed by the Inside Institutional Investors, which included [redacted] Ex. R-12 at 170:14-19. Unlike Bank of America's assumptions, the Inside Institutional Investors analyzed pools of similar mortgage types. Ex. 12 to RRMS Br. at 3. According to Mr. Lin, using the Inside Institutional Investors' assumptions resulted in a reasonable settlement range of *$27 to $52.6 billion*. *Id.* Contrary to BNYM's assertions that the Steering Committee is engaged in a fishing expedition by seeking the RRMS Discovery, the evidence already available indicates that the Trustee knew that Lin's report was unreliable and justifies the requested discovery. The RRMS Documents are relevant and material to the question of whether the Trustee unreasonably relied on flawed opinions.

B. The Scope of Discovery Requested is Limited and Within the Court's Discretion to Grant

Contrary to BNYM's histrionic claims in its Preliminary Statement, the extent of discovery conducted and requested is entirely appropriate for a settlement of this breadth, size, and nature.[13] The current requests before the Court are limited in scope and impose little, if any, burden on BNYM and RRMS. BNYM wrongly asserts that "analogous cases" support the

[12] Citations to "Ex. R-__" reference the exhibits to the Affirmation of Daniel M. Reilly in Support of the Steering Committee's Consolidated Reply Memorandum of Law in Support of Orders to Show Cause [Mots. Seq. 29-33], dated February 1, 2013, and filed simultaneously with this brief.

[13] For a summary of the considerations unique to this matter, see the Memorandum of the State Attorneys General Intervenors Addressing the January 16, 2013 Orders to Show Cause, at 1-2 (Doc. No. 496).

limitation of discovery. The cases are not as uniform as BNYM would have the Court believe and many courts have supported discovery similar in scope to that which is sought from RRMS.

1. Decisions of Special Litigation Committees

The corporate special litigation committee cases are not truly analogous to the Article 77 proceeding currently before this Court. However, to the extent they provide some guidance, they fully support the request for the RRMS Documents.

Under Delaware law, a corporation may establish a special litigation committee ("SLC") to investigate derivative claims purportedly brought on behalf of the corporation. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785-86 (Del. 1981). After investigating the claims and preparing a thorough written record of its findings and recommendations, the committee may move to dismiss the lawsuit on the grounds that it is not in the best interest of the corporation. *Id.* at 788. Limited discovery is available in order to facilitate the court's inquiry into the independence and good faith of the committee.[14] *Id.*

To the extent the SLC cases are relevant, they are instructive on the common adage that discovery is strongly within the discretion of the court to fashion as appropriate in the matter. For example, in *Sutherland v. Sutherland*, the court observed that in determining how to limit the scope of discovery, "the court cannot ignore the substantive history of litigation between the parties and the other anomalous circumstances that exist in the case" when it exercises its "inherent equitable discretion" to determine where to draw the lines. No. Civ. A. 2399-VCL,

[14] The discovery in SLC cases is "limited" for reasons that do not apply here. For example, as the court noted in one case cited by BNYM, wide-ranging document production in an SLC case may be unnecessary because "[t]o the extent that the SLC's analysis of the plaintiff's claims is incomplete, misleading, or erroneous, the plaintiff may come forward with evidence and legal arguments to demonstrate these flaws." *St. Clair Shore Gen. Emps. Ret. Sys. v. Eibeler*, No. 06 CV. 688(SWK), 2007 WL 3071837, at *5 (S.D.N.Y. Oct. 17, 2007). The weaknesses and inadequacies of the SLC's opinions about plaintiff's claims will be rooted in facts known to the plaintiff. This is not the case here, where Intervenors did not participate in the analysis of the proposed settlement.

2007 WL 1954444, at *3 (Del. Ch. July 2, 2007). There, the court permitted discovery on all the documents that the SLC ***and its counsel or advisors*** reviewed during their investigation and documents relating to the selection, retention, and compensation of the sole member of the SLC. *Id.* (holding that discovery was necessary where plaintiff had been prevented from "having a voice in, or even obtaining essential information about, the basic operational affairs of the companies" and defendants had persistently attempted to limit her access to critical information); *see also Weiser v. Grace*, 683 N.Y.S.2d 781, 784-85 (Sup. Ct. N.Y. Cnty. 1998) (granting discovery of what SLC's advisors viewed and relied upon even if those documents were not provided to the SLC on the grounds that the production of the documents "is necessary and will facilitate determination of the reasonableness and good faith of the SLC's investigation").

As held in *Sutherland* and *Weiser*, when an SLC delegates its responsibility for investigation to an advisor, the work of that advisor becomes relevant and discoverable. Similarly here, where the Trustee relied on RRMS, should extend to the documents created or compiled by RRMS regardless of whether those documents were conveyed to the Trustee.

2. *Reliance on Advice of Counsel Cases in Patent Infringement*

In this area of cases, the Steering Committee and BNYM agree that the advice of counsel cases are not applicable here insofar as they address whether a party's reliance on counsel's opinions waives the counsel's work product that was not communicated to the client. However, the Steering Committee strongly disagrees that the *Chiron Corp. v. Genentech, Inc.* matter is in the "distinct minority" of these cases. In fact, *Chiron* collects cases in which the court found a broad waiver and ordered production of counsel's work product, regardless of whether it was provided to the client. 179 F. Supp. 2d 1182, 1189 (E.D. Cal. 2001) (noting that "[s]everal cases hold that since an assertion of advice of counsel only implicates the state of mind of the client,

the work product of the advising attorney to be disclosed is that [which was] communicated to the client"; "*numerous cases* find to the contrary") (emphasis added). Likewise, the case cited by BNYM acknowledges that "many courts applying a broad waiver order disclosure of work product." *Simmons, Inc. v. Bombardier, Inc.*, 221 F.R.D. 4, 10 (D.D.C. 2004). Thus, there is ample and well-reasoned support for the assertion that the working files of RRMS are likely to contain relevant and discoverable information bearing on what was in the mind of the Trustee and whether the Trustee reasonably relied on the RRMS Reports.

For one example of the type of relevant documents that may exist within the RRMS Documents, the Court can consider testimony from the recent deposition of Capstone Valuation Services, another outside advisor on which the Trustee relied when considering whether to enter into the Settlement Agreement. The Steering Committee requested by subpoena, but BNYM did not produce, all notes from Capstone's files. Prior to Capstone's deposition, the Steering Committee located a document produced in a separate matter, [redacted] Ex. R-13 at 72:9-15. Capstone's representative, Mr. Bingham, confirmed that [redacted] *Id.* at 72:16-74:3. Mr. Bingham [redacted] *Id.* at 72:24-78:22. [redacted] elected to withhold the notes in response to the Capstone subpoena, presumably because they did not fall within BNYM's arbitrary definition of relevance as documents limited to what the Trustee saw. These types of documents are undeniably relevant and have been improperly withheld from BNYM's production of documents responsive to the subpoenas to the Trustee's expert advisors.

In light of BNYM's request to the Court for approval of the broad PFOJ findings, the scope of discovery easily encompasses the RRMS Documents. The Steering Committee's request is narrow, specific, does not impose any burden on BNYM, and will not create additional delay in these proceedings.

II. BNYM's Communications With Counsel Are Discoverable Here Because BNYM Has Placed Them At Issue and Because the Fiduciary Exception Applies [At Issue Motion, Mot. Seq. 31]

In the "At Issue Motion," the Steering Committee seeks discovery of three narrow categories of information: (1) communications with counsel at the [redacted] meeting; (2) communications with and documents generated by counsel concerning BNYM's evaluation of the settlement amount, including its decision to retain RRMS Advisors and to forego a review of loan files; and (3) communications with and documents generated by counsel concerning the event of default and forbearance agreement, BNYM's assessment of its own risk and its requests for an indemnity, [redacted], and BNYM's attempts to obtain an expansive release of claims held by certificateholders.[15]

A. BNYM Has Placed Specific Categories of Information At Issue

In bringing this Article 77 proceeding and seeking the broad relief contained in the PFOJ, BNYM has placed at issue the three categories of information sought by the At Issue Motion. At-issue waiver most commonly applies to two situations, both of which are relevant here: (1) where the party claiming the privilege asserts "that [it] has relied on the advice of counsel," and (2) where "a client does not expressly claim that he has relied on counsel's advice, but where

[15] Contrary to BNYM's assertions, the Steering Committee clearly identified the specific topics on which it seeks discovery. *See* At Issue Br. at 1, 20-21. The brief of the Delaware and New York Attorneys General also sets forth those categories. *See* Doc. No. 496 at 5. BNYM's claim that these requests are somehow "vague" and "expansive" is meritless.

the truth of the parties' position can only be assessed by examination of a privileged communication." *Bolton v. Weil, Gotshal & Manges LLP*, 798 N.Y.S.2d 343 (Table), 2004 WL 2239545, at *4 (Sup. Ct. N.Y. Cnty. 2004).[16] Both the Steering Committee's opening brief and the brief filed by the New York and Delaware Attorneys General detail the ways in which the findings proposed by BNYM have placed these categories of information at issue. At Issue Br. at 5-15; Doc. No. 496 at 3-6.

The cases cited by BNYM to support the proposition that judicial evaluation of a settlement ordinarily does not waive privileges are irrelevant. At Issue Opp. at 16-17. In those cases, the court was only asked to find that the settlement was reasonable and entered into in good faith. While these two findings alone, "*without more*," may not constitute an at-issue waiver, BNYM is seeking far more. *Deutsche Bank Trust Co. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64 (1st Dep't 2007) (emphasis added); *Nomura*, 62 A.D.3d at 582 (citing *Deutsche Bank*). BNYM has filed an 11-page proposed order containing numerous findings, only one of which is that the Trustee acted in good faith. By seeking these broad and detailed findings, BNYM is seeking far more than the ordinary litigant requesting court approval of a settlement.

Furthermore, counsel was far more instrumental in this settlement than in the cases cited by BNYM. The proposed settlement is largely the product of a [redacted] and as detailed in the Steering Committee's opening brief, [redacted] Ex. R-3; *see also* At Issue Br. at 6-15. [redacted] BNYM's use of the privilege here denies the Steering

[16] BNYM cites no authority for its novel proposition that a different standard for at-issue waiver applies in legal malpractice cases. At Issue Opp. at 21-23. In fact, BNYM relies on legal malpractice cases that it believes are helpful to its position. *See id.* at 16-17 (citing *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 62 A.D.3d 581 (1st Dep't 2009); *Corrieri v. Schwartz & Fang, P.C.*, No. 118251/2009, 2012 WL 251561 (Sup. Ct. N.Y. Cnty. 2012)).

Committee and others "access to information vital to its ability to resist" the findings sought by BNYM in the PFOJ. *Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 791 N.Y.S.2d 873 (Table), 2004 WL 1563259, at *7 (Sup. Ct. N.Y. Cnty. June 29, 2004).

In short, neither investors nor this Court can evaluate the PFOJ findings without access to the requested materials. BNYM cannot request broad findings from the Court "while at the same time refusing to disclose the information that would either prove or disprove" those findings. *Royal Indem.*, 2004 WL 1563259, at *7. Accordingly, production of the three categories of information identified by the Steering Committee should be compelled.

B. The Same Materials Are Subject to the Fiduciary Exception

In August, this Court ruled that BNYM owes certificateholders certain fiduciary duties and so could be subject to the fiduciary exception to the attorney-client privilege. Ex. 12 to At Issue Br. at 160:8-11, 162:4-7. The Court left open a determination of good cause. *Id.* at 162:4-7. After conducting discovery, the Steering Committee has been able to narrow its request to the three categories of information sought in this motion, for which there can be no doubt that good cause exists.

1. BNYM Owes Fiduciary Obligations to Beneficiaries

BNYM incorrectly asserts that the Court previously ruled on the issues raised by the Steering Committee's motion. In fact, BNYM is the party asking the Court to revisit the one issue that the Court did rule on: that the Trustee owes certificateholders fiduciary obligations. *See* Ex. 12 to At Issue Br. at 160:8-11. The new case cited by BNYM did not concern a pooling and servicing agreement, an RMBS trustee, or even raise the issue of the trustee's duty to avoid conflicts. At Issue Opp. at 3; *see ASR Levensverzekering NV v. Breithorn ABS Funding p.l.c.*, 2013 N.Y. Slip Op. 00386, 2013 WL 258647 (1st Dep't Jan. 24, 2013). This Court had already held that BNYM did not possess any fiduciary duties in *ASR Levensverzekering* before it held

BNYM owed fiduciary obligations to certificateholders in the Countrywide trusts, so the First Department's opinion *affirming* this Court's *ASR Levensverzekering* opinion could not reasonably cause this Court to reconsider its holding in this case. Ex. R-4. BNYM provides no plausible reason why the Court should revisit its prior ruling, made after substantial briefing and a full day of oral argument, that BNYM owes the certificateholders fiduciary obligations.

2. The Subject Communications Are Highly Relevant and May Be the Only Evidence of Whether BNYM's Conduct Was in Furtherance of Certificateholder Interests

As set forth in the opening brief, the Steering Committee has established the element of good cause that "the information sought was highly relevant to and may be the only evidence available on whether [the trustee's] actions respecting the relevant transactions and proposals were in furtherance of the interests of the beneficiaries of the trust or primarily for his own interests." *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 114, 756 N.Y.S.2d 367 (Sup. Ct. N.Y. Cnty. 2003); At Issue Br. at 16-20. BNYM does not dispute that the information sought here is "highly relevant," nor that the evidence sought by the motion "may be the only evidence available on whether *[the trustee's] actions*" furthered certificateholders' interests. *Stenovich*, 195 Misc.2d at 114 (emphasis added). Instead, BNYM ignores the fact that this element of good cause focuses on the Trustee's actions and incorrectly asserts that the Steering Committee has taken the position that "privileged communications between the Trustee and its lawyers 'may be the only evidence' of whether *the Settlement Agreement* benefits Certificateholders." At Issue Opp. at 4 (emphasis added). This is neither what the Steering Committee argued in its brief nor is it the standard under New York law. To establish good cause under the fiduciary exception, the inquiry is not whether the proposed settlement agreement benefits certificateholders, but whether the Trustee was acting in furtherance of certificateholder interests when negotiating and agreeing to the settlement agreement. For the

reasons stated in the Steering Committee's opening brief and unaddressed by BNYM, the Trustee's communications with its counsel "may be" the only evidence of whether its actions were in furtherance of certificateholder interests.

3. There Is Substantial Evidence that the Trustee Labored Under a Conflict of Interest

BNYM makes several dubious arguments in an attempt to avoid the conclusion that the Trustee acted throughout the settlement negotiations with a conflict of interest. First, BNYM's argument that the Trustee is not benefitted from avoiding an event of default is defeated by the record and common sense. BNYM's own risk officer has testified that the [redacted] Ex. 6 to At Issue Br. at 237:14-25.[17] When an event of default under the PSAs occurs, the Trustee has expanded duties and the certificateholders receive expanded rights, including: (1) BNYM must provide notice to all certificateholders; (2) a group of certificateholders can demand that the trustee take action to have the master servicer cure the event of default; and (3) BNYM becomes subject to the heightened prudent person standard. BNYM's assertion that it is "nonsensical" to suggest that it sought to avoid being subject to a heightened prudent person standard is undercut by its continuing claim that absent an event of default, it does not owe certificateholders *any* fiduciary obligations.

BNYM also argues that the indemnity it received was obviously required by the PSAs and provided no benefit to itself. This assertion is belied by BNYM's own conduct. Prior to signing the forbearance agreement, Kravitt informed Bank of America's lawyers, [redacted]

[17] Contrary to BNYM's assertion, [redacted]

Ex. R-9 at 1. Kravitt also admitted that receiving indemnity from Bank of America was a [redacted] Ex. R-5 at 569:24-570:4. As he put it in an e-mail to Bank of America, [redacted] Ex. 9 to At Issue Br. BNYM's argument that the indemnity agreement added nothing and should be obvious to all certificateholders is thus refuted by the record.

Contrary to BNYM's suggestion, the relevant consideration is whether the Trustee acted to protect itself rather than certificateholders, not whether the PSAs actually required Bank of America to indemnify BNYM. The Trustee is seeking numerous findings concerning the *process* by which the settlement agreement was reached, including that the Trustee "acted in good faith." *See, e.g.*, PFOJ ¶ k. Throughout this process, [redacted] Even if BNYM's contention that Bank of America was required to pay the indemnity anyway is correct, it is irrelevant to the process engaged in by the Trustee during the settlement negotiations, [redacted]

For the same reason, the Trustee's eleventh-hour attempts to obtain a broad release for all of its conduct are obviously relevant. As Gibbs & Bruns itself noted, these attempts "create[d] a conflict for the Trustee because it creates the appearance that the Trustee . . . wants to obtain a release of other claims for itself." Ex. 11 to At Issue Br. at 6. Simply because BNYM failed in its efforts to insert this entirely self-interested provision into the final version of the proposed final order and judgment does not change the fundamental reality that up until the eve of

settlement, the Trustee persisted in its attempts to benefit itself at the expense of certificateholders.

This straightforward evidence of a self-interested trustee supports finding good cause to compel the Trustee to produce the requested documents pursuant to the fiduciary exception.

4. The Trustee's Attacks on Its Own Certificateholders Are Baseless

Remarkably, the Trustee disparages the Steering Committee for trying to shed light on the process by which the proposed settlement was reached, claiming the Steering Committee's holdings are "miniscule" and that 97% of the certificateholders "apparently see no point" in the Steering Committee's efforts. At Issue Opp. at 15. Of course, the Inside Institutional Investors also only represent a minority of investors in the Covered Trusts (apparently less than 23%). Thus, to bolster their argument, the Trustee and the Inside Institutional Investors have repeatedly conscripted to their camp the roughly 75% of certificateholders who are not participating on either side of this proceeding. The Trustee and the Inside Institutional Investors must be reminded that when they commenced this action through an ex parte show cause order, the Verified Petition stood unexplored and untested. In light of the current record, any reasonable investor would surely have pause about the size of the settlement amount and could reasonably question the process by which the settlement was reached.

There is no basis for the Trustee's and Inside Institutional Investors' claim that non-participating investors support the settlement. In fact, evidence exists that investors believe the Intervenor-Respondents' efforts militate against the need to incur expense and effort only to raise redundant or duplicative issues:

> The Monarch Entities intervened in this litigation to preserve their rights to seek the disclosure necessary to make an informed decision about the merits of the proposed settlement . . . . A number of other entities have also intervened in this case, many of whom, similar to the Monarch Entities, are also certificateholders in the trusts covered by the proposed settlement. Many of those parties will raise

> arguments about the proposed settlement that are similar to the arguments that the Monarch Entities would raise, and judicial economy and efficiency would be served by eliminating redundant or duplicative filings.

Ex. R-6.

The Trustee also now joins in the Inside Institutional Investors' baseless attack on the motives and "bona fides" of the Steering Committee. This attack on the Steering Committee is misguided. The Steering Committee, and all other Intervenors, collectively own billions of dollars worth of bonds subject to a settlement that appears to be pennies on the dollar. Moreover, the Steering Committee's good faith efforts to obtain materials based on the at-issue waiver and fiduciary exception doctrines is joined by the New York and Delaware Attorneys General in their parens patriae role.

III. BNYM and the Inside Institutional Investors Continue to Incorrectly Assert the Common Interest Privilege [Common Interest Motion, Mot. Seq. 33]

The Steering Committee seeks disclosure of two specific categories of evidence currently being withheld under the common interest privilege: the production of 548 documents identified in the Inside Institutional Investors' May 21, 2012 privilege log and the re-opening of the deposition of Jason Kravitt on topics Mr. Kravitt was instructed not to answer. BNYM and the Inside Institutional Investors continue to block production of fundamentally relevant evidence pursuant to a purported common interest. They are wrong for three reasons.

First, New York law simply does not require a showing of collusion as a condition precedent to disclosure of settlement communications. Instead the test has always been whether the evidence sought is relevant, material, and necessary to a party's case. There is no question that the specific evidence sought herein satisfies this liberal test in favor of disclosure.

Second, BNYM and the Inside Institutional Investors cannot satisfy their burden of establishing a common interest. No evidence exists that the parties had an agreement, *in writing,*

orally, or otherwise, at the time the parties purportedly assert a common interest. Retroactive affidavits do not satisfy the narrowly construed common interest test, and this Court has made clear that such conclusory attempts to satisfy a common interest should be rejected. Furthermore, the record clearly establishes that the parties disagreed over several material terms of the proposed settlement, and had the ability to revert to their plainly adversarial position at any time before the parties filed this Article 77 proceeding.

Third, even if the Court finds that a common interest exists, the Intervenors undoubtedly share in this interest. The proposed settlement ostensibly seeks to benefit all certificateholders equally under the controlling PSAs. BNYM and the Inside Institutional Investors have no answer (because quite frankly there is none) to their own statements filed in this proceeding—including in their own PFOJ and Verified Petition—that the proposed settlement purportedly seeks to benefit, and was entered into on behalf of, all certificateholders.

As a result, the Intervenors respectfully request that the Court order production of the documents withheld on the basis of common interest and order the reopening of Mr. Kravitt's deposition. At a minimum, the Steering Committee requests that the Court order an *in camera* inspection to determine whether the common interest privilege has been properly asserted and whether the documents at issue in the May 21, 2012 privilege log should be produced.

A. Collusion Is Not Required Under New York Law

The Steering Committee established that no New York case has ever suggested that collusion must be shown in order to justify production of settlement-related documents. *See* Common Interest Br. at 7-8. Despite being specifically challenged to raise a New York case on point, BNYM and the Inside Institutional Investors failed to do so. Instead, they continue to stubbornly insist that the Intervenors must establish collusion and cite a laundry list of cases to support this point, none of which are from New York. *See* Common Interest Opp. at 2, n.2. This

omission is telling, because the reality is that under New York law, consistent with the plain language of CPLR § 3101(a), settlement communications are plainly discoverable if they are material and necessary to a party's case. *See* Common Interest Br. at 8-9.

Irrespective of what factual differences BNYM and the Inside Institutional Investors attempt to raise in *Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 15 Misc. 3d 583, 591, 834 N.Y.S.2d 631 (Sup. Ct. N.Y. Cnty. 2007), *rev'd on other grounds,* 49 A.D.3d 85 (1st Dep't 2007), they cannot dispute that the *Wyly* court expressly rejected an argument made by a party shielding discovery that collusion must first be shown. There, like here, the party attempting to protect discovery relied on extrajurisdictional authority suggesting that collusion must be established. *Id.* at 591. The court dismissed this argument, and instead chose to focus on relevance; the proper test under New York law. *Id.* ("[I]n this case both a legitimate need and a legal basis have been demonstrated for obtaining the documents at issue.").

Moreover, BNYM and the Inside Institutional Investors utterly failed to address that the documents identified in the May 21, 2012 privilege log are relevant, *see* Common Interest Br. at 4-5, or that Mr. Kravitt was instructed not to answer questions on seven key topics. *Id.* at 6. They failed to do so because they cannot deny the documents identified in the privilege log or the topics Mr. Kravitt did not answer relate to communications concerning key aspects of the settlement. Indeed, all tri-party and binary communications have now been produced with the exception of the communications between BNYM and the Inside Institutional Investors. If BNYM and the Inside Institutional Investors were indeed aligned with a common interest of maximizing the Trusts' recoveries, as both have claimed, the communications between them should support this. If not, then the communications themselves will demonstrate the absence of

the purported common interest. Either way, there is no reason *not* to produce this relevant discovery.

B. No Common Interest Exists Because the Parties (1) Have Not Established the Existence of an Agreement, (2) Disagreed Over Material Terms of the Proposed Settlement, and (3) Had the Ability to Revert to Adversaries

This Court recognizes that "[t]he party asserting the common interest rule bears the *burden* of showing that there was an *agreement*, though not necessarily in writing, embodying a cooperative and common enterprise towards an *identical* legal strategy." *AMP Servs. Ltd. v. Walanpatrias Found.*, No. 106462/2004, 2008 WL 5150654 (Sup. Ct. N.Y. Cnty. Dec. 1, 2008) (Kapnick, J.) (emphasis added; internal quotations omitted). The party asserting the privilege bears this burden, and like all privileges, the common interest is narrowly construed. *See Aetna Cas. and Sur. Co. v. Certain Underwriters at Lloyd's, London*, 176 Misc. 2d 605, 612, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Cnty. 1998). Based on these principles, the Intervenors identified specific evidence demonstrating that the parties never reached a common interest – in writing, orally, or otherwise. *See* Common Interest Br. at 11-12. The absence of any such agreement is fatal to BNYM's and the Inside Institutional Investors' assertion of a common interest.

In an attempt to cure this deficiency, BNYM and the Inside Institutional Investors now submit retroactive affidavits filed in connection with their opposition brief by Mr. Madden and Mr. Kravitt to suggest that they shared a common interest. Significantly, this is the *only* evidence they put forth to suggest they had a common interest agreement.[18] This Court has rejected this practice. *See AMP*, 2008 WL 5150654. In *AMP*, attorneys for a law firm and

[18] Mr. Kravitt's affirmation in particular highlights the problematic nature of using affirmations now to suggest a common interest existed previously, as his affirmation seeks to "clarify whatever ambiguity might exist" regarding his initial July 27, 2012 affirmation. *See* Doc. No. 480 ¶ 2. Furthermore, Mr. Kravitt's initial affirmation contained only two conclusory paragraphs regarding a supposed common interest. *See* Doc. No. 351. Realizing the insufficiency of such bald assertions, Mr. Kravitt now files a supplementary affirmation. However, as set forth above, the use of such retroactive affidavits does not satisfy the existence of a common interest.

attorneys for the IRS representing separate entities filed affidavits that the entities shared a common interest and agreed to use their best efforts to keep information confidential. *Id.* This Court rejected the use of such affidavits to create the existence of a common interest agreement, specifically holding that "none of the affidavits identifies an oral or written agreement or understanding embodying a common legal strategy or showing that [the parties] were acting with a common interest or purpose." *Id.*

The Steering Committee has also established in detail that there were specific and material differences over several key aspects of the proposed settlement. These disputes included [redacted] *See* Common Interest Br. at 14-17. On this last point, [redacted] The deposition testimony is clear that significant and indisputable material differences existed. Neither BNYM nor the Inside Institutional Investors point to any *specific* deposition testimony in their opposition brief refuting the existence of such fundamental differences.

Finally, BNYM and the Inside Institutional Investors ignore that just three weeks before the parties entered into the proposed settlement, Ms. Patrick and her clients threatened to walk away from the deal. *See* Common Interest Br. at 17. Though BNYM claims that they had a satisfactory indemnity in place, if Ms. Patrick did not enter in the settlement there is no doubt that the Inside Institutional Investors would become adverse to both BNYM and Bank of America. *See Mt. McKinley Ins. Co. v. Corning, Inc.*, No. 602454/2002, 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. Dec. 4, 2009) (Bransten, J.) ("[E]ven assuming that [the parties] shared a common legal interest, there was a substantial risk the parties would revert to adversaries, which calls the expectation of confidentiality into question.").

As this Court held, "merely having a shared interest in the outcome of the underlying litigation is not sufficient to create a common interest." *AMP*, 2008 WL 5150654. The deposition testimony makes clear that BNYM and the Inside Institutional Investors simply did not share a commonality of interests sufficient to invoke this narrowly construed privilege. Their conclusory assertions today do not serve as a panacea for their disagreements yesterday. This conclusion is also amply supported by common sense. As the Inside Institutional Investors have made clear, BNYM did not volunteer to join forces with the Inside Institutional Investors; instead they were compelled to do so as evidenced by a forced and reluctant Trustee that disagreed [redacted] The common interest does not apply.

C. The Common Interest, If Applicable, Applies to All Certificateholders

Even if the Court concludes that BNYM and the Inside Institutional Investors shared a common interest, there is no doubt that all certificateholders share in this interest. Both BNYM and the Inside Institutional Investors have repeatedly paraded in this Court and to the press the

purported benefits of this settlement to all certificateholders. Indeed, as this Court is well aware, both parties have made express representations to the Court that their conduct was always in the certificateholders' best interests. *See* Verified Petition ¶¶ 10, 15, 36, 58, 59, 61, 78, 81, 92 (Doc. No. 1); PFOJ ¶ k; Ex. D to Verified Petition ("[O]ur clients believe the settlement is in the best interests of all the Trusts included in the settlement. . . ."). If in fact the true intent of BNYM and the Inside Institutional Investors was to maximize benefits to all certificateholders under the PSAs—a goal and interest shared by the Intervenors—there is simply no reason why the common interest between BNYM and the Inside Institutional Investors would not extend to all certificateholders, who are not independent third parties, but the same direct beneficiaries to a trust as the Inside Institutional Investors are.

Nevertheless, the Inside Institutional Investors attempt to distract from this obvious conclusion by once again resorting to *ad hominem* attacks against the Steering Committee members. For the reasons the Steering Committee has previously stated, these attacks are frivolous, particularly since some of the Inside Institutional Investors themselves have securities lawsuits against Bank of America. *See* Doc. No. 396. The Inside Institutional Investors resurrect their attack on AIG by misleadingly quoting from letters exchanged between AIG and the managing member of one of the Inside Institutional Investors. As the letters make clear, AIG intervened here to obtain more information about the proposed settlement to reach a fully-informed view on whether it is fair and reasonable. *See* Ex. 4 to Common Interest Opp. at 2. The letters also describe the unremarkable commercial reality that when two companies have multiple legal disputes between them, resolution of one dispute might result in a global resolution of all. Nothing about the fact that AIG or any other certificateholders may have other legal disputes with Bank of America negates that AIG is a major stakeholder in the subject trusts

who was not at the bargaining table for this settlement. The Inside Institutional Investors' repeated and vociferous attacks against the members of the Steering Committee raise the question of what information they are attempting to conceal through the assertion of a common interest privilege.

In a final desperate attempt to divert attention from the conflicts of interest that disclosure has revealed about the proposed settlement, the Inside Institutional Investors attack a non-party, Triaxx's investment manager, on the grounds that it was subject to SEC enforcement action. *See SEC v. ICP Asset Mgnt., et al.,* No. 1:10-cv-04791 (judgment entered with defendants neither admitting nor denying allegations in Complaint). Common Interest Opp. at 15 n.43. The Steering Committee need not retort by pointing out the regulatory history of the Inside Institutional Investors, because any argument impugning character with respect to discovery obligations in a civil action is frivolous.

BNYM's and the Inside Institutional Investors' representations to this Court, the express language of the PSAs, and ultimately common sense dictate that to the extent the common interest applies, all certificateholders share in this interest. The Court should compel disclosure of the 548 documents identified in the Inside Institutional Investors' May 21, 2012 privilege log, and allow the Intervenors to re-depose Mr. Kravitt on the topics he was instructed not to answer pursuant to the common interest privilege.[19]

[19] At a minimum, the Intervenors respectfully request that the Court order an *in camera* review of the 548 documents identified in the May 21, 2012 privilege log. *See* Common Interest Br. at 19-20. This Court has conducted such reviews when the common interest was at issue, *see GUS Consulting GmbH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 858 N.Y.S.2d 591 (Sup. Ct. N.Y. Cnty. 2008), and other New York courts have done the same. *See Masterwear Corp. v. Bernard*, 298 A.D.2d 249, 250-51 (1st Dep't 2002).

IV. Emphasys Technologies' Settlement-Related Work is Relevant, Not Privileged, and Discoverable [ETI Motion, Mtn. Seq. 29]

The Steering Committee seeks an order compelling ETI to (1) produce the documents requested in the Steering Committee's October 29, 2012 Subpoena to ETI, and (2) answer deposition questions regarding the work that ETI performed relating to the proposed settlement. The information is relevant and discoverable because—as BNYM concedes—ETI's work concerned the terms of the Settlement Agreement, which BNYM asks this Court to approve in all respects. Moreover, BNYM has no basis on which to withhold any of the ETI information because it is factual information and the engagement is not privileged.

BNYM's opposition brief reveals that several key facts raised by the Steering Committee's opening brief concerning ETI are undisputed:

1. ETI is a fact witness. ETI Opp. at 13.
2. ETI has "*factual* knowledge" about "the process that led to the Settlement Agreement." ETI Opp. at 5.
3. ETI's work concerns paragraph 3 of the Settlement Agreement. ETI Opp. at 5.
4. ETI's work was *necessary* in determining whether the Settlement Agreement conformed "to the letter and spirit of the pre-existing PSA waterfalls." ETI Opp. at 6.

On these undisputed facts alone the Steering Committee is entitled to discovery from ETI because: (1) ETI's work concerned the settlement terms that this Court is being asked to approve in all respects; and (2) the attorney-client privilege (the only privilege BNYM claims) does not extend to underlying facts.

Yet BNYM continues to withhold ETI's factual knowledge and related information, arguing that the information "came through [a] privileged engagement." ETI Opp. at 5. This argument is premised on BNYM's assertion that the "purpose" of ETI's engagement was to

assist Mayer Brown in providing legal advice to BNYM. ETI Opp. at 8.[20] That purported "purpose" stands in stark contrast to [redacted] Witnesses testified that [redacted]

BNYM should not be permitted to redefine the purpose of ETI's engagement or to cloak ETI's services under a claim of privilege simply because Mayer Brown was involved (even if significantly or primarily) in the course of the engagement.[21] By that improper standard, BNYM could claim the attorney-client privilege over all of the work performed by its advisors, including Barry Adler, Robert Daines, Brian Lin, and Bruce Bingham, because [redacted] There is no justifiable reason for the Trustee to selectively make certain advisor reports and information concerning the settlement available (e.g., Daines, Adler, Lin, Bingham), while simultaneously withholding other reports and information concerning the settlement (e.g., ETI, Garden City Group). The Trustee has asked this Court to bless the entire settlement, the settlement process, and the Trustee's

[20] In support of this assertion, BNYM has submitted the Affirmation of Jason H. Kravitt, which states that "[t]he purpose of ETI's engagement was to provide simulation results from which Mayer Brown could identify issues that might need to be addressed in . . . the Settlement Agreement." *See* Kravitt Aff. to ETI Opp. ¶ 3. This is the first time ETI's purpose has been articulated that way. Neither ETI nor any BNYM corporate witness ever described ETI's purpose as such.

[21] BNYM relies on an ETI invoice to support its argument about the nature of ETI's retention in this matter. *See* Kravitt Aff. to ETI Opp. at Ex. A. The fact that the document is titled "Mayer Brown Project" does nothing to change the fact that ETI's engagement with respect to this matter is not privileged. *See id.*

Notably, like much of the relevant evidence the Steering Committee has sought from BNYM concerning third-party witnesses and experts, BNYM *never produced this document during discovery*. It now relies on the document in its opposition, even though the document contains redactions that block all descriptions about the factual work ETI performed. The Court should reject BNYM's repeated and improper use of privilege as both a sword and shield.

actions in all respects. The Trustee should not be allowed to select which parts of the factual process it will reveal and which parts it will conceal.[22]

A. BNYM Hired ETI to Perform Calculations Related to Waterfall Distributions and ETI's Assistance With This Business Function Is Not a Privileged Engagement

ETI's engagement with respect to this matter is not privileged. First, ETI's engagement concerns matters [redacted] Second, [redacted]

BNYM insists that the engagement is privileged because the "sole purpose" of ETI's work "was to assist Mayer Brown in providing classic legal advice—how to draft a contract." ETI Opp. at 12. However, that argument is an unjustifiable effort to redefine the purpose of ETI's engagement. Neither ETI nor any of the BNYM corporate witnesses ever articulated such a purpose. [redacted], deposition testimony revealed that [redacted] Ex. R-7 at 73:23-74:3; 153:11-17; Ex. 5 to ETI Br. at 48:5-11. Although BNYM argues that "[t]he *client* here did not seek waterfall modeling," ETI Opp. at 8 (emphasis in original), [redacted] Ex. 5 to ETI Br. at 39:20-23, 37:17-20.[23]

[22] BNYM complains about the "dilemma" it faces in that if it asserts the attorney-client privilege the Steering Committee will argue that no privilege exists, and if it does not assert the privilege, BNYM could be faced with a waiver argument. *See* ETI Opp. at 1. That "dilemma" has no bearing on whether the withheld information is privileged. The party asserting the attorney-client privilege bears the burden of establishing the basis for such a claim. The analysis never turns on whether one party is concerned about the arguments the other party might make in response. The privilege either exists or it does not exist. Here, there is no privilege.

[23] If there is any doubt that ETI was engaged by BNYM and for BNYM, one need only review the [redacted] *See generally Delta Fin. Corp. v. Morrison*, 14 Misc. 3d 428, 432 (Sup. Ct. Nassau Cnty. 2006) (relying on the terms of the engagement letter to determine the nature of the engagement). In its overview of [redacted] ETI states that [redacted]

Additionally, the federal district cases BNYM cites in support of its argument that the ETI engagement is privileged are inapposite. First, none of BNYM's cases concern consultation about contract terms that were affirmatively submitted to the Court for approval. Here, BNYM is asking the Court to approve the very terms that *BNYM* agreed to based in part on ETI's work and analysis. Second, in each of the cases BNYM cites in support of its argument, the attorney relied on an expert to provide specialized expertise that was beyond the purview of the attorney's knowledge *and* beyond the purview of the client's knowledge. *See, e.g., Cargill, Inc. v. Sears Petro. & Transp. Corp.*, 2003 WL 22225580, *3 (N.D.N.Y. 2003); *U.S. v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *U.S. v. Cote*, 456 F.2d 142 (8th Cir. 1972); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992). Distinguishably, ETI's consultation concerned a subject matter that was [redacted]

Indeed, Ms. Lundberg admitted that [redacted]

[redacted] Ex. R-8 at 74:15-25.

BNYM also relies on *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 35 Misc. 3d 1205(A), 2011 WL 7640152 (Sup. Ct. N.Y. Cnty. Jan. 25, 2011), to argue that the attorney-client privilege should apply, but that case is also distinguishable. There, MBIA hired the law firm of Weil, Gotshal & Manges LLP to advise MBIA about its rights and remedies with respect to securitizations. Weil Gotshal in turn hired Risk Management Group, Inc. ("RMG") and AlixPartners LLP ("AlixPartners") to assist Weil Gotshal in *Weil Gotshal's* investigation of potential claims against Countrywide. The court considered RMG and AlixPartners to be agents of Weil Gotshal, and held that the attorney-client privilege applied to protect certain documents

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[redacted] Ex. 8 to ETI Br. [redacted] *Id.*

and communications related to the engagement. Unlike in *MBIA*, [redacted] *See* Ex. 8 to ETI Br. Moreover, [redacted] Ex. 5 to ETI Br. at 39:20-23, [redacted] *See* Ex. R-14 at 32:8-11 (testifying that [redacted]). While the waterfall distribution analysis may have ultimately informed how the Settlement Agreement was drafted, that does not alter the nature of ETI's consultation. ETI's work was an extension of the Trustee's business functions, not an extension of counsel's advice.

B. ETI is a Fact Witness with Factual Information Concerning the Settlement and Here the Attorney Client Privilege Does Not Preclude Disclosure of Facts

BNYM has admitted that ETI possesses "*factual* knowledge . . . about the process that led to the Settlement Agreement." ETI Opp. at 5 (emphasis added). BNYM cannot shield relevant facts by claiming that all factual knowledge "came through [a] privileged engagement." *Id.* First, as set forth above, the engagement is not privileged. Second, even if some aspects of the engagement are privileged (and they are not), the privilege does not extend to all underlying facts. *See generally Sieger v. Zak*, 60 A.D.3d 661, 662 (2d Dep't. 2009) ("[T]he attorney-client privilege constitutes an obstacle to the truth-finding process," and its application "must be narrowly construed") (internal quotation omitted); *see also Spectrum Sys. Int'l Corp. v. Chemical Bank*, 157 A.D.2d 444, 449 (1st Dep't 1990) ("The attorney-client privilege extends only to communications and not facts"). Even where a witness serves both as a consultant and a fact witness, he or she must be allowed to testify about his or her factual knowledge. *See City of Rochester v. E & L Piping, Inc.*, No. 1999/12094, 2001 WL 1263377, *2 (Sup. Ct. Monroe Cnty. Aug. 29, 2001); *see also Cartis, LLC v. Gotham Builders and Renovators, Inc*., 20 Misc. 3d 1136(A), 867 N.Y.S.2d 373, *7 (N.Y. Sup. Ct. Kings Cnty. Aug. 20, 2008) (finding that an expert witness with factual knowledge must submit to deposition concerning the facts). Even the

MBIA opinion, on which BNYM relies, provides that "[f]acts are seldom, if ever, privileged, whether provided to an attorney or not." *MBIA Ins. Corp.*, 2011 WL 7640152 at *7.

In sum, it is not an extraordinary proposition that a *fact witness* should be required to testify about the *facts.* The simple undisputed fact that ETI has "*factual* knowledge" about the settlement process, ETI Opp. at 5, is sufficient to permit discovery into that factual knowledge.

C. Certificateholders Do Not Have Sufficient Information to Assess Whether the Terms in Paragraph 3 of the Settlement Agreement Are Reasonable, or To Assess Whether the Trustee was Reasonable in Agreeing to Those Terms

Contrary to BNYM's assertions, certificateholders do not have sufficient information about the allocation or the distribution. First, certificateholders do not have a comprehensive description of the precise method by which NERA will project expected future losses. NERA's 2-page methodology outline—which notably contains various assumptions which Intervenors are not privy to—provides the contours of its proposed method, but as Faten Sabry [redacted] Ex. 10 to ETI Br. at 69:3-70:12. Moreover, and setting aside allocation issues, certificateholders have not been provided with a projected distribution of each allocable share. Certificateholders do not know how much they will receive under the proposed settlement and certificateholders do not know what alternatives were available to the Trustee when it was deciding whether to accept the terms of the Settlement Agreement. Without the ETI information, certificateholders cannot know how any of those options compare to the requirements of the PSAs. They also cannot know how each option might affect each tranche or whether the Trustee considered the differing effects on the various tranches. BNYM asks this Court to approve of its actions in all respects as well as the settlement itself in all respects. Undoubtedly, the distribution of the settlement payment is part of the settlement, and the decision to adopt a particular distribution option is part of the Trustee's actions.

For these reasons, the Court should grant the Steering Committee's request for ETI's work and related information.

V. The Conflict of Interest Waivers Bear Directly On BNYM's Good Faith And The Reasonableness of Its Decisions During Settlement Negotiations And Are Thus Properly Discoverable [Conflict Waivers Motion, Mot. Seq. 32]

BNYM's sole objection to producing the Conflict of Interest Waivers is that the waivers are not relevant because they "have no bearing on whether BNYM was conflicted." Conflict Waiver Opp. at 1. BNYM's argument misses the mark. New York's broad discovery mandate requires disclosure of any facts bearing on the issues to be adjudicated, including whether BNYM acted reasonably and in good faith in negotiating and entering the settlement. *See Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968). BNYM hired conflicted counsel to represent it as Trustee in a settlement that is set to extinguish the claims of thousands of certificateholders in 530 trusts. Whether BNYM's decision to waive conflicts while acting on behalf of certificateholders was reasonable and in good faith cannot be evaluated without knowing the nature and extent of the conflicts. The best description of those conflicts will be found in the waivers. Therefore, under New York's liberal relevance standard, the waivers are properly discoverable.

BNYM's argument that "the PSAs unambiguously grant the Trustee an absolute right to select its own counsel" is misplaced. Conflict Waiver Opp. at 2. Even if BNYM had an "absolute" right to select counsel, it would not relieve BNYM of its duty to exercise good faith in carrying out that right. *Cf. In re Estate of Wallens*, 877 N.E.2d 960, 962-63 (N.Y. 2007) ("[E]ven when the trust instrument vests the trustee with broad discretion to make decisions . . . a trustee is still required to act reasonably and in good faith in attempting to carry out the terms of the trust."); *see* Am. Jur., Trusts (2d ed., updated Nov. 2012). The waivers bear directly on whether BNYM acted reasonably and in good faith in choosing conflicted counsel.

In addition, BNYM chose to carry out its duties as Trustee with respect to the settlement [redacted] BNYM cites no law to overcome the principle that its counsel, just like BNYM, had a duty to be free from conflicts and to act in the best interest of certificateholders in carrying out the Trustee's duties with respect to the settlement. *See Weingarten v. Warren*, 753 F. Supp. 491, 496 (S.D.N.Y. 1990).[24] In light of this duty, the fact that BNYM's counsel also had duties of loyalty to BofA and a number of IIIs at the same time it was representing the Trustee with respect to the proposed settlement is problematic on its face. Finally, even if BNYM's and its counsel's duty to avoid conflicts of interest is as narrow as BNYM defines it (which it is not), the Court and Intervenors cannot possibly know whether counsel's conflicts, which BNYM waived, fall within BNYM's myopic definition unless and until BNYM produces the waivers.

For the reasons stated above, and those described in the Steering Committee's opening brief, the waivers will shed light on the reasonableness and good faith of BNYM's conduct and should be produced.

CONCLUSION

For the reasons set forth above, as well as those in the Steering Committee's opening briefs, the Steering Committee respectfully requests that this Court grant the relief sought in: (1) the "RRMS Motion" (Mot. Seq. 30); (2) the "At Issue Motion" (Mot. Seq. 31); (3) the "Common Interest Motion" (Mot. Seq. 33); (4) the "ETI Motion" (Mot. Seq. 29); and (5) the "Conflict Waivers Motion" (Mot. Seq. 32).

[24] In a last ditch effort, BNYM argues the waivers are not relevant because BNYM does not "take[] on counsel's ethical obligations." Conflict Waiver Opp. at 1, 6-8. However, Intervenors do not argue that New York's Rules of Professional Conduct apply to BNYM. Intervenors merely relied on New York's Rules of Professional Conduct in discussing the type of relevant information contained in the waivers, such as "the material and reasonably foreseeable ways that the conflict could adversely affect [BNYM's] interests" as Trustee acting on behalf of all certificateholders. N.Y.R.P.C. Rule 1.7 cmt. 18.

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Respectfully Submitted,

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