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.

Motion Sequence No. 29

THE BANK OF NEW YORK MELLON'S OPPOSITION TO THE MOTION TO COMPEL DISCOVERY FROM EMPHASYS TECHNOLOGIES, INC.

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PRELIMINARY STATEMENT[1]

The Steering Committee's Motion to Compel Discovery From EmphaSys Technologies, Inc. ("ETI") well illustrates the dilemma that The Bank of New York Mellon ("BNYM" or the "Trustee") faces in dealing with the relentless attempts to breach the attorney-client privilege. On the one hand, the Steering Committee asserts that the Trustee has *waived* attorney-client privilege by disclosing protected communications[2]; on the other, when the Trustee asserts the privilege, the Steering Committee contends that none exists. Here, despite receiving advance warning that it had noticed the deposition of a third party (ETI) whose involvement with the Settlement Agreement consisted entirely of an engagement directed and supervised by counsel, and intended to assist counsel in providing legal advice, the Steering Committee argues that the Trustee improperly blocked questions concerning that privileged engagement. Of course, had the Trustee permitted testimony about, for example, the instructions that Mayer Brown gave to ETI, it undoubtedly would be defending a motion arguing that it thereby *waived* privilege. In any event, this whole discovery dispute is yet another sideshow, because nothing that ETI did had any bearing on the Trustee's decision to accept or reject the Settlement Agreement. Thus, even if broader testimony were allowed, it would be irrelevant.[3]

We are also compelled, at the outset, to respond to the Steering Committee's inflammatory language accusing the Trustee of "many efforts to block information concerning

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1 As with the other discovery motions, many of the intervenor-respondents have opted not to join this one. *See* Memorandum of Law ("Br.") 1 n.1.

2 *See, e.g.*, Motion Sequence 31; D. Reilly Oct. 9, 2012 letter to the Court at 10-13 (arguing that signing the Verified Petition using knowledge of facts obtained from counsel and that disclosing that Trustee had retained counsel both waived attorney-client privilege).

3 Mayer Brown LLP files this opposition on behalf of The Bank of New York Mellon. Mayer Brown also represented ETI in its response to a subpoena from the Steering Committee and at the deposition, but the attorney-client privilege belongs to BNYM.

the allocation and distribution of the settlement payment" (Br. 2), further "efforts to prevent Intervenors and the Court from obtaining critical information about the allocation and distribution of the settlement payment" (*id.* at 1), and its assertion that "BNYM has not disclosed how the settlement proceeds will be distributed to Certificateholders in the Covered Trusts" (*id.* at 11). These are serious allegations, and they are all false. The $8.5 billion settlement payment will be allocated according to a formula in paragraph 3(c) of the Settlement Agreement—that formula has been disclosed since June 29, 2011. As stated in paragraph 3(c), the formula incorporates estimates of future losses that will be performed by an outside consultant (NERA) as of the Settlement Approval Date—that, too, has been disclosed since June 29, 2011. Each trust's allocation will be distributed pursuant to the pre-existing terms of the PSAs, together with paragraph 3(d) of the Settlement Agreement—those terms, like everything else, have been public since June 29, 2011.

We understand that the Steering Committee has a quibble about the *timing* of NERA's calculation. It apparently believes that the allocation should have been performed in 2011, rather than, as the Settlement Agreement provides, on the Settlement Approval Date. But the Trustee has *concealed* nothing. The ETI engagement is no exception. As explained below, ETI's work related to hypothetical simulations designed to stress-test the payment waterfalls, not realistic projections of actual distributions.

FACTUAL BACKGROUND

The allocation and distribution terms of the Settlement Agreement

Any discussion of the privileged ETI engagement must begin with the payment distribution terms in the Settlement Agreement. The Settlement Agreement provides for an $8.5 billion payment by Bank of America or Countrywide. Paragraph 3(c) sets forth a contractual formula for "allocating" that payment *among* the 530 trusts. One piece of the allocation formula

involves the calculation by an outside expert (NERA) of expected future losses for each trust. ETI will have nothing to do with that calculation, nor did it have any role in determining the formula in paragraph 3(c). Once the Allocable Share of the $8.5 billion is allocated to each trust, paragraph 3(d) of the Settlement Agreement specifies how that share is "distributed" *within* the trust.

Paragraph 3(d) also addresses certain anomalies that might result from the distribution of the settlement payment. For example, the capital structure of some trusts includes "non-economic" residual interests. Those exist because the claim on the trusts' residual assets must belong to some security, yet tax rules mandate that it cannot belong to any of the Certificates (or else they would receive unfavorable tax treatment). Thus, those trusts have residual interest classes that theoretically are entitled to anything left over after the Certificates are paid; but because the payments to Certificates are designed to absorb all of the trusts' income, those residual interests are not expected to receive any payment prior to the trust's final distribution date. As a result, the residuals generally are retained by the sponsor of the securitization—here, Countrywide.

It was never the settling parties' intent (and would not have been in the interests of Certificateholders) for Countrywide to recoup part of the settlement payment as the holder of these non-economic residual interests. Kravitt Aff. ¶ 2. To prevent that from occurring, paragraph 3(d) provides for any such excess payment to be held back for distribution in a later month, so that all settlement proceeds go to investors and none revert to Countrywide:

> To the extent that as a result of the distribution of the Allocable Share in a particular Covered Trust a principal payment would become payable to a class of REMIC residual interests [prior to the final distribution date for that trust], such payment shall be maintained in the distribution account and the Trustee shall distribute it on the next distribution date . . . .

Other parts of paragraph 3 correct for improper accounting results, such as the reversal of certain overcollateralization triggers, or other unintended benefits to Bank of America or Countrywide, such as the possibility that the Master Servicer could use the settlement payment to recoup servicing advances.

The ETI engagement

ETI is a consulting firm that uses proprietary computer systems to model RMBS payment waterfalls. Anthony Tr. 8:18-10:19.[4] ETI also provides to the Trustee (without the involvement of Mayer Brown) "shadow analytics" work concerning the monthly distributions to investors pursuant to the PSA payment waterfall. [redacted] *See* Anthony Tr. 9:12-10:19; Buechele Tr. 70:13-22. [redacted] *See, e.g.*, Buechele Tr. 70:13-22.

As is relevant here, however, ETI was separately retained to help Mayer Brown identify anomalies or unintended results, such as those mentioned in the preceding paragraphs, that could result from the settlement payment. For that work, [redacted] (*see* Rollin Aff., Ex. 8); sent a separate bill titled "Mayer Brown project" (Kravitt Aff., Ex. A); and performed a qualitatively different type of analysis. [redacted]

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4 Deposition excerpts are attached as exhibits to the Ingber Affirmation, filed herewith.

[redacted] Buechele Tr. 74:17-75:9. The data inputs and specifications for those models were provided by Mayer Brown, and the results were used by Mayer Brown in drafting or revising paragraph 3 of the Settlement Agreement. Kravitt Aff. ¶ 3. Certain employees at BNYM also saw the ETI simulations, but no witness has testified that the content of that work factored into the decision to enter into the Settlement Agreement.

The ETI deposition

Because the only factual knowledge that ETI has about the process that led to the Settlement Agreement came through this privileged engagement, we warned counsel for the Steering Committee that the ETI deposition was unlikely to yield much (if any) non-privileged information. Houpt Aff. ¶ 3. Counsel responded that he appreciated the warning but wanted to proceed with the deposition anyway, in part because the parties might have different views on the scope of the privilege. *Id.* ¶ 4.

The motion somewhat overstates the extent of the privilege objections. For example, the Steering Committee asserts that BNYM [redacted] Br. 5 (citing Anthony Tr. 42:16-43:4). That quotation comes from a colloquy, not a question, to which BNYM's counsel responded that [redacted] Anthony Tr. 43:9-14. [redacted] *See, e.g.*, *id.* 36-37. But when counsel persisted in asking about details of the engagement, the

instructions that ETI received from Mayer Brown, or the ultimate work product, BNYM was forced to assert attorney-client privilege.

ARGUMENT

I. The Attorney-Client Privilege Covers Work by Third Parties for the Purpose of Facilitating Legal Advice.

The Steering Committee argues that it is entitled to the details of the work performed by ETI. This work was necessary so that the Trustee's counsel could draft paragraph 3 of the Settlement Agreement in a manner that conformed to the letter and spirit of the pre-existing PSA waterfalls. This work falls comfortably within the attorney-client privilege.

"While the primary focus of the attorney-client privilege is obviously upon exchanges between counsel and client, it is often considered as extending to communications with specialists engaged to assist attorneys in performing their representational functions." *Cargill, Inc. v. Sears Petro. & Transp. Corp.*, 2003 WL 22225580, at *3 (N.D.N.Y.2003). The privilege applies where "the presence of [a non-lawyer specialist] is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. . . . What is vital to the privilege is that the communication be made ***in confidence*** for the ***purpose of obtaining legal advice*** from the lawyer." *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (emphasis added); *see also Cargill*, at *4 (communication with patent agent privileged because "information provided in that communication was ultimately utilized by the prosecuting attorney to perform his function and advise his client").

Two recent Appellate Division decisions confirm that the work of consultants like ETI, whose role is to assist counsel in providing legal advice, is not discoverable. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 35 Misc. 3d 1205(A), 2011 WL 7640152 at *2 (Sup. Ct. N.Y. Cnty. 2011), *aff'd* 93 A.D.3d 574 (1st Dep't 2012) (holding that a consultant "hired to

assist in fact gathering and analysis" was within the privilege as an "agent" of counsel) *cf. Ambac Assurance Co. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 452 (1st Dep't 2012) (third-party consultant's review of mortgage loan files covered by attorney work product protection).

That principle applies to a wide range of professions, when they assist lawyers to provide legal advice: accountants (*Kovel*); "secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar" (296 F.2d at 921); language interpreters (*id.*); psychiatrists (*United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975)); patent agents (*Cargill*); and tax advisors (*United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995)), among others. The key is that "the purpose of the communication is to ***assist the attorney in rendering advice*** to the client." *Id.* at 1499 (emphasis added). The contrast between *Adlman* and the Eighth Circuit's decision in *United States v. Cote*, 456 F.2d 142 (8th Cir. 1972), is illustrative. In *Adlman*, no privilege applied, because "the evidence support[ed] the conclusion that [the client] consulted an accounting firm for tax advice, rather than that [the lawyer], as [the client]'s counsel, consulted [the accountant] to help him reach the understanding he needed to furnish legal advice." 68 F.3d at 1500. By contrast, in *Cote*, the privilege did extend to an accountant, because "the taxpayers did not consult [the lawyer] for accounting advice. His decision as to whether the taxpayers should file an amended return undoubtedly involved legal considerations which mathematical calculations alone would not provide. It is clear that the accountant's aid to the lawyer preceded the advice and was an integral part of it." 456 F.2d at 144.

II. The ETI Engagement Was Privileged.

The key elements of the privilege in this context are (1) the confidentiality of the third-party work and (2) the purpose of the engagement—*i.e.*, to assist the lawyer, rather than to provide non-legal advice directly to the client. Under that standard, ETI's engagement here easily falls within the privilege.

A. The ETI Engagement Was Confidential.

The confidentiality of the ETI engagement is undisputed here and is confirmed by the engagement letter. *See* Rollin Aff., Ex. 8.

B. ETI Was a Specialist Engaged to Assist Mayer Brown in Providing Legal Advice.

1. The purpose of the engagement was to advise Mayer Brown, not the Trustee.

The purpose of the ETI engagement relating to the Settlement Agreement was to assist outside counsel in providing legal advice to BNYM, not to assist BNYM directly. In 9 depositions of BNYM personnel, there is no evidence that BNYM considered ETI's work when evaluating the Settlement Agreement. The Steering Committee's assertion that ETI's report is among the work that "BNYM, as Trustee, relied upon in deciding whether to enter the Settlement Agreement" (Br. 11) is not only unsubstantiated—no witness said any such thing—but it makes no sense. ETI's work for Mayer Brown related to a technical problem in drafting the agreement, but it had nothing to do with the benefits of the settlement. That distinguishes *Adlman*. The *client* here did not seek waterfall modeling, it sought legal advice, and ETI was engaged only to help outside counsel provide that advice.

Beach v. Touradji Capital Management, LP, 99 A.D.3d 167 (1st Dep't 2012) (cited at Br. 9), is even farther off the mark. The consultant there was not retained to advise counsel at all. He inspected his client's computer in order to inform the *opposing party* of its contents. *Id.* at 169.[5] It was the adverse party that directed the engagement (it "identified specific areas of inquiry" for the consultant (*id.*)), and his work substituted for a forensic review by that adverse party. It is hardly remarkable that an engagement that was intended to disclose information to the other side

[5] Incidentally, that also distinguishes ETI from the "expert advisors"—Professors Adler and Daines, Capstone, and Brian Lin—who provided opinions on topics that went directly to the merits of the settlement and on which BNYM did rely when considering the settlement.

was not privileged. *Zimmerman v. Nassau Hospital* is off-point for similar reasons: the court there found that "the [clients]' primary motivation in bringing the infant plaintiff to [the medical expert] was not for consultation with respect for litigation, but rather was for a thorough examination, diagnosis and treatment." 76 A.D.2d 921, 922 (2d Dep't 1980).

2. Mayer Brown directed and supervised ETI.

The legal purpose of the engagement is confirmed by evidence that Mayer Brown, not BNYM, supervised this engagement. *See Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 518–19 (S.D.N.Y. 1992) ("communications to patent agents will qualify, provided it can be shown that the responsibility for the work being done for the client rested with an attorney, and that the patent agent worked under his direction and performed tasks relevant to the client's obtaining legal advice") (quoting 2 Weinstein & Berger, Weinstein's Evidence ¶ 503(a)(3)[01] (1990)). [redacted] Rollin Aff., Ex. 8; *see also* Buechele Tr. 78:4-6 ([redacted]). [redacted]

Buechele Tr. 72:10-18 ([redacted]).

[redacted] Anthony Tr. 39:3-10. [redacted]

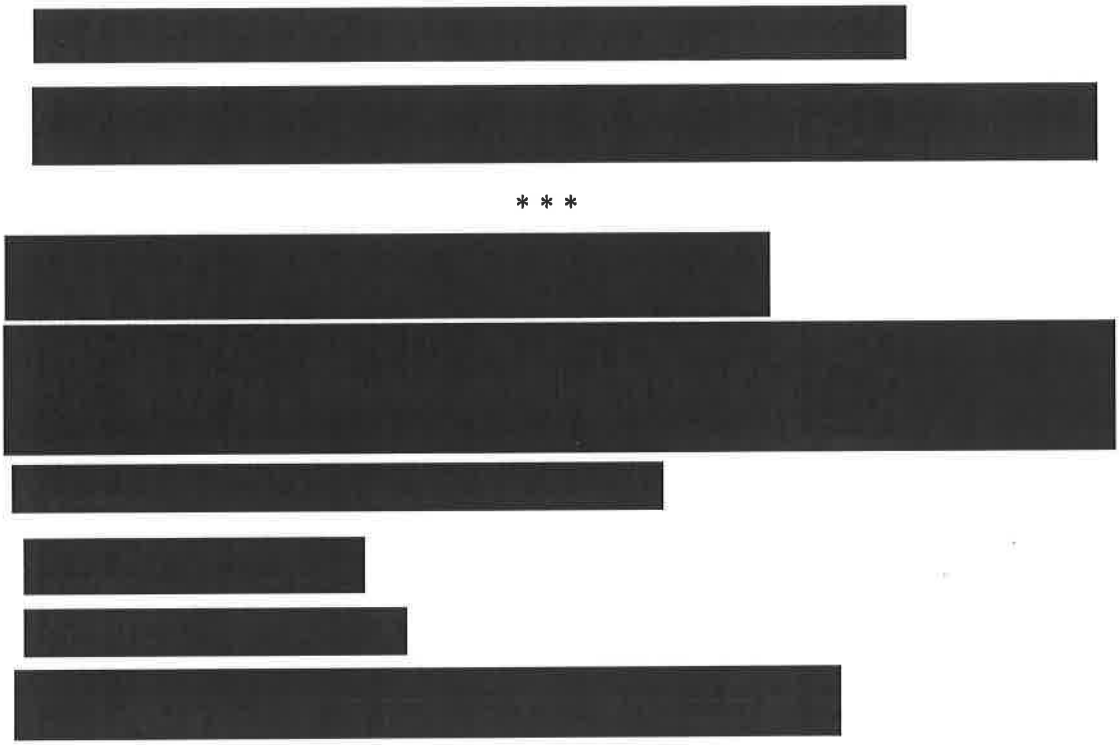
Buechele Tr. 72:19-73:7 ([redacted]); *see also id.* 94:15-23 ("[redacted]). [redacted] *Id.* 70:7-12.

Thus, unlike *Central Buffalo Project Corp. v. Rainbow Salads, Inc.* (Br. 9), in which the report was "prepared by a third party and thereafter conveyed to the attorney" (140 A.D.2d 943, 944 (4th Dep't 1988)), ETI's engagement was, from the outset, directed by outside counsel. Had either BNYM (at the direction of outside counsel) or outside counsel itself run these models, there would be no doubt about their privileged status, and as the court wrote in *Cargill*, "it would be incongruous to allow the fact that the [work] was conducted by a non-attorney agent,

apparently employed by and acting at the direction of the attorney," to vitiate the privilege. 2003 WL 22225580 at *4.

3. The ETI work product was used by Mayer Brown.

ETI's work product also went to, and was used by, Mayer Brown:



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Buechele Tr. 133:5-13, 135:24-136:11. As described above, Mayer Brown then used ETI's work product to identify potential anomalies in the settlement distribution and to address them in the Settlement Agreement. There can be no question that drafting a contract is legal work.

The Steering Committee misstates our position by asserting "[t]hat the results of ETI's factual investigation may have been *shared* with BNYM's counsel does not make ETI's factual analysis privileged." Br. 10 (emphasis added). The record shows not only that the results *were* shared with BNYM's counsel, but that counsel also set the scope of ETI's work, communicated all of the assumptions that went into that work, supervised it, and, most importantly, *used* the results to perform quintessentially legal services. Those are just the facts that supported a finding of privilege in *MBIA*, and they are a far cry from *Central Buffalo*, in which the report was merely

"conveyed to" the attorney and also disclosed to adverse parties. *See* 140 A.D.2d at 944 (noting that report "constitutes factual admissions made during settlement negotiations").

4. The Trustee could not have duplicated ETI's models effectively.

ETI's engagement was also necessary because it had specialized models that the Trustee does not possess. [redacted] satisfying *Kovel*'s requirement that the third-party specialist be "necessary, or at least highly useful." *Kovel*, 296 F.2d at 922.

[redacted]

Buechele Tr. 74:17-23.

* * *

Judge Friendly's 1961 observation that, "in contrast to the Tudor times when the privilege was first recognized, the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others" (*Kovel*, 296 F.2d at 921 (citation omitted)) applies forcefully to outside counsel's task of advising a trustee on how to distribute $8.5 billion of settlement proceeds through the complex payment waterfalls in the PSAs here. In order to provide legal advice to BNYM, the Trustee's outside counsel retained ETI to perform the specialized task of modeling future waterfall distributions. The sole purpose of that work was to assist Mayer Brown in providing classic legal advice—how to draft a contract. Accordingly, the ETI engagement is within the attorney-client privilege.

III. The Arguments About "Litigation Consultants" Miss the Mark.

The Steering Committee confuses the issue by arguing that ETI was not a "litigation consultant." Br. 3, 6-8. That is irrelevant, because a fact witness, such as ETI, need not be a litigation consultant to be within the attorney-client privilege.

A fact (or "lay") witness is simply anyone who is not an expert witness. *See, e.g., Beller v. William Penn Life Ins. Co.*, 15 Misc. 3d 350, 353 (Sup. Ct. Nassau Cnty. 2007) (cited at Br. 8 n.10) ("There is a dramatic difference between a fact witness and one who will be a testifying expert; and the extent of inquiring of a nontestifying expert is limited."). An expert witness is one who is designated as such, is subject to the rules governing expert discovery (*see* CPLR 3101(d)), and is qualified under *Daubert*; if qualified, the witness may give expert opinion testimony, which a fact witness cannot (*compare* F.R.E. 701 & 702). The work of a testifying expert generally is not privileged, because it is not confidential (it culminates in testimony in court) or intended to assist in the provision of legal advice (it is intended to assist the trier of fact). The law on "litigation consultants" is consistent with the *Kovel* principle discussed above, because the work of a consulting expert often meets both of those standards—it *is* confidential and it *is* designed to assist the attorney. That makes the consulting work privileged, even if the witness also has non-privileged information from other engagements. The Steering Committee's suggestion that *only* litigation consultants may invoke the privilege, and ordinary fact witnesses cannot, is bewildering and without any support.

In fact, two of the cases cited by the Steering Committee make just this point. In *Delta Financial Corp. v. Morrison*, a consultant was hired "to assist with [the] preparation of [the client]'s financial statements," and separately "to assist [outside counsel] in understanding the complexities of the valuation of the certificates." 14 Misc. 3d 428, 430 (Sup. Ct. Nassau Cnty. 2006). The court held that, while the first engagement was not privileged, the privilege did apply

to the second. *Id.* at 433. Those documents would be immune from discovery "[e]ven if [the consultant] were designated as an expert to testify at trial today," because they had not been created as part of any testifying-expert engagement. *Id.* at 434. *City of Rochester v. E&L Piping, Inc.* also involved a witness with a dual role, and the witness was compelled to disclose only those facts that related to the non-privileged engagement (including facts in "a gray area where [the witness]'s job activities . . . blur"). 2001 WL 1263377, at *2 (Sup. Ct. Monroe Cnty. 2001).

Neither case says that the designation of a witness (by the adverse party) as a non-expert "fact witness" somehow vitiates the privilege. *Delta* and *Rochester* both make the basic point that the privilege does not cover information, if any, learned *outside* the privileged engagement. For instance, one cannot "[t]ake a person, John Smith, who was standing on the corner of Fourth and Vine and had just witnessed an accident, and hire him as a litigation consultant to preclude his testimony as privileged." *Delta*, 14 Misc. 3d at 437. That is not what BNYM did. ETI's non-settlement-related work of double-checking monthly distributions is not privileged, and both ETI and Buechele were permitted to testify about it.

Nor, contrary to the Steering Committee's characterization, does either case suggest that only third parties who assist with *litigation* are within the privilege. Just as the privilege itself is not restricted to litigation, neither is the recognition of its scope in *Kovel*. In *Kovel* itself, the third party was a tax advisor, not a litigation consultant. *See* 296 F.2d at 920 (testimony "concern[ed] a transaction underlying a bad debt deduction" in client's tax return); *see also MBIA*, 2011 WL 7640152 at *7 ("MBIA will not disinherit the materials at issue from the privilege they are afforded because it has chosen to pursue multiple [*i.e.*, non-litigation] avenues of possible recourse"). The same was true in *Cote* and *Cargill*, discussed above. In fact, we have

found no case (and the Steering Committee has cited none), in which the presence or absence of litigation was found relevant to the scope of the attorney-client privilege.

The Steering Committee's discussion of *Beller v. William Penn Life Insurance Co.* is baffling. *Beller* does not hold, as the Steering Committee asserts, that a party waives privilege "by allowing [a consultant] to testify rather than moving to quash the deposition and seeking a protective order from this Court" (Br. 8 n.10). *Beller* does not even mention waiver or protective orders—the court held simply that the witness was never within the privilege. 15 Misc. 3d. 350, 355 (Sup. Ct. Nassau Cnty. 2007). Based on their equally-inaccurate parenthetical, the Steering Committee seems to be saying that that the privilege vanishes once an "expert retained as both a litigation consultant and a testifying expert" (Br. 8 n.10) is compelled (by them) to testify. *Beller* says no such thing. It found that the witness was hired *exclusively* as a testifying expert and was never truly a consultant. *See* 15 Misc. 3d at 352 (rejecting effort "to differentiate Mr. White's role as a litigation consultant from his role as an expert witness. [Defense counsel] has wisely not made that argument, at least not very strongly, and any such argument on her part is rejected by the court."); *id.* ("it is clear to the court that he was hired as a[testifying] expert simultaneously with being hired to provide 'advisory services'").[6] And even if the Steering Committee had

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[6] That decision is in accord with other cases that hold that the waivers attendant to expert *testimony* occur if and only if the witness is actually called to testify. *See, e.g., Aetna Cas. & Sur. Co. v. Manshul Constr. Corp.*, 2001 WL 484438, at *1-*2 (S.D.N.Y. 2001) ("*if* Doxey were called as an expert witness, the work-product rule would not protect any documents bearing on those of his opinions that he was to offer on the witness stand. Plaintiff has not, however, designated him as an expert, and we see no reason to compel production of the document at this time merely on speculation that he will be so named... The fact that Doxey is likely to be named as a *fact* witness does *not* automatically translate into a requirement that any document he authored for the attorney is producible.") (emphasis added) (internal citations omitted); *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) ("If the expert is later used as a witness on behalf of the defendant, obviously the cloak of privilege ends. But when, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself.").

correctly stated the holding of *Beller*, ETI was not in fact retained "as both a litigation consultant *and* a testifying expert," [redacted] Anthony Tr. 19:6-20, 50:13-22, 55:12-19, 57:19-58:2, 71:8-21, 72:9-73:2.

IV. Assertions That the Trustee Has Concealed the Terms of the Distribution Are False.

The Steering Committee closes its brief by addressing a privilege that the Trustee has never asserted with respect to ETI—the privilege pertaining to materials prepared in anticipation of litigation. Br. 10-12. Those two pages are irrelevant to the legal argument, but they contain at least two major factual misstatements.

First, the Steering Committee asserts that "BNYM's primary, if not only, motivation in hiring ETI was to allow BNYM to understand how any potential settlement payment would be distributed to Certificateholders" and that this was "an investigation to make a *business* determination concerning the distribution of funds *among* the Covered Trusts." Br. 10-11 (second emphasis added). As explained above, ETI's engagement had nothing to do with the allocation of funds "among the Covered Trusts" (as Jason Kravitt would have testified had the Steering Committee asked him). That allocation is detailed in paragraph 3(c) of the Settlement Agreement and will incorporate loss estimates created by NERA, not ETI. There also is no evidence that BNYM hired ETI to understand *how* settlement payments would be distributed; that is dictated by the Settlement Agreement, together with the PSAs. Instead, the record shows that BNYM hired ETI to understand anomalies that *could* result *if* the Settlement Agreement did not account for them; accordingly, its analysis necessarily was hypothetical and counter-factual. (For the same reason, the assertion that ETI "prepared work product concerning the underlying cash flow projections" (Br. 11) is imprecise. ETI's work consisted, not of projecting likely

distributions, but of modeling hypothetical amounts that were intended to place stress on the waterfalls).

Nor is there a shred of evidence that ETI's work fed into any "business determination." No one testified that ETI's work, or any analysis or prediction of distributions among holders within each trust, had any bearing on the decision to approve the Settlement Agreement. The deposition record, together with the Kravitt Affirmation, shows that ETI's work was used exclusively for a legal purpose.

Second, the Steering Committee asserts that "BNYM has not disclosed how the settlement proceeds will be distributed to Certificateholders in the Covered Trusts." Br. 11. This misstatement is consistent with its ongoing efforts to suggest that key terms of the Settlement Agreement are concealed. In fact, the contract terms that determine "how the settlement proceeds will be distributed to Certificateholders" are all contained in paragraph 3(d), and the most important portion of paragraph 3(d) states that the "Trustee shall distribute [each trust's Allocable Share] in accordance with the distribution provisions of the Governing Agreements" (*i.e.*, the PSAs and SSAs). There is no mystery here.[7] Disclosing hypothetical distribution numbers based on hypothetical settlement allocations would be irrelevant at best and misleading at worst.

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[7] Relatedly, it is not "shocking" (Br. 2) that the Trustee's counsel instructed NERA not to estimate losses in August 2011. As paragraph 3(c) of the Settlement Agreement expressly states, "[t]he Expert [NERA] shall calculate the Allocable Share within ninety (90) days of the Approval Date," that is, the date on which the Court approves the Settlement Agreement. Because the Approval Date did not occur as scheduled, NERA *could* not have carried out its duties at that time. Any calculation would have been outside the scope of the Settlement Agreement. AIG acknowledged on August 8, 2011 that "[t]here has been no allocation of the $8.5 billion across the 530 trusts." Doc. 131 ¶ 6(b). Its purported surprise is only an attempt to miscast this as a newly discovered issue, warranting further delay.

CONCLUSION

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

Dated: January 28, 2013
New York, New York

Respectfully submitted,

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