

In The Matter Of:
Bank of New York Mellon v.

Oral Argument
April 12, 2013

Supreme Court State of New York - Civil Term
60 Centre Street, Room 420
New York, New York 10007
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL TERM : PART 39

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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),

Petitioner(s).	Index No.
	651786/2011

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

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60 Centre Street
 New York, New York 10007
 April 12, 2013

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 Shameeka Harris, CSR, RMR, RPR- Senior Court Reporter

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(Appearances cont'd on next page)

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Senior Court Reporter

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2 THE COURT: Okay. Good morning, everybody. So on
3 the record. I am sorry I don't have a nice day for you in
4 New York, but I can't control that. Thanks to Ms. Rodriguez
5 for being so organized. We did send you out an e-mail
6 trying to give some time limitations so that, maybe, we can
7 get through everything.

8 Now, in the interim, obviously, you did withdraw
9 one of the motions which was supposed to be for this
10 afternoon and we thought we could fill in with that although
11 it is not taking 45 minutes, maybe, it will take ten. I got
12 that other order to show cause that I signed. I said don't
13 give me any papers. We will deal with it when you come in.
14 So we will be a little flexible because we are about
15 15 minutes late. But who is going to argue now, which is a
16 continuation of the argument on motion sequence 31?

17 Since I assume you all have transcripts, we do not
18 have to repeat what you said the last time because that's
19 the whole point of getting the transcript. We have that?

20 MR. REILLY: Yes, your Honor. Dan Reilly. Good
21 morning. We will split this session with Mr. Loeser, and I
22 will take, hopefully, about five minutes to just finish up
23 the at issue argument and then Mr. Loeser will argue the
24 fiduciary exception argument.

25 THE COURT: Okay.

26 MR. REILLY: And I just wanted to remind the Court

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that this motion is joined by the New York Attorney General's Office and the Delaware Attorney General's Office.

MR. WEINBERG: Yes, Amir Weinberg from the New York Attorney General's Office speaking on behalf of our office and the Delaware Attorney General's Office. We reiterate our support for a motion to compel.

THE COURT: Okay. Thank you.

MR. REILLY: Thank you. Your Honor, I'll start again with the at issue motion and this is -- this really is a motion that has two sides of the same coin. The coin side that I am on is dealing with the interactions between the trustee and its counsel that may have involved getting legal advice, exchanging communications that was contrary to the interest of specific beneficiaries, my client. And Mr. Loeser will deal with the fiduciary exception which will be communications between the trustee and its counsel that would have been in support of and furthering the interest of the beneficiaries.

So I'm on the side of was the trustee actually getting advice, was the trustee seeking to take positions that were contrary to the beneficiaries that were, in fact, to support the trustee's interest, to minimize the risk of the trustee being sued, and in that context sits within the broader picture of whether or not the trustee was acting in a conflict between its own interest to minimize its

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liability for its role in settlement versus promoting the interest of the beneficiaries.

And one of the things that has become apparent, as the expert witness support started rolling in, and by now I think all of the expert witness reports have been submitted, I think it's about 15 expert witness reports, every one of them is a lengthy, detailed and a heavily dependent document.

But as you look through those documents, you see that the question of whether or not the trustee was acting in a conflicted position has germinated to the top. And the question of whether the trustee was acting in a self-dealing position has germinated to the top. And what looked to be very important before the trustee's experts were submitted and before the intervenor experts were submitted, has now become a critical issue in the case.

And as we looked at in this courtroom, we have narrowed our focus on the subject matters that we wanted to pursue as it related to the at issue waiver. And today I am just going to address two of them.

One is as examples of what we're worried about could have been going on, and that's the preventive default situation and the request by the trustee for additional indemnity during the process of communications between the trustee and these two initial investors of Bank of America.

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2 How does an issue become at issue? It becomes at
3 issue by somebody putting it at issue. And when we looked
4 at the proposed findings, I submitted to the Court, again,
5 they are asking for the broad approval of their conduct in
6 all respects and they have basically asserted that
7 everything they did in this process was acceptable, met
8 their obligations, and you, ultimately, would have to
9 decide, when you look at the decision, what they did, and I
10 have the method to evaluate that.

11 We don't think they can, on one hand, as they are
12 doing through their experts now. The trustee did a great
13 job, in part because they relied on counsel, in part because
14 they conducted a legal investigation of the underlying
15 claims, in part because they evaluated the strength and
16 weaknesses of the underlying claims. And so we went into
17 discovery saying, okay, what legal investigation did you do.
18 And we heard when they rounded, what did they do, they can't
19 answer that.

20 What fashion of the investigation did you do.
21 Well, they rounded that. What did they do? You can't
22 answer that. Did you evaluate the strength and weaknesses
23 of the case, won't answer that. And Mr. Loeser will show a
24 number of times where we were blocked on focusing on the
25 issues that they are saying we did a great job. We got
26 counsel involved. We got outside consultants involved. But

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2 when we asked what did you do, what legal investigation did
3 you do, we get blocked.

4 So this is a classic situation of sword and shield.
5 We didn't put these issues in before the court. We didn't
6 come in here at the beginning saying, the question, whether
7 the trustee did a good job or a bad job and an order before
8 the Court. They did that in their original verified
9 petition. They did that in their proposed findings that
10 they are asking this Court to find.

11 And I think the case law is clear that when the
12 party affirmatively puts information in that they will use
13 to establish their position, that even in an attorney-client
14 setting that the other side is entitled to know what
15 happened there.

16 THE COURT: Well, in terms of that issue, I thought
17 the case said if a particular communication is used by the
18 other side and then it's put in issue, at issue, then you
19 can get that communication. I mean that I don't think it's
20 an overriding like, okay, this is an issue, anything about
21 that issue goes in under that exception. That's not how I
22 understand an exception, pursuant to the case law that I've
23 read.

24 MR. REILLY: Yes, and we're not suggesting that
25 there is a broad waiver of every single communication. But
26 when we talk about, for example, the preventive default

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2 situation, what happened was Mr. Patrick sent a letter out
3 that basically triggered the preventive default clock, tic,
4 tic, tic, 60 days. In the second of the day on that clock,
5 they got up to almost 60 days. In that process, the
6 question that we're asking is were there communications
7 about whether or not the trustee could forebear on the
8 preventive default clock because they stopped the clock, and
9 there is a question about that. That was negotiated. That
10 was agreed to.

11 And as we said before, if the clock ran and the
12 preventive default continued, then the certificate holder's
13 rights go up. If the next 60 days run, they have a right to
14 sue, and the trustee's duty goes up to a prudent person
15 standard, to a quasi fiduciary standard. So at that point,
16 they are in a conflict. Are we willing to let the clock run
17 and have our interest or duties increase and have the
18 certificate holder's right to sue increase or not?

19 And one nuance here is when we asked what were
20 their conversations about, we got blocked there. The
21 question of did this stuff happen, did these communications
22 occur at all around the preventive default. Let me just
23 step to the second issue, the indemnity.

24 The trustee asked for additional indemnity in
25 exchange for not giving notice to the certificate holders.
26 We can argue about that. They are going to say that didn't

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2 happen. We got an e-mail where Mr. Kravitz, said it will
3 really help us in deciding whether to give notices to
4 certificate holders if you give us an indemnity. That was
5 clearly what was going on.

6 So in those communications, were there
7 communications in which they had conducted a legal analysis
8 about the duties of the trustee in their ability to forebear
9 on the clock or to request additional indemnity when, in
10 fact, they're supposed to be only acting for the interest of
11 Mr. Coltz. So those communications, the facts of them, is
12 not privileged to begin with.

13 If, in fact, the trustee said look into Mayer
14 Brown, whether or not we can forebear, look into whether our
15 duties changed if preventive default was triggered. Look
16 into whether or not additional indemnity can be reflected or
17 obtained if we do not actually issue certificate holder
18 notice, and those conversations, we have never been told
19 they didn't happen.

20 The easiest thing that would put this whole thing
21 away would be if Mr. Kravitz, in his deposition, when we
22 asked did you have any conversation like that, he had said
23 no, or if we got a sworn statement from someone from Mayer
24 Brown with knowledge saying, you know what, this is a huge
25 waste of time, we never did any work on whether or not we
26 could stop the preventive default clock. We never did any

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2 work on anything that was contrary to the interest of the
3 certificate holders. We never did anything that would in
4 any way suggest that we were putting our interest first.

5 So the first step is the facts of those
6 communications at a minimal are not privileged. Why can't
7 we know whether or not those communications happened between
8 the trustee and against the interest of the certificate
9 holders.

10 Secondly, not every conversation is a waiver, but
11 any conversation about whether or not preventive default, it
12 was just a critical issue in this case, ultimately going to
13 have to be decided was preventive default triggered or not,
14 whether that occurred, whether there were conversations
15 about indemnity, which they clearly have in December, and
16 indemnity written by Bank of America and signed off by the
17 parties that says that you will be indemnified for this
18 conduct.

19 And the third issue then becomes focusing on the
20 settlement amount which is, from the perspective of the
21 intervenors at this point, why is the number so low. What
22 is it that was communicated regarding what would be a
23 reasonable range for settlement. Those issues are part and
24 parcel to the fundamental question of whether or not they
25 have put their communications at issue and whether or not
26 there should be, as the Court points out, limited findings

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2 that communications about the preventive default, about the
3 indemnity, about the settlement amount ought to be provided.

4 I will turn over to Mr. Loeser the other side of
5 the coin, which is whether or not there had been legal
6 advice for the benefit of the beneficiaries pursuant to the
7 fiduciary exception.

8 THE COURT: Okay. His five minutes was really 15.

9 MR. LOESER: My name is Derek Loeser. We had
10 multiple hearings before this Court and your Honor has
11 mentioned several times a variety of ways in which we are in
12 chartered waters and searching for some guide post. With the
13 fiduciary exception motion, we are not in chartered waters.
14 It's a well established exception. There is a New York case
15 law. There is a Southern District New York case law. There
16 is a lot for the court to look at to see how the exception
17 works and what's required.

18 What I find somewhat remarkable is in all of the
19 hearings we have had and all of the pleadings that we have
20 seen, the position of the trustee has been exactly the
21 opposite of the law. The position of the trustee has taken,
22 and even testified to this, what the trustee lawyer has
23 said, if I gave legal advice to my client about its duties
24 I'm not producing that information.

25 That is what Mr. Kravitz actually testified, and
26 that's exactly the information that the trustees haven't

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2 produced. What is remarkable about this is all of the trust
3 litigations that, frankly, I have done, there is always a
4 body of communications that falls into that description, the
5 trustee gets legal advice, that information is produced, and
6 so what's unusual here is the information that has not been
7 produced. So Mr. Ingber talked about how they can
8 compromise on many things, but they absolutely won't
9 compromise on the fiduciary duty documents because that's
10 attorney/client privilege.

11 I'm sorry. That's exactly what the case law says
12 they have to compromise on because the case law provides
13 that information. When a trustee gets legal advice about
14 its duties to trust, that is discoverable and that's what
15 the fiduciary duty exception provides.

16 Your Honor, the last time we had this argument
17 where we stood was the Court indicated there was some
18 fiduciary duties and for that reason the fiduciary exception
19 could apply, and your Honor was concerned that the good
20 cause component had not been met by the steering committee
21 and, essentially, we were instructed go to your discovery,
22 if you can come back with good cause, do so.

23 Now we're back with the results of that discovery
24 and we'll go through that quickly today. But one thing I
25 just wanted to clarify and that is the -- even the good
26 cause requirement is debatable in that there is New York

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2 case law, some cases say you have a good cause requirement,
3 other cases say you don't have a requirement, and the reason
4 is if you look at the cases and you try to figure out
5 where -- what really is the standard, there's a fundamental
6 principle that's at heart. And when we look at the cases
7 that say there are no good cause requirements, essentially,
8 what they say is, look, when a trustee goes and gets legal
9 advice for the benefit of the trust, the real client in
10 interest is the beneficiary so that legal advice is really
11 for their benefit.

12 And so the question is was it purportedly for their
13 benefit. If that is the case, then many cases say that's
14 the end of the inquiry. The information is produced. But
15 if you look at the cases that talk about a good cause
16 requirement, I think it is important to understand it,
17 again, in context of the fundamental issue, which is where
18 the norm is disclosure. If you have a trust paying legal
19 advice for the benefit of the fiduciary, the norm is that
20 the beneficiaries are entitled to that information.

21 So the good cause requirement interpreted in the
22 context is really the thumb being on the side of the scale
23 for disclosure. And so as we go through the good cause
24 requirement, how we've met, I think it is important to think
25 about it's really a low bar and that low bar is consistent
26 with the fundamental nature of the relationship between the

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2 trustee and its beneficiaries.

3 So as we have discussed and briefed a number of
4 times, in New York, when the good cause test is applied,
5 there are five factors that are considered. And despite how
6 it's been characterized sometimes in the trustee's briefs,
7 it's not a, you know, iron clad, you have to satisfy each
8 one of these elements. It's a technical test. The court
9 evaluates the elements and holds it up and decides where do
10 we come out on this. And in these proceedings, the trustee
11 really has challenged three of the five. So I'll talk
12 briefly about those.

13 But the first factor that's challenged is whether
14 the information is relevant and whether it is the only
15 evidence or the sole source of evidence on whether the
16 fiduciary actions were in furtherance of the beneficiary's
17 interest. And most of the case law, including here in the
18 Southern District of New York in the Ahmed Intern case,
19 indicates that that factor, whether the information was
20 relevant and whether it's the sole source of information
21 about whether the fiduciary -- whether the trustee acted in
22 a beneficiary interest. That is the single most important
23 factor and it's important to note the trustee does not say
24 one word about relevance. There is no challenge to the
25 relevance of the legal advice that the trustee got regarding
26 its duties.

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2 Instead, what we've heard is that the fiduciary
3 communications is the legal advice and not the sole source
4 of information about whether the trustee acted in the
5 beneficiary's interest. But, specifically, what the trustee
6 has said is, look, there's other information about the
7 settlement in general. You want to know about the
8 settlement, read the settlement. You want to know about
9 what the trustee did, read the verified petition.

10 I think it's important to take a step back and look
11 at what the other element is. The question is not is there
12 other information about the settlement. The question is is
13 there other information about whether the trustee acted in
14 furtherance of the beneficiary's interest. That's an
15 important distinction. What happened here in all of this
16 discovery that's gone on is we asked the trustee what did
17 you do and why and what we were told was, sorry, that's
18 privileged.

19 So then we asked the trustee's lawyers, you know,
20 what did you do and why and the answer we got was that's
21 privileged. Essentially, what the trustee said is what it
22 did and why and, specifically, in response to the question
23 were you acting in furtherance of the beneficiary's
24 interest, the answer was that's privileged. So what that
25 answer shows you, since there is nowhere else to turn to get
26 the answer to the question were you acting in furtherance of

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2 the beneficiary's interest, the answer provided was that's
3 privileged.

4 So what that tells you, your Honor, is that the
5 source of the information, the sole source of the
6 information of whether they were acting in furtherance of
7 the beneficiary's interest, is in the communications that
8 that have been ripped off because we asked all of the
9 questions and we heard the same answer every time.

10 I think it -- really, to get to see how this works,
11 it's worth looking at some of the deposition clips, so if we
12 can start with L1. This is Miss Lindberg, deposition of
13 Miss Lindberg who was the managing director of Bank of New
14 York of Mellon. Again, this is the -- when we went to the
15 trustee's spokesperson, the spokesperson said, here we have
16 some issues, we want to know about certain actions, whether
17 they were beneficiaries or not. To speed things along, we
18 put a few clips together.

19 (Video file played in open court.)

20 (Video file concludes.)

21 MR. INGBER: Sorry. The problem is Mr. Loeser put
22 a series of clips together and they gave me a page and a
23 line number for the first clip but not for the others and
24 there is -- in particular, with respect to the first clip, I
25 have testimony that will put that into context that will
26 show why the instruction was given and that the answer that

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2 they are looking for was actually provided by Miss Lindberg.
3 I could do that in my argument. I think it makes more sense
4 to do it now, but I can't know what the page number is, what
5 the line number is, when they have compilation of clips.

6 THE COURT: Do you have a list for them that you
7 can give him?

8 MR. LOESER: We can give him a list, your Honor. I
9 understand it's hard to watch some of this testimony for
10 Mr. Ingber.

11 THE COURT: Well, the thing is, he wants to be able
12 to address it now, you know, as soon as he gets up. So it's
13 like if you give it to him tomorrow I don't think that will
14 work. So, I mean, I need him -- somebody should -- there is
15 all of these people. Somebody will write it out.

16 MR. LOESER: We will.

17 MR. INGBER: I don't want to interrupt the
18 argument. My concern is that I want to see the testimony
19 now. I want to hear the testimony now. And I have marked
20 counter designations, for a lack of a better word, so that I
21 could explain how they are taking this out of context and
22 how the questions that they asked were actually answered.

23 THE COURT: I am asking you to give him a list now
24 before you show all of these clips of what you are going to
25 be showing.

26 MR. LOESER: Your Honor, we gave Mr. Ingber a list

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2 of all of the portions of the transcripts that we are going
3 to be showing today in advance of this hearing.

4 MR. INGBER: That's exactly right. That's why I
5 have a response when they put up a truncated clip of
6 Miss Lindberg. I have a response to that to put it into
7 context. I don't know what this compilation of clips is.

8 THE COURT: He said he gave you the list.

9 MR. INGBER: He didn't give me a list of what the
10 compilation is. He said we may use all of the following.
11 So we looked at all of the testimony that they were planning
12 to use or may potentially use at today's conference. For
13 each one of those clips we have a counter clip, if
14 necessary, if we think we need to put it in context. What
15 he didn't say was I am going to put together a compilation
16 of the clips and that compilation will include X, Y and Z so
17 it's very hard for me to know in the second segment when I
18 have only been given a page number and a line number to the
19 first where my counter designation is.

20 MR. LOESER: Your Honor, that's ridiculous. We
21 gave him a list.

22 THE COURT: I am asking you to tell him what you
23 are going to show. Since you just did it, I don't see what
24 the problem was.

25 MR. LOESER: We did it before as well. I
26 understand. Now, we have done it again. What is not there

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2 is not showing you on the page where it is. Now, he has
3 exactly what he needs.

4 THE COURT: Okay. Good.

5 (Video file played in open court.)

6 (Video file concludes.)

7 MR. LOESER: So, your Honor, this is just by way of
8 example. Here is the trustee. We have these particular
9 questions that go to the heart of whether the trustee was
10 acting in furtherance of the beneficiary's interests. We
11 asked were there communications with counsel for the benefit
12 of certificate holders. Can't answer, privileged. We asked
13 did Bank of New York Mellon have an obligation to give
14 notice to certificate holders. Can't answer, privileged.
15 We asked why did Bank of New York Mellon agree to the
16 forbearance agreement, can't answer, privileged. That's the
17 trustee, your Honor.

18 Having been told we can't answer, privileged, it's
19 all from the lawyers. We then have Mr. Bailey's deposition.
20 Mr. Bailey is in-house counsel for Bank of New York Mellon.

21 (Video file played in open court.)

22 (Video file concludes.)

23 MR. LOESER: So, your Honor, we have gone from the
24 trustee to the trustee's in-house counsel to get an answer
25 to these vague questions about whether the trustee, when it
26 engaged in these specific acts that are at issue here, was

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2 it acting for the benefit of certificate holders, was it
3 acting for the benefit of itself. What we got from in-house
4 counsel was that's privileged, I am not going to answer.

5 Next, your Honor, we have Mr. Kravitz who is from
6 Mayer Brown, Bank of New York Mellon outside counsel. We
7 are searching around, your Honor, for somebody who could
8 answer the question were you're acting for your own interest
9 or were you acting in the interest of the beneficiary.

10 THE COURT: Nobody answered that because there were
11 objections. I am going to stop you at some point. I
12 promise that's how he is going to do it. I don't know if
13 this is really that helpful. I mean, you explained nobody
14 answered those questions because there were objections.

15 MR. LOESER: With the Court's permission, there is
16 a couple of more clips and we can kind of shorten it. But
17 the point of the clips is really, your Honor, under the case
18 law, the most important factor, the sole source of
19 information. So I think it's really important to see if we
20 have seen enough. We've seen enough. That whenever we
21 asked a trustee why it did what it did, what we got was we
22 can't give you that answer because it's privilege.

23 THE COURT: I understand.

24 MR. LOESER: So the objections themselves
25 demonstrate that we satisfied the most important element of
26 the test. The most important element again is there is

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2 another place you can get this information. We asked
3 everybody. I am happy to play this. It sounds like your
4 Honor has seen enough.

5 THE COURT: I got the point. You asked all of
6 these different people, nobody answered. I saw this was a
7 conversation between the lawyers. The witness just sat
8 there and went like this and said, no, I can't answer.

9 MR. LOESER: The key point is we asked different
10 people because we are searching around for somebody to
11 answer the question.

12 THE COURT: I understand.

13 MR. LOESER: As to whether we can get the
14 information elsewhere, we are not talking generally it was a
15 settlement in the interest, we are talking about specific
16 concerns. They keep talking about preventive default,
17 forbearance agreement, the indemnity. We specifically asked
18 was that action for the certificate holders or was it for
19 yourselves, and in response to those specific questions was
20 we rely.

21 So moving on to the next factor then, your Honor,
22 that the trustee has challenged is whether we satisfied the
23 colorable claim requirement. That's what your Honor had
24 noted as well. And, again, I think it's important to
25 understand that the requirement, in the context of the
26 fiduciary duty exception, where really you do have the thumb

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2 on the scale of the disclosure and there's -- the colorable
3 claim is not a new phrase that just came up in context of
4 this discussion. It's well established, what it means.
5 Your Honor, there is the Adelpia Communication Corp. case,
6 330 B.R. 364 which explains that a colorable claim is a
7 relatively easy one to make. It's simply one that would
8 survive a motion to dismiss. It is, essentially, a notice
9 pleading standard.

10 Your Honor, on the last call when this was raised,
11 you asked about is there any case law in the fiduciary
12 exception world that defines colorable claim.

13 The answer is, yes, there is an abundance of cases
14 in the Southern District of New York specifically discussing
15 the case that the trustee has pointed to, the Warren case.
16 All of those cases uniformly say a colorable claim means one
17 that survives a motion to dismiss. None of them say, which
18 the trustee is saying, a colorable claim is one where you
19 have proven there is a conflict.

20 Obviously, when seeking discovery, the idea that
21 you have to prove something before you can get the discovery
22 is the cart before the horse. You are never going to get it
23 if that's the case. When you do get it, it's going to be
24 after the trial is over. Again, the case law is quite clear
25 what it means. As it has been discussed by Mr. Reilly with
26 the at issue motion both today and before, there are three

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1
2 examples of colorable claims of conflict and self-dealing
3 that the evidence has been developed suggests, and certainly
4 suggests enough to cross over this lower bar of motion to
5 dismiss standard.

6 The first example, your Honor, is one that came up
7 at the last hearing in that the Bank of New York Mellon was
8 seeking the broadest release possible for itself including a
9 release for its pre-settlement conflict -- pre-settlement
10 conduct. You don't need us to tell you about this conflict
11 because these two investors themselves pointed out when the
12 customer was seeking to do that you can't do that, you are
13 putting your own interest ahead -- that may be interpreted
14 as maybe you are putting your own interest ahead of the
15 beneficiaries. If we can see CI44.

16 Your Honor, this should look familiar so I won't
17 spend much time on it, but this is the draft settlement
18 agreement or the draft petition and this is Miss Patrick's
19 comments. Her firm gives a response to that. Essentially,
20 we can't support this. You know, we think this shows --

21 Secondly, we think this creates a conflict for the
22 trustee because it creates the appearance that the trustee
23 is entering into the settlement not because we think it
24 benefits the trustee but instead because the trustee wants
25 to obtain a release of other claims for itself. I think you
26 can see why we keep showing this to your Honor.

Proceedings

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2 Obviously, when searching for a colorable claim, if
3 you have a motion to dismiss before you and this was the
4 evidence that presented a potential conflict, it would,
5 obviously, satisfy the motion to dismiss standard. The
6 trustees respond to this specific example, we didn't get
7 what we asked for. It doesn't matter. What we are talking
8 about was the trustee acting, putting its own interest
9 ahead. Whether it was successful or not, it has nothing to
10 do with whether it was acting and the way it was approached.

11 Second example, your Honor, is this exchange
12 occurred where the trustee agreed not to provide notices of
13 certificate holders in exchange for indemnity. The trustee
14 has said over and over again we always have all of the
15 indemnity. We didn't get any more indemnity. Your Honor,
16 if you look at slide AI55 which, again, should be familiar
17 to the Court at this point, e-mail from Mr. Kravitz
18 indicating Matt and I just finished a call with our client
19 discussing our call with you.

20 In our just ended discussion, we agreed you made
21 some very good points on notice to the certificate holders,
22 CHS. It would help us considerably in our decision-making
23 process to put aside such notice if, indeed, we received a
24 very narrow liability indemnity that we discussed with you
25 this afternoon.

26 Well, your Honor, this is a deal being struck.

Proceedings

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2 Obviously, the trustee thinks it needs something else to
3 forego this notice. If the indemnity was iron clad, it
4 didn't need anything else, they wouldn't be asking for this.
5 Here, they are giving up something, which we think is
6 extremely important to our client, the certificate holders,
7 which is notice of preventive default and the deal struck,
8 which gives us a little more, give us something, a little
9 bit of security here and we will go along with that.

10 Again, your Honor, if we are at a motion to
11 dismiss, if this is the evidence that's being presented, it
12 is enough to state a colorable claim. Your Honor, next,
13 just a quick example, it is something we spent a lot of time
14 talking about and that's the preventive default. In the
15 trustee world it is just a game changer. For a certificate
16 holder, preventive default means you've got trustees who
17 have got to -- trustees who have to evaluate the settlements
18 as if it were the trustee's own money as opposed to the
19 version of the trustee that Mr. Ingber is talking about,
20 which is one that doesn't have to do anything, frankly, and
21 can just wait and see people, do whatever they've got to do.
22 It's a complete game. It's in terms of what the trustee has
23 to do with the certificate holder.

24 Here there is abundant evidence that the trustee,
25 essentially, orchestrated an event around the preventive
26 default via the forbearance agreement. It's not something

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1
2 discussed in the PSA. It's outside the PSA. The argument
3 that we heard the last time we were in court, your Honor,
4 was the trustee -- Mr. Ingber was saying, you know what,
5 your Honor, preventive default doesn't matter, it doesn't
6 change anything here. And, frankly, your Honor, that's just
7 not credible. There is no case law that would support that.
8 The case law makes it abundantly clear that it's a huge
9 deal.

10 The experts, the experts' reports, when your Honor
11 gets to those, even their own experts make it clear that the
12 preventive default is a huge deal and if we could just show
13 the Kravitz, K-2, deposition that was issued. Here we have
14 Mr. Kravitz, the actual lawyer for the trustee, there was a
15 lot of hemming and hawing around this question of how it
16 could be answered. This is what we heard about what
17 happened, not specific as to these trustees because he
18 couldn't answer that, just generally what happens, generally
19 when there has been a preventive default.

20 (Video file played in open court.)

21 (Video file concludes.)

22 MR. LOESER: So, your Honor, I think when it comes
23 to looking at the question does trying to avoid preventive
24 default suggest self-dealing or conflict, I think we need to
25 take that with a big grain of salt, the idea that we're
26 hearing that none of that will change anything at all. It's

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2 a very important thing, and with the evidence that has been
3 presented, again we clearly meet the colorable claim
4 threshold.

5 Your Honor, just a final point and that is where we
6 are now in litigation and coming back again to the standard
7 has a colorable claim of conflict been presented. We have
8 expert reports now. The steering committee expert,
9 Professor Franco, has submitted detailed expert reports, and
10 our reply as well, indicating that based on her review of
11 the evidence, based on her review of the agreement, the
12 trustee had a conflict that engaged in self-dealing.

13 Now, certainly Mr. Ingber and everyone on that side
14 of the table, I am sure, disagrees with Professor Franco.
15 They have their own expert, in fact, Professor Linbi who
16 comes to a different conclusion. Again, when we are
17 evaluating and we are clear, the motion to dismiss
18 threshold, we have a renowned trust scholar saying there is
19 a problem here and they have their renowned trust scholar
20 saying, no, there is not a problem. That's an obvious
21 conflict. Conflicts can't be decided on a motion to dismiss
22 so the threshold must be met.

23 THE COURT: I am going to give you another two
24 minutes. You have then taken up 45 minutes. Then you will
25 have to stop and let the other side go. Then you will have
26 15 minutes to reply.

Proceedings

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2 MR. LOESER: Your Honor, I will take even less.
3 The final factor is this, whether it's specific. We are
4 seeking very specific information about very specific
5 events. Just to close, your Honor, you know what we are
6 asking for is what a beneficiary can get in trust
7 litigation. We are asking for standard information, the
8 legal advice that the trustee went and got and that's
9 exactly the advice the beneficiary is entitled to receive in
10 order to figure out if the trustee acted in their interest
11 or not.

12 Thank you, your Honor, for your time.

13 THE COURT: Thank you very much. Who is going to
14 be addressing this? Mr. Ingber.

15 MR. INGBER: Good morning, your Honor. So after
16 all the briefing on the at issue and fiduciary exception
17 issue and after the many arguments that we have had on this
18 issue, I think it's helpful to take a step back and really
19 consider what this small minority of objectors is actually
20 seeking. They want privilege attorney-client
21 communications. These are not communications that are
22 borderline, attorney-client privileges. These are
23 indisputably classic attorney-client privileged
24 communications.

25 They want the Court to apply the fiduciary
26 exception and find good cause with respect to a corporate

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1 trustee. That has never been done. They want the Court to
2 find an at issue waiver. We've said in our papers, we've
3 said in open court several times, the trustee is not seeking
4 approval of this settlement on the ground that it relied on
5 the advice of counsel. It's not saying that it made the
6 decision to enter into this settlement agreement because
7 counsel told it to do so. It hasn't inserted, injected into
8 this case any privileged information. That's dispositive of
9 the at issue question.
10

11 They want your Honor to find a colorable claim of
12 conflict. The Gardner case says it has been to be an
13 obviously colorable claim of conflict. But where is the
14 self-dealing in the transaction? Now, I know you don't want
15 us to repeat the arguments we made the last time but there
16 is one that I need to repeat. I stood up here and I said
17 that after all of the arguments, after all of the briefing,
18 after all of the documents, e-mails, drafts, that they've
19 put on the screen, they haven't shown you one very important
20 document and that's the settlement agreement, because there
21 is nothing in the settlement agreement that gives the
22 trustee a financial benefit.

23 They had two months since the last argument to
24 scour the settlement agreement, to scour the side letter
25 with the indemnity, and to show something to your Honor that
26 indicates that the trustee got something out of this deal.

Proceedings

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2 The trustee got nothing out of this deal, and that is
3 dispositive, because we know that the cases that discuss
4 conflicts of interest look to the transaction.

5 The transaction here was the settlement agreement.
6 They think the indemnity created a conflict. They haven't
7 shown you the actual indemnity and walked through the
8 indemnity. How does an indemnity harm certificate holders?
9 How does that harm certificate holders? It is a good thing.
10 We want to encourage trustees to exercise their right to an
11 indemnity instead of sitting on their hands and doing
12 nothing, which is their right under the contract.

13 They're saying that the forbearance agreement shows
14 that there is a conflict. Well, they haven't shown you the
15 forbearance agreement. There is nothing on the face of the
16 forbearance agreement that suggests that there is a
17 conflict. They're saying that a draft of a provision in a
18 proposed final order and judgment, which was never actually
19 submitted to the court, presents a conflict but they don't
20 show the final order and judgment that was actually
21 submitted to the Court that doesn't contain that provision.
22 I don't know what they are hiding but we're not hiding
23 anything. There is no secrets here. The trustee got
24 nothing out of this transaction.

25 So as a matter of law, as a matter of logic, as a
26 matter of common sense, there is no conflict here. Your

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2 Honor, we've turned over a lot in this case. The objectors
3 have asked for a lot but this is something that, as you
4 know, we can't compromise on. This would be a very
5 dangerous precedence to set for the trustees who are trying
6 to do the right thing. Bank of New York here was acting
7 when no other trustee was acting. It obtained a recovery
8 when no other trustee had obtained a recovery. It was doing
9 the right thing, and this cannot be the price that the
10 trustee pays for doing the right thing.

11 Now, I'd like to start with the fiduciary
12 exception. I'd like to go through the good cause elements
13 of the fiduciary exception and then I'll turn to the at
14 issue of waiver and then I'll sit down. So let's start with
15 slide number one, Justin.

16 Okay. Good cause is a requirement and the New York
17 cases say that good cause is a requirement. That comes out
18 of the Garner case, the Fifth Circuit case from 1970 and the
19 cases in New York that have considered the fiduciary
20 exception and applied the fiduciary exception, like I said,
21 not to corporate trustees but have applied the fiduciary
22 exception taking into account the good cause standard.

23 So a document, a good cause may exist for a
24 document if -- and this is -- these are the six factors.
25 The objectors' holdings are large enough to warrant invading
26 privilege. The requesting parties have demonstrated their

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2 bona fides. The request is highly specific. Privileged
3 communications are the only evidence available on the point.
4 Communications are highly relevant and there is an,
5 obviously, colorable claim in this case that the settlement
6 agreement was a self-dealing transaction.

7 So I'd like to go through this list in order.
8 We'll end with a conflict point, but I want to start with
9 something that we haven't really discussed in any detail
10 with the Court and that is who is actually making this
11 motion, which investors are actually behind this motion.

12 The steering committee holds less than four percent
13 of the voting rights in these trusts, and by the way this
14 case started, okay, when we filed our petition, we gave
15 thousands of certificate holders the opportunity to come in
16 and object or intervene on the ground that they just wanted
17 more information.

18 So we were all -- so there was a very limited
19 number of certificate holders that intervened, an even
20 smaller number of those certificate holders had anything
21 substantive or negative to say about this settlement, an
22 even smaller number, I can count on one hand the number of
23 intervenors who have actively participated in discovery, and
24 now it's the steering committee and the steering committee
25 supposedly on behalf of the other intervenors that was
26 filing this motion.

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2 We know, your Honor, that 47 individual intervenors
3 have opted out of this motion, intervenors that are suing
4 Bank of New York in other cases in federal court and even
5 before this court. They have opted out of this motion
6 seeking attorney-client privilege communications from the
7 Bank of New York.

8 We also know, if you turn to slide three, Justin,
9 slide three. Thank you. We also know that since this
10 proceeding began, 36 individual intervenors have withdrawn,
11 Anback, Sincora, of course, Walnut Place, Miback, in which
12 wrote a letter to your Honor not just withdrawing as an
13 intervenor but active -- indicated to your Honor that they
14 actively support the settlement, Goldman Sachs, Federal Home
15 Loan Bank of Seattle and the list goes on.

16 So of these intervenors, the steering committee
17 said we are supporting the motion. They said we are acting
18 on behalf of everybody other than those who opted out.
19 Well, we know that's not the case because Goldman Sachs has
20 now withdrawn as an intervenor. Federal Home Loan Bank of
21 Seattle has now withdrawn as an intervenor. So this is a
22 factor that the Court is required to consider. We think
23 it's a relevant factor that there is a tiny minority of
24 investors who are actually looking to invade the
25 attorney-client privilege.

26 Factor number two, let's go back to slide one.

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2 When they're asking for privileged communications and
3 they're asking the Court to apply the good cause test, the
4 intervenor needs to show their bona fide, the investors need
5 to show their bona fide. What are their bona fide? Do they
6 have the bona fide to seek these documents?

7 The answer, your Honor, is we don't know because
8 when we tried to get discovery from the intervenors a long
9 time ago they said no. It's -- we have to file our
10 objections first before we discuss anything about our bona
11 fides. When the institutional investors served discovery
12 request just a few weeks ago saying just let us know if you
13 are going to comply with discovery requests so we don't
14 waste time and come May 3rd when you put in your formal
15 objections, they filed an order to show cause and said we
16 are not telling you now whether we are going to participate
17 in discovery. And by the way, there is no basis for you
18 seeking this information from us.

19 They filed a motion that puts their bona fide at
20 issue. It's a factor for the Court to consider. We don't
21 know who their bona fides are, as trustee, if we have not
22 questioned whether a certificate holder can come into court
23 and object even if it had de minimus holdings in these
24 trust. We filed this proceeding, as I said, many times so
25 that all certificate holders would have an opportunity to be
26 heard. With respect to this motion, we are required to

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2 consider the bona fide. So we have questions about them.
3 We want to know what's behind these objections.

4 We've heard complaints in their briefing through
5 depositions that they were shut out of settlement
6 negotiations but now we know that some of these intervenors
7 were actually invited to participate in settlement
8 negotiations and they said no. They are complaining now
9 about being shut out when they were actually invited so what
10 is behind that? We are entitled to know.

11 Third, factor number three, is the request highly
12 specific. Mr. Reilly and Mr. Loeser have said we have
13 really narrowed this request. We are only seeking limited
14 categories of documents. This is what they are seeking.
15 They are seeking communications with Bank of New York
16 counsel at the trust committee meeting. They are seeking
17 communications with and documents generated by counsel
18 concerning Bank of New York evaluation of this settlement
19 amount. They are seeking communications and documents
20 generated by counsel concerning the preventive default and
21 the forbearance agreement, Bank of New York successor of its
22 own risk and its request for any indemnity, Bank of New York
23 decision not to provide notice to certificate holders and
24 Bank of New York attempts to obtain an expanded release of
25 claims held by the certificate holders.

26 They justify this by saying that the communications

Proceedings

1
2 on these discrete topics, they call them, would not impose
3 any significant burden on the trustee.

4 First of all, burden is certainly not the standard
5 and burden is not the reason why Bank of New York is saying
6 no to this request for production. For us, it's about the
7 principle. It's about applying the law. It's about not
8 crediting theories that in our view makes no sense and are
9 fundamentally wrong. They want a blanket order that these
10 large buckets of documents are discoverable but after a year
11 and a half they haven't identified which specific documents
12 they want. They had a privilege log. They haven't
13 identified with specificity what they want and that is
14 another strike against the certificate holders.

15 Factor number four, are privileged communications
16 the only evidence available on these issues? Well, your
17 Honor, we know that's not the case. We know -- first of
18 all, let me just clarify a point that Mr. Loeser made about
19 what they are seeking. The standard here is whether the
20 trustee acted within the bounds of its reasonable judgment
21 in entering into the settlement. That is the issue in this
22 case. And the question is whether these privileged
23 communications are the only evidence available on that
24 question.

25 And we know that's not the case. We know that's
26 not the case because in August of 2011, before any documents

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2 were produced in this case, some of the intervenors filed a
3 motion to intervene and they made the argument that, quote,
4 the settlement terms -- the settlement terms and profit
5 justifications also show that Bank of America is drastically
6 underpaying on its liability, closed quote.

7 Before the deposition of any expert, they attacked
8 the expert's methodology because they looked at the expert's
9 reports. They attacked the settlement terms because they
10 looked at the settlement agreement. Before any deposition
11 of a bank witness, they argued that Bank of New York was
12 engaging in self-dealing. That was in August of 2011. So
13 what did they look at then? They looked at the settlement
14 agreement. They looked at the attachment to the settlement
15 agreement. They looked at the expert report and they made
16 their argument.

17 I think we need to start with the premise that
18 everything that was produced after that merely wasn't
19 necessary, necessary for the objectors to make whatever
20 arguments they wanted to make. We produced it anyway.

21 Can we turn to slide four? I won't go through the
22 entire list of what we produced but the list is long. As
23 your Honor knows, we produced everything that the bank
24 considered in connection with the decision to enter into
25 this settlement.

26 We produced all of the governing contracts. We

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2 produced internal Bank of New York non-privileged
3 communications. We produced all of the communications with
4 the certificate holders on these trusts. We produced all of
5 the tri-party settlement discussions. We offered to produce
6 the common interest communications. We offered, as your
7 Honor knows, to produce the common interest communications
8 and they wanted to take that deal, apparently, but some of
9 these intervenors said we are going to reserve the rights to
10 argue that. If you produce these communications, we are
11 going to argue waiver as to other communications, so they
12 tied our hands and we couldn't produce those communications.

13 They suggest that so many questions were shut down
14 on the basis of attorney-client privilege. We know that's
15 not the case because we've actually counted the number of
16 questions that witnesses were instructed not to answer.
17 Just with respect to the trust committee meeting, we counted
18 about 1200 questions, and 13 questions with respect to 13
19 questions being instructed to witnesses not to answer.

20 What the witnesses were allowed to answer were
21 questions about the fact that they considered in connection
22 with the decision to entering into the settlement. They
23 were allowed to testify about the underlying facts. They
24 were allowed to testify about what they understood about the
25 settlement terms even if that came from counsel. They were
26 allowed to testify about their understanding of the expert's

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2 reports even if that understanding was informed by counsel.
3 They can testify about communications with non-lawyers even
4 in the presence of counsel. They can testify about topics,
5 factual topics, legal topics that they've discussed with
6 counsel. What they couldn't testify about was the actual
7 communications with counsel that related to legal advice.

8 So we've heard that this is the only evidence
9 available and that the answers to the questions -- sorry,
10 many of their very important questions on these topics went
11 unanswered.

12 I want to detour, just to put in context, a few of
13 the snippets that you've heard Mr. Loeser play. One of them
14 was a question on page 214, line 7 of Miss Lindberg's
15 deposition. In all of your communications with Mr. Bailey,
16 the lawyer, regarding a settlement and the process by which
17 it was breached were engaged in for the benefit of the
18 certificate holders.

19 Miss Lindberg was instructed not to answer because
20 that is a communication with counsel. But about six lines
21 before that, page 213, line 19, the settlement was entered
22 into in your view for the benefit of the trust
23 beneficiaries; is that true?

24 The trust -- "ANSWER: The trust beneficiaries are
25 the certificate holders, yes.

26 "QUESTION: And all of the settlement negotiations

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2 you are aware of from your view were engaged in for the
3 benefit of the trust beneficiaries?

4 "ANSWER: For the benefit of the certificate
5 holders, yes."

6 Page 395, line 14.

7 "Did you tell -- did anyone tell you that in this
8 process of the settlement negotiations that the bank had no
9 obligation to give notice to the certificate holders about
10 the settlement negotiations?"

11 There's a privilege instruction not to answer.

12 "Did anyone tell you the concern is about the
13 privileged attorney-client communications?"

14 But we know that if you go to line 113 -- sorry,
15 page 113, line 13, Ms. Lindberg was asked: "Did you discuss
16 with anyone within Bank of New York Mellon whether or not
17 certificate holders would be given notice of the existence
18 of the settlement negotiations in the subject trust?"

19 "No.

20 "Did you become concerned yourself that the
21 certificate holder should be given notice that negotiations
22 were ongoing?"

23 "ANSWER: No."

24 These questions were answered. That's just a few
25 snippets that were taken out of context. Let's focus
26 specifically on the type of information that they say they

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2 can only get from privileged communications. At the last
3 conference we played a clip. The clip was of Richard
4 Stanley giving an answer to a question about the bank's
5 rationale for entering into the settlement.

6 If you recall, your Honor, the clip went on for
7 about eight pages of transcript. I could play it again. If
8 your Honor doesn't recall it, I can play a snippet of it.

9 The problem was that through months of depositions
10 the objectors never asked the bank witnesses why they
11 entered into the settlement. They want to get information
12 about the -- how we evaluated the settlement. They never
13 asked the question what did you consider, why did you enter
14 into the settlement agreement. When they finally did, this
15 is what Mr. Stanley had to say at S1. It's page 17714
16 through 16817. I am not going to play the whole thing
17 because you've heard some of it before.

18 (Whereupon, video file played.)

19 (Whereupon, Video file concludes.)

20 MR. INGBER: So it goes on and on and on. When
21 they finally asked the question what was the rationale,
22 Mr. Stanley, who was the chair of the trust committee, was
23 able to give his response. Now, before that, before that
24 answer, my instruction to Mr. Stanley was -- and I am going
25 to read a piece of it. My instruction is to testify about
26 everything but what you've interpreted as specific legal

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2 advice by Mr. Bailey, what Ms. Lindberg may have said, what
3 your understanding of the facts were, what led you to
4 conclude that you would vote in favor of the settlement.

5 All of that from our perspective is appropriate.

6 So there was a very limited instruction about what
7 was off the table and that was specific communication with
8 counsel about legal advice. In the briefing, they said the
9 only evidence available about why the trustee didn't conduct
10 a loan file review, it's privileged communication. We know
11 that's not the case because there was deposition testimony
12 about that very issue, and I am going to play a very brief
13 clip from V1. Justin, please.

14 And before we start it, I just want to -- let me
15 introduce the leading question. Mr. Kravitz, earlier in the
16 deposition, had started to give an answer. He was cut off,
17 but he couldn't finish the answer.

18 The objector didn't ask the follow-up question. I
19 don't know if they didn't want to know or they had a more
20 interesting topics to move on to but in our cross of
21 Mr. Kravitz, Mr. Gonzalez asked him to finish his answer
22 from earlier in the day and this is what he said about loan
23 file reviews. They said the privilege communications on
24 loan file review is the only evidence available.

25 (Video file played in open court.)

26 (Video file concludes.)

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2 MR. INGBER: So that is what Mr. Kravitz was
3 describing, your Honor, that communications, tri-party
4 communications, they have these tri-party communications,
5 they were able to ask Mr. Kravitz and others about the
6 tri-party communications, including why the parties decided
7 to forego loan file reviews and rely on the actual
8 repurchase experience involving the GSE.

9 They said that Mr. Bailey was unwilling to testify
10 about what investigation the trustee conducted, but we know
11 that's not the case. And we know privilege communications
12 aren't the only evidence of that because at page 234, line
13 24 the question was asked:

14 "So upon receiving this notice of non-performance,
15 what did the Bank of New York Mellon do to investigate its
16 allegations?

17 "ANSWER: I think this letter began the process
18 that we have been discussing all morning and all afternoon
19 leading up to the ultimate settlement. It began a process
20 of engaging holders, engaging Bank of New York, you know,
21 negotiations over both the repurchase allegations and here,
22 obviously, the servicing allegations. There was lots of
23 discussions about how to enhance servicing under the
24 existing PSA."

25 I believe my recollection is that Bank of New York
26 Mellon ultimately retained RMS provider with expert views on

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2 services that was ultimately agreed to by the parties. So
3 it was, you know, it was all the things we have been
4 discussing all day, the experts, the negotiations, the bank
5 and so forth on all issues in a particular servicing.

6 You know, my recollection is that the negotiation
7 focused largely on the repurchase obligations that were
8 alleged and the servicing enhancements that were sought.
9 When they asked the question the right way, they got the
10 answer, privileged communications is not the sole evidence
11 on these topics, and it goes on and on.

12 I could play hours of testimony, not just from
13 Mr. Bailey, not from Miss Lindberg, not from Mr. Kravitz,
14 but I can play the institutional investor's deposition
15 testimony. I can play Mr. Maritz deposition testimony. I
16 can play the testimony from the business people at Bank of
17 America who were given presentations about the settlement
18 amount throughout the negotiations. We can show testimony
19 about the institutional investor's presentation to the
20 trustee and the other party sitting at the negotiating table
21 about how this number was arrived at.

22 We have 27 depositions. They have had hundreds of
23 thousands of pages of documents. The information is in
24 there. They just need to ask the right questions. Factor
25 number five, we are getting there. There is only six.
26 Factor number five, are the communications highly relevant.

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2 When you go through all of the information that they have,
3 the answer to the question, are the privilege communications
4 highly relevant, no.

5 They have what they need. It is related to factor
6 number five. But the irony here, your Honor, is that if you
7 were to accept the objectors' proposed standard of review,
8 which is substantive fairness, the communications they're
9 seeking are completely irrelevant, completely irrelevant.
10 All communications are irrelevant. They have articulated a
11 standard that this Court should accept a substantive
12 fairness. We disagree with that.

13 But under their own standard, you should look to
14 the settlement agreement and you should determine whether
15 based on the settlement agreement this was substantively a
16 fair deal. So in a way they are talking out of both sides
17 of their mouth with respect to factor number five, and that
18 leads us to factor number six. Are there, obviously,
19 colorable claims of self-dealing? And let me start with the
20 law. We can bring up slide 7, what is a conflict of
21 interest?

22 Well, the case law is crystal clear on this. The
23 trustee needs to profit at the expense of its beneficiary.
24 With respect to the transaction, the trustee needs to
25 benefit financially and it has to do so at the expense of
26 the certificate holders. Hypothetical possibilities of

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2 conflict are not enough. Speculative theories are not
3 enough. This is exactly what the cases said. These are the
4 cases cited by the objectors.

5 In the first case, Malia Oak Trustees were also
6 beneficiaries of the trust. They preferred themselves over
7 the trust beneficiaries. They profited at the expense of
8 the beneficiaries. Birnbaum, the trustee, lied to the trust
9 beneficiaries about a \$365,000 debt owing to him and it used
10 trust assets to offset that debt. It stole \$365,000 from
11 the trust. The Cannon case, it was a corporate trustee and
12 it invested trust assets in its own stock. That was a
13 classic conflict of interest and it goes down.

14 The Stenfevich case, the company director who owed
15 fiduciary duties to the beneficiaries, he was the CEO of the
16 company and he was also the trustee and he secured a million
17 dollars per year payment for life. He had a 70th birthday
18 party, presents of a million and half dollars, and in
19 connection with the merger negotiations he secured for
20 himself at the expense of the beneficiary shares.

21 Wells Fargo Stock Options case, a very similar
22 case, Anback, Justice Bear found no good cause in that case.
23 The trustee allegedly misappropriated the trust funds and
24 charged excessive fees. Then there is Dabbiny. Dabbiny is
25 a very important case. It was a corporate trustee and the
26 court found this was an fiduciary exception case but the

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2 court found there was a conflict of interest because the
3 trustee was, at the same time, a creditor of the debtor, and
4 it was also the trustee for other creditors of the debtor
5 and it collected a payment to the trustee. It collected its
6 own payment, which, of course, disadvantaged the trust
7 beneficiaries who that corporate trustee was serving.

8 So what are the distinctions? If you go to next
9 line, Justin, the trustee was literally on both sides of the
10 transaction. There was a self-dealing found in the
11 transaction. In most of these cases, the trustee was also a
12 broad fiduciary with a duty of undivided loyalty to the
13 trust beneficiaries and not a corporate trustee, which I am
14 not going to concede a point, as your Honor has ruled, very
15 limited fiduciary duties.

16 Now, I do want to say another word about Dabbiny
17 because that's the main case they rely on. Dabbiny Court,
18 Judge Lin was very careful to say we find that there is a
19 conflict of interest here because this is a very well
20 recognized conflict. This has been a longstanding conflict
21 where a trustee is putting its own interest ahead,
22 profiting, collecting a loan at the expense of the
23 beneficiaries. Money was going into the trustee's pocket,
24 money was going out of the trust beneficiary's pocket, but
25 the Dabbiny Court warned, we should go to the next slide,
26 the Dabbiny Court, Judge Lin, warned other beneficiaries

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2 suing for a breach of fiduciary duty, warned future courts
3 trying to resolve this conflict of interest issue and
4 deciding whether these claims are obviously colorable to be
5 very careful, and this is what the Dabbiny court said, push
6 with relentless, logic possible conflict of interest can be
7 conjured up out of all sorts of situations in which persons
8 of normal scruples would feel no hesitation to go ahead.

9 The laws ought not make trusteeship so hazardous
10 that responsible individuals and corporations will shy away
11 from it. It goes on. Mere vague or remote possible
12 self-advantage to a trustee is not sufficient to prove such
13 adverse interest as to bring his conduct into question. It
14 would be likely to impede the legitimate business of the
15 trustees far more than it would protect their beneficiaries.

16 THE COURT: We have a copy of the case. Do you
17 have a page cite for that?

18 MR. INGBER: It's on page 674, your Honor. Sorry
19 675. These conflict theories are not concrete. They are
20 theories. They are speculative, they are hypothetical, and
21 that's exactly what the Dabbiny Court warned against. Don't
22 let the trust beneficiaries call a trustee's conduct into
23 question based on speculation. They are not entitled to
24 privilege communications to bolster a theory that there's a
25 conflict. They have to establish that there is a real
26 conflict. They don't have to prove that there is a

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2 conflict, but they have to show that there is an, obviously,
3 colorable claim of conflict.

4 I'll satisfy their motion to dismiss the standard.
5 Okay. That's colorable. The Court in Garner said,
6 obviously, colorable, but I'll even accept their motion to
7 dismiss standard. If they were asserting these in a motion
8 to dismiss, these allegations would be dismissed as a matter
9 of law.

10 THE COURT: What about the expert reports which
11 maybe you didn't have at one point and you do have it now?
12 I have to admit I have not read all of these reports. But
13 there are people, you both have experts that, of course,
14 that say different things. They are both excellent experts
15 and, of course, they don't agree with each other. That's a
16 given. One side says they are definitely colorable, more
17 than colorable, provable, proven conflicts of interest. The
18 other side says absolutely not. I mean, how am I supposed
19 to say, well, that expert must be wrong, he must be right?

20 MR. INGBER: The experts' reports are in evidence.
21 It's the Court's role -- no, the Court's role is to weigh
22 the law, weigh the facts, weigh what the contract says on
23 its face and make a determination. They say they have a
24 renowned expert. This expert is renowned because she goes
25 against the grain of decades of case law. She goes against
26 the restatement.

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2 I don't want to get into a battle of experts here.
3 Our expert we have, practitioner of 50 years, he was the
4 head of the -- he was chair of the corporate trust committee
5 of the American Bank Association. He was head of the Banker
6 Trust Corporate Trust Group, worldwide corporate trust
7 group, for 17 years. He wrote the book on Corporate Trust
8 Management and Administration. That's a leading treatise
9 for practitioners in the corporate trust industry.

10 We have Professor Yangban, who's a Yale law
11 professor, who served on the committee that drafted the
12 restatement but it's not about the battle of the experts.
13 It's about the evidence and it's about the law and it's
14 about the contracts.

15 THE COURT: I understand that. Let me ask you one
16 other thing because now you have taken your 45 minutes. One
17 of the big things here is the fact that you -- that the
18 trustee sought indemnity to avoid future liability. Why is
19 that a -- not some kind of conflict. That's something that
20 you would say, well, we didn't get anything. Well, you did
21 get an indemnification that, you know, you did everything
22 right. You didn't do anything wrong. That was negotiated,
23 obviously, and so why is that some kind of conflict that you
24 would be getting indemnity for yourself in the course of
25 negotiating the settlement agreement.

26 MR. INGBER: This is what your Honor said at one of

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2 our prior hearings. You said you don't understand how the
3 indemnity provision suggests there is any kind of conflict
4 of interest because the PSA provided for some indemnity.
5 That's the point.

6 If I may, your Honor, can you bring up D4, please.
7 Through all of the briefing and all of the arguments, no one
8 has said, because they can't, that the trustee was not
9 contractually entitled to an indemnity. That is what
10 Section 805 says.

11 The trustee and any director, officer, employee or
12 agent shall be indemnified by the master services and held
13 harmless against any lost, liability or expense. Then it
14 goes on, incurred in connection with any claim or legal
15 action relating to this agreement. This is the language
16 that provides, contractually provides, the trustee with an
17 indemnity. Let's go to D4.

18 802 (d)(4), your Honor, says the trustee -- sorry,
19 six. The trustee shall not be required to risk or expend
20 its own funds or otherwise incur any financial liability in
21 the performance of any of its duties or in the exercise of
22 any of the rights or powers hereunder. It shall have
23 reasonable grounds that repayment of such funds and adequate
24 indemnity against such risk or liability are not assured to
25 at the present time.

26 The trustee could say, no, you are not giving us an

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1 indemnity or you are disavowing the contractual indemnity
2 that we provide. To provide, we are not moving forward.
3 The trustee was entitled to this indemnity. The
4 confirmation that the trustee got, which they haven't shown,
5 you say very clearly that the side letters say that it's
6 confirming the contractual indemnity. The indemnity that
7 they are talking about in connection with the forbearance
8 agreement says that the indemnity doesn't modify any of the
9 rights that the trustee has in this contract so it can't be
10 a benefit to the trustee if the trustee is already
11 contractually entitled to it.

12
13 THE COURT: Do you have a last sentence or you are
14 doing -- because you have to be done. I mean, you can say a
15 last sentence as you would like.

16 MR. INGBER: Two sentences.

17 THE COURT: Two.

18 MR. INGBER: The forbearance agreement was an
19 agreement that the trustee and the noticing certificate
20 holders were permitted to enter into. It did not. It did
21 not deny the certificate holders of any rights, your Honor.
22 It has ruled that in order for the certificate holders to
23 sue they need to issue their own notice of preventive
24 default. They could have done that. They were not deprived
25 of that right. That is straight out of section 10.08 (a.)
26 PSA.

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2 Each holder looking to sue has to issue its own
3 notice of preventive default and notice of the certificate
4 holders are the ones who have the right to withdraw, to
5 waive, to forebear on their notice of nonperformance and
6 that's what's permitted.

7 The restatement says that the trustee is permitted
8 to do anything unless it is told in the PSA that it can't do
9 it. There is no language in the PSA that says the trustee
10 can't do this. I can address the other conflict
11 theories if you want or I will sit down, and I thank the
12 Court for your indulgence.

13 THE COURT: Do you want to do your reply?

14 MR. LOESER: Sure.

15 THE COURT: I will give you about 15.

16 MR. LOESER: I will try to keep it short, your
17 Honor. I think you've heard plenty on this issue, just a
18 couple of great picture points. When Mr. Ingber stands up
19 and tells us his expert is better than ours, his expert
20 serves a bigger committees, or whatever it is, that's the
21 kind of argument the Court, I am sure, is accustomed to on a
22 summary judgement motion. May be a dream but it's certainly
23 not something that's argued when you are looking at a
24 standard that's a colorable claim standard.

25 Your Honor is absolutely right. We have competing
26 experts in addition to all of the other allegations we have

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2 made and all of the evidence that has been presented. The
3 motion to dismiss standard is met by us clearly. And,
4 again, the standard has to be understood, the context of
5 what is a doctrine. And what we are talking about is a
6 doctrine that says beneficiaries are entitled to know what
7 their trustees did for them and why. And since the lawyer
8 for the trustee is providing advice for the benefit of the
9 beneficiary, the beneficiary is entitled to know what the
10 lawyer said to the trustee.

11 What Mr. Ingber is talking about when he says there
12 is no New York case law, saying good cause is not a
13 requirement, there is an abundance of case law. Be that as
14 it may, looking at the good cause requirement, we clearly
15 satisfied the elements. We've made colorable claims
16 supported by, among other things, the expert report and it's
17 just not true that there's other sources for the answers to
18 the questions we asked.

19 Mr. Ingber can play the same 12-minute video over
20 and over again in which the trust representative talks about
21 any number of things. But the fact of the matter is when we
22 asked specific questions, and it's the specific questions
23 for which we are seeking specific communications, which is
24 another one of the elements we did not get answers to, the
25 specific questions that go to the central question at the
26 heart of this dispute is were the trustees acting in

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2 furtherance of its own interest or was it acting in
3 furtherance of the beneficiary's interest. When that
4 question was asked over and over again as to a specific
5 matter, the witness was instructed not to answer.

6 Taking a step back, your Honor, we've seen exhibits
7 that had that sort of road gallery of trustees and all of
8 the bad things they did. Somehow what they did is so much
9 worse. That means we can't satisfy and attest here from our
10 client's perspective, taking a step back from this
11 settlement, what we see from the outside looking in is eight
12 and a half billion dollars in the face of what may be 50,
13 60, 70, 80 or more billion dollars in liability.

14 We see a trustee that did not view one single loan
15 file. We know from all of the litigation that's out there
16 right now, including, again, Country-Wide against Bank of
17 America, against other sponsors, they put back litigation.
18 The standard method in adjudicating a case is, today,
19 underwrite loan, find and see what the liability is.

20 I am sure your Honor is familiar with the Fagstar
21 decision, litigated its claim that the loans were bad. This
22 is a statistic for underwriting, as is the norm in the
23 litigation, and plaintiff won one hundred percent of their
24 damages based on that rendering.

25 Now we have this proceeding which is massive in
26 scope, 530 trusts. That is about two certificates over a

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2 \$90 million judgment awarded to plaintiff. Here we have 530
3 sitting here. We are looking at it. We see trustees that
4 have a settlement that was delivered to it or involved in
5 some way in negotiating. It's very small in proportion to
6 the potential liability for which the trustee did not appear
7 to have done any real analysis until after the settlement
8 was reached. The experts were brought in. After the
9 settlement was reached, the amount was quite small in
10 comparison.

11 When Mr. Ingber said, well, look, we didn't do
12 anything wrong, we didn't benefit in any way. Look at these
13 other road of trustees and how they stole money or put money
14 in their pocket. You can't read the test because we didn't
15 do that. We submit this in part and find the trustees
16 involved in compromising the rights is worth more. If the
17 trustee got it wrong, if the trustee didn't fully evaluate,
18 we think that to look at their actions and say there is no
19 evidence of self-dealing, the trustee was dealing with a
20 long barrel shotgun of its own liability here and it got out
21 of this.

22 It sought indemnity. Obviously, it didn't have all
23 indemnity or it wouldn't have sought more. It avoided most.
24 The most that can happen to a trustee in a claim is their
25 duties go up and the prudence level, these are colorable
26 claims, we think from the outside looking in, we have

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2 clearly met this test. It's hard to think of a trustee who
3 has done more violence to the beneficiaries than one
4 accepting a settlement without really evaluating liability.
5 We could be wrong. We could lose the trial, they could win,
6 but you can't say from where we are looking that we haven't
7 met the speed bump of the test to get the communications
8 that answer the fundamental issues at issue in this case
9 which are protecting their interest or were they protecting
10 our interest.

11 You know, as to the bona fide, your Honor, it's
12 interesting to go back and look at the Gardner case, the
13 Fifth Circuit case, where this discussion came from, that
14 was in the context of shareholder's claims, and the problem
15 in those cases is that you can have a shareholder that owns
16 one share of stock worth exactly three dollars or thirty
17 cents and that person can show up and demand discovery and
18 become a nuisance and there is a factor then that allows the
19 Court to say, look, do you have a real interest here. Bona
20 fides have a meaning. Do you have bona fide interest or
21 not?

22 Frankly, your Honor, the steering committee,
23 together with other intervenors, have billions of dollars at
24 stake. It's kind of silly for them to say we are just
25 showing up, we have no real interest. You, obviously, have
26 a real interest more than that. It was invited by the

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2 trustee when they submitted this petition to evaluate the
3 settlement, to give our opinion, to object, if we thought it
4 was appropriate.

5 It's hard to see how we haven't met this very well
6 threshold bona fide in finding out whether they're acting in
7 their own interest. Frankly, we think at the end of the
8 day when discovery is completed and having a trial in front
9 of the court it does not -- make sure not to know that if
10 the trustee believes it was protecting its interest or ours.
11 It's too important to know what the whole proceeding is
12 about. If they didn't want it to be about that, they didn't
13 have to submit a PFOJ that made it about that.

14 Your Honor, just one very brief final point.
15 What's very concerning to us is in every bad case out there
16 underwriting occurs and it's how you determine what the real
17 liability is. And when Mr. Kravitz testifies that, you know
18 what, it's just too expensive, you don't need to do it, it
19 would have taken too much time, there is better ways to do
20 it.

21 The Bank of New York always says you can't
22 underwrite, it's too expensive, it's too subjective. You
23 shouldn't do it. That's their position when we have a
24 trustee itself saying endorsing a position for; one, is so
25 obviously contrary to the certificate holder's view and;
26 two, it has been repeatedly rejected by the court. Like in

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2 the Ashored and Fagstar case and the other cases here in New
3 York itself ask the question is the trustee acting in its
4 own interest or was it acting in ours. Thank you, your
5 Honor.

6 THE COURT: Mr. Reilly.

7 MR. REILLY: Yes, your Honor. Your question about
8 indemnity is a critical question and the reality is that
9 Section 805 of the PSA, which Mr. Ingber showed you part of,
10 is the heart of the problem that they were facing at that
11 time. They were not entitled to this indemnity that they
12 got contractually because they were arguably at that point
13 acting at the direction of the certificate holders and the
14 indemnity protection specifically says they are entitled to
15 indemnity unless they are acting at the direction of the
16 certificate holders, so they are in a big situation at that
17 point, because if we go forward and do what Miss Patrick's
18 letter wants us to do, then we don't have indemnity.

19 If we go forward, and Bank of America wants us to
20 go forward and not give notice to the certificate holders,
21 we don't have indemnity. If we go forward arguably and
22 enter into a forbearance agreement, which is nowhere set
23 forth, we don't have an agreement. People don't just ask
24 for things. They don't. Sophisticated lawyers like Mayer
25 Brown don't say, you know what, we will give no notice if
26 you give us a little indemnity because they don't need it.

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2 That's their argument. We just did it because we didn't
3 need it. They needed it. They got it. They benefited from
4 it. That was our trustee taking the position that was
5 contrary to the interest of my clients and all of these
6 other intervenors who were not represented in these
7 negotiations.

8 It is undisputed Miss Patrick and her group did not
9 represent us, did not represent anyone other than those
10 people, did not represent the 75 percent of the people who
11 weren't in this lawsuit. It is undisputed that the trustee
12 was not representing our interest in that process so it's in
13 that setting they got this tension between following the
14 directions of that Miss Patrick sending and getting no
15 indemnity or doing what Bank of America wanted to do and
16 getting additional indemnity.

17 That's a true answer. All you have to look at is
18 Section 805 and confirm what I am saying is true.

19 The second point is the last point. Mr. Ingber
20 said we are not getting specific. We got the privilege log.
21 Why don't we pick things out of the privilege log and tell
22 them what we want.

23 The privilege log is replete with, item number six,
24 communications between Mr. Kravitz and the number of people
25 at Bank of New York Mellon, privileges asserted,
26 attorney-client, attorney work product, privilege comments,

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1 attorney-Clint communication regarding settlement
2 negotiations. There are tons of these in the roughly three
3 hundred and fifty some entries. What is that supposed to
4 mean? I can't tell what that has to do with this.
5

6 Now, there are some specifics that say settlement
7 or attorney communications regarding the forbearance
8 agreement, right. We can tell. There were some that say
9 attorney-client communications regarding indemnity. We can
10 tell. That's what we wanted. To criticize us for not being
11 specific is silly when the law is not specific. We would
12 ask for the information in the topic areas that we suggest,
13 forbearance, indemnify and preventive default. We were
14 precise about it. We were specific about it, and we should
15 get that, and if, in fact, there are other entries on this
16 privilege log that are covered by that, but we can't tell,
17 they should be required to turn that over, too.

18 Finally, we didn't put this at issue. If, in fact,
19 they didn't want the conduct of the trustee, a legal
20 investigation of the trustee and everything that the trustee
21 did at the direction of counsel and advice of counsel would
22 be in this case, he shouldn't have put it in the PFOJ. They
23 did. They waived. Thank you.

24 MS. PATRICK: Your Honor, may I just be heard on
25 one point?

26 THE COURT: We've got to take a break. Sorry. So

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2 we are taking a break. Then we will start the other issue
3 and you will work it in somewhere at some point. We've got
4 to take a break.

5 (Whereupon, a recess was taken.)

6 (Whereupon, the following discussion takes place on
7 the record in open court.)

8 COURT CLERK: All rise, Part 39 is now in session,
9 the Honorable Barbara Kapnick presiding. Please be seated,
10 come to order.

11 THE COURT: Just one thing. Before we start on the
12 next motion, we were thinking that maybe to help us in
13 making a decision on this motion that you just argued, do
14 you have a problem giving us a copy of the privilege log,
15 because I know you've tried to narrow it down in
16 Mr. Loeser's letter of March 25th what you're seeking, but
17 then you were talking about the various things on the
18 privilege log, so it seems like it shifts a little bit.

19 Exactly what is it that you're looking for, and it
20 might just make it a little bit easier for us to figure that
21 out, so to the extent somebody can give that to us before
22 the lunch break so we can take a look at it.

23 MR. REILLY: Your Honor, I have copy of it. Let me
24 look at it to see if there are any notes on it. It is
25 highlighted by topic for our internal purposes. I will show
26 it to Mr. Ingber. If he doesn't have any problem with the

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1 way the formality is --

2 THE COURT: If not, we will run it off on our
3 machine which doesn't have color so we can't get your
4 colors.
5

6 Now, let's start with whoever is going to start the
7 argument on motion sequence number 29, which is the PTI, the
8 request for the PTI. Okay.

9 MS. PENNINGTON: Thank you, your Honor. My name is
10 Kathy Patrick. I am currently with the law firm of Gibbs &
11 Bruns. I am here as counsel on behalf of the Institutional
12 Investors. I will be addressing motion sequence 29 which,
13 as already noted, is the motion privilege for the steering
14 committee seeking documents produced by and exchange with
15 Bank of New York Mellon and the third-party vendor.

16 The Bank of New York involved, prior to entering
17 the appellant agreement, interpreted ETS. We are also
18 seeking communications between bank technology ETS as well
19 as ETS work product, sort of the related documents in their
20 files. One of the things, which is a foundational matter,
21 it's important to discuss with respect to the ETS motion is
22 that Bank of Mellon, if this settlement is approved, would
23 be responsible for, under the settlement agreement, for
24 contributing the payment of the settlement amount to each
25 respective of the 530 covered trust.

26 What the steering committee learned through

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2 discovery was that prior to the settlement agreement being
3 entered into by the Bank of New York Mellon, it hired ETS to
4 model projected cash flow that would occur down the
5 waterfall of at least some of the covered trust if a lump
6 sum payment occurred for those covered trusts and that lump
7 sum payment, of course, was the anticipated settlement
8 agreement assuming that the settlement reached court
9 approval.

10 I just want to pause on this point for a moment,
11 your Honor, and just state here it can't really be a
12 question that the hire of ETS third-party vendor was part of
13 Bank of New York Mellon process that it engaged in prior to
14 entering into the settlement. It was part of the
15 investigation that it did and what we learned, and we will
16 see this later in my argument, but one other thing, critical
17 thing, that we had learned through discovery is that ETS
18 provided to Bank of New York Mellon different options about
19 how the distribution of settlement amount could work in the
20 covered trust.

21 And if we just look quickly, I know that we have
22 talked about the proposed -- final proposed judgment, if we
23 look again at the summary of those findings that Bank of
24 New York Mellon has asked to be made, at the end of the day
25 they want a finding that the settlement agreement is as a
26 result of factual investigation by the trustee, that the

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1 trustee appropriately evaluated the terms, benefits and
2 consequences of the settlement and the Court hereby approves
3 the actions of the trustee and pension of the settlement
4 agreement in all respects, these findings will be put before
5 a court and that trustee is seeking a PFOJ.
6

7 Go far beyond the decision to enter into the
8 settlement, they go to the process just like other advisors
9 and third-party entities or individuals who were hired by
10 Bank of New York Mellon prior in entering into the
11 settlement agreement such as Professor James, Professor
12 Adlernia, Brian Lynch. Such as those individual entities
13 were hired by Bank of New York Mellon to evaluate various
14 aspects of the proposed settlement.

15 So ETS, the aspect ETI was asked to run a model
16 company and do some analysis of is one that directly affects
17 the interest of the certificate holders and of keen interest
18 to the certificate holders because it affects the
19 distribution of any settlement payment that may be received
20 by the covered trust down the waterfall of the structure of
21 the trust that's set out in the servicing agreement.

22 Having learned early in discovery that this
23 company, ETI, was engaging the steering committee to serve a
24 subpoena, one for documents, and one for a deposition and
25 the documents. The subpoena was another identical subpoena
26 we served on the other advisors and third-party vendor that

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2 Bank of New York Mellon hired. The process we sought
3 documentation and communication, ETS we sought data, their
4 files and communications. And what we found was we got back
5 in return from Bank of New York Mellon was a claim that the
6 entire engagement ETI was privileged, that all of the
7 communications of ETI following the attorney-client
8 privilege and that all work product produced by ETI was
9 likewise protected by privilege or the attorney work product
10 doctrine.

11 This blanket claim of privileges just do not hold
12 up under the facts of this case and under the factual record
13 of the very limited testimony that we were allowed to get
14 regarding the engagement of ETI.

15 Before I discuss specifically some of that
16 testimony it is important to discuss just a little bit of
17 background on what the trustee's role is in the cover trust
18 as it relates to distribution of payments down waterfall.

19 This is, in fact, the trustee's normal
20 administrative function, one of them in the cover trust.
21 It's what the trustee does on just a routine day-to-day
22 basis. It's the trustee's business. Whoever the servicing
23 entities is on these loans, whether it's Bank of America
24 master service entity or some sub-server collecting the
25 interest, principal and interest, payments on the borrower
26 on a monthly basis, those funds are trusted by the trustee

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2 and are then distributed by the trustee down the waterfall
3 on a routine basis to be paid to the certificate holders.

4 This is such a routine function of the trustee's
5 duties under PSA and the role that the trustee, just as a
6 norm, pours them out and places it in these trusts of the
7 Bank of New York Mellon Group and the entire department that
8 does this sort of analytic group. The analytic group is in
9 charge of understanding the waterfall structures, various
10 trusts, and figures out how the funds that are received for
11 the trust will then be distributed.

12 And we were actually able to depose one of the
13 employees of Bank of New York Mellon who works in the
14 analytic department. His name is Jason Buchele. And we
15 asked him about the function that Bank of New York Mellon
16 serves and what he does in his department. And it is also
17 important, as I mentioned earlier, to note that under the
18 settlement agreement Bank of New York Mellon officer does
19 this same function that it always does in distributing
20 waterfall payment.

21 But Mr. Buchele told us when this is going to
22 happen, when it happens, in distributing this lump sum
23 payment, it's going to take the trustee in some sort of
24 charted territory that the trustee -- there is not specific
25 structure in the PSA for how to deal with this type of
26 payment. So we will play that deposition clip, which is

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2 page 75, line 24 through page 76, 24.

3 (Video file played in open court.)

4 (Video file concludes.)

5 MS. PENNINGTON: So before the settlement agreement
6 and the terms of it could be determined, Bank of New York
7 Mellon had to understand how to determine how the basic
8 function that it performs all the time as trustee was going
9 to work with respect to a settlement payment. And so Bank
10 of New York Mellon, the entity hired ETI, the third-party,
11 vendor to sift it, and we also know from testimony that ETI
12 is the vendor that Bank of New York Mellon has used for
13 20 years to assist it at various points of time in doing the
14 analytics on the waterfall.

15 And we know from a couple of sources that it was
16 Bank of New York Mellon that hired ETI and not Mayer Brown
17 and that was for purposes of doing these cash flow
18 projections and the waterfall analysis. First of all, we
19 know by some of the very few documents that we actually
20 produced, I believe it was three documents and it was
21 something of nine pages of paper, so much of which was
22 redacted, but we did learn a few important things from those
23 few documents.

24 One of them was a confidentiality undertaking that
25 Bank of New York Mellon signed and ETI signed. That
26 undertaken was signed by the Levert Rondon on behalf of Bank

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2 of New York Mellon, who was an employee at Bank of New York
3 Mellon.

4 And the second whereas clause, that agreement says
5 that BNY was considering engaging, emphasis, and technology
6 interpreted, parenthesis, services, provider to provide
7 certain waterfall distribution modeling services. Another
8 documentary source of evidence that we have about what the
9 nature of this engagement was and what its purposes was is
10 the engagement letter, statement of the scope of services
11 that ETI drafted and sent to Bank of New York Mellon, Mayer
12 Brown, describing what the engagement would be.

13 This was a heavily redacted document but there was
14 some information in there that shed light on this question,
15 and Mr. David Anthony, who was the representative of ETI,
16 who appeared for the deposition, testified as to this issue
17 as well. And if we could play A1, which is page 37, line 12
18 through 38, 6.

19 (Video file played in open court.)

20 (Video file concludes.)

21 MS. PENNINGTON: So, your Honor, that testimony was
22 not ambitious as to who hired Mr. Anthony and his firm ETI
23 and there is finally a third source, sort of a late produced
24 one, that gives some insight into the nature of the
25 engagement that the privilege log that Bank of New York
26 Mellon finally produced on, actually, March 13th of this

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2 year, where they logged the communications and documents
3 that they have been claiming this privilege is work product.

4 I will just note this privilege log was produced
5 four months after the deposition actually took place, two
6 months after our motion was originally filed, and one month
7 after the hearing at which this motion was originally slated
8 to be argued but, nonetheless, we did receive a privilege
9 log on March 13th and that privilege log shows two
10 interesting things.

11 The first is that Mr. Buchele, who you saw a clip
12 of his testimony a moment ago, was on the majority of the
13 communications that were logged. On that log Miss Lindberg
14 was in lesser amounts of those communications, but she
15 certainly was on numerous of them as well, so this
16 engagement, the business personnel of Bank of New York
17 Mellon was involved in the loop behind receiving the work
18 product, receiving e-mails and involved in phone
19 conversations all along the way.

20 The second thing that was interesting to me from
21 this privilege log is that at least 20 or so communications
22 there is no attorney listed whatsoever. And yet an
23 attorney-client privilege and work product claim has been
24 made. But why does the steering committee seek this
25 information. The reason, the least of it is because
26 Mr. Anthony testified that there were multiple options as to

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2 how a lump sum payment of the settlement could be
3 distributed down the waterfall.

4 If we could play A2, which is Mr. Anthony's
5 deposition, page 48, line 5 -- line 1.

6 (Video file played in open court.)

7 (Video file concludes.)

8 MS. PENNINGTON: Your Honor, that clip actually
9 shows two important things. The first is that there were,
10 in fact, different options that ETI modeled and determined
11 that there were from the Bank of New York Mellon and how to
12 distribute these funds.

13 The other important thing that that clipped showed
14 us is the nature of the questions that were being objected
15 to, what is being withheld under this blanket claim of
16 privilege, and there can be no dispute, no question that the
17 underlying facts are not subject to the attorney-client
18 privilege, and the types of facts that we have not been
19 provided, and that we saw some of in that clip under the
20 guise of privilege were, what were the number of trusts for
21 whom a distribution was modeled, which trusts were modeled,
22 what were the options for the distribution, what was the
23 effect of the various options for the certificate holders in
24 option A versus option B versus option C.

25 And we don't know the answer to any of those
26 questions. What at the end of the day the data funded, what

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2 is fundamentally the data that ETI produced. There is
3 testimony in other slides. I won't show these, they are
4 they work product, what did the data show, and what that
5 impact had been for the certificate holder.

6 This goes directly to how money flows down the
7 waterfall and to the holders of the beneficial interest in
8 these trusts who are supposed -- who are the beneficiaries
9 of all of the trustees conduct, and it also goes to what
10 Bank of New York Mellon did and did not do. Did Bank of New
11 York Mellon question and analyze and determine the effects
12 that these various options could have for certificate
13 holders, are some certificate holders advanced under one
14 distribution method versus under another. That was
15 fundamentally the steering committee sought this
16 information.

17 That's what we are concerned about. That's why we
18 do not believe it falls under any sort of attorney-client
19 privilege or work product protection because it falls
20 squarely in some of the business functions that Bank of New
21 York Mellon trustee provides to these trusts. In this
22 respect, the First Department said in the Spectrum Systems
23 versus Chemical Bank case, which is 15 A.D. 2d 444. They
24 said that on page 448, that in the facts of that case,
25 similar to here, that the information requested was a symbol
26 to aid the defendant in the operation of its business and as

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2 such is not exempt from disclosure.

3 They also cited approvingly of another appellate
4 division case that says it has long been settled that
5 information received by the attorney from other persons and
6 sources while acting on behalf of a client does not come
7 within the attorney client privilege.

8 So the fact that Mayer Brown may have been involved
9 in this engagement or Mayer Brown may have also been privy
10 to other parts of the conversation that occurred with ETI or
11 with Mr. Buchele or other persons within Bank of New York
12 Mellon does not suddenly cover the facts of what Bank of New
13 York Mellon did in this engagement.

14 Even if those facts and that data and the models
15 that ETI produced, the way the Sullivan agreement was
16 drafted, that doesn't cloak the fundamental facts about what
17 Bank of New York Mellon did prior to entering a settlement
18 agreement under decisions that were made, that received
19 additional approval, does not cloak them with privilege.

20 Finally, your Honor, I'll just say that even if the
21 Court were to determine that these were privileged
22 communications of documents and work product in the first
23 instance, which we obviously don't think they are, but even
24 if the Court was to determine that they are they would fall
25 under the fiduciary exception because there's going to be
26 really no question about whether this work was done and to

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2 the extent it was legal by an institute we don't think it
3 was for the reason I articulated to the entity there was
4 legal advice involved that was legal advice directly for the
5 benefit of beneficiaries we are entitled to know what the
6 options were, we are entitled to know what decision was made
7 and what the potential other scenarios could have been.

8 THE COURT: Do you know now what option they chose?
9 Is there somewhere in the settlement agreement or some other
10 document that says this is how the waterfall payments are
11 going to happen once this gets signed off on.

12 MS. PENNINGTON: Well, your Honor, section 3, I
13 believe it's D2, settlement agreement addresses, you know,
14 the funds, for example, not hitting residual, was interested
15 in being reserved for secondary distribution date, but it's
16 not clear, at least to us, from the Sullivan agreement what
17 the various scenarios could have been and what the different
18 impacts could have been to certificate holders of what were
19 the different ways in which the distribution could have
20 worked.

21 Those are all questions that were blocked. So
22 bottom line is we don't know what's behind the curtain. We
23 don't know what impact they may or may not have had. That's
24 precisely why we had need to see these communications, so
25 they can be evaluated.

26 THE COURT: Okay, who is speaking to that on behalf

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2 of the petitioner?

3 MR. HOUPT I will, your Honor. I will use the
4 podium. I will try.

5 THE COURT: She was good, she was quick. If you
6 run it over we will have to do it after lunch.

7 MR. HOUPT I'd like to start, actually, with what
8 the steering committee has left out on all of its briefs and
9 argument today, which is the legal standard for when a
10 nonlawyer or third party can be within the attorney client
11 privilege, if I can have the first slide.

12 That's set out most articulately in a friendly
13 decision in United States versus Kovel, he says, talking
14 about an accountant in that case, what's vital to the
15 privilege is that communication be made in confidence for
16 the purpose of obtaining legal advice from the lawyer. And
17 he says in the other box that if the presence of the
18 nonlawyer is necessary, or at least useful for the legal
19 consultation, that the accountant or whoever it is is within
20 the privilege. And so we can think about what could have --
21 it's distinct, are two different fact patterns. In one you
22 have a client that is seeking nonlegal advice, what the
23 client ultimately wants to consume, accounting advice or
24 medical treatment or some other nonlegal work, of course
25 that's not privileged.

26 Now, you can funnel that through a law firm that

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2 just transmits the nonlegal advice, that doesn't change
3 anything, it is still not privileged. And so there is some
4 cases saying what the client was looking for was an audit of
5 its accounting status, what the patient was looking for was
6 medical treatment, it doesn't matter whether the lawyer was
7 there or not, that doesn't effect privilege.

8 By the same token the other side, if you have a
9 client that's looking for legal advice and they say, you
10 know, before this lawyer can conduct a litigation, before
11 the lawyer can draft this contract it needs to understand
12 some technical aspect of how the world works, it needs some
13 administrative support. And well, of course the lawyer's
14 advice is privileged. And so the lawyer gets advice from a
15 nonlawyer. In that case if what the client ultimately
16 consumes is the legal advice rather than the nonlegal advice
17 the latter is also within the attorney client privilege.

18 Now, that's the standard, that's the distinction
19 that we have to make. That's why we have to treat some of
20 our consultants in different ways. Some of them provide you
21 nonlegal advice that the trustee and the trust committee
22 considered directly, where countrywide assets were, what's
23 the value repurchasing claim, they went through Mayer Brown,
24 but trustee wants the nonlegal advice, so he never asserted
25 privilege with respect to two lenders, ETS being one of
26 them. Because those vendors did not assist the client

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2 directly, they assisted Mayer Brown in providing legal
3 advice.

4 THE COURT: What was legal advice? Ultimately they
5 were going to enter into settlement agreement, that's what
6 you were working, but they just gave them accounting advice
7 that would have to be incorporated into the settlement
8 because. Obviously, if you are going to get this
9 unprecedented settlement then you would have to do the
10 unprecedented payment to all certificate holders in some way
11 that I imagine if you understood all the details you could
12 be an accountant not a lawyer, but you don't, where does
13 that like become legal advice. I am missing that little
14 connection.

15 MR. HOUP: I will go there right now. If we can
16 have D2, this is the part that's a little bit complicated
17 and I will do my best to explain. There were some
18 provisions of the settlement agreement and the provisions of
19 the settlement agreement, Mayer Brown was struggling, as we
20 drafted along, and the other parties drafted these
21 provisions.

22 This is paragraph 3 which deals with the settlement
23 amount. 3A says the settlement payment 785 billion. 3B
24 talks about how it would be paid to the appropriate
25 accounts. On the next page, this is where it gets more
26 interesting. 3C deals with the allocation formula, that's

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2 how 8.5 billion is divided among the 530 trusts that involve
3 some calculations that would be done by another consulting
4 firm called Narrow, we didn't assert privilege over them,
5 they got full discovery from Narrow. On the next page here
6 is where ETI comes in.

7 Paragraph 3D, which is Miss Pennington alluded to
8 the distribution is distinct from the allocation, the
9 distribution within each trust. And I won't try to explain
10 and justify every part of this, but I would like to give the
11 Court some sort of idea how it works at the high level.

12 So the first highlighted portion there says, within
13 each trust we will distribute that trust share of the
14 payment in accordance with the distribution provisions of
15 the governing agreement PSA, as though that settlement was
16 something called a subsequent recovery. That's a particular
17 kind of income that already exists in PSA, they distinguish
18 among principal payments from borrower interest payments.
19 They all sort of go into waterfalls and account for
20 different ways. We are going to treat this one as
21 subsequent recovery.

22 Jason Buchele said we haven't allocated settlement
23 this way before. What he meant is the PSA doesn't say you
24 have a litigation settlement, this is exactly how you do it.
25 So the lawyers had to figure out, the lawyers for all three
26 parties had to figure out what's the closest analogy, the

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2 best way to characterize this within PSA. The general rule,
3 treat as subsequent recovery and follow the preexisting
4 waterfalls.

5 Then there are some details that are filled in.
6 The next one is, however, the master services is not
7 entitled to get any of this money. With normal subsequent
8 recovery under PSA sometimes master receiver can get a piece
9 of that, and that makes sense in that context. When you are
10 dealing with the settlement payment, where one of the
11 settling parties is master receiver it doesn't make sense
12 for money to go into trust and bounce back to them. We
13 said, okay, that's something we need to address.
14 Specifically, we did that.

15 Further down we see that if a principal payment
16 would become payable to a class of REMIC residual interest
17 which changed distribution, that doesn't happen, we spread
18 it out over time. Again, we thought that that adjustment
19 was appropriate, and other people can talk about why, I
20 don't know if they have any real substantive objection to
21 those terms. Primarily it's because the REMIC residual
22 interest are mostly owned by Countrywide, so again, we
23 didn't want them to get a share of the settlement payment on
24 the back end. We also thought the intent of those
25 certificates is not that they receive principal payments at
26 this time. So we had a general rule, treat it as subsequent

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2 recovery then we have specific things, some tweaks we needed
3 to make.

4 On the next page 37(D)(2) deals with some
5 accounting issues and principal write ups and write downs,
6 and it also has some details in this thing called senior
7 credits, support depletion date shall have occurred. We
8 explain how that should be dealt with because PSA doesn't
9 say with specificity. What ETI does, Miss Pennington said,
10 ETI ran projected cash flow and that's not right.

11 What ETI did, according to testimony that's in the
12 record, an affidavit from Jason Kravitz that we put in on
13 this motion, is they ran hypothetical numbers that were not
14 designed to protect what would actually happen, they were
15 designed to put stress on PSA waterfalls. We said how do
16 you identify these tweaks that we need to make. How do we
17 know it's possible, for example, that master services might
18 get money or REMIC residual interest might get money or
19 senior support completion date, maybe elect one day to do
20 work for a lawyer, like PSA for a long time and try to
21 brainstorm everything. But another one today is run models,
22 say let's make up some numbers, take extreme examples that
23 might cause weird things to happen and see where the money
24 goes, we say in this simulation, in this option, we see
25 money given to the lawyers and said we need to address that
26 in the contract.

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2 In this model over here we see money going to
3 residual interest, that's not what we meant to do, that
4 doesn't make sense. We will address that when we address
5 paragraph 3D. That's how ETI engagement fits into drafting
6 settlement agreement and the legal advice Mayer Brown
7 provided.

8 I will note to the extent there were discussions
9 among all three parties and there were drafts going back and
10 forth of these provisions, all three parties, those aren't
11 privileged. They are options that parties discussed, they
12 aren't privileged. They haven't asked about them in any of
13 the depositions, as far as I can recall, we never asserted
14 privilege over this third party communication.

15 Only thing we assert privilege is what Mayer Brown
16 did internally that did not communicate to the other parties
17 and assistants that ETI provided, running these hypothetical
18 simulations that Mayer Brown could understand what might go
19 wrong, and what they might need to address is simplicity in
20 the settlement agreement.

21 There are a few things that Koval and its project
22 did say are not relevant to whether the third party is
23 within the attorney client privilege. Actually, if we could
24 have the last slide Koval specifically says it doesn't
25 matter, it doesn't matter who hires the nonparty. The
26 client here is talking about language interpreter. Client

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2 might hire the interpreter, the lawyer might hire the
3 interpreter that doesn't effect the purpose for legal
4 advice. It doesn't matter who signs the engagement letter,
5 it doesn't matter who pays the bills. Also it doesn't
6 matter who is present or who heard the advice from the
7 nonlawyer. If in fact the nonlawyer and client are speaking
8 directly doesn't somehow waive privilege. You don't waive
9 privilege by disclosing communications to a client. What
10 matters is why that person is there. Is he there to help
11 the client directly or is he there to help the lawyer help
12 the client. That's the ultimate question.

13 So there is really, I think the steering committee
14 doesn't really dispute that if ETI did what I said they did
15 that it would be privileged. Instead they dispute, they
16 think we are just making this up after the fact, what each
17 guy actually did was something totally different. Here we
18 can look at the record. Jason Kravitz has put in an
19 affidavit on this motion explaining the engagement, just as
20 I have. He was also deposed for two days, he is Mayer
21 Brown's lawyer and part of the transaction site, he would
22 know best what we did with waterfalls, what we did with
23 drafting these technical parts to Sullivan. He wasn't asked
24 a single question about ETI, he never had the opportunity to
25 give that explanation.

26 Jason Buchele, you saw a little bit from, and

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2 certainly he was involved in the process, he talked to ETI
3 and to the trustee, he specifically asked did the Bank of
4 New York Mellon hire ETI, this is page 72 of his transcript,
5 he says no. He said why do you think the answer is no? He
6 said, well, I didn't ask them that, Mayer Brown did. He was
7 also asked did you talk to ETI during this engagement. He
8 said yes, but never without the presence of Mayer Brown. He
9 never talked to ETI without his lawyers presence.

10 Now, he said that doesn't really matter, nonlawyer
11 and client could talk directly without lawyer and confirms
12 ETS really was working with Mayer Brown. They also asked
13 Mr. Buchele did you discuss paragraph 3, the settlement
14 agreement with ETI. He said no, those discussions were
15 entirely with Mayer Brown. That's exactly consistent with
16 what David Anthony said.

17 I think this is really the conclusive factor on
18 this point. I think it's a little bit of a long cut, I
19 would like to play D2, Mr. Anthony from ETI testified that
20 he actually was not aware that there was a settlement
21 agreement and so until he read about it in the newspapers
22 what he did was run simulations of hypothetical newspapers
23 that Mayer Brown had given to them. He found out after the
24 war that was related to settlement agreement. I think that
25 really, the notion that trustee asked him how do we
26 distribute settlement proceeds under PSA, he doesn't know

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2 there was a settlement to begin with.

3 (Videotape heard in open court.)

4 (Videotape concludes.)

5 MR. HOUPPT: That confirms the description I gave
6 before which is that the legal analysis of what options are
7 there, what ways can you characterize the litigation
8 settlement payment under PSA, that was legal work that was
9 done by Mayer Brown. The work that was done by ETI was
10 purely computation, it was for the purpose of identifying
11 what might go wrong and what might happen if it is not
12 intended. But ETI was not presenting a menu of options,
13 they treat it as subsequent recovery or you could treat it
14 as foreclosure presence, that's legal, right. That's not
15 what ETI was doing, they were helping out the lawyers and
16 sort of the issue spotting exercising.

17 The details Mr. Hani gave in this engagement were
18 also consistent with the fact this is directed by counsel.
19 If we can, El. He had been asked about Mr. Buchele and
20 whether he was working with Mr. Buchele. He said was
21 Buchele your main point of contact.

22 (Videotape played in open court.)

23 (Videotape concludes.)

24 MR. HOUPPT: He said ETI was partner of Mayer Brown.
25 Ms. Pennington alluded to the engagement letter that's D 23.
26 She didn't show you what it says, as we mentioned we had to

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2 redact a lot of it because it goes into a lot of details.
3 One thing it says, at the request of the Bank of New York
4 Mellon, under the direction of Mayer Brown, this is what we
5 are going to do that distinguishes ETI work, that we are
6 claiming privilege over relating to settlement agreement
7 from work they do on a month to month basis. Certainly
8 every month trustee has to calculate distribution payments.
9 ETI helps them with that, and that is a business function
10 that's not privileged. We have never asserted privilege
11 over that.

12 If the steering committee were interested in how
13 the money is going to be distributed when settlement payment
14 is actually made, to the extent preparations had been made
15 for that that mechanical process that would not be
16 privileged, that would be business function.

17 THE COURT: So has that been given to them?

18 MR. HOUP: They didn't ask. I don't know what
19 there is to say about how it would be. Let me clarify, your
20 Honor looks puzzled.

21 The answer to the question how will the settlement
22 payment be characterized in the settlement agreement. The
23 legal rules for how it would be distributed, that's up there
24 in paragraph 3D. That's all set forth.

25 THE COURT: You said how was money going to be
26 distributed? I would say they had interest in that, if you

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2 says they didn't give them they didn't, but you would give
3 it to them so give it to them.

4 MR. HOUPPT: I think I was confusing two different
5 things. What I was saying if they want to ask Jason Buchele
6 what's the process Bank of New York Mellon for how you
7 calculate numbers, how are you going to mechanically move
8 the money, they could have asked that, that would not have
9 been privileged. If they want to know how the money will
10 run through waterfall, how it will be treated, that's in the
11 settlement agreement.

12 THE COURT: I know you have not finished, you have
13 to finish after lunch. Do you think it would make sense for
14 you to give a copy of this privilege log, since I didn't
15 know about it because it came back since you were last here
16 and the privilege log that refers to ETI that you and Ms.
17 Pennington mentioned that you received last from Mayer
18 Brown.

19 MS. PENNINGTON: Sure, your Honor, I have a copy of
20 that similar to Mr. Reilly's copy, there are some
21 highlighted.

22 THE COURT: I have to close the courtroom, show it
23 to Mr. Ingber outside, and if you don't have any problems
24 then I guess somebody who got to come around to the bank.

25 MR. INGBER: Your Honor, one other option is
26 e-mailing to Miss Rodriguez.

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2 THE COURT: When?

3 MR. INGBER: Right in the next ten minutes.

4 MR. REILLY: Let's do that with the privilege logs
5 on the other issue also.

6 THE COURT: It doesn't matter since we are not
7 going to get that -- maybe you should come too, please, or
8 to both of us, send it to both of us, okay. Okay. Great.

9 (Whereupon, a luncheon recess was taken.)
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2 A F T E R N O O N S E S S I O N

3 THE COURT: All rise, part 39 now in session, the
4 Honorable Barbara Kapnick presiding. Please be seated, come
5 to order.

6 Okay. Do you want to finish?

7 MR. HOUPT: I have less than ten minutes left.

8 THE COURT: Okay, that's fine.

9 MR. HOUPT: Thank you. I think I might have
10 forgotten to introduce myself when I started. My name is
11 Chris Houpt. We just looked at the ETI engagement letter
12 and said we are working for Bank of New York at the
13 direction of Mayer Brown. The other document I want to show
14 you is the ETI invoice that they --

15 THE COURT: The Mayer Brown project?

16 MR. HOUPT: Exactly. You see two things. One is
17 the title. This is the Mayer Brown project, unlike
18 everything else they do.

19 The other thing you see that they kept their time
20 separately for this project, this wasn't mixed together with
21 their nonprivileged trust administration. We didn't produce
22 this document before this motion because it wasn't relevant
23 to the decision entering into settlement. They didn't send
24 it to the trustee until after the trustee had already signed
25 the settlement, that's why we didn't produce it. But it is
26 relevant, we think, to showing on this motion that the

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2 engagement was privileged.

3 I'd like to show one more clip, and this is Jason
4 Beuchele, again explaining why we needed to use ETI rather
5 than do this work internally.

6 And also the second question here gives an example
7 of the kind of information that the steering committee was
8 able to get when the asked a business person about what the
9 business considerations were in distributing settlement.

10 (Video file played in open court.)

11 (Video file concludes.)

12 MR. HOUPPT: You have heard the steering committee
13 make the argument, we don't think this is legally correct,
14 anyway, but that Bank of New York Mellon could have done the
15 ETI work internally, we didn't need to hire a third party,
16 that's not the standard, but in any event Mr. Beuchele
17 explained why we did need to hire ETI, they have different
18 computer models that could do different forward looking
19 simulations. I would like to close going back to D26, the
20 settlement agreement. I just want to reinforce what they
21 have and the limited amount of information they don't have.

22 So your Honor asked Mr --

23 THE COURT: Can I ask a silly question, where is
24 our copy of the settlement agreement, wasn't it attached to
25 the first motion?

26 MR. HOUPPT: I think it was attached to the verified

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2 petition. I want to say it was Exhibit B, maybe.

3 MS. PATRICK: Your Honor, it's Exhibit B to the
4 trustee's petition.

5 THE COURT: Okay. All right, you can continue, we
6 will look.

7 MR. HOUPT: So your Honor had asked Ms. Pennington,
8 do you know what option the trustee choose. And here it is.
9 They know how the settlement payment is going to be
10 allocated, that's Section 318, that has been public since
11 day one. They know how Mayer is going to do those
12 calculations, that is all nonprivileged, they deposed, they
13 have got documents from Mayer, they know in section 37D how
14 settlement payment is going to be distributed within each
15 waterfall. And they also have, or they have had the
16 opportunity to get all of the communications among the
17 parties discussing how to draft these provisions.

18 The only thing that they don't have is the internal
19 Mayer Brown documents, and the documents where we work with
20 this vendor to help us issue spots and help us draft this
21 provision.

22 David Anthony also testified, we saw him testify,
23 he didn't know that this was about a settlement agreement,
24 he was just running simulations. He also testified he
25 didn't talk to Bank of America, he didn't talk to the
26 institutional investors. So the idea that they are some

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2 kind of trove of factual information about the settlement
3 processor negotiations or anything else, it is belied by
4 that testimony. They had a very narrow engagement, they
5 were given very little information, and so all of the
6 documents that they have are either instructions from Mayer
7 Brown on what to simulate their own work on, figuring out
8 how to do that, and then transferring that work product back
9 to Mayer Brown and the Bank of New York Mellon.

10 So if we were to produce these documents what would
11 it tell the steering committee? They will not learn how
12 money is going to be distributed. At most it would tell
13 them that they would see a simulation result that might
14 show, for example, money going to the master services.

15 Well, is that useful? No, because the settlement
16 agreement says, because we looked at those kinds of
17 simulations, we said we're not going to give money to the
18 master server, they might see simulations that show money
19 going to the REMIC Residual agency or the senior medical
20 support senior trigger being flipped. But that won't happen
21 in reality, because after we saw the simulation result we
22 drafted settlement agreement to do exactly what the
23 agreement says and not to match these hypothetical results.

24 The whole point was we wanted to know what could go
25 wrong so we could address that in the agreement. The
26 agreement is the beginning and end of the distribution

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2 provisions and there is really nothing else that would even
3 be useful, even if it were slightly useful we think clearly
4 it's privilege.

5 Thank you, your Honor.

6 THE COURT: Thank you. Would you like to make any
7 brief replies to Mr. Houpt's argument?

8 MS. PENNINGTON: I would, your Honor. There is
9 just a few points in Mr. Houpt's argument that I would like
10 to hit on. The first is where he started when he put up the
11 U.S. versus Koval, Second Circuit opinion, he said that this
12 is standard.

13 What I would submit to your Honor, there is First
14 Department New York cases, that's one. That reference in my
15 opening argument, that's essentially dispositive of this
16 issue. Again, the quote in that case, that has long been
17 settled.

18 THE COURT: Which case are you reading from?

19 MS. PENNINGTON: I am reading from the Spectrum
20 Systems versus Chemical Bank at pin point site 449. In this
21 particular instance the First Department is quoting with
22 approval another case. That has long been settled, that
23 information received by the attorney from other persons and
24 sources while acting on behalf of a client does not come
25 within the attorney client privilege.

26 So notwithstanding what the Second Circuit might

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2 have said in some of the other federal cases, all or none of
3 which are really fact in point in this type of scenario that
4 we have here, but in any event, this New York authority says
5 that information received from a third party by an attorney,
6 even if it's in the assistance of a client, does not fall
7 within the attorney client privilege.

8 Secondly, something that I found very interesting
9 about the end of Mr. Houpt's argument right there was his
10 admission that they did not produce the invoice, the
11 redacted invoice that we saw for the first time with their
12 opposition to this motion. And this creates precisely
13 the -- of the steering committee faced with this motion and
14 many of the other discovery issues that we face in this
15 case. That document was directly responsive to the subpoena
16 that we served on ETI and it was not produced because of
17 this privileged claim until they had to defend the motion to
18 allow us to get the facts about the engagement.

19 And that brings to me to my third point, your
20 Honor, which is the clip that Mr. Beuchele -- of
21 Mr. Beuchele's testimony that Mr. Houpt just played in which
22 he said something very important. It was the clip where he
23 was discussing why ETI had to be brought in, because down
24 the road the statement of the settlement amount, this lump
25 sum payment could have, I think he said, down the road
26 impact to holders. And that again crystalizes why after

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2 that deposition Mr. Anthony's deposition, because of the
3 clips that I showed you earlier today, the steering
4 committee was interested in that information. What could
5 that down the road impact to holders have been, and there is
6 no reason why the date at that ETI crunched in the analysis
7 that it did, even if it was then used by Mayer Brown why
8 that data, that those underlying facts should be repelled
9 under the privilege.

10 And finally, your Honor, the purpose of discovery
11 is to be able to test the assertions of the parties that
12 were made in court. And, you know, as I said in opening
13 argument, we don't know what's going to be behind the
14 curtain, but the representations that are being made about
15 what's going to be behind the curtain are things that the
16 steering committee should be able to test with the facts and
17 documents. That is the purpose of discovery. We don't
18 think that is privileged. For this reason we request that
19 you grant motion sequence 29.

20 THE COURT: I agree that discovery is very broad in
21 this Court, but I also agree that the attorney client
22 privilege is a very important privilege. So now you're
23 weighing different things. You are trying to invade the
24 privilege, and all these different motions, and all of these
25 ways. And I'm not sure in every single way that's okay just
26 because the discovery is broad, give us everything.

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2 Well, there are some limitations on discovery and I
3 have to weigh all of these different things. It's just
4 not -- you just cannot get everything in the world you could
5 possibly get, and there has been a lot produced here.

6 All right. Thank you very much.

7 Do you want to deal really briefly with this order
8 to show cause that I signed last week and told you not to
9 give me any papers because I don't want any more?

10 MR. REILLY: Sure.

11 THE COURT: This is, for the record, now motion
12 sequence 34, why the Court should not vacate inside
13 institutional investor's discovery demands. I guess you got
14 some discovery demand by institutional investors and there
15 was some time restraints on it. Why don't you just briefly
16 deal with this.

17 MR. REILLY: Your Honor, as we indicated in the
18 motion, what we are asking is that the Court in essence say
19 if you are going to ask for discovery do it consistent with
20 the amended scheduling order which this Court entered on
21 February 26th. We had a discussion about the scheduling
22 order. We had issues. Both sides made their points. We
23 proposed that the hearing be a few months later, they wanted
24 it at the end of May. And then we modified the other
25 schedules, including when the objections are due.

26 Currently the objections are due May 3rd, and any

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2 support for the settlement is due May 3rd, and the order is
3 clear that, in fact, on May 3rd the discovery, if they want
4 to try to pursue discovery from the objectors it would
5 start. That's the way we have been operating.

6 So, frankly, out of the blue we got e-mails from
7 Miss Patrick, we meaning virtually every intervenor, with
8 extensive set of discovery, which clearly violated the order
9 that said discovery commences after the objections. And
10 then notices to appear for deposition on May 3rd, the day
11 the objections are due, all stacked up on one day, as best
12 we could tell, everybody is supposed to show up on May 3rd
13 to answer questions, so it didn't --

14 THE COURT: As long as I don't have to be there.

15 MR. REILLY: You don't have to be there, no, no.
16 And if I could convince you I won't have to be there either.
17 But coupled with that was a letter from Ms. Patrick that
18 said, you know, look, if you don't object you don't have to
19 answer this stuff, right.

20 THE COURT: You don't, but what happened, you are
21 saying you don't have to decide whether you are going to
22 object to May 3rd?

23 MR. REILLY: Right.

24 THE COURT: You might shock us all and not object
25 and we will be all right.

26 MR. REILLY: Right, exactly, that's point number

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2 one. And they were moving up to say tell us on April 1st
3 whether you are going to object or not. So it was clearly,
4 in our view, contrary to the order. And in our view we
5 think it was intended to have those people who wanted to
6 decide whether they are going to object have to decide
7 before the expert reports. And you had said let's get the
8 expert reports out there.

9 Now as of last night all the expert reports are now
10 in. But as I said, there are a lot of stuff, and anybody
11 who is trying to make a decision whether they are going to
12 get involved or not is going to need that time from today
13 until May 3rd. And so fundamentally the relief we are
14 asking for is to stay with the order as is drafted.

15 One of the things in your -- that I think is
16 apparent, we as a steering committee and 18 law firms that
17 signed our motion are all going to object to discovery from
18 the intervenors, that we've told them from the beginning
19 that we don't think that's appropriate, and when we get that
20 stuff we'll look at those answers and we will look at what
21 we can do and can't do, but fundamentally we don't think
22 it's appropriate.

23 Secondly, there's a request in there that we
24 provide all the information that's the basis for our
25 objections. That's what we are going to do in the
26 objection. The court indicated when you file your objection

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2 indicate the basis for it, indicate the testimony that you
3 are going to present at the hearing. And that's going to
4 happen on May 3rd. So I think it makes most sense to stick
5 with the order. If they wanted to move to amend the
6 scheduling order, they could have done that, but this was
7 kind of back doorway of doing that. So bottom line is we
8 ask you to vacate their discovery, comply with the order,
9 submit it to us on May 3rd, and to anybody else who objects
10 we'll respond with objections. If there is disputes about
11 it we will come to you, and you can resolve it at that the
12 point.

13 MS. PATRICK: Good afternoon, your Honor, Kathy
14 Patrick for the institutional investors.

15 Let me start with your order, which says that
16 discovery shall commence on May 3rd. The request that we
17 served contemplates a response in the production of
18 documents on May 3rd. They are --

19 THE COURT: The thing is, I don't know where you're
20 reading, but my scheduling order that I signed on
21 February 26th, and let me just make it clear, I didn't make
22 it up, I so ordered your stipulated amended scheduling
23 order. I didn't come up with this. This is what is
24 supposed to happen on May 3rd. The briefs and supporter
25 opposition to the settlement shall be filed. Each
26 intervenor and/or objector shall notify the trustee and the

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2 Court whether they object to the settlement, whether they
3 intend to present evidence in testimony in opposition to the
4 settlement at the final hearing, and shall state the points
5 or grounds of their objections.

6 Discovery, I guess, then shall be commenced. But
7 to serve discovery responses now, when no one has even
8 decided if they want to reject it and expect responses by
9 that day, I think, is not reading that the way I would read
10 it.

11 MS. PATRICK: Well, your Honor, if we erred in that
12 I apologize to the Court, but let me give you why we did it
13 that way so that you understand. If we served the requests
14 on May 3rd and they claim their full 20 days to respond we
15 will get documents on May 23rd, four days before the hearing
16 is set to commence. Now, there is nothing untoward about a
17 discovery period, how are we supposed to start discovery
18 without the documents. If they need a few days at the
19 beginning of the discovery we would ask that Court simply
20 order us to serve those requests on the 3rd and shorten the
21 time so their responses are due on the 6th. We want to use
22 the discovery period that we have. And it's quite
23 important, your Honor, this discovery is targeted and it is
24 discovery that we are entitled to. 3101 says we are
25 entitled to all material relevant to the defense. Your
26 order says they have to identify the evidence and testimony

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2 on which they are going to rely.

3 If it is their position that they are not relying
4 on anything other than the documents that have already been
5 produced there's no burden to them in saying that. But
6 here's what we have asked them for and why it is relevant.
7 Holdings, holdings are essential to determine their
8 standard.

9 THE COURT: Holdings?

10 MS. PATRICK: Their holdings of securities. We ask
11 them in request 7 through 13 for the evidence they intend to
12 use at the hearing. Why are we not appropriately entitled
13 not to be ambushed at the hearing. We ask and request 14
14 through 17 for information related to the motivation for
15 their objections. We've given you case law from Tally
16 Industries and Prodigy demonstrating that when an objector's
17 efforts are engaged in forcing the payment or settlement of
18 the objector's claims that necessarily colors the Court's
19 consideration of the objections.

20 And finally, and this is quite important, your
21 Honor, none of the expert reports that have been filed
22 contests that the 8.5 billion settlement is too low. There
23 is no expert report from their side that says the number
24 should have been 9 billion, 19 billion, 90 billion. Not a
25 single expert report. So if we are going to hear that there
26 is a definitive number that should have been obtained in the

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2 settlement negotiations, it would be quite important for us
3 to understand what the evidence is they intend to offer on
4 the value of the claims.

5 So when you boil it down, your Honor, we have a
6 short window of time for discovery from objectors. And we
7 gave them weeks and weeks of advanced notice about the
8 documents we were going to seek to use in that process. If
9 we've misunderstood what the order meant by commenced, I
10 apologize. But the easy solution is for us to hit reset.
11 We will serve these requests on the 3rd, but we would ask
12 that the Court shorten the time, because we can't get the
13 documents four days before the hearing.

14 THE COURT: You want to address that? I mean, I
15 don't think you know who the objectors are, I think you have
16 to give them to May 3rd to decide whether they are going to
17 do that. Then you can serve on whoever the objectors, their
18 request. But honestly, to say you are going to give them
19 three days to come up with all of that, I mean, look, you
20 pushed me like crazy for the May 30th date, it couldn't
21 possibly be later, no possible way. You knew that there was
22 all this discovery, I just think, I mean, I'm not saying you
23 should get it as a walk in the door for hearing but maybe we
24 could shorten it little bit, but I don't think they have to
25 start handing over to you and have 45,000 depositions on May
26 3rd, which is impractical and doesn't make any sense,

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2 anyway.

3 MS. PATRICK: Your Honor, our cover letter, to be
4 clear so that you understand. In our cover letter we said
5 to people we intend to take the depositions of objectors.
6 We have sent you a notice marking the book for the
7 commencement of the discovery, we will work you on dates.
8 This is not -- just so you understand what the problem here
9 is, your Honor, let me read to you from what they said.

10 The steering committee, quote, will oppose any
11 attempt by the settlement proponents to obtain discovery
12 from intervenors other than holdings information. Their
13 position is we get no discovery at all.

14 THE COURT: Well, I guess it will be another motion
15 right after May 3rd, which I will try to fit into my
16 schedule, which I have other cases than you, which I already
17 set aside three weeks in May and June. I am not going to
18 rule now on the discovery you're entitled to. I mean, you
19 can't get the discovery they are entitled to, so once I
20 finish that then you can fight about the discovery you are
21 entitled to, but you have given yourself zero time, almost
22 zero time, I don't think they have to respond to you on May
23 3rd, that's not really appropriate.

24 Now, if you can work it out, I mean, I guess there
25 could be a lot of other objectors other than you. Given
26 that this proceeding has been going on, not only in my court

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2 but almost two years in the two courts, almost two years,
3 not quite, I'd imagine that it's unlikely that some major
4 objector is going to show up on May 3rd that hasn't ever
5 been here, that's a complete surprise to us all.

6 If you are the major potential objectors then maybe
7 you can work out a little bit of a shortening of the time so
8 we aren't down to Memorial Day weekend, when you are calling
9 me on Saturday to come to court, that doesn't let you stay
10 here until after 4:30 on penalty, or I don't know what, I
11 can't do it. So perhaps you could shorten it a little bit.
12 I don't think you should have all the depositions in
13 response to everything on May 3rd. I am not taking any
14 position on what you are entitled to, what you are not
15 entitled to because I can't do that today.

16 So I'm hoping that maybe you could talk about that
17 a little bit. I think three days is very unrealistic. But
18 if they could take until sometime until next week, rather
19 than 20 days, cut it in half probably a little bit, maybe
20 you can get it the week of -- the following week and get
21 some responses, then if there is a problem I have no doubt
22 you will let me know. So that's all I can say. But I don't
23 think it's realistic to expect all the responses.

24 I mean, I guess maybe it's nice you give me a heads
25 up, this is what we are going to hit you with on May 3rd,
26 but they don't have to respond to it on May 3rd. Perhaps

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2 you can try to work that out and shorten it a little bit.

3 Obviously you can't bind everybody else but you can
4 bind whoever you can bind as part of the steering committee.
5 As I said I think it's unlikely that someone we never heard
6 of is going to come in that hasn't been here for the past
7 two years. So that's what I think on that.

8 So you've now dealt with all three of these
9 motions, I have one question before we take a little bit of
10 a break, and I trying to try to figure out how we are going
11 to leave this today. You have given us these privilege
12 logs, we have had an opportunity to just review very
13 briefly. How many documents are related to your privilege,
14 I mean the privilege log that deals with, I guess --

15 MR. REILLY: At issue and fiduciary?

16 THE COURT: Yeah.

17 MR. REILLY: I can't tell. But I think there is
18 roughly 600 in the two laws, that's a rough number.

19 THE COURT: Are you talking about 600 pieces of
20 paper or 600 documents that are each 100 pieces of paper.

21 MR. REILLY: Mr. Ingber will have to answer that.

22 MR. INGBER: Unfortunately, your Honor, I can't
23 answer that question either, because it seems to us that
24 they've just asked for everything, right? If they wanted to
25 identify a specific document they could have called us up
26 and said we have your privilege log, let's go through your

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2 privilege log and identify specific documents. What they
3 have done instead is to say we want all of this, which is
4 why it's not a specific request. I mean, I don't know the
5 exact number of all of the privileged documents that are
6 being withheld, I think it's hundreds if not thousands of
7 documents, but, you know, they have had the privilege log
8 since last -- they had it for over a year. Sorry, August of
9 last year, summer of last year. We could have sat down and
10 they could have told us what documents they wanted to
11 discuss, or if they wanted to do it on a document by
12 document basis we could have had a discussion about that.

13 THE COURT: To the extent that Mr. Mosher's letter
14 attempted -- purported to limit what they are seeking, does
15 that letter do it at all?

16 MR. INGBER: It doesn't limit it at all. It
17 doesn't limit it in the slightest, because they are asking
18 essentially for, as we understand it, everything. If we go
19 through each document and maybe you can carve out a few here
20 and there, but the problem, one of the problems with this
21 request is that it's not a specific request. I mean, they
22 had very long time to ask us if they wanted more detail on
23 the privilege log, if they wanted to do this on a document
24 by document basis, they could have done that, they could
25 have said there is a specific question you didn't answer,
26 and that's the subject of this motion, that's the answer we

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2 want, they haven't done that.

3 So they have just thrown this at your Honor and
4 said we basically want everything, it's not a narrowing.
5 That's one of the several issues that we have with this
6 motion. They haven't done that.

7 THE COURT: What about the ETI privilege log, how
8 much does that deal with?

9 MR. HOUPT: I think the log itself is about ten
10 pages.

11 THE COURT: I have the log. I have the log.

12 MR. HOUPT: They were probably a few hundred
13 documents.

14 THE COURT: How many?

15 MR. HOUPT: Probably a few hundred.

16 THE COURT: 165 entries. You don't know how big
17 all of those documents are?

18 MR. HOUPT: I think they are mostly e-mails and
19 some of them would have spreadsheets attached to them. I
20 don't think there are a hundred page word documents.

21 MR. REILLY: We have, and our motion makes it very
22 clear there is basically the following topics, all
23 communications regarding the June 28, 2011 trust committee
24 meeting.

25 THE COURT: What do you expect to get out of that?

26 MR. REILLY: I don't know.

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2 THE COURT: Isn't that after the settlement has
3 already been informed, didn't they show up here like the
4 next morning or something, or that day.

5 MR. REILLY: This is what they say is their step
6 for approval of the process. This is their internal process
7 in which counsel was present and they had communications
8 about the settlement process and so...

9 THE COURT: I mean, I can't see how that could be
10 relevant, it's all done in pen and ready to walk into my
11 door.

12 MR. INGBER: It was June 28th, your Honor.

13 THE COURT: June 29th I settled it, you were in
14 meeting, so I mean, they didn't spend, I mean it was all
15 ready then, so they said okay, great, you did a great job
16 let's go have champagne and bring it over to the courthouse
17 tomorrow and see who gets it signed.

18 MR. REILLY: That's what we think happened but they
19 make it sound like that was the key event.

20 MR. INGBER: We haven't actually said that, what we
21 said is that it was a final check at the end of a very long
22 process, it was the culmination of a very long process so it
23 is not the defining event in this case, notwithstanding what
24 Mr. Riley said.

25 THE COURT: The second thing is?

26 MR. REILLY: The second category is, in essence,

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2 any evidence that there is self-dealing. But we limited
3 that to the advice they got regarding the preventive
4 default, meaning it's the trustee's responsibility and
5 obligations going to go up to fiduciary, and are the
6 certificate holders going to have a right to sue if the
7 preventive default continues.

8 Secondly, the indemnity, what was going on while
9 they were looking at whether or not they could get a bigger
10 indemnity.

11 THE COURT: Okay. This is what I want to ask
12 about, the indemnity. So the PSA allows them to get an
13 indemnity.

14 MR. REILLY: In certain circumstances.

15 THE COURT: So you have had all of the access, and
16 I directed and they agreed to produce all of the discussions
17 between Bank of New York and Bank of America
18 and tri-partite discussions, all of these discussions about
19 the settlement A. I mean, I've seen it so I know you've
20 seen it because I've seen it. They were offering much less,
21 and then finally they came to 8.5 and that was it, and that
22 was the final deal.

23 I mean, where did you think, where do you think
24 there's a possibility that there could be discussions that
25 there would be a much, much, much larger amount offered if
26 they didn't ask for the indemnity. Isn't really the bottom

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2 line thing, one of the things, I mean, I guess maybe you're
3 upset because maybe eventually somebody would get over it
4 that you weren't invited to the party, that they negotiated
5 and you weren't there. And I guess I can understand your
6 frustration but they negotiated and you didn't. And you
7 didn't know about it and they did. In the end what you want
8 to do, I guess, is do the best for the certificate holders
9 and I guess that's get the most amount of money.

10 MR. REILLY: Get more money.

11 THE COURT: And where is there in all the documents
12 and all the depositions and everything that you looked at,
13 any indication that the indemnity caused the settlement
14 amount to be less, that there was ever anything, like if
15 someone had said, well, there's \$10 billion out there but if
16 you want the indemnity you are going to take 8.5 and that's
17 it. I mean 8.5, it seems like was very, very heavily
18 negotiated, you finally got that, that's it, take it or
19 leave it. But it wasn't based on the indemnity, based on
20 all the conversations, so what conversation do Bank of New
21 York Mellon, as trustee, and their lawyer would have had
22 that would have shown that an order was given and that all
23 the other negotiating partners had never come up.

24 MR. REILLY: Well, it starts with the fundamental
25 question about whether the trustee was acting to protect its
26 own interest or not, right? If the trustee is putting it's

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2 interest ahead of the beneficiaries' interest, the
3 certificate holders interest, then it might well be
4 motivated to settle this case rather than be aggressive
5 about it and sue on this case.

6 THE COURT: And you don't think that in all the
7 other things that you looked at, I mean, that you have found
8 that already, I mean?

9 MR. REILLY: Well, we don't know. The question
10 we're asking right now is did in any of these privileged
11 documents, and I assume these are all of the privileged
12 documents that exist between Bank of New York Mellon and any
13 lawyers that they consulted with about their exposure in
14 this case because their exposure in this case was on their
15 mind. We have the risk officers admitting that Bank of New
16 York Mellon hired Mayer Brown, in part, to represent them as
17 to their liability for their roles as trustees. So we know
18 that they were doing that in part.

19 You've got a group of lawyers at Mayer Brown who
20 were doing research that says how can we settle this thing
21 without exposing ourselves to liability? How can we make
22 sure we expand our own indemnity, which we think patently
23 happened here and not notify the certificate holders? How
24 can we avoid the heightened duties of a trustee.

25 So Bank of New York Mellon goes to its lawyers and
26 says we don't want to be a full blown, you know, prudent

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2 person under the employment servicing agreement and we don't
3 want the preventive default to be triggered, what can you
4 do, can you research that, can you tell us that. If that's
5 going on at the time that they are supposedly representing
6 our clients and the rest of these clients at the same time,
7 it goes directly to whether or not the trustee was meeting
8 its obligations to us.

9 Now, can I predict what e-mail is out there? Can I
10 predict what communications went on, no. But we are still
11 at a point where they will not say to you, your Honor, and I
12 don't think they'll ever say, reassure, your Honor, we
13 didn't do anything, we didn't ask Mayer Brown to research
14 our liability. We didn't ask Mayer Brown to research our
15 duties. We didn't ask them to do anything that was contrary
16 to the interest of the beneficiaries. They must have done
17 that. And that's what our concern is. I cannot tell from
18 their privilege log what portions of it refer to anything.
19 It's completely generic. I have no idea.

20 Now, they've got a few that are related to
21 forbearance agreement. They got a few that are related to
22 indemnity. But attorney client relationship regarding
23 settlement negotiations, there is 40 percent of these
24 50 percent of these. So to attack us for not being
25 specific, we can't see behind the curtain. And the critical
26 question the Court has to decide at the beginning of this

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2 procedure is what standard applies. They want this
3 deferential standard. Conflicted trustee is not entitled to
4 deferential standard. But if, in fact, which appears to be
5 true, they allowed this minority group of institutional
6 investors to settle claims, and including claims and trusts
7 in which they did not have 25 percent, there is about more
8 than half of these trusts. Ms. Patrick's clients didn't
9 have 25 percent, right. And when we asked the trustee,
10 representatives at the deposition, well, who is representing
11 those investors in those negotiations. We don't know is the
12 answer.

13 So bottom line is we were not represented in that
14 set of negotiations. The trustee waited until Miss Patrick
15 reached a number with Bank of America that her clients are
16 willing to accept. And then the trustee later on comes in
17 and says well, we would like indemnity, we would like a full
18 relief for us, our role involved as the trustee before this.
19 We would like a relief for our role in the settlement
20 communications. These things are totally contrary to them
21 protecting us.

22 And if all they said was, your Honor, why don't you
23 come in here and we are going to come in and you just tell
24 us whether 8.5 is reasonable or not, that's one thing. They
25 came in and said we, the trustee, want you to say we did
26 things, in all respect --

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2 THE COURT: If they don't prove it to me they are
3 not getting that finding. That's the risk they are going to
4 bear. I don't know if it's going to fall apart if half of
5 those findings aren't able to be made or not.

6 MR. INGBER: The risk is up, there is a proposed
7 final order of judgment, your Honor is going to hear the
8 evidence, it's going to involve nonprivileged information.
9 You are going to go through the proposed final order of
10 judgment and decide which of those findings your Honor is
11 going to accept.

12 A few just very quick points. You are exactly
13 right, there is a disconnect between arguing that an
14 indemnity, which we're contractually entitled to, presents a
15 conflict relating to settlement agreement. How does an
16 indemnity that we're contractually entitled to incentivize
17 us to take a bad deal. Indemnities are a good thing.
18 Indemnities are baked into these contracts because trustees
19 are getting paid cents on the dollar compared to other
20 parties of the deal. They are not going to incur the legal
21 expenses and fees associated with getting involved in a
22 negotiation or getting involved in a litigation unless there
23 is indemnity. That is why the contracts are so clear, that
24 the trustee is entitled to an indemnity and the trustee is
25 entitled to any indemnity that it believes is satisfactory
26 to it.

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2 So it could have gone to BFA, it could have gone
3 arguably to another party and said if we're doing this we
4 want an indemnity, it's right out of the contract. Mr.
5 Reilly said earlier that we needed something more because we
6 were getting a certificate holder direction. And when you
7 get a certificate holder direction BFA no longer provides
8 indemnity but certificate holders do.

9 Now Miss Patrick will stand up, if you would like
10 her to, but I think I can represent, because I have seen the
11 documents, because I received the letter from her on behalf
12 of her client saying we are not directing the trustee. Mr.
13 Reilly just said her clients didn't have 25 percent of the
14 trust. They weren't in a position to direct the trustee
15 with respect to all of these trusts. There was a letter
16 from Miss Patrick to the trustees saying we request that you
17 enter into this settlement because on behalf of our clients
18 with more than \$40 billion of holdings we think it is a
19 great deal. And she was very clear that this is not to be
20 interpreted as a binding instruction under the PSA, under
21 the governing contracts.

22 So the master server was indemnitor all the time.
23 There was no certificate holder directly, notwithstanding
24 what Mr. Reilly said. But the fundamental point is the one
25 your Honor raised. This indemnity allowed us to be in a
26 position to participate in these negotiations. It allowed

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2 the trustee not to have to incur the expense associated with
3 hiring lawyers and experts and others, so that it could try
4 to move this forward, along with the institutional
5 investors. Indemnities are good things, and that's why the
6 are so -- the trustee is so clearly entitled to them under
7 the contracts.

8 Last point. Mr. Reilly said that the trustee was
9 concerned about liability, right up until the settlement
10 agreement was signed the trustee was concerned about
11 liability. There is testimony on this. Okay.

12 Mr. Bailey testified at page 41, 17 of his
13 deposition, he was asked, was there a point in time after
14 June 17, 2010, that you were interested in the settlement
15 negotiations so that Bank of New York Mellon could obtain a
16 relief of any potential claims by certificate holders
17 against it for its role as a trustee in the covered trusts.
18 And he answered, as I understand the question it is: Was
19 the institution interested in a settlement with the goal of
20 obtaining a relief. The answer to that question is no.
21 Loretta Lindberg said the same thing when she was asked.
22 That was not a goal, it's not in the settlement agreement,
23 there is no release in the settlement agreement. All Mr.
24 Reilly has said is that in a draft of a proposed final order
25 and judgment the trustee inserted a provision into that
26 first draft that gave us, that would allow the Court the

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2 option of making a finding that certificate holders are
3 barred from suing the trustee for general administrative
4 activities associated with the trust.

5 That provision, and I won't bring up the slide
6 unless your Honor wants to see it. That provision was
7 modeled after the order to show cause in the IBJ Schroeder
8 case. If you compare that provision to the provision that
9 was submitted to the court in the IBJ Schroeder case, it is
10 nearly identical.

11 You saw Mr. Madden's response to that draft
12 proposed final order and judgment. He said we think this is
13 a bad idea. That was on June 23rd. Later that day on
14 June 23rd I circulated another draft of that proposed final
15 order and judgment and it was out. So if this was such a
16 big deal for the trustee, okay, the same day Mr. Madden said
17 we don't think this is a good idea the trustee said, okay,
18 it's out. It never made its way into the proposed final
19 order and judgment that was presented to the court. Even if
20 it did, it's up to your Honor to decide whether it makes
21 sense given the evidence. That's all that the trustee was
22 proposing at the time, give the Court the option of adopting
23 this finding. The Court may, the Court may not, ultimately
24 it came out so it didn't matter. It was obviously not
25 something that the trustee was focused on given Mr. Bailey's
26 testimony. Given what I represent to, your Honor, was Miss

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2 Lindberg's testimony, and given that chronology that I just
3 described it's not a conflict. These are basic conflict of
4 interest questions that are being presented to your Honor.

5 The law, I am not going to get into an oral
6 argument but the law is clear in our view and the facts are
7 very clear on this point.

8 MR. LOESER: Essentially the trustee has described
9 for you, I guess, what sounds like now this idea that they
10 are out there crusading for certificate holders, they did
11 everything they could to make sure the settlement was as big
12 as possible. The problem was that every question that was
13 asked about why the trustee did what it did. The answer was
14 the trust was not complied with, why didn't the trustee
15 reunderwrite the loans like everybody else does to become
16 reliant. We don't know.

17 THE COURT: That's not in this kind of case, that's
18 in a different kind of case.

19 MR. LOESER: That's in this kind of case.

20 THE COURT: This is not that kind of case.

21 MR. LOESER: It's a put back case involving -- well
22 that's the underlying -- that's a really important point.
23 That is the underlying liability in this case. And they've
24 settled. Usually the cases involves a couple of trusts.
25 They have taken countrywide Bank of America this massive
26 liability and they have settled for everybody. A limited --

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2 this is happiest day of Bank of America's life. You can
3 read the trade press about it. That is the best thing that
4 could possibly happen. Has this \$400 billion of trust which
5 it's anybody's guess what the liability, nobody has tried to
6 figure out. \$50 billion 60, whatever it is, they settled
7 for eight and a half.

8 Nobody knows the extent of the liability because
9 the trustees, who as they said now in the context of the
10 settlement, they got this full indemnity within the
11 settlement, they had Bank of America paying for everything.
12 Bank of America has paid for them. Bank of America
13 has paid for them. Bank of America has paid for experts.
14 Why didn't they go out and get Bank of America to pay for
15 re-underwriting the loan, they have the complete indemnity.
16 But they didn't. So now we are sitting here trying to
17 decide --

18 THE COURT: That's what they are trying to avoid
19 doing, that will take forever. That's exactly why they
20 settled it, because otherwise you -- have you been part of
21 those put back cases; do you know what's going on with all
22 those litigations?

23 MR. LOESER: We have been involved in lot of cases,
24 your Honor.

25 THE COURT: Have they ended?

26 MR. LOESER: Parts of some of them have ended

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2 because parties have settled after they have done some
3 re-underwriting and seen what the liability is. And here
4 the idea that you have to spend five-years, it's not true.
5 It's Bank of America's position, your Honor, they said that
6 in every case, they have always said you can't do any
7 underwriting, they have always said statistical sampling,
8 you have to look at every loan, but they always lost that
9 argument.

10 When you have the trustee and Mr. Kravitz
11 testifying, essentially taking Bank of America's position,
12 arguing that no, we can't -- underwriting would take
13 forever, it's too complicated, and at the end everybody
14 would disagree on the results of re-underwriting. This is
15 the trustee taking a position that favors Bank of America
16 when the trustees have a duty of loyalty to us. Everyone is
17 frustrated, we are still here arguing about this. It would
18 be a lot easier if they showed up and gave everyone their
19 one month, or whatever it was, for the Court to approve the
20 settlement be done. It would be lot easier if everyone
21 said, okay, fine, they have billions, a lot of money.

22 But there is some really important questions about
23 the fact that they don't even know what the liability is
24 because they never tried to figure it out.

25 So when you ask them what did the trustee get out
26 of this, did they trade billions for indemnity the answer

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2 is -- the question is did the trustee care about the
3 settlement amount or did they care about not getting sued
4 when the institutional investors have their shotgun pointed
5 at the trustee saying, you have to act, there is preventable
6 default, you are going to get sued. Did they care about
7 getting out of that jeopardy or did they care about
8 settlement amount.

9 Your Honor, what we want to know and why we keep
10 fighting about this is the only place that anyone can answer
11 that question is in the legal advice they got about their
12 trust duties.

13 MR. INGBER: Your Honor, we are still in jeopardy.
14 We are being sued across the street, we are being sued in
15 this courtroom. We didn't have any relief. That's really
16 one of the most fundamental points. The second point is
17 that when we talk about loan files and whether we should
18 have done a full loan re-underwriting and trustee was for
19 some reason just buying Bank of America's position, it
20 ignores that Miss Patrick and her clients with their 40
21 billions of dollars worth of holdings were in the room and
22 were part of that discussion, were active, were leading that
23 discussion. It just doesn't make any sense, your Honor.

24 THE COURT: Since you were involved in it I have
25 this case called Knights of Columbus, Inc.

26 MR. INGBER: I am very well aware of it.

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2 THE COURT: Is that case extinguished by this
3 argument.

4 MR. INGBER: Absolutely not. During that oral
5 argument on motion to dismiss I said to your Honor it would
6 be nice if I could get rid of this case because it's
7 extinguished by virtual of the settlement. I can't. I have
8 stood up here on a number of occasions and said there is no
9 OR relief of claims. They understand that. They understand
10 that when you look at the settlement agreement there is not
11 a relief of claims against the trustee, we are being sued by
12 Knights of Columbus, unfortunately, we are being sued in a
13 punitive class action across the street in Judge Pauly's
14 chambers, we are disputing those on the merits, we are
15 fighting them on the merits because unfortunately it is just
16 reality, we can't stand up and say that this settlement
17 agreement contains a relief, it didn't. Again, we are
18 getting nothing out of this deal. And the notion that the
19 indemnity was some real benefit for us, it ignores that the
20 indemnity only applies with respect to the settlement
21 activities. It's not an indemnity that goes on forever and
22 ever and ever.

23 How can an indemnity that applies only to the
24 activities in connection with the settlement incentivize the
25 trustee to make a bad deal in connection with the
26 settlement, it just doesn't add up, it doesn't make any

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2 sense, your Honor.

3 MR. LOESER: It sure doesn't make a lot of sense to
4 us. Frankly, your Honor, when you have a trustee threatened
5 with a massive lawsuit gets on board with settlement, what
6 we want to know, did they care about settlement or not or
7 was the situation where they basically said, I don't know,
8 there is lot of things in here that aren't really in the
9 PSA, we are being asked to do a lot of things, we are going
10 to go along with it as long as we can't get sued for it. If
11 that's what trustee did that will violate the order.

12 MS. PATRICK: Your Honor, that would be true,
13 perhaps, if that happened, but there is abundant evidence
14 our client never threatened to sue the trustee, we never
15 threatened them, we never threatened to sue, we have gone
16 through the looking glass into an alternative universe of
17 alternative fact. You are rightly focused on the evidence
18 that you have heard and on the evidence you have heard what
19 they have represented to you about what might have happened
20 when Alice went through the looking glass in some of the
21 universe, it's totally irrelevant, it's irrelevant.

22 THE COURT: We will take a short break, hopefully
23 we will be ready around 3:30 to do something.

24 (Whereupon, a recess was taken.)

25 COURT OFFICER: All rise. Part 39 is now back in
26 session. Please be seated. Come to order.

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2 THE COURT: Okay. Well, I would like to resolve
3 everything on the record, I can't do that. So I am going to
4 have to reserve on this number 31, this at issue fiduciary
5 exception. We are just going to have to write something.
6 And because I know it's a big issue, on behalf of both of
7 the parties you need to go back and look at a few more of
8 these things, so you will just have to wait and, you know,
9 get that when it's signed, I'll let you know, it will be
10 uploaded.

11 As to motion 29, that deals with the work by ETI
12 third party. Everybody made reference to the Spectrum case
13 which is an Appellate Division, First Department case from
14 1990. It was interesting the Appellate Division in making
15 that decision said that it would have been the better
16 practice for the Supreme Court to have conducted an in
17 camera review of the documents to have allowed for a more
18 informed determination as to whether the information was
19 indeed protected from disclosure.

20 The part that surprises me an elite division said,
21 well, they didn't do it so we did it. I kind of don't think
22 they still do in camera inspections up there, but in any
23 event, because it doesn't look like that privilege law is
24 that enormous, we will do that in camera inspection, but we
25 can't do it next week because we have too many other things
26 next week.

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2 So if you deliver before the close of business next
3 Thursday a better copy of the privileged log, because the
4 copy that came through on computer was kind of swishy. If
5 you get us a better copy of the privileged log as to ETI
6 documents and the documents, which better not be too many
7 documents, it doesn't appear that they are, we'll make a
8 ruling, and we know that disclosure is broad, there is some
9 questions. It looks to me like some of those things might
10 have some privileged stuff in it, some of those things may
11 not be privileged. You did an interesting chart there but
12 I'm still having a hard time knowing how the privilege
13 became not privilege or how the attorney client work product
14 turned into not something like in the middle of that chart.

15 If there is any human possibility of the parties
16 looking at any of those, maybe limiting that, that would be
17 really nice, but if not, if you would deliver that to the
18 courtroom by 4 o'clock next Thursday we'll get it done
19 sometime shortly thereafter, but we cannot even think of
20 looking at it before then.

21 Now, the only other substantive motion is the one
22 that you argued the last time and that deals with the common
23 interest privilege. So I'm not going to go over what you
24 argued because you spent half the day arguing it last time
25 you were here, February 7th, I think that might have been
26 the date and we all have a copy of that transcript, so I

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2 made reference to the transcript there. We know that the
3 common interest exception is an exception to the waiver of
4 the attorney client privilege. There is some dispute
5 between the parties as to whether or not the attorney client
6 privilege consisted there at all.

7 Assuming that the attorney client privilege did
8 exist as to those documents, we have to determine whether,
9 nonetheless, those documents can be withheld because of a
10 common interest between the institutional investors and the
11 trustee. Those are what you are seeking there. There are
12 documents between trustee and the institutional investors
13 that have all been identified in the privilege log.

14 I think you also mean the steering committee also
15 wants to redepose Mr. Kravitz on questions that he was
16 instructed not to answer based on common interest privilege
17 or alternatively you'll have an in camera inspection. I
18 can't do that. You will have to make a decision. It seems
19 that, and I seem to have written a few of these decisions so
20 you can take a look at those, but the communication must
21 have been made for the purpose of facilitating the rendition
22 of legal service advice or services in the course of
23 professional relationship and had been predominantly of
24 legal rather than a commercial nature.

25 Once there is a finding the communication would
26 have been protected by the attorney client privilege but for

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2 the disclosure to a third party, and we have to determine
3 whether or not the nonetheless protected uncommon interest
4 doctrine, which can apply even when the parties are
5 represented by different counsel and engaged, but engaged in
6 a common legal strategy. A claim resting on the common
7 interest rule requires a showing that the communication in
8 question was given in confidence and that the client
9 reasonably understood to be so given, and there has to be
10 some meeting of the mind between the parties that it is
11 required for that.

12 The party asserting the common interest privilege
13 has the burden of demonstrating the existence of a
14 reasonable expectation of confidentiality, which is
15 essential to this principle. While it is true that in the
16 U.S. Bank case, which is a Delaware Chancery decision, the
17 Court stated that it would be difficult to see how the
18 interests of an indentured trustee and of no holders could
19 be more closely aligned, that's in the relationship we have
20 going on here, still the no holders were required to show
21 that they agreed to maintain the confidentiality of these
22 communications.

23 And that disagreement was either some kind of
24 formal agreement, even though it doesn't have to formerly be
25 in writing. Here the only evidence that there was an
26 agreement or reasonable expectation of confidentiality are

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2 statements made by Mr. Madden and Mr. Kravitz after the
3 fact, an affidavit in which they said, yes, there was an
4 understanding, there was an agreement that they would not be
5 disclosed by their parties. Of course Mr. Kravitz and Mr.
6 Madden are not the clients, they are the attorneys. It
7 seems that the statements were, to our way of viewing, were
8 conclusory, not supported by the clients. And they are not
9 sufficient evidence of parties reasonable expectation of
10 confidentiality.

11 It's also important to note in this particular case
12 the proponent of the common interest privilege, meaning the
13 institutional investors are seeking to keep these
14 communications from parties who have the same interest that
15 they have and, namely, the note holders. Since they are
16 note holders and they are note holders, and are all kind of
17 in the same position as note holders in respect to the
18 relationship with the trustee.

19 And in the U.S. Bank case, that any communications
20 where the trustee was discussing its indemnification, which
21 is a point where their interest may become divergent, I
22 didn't say conflict, I say divergent, would not be covered
23 even if there were sufficient evidence of the parties
24 expectation of confidentiality, which I really don't see
25 existing here.

26 So based on the briefs that you have submitted in

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2 that motion, and the extensive oral argument that we had the
3 last time, I am going to direct that those documents, which
4 comprise 548 communications, most of which are e-mails which
5 are on a privileged log that was provided at some time, I
6 don't remember when, but those be produced.

7 I will also allow the steering committee to
8 redepose Mr. Kravitz on those questions that he didn't
9 answer based on the common interest privilege. So that is
10 all that's going to be my decision, including three, the
11 motion that you made about the discovery document.

12 MR. REILLY: Motion to vacate.

13 THE COURT: I will write something on that. We
14 will talk about what we are going to do with it and the
15 other motion, you withdrew that sometime during the week. I
16 got a letter that said that was withdrawn.

17 So if you get me the documents, the ETI documents,
18 and a better copy of the privileged log by Thursday, and as
19 I said, if there is any way that may be in the next week you
20 could look at some of those documents, because you said I
21 have had those for a long time, I guess maybe that's really
22 a newer one. If you review that and maybe agree to either
23 of those documents, if not we will look through them and
24 make a determination and that would be that. 31 we'll get
25 to.

26 I know there is time limitations but there is only

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2 so many hours in the day, we will try to get to that. It
3 wasn't a really, really long decision. I am not going to go
4 through the history of the case, everybody knows that. If
5 you don't that's your problem. But we will just sort of
6 deal with that the issue. Okay. So we will take care of
7 that one. So I guess, I don't know when am I supposed to
8 see you again, May 30th?

9 MR. WARNER: Excuse me, your Honor, did you just
10 mention you were going to write a decision on order to show
11 cause to vacate discovery?

12 THE COURT: I said it on record. I have to write
13 something on Gray sheet because I am required to.

14 MR. WARNER: I understand, but could we put in a
15 very, very brief response because we have no opposition in?

16 THE COURT: I don't want opposition. Miss Patrick
17 argued it. I just said you can reserve it on May 3rd and
18 they all have a heads up on it. If they don't like it on
19 May 3rd and you can't work out a day for shortening response
20 time, then I am sure that you will let me know that.

21 MR. WARNER: Because what we have done at this
22 point, we have given notice. Actually they are in a better
23 position by getting notice from us now as to what they are
24 going to be requested to do. And then on May 3rd, when we
25 -- if we haven't been able to work something out we ask your
26 Honor to expedite the date, part of the consideration will

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2 be they've had it while they were making this decision.

3 THE COURT: They have it, I know they have it.
4 That's why they brought the order to show cause. I know
5 they have it. And I have indicated that I certainly will
6 consider shortening the dates, and I have asked Mr. Reilly
7 to deal with that. I mean, if you have a problem between
8 now and then, okay, then you will have a problem. I am not
9 going to make them come up on May 3rd with the responses to
10 your discovery requests.

11 MR. WARNER: We didn't say May 3rd, we wanted to
12 take advantage of the notice we are giving because it is
13 reality, they know now while they are making their decision
14 as to whether to object or not, that this is the discovery
15 they will be called upon to produce, I think it helps them.

16 THE COURT: I think they know that. I assume you
17 are either going to reserve it with a new date and consider
18 it reserved non pro tunc, something like that, I'm not going
19 to start dealing with their responses to it now.

20 MR. WARNER: I understand on their responses. The
21 only thing we were interested in is on May 3rd, when that
22 date comes, they would have had notice for several weeks and
23 when we request an accelerated date we are not requesting
24 accelerated date from the May 3rd serving, we are requesting
25 it from the earlier serving, which they can consider while
26 they are making their decision.

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THE COURT: Okay. No problem. So I think that's it. So I guess, I mean the only definitive date we know is the May 30th date that I know I will see you back here for the hearing. On the assumption that there may be some problems before that we'll see what we can do.

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

SHAMEEKA HARRIS, CSR, RMR, RPR
Senior Court Reporter

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