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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. 31

THE BANK OF NEW YORK MELLON'S OPPOSITION TO THE MOTION TO COMPEL DISCOVERY BASED ON THE FIDUCIARY EXCEPTION AND AT-ISSUE WAIVER

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PRELIMINARY STATEMENT AND FACTUAL BACKGROUND

As the Court observed on a January 18 teleconference with the parties, it has already heard and decided this motion. Its first several decisions were right, and with the shrinking band of non-supporting investors[1] and the substantial investor support to conclude this proceeding, distribute the $8.5 billion in settlement proceeds, and implement the precedent-setting servicing improvements, there is no reason to revisit them now.

The Steering Committee argues—for at least the fourth time—that the fiduciary exception compels disclosure of privileged communications. Yet after 27 depositions, the Steering Committee still cannot show good cause to invade the attorney-client privilege. It cannot show, as it must, that privileged communications are the only evidence available on the three topics it identifies. It cannot show, as it must, that the topics are relevant and specific; in fact, they encompass everything that the Trustee did in connection with the settlement. It cannot show, as it must, that its *de minimus* holdings justify this extraordinary remedy. And after receiving far more discovery than is required under any legal standard, it still cannot show evidence of anything approaching a conflict of interest. The Steering Committee's brief is unfounded speculation.

On this point, even *Dabney v. Chase National Bank,* 196 F.2d 668, 670 (2d Cir. 1952)—the leading case on which the Steering Committee relies—rejects the type of speculation offered by the Steering Committee: "it is not every possibility, however remote, of a conflict of interest between a trustee and his beneficiary which will forbid his entering into a transaction." *Id.* at 675. Indeed, the court cautioned that one can find imaginary conflicts anywhere:

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[1] Even among those that remain, only a few join in this motion. *See* Memo. of Law in support of Motion ("Br.") 1 n.1.

> Pushed with relentless logic, a possible conflict of interest can be conjured up out of all sorts of situations in which persons of normal scruple would feel no hesitation to go ahead. The law ought not to make trusteeship so hazardous that responsible individuals and corporations will shy away from it. As we said in *York v. Guaranty Trust Co.*, 2 Cir. 143 F.2d 503, 514: "Of course the courts should not impose impractical obligations on a trustee. Merely vague or remote possible selfish advantages to a trustee are not sufficient to prove such an adverse interest as to bring his conduct into question."

Id. Indulging such allegations "would be likely to impede the legitimate business of trustees far more than it would protect their beneficiaries." *Id.*

Those remarks were prescient. As of the settlement date, The Bank of New York Mellon ("BNYM" or the "Trustee") stood nearly alone in taking any action on breaches of underwriting representations or servicing deficiencies. No other trustee—in fact, no other private plaintiff in history—had recovered $8.5 billion and secured the type of servicing improvements that Countrywide has agreed to undertake. To our knowledge no other trustee has actually *recovered* a single penny from originators, either through litigation or settlement. BNYM entered into a Settlement Agreement that provides it with no personal benefit whatsoever—no money, no release of claims, and no new indemnity. It did so without demanding or receiving a direction from Certificateholders representing 25% of the trusts' Voting Rights, an approach that would have limited relief to less than half of the trusts here. [redacted] Koplow Tr. 153:5-14.[2] BNYM's reward for its proactive conduct has been over a year of attacks from a tiny group of objectors—led by the party that refused to participate in negotiations—who do not even have an opinion about the settlement. This is not a result that *Dabney* requires, or even condones.

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

Finally, the Steering Committee also renews its claim of "at-issue waiver" of the attorney-client privilege. They last made this argument in their October 9, 2012 letter (at 12-13), and the Court declined to order further discovery. The Court was right—the First Department's decision in *Deutsche Bank Trust Co. v. Tri-Links* holds that litigating the good faith and reasonableness of a decision to settle does not place privileged communications at issue. Neither the law nor the facts have changed since October; in fact, the Steering Committee's brief relies primarily on depositions that occurred before then and the Verified Petition that BNYM filed on June 29, 2011.

In short, we have heard all of the Steering Committee's arguments before and the Court rejected them for all the right reasons. Nothing has changed. The Court should again deny the motion.

ARGUMENT

I. The First Department's Recent Decision in *ASR Levensverzekering* Holds That BNYM's Duties Are Not "Fiduciary" in Nature.

As the Court knows, there has been a dispute about whether the Trustee's duties arising out of the PSAs are purely contractual in nature, or also "fiduciary." The Court ruled on that issue in August, holding that although "[i]t's clear that the type of Trustee we have in this case is not a full fledged fiduciary," the Trustee had a limited, narrow fiduciary duty to avoid conflicts. Conf. Tr. 8/2/2012, at 160. Last Thursday, however, in an opinion affirming this Court's decision in *ASR Levensverzekering NV v. Breithorn ABS Funding p.l.c.*, the First Department added to the weight of authority holding that contractual trustees are not fiduciaries. Focusing, as here, on the period prior to an Event of Default, the court "reject[ed] plaintiffs' attempt to impose fiduciary obligations upon BNY, an indenture trustee with ministerial duties. BNY owed plaintiffs ***no fiduciary duty*** . . . ." 2013 WL 258647, at *1 (1st Dep't 2013) (emphasis added) (citing

Racepoint Partners, LLC v JPMorgan Chase Bank, N.A., 14 N.Y. 3d 419, 425 (2010)). In light of that new, binding authority, we ask the Court to reconsider its ruling that BNYM had even a limited fiduciary duty. But even if it declines to do so, as the Court ruled in October, there is an independent basis to deny the motion—namely, for lack of good cause.

II. There Is Still No Good Cause to Breach the Attorney-Client Privilege Under the Fiduciary Exception.

The Court found last August that there was no good cause to apply the fiduciary exception (Conf. Tr. 8/2/2012, at 161-62), and discovery since then has only bolstered the Court's earlier ruling. Before breaching the privilege, the Court must consider, among other things, (1) whether the information "may be the only evidence available" on each topic, (2) whether the Steering Committee has plausibly alleged a conflict of interest, (3) whether the requests are both relevant and specific, ***and*** (4) the size of the Steering Committee's holdings and its bona fides. *See Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 114 (Sup. Ct. N.Y. Cnty. 2003).

A. Privileged Communications Are Far From "the Only Evidence" of Whether the Settlement Agreement is in the Interests of Certificateholders.

The Steering Committee's baffling assertion that privileged communications between the Trustee and its lawyers "may be the only evidence" of whether the Settlement Agreement benefits Certificateholders (Br. 16, 18-19) would mean, among other things, that the Settlement Agreement—the contract that the Trustee signed and that it has asked the Court to approve—is not even relevant to the Court's decision. The reality is that no privileged communication can materially affect whether the decision to enter into an $8.5 billion settlement with unprecedented servicing improvements and cures of document deficiencies was within the bounds of the Trustee's reasonable discretion. In fact, the Steering Committee has already claimed, without the benefit of attorney-client communications, that "[m]any [undisclosed] investors have argued that

the pennies-on-the-dollar settlement . . . is insufficient." Br. 18. In a pleading filed before *any* discovery occurred, AIG argued that "[t]he settlement terms and proffered justifications also show that Bank of America is drastically underpaying on its liability." Doc. 131 at 2. That was based, supposedly, on still-undisclosed "expert analyses of publicly available information" (*id.* ¶ 5), not the Trustee's attorney-client communications. This point applies to each of the three document categories identified by the Steering Committee:

Trust Committee meeting: The Steering Committee had the opportunity to ask each of the Trust Committee participants why the Committee approved the decision to settle, what factors were considered, and what questions were asked.[3] They also received copies of and were able to ask questions about the non-privileged expert reports that the Trustee considered.

RRMS reports: Brian Lin of RRMS Advisors (Br. 18) presented two reports to the Trustee, concerning the settlement's servicing provisions and the potential damages for breaches of representations and warranties (which accounted for no litigation discounts, including defenses to successor liability claims and limits on recovery from Countrywide). The Steering Committee has those reports, as well as all data and documents given by the Trustee to Brian Lin, all of Lin's communications with Mayer Brown, *two days* of deposition testimony from Lin, [redacted] (Kravitt Tr. 501-08). Privileged communications about the selection of RRMS are not the "only evidence" of its qualifications or advice. Nor is the Lin report the only evidence of damages. Detailed presentations from Bank of America and the Institutional Investors were produced, along with days of testimony about them. Br. 18.

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[3] [redacted] *See* Stanley Tr. 176:25-186:17; 266:18-267:8.

"Self-dealing": The only evidence of whether the Settlement Agreement is a self-dealing transaction (Br. 19-20)—that is, whether it grants some personal benefit to the Trustee—is the Settlement Agreement itself. If the Steering Committee cannot find an "expanded indemnity" in the Settlement Agreement, it is because there is none. If the Steering Committee cannot find a release of claims against the Trustee in the Settlement Agreement, it is because there is none. The Steering Committee has not identified any case in which a court found a conflict, when the transaction itself was not self-dealing on its face. Absent a self-dealing transaction, it makes no sense even to ask whether a conflict may have motivated the Trustee's decision.

B. The Allegations of Conflict Are No Stronger Now Than They Were Last Year.

The Steering Committee's theories of conflict and self-dealing by the Trustee are largely the same ones that it advanced nearly a year ago. There is no new evidence to support them, and most importantly, all depend on patent mischaracterizations of the Settlement Agreement, such as the notion that it expanded an indemnity or released claims against the Trustee.

1. <u>No court has accepted the Steering Committee's diluted notion of "self-dealing."</u>

The Steering Committee cites no case in which a court found self-dealing on facts remotely like those here, and the cases it does cite—involving *actual* conflicts of interest—underscore the implausibility of its theories. *Milea v. Hugunin* involved a testamentary "trustee who is also a beneficiary of the trust." 24 Misc. 3d 1211(A), 2009 WL 1916400, at *3-*7, *9 (Sup. Ct. Onondaga Cnty. 2009). *Birnbaum v. Birnbaum* evaluated a contract "pursuant to which certain estate assets were transferred to" the trustee, noting "the conflict inherent *in such [a] transaction*." 117 A.D.2d 409, 411, 416 (4th Dep't 1986) (emphasis added). The trustee in the third case, *City Bank Farmers Trust Co. v. Cannon*, invested trust funds in its own stock. 291 N.Y. 125, 132 (1943). All of these cases involved traditional trustees with expansive fiduciary duties, not contractual trustees that are "not subject to the ordinary trustee's duty of undivided

loyalty." *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985); *AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc. 2d 334, 338 (Sup. Ct. N.Y. Cnty. 1991); *see also* Conf. Tr. 8/2/2012, at 160 ("It's clear that the type of Trustee we have in this case is not a full fledged fiduciary. Everybody agrees with that."). All three also found self-dealing in the transaction, not in the trustee's internal documents. In all three, the trustee was self-dealing because it was literally on both sides of the transaction.

The fiduciary-exception cases are even starker—they involved apparently undisputed allegations that fiduciaries had received direct, and massive, monetary payments. In *Stenovich*, a corporate officer responded to "a personal affront" by a potential acquirer by selling the company to a lower bidder and then securing for himself a payment for life of approximately $1,000,000 per year for little apparent work, a $500,000 per year payment to his wife should she survive him, a $1,500,000 birthday present bonus on [his] 70th birthday, and options for 185,000 shares of Wells Fargo Stock. 195 Misc. 2d at 101. The trustees in *Hoopes v. Carota* had "almost doubl[ed] their annual remuneration in the space of three years," obtained "long-term employment contracts for various corporate officers which would protect and reward them financially in the event of" a merger, and "allegedly discouraged consideration of merger possibilities which would have been favorable to stockholders but less favorable to management." 142 A.D.2d 906, 907-08 (3d Dep't 1988). And the trustee in *AMBAC*, in which Justice Baer found good cause lacking, was alleged to have "wrongfully appropriated [trust funds] to its own use" and "charged excessive fees and paid them to itself in advance of payment of superior obligations." 151 Misc. 2d at 340.

The one case that the Steering Committee cites (Br. 19) involving a contractual trustee is *Dabney,* 196 F.2d 668, 670 (2d Cir. 1952). That decision outlines the trustee's duty "not to profit

at the possible expense of his beneficiary" in terms so narrow that the Steering Committee has never attempted to explain how it is violated here:

> The controlling issue is how far the corporate trustee of two series of unsecured bonds is bound to abstain from transactions with the debtor which may give it an advantage over the bondholders, its beneficiaries. More particularly, it is what doubts of the continued solvency of the debtor should bar such a trustee from *collecting a personal claim against the debtor.*

Id. at 669 (emphasis added). The *Dabney* trustee was both a creditor of a distressed debtor and the trustee for competing creditors. The trustee "compelled payment" of its own loan, thereby "secur[ing] itself by the depletion of assets which . . . it would be obliged to share ratably with all . . . creditors, including the [trustee]'s bondholders." *Id.* at 672-73. Here, by contrast, the Steering Committee neither alleges that BNYM took money directly from the pockets of investors (or that it took money at all) nor cites authority recognizing anything short of that as a conflict.

2. The Settlement Agreement provides no benefit to the Trustee.

a. The Notice of Non-Performance

The Steering Committee posits that the Trustee somehow benefited from the Institutional Investors' halting of the running of a 60-day cure period that is a condition (among others) to the triggering of an Event of Default. Br. 11-12. But that makes no sense because an Event of Default is triggered by various failures by the *Master Servicer*, not the Trustee (*see* PSA § 7.01), which the Trustee has no obligation to cure. The Steering Committee thus assumes, nonsensically, that BNYM wanted to avoid an Event of Default because it would have been overwhelmed by its post-default "prudent person" duty and would have inevitably breached the PSAs had an Event of Default occurred. Br. 11-12.

That assumption is devoid of any support.

Ingber Aff., Ex. D; Kravitt Tr. 85-91. In any event, the Trustee did manage to secure an $8.5 billion settlement payment, along with substantial other consideration, for alleged breaches of the PSAs—something that no other trustee has done—and all within months of the earliest date on which an Event of Default could (theoretically) have occurred. Therefore, even if the forbearance agreement was ineffective and an Event of Default had, in fact, occurred (which Bank of America disputed at the time), the Trustee has amply met the prudent-person standard by entering into the Settlement Agreement, notifying Certificateholders through this proceeding, and tolling the statute of limitations while submitting its decision for judicial review.

Neither evidence nor logic supports the Steering Committee's suggestion that the Trustee agreed to extend the cure period because of some fear of an Event of Default, nor is any precedent offered for the assertion that the Institutional Investors were forbidden to toll a notice that they themselves had sent, and that any other investor could have sent on its own initiative.

b. Indemnity confirmations

The Steering Committee has abandoned what used to be the centerpiece of its case, the "expanded indemnity" in a side letter to the Settlement Agreement. Now it focuses on an indemnity confirmation executed concurrently with the forbearance agreement in December 2011. Br. 12-13. There is no support for the contention that the Trustee bargained for new benefits; Mirvis Tr. 14:21-15:6.

That interpretation is evident from the actual indemnity confirmation letter. *See* Ingber Aff., Ex. F. The December 2010 confirmation covers only "the reasonable legal fees and

expenses that the Trustee incurs (or has incurred) in connection with its counsel's participation in, and planning with regard to, ongoing discussions regarding the October 18 Letter and any modifications thereof." *Id.* On its face, the confirmation modified nothing in the PSAs: "Nothing herein is intended to limit, modify, supersede, expand or in any way affect any indemnity rights already available to the Trustee under each PSA for each Original Trust and Additional Trust." *Id.* It is remarkable that, for all the talk about trustee indemnities, there has never been even a suggestion that these expenses were not already within Bank of America's pre-existing obligation, in Section 8.05 of the PSAs, to indemnify the Trustee's "attorney's fees (i) incurred in connection with any claim or legal action relating to (a) this Agreement, (b) the Certificates or (c) in connection with the performance of any of the Trustee's duties hereunder..."

The Steering Committee's new grievance that the Trustee should have provided "formal notice to certificateholders . . . that Bank of America was paying the Trustee's legal fees" (Br. 12), is absurd; the Master Servicer indemnity is obvious from the face of the PSAs and there indisputably is nothing in the PSAs that even contemplates notice of this type. In short, a Master Servicer indemnity is not the exception; it is the rule.

Indeed, the notion that an adverse party pays the Trustee's expenses (Br. 12) is neither novel nor problematic. Here, it is the PSAs, not the Settlement Agreement, that provide that the Trustee's indemnity comes from the Master Servicer. Moreover, *as a matter of law*, no conflict exists when a trustee "executed . . . indemnification agreements with [a party adverse to the trust]." *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) (finding "no showing of an actual conflict of interest on this record"). Especially where "the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability, . . . it [is] reasonable for [the trustee] to seek indemnification [from the adverse party]

once it became clear that there was a dispute between the Fund and [that party]." *Id.*; *see also* PSA § 8.01(vi) (trustee need not expend funds or risk liability without adequate indemnity).

[REDACTED]

[REDACTED]. *See* Kravitt Tr. 540:20-23.

c. The draft proposed order

Another theory of "self-dealing," already raised at the last conference, relates to a *draft* of the Proposed Final Order and Judgment that was never submitted to the Court. This theory illustrates just how far-fetched the conflict theories have become—the Steering Committee is now litigating, not about a term of the Settlement Agreement, or even a proposed finding by the Court, but about a finding that was briefly discussed and never even proposed to the Court. The Steering Committee never explains how this superseded draft order could benefit the Trustee or turn the Settlement Agreement into a self-dealing transaction.

The draft order would have had the Court determine whether the Trustee was entitled to a bar against the assertion of claims relating to trust administration generally, rather than just those claims that relate to the Settlement Agreement. Pennington Aff., Ex. 11. The draft was not a self-executing release, but a *proposal* for a *proposed* finding by the Court; the Court would have ruled on that order only after appropriate discovery and evidentiary hearings. In any event, as the motion notes, other parties argued that the proposal could "create[] the appearance" of conflict (Br. 14), and the Trustee never submitted it to the Court.[4] This is a non-issue.

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4 By contrast, the proposed order in *In re IBJ Schroder Bank & Trust Co.*, Sup. Ct. N.Y. Cnty. Index No. 101530/1998 (Apr. 13, 1998), an Article 77 proceeding filed by a securitization trustee seeking settlement approval, *did* contain a declaration that the Trustee would not "be subject to claims for damages or otherwise based on alleged breaches of the Investor Trust Agreement or its duties to the Beneficiaries thereunder." Ingber Aff. Ex. G.

d. The Trustee's view of "risk"

The Steering Committee's common theme is that, even though the Trustee did not obtain a single benefit from the Settlement Agreement, its decision was nonetheless conflicted because it had "sought to protect itself from potential liability and the significant downside risk it was facing" from its role as trustee generally, and that the mere involvement of the bank's risk officers proves some nefarious intent. Br. 14. The Court has already rejected the latter point. 10/12/2012 Conf. Tr. 120:9-11 ("It is not surprising to me when you are entering into a settlement of this magnitude that risk officers might be involved."). The theory also suffers from a total absence of evidence—this is not a plausible reading of even the one-sided record constructed thus far. *No BNYM witness* testified that they were even aware of any such risk[5]:

- *Lundberg* Lundberg Tr. 315:15-316:3.
- *Bailey* (Bailey Tr. 135:2-10), (*id.* at 134:23-25), (*id.* at 136:20-25).
- *Kravitt (Mayer Brown):* Kravitt Tr. 425:24-426:9.
- *Stanley*

5 The absence of any record support makes perfect sense for the additional reason that the Trustee, in fact, has no liability for Countrywide's alleged breaches of representations and warranties, the Master Servicer's alleged servicing breaches, or any purported failure by the Trustee (given the absence of any duty) to investigate and pursue claims against these parties on its own initiative. *See* PSA §§ 3.03, 8.04. In any event, as we have explained on several occasions, and as the Settlement Agreements makes unambiguously clear, the Settlement Agreement contains to release of claims against the Trustee.

Stanley Tr. 104:10-22.

- *Chavez* Chavez Tr. 78:24-79:11.

Lundberg Tr. 201:8-10; *id.* at 203:25-204:2

Stanley Tr. 70:10-23

(Chapman Tr. 280:13-14), (*id.* at 251:23-252:4), t

(*id.* at 155:19-25), (*id.* at 168).

(Br. 11). Chapman Tr.

237:10-13.[6]

In short, the Steering Committee comes nowhere close to alleging either a conflict of interest or that the Trustee acted in bad faith. *See Premier-New York, Inc. v. Travelers Prop. Cas. Corp.*, 20 Misc. 3d 1115(A), 2008 WL 2676800 (Sup. Ct. N.Y. Cnty. 2008) (bad faith means "an extraordinary showing of a disingenuous or dishonest failure to carry out a contract"). This is yet another factor that dooms the Steering Committee's renewed effort to show "good cause."

C. The Requests Continue to be Expansive and Vague.

Even if the Steering Committee could point to a conflict, the fiduciary exception requires that the requests be "specific." *Stenovich*, 195 Misc. 2d at 114. The requests here are not. The $8.5 billion "settlement amount" is a central term of the Settlement Agreement, and "communications concerning the settlement amount" is not a narrow request. This request is also vague, because the settlement amount was not evaluated in isolation from the other terms of the agreement. Do documents about Countrywide's ability to pay "concern[] the settlement amount"? What about documents concerning the successor liability of Bank of America? This request would sweep in virtually every privileged document.

The request for documents "concerning [the Trustee's] own self-dealing" suffers from the same problem. According to the Steering Committee, the Trustee's entire course of conduct was self-dealing; it alleges that the mere fact of a settlement, regardless of its terms, somehow benefited the Trustee. Thus, this request, just like the one that the Court rejected last August, appears to call for all of the Trustee's privileged documents. The request is also hopelessly vague. The reality is that the Trustee does not have any documents about "self-dealing," because there was no self-dealing. Nor are there documents about the "expanded indemnity" or the

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6 [redacted] Chapman Tr. 237:20-23.

"release of claims against the Trustee," because those provisions do not exist. Surely the Steering Committee means for its request to cover something, but there is no way to tell what that is.

D. The Steering Committee Represents a Tiny Fraction of Certificateholders and Has No Evidence of Its Bona Fides.

Garner v. Wolfinbarger, the Fifth Circuit case that invented the fiduciary exception, holds that among the good cause factors, courts should consider "the number of shareholders and the percentage of stock they represent [and] the bona fides of the shareholders." 430 F.2d 1093, 1104 (5th Cir. 1970). The Steering Committee represents holders of approximately 3% of the principal balance of the Trusts; by contrast, the Institutional Investors, who have not joined in any of these allegations, hold more than 22%. More than 15 intervenor-respondents expressly opted-out of the Steering Committee's motion, including at least two that have actively participated in discovery. More than 97% of Certificateholders are patiently awaiting their money and apparently see no point in the Steering Committee's unending efforts to invade the attorney-client privilege. Those figures are especially salient in light of *Dabney*'s admonition that harassment of trustees through groundless allegations of self-dealing harm legitimate investors.

That brings us to the last *Garner* factor—"the bona fides of the shareholders." The Steering Committee, on behalf of a miniscule percentage of investors, is making an extraordinary request, which puts their bona fides directly at issue. We have not yet been permitted to explore those bona fides in discovery because, at the Steering Committee's urging, the Court postponed such discovery until after they decide whether to object. No privileged documents even *could* be compelled until we have an opportunity to explore the Steering Committee's bona fides.

III. Attorney-Client Communications Are Not At Issue.

A. At-Issue Waiver Occurs Only When Privileged Documents Are Necessary to Prove a Claim or Defense.

Legal advice is "at issue" only when a party uses that advice to prove its claim or defense. "The key to a finding of implied waiver [under the at-issue doctrine] is some showing by the party arguing for a waiver that the opposing party *relies* on the privileged communication as a claim or defense or as an element of a claim or defense. . . . [A] party must *rely* on privileged advice from his counsel to make his claim or defense." *In re County of Erie*, 546 F.3d 222, 228-29 (2d Cir. 2008) (emphasis in original). Here, the Trustee has not relied on the content of any privileged advice to prove its case.

1. Assertions of good faith do not cause at-issue waiver.

Courts have held without exception that the types of claims in this proceeding—that a party acted reasonably and in good faith—do not put privileged communications at issue. Perhaps most directly on-point is the First Department's decision in *Deutsche Bank Trust Co. of the Americas v. Tri-Links Investment Trust.* In that case, the plaintiff trust company had to prove the reasonableness of a settlement in order to claim an indemnity. "[I]t [was] undisputed that Bankers Trust, by suing to obtain indemnification for the WMI action, has, at a minimum, placed at issue the reasonableness of the amounts it spent on the defense of that matter and of the amount it paid WMI in settlement." 43 A.D.3d 56, 64 (1st Dep't 2007). Though the defendant was "clearly correct" in "making the point that it can be required to indemnify Bankers Trust only for a settlement that was made in good faith," the court held nonetheless that this gave no "warrant to invade Bankers Trust's attorney-client privilege." *Id.* at 67.

Tri-Links is in line with repeated decisions of the First Department and other courts that evaluating a settlement does not require waiver of privilege. *See Nomura Asset Capital Corp. v.*

Cadwalader, Wickersham & Taft LLP, 62 A.D.3d 582, 582 (1st Dep't 2009) ("Nor does the question of the reasonableness of the settlement amount that plaintiff seeks to recover, without more, put plaintiff's privileged communications with its attorneys concerning the settlement 'in issue.'"); *Am. Re-Ins. Co. v. U.S. Fidelity & Guar. Co.*, 40 A.D.3d 486, 492 (1st Dep't 2007) (rejecting claim that insurer "waived any privilege by placing 'at issue' the reasonableness and good faith of the settlement of the underlying action"); *Corrieri v. Schwartz & Fang, P.C.*, 2012 WL 251561 (Sup. Ct. N.Y. Cnty. 2012) (rejecting "conten[tion] that to evaluate the soundness of the settlement . . . , [defendants] must have access to the privileged matter and be allowed to ask questions about counsel's conversations with plaintiffs on these subjects.").

Nor do other claims based on good faith or the party's state of mind waive privilege. *See, e.g.*, *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner.").[7] As the First Department warned in *Bank of New York v. River Terrace Assocs., LLC*, in which a lending agent needed to prove good faith, non-negligence, and the absence of willful misconduct, "[i]f such allegations constituted a waiver, a waiver would be found in a huge number of lawsuits, a disfavored result." 23 A.D.3d 308, 311 (1st Dep't 2005). The First Department has been unyielding in refusing to find waiver on the grounds advanced by the Steering Committee here, and the Court should follow those decisions.

2. Relevance is not enough to require waiver.

Importantly, the above-cited cases emphasize that relevance has nothing to do with at-

[7] *See also Green v. Beer*, 2010 WL 3422723, at *6 (S.D.N.Y. 2010) (same, as to reasonable reliance); *Thorn EMI N. Am., Inc. v Micron Tech., Inc.*, 837 F. Supp. 616, 620-21 (D. Del. 1993) (same, as to denial of willfulness in patent infringement case).

issue waiver:

> Of course, that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself "at issue" in the lawsuit; if that were the case, a privilege would have little effect.

Tri-Links, 43 A.D.3d at 64; *see also, e.g.*, *Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP*, 52 A.D.3d 370, 374 (1st Dep't 2008) ("it was error for the JHO to find waiver on the basis of relevance alone"); *Rhone-Poulenc*, 32 F.3d at 864 ("Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue."). In the words of the U.S. Supreme Court, "[p]arties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict." *United States v. Salerno*, 505 U.S. 317, 323 (1992) (citing *Wigmore on Evidence*).

3. The Steering Committee had access to ample non-privileged information.

Even in the rare cases when at-issue waiver occurs, disclosure is still not required without a showing of prejudice. *See Credit Suisse First Boston v. Utrecht-Am. Fin. Co.*, 27 A.D.3d 253, 254 (1st Dep't 2006) ("Even if there had been an implied waiver, defendants did not demonstrate the prejudice that failure to breach the privilege would cause, particularly since there would be sufficient available means of discovery to defendants against the claim, namely, through discovery already provided and the availability of other personnel for depositions[.]").

The Steering Committee's allegations that it already has evidence of bad faith based on deposition testimony and documents that have been public since the start of the case weigh *against* disclosure, not in favor. *See* Br. 10-20. The First Department reasoned in *Tri-Links* that disclosure was unnecessary because the adverse party had alleged that, "based on Tri-Links'

review of the non-privileged documents currently in its possession, Tri-Links has already determined that both the settlement of the WMI action and the defense costs incurred therein were unreasonable." 43 A.D.3d at 66; *see also Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 WL 31729693, at *18 (S.D.N.Y. 2002) ("even if the protected communications contain factual information that would be useful to AIG in prosecuting its claims or in defending against the asserted counterclaims, AIG 'has not shown that such information is not available through depositions and interrogatories.' In fact, AIG already claims to have evidentiary support for its contention") (citation omitted)). This conclusion holds for each of the three topics on which the Steering Committee seeks privileged information.

As to the Trust Committee, the Steering Committee had the opportunity to depose the participants in that meeting, it has all five expert reports that the Trustee considered, it has the participants' testimony about their understanding of the facts presented at the meeting, it has the participants' testimony of statements (to the extent they recall) by non-lawyers, it has the participants' testimony about the topics (legal or factual) discussed at the Trust Committee meeting and, most importantly, it has the Settlement Agreement itself.[8] All that it lacks are

[8] *See, e.g.* Stanley Tr. 170:16-171:19 ([redacted] 173:6-174:2 [redacted] 175:3-9 [redacted] 176:25-177:9 [redacted] Bailey Tr. 157:23-158:15 [redacted] 33:7-34:19 [redacted] 172:20-25 [redacted] 180:13-184:15 [redacted] 191:17-193:20 [redacted] 208:11-25 [redacted] Chavez Tr. 61:6-20 [redacted]

counsel's actual statements concerning legal advice or interpreting legal documents. But they offer no reason to think that the Trustee's counsel described those documents in any manner inconsistent with their unambiguous text.

As to the Lin reports, the Steering Committee had two days of depositions, the reports themselves (the only Lin documents that the Trustee ever saw), data and information provided by the Trustee to Lin, and communications between Lin and the Trustee's counsel, including from the period prior to RRMS's retention. The Steering Committee can hardly argue that it needs the contents of privileged communications about RRMS's qualifications to litigate the credibility of the report.

Finally, as to the Trustee's "legal investigation," the Steering Committee has received the expert reports that were provided to the Trustee's decision-makers, along with the experts' communications with Mayer Brown. It also deposed each expert, the lead Mayer Brown lawyer, and many Trustee witnesses. It has had every opportunity to obtain the essential information.

B. The Mere Receipt of Legal Advice Does Not Cause At-Issue Waiver.

As even the Steering Committee admits, at-issue waiver requires "some affirmative act." Br. 4. It is not enough that privileged communications are identified in discovery; rather, "'at issue' waiver occurs when a party has asserted a claim or defense [it] *intends to prove* by use of the privileged material" (*Veras*, 52 A.D.3d at 374 (emphasis added)), or that cannot be litigated without privileged documents. *See also Nomura*, 62 A.D.3d at 582 (despite relevance, no waiver where party "disavows any intention to use such communications and defendant fails to show that any such communications are necessary to either plaintiff's claim or its defense."). Even the

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Buechele Tr. 32:5-15
117:9-118:21

implicit disclosure of the content of the advice, by assertions that the attorney approved the client's conduct, does not waive privilege. *See Hoopes*, 142 A.D.2d at 909; *Joy Global v. Wisc. Dep't of Workforce Dev.*, 2008 WL 2435552, at *5 (D. Del. 2008).

In short, the Steering Committee cannot force waiver by eliciting testimony that the Trustee received, or even relied on, advice of counsel. If it could, then parties would lose privilege as to any transaction on which they consulted counsel. That defies common sense and has no support in the law. *See, e.g., John Doe Co. v. United States*, 350 F.3d 299, 306 (2d Cir. 2003).

C. Attorney Malpractice Cases Are Not Relevant.

The Steering Committee cites no authority holding that a claim of good faith places attorney-client communications at issue. Instead, it relies almost exclusively on attorney malpractice cases. But malpractice claims obviously place the content of privileged communications at issue, because the plaintiff needs to prove that he relied on legal advice and that the reliance caused damages. *See, e.g., Bolton v. Weil, Gotshal & Manges, LLP*, 4 Misc. 3d 1029(A), 2004 WL 2239545, at *6 (Sup. Ct. N.Y. Cnty. 2004).

Bolton (cited at Br. 5) found waiver because the plaintiff had to prove "that he was not informed of [a] potential conflict of interest," that the defendant's "failure to explain the legal effect of [certain contract terms] . . . caused injury," and that he relied on the defendant's advice. 2004 WL 2239545, at *4-*6. Yet the same court held that "the attorney-client privilege is not waived when the information sought relates primarily to a *plaintiff's knowledge* rather than the legal advice given or information conveyed to counsel." *Id.* at *5 (emphasis added). That is, placing the party's knowledge or state of mind at issue does not cause waiver; waiver occurs only when the claim or defense relies directly on the content of legal advice.

In *G.D. Searle & Co. v. Pennie & Edmonds LLP*, 308 A.D.2d 404 (1st Dep't 2003) (cited

at Br. 5), reporting a pair of malpractice cases, the court found waiver only in the case in which the plaintiff relied on attorney-client communications to prove its case. In the other, because the "plaintiffs have agreed to rely only on public information in support of their conflict of interest claim against defendant attorneys, the motion court properly denied the [defendant]'s motion to compel disclosure." *Id.* at 404-05. Finally, in *TIG Insurance Co. v. Yules & Yules* (cited at Br. 5), another malpractice case, the court found no waiver at all. 1999 WL 1029712, at *2 (S.D.N.Y. 1999). "That this result is compelled under New York law is illustrated by the holding in *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 834 (2d Dep't 1983)]," because "the plaintiff was not relying on these conversations," and the communications were not relevant to mitigation of damages either. *Id.* Here, as in *Jakobleff* and in *G.D. Searle*'s companion case, the Trustee has never relied on the content of privileged communications to prove its case.

The only non-malpractice case that the Steering Committee cites is *Royal Indemnity Co. v. Salomon Smith Barney, Inc.* (cited at Br. 8), an insurance coverage dispute in which Salomon had to prove that it gave its insurer timely notice once it realized that claims could exceed a certain amount. The court pointed out that "[i]n order to carry their burden, defendants will have to establish that the timing and quantity of the demands they received from the class action plaintiffs, and the assessments of these demands by defendants' own counsel, made it reasonable for notice to have been withheld from" the insurer prior to the time it was given. 4 Misc. 3d 1006(A), 2004 WL 1563259, at *9 (Sup. Ct. N.Y. Cnty. 2004). Salomon had to prove when it became aware that the likely value of the claims exceeded the notice threshold, and any such knowledge would almost certainly have been acquired in its legal department. Accordingly, Salomon could not prove that it gave timely notice without disclosing the content and timing of its legal advice. By contrast, proof of good faith and reasonableness in making a business

decision does not require disclosing the content of legal advice.

D. The Steering Committee's Waiver Theories Misstate the Record.

The Steering Committee asserts that the Trustee has waived privilege as to three topics. But their arguments about the *relevance* of privileged communications have no bearing on the question of whether those communications have been placed at issue.

1. The Trust Committee meeting.

The first topic is the Trust Committee meeting. The Steering Committee states incorrectly that "BNYM's decision to enter into the settlement was made by the Corporate Trust Committee at a June 28, 2011 meeting." Br. 6. [redacted] *See, e.g.*, Stanley Tr. 160:11-15 [redacted] *id.* at 268: 22-23 [redacted] *id.* at 173:10-174:2; Lundberg Tr. 286:13-287:14 [redacted]

Even if the decision had been "made" by the Trust Committee, legal advice is not at issue just because the committee received and considered it. Br. 7-8. That might make the advice *relevant*, but it does not put it *at issue*. There is no dispute that the presentation by in-house counsel was privileged or that the Trustee has asserted the privilege. *See Aiossa v. Bank of Am., N.A.*, 2011 WL 4026902, at *5 (E.D.N.Y. 2011) ("'At issue' waiver is concerned with the selective disclosure of privileged material, not the disclosure of non-privileged material and redaction or withholding of privileged material."); *Shinnecock Indian Nation v. Kempthorne*, 652

F. Supp. 2d 345, 365 (E.D.N.Y. 2009) (no waiver when parties "have disclosed all factual material . . . and have redacted all legal conclusions"). The Steering Committee argues that the Trustee cannot prove (1) reasonableness, (2) good faith, and (3) that it "considered the claims being settled" without waiving privilege. Br. 8. But as shown above, all of the binding precedent holds that reasonableness and good faith of a settlement does *not* put legal advice at issue. As to the third point, no claim of privilege has been made as to the expert reports analyzing various aspects of the claims being settled—the reports on which the Trustee actually asserts reliance—which have long since been disclosed.

Tri-Links is dispositive. It found no waiver even though the plaintiff, which had to prove good faith and reasonableness, refused to answer, "What factors did you consider in approving the settlement?" but did say that he "rel[ied] on the advice of counsel in determining . . . whether to approve the settlement." 43 A.D.3d at 68. Because the plaintiff "neither sought to justify the decision to settle . . . on the ground that it was based on the advice of counsel, nor did he divulge the contents of any of the advice Bankers Trust received from its counsel," no waiver occurred. *Id.* at 68-69. Here, the Trustee has not asserted that its decision was reasonable *because* of the content of the legal advice it received. In fact, on the few occasions on which the Steering Committee asked "What factors did you consider in approving the settlement?," [REDACTED]

[REDACTED] *See* Lundberg Tr. 280:4-282:15; Griffin Tr. 63:14-66:10; Stanley Tr. 181:6-186:17.

2. The "settlement amount"

The Steering Committee next argues that by relying on counsel to select RRMS Advisors, the Trustee waived privilege over the "settlement amount." Br. 9. In other words, the Trustee relied on counsel in selecting the experts on which it would rely as part of its decision. This

bootstrap is unpersuasive, because it is the settlement, not the decision to hire RRMS, that is at issue. [redacted]

Lundberg Tr. 459:16-17; *see also* Bailey Tr. 154:11-19.

As to the decision not to review loan files, there has been abundant testimony about the discussions among the Trustee, the Institutional Investors, and Bank of America. [redacted] *See also* Kravitt Tr. 627:2-629:4; Bailey Tr. 102:18-103:2; 104:2-6.

3. "Legal investigation" and "deliberations"

Last, the Steering Committee suggests that the Trustee has waived privilege based on a proposed finding that it conducted a "legal investigation" of the settled claims and a finding about its "deliberations." Br. 10-11. The answer is simple—the Trustee does not seek to prove the content of its legal investigation or any legal aspects of its deliberations. *See Soho Generation of N.Y. v. Tri-City Ins. Brokers*, 236 A.D.2d 276, 277 (1st Dep't 1997) ("By merely mentioning at his deposition that he had withdrawn plaintiff's claim upon the advice of counsel, plaintiff's president . . . did not waive any attorney-client privilege by placing the subject matter of counsel's advice in issue or by making selective disclosure of such advice[.]"). Neither does the possibility that "those communications might be useful in undermining [the Trustee]'s explanation . . . mean that the attorney-client privilege has been impliedly waived." *See Leviton Mfg. Co., Inc. v. Greenberg Traurig LLP*, 2010 WL 4983183, at *6 (S.D.N.Y. 2010).

CONCLUSION

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

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Respectfully submitted,

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