

In Re:
RESIDENTIAL CAPITAL, LLC, et al.
Case No. 12-12020-mg

July 17, 2013

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

July 17, 2013
3:05 PM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

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2 On the record, status conference re: FGIC 9019 settlement

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. All right. We're here
3 in Residential Capital, number 12-12020. This is a hearing
4 with respect to the discovery dispute regarding the investors
5 represented by Willkie Farr, their motion to -- or application
6 to compel production of privileged information from the RMBS
7 trustees of the trusts that are wrapped with FGIC insurance.

8 Mr. Kerr?

9 MR. KERR: Your Honor, it's Charles Kerr of Morrison &
10 Foerster on behalf of the debtors.

11 I'm just here to say I'm here.

12 THE COURT: You're the master of ceremonies? Is
13 that --

14 MR. KERR: I'm the master of ceremonies. I'm going to
15 turn it over the parties of interest.

16 THE COURT: Okay.

17 MR. KERR: But so I know Ms. Eaton's here and Mr.
18 Weitnauer's here, so I don't know who you want to start with,
19 but I'll turn it over to you.

20 THE COURT: Well, I guess Ms. Eaton, because she's the
21 one who's trying to get this stuff.

22 MS. EATON: Good afternoon, Your Honor. Just to put
23 the dispute in context somewhat, the Court will remember,
24 perhaps, that the dispute really centers on the findings
25 contained in the proposed order submitted in connection with

1 the debtors' motion for approval of the FGIC settlement
2 agreement that our clients, my clients take issue with. And
3 those findings provide that the FGIC settlement agreement is in
4 the best interest of my clients, the investors and the FGIC
5 wrapped trusts, among other things, that the agreement is in
6 the best interest of the trusts, and moreover, that it's in the
7 best interest of the trustees, who are fiduciaries to those
8 trusts. The findings also provide that the trustees acted
9 reasonably and in good faith in agreeing to the FGIC settlement
10 agreement and binding the FGIC wrap trust investors to its
11 terms.

12 When this matter comes on for hearing, we intend to
13 try and prove that in fact the settlement agreement was not in
14 the best interests of the investors, from an economic point of
15 view, and that in fact, there was a pre-existing plan, to which
16 the trustees did not object, that was pending before the state
17 rehabilitation court, that provided for recoveries that were
18 economically superior --

19 THE COURT: Well, that's your position, that over,
20 what, the next fifty years, the present value of the
21 recoveries, you believe, would be superior to the lump sum
22 payment that will be paid pursuant to the settlement, if it's
23 approved. Is that a fair statement?

24 MS. EATON: I hate to argue with the Court, but
25 somewhat, not entirely, fair. The great -- the vast bulk of

1 the payments will be --

2 THE COURT: Oh, not fifty years?

3 MS. EATON: Not fifty years, and that's part of what's
4 in dispute here. So --

5 THE COURT: But --

6 MS. EATON: -- but yes and no, Your Honor.

7 THE COURT: Okay. The fundamental point that you're
8 challenging is the fairness of the settlement from an economic
9 point of view, based on your client's assessment that they
10 will do better under the FGIC rehabilitation plan, with
11 payments received over time, than they will by the trustees
12 settling for a lump sum payment. That's fundamentally what
13 you're disputing, isn't it?

14 MS. EATON: Fundamentally, there was a pre-existing
15 plan that provided for superior economic recovery.

16 THE COURT: Pre-existing or otherwise, I mean, you say
17 there's a plan which doesn't pay, today, what would be paid if
18 this settlement's approved; do you agree with that?

19 MS. EATON: We'd be paid on different terms.

20 THE COURT: Right. And so -- and of course, the
21 standard in this court -- I don't know about in the state
22 court, but the standard here for approval of a settlement is,
23 you know, is the settlement in the range of reasonableness,
24 have the trustees -- has the debtor and others established --
25 satisfied a best interest test that this settlement is fair and

1 reasonable. And you challenge that; I understand that. But
2 you're -- I guess the point is your point is really an economic
3 issue, that you think you do better under the previously
4 approved FGIC rehabilitation plan than you would here. That's
5 something of a bet, don't you agree with that?

6 MS. EATON: I would not agree with that, Your Honor.

7 THE COURT: You don't.

8 MS. EATON: That's what the expert testimony is --

9 THE COURT: All right. I guess we'll --

10 MS. EATON: -- hopefully going to show and convince
11 the Court.

12 THE COURT: Let me ask you a couple of questions. Are
13 there current defaults in the trust in which your client holds
14 certificate -- they're certificates; is that what they're
15 called?

16 MS. EATON: Yes, Your Honor.

17 THE COURT: Okay. Are there current defaults?

18 MS. EATON: Has there been an event of default?

19 THE COURT: Yes, has there been?

20 MS. EATON: According to the testimony of the Wells
21 Fargo trustee yesterday, the answer to that question is yes --

22 THE COURT: Okay.

23 MS. EATON: -- at least with respect to some of them.

24 THE COURT: So a different answer with respect to a
25 different trust?

1 MS. EATON: So it would appear, according to that.

2 THE COURT: How many trusts do you believe there's a
3 current event of default?

4 MS. EATON: I don't know the answer to that question,
5 Your Honor, but I could certainly find out.

6 THE COURT: The event of default which you say has
7 occurred, is it a payment default, or is it some other default?

8 MS. EATON: I believe it was a payment default, Your
9 Honor, yes.

10 THE COURT: And which of your -- which trusts and
11 which of your clients?

12 MS. EATON: I beg your pardon, Your Honor, I didn't
13 bring those details with me.

14 THE COURT: Okay.

15 MS. EATON: But I'm certain --

16 THE COURT: All right.

17 MS. EATON: I do have the details, not at my
18 fingertips --

19 THE COURT: All right.

20 MS. EATON: -- and I'd certainly be able to get --

21 THE COURT: I guess the reason I'm asking these
22 questions is, my reading of the case law is that an indenture
23 trustee's obligations are different pre-default and after a
24 default. You agree with that? I think so.

25 MS. EATON: I agree that that is one reading of the

1 cases, Your Honor. But I don't think --

2 THE COURT: Is there a different reading of the cases?

3 MS. EATON: Well, in --

4 THE COURT: I mean, I haven't found a case that said
5 anything other than that.

6 MS. EATON: I --

7 THE COURT: I most heavily -- I can't say I've done
8 the most exhaustive research around, but Judge Mukasey's
9 decision in LNC Investments -- and he relies on the Beck case
10 from the First Department -- I mean, he clearly draws a
11 distinction and says cases do -- he goes back to Learned Hand's
12 decision and basically the cases draw a distinction between
13 what the pre and post-default obligation are of the trustee.
14 The cases seem to say after a default, to some extent, unclear
15 to what extent, the common law, New York common law fiduciary
16 duties apply to an indenture trustee.

17 MS. EATON: Right, and it is quite correct that the
18 cases that are out there say that. The only reason I qualified
19 my answer is that there are a number of different deal
20 structures at issue here. And there is certainly an argument
21 to be made that the distinction drawn in the existing case law
22 about the duties of an indenture trustee, pre and post default,
23 really, or arguably, don't apply when the deal documentation --
24 depending on the deal documentation --

25 THE COURT: Yeah.

1 MS. EATON: -- is the answer. And I hate to try and
2 drag you through it right now, but there's a very complicated
3 analysis that would lead one to the conclusion that that
4 distinction does not necessarily apply to all of the trust at
5 issue. But I think the larger --

6 THE COURT: Okay.

7 MS. EATON: -- point, Your Honor --

8 THE COURT: So let me -- well, let me follow up my
9 questions and let me see whether -- I'm trying to see if I can
10 narrow some of the difference.

11 Mr. Weitnauer's letter -- I don't know whether you
12 signed it or Mr. Johnson signed it.

13 MR. WEITNAUER: I was away, so I had one of my
14 colleagues sign it for me.

15 THE COURT: Oh, I see --

16 MR. WEITNAUER: But I am --

17 THE COURT: -- your initials next to your name.

18 MR. WEITNAUER: -- the person responsible for the
19 words in it.

20 THE COURT: Okay. So in footnote 5, on page 2 -- I
21 won't read it all, but it says, "solely for the purposes of
22 resolving this dispute, the FGIC trustees stipulate that (i)
23 they are obligated to act in the best interests of the
24 investors with respect to the settlement agreement and (ii)
25 that stipulated level of obligation is sufficient to invoke the

1 fiduciary exception in this context - but only when good cause
2 in the other elements of the fiduciary exception can be shown."

3 Do you agree with that statement? Well, it's their
4 stipulation, but do you -- let me ask you this, do you agree --
5 they're willing to stipulate, for purposes of this dispute,
6 that the fiduciary exception applies. They add the proviso
7 "but only when good cause" and other requirements are shown.
8 Do you agree that good cause is an element of the showing that
9 you're required to make to invoke the fiduciary exception?

10 MS. EATON: No, I don't agree, but I think that
11 it's --

12 THE COURT: Well, I want you to tell me why you don't
13 agree.

14 MS. EATON: Because I don't think that it's required
15 as a matter of federal --

16 THE COURT: Okay. Show me --

17 MS. EATON: -- common law.

18 THE COURT: Show me what cases say that, because I
19 think this is a very fundamental point in the decision.

20 MS. EATON: I'm going to get that decision for you --

21 THE COURT: Yeah, I want you to get it now because I
22 want to address this issue right now, because I think it sets
23 the framework for our discussion. Okay. Alston & Bird's
24 position is -- and they stipulate, so they don't get into a
25 lengthy discussion of it, but you know, this is a fundamental

1 point: do you have to show good cause, and if so, have you done
2 so? And if you've done so, with respect to what issues?

3 I will -- so I make no mystery about it, I mean, I
4 think that Justice Kapnick's decision in Bank of New York
5 Mellon is -- you know, it's the most closely analogous case
6 that I have found, called to my attention by Alston & Bird.
7 And I think it's a very thoughtful opinion that she wrote. And
8 she obviously believed that good cause was a requirement, and
9 she found it as to some issues and not as to others.

10 And so I want to get through -- if you don't believe
11 good cause is a requirement, you show me the authority that
12 supports your conclusion.

13 MS. EATON: I'm digging up the cases now, but the two
14 cases we cited in our letter, Your Honor, are the Martin case
15 and Lawrence v. Cohn at page --

16 THE COURT: What's the second one?

17 MS. EATON: Lawrence v. Cohn.

18 THE COURT: Yeah, so both of those cases are by
19 Magistrate Judge Dolinger. And Martin involves an ERISA
20 fiduciary, and Lawrence, I believe, involved an executor of an
21 estate; neither involves an indenture trustee. And so why are
22 those -- why do you think those are the guiding principles?
23 Magistrate Judge Dolinger is about the only one I've seen who
24 said I don't think the good cause requirement applies outside
25 of shareholder suits. And I don't think that's right. I mean,

1 Judge Sweet, in the Quintel opinion in the Southern District,
2 which certainly comes later than Magistrate Judge Dolinger's
3 decisions -- Judge Sweet specifically applied the good cause
4 requirement.

5 So what -- do you have any authority, other than
6 Magistrate -- and I respect Magistrate Judge Dolinger; that's
7 not the issue. But the context in which his two decisions
8 arise are not this context.

9 MS. EATON: Indeed --

10 THE COURT: And they are -- I mean, at most, it's
11 dicta, because he dealt with -- and there are other cases that
12 would, arguably -- say, in the fiduciary context, there's
13 another ERISA case I read, and in the estate context, although
14 I have to say that there are other even estate context, which
15 seemed to impose good faith (sic). But Judge Sweet, in -- let
16 me find his case. Yeah, in G-I Holdings v. Heyman, Judge Sweet
17 says there's no difference between New York law and federal law
18 with respect to the fiduciary exception, so he doesn't have to
19 resolve the conflict issue. I think it's not a clear question
20 whether New York law would govern here or whether federal law
21 would govern here. Judge Sweet, in Heyman, concludes it
22 doesn't make any difference; there's no difference. And I've
23 read all -- I've read both of Magistrate Judge Dolinger's
24 opinion, I just don't see why they would apply in this
25 circumstance.

1 MS. EATON: Well, and I -- well, I agree, Your Honor,
2 in different circumstances, the courts seem to be applying --

3 THE COURT: Do you have any authority, in the context
4 of a an indenture trustee, that says the good faith --
5 excuse -- the good cause requirement for invoking the fiduciary
6 exception, that that requirement doesn't apply?

7 MS. EATON: The short answer to that question is no,
8 Your Honor.

9 THE COURT: Okay.

10 MS. EATON: I would like to point out one thing that
11 goes back to an issue that the Court raised a couple of minutes
12 ago, and that was with respect to whether there was an event of
13 default. Yesterday we took the deposition of the
14 representative of Wells Fargo, who is one of the RMBS trustees
15 for the trust in question. And that representative testified
16 to two things, one of which I've already mentioned, i.e., that
17 Wells Fargo did determine that there had been an event of
18 default with respect to one trust. With respect to the
19 remaining trusts, they were unable to ascertain, according to
20 the testimony, whether an event of default had occurred or had
21 not occurred, and elected, on that basis, to treat all of the
22 trusts in the same fashion and conceded, during deposition,
23 that Wells Fargo did indeed owe a fiduciary duty to the
24 investors --

25 THE COURT: Well, that's one of the trustees.

1 MS. EATON: -- in the FGIC-repped trust, so --

2 THE COURT: That's one of the trustees. It's not --
3 that's -- I mean, that's a position that I guess would be
4 consistent with the footnote from the Alston & Bird letter that
5 I just read; they're saying they're stipulating. But that's
6 why I want to focus in, what does that mean, okay?

7 I will, for purposes of this hearing, without going
8 further, since the trustees are not disputing it -- they say
9 that the fiduciary exception -- that the facts are sufficient
10 to invoke the fiduciary exception in this context. They, of
11 course, argue that the good faith -- the good cause; I keep
12 saying good faith -- the good cause requirement must be
13 satisfied, and they say you haven't done that. And that's why
14 I'm trying to -- so I think I got an answer now; you have no
15 authority, other than Magistrate Judge Dolin's (sic) two
16 decisions, one involving an ERISA fiduciary, and one involving
17 an estate matter.

18 MS. EATON: And the United States Supreme Court in
19 what we would say is an analogous circumstance. You're quite
20 right, Your Honor. Nothing --

21 THE COURT: Okay.

22 MS. EATON: -- on all fours in the context of --

23 THE COURT: So you think that Justice Kapnick got it
24 wrong in Bank of New York Mellon?

25 MS. EATON: Well, she was applying New York law.

1 THE COURT: Well, but you know, and Judge Sweet has
2 said he doesn't see any difference between the two. There's no
3 definitive -- Second Circuit hasn't ruled on it.

4 MS. EATON: Correct.

5 THE COURT: There is no binding authority on this
6 court that I found.

7 MS. EATON: Correct.

8 THE COURT: And so what do I find persuasive? Because
9 Judge Mukasey, in LNC Investments, doesn't say post-default the
10 indenture trustee has exactly the same obligations that might
11 be the obligations of an express trustee of an express trust.
12 This does seem different.

13 How many investors are there in the trusts wrapped by
14 FGIC?

15 MS. EATON: The total number of investors?

16 THE COURT: Yes.

17 MS. EATON: That information is not available to us,
18 Your Honor, I don't believe.

19 THE COURT: Mr. Weitnauer, can you provide me with
20 that information, an estimate on the number?

21 MR. WEITNAUER: Your Honor, Kit Weitnauer on behalf of
22 Wells Fargo, and speaking on --

23 THE COURT: I'm mispronouncing your name, and I
24 apologize.

25 MR. WEITNAUER: Oh, that's all right.

1 THE COURT: Okay.

2 MR. WEITNAUER: Everybody does. And speaking also on
3 behalf of the FGIC trustees --

4 THE COURT: Okay.

5 MR. WEITNAUER: -- as enumerated in my letter.

6 We do not know the number of the investors. It may be
7 we could get that for you if it's important.

8 I think all we need to point out at this point is that
9 Ms. Eaton represents a group of investors who have holdings in
10 some of the FGIC-repped trusts. There are others, of course,
11 that support the deal, and then some we've not heard from.

12 THE COURT: All right. Okay. Go ahead, Ms. Eaton.

13 MS. EATON: So focusing on the good cause requirement,
14 Your Honor, I think that we have established that good cause
15 exists for the application of the fiduciary exception.

16 THE COURT: May I ask you this question? In what, if
17 any, way do you contend the trustees engaged in self-dealing or
18 that they have a conflict of interest.

19 MS. EATON: Well, one of the ways is, Your Honor,
20 they've sought a ruling from this Court that the settlement
21 agreement was in their best interest. Now, that's not --

22 THE COURT: And you think that establishes a conflict?

23 MS. EATON: No, and that -- I was going to say, that
24 is not a direct -- that is not a direct conflict --

25 THE COURT: So let me ask --

1 MS. EATON: -- although --

2 THE COURT: -- my question again, and I want a direct
3 answer to my direct question. In what, if any, way do you
4 contend that the trustees engaged in self-dealing? Let me
5 break it down into two parts.

6 MS. EATON: We don't have any basis to believe that
7 the trustees engaged in self-dealing, Your Honor.

8 THE COURT: And in what, if any, way do you contend
9 that the trustees have a conflict of interest?

10 MS. EATON: If You look at page 6 of our letter to the
11 Court, and in particular, footnote 15, we drew the Court's
12 attention there to some filings that the -- certain trustees,
13 at least, had made in the FGIC rehabilitation action where they
14 objected to the rehabilitation plan on the basis that it would,
15 essentially, require them to continue shouldering the burdens
16 of being trustees for these particular trusts for longer --

17 THE COURT: Okay. And that --

18 MS. EATON: -- than they wanted --

19 THE COURT: -- that objection was overruled, and the
20 rehabilitation plan was approved, correct?

21 MS. EATON: Well, I believe that they withdrew their
22 objections --

23 THE COURT: Okay --

24 MS. EATON: -- ultimately --

25 THE COURT: -- they withdrew their objections.

1 MS. EATON: -- Your Honor, after certain other details
2 were --

3 THE COURT: The fact that they objected, that they
4 could thereby be signed on as trustees for a very, very long
5 time, fifty years, or long -- or shorter, you think that
6 establishes a conflict of interest?

7 MS. EATON: I don't think that it establishes a
8 conflict of interest; I think that the --

9 THE COURT: What are your facts that support a
10 colorable claim that the trustees have a conflict of interest?
11 Specifically, what are the facts that establish a colorable
12 claim that the trustees have a conflict of interest in seeking
13 approval of this settlement?

14 MS. EATON: We don't have those facts, Your Honor,
15 because we have been denied --

16 THE COURT: Well, you don't --

17 MS. EATON: -- discovery in its --

18 THE COURT: -- privileged information. If the good
19 cause requirement applies, and the cases, such as Bank of New
20 York Mellon and the Hoops (ph.) case from the Third Department,
21 written by Judge Levine -- who went on to serve with
22 distinction on the New York Court of Appeals for many years;
23 this is when he was on the Third Department -- self-dealing and
24 conflict were central to the application to triggering the
25 fiduciary exception there. And that's why -- if I were --

1 that's why I wanted to know. If I conclude -- and you can
2 disagree with this, but if I conclude that to trigger the good
3 cause -- in order to trigger the fiduciary exception, you have
4 to have a colorable -- articulated colorable claim of self-
5 interest, self-dealing -- self-dealing or conflict of interest,
6 and what you're telling me is you don't have any specific
7 facts. You don't get discovery to find out whether you have
8 a -- can do it. Otherwise -- the privilege would be
9 meaningless if all you had to do is come in and say, I think
10 we -- if we get this discovery, we think we'll be able to show
11 self-dealing or conflict of interest. Okay. That can't be the
12 law, it just can't be.

13 MS. EATON: I thought that the question Your Honor had
14 posed to me is whether we had facts that established self-
15 dealing --

16 THE COURT: Support.

17 MS. EATON: -- or a conflict of --

18 THE COURT: Do you have any evidence that supports a
19 contention that the trustees engaged in self-dealing? Break
20 that down.

21 MS. EATON: Not in self-dealing, Your Honor, no.

22 THE COURT: Okay. Do you have any evidence to support
23 a contention that the trustees have a conflict of interest in
24 seeking approval of the FGIC settlement?

25 MS. EATON: Yes.

1 THE COURT: What is that? Tell me specifically.

2 MS. EATON: The evidence is that there was the
3 pre-existing arrangement to which the trustees agreed that
4 provided a economically superior recovery to the effect --

5 THE COURT: Well, we don't know whether it provides an
6 economically su -- you say it provides an economically superior
7 result. That, I suppose, will be one of the issues that I'll
8 hear. So you say a -- I cut you off, but I think you said it
9 before, a pre-existing arrangement for what you believe is an
10 economically superior result for the investors?

11 MS. EATON: I think in order to meet the test
12 articulated by Justice Kapnick in the Bank of New York case,
13 I'm trying to lay out all of the factors that we believe, in
14 combination, meet the standard for establishing that we have a
15 colorable claim of a conflict of interest. One of them is, why
16 is it that the trustees engaged in a long, drawn out process to
17 negotiate the terms of the FGIC rehabilitation plan, and once
18 that process had concluded, for reasons that they have never
19 disclosed to us, decided to engage in a different settlement
20 agreement that we contend -- yes, it's subject to proof at
21 trial -- was economically far inferior to the deal that had
22 already been hammered out. That's --

23 THE COURT: Well, FGIC didn't --

24 MS. EATON: -- point number one.

25 THE COURT: -- wrap only ResCap trusts, correct?

1 MS. EATON: I beg your pardon?

2 THE COURT: FGIC did not wrap only ResCap trusts.

3 MS. EATON: That is correct, Your Honor.

4 THE COURT: So the fact that they have a
5 rehabilitation plan that provides a result, not all of the
6 sponsors of the trusts that they wrap are in a bankruptcy
7 proceeding, agreed?

8 MS. EATON: Yes.

9 THE COURT: Okay. And you don't think those
10 circumstances could lead trustees to conclude that we think the
11 trusts, for which we act as trustees, would be better off if we
12 negotiate a settlement that results in a lump-sum payment
13 today, versus the uncertainty of collecting over a long period
14 of time? You don't think they can do that?

15 MS. EATON: I think it would depend on the facts, Your
16 Honor.

17 THE COURT: All right.

18 MS. EATON: What other evidence do you have to support
19 a contention that the trustees have a conflict of interest in
20 seeking approval of the FGIC settlement?

21 MS. EATON: That against that background, on the same
22 day that the PSA was signed, the FGIC settlement agreement was
23 signed. A motion was made for approval of the PSA, for reas --

24 THE COURT: It's included in the term sheet of the
25 PSA. I mean, it's embodied -- it's a requirement --

1 MS. EATON: It --

2 THE COURT: -- of the PSA.

3 MS. EATON: Right, and it was a final executed
4 settlement agreement, and for reasons unknown, it was not
5 disclosed to any of the investors. In fact, it took --

6 THE COURT: But how does that show a conflict of
7 interest on the part of the trustees?

8 MS. EATON: Because at the same time that the trustees
9 were doing these things, cutting a deal on -- let's say on the
10 side, not disclosing to investors that they were embarking on
11 settlement discussions for a different deal, whereas everybody
12 thought they were negotiating over the terms of the
13 rehabilitation agreement, they provided no notice to any
14 investors. They failed to disclose the fact that they had
15 already reached an agreement and signed an agreement, and it
16 was not publicly disclosed, for no reason that we can think of,
17 for a great many days after that, and in the meantime, joined
18 in a motion that sought findings that they had acted in good
19 faith, in the best interests of my clients, and in the best
20 interests --

21 THE COURT: They filed --

22 MS. EATON: -- of themselves.

23 THE COURT: You think it shows a conflict of interest
24 because they filed a motion in court asking two courts to
25 approve the settlement? I mean, it's another major distinction

1 between Magistrate Judge Dolinger's two decisions. Here the
2 settlement will require approval of two courts, at which you
3 can air your arguments as to why the settlement should not be
4 approved. This is not unilateral or secret action by the
5 trustees; it requires two courts to approve it.

6 MS. EATON: And I certainly wasn't suggesting that --

7 THE COURT: May I ask this? This is for tomorrow, I
8 think -- I think I set it for tomorrow, but did Mr. Abrams sign
9 a confidentiality agreement and participate in the mediation?

10 MS. EATON: Mr. Abrams signed an NDA that I negotiated
11 with the lawyers -- myself and my partner, Mr. Abrams,
12 negotiated with the lawyers at Morrison & Foerster over a
13 period of many, many months. That is an undisputed fact.

14 THE COURT: Okay. So your clients were not -- did not
15 sign on, were not restricted. So Mr. Abrams was not free to
16 disclose to your clients information that he gained in the
17 mediation; is that correct?

18 MS. EATON: He was -- right. Under the terms --

19 THE COURT: And did Mr. Abrams learn, during the
20 course of the mediation, that there was a settlement being
21 negotiated with FGIC that was going to be part and parcel of
22 the PSA?

23 MS. EATON: Not to my knowledge, Your Honor. And to
24 be clear, over the course of those negotiations, we were
25 seeking an included term in a confidentiality agreement, or an

1 NDA, that would have permitted us to put up a screening wall so
2 that we could share information --

3 THE COURT: I'm not --

4 MS. EATON: -- with our clients.

5 THE COURT: I'm not focusing on whether -- the reality
6 is there was no provision that permitted him to disclose -- as
7 I understand it, that would have permitted him to disclose
8 information he learned in the mediation. I'm not faulting that
9 at all. There's somebody else sitting in the courtroom whose
10 clients had that same issue where he participated in mediation
11 sessions but could not disclose to his clients because there
12 was no such provision. Okay? But the point is -- and that's
13 why -- and I'll ask this; maybe one of the other lawyers can
14 tell me this, as to whether -- and I understand he wouldn't be
15 able to disclose the information to your client, but did he
16 know that the FGIC settlement was an issue that was being
17 considered as part of the PSA and the two term sheets?

18 MS. EATON: I don't believe so, Your Honor.

19 THE COURT: Okay. All right.

20 MS. EATON: I don't have --

21 THE COURT: Do you have any -- you've given me two
22 things that -- you say the pre-existing arrangement for
23 superior economic result, signing the settlement agreement
24 without disclosing it to your -- to --

25 MS. EATON: To any investor, inexplicably for --

1 THE COURT: Anything else?

2 MS. EATON: -- about a week?

3 THE COURT: Well, okay, without disclosing for a week.
4 Go head. Anything else?

5 MS. EATON: No notice. And that no real mechanism has
6 been put in place to allow investors a full and fair
7 opportunity to object to the agreement.

8 THE COURT: What are you doing here?

9 MS. EATON: This is the only mechanism there is, Your
10 Honor, and --

11 THE COURT: What's wrong with this mechanism?

12 MS. EATON: Well, that's the -- the basis for the
13 motion is that, yes, we've been allowed to participate, yes,
14 we've been allowed to seek the production of documents. I
15 think if you look at the schedule that is attached to our
16 letter, we've essentially been given publicly filed documents
17 and a bunch of confidentiality agreements, with very few
18 exceptions. In terms of the depositions that we've been
19 permitted to take, the witnesses have answered virtually every
20 question of substance with either an instruction not to answer
21 from counsel, on the basis of the mediation privilege, an
22 instruction not to answer from counsel, on the basis that the
23 information is subject to the attorney-client privilege, or an
24 I don't know, including --

25 THE COURT: Did you inquire of the trustees'

1 representatives about their consideration of the Duff & Phelps
2 report?

3 MS. EATON: Yes.

4 THE COURT: And were you restricted from doing that?

5 MS. EATON: We were not restricted from asking them
6 what they considered about the Duff & Phelps report; at the
7 same time, we have not been provided with the underlying
8 assumptions and data that -- well, assumptions and data that
9 underlie the Duff & Phelps report, so it's very difficult to
10 sort of get behind it and ask --

11 THE COURT: Have you asked for that?

12 MS. EATON: Yes, indeed.

13 THE COURT: That's not the privilege log. You know, I
14 should tell you, when I directed the letter briefs, I directed
15 the trustees to provide the Court, for in camera review, with
16 the documents that they withheld on the basis of privilege.
17 And sitting in front of me here are three binders that were
18 delivered to chambers yesterday at noon, and I reviewed every
19 page of every one of them. Okay. I didn't see any underlying
20 information from Duff & Phelps. What is the status of -- are
21 there outstanding requests for the data that Duff & Phelps
22 considered in preparing its report?

23 MS. EATON: Yes. We have a dispute about that, if the
24 Court will give me a moment. We took the position, and have
25 had several discussions about this, that in serving the

1 trustees with a document request, that they were required to
2 produce documents within their possession, custody, and
3 control, and that would include, obviously, the law firms
4 representing them and their agents, which is what we did and
5 what I understand --

6 THE COURT: Just tell me --

7 MS. EATON: -- the debtors did.

8 THE COURT: -- what the status --

9 MS. EATON: They took the --

10 THE COURT: Mr. Johnson, what's the status of the Duff
11 & Phelps underlying --

12 MR. JOHNSON: Yeah, I have no idea what -- anyway, we,
13 Your Honor, did produce underlying information that Duff relied
14 on in preparing their report. Your Honor, there have been at
15 least four or five meet and confer phone calls, and this has
16 never been raised --

17 THE COURT: I just want --

18 MR. JOHNSON: -- by Ms. Eaton's client as a
19 shortcoming --

20 THE COURT: I'm going to have --

21 MR. JOHNSON: -- in our production.

22 THE COURT: I want to make it clear, I'm going to have
23 no patience if anything that was provided to Duff & Phelps that
24 they considered in preparing their report is not provided. I
25 mean, it's just -- that should have been done already.

1 MR. JOHNSON: Your Honor, that is my understanding.

2 If Ms. Eaton has a particular issue with --

3 THE COURT: No privilege has been asserted, has there?

4 MR. JOHNSON: No, Your Honor, that is correct. With
5 respect to what they relied on and their analysis, we have
6 turned that over; that is my understanding. I can confirm that
7 with my colleagues. But if Ms. Eaton has a particular gap or
8 deficiency that has been identified, I would request that she
9 raise it with us --

10 THE COURT: Okay.

11 MR. JOHNSON: -- rather than spring it on us in open
12 court.

13 THE COURT: I'm not making any decision about it.
14 It's just that it strikes me that something that has to be
15 produced. I mean --

16 MS. EATON: And on the issue --

17 THE COURT: Tell me, I've got three things listed now,
18 are there any other -- is there any other evidence that you
19 believe supports your contention that the trustees have a
20 conflict of interest in seeking approval -- in entering into
21 and seeking approval of the settlement?

22 MS. EATON: Not that we're aware of at --

23 THE COURT: Okay.

24 MS. EATON: -- this point.

25 THE COURT: All right. So three things. All right,

1 go ahead with your argument.

2 MS. EATON: With respect to the question of need,
3 which is something we've addressed, in part, already, and one
4 of the primary considerations that the courts apply and the
5 good cause requirement turn to, the trustees have argued that
6 we can make a determination as to whether the agreement was in
7 our best interest on the basis of the contract alone. We don't
8 think that is a fair or reasonable assertion. Indeed, if that
9 were the case, one questions why the trustees felt the need to
10 put in declarations attesting to their --

11 THE COURT: Look --

12 MS. EATON: -- the reasonableness --

13 THE COURT: -- you're getting --

14 MS. EATON: -- in the first place.

15 THE COURT: You either have taken or you're taking the
16 depositions of the trustees about their decision to enter into
17 the settlement, correct?

18 MS. EATON: Yes, Your Honor.

19 THE COURT: Okay. And have you taken the Duff &
20 Phelps deposition yet?

21 MS. EATON: Not yet, Your Honor.

22 THE COURT: Okay. I'm assuming that the trustees are
23 not using a reliance on advice-of-counsel defense. Justice
24 Kapnick, in the first part of her opinion, addresses the
25 at-issue doctrine. That's not before me today; nobody's raised

1 that. The two things that were raised in the correspondence
2 are the fiduciary exception and, to some extent, the mediation
3 privilege, although not quite as clearly, but -- and that's
4 what I've prepared for and considered.

5 Tell me -- lay out for me why you believe -- assuming
6 that I conclude that you have to establish good cause in order
7 to invoke the fiduciary exception, tell me specifically why you
8 believe you have established good cause. And as Justice
9 Kapnick did, she didn't look at just either there is -- the
10 fiduciary exception applies or it doesn't; she looked question
11 by question. And so it's a little unclear to me, with respect
12 to those things as to self-dealing or conflict, where she did
13 invoke the exception, she found that there were colorable
14 claims that were asserted. That's why I've asked you the
15 questions I've asked. And as to others, she concluded they
16 hadn't. So the others were -- I think she talked about the
17 reasonableness of the amount of the settlement. That sounds
18 very much like your argument that the amount of this settlement
19 is unreasonable because you would have done better under the
20 FGIC rehabilitation plan.

21 MS. EATON: Well, the difference -- the factual
22 difference between the two cases is there was a pre-existing
23 arrangement in place that the trustees decided to jettison in
24 favor of an inferior proposal.

25 THE COURT: That's your position that it's inferior.

1 The trustees' position is it's not inferior, and that's what, I
2 guess, I'm going -- part of what I'm going to hear. I mean,
3 you think any time you just say you think there was a better
4 deal, and if they do anything else, that triggers the fiduciary
5 exception to attorney-client privilege and you're entitled to
6 everything they've --

7 MS. EATON: That's --

8 THE COURT: -- whatever communications there were with
9 counsel?

10 MS. EATON: I certainly didn't make that contention,
11 Your Honor. As I said --

12 THE COURT: I thought you did.

13 MS. EATON: -- at the beginning, what I'm trying to
14 focus on here is the findings that the trustees have sought.
15 That is our only -- that's the only reason that we're here, and
16 that is what we dispute: why do we think the good cause
17 exception applies. When you address the first element under
18 Justice Kapnick's decision, with respect to need, the fact of
19 the matter is we are not -- although we've been permitted an
20 opportunity to participate in discovery, we're not getting any
21 information, even though the witnesses -- at least one witness,
22 I should say, has testified that the basis for their conclusion
23 that the FGIC settlement agreement was in our client's best
24 interest was on the advice that they got from their legal
25 advisors. So --

1 THE COURT: Somebody said that?

2 MS. EATON: And yet -- and yet, we're not permitted to
3 inquire into what that advice was. That's an obvious --

4 THE COURT: Which --

5 MS. EATON: -- problem.

6 THE COURT: Which trustee was that?

7 MS. EATON: That was this morning at Mr. Major's
8 deposition on behalf of the Bank of New York, 30(b)(6) witness
9 on behalf of the Bank of New York. I only have the citations
10 from the rough transcript, which I'd be happy to give to Your
11 Honor, if you'd find that useful.

12 THE COURT: Do you have -- was there a transcript
13 being -- you know, a rough transcript being prepared
14 immediately or --

15 MS. EATON: Yes.

16 THE COURT: Can I see it?

17 MS. EATON: It has my handwriting on it, Your Honor.

18 THE COURT: Oh.

19 MS. EATON: Is that --

20 THE COURT: Well, you don't have to give it to me
21 then.

22 MS. EATON: I could read the question --

23 THE COURT: Go ahead, read --

24 MS. EATON: -- and answer for you.

25 THE COURT: Go ahead.

1 MS. EATON: The question was -- one of the findings
2 was read out to the witness, and the question was:

3 "Q. Do you believe that the settlement agreement and the
4 transactions contemplated thereby, including the releases
5 therein, are in the best interests of the investors in each
6 trust?

7 "A. Yes.

8 "Q. And what do you base that conclusion on?

9 "A. I base that conclusion on the recommendation of our
10 financial advisor, the recommendation of our legal advisor, and
11 the analysis of our financial advisor."

12 So clearly, the financial advisor -- the advice of the
13 financial advisor was one of the reasons why the trustees
14 concluded that the FGIC settlement agreement was in my client's
15 best interest, but that was not the only reason. And we have
16 been, as I say, precluded from getting discovery into the --
17 that part of the foundation for their decision. It can -- in
18 terms of the need test, it can only come from the, allegedly,
19 privileged information. I can't think of another place where
20 it would come from.

21 The other part --

22 THE COURT: Well, if Bank of New York is going to have
23 a reliance on advice-of-counsel defense, they're going to have
24 to produce the advice they gave. I mean, it's as simple as
25 that.

1 Do we have Bank of New York's lawyer here? Mr.
2 Siegel?

3 MR. SIEGEL: Your Honor, I was actually at the
4 deposition this morning. It's been a full day. It's one thing
5 for him to say that he actually consulted with his lawyers in
6 this process, which I don't think --

7 THE COURT: That's not what Ms. Eaton just read to me.

8 MR. SIEGEL: I understand what you're saying, but he
9 had an obligation to do a whole bunch of things and check
10 boxes. That doesn't mean that this is a matter of reliance on
11 the attorney advice here.

12 THE COURT: You're saying that, but Ms. Eaton just
13 read me from a transcript; I assume it's accurate.

14 MR. SIEGEL: Your Honor, if you want to read the
15 entire section of the transcript, I think you should do that.

16 THE COURT: I'm not particularly interested in doing
17 that unless I have to.

18 MR. SIEGEL: No, I know, but I'm just saying to you
19 that that is one line in a four-plus hour deposition that was
20 taken this morning. And it says what it says --

21 THE COURT: Okay.

22 MR. SIEGEL: -- but we -- we don't really think that's
23 the basis, the gravamen of this thing.

24 THE COURT: I don't know what -- was he the decision
25 maker for Bank of New York?

1 MR. SIEGEL: By himself? No. He was the line
2 officer, he consulted with his superiors. But you know, he's
3 not the only person.

4 THE COURT: Okay. Whatever I rule today may change.

5 MR. SIEGEL: I understand.

6 THE COURT: Go ahead, Ms. Eaton.

7 MS. EATON: In terms of the last element, I suppose,
8 Your Honor, it's the sufficiency of my client's interest here.

9 THE COURT: See, that element -- and I do want to hear
10 you on this, because I'm -- you know, the Alston & Bird letter
11 makes a lot of the fact that you're a subset of some tranches
12 of some trust, and that's of concern to me. Look, in some of
13 these fiduciary cases where this is -- the ERISA cases where
14 it's come up, it's been dealing with a specific person or
15 institution's account or in the executor cases. So to me, this
16 seems to me more analogous to the shareholder context. Your
17 client's own certificates, they're like -- you know, these are
18 -- there's lots of securities cases pending everywhere
19 involving RMBS trust certificates. So these are all -- you
20 know, so I -- these do seem more analogous to me -- it's one of
21 the reasons that I think the good cause requirement applies,
22 but whether it's satisfied or not is a different issue.

23 MS. EATON: And I believe it may have come from the
24 securities context, Your Honor, and in particular from the
25 Garner case, which addressed the sufficiency of the interest

1 element. And it was -- if you look at -- I didn't cite all the
2 cases or bring them with me, for that matter, but if you look
3 at the genesis of that test, it was really meant to filter out
4 so-called busy body shareholders, people who held a minute
5 number of shares --

6 THE COURT: So now you're focusing on why I
7 asked my question about what was the total amount of the
8 certificates issued by --

9 MS. EATON: Well, I can -- I can -- I'm sorry. I
10 didn't mean to interrupt you, Your Honor.

11 THE COURT: No, that's why I asked the question
12 about -- you said about how much your clients own. I don't
13 know which trusts and what tranches, but that was why I asked
14 my question about what's the total amount of certificates
15 represented by trusts that were wrapped by FGIC. I'm trying to
16 get a sense for how big is your client's interest.

17 MS. EATON: That information -- that, unfortunately, I
18 don't believe that information is publicly available. But
19 here's what I can tell you, is that our clients together with
20 Freddie Mac hold in excess of a billion dollars' worth of these
21 FGIC-repped securities, and that based on what we've been able
22 to ascertain, the members -- I think it was of the Kathy
23 Patrick group who signed the FGIC settlement agreement by
24 contrast had a position that was just south of the 350 million
25 dollars in those securities.

1 So I don't think that it would be fair or reasonable
2 to conclude that we qualify as busybody interlopers here;
3 there's a significant amount of money at stake and --

4 THE COURT: I'm sure your hedge fund clients are only
5 looking out for the interests of all those certificate holders
6 and all of the trusts, and not their own self-interest. So --

7 MS. EATON: Welcome to America, Your Honor.

8 THE COURT: Yeah.

9 MS. EATON: And the other point that I wanted to make
10 vis-a-vis the holdings issue is that the other investors had
11 positions in trusts that were not repped by FGIC and therefore
12 stood to gain significantly more from if the FGIC settlement
13 were approved than if it were not. So --

14 THE COURT: Look. Let me just put this out on the
15 table now and I'm reluctant to ever see this as part of the
16 standard that ought to apply in determining in whether to
17 trigger the fiduciary exception, but I spent a lot of hours
18 going through the privileged material. Some of it was
19 redacted and where they had the redacted stuff, they had the
20 unredacted with it. So I saw what was redacted; I saw the
21 unredacted. And I saw everything else. And I can't block that
22 out when I analyze the issue of need.

23 MS. EATON: May I be heard on that issue?

24 THE COURT: Well, let me finish my statement and then
25 I'll hear you on it.

1 I can't -- and I don't think in every instance where
2 this is raised that the Court should have to do an in camera
3 review. I did it because we're on such a tight time frame, I
4 didn't want to have a hearing today and then conclude I need to
5 review materials in camera. And my clerks didn't do it; I did
6 it myself. And my assessment, based on all that I've read, is
7 that I don't see that you've, based on what I've read in your
8 papers, that you've established need for anything that's here.

9 The trustees' counsel have said repeatedly in court
10 that the Duff & Phelps report, the analysis of the economics,
11 was the driving factor of the decision to enter into the FGIC
12 settlement. And everything I read in here supports that
13 contention, okay? Everything I read in here supports that
14 contention. Yeah, there's a lot of drafts of -- and this would
15 go to the mediation privileges -- there's a lot of drafts of
16 the PSA and the term sheet and the FGIC settlement and comments
17 on it and all of that, but with respect to the approval of the
18 FGIC settlement, these three binders that I went through have
19 not established -- and there was nothing that I read in your
20 material, and after reviewing this, I was more convinced than
21 ever -- there's nothing that establishes your need to break
22 privilege; something I'm very reluctant to do.

23 Now tell me why you think you've established need.

24 MS. EATON: Well, I don't think, first of all, that
25 the logs present a full picture. I mean, for example --

1 THE COURT: I know. That's why I read all this
2 stuff -- that does present the full picture.

3 MS. EATON: I do not know what the --

4 THE COURT: I know.

5 MS. EATON: -- trustees have chosen not to log. I can
6 tell you why I suspect that there are materials that have not
7 been logged.

8 THE COURT: And I see you've raised a question about
9 the time period that they covered. I want to hear from them
10 about it. All I could review was what I received, and what I
11 received was on their privileged logs. And I personally looked
12 at it all.

13 MS. EATON: With respect to the date range, it's a
14 mystery to us why the testimony is that negotiations began over
15 this agreement in January and yet, for whatever reason, they
16 chose only to produce documents and therefore to log documents
17 beginning on March the 18th of this year. The agreement,
18 according to the testimony, was signed on May 23rd, and that
19 was the end date that they chose, both for their production and
20 for logging purposes. But of course, they didn't file their
21 joinder in this court until the 10th of June.

22 So there are pieced both before their date range and
23 after their date range that are plainly relevant here, that's
24 one reason. As I mentioned before, they restricted their
25 search to their client files, per se. Our understanding is

1 that to the extent that there were negotiations going on here,
2 they were being conducted by the lawyers, and therefore it's
3 the documents within their lawyers' files would presumably be
4 responsive --

5 THE COURT: Lawyers' files -- well, I don't know where
6 they came from. I mean, there's numerous e-mails. They're all
7 between lawyers. I mean, it's just --

8 MS. EATON: They made a representation to us, Your
9 Honor, that they did not search their own files for responsive
10 documents. And then in those --

11 THE COURT: I kept their clients kept all the lawyer
12 communications, so --

13 MS. EATON: I don't know that --

14 THE COURT: I don't whether it's all -- I'm just -- I
15 don't mean to be flippant about it --

16 MS. EATON: I don't think either one of us knows the
17 answer to this --

18 THE COURT: Okay.

19 MS. EATON: The point that I'm making is --

20 THE COURT: That's a fair point.

21 MS. EATON: -- that the parameters that they imposed
22 on what was relevant, what they were going to search for, how
23 they were going to search for, what date ranger they were going
24 to use, has resulted in a set of materials both produced and
25 logged that seems self-evidently to be a subset. Because, if

1 for no other reason, it does not include the period when the
2 decision was made to seek findings from this Court that they
3 had acted in the best interest --

4 THE COURT: You're all excited about them seeking
5 findings. It doesn't excite me at all. I mean, I just -- if
6 they demonstrate that they acted in good faith -- if I approve
7 the settlement, not clear, if I approve the settlement, and the
8 factual record supports the finding of good faith, I'll make
9 the finding of good faith. If it doesn't, I won't.

10 MS. EATON: Then that's the issue, but the --

11 THE COURT: But I don't see why that results in
12 triggering the fiduciary exception. I mean, I just don't. I
13 mean, I -- let me hear from Mr. Weitnauer. I'll give you a
14 chance to reply.

15 So tell me first, Ms. Eaton says that you haven't
16 logged documents from the relevant period and you haven't
17 produced documents from the lawyers' files. Is that an
18 accurate statement?

19 MR. WEITNAUER: Well, part of that question, Mr.
20 Johnson may have to answer because he's been closely involved
21 in the production of documents. With respect to the time
22 period, the trustees picked the day before we got before the
23 first e-mail that had anything to do with anything that was
24 close to a suggestion of a deal with FGIC. Mr. --

25 THE COURT: What about Ms. Eaton's statement that as

1 early as January, there were negotiations?

2 MR. WEITNAUER: There's -- apparently she's referring
3 to testimony by Mr. Dubel at FGIC about negotiations he was
4 having over at -- not with us.

5 THE COURT: Who were they having -- do you know?

6 MR. WEITNAUER: With the debtors, is what I'm told.

7 THE COURT: Okay.

8 MR. JOHNSON: No.

9 MR. WEITNAUER: Not the debtors. Okay, well --

10 MR. JOHNSON: Well, with the institutional investors.

11 MR. WEITNAUER: Institutional investors.

12 THE COURT: But not with your client --

13 MR. WEITNAUER: Yes, sir,

14 THE COURT: -- not with the trustees?

15 MR. WEITNAUER: Right, the --

16 THE COURT: You're speaking; I assume somebody will
17 pop up --

18 MR. WEITNAUER: Right. We were brought into the tent
19 later, Your Honor, on or about the 19th.

20 THE COURT: Mr. Johnson wants to whisper in your ear.
21 Go ahead. You can tell me or you can tell him, I don't care.

22 MR. WEITNAUER: Go ahead.

23 MR. JOHNSON: I'm sorry, Your Honor; you've sort of
24 probably picked up on that in our shop, I've sort of taken
25 charge of the responsibility matters and this is the brain

1 trust on the law, so that's why he wrote the letter to you on
2 this particular issue.

3 THE COURT: But he didn't sign it.

4 MR. JOHNSON: We have an expert on signatures as well,
5 Your Honor.

6 MR. WEITNAUER: I directed it.

7 MR. JOHNSON: Your Honor, Mr. Weitnauer is correct
8 that --

9 THE COURT: See, I see Mr. Shore sitting in the back
10 and I get his letters. He doesn't even sign -- nobody even
11 signs, so he -- go ahead, I'm sorry.

12 MR. JOHNSON: Your Honor, Mr. Weitnauer is correct
13 that our clients were first brought into the settlement
14 negotiations around March 19th, I think it is --

15 THE COURT: That's for all the trustees; not just the
16 specific ones that you represent?

17 MR. JOHNSON: Yes. And, Your Honor, I believe that is
18 entirely -- in fact, I know it's consistent because I've
19 participated or listened in on the depositions so far -- it's
20 consistent with the testimony of the trustees' witnesses so far
21 as well.

22 THE COURT: And what about the cutoff date?

23 MR. JOHNSON: Your Honor, we -- yeah, Your Honor, we
24 made the cutoff date the date that we executed the FGIC
25 settlement agreement. We're not sure why anything after that

1 date would be relevant since it's our understanding that this
2 dispute really should be about --

3 THE COURT: Well, somebody's --

4 MR. JOHNSON: -- the settlement agreement.

5 THE COURT: -- could have written an e-mail, boy, we
6 really pulled the wool over their eyes on this one.

7 MR. JOHNSON: I don't think that type of document
8 exist, but --

9 THE COURT: Well, that may be true and it may not be
10 true. I don't know.

11 MR. JOHNSON: But, Your Honor, the relevant time
12 period in terms of considering whether this settlement
13 agreement is in the best interest and the good faith basis upon
14 which the trustees decided to enter into this settlement
15 agreement, all of that is going to date as of May 23rd, 2013,
16 and prior to that.

17 THE COURT: Okay.

18 MR. JOHNSON: So that's the basis for that, Your
19 Honor.

20 THE COURT: All right.

21 MR. JOHNSON: While I'm up, I'll just address it
22 before we get back to the brain trust, I guess, and the law.
23 In terms of the files that were searched, lawyer files were
24 searched; at least the trustees searched lawyer files, internal
25 lawyer files. The trustees did not search their outside

1 counsels' files. There's been no evidence so far, at least
2 developed in the depositions, that there's any reason to
3 believe that the files of the clients would, for any reason, be
4 incomplete and not contain those communications --

5 THE COURT: Let me ask this. Did you search your
6 files?

7 MR. JOHNSON: No, Your Honor. Well, excuse me; Wells
8 Fargo did. Alston & Bird's counsel did not. And there is
9 certainly authority, Your Honor, for limiting discovery just to
10 the actual parties, not having the outside counsel who
11 represented the parties in the underlying transaction and who
12 represent the party in the disputed issue, also serve their
13 files.

14 THE COURT: Well, the disputed issues is a different
15 issue than -- you represented Wells Fargo in the negotiations?

16 MR. JOHNSON: Your Honor, this firm did. Yes.

17 THE COURT: So why shouldn't you have to search your
18 firm's files for files during the negotiation?

19 MR. JOHNSON: Because, Your Honor, the only thing that
20 could be relevant -- I mean, there would be nothing that would
21 be discoverable, is the short answer. I --

22 THE COURT: I don't know whether that's true or not.
23 I mean, look, if I were to -- if Ms. Eaton persuaded me that
24 the fiduciary exception was triggered, why wouldn't that, if
25 you had privileged documents in your file, wouldn't you have to

1 produce them, then?

2 MR. JOHNSON: Your Honor, yes. Under that assumption,
3 attorney-client-privileged communications would be
4 discoverable. But again, Your Honor, there's no showing that
5 those communications from the client's side are incomplete.
6 And of course, in every litigat -- excuse me; every discovery
7 scenario, it is always appropriate to consider whether the
8 burden and cost associated with the search is commensurate with
9 any potential benefit.

10 THE COURT: Well, usually you sort that out with
11 opposing counsel because it's what's good for you is good for
12 them.

13 MR. JOHNSON: We never asked, Your Honor, that the
14 Willkie Farr firm, which apparently has been --

15 THE COURT: You just want to take Mr. Abrams'
16 deposition now.

17 MR. JOHNSON: Yes, Your Honor, as to non-privileged
18 matters only, as to which he has knowledge but his client has
19 not. That's the difference, Your Honor. Our clients are in
20 possession of those attorney-client communications that are at
21 issue here. Mr. Abrams is in possession because of this
22 confidentiality agreement that his clients allowed him to sign
23 up, is the only one who knows precisely what he found out about
24 this settlement agreement. That's not the case here.

25 Alston & Bird doesn't know anything about these

1 attorney-client communications that its clients doesn't know
2 about because its client is necessarily part of that
3 communication.

4 THE COURT: Let's --

5 MR. JOHNSON: Do you want to get back to the brain
6 trust -- okay. Thank you, Your Honor.

7 MR. WEITNAUER: I really hate being characterized that
8 way, but here I am.

9 THE COURT: Take it, you know, I mean --

10 MR. WEITNAUER: Okay. Well, Your Honor, I think that
11 what I would focus on is that while Ms. Eaton was concerned
12 about this being a final agreement agreed to in secret and
13 something she couldn't do anything about and she's faced with
14 findings about our behavior in coming to that agreement, if you
15 look at the settlement agreement itself, you'll see that we
16 very carefully said that a condition to its effectiveness was
17 the entry, among other things, of this Court's order approving
18 it. And it will terminate if that order's not entered by
19 August 19th, I think it is.

20 THE COURT: But they're -- look, they're opposing it.

21 MR. WEITNAUER: Um-hum.

22 THE COURT: And they're entitled to a fair opportunity
23 to oppose it.

24 MR. WEITNAUER: Absolutely.

25 THE COURT: All right. It doesn't mean that

1 automatically means that they get attorney-client-privileged
2 communication.

3 MR. WEITNAUER: All right.

4 THE COURT: Bank of New York may have a problem after
5 Mr. Major's deposition, but we'll see. Okay. If Bank of New
6 York, for example, is putting at issue the advice of counsel as
7 supporting their decision to approve the settlement, we'll --
8 that's going to get revisited. But we won't dwell on that now.

9 So Ms. Eaton, in response I pressed her about this,
10 first to ask in what, if any way, do you contend the trustees
11 engaged in self-dealing and have a conflict of interest. And
12 then I asked what evidence do you have to support such
13 contentions. Okay. And she identified three things. The pre-
14 existing arrangement for superior economic result: tell me why
15 you disagree that that is evidence that supports the contention
16 of conflict of interest.

17 MR. WEITNAUER: Your Honor, the fact of the matter is
18 that people can disagree about economic terms, whether they're
19 good, bad or indifferent. I do not think it could ever be the
20 rule that just because someone disagreed about the merits of a
21 particular settlement, and the business terms contained within
22 it, that a party entering into that agreement must necessarily
23 have a conflict or a lack of good faith.

24 With respect to the economic merits of the settlement,
25 I guess two things. Justice Kapnick noted the difference

1 between allegations of conflict of interest versus whether or
2 not a particular transaction was reasonable.

3 THE COURT: She didn't permit -- she didn't invoke the
4 fiduciary exception with respect to the amount of the
5 settlement.

6 MR. WEITNAUER: Correct.

7 THE COURT: That's -- but --

8 MR. WEITNAUER: And so I do think the fundamental
9 disagreement is that the objecting parties, as is their right,
10 don't think it's a good deal. And that gets back to, really,
11 how this was set up. In order for the settlement to become
12 effective, this Court and the rehabilitation court have to
13 approve it. The orders that have to be entered that cannot be
14 waived have to include an affirmative finding that the
15 transactions contemplated by the settlement agreement are in
16 the best interest of the investors.

17 You may disagree with the trustees' view that this is
18 in the best interest. You may disagree with Duff. You may
19 disagree with institutional investors who also think it was in
20 the best interest. You may agree with them. And if that's the
21 case, it won't be approved and we won't get any findings. It
22 is not as though we were asking for findings that we acted in
23 their best interest even though you thought the deal was a bad
24 deal. There's a complete consistency between a finding that we
25 think you'll be justified in coming to that it is in the best

1 interest of the investors, and that, therefore, we acted in
2 their best interest.

3 So, to me, the fact that there's a disagreement about
4 the merits of the economics, just could never get to a point of
5 conflict of interest.

6 THE COURT: And what about, she raised that there was
7 a signed settlement agreement without disclosure for one week?

8 MR. WEITNAUER: Your Honor, it would have been
9 impossible for everybody who might be economically affected by
10 this settlement to be in the room. And it fell to the trustees
11 to do their part in deciding whether or not the settlement was
12 in the best interest of all the investors. The settlement
13 itself provides that within, I think it said seven days, the
14 debtors would be obligated to file it in this court and seek
15 approval of it. And I didn't count the days, but I think the
16 debtors promptly filed it --

17 THE COURT: They did. I think that, as I recall, I
18 remember Mr. Lee and Mr. Eckstein complaining -- not
19 complaining, but they came in absolutely bleary because they
20 got the PSA filed -- I gave them a deadline and they begged for
21 a couple more days and when I gave the deadline -- so I agreed
22 to the couple more days and they literally, they got it in
23 minutes before the deadline. So it was around -- I take them
24 at their word that it was a many-days, round-the-clock effort
25 to get -- because it involved a lot more than just the FGIC

1 settlement, obviously.

2 MR. WEITNAUER: Correct.

3 THE COURT: It was a major undertaking.

4 MR. WEITNAUER: Hundreds of folks would substantiate
5 their position that they were round-the-clock.

6 THE COURT: Yes. Okay, so the last point was no
7 mechanism to allow the investors to object.

8 MR. WEITNAUER: Well, and that seems odd to me because
9 we specifically required that the agreement be conditioned on
10 two courts' finding it to be in their best interest, that the
11 debtors in this court give a motion to get it approved. They
12 are here; they are objecting. And I don't know any other
13 mechanical way to move this case forward except for the
14 trustees to act as they must and then give folks an opportunity
15 to complain about it. And we will see whether or not it was in
16 fact in the best interest of the investors after you hear from
17 their experts and their clients on why it's a terrible deal, if
18 that's what their experts say, and the evidence that's put up
19 by the debtors and the trustees.

20 THE COURT: Have you taken their expert depositions
21 yet?

22 MR. WEITNAUER: No, declarations of experts, I think,
23 are due Friday and then depositions will be next week.

24 THE COURT: All right.

25 All right, anything else you want to raise at this

1 point?

2 MR. WEITNAUER: I would just add, at the very end, if
3 you look at their letter, the types of things they say they
4 would like to find out, what could have been gained which --
5 what was given up as part of the negotiations, that goes
6 straight to the mediation privilege which would just be on top
7 of other arguments.

8 Thank you.

9 THE COURT: All right, thank you.

10 Ms. Eaton -- well, let me see, anybody else want to be
11 heard? And then I'll give you a chance to reply.

12 All right, Ms. Eaton?

13 MS. EATON: Just a couple of points, Your Honor. With
14 respect to the argument that this is no different than any run-
15 of-the-mill dispute about valuation or economic value of the
16 deal --

17 THE COURT: I'm not sure he said that, but it's an
18 economic dispute about valuation.

19 MS. EATON: At bottom, certainly, it is, at bottom
20 it's that. The standard to be applied by the Court on this
21 motion is whether the agreement is outside the range of
22 reasonableness from the point of view of the estate, with
23 respect to the trustees, however. So it's quite possible that
24 the Court could approve the settlement agreement. But what's
25 been baked in here is a walk right on behalf of the trustees

1 that if they do not get the findings that they have sought from
2 this Court, that they can walk away from the deal, which is one
3 of the reasons why we think this is not just a
4 straightforward --

5 THE COURT: The terms of the deal require the Court to
6 make additional findings, no mistake about it --

7 MS. EATON: Right.

8 THE COURT: -- that go beyond the normal findings on a
9 9019 motion. There's no question about that.

10 MS. EATON: Right, Your Honor. And then with respect
11 to the mechanism to object, it's been said well, the investors
12 have the opportunity to object here and they have the
13 opportunity to object in the state court. But, of course, you
14 may remember that they've taken the position that we lack
15 standing to object --

16 THE COURT: Not here, they haven't.

17 MS. EATON: -- to lodge any objection in the state
18 court.

19 THE COURT: Not here. I can only deal with my court,
20 and I'm not sure whether they've taken that position in the
21 state court. But they clearly haven't taken the position here.
22 And I've already, in the short time this has been in the works,
23 I've had numerous in-court hearings, some of them haven't been
24 on the record because they've been after 5 o'clock; I've had
25 telephone hearings; you're here today. So other than the fact

1 that you asked for considerably more time for the dispute, I
2 think I've allowed sufficient time to -- there's a lot of work
3 for everybody to do; there's no question about it. Very
4 expedited discovery and that's why I've had as many hearings as
5 required to deal with these issues.

6 MS. EATON: Right, Your Honor. The only point is that
7 if there were -- the agreement did not build in any other kind
8 of, or more efficient, or easier mechanism for the investors to
9 be heard. There was no advance notice to the investors that
10 was publicly made that this was -- and this is an issue that
11 came up in Justice Kapnick's decision --

12 THE COURT: Where do you find an obligation that the
13 trustee tell you before it signs a settlement agreement that
14 requirements court approval that they're negotiating? You've
15 cited no authority for that. You're complaining about it.
16 That's fine, okay. But there's no legal authority that says
17 the trustee can't go ahead and negotiate a settlement agreement
18 where it -- I mean, any putback claims belong to the trustees'
19 they don't belong to investors. Other claims that could be
20 asserted belong to the trustee, not the investors. They have
21 it, at a point at least, where there's a default, they owe
22 common-law fiduciary duties as well as whatever the indenture
23 requires.

24 But you've, other than complaining about it, you've
25 pointed to no authority that says they had to tell you before

1 they did it. Do you have any authority for that?

2 MS. EATON: No, not -- no, I don't, Your Honor. The
3 point is that once the prudence standard applies, they had a
4 duty to treat the property as if, to manage the property as
5 if -- which, our property -- as if it were their own.

6 THE COURT: Other than your disagreement as to whether
7 the existing rehabilitation plan is superior to this
8 settlement, you've pointed to nothing to suggest that the
9 trustees did not act solely for the benefit of the investors.

10 MS. EATON: With respect, Your Honor, I disagree. We
11 don't -- I've given you -- laid out the facts that we are aware
12 of based on the information that we've been able to gain access
13 to. And I think the circumstances taken as of --

14 THE COURT: And you'll get an opportunity to get all
15 nonprivileged information that supports your claims, but you
16 don't break privilege because you think if you're able to do
17 it, maybe you'll be able to come up with some facts to support
18 an argument why you can. Privilege doesn't go away that
19 easily.

20 MS. EATON: I'm not -- we're not --

21 THE COURT: All right. Anything else -- new points
22 you want to raise?

23 MS. EATON: The only new point I wanted to raise, Your
24 Honor, is with respect to the mediation privilege, which we've
25 discussed before. We're here, Your Honor, with respect to --

1 the respect to be afforded to the mediation privilege. I think
2 one of the issues here is, just how far it's being applied is
3 pretty unclear to us. It's certainly -- our view is that it
4 certainly cannot cover everything that happened that was
5 remotely related to the bankruptcy or any negotiations or
6 discussions that were going on --

7 THE COURT: That's not what the documents that I've
8 reviewed that -- they're not remote; they're very specific.
9 They relate --

10 MS. EATON: Those weren't to be logged, Your Honor,
11 under --

12 THE COURT: I'm sorry?

13 MS. EATON: Those items weren't to be logged. When we
14 discussed --

15 THE COURT: Well, I can only review what was logged.

16 MS. EATON: When we discussed -- well, the issue --
17 that's why I'm raising it, is that what's out there, I don't
18 know what all is out there, but when we were discussing the
19 obligation to log privileged documents -- I don't remember when
20 it was -- but it was some time back, you indicated that
21 discussions -- communications between attorney and client
22 needed to be logged, but other items with respect to the
23 "mediation privilege" did not need to be logged.

24 And therefore, those logs -- and that's what I
25 understand the trustees to have done -- and therefore those

1 logs don't reflect any of those other materials. And that may
2 be fair game, but it depends on how you construe the mediation
3 privilege.

4 THE COURT: What -- did you ask for any document that
5 relates to the bankruptcy? What was the documents -- what did
6 you ask for in your request?

7 MS. EATON: No, no, we didn't ask for those things.
8 I'm basing my comments on questions not -- to be fair, not of
9 the trustees, but of Mr. Kruger, who took the position that
10 everything that happened from X date to Y date was part of the
11 mediation process, and therefore, covered by the mediation
12 privilege.

13 THE COURT: If you want to make a motion to compel
14 with Mr. Kruger -- about Mr. Kruger, you have a meet-and-confer
15 with the debtors' counsel, and then you come back to me, after
16 you've -- that's not before me today. What I have before me
17 today is your application to compel the trustees to produce
18 attorney-client privileged documents. That's what I have
19 before me. And your arguments relate to the fiduciary
20 exception in the mediation privilege.

21 Anything else you want to say on that subject?

22 MS. EATON: I don't have anything further to add --

23 THE COURT: Okay.

24 MS. EATON: -- unless Your Honor has any questions.

25 THE COURT: All right, I don't. Mr. Shore?

1 MR. SHORE: I'll be very quick. I just wanted to be
2 heard on that last point on the mediation, and then how we're
3 going to be approaching that, because I certainly don't want to
4 file a motion to compel.

5 So, for the record, Chris Shore, from White & Case on
6 behalf of the ad hoc group. First, let me tell you, we sent a
7 letter down just around 3 o'clock on the JSN adversary
8 proceeding. We resolved the statement of issues; that's
9 consensual now. And the --

10 THE COURT: You're still coming in tomorrow, though.

11 MR. SHORE: -- and the scheduling order, we're still
12 coming into deal -- and we're talking through the issues on
13 whether or not there'll be a consensual amendment. I don't
14 think there are going to be big distinctions.

15 THE COURT: I hope there will be. I mean, I -- if
16 there's debtors' counsel here, I hope -- and committee counsel,
17 I hope there'll be a consensual agreement.

18 MR. SHORE: We're also, and I think Ms. Eaton just
19 expressed it.

20 THE COURT: Let me put your mind through. I'm not
21 making a decision on the mediation privilege today, so nothing
22 I'm saying today is going to affect what positions you're going
23 to take, okay.

24 MR. SHORE: Good. I -- it's then a question of
25 procedure, which is, there're two ways, it seems to us, to

1 approach it in connection with FGIC, because there have been
2 some blanket assertions of mediation privilege. One is to file
3 a motion to compel, have that heard --

4 THE COURT: I don't allow them to be filed.

5 MR. SHORE: Well, they have a meet-and-confer --

6 THE COURT: I mean, you'll follow my procedures.

7 MR. SHORE: And then try to resolve that issue through
8 that process, or through a process that was discussed in the
9 JSN adversary proceeding is if they're not going to produce the
10 documents, they're not going to get findings of fact on it.

11 So I would propose that our supplemental responses are
12 due on the 29th, I think, and we were intending on just saying,
13 with respect to findings of fact they're seeking, or Iridium
14 factors they want the Court to rule in their favor on, that
15 require looking into the mediation, that is, for example, that
16 it's arms-length, that we just -- that they not be permitted to
17 proceed on those. So it's just I don't want to be in a --

18 THE COURT: I don't want to take those up now. I have
19 enough -- I'm sorry, Mr. Shore, but --

20 MR. SHORE: We'll discuss it --

21 THE COURT: Okay.

22 MR. SHORE: We'll discuss it with the debtors and try
23 to come to some arrangement.

24 THE COURT: Yeah, I got enough to deal with, okay?

25 MR. SHORE: All right.

1 THE COURT: All right, thank you.

2 MR. SHORE: Thank you, Your Honor.

3 THE COURT: Anybody else wish to be heard? All right.

4 Pending before the Court is a discovery dispute
5 between certain investors and RMBS Trust that are wrapped with
6 insurance provided by FGIC. The debtors, the rehabilitator,
7 FGIC, and the RMBS Trustees have entered into a proposed
8 settlement that will result, among other things, in a lump sum
9 payment from FGIC in satisfaction of claims asserted by the
10 trustees and the debtor.

11 The settlement also includes a commutation,
12 essentially capping FGIC's liability for insured claims.
13 Because FGIC is subject of a rehabilitation proceeding in state
14 court, the proposed settlement requires approval of both the
15 state court and the bankruptcy court. The settlement hearing
16 in this court is scheduled for August 16 and 19, 2013.

17 The investors represented by Willkie Farr oppose
18 approval of the settlement, essentially arguing that the
19 settlement is not fair and reasonable to the investors, because
20 the commutation substantially reduces the amount the investors
21 would recover from FGIC under its already-approved
22 rehabilitation plan.

23 As part of the expedited discovery in this case, the
24 investors argue that the trustees' assertion of attorney-client
25 privilege must be set aside on the basis of the fiduciary

1 exception to the privilege. The Court directed counsel for the
2 investors and for the trustees to submit simultaneous briefs,
3 addressing the privilege issues on or before noon yesterday,
4 July 16. The Court also directed the trustees to provide the
5 Court, for in-camera review, the documents that have been
6 withheld on the basis of privilege. The Court set a hearing on
7 the matter for Wednesday, that's today, July 17 at 3 p.m. All
8 submissions to the Court were timely made.

9 Time is of the essence in resolving this dispute,
10 because of the tight time schedule leading to the settlement
11 approval hearing. As I said earlier, because of that very
12 tight time schedule, I required the trustees' counsel to
13 provide, for in-camera review, the documents as to which these
14 privileges were asserted. And in my ruling today, I don't mean
15 to suggest that that is a requirement in order for the Court to
16 reach the decision. It bolsters my decision, as I said
17 earlier, by having reviewed these documents, specifically with
18 respect to the need.

19 Treating the Willkie Farr letter as a motion to compel
20 the production of documents, the Court denies the motion for
21 the following reasons. First, for purposes of the motion, the
22 Court will treat the duties owed by the trustees to the
23 investors as extending beyond the four corners of the
24 indentures, pursuant to which the trustees act.

25 The trustees have stipulated, for purposes of the

1 motion, that they are obligated to act in the best interest of
2 the investors, with respect to the settlement agreement, and
3 that the stipulated level of obligation is sufficient to invoke
4 the fiduciary exception in this context, and then "but only
5 when good cause and other elements of fiduciary exception can
6 be shown."

7 Ms. Eaton has disagreed as to the issue of whether --
8 the legal requirement of whether good cause is a requirement.
9 In support of her argument that good cause is not required, Ms.
10 Eaton points to two decisions, both by Magistrate Judge
11 Dolinger. First, *Martin v. Valley National Bank of Arizona*,
12 140 F.R.D. 291, Southern District of New York, 1991. The
13 second case is *Lawrence v. Cohn*, 2002 WL 109530, Southern
14 District of New York, January 25th, 2002.

15 In the *Martin* case, it arose in the context of a
16 fiduciary trustee in a DOL action for breach of fiduciary duty.
17 In the case of *Lawrence's* case, I believe it involved an
18 executor or estate beneficiary conflict. Neither of those
19 cases involve the circumstance of an indenture trustee.

20 Case law establishes that before an event of default
21 occurs, an indenture trustee's obligations are limited to those
22 set forth in the indenture. And I quote, "After an event of
23 default, however, the loyalties of the indenture trustee no
24 longer are divided between the issuer and the investors. As a
25 consequence, New York law reallocates indenture trustees'

1 fiduciary duties to reflect the change." See LNC Investment
2 Co. v. First Fidelity Bank, National Association, 935 F.Supp
3 1333, Southern District of New York, 1996; that's the decision
4 by Judge Mukasey.

5 After an event of default, "It is clear that the
6 indenture trustee's obligations come more closely to resemble
7 those of an ordinary fiduciary, regardless of any limitations
8 or exculpatory provisions contained in the indenture." See
9 Beck v. Manufacturers Hanover Trust Co., 632 N.Y.S.2d 520 at
10 527, First Department 1995. While Beck and LNC indicate that
11 the indenture trustee's obligations more closely resemble the
12 obligations of a trustee -- of an expressed trustee, the
13 obligations are not identical.

14 The Court concludes that those cases which
15 specifically requiring a good -- a showing of good cause to
16 invoke the fiduciary acceptance or other requirements as well,
17 but I'm going to focus on the good cause requirement. The
18 cases that the circumstances of an indenture trustee in the
19 case such as this one, much more closer resemble those from
20 Garner v. Wolfinbarger, which is at 430 F.2d 1093, Fifth
21 Circuit, 1970. It's sort of the progenitor of this fiduciary
22 exception doctrine.

23 Other cases have likewise recognized that under both
24 federal law and New York law. In Quintel Corp. v. Citibank,
25 567 F.Supp. 1357, Southern District of New York, 1983; I

1 believe it's an opinion by Judge Sweet. He certainly
2 considered the -- and analyzed and applied the good cause
3 requirement. So the Court concludes that the good cause
4 requirement applies in this case.

5 And it's unnecessary for me to consider each of the
6 elements of the requirement to establish that the fiduciary
7 exception is triggered, because I believe on the record before
8 me, and including the argument today, that investors
9 represented by Willkie Farr have failed to show good cause to
10 invoke the fiduciary exception.

11 While it's a state court decision, I rely
12 substantially on Justice Kapnick's decision in the Bank of New
13 York Mellon Matter. As I commented earlier, it's a decision, I
14 think, from May 20th, 2013; it's quite recent. Justice Kapnick
15 in an RMBS case analyzes both the at-issue waiver doctrine --
16 which the Court doesn't have to consider today, but might have
17 to -- and also the fiduciary exception. And in a careful
18 analysis, she parsed the specific issues as to which the
19 investors sought discovery of attorney-client privileged
20 communications.

21 First she concluded that the fiduciary exception is
22 potentially applicable in such a case of an indenture trustee,
23 but Justice Kapnick after carefully analyzing prior case law --
24 and I won't go through those cases now, but I agree with her
25 analysis of the case law -- concluded that among the

1 requirements for application of the exception is a showing of
2 good cause for required disclosure of otherwise privileged
3 information.

4 Justice Kapnick concluded that the investor had
5 established good cause with respect to disclosures specifically
6 related to a colorable claim of self-dealing and conflict-of-
7 interest by the trustees. On other issues, however, such as
8 communications at and surrounding the trustees' meeting at
9 which they determined to support the settlement and
10 communications regarding the settlement amount, the investors
11 had not established good cause.

12 I reach a similar conclusion here, except that when
13 pressed, Ms. Eaton identified three matters, when I asked for,
14 in what way she contended that the trustees engaged in self-
15 dealing and have a conflict of interest. I followed it up with
16 a question of what, if any, evidence do you have to support
17 such contentions? She identified three items. One, a pre-
18 existing arrangement for, what she described as, a superior
19 economic result with the FGIC rehabilitation agreement. That
20 is fundamentally an economic issue as to which there will be
21 expert testimony at the hearing.

22 The circumstances of the FGIC rehabilitation plan and
23 its approval, and the negotiation of the settlement and
24 presentation of the settlement before me and before Justice
25 Ling-Cohan are very different. The proposed settlement would

1 result in a lump-sum payment and a commutation of FGIC's
2 insurance that the amount of its exposure is capped, versus the
3 FGIC rehabilitation plan would have a long term payout, which
4 may or may not exceed the net present value of the lump sum
5 payment today, an issue as to which expert testimony will be
6 provided.

7 So I don't believe that that issue establishes a
8 conflict of interest on part of the trustees or any self-
9 dealing on the part of the trustees. There's no -- and I
10 should say, Ms. Eaton did not identify any alleged self-dealing
11 on the part of the trustees. The focus has been on the
12 conflict-of-interest issue.

13 The second issue she raised was signing the settlement
14 agreement without disclosure for a one-week period. Now I
15 suppose I'd add to that, disclosure that -- without disclosure
16 that the trustees were negotiating the settlement, and then
17 once it was signed, disclosure for one week. The Court does
18 not believe that that matter supports a colorable claim of
19 conflict of interest on the part of the trustee. Many or most
20 settlements are negotiated without disclosure to third parties.
21 The major point is that the settlement requires approval of two
22 courts, this court and the State Supreme Court. And the issue
23 of whether approved, it'll be decided on the merits.

24 The third issue that Ms. Eaton raised was that there's
25 no mechanism to allow the investors to object. And it's very

1 precisely in this Court what -- that the settlement required
2 it, and this Court has established a schedule for expedited
3 discovery, briefing and hearing, and there very much is a
4 mechanism, and as I commented earlier, this Court has already
5 had numerous hearings on the record and off the record. And
6 off-record is related to either discovery disputes or
7 scheduling matters, as to which I frequently do it after
8 regular court hours, but the Court has had numerous hearings
9 about it.

10 And so, the Court concludes that the three issues
11 raised by Ms. Eaton do not raise a colorable claim of self-
12 dealing or conflict-of-interest sufficient to trigger the
13 fiduciary exception to the attorney-client privilege.

14 I'm not going to go through -- I've read, I think, all
15 of the cases that Justice Kapnick cited in her opinion. I've
16 mentioned specifically Hoops, which I -- is a Third Department
17 decision by then Judge Levine, subsequent -- then Justice
18 Levine, subsequently Judge Levine on the New York Court of
19 Appeals, and obviously Garner v. Wolfinbarger, which is the
20 leading case on fiduciary exception. I'm not going to go
21 through each of the cases that have been discussed, but in
22 applying the law to the facts as presented to me, the motion to
23 compel the trustees to disclose documents or deposition
24 testimony regarding attorney-client privilege matters is
25 denied.

1 But let me make clear that, to the extent that any of
2 the trustees are relying of advice of counsel as a basis for
3 their decision to approve the settlement, I'm not going to rule
4 on it today, but it obviously puts the "at-issue" doctrine,
5 which the state court addressed and other courts have
6 addressed. I think I addressed them in one opinion, in ResCap
7 in fact. So I'm only ruling on what's before me today. Let me
8 just say, I thought the submissions of both parties, the
9 briefs, were very well done in a relatively short period of
10 time. It was very helpful to the Court.

11 My decision is not in any way based on the mediation
12 privilege. That raises no particular reluctance; I just don't
13 need to get there today. There may be other matters as to
14 which the mediation privilege needs to be addressed. And with
15 respect to mediation privilege, there are at least three
16 sources that need to be consulted: one, the Court's general
17 order with respect to the mediation program; two, the specific
18 order I entered when Judge Peck was appointed as the mediator;
19 and third, the case law with respect to the scope of mediation
20 privilege. But I don't need -- for my decision today -- I
21 don't need to reach any of those.

22 What I would like to do, is return the binders with --
23 that I reviewed in-camera to counsel who provided them.
24 Obviously, they're all -- everything was bates numbered;
25 everything is on the log. I just don't choose to keep

1 privileged documents that haven't been disclosed in my
2 chambers.

3 Do we have counsel for each of those parties here?
4 Mr. Siegel, I know you provided what Bank of New York Mellon.
5 I got U.S. Bank National Association, I don't know who -- can't
6 remember who's that was.

7 So here's yours.

8 Which one is yours? The biggest of the binders.

9 Okay, so let the record reflect that I've returned the
10 binders containing the privileged documents which I reviewed
11 in-camera.

12 Court is adjourned.

13 (Whereupon these proceedings were concluded at 4:37 PM)

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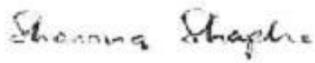
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.



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Date: July 18, 2013

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