1
2 SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM: PART 39
3 -X
In the matter of the application of
4 THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling
and Servicing Agreements and Indenture Trustee under various
5 Indentures), BlackRock Financial Management Inc (intervenor),
Kore Advisors LP (intervenor), Maiden Lane LLC (intervenor),
6 Metropolitan Life Insurance Company (intervenor), Trust Company
of the West and affiliated companies controlled by The TCW Group
7 Inc (intervenor) Neuberger Berman Europe Limited (intervenor),
Pacific Investment Management Company LLC (intervenor), Goldman
8 Sachs Asset Management LP (intervenor), Teachers Insurance and
Annuity Association of America (intervenor), Invesco Advisors
9 Inc, (intervenor), Thrivent Financial for Lutherans
(intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW
10 Asset Management (Ireland)plc, Dublin (intervenor), ING Bank fsb
(intervenor), ING Capital LLC (intervenor), ING Investment
11 Management LLC (intervenor), Nationwide Mutual Insurance Company
and its affiliated companies (intervenor), AEGON USA Investment
12 Management LLC, authorized signatory for Transamerica Life
Insurance company, AEGON Financial Assurance Ireland Limited,
13 Transamerica Life International (Bermuda) Ltd, Monumental Life
Insurance Company, Transamerica Advisors Life Insurance Company,
14 AEGON Global Institutional Markets plc, LIICA Re II Inc, Pine
Falls Re Inc, Transamerica Financial Life Insurance Company,
15 Stonebridge Life Insurance Company, and Western Reserve Life
Assurance Co of Ohio (intervenor), Federal Home Loan Bank of
16 Atlanta (intervenor), Bayerische Landesbank (intervenor),
Prudential Investment Management Inc (intervenor) and Western
17 Asset Management Company (intervenor),

18 Petitioners,

19 Index Number:
651786-2011
20

21 for an order, pursuant to CPLR 7701, seeking judicial
instructions and approval of a proposed settlement.
22 -X
Supreme Court
23 60 Centre Street
New York, New York 10007
24
May 8, 2012
25 BEFORE:

26 HONORABLE BARBARA KAPNICK,
Justice of the Supreme Court

Claudette Gumbs

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1 Proceedings
2 THE COURT: Good afternoon.
3 I think we are here mostly to deal with some of the
4 discovery issues that we did not really talk about too much
5 last time. We may have started to, and there was a motion
6 that was made with that original group of motions that was
7 made by the intervenors for certain types of discovery and
8 my understanding is not too much has been able to be agreed
9 upon since last time, so I think that is really what we are
10 doing today.
11 So, Mr. Reilly, can you start with that?
12 MR. REILLY: Thank you, your Honor. I might just
13 give the Court some comfort. I think we actually have
14 agreed on a schedule that we would like to propose to the
15 court. It is not completely typed out because we just
16 hammered out the final part of that. Do you want me to
17 present this to you, or get it cleaned up and then get it to
18 you? Or go over it now?
19 THE COURT: If you want to clean it up so that the
20 record is a little bit easier to read, that that would be
21 fine. You want to tell me some of the stuff that you worked
22 out? That is great.
23 MR. REILLY: Sure. What we have done and this
24 -- I am speaking for myself right now and obviously Mr.
25 Ingber and Ms. Patrick can comment, but from our side, what
26 we were most concerned about is that we didn't want to get

squeezed at the end because there are still some discovery issues going on and get resolution. We are waiting for documents, so we just put a little place holder in there that says subject to our right to come back to the court and ask for additional time if necessary, and in concept, I don't think BNY or the institutional investors dispute that.

Having said that, I think October 30th or Halloween will be the fact discovery and deposition date, so October 31 of this year. November 15th would be expert reports exchanged. December 15th would be completion of expert discovery and on January 7th, there would be briefs in support or opposition of the settlement to be filed. Each intervenor or objector would notify the trustee and the Court whether or not they object to the settlement and whether they intend to present evidence or testimony in opposition to the settlement at the final hearing and at that point, discovery of any intervenors who have given notice of objection could commence and January 22nd, then, next year, 2013 responses to the support or opposition of the settlement reply. January 29th will be replies in support or opposition to the settlement and then the final hearing on February 19th or any time after that that is convenient to this Court.

There are a number --

THE COURT: You're talking about --

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2 MR. REILLY: February 19, 2013.
3 THE COURT: I don't have too much on that date.
4 MR. REILLY: But we don't want to suggest or
5 pick that date. That is your schedule, whenever you're
6 available.
7 Also, there are -- and this is now me speaking and
8 Mr. Ingber will comment and Ms. Patrick will continue, but
9 there are continuing disputes about the scope of discovery.
10 We think they will come -- I didn't want anything about this
11 to comment one way or the other on discovery issues, so we
12 have inserted /PAG to all discovery that is it.
13 MR. INGBER: Your Honor just one -- just one very
14 important caveat and that is, that this schedule does not
15 take into account the possibility that 10,000 loan files
16 will be produced. That is an issue that will be addressed
17 today, I believe, and this is a schedule that we think is
18 very manageable, it is doable, we think we can -- we
19 proposed a more agressive schedule which we thought was
20 doable. We have agreed to move the hearing date to February
21 from January, but if we are talking about the production of
22 thousands of loan files and going through an entire re
23 underwriting process and having disputes about whether there
24 is a breach, disputes about causation and the meaning of
25 certain language in the PSA, which is essentially what will
26 be required if the objectors get what they want, we are

going to have to tear up the schedule and start over.

We don't see -- and maybe your Honor will disagree but we don't see a way in which we can get through discovery into a hearing by February. We may not get to a hearing until you know sometime later in 2013, given what they have said with respect to loan files. This is a schedule we think is very manageable, but a lot of it will depend on your Honor's decisions.

THE COURT: That is the easy part, picking out the dates. What are you going to do during those dates? That is the hard part. Didn't seem like that was such great -- you know, you're fighting about that and setting out dates, but you don't know what you will do during those dates. So I don't know how much that accomplishes, it is fine with me to start with some kind of schedule, but as I probably said last time, I have never really that I can recall entered into a discovery schedule that never got changed. They always get changed, modified and extended, so it is not really a big issue. I don't think we should spend too much time talking about that.

As I said, we don't have a calendar for February of 2013 yet, but that is not really a big issue.

MR. REILLY: I just wanted to raise that issue.

MR. CYRULNIK: Just to clarify, your Honor, we lowered our request to 7500 loan files and we think the

schedule is workable even with those loan files. Let's talk about that.

THE COURT: Let's talk about that later. Here is another easy thing. I got something, this is kind of nice, that some intervenor actually was withdrawing from this proceeding. Did you see that? On the e-filing?

MR. INGER: I did, your Honor.

THE COURT: So nobody seemed to oppose that.

MR. INGBER: We have no objection.

THE COURT: That is one down.

There is another motion that is here, too, which was the scope of the discovery. I guess the standard of review and the scope of discovery, but I thought we really ought to talk about what some of this discovery that is going to fill in those time slots is going to be and I know that there were three broad categories that the intervenors had put in their brief, which were settlement negotiations and underlying loan files, another category.

I don't know. Do you want to start with the issue of the settlement negotiations? Seems to be like a really pretty big thing and I guess I don't know exactly what is out there on the website. I don't have -- I have not had the time to go and look at what you have and what has been produced by the petitioners since sometime after last June on the website. What is out there and what else you're

really looking for and maybe you could address that. I think that is the big line item here.

MR. REILLY: Sure. Just for clarification your Honor, this is one item in dispute. We have had conversations about it and in the interest of moving forward today, one of the items we are going to deal with is what is called the fiduciary exception, we will withdraw that argument at this point and what I am hoping is that we will get a supplemental privilege log and I think Mr. Ingber will check to see if he has got any additional supplementation and we definitely need a supplementation of the log that intervenors provided because it is just seven categories without any specificity.

We can then look at those issues and get a better feel whether that is going to be a real issue or not, so I think in the interests of this Court's time, that is the way we will proceed.

MR. INGBER: Just in very quick response to that, we certainly have no objection to light evening the courts workload. The only concern that I would raise is that if the object or so are going to be seeking deposition of bank witnesses and there is this outstanding question of whether privileged communications will be produced, that is a problem. We don't want to have to bring witnesses back a second time. We think this is actually a very, very easy

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2 issue. We think the law is crystal clear on this and we
3 think it can be resolved today and we can have a very brief
4 argument on it if the Court would like to hear it.
5 The only concern about withdrawing the motion
6 without prejudice is that there is this unknown, and this
7 uncertainty as we proceed with depositions. So if Mr.
8 Reilly is willing to commit to a date by which he will
9 decide whether he is going to renew the motion and that date
10 is before deposition, the trustee has no objection to that
11 but if it is going to be an ongoing issue and we will have
12 to deal with the uncertainty in the midst of a deposition,
13 we would prefer to get an answer on this question today, an
14 answer that we think for all of the reasons we briefed and
15 could argue today is really an easy one.
16 MR. REILLY: Within seven days after we get the
17 supplemental privilege log from the intervenors and the
18 privilege log from Bank of New York, we will declare whether
19 we will pursue it or not, and what I would like is a solid
20 date from both of them that will indicate that we will get
21 the privilege log soon, so we don't have a problem trying to
22 identify what will go on between now and this magical date
23 that we picked here and the sooner we get from them an
24 understanding of when they consulted and a general statement
25 in there as to what they are consulting about, then we can
26 put in seven days after that, is either say we will pursue

2 this issue or not.

3 MS. PATRICK: Your Honor, Kathy Patrick with Gibbs
4 and Bruns for the institutional investors.

5 A couple of points on that: First, on this
6 privilege log that we produce, the Court will remember that
7 we were involuntarily in federal court. There is no
8 suggestion that the privilege log that our clients produced
9 at that point when they were called upon to do it did not
10 comply with the federal rules of procedure which
11 contemplated categorical privilege law. We have told them
12 we will give them a supplemental log, we will do it rapidly,
13 we should be able to get it done within the next week or ten
14 days, but let my carve out one suggestion: The
15 institutional investors are entirely differently situated
16 with regard to this issue than is the trustee. We don't
17 believe for a moment that the fiduciary exception applies to
18 the trustee because these PSAs don't in general create the
19 broad fiduciary obligations that contemplate a fiduciary
20 exception, but our clients did not file derivative claims,
21 they did not issue binding instructions, they didn't take
22 control of the trusts and so, really what this is is an
23 effort to invade the attorney/client privilege of people who
24 were acting in their own interest to try to achieve
25 resolution.

26 THE COURT: Are you going to argue the merits of

2 this now or not? I mean, he seems to suggest that we would
3 hold off on that and you're kind of arguing the merits of
4 it, so -- I understand your position, but are we going to
5 deal with that today, or you want to wait until you produce
6 the new and improved privilege logs and the intervenors will
7 let you know seven days after they get them whether they
8 will pursue this issue about the fiduciary exception,
9 whether it is the same or different. I mean, I understand
10 your point, but will we get into that, or will we just hold
11 off on that?
12 MS. PATRICK: My only point is the content of the
13 privilege log, is it not change the fact about how my
14 clients deal with it. If the Court would first take it up
15 differently, it is not a question of what is in the log. It
16 is a question of what my clients did. That is all.
17 THE COURT: So what do you want? What is the
18 option?
19 MS. PATRICK: We are prepared to argue it today.
20 If they want to withdraw it with prejudice as to us and
21 leave the issue open as to the trustee, we are fine with
22 that.
23 Otherwise, we are prepared to go forward.
24 MR. REILLY: J we will not do that, Judge. It is
25 a waste of your time. Let's put this baby to bed. Give us
26 the -- we are willing, we are willing to withdraw -- I don't

think they can make me argue, so why don't we just hold off, get the log, and it may never happen?

MR. INGBER: That proposal is fine with us, your Honor.

THE COURT: Can we deal with the -- do you want to get to the settlement negotiations? Can we just leave that for now?

MS. PATRICK: Your Honor, I am at your disposal. I do what you want, however you prefer.

MR. REILLY: So, your Honor, this issue is obviously from our perspective -- I think from everybody's perspective, a critical issue. The question is how much of the communications engaged in between and among the settlement proposals -- and there are three, there is essentially Bank of New York, institutional investors and Bank of America is not a party here, but they are certainly a part of the whole equation and there is two issues they are arguing, saying they are not relevant and they are saying that they are privileged pursuant to the common interest privilege. The relevance is, I think, clear. They are relevant because they made them relevant and the bottom line is the Court will recall the findings board that we put up in which they asked this Court to find that -- they have asked this Court for approval of the settlement. This Court will sign an order that hereby a -- the

settlement is hereby approved in all respects and all respects includes, not only the terms of the settlement, but how they got there. That is Number 10 of the proposed final order of an judgment.

In paragraph L, they ask for this Court to find -- and this will be the words that they are asking to you sign. The Court hereby approves the actions of the trustee in entering into the settlement agreement in all respects.

Paragraph J of the proposed final order -- and Judge, they are asking for this Court to find the arm's length negotiations that led to the settlement agreement focused on the strengths and weaknesses of the claims.

So they have put this into evidence. We can't get to yes on this proposal without knowing what the settlement negotiations were and what they engaged in.

That is an affirmative action on their part, asking you and the institutional investors to decide everything they did in all respects is covered.

It ought to end right there, but we don't know whose arms are involved in this arm's length negotiation without seeing who was at these meetings. And we are not guessing whether or not there were meetings, we are not, because when Bank of New York/Mellon in its original petition to the Court described what happened, and I think was trying to emphasize to this Court how much work had gone

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2 into the settlement, in Paragraph 35 of the original
3 verified petition, they made the following statement and I
4 have broken it into three because it tells us who was there.
5 This is Paragraph 35 of BNYM's verified petition.
6 In November 2010, the institutional investors, that is
7 Ms. Patrick's group, with participation by the trustee, that
8 is Mr. Ingber's client, initiated settlement discussions
9 with Countrywide and Bank of America. We know who
10 represents them. So that is the group. That is who is
11 sitting down.
12 What were they doing? "Those discussions continued
13 for seven months, involved dozens of face-to-face meetings
14 and conference calls." Dozens. I assume that dozens
15 means at least two. I don't know how many more after that.
16 Face-to-face meetings. I don't know how many
17 there are. We know of probably two, maybe three, but we
18 don't know of dozens. We don't know of any conference
19 calls. This is their language. This is what they used to
20 tell this Court how much time went into these negotiations.
21 They not only told us who was there, and roughly
22 how often, they told us what they were talking about. And
23 this is a continuation of the paragraph.
24 Those discussions, "dozens and dozens" and
25 "involved extensive dialogue among the parties concerning
26 the merits of the institutional investors' allegations and

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2 Countrywide's defenses and extensive analysis of the
3 trustee's likely recovery if it commenced and prevailed in
4 litigation on behalf of the trusts."
5 There isn't any question that a settlement of this
6 magnitude involved dozens and dozens of conversations, but
7 now we know that it is actually true and because of the
8 conduct and the way that we do know the settlement was
9 entertained, and because of the terms of the settlement
10 which we do know, and what also came out of it and because
11 of what has happened since then, those three phases, the
12 intervenors who are not on the inside, but on the outside,
13 are very concerned about how the negotiations went.
14 Let's talk about before. Before there was a
15 settlement, there was no lawsuit. There was no complaint
16 for us to look at and see what were the claims going to be.
17 There was no answer filed. There were no depositions
18 taken, no motions filed. There were no orders by a court.
19 There were no rulings of any kind whatsoever, unlike many
20 situations where there is actually a settlement presented,
21 where we could sit back and say okay, what went on.
22 We also have seen frankly that a number of
23 positions that were taken before the settlement was reached
24 have been about-faced; positions that there might have been
25 a possibility of default and now there is not, and there
26 might have been instructions given by the institutional

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2 investors to the trustee. Now there are no instructions.
3 Positions that resulted in forbearance of positions that
4 were probably not to the benefit of the rest of the
5 certificate holders, so what went on during -- as far as
6 settlement was concerned, the terms of the settlement coming
7 out because during those negotiations, Mr. Ingber's client,
8 the Bank of New York/Mellon was supposedly negotiating for
9 our clients, right? We are not separated at that point.
10 They are trustees and they are negotiating for all of the
11 certificate holders and presumably, we will hear what Ms.
12 Patrick says, were they acting for us at that time or not.
13 It is very unclear. They have said at times they were
14 moving forward and trying to get a settlement that was good
15 for all certificate holders and then most recently, they
16 said we never represented any of the certificate holders.
17 So even if in fact they didn't, and if in fact Bank
18 of New York/Mellon was interested more in its liabilities,
19 then who was representing us? And that is what comes out
20 of the settlement agreement. The 8.5 number seems to be
21 pennies on the dollar. It is not clear who gets what
22 money. It is not clear what trusts get that. It is not
23 clear to our clients how much any of us get. But it seems
24 small and for us to understand why it is small, we ought to
25 be able to get into these fundamental questions.
26 There are ambiguities in the agreement not

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2 withstanding that we have made the issues clear to Mr.
3 Ingber. He has at times said it is not unclear, you don't
4 understand it, you don't get it, and there are times I have
5 understood what he said and there are times that I don't.
6 And then, after the verified petition had been
7 submitted, it raised more concerns, because although there
8 is another condition in the summary of findings by -- which
9 is Paragraph E, which would find that this Court would make
10 a ruling that a full and fair opportunity has been offered
11 to all interested persons to object to and participate in
12 the hearing. A full and fair opportunity. And when we
13 come forward saying here, tell us what some of the
14 communications were, we get in essence trust us, you have
15 gotten everything.
16 And when we ask questions about the other steps in
17 the process, we get trust us from the trustee, and we get
18 attacked by the institutional investors. That is
19 fundamentally what we have seen since the verified petition
20 has come in. You don't need any more. Attacks on why
21 you're here.
22 And that causes more concern for us as to what
23 really went on.
24 We are very concerned about whether those
25 negotiations were conflict free, because Bank of New
26 York/Mellon cares about its own exposure and I just want to

walk through what the obligations were of Bank of New York/Mellon, because the two banks, both Bank of America and Bank of New York/Mellon had liabilities that were on the table while those negotiations were going on and it is not clear to us what happened to all of the liabilities of Bank of New York/Mellon.

If going into the negotiations they had liabilities on the table, Bank of America has liabilities on the table, who gave up what?

And again, Mr. Ingber has said there is no release whatsoever for Bank of New York/Mellon in this case, no indemnification. That is not clear from the documents. It is just not clear.

Here is and I apologize -- I will start at the beginning. But here are the banks; Countrywide and Bank of New York/Mellon. They are the parties to the agreement. They are parties to the pooling and servicing agreement. They are the ones who had obligations under the CUTPA claims that are being made in this case. That pooling servicing agreement is between them and out of those agreements, there are six potentially different liabilities that the banks have. We know Bank of America stepped in here and we can argue whether they took over the liability or not and that is out there for dispute. The courts have gone in different ways and we don't think that any court has ever really dug

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2 into that, but there is a liability for Bank of America here
3 that has nothing to do with whether or not they are a
4 successor to Countrywide. They became the master servicer
5 at this point and they had obligations to service these
6 loans, one of their entities did, and that has nothing to do
7 with whether they are successful. That liability has no
8 cap on it and that point I don't think has ever been made
9 clearly in these papers and I don't know if that issue was
10 ever clearly negotiated, but the only thing that we have
11 here when we talk about Bank of America's liabilities is
12 some cap because Countrywide can't pay it and Bank of
13 America does not have to. That servicing liability is Bank
14 of America's fully and completely.
15 The second liability that Bank of America had is
16 the representations, basically, the quality of the loans, do
17 these loans meet either reps and warranties in the
18 agreement. That liability was existing when they sat down
19 and talked.
20 Bank of New York/Mellon is the trustee appointed by
21 Bank of America, right? They are the trustee on all of
22 these claims and they have some connective liability here.
23 When a loan is put together, there is a loan file delivery
24 obligation. Countrywide had to make sure in every loan
25 file and this Court may have seen some, there is a note,
26 sometimes a statement of income, there is an appraisal of

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2 the property. There is a set amount of stuff. Countrywide
3 had an obligation that Bank of America we say had succeeded
4 to, to make sure they delivered loans that met those
5 obligations in terms of documentation.
6 Bank of New York/Mellon had obligations to make
7 sure that those documentation issues were certified. They
8 were supposed to look at the loans and certify that the
9 documentation was proper. It appears that that was not
10 done or not done well. We don't know yet. But if in fact
11 when these loans were produced, Bank of New York/Mellon did
12 do its job as trustee in making sure that the assignments to
13 the trust were perfected, they have got liability here.
14 Mr. Ingber said that liability is gone, there is
15 nothing left any more, there is nothing left. It is not
16 clear to us. But if it is gone, it was on the table when
17 they were negotiating.
18 Finally, Bank of New York/Mellon's own obligations.
19 If there is a default, we know that the bank as a trustee
20 has heightened obligations and Ms. Patrick's clients put the
21 bank on notice of default back in the fall of 2010 and what
22 we see is that in the negotiations now, there are statements
23 in essence that well, we didn't -- there was no default.
24 They back off, they back up, we didn't put you in default
25 and I suspected that that was part of the negotiation.
26 The trustee says we could not be in default. If we

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2 are in default, we have obligations under the PSAs, they
3 pull those back, the obligations would include in all
4 likelihood to notify the certain certificate holders, all of
5 them, that there is a default, and that did not happen.
6 The other liability was on the table while these
7 three groups sat down was the trustee settlement activity.
8 What was Bank of New York/Mellon actually doing when it went
9 to the table and sat down and negotiated? And so, before we
10 got to settlement communications, Mr. Ingber's clients had
11 their issues to protect, the Bank of America had their
12 issues to protect and we want to know, how did that play
13 out? How did that play out in terms of money? How did it
14 play out in terms of the releases? How did that play out in
15 terms of the shifting of indemnity? How did that play out
16 in terms of the forbearance agreements that we have never
17 gotten, in which apparently, the parties agreed to forbear
18 either on -- looks like the event of default as best we can
19 see, we will hold that back, and there were repeated
20 agreements to hold that back, hold that back, hold that
21 back.
22 That was what was going on in the dozens -- as best
23 we can tell in these dozens and dozens of meetings and
24 face-to-face meetings and for example, and we would, we
25 believe, be entitled to this information if all they really
26 did ask for was just say the settlement is reasonable, but

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2 they went so far beyond that. They said are all of our
3 actions reasonable? Our settlement negotiations are arm's
4 length. It doesn't look like they are arm's length. It
5 looks like they are arm in arm when you see the results that
6 come out ultimately of the settlement agreement.
7 I want to talk about the common interest privilege
8 for a second, because that is really the only argument they
9 got that is not a relevant argument and really, what they
10 are saying is as I understand this point, is that Bank of
11 New York/Mellon and the institutional investors have a
12 common interest in trying to promote this settlement.
13 This Court has written on that issue, Justice
14 Bransten has written on that issue and if fact, in order for
15 them to prevail in this case, the result would be that this
16 trustee, who is the trustee for Ms. Patrick's clients, but
17 is also the trustee for everybody else, not only the
18 institutional investors and the objectors, all of the other
19 certificate holders out there, this trustee could say to
20 this Court, I can have confidential secret negotiations and
21 secret meetings with a select group of institutional
22 investors and not tell all of the other investors about
23 them. That is basically the practical effect of it, that
24 there is something about this process that would justify the
25 trustee to have a favored group of institutional investors
26 and ignore the other institutional investors and not provide

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2 them with the information that we would be entitled to to
3 try and ever get to the point where we can determine whether
4 we agree with all of their actions, or this Court agrees
5 with all of their actions.
6 There isn't a case that they cited, there is not a
7 case that would support that a trustee could pick and choose
8 which certificate holders it will talk with about a
9 settlement that affects all of them and let's not forget,
10 one of the other terms of the settlement is all of the
11 rights of all the certificate holders are extinguished as to
12 Bank of America with the exception of the securities claims,
13 but all of these contractual obligations are gone and all of
14 the settlement activity and liability of the trustee is gone
15 and we are supposed to not know because of some common
16 interest assertion about what went on there?
17 In order for them to prevail on the common interest
18 assertion, they have to prove one, that there is an
19 agreement. I have not really seen evidence of that.
20 Two, that the information originally was
21 attorney/client privilege, and there is nothing privileged
22 about conversations between Mr. Ingber and Ms. Patrick in
23 negotiating this deal. They are not attorney/clients, they
24 are in essence truly adversaries at the beginning because as
25 the Court might recall, when Ms. Patrick sent the notice to
26 the Bank of New York/Mellon, they were essentially saying

2 you're not doing your job, trustee; you have not protected
3 us and then eventually they said you must sue and if you
4 don't sue, we will sue you. They weren't arm in arm at the
5 beginning and they weren't arm in arm at the end and they
6 may not be arm in arm again if this Court says I don't find
7 this agreement so reasonable, I don't find the activities
8 involved here so reasonable.
9 Then, the institutional investors and all of the
10 other investors out here may have to decide are we going to
11 sue Bank of New York/Mellon.
12 So that potential of eventual adversarial positions
13 cuts directly against the common interest privilege.
14 Lastly on that, this interest that they are
15 asserting to have in common with the interest of creating a
16 settlement or obtaining a settlement, that is not the kind
17 of common legal interest that would support this. That is
18 the kind of interest that the common interest group looks
19 to, because that privilege looks to when the parties are
20 seeking the rendition of legal advice. They are not
21 looking for legal advice here. They weren't when they were
22 talking to each other. They were looking for court approval
23 and while they say that particular common interest which
24 they share right now of is trying to get a settlement, this
25 settlement approved is not sufficient to establish the level
26 that would be needed for the common interest privilege.

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2 They have a burden on that issue. They have not
3 met it.
4 Unless the Court has questions, I will turn it over
5 now to hear their comments.
6 THE COURT: Why don't we let them respond to what
7 you have said?
8 Who will speak first?
9 MS. PATRICK: I am Kathleen Patrick for the
10 institutional investors. I am going to begin by answering
11 the question that Mr. Reilly and Mr. Cyrulnik consistently
12 fail to answer each time the Court asks it, which is, what
13 do you already have, what does it tell you? And what else
14 are you looking for?
15 And those are highly relevant questions, because
16 what Mr. Reilly just told you, as you were listening
17 carefully, I know you got the sense that he clearly has
18 quite a lot of information, far more than he would give the
19 Court to understand.
20 What does he have? He has 250,000 pages of
21 production from the trustee, including 100,000 actual loan
22 re purchases, litigated at arm's length, not by my clients,
23 but by monoline insurers, by whole loan purchasers and by
24 government sponsored enterprises, Fannie Mae and Freddie Mac
25 over a period of years involving loans on the same platform
26 that were litigated at arm's length for years; a hundred

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2 thousand of them. They have all of that data. They have
3 confidential presentations that are highly sensitive from
4 Bank of America winnowing that data down into breach rates
5 and success rates, documents from which any person with a
6 calculator, me with my Soviet studies degree included, could
7 come up with various and sundry estimates of losses, but
8 they don't even have to do that, because we have produced
9 our matrix of how we estimated the claims, how our clients
10 went about it, and it is just our estimate, but the trustee
11 has produced the reports of all of its experts, including an
12 expert that did an independent valuation of the claims. We
13 didn't see that report until it was produced in this case.
14 Never saw a draft of it. It was entirely the trustee's
15 process. Estimates from the trustee's experts about the
16 likelihood -- Mr. Reilly says, well you know, nobody has
17 really dug into the question of Bank of America's successor
18 liability. Really? Has he read the report of Professor
19 Robert /TKAEUPBS, which is in the record in this case and
20 was produced to them? Forty or 50 pages of detailed
21 description and consideration of all of the facts about the
22 various acquisitions and transactions between Countrywide
23 and Bank of America, how those fit into theories of de facto
24 merger, Delaware alter ego law, successor liability. All of
25 that is in the record.
26 He says there appears to have been an event of

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2 default. There are documents about instructions. There
3 is a series of forbearance agreements. How does he know
4 that? They have been produced. He has those documents
5 already in his hand.
6 He says it is not clear what we get under the
7 settlement agreement. The settlement agreement has the
8 formula, and then, he makes the incredible claim that
9 somehow Bank of New York/Mellon has gotten a release here.
10 Ipse dixit are not facts. The settlement agreement is
11 clear. There is no release of Bank of New York here. His
12 argument about their collateral certification functions.
13 Let me tell you, if Bank of New York thought they had been
14 released, they would have raised it. You know why?
15 Because they are across the Plaza in federal court being
16 sued for that very issue, for failing to insure that those
17 collateral certificates were done properly and do you know
18 what? They have not argued, because they cannot argue,
19 because it is not true that under the settlement agreement
20 that claim has been released. It is a fix and an absolute
21 fix. There is no release of Bank of New York in this
22 settlement agreement bar none. Full stop. Didn't happen.
23 THE COURT: Who is suing them in federal court for
24 that?
25 MS. PATRICK: The Scott and Scott firm from the
26 Policemen's Pension Fund filed a class action of some sort

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2 involving that.

3 THE COURT: That is before Judge Pauley?

4 MS. PATRICK: Yes, your Honor.

5 Mr. Reilly somehow meets himself coming and going,

6 because the suggestion here, right on the settlement

7 discussions, because they recognize, right, courts look at

8 settlement negotiations to determine whether they are arm's

9 length based on the circumstances of the parties, based on

10 the relative interests at stake, based on the length of the

11 negotiations, and they routinely make findings as we have

12 given you in the law in both New York State Court Southern

13 District, authorities routinely make these findings without

14 looking at the content of the settlement negotiations, based

15 on what the parties did.

16 And your Honor, I am going to show you what is in

17 the record, what these two objectors here, AIG and Walnut

18 have in the record, what is publicly disclosed, and what

19 they knew.

20 Now, one point: Mr. Reilly makes an argument about

21 our clients acting for the benefit of certificate holders.

22 The PSA does not permit us to send notices or give

23 instructions to the trustee, even discretionary instructions

24 like those we gave, Judge, unless what we are trying to do

25 is for the common benefit of all certificate holders. You

26 read the PSAs and I know that because you wrote on 10.08,

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2 not once, but twice, and that requires that investors
3 invoking rights under those agreements demonstrate that the
4 remedies they seek to pursue will have the effect of
5 benefiting all certificate holders.
6 So did your client try to comply with this
7 contract? Yes.
8 They did why? Because they are reputable
9 disclosed names, the New York Federal, Pacific Investment
10 Company, Black Rock, Met Life, the Invesco funds, the
11 Federal Home Loan Bank of Atlanta, not anonymous hedge
12 funds. Twenty two large institutions looked at this
13 contract and said okay, this is a maze, it is Byzantine, but
14 we have to comply with it and so, we did. We did.
15 And in doing that, we didn't try to gain any
16 individual advantage for our clients. Our clients -- you
17 have read the settlement agreement -- get exactly what every
18 other similarly situated certificate holder gets, but how
19 did we get there? How did we get there?
20 Well, Mr. Reilly is right about one thing.
21 Adversaries at the beginning is an understatement. In May
22 of 2010, Bank of America in a disclosure document subject to
23 the criminal penalties of the federal securities law says oh
24 yes, we got 430 billion dollars of Countrywide paper out
25 there, but we have no liability on it. Zip. Okay.
26 And in August, our clients met with BNY/Mellon and

2 we said, you know what? Right here, we want to discuss
3 litigation of repurchase and servicing claims against
4 Countrywide. We have 25 percent of the holdings, but we
5 recognize BNY, these are your claims and the PSAs limit what
6 we can do but here is what we know, please, do something.
7 This is in the public record. This is all in the
8 documents that they have already got.
9 We sent a letter in August instructing the trustee
10 to investigate those claims, investigate litigation claims.
11 What does the work product doctrine apply to, your Honor?
12 Investigation of potential litigation claims.
13 And then, in October we sent a notice of non
14 performance to the trustee and to the master servicer.
15 This is the first communication to Bank of America. It is
16 a communication that is mandated under Section 7.01 of the
17 PSAs when certificate holders seek to have a declaration of
18 a servicer default. That was the subject of a public press
19 release. It was not merely a public press release, it was
20 a public relations disaster for Bank of America. Its stock
21 price dropped 4.4 percent and in an emergency call the next
22 day, Mr. Moynihan compared my clients to people who bought a
23 Chevy Vega and thought they came back wanting to return it
24 for a 12-cylinder Mercedes.
25 Now, I will confess, I didn't know they made a
26 12-cylinder Mercedes until he said that, but it is

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2 absolutely true that our clients, having bought what he
3 characterized as a Chevy Vega, expected that the car would
4 run and expected to pursue those claims and wanted remedies.
5 So yes, public notice of non performance.
6 Document produced to them. They have it.
7 In November, Bank of America discloses that it
8 wrote a letter to my clients and to me that described what
9 we had done as "materially baseless" and that our letter and
10 notice were "written for an improper purpose." Really?
11 Pursuing claims under a contract is not in my part of the
12 world an improper purpose, but there you go. We were
13 letting them know that there were billions of dollars at
14 stake and they didn't react very kindly to it. I get it.
15 And even after that, in its next disclosure, Bank
16 of America continues to diminish these claims, continues to
17 say oh well, you know, there is not much merit to these
18 claims, they are not worth very much and continues to say
19 there is nothing to it.
20 And then, Mr. Moynihan says we are going to engage
21 in "hand to hand" combat on a loan by loan basis. Lots of
22 war metaphors here. Hard to reconcile that with the
23 conclusion you have to find under New York law in order to
24 order the production of settlement communications. And
25 then, the settlement negotiations begin. And they continue
26 for months and months until May, when Bank of America

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2 discloses that it has an upper range of loss estimate of 7
3 to 10 billion dollars that includes what they say are
4 monoline private label, which is this case, and whole loan
5 repurchase, which is people that buy loans for their own
6 book and that is on everything by the way, not just
7 Countrywide, it is everything; First Franklin, Bank of
8 America, Merrill Lynch, all of them had securitizations and
9 they say 7 to 10 billion dollars, and then our clients show
10 up and we have achieved an eight and a half billion dollar
11 settlement with marked servicing improvements, with document
12 cures and a number that is not pennies on the dollar,
13 because they have the document. They know that the
14 repurchase claims were estimated at around 32 and a half
15 billion dollars and we settled for about 26¢ on the dollar.
16 They have that document, too.
17 All of that is public. It is all in the documents
18 they have.
19 So why do I care? And why are we arguing about
20 settlement negotiations?
21 We took seriously, your Honor, what you said at our
22 last conference and we sat down and took a hard look at what
23 we could do to accommodate what we think is, in all candor,
24 a specious claim that they don't know, because as you just
25 have seen, they do know. They do know. But we get it, and
26 so, we tried to come up with a solution and the solution we

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2 proposed took into account what is before the Court, that
3 is, did the trustee act within the bounds of its reasonable
4 discretion in making this decision, which in turn focuses on
5 what did the trustee know and so we told them we don't like
6 it and I want to be clear, we do not like it, we think this
7 is a bad, bad precedent to set out; it is a bad precedent
8 because people will not comfortably negotiate settlements if
9 they believe that in any settlement that is ultimately
10 achieved, the back and forth is going to get disclosed.
11 And that matters, a lot, your Honor. It matters
12 to my clients who are publicly out there trying to negotiate
13 resolutions of other issues entirely similar to this and
14 what comfort can those banks have that they can talk to us?
15 That they can facilitate a resolution which is favored under
16 the law? Right. Settlement is favored.
17 THE COURT: Well, I -- of course it is.
18 One of the things that makes this little bit
19 different is you're engaged in settlement negotiations and I
20 am not make any evaluation on whether it is fabulous one or
21 a terrible one or something in between, but usually when
22 people negotiate for months and months, they are negotiating
23 for a settlement between themselves and then sometimes
24 courts for various reasons, like if it is a class action or
25 something and they have to get the Court's approval even
26 though the parties agree.

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2 Sometimes, if the parties agree, they don't need my
3 approval. If they agree, that is fine, but this was a weird
4 situation because the settlement was being negotiated for a
5 long period of time to cover people that weren't at the
6 settlement negotiations, so it was -- for eight months it
7 was going on and then you say guess what? Your case is
8 settled.
9 My case is settled? Well, what happened?
10 I don't know.
11 And that is the funny thing, because the settlement
12 is to include all of them and they have to be happy with it,
13 but you were there and they weren't, and that I think is
14 part of the big problem here.
15 MS. PATRICK: I understand the problem, your
16 Honor, but let me say two things that I think will clarify
17 the matter enormously; right, because our clients were in
18 there to let people know that if a resolution was achieved
19 that the trustee ultimately decided it wanted to do, we
20 would not object to it and the point here is, these are not
21 our claims, okay? Everybody at this -- everybody here
22 agrees, the trustee owns these claims and the trustee was
23 negotiating and we were telling the trustee what would be
24 acceptable to us, but ultimately, the trustee makes its
25 decision and so, it is wrong and it is an error of all of
26 these contracts for the objectors to say you're settling my

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2 claims. They don't own these claims. I don't, either.

3 Now, let me say a few more words about that point,

4 because --

5 THE COURT: So it could have been that the trustee

6 could have negotiated on its own with Countrywide and Bank

7 of America, whatever, and said okay, this is the settlement

8 and nobody would have been there?

9 MS. PATRICK: Exactly. That's right. And in

10 fact, there were many discussions, at least I believe there

11 were, between Bank of America and Bank of New York/Mellon

12 where we were not present, okay, because these are the

13 trustee's claims, and the trustee owns them and the trustee

14 can decide what to do with them and that is, as the Court

15 has noted, the agreement that all of us made. None of us

16 agreed that these PSAs created a parliamentary democracy.

17 We all agreed that the trustee would decide.

18 THE COURT: I think I have said that in the past.

19 MS. PATRICK: Yes, you have. You have. And so,

20 that is the whole point. It is not that the trustee or we

21 turned around and said to those holders your case is

22 settled. Instead, what the trustee said is, I have settled

23 my case, this is what I have done and indeed, your Honor,

24 that is why you dismissed the Walnut case, because these

25 claims don't belong to Walnut and it is a myth to suggest

26 that they do.

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2 So that is one piece of it. Okay.

3 The other piece of it is that in evaluating a

4 settlement, you look at the arm's length character of what

5 has happened and I have talked to you about that. But we

6 made an effort to try to resolve this. And --

7 THE COURT: Sorry to interrupt you, but one of the

8 -- I agree to some extent to one of the things Mr. Reilly

9 said, which was that there are a lot of findings that you're

10 asking me to ultimately make at this hearing in 2013 or

11 whatever.

12 MS. PATRICK: Yes.

13 THE COURT: And they say 18, I am not sure how it

14 is numbered, but something in that range, and in order for

15 me to make all of those findings, I would want to see

16 something.

17 So you say well, look, we did everything, we were

18 great, got all of experts, they all gave in the reports,

19 they all thought this was wonderful and isn't that great?

20 And I guess yes, I mean it sounds good, but don't they have

21 a chance to see a little bit more? And I guess that is what

22 I said last time about is there a way to open up a little

23 bit more to help convince them?

24 MS. PATRICK: Yes, and your Honor, we made that

25 offer. And I actually care about convincing you, so we

26 heard you and we made an offer and this is the offer that we

2 made: These are the trustee's claims. You can have access
3 to any settlement discussions where the trustee was present.
4 Okay. Anything the trustee said to Bank of America on its
5 own or anything the trustee said or did or anything that
6 happened in the trustee's presence where we were present,
7 okay.
8 But here is what I carved out of that, and I say I,
9 because this had to do with discovery from my clients that I
10 care about, okay? So let me be clear. This is my issue.
11 What I don't want to have happen is for our clients to be in
12 a circumstance where, when we are trying to resolve other
13 cases and claims or get started with other trustees, people
14 feel like they cannot talk to us in candor, like they can't
15 even safely discuss anything with us.
16 THE COURT: Trust.
17 MS. PATRICK: I understand the argument that
18 BNY/Mellon, maybe I -- I get the idea that if BNY/Mellon was
19 present and was there not discussions, that that may help
20 the Court to understand how BNY/Mellon conducted itself and
21 how it went about negotiations. That I understand.
22 THE COURT: What are you asking to have carved
23 out?
24 MS. PATRICK: I am asking for my clients binary
25 communications with Bank of America not to be covered,
26 because if the trustee was not there --

2 THE COURT: With Bank of America, as opposed to
3 when the trustee was there?
4 MS. PATRICK: I have two pieces. Bank of America,
5 absolutely I believe there should be no discovery of that
6 and the reason there should be no discovery of that is it is
7 deeply prejudicial on a trust basis, but also on a work
8 product and strategy basis.
9 What you say to somebody at the end of settlement
10 negotiations as you're getting down to the lit log to say
11 okay, I can do this deal, I can make my clients comfortable
12 that they will not object to this, what you say in that
13 circumstance is your end point that other banks would like
14 to have as their starting point. It is not fair. It is
15 prejudicial, deeply, deeply prejudicial to put us in a
16 situation where our communications with banks, where people,
17 where the trustees are not present, are made the subject of
18 discovery.
19 And separate from that, separate from that is our
20 independent communications with the trustee, where Bank of
21 America was not present. And let me talk a bit about why I
22 think that matters.
23 Let's back up here. We instructed the trustee to
24 investigate and pursue repurchase and servicing claims.
25 They are the trustee's claims. There is a union of
26 interest on work product. The PSAs do not require -- that

is the contract. The PSAs don't require the trustee to canvass every certificate holder and say, what do you think? Should I do it or not?

Instead, they say the trustee can decide and they give a limited range of motion to certificate holders, that is, when you have 25 percent of the voting rights as we did, you can give certain directions, but they can also tell you to pound sand because it is clear their claim and the work product issues are associated with posturing these claims so that they could be maximized, so that we could say look, this is a good argument to make here, right, the kinds of discussions you always have when you're prosecuting or trying to prosecute a claim, right, those are important and confidential discussions and again, every certificate holder depends on the trustees as a collective matter, willingness to talk to them about pursuing claims where they have voting rights, where they can persuade people that they ought to move forward and we are trying to do that. And it is a deep and prejudicial risk to say that communications with certificate holders about their invocation of rights under the PSAs should be discoverable.

And do you know how I know it is deeply prejudicial? I will tell you how I know. Because each of these objectors, AIG and Walnut Place, there is in the record before you evidence that each of them has tried to

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2 trade their objection here away in exchange for an
3 individual benefit to them.
4 And when I turn around and say okay, you're
5 invoking your rights under the pooling and servicing
6 agreement to object, you're out here saying oh gee, this
7 settlement should be held up, that there are lots of
8 evidence from Quinn Emanuel documents in the record, lots of
9 evidence in Walnut Place in here, and you are trying to
10 trade your objections away for personal benefit, which is
11 inconsistent with 10.08, and if we will talk about
12 settlement negotiations, we are going to talk about them,
13 because the Court is entitled to know the bona fides of the
14 objections that have been filed here.
15 THE COURT: What do you mean by they are trying to
16 trade away their objections?
17 MS. PATRICK: Your Honor, if you look at the
18 intervenors' statement in support of the settlement, in that
19 document attached as an exhibit with regard to to AIG are a
20 series of letters and correspondence that were produced in
21 connection with the motion to disqualify Quinn Emanuel in
22 another case, and it is perfectly clear under that
23 correspondence that there were mediations scheduled that
24 related -- that seem to relate to these objections that AIG
25 has filed here and the prospect that they would not object
26 to the settlement if their independent securities claims

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2 would be settled and similar documentation with regard to
3 Walnut Place and importantly, your Honor, both AIG and
4 Walnut Place were informed of these discussions. That is in
5 the record. Each of them was advised of what was happening
6 by BNY/Mellon and each of them met with Bank of America
7 separately and without us.

8 Now I say that BNY -- although they claim
9 vociferously that our clients' communications with Bank of
10 America are discoverable and ignore the prejudice even
11 though there is no evidence at all that our clients sought
12 to obtain an individual benefit for their part, when I turn
13 around and say all right, well, if invocation of rights
14 under pooling and servicing agreements relevant here, I want
15 what you said to Bank of America and I want what you said to
16 the trustee, because the trustee obviously considered it,
17 they knew about it, and the answer is oh, no no, that is
18 privileged, that is not relevant.

19 Well, if it is relevant, it is relevant. If it is
20 not, it is not. We have made a reasonable proposal. Our
21 reasonable proposal is the communications that were made
22 available to the trustee, including their -- including their
23 efforts to trade away their objections should be
24 discoverable for everyone or no one. And we are prepared
25 to live with that, your Honor, although I believe very
26 strongly that the law does not require you to look at the

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2 the content of the negotiations to determine whether they
3 were conducted at arm's length.
4 But I hear you, and we have made a proposal that
5 allows the trustee, that allows the discussions to which the
6 trustee was party to be discovered and they have refused.
7 And they have refused because their position is that there
8 is no limitation on what they can discover, even as they
9 raise the curtain of secrecy over their own discussion and
10 they, at least until today, were taking the further portion
11 that our clients' attorney/client privileged communications
12 were discoverable and that our legal analysis was
13 discoverable and the estimates we made that -- the memos
14 that were generated concerning the strengths and weaknesses
15 of the claim, all of that they demand, all of that under the
16 guise of seeking to know what happened here.
17 We have made a reasonable proposal and we think it
18 makes sense, but if that proposal is adopted, it needs to
19 apply equally to everyone and that is where we are on this,
20 your Honor.
21 THE COURT: Thank you.
22 Do you want to --
23 MR. INGBER: I have very little to add to what Ms.
24 Patrick just said. We agree with what Ms. Patrick said
25 about the discoverability of settlement communications. We
26 think that the law is pretty clear crystal clear that

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2 settlement communications are not discoverable for all of

3 the reasons Ms. Patrick articulated.

4 I just want to make a point about the proposal that

5 we made and address very briefly the conflict allegations

6 that Mr. Reilly made.

7 THE COURT: Do you agree with her proposal?

8 MR. INGBER: Your Honor, I am happy to hand up the

9 proposal that we made. It was an e-mail that I had sent to

10 counsel for the objectors. So yes, I agree wholeheartedly

11 with the proposal.

12 Here is a copy. You guys have seen it.

13 (Document handed to the Court.)

14 MR. INGBER: The proposal is very straightforward.

15 There were really three issues on the table in this motion

16 to compel. First issue was the discoverability of

17 settlement communications. The second issue was the

18 discoverability of documents protected by the

19 attorney/client privilege and the attorney work product

20 privilege. And the third was the discoverability of loan

21 files.

22 So this proposal that we made sought to address two

23 of the three items, settlement communications and privileged

24 communications. We proposed to the steering committee that

25 the trustee would produce what it has in trust, share its

26 possessions and what is protected by the common interest

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2 privilege, so we have to produce tri-party communications,
3 the communications between -- among the trustee, the
4 institutional investors and Bank of America or counsel for
5 those parties. We would also produce communications
6 between the trustee or its counsel and Bank of America and
7 its counsel. We don't have communications between the
8 institutional -- solely between the institutional investors
9 and Bank of America. We can't offer to produce those
10 documents and we understand the rationale behind not
11 producing those documents. It makes perfect sense to us.
12 It was not part of this proposal.
13 We also can't unilaterally waive a common interest
14 privilege that so clearly applies to the communications
15 between Bank of New York and the institutional investors,
16 and we don't want to waive that privilege. Again, we
17 understand the rationale and all of the policy reasons
18 behind not effectuating a waiver of the common interest
19 privilege between the trustee for the trusts and the
20 institutional investors. So that was it. It was two very
21 significant buckets of settlement communications. It is
22 the overwhelming majority of settlement communications. I
23 don't know how many communications there were solely between
24 the institutional investors and Bank of America. I do know
25 that relative to the total number of tri-party
26 communications, the number of communications between the

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2 institutional investors and the trustee is a drop in the

3 bucket.

4 So what we were offering was the overwhelming

5 majority of the settlement communications.

6 Now, there were conditions attached, which we think

7 very reasonable and modest. Number One, when they get

8 these communications, they see who was representing Bank of

9 America, the institutional investors and BNY/Mellon in these

10 negotiations. They should not seek to disqualify counsel

11 because counsel that is advocating for this settlement also

12 participated in settlement negotiations. That just doesn't

13 happen. This is a bench trial. They would not prevail on

14 that motion anyway, but it was a condition that we attached

15 to this proposal.

16 We wanted them -- this settlement communications

17 subject to an attorneys' eyes only designation. This is

18 legal strategy. This is information that the institutional

19 investors very clearly do not want to get into the hands of

20 other targets of theirs and for very good reason, so we

21 think that was again a very reasonable condition.

22 There was another category of documents, the

23 privileged communications. We think if we were to argue

24 this today, they would lose. The trustee -- there is a

25 drum that I have been beating in this case and others. The

26 trustee is not a fiduciary. The law is crystal clear on

2 that point. The contracts are crystal clear on that point.
3 Mr. Cyrulnik himself has said to the Second Circuit in this
4 case, the trustee is not a fiduciary.
5 So we think we would prevail on that issue, but
6 what we proposed to the steering committee for the objectors
7 was that they take that off the table. They could argue
8 that a document that is on our privilege log does not meet
9 elements of the attorney/client privilege or the attorney
10 work product privilege, they are free to do that, but they
11 should stop arguing that the fiduciary exception applies and
12 they should stop arguing that the attorney/client waiver
13 applies, because we have not put the content of any
14 attorney/client communications at issue.
15 The case law is -- all the cases are clear on this
16 point, that if you put your good faith at issue, that is not
17 a waiver of the attorney/client or the attorney work product
18 privilege and that is what we are doing here. So we asked
19 them to take the communications off the table and asked them
20 to agree to a schedule that will get to us a hearing by the
21 end of the year that was eight months from the date of the
22 last conference, and your Honor indicated at the last
23 conference that we should try to get this done within eight
24 months.
25 That was the proposal. We think it was eminently
26 reasonable. It was a way to get two of these very

2 significant issues off your plate. It was an opportunity to
3 give the intervenors almost everything they were looking for
4 with respect to settlement communications, and it takes the
5 privileged communications off the table.
6 Now, to be fair, we got what they call the counter
7 proposal, and I will hand that up as well. There are words
8 on the page, and these words at a very quick glance seem to
9 suggest that this is a counter proposal.
10 (Document handed to the Court.)
11 THE COURT: You gave me -- you just gave me the
12 same thing.
13 MR. INGBER: I am sorry.
14 THE COURT: You gave me two copies of the same
15 thing.
16 (Document handed to the Court.)
17 MR. INGBER: But this is in fact not a counter
18 proposal at all. What the steering committee proposed was
19 Number One, all of the buckets of settlement communications
20 have to be produced by the trustee and the institutional
21 investors, so they added the common interest privileged
22 communications and they added communications between the
23 institutional investors and Bank of America. So, no
24 compromise on that issue. We want it all. That was their
25 counter.
26 They agreed they were willing to disqualify

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2 counsel. They would not agree to attorneys' eyes only
3 provision, although they would not object to the documents
4 being filed under seal and with respect to the privileged
5 communications, this is interesting, what they said was, the
6 steering committee agrees at this time to withdraw the
7 portion of the motion to compel that seeks on the basis of
8 the fiduciary exception and/or the at issue waiver doctrine
9 all other documentation which the trustee or the
10 institutional investors claim are protected by the
11 attorney/client and/or work product privilege.
12 Well, that allows them to renew their motion in a
13 week or in a month or in six months. That is taking
14 nothing off the table. That is not a counter offer. That
15 is not in our view a good faith response to what we have
16 proposed.
17 And to boot, they throw in a proposal about loan
18 files. In addition to the other two buckets of settlement
19 communications, in addition to the fact that we are taking
20 nothing off the table with respect to privileged
21 communications, we want you trustee and Bank of America to
22 agree to produce 10,000 loan files and we want Bank of
23 America to do it within 45 days of this agreement.
24 THE COURT: He just said it went to 7500.
25 MR. INGBER: You're right. That was after this
26 proposal was sent. I think the 45-day turn around still

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2 applies, which is just not at all realistic. And then a
3 schedule was proposed.
4 Thankfully, your Honor, we have reached agreement
5 on the schedule with a significant caveat that I mentioned
6 before.
7 Now, all of these so-called counter proposals, the
8 four buckets of settlement communications, the non proposal
9 with respect to privileged communications, the 10,000 loan
10 files, at least on the face of this, it seems to be a take
11 it or leave it. In the meantime, there was -- it seemed as
12 if the steering committee was open to negotiation over this,
13 but the terms of this proposal say that the terms are -- the
14 proposed compromise is integrated and non severable, so they
15 are trying to get everything into this counter proposal.
16 They want the ability to pursue the privileged
17 communications, they want all of the settlement
18 communications and 10,000 loan files.
19 We had a meeting. We were not optimistic that we
20 would be able to reach resolution and unfortunately, we have
21 not, but the offer that we made remains and that is, the
22 trustee, who has nothing to hide here, these communications
23 were actually offered a long time ago, we are willing to
24 produce our settlement communications with the institutional
25 investors and Bank of America. We are willing to produce
26 the communications with Bank of America.

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2 That is a reasonable proposal and if the Court is
3 considering a proposal that brings the parties together,
4 that is somewhere between the narrow discovery that we want
5 and the broad discovery that the objectors want, to us this
6 seems like the logical place to land.
7 Now, I can argue about loan files. I don't know if
8 your Honor is ready for us to argue that point now,
9 otherwise I would just like to address briefly the conflict
10 allegations that Mr. Reilly raised. I know we have been
11 down this road before, but I think I can do it very briefly.
12 THE COURT: Why don't we leave the loan files
13 until afterwards? Let's finish this.
14 MR. INGBER: I will get Mr. Reilly's board here
15 and let's take a look, because I was surprised by some of
16 the things that Mr. Reilly said, and let's start with the
17 release.
18 Ms. Patrick referred to a case that is across the
19 street in federal court. Your Honor is aware of that case
20 that is pending before this Court, a case that we argued a
21 week ago.
22 THE COURT: The day after you were here.
23 MR. INGBER: The day after I was here, the Knights
24 of Columbus case, and if your Honor recalls, counsel for the
25 plaintiff stood and started to argue and your Honor
26 interjected with a question and that is, something along the

lines of why isn't this incorporated into the Article 77 proceeding? Why shouldn't this be stayed until there is a resolution of the Article 77 proceeding? There will be discovery in that proceeding, you can get discovery there, and then we will see what happens.

Plaintiff's counsel stood up and said your Honor, there is no release of claims against the trustee. This is a case that can proceed and should proceed. And I stood up and I said that is absolutely correct. It would be nice for us to take this case off your docket and to go home and not have to worry about it, and we are fighting that as you know on the merits, but what we would not do and this is what I said to your Honor last week, we would not stand up and say this is a claim that is released by the settlement agreement, because it is not.

We disagree with everything that Mr. Reilly and Knights of Columbus and the plaintiffs across the street have said about the trustee's duties and obligations, but we will fight that on a motion to dismiss and we will fight it on the merits. We will not stand here and say that is released by the settlement agreement, because that is a lie. There are no releases of claims against the trustee in the settlement agreement.

I have made this point, your Honor, probably a dozen times in this court and in federal court. I don't

know what else I can do. It is in the document itself. You could scour the settlement agreement. You will not find a release of claims against the trustee.

Now, there is a proposed final order and judgment and there is a provision in a proposed final order and judgment that says if the Court finds that the trustee acted within its reasonable discretion and entered into this settlement, then the certificate holders who have been given an opportunity to be heard in this case are going to be barred from asserting that the trustee didn't act within its reasonable discretion, they will be barred from asserting that we violated our duties by entering into the settlement, and either your Honor will adopt that provision or not. Your Honor will either find that the trustee acted within its reasonable discretion and that will make perfect sense, that bar order, or you will find that we didn't and that goes away, the final order and judgment goes away and unfortunately for the institutional investors and the thousands of certificate holders who don't object to this settlement, the settlement will go away and the parties will be back to their pre settlement position.

So that is the trustee's settlement activities on this chart.

Loan file certification. I do not want to repeat the motion to dismiss argument that I made last week, but

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2 very briefly, the contracts are pretty clear on this point,
3 your Honor. The obligation to deliver the mortgage file to
4 the trustee pursuant to to Section 2.01 shall be solely the
5 depositor's obligation. The trustee does not have to go
6 out and seize mortgage files. That is not its obligation
7 under the governing documents.
8 Mr. Reilly talked about the trustee having to
9 insure that the assignments were in -- were accurate and
10 were in proper form and were properly recorded. Well,
11 there is actually language in the PSAs which says the
12 trustee shall be under no duty or obligation to inspect,
13 review or examine said documents, instruments, certificates
14 or other papers to determine that the same are genuine,
15 enforceable or appropriate for the represented purpose or
16 that they have actually been recorded in the real estate
17 records, or that they are other than what they purport to be
18 on their face.
19 We don't have to argue the merits of this issue
20 now, but to stand here and say that the trustee was
21 conflicted because it had liability that was being released,
22 ignores the contract language and ignores the settlement
23 agreement which contains no releases and then, the final
24 point, failure to act on default.
25 I mentioned this last week or two weeks ago your
26 Honor, when we were before you in this matter. And I went

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2 through all of the various conflict allegations that
3 remained and as I understand it, counsel for the objectors
4 is saying we entered into this settlement agreement. We
5 hired experts. We sat through all of these meetings and
6 conference calls. We filed the verified petition. We are
7 here against this settlement, all because we wanted to avoid
8 certain obligations that arise when there is an event of
9 default, but they are missing -- they are missing the point.
10 The obligations that arise when there is an event of
11 default, and there was none here, certificate holders just
12 -- very quickly, certificate holders have sent a notice of
13 non performance. Certificate holders are entitled to
14 withdraw that notice of non performance if that is what they
15 choose. They are the ones who sent it. They can take it
16 away. There is no reason why they can't also forbear on
17 the tolling period, and that is exactly what they did here.
18 But the argument that the objectors are make is
19 that we wanted to avoid certain obligations that kick in
20 after an event of default. What happens after an event of
21 default with respect to duties and obligations is the
22 following -- before an event of default, our duties and
23 obligations are defined by the express terms of the
24 contract. After an event of default, our duties and
25 obligations are defined by the express terms of the
26 contract.

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2 Now, with respect to rights and powers before an
3 event of default, we don't have to exercise the -- the
4 trustee does not have to exercise any rights and powers
5 under the agreement. We did here at our discretion. We
6 settled this case. That was our right, that was our power.
7 It was not our duty or our obligation. After an event of
8 default, this is the only difference, after an event of
9 default a trustee must exert rights and powers in the
10 contract -- not expanded rights and powers -- the rights and
11 powers in the contract as a prudent person would under the
12 circumstances. So we are a contractual prudent person with
13 respect to the rights and powers that are defined in the
14 agreement. There are not extra contractual rights and
15 powers. There are no expansive fiduciary duties.
16 So the argument goes something like this: We did
17 all of these things to avoid an obligation to do what we did
18 before this alleged event of default had occurred. We
19 exercised the right by entering into an eight and a half
20 billion dollar settlement with industry-leading servicing
21 improvements that were supported and advocated by 22 of the
22 largest institutional investors in the world, who have more
23 than $40 billion in holdings.
24 The flaw in the argument is that we would have had
25 to do something different after an event of default, so this
26 conflict allegation, your Honor, as a matter of common sense

2 and as a matter of contract, makes no sense.

3 So those are the three conflict allegations that

4 they think they need to delve into in the settlement

5 communications. We don't -- we think your Honor could

6 actually rule on those conflict allegations right now. We

7 know, if we were to file a motion to strike these

8 allegations, your Honor would need nothing more than what is

9 already in the record. The settlement agreement, either we

10 got a benefit or we didn't get a benefit, and it would be in

11 the settlement agreement. So the settlement communications

12 are not necessary for anyone, but we recognize what your

13 Honor said at the last conference. We heard you. We are

14 not going to get what we want, they are not going to get

15 what they want. And we have nothing to hide about these

16 settlement communications. We are proud of what we

17 accomplished as trustee with the institutional investors and

18 so, the proposal that we made is one that if the Court is

19 inclined to order the production of some settlement

20 communications, this is the one, respectfully, that we think

21 the Court should adopt.

22 Thank you.

23 THE COURT: Thank you.

24 Can you respond to Ms. Patrick and Mr. Ingber?

25 MR. REILLY: Yes.

26 I can't understand why the trustee would be willing

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2 to turn over its negotiation with Bank of America and ask us
3 not to get the institutional investors negotiations with
4 Bank of America.
5 What possible interest does the trustee have in
6 making that choice? Because that is what is going on here.
7 Ms. Patrick does not want to give us her negotiations with
8 Bank of America and the trustee is agreeing with that. You
9 should not get those.
10 That in and of itself suggests that the trustee is
11 acting in a way contrary to the rest --
12 THE COURT: I don't think that is it. They are
13 not his to give. I mean, that is what he said. Those are
14 her -- there is no -- he does not have the right to say
15 okay, take hers, you know, it's okay with me. Of course --
16 he doesn't care and he is not the one that has the
17 privilege. It is her privilege, and she has made her case
18 for that, but they are suggesting that the communications
19 that were held between the three of them, nobody has any
20 problem and it would seem to me that the smart thing is to
21 start with something that nobody -- that everyone agrees
22 with and see where it leads you.
23 As I said last time, you should get more and the
24 settlement negotiations I think were the big thing and you
25 have some of it. As Ms. Patrick pointed out, you certainly
26 have some of that, but now you want some more and so, those

2 should be disclosed.

3 I would think that you should start with those.

4 MR. REILLY: I think that is a great idea.

5 THE COURT: And the thing is, what do you care if

6 they are attorneys' eyes only? What is the big problem?

7 MR. REILLY: That is a great question.

8 THE COURT: Because that seems to be the only

9 issue on that -- you will take them with more, but you will

10 take them.

11 MR. REILLY: Here is the challenge. We have

12 clients. We can't represent our clients then. We said to

13 them, make it confidential, we're okay with that. And this

14 Court can control whether it ever comes up. The interests

15 that are trying to be protected here, the institutional

16 investors suggest there are some kind of trade secrets or

17 something. These are just work product communications with

18 an adversary. When the institutional investors talk to Bank

19 of America, that is -- needs to be attorneys' eyes only? I

20 mean, that is really what is going on here.

21 We said we can't do that. We have clients who need

22 to know what went on. And why can't they just accept the

23 confidentiality provision? Seems to me that that is not

24 going anywhere. All of these sophisticated clients sign

25 protective orders and confidentiality agreements all the

26 time.

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2 THE COURT: I know that. I sign them in every
3 case.
4 But could you just address that?
5 MS. PATRICK: You got it. Easy answer to give.
6 Mr. Reilly's client AIG is publicly out there were
7 any number of large securities fraud lawsuits in which it is
8 seeking individual remedies for itself. There are other
9 holders who are likewise seeking individual and PSA-type
10 remedies for themselves. And our clients are pursuing
11 similar claims.
12 It is quite customary to say that the business
13 people who are involved in their strategies, like an IP
14 case -- yes, I will say Mr. Reilly doesn't have a high
15 opinion of his own work product, but I kind of like mine.
16 My litigation strategy is my litigation strategy. I kind
17 of value it and in all honesty, my clients kind of value it,
18 too.
19 And it is surprising to me that they are fighting
20 to be able to disclose my litigation strategy and my work
21 product and my settlement negotiations to their client and I
22 made this proposal to them: I said look, here is what I
23 will do. Put somebody over a wall. If you need a business
24 person to talk to, put them over a wall, so that the people
25 that get this information are not people that are working at
26 cross purposes with us with regard to other matters and you

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2 know what? I got same answer I got last time. No. No.

3 No. It is a one way street. You give up everything, you

4 put yourself at risk. I tell my clients --

5 MR. REILLY: Those aren't quotes.

6 THE COURT: I didn't think --

7 MS. PATRICK: I am an advocate.

8 THE COURT: Really?

9 MS. PATRICK: I have a job to do. I enjoy it.

10 The answer was no, no, no. You give up everything,

11 we will provide you with no protection and I didn't get an

12 answer from Mr. Reilly as to why it was that AIG, which is

13 overtly working at cross purposes, should be able to have

14 access broadly within AIG to our information.

15 MR. REILLY: Your Honor, here is what we will --

16 what are we talking about? We have got a big concept of

17 walking around with pieces of papers, and what

18 communications were we talking about? This work product

19 concept, this is what we are asking for, is what they gave

20 to their adversary Bank of America. If they gave them

21 internal memos, they wrote on legal analysis, I would be

22 shocked, because Ms. Patrick is an advocate. She didn't

23 turn that over. We want to know what she gave to the

24 adversary. Why would that need to be protected with

25 attorneys' eyes only? She was willing to give it and we are

26 saying if you gave it to Bank of America, then you ought to

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2 give it to us.

3 This triangle here, your Honor, is -- and I think

4 -- let me help solve the problem, because I hear what you're

5 saying and if I hear what you're saying, which is take this

6 round now and hold off on that information from Ms.

7 Patrick's client, I am willing to do that.

8 We cannot agree to not get that information. That

9 is why we want to get a privilege log, so we can see what it

10 is that we don't have, because when the Court was asking me

11 about what it is to have -- we don't know what we don't

12 have. We have a privilege log here from Ms. Patrick that

13 has got these big broad categories.

14 THE COURT: They are going to give you that. We

15 got past that. That is one of the few things you agreed to,

16 so let's not go back on that.

17 MR. REILLY: Yes.

18 THE COURT: I don't understand. Is there a way

19 that you can work this out? And you would have to write

20 this up because this --

21 MS. PATRICK: I heard --

22 THE COURT: Your last comment I am sure is not

23 exactly -- put the person on the wall, that is not going to

24 be in the order, so I would prefer if you could write that

25 up, because I would like you to start getting something.

26 MR. REILLY: I agree, so you can have your trial

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2 and we go to work.

3 THE COURT: You better not call it a trial. That

4 was a big conversation today. Don't call it a trial --

5 MR. REILLY: Whatever it is.

6 THE COURT: -- whatever it is on Monday.

7 MS. PATRICK: But --

8 THE COURT: I think you have got to be able to work

9 out these other things. You apparently agreed on the

10 disqualification, so not raising that, which you put there

11 and if you can agree on the privilege and protect it in a

12 certain way, get that going and see. I mean, eventually, if

13 you get tons of things and you don't have one shred to say

14 you see, Judge, here is the conflict I was talking about.

15 Here is this. It will be difficult, but I would like you to

16 get something. Let's start with what they are willing to

17 give. I would like you to see if you can get it.

18 Do an order like that, and then, once you get the

19 privilege log, you will see if you want to pursue that

20 issue. You don't have to withdraw or make another motion,

21 because it is part of what is before me anyway, so we can

22 set up a time when that proceeding is over to come back and

23 talk about that, but it will take a little while to get this

24 and review it and see it. So at least get moving is what I

25 am saying.

26 MR. REILLY: What I hear, so we can be clear

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2 because I don't want to get confused about this, the trustee
3 is saying we will give you what we have between us and Bank
4 of America. Right? And we will give you what we have,
5 you tell us whatever else it is, because we get --
6 MS. PATRICK: Three party communications.
7 THE COURT: The three party communications, they
8 agree to -- and the communication that Bank of New York had
9 with Bank of America where the trustee was not there, but
10 not what the trustee -- not where the institutional
11 investors? I mean -- I am sorry.
12 MS. PATRICK: Your Honor, what I think of as my
13 clients' binary communications are not being breached, that
14 is, us with the trustee, us with Bank of America but three
15 party communications and Bank of New York's binary
16 communications with Bank of America and on that basis, and
17 you know, the no disqualification, I think we can move
18 forward.
19 THE COURT: And this is -- you are agreeing on the
20 period -- the period of time during which these negotiations
21 were going, so you know what period of time you're talking
22 about.
23 MR. REILLY: We agreed that the date of
24 petition -- we made another concession. We had requested
25 things past the petition. We stopped on the petition
26 June 28, 2011. We don't know when it started, so whenever

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2 those discussions started, that is when we want. I don't
3 want to pick one date and miss something. I don't want -- I
4 want total clarity on this. Any time the trustee was
5 talking either with Bank of America or collectively.
6 THE COURT: Relating to settlement.
7 MR. REILLY: Related to the claimants in the
8 settlement. If they are talking about the claims, I don't
9 want them to play settlement negotiation games. We have
10 seen this already.
11 MR. INGBER: This is not complicated, your Honor.
12 We know what they are looking for. We will produce it. We
13 have agreed to produce the non privileged settlement
14 communications, tri-party and the ones between Bank of New
15 York and Bank of America, beginning at the date of
16 settlement negotiations which -- let's look at Ms. Patrick's
17 chart. I think it is mid November.
18 MR. REILLY: No. No. No. No. Now, I will say
19 those --
20 MS. PATRICK: Dan, this is -- you're about to have
21 an argument that is not an argument, okay? You have got my
22 -- we have said, my clients' binary communications with Bank
23 of New York/Mellon are not discoverable. I have no idea
24 what Bank of New York/Mellon talked about with Bank of
25 America before November 18th, but the only communications
26 that happened before November 18th were binary

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2 communications as far as I know with our clients and Bank of

3 New York/Mellon, so it is a non issue.

4 MR. INGBER: We will start on a date. Look and

5 see. We will start on a date that we had your first

6 communication with Bank of America.

7 THE COURT: So I think that maybe now you will be

8 able to go back and create an order, because I want this.

9 MS. PATRICK: Yes.

10 THE COURT: And so, do all of you want this?

11 Clearly -- so that we can get this started?

12 MR. REILLY: Right.

13 THE COURT: Can you indicate in there there is

14 going to be this more detailed privilege log and that you

15 will --

16 MR. REILLY: We will come back if we have a

17 problem.

18 THE COURT: And you will go with that and let me

19 know what you are pursuing with that.

20 The only other thing, maybe now if you want to deal

21 with briefly and I appreciate that there has been a lot of

22 progress made on that, might be about the loan documents.

23 Now, I know that Mr. Mirvis had some very nice

24 young associates from his office late one -- late after the

25 courtroom had been closed, for the reasons we all know,

26 deliver to our chambers a box of materials and we all said

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2 to each other gosh, I wonder what this is, and apparently it
3 was two copies, it was only like half a box, of a memo and
4 some documents basically in opposition to that portion of
5 the motion to compel that sought loan files.

6 And you were upset about that, but I said look, we
7 will probably take a brief look at his brief, and why don't
8 you make a brief response to the loan files and let -- if we
9 are able to reach it, because we kind of -- you indicated
10 and it seems it made sense we would start with the
11 settlement negotiation issues.

12 Why don't we see briefly what we can do with the
13 loan files, so since we have a little bit of time, why don't
14 you deal with it? I am not promising I will make a
15 determination. I understand his papers came in late, but
16 then there could be just another motion. I try to, on
17 discovery, take a little bit more of a less formal -- I have
18 never had such a formal argument in discovery in my
19 recollection. So, Mr. Cyrulnik, you want to deal with that.

20 MR. CYRULNIK: I am happy to briefly address the
21 loan file issue. I hope the Court received our letter
22 yesterday in which we try to keep this as short as possible.

23 THE COURT: The three-page letter -- and we read
24 it. We also read it.

25 MR. CYRULNIK: I will not repeat it. We think
26 this is very simple.

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2 THE COURT: Everybody thinks everything is simple
3 and crystal clear. I am not sure I agree with you.
4 MR. CYRULNIK: We think more simple than most of
5 the other things. It is hard to believe that we are
6 actually here arguing about whether loan files are relevant
7 in the case. I understand the argument Mr. Ingber is
8 making about the complexity of the production of and review
9 of and presentation of loan files, but it is hard to imagine
10 and first time I sat in Mr. Mirvis' office and heard about
11 this, I was actually quite shocked that we are arguing here
12 about whether loan files are relevant to the case from a
13 relevance and discovery perspective.
14 The claims that the trustee proposes to settle here
15 -- and just to take a step back as to what those claims are,
16 they are CUTPA claims. The claims the trustee is settling
17 are claims for breaches of representations and warranties,
18 not the PSAs that Mr. Mirvis' client Countrywide that he is
19 now representing here together with Bank of America, made
20 about the loans that are in the pools that our clients
21 bought certificates in and had this case been litigated by
22 Bank of New York against Bank of America, the whole case
23 would have been about loan files, because the way you prove
24 a breach of representations and warranties, as the Court
25 well knows Bank of America and Countrywide made certain
26 representations about the lines in the pools, owner

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2 occupied, what was the LTD ratio, all sorts of other
3 representations. They are all about the individual loans
4 and the way you go about proving, as Justice Bransten has
5 been dealing with forever, the way you go about proving that
6 those representations and warranties were important is, you
7 look at the individual loan files and you look at them --
8 not each and every one of them -- but you look at them on a
9 sampling basis.
10 THE COURT: Look, Judge Bransten's case is a
11 different case. You're talking about the MBIA versus
12 Countrywide and I have read her decision and I know what she
13 has done, but her case is very different in a very -- is a
14 very different postured case than this case and what Bank of
15 New York and maybe what Bank of America have said is look,
16 if we are going to litigate the underlying claim, loan
17 claim, what the heck was the purpose of entering into this
18 settlement? Because it was all to try to say look, we
19 evaluated what we thought were the strengths and the
20 weaknesses of the claimants and whether or not there is
21 going to be a -- whether they will take over their claims or
22 not, which I know is a big issue before Judge Bransten and
23 we have considered all of those things and this is sort of
24 what we have done. If we were going to look through all of
25 these underlying loan modifications -- these loan files,
26 what was the point of settling this case? And that is

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2 oversimplification, but that is one of the things they said.

3 MR. CYRULNIK: Justice Bransten ordered

4 production of 100,000 loan files. Our original request as

5 Mr. Mirvis keeps telling the Court was for 1,000 loan files

6 for each trust, 530, which we never intended to truly pursue

7 but it was hundreds of thousands of loan files, tens of

8 thousands of loan files.

9 We are trying now to test the trustee's assumption

10 that it figured out the right value of the claims before it

11 started looking at everything else. If the trustee says --

12 and this is another thing, the trustee stands up and says we

13 didn't look at a single loan file before we entered into the

14 settlement, and we say that was an entirely incorrect way to

15 go about valuing these claims. They submitted an expert

16 report from Mr. Lin, which is what they relied on to figure

17 out what the claim is worth and Mr. Lin relies on what Mr.

18 Mirvis refers to as Fannie Mae and Freddie Mac re purchase

19 experience, which to me sounds like a Disney World fantasy,

20 but if you purchase Fannie Mae and Freddie Mac, they were

21 entirely different loans and the one here -- how do I know

22 that? Because Brian Lin said so in his report that Bank of

23 New York submitted, and he said on Page 4 of his report, he

24 said I believe that it would have been easier to compare two

25 analogous portfolios rather than to utilize a comparison

26 between conforming and nonconforming portfolios. Conforming

2 is Fannie Mae and Freddie Mac. Non-specific performings are
3 the private loans issued here. However, due to the lack of
4 available information, he goes on to say he used the
5 portfolio -- the Fannie Mae and Freddie Mac portfolio loans
6 to do his analysis, due to the lack of available
7 information. We are not asking to look at or litigate over
8 or have mini trials on every single loan file that would
9 become available in this case. Like Brian Moynihan says he
10 wants to do hand to hand combat over every loan, Mr. Mirvis
11 in his brief reserves the right -- we are not asking too
12 much. We are asking for a very reasonable and small number
13 of loan files to be produced so that we can test the
14 trustee's assumptions that it didn't have to look at a
15 single loan file to arrive at an assumption about how many
16 loans would have breached reps and warranties and we started
17 at 10,000, we came down to 7500 and we are not suggesting
18 that is a magic number, but it is what we, in consultation
19 with our expert, think will allow us to construct a good
20 sampling to show the Court and what we are saying is, it
21 just seemed impossible to imagine that loan files are
22 irrelevant to this case.
23 Now, I think it is fair to say that there is an
24 argument to be had over what we will do with the loan files
25 and how we will present it and how it affects the schedule,
26 but I think the most important question for the Court to be

1 Proceedings
2 concerned about now is, how long is it going to take Bank of
3 America to produce 7500 loan files? How long will it take
4 Bank of America to do that?
5 In our view, in our understanding, it should not
6 take very long as all. I don't think it will take a matter
7 of days.
8 THE COURT: If they hire 50 more people, is what
9 you said?
10 MR. CYRULNIK: That is for us. Just to be
11 clear, your Honor, the production of the loan files is what
12 they're giving us, the files. The review of the loans is
13 what we will be willing do to, so the 50 reviewers and the
14 two months, for 50 reviewers, that is people we will hire to
15 re underwrite the loan files. That is at our expense and
16 that is our endeavor. All we want them to do is get copies
17 of the loan files and give them to us. We will do all of
18 the rest of the work and the point I wanted to make to your
19 Honor is the question before the Court today is not you know
20 what will we do with the loan files? How hard will it be
21 for us to review them? How long will it take for us to
22 present it to the Court?
23 The question is, can they produce 7500 loan files
24 in a reasonable time frame that will allow this schedule to
25 move forward? And we think they absolutely can, and that is
26 how we know it. We know they have produced many more loan

1 Proceedings

2 files in other cases in time frames that suggest that they
3 should be able to get these loan files produced in a couple
4 of months.

5 THE COURT: Are these different loan files that
6 were produced in the other cases? Is there any overlap?

7 MR. CYRULNIK: There is no overlap between these
8 and the MBIA loan files before Justice Bransten. There is
9 some overlap between these and other cases in which I Bank
10 of America has produced loan files, but not entirely
11 overlap, because there is all of the trusts that Countrywide
12 issued essentially except for the MBIA ones that are at
13 issue in the settlement, so we have to construct the sample
14 and present to the Court a cross section that allows us to
15 cover all of the different kind of loans and vintages of
16 loans and years of loans that are in this pool.

17 But you know, I -- we think that Bank of America
18 should be able to produce the loan files in a timely way and
19 you will hear from Mr. Mirvis that is simply not possible
20 and our information, based on credible sources and actual
21 personal experience is to the contrary, and we suggest that
22 the Court take our very reasonable compromise number of 7500
23 loan files and order Bank of America to try to produce them
24 in 60 days and if Bank of America can't produce them in
25 60 days, says they physically cannot comply with the order,
26 we suggest they make a proffer, put forward someone from

Bank of America that is involved in producing loan files and tell us why they could not do it.

Give us an hour to take that person's deposition or ask them some questions and then we come to the Court and say we don't think it is physically possible.

We don't think that will happen. We think if the Court orders them to do it, they will figure out a way to do it.

One more thing. You will hear from Mr. Mirvis that our request for loan files includes multiple parts, some of which are readily produced, and others of which required them to go searching and spending a lot of time finding. That is a detail, your Honor, and it may be that is a detail this they are using in order to obfuscate the point, which is we have -- our understanding is that 90 percent of the loan files that we have asked for 90 percent of the information about each loan could be produced within 30 days, or at most 60 days of when they start looking for it.

There may be certain small elements that we have asked for about loans that are not part of the standard loan file or not in the same computer system that will take them more time and we are happy to meet with them and confer with them about reducing the burden by narrowing the universe of information that we are looking for. What we are looking

1 Proceedings
2 for is is essentially what they have stored is readily,
3 easily retrievable, asking for a very small sampling, 530
4 trusts, less than 20 loan files per trust and we are not
5 asking for 20, but less than 20 per trustee in the aggregate
6 and to give us an opportunity to allow our expert to test
7 the assumptions that BNY/Mellon made that we think are
8 indefensible.
9 THE COURT: What is the difference between loan
10 files in each of the trusts and why do you have to get a
11 certain number from 530? Is there really any difference?
12 Seems to me that if I were to decide we needed something,
13 that you could do that on a much lesser number and I don't
14 understand personally what the difference is between -- in
15 each trust, except how they get divided up and sort of
16 haphazardly when that was done and what is the difference.
17 MR. CYRULNIK: Judge, we are not going to be asking
18 for 20 loan files from each trust. We don't need loan files
19 from each of the trusts, but there are differences between
20 the trusts and you can group them into various categories
21 like, for example, there are big differences between trusts
22 that were issued in 2005 and trusts that were issued in
23 2008. There are different products of loans. There are
24 what we call all the A loans which had certain
25 characteristics of borrowers; Option Arm loans, which had a
26 totally different characteristic of the kinds of loans that

1 Proceedings

2 were being issued and the kind of representations that were
3 made and the kind of breaches that you find in different
4 characteristics of loans. There are activity loan types,
5 there are different vintages, and we are working with an
6 expert who is the same expert that testified before Justice
7 Bransten who is going to use these 7500 loan files to
8 construct a sample that will show the Court in a
9 statistically significant way, here is a representation of
10 all of the hundreds of thousands of loans in the 530 trusts
11 and we can do that with at most 7500 files, maybe with
12 something less than 7500, but we want to be able to give our
13 expert the room to make a sample that gives the Court some
14 confidence that it is useful.
15 THE COURT: Okay.
16 Mr. Mirvis.
17 MR. MIRVIS: Thank you, your Honor and I
18 appreciate the opportunity to be heard on this, but it is a
19 very significant issue to us and I think to the trustee and
20 the intervenors.
21 The proposal is to get a significant amount of loan
22 files so they can engage in an underwrite -- re
23 underwriting, which is in effect litigating the merits of
24 the repurchase claims. In all of the cases, and all of
25 arguments which submit there is one more star, one more
26 guiding principle that all courts have followed: Whenever

1 Proceedings

2 there is a proposed settlement before in /KPHES /-RG the
3 Court's discretion and yes, this is a discretionary decision
4 for the Court, regardless of context, whether it is standard
5 of review, whether it is a class action, derivative action,
6 specification committee, what have you, so even when the
7 fairness of the settlement terms are at issue, and we say
8 they are not, but they say it is, put that to one side. In
9 considering the proposed settlement, courts do not entertain
10 litigation of the merits of the settled claims. As your
11 Honor indicated, the parties on both sides of the caption
12 settle cases precisely not to litigate the merits. They
13 consider the merits, they think about the strengths and
14 weaknesses of the various sides, but they settle because
15 they don't want to litigate. They don't want to get to
16 some conclusion where one side might lose it all and one
17 side may win it all. They compromise.
18 There is nothing unusual about the fact that the
19 trustee, the institutional investors and yes, Bank of
20 America oppose producing loan files for this purpose. They
21 are asking the Court for the same kind of sampling and re
22 underwriting, which, by the way, is not a one way street, it
23 is not that they re underwriting the files, which takes at
24 least several months even after they are produced, which
25 takes many months --
26 THE COURT: What does it mean to re underwrite? I

2 thought you were just supposed to review loan files. I
3 don't expect them to -- I am not sure what re underwrite
4 means. So maybe I do expect them to --
5 MR. MIRVIS: I didn't know what it meant, and that
6 is why we submitted the short affidavit from Mr. Kempf to
7 explain it.
8 What re underwriting means is, you take the file,
9 which on average is between 200 and 600 papers per loan.
10 That is just the origination file, not the servicing file,
11 not the foreclosure file, not the loss mitigation file, just
12 the origination and you hire professionals -- he talked
13 about hiring 50 at a time, like you can get them up and
14 running like that, but let's say they could, they take the
15 files and apply the underwriting guidelines that were
16 applicable at the time the loans were originally made back
17 in 2004, 2005, 2006.
18 Now, what does that mean? It is inherently a
19 subjective process. People are going to disagree. We
20 know that. We are not guessing. Experts disagree. They
21 will have a plaintiffs' expert who probably concludes
22 something like it is a miracle Countrywide made a single
23 loan that complied. We will have an expert that will say
24 the opposite, because the standards are inherently
25 subjective. The standards are, was there a material breach?
26 We can disagree.

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2 The PSAs talk about customary underwriting
3 guidelines, all the room in the world for people to disagree
4 and on top of all that, the underwriting guidelines are
5 expressly subject to "exceptions and compensating factors".
6 Countrywide's own materials to the investors highlighted
7 this. When these loans were underwritten back in the day,
8 the Pro-Supp that went with them said on a case by case
9 basis, Countrywide may determine based upon compensating
10 factors which are not limited, that a borrower not strictly
11 qualifying and Countrywide may determine based on
12 compensating factors, a borrower not strictly qualifying
13 under its applicable risk category, guidelines, merits and
14 underwriting exception.
15 And by the way, this is not a rare occurrence, to
16 have a compensating factor on top of the subjective
17 guidelines. It is subjective on top of subjective, because
18 Countrywide said it is expected that a significant number of
19 the mortgage loans will have been originated based on
20 underwriting exceptions of this type.
21 And that is in the Kempf affidavit, Exhibit C
22 Page 820, so we don't have to guess.
23 And on top of all that, if you engage in this
24 litigation and it is a litigation, and the proof that it is
25 a litigation is in Mr. Cyrulnik's letter to the Court, what
26 is his argument?

2 On Page 2, it is well established that sampling
3 loan files for re underwriting -- and I am trying to explain
4 in part what it, is appropriate in litigation surrounding
5 mortgage backed securities. What does he cite? Judge
6 Bransten's opinion in MBIA and of course, as your Honor
7 knows, Judge Bransten hardly blessed sampling.
8 What Judge Bransten said was the Court makes no
9 finding that plaintiffs' proposed method is the only method
10 that plaintiffs may present or that plaintiffs' method was
11 not flawed or unsusceptible to challenge. Defendants
12 referring to Countrywide in that case have raised
13 significant valid challenges to plaintiffs' methodology.
14 Defendant cited issues that will be decided by the trier of
15 fact. That decision will be made at trial. She was
16 recognizing that she was deferring, yes, it will be a big
17 issue to be decided. He is trying to have those issues
18 decided in this case here, and that is just plain wrong.
19 It is wrong as a matter of principle, not just a burden.
20 The burden is considerable, and by the way, on top of all of
21 the -- then there will be interpretation issues; what the
22 underwriting guidelines mean, what do the representations
23 and warranties mean, and we point out examples in our papers
24 and what is the grand daddy, grandfather and I say that
25 because I became a grandfather two days ago, what is the
26 grandfather of the all of the reps and warranty disputes?

1 Proceedings
2 Causation. We know that.
3 The PSAs says even if there is a material breach,
4 even if the re underwriting shows that yes, this loan was
5 made in violation of a rep and warranty or underwriting
6 guideline, the PSAs say there is no re purchase obligation
7 unless the breach "materially and adversely affected" the
8 interests of certificate holders in the mortgage loan. I
9 think Countrywide has to pre purchase a loan if the breach,
10 the reason -- if the reason a borrower didn't pay had
11 nothing to do with the breach. Maybe the borrower lost his
12 or her job, maybe had unexpected medical bills. Maybe they
13 stopped paying because of property value going down.
14 That is a hotly disputed issue that is before the
15 First Department now, and if you bring that into this case,
16 and we go through months if not more than a year clearly
17 more than a year of underwriting, re underwriting by them,
18 re underwriting by us and re underwriting by the trustee.
19 We say what do you think the defect is? They have to tell
20 us.
21 Our expert looks at it and says wait a minute, that
22 is wrong.
23 They say the document is missing. Here is the
24 document.
25 They say this is material. Not material.
26 You are going to end up with thousands of disputes.

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2 It is avoidable. There is a way out of this and by the way
3 we do rely heavily on the case law cited in our brief, I
4 don't have to repeat it here that as I said before, the one
5 rule that courts have never strayed from in exercising the
6 discretion about objectors' discovery to settlement is you
7 don't get to litigate the merits of the claims. I
8 understand what they are saying in part. Part of what they
9 are saying is look, we want to be able to argue to the Court
10 relevance, and I have not said a word about relevance. We
11 want to be able to show the Court what a loan file looks
12 like so we can show the Court what the trustee didn't look
13 at. They want to flesh out their argument. They want to
14 bring it to life. And they are handicapped in doing that
15 if they don't have any loan files to display. I understand
16 that.
17 That doesn't have anything to do with the re
18 underwriting process, with a sampling that may or may not be
19 appropriate. Even if you litigate the claims and of course
20 it is not their claims, we are not here to litigate claims
21 and that is why we have proposed we will provide and they
22 can check the files, 10, 20, 40, 100 loan files for them to
23 look at. They can show them to their re underwriters if
24 they want and come back to the Court and say look, see how
25 significant this is?
26 And we can say wait a minute, we disagree and the

Court will say who is right. When I say that this is going down this road, this is just a road to a pile of disputes, a pile of collateral issues, because it is litigation and we are here to settle.

So why don't we do it that way? The game is not over. If they get their 40 loan files and they come back and persuade the Court that they want to see more, they can see more. That is a doable job. Origination files. Forget about -- whatever we can put together in a short period of time.

I don't want to get into details, but all of the other things Mr. Cyrulnik referred to as details, if they were details, they are not willing to give up on them. Their burden is huge. The origination files are one thing. It is not just a question of pressing a button. Mr. Cyrulnik say you produced a hundred thousand loan files in other cases. Are they the same loans? We have no idea, nor does he. We are now, I can't count, six months since we got the subpoena. They have never told us which loans they are talking about. All they did is numbers; 130,000, 10,000, 7500. Maybe if they come back next week, it will be down to zero.

THE COURT: Don't count on that.

MR. MIRVIS: But I think as a practical matter, the one thing that ought to be ruled out from the get go is

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2 litigating the merits and I would as a compromise, I think
3 it is very practical, we provide a subset of loan files,
4 they can pick them, we will sit down, come up with some that
5 we can get them as fast as we can. They can re underwrite
6 them. If they want, we can re underwrite them. The trustee
7 gets to do it. And if they really think this game is worth
8 a candle and can persuade your Honor that this is not just a
9 road to a dead end, we can come back and talk to you about
10 it.
11 Thank you.
12 THE COURT: Thank you.
13 MR. CYRULNIK: Mr. Ingber has a very persuasive
14 manner and I think what has happened in this case, and the
15 one fundamental problem we think exists in the case is that
16 he first persuaded Ms. Patrick that she could settle this
17 case without looking at any loan files and then she
18 persuaded Mr. Ingber that is okay to settle this case
19 without looking at a single loan file or take a significant
20 sample of them and now he is trying to persuade the Court
21 that we should not be able to look at loan files to figure
22 out whether that was right or wrong, and it would be
23 impossible to imagine the Court ordering the findings that
24 -- the 18 findings or how many findings he is asking
25 including approval of settlement a full and fair opportunity
26 to litigate about the settlement or to raise issues about

2 the settlement, the legal investigation, finding about the
3 settlement without allowing us the opportunity to say to the
4 Court for the Court's benefit here is what they would have
5 found if they had looked at the actual documents they should
6 have been litigating about.
7 THE COURT: Obviously, if we looked at all of
8 these loan files, it would take many, many years and that
9 would -- then the whole settlement would fall apart. So, to
10 the extent that you can walk out here today with more than
11 you came in, even if not the whole ball of wax, I would like
12 to get that going. Despite the fact you told me it is so
13 clear and everybody tells me they are absolutely right on
14 the law, sitting here, I don't necessarily see that. You're
15 all making persuasive arguments and there is something to be
16 said but I don't want this to go on forever, because I don't
17 think that is the point of it and I don't think that will do
18 good, so I want -- and I say that you did use Judge
19 Bransten's decision and I think you're involved in that
20 case.
21 MR. CYRULNIK: We are not.
22 THE COURT: The attorney behind you, Quinn Emanuel
23 is, and I think that -- I read that -- read the part that
24 Mr. Mirvis read. I read her decision earlier today, and I
25 know that she said that -- I guess she had gotten past the
26 Frye issue, but that didn't take away the defendants'

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2 opportunity to say later on that there were problems with
3 that, but that is a different case. That is a lawsuit.
4 This is an approval of a settlement where you're right, they
5 didn't look at loan files.
6 I think that although, you know, you come back with
7 different numbers, this is reasonable. They can do it in a
8 number of months. Why don't you start with a smaller number
9 with -- maybe you can give them an idea, like you said some
10 are 2004, some are 2005, some are 2006 and I am sure that
11 that makes a difference until they stopped in 2007 or 2008
12 or whenever, when everything fell apart and you say there
13 are different other kinds of things.
14 Why don't you take like, you know, maybe 150
15 samplings from there that they can do it a relatively easy
16 time frame, see what you can find in there and if you can
17 come back and say to me, Judge, I cannot believe that they
18 are -- Mr. Lin was their person, it is absurd, it is so
19 clear that we will be able to show that his expert's report
20 does not hold any water, then I think we have got to have a
21 larger sampling and then I will have them go back and do
22 that, and I think that it makes sense, at least to start
23 with a smaller number that you guys can work with because if
24 I give you two months to review it, you take two months and
25 then go back and forth that is six months before we know if
26 anything makes sense.

Get started with something smaller, a smaller number. Let's see what you can find out. You may be able to show me that this is like a disaster here or not.

MR. CYRULNIK: Your Honor, may I suggest this, because I take Mr. Mirvis point and the Court's point?

I think that everyone would agree that 100 loan files is a silly way to start because Mr. Mirvis in his own brief writes that nobody would ever argue that such a number was significant. We can start, we can absolutely start below 7,000 and make a showing to the Court that would allow to us get more if we need it, but may I suggest to the Court that we consult with our expert about how small we can go, but still have a plausible argument that we are presenting something that is meaningful and then try to meet and confer with Bank of America with the knowledge that some loan files should be produced and then see if we can reach an agreement on where to start, because essentially, without being able to consult with an expert and tell the Court that we will be able to present something meaningful, picking random loan files will not allow to us say anything to the Court other than these random anecdotal loan files say something. We would like to say something meaningful to the Court and make a showing if we need more.

So may I suggest that we start with a number that is meaningful, but while under 7,000, and if we need more,

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2 come back to the Court, but that is well over 100.

3 MS. PATRICK: Your Honor, Kathy Patrick for the

4 institutional investors.

5 THE COURT: I know who you are.

6 MR. PATRICK: You have taught me well and I am

7 obedient.

8 MS. PATRICK: Continuing, there is a backdrop

9 issue here that I want to be sure does not get lost in the

10 shuffle. Your suggestion of a hundred or 150 loan files,

11 we do not think any are necessary, but it allows them to

12 illustrate the problem, but here is the thing I am concerned

13 about. There are my clients, who have $40 billion at stake.

14 There are tens of thousands of other investors who are

15 looking at a million dollars a day in lost opportunity from

16 the value of this settlement and what they are talking about

17 doing is litigating in this case and that is what Mr.

18 Cyrulnik said, litigating, those loan file reviews in this

19 case when those claims have been settled. It is not a cost

20 free process. It should not be a statistical sample,

21 because a statistical sample becomes an argument about

22 litigating the underlying claims and we have settled and we

23 would like very much to have that settlement progress and

24 have that money distributed.

25 THE COURT: Mr. Mirvis.

26 MR. MIRVIS: Only to underscore the point. I am

2 not talking about agreeing to a statistical sampling that
3 would be used in litigation. I am talking about giving them
4 enough loan files so they can bring their argument to life
5 to the Court about what the trustee didn't look at. End of
6 story.
7 MR. CYRULNIK: At the very minimum, if we will
8 start this way we will start with 3500 loan files which is
9 an incredibly small number, so we can make some significant
10 showing to the Court even if it is not statistically
11 significant. That is far closer to Mr. Mirvis' number and
12 nowhere near the number we suggested.
13 MS. PATRICK: How do you need 500 to show an
14 example of the findings that the trustee might have found
15 had it looked at loan files?
16 What they are doing is creeping up on trying to
17 figure out the bare minimum, so that they could turn around
18 and argue to you is some kind ever statistical sample which
19 gets us into the litigation. This is an illustrative --
20 what I understood Mr. Mirvis to be offering was an
21 illustrative look at the loan files so you could see the
22 kind of defects and how difficult it is for people to agree
23 on what is a loan that is subject to re purchase. That is
24 one thing.
25 500 loan files. And then, the argument and
26 enabling them to litigate a statistical sample is something

2 entirely different. We are not litigating. We are
3 settling. We settled.
4 THE COURT: What about the files that have been
5 produced in other cases? Does that make a difference?
6 See, I don't know if those --
7 MR. CYRULNIK: Your Honor, we need some cross
8 section of the loans and 500, the difference for Mr. Mirvis
9 between producing 150 loan files and 500 loan files cannot
10 be material to Bank of America in terms of the cost or
11 burden of production. We could ask that we -- you see how
12 afraid everybody is of the loan files actually coming --
13 THE COURT: That is what you say. I don't think
14 they are afraid. I think they don't think they are relevant
15 and I think in Judge Bransten's case, that is what the case
16 is about, that is why MBIA is suing Countrywide in that
17 case, because of -- I mean, it is a different case, not this
18 case.
19 MR. CYRULNIK: But they are asking the Court to
20 sign off on what they settled without knowing what might
21 have been important to look at and all we want to do is have
22 an opportunity and we are trying to be incredibly reasonable
23 by saying we will adopt Mr. Mirvis' concept and the Court's
24 concept and say the minimum we can imagine making a showing
25 to the Court with is 500 files available to us to look at.
26 THE COURT: I will think about it. I was hoping to

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2 get things going here, but I don't even know how to divide
3 it up. I was hoping that you could maybe do that. I mean,
4 maybe you could try in the next day or two, you and Mr.
5 Mirvis to sit down and talk and -- in that small number, if
6 you could divide them up in some way and just agree on the
7 number that you could get going on that, and if you can't,
8 let me know what without waiving your rights to your other
9 arguments and I will just pick something. I would rather
10 make more sense than just pick numbers out of a hat, but
11 maybe there is a way to get from certain years and the other
12 differentiations that you mentioned, that is a very small
13 number but I don't call it -- I am not calling it a
14 statistical sampling. That is not what I am calling it.
15 I am just saying to see what, if anything, you
16 think these will show why, it is so important because if I
17 have to start reading all of those underlying files or
18 looking at them, or you will start reviewing them and -- I
19 think you will turn this into what this isn't and I don't --
20 maybe one day you will find out this was a good settlement
21 and it won't be available to your clients or anybody else
22 and that is, you know, I think about that in the back of my
23 mind like there is one person who said I am withdrawing from
24 this, that is okay with me. So I don't want to turn this
25 into what it isn't. So maybe now that you're in a much
26 smaller area, you and Mr. Mirvis could figure out a way, do

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2 a first quick evaluation on it and then we can move along.

3 I would like to give you a control date but my

4 proceeding, I don't know how long it will take since there

5 is nothing they can agree on. I am hoping it will be over

6 whatever it is by the very beginning of June with -- I don't

7 know if you think there will be anything to talk about that

8 early or if I should do it later. Like I can do something

9 on July 7th if I needed to, but if you think that is too

10 early, I can do it at the end of June. June, not July.

11 June 7th but if you think that might be -- might not be

12 anything to talk about them.

13 MR. REILLY: I think there will always be

14 something to talk about.

15 THE COURT: That is nice.

16 MR. REILLY: We move forward when we come here,

17 Judge. We do. This entire process, the most progress was

18 made in a conversation with Kathy Patrick and Matt Ingber

19 and Bank of America and Mr. Cyrulnik and I out in the

20 hallway as the pressure builds. Give us some pressure, keep

21 it honest, and make us move forward and we --

22 THE COURT: Can I put June 7th as the control date

23 and if there is nothing that -- if there is nothing to talk

24 about, I mean of substance or whatever, you can call me on a

25 conference call and we can put it over it a few weeks if I

26 am still on my proceeding. They told me how many times I

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2 said the word trial and I didn't mean it, so my proceeding,

3 then you know --

4 MR. INGBER: June 7th is perfect.

5 MS. PATRICK: June 7th is fine. I don't think I

6 will be here because I have trashed my Christmas and Spring

7 Breaks the last two years, so I am in Costa Rica, but Mr.

8 Madden will be here and he is fully up to speed. So I will

9 probably not be here, but Mr. Madden will be here and I

10 think we should keep the date.

11 THE COURT: Put it on for the 7th. Afternoon

12 seems to work.

13 MR. REILLY: Two o'clock?

14 THE COURT: And again, with all of the other

15 caveats and I am going to be looking forward to getting a

16 fax that deals with the first set of issues that we talked

17 about that we, I think we got to the point and maybe Mr.

18 Mirvis and Mr. Cyrulnik with the input of the other people

19 will figure out what. I sort of threw out 150. It is a

20 little bit more than he asked for. You threw out 500. So

21 maybe somewhere in that number you can get a small number so

22 just if you can get some and see -- make a stronger or less

23 strong point to the Court as the case may be.

24 So, thank you all very much.

25 (Continued on next page.)

26

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2 MS. PATRICK: Thank you, your Honor.

3 THE COURT: And we will see you on the 7th.

4 * * *

5 Certified that the foregoing is a true and accurate transcript of the original stenographic minutes of this case.

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Claudette Gumbs
Senior Court Reporter

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