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. 30

THE BANK OF NEW YORK MELLON'S AND RRMS ADVISORS, LLC'S OPPOSITION TO THE MOTION TO COMPEL DISCOVERY FROM RRMS ADVISORS, LLC

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Petitioner The Bank of New York Mellon (the "Trustee") and non-party RRMS Advisors, LLC ("RRMS")[1] submit this memorandum of law, and the accompanying Affirmation of Mauricio A. España dated January 28, 2013 ("España Aff."), in opposition to the Steering Committee's Order to Show Cause Why The Court Should Not Compel Discovery from RRMS Advisors, LLC.

PRELIMINARY STATEMENT

This Settlement Agreement has been the subject of more discovery than probably any settlement in history. We have cited cases on the discovery standards that apply to the review of class action settlements. We have cited cases on the discovery standards that apply to the review of corporate board decisions. We have cited cases on the discovery standard that applies in other circumstances in which a party's good faith is at issue. In short, we have cited to this Court cases covering every conceivably analogous situation. ***Not a single case requires discovery that even approaches the degree of discovery that has already occurred here.*** That universe of comparable cases includes one (*In re IBJ Schroder Bank & Trust Co.*, Index No. 101530/98) that reviewed a litigation settlement by a securitization trustee—precisely the facts here. The record in that case gives no indication that discovery extended to any of the areas that are now in dispute, or for that matter, to many of the areas in which the Trustee has voluntarily submitted to discovery already. It is increasingly obvious that the Steering Committee is waging a war of attrition and delay, relying on the threat of motion practice and appeals to extract agreements for patently irrelevant, improper, and time-consuming discovery. This motion is only the latest example. They seek, among other things, "impeachment" evidence relevant only to an expert

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[1] Mayer Brown LLP files this opposition on behalf of the Trustee and RRMS. Mayer Brown represented RRMS in response to the Steering Committee's subpoena and its deposition of Mr. Lin.

opinion by a witness who is designated to provide expert opinion testimony. It is time to move on to expert discovery and a hearing on the merits, not to revisit depositions and document productions that were unnecessary in the first place.

FACTUAL BACKGROUND

As described in the Trustee's Verified Petition (Dkt. No. 1), prior to entering into the Settlement Agreement the Trustee retained several experts as part of its decision-making process. Verified Petition ¶¶ 64-67, 93-95. One of those experts was Brian Lin of RRMS, which the Trustee retained to, among other things, "consider[] and analyze[], in depth, the competing calculation methodologies of the Institutional Investors and Countrywide/Bank of America, and the assumptions underlying those methodologies." *Id.* ¶ 65. As part of its analyses, Mr. Lin issued an opinion (the "Settlement Amount Opinion") concluding that, before accounting for legal haircuts and the settling trusts' ability to collect a judgment against Countrywide, a reasonable valuation of the trusts' claims was between $8.8 and $11 billion. Rollin Aff. Ex. 12 at 7.[2] In assessing the servicing provisions of the Settlement Agreement, the Trustee also considered a second opinion issued by Mr. Lin (the "Servicing Opinion," and together with the Settlement Amount Opinion, the "RRMS Opinions"). *See* Verified Petition ¶ 93-95. The Servicing Opinion concludes that the servicing standards set forth in the Settlement Agreement are "reasonable and in accordance with or exceeding customary and usual standards of practice for prudent mortgage loan servicing and administration." Rollin Aff. Ex. 13 at 6.

The Trustee has at all times been transparent regarding its review and consideration of the RRMS Opinions. [redacted]

[2] Citations to the "Rollin Aff." refer to the Affirmation of Michael A. Rollin in Support of Order to Show Cause Regarding RRMS Advisors and citations to the "Memo" refer to Steering Committee's Memorandum of Law in Support of the Order to Show Cause Why the Court Should Not Compel Discovery From RRMS Advisors.

[redacted]. *See, e.g.*, España Aff. Ex. B (Lundberg Tr.) at 464:3-7, 459:2-460:23, 461:7-16, 524:16-525:21 [redacted]; Ex. C (Bailey Tr.) at 305:4-16 [redacted] *See* España Aff. Ex. D (Lin Tr.) at 241:11-241:18; Ex. D (Lundberg Tr.) at 464:3-7; 524:16-525:21. [redacted] *See* España Aff. Ex. D (Lin Tr.) at 241:11-241:18; Ex. B (Lundberg Tr.) at 464:3-7.

Shortly after commencing this Article 77 Proceeding, the Trustee voluntarily disclosed the RRMS Opinions to the public on its settlement website (*see* www.cwrmbssettlement.com) and it produced, voluntarily, all of the documents that the Trustee, through its counsel, provided to RRMS. Rollin Aff. Ex. 8. In response to the Steering Committee's subpoena, the Trustee and RRMS produced all of the communications between and among Mr. Lin, the Trustee, and the Trustee's counsel. España Aff. Ex. A. The Steering Committee also deposed Mr. Lin regarding his engagement by the Trustee and his preparation of the RRMS Opinions. Mr. Lin's deposition lasted two full days and the transcript of that deposition spans 678 pages. España Aff. Ex. D (Lin Tr.).

Despite RRMS's and the Trustee's robust disclosure, the Steering Committee now demands further discovery "to fully evaluate what the evidence currently shows[.]" Memo at 4. Specifically, it seeks to compel RRMS, a non-party to this proceeding, to produce five categories of documents that were not provided to the Trustee:

(i) information that Mr. Lin relied upon in forming the opinions in the two opinions that he signed;

(ii) drafts of the two opinions that were prepared by Mr. Lin;

(iii) notes and calculations made by RRMS in their preparation of the opinions signed by Mr. Lin;

(iv) time records, invoices and bills evidencing payment for all work performed by RRMS and Mr. Lin; and

(v) other reports that Mr. Lin has prepared in prior, confidential engagements.

Memo at 2-3. The Court should deny the motion, because the Steering Committee has failed to demonstrate, as is its burden, that the information it seeks (i) is relevant to this proceeding and (ii) cannot be obtained from any other source.

ARGUMENT

I. The Applicable Legal Standard

CPLR § 3101(a) provides that discovery extends only to "all matter *material and necessary* in the prosecution or defense" of an action. CPLR § 3101(a) (emphasis added). As Professor Siegel explains:

> CPLR 3101(a) sets forth the criterion for disclosure under the CPLR. It requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The key words are "material and necessary." In the leading case, *Allen*, the New York Court of Appeals interpreted the New York CPLR phrase "material and necessary" ***to mean nothing more or less than "relevant***[.]"

David D. Siegel, Practice Commentaries § C3101:5 (2005) (citing *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403 (1968)). Discovery that will "hardly aid in the resolution of the question" before the court or that will "unnecessarily broaden the scope of the litigation and invite extraneous inquiries" is properly denied. *Andon v. 302-304 Mott Street Assoc.*, 94 N.Y.2d 740, 745 (2000) (citations omitted).

The Steering Committee, as the party seeking disclosure, has the burden of demonstrating that the disclosure it seeks is relevant.[3] *See Tannenbaum v. City of New York*, 30 A.D.3d 357, 358-59 (1st Dep't 2006) (denying request to seek discovery from non-party "since plaintiff failed to show special circumstances or that the information sought was relevant *and* could not be obtained from other sources"); *Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.*, 150 A.D.2d 420, 421 (2d Dep't 1989) ("It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence"). Moreover, where, as here, a party seeks disclosure from a non-party, the party must demonstrate not only that the information it seeks is relevant, but also that it cannot be obtained from any other source. *See, e.g.*, *Tannenbaum*, 30 A.D.3d at 358-59; *Troy Sand & Gravel Co. v. Town of Nassau*, 80 A.D. 3d 199, 202 (3d Dep't 2010) ("something *more than mere relevance* or materiality must be shown to obtain disclosure from a nonparty witness) (emphasis added) (quoting *Fraser v. Park Newspapers of St. Lawrence*, 257 A.D.2d 961, 962 (3d Dep't 1999)). The Steering Committee has failed to demonstrate (because it cannot) that the documents it seeks from RRMS are relevant and that it is unable to obtain the information it purportedly seeks from any other source. On the contrary, the Steering Committee has had ample opportunities to obtain that information from other sources and either obtained it or chose not to do so.

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[3] The Steering Committee incorrectly asserts that RRMS and the Trustee have the burden of proof on its motion to compel. Memo at 6. *Flacke v. NL Industries, Inc.*, 463 N.Y.S.2d 351, 352 (Sup. Ct. Albany Cnty. 1983), the sole case cited by the Steering Committee, addresses the burden of proving that an immunity or privilege exists. It does not discuss who has the burden of proving that documents sought on a motion to compel are relevant.

II. The Steering Committee Has Failed to Demonstrate That the Information It Seeks Is Relevant.

A. RRMS's Internal Documents Are Irrelevant Under Any Substantive Standard of Review.

1. These documents are not relevant to the Trustee's knowledge or good faith.

The only issue before the Court is whether the Trustee's decision to enter into the Settlement Agreement was within the bounds of its reasonable exercise of discretion and made in good faith. *See* Memorandum of Law in Support of the Trustee's Motion Regarding the Standard of Review and Scope of Discovery, Dkt. No. 228. That is because when

> discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not dishonest motive, or fails to use his judgment or acts beyond the bounds of reasonable judgment.

In re Stillman, 107 Misc. 2d 102, 110 (Sur. Ct. N.Y. Cnty. 1980) (quoting *Restatement (Second) of Trusts*, § 187, cmt. e (1959)). If that standard applies, then documents that the Trustee never saw or even knew about cannot possibly be relevant. The record is already clear that it is RRMS's opinions that the Trustee relied on, and not the documents that are sought here.

The Steering Committee tacitly concedes the importance of the Trustee's reasonable reliance, rather than the correctness of the opinions, by arguing that these documents are discoverable because they "are *likely* to include evidence, or *may lead* to the discovery of relevant evidence demonstrating, that the Trustee's reliance on an untrustworthy opinion, with knowledge that the opinion lacked credibility, was not good faith reliance." Memo at 8 (emphasis added). Yet it cannot explain how documents that the Trustee never saw can have any bearing on its knowledge.

As noted above, the Steering Committee already has the documents that the Trustee reviewed (and then some). It has also has twelve days of deposition testimony from the

Trustee's representatives. España Aff. ¶ 2. [redacted] *See, e.g.*, España Aff. Ex. B (Lundberg Tr.) 460:24-461:6 [redacted], 461:17-464:2 (same), 459:2-460:5 [redacted]; Ex. C (Bailey Tr.) at 156:4-21 [redacted]; Ex. E (Kravitt Tr.) 497:10-498:12; Ex. F (Stanley Tr.) 115:5-119:9 [redacted]); Ex. G (Crosson Tr.) at 6:11-17 [redacted]; Ex. H. (Griffin) 73:3-81:17, 285:13-287:3 ([redacted]. The Steering Committee ignores that testimony, and cites no evidence to support its musings that the Trustee "knew" that the RRMS Opinions lacked credibility. That alone requires denial of the motion. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc.3d 1061, 1067, 1070 (Sup. Ct. N.Y. Cnty. 2010) (denying motion to compel because "MBIA bases its request on nothing more than its suspicions . . . . Merely because discovery might be relevant does not consequently entitle MBIA to that discovery"); *Orix Credit Alliance, Inc. v. R.E. Hable Co.*, 256 A.D.2d 114, 116 (1st Dep't 1998) ("defendants should not be allowed to use pre-trial discovery as a fishing expedition when they cannot set forth a reliable factual basis for their suspicions").

2. <u>These documents are not relevant to the "substantive fairness" of the settlement.</u>

The Steering Committee has occasionally suggested that a standard of "substantive fairness" should apply. We are not aware of any legal authority for such a standard, but it evidently would require the Court to disregard the decision of the party contractually vested with the discretion to make that decision (namely, the Trustee) and make its own *de novo* evaluation. Even if the Steering Committee is right about that, the documents that it seeks here are still

irrelevant—as is nearly all of the discovery that has occurred already. If the Trustee's decision deserves no weight in the Court's evaluation, then the Court does not need to see the Trustee's own documents or the internal work product of its advisors.[4]

B. The Steering Committee Seeks Disclosure Far Beyond That Allowed in Any Analogous Case.

The result that the only document that is relevant to the Trustee's reliance on the RRMS Opinions are the opinions themselves is hardly novel. In fact, it is entirely consistent with, among other things, the large body of case law addressing discovery relating to decisions by corporate special litigation committees ("SLCs") and the advice-of-counsel defense in patent litigation.[5] The discovery that the Trustee voluntarily produced in 2011, before the Steering Committee even served formal discovery requests, far exceeds that required in either of those contexts.

1. Corporate special litigation committees.

At *most*, parties challenging decisions made by SLCs are allowed discovery of the documents that the committee reviewed and relied upon. Many cases do not even allow that much discovery. *See, e.g., St. Clair Shore Gen. Emps. Ret. Sys.* 2007 WL 3071837, at *4-*5 ("the court finds no occasion at this time for far reaching and comprehensive discovery of all documents reviewed and relied upon by the SLC"); *Kaplan v. Wyatt*, 499 A.2d 1184, 1192 (Del.

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[4] In fact, under this proposed standard, the Steering Committee could make (and apparently has made) its own determination of "fairness" based on nothing more than the Settlement Agreement. *See* AIG Verified Petition, Dkt. No.131 at 2.

[5] The SLC cases are analogous because the courts there, as is the case here, must determine whether the SLC was independent, acted in good faith, and had reasonable bases for its conclusion. *See, e.g., St. Clair Shore Gen. Emps. Ret. Sys. v. Eibler*, 2007 WL 3071837, at *2 (S.D.N.Y. 2007) ("First, the court should determine . . . whether the committee has shown that it is independent, acted in good faith, and possessed reasonable bases for its conclusions.").

1985) ("[derivative plaintiff] was not entitled to discover all the information relating to the [Special Litigation] Committee's report"), *aff'g*, 9 Del. J. Corp. L. 205, 210 (Del. Ch. 1984) ("I do not feel that the total production of all other documents reviewed and relied upon [by] the Committee in compiling its report is necessary to the plaintiff's right to challenge the good faith of the Committee or the reasonableness of the bases for its conclusion that the derivative action should be dismissed"). In no circumstances does discovery extend—as it already has in this proceeding—to the SLC's counsel or outside advisors. *See, e.g., In re Take-Two Interactive Software, Inc. Deriv. Litig.*, 2008 WL 681456, at *3 (S.D.N.Y. March 10, 2008) (denying motion to compel production of legal advisors' documents where "Plaintiffs have seen all the documents that were seen by the Committee").

As those cases hold, if "the Court finds that the [expert's] Report 'provides[s] a sufficient basis for [the requesting party] to depose the SLC members themselves and determine whether the investigation was done in good faith and in an informed manner and whether the conclusions reached can be thought fair,' [that party] is not entitled to inspect all documents reviewed and relied upon by the SLC." *St. Clair Shore Gen. Emps. Ret. Sys.*, 2007 WL 3071837, at *5. In other words, if the Steering Committee can depose the Trustee's representatives (and its counsel) to determine whether the Trustee acted within the bounds of its reasonable exercise of discretion, that is enough. The Steering Committee is not entitled even to "all documents reviewed and relied upon by the" Trustee, much less information that it never considered. *See Take-Two*, 2008 WL 681456, at *3. All the documents discoverable under that standard were produced well over a year ago.

2. The advice-of-counsel defense.

Not only is advice of counsel analysis inapplicable here since Mr. Lin was not the Trustee's counsel, it is fundamental that the invocation of the advice of counsel defense does not

require production of documents that the client never saw. They are not relevant. *See, e.g.*, *Simmons, Inc. v. Bombardier, Inc.*, 221 F.R.D. 4, 9 (D.D.C 2004) ("To the extent that Simmons will challenge the competency of the opinions and Bombardier's reasonable reliance on them, therefore, drafts of the opinions not shared with Bombardier are not relevant"); *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 250 F.R.D 575, 580 (D. Colo. 2007) ("Documents and information not provided to the alleged infringer, and which therefore played no part in its decisions concerning the alleged infringement, maintain their privileged nature" because they are irrelevant); *Intex Recreation Corp. v. Metalast, S.A.*, 2005 WL 5099032, at *4 (D.D.C. March 2, 2005) (same, while endorsing "broad" view of privilege waiver).

The Steering Committee cites a single case to the contrary (Memo at 9)—*Chiron Corp. v. Genentech, Inc.*, 179 F. Supp. 2d 1182 (E.D. Cal. 2001)—but as shown in the previous paragraph, that case is in the distinct minority. But even on its own terms, *Chiron* does not apply here. The court reasoned that the attorney's work product might have some "relationship between what counsel really thought (as reflected in her private papers) and what she in fact communicated to her client." *Id.* at 1189. That might make sense when there is doubt about what the advisor (there, the attorney; here, Brian Lin) told the decision-maker. Here, however, the only communications from Mr. Lin to the Trustee are the written opinions; there is no suggestion in the record that the Trustee relied on any discussions with Mr. Lin other than those opinions, which have long since been disclosed. Accordingly, there is no need to use documents that only Mr. Lin ever saw as evidence of what Mr. Lin might have thought, as evidence of what he might have told the Trustee, or as evidence of whether the Trustee acted in good faith.

III. The Steering Committee's Assertions of Relevance Overstate the Trustee's Duties When Relying on Outside Experts.

The Steering Committee seeks to evade the doctrines cited above and dramatically broaden the scope of discovery by arguing that by "rely[ing] on the opinions of its advisors, BNYM affirmatively injected the credibility of its advisors and the trustworthiness of its advisors' opinions into the question of the Trustee's reasonableness and good faith." Memo at 3.

It is beyond dispute that corporate trustees generally, and the Trustee here, are entitled to rely on the advice of outside advisors. The relevant Pooling and Servicing Agreements (the "PSAs") state that

> the Trustee may consult with counsel, financial advisers or accountants of its selection and the advice of any such counsel, financial advisers or accounts and any Opinion of Counsel shall ***be full and complete authorization and protection*** in respect of any action take or suffered or omitted by it hereunder in good faith and in accordance with such Opinion of Counsel

España Aff. Ex. I (CWALT 2006-OC7 PSA § 8.02(ii)) (emphasis added).

Even the cases cited by the Steering Committee (Memo at 7-8), mostly decided under ERISA's strict statutory regime, state that a trustee is *not* expected to review or verify the expert's underlying work:

> In order to rely on an expert's advice, a "fiduciary [the ERISA trustee] must (1) investigate the expert's qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances."

Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 301 (5th Cir. 2000) (quoting *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996)).

Likewise, immediately after saying that an appraisal is "not a magic wand" (quoted at Memo at 7), *Donovan v. Cunningham* describes the standard for reliance in terms that the Trustee here clearly met:

> To use an independent appraisal properly, ERISA fiduciaries need not become experts in the valuation of closely-held stock—they are entitled to rely on the expertise of others. However, as the source of the information upon which the experts' opinions are based, the fiduciaries are responsible for ensuring that that information is complete and up-to-date.

716 F.2d 1455, 1474 (5th Cir. 1983) (citation omitted).[6]

Even the slightly higher standard described in *Howard v. Shay* (quoted at Memo at 7) applies only to "conflicted fiduciar[ies]" and only because "[a] fiduciary determined to self-deal has ample opportunity to sway the final valuation that will set the transaction price." 100 F.3d 1484, 1490 (9th Cir. 1996). Here, there is no evidence of self-dealing (*see generally* motion seq. no. 31), no evidence that the Trustee attempted to "sway" RRMS, and no evidence that the RRMS Opinions were what "set the transaction price." Even the Steering Committee's own cases hold that a trustee is not required to independently critique and verify the expert's analysis, let alone to audit all of his drafts, work papers, and supporting data. Indeed, the *whole point* of permitting reliance on outside experts is that trustees may not be qualified to carry out that analysis. That express contractual protection would be meaningless if the Trustee were responsible for evaluating every scrap of paper that crossed the advisor's desk.

IV. Any Relevant Information Is Available From Other Sources.

Even if the Steering Committee could show relevance, the Court nevertheless should deny the motion because any information available from RRMS—a nonparty—can be (and has

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[6] The Steering Committee's reliance on *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983), a review of a administrative decision under a different legal standard, is similarly misplaced. The "separately commissioned report" in that case was *in the possession of the decision-maker*. *Id.* at 1023. The court did not simply hold that the report that the Army Corps relied on was wrong, but that the Corps itself had access to contrary data, which it ignored. The report also contained errors so apparent on its face that "a decisionmaker relying on [it] could not have fully considered and balanced the [relevant] factors." *Id.* at 1031. Here, there is no evidence that the Trustee had any reason to question the accuracy of the methodology used, or the conclusions contained, in the RRMS Reports.

been) obtained from other sources. *See, e.g.*, *Tannenbaum*, 30 A.D.3d at 358-59; *Troy Sand & Gravel Co.*, 80 A.D. 3d at 202. The Steering Committee had ample opportunity to obtain this information through the depositions of Mr. Lin and the various Trustee representatives, and in fact, actually did obtain much of the information it claims to still need.

A. Mr. Lin's "Industry Knowledge"

The Steering Committee asserts that it needs additional information regarding Mr. Lin's "industry knowledge" because he referred to that knowledge on several occasions during his deposition. Memo at 5. Testimony regarding Mr. Lin's experience and background spans over fifty pages of his deposition transcript. *See, e.g.*, España Aff. Ex. D (Lin Tr.) at 10-64, 149:9-153:23; 154:12-156:8. [redacted] *See, e.g., id.* at 274:20-278:3, 359:9-361:10; 461:20-463:24. [redacted] *See, e.g., id.* at 178:4-10, 209:12-16, 244:17-245:23, 366:7-22, 522:5-17, 559:14-25. In any event, there is no reason to think that the documents the Steering Committee seeks would shed any light on the extent of that knowledge.

B. Evidence of Communications with Mayer Brown

The Steering Committee wants additional information from Mr. Lin and RRMS to determine what was in the mind of the Trustee. Memo at 10 (arguing relevance of drafts, notes, calculations, and time records and invoice). But the Steering Committee has deposed numerous Trustee representatives who are far and away the best source of that information. España Aff. ¶ 2. Furthermore, RRMS and the Trustee produced all communications between and among Mr. Lin, the Trustee and/or its counsel. España Aff Ex. A. [redacted]. *See, e.g.*, España Aff. Ex. D

(Lin Tr.) at 104:22-109:8, 115:14-123:22, 128:1-130:17, 132:23-149:8, 188:17-206:5, 222:7-234:4, 449:5-452:3. [redacted]. España Aff. Ex. B (Lundberg Tr.) at 464:8 – 465:9; Ex. C (Bailey Tr.) 87:2-14, 156:8-21; Ex. E (Kravitt Tr.) 500:20-501:24, 502:1-508:10.

C. Evidence Regarding Changes in Draft Opinions

The Steering Committee states that RRMS's drafts would reflect Mr. Lin's conversations with Mayer Brown. [redacted] España Aff. Ex. D (Lin Tr.) at 241:11-18. [redacted] España Aff. Ex. B (Lundberg Tr.) at 524:16-525:21. The Steering Committee also had the opportunity to question Jason Kravitt, Mayer Brown's most senior lawyer representing the Trustee, regarding his communications with Mr. Lin, but they never did.

D. "Undisclosed" Research

The Steering Committee asserts that it needs certain allegedly undisclosed documents (two publicly available analyst reports) to determine how those documents affected Mr. Lin's analysis and "to develop discovery on why the RRMS Reports lacked trustworthiness[.]" Memo at 8. Although Mr. Lin did not commit to memory the complete titles of those reports, [redacted] *See, e.g.*, España Aff. Ex. D (Lin Tr.) at 176:9-177:5, 284:7-285:9, 375:2-376:8.

E. Other Reports That Lin Wrote or Contributed to

The Steering Committee states that it needs copies of Mr. Lin's reports from prior, unrelated matters to determine the reasonableness of the Trustee's reliance on his opinions in this matter, and to enable the Steering Committee to "impeach" Mr. Lin. Memo at 9, 11. [redacted]. *See, e.g.*, España Aff. Ex. D (Lin Tr.) at 69:9-73:15, 84:7-94:9, 98:15-102:2, 149:9-153:23, 155:21-156:8, 651:3-656:8. [redacted] *See, e.g., id.* at 70:20-73:10, 87:11-17, 101:15-102:2, 502:24-503:11.

F. Evidence of What Reached the Trustee or Its Counsel

The Steering Committee argues that "documents that Mr. Lin relied upon are relevant to what was in the mind of Mr. Lin and are, therefore, probative of what may have reached the Trustee or its counsel." Memo at 10. Through the depositions of Mr. Bailey, Ms. Lundberg, Ms. Baker, Mr. Buechele, Mr. Chapman, Ms. Chavez, Ms. Crosson, Mr. Griffin, and/or Mr. Stanley, [redacted] *See, e.g.*, España Aff. Ex. C (Bailey Tr.) at 165:12-168:24 [redacted], 305:4-16 (discussing extent of analysis performed by Trustee regarding RRMS Opinions); Ex. G (Crosson Tr.) at 61:4-62:16 (knowledge of RRMS Opinions); Ex. H (Griffin Tr.) at 73:3-81:17 [redacted]

* * *

Because the Steering Committee could have, and in most instances has, obtained through prior depositions much of the (irrelevant) information that it seeks, the Court should deny the Steering Committee's motion for non-party discovery.

V. RRMS's Documents Are Not Relevant, Discoverable Impeachment Evidence

In a last-ditch effort, the Steering Committee claims that it needs RRMS's documents in order to impeach Mr. Lin's credibility. *See* Memo at 11. That argument is based on the flawed premise that "Mr. Lin is a fact witness on the issue of the reasonableness of the proposed Settlement Agreement[.]" *Id.* On the contrary, as the Trustee stated in its Verified Petition, the RRMS Opinions are relevant only to the reasonableness of the Trustee's *decision* to enter into the Settlement Agreement and not the reasonableness of the Settlement Agreement itself.[7] [redacted] España Aff. Ex. D (Lin Tr.) 156:9-14. Nor is he an expert on other topics that the Trustee considered, such as successor liability or the value of Countrywide's assets.

Of course, Mr. Lin might have a modicum of relevant information about the fact that he wrote and delivered the opinions, or about his discussions with Mayer Brown. But his drafts and work product would not be relevant impeachment on those topics. The Steering Committee seeks further discovery to impeach, not his factual testimony, but rather an expert opinion that he has not been asked to give in this proceeding.

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[7] For the same reason, the Steering Committee's reliance on *Nationwide Mut. Fire Ins. Co v. Smith*, 174 F.R.D. 250 (D. Conn. 1997) is unavailing. There, the court compelled the testimony of a testifying expert who was hired by the insurer to investigate the cause and origin of the fire that was the subject of the insurance claim being litigated.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Steering Committee's Motion.

Dated: January 28, 2013
New York, New York

Respectfully submitted,

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