SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the matter of the application of

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

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

THE INSTITUTIONAL INVESTORS' RESPONSE TO THE OBJECTORS' ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT COMPEL DISCOVERY

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The Institutional Investors respond as follows to the Objectors' Motion to Show Cause Why the Court Should Not Compel Discovery (the "Discovery Motion").

I. THE OBJECTORS SEEK NUMEROUS CATEGORIES OF DISCOVERY THEY HAVE NOT BEEN DENIED

The Objectors claim that they have been denied discovery concerning "the meaning, effect, and reasonableness of the settlement terms and the claims to be settled under those terms."[1] However, the meaning and effect of the Settlement Agreement is apparent on its face. As for reasonableness, as explained in the Trustee's brief, the issue before the Court is the reasonableness of the Trustee's exercise of discretion in entering into the Settlement, not the reasonableness of the terms of the Settlement.

Perhaps recognizing that the facts do not demonstrate any actual failure to produce relevant evidence, the Objectors have retreated to innuendos, "questions" or "suggestions" of issues they assert relate to the Settlement.[2] These "questions" rest on fiction, not fact; they rest on provisions of the Settlement Agreement the Objectors carefully cite, but do not *quote*.

> Fiction No. 1: "The Settlement Agreement suggests—though does not expressly state—that BAC/CW (through its Master Servicer) will withhold or repossess an undisclosed portion of the Settlement amount through reimbursement of servicing and other advances (*See* Settlement Agreement §3(d)(i)).[3]
>
> **Fact: Section 3(d)(i) states, expressly, that "the Master Servicer *shall not be entitled* to receive *any portion* of the Allocable Share [of the Settlement Payment] distributed to any Covered Trusts,…"**

Paragraph 3(d)(i) of the Settlement Agreement categorically precludes the Master Servicer from participating in any way in the Settlement Payment as it flows down the waterfall

[1] Discovery Motion at 17.
[2] *See* Discovery Motion at 14-17.
[3] *Id*. at 15.

to the covered trusts.[4] There is no "suggestion" otherwise in the paragraph cited by the Objectors. There is no other provision of the Settlement Agreement that would ground this purported "question" in any fact relevant to this proceeding.

> Fiction No. 2: Certificateholders are allegedly injured because Bank of America as Master Servicer "may not be obligated to modify loans or otherwise mitigate Certificateholders losses."[5]
>
> **Fact: "Obligating" the servicer to provide loan modifications would have required the consent of more than 66 2/3% of the Certificateholders, because the PSAs do not obligate the Certificateholders to accept, or permit the servicer to impose, wholesale or categorical loan modifications.**

The Objectors imply there is something wrong with the Settlement because it does not "obligate" the servicers to modify loans in a wholesale fashion. However, the Mortgage Loans in the Trusts are to be serviced "for and on behalf of the Certificateholders." PSAs at § 3.01.[6] The Master Servicer is required to "make reasonable efforts in accordance with the customary and usual standards of practice of prudent mortgage servicers to collect *all payments called* for under the terms and provisions of the Mortgage Loans." *Id*. at § 3.05(a). While the Master Servicer "may in its discretion (i) waive any late payment charge…any Prepayment Charge or penalty interest in connection with the prepayment of a Mortgage Loan and (ii) extend the due dates for payments due on a Mortgage Loan for a period not greater than 180 days," *id*., nothing in the Governing Agreements *mandates* (nor, rationally, would it ever mandate) that all (or even any specified percentage of) Mortgage Loans must be modified in a blanket fashion. Any attempt to impose such a mandate would thus have required an amendment of the PSAs.

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[4] *Id.* ("…the Master Servicer *shall not* be entitled to receive any portion of the Allocable Share [of the Settlement Payment] distributed to any Covered Trusts,…") (hereafter, emphasis added unless otherwise noted).

[5] Discovery Motion at 16-17.

[6] Excerpts of a representative sample of the Pooling and Servicing Agreements (the "PSAs" or "PSA") at issue in this case is attached as Exhibit A to the Warner Affirmation filed contemporaneously herewith.

Every borrower is different. The Servicer must assess, in each individual instance, which approach to a modification (if any) is reasonably likely to permit the Trusts to collect "all payments called for,"[7] as required by the PSAs. Where borrowers have the means to pay, but have chosen to default strategically to try to leverage a modification, the Master Servicer could not (in the best interests of Certificateholders) conclude that a modification was warranted.[8] Where, in contrast, a borrower has struggled to pay and a modification "would have a positive effect on the net present value of the Mortgage Loan as compared to foreclosure,"[9] the Servicer might conclude a modification would benefit Certificateholders. In each instance, however, the PSAs require the Servicer to make an individual judgment concerning whether a modification is in the best interests of Certificateholders.[10] Paragraph 5 of the Settlement Agreement thus conforms, on its face, to the servicing obligations set forth in ¶3.01 of all of the PSAs. It does not mandate modifications, because any such a mandate would violate the PSAs.

There is no actual "question" about the value of the servicing improvements achieved in the settlement: virtually every public analysis of the Settlement terms estimates these servicing provisions have enormous value to the Trusts and their Certificateholders. To cite just one example, Laurie Goodman of Amherst Securities—a leading authority on mortgage servicing—has estimated that the servicing provisions of the Settlement may add as much as **$10 billion in additional value** to the securities issued by the Covered Trusts when fully implemented.[11]

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[7] Ex. A to Warner Aff. (PSA) at § 3.05(a).

[8] *Compare* Settlement Agreement at ¶¶5(3)(c)(requiring the servicers, in evaluating a request for a modification, to consider "whether the borrower has the ability to pay, but has defaulted strategically or is otherwise acting strategically,") and 5((d) (requiring the servicers to consider "reasonably available avenues of recovery of the *full principal balance* of the Mortgage Loan other than foreclosure or liquidation of the loan;").

[9] Settlement Agreement at ¶5(e)(a).

[10] *See* Ex. A to Warner Aff. (PSA) at §3.01.

[11] *See* Ex. B of Warner Aff. (L. Goodman, "Bank of America Settlement—Impact on Securities Valuation," July 28, 2011 at pgs. 7-10.)

Given that this leading authority was able to derive a detailed valuation from publicly available information (and from the Settlement Agreement itself), there is no reason the Objectors could not do likewise.

> Fiction No.3: "Additional questions surround the extent to which Bank of America will be able to avoid its servicing obligations under a carve out in the agreement for 'commercial impracticability' and an express provision of the National Mortgage Settlement superseding the servicing improvements in the Settlement Agreement."
>
> **Fact: Nothing in the National Mortgage Settlement is contrary to the servicing provisions of the Settlement. Bank of America can and must comply with both.**

The Objectors' error begins with their suggestion that the reasonableness of the Trustee's decision should be assessed in light of events that occurred nine months *after* the Settlement Agreement was reached. This is false. That said, legitimate discovery concerning the merit of the servicing improvements has never been disputed by anyone, although it is apparent that if the Objectors were to read the National Mortgage Settlement and ¶5 of the Settlement Agreement to assess whether there is any *actual* conflict between the two, they would find that there is none.[12]

II. SETTLEMENT COMMUNICATIONS ARE NEITHER RELEVENT TO, NOR DISCOVERABLE IN, THIS ARTICLE 77 PROCEEDING

A. The Objectors Have Made No Attempt To Satisfy the Applicable Rule for Obtaining Discovery of Settlement Negotiations

Courts considering the approval of settlement agreements consistently apply the rule that "discovery of settlement negotiations is proper only where the party seeking it lays a foundation by adducing from other sources evidence that the settlement may be collusive."[13] This rule has

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[12] Notably not *one* of the 49 Attorneys General who signed the National Mortgage Settlement—including the two attorneys general who have sought leave to intervene here—supports the Objectors' suggestion that there is some "question" about how the National Mortgage Settlement interacts with the Settlement Agreement.

[13] *Lobatz v. U.S. West Cellular of Calif.*, 222 F.3d 1142, 1148 (9th Cir. 2000); *Accord Thornton v. Syracuse Sav. Bank.*, 961 F.2d 1042, 1046 (2d Cir. 1992); *Mars Steel Corp. v. Continental Ill, Nat'l Bank and Trust Co. of Chicago*¸ 834 F.2d 677, 684 (7th Cir. 1987); *In re Wachovia Corp. "Pick-a-Payment" Mortgage Marketing and Sales Practice Litigation*, 2011 WL 1496342, at *3 (N.D. Cal. 2011); *Klein v.*

been developed in the class action context, where the standard of review (whether the settlement itself is "fair, reasonable, and adequate")[14] is far broader than the narrower question posed in this Article 77 proceeding ("whether the Trustee acted negligently in ascertaining the pertinent facts and whether its decision based on those facts was in bad faith or outside the bounds of the broad discretion conferred upon it by the PSAs").[15]

Courts have adopted and followed this rule for several reasons. For example, courts have found that application of this rule is required to avoid significant and unnecessary delays in the settlement approval process. If "a disagreement about the merits of the settlement agreement [could be] the basis for a ruling permitting discovery of settlement negotiations . . . discovery would be available in virtually every proposed class settlement to which there is an objection."[16] In addition, discovery of the content of Settlement negotiations is discouraged because it could have an "obviously chilling effect on the desire to settle cases[, carrying] a great risk of exposing legal strategy and attorney client privileged communications."[17]

O'Neal, Inc., 2010 WL 234806, at * 4 (N.D. Tex. 2010); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 24, 28 (D.D.C. 2001); *White v. Nat'l Football League*, 822 F.Supp. 1389, 1429 (D. Minn. 1993) *aff'd* 41 F.3d 402 (8th Cir. 1994); *In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421, 424 (N.D. Ga. 1992); *Bowling v. Pfizer, Inc.*. 143 F.R.D. 141, (S.D. Ohio 1992); *Cho v. Seagate Tech. Holdings, Inc.*, 99 Cal. Rptr.3d 436, 448 (Cal. Ct. App. 2009); *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 438 (Tex. App. – Texarkana 1994), *aff'd* 916 S.W.2d 949 (Tex. 1996). *See also* MCLAUGHLIN ON CLASS ACTIONS § 6:10 (7th ed. 2010) ("It is well established that objectors are not entitled to discovery concerning settlement negotiations between the parties without evidence indicating that there was collusion between plaintiffs and defendants in the negotiating process.").

[14] Fed. R. Civ. P. 23(e).

[15] Memorandum of Law in Support of the Trustee's Motion Regarding the Standard of Review and Scope of Discovery at 10-11.

[16] 2003 WL 715748, at *2.

[17] *Id.*; *see also Mars Steel*¸ 834 F.2d at 684; *Thornton*, 961 F.2d at 1046 ("Discovery with respect to a settlement agreement of an ongoing litigation, however, is permissible only where the moving party lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive. This is necessary to prevent parties from learning their opponent's strategy."). This risk is evident here where disclosure of settlement negotiations would be deeply prejudicial to the Institutional Investors' efforts to pursue or obtain settlements of similar claims against other banks. *See* Section IV(E)(3), *infra* (including discussion of Institutional Investors efforts' with respect to other banks). The prospect of such severe prejudice, when weighed against the abundance of other evidence available to the

The Objectors ignore this well established rule in their motion and make no attempt to demonstrate that they have "adduc[ed] from other sources evidence that the settlement may be collusive."[18] This is no doubt because there is no credible allegation, much less any evidence, of collusion with respect to the Settlement.[19] Having failed to meet this threshold test, the Objectors' request for discovery regarding settlement negotiations should be denied.

B. The Authorities Relied On By the Objectors Do Not Support Their Request for Discovery Regarding Settlement Negotiations

Rather than attempt to offer evidence of collusion, and thereby satisfy the relevant test, the Objectors instead offer three inapposite cases. The Objectors first cite *Masterwear Corp. v. Bernard*,[20] a case in which the issue was the liability of a corporate executive to his former employer for alleged overpayments made to himself and a codefendant. When the codefendant settled, the court ordered production of the settlement agreement because the plaintiff sought to hold the defendant liable for payments made to the settling codefendant and because "the settlement agreement contains admissions by this codefendant."[21] *Masterwear* offers no support to the Objectors. *Masterwear* did not involve settlement approval, and the issue there was not the discoverability of a settlement *negotiations*, but rather the discoverability of a settlement *agreement*.[22] Here, the Settlement Agreement was made public when the Trustee initiated this proceeding, so the Objectors already have what *Masterwear* permits them to discover.

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objectors, and the lack of relevance of the information, counsels strongly against permitting this discovery.

[18] *Lobatz*, 222 F.3d at 1148.

[19] *See* Exh. F to Warner Affirmation (Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections) at 39-60 (addressing allegations of conflict and collusion in Objectors' intervention pleadings).

[20] *Masterwear Corp. v. Bernard*, 298 A.D.2d 249, 250 (1st Dep't 2002).

[21] *Id*.

[22] The Objectors suggest, without ever saying it, that the *Masterwear* court ordered the production of settlement negotiations. It did not. While the Appellate Division made clear, in a later opinion, that its order requiring the production of the "settlement agreement" included "all of the 'confidential documents'

Next, the Objectors cite the Court to *NYP Holdings, Inc. v. McClier Corp.*,[23] in which an architect for a defective construction project settled claims against it and then sought indemnification from various subcontractors for the amounts paid. The court ordered the production of settlement negotiations because: (i) an indemnitee who negotiates a Settlement free of the control of the indemnitor bears the burden of proving that the settlement amount was reasonable, and (ii) such an indemnitee "knows or believes that any financial responsibility he undertakes is likely to fall ultimately on the indemnitor," and for this reason "he is not inhibited, except by the barest self restraint."[24] *NYP Holdings* has no application here. It does not address whether objectors to a settlement can obtain discovery of settlement negotiations, and the present case is not a dispute over an indemnity.

The Objectors' citation to *NYP Holdings* demonstrates the Objectors' fundamental *misconception* of the issue before the Court. In *NYP Holdings*, this issue was whether *the amount* of a settlement was reasonable. This Court, in contrast, will only determine whether the Trustee acted within the scope of its discretion in electing to settle, *i.e.*, "whether the Trustee acted negligently in ascertaining the pertinent facts and whether its decision based on those facts was in bad faith or outside the bounds of the broad discretion conferred upon it by the PSAs."[25] The architect seeking to be indemnified in *NYP Holdings* had no such discretion, and his decision as to the appropriate settlement amount was entitled to no such deference. To the contrary, his decision to settle was suspect from the outset because he "knows or believes that

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sought in [the defendant's] notice," *Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 307 (1st Dep't 2004), nowhere in either opinion is it stated, suggested, or implied that these "confidential documents" included settlement negotiations. Indeed, the word "negotiations" appears nowhere in either of the two *Masterwear* opinions cited by the Objectors. The only additional "confidential document" that is ever referred to is an unidentified affidavit. *Id*.

[23] *NYP Holdings, Inc. v. McClier Corp.*, 2007 WL 519272 (N.Y. Sup. Ct. 2007).

[24] *Id*. at *3-4.

[25] Memorandum of Law in Support of the Trustee's Motion Regarding the Standard of Review and Scope of Discovery at 10-11.

any financial responsibility he undertakes is likely to fall ultimately on the indemnitor," and for this reason "he is not inhibited, except by the barest self restraint."[26]

Finally, the Objectors cite *In re General Motors*,[27] a case that undercuts, rather than supports, the Objectors' argument. As noted above, in settlement approval cases, "discovery of settlement negotiations is proper only where the party seeking it lays a foundation by adducing from other sources evidence that the settlement may be collusive."[28] In applying this rule, courts frequently cite to *In re General Motors* as exemplifying the type of "hanky-panky" that must be shown before objectors may obtain discovery of settlement negotiations.[29] They do so because, in *In re General Motors*, there was substantial evidence of collusion. The settlement was negotiated in violation of a prior court order; other class counsel who had appeared in the action were not informed or consulted about the settlement; no notice had been mailed to class members; and the settlement abandoned claims by a subset of class members.[30] None of these facts – or any remotely like them – is present here. The Objectors' innuendos are not evidence of collusion; absent such *evidence*, the Objectors have not met their burden.

C. Settlement Negotiations Are Not Relevant

The sole explanation provided by the Objectors for why settlement negotiations are relevant to the issues before the Court is their claim that such information:

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[26] *Id*. at *3-4.

[27] *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979).

[28] *Lobatz*, 222 F.3d at 1148.

[29] *Mars Steel Corp.*, 834 F.2d at 684 ("[D]iscovery [of settlement negotiations] is proper only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive, as in the *General Motors* case . . . there is no indication of such hanky-panky here."). *Accord In re Lupron Mktg. & Sales Prac. Litig.*, 2005 WL 613492, at *2 (D. Mass. 2005) (describing *General Motors* as one of the "exceptional cases" in which "circumstantial evidence may warrant discovery into settlement agreements"); *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 622 n.3 (S.D. Cal. 2005) (distinguishing *General Motors* because "there were no irregular negotiations in violation of any court order").

[30] *In re General Motors*, 594 F.2d at 1123-32.

> may be the only evidence of among other things: (1) the roles that BNYM and the Institutional Investors played in the negotiations; (2) the process by which BNYM purportedly evaluated the underlying claims and the terms of the Settlement; (3) the compromises that were made in reaching the terms; and (4) whether BNYM and/or the Institutional Investors negotiated for individual benefits to the detriment of the trusts and other beneficiaries.[31]

Settlement communications are *not* needed to evaluate any of these issues.

The Objectors do not explain how settlement roles are relevant to any issue in this case. Even if they were, discovery into settlement negotiations is not necessary to obtain this information. The roles of the Trustee and the Institutional Investors, and the actions each undertook, in connection with the settlement negotiations are described in detail in both the Trustee's Verified Petition and in the Institutional Investors Statement in Support of Settlement and Consolidated Response to Settlement Objections.[32]

Equally meritless is the Objectors' assertion that they are entitled to discovery of settlement negotiations to understand "the process by which the Trustee purportedly evaluated the underlying claims and the terms of the Settlement." As noted above, the entire focus of the discovery which the Trustee has voluntarily produced, and agreed to engage in, revolves around the process by which it evaluated the underlying claims and Settlement. The Objectors now have, or will soon have, all of this information.

Nor do the Objectors need discovery of settlement negotiations to understand "the compromises that were made in reaching the [Settlement] terms" or "whether BNYM and/or the Institutional Investors negotiated for individual benefits to the detriment of the trusts and other beneficiaries." The compromises made by both parties, and the benefits conferred by it, are <u>all</u>

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[31] Discovery Mtn. at 10.

[32] *See* Verified Petition at ¶¶ 10-12, 27-36; Exh. F to Warner Affirmation (Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections) at 39-50 (describing the role of the parties and detailing voluminous public disclosure of the existence of settlement negotiations and the parties involved in them).

contained in the Settlement Agreement itself and the related agreements that have already been produced to all parties. There are no other agreements or benefits and there is no basis for the parties to engage in lengthy and fruitless discovery into settlement negotiations in search of non-existent compromises and individual benefits.

Finally, even if it could be argued that the Trustee's settlement communications were relevant to the issues before the Court (and it cannot), that would still not make settlement communications to which the Trustee *was not a party* (for example between the Institutional Investors and Bank of America or Countrywide) relevant or discoverable. Indeed, the Objectors have offered no explanation for how communications that did not include the Trustee could be relevant to any issue before the Court.

III. THE COMMON INTEREST PRIVILEGE APPLIES TO THE INSTITUTIONAL INVESTORS' COMMUNICATIONS WITH THE TRUSTEE AND THEIR POST-SETTLEMENT COMMUNICATIONS WITH BANK OF AMERICA AND COUNTRYWIDE

Even if the Objectors were entitled to discovery into settlement negotiations (they are not), the "common interest" privilege would nonetheless apply to shield from discovery communications between the Trustee and the Institutional Investors during settlement negotiations. These parties were pursuing an obvious common interest: reaching a settlement of trust claims that was acceptable to the Trustee, Bank of America, and Countrywide, on terms fair to all Certificateholders and that the Institutional Investors could support.[33] Since the Settlement Agreement was executed, the common interest privilege applies to communications between the Institutional Investors, the Trustee, Bank of America, and Countrywide because they share the

[33] *See U.S. Bank N.A. v. APP International Finance Co.*, 33 A.D.3d 430, 431-32 (1st Dep't 2006) (common interest privilege applies to indenture trustees communications with parties sharing common litigation interest to the exclusion of trust beneficiaries who oppose its actions).

common objective of obtaining this Court's approval of the Trustee's decision to enter into the Settlement. The Objectors' challenges to the common interest privilege are meritless.

First, the Objectors lodge an irrelevant complaint that the Institutional Investors' privilege log includes broad categories of documents and the privileges asserted with respect to them. This log conforms to the practice in the Southern District of New York, where the case resided when the privilege log was produced.[34] The Institutional Investors have informed the Objectors that they are in the process of preparing a detailed privilege log of the voluminous documents encompassed within their document requests. The *form* of the log, however, is irrelevant to the *substance* of the common interest privilege.

Next, the Objectors assert the Trustee and the Institutional Investors did not share a common legal interest in negotiating the Settlement Agreement, and that the Institutional Investors, the Trustee, Bank of America, and Countrywide do not currently share a common legal interest in obtaining this Court's approval of the Trustee's decision to enter into the Settlement. The Objectors' argue the privilege does not apply because the parties "were adversaries when negotiations began and will revert to adversaries if the Settlement is not approved." However, in *AMP Servs. Ltd. v. Walanpatrias Found.*,[35] this Court recognized that the common interest privilege can apply to parties between which there is "adversarial tension" if there is an "agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy." Likewise, the Court in *Mt. McKinley Ins. Co. v. Corning, Inc.*,[36] held that a common interest privilege can exist "despite an adversarial relationship" on issues for which the parties' interests are aligned. As this Court has explained,

[34] *See* S.D.N.Y. Local Rule 26.2(c) Assertion of Claim of Privilege ("it is presumptively proper to provide the information required by this rule by group or category").

[35] 2008 WL 5150654 (Sup. Ct. N.Y. Cnty. Dec. 1, 2008).

[36] 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. Dec. 4, 2009).

for the common interest to apply "a total identity of interest among the participants is not required . . . the privilege applies where an 'interlocking relationship' or a 'limited common purpose' necessitates disclosure to certain parties."[37] The common enterprise of negotiating and obtaining approval of the Settlement Agreement constitutes such a "limited common purpose" for purposes of the common interest privilege.

Also meritless is the Objectors' argument that they are entitled to invade the common interest privilege between the Institutional Investors and the Trustee because the Objectors, as Certificateholders, shared a common interest in settling the trusts' claims. The premise of this argument – that the Objectors have an interest in a reasonable settlement of trust claims – is highly suspect given the positions the Objectors have taken in this litigation. Moreover, the Objectors cite *no authority* for the proposition that a party sharing some common legal interest with another (or a group of others) is entitled to invade the other's privileged communications.

Finally, the Institutional Investors and the Trustee did not waive the common interest privilege by seeking approval of the Settlement. The sole issue on which this Court is asked to rule is on the reasonableness of the Trustee's decision to enter into the Settlement. As the First Department specifically recognized in *American Re-Insurance Co. v. United States Fidelity & Guaranty Co.*, seeking a court declaration as to the reasonableness and good faith of a settlement does not put any privilege "at issue."[38]

[37] *GUS Consulting GmbH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 542 (Sup. Ct. N.Y. Cnty. 2008).

[38] 40 A.D.3d 498, 492 (1st Dep't 2007) ("An insurer does not place the bona fides of a settlement at issue merely by alleging in a pleading that the settlement was reasonable and in good faith.").

IV. THE INSTITUTIONAL INVESTORS' PRIVILEGED COMMUNICATIONS WITH THEIR COUNSEL ARE NOT DISCOVERABLE

A. The Institutional Investors' Communications are Plainly Privileged

The Objectors do not dispute that the Institutional Investors' communications with their counsel fall within the ambit of the attorney-client privilege.[39] Instead, their argument is that the privilege that ordinarily would apply does not apply based on the so-called fiduciary exception. Thus, the sole issue presented is whether there is any legal basis for *invading* an attorney-client privilege the objectors concede exists. There is not.

B. The Fiduciary Exception Does Not Apply Because the Institutional Investors Have Never Purported to Act on Behalf of All Certificateholders

The Objectors' assertion of the "fiduciary exception" lacks any basis in fact or law. The Institutional Investors have *never* asserted a derivative claim or otherwise purported to act on behalf of all Certificateholders, the Trustee, or the Covered Trusts.[40] Instead, beginning in November 2010, they engaged in settlement negotiations with the Trustee and Bank of America to arrive at settlement terms they would be willing to *support if* the Trustee elected to settle the Covered Trusts' claims. The Trustee then exercised its independent discretion and struck its own deal with Bank of America. Though they provided a letter to the Trustee expressing support for the eventual Settlement, the Institutional Investors were absolutely clear that they were *not* instructing the Trustee to accept the Settlement terms.[41] The Institutional Investors thus appear here to support the *Trustee's* Settlement with Bank of America, *not* their own.

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[39] *See* Discovery Mtn. at 4.

[40] Ironically, several of the Objectors who make this argument *have* filed (or sought to pursue) derivative claims on behalf of one or more the Trusts. Were they to succeed on this argument, the Objectors' privileged communications would immediately become discoverable.

[41] *See* Letter of June 23, 2011 to BNY Mellon, as Trustee, attached as Exhibit B to Institutional Investor Agreement (attached as Exhibit C to the Trustee's Verified Petition) ("'On behalf of all of our clients except Freddie Mac, we ask BNY to exercise its *independent business judgment* to accept the

1. The Objectors' Materially Misstate Known Facts Concerning the Settlement Negotiations and the Institutional Investors' Role

The Objectors also misstate a number of facts on an issue central to their argument. The Institutional Investors have never sought or obtained any "priority or preference,"[42] over other Certificateholders. They will receive exactly the same benefits under the Settlement that other similarly situated Certificateholders receive.

The Objectors' brief also ignores the Institutional Investors' publicly disclosed role in settlement negotiations and omits material facts about the Objectors' own involvement. The Objectors were aware of the information they now seek in discovery through the Institutional Investors' Statement in Support of the Settlement.[43] As explained in detail therein, the Institutional Investors *never* assumed control of the trusts, never attempted to usurp the Trustee's role to act on behalf of all Certificateholders, or claimed to be acting on behalf of any Certificateholders other than themselves and their clients, and the Notice of Non-Performance they sent never became an Event of Default.[44] The Institutional Investors supported the Trustee's decision to engage in settlement negotiations with Bank of America, and participated in them, but they neither *instructed* the Trustee to open discussions nor did they instruct the Trustee to accept Bank of America's settlement offer. There is therefore no colorable argument: (i) that the Institutional Investors assumed a fiduciary role with respect to other Certificateholders; or (ii) that the Objectors are entitled to the Institutional Investors' privileged and confidential attorney-client communications.

Settlement on the Trusts' behalf. Though *this is not a binding instruction* from our clients, our clients believe the Settlement is in the best interests of all of the Trusts included in the Settlement, so they urge the Trustee to accept it.")

[42] Discovery Mtn. at 20.

[43] *See* Ex. F to Warner Aff. This document was filed in federal court, and therefore made available to all parties, on Oct. 31, 2011.

[44] *Id*. at ¶¶63-68 and 72.

C. The Institutional Investors Do Not Owe Fiduciary Duties to All Certificateholders

Because the Institutional Investors never asserted a derivative claim or otherwise purported to act on behalf of all Certificateholders, they do not owe a duty to all Certificateholders on which a "fiduciary exception" claim could be based. Tellingly, each of the cases the Objectors cite—*Sterling*, *Velez*, and *CFIP*—provide only that a certificateholder acts in a "representative capacity," Discovery Motion at 19, if it actually filed a derivative claim where the trustee was defendant, or where demand on the trustee had been excused and the plaintiff proceeded derivatively.[45] Those cases do not apply here, because the Institutional Investors never filed *any* claim, never sued the Trustee, and never proceeded derivatively on behalf of all of the Trusts.[46] The Objectors have not cited a single case, and the Institutional Investors have found none, in which a court imposed a duty on a trust beneficiary, on which a "fiduciary exception" claim could be based, who had not filed a derivative claim on behalf of the trust. The reason is simple. Trust beneficiaries "may bring a suit on behalf of the trust" only when the trustee "improperly or unjustifiable failed to do so."[47] Where the trustee has taken action, the trustee remains subject to its contractual duties to act on behalf of *all* beneficiaries. Where the

[45] *See Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, No. 09 C 6904, 2010 WL 3324705, at *6 (N.D. Ill. Aug. 20, 2010) (excusing demand on trustee where plaintiff Certificateholder filed suit on behalf of trusts against both the mortgage seller and the trustee); *Velez v. Feinstein*, 87 A.D.2d 309, 315, 317 (1st Dep't 1982) (excusing demand on trustee where plaintiff trust beneficiaries filed suit on behalf of trusts because trustee was conflicted); *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 477-78 (S.D.N.Y. 2010) (excusing demand on trustee where plaintiff Certificateholders sued on behalf of trusts because the trustee was allegedly conflicted).

[46] It is undisputed that the Institutional Investors did not meet, prior to the Settlement, all of the conditions precedent needed to proceed derivatively to declare an Event of Default under §7.01 of the PSAs. First, and most obviously, the cure period for the default notice was tolled before it expired. Had the efforts to resolve the issues raised by the Notice of Non-Performance failed, the Institutional Investors would have been required to satisfy a number of additional conditions precedent under PSA §10.08 *before* they could sue on the Servicing Default. These steps include: a demand that the Trustee file suit, provision of a reasonable indemnity, and refusal by the Trustee to act within sixty days of demand. None of that occurred because—as this Court noted in its decision in *Walnut Place*—the Trustee acted independently to resolve the Trustee's claims. *Walnut Place*, slip op. at 15.

[47] *Velez v. Feinstein*, 87 A.D.2d 309, 314 (1st Dep't 1982).

Trustee has not acted and Certificateholders step in to file suit, they may come to resemble a Trustee and may—in very narrow circumstances—be impressed with limited duties to other beneficiaries, *e.g.* the common benefit rule, that would otherwise be discharged *by* the Trustee. Those circumstances are not present here with respect to the Institutional Investors.

D. Based on Their Own Argument, the Objectors Who Previously Asserted Derivative Claims are not Entitled to Assert the Attorney-Client Privilege

Unlike the Institutional Investors, several of the Objectors actually filed purported derivative claims on behalf of the Covered Trusts. Objector Walnut Place is one such objector.[48] Similarly, the self-styled "Public Pension Fund Committee" filed a class action and derivative complaint against BNY Mellon on behalf of *all* the Covered Trusts.[49] If the fiduciary exception applies to anyone in this case, it applies only and solely to these Objectors.

E. The Objectors Separately Fail to Establish Good Cause to Invade the Attorney-Client Privilege and are Not Entitled to Discovery of Attorney-Work Product

Establishing the existence of a claimed fiduciary relationship (which the Objectors have failed to do) is only one of the elements the Objectors must establish before they may invade the Institutional Investors' attorney-client privilege. Under *Hoopes v. Carota*, the fiduciary

[48] *See* Amended Complaint, Doc. #8, *Walnut Place LLC v Countrywide*, No. 650497/2011 (N.Y. Sup. Ct. April 12, 2011) at ¶ 11 ("Plaintiffs are suing derivatively to enforce the rights of the trusts *on behalf of themselves and all other Certificateholders*.")

[49] *See* Verified Class Action and Derivative Complaint, Doc. #8, *Retirement Board of the Policeman's Annuity and Benefit Fund of the City of Chicago et al v. The Bank of New York Mellon*, No. 11-cv-05459 (S.D.N.Y. Aug. 31, 2011) at ¶ 122 ("These claims are made derivatively *on behalf of the Trusts* for which BNY Mellon serves as Trustee.") The privileged communications of the Knights of Columbus Objectors may face the same fate. *See Amended Complaint, Knights of Columbus v. The Bank of New York Mellon*, No. 651442-2011 (N.Y. Sup. Ct. Aug. 16, 2011) at 53-54.

exception to the attorney-client privilege does not apply unless the Objectors also establish that "good cause" exists for disclosure.[50]

1. Contrary to the Objectors' Assertion, New York Courts Do Not Apply an Exclusive "Five-Part Test" for Good Cause but Instead Look to the *Garner* Indicia of Good Cause and Emphasize a Case-by-Case Analysis

To analyze whether good cause existed for disclosure, the court in *Hoopes* looked to a key Fifth Circuit case which first established the fiduciary exception to attorney-client privilege: *Garner v. Wolfinbarger*.[51] In *Garner*, the issue was whether plaintiff stockholders in a derivative action were entitled to otherwise privileged communications between the corporation and its counsel. There, the Fifth Circuit listed at least *nine*, *non-exclusive* indicia of good cause for disclosure, once a fiduciary relationship is shown:

> There are ***many indicia*** that may contribute to a decision of presence or absence of good cause, among them ***the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders***; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the ***risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons***.[52]

In *Hoopes*, the Appellate Division, Third Department, *applied* five of these factors in holding that good cause existed for disclosure, but it did not hold that the other *Garner* factors were

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[50] 142 A.D.2d 906, 910 (3d Dep't 1988); *accord Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 113-114 ("In New York, the application of the fiduciary exception is governed by *Hoopes v Carota* . . . .").

[51] *See Hoopes*, 142 A.D.2d at 910 (citing *Garner v. Wolfinbarger*, 430 F.2d 1093, 1104 (5th Cir. 1970)).

[52] *Garner*, 430 F.2d at 1104 (emphasis added).

irrelevant.[53] Similarly, in *Stenovich*, the court explained that *Hoopes* had *applied* five factors in its good cause analysis, but did not suggest the other *Garner* factors should be ignored. The Objectors latch onto *Stenovich* to attempt to convert the *Garner* good cause analysis into an exclusive, five-part test. In doing so, the Objectors ignore: (1) other New York cases showing that *Hoopes* did *not* narrow the *Garner* good cause analysis[54]; (2) language in *Hoopes* suggesting that the five applied *Garner* factors were actually *non*-exclusive[55]; and (3) language in *Hoopes* emphasizing the importance of a "case-by-case analysis" to determine the application of the fiduciary exception to the attorney-client privilege.[56]

As explained below, the Objectors cannot show good cause for disclosure even under the five-part test they propose. Their case for disclosure *completely* falls apart, however, if one also analyzes the *Garner* good cause factors they would like the Court to ignore.

2. The Objectors Do Not Establish Even the Garner Factors They Cite

a. "Relevant and Specific"

The Objectors do not seek information which is both "relevant and specific."[57] The Objectors admit they seek an undifferentiated mass of private communications between the

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[53] *Hoopes*, 142 A.D.2d at 910-911.

[54] *See, e.g.*, *Nunan v. Midwest, Inc.*, No. 00280-2004, 2006 WL 344550, at *7 (N.Y. Sup. Ct. 2006) (noting that the court in *Hoopes* "appl[ied] *Garner's* 'good cause' for disclosure criterion ***on facts***" and explaining that "even if *Garner* was applicable [in *Nunan*], plaintiff fail[ed] to establish 'good cause' for disclosure *under the Garner doctrine*.").

[55] After explaining that five of the *Garner* factors weighed in favor of disclosure, the court in *Hoopes* stated: "On the other hand, defendant made no showing . . . of any factors which would militate in favor of applying the privilege to the information sought. For example, defendant might have shown that he solicited advice from counsel solely in an individual capacity and at his own expense, as a defensive measure regarding potential litigation over his disputes with the trust beneficiaries." 142 A.D.2d at 910-911.

[56] *See Hoopes*, 142 A.D.2d at 910 (noting that to the extent *Garner* emphasized a "case-by-case analysis, weighing the individual circumstances presented to determine whether or not the privilege should apply, [it] appeared to be more consistent with the approach to attorney-client privilege issues adopted by the Court of Appeals").

[57] *Stenovich*, 195 Misc. at 114.

Institutional Investors and their counsel during a seven-month period. The Objectors' demand for "the legal advice . . . the Institutional Investors sought," Discovery Mtn. at 21, does not remotely satisfy the requirement that the Objectors' request be specific. It is readily apparent that the Objectors are "blindly fishing" for entirely irrelevant communications between the Institutional Investors and their counsel. *See Garner*, 430 F.2d at 1104. The *sole issue* in this case is whether the Trustee acted within its discretion in entering into the Settlement Agreement. The Trustee never saw or received the Institutional Investors' privileged communications. By definition, the Trustee did not (and could not) rely on them in deciding to enter into the Settlement Agreement.

b. Not the "Only Evidence"

The Objectors misapply the test when they argue that these communications "may be *the best, if not the only*, evidence of whether . . . the Institutional Investors in fact acted in the best interests of all Certificateholders or sought to obtain individual benefits." Discovery Mtn. at 21 (emphasis added). This *Garner* factor, mentioned in *Stenovich*, does not ask whether information is "the best" evidence; it asks only whether "the the information sought may be the *only evidence* of whether the fiduciary's actions were in furtherance of the beneficiary's interests."[58] Plainly, the Institutional Investors' privileged communications are not the *only* evidence on this issue. The Settlement Agreement itself provides *ample* evidence that the Institutional Investors never sought or obtained a priority over other Certificateholders. The Settlement Payment, for example, flows down the waterfall mandated by the PSAs, *see* Settlement Agrmt. at ¶3. The Institutional Investors will therefore receive only the amount any similarly situated Certificateholder would receive. The Trusts in which the Institutional

[58] *Stenovich*, Misc. 2d at 114 (emphasis added); *see also Garner*, 430 F.2d at 1104 (considering "the apparent necessity or desirability of the [beneficiaries] having the information and the availability of it from other sources").

Investors are Certificateholders will also receive their allocation of the Settlement Payment based on the *identical* formula that applies to *all* of the Covered Trusts. *Id.* at ¶3(c). The Objectors' *assertion* of self-dealing is not a substitute for the granular allegations of self-dealing *Garner* requires before one party may invade the attorney-client privilege of another.

c. No "Colorable Claims of Conflict and Self-Dealing"

The Objectors' claims of self-dealing and conflict of interest are not "colorable."[59] The Institutional Investors did not assume any indemnification obligations under §§8.02(iii) or 10.08 of the PSAs because they never "directed" the Trustee to act under either section. Instead, the Trustee exercised its own, independent, discretion to act. The Institutional Investors thus did not "shift," Discovery Mtn. at 22, their own indemnity obligations to Bank of America because they had none to shift. The Objectors' grousing about Bank of America's *separate* agreement to pay the Institutional Investors' attorneys' fees does not state a claim for self-dealing by the Institutional Investors. Here, the Institutional Investors' attorneys' fees will be paid *only* if the Settlement is approved. More important, those fees are *in addition* to, rather than out of, the Settlement payment that will flow to the Covered Trusts. This benefitted all Certificateholders, who will share in an $8.5 billion Settlement achieved at no cost to them or the Trusts.[60]

3. Additional *Garner* Factors Weigh Against Disclosure of the Institutional Investors' Privileged Communications

Three other indicia of good cause discussed in *Garner* establish there should be no disclosure of the Institutional Investors' privileged communications with their Counsel: (1) the risk of revelation of trade secrets or other information in whose confidentiality the Institutional

[59] *Stenovich*, Misc. 2d at 114; *Garner*, 430 F.2d at 1104.

[60] The same cannot be said for the Objectors, whose dilatory and self-interested tactics cost the Covered Trusts $1 million every day. Notably, none of the Objectors has offered to indemnify or otherwise reimburse the Covered Trusts for these massive losses occasioned by the Objectors' scorched earth delay tactics.

Investors have an interest for independent reasons[61]; (2) the number of Certificateholders seeking disclosure and the percentage of Certificates they represent[62]; and (3) the "bona fides" of the Certificateholders seeking disclosure.[63] Here, the Institutional Investors have obvious "independent reasons" to maintain the confidentiality of communications with their counsel concerning the Settlement.[64] Those communications contain *highly* sensitive information concerning, among other matters, their litigation strategy, the merits of the underlying claims against Bank of America, and their investment holdings.

The Institutional Investors' privileged communications also include highly sensitive litigation strategies concerning their efforts to obtain relief *not merely* against Bank of America, but against other banks that have sold ineligible mortgages into RMBS Trusts and failed to provide proper servicing to RMBS Trusts. It is a matter of public record that the Institutional Investors have retained Gibbs & Bruns to urge Trustees to take legal action[65] on claims involving over $95 billion of RMBS issued by affiliates of JPMorgan Chase,[66] $19 billion of RMBS issued by affiliates of Wells Fargo,[67] more than $25 billion of RMBS issued by affiliates of Morgan Stanley,[68] and more than $24 billion of RMBS issued by affiliates of Citigroup.[69] The claims

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[61] *Garner*, 430 F.2d at 1104 (considering "the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons").

[62] *Id.* (considering "the number of shareholders and the percentage of stock they represent").

[63] *Id.* (considering "the bona fides of the shareholders").

[64] *Id*.

[65] Under the applicable PSAs, the claims Gibbs & Bruns has been retained to pursue—like the claims here—must be pursued through the applicable Trustess for the RMBS Trusts.

[66] Hugh Son, "Dimon Vows Fight Moynihan Lost Over Claims from Mortgages," April 12, 2010, http://www.bloomberg.com/news/2012-04-12/dimon-vows-fight-moynihan-lost-over-claims-from-mortgages.html, Bloomberg News.

[67] Alison Frankel, "Gibbs & Bruns Hits MBS Trustees on $19 bn. in Wells Fargo Notes," Thompson Reuters, Jan. 5, 2012, http://newsandinsight.thomsonreuters.com/Legal/News/2012/01_-_January/Gibbs___Bruns_hits_ MBS_trustees_on_$19_bn_in_Wells_Fargo_notes/.

[68] Kerri Panchuk, "Gibbs and Bruns probes Morgan Stanley-issued RMBS," Housing Wire, Feb. 1, 2012, http://www.reuters.com/article/2011/11/08/morganstanley-debt-idUSN1E7A625P20111108.

involving these trusts are very similar to those that have been settled by the Trustee here: they involve virtually identical contract provisions, many of the same risks concerning the burden of proof to obtain repurchases, and—in many cases—issues of successor liability, sponsor liability and de facto merger. Disclosure of the Institutional Investors' privileged communications on such highly sensitive matters of litigation strategy would be deeply and irretrievably prejudicial to their ability to urge other Trustees to move forward to prosecute similar claims—and would be highly informative to the target banks, who would no doubt welcome access to such communications as they seek to develop a strategy to counter the Institutional Investors' efforts to compel these banks to live up to their contractual promises to RMBS Trusts and their Certificateholders. The Objectors' desire to conduct a fishing expedition for irrelevant evidence *pales in comparison* to the deep and obvious prejudice that would result if the Institutional Investors were compelled to disclose their privileged communications. The Court should therefore deny the Objectors' application.

Disclosure should be denied for another reason: the Objectors joining in the Discovery Motion represent a *tiny* fraction of Certificateholders across the Covered Trusts.[70] Given notice and the opportunity to object to the Settlement, the vast majority of Certificateholders chose *not* to do so. Footnote 1 of the Discovery Motion demonstrates that many Objectors chose *not* to join in the Discovery Motion. In contrast to this tiny, vocal minority of Certificateholders, the vast majority of Certificateholders do not seek disclosure of privileged communications between the Institutional Investors and their counsel.

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[69] Shanthi Bharatwaj, "3 New Risks for Citigroup," February 24, 2012, thestreet.com, http://www.thestreet.com/story/11432711/1/3-new-risks-for-citigroup.html ("Citigroup has become the target of law firm Gibbs & Bruns, which has been representing large institutional investors in their repurchase claims over souring mortgage backed securities…").

[70] *See Garner*, 430 F.2d at 1104 (court must consider "the number of shareholders and the percentage of stock they represent"). Some Objectors joining in the Discovery Motion have not even produced their holdings in the Covered Trusts, so they may not even have standing to object.

Furthermore, the "bona fides" of certain Objectors joining in the Discovery Motion are highly suspect.[71] There are serious concerns whether certain Objectors have acted in good faith and in the common benefit of all Certificateholders.[72] Equally telling is the fact that several Objectors joining in the Discovery Motion have actually *filed* derivative claims on behalf of one or more Covered Trusts, but have not offered to disclose their own communications with counsel concerning those actions to other Certificateholders. That fact alone raises serious questions about the propriety of their arguments concerning the fiduciary duty exception here.

F. The Fiduciary Exception Does Not Entitle the Objectors to Obtain Discovery of Attorney-Work Product or Advice Rendered After the Putative Fiduciary Learns that Litigation is Anticipated

The Objectors' discovery demand also wildly exceeds the very limited production contemplated by application of the fiduciary exception. The fiduciary exception—at best—applies *only* to attorney-client communications that concern the administration of the trusts *prior to* the time when it was anticipated litigation will be commenced.[73] Here, all of the privileged communications the Objectors seek occurred *after* the point when the Institutional Investors reasonably anticipated litigation might be commenced. Communications that occurred between "approximately November 2010 and June 29, 2011," Discovery Mtn. at 21, all occurred against the backdrop of the Institutional Investors' Notice of Non-Performance, a document that the Objectors concede started a sixty-day clock ticking toward the commencement of litigation. *See* Discovery Mtn. at 22 ("This notice began the running of a sixty-day cure period."). The forbearance agreements the Institutional Investors signed *tolled* the running of applicable statutes

[71] *Id.*

[72] *See* Ex. F to Warner Aff. Support Stmt. at 3, 37 (noting that certain Objectors are litigating their own, separate claims against BNY Mellon or Bank of America); *id.* at 56-57 (questioning the bona fides of AIG's objection).

[73] *Stenovich*, 195 Misc.2d at 115 ("the exception has not been applied to communications made after the fiduciary learns that litigation is anticipated or has been commenced.").

of limitation, an action that again evidences an intent to commence litigation if the settlement negotiations did not bear fruit. The Settlement Agreement and the Institutional Investor Agreement each contemplate the commencement of litigation under Article 77 to seek judicial confirmation of the Trustee's authority to consummate the Settlement. Under *Stenovich*, therefore, none of the communications made *after* the October 18, 2010 Notice of Non-Performance falls within the fiduciary exception because *all of them* occurred after the Institutional Investors learned they might need to commence litigation.[74]

The mental impressions, conclusions, opinions or legal theories of the Institutional Investors' counsel are, in any event, not discoverable for any purpose—including under the "fiduciary exception." *Id.* at 117 *citing* CPLR 3101(d)(2). Under this section of the CPLR, even if materials prepared in anticipation of litigation are held to be discoverable (based on a showing of "substantial need"),[75] "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." An attorney's work product is "absolutely immune" from discovery under CPLR 3101(d)(2).[76]

Many courts have held that the *Garner* fiduciary exception to the attorney-client privilege does not permit discovery of attorney work product.[77] It is evident that much of what the

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[74] 195 Misc.2d at 115.

[75] The Objectors do not contend they are entitled to seek discovery of attorney-work product under CPLR 3101. They have also made no effort to establish the existence of "substantial need," a showing that would—in any event—not result in discovery of the "mental impressions, conclusions, opinions or legal theories" of either Gibbs & Bruns LLP or the Institutional Investors' internal litigation counsel.

[76] *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 376, 581 N.E.2d 1055 (N.Y. 1991)

[77] *See, e.g., Koenig v. Int'l Systems and Controls Corp.*, 693 F.2d 1235, 1239 (5th Cir. 1982) ("*Garner's* rationale indicates that it was not intended to apply to work product."); *Strougo v. BEA Assocs.*, 199 F.R.D. 515, 524 (S.D.N.Y. 2001) (same); *In re Fuqua Industries, Inc. S'holders Litig.*, 2002 WL 991666, at *6 (Del. Ch. May 2, 2002) ("[T]here is no Garner exception to the work product privilege.").

Objectors *call* attorney-client communications is, in fact, attorney work-product. It is, as the Objectors implicitly acknowledge, an effort to discover counsel's mental impressions concerning "the terms and negotiations of the settlement." Discovery Mtn. at 21. Counsel's negotiating strategy, their legal theories, and their assessments of potential outcomes in the litigation the Institutional Investors anticipated filing—whether that was anticipated litigation against Bank of America and the Trustee or litigation to seek approval of an acceptable settlement—are all core work product. Regardless of the application of the fiduciary exception, these materials are "absolutely immune" from discovery under CPLR 3101(d)(2).

V. CONCLUSION

For all the foregoing reasons, the Institutional Investors respectfully request that the Objectors' Motion to Show Cause Why the Court Should Not Compel Discovery be denied.

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