In The Matter Of:

BONY v.

February 7, 2013

Anne Marie Scribano

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 39

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,

Index No.
6517886/2011

For an order, pursuant to C.P.L.R. 7701, seeking judicial instructions and approval of a proposed settlement.

February 7, 2013

60 Centre Street
New York, New York

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THE COURT: So, on the record.

We have a lot of motions, a lot of letters. I'll let you guys decide what it is that you'd like to start with.

MR. REILLY: Your Honor, we've got an agreement.

THE COURT: A lot of motions you made.

MR. REILLY: We have a lot of motions we made. I think they're going to be interesting.

THE COURT: Interesting? Good.

I mean, I did read them.

MR. REILLY: Well, good.

We'll deal with the scheduling order first.

There's the dispute on the expert scheduling and fundamentally the question is, we thought from the conference call we had with you, and the Steering Committee were on the call, we thought you had said, since they've already put their experts in, you go first, submit your experts, they go next, and do your replies. That's what we submitted. And that's apparently not what they thought was going on. So the fundamental question is whether or not that first deadline, which was February 28th, would be just the intervenors' experts, then the settlement proponents would come in and submit theirs, and then we would come in and submit ours.

The reason that we thought you had said that, and

it made sense, is because they already submitted their experts. They have a list of four or five people that, in the verified petition, from the beginning they indicated were the independent experts that they relied upon to come up with a settlement. And that's what we've been focusing on in discovery. We took their depositions, we got their fundamental opinions. These were paid witnesses, basically. And that's what we're ready to respond to.

THE COURT: That's what you're going to respond.

I thought the issue was when the other side, when the petitioners and intervenors, I mean the institutional investors, put in their response, are they limited to the scope of what he puts in or can they add something. I had said on the record it didn't make sense -- on the telephone call -- that it didn't make sense to me to have each side do a series because then I'd thought you'd be going in different directions and I didn't think that made sense for me. So I thought it should start with you, and then you should go next.

Now, I thought the question was -- were you sort of limited -- was your opposition limited to, in scope, to what he says or if there is an issue you felt wasn't dealt with, could you deal with that in your response.

MS. PATRICK: That's correct, your Honor.

And the real issue there is that, as you know, the

trustee retained a series of experts to give it advice in connection with its decision to approve the settlement, valuation experts, causation experts, all of that. Mr. Reilly is correct about that. But one of the issues in the litigation, as distinct from the trustee's decision, is whether that was an appropriate exercise of the trustee's discretion under the pooling and servicing agreements. So that's an example of what we're talking about.

The trustee -- and we are entitled to put on an affirmative expert to look at, in a holistic way, the process the trustee went through to evaluate the settlement and decide to enter into it, to appear here before you under Article 77, look at servicing, look at those issues and say yes or no, the trustee discharged adequately its obligations by reference to the standards of a reasonably prudent trustee.

And so that's an example of what we're talking about that Mr. Reilly -- it's as though Mr. Reilly is saying, because the trustee had business personnel evaluate the settlement who happened to be lawyers, that they can't retain a litigation expert to opine on the standard of care. And so that's the nature of the dispute.

They're going to put in their experts, attacking the settlement. And we are entitled to put on affirmative experts demonstrating that the exercise of discretion here

was appropriate. That's what the Article 77 is about.

THE COURT: So if she's going to do that, you want a little more time to respond?

MR. REILLY: Yeah. I mean, we've spent the last year focusing on the experts that they already used and now we're going to hear -- the game is going to change, apparently, because the original experts were supporting the settlement and all the actions of the trustee in reaching it. That's the opinion they gave. They weren't just business people. They were lawyers giving opinions on success of liability, they were people commenting on the magnitude of the settlement, whether it's a fair number or not. And if we're going to hear something brand new after we spent all this time and all this money, they're going to change the game completely, then -- they're giving us two weeks to see that, find somebody, inform them "the record is like this" and that's not fair.

MS. PATRICK: Your Honor --

MR. INGBER: Can I make a few points, your Honor?

MS. PATRICK: Can I -- the key thing, your Honor, is the original schedule order. It's a fiction to suggest that they didn't understand that the settlement proponents could have experts. The original scheduling order said experts. I don't understand what Mr. Reilly is contending, that he believes --

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THE COURT: Turn off your cell phones, please.

MS. PATRICK: -- that he believes the only people in this case who would have expert witnesses at the trial would be the settlement proponents.

And I think the easiest way to deal with this -- there's a solution, which is -- as the Court will remember, when we had the telephone hearing, Mr. Reilly's assertion that they couldn't anticipate what experts they needed is a little incredible. What we would propose is that, in the next 10 days, because we're in a position to do that, we designate the names of the witnesses and the topics so they have plenty of time and they can do the same.

THE COURT: What do you mean, designate new people?

MS. PATRICK: Yeah. Our people. We'll tell them who our people are and the topics we expect them to talk about. That gives them plenty of time.

THE COURT: Before he gives his papers in?

MS. PATRICK: Yeah. If he wants to know who our affirmative experts are, that's fine.

MR. INGBER: Well, we would do the same thing. The proposal, your Honor -- let me make two points.

Number one, there's no reason that Mr. Reilly or anyone on this side of the table should be surprised that we want to use litigation experts at the hearing in this

matter. There's no reason they should be surprised that we're saying that the experts who advised the trustee were not litigation experts. We made that point before these depositions took place. I believe we made the point in open court that all the Court needs to consider, all they need to consider is the report of these advisers themselves, just the reports. That's what the trustee relied on, the reports. They went ahead and took depositions anyway. During those depositions, when they were going through downward issues, we said "You could go through this process if you'd like. You could depose these individuals if you'd like. But we're not putting them forward as testifying witnesses on expert issues in the litigation." They were expert advisers who issued reports that the trustee relied on. That's point one.

Point two, the complaint about timing, the complaint about having to scramble to find experts and to issue rebuttal reports, that issue that they are explaining is the same issue that we'll have. They're going to propose experts, they're going to issue expert reports on February 28th. Now, I expect that there's going to be a non-issue. I expect that we're going to put in rebuttal reports, because they'll identify all the important topics. If they don't, then of course we want to have the right to put in our own affirmative experts. But if they -- if they

raise new topics, if they issue reports on topics that we didn't anticipate, well then we're going to have to go through that same process. We're going to identify experts, we're going to have two weeks, we're going to do it. We're going to turn it around --

THE COURT: Honestly, I think two weeks is a little ridiculous. I really do. I know that you're anxious to get this to a hearing. But there has been an outrageously enormous amount of discovery and experts and things here. I don't really see why I have to limit it to two weeks. If it's an extra couple weeks here -- it's been going on for almost two years. I know you didn't anticipate that at the beginning, but that's what happened here. And I think that, now that we're getting down to the final end run, we shouldn't fight over a week or so. I mean, you're right, so his papers -- you don't know what his papers are going to say. I don't know if you're going to be able to do it in two weeks. And he's saying "I'm not sure we're going to be able to." So there's an extra week or so. Really? I can't sit here and fight over a week because I've got to tell you, you have tons of discovery motions here. You're asking me to decide a million different things.

MR. INGBER: They did.

THE COURT: Well, yes.

MR. GONZALEZ: Because they didn't do produce

their stuff.

THE COURT: Guys, please.

I mean, I can't limit myself necessarily -- I don't know why we're talking about this first until we see what you've asked me to do and how much I'm going to be able to do.

MR. INGBER: That's why --

THE COURT: I can't -- I just don't see the point of fighting so much over a week or -- a week. I mean, you got to give in on a couple things here, guys.

MR. INGBER: Your Honor, I agree, we shouldn't be fighting over a week. This is why the proposal that Ms. Patrick suggested makes a lot of sense. The parties, in the next 10 days or two weeks, identify the names of the experts they intend to use and the topics.

THE COURT: So what's that going to do?

MR. INGBER: Because it's going to give Mr. Reilly more time to figure out whether he needs a rebuttal exert, define the expert and to issue the report.

THE COURT: I think he needs to see the report before he says "Oh, I wonder what this guy's going to say." I mean, I don't know if that really is going to help. I wanted him to focus his expert reports and his presentation to you and then we'll see. You're saying "Well, let us tell him first." You're kind of trying to do what I said I

didn't want you to do initially. I think, if you give him all these names, then they're going to sit there and scratch their heads and say "I wonder what this guy's going to testify about." So I don't know how that helps him.

MS. PATRICK: Your Honor, if I could.

The one issue that we're getting locked up on is reports. And the granting of reports here is something that's not required under New York practice.

So, simply, well, just to make the point, the idea -- the idea that Mr. Reilly, from a designation of topics and the name of the witness and a CV, cannot reasonably anticipate what the subject of the expert's testimony is understates his ability as an advocate. Let me put it that way.

And so I think you're right, your Honor. It is regrettable that the Court was clear that the settlement proponents were to go first and we were to designate ours in response and Mr. Reilly then took the sharp elbowed position that he was the only person entitled to liability experts. And that's really not consistent with what the Court said and that necessitated coming back to you. We thought your ruling was absolutely clear.

We are here because the plaintiffs refused to accept the Court's guidance and instead took the position that we were not entitled to any liability experts, only two

responsive experts, which was not the Court's ruling on the phone conference.

THE COURT: I don't really remember discussing that specific issue.

MR. REILLY: I don't either, your Honor.

We have a month, month, 30 days. If we get something new, we'd like 30 days. And if we need more, we'll ask you. But we'll focus on that. We'll try and get that done.

THE COURT: So your reports --

MR. REILLY: February 28th is right now. And you'll -- you'll have to tell them whether you're going to let them put reports in on the 28th or not. Right? If you do, then we'd like a month to respond to anything. If you don't and we go first and they only want two weeks, fine. If they put something new in, we'd like a month to respond. I don't care where it is but, fundamentally, that's it.

And I think you're right, it's just unrealistic, it's not fair to have squeezed us at the very end.

The Court has allowed discovery. We've gotten a good record. We still have holes in it. But to fill those holes with a race at the end doesn't make sense.

If you want to say February 28th we go; two weeks they go; and then we have a month if it's new, fine. If you want us both to go on the 28th, I don't care.

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THE COURT: I don't. I don't. I told you that's not what I want.

MR. REILLY: That's --

THE COURT: I wanted them to put in the first set of reports on the 28th. You think you can respond to everything in two weeks, great, then do it. You'll get the rebuttal, opposition, whatever you call it.

MR. REILLY: Right.

THE COURT: And, I mean, if you can get it done in two weeks, you can get it done in two weeks. If you need an extra week or two, I'm going to give it to you. I'm not going to, at this stage, fight over a week or two.

MR. INGBER: We agree.

MR. REILLY: Okay.

THE COURT: I'm not going to do that.

And I don't see any point of your giving him the names and CVs of the people because, even then, you don't really know what they're going to say. So how can you respond to the CV, "I don't like your CV"? That's not the --

MR. INGBER: We agree. A week or two, that's fine.

The fundamental point for us, we wanted our affirmative experts and we understand your Honor to be saying we can use experts.

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THE COURT: Yes. You'll respond however you want to respond. If you come up with a whole new series, then I don't think limiting him to two weeks is fair --

MR. INGBER: That's fine.

THE COURT: -- if he can't do it. So if he needs four weeks, I'll give him four weeks. Not just him. But I think that that's fair.

So I guess neither of your scheduling orders -- but that's the least. I've told you that. You know what it is, so you can adjust it --

MR. REILLY: We'll write it up.

THE COURT: -- accordingly.

Just out of curiosity, and I want to get to some of these substantive issues, how long do you think this hearing is going to take?

MR. REILLY: That's --

THE COURT: I was thinking it was like a day or two, but now I'm listening to you, it sounds like a month or two.

MR. REILLY: That's possible, your Honor.

If we can look at the scheduling order which we've now agreed on --

THE COURT: Which scheduling order you are you talking about?

MR. REILLY: It's the one that's in place. You

don't have to look at it.

But, fundamentally, we've agreed, at least at this point, I think it was the 17th of April would be when any objections would be filed. And at that point, anyone who's going to object would have to indicate whether they intend to present evidence or testimony in opposition to the settlement at the hearing. So we don't know how many people will, how many -- what type of evidence will be submitted. Obviously, we've got Steering Committee members, we've got the AGs, we've got other intervenors out here. So I think it's going to be difficult to say how much evidence and how much testimony. I'm not sure today is the day to have that -- because I don't have a clear picture of it.

This relates to the second issue, which, as the order currently stands, on that date, on that date, everyone who is objecting to the settlement would have to submit their papers and whether they're going to propose testimony and present evidence at a hearing. That's everyone who objects. It also includes, at this point, everyone who supports is supposed to file their papers in support and whether they're going to present testimony and evidence at that time. And that's how we all originally submitted it and that's how the Court signed it.

In light of your comments about the experts, we thought that maybe that wasn't an efficient way to do it.

Because remember early on when we were doing all those original show cause orders, everybody was filing original papers, everybody filed response papers, everybody filed reply papers. So I think it's a question that the Court ought to think about and not decide today.

We're proposing right now that, if people are going to object, that's what's filed on the 17th, so that we can look at what they've done. They've filed a verified petition, they've filed a consolidated support of the petition already, they've stated their position as to the -- as to what the settlement is and why it ought to be approved. And then you could see who objects, what the objections are. And then they can respond to that and then we can reply. If you don't change it, then you're going to get double briefing from everybody. This side will come in saying "We oppose it." This side will come in and saying "We support it." Then there'll be responses to the support, responses to the opposition. Then there will be replies again.

So we just thought you'd want to think about -- we think it would be cleaner do the objections, do the responses, do the replies. But I don't have a strong feeling on this, I'm just giving you a heads up that it could be a briefing nightmare if both the supporters and the objectors file on that date.

And I think after that date, what I would suggest is, that you get us in here and we can look at -- say, okay, who's saying they're going to submit some evidence, what is the evidence they're probably going to submit, and when would this thing get started.

And as we've said to the Court, both sides, the first day of the hearing between May 20th and May 30th, but how long it's going to take at this stage is not clear until we get a sense of how many people are submitting evidence and how much evidence there's going to be.

MS. PATRICK: Your Honor, this is a gambit for delay again. And the truth of the matter is, on the 17th --

THE COURT: The 17th of what, April?

MS. PATRICK: April.

MR. REILLY: April.

THE COURT: Just hold off for a second.

I don't even see how that makes sense because, if February 28th is the day that you're putting in your papers, and March 14th is the date that you're putting in your papers, and he's going to have two to four weeks, that is the middle of the April. And then when the heck are all these people going to look at it? They're going to have one day to decide? That date doesn't make sense either.

MR. REILLY: And we had depositions in the middle of that, too. Once the experts come in, we have to take the

depositions.

So I think you're right, but --

MS. PATRICK: Your Honor, if I could, without Mr. Reilly's interruption, the reason the Court decided on the April 17th is that people -- if I could -- people have known about this settlement for two years. We're going to talk today. And the delay here is not at this -- there's a whole year that we spent across the plaza.

THE COURT: Well, that's not --

MS. PATRICK: And I get it. I understand that.

But, at some level, we're talking about how long the people who want this settlement to be decided on have to wait for a hearing. And the issue is this. There are three institutions on this Steering Committee, three. They're going to file whatever they file on April 17th. The reason for that is the expert reports will be available. People don't need to read depositions to understand the import of the expert reports and then decide "Do I object to this settlement or not?" They will have 30 days after the last expert report is filed to file their objections on April 17th under the current schedule. So that's plenty of time for people to decide whether they want to object.

THE COURT: Actually, that's really not true, because if it's February 28th, March 14th and then somewhere between March 28th and the middle of April that he files his

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reply, they'll have no time to look at the papers. So I've got it. That April 17th date does not make sense with this schedule. I understand that everybody doesn't have to look at the depositions of the experts, but I think they certainly should be able to see what the experts say on both sides and what the reply is. Because your papers, with potentially new experts, because I've just said you could do affirmative responses, rebuttals, whatever you're calling it, isn't coming in until mid March. And they want to respond to it. So while they're responding -- I think the response should go in, and then someone should get out there, whoever it is, institutions, individuals, whoever, and make a decision whether they support it, they object to it or whatever the other alternatives are. I think they should be able to see the briefing. The briefing may not end until the second week of April. So April 17th does not make sense. I'm not saying that I necessarily think you have to do -- that everything can't come in at the same time, but I don't think April 17th is very realistic. Since you've spent all this time putting together the expert reports, let the people see what the experts say.

MS. PATRICK: Fair enough, your Honor.

I think the key thing is, if the last expert report comes in on March 28th, then 30 days after that, the week of the 25th is plenty of time for people to appear and

object. And that gives the parties more than a month to prepare to argue this case at the hearing in May.

Our biggest issue is this hearing needs to go forward in May. Every suggestion you're hearing is an effort to bust that date. And it's really, really important that we get this hearing on calendar and get moving.

Now, with regard to the Court's question about the scope of the hearing. I think it's a useful exercise, at this point, to focus on what is at issue and what is not.

This is an Article 77 proceeding concerning a settlement. It is neither appropriate nor required nor permissible for the objectors to turn this into a trial on the merits. The issue is did the trustee act within its reasonable discretion when it decided to settle these claims, considering all of the facts known to it and available to it. That's it. And so the suggestion -- and I suspect you will hear that today in some of the discovery motions -- that they want to go further into the underlying merits of the claims, that's not what happens in a settlement. That's why, as the Court as observed previously, people settle. They don't want to have to try the underlying merits of hotly disputed and uncertain claims.

So, with that in mind, we do not believe that the trial of this case should take more than 10 days. It really

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only takes a week. Because it's a question of putting on the evidence of what the trustee considered. If the Court wants to hear evidence of how it was negotiated, that's relatively quick. And then you can consider the evidence you've heard and decide it.

THE COURT: Okay. So you're going to have to move that -- I think you're going to have to move that April 17th data little bit.

MR. REILLY: I agree, your Honor. I think that's the day when the expert reports are going to be finally in, roughly. And if people are going to see them and people are going to decide whether or not --

THE COURT: I'm giving you potentially two weeks from the 28th of March --

MR. REILLY: Right.

THE COURT: -- which is April 11th.

You know, you'll have to look at it and pick some date -- I think people are entitled to a few weeks. I mean, you've done all this work. I don't think it's fair that people who are considering whether or not they want to object, support or something else shouldn't have a little time to look at all the stuff that you've spent a year and a half putting together.

That was the whole point, wasn't it?

MR. REILLY: Yes, it was.

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THE COURT: I think people should have a chance to look at that and then make their submissions.

MS. PATRICK: So, your Honor, that Monday, if the last expert report comes in --

MR. REILLY: May I speak? I'm sorry. I didn't want to be interrupting you and I don't want you interrupting me.

THE COURT: I got to tell you, there's a lot going on here. You're one of 400 cases. A big one, but you're one. I just can't -- I mean, I respect all of you. I know you're all working hard. So are we. Put that -- don't -- just cut the other -- stop interrupting. I'm listening. I'm going to listen to you. I've given the whole day to you. I'm going to listen. But I can't really listen to, you know, little quips. You don't like each other, that's your problem. I like everybody here today. So I'll listen to you all. You don't have to interrupt each other.

What do you want to say?

And then you can respond.

MS. PATRICK: The only thing I was going to say, your Honor, is that April 29th is a Monday. It's 30 days after the last expert report comes in. That's certainly a sufficient time for anyone who wants to object to consider the expert reports and file their objections.

THE COURT: But it's not a month afterwards.

Because I've said I would give him two weeks if he needs it. So that's potentially April 11th. So if that works out, fine. If they can do it in two-and-a-half weeks, fine.

MR. REILLY: If we can have near the end of that week, your Honor. I don't want to have to do it on a Monday. We've got filing from other states.

THE COURT: I just don't care --

MR. REILLY: The end of that week of the 29th would be fine.

MS. PATRICK: That's May 3rd.

THE COURT: What happens after that?

MS. PATRICK: Then the hearing, we just need a hearing date for your Honor.

THE COURT: Are you telling me people are going to file briefs and then there's going to be opposition and reply? Are you going to give me a chance to read these? I have jury trials every day.

MS. PATRICK: Yes, your Honor.

MR. REILLY: I think you need -- your Honor, we know you will try to read them, we would like you to.

Remember, this is the first filing date, then there is -- under the current schedule -- then there is a response date, and then there's a reply date. And we think that all should happen.

So the first question that I think you should try

and tell us what you want to do is, do you want to hear just on that date from anyone who objects or do you want to hear from everybody who objects and everyone who supports? And it's your call, but you're going to double the number of briefs if you do that. That's -- but I don't have a strong feeling on it, we just thought it made sense that we be careful not to do that.

MS. PATRICK: Your Honor, from our perspective, briefs in support of the settlement can be filed on May 3rd. Objections can be filed on May 3rd. One set of response, that you respond to our brief. We can reply. You can give them 10 days to respond. That's May 13th. You'll have the responses in by May 13th. And then that permits a reasonable reply period of May 20th, a week for replies, which is plenty of time, your Honor. I mean, as you know, as practicing lawyers, tasks expand to fill the time available. And the hearing could then commence, you know, later that week.

I think the real thing, your Honor, is what date do you have in May where you can calendar this hearing? And then between those dates and May 3rd we can move forward.

Part of this is that there's a concerted effort on the part of settlement opponents, the three of them, to push this hearing out as far as possible. And we're overtly, honestly, openly saying to you, no, please don't do that.

We really want to get this over with one way or another. And so that's the -- that's the plea.

You said the hearing is going to happen in late May. If it's going to happen in late May, the briefing schedule needs to be set between late May(sic) and May 3rd and that's easily enough done.

MR. REILLY: What's important is we get it right.

THE COURT: I understand.

But what's important here is we get to the end and get it right.

MR. REILLY: Sure.

THE COURT: So I think that's reasonable that you can put in papers -- you asked for the end of the week, so she says "Okay, I'll give you Friday." That's the end of the week. May 3rd. You have 10 days to respond. A week to reply. I don't even know what's coming in then. I don't know how much briefing you're going to do and how much you expect me to read. That weekend is Memorial Day. It's -- I think, if you want to start on the 30th, that's fine. You know, we'll try to not -- right now, I have nothing scheduled of any substance after -- you know, at the beginning of June and so I can hold, you know, those two weeks pretty much --

MS. PATRICK: Great.

THE COURT: Usually one day a week I've got to do

my other cases, the other 399. On Wednesdays I usually have conferences, motions. I've got to have a day. I can't do this five days a week. But those first couple weeks seem pretty okay. So you can start that Thursday, that's after Memorial Day, and have a hearing. So I think that that works out. I think it was always intended -- I mean, the expert -- I like doing it the way I've suggested.

MR. REILLY: Right.

THE COURT: But the objections and those things, those are different things, they can all be on one day.

MR. REILLY: Okay.

THE COURT: And I don't know -- I don't know what -- I'm not really sure what is the form of these -- since nobody ever had a case like this -- what's going to come in on May 3rd. Is this a one-line thing "I object"? Is it a 55,000 page brief? I don't know. If it is, that's going to be a problem because I'll never get to read it. So I suggest no one put that in. But I don't really know what the form of the objection is.

MR. REILLY: We don't, either. As I said this, is new here.

THE COURT: Live and learn.

I suggest you clear your calendars --

MR. REILLY: Yeah.

THE COURT: -- personally and in your office for

May so you're working on this, and then you can start on May 30th. I think that works. I really think that works. So when you go back to your office or all these people here, maybe they can run it out before the end of the day and have a schedule that comports with what I said. I think that gets us to May 30th.

It gives you time, it gives you the extra time you need to respond to witnesses that you weren't expecting.

If you want to give him the names and CVs in advance, fine.

But I don't think you should be sitting there --

MR. REILLY: I'm not asking for it.

THE COURT: -- trying to figure out what they're going to say, you know, until you see what they say.

Okay. That's fine.

So, now, what do you want to do?

MR. REILLY: Your Honor, we've got an order we think makes sense, it will be efficient. Mr. Rollin, my partner here, will address the RRMS issue and I believe the New York AG will comment on that. Then we will go to the common interest privilege, Mr. Loeser from the Steering Committee will -- if you want the list now or when we go through or just get up and do them --

THE COURT: Well, you made five motions.

MR. REILLY: Right.

Proceedings

THE COURT: It's the order -- that's not the order -- we did them in an order of what numbers they were.

MR. REILLY: Okay.

THE COURT: But I don't really care.

MR. REILLY: RRMS is -- anyone know the number?

THE COURT: We know the number.

MR. REILLY: 30, that's 30.

THE COURT: That's 30.

MR. REILLY: And also Mr. Carlinsky is here from Quinn Emanuel to address an issue that may come up. And if it doesn't come up, he won't stand up, but I just wanted to make sure that if some of that stuff came up --

THE COURT: A secret issue?

MR. CARROLL: Judge, Teige Carroll for the State of New York.

I want to stand up only once. I'd like to do it after the Steering Committee has argued in support of all of their briefs so you don't have to hear me again and again after every motion. We're going to talk about three of the motions. So just once after all this side has gone.

THE COURT: You think you're going to get up and argue five motions before they respond to any of it?

MR. REILLY: No, I don't. We're going to argue one, they'll get to argue, and then what I understand Mr. Carroll is saying, the first three are issues that the

AG has weighed in on, so that's one of the reasons we ordered it that way.

MR. CARROLL: So I think the best thing for me to do is for you to hear the argument on all of them and then for me to make a brief statement after that, after the first three.

MS. PATRICK: Your Honor, my only concern is, if Mr. Carroll addresses the common interest motion, which I -- which is addressed to our client's privilege with their trustee, we need to be able to respond to the Attorney General's argument, whatever it is. I'm happy for him to talk whenever he wants to.

THE COURT: You can't even agree on how you're going to make your arguments. That's amazing.

Okay, start. I'll see.

I mean, I understand you want to stand up once. That might not work. You may have to stand up a few times. You're tall, so --

MR. CARROLL: I'm doing my exercise.

THE COURT: That will be fine.

Your name is?

MR. ROLLIN: My name is Michael Rollin, your Honor. I'm handling motion sequence number 30, which is the RRMS Advisors.

Your Honor, the Bank of New York Mellon, as

trustee, as we've talked about some this morning, hired an expert, an outside expert, and delegated to that expert two critical tasks in connection with the settlement agreement. One was to determine a reasonable settlement amount and two was to evaluate the servicing improvements that are called for by the settlement agreement. That expert's name was Brian Lin, L-I-N, and the firm that he worked for is RRMS Advisers.

Today, what we're asking for is his working file. We've received part of it. A large part of it, with very important parts, and we describe why they're critical, have not been disclosed to us. And we're asking for information from his file and also some other expert reports that he's prepared in this case, in the RMBS case, that informs the industry knowledge that he relied on in performing these analyses.

The only issue before the Court is relevance. There's no assertion of privilege. There's no assertion of burden. As we understand it from the deposition, we're talking about a very small stack of documents that were turned over to Mayer Brown and are probably sitting in Mayer Brown's office right now.

As both sides' papers show, a very non-controversial issue is that relevance turns on specific facts of the case. And we're going to talk about how about

those facts in this case and a determination of relevance is well within the Court's discretion. This is everyday stuff for the Court, not complicated issues.

I'll hit three points. One, why is the information is relevant to the proposed findings. Two, why the information being withheld is so critical. And three, we'll show you that the trustee, in reviewing the Lin reports, turned a blind eye to fundamentally flawed expert analyses. And if the trustee didn't scrutinize Mr. Lin's people, somebody has to. We believe we have to. We believe the Court will want to in connection with the proposed order before it.

Before I go into those three topics, a couple of preliminary points. What I'd like to talk to the Court about, very briefly, is how the subpoenas were responded to, because there are some procedural issues here that are very important for the Court's understanding about how the trustee has made certain determinations about what to turn over and what not to turn over.

When I say "the trustee" -- I'll elaborate on this a little bit in a moment -- the trustee's counsel inserted itself as counsel for these third-party, outside experts and created a position where it could be the gatekeeper over what comes in or what's disclosed to us and what isn't disclosed to us.

Very briefly, you don't have to study the chart, but down the left-hand side are five of the expert consultants that the trustee relied on. And across the top are five different generalized topics of information that we asked for in the subpoenas. The red indicates topics for experts on which we received no response. The green is where we received all the responsive documents. And the yellow shows that we received some of the responsive documents.

And what you can see is arbitrary line drawing, if not arbitrary, then intentionally selective line drawing about how they were going to respond to the subpoenas.

One of the problems with the subpoena responses -- one of the problems with the subpoena responses is they don't comply with the CPLR. And it has an effect here. Under the CPLR, when a third party responds to a subpoena and they don't produce all of the documents that are asked for, they are required to provide certain information. The document type, the general subject matter, the date of the document and other information sufficient to identify the document. And there's a reason for that. It makes it easier for us to ask in deposition, find out whether those documents are relevant, identify the universe of documents, and it also make it easier when we have to come to the court and resolve these kinds of disputes.

But with respect to none of these did we receive such information. And particularly with respect to the Lin documents, it left us in a position at deposition where we had to try to fish around and figure out what they were weren't turning over. The documents that we requested, we don't even know if those are all of the documents that are being withheld because we didn't get this information. That's procedural problem number one.

Procedural problem number two that I alluded to before is that Mayer Brown, as counsel to the trustee, has made itself counsel to each of the third-party experts as well. And so we have a situation where the third-party expert RRMS, Capstone, whoever it is, has a stack of documents that are responsive to the subpoena and they give them to Mayer Brown, their lawyers, and Mayer Brown sifts through the documents and decides which ones they're going to turn over and which ones they're not going to turn over. The problem there, is Mayer Brown making that decision as the adviser, the expert's counsel, or are they doing it as the trustee's counsel? The adviser has no motivation not to turn over his or her file. They turn it over to their counsel. The trustee may have a motivation not to turn over certain documents based on their articulation of the standard of review and their articulation of relevancy. And by embedding themselves in the process, the trustee's

counsel has been in a position to hold back documents. And that's probably procedural problem number 2.

Now, when you talk about the kinds of arbitrary selective line drawing, I'd like to give you a couple of examples, real world examples.

This is trustee counsel and RRMS counsel in a dual role, objection and response, to the subpoena to RRMS. And if you look at paragraph 4 at the bottom, what they say is that documents that were not reviewed by Ms. Loretta Lundberg are not relevant. They're only turning over what Ms. Lundberg saw. One individual at the Bank of New York Mellon, just one. Not even the whole Bank of New York Mellon and not the Bank of New York Mellon's counsel. That's an arbitrary line. That doesn't comport with relevance -- with the CPLR.

Number two, another example are billing records. As your Honor knows, billing records can be very informative. They can be informative about the task the expert undertook, how much time was spent on it, what communications there were between the expert and the trustee's counsel. And we'll see that's very important.

We'll talk about a case called Chiron case or Chiron, C-H-I-R-O-N, I don't know how to pronounce it. And what that case stands for is the proposition that when a decision maker hires an outside consultant, in that case an

attorney, but the same principal applies, then the information in the mind of the consultant is information in the mind of the attorney -- I'm sorry -- the decision maker, because it recognizes the very practical reality that the decision maker and their advisers communicate and pass each other -- pass the information on to one another.

Billing records are very helpful. Now, with respect to billing records, for Mr. Daines, Professor Daines, we got the billing records. They turned those over. For ETI, we got them, but only after filing the motion. But for Mr. Lin, who's got over a million dollars' worth of billing records, for Mr. Lin, none of those have been turned over.

And, again, that was very informative under the Chiron analysis and very helpful in deposition to help elicit the testimony that informs Mr. Lin's report.

Now, they will say "Mr. Rollin, you asked all these questions of Mr. Lin and you didn't ask the question, you didn't follow through enough." Had we had the information that we requested before the deposition, we could have had an orderly examination about those conversations. And if we would have had the CPLR 3122 information about the documents being withheld, we could have had an orderly efficient examination on those documents.

Finally, your Honor, the last example of this arbitrary line drawing has to do with the notes. These advisers obviously take notes when they're doing their work. The issue is, the trustee says "Well, if the trustee itself didn't see the notes, then they're not relevant and not discoverable." But -- and for Mr. Lin we didn't get any notes. For Professor Daines there was one set of notes that we did get. We don't know for sure whether or not it went to the trustee. But for Mr. Lin, we know that we didn't get it.

But here's an example. This is why this is a problem, your Honor. Capstone, as you can see, is one of the advisers. And Capstone was hired to do a valuation of Countrywide. And Capstone, on May 5, 2011, participated in a telephone conference. Professor Daines was on that call, Bank of America and its counsel was on that call, and Mayer Brown representing the trustee was on that call. And Capstone took very detailed notes of that call. And Capstone's representative testified that they were critical, these notes were critical to the work that it did in this case and testified that it turned those documents over to counsel and it was counsel who determined them as not relevant, even though they were critical to the report that Capstone wrote and filed in this case. How did we find them? They weren't turned over to us. They happened to be

posted to the court website in the MBIA case, because they came in as evidence in the summary judgment motion without any -- without ever giving us a CPLR 3122 log that said "We have these documents, we're not turning them over" without ever identifying them. We had to find them ourselves on our own. And that's why this decision making of the trustee's counsel inserting itself as the gatekeeper, the expert's counsel, should be subject to the Court's scrutiny.

Why are they relevant? Back to the substantive argument. The documents that are relevant are necessary, first, to determine the trustee's good faith. It's in the proposed final order and judgment and even under their articulation of the standard, the trustee's good faith is in issue.

Now, the notes, the calculations, the documents considered, all of the documents considered, and other information that informs Mr. Lin's qualifications and the industry knowledge that he testified that he relied on in coming up with these two very important parts bear on the trustworthiness of the documents, bear on the trustworthiness of the opinions. And whether or not those opinions are trustworthy is relevant to whether or not the trustee acted in good faith. That's something your Honor is going to have to decide under the proposed final and order and judgment that they submitted and even under the more

limited standard that they agree is at issue.

Now, the courts, in dealing with this issue, have allowed discovery into what the experts did and refer to the Chiron case a couple of times. Here's what that case said. In that case, it was a lawyer and a client. In this case, it's an expert and the trustee. Either way. It says it's irrational to --

THE COURT: Did you give me the cite of that case?

MR. ROLLIN: I will, your Honor. It's Chiron Corp. versus Genentech, Inc. 179 F Supp. 2d 1182. And I'm looking at page 1189.

It says "It would be irrational to assume that there could be no relationship between what counsel really thought, that is the expert in this case, as reflected in her private papers and what she, in fact, communicated to her client, the trustee in this case. In this important sense, evidence about what really was in the lawyer's mind could be quite relevant to the issue of what's really in the client's mind." Here, the good faith of the trustee.

Now, in order to avoid this argument, in the opposition filed by RRMS and the trustee's counsel, as RRMS's counsel, they have a line at page 10 that reads -- I'll read it to the Court -- it says, in response to the Chiron argument, "Here, however, the only communications from Mr. Lin to the trustee are the written opinions,"

meaning those two reports.

Look how artfully drafted that is. From Mr. Lin, not his partner Mr. Gutterman or anybody else at RRMS, who also had contact with the trustee's counsel, and to the trustee. In other words, not the trustee's counsel, not Mayer Brown, even though Mayer Brown was managing this relationship with the experts, with all the experts.

There certainly are communications with respect to different experts that happened directly with the trustee. We didn't have occasion to talk about that. But with respect to this engagement, Mayer Brown, for the trustee, was working with Brian Lin and RRMS.

What they're saying is, if -- the only information communicated by Mr. Lin to the trustee were these reports. That's patently not true, because information was communicated to the trustee's counsel, acting as the trustee's counsel and agent with this particular purpose.

As the Chiron court holds, information in the adviser's mind is relevant to the information that's in the trustee's mind. And that's clearly an issue.

The second finding that your Honor is being asked to make, your Honor is being asked to compare H and I of the proposed final order and judgment to determine if the settlement is the result of an investigation and an appropriate evaluation of the claims and defenses.

Your Honor, the trustee delegated to RRMS the function of determining these two critical issues, the reasonable settlement amount and the servicing agreement. And the trustee did not evaluate it itself.

There is a small bit of testimony. Mr. Reilly asks Ms. Lundberg "Do you know what, if anything, was done by the trustee to evaluate losses to the certificate holders arising out of Countrywide's violation of reps and warranties?"

There was an objection.

She says "Outside of consulting with RRMS, I'm not aware of anything else."

There's other testimony that confirms this.

The trustee delegated lock, stock and barrel the entire process in evaluating the settlement amount, in evaluating the servicing improvements to a third party. That's the trustee's evaluation. And there's no question that the trustees evaluation is at issue in this case and is relevant to the Court's final determination of good faith and the other issues identified in the proposed final order and judgment.

You can't del -- you can't take a trustee task, delegate it to a third party, say only what the trustee did is relevant but whatever this third party did you can't have all of that information. That is the trustee's

investigation. It's simply delegated to somebody else.

The last finding, your Honor, that we talk about is that you're being asked to approve the settlement in all respects. The Court needs to know whether an $8.5 billion settlement and the servicing improvements should be approved. And the only analysis of that reasonable settlement -- of that settlement amount, as we just pointed out, was done by RRMS. Now -- and the trustee accepted the settlement in reliance on that report.

At the end of the day, at the hearing we talk about, there's going to be competing evidence about what a reasonable settlement amount is and should be. One of those, the trustee, is going to be -- I'd be surprised if it's not -- is going to be the RRMS report. But there is hidden information. In other words, that report is built on information that's not fully disclosed. Much of it is, but not all of it.

And I'm going to show you right now some of the key -- some of the key calculations have not been disclosed.

What's going to happen is we're going to come to court, we may a file an objection. We going to say "Your Honor, this settlement amount and this report by Mr. Lin is unreasonable and the trustee could not, in good faith, have relied on it." When we say that, I suspect that the other side's going to say -- they're going to disagree and they're

going to say "Prove it." And if we don't have the evidence that we're asking for, I'm going to say "Judge, do you remember we were here on February 7th and we asked to see everything that Mr. Lin relied on? We wanted that so we could establish this argument." It would be highly inefficient and contrary to the discovery rules for us to have to get up and make an argument and then be presented with an argument in response "Prove it, you don't have the information" and that's exactly the information we asked your Honor for.

We talked about -- just to show you very briefly what the hidden information is or at least how it works, because you don't have it.

The RRMS methodology for coming up with the damages amount is about this funnel. They take the original balance of the loans, put all of the loans and all of the covered trusts and they run it through this funnel and have a series of haircuts along the way, and what it spits out is what they call the reasonable settlement amount.

The first two things they do, they first try to figure out how many loans have gone into default or how many loans are likely to go into default. Then they try to figure out severity, how much how much money is ultimately going to be lost by the trust, and it comes up with the losses.

And you can see Mr. Lin's numbers are on the right. The numbers on the left are the numbers that were provided by the institutional investors. The institutional investors, based on publicly available information, not disputed by Mr. Lin, come up with losses of about $108 billion in the trust. Mr. Lin's losses, he starts out with $76.8 billion. And it's very important, because losses are the jumping off point for the rest of the analysis. There's a $31 billion swing in there. And that swing is a consequence of some decisions that Mr. Lin made, in calculations that he made, some industry expertise that he says that he relies on. But they're nowhere found in the information produced to us and he was unable to testify about them at his deposition. Those are big numbers, those are very important decisions that were not provided to us.

We can go through this analysis. I don't want to bore the Court. I wanted to dip our toe into the merits a little bit, because your Honor had to see what's hidden and what decisions are being made very briefly.

The other assumptions that are made here have a significant impact on what the ultimate reasonable settlement amount should be.

The information provided by the institutional investors, based on re-underwriting of similar loans, come up at 32.3 billion. In Mr. Lin's analysis, in which he

relies on Bank of America data, he relies on breach and success rates that come from the opponents, that have the opponents' legal theories embedded in them, resulting in a much lower number. This is information that's apparent to the trustee on the face of the report.

So, to the extent that there's any obligation -- and we don't believe there is -- but to the extent that there's any obligation to demonstrate that the trustee should have known that the report was untrustworthy, and without taking the Court through all of the detail that your Honor doesn't want to hear, but if you have questions on I'll answer them for you, it is clear from the face of the report that the trustee knew or certainly should have known that Mr. Lin's analysis was deeply flawed. And we have to and the Court ought to want to look into and find all of the calculations that he made so that we can make a reasonable presentation about whether they're reasonable or not so your Honor will have all of the information that the Court needs in order to rule on the proposed final order and even under their articulation of the standard to rule on the good faith of the trustee in reliance on the report.

I believe the trustee -- I'll conclude here and depending upon the arguments they make I may have to respond -- I believe what the trustee is going to say is that "Listen, there's a provision in the pooling and

servicing agreements that says we can blindly rely on reports from our experts." We don't believe that that applies. We don't believe that that's true. And it's certainly the cart before the horse because there's a question about whether that provision of the PSA springs into action at all in this case.

But they don't get to define relevance. Relevance is defined by the CPLR. Relevance is defined by this Court based on the issues presented to it. And the issues presented to it are issued in the proposed final order and judgment.

With that, your Honor, it's a straight relevancy question again. No privilege. No burden. Small stack of documents, probably at Mayer Brown's office. We ask your Honor to require production.

THE COURT: Thank you.

Who's going to respond to that?

MR. GONZALEZ: I am.

MR. CARROLL: I want to, I guess, follow the direction --

THE COURT: You want to weigh in on this?

MR. CARROLL: Right.

THE COURT: You're not going to repeat what counsel said.

MR. CARROLL: Certainly not.

In fact, I'm so tired from getting up, I probably will only speak for seconds.

Seriously speaking, I'm here for both AGs, and you know we put in the brief, we endorse three of the motions.

And what we think it's important for the judge to consider, for the Court to consider, in addition to the legal arguments, which I mercifully will not repeat, are the larger considerations the Court is going to make findings that the other side, the proponents, have asked the Court to make, which involve the details of the settlement. It's indisputable the settlement was negotiated by a subset of the investors and it will bind all the investors and will extinguish all the rights. The sensible approach, consistent with the law, is to consider all the information that bears on this.

The settlement number is the heart of the settlement. RRMS was instructed by the trustee, was directed by the trustee. It opined on the settlement number. The Court should have all of that information. The relevance rule says so.

That's really all I have to say on the subject, but unless the Court has any questions --

THE COURT: Why don't we hear from the other side and then if anyone wants to respond.

Thank you.

Proceedings

MR. GONZALEZ: Good morning, your Honor. Hector Gonzalez.

Your Honor, if I can take advantage of the sanctuary of the podium?

THE COURT: Sure.

MR. GONZALEZ: Good morning again, your Honor.

Your Honor, I don't disagree with the point that this is a straightforward motion.

Because RRMS is a nonparty here, the Steering Committee needs to demonstrate two things, both the relevance of the materials they seek, but also that the information can't be obtained through other means.

As we put in our papers, we think the motion fails on both counts, but I want to focus on the relevant point for now.

In an effort to confuse that issue, in its reply brief, there is a quote in one of the footnotes that I can characterize in many ways, but it's probably better just for me to read it for the Court. And this is on page 5, footnote 9. There, the Committee states that "Indeed, the verified petition makes it abundantly clear that the BNY determination that the settlement payment is reasonable is based solely" -- and that was their emphasis -- "solely on its review of the RRMS reports regarding the settlement amount."

They then cite paragraphs 63 and 67 of the petition as support for that assertion. I think, now, it's important to actually look at what paragraph 63 says and not how it's characterized.

Paragraph 63, your Honor, and I'll blow up the section that I'm reading, first it comes under a heading called "The Settlement Payment Is Reasonable." And it reads "In the trustee's judgment" -- in the beginning of the second sentence -- "In the trustee's judgment, the trustee could have accepted this settlement payment as reasonable based principally on the fact that Countrywide alone would be unable to pay a future judgment in an amount exceeding or even approaching the settlement payment."

The paragraph ends by saying -- after additional Additional discussion on that point -- ends by saying "In the trustee's judgment, the analysis could end there."

The petition then goes on, in the remaining paragraphs that were quoted in the brief, to explain that the trustee, nevertheless, took the additional step of hiring RRMS to review the competing calculation methodologies of both Bank of America and the institutional investors. It was not an evaluation of the reasonableness of the settlement.

So, regardless of why the Steering Committee makes the statement, the preposterous statement, really, that the

RRMS opinions were the sole basis for the trustee's decision, it wouldn't help them one whit here, your Honor. Whether that statement is true or not has nothing to do with determining the relevance of the material that they seek in this motion.

They would have the Court believe that they've been hamstrung in their ability to test the trustee's reliance on RRMS, which is really the issue here, and, by extension, the trustee's settlement approval process. Truth be told, the Steering Committee knows at least everything that the trustee knew at the time of the settlement.

And how do we know that?

And I just want to focus on the discovery that's been made by the trustee, not by Bank of America and not by the institutional investors. They've taken 20 days' worth of deposition testimony from 17 trustee-related witnesses, including two full days from Mr. Lin, the author of the RRMS opinions. They've taken an additional 18 days of testimony from every trustee-related witness, no matter how remotely connected to the settlement. That includes two days from Mr. Kravitt, who is the senior partner at Mayer Brown, who led the team representing the bank; two days from Ms. Lundberg, who was the principal Bank of New York Mellon employee or business person on the matter; they took one day of testimony from Mr. Bailey, the principal in-house

attorney at the trustee assisting Ms. Lundberg; and then 13 additional days of testimony from every member of the Trust Committee involved with the settlement approval process; other Bank of New York employees who assisted in that process; and all outside advisers involved in any aspect of the settlement.

In addition, the trustee has turned over more than 285,000 pages of documents, including 1,100 pages related to RRMS.

So, far from being thwarted, the Committee has been provided with expansive discovery in this case, your Honor. At some point, I submit that, even under our current litigation standards, enough simply has to be enough. And we are well past that point.

Let me turn back to the question of relevance, the scope of which turns on the only issue that should be before the Court at the hearing, and that is whether the trustee's decision to enter into the settlement agreement was within the bounds of its reasonable exercise of discretion and made in good faith.

As part of that determination, the Court will look at whether it was reasonable for the trustee to rely on RRMS. The answer to that question does not and cannot depend on the documents that the trustee didn't see at the time it entered into the settlement. But that is precisely

the sort of information that the motion is seeking to compel.

We'll turn to page 7 of the Committee's opening brief. On that page, they make the point, which is really the key point in support of their motion, that their requested documents are necessary in order for the Committee to demonstrate that the trustee did not make a, quote, "sufficient effort to obtain accurate information," close quote. But the Committee doesn't need anything else to make that point at the hearing, your Honor.

In order to demonstrate that it was unreasonable for the trustee to rely on the opinions, something that Mr. Rollin has said was obvious from the opinions, they don't need to see materials that the trustee did not see. And that's the point of our opposition here, your Honor.

The question for the Court is whether the RRMS opinions are facially unreliable. They claim they are. That should end the discussion, your Honor.

Stated another way, what the Court is being asked to do is to decide whether: One, based on the four corners of the report, which is something the Committee has had for nearly 18 months now; and, two, whether based on what the trustee knew about RRMS, information that's already been provided through the testimony of trustee witnesses; and, three, whether based on the steps the trustee took to review

and analyze the report, again, information provided and obtained by the Committee through the documents and testimony of witnesses, was it reasonable for the trustee to rely on the RRMS opinion?

Now, to grant the motion in support of that, they ask the Court to accept an argument that they need these materials in order to answer four questions. And these are four questions that they made at pages 5 and 6 of their reply brief. As I read those four questions verbatim your Honor, I ask the Court to focus on who is the subject of each of those questions.

Question 1: Whether the trustee was negligent in ascertaining pertinent facts.

Question 2: Whether the settlement agreement was the result of factual and legal investigation by the trustee.

Question 3: Whether the trustee appropriately evaluated the terms, benefits and consequences of the settlement and the strengths and weaknesses of the claim being settled.

And Question 4: Whether the trustee acted in good faith when it relied upon the RRMS reports.

Again, your Honor, the subject of each of those questions is the trustee, what it knew and didn't know; what it did and didn't do.

The discovery provided to the Committee, both in documents and testimony, answers each and every one of those questions. There can be no serious doubt that the Committee already knows what the trustee knew at the time it entered into the settlement. And it necessarily follows, your Honor, like night follows day, that the Committee also knows what the trustee didn't know.

Loaded with that information, the Committee is free to argue, as they began to do during Mr. Rollin's argument just a few minutes ago, about any supposed deficiencies in the process. Nothing in the RRMS file can properly -- can alter, in any way, its ability to do what it was just doing.

In effect, what the motion assumes is that the trustee was required to double check RRMS's work in order to reasonably rely on the opinions. But that can't be correct, your Honor. If that's true, the trustee, which admittedly -- and there's testimony to this and there's no issue of it -- did not have the independent expertise to assess this aspect of the settlement, so it had to go to outside advisers for assistance in this process. If the trustee needed to do more than rely on the opinions of those experts, it would have had to hire, in effect, another expert to test the bona fides of the RRMS work. Where would it end, your Honor? Does the trustee then need to hire a

third expert to follow up on the work of the second expert? It sets up this carnival hall of mirrors effect of constant reflections back and forth and the trustee would never be able to rely on outside advisers.

There's also another point in the brief, that it's essential that these documents be turned over in order to test Mr. Lin's credibility. But I submit to the Court that that's really a straw man argument, since nothing in the materials they seek goes to the question of whether the opinions, on their face, are unreliable. By framing the issue in that way, the Committee necessarily contends that the trustee would have had to go beyond the written opinions to engage in the same credibility testing that the Committee says is relevant here.

That's ironic, your Honor.

We've heard a little testimony, a little back and forth this morning about trial experts. And the Court should know that, with respect to testifying experts who will be providing testimony directly to the Court, as opposed to Mr. Lin, who's not being offered as a trial testifying expert, the Committee has stipulated that all drafts and communications between counsel and the experts are off limits in discovery. Somehow, the Committee can manage to test the credibility of testifying experts simply by reviewing the expert's report, but can't manage to do the

same with Mr. Lin.

It strikes as a -- it raises the question, your Honor, of what's really going on.

I submit that what's driving this motion is the Committee's inability to come up with any evidence to question the reasonableness of the trustee's reliance on the RRMS opinion, even after all this discovery. That's why it needs to stand here and try to bend the limits of what is and isn't relevant in this case.

But, your Honor, even if this last-ditch effort to expand discovery were to succeed, the Committee still won't be able to avail itself of the proverbial needle in a haystack that they're looking for. Because it always goes back to this question, your Honor, which that proverbial needle can't answer. What did the trustee know? And we know it didn't know what was in the RRMS files, because there's been plenty of testimony about that. Or what should it have known -- you can make that argument, as they've made it here to the Court today -- from its review of the opinions themselves, your Honor? That is the question. The fact that the trustee does not know, didn't know what was in those files at the time it made its decision, that's an argument point. They can raise that to the Court as a deficiency in our process and we will respond to it. But it is not an argument to expand what's relevant in this case by

trying to demonstrate that somehow what's in the RRMS files will go to the fairness of the settlement, which is not, we submit, an issue that is before the Court.

So, your Honor -- and just -- the one case that they referred to, the Chiron case, I just think it's important, before I sit down -- first of all, that was an assertion of advice of counsel on a patent infringement case where the willfulness or the intent of the patent infringer was at issue. There, unlike here, your Honor, the Court assumed that everything in counsel's file formed the basis of what was on counsel's mind and, therefore, what counsel communicated orally to its client, therefore, relevant in what was in the client's mind. That's not the case here, your Honor. There has been no testimony -- in fact, the testimony is clear that the only contact between Mr. Lin and the trustee was the opinions. And that is the only issue for your Honor to consider.

Thank you, your Honor.

MR. ROLLIN: May I respond, your Honor?

THE COURT: Yeah.

MR. ROLLIN: Briefly.

THE COURT: Do you have a specific list of exactly what documents you're seeking? You're saying "We don't know what they didn't give us, so we just" -- I mean, how specific is what you want?

Proceedings

MR. ROLLIN: I will say, had they provided the information provided by the CPLR, I could give you a very specific list. It listed each document and provided the information in CPLR 3122.

THE COURT: I understand you didn't get that.

MR. ROLLIN: Yes.

THE COURT: But where did you put in your brief a specific list?

MR. ROLLIN: I did, your Honor. I think the list is -- there are notes and calculations performed by Mr. Lin. There are some billing records. There are some industry reports that Mr. Lin talked about, that he relied on.

THE COURT: Did he make reference to what industry reports he relied on?

MR. ROLLIN: He mentioned two.

THE COURT: Can't you just get those? Aren't they on a website or something?

MR. ROLLIN: I can't find them.

And that brings up -- there were two days of depositions. After the first, day I searched their production, I searched for them, I couldn't find them. They're at Mayer Brown's office. There's no reason to make us run around and look for them.

MR. GONZALEZ: Your Honor, we'll give them the reports. The testimony was so clear on what it was, down to

the date of when the reports were issued by two known financial institutions. But if they're telling me they can't find them, we will turn them over, your Honor.

THE COURT: Thank you.

MR. ROLLIN: It goes to -- thank you, I appreciate that.

It goes to the larger point. If it's information that Mr. Lin relied on, they've got it, there's no reason to not to give it to us. Again, notes and calculations, the industry reports, bills and records, some other --

THE COURT: When you're saying "records," what kind of records?

MR. ROLLIN: Bills.

THE COURT: I understand what a bill is, but what's the records?

MR. ROLLIN: His invoices that demonstrate the work he performed and who he talked on the phone to, calls he had.

That brings up a great point that follows on Mr. Gonzalez's comments. And that is that they talk about the fact that there were only these written communications. And this is a point I made before. But what the Chiron case expressly recognizes is that you can't limit it that way; that there are all forms of communications between experts. And that gives a lawyer and the decision maker -- in that

case a client, but the analogy holds. We know that there were communications. They talked about the draft reports. They talked about the structure of the draft reports. And that could be what goes in, what stays out. And so the fact that it's communicated to Mayer Brown, trustee's counsel, rather than somebody at the trustee's office itself, that's a distinction without a difference. If it's information that they shared, even they would admit that that's relevant. And those records, those billing records are relevant to all of the different ways in which they would have shared information, including by phone calls.

Your Honor, if the information that we're asking for was given in any of that testimony, in any of those depositions, we wouldn't be here and they would have identified that for the Court. And if that information, Mr. Lin's own calculations about how to push down the rates to get to the losses that he got to, if that was available from some other source, other than inside Mr. Lin's head, which he couldn't testify about, and what's in those documents, you would have heard about it.

It doesn't -- it is relevant. It's not available from another source and it's at their office. And the exact same effort that it will take for Mr. Gonzalez to send those reports is the exact effort it will take to send me the rest of the stuff, a small stack of documents.

Proceedings

Your Honor --

THE COURT: Yes?

MR. ROLLIN: Your Honor, relevancy is not "enough is enough now". That's not the test. The test is whether the relevant information that's necessary to determine whether what RRMS did was reasonable and whether what the trustee did was reasonable and to fill those holes, small, narrow holes, but they need to be filled, that's what the scope of discovery is.

MR. GONZALEZ: Your Honor, I just want to focus on one thing.

THE COURT: Sure.

MR. GONZALEZ: He said whether what RRMS is did reasonable. That has nothing to do with whether what the trustee did is reasonable. The question is whether, on the four corners of the opinion, the trustee was -- it was reasonable for the trustee to rely on that. They've already tried to shoot holes and say that the holes are obvious and blatant. So that's their case, your Honor, that's what they will say and that's what they will present to the Court. To say that they need to know whether RRMS was reasonable, that's not the standard, your Honor. The standard is the trustee's conduct.

And that's it, your Honor, thank you.

THE COURT: Well, I mean, you're asking me, at the

end of the day, at the end of the hearing in May through June, to make a lot of findings. And they're going to say, well, how would I know that it was reasonable for the trustee to rely on RRMS if we don't know what RRMS relied upon to come up with their figures.

I mean -- what's your last name?

MR. ROLLIN: Rollin.

THE COURT: Mr. Rollin showed his little funnel there and explained that there were -- that different people arrived at different numbers. I mean, institutional investors came up with one thing and the Bank of America came up with something else and RRMS came up with something else and, eventually, you got to the 8.5.

That's a pretty big number. It's a pretty big settlement. It's -- you're asking me to decide the reasonableness of it. So I -- it's really hard to draw a line.

I mean, if this is your expert, wouldn't it be helpful to see the things he relied upon to reach that settlement amount? Which is -- I mean, the settlement amount, that's what this is all about. I mean, this was the 8.5. I mean, was that number a reasonable -- was that reasonable? And that sounds like a very simple question, but it's taken two years of lots of things going on for you to be in a position to be able -- I mean, you would have

liked to present it to me right at the beginning, I understand. But you're asking me to make this determination at the end of the line. There's an awful lot that's gone on here.

And it would seem to me that -- why not show them, if you've got documents of things that Mr. Lin relied on? I understand he may not have put everything into his report, but wouldn't that be helpful to me, rather than waiting until the hearing when they say "You know, Judge, I think this should have happened" and I say "You know what? I agree with you." Then you're going to want to spend two more months getting me documents and having a continued hearing. You'd be really upset about that.

So it seems to me that, when you come in in May, you want to have dealt with all the problems we could have dealt with and I either say it's reasonable or they can convince me that it wasn't. Wouldn't that like sort of jump ahead and help me at the end of the day?

MR. GONZALEZ: Obviously, my goal as a petitioner is to help the Court see our position, your Honor.

The issue is what -- how is the question for the Court framed? And the question for the Court is framed this way, your Honor. Did the trustee act reasonably? Okay. So the question there, then, necessarily goes to what did the trustee do, what did it look at.

THE COURT: I certainly think it was reasonable for them to hire experts in areas where they don't have expertise. We have that in cases all the time. That's why you have an expert.

So it's certainly -- it certainly makes sense and, as you said -- if an expert comes up on the stand to testify in a medical malpractice case or some other kind of case, they say "Well, within a reasonable amount of certainty, medical certainty, do you find this, do you find that? Well, what do you base that on? Well, I base it on these medical records. Well, can we see them? Nope, can't see them, but I know it was reasonable."

Now, I know this person might not testify, but I think that's splitting hairs a little bit, because if the expert is presented to show me that this number makes sense, because the expert said it does, shouldn't I see what the expert --

MR. GONZALEZ: But --

THE COURT: -- based his determination on so I'll say "Well, gosh, this person said this. Why didn't you also consider this?"

He's not even going to be here, you're telling me, for me to ask him questions.

MR. GONZALEZ: The point, your Honor, is that the question that was given was not whether the settlement

amount was fair. The expert was asked to evaluate the different methodologies of the counterparties. That's what he did. That's what the report speaks to. And that's it.

If we're getting into the fairness of the settlement amount, your Honor, which we've consistently -- Ms. Patrick, as early as this morning, made the point again -- believed is not the standard here, then anything that we did as a trustee is actually completely irrelevant to the Court and that will be a whole new presentation of evidence on the settlement fairness and the amount of the settlement, whether it's fair. That's not what we're presenting, your Honor.

And they make, you know, they consistently throw out the different findings in the order, the proposed order. That's our burden. If, at the end of the day, we don't meet point F, the Court will strike that out. And if that, you know, defeats the purpose, it defeats the purpose. But they're basically saying "Your Honor, we're really concerned that they're not going to meet their burden." That's a first for me, your Honor, in litigation, that my opponent is actually concerned about whether I meet my burden or not. It's our burden. Whatever we submit as the order -- the proposed order, if we don't meet that burden, your Honor, we loose that point.

So it's just -- we've been hearing this same trope

about how we have to, you know, meet this line, meet this line. It's our burden. We believe we will meet it. It's not up to the objectors to tell us how to meet our burden.

And that's really why -- your Honor, the relevance point, we're not saying this is a burden. We are not saying it's a burden in the slightest, your Honor. But relevance matters. It is a principal position that I think matters for a case that's been going on for as long as this has been going on.

THE COURT: Okay. Thank you.

Can we take a couple minutes for all of us up here?

And then whatever -- which is your next motion?

MR. REILLY: Common interest privilege. Mr. Loeser will be doing that.

THE COURT: We'll do that one next.

MR. REILLY: Thank you.

(Pause in proceedings)

THE COURT: Okay. Yes?

MR. GONZALEZ: Your Honor, just in an effort to make sure I don't have too much of a tin ear, I just -- I was thinking about what the Court said, and we certainly would be prepared to turn over any materials that might exist in their file that Mr. Lin may have relied on, so we can do that as a compromise, your Honor.

Proceedings

THE COURT: Okay.

MR. ROLLIN: Your Honor, I'm not sure what that means in terms of what we're not getting.

THE COURT: What?

MR. ROLLIN: I'm not sure what that means in terms of what we're not getting.

THE COURT: I'll tell you, I was just going to start with the next motion, but, honestly, we went in the back and I took a look at specifically what you asked for, and that was exactly what my decision was going to be, so let's just do it and go through it. He already offered to produce, prior to this, the industry reports, as we know. And I thought that the first subsection of your document request which was facts, data, things that Mr. Lin relied upon. I think you heard what I said. That's what I would expect you would get when you're dealing with an expert. I really don't go for the, you know, the bills, the invoices. I mean, you know, at some point, I don't think that's relevant. The drafts. I was going to -- that's what I was going to say on the record, so that's what I'm going to say on the record. Of course, he said it, but it just made it even easier. That's exactly what I was going to order.

The rest of the things really are not relevant, they just go beyond -- I understand relevance isn't "okay, enough is enough" or 1,100 pages or a million pages, none of

that. Relevance is sort of, you know, something that the judge decides with some discretion based on the facts of the case.

And we keep looking for precedent for this case and don't ever find any. So the next person who has an Article 77 should have it a little easier maybe.

So the things that were listed in section A of your request, that he's agreed to produce, I'm directing him to produce the rest of the things.

I'm not -- that's my ruling. It was going to be my ruling.

So, good, now let's get to the next motion.

Thank you very much.

MR. ROLLIN: Thank you, your Honor.

THE COURT: You're -- I'm sorry, I don't remember everyone's name.

MR. LOESER: Derek Loeser, your Honor.

THE COURT: You're going to deal with motion sequence --

MR. LOESER: The common interest.

THE COURT: Common interest, okay.

MR. LOESER: Your Honor, I stood here before so I'll stand in this spot.

THE COURT: If you like that spot.

MR. LOESER: Your Honor, I represent the Federal

Home Loan Banks of Boston, Chicago and Indianapolis. My clients are federally chartered institutions. They have a public mission. They support local community lending.

And the reason why the Federal Home Loan Banks are involved in this, my clients anyway, is because they are seeking more information about the settlement. That has been our position consistently. It's still our position. And, frankly, while we seem to be getting a lot of criticism from some of the parties here about wanting to have more information, that is, in fact, what we seek. And we think that, in a matter of this importance involving the rights -- our clients' rights -- our clients have hundreds of millions of dollars of securities that will be impacted by this settlement and it's an enormous settlement that releases claims of many, many people.

So just before getting to the motion, your Honor, the briefest of comments about something Mr. Gonzalez said as -- what I heard was that the Court is going to be asked to simply plea decide a procedural question, which is whether the trustee, as a procedural matter, acted appropriately.

And, your Honor, I've been involved in a lot of fiduciary cases. I've dealt with a lot of trustee issues. And, frankly, that is half of the question. Frankly, it's half of the question that interests my clients. My clients

are interested, as well, in whether it was reasonable for the trustee to enter in the settlement as a substantive matter. It's not just a procedural question. The analysis is not a form over function matter. What we're deciding here and what the trustee has asked the Court to decide is if the settlement -- if its actions in approving the settlement were reasonable. And that is both substantive and procedural and I think that's an important point and, frankly, it's a reason why the information is being sought. And the same thing is true for the documents that have been withheld by the institutional investors under the common interest privilege.

And, your Honor, the request is very specific. We do have a privilege log, unlike with the Lin documents. We have been told what has been withheld. It's 548 documents, most of which are e-mail, so it's not some enormous quantities of information that would be a burden for anybody to produce. And it's been cordoned off. I'm sure it's sitting in a folder, this time in institutional investors' counsel's office, not Bank of New York Mellon, at least not entirely Bank of New York Mellon. The documents were created between November 18, 2010 and June 28, 2011 and they represent the core communications between the people who actually negotiated the settlement, the lawyers for the institutional investors and the lawyers predominantly for

Bank of New York Mellon. The privilege has been asserted both to block documents and also to block testimony.

Just by way of example, your Honor, Jason Kravitt, who is Bank of New York Mellon's counsel, was not allowed to answer questions on following important topics:

Whether the trustee and institutional investors actually contemplated litigating put-back claims against Bank of America -- because we can't forget we're here because of Bank of America. This is a Bank of America liability and it's a tremendous liability and it's a put-back liability. So Mr. Kravitt was not allowed to answer questions about whether there was actually contemplated put-back litigation as a foundation for this settlement.

Mr. Kravitt was not allowed to answer whether an event of default actually occurred. And we know, your Honor, we've had a lot of conversation in this courtroom about the importance of event of default. It's a hugely important event in terms of the trustee's duties and in terms of certificate holders' rights. And it's important that we understand the trustee's position on that. That is a huge hole in the information that we have. And not just what the trustee will say here. The trustee can stand up today and say "No, we don't believe there was an event of default." But what do they say to the institutional

investors? What was that position during this as to whether an event of default occurred or not?

Mr. Kravitt was not allowed to answer the question of whether it was necessary to undertake loan file sampling in order to assess Bank of America's liability. Again, that is a huge issue. The way these cases get litigated, when they do get litigated, is based on a sample of loan files.

THE COURT: I understand.

MR. LOESER: And in order to understand the liability, we need to know what their position was on that and what the discussions were between the institutional investors and the trustee. That's what we're after. It's this binary communication between them on these topics. And it's a hole, it's a hole that we need to have filled.

Frankly, Mr. Kravitt would not even testify -- he was blocked from testifying about where the institutional investors and the trustee disagree. There is certainly common interest privilege. And we're not even hearing -- we're not even allowed testimony of where they had disagreement between them.

Your Honor, the basis for not producing this information, for not allowing us to fill these holes, for not allowing the Court to fill these holes, because, as we've noted earlier, when the Court comes to make a decision here, based on their PFOJ, it's going to have to evaluate

all these things and if there's holes, it's going to make it hard to do so.

THE COURT: Mr. Gonzalez says, what do you care about it if he can't make out his burden of proof? But I think this is the case kind of case where I don't think anyone hopes that, in the end, you lose and the whole thing falls apart. I don't really think that's what --

MS. PATRICK: We certainly do not, your Honor.

MR. LOESER: Your Honor, that is an excellent point, because one of the things we keep hearing here is somehow we want to harm the trust.

My clients are here to make sure this is fair to the trust and, if it's not, to make sure that everything possible is done to make the recovery bigger. So Ms. Patrick and I are unified in our interest to make these trusts more whole, to get more money. And I would be shocked to hear her say otherwise. There's nothing we've done here to indicate we want to take money from the trust or prevent the trust from receiving a fair settlement. We just want to make sure they get fair compensation for what happened here. And that's why we're here, your Honor.

But as to these binary communications, we have all these other communications, a lot of holes have been filled, but for some reason the institutional investors refuse to give us and Bank of New York Mellon refuses to give us the

communications that went back and forth between them.

And we've heard two reasons for this, both purportedly under the common interest privilege, but really two separate reasons.

One is the institutional investors say these are settlement communications and because they're settlement communications, we can't have them.

Well, your Honor, there is no privilege for settlement communications. The test in New York is relevance. The DH Holding case lays out the law quite clearly. And what you can see from all of the New York cases on this question is there are different ways that settlement communications can become relevant. They are not categorically off limits. And it depends on the circumstances of the case.

One thing that we've said a number of times and we keep having to say it, there is no collusion requirement under New York law to discover settlement communications. That is not the requirement. There's not a single New York case that they cite for that, not one. And there isn't one. The question is relevance.

Now, your Honor, we certainly understand that usually settlement communications are not relevant. Usually, they are not produced because usually they're not relevant. It's not because of some collusion requirement,

you don't get these in the normal course of business because we have a collusion requirement. It's because, in most cases, they're not relevant, but here they are directly relevant.

The trustee -- Mr. Gonzalez, perhaps, wants to get out the blue pencil and start crossing off parts of that PFOJ. But they haven't done it yet. The trustee has come forward and asked you to bless both the settlement and all of the negotiations. They've asked you to say everything that was done in any way involving the settlement was reasonable.

And as part of the relief that they're seeking -- there are many, many cases and we've all been involved in many, many cases where what happened in the negotiations does not matter. And this is not one of them.

We'll put up slide 4, your Honor, you've seen this a number of times. But it's particularly relevant to this point we're talking about today. This is what the PFOJ asks the Court to decide.

The arm's length negotiations that led to the settlement agreement and the trustee's deliberations appropriately focused on the strengths and weaknesses of the trust-released claims, the alternatives available or potentially available to pursue remedies for the benefit of the trust beneficiaries and the terms of the settlement.

They're asking you to bless the negotiations, but they're withholding the negotiations. That just doesn't make any sense.

The end of this case, when we're at that hearing in May or June, whenever it happens, this presumably will be on the board. And if we don't have these negotiations, that question can't be answered.

The institutional investors certainly cite cases. They cite a lot of cases. And every single one of them is a class action case.

So why does that matter? We've talked a lot --

THE COURT: Because there haven't been any of these, that's why.

MR. LOESER: This is a highly unusual proceeding, that is for sure.

The class action cases do have a collusion requirement and there's a reason for it. In a class action case, there are important procedural protections. For one, class counsel has to satisfy Rule 23G. They have to be appointed. They have to be free from conflicts. They have to be demonstrated as adequate. And their clients also have to satisfy that test. They have to demonstrate they don't have any conflicts. They have to be typical and common and all of these other things. And settlements -- class action settlements have an opt-out procedure. Class counsel is

appointed as a fiduciary. It's a role a lot of us in this courtroom have played many times. As class counsel, I'm a fiduciary for the class, the whole class, not just for my clients, for the whole class. And it's a duty. And if actions are taken which are not for the benefit of the whole class, class counsel gets in a lot of trouble. That is why collusion is a requirement.

In the normal -- in a class action case, absent class members don't get to look under the tent at the settlement negotiations absent collusion because there's deference paid to class counsel. The Court chose class counsel and imbued them with a lot of authority and a lot of trust.

Well, that didn't happen here and those protections don't exist here. So the basis for the deference that's the source of the collusion requirement does not apply here.

Your Honor, if this were just a private settlement that didn't release other people's claims, settlement negotiations certainly wouldn't matter to us. But that's not what this is. We all know -- we all recognize this is an unusual proceeding in which my clients' claims have been released or will be released if the settlement's approved. Hundreds if not thousands of people's claims will be released. It's not -- and there are no procedural

protections. So the collusion thing just doesn't work here and the class action cases just don't apply.

So the institutional investors only need the common interest privilege, because just saying they're settlement communications doesn't cut it.

Your Honor has indicated in some of the prior hearings a question about weren't these settlement negotiations -- aren't these -- well, we can demonstrate, we have demonstrated why the fact that they're settlement communications doesn't take them off the table. So they need a privilege. And the privilege they reach for is the common interest privilege. And your Honor is very familiar with the privilege, having written a few opinions on it. And it's very clear, it's a narrow exception. It's strictly construed and it's an exception.

And throughout the briefs, we -- the institutional investors keep referring to the failure of the Steering Committee to satisfy its burden. It shows up on page after page. We didn't satisfy our burden. We don't have a burden. It's the institutional investors' burden to invoke this exception to the waiver of the attorney-client privilege. It's their burden, your Honor, that we're here to evaluate.

There are specific requirements to the common interest privilege. And many courts have explained that the

key consideration is the nature -- the key consideration is that the nature of the interest be identical and be legal and not solely commercial.

And in the Amp case your Honor noted that there must be an identical legal strategy. And in that case it didn't exist because there were adversarial tensions between the parties attempting to invoke the amendment.

A few months later, in the GUS case, your Honor discussed what this -- how congruent the interest needed to be and noted that they didn't need to be identical in all respects.

So whether the standard is the interests have to be identical in all respects or in some respects or, as your Honor indicated in the Amp case, you need an identical legal strategy, the nuances of standard don't matter because the institutional investors don't meet it under any iteration.

And Mr. Madden submitted an affirmation in this case in which, post facto, he's attempted to describe the existence of this common interest. And what he says in that affirmation is that the institutional investors and the trustee had a common and identical legal strategy. So that's the standard they're shooting for, common and identical legal strategy.

But they haven't met their burden to show that, your Honor, they haven't come close.

Most fundamentally, divergent interests destroy the protection. If we have two parties claiming a common interest, but they have significant divergent interests, they can't have -- they can't come under this narrow exception to the waiver of the attorney-client privilege.

So let's start with common sense. To say there was adversarial tension between these parties here is a gross understatement.

This relationship started with Ms. Patrick's firm sending demand letters to the trustee one after another "You're not doing your job, you should do your job, PSA requires you to do your job, you're at risk if you don't do your job."

Ms. Patrick's firm, on behalf of the institutional investors, set up an event of default. They put the trustee in the position of having to act or face peril. That was, in fact, the strategy that we've heard about. Force the trustee in, pull the trustee into the middle of this. Because we all know that, for years of this these trusts languishing, the trustee was not doing anything. Drag the trustee into the middle. Tell the trustee "Investigate, initiate suit. And, frankly, we'll initiate suit for you, so hire us. But you better do it because you have an obligation." This was not two parties coming together in peace and harmony to work out a solution to a common

problem. The trustee was dragged into this.

The interpretation of the common interest privilege that you're hearing today is something along the lines of someone going into a bank, handing a teller a note that says "Empty the safe or else." And what you're hearing is that everything the teller does after that to get the money out of the safe, they have a common interest with the person who handed them the note.

The reality is they had a common goal, but they did not have a common interest. One was dragged into it kicking and screaming and fought the whole time with what their obligations were and what their duties were.

So even after being compelled to act, the trustee and the institutional investors had several significant disagreements about the very basic requirements that the trustee was required to perform.

Fundamentally, the first fundamental disagreement between the institutional investors and the trustee is whether an event of default occurred.

Now, we have to kind of occupy the trust world a bit to really appreciate what a significant event that is. And we've been through the case law and the fiduciary exception to see what happens when a fiduciary goes from having limited duties, as your Honor has found the trustee has, to having the full duty and prudence. And it's

triggered by an event of default. In a trust department, you have a stack of people over here for which you have limited duties and you have a stack of people over here for which you have full duties and prudence. It is the significant event that defines the obligations of the trustee. It defines the rights of the certificate holders.

And these two parties that supposedly had an identical legal strategy disagreed on that fundamental point.

We've heard it in the courtroom when the trustee has indicated it didn't think there was an event of default and the institutional investors have said "Well, we set up an event of default, that's what motivated this."

And here's the testimony of Robert Bailey, Bank of New York Mellon, senior counsel:

"My answer is that Ms. Patrick's letters purported to trigger a cure period. If there was no cure at the end of that period, I believe Ms. Patrick's view would be there had been a servicer event of default. The cure period never lapsed, so we never got to the ultimate question of whether or not there was a servicer event of default.

"And the cure period -- the cure period never lapsed because of the forbearance agreement?

"Correct, that is my understanding. That is not something they agreed on. There was fighting throughout

this thing about if there was an event of default and if that forbearance agreement cured it or merely delayed having to respond to it."

Related to whether there was an event of default, there was also a disagreement between these two parties that supposedly had an identical legal strategy as to whether the institutional investors could sue the trustee.

This testimony is from Mr. Koplow, who was Bank of America's counsel.

"Did you hear Kathy Patrick say, at any point, that she would bring suit against Bank of New York Mellon?

"I just don't recall one way or the other.

"Do you recall Kathy Patrick ever saying she could bring suit against Bank of New York Mellon because there had been an event of default?

"Objection.

"Yes.

"When did she say that?

"I don't recall whether she said it at that November meeting, but I do recall that sometime in that period she said that.

"And what do you recall her saying?

"Just that, you know, that she could.

"Did she say that in the presence of Jason Kravitt?"

Proceedings

Mr. Kravitt, again, is Bank of New York Mellon's counsel.

"Yes.

"And where did that take place?

"That, I don't recall. It was in New York, but I don't recall whether it was in the office or his office or on the telephone."

I'm cutting out the rest.

"Did she repeat that statement in 2011?

"I don't recall.

"Do you recall Jason Kravitt taking a position that Kathy Patrick --

THE COURT: Could you speak a little slower, because you're not doing the question and answer, and --

MR. LOESER: I'm sorry.

THE COURT: -- it's a little tough on the record to speak that fast.

Thank you.

MR. LOESER: "Do you recall Jason Kravitt's taking a position that Kathy Patrick's clients have no rights to pursue claims against the trustee?

"I recall Jason Kravitt disagree with her.

"What did he say?

"That he didn't believe an event of default had occurred at that time."

Your Honor, that is a fundamental disagreement on legal strategy. It's a fundamental disagreement on the obligations that the institutional investors believed that the trustee had.

There was also a serious disagreement between these two parties that supposedly have these identical legal strategy on the scope of the release that the trustee was entitled to obtain in the settlement. And, your Honor, we'll hear more about this particular disagreement over the course of the day.

But on the left is a draft of the settlement and on the right is a deletion that the institutional investor counsel made and an explanation for why the deletion was made.

Trustees were negotiating -- we're down to -- this is five days before this deal got finalized. They were negotiating the release and they still disagree on the legal strategy, they still disagree on what the trustee is entitled to get.

The trustee tried to insert into the release a release of all conduct of the trustee having to deal with these trusts, not just for the settlement conduct, which is what ultimately made it its way into the release, but even the pre-settlement conduct, that period of time that the trustee was not doing anything.

And this is what the institutional investors said.

"We can't support this. We don't see any basis in the settlement for barring claims against the trustee that are not based on actions in entering into the settlement, but rather are based on its pre-settlement conduct. Separately, we think this creates a conflict of -- creates a conflict for the trustee, because it creates the appearance that the trustee is entering into the settlement, not because it thinks it benefits the trust, but instead because the trustee wants to obtain release of other claims for itself."

Your Honor, if that is not a substantial divergence of interest and disagreement over legal strategy, I don't know what is. Again, these are not two entities in peace and harmony agreeing on an identical legal strategy. They are fighting all the way through, back and forth.

There's many more examples, your Honor, and we've discussed many of them in our briefs and I won't bore you with the details.

There's not identical legal strategy. I understand that, ultimately, they got together and wanted to empty the safe and they worked towards that purpose. But they had disagreements along the way. And those disagreements undermine and prevent the assertion of the common interest privilege.

Your Honor, I want to point to one case that the institutional investors rely on significantly in their briefing, and that's the U.S. Bank case from Delaware Chancery Corp. And that's the one case that they cite that involves a note holder and trustee. In that case I think it was an indenture trustee. And they cite that case for support of the proposition that, of course there's a common interest, we're a note holder and they're the trustee. But it's really worth taking a close look at that case and looking at what the circumstances were there. U.S. Bank was the indenture trustee for the notes. It withheld communications from note holders based on a common interest privilege. The common interest was premised on the fact that the note holder gave notice of the event of default. The trustee accepted the notice and, in response to the notice, initiated a lawsuit. There's not an inkling of disagreement between those note holders and that trustee. The proceeding just flew down the tracks. Gave the notice. Trustee said "You're right, event of default. You're right, we got to initiate suit. You're right, we got to sue them." There's a common interest.

That case shows when a trustee and a note holder have a common interest. This case shows when they don't.

Here, the note holder gave notice, trustee challenged the basis of the notice, denied the event of

default had occurred, and disagreed with the note holders on a variety of topics throughout the relationship, including the most fundamental topics about the source of the trustee's duties and the extent of their duties.

Your Honor, another fundamental problem here is there's no evidence of an oral or a written agreement. By any measure, the standard requires an agreement. It doesn't have to be written, but if it's not written, it needs to be oral. It's not enough to just decide you want to do something. You got to have an agreement, an agreement to invoke the common interest privilege and an agreement to work together in pursuit of an identical legal strategy.

It's their burden. It's a narrow exception. They have to prove the existence of an agreement.

During the discovery that occurred, the Steering Committee asked whether there was an agreement and this is what we got.

"As you sit here today, you don't remember having any role in the negotiation of that provision or that agreement?"

And that's referring to a common interest.

"I don't recall.

"Do you recall any discussion about the need for such an agreement?

"Sitting here, I don't recall.

Proceedings

"Basically, you don't have any memory of --

"ANSWER: I don't recall common interest agreement.

"Okay. Or anything about it?

"Yeah."

THE COURT: I'm sorry. Whose deposition is this?

MR. LOESER: This is Mr. Bailey's deposition, senior in-house counsel for BONY.

It's their burden and when questioned about whether they had an agreement, any agreement, what we got was "I don't recall." Well, "I don't recall" is a convenient answer. We've all heard "I don't recall" in depositions. But it has an impact. If you don't recall, you can't establish a burden that there was an agreement.

Now, Mr. Madden and Mr. Kravitt had each submitted affirmations -- one was an affidavit, one was an affirmation -- after-the-fact affirmation, saying "We had a common interest."

First of all, neither one of those statements says "We had an agreement." They're very careful at how they word that. They say they had a common interest to pursue a common goal. They do not say they entered into an agreement. An agreement is a requirement of a privilege.

At any rate, your Honor, as this Court indicated in the Amp case, post facto affirmations don't satisfy the

burden. You need evidence, contemporaneous evidence of there having been an agreement. And they don't have it here.

Your Honor, just a final point. I don't have the affirmation in front of me, but what it says -- what Mr. Kravitt and Mr. Madden both say is that "We wanted to pursue this common goal of recovering funds for the trusts, of entering into a settlement." But abundant case law from New York has indicated that just having a common goal of outcome is not enough to have a common interest. The affirmations also say "We had a common understanding that the information would be confidential that we shared." Well, parties share confidential information all the time. That doesn't mean they're united in a common interest.

So it's a very narrow exception, which they have the burden, and they don't meet the burden.

If all it takes, your Honor, is having a common interest in recovering money for the trust, in having the common goal of emptying the safe, well, if that's all the privilege takes, your Honor, we have that privilege, too.

We are certificate holders. My clients have hundreds of millions of dollars in certificates that are at issue here. The Steering Committee has billions of dollars of certificates. This is not just their trustee, this is our trustee. And if all we're talking about here is a

common interest in recovering money for the trust, we have that interest, too.

Now, what we hear, in the midst of ad hominem attacks on why we're here, what we're doing, is reference to a Florida case, the Barnett case. And that case is worth looking at as well. That case found that other beneficiaries couldn't get access to common interest documents because they were adverse to the trust. In that case, the other beneficiary was suing the trust, was attempting to take money out of the trust and pay it to that beneficiary.

Your Honor, that's exactly the opposite of what we're doing here. We are not suing the trust. We aren't trying to take money from the trust. We're doing just the opposite. In fact, we're doing exactly what the affirmations say is the basis of the common interest between these parties.

So to the extent there is any common interest here at all, your Honor, we share in that interest and we're equally entitled to these communications.

THE COURT: Thank you.

Who's going to speak to that?

MS. PATRICK: I am, your Honor.

May I have just a moment?

THE COURT: Sure.

Proceedings

MS. PATRICK: May it please the Court, Kathy Patrick for the institutional investors who hold $30 billion of these securities and are eager to see this settlement approved.

What we are dealing with here is an evidentiary privilege, an issue of whether confidential communications should be disclosed. And in the context of the argument that has been made, one of the key things to bear in mind are the legal structure that governs this decision and, separate and apart from that, whether the claim of need is accurately stated and whether the claim of alignment is accurately stated.

Now, let's be clear about a couple of things that Mr. Loeser said that need to be taken off the table as issues. There have been -- there has been, notwithstanding the fact that collusion is the standard to obtain discovery of settlement communications, they have obtained full and complete discovery of all negotiations with Bank of America. Mine with Bank of America, the trustee's with Bank of America, and all of the three-party negotiations, all of that has been disclosed.

He argued that this marriage began in unhappy circumstances and he's right, it did. We did send a series of demand letters to the trustee. How do they know that? They've been produced. We did have a series of not happy

discussions with the trustee. How do we know that? People have testified about it.

The key issue is when the common legal strategy and interest arose and in what circumstances. And for that purpose, Mr. Loeser is inaccurate when he says that the declarations do not establish a common interest.

This is reading from Mr. Madden's declaration, something similar in Mr. Kravitt's. And we'll review some of the evidence we have available to the Court to satisfy this burden in a moment. But Mr. Madden notes that prior to November 18th we had been pushing on the trustee pretty hard to do something. Absolutely true. We were not arguing that the trustee should drive the getaway car for a bank robbery. That is not true. We were arguing that the trustee should do its job.

And from and after November 18th, which is the pivotal meeting about which you will hear in a moment, this is what Mr. Madden says:

"BNY Mellon and the institutional investors agreed to enter into settlement negotiations with Bank of America and from and after that day, BNY Mellon, through its counsel, and the institutional investors, through their counsel, agreed to, entered into a common legal strategy to obtain a recovery from Bank of America."

This was not robbing a bank. This was insisting,

with the trustee's help, in a coordinated legal strategy, that Bank of America honor its obligation to repurchase mortgages and remedy its servicing failures.

Now, the claim here is that there are holes in the discovery.

The Court will recognize this board. AIG uses it at almost every hearing. It is the summary of findings board.

And Mr. Loeser, in his opening presentation, claimed there were holes, as he put it, around three issues. Whether the parties contemplated suing Bank of America; whether the institutional investors contemplated suing the trustee; and issues of loan file samplings. Nope, not holes. They have that discovery.

And that's really why we're here, your Honor, is to answer the question, what have they done with the abundant discovery you gave them. Discovery they didn't meet their burden to obtain, including settlement negotiations.

What have they received? 323,000 pages of documents, 27 depositions, 10,381 questions of the 10 negotiators, and four discovery hearings about this issue, common interest.

This is the fourth time we're here. They don't want to take no for an answer.

Here is an example of what they have done with the abundant discovery you have given them. These are the principal negotiators who were deposed. And in those depositions of 11 people, they didn't mark the settlement agreement at all, a time. Just simply didn't mark it. Didn't ask a single question about it. Didn't ask a single question about drafts. Didn't ask a single question about provisions of the settlement agreement. And in my deposition, they only marked the settlement agreement nine minutes before the end, because I asked to see it to refresh my recollection about a key point.

You heard a lot about the data on which the trustee relied and how Bank of America presented the GSE data.

Mr. Scrivener was a Bank of America presenter on that. Do you know when they marked his first presentation and began to ask about it? At 3 o'clock in the afternoon. 3 o'clock in the afternoon. We spent half the day asking about Bank of America's securities disclosures of its loss reserves. I was baffled.

In total, out of all 10,000 questions, less than 1 percent pertained to the settlement agreement or its terms. Less than 1 percent. And they come here telling you they need more information.

Now, what is the evidence that there was a common

interest? We have it here on the board. The trustee and the trust beneficiaries have a common interest in pursuing the same claims, seeking the same remedy. That's the standard of those two cases. And as you know from your decision in GUS, it does not require a complete unity of interest, not a total identity of interest. It's even been applied, as you noted, to a debtor and creditor, who have antagonistic interests.

The issue is does a limited common purpose necessitate disclosure to certain parties. It applies even where a later lawsuit might break out if the strategy is not successful, as you noted in citing Eugenia VI, Eugenia Roman Numeral 6.

Was the disclosure necessary? Plainly, it was. Bond holders and trustees share a common interest in pursuing the trust claims. And the important holding of Barnett Bank is that aligned beneficiaries share that common interest. And we will come to the question of alignment in a moment.

So let's look at what the evidence establishes about a common interest.

Can we go -- this is what Mr. Kravitt testified in his deposition, your Honor.

(Video played)

MS. PATRICK: Our discussions were strategic.

What did Bank of America observe about the unity of interest between the trustee and our clients with regard to the possibility -- remember that whole did we talk about suing Bank of America? Here's Mr. Koplow, the chief negotiator for Bank of America.

(Video played)

MS. PATRICK: And one more, your Honor, before we take the break, on the existence of common interest and then I'll come back and talk about some other points.

THE COURT: Okay.

MS. PATRICK: This is my -- there is a certain weird awkwardness. I think I am probably the only trial lawyer who has ever had to play her own deposition, so please forgive me, I'm sorry, but this is evidence of the common interest.

(Video played)

MS. PATRICK: Your Honor, with that, we think we have met our burden on the common interest privilege, but I will have more after the lunch hour to discuss about the points concerning alignment and what other information they claim to need.

THE COURT: Okay. We're going to have to take a lunch break. If everybody could come back at 10 after 2 so we could continue for the afternoon.

Thank you.

Proceedings

(Luncheon recess)

THE COURT: Okay. So, Ms. Patrick, you want to finish up on this motion?

MS. PATRICK: Yes, your Honor, thank you.

Before the break, we were talking about the evidence of an agreement. We were talking about the evidence of an agreement to pursue a common legal strategy with regard to Bank of America on the part of the trustee and the institutional investors, what did we do to meet our burden of proof. We have met that burden.

Now I want to talk to you briefly about the evidence that they assert belies that showing.

First, you heard the testimony from Mr. Koplow and they showed you a page from Mr. Koplow's deposition in which he purported to say that, in November, which the transcript reports at that point that, in November, he was asked "Did Kathy Patrick ever say that she would sue BNY Mellon?" And he said "Yes." And they made a greet deal out of that by arguing that there was an antagonism of interest between our clients and BNY Mellon.

Now, of course, there doesn't have to be complete identity every interest and the time frame is evocative in November. But what they forgot to tell you and what was pointed out in our brief is that Mr. Koplow misspoke and he immediately, in his deposition that day, while they were

sitting there, corrected the testimony.

This is his testimony at page 266.

"QUESTION: You were asked by Mr. Reilly: Do you -- Question: Do you recall Kathy Patrick ever saying that she could bring the suit against Bank of New York Mellon because there had been an event of default? Is there something you want to clarify about that testimony?

"ANSWER: Yes. The reference should have been to Bank of America. That's what caused the consternation on the part of Bank of America at the November meeting. Bank of New York Mellon was quite calm about it. Bank of New -- Bank of America" -- sorry -- you see the problem -- "Bank of America was not."

Now, Mr. Bailey's testimony that you saw, Mr. Bailey was asked about a written joint defense agreement. There is not one. Nobody maintains there was one. He was not asked whether he was aware of an agreement, or agreement of counsel, to which you've seen the evidence presented, between me and Mr. Kravitt, to work on a common legal strategy for a common purpose.

Finally, in their brief they cite the testimony of Mr. Stanley to imply that the parties were quite far apart. But the immediately preceding question and answer demonstrates that Mr. Stanley was answering a question about when the parties to the settlement formed common ground.

And there's even a clarifying answer and question.

(Video played)

MS. PATRICK: So he was asked and answered questions about when the settlement -- when there was common ground on the settlement. He was not answering questions about the common interest between the institutional investors and their trustee, BNY Mellon.

You heard a lot from Mr. Loeser about the arm's length negotiation finding and the claim that they need this information because they do not know whether the negotiations were at arm's length. He referred to it as a hole in the evidence.

Now, you saw the board earlier about the 10 negotiators that have been deposed, that have given testimony about this topic, but let's look specifically at what the trustee said about how the negotiations were conducted and then we will look at what Bank of America's representatives observed about the common interest that was pursued by the trustee and the institutional investors against Bank of America, because that's the common legal strategy here, against Bank of America, with regard to the negotiations.

Mr. Kravitt first, please.

(Video played)

MS. PATRICK: So it's a common negotiating

strategy. "I would have said it if Kathy hadn't."

Now, let's look at how Bank of America perceived these negotiations, whether they were arm's length, whether they were contentious and whether the institutional investors and BNY Mellon acted with regard to a common legal strategy toward Bank of America.

Mr. Laughlin's testimony, please.

(Video played)

MS. PATRICK: Mr. Koplow --

THE COURT: He's testifying about a meeting that he had with you and who else?

MS. PATRICK: BNY Mellon. He's testifying about the course of the negotiations -- these negotiations extended over weeks -- about a series of meetings. We've compressed it. It was a very long several-hour section of his deposition. But these were negotiating sessions where you heard Mr. Kravitt testify he was testifying -- he was there corroborating my character as a mature person; we said no to 4-1/2 billion and we did not throw any papers.

THE COURT: I didn't remember who was at that meeting.

MS. PATRICK: And then, finally, on this point about -- I'm going to show you Mr. Koplow's clip. It's a very short clip. But the key thing to remember is that Mr. Laughlin, in that excerpt that you saw, referred

repeatedly to both sides, i.e. Bank of America on one side and the institutional investors and the trustee on the other.

So here's Mr. Koplow's testimony.

(Video played)

MS. PATRICK: There is no circumstance in which it can fairly be said that the objectors do not have chapter and verse each syllable, each consonant, each vowel of the negotiations that went on with Bank of America. The question is whether they have established that they are entitled to invade the common interest privilege.

And I say "established" because we have met our burden to establish that the trustee and we pursued a common legal strategy by agreement of counsel to maximize the trust's claims.

Why do I say "the trust's claims"? Because it is important to remember that the claims here belong to the trust. The three objectors continually say "Our clients' claims are being extinguished." These are not their claims. These claims belong to the trustee. The certificate holders are the beneficiaries of the proceeds of them.

And so, of necessity -- back to your question -- of necessity, we had to work with them to maximize the recovery on those claims. We absolutely did.

But going back to this question, in that

circumstance, the note holders and trustee's interest in prosecuting claims of this nature, it's hard to see how they could be more closely aligned.

I want to turn now to that issue of alignment, because of one of the arguments that Mr. Loeser made to you before the noon hour was "Well, my clients are similarly situated. We have the same interests."

And I must say, I have seen no case nor am I aware of any law that says that you can invade a privilege by adhesion, by asserting that you share the same interest of the parties who are entitled to hold that communication in confidence.

But it is also not true. It is not true that Mr. Loeser's clients and the three objectors sitting at that table share the same interest as the great bulk of certificate holders who are beneficiaries of this settlement and want it to be approved.

This is a graphic depiction of the relative interests here. $73-1/2 billion held by other investors. $23 billion held by our clients. About 5 -- I'm sorry -- 33 billion -- sorry, I can't do math and I can't read numbers, apparently. 96 percent of the certificates support the settlement. And I say that advisedly. We're going to come to why I say that. 3.6 percent of the certificates are held by the Steering Committee, this group that says their

interests are aligned with that of other holders. But they are not.

Mr. Loeser said he would be shocked if I said that his interests were not aligned with my clients. Prepare to be shocked. They are not.

You asked the objectors at the last hearing to tell you which of them was pursuing litigation against Bank of America, securities litigation. A bunch of stuff that they spent time on in these depositions related to their other cases, Bank of America's securities disclosures, things like that, that are of no relevance here, that they used -- that they seek and obtain in these proceedings. They didn't answer your question about their pending lawsuits and so we did.

The four Federal Home Loan Banks represented by Mr. Loeser, Keller Rohrback, all have securities claims pending against Bank of America.

AIG has now got three different disputes pending against Bank of America.

In every real sense, this settlement proceeding is a proxy war in a larger battle between securities litigants, a minority of securities litigants and the certificate holders who want this settlement to be approved. And like all proxy wars, the innocent noncombatants are getting run over here, run over by their efforts to delay. Not from any

fault of this Court, but because they don't want this to go forward because it is their sole leverage.

How do you know that? How do you know that?

We had a hearing earlier about the question of whether AIG should be required to disclose its settlement communications with Bank of America. And you'll remember that you ruled that settlement communications shouldn't be discoverable because there was no basis for them to be disclosed.

And Mr. Carlinsky appeared and said, very carefully, well, "If AIG hypothetically said" -- we said -- "if you make us whole, we go home and therefore we don't have any standing even necessarily to say boo in the Article 77 proceeding. Let's suppose they said that. My question comes back to you, so what? Does that make us an extorter."

The implication of the argument was that had somehow not happened; that there somehow was some doubt about whether AIG had done that. There is no doubt. There is no doubt because, in one of the many cases they have pending against Bank of America, they have now produced some, but not all, of their correspondence with the New York Fed related to this proceeding and their settlement objection.

Let me see first the November -- the letter from the New York Fed. This is a letter from Thomas Baxter, the

general counsel of the New York Fed to Thomas Russo, the general counsel of AIG.

"Thank you for your letter of October 3rd setting forth those items to which AIG would agree with respect to its complaint in the Bank of America litigation."

This has to do both with this settlement and also with allegations AIG made in the securities case that it could tender securities for rescission that actually belong to my client, Maiden Lane, the New York Fed.

So this October 3rd letter we do not have, but we have produced in the record of that securities case the New York Fed's reaction to what they saw in that letter.

And let's go to the next page. This is Mr. Baxter's observation.

"We believe that the settlement of the Countrywide Bank of America litigation is in the interests of Maiden Lane 2 and Maiden Lane 3 vehicles in which the Federal Reserve Bank of New York and AIG have an interest. The Federal Reserve Bank of New York, as the managing member of these vehicles, has concluded that the settlement will benefit both vehicles and we strongly support it. While I understand AIG's desire to use its objection in the Article 77 proceeding as leverage to advance settlement discussions with Bank of America related to the claims made against Bank of America, I believe it is harmful to the interests of

those vehicles."

And did AIG deny that was what they had done? No, they did not.

This corresponded back to Mr. Baxter on November 10th. "Acknowledges that AIG has stated it would agree not to pursue its objection in the Article 77 proceeding if there is an agreement to resolve its fraud and other claims against Bank of America."

Now, what about these absent certificate holders for whom the objectors purport to speak? In page 17 of their reply brief -- slide 18 -- at page 17 of their reply brief, they implied that they were acting for absent certificate holders including a holder called Monarch. And although they call themselves the Steering Committee, if you read the footnotes at the beginning of their pages, and particularly as to this motion, 14 of the intervenors refused to join their demand to invade the common interest privilege between my clients and the trustee. 14 refused to join. And on top of that, they invoked a former intervener, Monarch, to imply that they should be listened to because people who work here were counting on them to represent their interests. Not true.

The Court received a letter from Monarch. Let's look at page 19. Monarch wrote to you.

"The memorandum" -- filed by the Steering

Committee, referring to the brief that I'm discussing -- "implies that the Committee speaks for certain investors, like Monarch. Monarch submits this letter to set the record straight.

"Simply put, Monarch does not oppose the settlement. To the contrary, Monarch supports it. Monarch believes the settlement will provide significant immediate benefits to the beneficiaries of the trusts and should be approved expeditiously. Certificate holders should not be held hostage to a legal battle that threatens to delay and potentially destroy the entire settlement based on the actions of what appears to be a small minority of objecting holders."

We do not represent Monarch, your Honor. They appeared and sent that letter themselves to make clear that this -- the Steering Committee does not speak for them when it asserts that this privilege should be invaded.

Your Honor, I think we have more than met our burden to establish the existence of a common interest between the trustee and the institutional investors.

We have also established that the matters about which the objectors claim they do not have discovery, the holes they assert exist in the discovery, are not holes at all. They have had discovery on those matters. And as to the discovery they seek here, a key reason that they have

not obtained discovery is not because they were precluded from any settlement negotiations with Bank of America, not because the relevant documents weren't produced, but because they pursued other issues in their depositions.

When less than 1 percent of the questions of all of the key negotiators are devoted to the settlement agreement and its terms, it is unfair to hold -- to argue -- it's certainly unfair to argue that the privilege, an evidentiary privilege we have established existed, should be invaded simply because they want to know.

Thank you, your Honor.

MR. CARROLL: Your Honor, Teige Carroll for the Attorney General.

May I make a few points.

THE COURT: I was just looking for you.

MR. CARROLL: Thank you.

Our offices are here because of our interest, among other things, in the transparency and exchange of information maximum consistent with the law. We endorse the legal position here of the Steering Committee.

And I want to make two points, which I hope will refocus the Court's attention on the task before it.

The argument we've just heard has made a numerical -- has a numerical theme to it. There's a very small contingent here that wants this stuff. Nobody else

does. That argument is really beside the point. The judge, the Court, rather, has to -- disclosure doesn't depend on the number of investors seeking information nor does settlement approval depend on the number of investors that support the settlement. What's important here is the factual findings you have to make. The trustee recognizes this. In its finding it asked the Court to make regarding a full and fair opportunity, for example, the trustee asked the Court to find that a full and fair opportunity has been given to all potentially interested persons, to all. Not 97 percent, not a majority, not a minority which is bigger than your minority, but all potential interested persons. The Court can't make that finding if it operates on the majority vote. That's just not the rule here.

The second point that I want to make is the lots and lots of discovery, which we heard a lot about. The standard, again, it's a simple proposition, the standard is not lots and lots of discovery, the standard is full disclosure of all material necessary to the prosecution of the defense of the action. Simple statements, but I think they need to be made to refocus attention on what's at stake here. What's at stake here are the findings, not a proxy war, not peripheral considerations. What we care about in the AG's office is the integrity of the proceeding that's happening right here and the integrity and the accuracy of

the Court's finding as requested by the trustee.

Thank you very much.

THE COURT: Thank you very much.

Mr. Loeser, did you -- Mr. Carlinsky?

MR. CARLINSKY: May I have an opportunity to respond to one point? I saw my name on the board. And I'll be very brief, your Honor.

Michael Carlinsky, C-A-R-L-I-N-S-K-Y, I'm from Quinn Emanuel.

THE COURT: Do you have a card?

MR. CARLINSKY: All I wanted to say was the Court saw a letter from the Federal Reserve Bank of New York, in which the Fed Reserve Bank of New York, which is part of ML 2, one of Ms. Patrick's clients, purports to assert or ascribe a motive to AIG. The motive, I think, that Ms. Patrick mentions is that AIG was somehow trying to leverage its securities case by being an intervener, not even an objector. AIG's position has been constant, which is it, like the AG's offices and the others, want transparency. AIG hasn't made up its mind. It hasn't said 8.5 is unfair, fair. Sunshine is the best disinfectant. I think I used that phrase last time. And that's what AIG seeks here.

What Ms. Patrick failed to point out, your Honor, was AIG's response. The response to Mr. Baxter's letter, you only saw a portion of it that was pulled out for

purposes of the blow-up. AIG responded to Mr. Baxter's letter. I don't know what exhibit this is. It's probably attached to Mr. Madden's affidavit. But I managed to grab a copy during the lunch break.

AIG responded to say, quote -- and this is its letter from the general counsel of AIG dated November 10th, 2011, Tom Russo to Tom Baxter.

THE COURT: Got it.

MR. CARLINSKY: Page 2, middle paragraph, AIG points out that it is intervening, quote, "for the proper purpose of gaining access to this information and to assure that the proposed settlement receives the proper judicial scrutiny it deserves, particularly given that the trustee, which filed the Article 77 proceeding and is seeking court approval, has conceded that it suffers from conflict of interest."

So the first point made by Mr. Russo to Mr. Baxter is we're only here, like others, because we want transparency.

And then with respect to the assertion made by Mr. Baxter -- and I really have to question whether Ms. Patrick played a role in the drafting of that particular letter because --

MS. PATRICK: May I answer that right now?

Did not.

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MR. CARLINSKY: Well, the last time when we were here, Ms. Patrick had told me she had seen all of those letters well before we appeared here the last time for the motion that I think sought discovery material.

But regardless, what Mr. Russo responded very clearly was "that AIG has stated that it would agree not to pursue its objections in the Article 77 proceeding if there is an agreement to resolve its fraud and other claims against B of A, does not, as you suggest, indicate that AIG has intervened for the purpose of leverage to advance settlement discussions with Bank of America over its fraud claims. Rather, AIG is seeking to recover from Bank of America for billions of dollars in losses it suffered in connection with B of A related RMBS investments."

And Mr. Russo presses the very logical point, which is the same point I made the last time I was here, your Honor, quote, "To do this, AIG is pursuing all avenues of recovery against Bank of America, including through AIG's fraud-related litigation, as well as seeking to maximize its recovery in the Article 77 proceeding where it is a significant trust beneficiary. If, however, AIG was able to reach a negotiated resolution with Bank of America that AIG believes is fair recompense for it's RMBS losses, then AIG would consider withdrawing from the Article 77 proceeding and releasing its rights therein."

I want to be clear. That makes total sense. What AIG has always said and what I represented to the Court in the transcript that we looked at was, if AIG ultimately got redress from Bank of America for its harm, of course it's not going to seek an extra double recovery in this proceeding. What it told Bank of America, what it stands by, is it will -- it will go home. It's not going to assert rights that Bank of America would insist that it releases. And that's the position AIG has always taken.

But the notion that AIG is somehow using this proceeding in which it's an intervener to leverage the RMBS case is simply a falsity. There's been no resolution with respect to Bank of America in its fraud cases and so AIG, just like many parties -- and, in fact, I think there are parties that are part of the institutional investors that have separate fraud claims pending against Bank of America. AIG is trying to recover for losses that it suffered. If it receives them from one pot or from this pot or from both pots, it really doesn't care. Once it has a recovery that it feels is fair, it will ultimately say, then, "We're not seeking anything further."

But in terms of what its done in this proceeding is consistent with what all of the others on this side of the table, including the Attorney Generals, are asking, which is let's get the information so that, at the end of

the day, your Honor has all of the information, the transparency necessary to decide is this settlement a fair settlement and did the trustee ultimately discharge its duties.

Thank you, your Honor. I appreciate the opportunity on being heard.

THE COURT: Certainly.

Mr. Loeser, do you have any response?

MR. LOESER: Some comments, your Honor. I'll keep them brief.

I think it's important to avoid distractions. And, you know, when you're standing up and hearing a lot of distractions, it should give pause as to why we're hearing them.

When this issue of other securities claims came up, we responded and also noted a variety of members of the institutional investor group also have securities claims. In fact, your Honor, there are class securities claims involving Countrywide that -- involved in the class, many of the certificate holders who are impacted by this. Is there a notion, then, that all the people that are within those classes also somehow have a separate, different and adverse set of interests than they do? It's a distraction and it makes no sense.

The fact of the matter is, if these negotiations,

as they say, between the institutional investors and Bank of New York Mellon were for all the interests of all the beneficiaries, that includes all, and if these negotiations were for our interests, and if they're coming now asking you to bless those negotiations, then we should see them, too. We are equally entitled.

Your Honor, at its essence, this is entirely about holes. That's what we're dealing with here. We've got the haystack. They keep referring to the haystack. Yeah, we do have the haystack, but they have the needles. And this is one of the needles that's left.

They have communications, purportedly on our behalf, between the two of them, purportedly that were the basis of this agreement. We want to see them. We are entitled to see them. We have no adverse interests to them. We are within the same group. If all it takes is a common goal, which is -- frankly, all you heard in all of the video clips that were presented was an effort and common goal to obtain a settlement -- these parties participating together in negotiations, fine, they had a common goal. We share that goal. So if that's all it takes, we're under the tent as well.

But, your Honor, it does take more. A common goal, as your Honor noted in the Amp case, just sharing an interest in an outcome is not enough. That is the law in

New York. All you've heard is an effort to share in a common interest.

Now, it is significant that the clips that the institutional investors put on discussed some times that these people were talking together, negotiating together. But what you didn't hear was that these disagreements did not, in fact, exist.

There are, as we showed in the transcripts that I read from, and as the briefs describe, there are a variety of fundamental disagreements. Those can't be backfilled in.

Now, Ms. Patrick showing testimony of herself after a privilege has been invoked saying "Well, we believe we had an agreement" cannot undo evidence of actual fundamental disagreements, which the evidence, in fact, shows.

Your Honor, I would like to, if we could put up slide 43, this is a good example of just what we're talking about here.

There are some things they agree on. They pursued the common effort to have a settlement. That's fine. But there's many significant things they disagree on. And under your Honor's rulings and the laws of the State of New York, there clearly was not an identical strategy.

"QUESTION: Did you" -- this is Mr. Koplow testifying.

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"QUESTION: Did you hear Kathy Patrick say, at any point, that she would bring suit against BNY Mellon?

"I just don't recall one way or the other.

"Do you recall Kathy Patrick ever saying she could bring suit against Bank of New York Mellon because there had been an event of default?

"Yes.

"When did she say that?

"I don't recall whether she said it at that November meeting, but I do recall sometime in that period she said that.

"And what do you recall her saying?

"Just that, you know, that she could.

"Did she say that in the presence of Jason Kravitt?

"Yes.

"And where did that take place?

"That, I don't recall. It was in New York, but I don't recall whether it was in the office or his office or I guess on the telephone, but I think I have a vague recollection of it occurring in person.

"Did she repeat that statement in 2011?

"I don't recall.

"Do you recall Jason Kravitt taking a position that Kathy Patrick's clients have no rights to pursue claims

against the trustee?

"I recall Jason Kravitt disagreeing with her.

"What did he say?

"That he didn't believe an event of default had occurred at that time."

And this is crucial.

"Was that before or after the forbearance agreement was first entered?

"ANSWER: It was before and after."

There were disagreements, your Honor. It was an unhappy marriage or however it was described at the outset. The trustee was kicking and screaming. They disagreed on fundamental aspects of legal strategy, and that disagreement lasted throughout.

The forbearance agreement was entered after the time in which they're withholding these documents. It's within the period of time that they say there was a common interest agreement. And they couldn't even agree on whether there was event of default before and after.

So, your Honor, the question is not are there some things they agreed on, that's not the standard under this narrow exception to the waiver doctrine. The standard is that they have an identical legal interest. And they just don't meet that standard. They don't present the evidence they need to get there.

Your Honor, the Steering Committee, as they keep telling you, holds 3.6 percent, apparently, of all of the certificates of the 530 trust. That's billions of dollars. Institutional investors hold certificates that account for 22 percent. The rest are unaccounted for.

We keep coming back here and hearing everybody supports this agreement, everybody is waiting for their money. No one's called me, no one's called the Steering Committee. Intervenors that we talk to when we have our regular meeting aren't telling us "Stop what you're doing, we're waiting for our money." And the fact of the matter is, it's ridiculous to say that people who haven't voted yet will vote for them. Who knows? We'll find out at the objection deadline.

Your Honor, it's their burden. We are not invading a privilege. The privilege has not been established. It's an evidentiary burden they have to meet. They didn't meet it. It's narrow, it's specific. And, frankly, if it's as bland as they're telling you now, we're in the same group.

Thank you, your Honor.

THE COURT: Let me just throw out one question.

The common interest privilege is a narrow exception to the waiver of the attorney-client privilege. So, in the first instance, there has to be the

attorney-client privilege involved in here. And I was just trying to figure out -- we were just trying to figure out, how does that -- how does it start? I mean, these are conversations between you, Ms. Patrick and Mr. Ingber on behalf of Bank of New York Mellon. Where's the attorney-client privilege here that starts this evaluation going or this --

MS. PATRICK: Your Honor, the issue with regard -- you're right. It is a subspecies of the attorney-client privilege. But the key aspect of it is communications to facilitate legal advice that are primarily legal and interlocking relationship or limited common purpose.

And so what Mr. Kravitt testified to, when I opened this discussion, the clip I showed you, we would talk about what is the best strategy, what arguments should we make to Bank of America, how should we do this.

When I shared with Mr. Kravitt my clients' views about the best way in which to proceed to maximize the trust's claims against Bank of America, that is disclosing my advice to my clients and my work product and my strategy, which, otherwise, the disclosure to Mr. Kravitt would have waived.

And so when you think about a common interest privilege, the issue is, do we share a common purpose in maximizing the trust's recovery on their claims? We do.

Were the communications between Mr. Kravitt and myself communications designed to facilitate his legal advice to his clients and mine to my clients about the best way to prosecute these claims? These were not -- nobody is suggesting these were business communications. These were lawyers' communications about litigation strategy and respective client's views of the best way to proceed. And so, in that context, when I agreed to work in concert with Mr. Kravitt to maximize these claims, we are disclosing our advice to our clients and we are disclosing our work product, which is equally shielded by the common interest privilege.

And I think, your Honor, Mr. Madden pointed out to me, that the U.S. Bank decision, which we cited here, it's difficult to see how the note holders' and the trustee's interest in prosecuting claims of this nature could be more closely aligned, sustained the common interest and privilege in part because, quote, "the communication must have been made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and then primarily or predominantly of a legal rather than a commercial nature." That's page 7 of our brief.

And when Mr. Kravitt and I talk about our clients' respective legal views about how to maximize these claims,

that is the essence of attorney-client privilege and work product matter that is shielded by the common interest privilege.

MR. LOESER: Your Honor, if I may.

We began our brief on this motion by noting that they haven't tried to establish the underlying fundamental privilege in the first place. There's been no identification that they've made that would create a foundation necessary to establish that there was an attorney-client privilege to start this. Instead, we have a whole lot of negotiations between two lawyers that are sometimes on the same side and sometimes adverse; who started out adverse and up until five -- even five days before the settlement was finally in, one of them was writing comments accusing the other one of a conflict.

So there are two levels. There's an attorney-client privilege, that's a burden they have to establish. And then there's the waiver. It is a waiver to go out and disclose something that's supposedly attorney-client privilege to someone who's not your client. That occurred. The only way you can yank that back is if you then have to establish another burden, which is to show that there's an identical legal strategy --

THE COURT: I understand, that's why I asked the question.

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I have one more question for you.

Let's assume that maybe I don't buy that there was an attorney-client privilege, so then I don't have to go through that whole discussion because it's not necessary.

So then you say "Well, it's got to be relevant and it's important why this should be disclosed here and why this is" -- you have a lot, but you have holes in your testimony.

So in -- somewhat in response to that, Ms. Patrick argued "Well, you have an awful lot of the settlement negotiations that went on and yet, when you deposed all these people, you only asked -- 1 percent of your questions dealt with the settlement negotiations. So why didn't you ask more questions? You must have enough because you didn't really ask too many questions during the deposition."

I wasn't there. I haven't read all those transcripts. But that was part of her argument.

So I was wondering if you could just briefly address that, because if I'm going to consider this on relevance, and what you need to -- to make your objections, if ultimately that's what you decide to do, shouldn't you or why didn't you spend more time going over those issues during the depositions?

MR. REILLY: Your Honor, can I help on the depositions part, since we took most of the depositions and

Mr. Loeser's firm did not?

THE COURT: I guess, if you were there, maybe it would have been different.

MR. REILLY: Oh.

MR. LOESER: You know, your Honor, Kathy has not said that.

MR. REILLY: Ms. Patrick picked her words very, very carefully. What her statement was, questions on the settlement agreement. So what they must have done have is gone through each time that the actual document was taken out and put in front of somebody, that's what their -- whatever their percentage is.

We asked -- we focused on the process, because that's what the proposed finding -- you're being asked to conclude, is the negotiations, all their conduct in all respects.

So we spent the majority of the examinations of the witnesses on when did you meet, who did you talk to, what did you do to get prepared, when did you get documents that supported this, what did you do to look into it.

So I want to make sure that Mr. Loeser doesn't have to answer a question that I don't think is exactly what Ms. Patrick was suggesting.

THE COURT: Okay.

MR. LOESER: I think that the rest of the answer

to the question, your Honor, is kind of like The Price Is Right, where you get to choose behind one curtain or another and tell me what's there.

The issue here are these very specific communications. There's no question they didn't give them to us. So this other questioning about other people -- information that they are not asserting a privilege for is really beside the point. We want what's behind the other curtain, which is the needles. These are the specific communications.

We have to remember this was a lawyer-conducted negotiation, lawyer to lawyer, talking about these things. And these lawyers for the institutional investors and the trustee are the ones who apparently negotiated this thing. And so when they say "Your Honor, we want you to bless our negotiations, and that's behind curtain number one, but we don't want to open that curtain; instead, we did open curtain number two, and we have these other disclosures, and you know what, we gave you the haystack, we just want to keep the needles," that doesn't work. Again, that's a distraction.

We turn back around to what is the specific information we're seeking and why is it relevant. What we're seeking are the actual negotiations. And it's relevant because they want you to say they were conducted in

good faith. So it really just comes down to that.

THE COURT: Okay. You want to get to your next motion? I don't think you're going to get through three of them, but what's the next one?

MR. REILLY: Sure. The at-issue waiver slash fiduciary exception, that's number -- I don't have the number, your Honor.

THE COURT: That's okay. I think it's 31.

MR. REILLY: Okay. Your Honor, we're going to split this one up.

There's really two arguments here. One is whether or not there's been a waiver by the trustee putting the issues at issue before the Court. And then the second one is whether or not the fiduciary exception would apply.

But we're talking, in essence, about the same stuff Mr. Loeser was just discussing, the issue of whether or not communications between the trustee and the institutional investors' counsel was relevant in the case. And much of that is obviously relevant as it relates to the claims that they're asking this Court to find. This now focuses on the question of whether or not communications between the Bank of New York Mellon and its counsel, Mayer Brown -- that's the next layer of it.

And the law does recognize that if, in fact, a party puts into evidence claims that necessarily put at

issue privileged communications and puts in evidence claims that necessarily to -- either for them to prove or for the other side to defend against, necessarily need to have the privileged communications reviewed, then a waiver does occur. So that's the fundamental distinction here between the previous argument.

What's really clear is that a party cannot use the attorney-client privilege as a sword and as a shield. And that's what's happened here. You know, because I know you've looked at --

THE COURT: Go ahead.

MR. REILLY: -- this proposed final order and judgment, that's the --

THE COURT: A few times I've looked at it. I think I've looked at it a few times.

MR. REILLY: And that basically is the claims that they're making when we ultimately get to the end of this thing. They're going to claim that all of these things that are in here are true. And we believe they have the burden of proving all of the things that they put in here.

So the question becomes for the Court, do you need, in order to evaluate whether or not they actually did, for example, a legal investigation, do you need to know what they did in conducting that legal investigation?

From our perspective, if we're going to decide and

determine whether we think that particular provision of the proposed final order and judgment actually is valid, then we need to know what they did in that regard. And I'm going to show you right out of the box here that they have blocked us getting information that would necessitate us, as part of our evaluation, would necessitate us getting.

So let's start with the legal investigation, which they have in their proposed findings as paragraph H.

And, your Honor, while -- during my comments, I want to make sure I do the following. I want to identify for you the specific documents and the specific testimony that we're asking for; show you why we need it; and show you that it is necessary to assess the claims that they're making.

So we have Exhibit N here, the settlement agreement as a result a legal investigation by the trustee.

Let's look to Ms. Lundberg's testimony. In the -- and Ms. Lundberg is the Bank of New York Mellon manager who actually signed the petition. So we took her deposition thinking we would get information about her knowledge about the process, her knowledge about the petition. And I asked her, in this process, to tell me about the legal investigation that was referred to in Exhibit N, and here's what we saw.

(Video played)

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MR. REILLY: So here we are with the assertion being made by the petitioners, we did a legal investigation. We asked them what it is. They say the lawyers did it. We ask them what they did. They block us.

That is the classic situation in which the cases that we cited concerning the waiver or at issue waiver exists.

The cases that -- even the cases that Bank of New York Mellon submits as authority, including the Deutsche Bank case and Nomura, indicate that when you have affirmative action by a party putting a claim forward, that makes the issue relevant.

And there isn't any question about relevance here. We now know that what the legal investigation was matters to this Court -- and you're being asked to sign the PFOJ -- matters to those people here who want to know what it is that was done so we could evaluate whether the legal investigation was appropriate or not. No question about relevance.

So then the argument becomes are we doing anything more here than asking this Court to make a decision in the dark or asking intervenors to conclude that a legal investigation was appropriate.

If you look at the cases that are cited by Bank of New York Mellon, they try to focus on cases in which the

only issue before the Court was, in a settlement setting, was whether the settlement was reasonable and in good faith. But all those cases say, in cases where there's a question of settlement and good faith and nothing more, then the mere fact that the lawyers were involved in negotiating the settlement or the mere fact that the lawyers gave advice concerning the settlement is not enough.

We have much more here. We have dramatically more than just is the settlement reasonable and just is the settlement done in good faith.

And we didn't write this proposed finding that the Court has before it. This is the one that we received when they submitted the verified petition. This is the one that we've been operating under as a road map for discovery. These are the items that we've asked their witnesses about to try and find out what, in fact, was done, not only by Bank of New York Mellon in its role as a trustee, but in its conversations with counsel.

Because now we know that they are also suggesting to this Court -- this is paragraph L of the proposed final order and judgment -- "The Court hereby approves the actions of the trustee in entering into the settlement agreement in all respects." All of their actions in all respects.

Now, I don't know how that could be any broader. They wrote it for it to be broad. And, in fact, a fair

reading of that is everything the trustee did in reaching this negotiation, in negotiating this agreement, everything they did in retaining experts, everything they did in talking to their lawyers. There's really no limit to it.

And so, when we step back and say, okay, we're going to go through and find out everything that they did, then we get blocked because much of what they did, they say, was done by lawyers or was done at the direction of lawyers.

We have identified three areas in our brief that we're fundamentally looking for this information on, and I'm going to spend most of my time on the first one.

The first one is a category that we would call self-dealing by the trustee. Situations where we see the trustee is getting something, is asking for something, is trying to do something to its benefit which we believe is to the detriment of the certificate holders. And this fundamentally sits on one of the tensions in this case, which is Bank of New York Mellon, as a trustee, has obligations to the certificate holders.

What are those obligations? You've commented on them and you've ruled on some of them already. You said it's not your classic fiduciary, but they have some fiduciary duties, no matter what, outside the four corners of the pooling and servicing agreements. And there's 530 of these, because there's 530 trusts, that delineate what the

trustee is supposed to do. But outside all 530 of these, there is a duty to avoid conflicts. And there may be a duty to avoid self-dealing. And as Mr. Loeser said, if there's an event of default, there's a duty to be a prudent person.

That tension as to what the trustee's obligation is is sitting squarely in this issue. Because we have seen now and with the record that we've established we're much more concerned about six different events that the trustee was involved in that appears it was trying to get something in this process, rather than looking out for the benefit of the other certificate holders. And I'm going to go through those right now.

Self-dealing is one.

A second one that I'm not going to spend much time on either, the last two, the second one is the settlement amount. We have asked for information that's a little different than what Mr. Rollin was talking about today, but what communications did they have with Mr. Lin, again, about the settlement amount. And a subsection of that, what communications did they have with their lawyer about the loan file review. Meaning, there were parties asking for it; Ms. Patrick was demanding a loan file review early in the process; and, at some point, Bank of New York Mellon and its counsel, Mayer Brown, had conversations, we believe, about whether we should agree to loan file review or not.

And the last one -- I'm going to do the last one right now. On June 28th, there was a Trust Committee meeting, June 28th, 2010. This is the very last thing that Bank of New York Mellon does -- June 28th, 2011 -- excuse me, your Honor -- just before you get the paper landing on your desk that starts this. They have a Trust Committee meeting --

THE COURT: Some people actually brought it in.

MR. REILLY: They have a Trust Committee meeting within Bank of New York Mellon. And, initially, when we were asking about that meeting, that was the decision day, that was when Bank of New York Mellon made the decision. And so we went down the discovery line for a while thinking, okay, that's what they're going to say. The decision, when they asked you to review their decision-making process, was just the Trust Committee. As we got into that, we were getting blocked in that Committee because a lawyer from Bank of New York Mellon presented to the Trust Committee what the -- the information about the proposed settlement and we asked what did he say and we asked what questions were asked, so that we could know what mattered. And the one thing we're most concerned about in that meeting, and in the other six areas I'm going to talk about, is was the Bank of New York Mellon trustee looking out for itself, was it putting its interest before the interest of certificate

holders. We were blocked there. We were not allowed to know what the lawyer presented or what the questions were to the lawyer based upon attorney-client privilege.

Let's go back to the six things in the self-dealing document issue.

We cite cases that suggest that the privilege is narrow. That -- the Stenovich case, in which the Court says that, in fact, the privilege is an obstacle to the truth-seeking process and so we must cautiously evaluate.

I think the privilege -- I'm sorry -- I think the privilege is something they have to prove. And I think they have to also establish that they have not waived the privilege by putting the points that we're suggesting at issue.

So, self-dealing documents.

Let's look to 52. This is -- which is something Mr. Loeser showed you this morning. And this is a document, again, that was at the end of the process. This is part of the draft, the drafting process of this document, the final proposed -- proposed final order and judgment. And this document was sent back and forth between Bank of America and the trustee and among Bank of America and the trustee and the institutional investors.

And I want to go back to -- again, what we're seeing here -- what we're seeing here is the language in

which the trustee is attempting to get a release for all of its conduct being deleted by someone at Gibbs and Bruns' office. Someone is saying "We're taking this out."

Now, before this actual release language was discussed here, that language had gone back and forth between Bank of New York Mellon and Bank of America, the trustee's counsel saying "We'd like the release language in;" Bank of America sending it back with it out; the trustee sending it back with the language in; the trustee's counsel or Bank of America sending it out.

And then, finally, the institutional investors step in here and they say to you "We can't support this. We don't see any basis in the settlement for barring claims against the trustee" -- so, again, the trustee is looking out for itself here -- "that are not based on its actions in entering into the settlement, but rather are based on its pre-settlement conduct."

Then here's the key sentence. "Separately, we think this creates a conflict for the trustee." We didn't make this up, your Honor. This is a document in the record by another certificate holder, counsel for another certificate holder, saying "You know what trustee? If you're trying to get a release here for all of your prior trustee role conduct, it's a conflict." The appearance -- that the trustee's entering -- because it creates the

appearance that the trustee is entering into the settlement, not because it thinks it benefits the trustee -- or the trust -- I'm sorry -- but, instead, because the trustee wants to obtain a release of other claims for itself. Right? That is the nub. That is what we're concerned about here, is that we do have a trustee here asking for something for itself beyond what it would be entitled to and having to be told by the certificate holders no, no, no.

Now, Mr. Mirvis, we asked him, who was representing Bank of America, if he recalled this issue and whether he, on behalf of Bank of America, took a position on whether or not the trustee should be seeking a release for himself, and here's what we have.

(Video played)

MR. REILLY: So what does this matter? It matters because the trust -- the trustee is asserting that, if it had conversations with its counsel about whether or not they were entitled to a release, whether or not they should try and get a waiver of that -- a bar of some kind against certificate holders, then that issue goes to whether or not all of the actions of the trustee in this setting should be approved by there Court.

We can't we have them, at this point, denying -- and Mr. Ingber is probably going to get up here again and say "We never got a release. We never asked for a release.

We were never concerned about our liability." Then why do you put this in? If, in fact, this Court is going to determine whether all of the actions be approved, then this particular action should be evaluated in the context of what the trustee did to determine whether or not it was entitled to a release, whether or not it should pursue a release, whether it asked its lawyers to evaluate whether it should get a release.

Now, let's go backwards in time from this -- again, this is right before the verified petition was submitted. The question of whether or not the Bank of New York Mellon had risk from being sued by certificate holders and by Ms. Patrick, from the letters that she was sending, starts back in the fall of 2010.

And as you heard today and you know, Ms. Patrick's sending letters to the master servicer and copying a trustee. And in one of the letters she says to the trustee, "You have known for a long time" -- I think her language was -- "a long time that these loans are terrible, that they're toxic; you have known for a long time that the master servicer hasn't been doing its job and you haven't done anything." And clearly adverse. And even Ms. Patrick would agree, in those days, that they were clearly adverse.

And we found that they were adverse enough that Bank of New York Mellon then went to its risk department,

it's risk group and got a risk officer in. And we took his deposition. And they did start looking at, well, is the Bank of New York Mellon at risk. Because if the Bank of New York Mellon is at risk, then, in their defense, they're certainly entitled to try and protect themselves in that process. They're certainly entitled to make sure this doesn't blow up in their face. They're not entitled to put themselves in front of the certificate holders, their beneficiaries. They are a trustee.

So we asked Mr. Chapman whether or not they were believing or thinking or worried about whether Bank of New York Mellon had any risk, early on, and this is what he said.

(Video played)

MR. REILLY: I think you didn't hear the question, "It could have been a lot of money?" And he said "It could have been."

Now, we're going to hear, from their briefs anyway, "Look, we never got the release at the end. At this particular time, it could have been a lot of money, but, you know, we don't know for sure if it ended up being a significant risk or not."

But what they cannot avoid is that this fellow here was looking at the letters that Ms. Patrick was sending.

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THE COURT: This was the risk officer?

MR. REILLY: This is the bank.

THE COURT: What's his name?

MR. REILLY: His name is Chapman, I think it's -- his name is Randy.

MR. LOESER: Doug.

MR. REILLY: Doug Chapman, C-H-A-P-M-A-N.

And so we kind of bracketed the very end of the process where they're asking for release and the early part of the process where they're saying "Let's look at our risk."

We can't tell what effect the fact that Bank of New York Mellon viewed themselves as at risk for their role as a trustee in the Countrywide loans. But if, in fact, when Mr. Chapman looked at this and said, you know, "We could have significant downside risk and, in fact, it could be a lot of money," did they ask trustee's counsel, Mayer Brown, to look into the risk? Did they evaluate what their exposure was and what effect did it have on their decision-making process from that point on until they came to the Court?

That is, again, one of the actions that the trustee engaged in. They had their risk officers looking at it.

We want to know, were there communications, was

there work done, was there research done, was there anything done that would support that they were looking out for themselves.

And, your Honor, I want to give you a sort of a soft landing here on some of this stuff because we have privilege logs from them. They are not very specific. A lot of them just say, you know, "Document created regarding settlement negotiations. Document created regarding settlement agreement." We can't tell that. But, at the end of the process -- we're going to ask, first of all, that the Court rule that there is -- there has been an at issue waiver and that any documents that relate to these six topics: Number one, their request for a release; number two, whether they had any work done to evaluate Bank of New York Mellon's risk, as we've just see from Mr. Chapman; number three, whether or not they had any legal work done and evaluations about whether there was an event of default; number four, whether or not they had any legal work done; got any legal advice about the forbearance agreement, including whether they were allowed as a trustee to enter that forbearance agreement; and then, lastly, whether or not they traded -- let me just put this category -- indemnity/notice, whether they got indemnity in order to protect themselves from liability in exchange for not giving notice to certificate holders about the process, and I'll

show you an e-mail on that.

Those are the discreet specific documents and testimony that they will not allow us to have that is part of the action that the trustee engaged in and that you you're being asked to bless at the end of this process. And we don't think you should have to bless it if, in fact, there are documents out there in which trustee's counsel was researching how to do things to the detriment of the certificate holders that I represent, that the other Steering Committee members represent, that are in this courtroom and, in fact, that are in that 75 percent that haven't said a word and don't know anything about what was going on behind closed doors.

The soft landing that I'm suggesting, your Honor, is, if you're uncomfortable with -- because it's a big step, I don't want to suggest for a moment that the at issue waiver isn't a big step -- but if these documents exist -- let's start with -- if they don't exist, they don't exist. If they do exist, then we ought to get them or a first step ought to be some type of in camera review. I know that's the last --

THE COURT: Then you're getting -- then you're hiring someone. I've been telling you all along, you've been fighting along, I'm not doing this.

MR. REILLY: I understand. And I'm not proposing

that, your Honor, because I think it's pretty clear that we should be entitled to get this.

Now, let's go to item number three, within the self-dealing category, the event of default. And we've talked about it before. Mr. Loeser did a nice job of describing the event of default and we've charted it and I had to do this for myself because it gets confusing.

There's a couple things that happen. What are the consequences of event of default and why does the trustee want to avoid an event of default, why would they want to avoid event of default?

If there's -- the first step is that there's a letter that, under step 7.01 of the pooling servicing agreement, that gives written notice to the trustee and master servicer. That letter was sent out by Ms. Patrick on October 18, 2010.

And the clock started ticking. There are 60 days to fix that event of default. There's a cure period. And, in fact, if it's cured, then the event of default is not triggered. If it isn't cured, then the event of default clicks in.

And if it clicks in, critical things happen. The world changes for the trustee and the world changes for the certificate holders. Obligations of the trustee go up, two prime ones. Once it's triggered, the trustee shall act as a

prudent person. And that means prudent person as they would treat their affairs for the purpose of the certificate holders. And I don't think anybody can really question that elevates the fiduciary duties and I think, frankly, it makes them a full-fledged fiduciary at that point. The other thing a trustee has to do in event of default is give notice of event of default to all certificate holders. This is no longer a letter from Ms. Patrick on behalf of her clients just to Bank of New York Mellon. They have to send a letter out to everyone, all thousands and thousands, in all 530 trusts or whatever trusts were triggered at that time. And the certificate holders then get rights that they don't have before the event of default. They can give the trustee a written requirement to sue. They can say, since event of default occurred, meaning, in essence, that the master servicer has violated its duties in accordance with the service agreement, you should sue the master servicer. And if the master -- if the trustee does not do anything in 60 days, they can sue if the trustee does not act in 60 days.

So it is a significant event, a significant triggering event, and that clock was ticking.

I would argue that certificate holders, like our clients and the other folks in here, benefit from that, in fact, happening because the pressure on Bank of America

rachets up. Now they have all of the trusts potentially suing them.

So what did we see?

Let's go to Exhibit 55, Mr. Kravitt. Mr. Kravitt. This is an e-mail from Mr. Kravitt to the lawyers for Bank of America and he's discussing a phone call that they had earlier in the day. And he says "Matt and I just finished a call with our client discussing our call with you." So, at some point, Bank of America, Bank of New York on. "In our just-ended discussion, we agreed that you made some very good points on the notice to certificate holders. It would help us considerably in our decision-making process to put aside such notice if, indeed, we received" -- and I emphasize "received" because -- meaning the trustee wants to get something -- "we received the very narrow liability indemnity that we discussed with you this afternoon." This is the trustee looking to get something.

So let's go to 56, I'm asking Mr. Kravitt about whether he was linking not giving notice to the certificate holders with the trustee getting some type of indemnity. And he disagrees with my language, but here's what his answer is:

I said "Is this the first time that you linked the obligation of Bank of New York Mellon to give notice to certificate holders to the request by Bank of New York of

New York Mellon to get an indemnity from Bank of America?"

And there were some objections.

And then I add "In any way, shape or form."

"ANSWER: This doesn't say that they're linked. It says they will help us in our decision. That doesn't mean it's a requirement or not a requirement. It said it would help us make our minds up.

"QUESTION: It would be a factor in Bank of New York Mellon's decision-making process, that's what you're saying, isn't it?

"ANSWER: I agree with you. It would be a factor."

So, if, in fact, we can get some indemnity, we'll consider not giving notice. And, as a result, the reality of what happened here is indemnity was given. Bank of America gave Bank of New York Mellon indemnity and no notice was given to the certificate holders.

I want to focus on the event of default one more time when we look at Exhibit 59.

And before we put that up, your Honor, as the clock was ticking, in this period right here, Mr. Kravitt testified that the event of default would have occurred, been triggered, December 18th, 2010. That's 60 days from the time that the letter came out. And there were negotiations going on in that 60-day period of time. And we

believe it's clear that the trustee wanted to avoid the event of default.

Let's look to Exhibit 59, this is taken from Mr. Kravitt's e-mail to Bank of America, in which they're negotiating what's called a forbearance agreement. They're trying to stop the clock.

THE COURT: I know what a forbearance agreement is.

MR. REILLY: Yes.

And Ms. Patrick had been disagreeing with Mr. Kravitt about the effect of forbearance agreement.

And Mr. Kravitt wrote "Oy. I put a call into Kathy and shot her an e-mail saying all I wanted to do is change extend in the first sentence to -- of item 1 to toll. The letter should" -- quote -- and my quote -- "prevent an event of default from occurring for a period of time," end quote, "not tie one group of certificate holders' hands with regard to an event of default that is claimed to be outstanding. I will keep you informed."

The trustee here is trying to stop this clock, trying to avoid moving into the world where -- I'm sorry.

THE COURT: No, I'm -- women judges have to multi-task, so I'm writing and listening.

MR. REILLY: I can't do that.

THE COURT: Well --

Proceedings

MR. REILLY: You know that already.

THE COURT: I have to.

So, go ahead. I'm listening. Go ahead.

MR. REILLY: So, trying to avoid the elevated responsibility to the trustee and the increased rights of the certificate holders.

This question, again, what was going on at that time? Did Bank of New York Mellon get legal advice about whether or not they could forebear on the event of default? Did they get legal -- there's nothing in the pooling and servicing agreement that says you can stop the event of default; you, the trustee, can agree to stop the clock. That is outside the four corners. And we believe that, when we finally get to this issue, any time they're outside the four corners, they have to act as fiduciary.

THE COURT: So is -- what is your position on the occurrence of the event of default? Do you think that it happened on --

MR. REILLY: We think it happened.

THE COURT: When?

MR. REILLY: December 18th, the 60 days after Ms. Patrick's letter came out.

THE COURT: That's the position you have.

MR. REILLY: I think -- your Honor, we believe that it's the likely position. But I think it's a question

of law and you're going to have to answer it. I think it's going to be presented --

THE COURT: First, I want to know what your answer -- that's what you think?

MR. REILLY: That's what I think.

And I think that's what Ms. Patrick fairly thought from the e-mail that she's sending. She's saying "We're not going to stop this from happening. We're willing to hold off on sending the notice to the trustee that says you have to sue." That's basically what she's saying. "I can stop on this. I won't do that. I'll tell you I won't do that. But I am not going to let you avoid getting to this side of the red."

The trustee is going to say, I believe, "No event of default occurred, we didn't want it to occur and it didn't occur."

Now, if that happened and that legal issue was sitting squarely in their laps at that time, what advice did they get? What did they say to the lawyers? "Help us establish a strategy where we can prevent this," which would be to the contrary of the interests of certificate holders, but might be to the benefit of the trustee.

Yes?

THE COURT: What did -- I'm sorry -- I mean, obviously, we're not going to get through two-and-a-half

more motions with everybody talking in the next 35 minutes and, unfortunately, this isn't federal court, I can't get one minute. I already know that.

Can you answer me -- this has been an issue that's come up all day long. So what is your position on the event of default situation? Do you think it never happened and why?

MR. INGBER: Okay. The answer is it never happened because there was a forbearance agreement that was signed and it's irrelevant whether it happened or not.

THE COURT: Well, wouldn't -- I mean, is he wrong, Mr. Reilly, is he wrong to say that, once there's an event of default, the trustee's obligations switch, become higher, like his chart over there is explaining?

MR. INGBER: Here's what happens. And this, by the way, has nothing to do with the question of whether legal advice was put at issue. But let me answer your question directly.

THE COURT: I'm interested. Humor me.

MR. INGBER: I understand, but let me answer the question directly.

THE COURT: It's been so interesting so far.

MR. INGBER: At all times, the trustee has to fulfill its obligations that are under the contract, before an event of default and after an event of default.

Proceedings

THE COURT: Do they change?

MR. INGBER: No.

What's different, okay, what's different is that, before an event of default, the trustee doesn't have to exercise any rights whatsoever. It has to fulfill its obligations, it's duties. It doesn't have to fulfill any rights. It doesn't have to exercise any of its rights before an event of default. After an event of default, it has to exercise those rights that a prudent trustee would exercise. That is the difference between before an event of default and an after an event of default.

And the reason why I said it's irrelevant is because the trustee exercised the right -- the trustee exercised the right to pursue remedies against Bank of America and Countrywide. It had nine months of negotiations, which culminated in the largest private settlement in history. It did more than any other trustee was doing at the time. So it not only acted prudently, it acted above and beyond what every trustee was doing. So the argument about whether an event of default occurred or didn't occur is -- it's a non sequitur, in a way, it's a red herring, because we fulfilled whatever obligations we had post event of default by having these discussions, by looking for a remedy that was in the best interests of the trust and having that discussion, that nine-month discussion

culminating in this settlement agreement. So this has nothing to do with -- the question of whether there's an event of default is irrelevant and it has nothing to do with the question of whether we've put legal advice at issue.

What we -- and I'd like to respond. I know we're running out of time. I'd like to respond to some of the points before we --

THE COURT: Okay. What about the second thing on his chart, the second item, where he says the event of default would also, in addition to requiring you to act as a prudent person -- and you're telling me you acted as an exceedingly prudent person --

MR. INGBER: Yes.

THE COURT: -- whether it occurred or not. But what about the obligation to give notice of the event of default to all the certificate holders, not just Ms. Patrick's clients, but their clients and everybody else?

MR. INGBER: If there is, in fact, an event of default -- and let's be clear about what was going on at the time. Ms. Patrick issued what's called a notice, a notice of nonperformance.

THE COURT: Okay.

MR. INGBER: That was not a notice of an event of default, it was a notice of nonperformance. And it purported to trigger a 60-day cure period.

Proceedings

THE COURT: Okay, I got that.

MR. INGBER: The trustee got that letter from Ms. Patrick.

THE COURT: Right.

MR. INGBER: The trustee then got a letter from Bank of America and Countrywide's counsel saying "This doesn't trigger anything. These are allegations of breaches by the master servicer. We are disputing whether this triggers any cure period whatsoever."

Okay. At that point, the parties sat down --

THE COURT: Isn't there something in the -- in the PSA that says this is the document that starts the 60 days or not? Does it say a notice of nonperformance --

MR. INGBER: Yes, but it says --

THE COURT: She wasn't obligated to prove the whole --

MR. INGBER: What it says is, if there is a breach by the master servicer, and the trustee receives notice from certificate holders representing 25 percent of the trust, and other conditions are satisfied, then a cure period could be -- would be triggered. Okay?

THE COURT: Okay.

MR. INGBER: So the question is, was there a breach by the master servicer? The certificate holders said yes. Bank of America and Countrywide said no. The trustee

said to both of them "We're not getting in the middle of this." Everyone is starting a constructive dialogue. And all of the parties agreed that it would be disruptive if we didn't have a forbearance agreement in place.

And let me play some testimony on this.

THE COURT: You know what -- let me let him finish, because he was in the middle of his presentation.

MR. INGBER: Sure.

THE COURT: I know I interrupted, because I need to know that when I need --

MR. INGBER: Sure.

My only request is that I get a little bit of time. I know the Court closes at 4:30.

THE COURT: I have to -- it's not something we want to do, but we have no choice.

MR. INGBER: I completely understand.

I just ask that you and Mr. Reilly give me some time to respond to these arguments.

THE COURT: We'll have to see what we're going to do about discussing the rest of it, because -- don't tell me to take it on submission on decide it some day. We're going to have to figure something out. I really got to tell you, when I talked to you a couple months ago, I had no idea you were going to bring five massive orders to show cause.

And, in any event, why don't you continue, but be

aware that it's 4 o'clock.

MR. REILLY: Okay. What time do you want to stop? Are we stopping at 4:30?

THE COURT: I don't have a choice.

MR. REILLY: What time do we have to stop?

THE COURT: I have an obligation to have the courtroom locked up at 4:30 because that's the rules. There's no money in the system. Read the Law Journal. We have no money. We have nothing. We can't do anything. I can't get permission for anything, so I can't even try. I might -- the Administrative Judge was here. She saw all you people in the courtroom she said "Don't call me at 4:30." That's not what she said, but I know that's what --

MR. REILLY: We understand.

THE COURT: I want to give him a few minutes, so can you sort of wrap it up? I know that's half of this motion. If somebody wants to take a couple minutes, shorten their argument, let him respond, and we'll see what we're going to do here because --

MR. REILLY: Let me stay here for a second, because these provisions are clear.

There isn't any dispute about what the language says, so section 8.01 --

THE COURT: Okay, the PSA.

MR. REILLY: -- shall act as a prudent person.

I'm reading 8.01. It's called Duties Of Trustee. It's the second sentence in the first paragraph. "In case an event of default has occurred and remains uncured, the trustee shall exercise such of the rights and powers vested in it by this agreement and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs."

THE COURT: Okay.

MR. REILLY: We couldn't disagree more that this is irrelevant. All right? We couldn't -- I actually think --

THE COURT: I kind of got that.

MR. REILLY: It's shocking to me that they disagree that the prudent person standard clicks in if an event of default occurs.

But the point here is, as it relates to the issue, were they seeking legal advice about the issue? Were they taking actions that are, in all respects, what they're asking you to bless, to find out could they avoid an event of default or not? Has one been triggered or not? Can we forebear on it or not? Is it -- do we have a conflict by protecting our interests to prevent an event of default or not?

If that stuff is out there, then this Court

shouldn't have to go forward and believe it didn't happen and believe that the only thing that's in front of you is the verified petition and their, frankly, self-serving testimony that we did a great job, but we're not going to let you know that the trustee asked for advice from his lawyers to find out whether it could avoid this particular exposure.

So the event of default is the next issue. We've covered the notice in indemnity issue, meaning where they got indemnity --

THE COURT: I got it.

MR. REILLY: Okay.

-- and didn't give notice.

Oh, so, in describing what would happen if we got to this side, because I asked Mr. Kravitt, the lawyer for the Bank of New York Mellon, what's going to happen in the event a default gets triggered, well, in essence, I think he agreed with me and disagreed with what Mr. Ingber just said, but we'll submit something to show that. But what he really said is "You know what? If we get to this side, it's going to get real messy, because there's going to be the potential for interference by other parties." Right? The parties he's talking about are the other certificate holders, who could have gotten notice, who could have sued. It's going to get real messy, because his beneficiary will have rights

that might allow them to stir this pot up and could result in it coming back against the trustee.

Now, let's show Mr. Kravitt's testimony, 59.

It ran out of the loop.

I believe what he said, "When other parties interfere, if an event occurred -- if an event happened."

So that's what he believed he should try and do, which was to avoid getting to this side of the red line.

I'm going to wrap up so Mr. Ingber has time.

THE COURT: Give him a second.

MR. INGBER: I'm bouncing out of my chair.

THE COURT: I see.

MR. REILLY: We have the second half. You want Mr. Ingber to go first on this?

MR. LOESER: I'll be very brief.

MR. INGBER: Can I respond and then --

THE COURT: Yes.

MR. INGBER: -- Mr. Loeser can go, if necessary?

And my response is really going to --

THE COURT: Finish up. Don't tell me how, just finish up.

Mr. Reilly.

MR. REILLY: Bottom line is, your Honor, that, as we look at the cases, all the cases they cite are cases in which the Court is being asked two things: Was the

settlement reasonable? Did they act in good faith in this case?

THE COURT: I got it.

MR. REILLY: You got that.

THE COURT: I remember that.

MR. REILLY: So we believe there is much more than that.

THE COURT: Okay, yes, can you briefly respond to what you think are the most important --

MR. INGBER: Yes.

THE COURT: I'll try to get to your point.

MR. LOESER: Let me just say what hasn't happened. I'm not going to argue.

THE COURT: What hasn't happened?

MR. LOESER: Yeah. Half of the motion has been presented --

THE COURT: I'm aware of that.

MR. LOESER: I'll say whatever I have to say.

THE COURT: Let him deal with it.

I'm not going to get to the other two, and I may not finish this.

MR. INGBER: This is --

THE COURT: I'll do what I can do.

MR. INGBER: There is so much to respond to.

THE COURT: Sure.

Proceedings

MR. INGBER: Let me offer one reason why we win on the at issue point and one reason why we win on fiduciary exception point.

And there's related -- there's a lot of overlap, I think, between Mr. Reilly's argument and what we're going to hear from Mr. Loeser.

On at issue, we've never said that the trustee entered into the settlement because counsel recommended it. Consultation with counsel, which is a good and necessary thing, and is, in and of itself, evidence of good faith, doesn't put the content of the legal advice at issue. No witness and no pleading has put the content of the legal advice affirmatively at issue. That's point one.

Point two. With respect to the fiduciary exception, there's a lot of hoops they need to jump through. You've heard this argument before. They need to establish they have the bona fides. They need to establish that they have the holdings. This is where -- in response to the New York Attorney General's point -- this is where holdings is relevant. If they don't have substantial holdings, they're not entitled to relief under the fiduciary exception case law. They have to jump through the hoop of showing that it's the only evidence available, privileged communications are the is the only evidence available.

But there's one factor that really stands out,

your Honor, and that is they need to show conflict, and that's why they're focusing so much attention on the conflict issue. They need to show conflict.

But what the cases say about conflict is that the conflict has to be apparent, it has to be obvious on the face of the transaction.

So what's the transaction here? It's the settlement agreement. What is the benefit to the trustee of having entered into the settlement agreement? There is no benefit, financial or otherwise.

We've seen a lot of documents, we've seen a lot of testimony. What document haven't we seen in these presentations? We haven't seen a settlement agreement. We haven't seen a provision, words in the settlement agreement that show that the trustee was getting a benefit, was getting out of this -- was getting something out of this.

So how far have we veered off course when we're arguing about motives behind decisions that have nothing to do with the settlement agreement that the trustee was contractually entitled to make and that caused no harm to certificate holders?

Their conflict theories keep changing. Some of it sounds familiar, but they've changed. From AIG's initial motion to intervene to the first time they argued this motion to the second, the third and now the fourth, the

conflict theories keep changing. But they're theories. They are theories, they are not fact. It is speculation built upon speculation built upon speculation.

Now, I'd like to go right to -- there's a lot, like I said, I could say. I'm going to go right to the conflict. These theories of self-dealing and this point that Mr. Reilly made that they can't establish -- I'll use their diagram -- they can't establish or they can't refute these findings about a factual investigation and a legal investigation and an evaluation of the underlying claim, because they focused on the Trust Committee meeting and how everything at the Trust Committee was privileged because Mr. Bailey, the in-house lawyer at Bank of New York, presented information about the settlement to the Trust Committee members.

Remember, they need to show that privileged communications is the only evidence available.

And what I'd like to show your Honor is a clip from him the chair of the Trust Committee. And he gave testimony about the rationale for entering into the settlement. In September, October, November and December there were about 22 depositions. They never once asked the most obvious question of bank employees, "Why did you enter into the settlement? Why? What was the rationale?" Well, they finally did it in January at Mr. Stanley's deposition.

Proceedings

And before we play that clip -- excuse me -- I just want to -- I want to explain to the Court how narrowly tailored our privilege instruction was.

There is the suggestion that they're not getting all of this information because we're shutting everything down. And that's just not the case.

So let me quote myself at this deposition of Rick Stanley. Okay. This is what I said to Mr. Stanley right after the question "What was the rationale?"

"If you have an understanding of what rationale you applied, you could testify about that. If you understand facts about the settlement agreement and the processes that led to the settlement communicated by Bob Bailey" -- the in-house counsel -- "or anyone else at the meeting, you can testify about that."

We're going to draw a distinction between legal advice that Bob Bailey may have been giving and factual information that he would have given to Mr. Stanley and others which allowed them to ultimately make a decision.

Okay. And if that weren't clear enough --

THE COURT: But what -- Mr. Bailey was in-house counsel?

MR. INGBER: He was in-house counsel.

THE COURT: So what kind of factual information was he giving that wasn't legal?

MR. INGBER: Describing the process. Describing the process that led to the settlement. Describing the fact that they got experts. Describing factually what the experts opined on.

So, again, I made -- if the first instruction wasn't clear enough, I said, "My instruction is to testify about everything but what you interpreted as specific legal advice by Mr. Bailey. What Ms. Lundberg may have said, what your rationale was, what your understanding of the facts were, what led you to conclude that you would vote in favor of the settlement. All of that, from our perspective, is appropriate."

And here's what he said.

Do you have the clip?

(Video played)

MR. INGBER: You can check every box right here. It is not impossible to make these findings. It is not impossible to demonstrate good faith and reasonableness with that testimony.

And that is just one clip and it's their deposition. You haven't had the benefit of our direct examinations.

Now, can we bring up slide 5, please, on the conflict point.

I'm just going to hit the forbearance agreement.

There's other issues that they identify. I know we're short on time. But what's critically important here is to make the point that the allegations of conflict that they're making are not even remotely akin to the allegations that we've seen in the cases that they cite; cases in which trustees or others have been found to be conflicted involve profit to the trustee at the expense of the beneficiaries, actual money going into the pocket of the trustee.

So, in Milea, the trustees were all beneficiaries.

In Birnbaum, the trustee lied about a debt that was owing to him from the beneficiaries and he paid himself off with trust assets.

The trustee in the City Bank Farmers case, the trustee invested trust funds in the trust company's own stock.

And I'll skip down to AMBAC. That was then Justice Behr. The trustee was alleged to have misappropriated funds. That was a fiduciary exception case. And then Justice Behr said "I don't find good cause." The trustee was alleged to have misappropriated trust funds and there still wasn't a finding of good cause.

Now on the forbearance agreement -- if we can bring up 02, please -- they have the forbearance agreement itself. They have testimonies from all the parties about the purpose of the forbearance agreement, why the parties

entered into the forbearance agreement. They have documents showing these discussions. They showed them to you today.

THE COURT: What was the date of the forbearance agreement?

MR. INGBER: It was --

MS. PATRICK: December 18th.

MR. INGBER: Was it December 18th?

THE COURT: It was December 18th.

MR. INGBER: December of 2010.

Here we go. Thank you. December 9, 2010 -- and let me make one point while we have it up.

Look at paragraph 1, the first line of it. To the extent that Ms. Patrick's letter commenced any time period, B of A and Countrywide were disputing it. The fact is, if we got to that 60-day period, most likely the trustee -- and I'm speaking not on behalf of the Bank of New York in particular -- but what I'm saying is what trustees typically do under these circumstances -- if there's a question about whether there's an event of default, they file an Article 77 proceeding and they come to court for guidance.

So that's most likely what would have happened if there wasn't this forbearance agreement. But they have the documents. They've made the argument that they think there was a conflict. They're making the argument for us that privileged communications are not essential to make whatever

crazy conflict point they want to make.

But let's see what Mr. Kravitt said.

THE COURT: And then that's all I can see.

I'm sorry.

MR. INGBER: Okay.

THE COURT: Write a letter to the Chief Judge and the Chief Administrative Judge.

But I can't do this.

MR. INGBER: Okay.

THE COURT: And you've got to get out of here and I guess your people are going to have to come back tomorrow. You cannot clean up this courtroom today. I know there's all this electronic stuff. Take it in your hands -- you cannot rip this place up. You can come back tomorrow. I honestly --

MR. INGBER: I understand.

THE COURT: Just tell me what the guy said.

MR. INGBER: The lead-in to this testimony is that Mr. Reilly has said that, if the other certificate holders knew there was an event of default, they could have sued. That's wrong.

10.08 of the PSA -- I'm not going to show it now because we're out of time --

THE COURT: I kind of think I wrote a decision on this, too.

MR. INGBER: You did.

They need to issue a notice for themselves. The only one who can sue, if the trustee does not sue, is the party giving notice of nonperformance. That is Ms. Patrick and her client. And they decided they didn't want to pursue it.

So there is no cost to the certificate holders of having entered into -- the trustee having entered into this forbearance agreement.

And after this clip, which is short, I will sit down, your Honor.

Thank you.

(Video played)

THE COURT: Okay. This is what we're going to do.

You'll have to give me a call, either by conference call or something, tomorrow or Monday to see when what we're going to do. I know you're busy getting your expert reports and doing all that. And I have a terrible schedule. So we'll have to see what we're going to do about the rest of this thing.

At the end of the first motion, Mr. Gonzalez made a suggestion "Look, we'll give you some of these things," and that's what we'll do.

I beg of you, to try and see if you can't do something on all these issues.

You tell me how easy these are. Do you have any concept of the number of things you're asking me to sign and the number of issues that you raised, talking all day long, and you didn't even get through three of the five motions? I mean, there's a lot of things. And although I know you're 150,000 percent, each of you, immersed in all this, I'm immersed in it today, too, but tomorrow I got 15 other things to do. And that's how it is here. So it is really difficult. I try to do whatever I can on the record, but you guys have raised so many things here, I don't know when exactly we're going to get to all this -- and I don't want to hold up the dates that we spent an hour, unfortunately, discussing before we got to the merits of the first of the five motions.

So I don't know if there's a way you can take a more practical approach, if there's some things you can give and some things you can live without.

I don't know when you're going to do all this. And all these documents and in camera inspections and continued depositions, I don't know how you're going to do all this stuff.

So it's -- I mean, I've listened, I've taken notes, we've read these papers. But I don't have any great answers on this.

So the tech people have to come back tomorrow.

Proceedings

I imagine those of you -- there's a lot of you from out of town who are going to try to fly home before the first snowstorm of the season comes sometime after midnight. I hope you get there. You can't come back tomorrow.

But I don't know what to suggest.

MR. INGBER: We'll try for a Monday call, your Honor, and we'll see what the Court's schedule looks like.

And we'll certainly take the Court's guidance and think about working around some of these issues. For us, obviously, privilege is a pretty -- it's an important issue for us, so -- but we will certainly take the Court's advice.

THE COURT: I'm sorry, there was no way to get through any more here today.

MR. INGBER: We understand.

THE COURT: I guess I gave everybody a lot of time to speak, but there was just too much. I'm sorry.

Okay. Get home safely.

I guess we'll talk to you some time on Monday. Call my chambers and see what you can work out.

(Proceedings adjourned)

Certified to be a true and accurate transcript of the foregoing proceedings

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Anne Marie Scribano

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