In The Matter Of:

Bank of New York Mellon v.

Oral Argument
April 12, 2013

Supreme Court State of New York - Civil Term
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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

B E F O R E:

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(Appearances cont'd on next page)

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

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

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

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

THE COURT: Okay.

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

trustee and its beneficiaries.

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

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

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

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

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

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

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

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

(Video file played in open court.)

(Video file concludes.)

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

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

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

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

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

MR. LOESER: We will.

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

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

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

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

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

THE COURT: He said he gave you the list.

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

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

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

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

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

THE COURT: Okay. Good.

(Video file played in open court.)

(Video file concludes.)

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

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

(Video file played in open court.)

(Video file concludes.)

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

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

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

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

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

THE COURT: I understand.

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

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

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

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

THE COURT: I understand.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Video file played in open court.)

(Video file concludes.)

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

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

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

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

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

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

Thank you, your Honor, for your time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

They justify this by saying that the communications

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

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

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

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

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

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

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

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

We produced all of the governing contracts. We

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

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

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

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

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

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

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

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

"QUESTION: And all of the settlement negotiations

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

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

Page 395, line 14.

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

There's a privilege instruction not to answer.

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

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

"No.

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

"ANSWER: No."

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

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

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

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

(Whereupon, video file played.)

(Whereupon, Video file concludes.)

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

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

All of that from our perspective is appropriate.

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

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

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

(Video file played in open court.)

(Video file concludes.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. INGBER: Two sentences.

THE COURT: Two.

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

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

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

THE COURT: Do you want to do your reply?

MR. LOESER: Sure.

THE COURT: I will give you about 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Mr. Reilly.

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

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

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

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

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

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

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

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

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

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

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

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

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

(Whereupon, a recess was taken.)

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

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

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

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

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

way the formality is --

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

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

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

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

What the steering committee learned through

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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page 75, line 24 through page 76, 24.

(Video file played in open court.)

(Video file concludes.)

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

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

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

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

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

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

(Video file played in open court.)

(Video file concludes.)

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

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

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

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

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

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

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

(Video file played in open court.)

(Video file concludes.)

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

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

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

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

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

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

such is not exempt from disclosure.

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

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

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

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

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

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

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

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

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

of the petitioner?

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

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

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

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

Now, you can funnel that through a law firm that

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

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

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

directly, they assisted Mayer Brown in providing legal advice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jason Buchele, you saw a little bit from, and

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

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

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

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there was a settlement to begin with.

(Videotape heard in open court.)

(Videotape concludes.)

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

The details Mr. Hani gave in this engagement were also consistent with the fact this is directed by counsel. If we can, E1. He had been asked about Mr. Buchele and whether he was working with Mr. Buchele. He said was Buchele your main point of contact.

(Videotape played in open court.)

(Videotape concludes.)

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

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

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

THE COURT: So has that been given to them?

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

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

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

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

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

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

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

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

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

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THE COURT: When?

MR. INGBER: Right in the next ten minutes.

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

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

(Whereupon, a luncheon recess was taken.)

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A F T E R N O O N S E S S I O N

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

Okay. Do you want to finish?

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

THE COURT: Okay, that's fine.

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

THE COURT: The Mayer Brown project?

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

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

engagement was privileged.

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

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

(Video file played in open court.)

(Video file concludes.)

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

So your Honor asked Mr --

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

MR. HOUPT: I think it was attached to the verified

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

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

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

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

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

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

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

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

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

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

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

Thank you, your Honor.

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

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

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

THE COURT: Which case are you reading from?

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

So notwithstanding what the Second Circuit might

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

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

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

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

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

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

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

All right. Thank you very much.

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

MR. REILLY: Sure.

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

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

Currently the objections are due May 3rd, and any

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

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

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

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

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

MR. REILLY: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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on which they are going to rely.

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

THE COURT: Holdings?

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

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

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

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

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

anyway.

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

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

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

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

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

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

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

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

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

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

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

MR. REILLY: At issue and fiduciary?

THE COURT: Yeah.

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

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

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

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

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

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

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

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want, they haven't done that.

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

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

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

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

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

THE COURT: How many?

MR. HOUPT: Probably a few hundred.

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

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

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

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

MR. REILLY: I don't know.

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

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

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

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

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

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

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

THE COURT: The second thing is?

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

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

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

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

MR. REILLY: In certain circumstances.

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

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

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

MR. REILLY: Get more money.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: This is not that kind of case.

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

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

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

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

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

THE COURT: Have they ended?

MR. LOESER: Parts of some of them have ended

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

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

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

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

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

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

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

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

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

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THE COURT: Is that case extinguished by this argument.

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

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

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sense, your Honor.

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

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

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

(Whereupon, a recess was taken.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So based on the briefs that you have submitted in

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

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

MR. REILLY: Motion to vacate.

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

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

I know there is time limitations but there is only

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

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

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

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

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

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

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

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

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

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

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