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

- -x

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

On the record, status conference re: FGIC 9019 settlement

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P R O C E E D I N G S

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

Mr. Kerr?

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

the payments will be --

THE COURT: Oh, not fifty years?

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

THE COURT: But --

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

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

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

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

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

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

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

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

THE COURT: You don't.

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

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

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

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

MS. EATON: Yes, Your Honor.

THE COURT: Okay. Are there current defaults?

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

THE COURT: Yes, has there been?

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MS. EATON: But I'm certain --

THE COURT: All right.

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

THE COURT: All right.

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

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

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

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

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

MS. EATON: Well, in --

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

MS. EATON: I --

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

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

THE COURT: Yeah.

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

THE COURT: Okay.

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

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

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

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

THE COURT: Oh, I see --

MR. WEITNAUER: But I am --

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

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

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

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

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

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

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

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

THE COURT: Okay. Show me --

MS. EATON: -- common law.

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

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

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

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

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

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

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

THE COURT: What's the second one?

MS. EATON: Lawrence v. Cohn.

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

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

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

MS. EATON: Indeed --

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

MS. EATON: Correct.

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

MS. EATON: Correct.

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

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

MS. EATON: The total number of investors?

THE COURT: Yes.

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

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

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

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

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

THE COURT: And you think that establishes a conflict?

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

THE COURT: So let me ask --

MS. EATON: -- although --

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

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

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

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

THE COURT: Okay. And that --

MS. EATON: -- than they wanted --

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

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

THE COURT: Okay --

MS. EATON: -- ultimately --

THE COURT: -- they withdrew their objections.

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

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

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

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

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

THE COURT: Well, you don't --

MS. EATON: -- discovery in its --

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

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

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

THE COURT: Support.

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

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

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

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

MS. EATON: Yes.

THE COURT: What is that? Tell me specifically.

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

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

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

THE COURT: Well, FGIC didn't --

MS. EATON: -- point number one.

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

MS. EATON: I beg your pardon?

THE COURT: FGIC did not wrap only ResCap trusts.

MS. EATON: That is correct, Your Honor.

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

MS. EATON: Yes.

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

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

THE COURT: All right.

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

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

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

MS. EATON: It --

THE COURT: -- of the PSA.

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

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

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

THE COURT: They filed --

MS. EATON: -- of themselves.

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

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

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

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

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

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

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

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

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

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

THE COURT: I'm not --

MS. EATON: -- with our clients.

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

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

THE COURT: Okay. All right.

MS. EATON: I don't have --

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

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

THE COURT: Anything else?

MS. EATON: -- about a week?

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

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

THE COURT: What are you doing here?

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

THE COURT: What's wrong with this mechanism?

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

THE COURT: Did you inquire of the trustees'

representatives about their consideration of the Duff & Phelps report?

MS. EATON: Yes.

THE COURT: And were you restricted from doing that?

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

THE COURT: Have you asked for that?

MS. EATON: Yes, indeed.

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

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

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

THE COURT: Just tell me --

MS. EATON: -- the debtors did.

THE COURT: -- what the status --

MS. EATON: They took the --

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

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

THE COURT: I just want --

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

THE COURT: I'm going to have --

MR. JOHNSON: -- in our production.

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

MR. JOHNSON: Your Honor, that is my understanding. If Ms. Eaton has a particular issue with --

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

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

THE COURT: Okay.

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

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

MS. EATON: And on the issue --

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

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

THE COURT: Okay.

MS. EATON: -- this point.

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

go ahead with your argument.

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

THE COURT: Look --

MS. EATON: -- the reasonableness --

THE COURT: -- you're getting --

MS. EATON: -- in the first place.

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

MS. EATON: Yes, Your Honor.

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

MS. EATON: Not yet, Your Honor.

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

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

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

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

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

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

MS. EATON: That's --

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

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

THE COURT: I thought you did.

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

THE COURT: Somebody said that?

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

THE COURT: Which --

MS. EATON: -- problem.

THE COURT: Which trustee was that?

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

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

MS. EATON: Yes.

THE COURT: Can I see it?

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

THE COURT: Oh.

MS. EATON: Is that --

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

MS. EATON: I could read the question --

THE COURT: Go ahead, read --

MS. EATON: -- and answer for you.

THE COURT: Go ahead.

MS. EATON: The question was -- one of the findings was read out to the witness, and the question was:
"Q. Do you believe that the settlement agreement and the transactions contemplated thereby, including the releases therein, are in the best interests of the investors in each trust?
"A. Yes.
"Q. And what do you base that conclusion on?
"A. I base that conclusion on the recommendation of our financial advisor, the recommendation of our legal advisor, and the analysis of our financial advisor."

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

The other part --

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

MR. SIEGEL: I understand.

THE COURT: Go ahead, Ms. Eaton.

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

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

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

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

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

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

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

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

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

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

MS. EATON: Welcome to America, Your Honor.

THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

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

THE COURT: I know.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: That's a fair point.

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

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

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

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

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

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

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

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

early as January, there were negotiations?

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

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

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

THE COURT: Okay.

MR. JOHNSON: No.

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

MR. JOHNSON: Well, with the institutional investors.

MR. WEITNAUER: Institutional investors.

THE COURT: But not with your client --

MR. WEITNAUER: Yes, sir,

THE COURT: -- not with the trustees?

MR. WEITNAUER: Right, the --

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

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

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

MR. WEITNAUER: Go ahead.

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

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

THE COURT: But he didn't sign it.

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

MR. WEITNAUER: I directed it.

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

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

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

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

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

THE COURT: And what about the cutoff date?

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

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

THE COURT: Well, somebody's --

MR. JOHNSON: -- the settlement agreement.

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

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

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

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

THE COURT: Okay.

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

produce them, then?

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

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

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

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

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

Alston & Bird doesn't know anything about these

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

THE COURT: Let's --

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

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

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

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

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

MR. WEITNAUER: Um-hum.

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

MR. WEITNAUER: Absolutely.

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

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

MR. WEITNAUER: All right.

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

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

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

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

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

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

MR. WEITNAUER: Correct.

THE COURT: That's -- but --

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

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

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

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

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

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

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

settlement, obviously.

MR. WEITNAUER: Correct.

THE COURT: It was a major undertaking.

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

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

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

THE COURT: Have you taken their expert depositions yet?

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

THE COURT: All right.

All right, anything else you want to raise at this

point?

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

Thank you.

THE COURT: All right, thank you.

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

All right, Ms. Eaton?

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

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

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

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

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

MS. EATON: Right.

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

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

THE COURT: Not here, they haven't.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I'm sorry?

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

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

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

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

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

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

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

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

Anything else you want to say on that subject?

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SHORE: We'll discuss it --

THE COURT: Okay.

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

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

MR. SHORE: All right.

THE COURT: All right, thank you.

MR. SHORE: Thank you, Your Honor.

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

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

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

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

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

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

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

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

The trustees have stipulated, for purposes of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So here's yours.

Which one is yours? The biggest of the binders.

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

Court is adjourned.

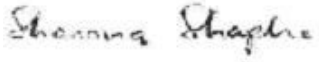
(Whereupon these proceedings were concluded at 4:37 PM)

I N D E X

RULINGS

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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SHARONA SHAPIRO

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