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# [***Homeward Residential, Inc. v. Sand Canyon Corp.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PRF-SVS1-F04F-0207-00000-00&context=)

United States District Court for the Southern District of New York

October 17, 2017, Decided; October 17, 2017, Filed

12-CV-5067 (JFK) (JLC); 12-CV-7319 (JFK) (JLC)

**Reporter**

2017 U.S. Dist. LEXIS 171685 \*; 2017 WL 4676806

HOMEWARD RESIDENTIAL, INC., Plaintiff, -against- SAND CANYON CORPORATION, Defendant.

**Prior History:** [*Homeward Residential, Inc. v. Sand Canyon Corp., 2014 U.S. Dist. LEXIS 46176 (S.D.N.Y., Mar. 30, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BWH-9VD1-F04F-00M6-00000-00&context=)  
[*Homeward Residential, Inc. v. Sand Canyon Corp., 298 F.R.D. 116, 2014 U.S. Dist. LEXIS 20771 (S.D.N.Y., Feb. 14, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BJH-JXX1-F04F-034G-00000-00&context=)

**Core Terms**

documents, communications, loans, subpoena, discovery, parties, attorney-client, common interest, requests, privileged, argues, waived, certificateholders, notice, repurchase, warranties, services, cases, work product protection, legal interest, representations, withheld, consultants, functional equivalent, motion to compel, materials, motions, Reply, quotation marks, employees

**Counsel:** **[\*1]**For Homeward Residential, Inc., solely in its capaciy as Master Servicer for the Option One Mortgage Loan Trust 2006-2, for the benefit of the Trustee and the holders of Option One Mortgage Loan Trust 2006-2 Certificates, Plaintiff (1:12-cv-05067-JFK-JLC): Patrick L. Robson, LEAD ATTORNEY, Brian V Otero, Kristen Madison, Michael Bert Kruse, Stephen Roy Blacklocks, Hunton & Williams, LLP(NYC), New York, NY.

For Sand Canyon Corporation, f/k/a Option One Mortgage Corporation, Defendant (1:12-cv-05067-JFK-JLC): Michael Calhoon, LEAD ATTORNEY, Vernon Anthony Andrew Cassin, III, Baker Botts L.L.P., Washington, DC; Brian C. Kerr, Baker Botts L.L.P(NYC), New York, NY; Daniel T. Brown, PRO HAC VICE, Murphy & McGonigle PC, Washington, DC; Douglas W Henkin, Baker Botts LLP (NY), New York, NY; Hannah Berkowitz, Soren Elliot Packer, Murphy & McMonigle PC, New York, NY; James K. Goldfarb, Murphy & McGonigle PC (NYC), New York, NY; Richard P. Sobiecki, Baker Botts LLP (DC), Washington, DC.

For LBF International I LLC, LBF International II LLC, Proposed Intervenor-Plaintiff, Intervenor Plaintiffs (1:12-cv-05067-JFK-JLC): Lyndon Mitchell Tretter, LEAD ATTORNEY, Wollmuth Maher & Deutsch LLP, New York,**[\*2]** NY.

For Non-Party Former Employees of Defendant, Sand Canyon Corporation, ADR Provider (1:12-cv-05067-JFK-JLC): Albert H Ebright, Caraballo & Mandell, LLC, New York, NY.

For Athreya Sampaths, Interested Party (1:12-cv-05067-JFK-JLC): John Nelson Thomas, LEAD ATTORNEY, Crowell & Moring LLP (NYC), New York, NY.

For Homeward Residential, Inc., solely in its capaciy as Master Servicer for the Option One Mortgage Loan Trust 2006-2, for the benefit of the Trustee and the holders of Option One Mortgage Loan Trust 2006-2 Certificates, Plaintiff (1:12-cv-07319-JFK-JLC): Patrick L. Robson, LEAD ATTORNEY, Brian V Otero, Kristen Madison, Michael Bert Kruse, Stephen Roy Blacklocks, Hunton & Williams, LLP(NYC), New York, NY.

For Sand Canyon Corporation, formerly known as Option One Mortgage Corporation, Defendant (1:12-cv-07319-JFK-JLC): Michael Calhoon, LEAD ATTORNEY, Vernon Anthony Andrew Cassin, III, Baker Botts L.L.P., Washington, DC; Brian C. Kerr, Baker Botts L.L.P(NYC), New York, NY; Daniel T. Brown, PRO HAC VICE, Murphy & McGonigle PC, Washington, DC; Douglas W Henkin, Baker Botts LLP (NY), New York, NY; Hannah Berkowitz, Soren Elliot Packer, Murphy & McMonigle PC, New York, NY; James K. Goldfarb,**[\*3]** Murphy & McGonigle PC (NYC), New York, NY; Richard P. Sobiecki, Baker Botts LLP (DC), Washington, DC.

For LBF International I LLC, LBF International II LLC, Proposed Intervenor-Plaintiffs, BDC Credit LLC, Proposed Intervenor-Plaintiffs, Intervenor Plaintiffs(1:12-cv-07319-JFK-JLC): Lyndon Mitchell Tretter, LEAD ATTORNEY, Wollmuth Maher & Deutsch LLP, New York, NY.

**Judges:** JAMES L. COTT, United States Magistrate Judge.

**Opinion by:** JAMES L. COTT

**Opinion**

**MEMORANDUM ORDER**

**JAMES L. COTT, United States Magistrate Judge**.

By Order dated April 3, 2017, these related cases were referred to me for general pretrial supervision. There are presently several discovery disputes pending before the Court. Plaintiff Homeward Residential, Inc. has moved to compel defendant Sand Canyon Corporation to produce certain settlement and tolling agreements and separately for a protective order quashing a subpoena to a non-party consultant. Sand Canyon has moved to compel Homeward's production of certain documents related to the subprime mortgage crisis and of other documents that were withheld on privilege grounds. It has also moved to compel a different non-party consultant to comply with a subpoena. For the reasons that follow, Homeward's motions**[\*4]** are granted, and Sand Canyon's motions are granted in part and denied in part.

**I. BACKGROUND**

**A. Facts**

The Court assumes familiarity with the underlying facts in this diversity action and will not recount them in any detail here.[[1]](#footnote-0)1 These cases concern warranties and representations made regarding mortgage loans that were sold into two trusts in 2006.

Sand Canyon Corporation, formerly known as Option One Mortgage Corporation, is a California corporation and a former originator of subprime mortgage loans. Memorandum of Law in Support of Defendant's Motion to Compel Plaintiff to Comply with Its Discovery Obligations ("Omnibus"), dated May 5, 2017, Dkt. No. 212, at 1; Amended Complaint ("Homeward I Compl."), dated July 19, 2013, Dkt. No. 24 at 5.[[2]](#footnote-1)2 Homeward Residential, Inc., is a Delaware corporation that services mortgage loans. *Id.*

Sand Canyon originated the majority of loans that were sold into the two trusts at issue in the current actions: Option One Mortgage Loan Trust 2006-2 (or, using the terminology provided by the parties, the "Homeward I" trust, which involves the loans at issue in 12-CV-5067); and Option One Mortgage Loan Trust 2006-3 (the "Homeward II" trust, which involves the loans**[\*5]** at issue in 12-CV-7319). Omnibus at 1. These trusts hold loans on behalf of investors, who are known as certificateholders. *Id.* Homeward services the loans on behalf of both trusts, and is suing Sand Canyon for alleged breaches of contractual representations and warranties in the Mortgage Loan Purchasing Agreements ("MLPAs") governing the sale of the loans into the trusts. *Id.*[[3]](#footnote-2)3

A number of other entities are central to the motions pending before the Court. LBF International I, LLC, and LBF International II, LLC (collectively, "LBF"), is a certificateholder in the Homeward I trust, and a proposed intervenor in both cases. Memorandum in Support of Sand Canyon's Motion to Compel Opus Capital Markets Consultants, LLC ("Opus"), dated May 5, 2017, Dkt. No. 215, at 1; Motion to Intervene, dated Feb. 13, 2017, Dkt. No. 190; Motion to Intervene, dated Feb. 13, 2017, Dkt. No. 167 in 12-CV-7319. In 2011, LBF retained the law firm Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel") to investigate whether the loans that Sand Canyon sold to the Homeward I trust breached warranties and representations. Declaration of Maria Ginzburg in Support of LBF's Opposition to Sand Canyon's**[\*6]** Motion to Compel Directed to Opus ("Opus Ginzburg Decl."), dated May 19, 2017, Dkt. No. 221, ¶ 1. In 2011, LBF hired Opus, a firm that specializes in review of mortgage loans, to analyze the loans in the Homeward I trust. *Id.* ¶ 2.

Wells Fargo Bank, N.A. ("Wells Fargo") is the trustee for the Homeward I trust. Declaration of Michael Calhoon in Support of Defendant's Motion to Compel Plaintiff to Comply with Its Discovery Obligations ("Omnibus Calhoon Decl."), dated May 5, 2017, Dkt. No. 213, Ex. 22 at 3.[[4]](#footnote-3)4 The trust's governing documents require certificateholders like LBF to coordinate with the trustee, Wells Fargo, about litigation on behalf of the trust. Memorandum of Law of Proposed Intervenor-Plaintiff LBF in Opposition to Sand Canyon's Motion to Compel Directed to Opus ("Opus Opp."), dated May 19, 2017, Dkt. No. 220, at 1.

In January of 2012, Quinn Emanuel, acting on behalf of LBF and in light of a review by Opus, notified Wells Fargo by letter that certain loans in the Homeward I trust were in breach of warranties and representations sufficient to trigger the repurchase obligations of Sand Canyon. Omnibus, Ex. 22 at 6-7; Opus Ginzburg Decl. ¶ 5. Quinn Emanuel requested that Wells**[\*7]** Fargo promptly send a repurchase demand to Sand Canyon, and provided a summary of material breaches that was prepared by Opus. *Id.* In response, Wells Fargo sent such a demand to Sand Canyon, and included with it both Quinn Emanuel's letter and Opus' summary. Opus Ginzburg Decl. 11 6. After Sand Canyon failed to address the alleged breaches, Wells Fargo "deputized" Homeward, as loan servicer, to initiate litigation against Sand Canyon. Opus Opp. at 2. When Homeward brought suit regarding loans in the Homeward I trust, it attached Opus' summary as an exhibit to its complaint. Declaration of Michael Calhoon in Support of Sand Canyon's Motion to Compel Opus ("Opus Calhoon Decl."), dated May 5, 2017, Dkt. No. 216, Ex. 1, Part 2.

In 2012, Homeward also sued Sand Canyon over alleged breaches of representations and warranties made with regard to 96 loans in the Homeward II trust. Plaintiff Homeward's Memorandum of Law in Support of Its Motion for a Protective Order Quashing Sand Canyon's Subpoena to PIR Capital LLC, dated May 5, 2017, Dkt. No. 191, at 1. In 2015, an unnamed certificateholder in the Homeward II trust and the certificateholder's law firm, Perry, Johnson, Anderson, Miller & Moskowitz, LLP ("Perry Johnson"),**[\*8]** retained a financial and economic consulting firm, PIR Capital, LLC ("PIR"), to determine if there was evidence that Sand Canyon had breached representations and warranties with respect to other loans in the Homeward II trust. Declaration of Jeremy R. Calva ("PIR Calva Decl."), dated May 4, 2017, Dkt. No. 192, ¶2. PIR concluded that there were reasons to believe Sand Canyon had breached warranties and representations with regard to 649 additional loans, and set out its conclusions in a summary that listed each loan and described the basis for the alleged breaches. PIR Calva Decl. ¶ 5; PIR at 1.

The certificateholder's law firm, Perry Johnson, thereafter sent a letter and PIR's summary to Law Debenture Trust Company of New York, which had been appointed a separate trustee of Homeward II in 2012 and was thus afforded certain rights and powers of Wells Fargo, also a trustee of the Homeward II trust. PIR at 3; Declaration of Brian V. Otero in Support of Homeward's Motion for Leave to File a Second Amended Complaint, dated Dec. 23, 2015, Ex. D (Dkt. No. 104-107 in 12-CV-7319). Law Debenture forwarded Perry Johnson's letter and the summary to Sand Canyon and, after Sand Canyon refused to remedy the alleged**[\*9]** breaches, Homeward moved in December 2015 for leave to amend its pleadings to add claims with respect to the 649 additional loans. PIR at 3. Homeward's motion was granted on September 30, 2016, Dkt. No. 124 in 12-CV-7319, and Homeward filed a Second Amended Complaint that included PIR's summary as an exhibit. Homeward II Compl., Ex. C.[[5]](#footnote-4)5

Ocwen Financial Corporation ("Ocwen") acquired Homeward in 2012 and remains its parent company. Homeward's Opposition to Sand Canyon's Motion to Compel ("Omnibus Opp."), dated May 19, 2017, Dkt. No. 222, at 18 n.17. Altisource Portfolio Solutions, S.A. ("Altisource"), provides data management and reporting services to Ocwen. Declaration of Patrick Cox ("Omnibus Cox Decl."), dated May 19, 2017, Dkt. No. 224 ¶ 2. Under the terms of a 2009 agreement between Ocwen and Altisource, Altisource stores, maintains, and manages data about Ocwen's mortgages, and provides technical support. Omnibus Cox Decl. ¶¶ 3-5, 8. Between February 2013 and April 2015, Ocwen employees used Altisource's servicing system to store and provide the data it needed to service loans. Omnibus Cox Decl. ¶¶ 6-7.

**B. Pending Discovery Motions**

At the time that these cases were referred to me for general**[\*10]** pretrial supervision, Order of Reference, dated April 3, 2017, Dkt. No. 204, there were several pending or proposed discovery motions. *See* Order, dated Apr. 7, 2017, Dkt. No. 206. The Court held a conference on April 21, 2017 to address the pending disputes and set a briefing schedule for three motions: an omnibus motion to compel Homeward to comply with certain of Sand Canyon's discovery requests, and two motions related to subpoenas that Sand Canyon had served on non-party consultants PIR and Opus. *See* Order, dated April 21, 2017, Dkt. No. 210. These motions are summarized below.

1. Omnibus Motion

On May 5, Sand Canyon filed an omnibus motion to compel covering a number of applications. Defendant's Motion to Compel Plaintiff to Comply with Its Discovery Obligations, dated May 5, 2017, Dkt. No. 211. Homeward filed its opposition papers on May 19, Omnibus Opp., and on May 26, Sand Canyon replied. Reply Memorandum of Law ("Omnibus Rep."), dated May 26, 2017, Dkt. No. 226. Sand Canyon's omnibus motion seeks production of two categories of documents: (1) documents related to the subprime mortgage crises in 2007 and 2008, and (2) documents it believes have been wrongfully withheld on the**[\*11]** basis of attorney-client privilege and work product protection.[[6]](#footnote-5)6

a. "State of the Economy" Requests

Sand Canyon seeks to compel Homeward to respond to requests for documents about the subprime mortgage crisis, referred to by both parties as "state of the economy" requests. Declaration of Brian Otero ("Omnibus Otero Decl."), dated May 19, 2017, Dkt. No. 223, Ex. A at 6, 8; Omnibus Opp. at 1. Sand Canyon initially made these requests on February 3, 2017 after Homeward filed a separate lawsuit against Radian Guaranty, Inc. ("Radian"), a mortgage insurer. Omnibus at 2; Omnibus Calhoon Decl., Ex. 5. In its complaint against Radian, Homeward made a number of statements about the mortgage crisis (such as, "[a]s a result of the deep economic recession, there was a dramatic increase in defaults on residential mortgage loans"); Sand Canyon's requests are for documents related to these statements. *See* Omnibus Calhoon Decl., Ex. 8 ¶¶ 37-43 (Homeward's statements about the mortgage crisis); Omnibus Calhoon Decl., Ex. 5 at 6-12 (Sand Canyon's document requests). According to Sand Canyon, a number of allegations that Homeward made in the complaint against Radian were "substantially similar to Sand Canyon's defenses here," and for that**[\*12]** reason, Sand Canyon served discovery requests seeking documents related to the statements. Omnibus at 2. Homeward contends that discovery is unwarranted because it is willing, in response to a [*Rule 36*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-138V-00000-00&context=) request, to admit the truth of the statements it made in its Radian complaint, and further argues that the requests are irrelevant, overbroad, unduly burdensome, and fail the proportionality test. Omnibus Opp. at 1, 3, 7, 12.

b. Documents Withheld in the Privilege Log

Sand Canyon separately takes issue with the assertion of attorney-client privilege and work product protection as to a number of documents in Homeward's privilege log, contending that Homeward waived privilege when it shared documents with Quinn Emanuel, Wells Fargo, and Altisource. Omnibus at 12, 17, 19. Homeward argues that no privilege was waived because certain exceptions apply to each of the entities with whom it shared documents. Omnibus Opp. at 14, 16, 18. Additionally, Sand Canyon claims that Ocwen, Homeward's parent company, cannot assert work product protection as to documents that were shared with Wells Fargo and Altisource. Omnibus at 19.

2. Subpoenaed Consultant Motions

Two of the pending motions relate to subpoenas served on the non-party consultants, Opus and PIR, who were retained by certificateholders and their attorneys in order to analyze the loans in the trusts. Sand Canyon moved**[\*13]** to compel Opus to produce documents. Sand Canyon's Motion to Compel Opus ("Opus Motion"), dated May 5, 2017, Dkt. No. 214. Proposed intervenor-plaintiff LBF, whose then-counsel Quinn Emanuel retained Opus in 2012, opposed the motion on May 19, Opus Opp., and on May 26, Sand Canyon replied. Reply Memorandum ("Opus Rep."), dated May 26, 2017, Dkt. No. 227.

Homeward also moved for a protective order quashing Sand Canyon's subpoena of PIR. Notice of Motion, dated May 5, 2017, Dkt. No. 190 in 12-CV-7319. Sand Canyon filed its opposition on May 19, to which Homeward replied on May 26. Memorandum of Law in Opposition ("PIR Opp."), dated May 19, 2017, Dkt. No. 197 in 12-CV-7319; Reply Memorandum of Law ("PIR Reply"), dated May 26, 2017, Dkt. No. 203 in 12-CV-7319.

These two motions relate to subpoenas that Sand Canyon served on Opus and PIR requesting documents and communications related to any work done on loans in the trusts. Opus Calhoon Decl. Ex. 4 at 5-6; Declaration of Brian V. Otero, in Support of Plaintiff's Motion for a Protective Order ("PIR Otero Decl."), dated May 5, 2017, Dkt. No. 193 in 12-CV-7319, Ex. A at 9-10. Sand Canyon contends the material sought is relevant to its rebuttal**[\*14]** of an argument that Homeward will make that Sand Canyon was on notice of breaches of warranties and representations, and because it will allow Sand Canyon to compare the consultants' analyses with other analyses of the loans. Opus at 9-19; PIR Opp. at 18-19. It also argues that the material is not privileged or protected as work product, and that any privileges were waived through the disclosure of the summaries. Opus at 11-16; PIR Opp. at 11-17.

Both Homeward and LBF have represented to the Court that Homeward will not rely on the work of PIR or Opus to prove that Sand Canyon breached its warranties and representations. PIR at 4, 12; PIR Reply at 10 n.10; Opus Opp. at 12; Omnibus Otero Decl. Ex. A at 18. Instead, Homeward has said that it will hire its own experts who will conduct an independent review of the loan files and create reports that will be provided to Sand Canyon. *Id.* LBF and Homeward argue that the materials sought from Opus and PIR are thus irrelevant, and furthermore are work product whose protection has not been waived; they also contend that the communications sought are protected by attorney-client privilege. Opus Opp. at 5, 12-14; PIR at 5, 9-12.

3. Settlement and Tolling Agreements Motion

On July 19, the Court held a conference to address additional discovery disputes that the parties**[\*15]** had raised by letter-motions, and set a briefing schedule as to the sole dispute that was not resolved at the conference. *See* Order, dated July 19, 2017, Dkt. No. 238. On July 28, Homeward moved to compel Sand Canyon to produce copies of all settlement and tolling agreements entered into by Sand Canyon in connection with mortgage loan repurchase demands. Letter Motion to Compel Production of Settlement and Tolling Agreements ("Agreements"), dated July 28, 2017, Dkt. No. 244. On August 4, Sand Canyon opposed the motion, Letter Response in Opposition to Motion ("Agreements Opp."), dated Aug. 4, 2017, Dkt. No. 248, and on August 10, Homeward filed a reply letter concerning potential redactions of the agreements. Letter, dated Aug. 10, 2017, Dkt. No. 251.

**II. DISCUSSION**

**A. Legal Standards**

1. Proportionality

"A district court has wide latitude to determine the scope of discovery." [*In re "Agent Orange" Prod. Liab. Litig., 517 F.3d 76, 103 (2d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RWT-52F0-TXFX-41XM-00000-00&context=); *see also* [*SEC v. Rajaratnam, 622 F.3d 159, 180-81 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:514B-3F71-652R-000G-00000-00&context=) (discussing discretion of district court to manage discovery). *Rule 26 of the Federal Rules of Civil Procedure*, as amended in 2015, provides that a party is entitled to discovery on "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *Fed. R. Civ. P. 26(b)(1)*. The Rule also sets forth factors to consider in**[\*16]** analyzing proportionality: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.*

2. Attorney-Client Privilege

"In New York, the attorney-client privilege protects confidential communications between attorney and client relating to legal advice." [*Millenium Health, LLC v. Gerlach, No. 15-CV-7235 (WHP) (JLC), 2015 U.S. Dist. LEXIS 169563, 2015 WL 9257444, at \*1 (S.D.N.Y. Dec. 18, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMT-J2K1-F04F-01GV-00000-00&context=) (quoting [*AIU Ins. Co. v. TIG Ins. Co., No. 07-CV-7052 (SHS) (HBP), 2008 U.S. Dist. LEXIS 66370, 2008 WL 4067437, at \*6 (S.D.N.Y. Aug. 28, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TC1-TCB0-TX4N-G0B0-00000-00&context=) (citing *N.Y. C.P.L.R. § 4503(a)*)).[[7]](#footnote-6)7 New York's codification of the attorney-client privilege provides in pertinent part:

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains . . . evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication . . . .

*N.Y. C.P.L.R. § 4503(a)(1)*. "The party asserting privilege carries the burden to prove every element of the privilege." [*Egiazaryan v. Zalmayev, 290 F.R.D. 421, 428 (S.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57Y1-1KS1-F04F-0435-00000-00&context=) (citing**[\*17]** [*People v. Mitchell, 58 N.Y.2d 368, 373, 448 N.E.2d 121, 461 N.Y.S.2d 267 (1983))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-YFV0-003D-G0J0-00000-00&context=). "The party asserting privilege also has the burden to establish that there has been no waiver." *Id.* (citing *John Blair Commc'ns, Inc. v. Reliance Capital Grp., 182 A.D.2d 578, 579, 582 N.Y.S.2d 720 (1st Dep't 1992))*.

a. Agency Exception to Privilege Waiver

An exception to the rule that "'communications made between a defendant and counsel in the known presence of a third party are not privileged' . . . exists where 'communications are made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication.'" [*Egiazaryan, 290 F.R.D. at 430*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57Y1-1KS1-F04F-0435-00000-00&context=) (quoting [*People v. Osorio, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 550 N.Y.S.2d 612 (1989))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-9RW0-003V-B3XB-00000-00&context=) (alterations omitted). The "scope of this exception 'is not to be defined by a third party's employment or function,'" but "the party asserting the agency exception must show: '(1) a reasonable expectation of confidentiality under the circumstances, and (2) that disclosure to the third party was necessary for the client to obtain informed legal advice.'" *Id.* (quoting *Don v. Singer, 19 Misc. 3d 1139[A], 866 N.Y.S.2d 91, 2008 NY Slip Op 51071[U], 2008 WL 2229743, at \*5 (N.Y. Sup. Ct. 2008)* (citations and alterations omitted). "[W]here the third party's presence is merely useful but not necessary, the privilege is lost." [*Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 104 (S.D.N.Y. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MWH-9T40-0038-Y1W2-00000-00&context=) (quotation marks omitted).

b. Common Interest Doctrine

The "common interest" doctrine is another "exception to the general rule that voluntary disclosure of confidential, privileged material to a third party waives any applicable**[\*18]** privilege." [*Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y., 284 F.R.D. 132, 139 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:561W-8YV1-F04F-00TH-00000-00&context=) (quoting [*Sokol v. Wyeth, Inc., No. 07-CV-8442 (SHS) (KNF), 2008 U.S. Dist. LEXIS 60976, 2008 WL 3166662, \*5 (S.D.N.Y. Aug. 4, 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T6D-VWD0-TXFR-J2NT-00000-00&context=).[[8]](#footnote-7)8 "Under the common interest doctrine . . . an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest." [*Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 620, 36 N.Y.S.3d 838, 57 N.E.3d 30 (2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JYW-B4R1-F04J-60NF-00000-00&context=). The doctrine "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." [*United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7NM0-003B-54NV-00000-00&context=). It exists "to protect the free flow of information from client to attorney . . . whenever multiple clients share a common interest about a legal matter." *Id.*

"Parties may share a 'common legal interest' even if they are not parties in ongoing litigation." [*Schaeffler v. United States, 806 F.3d 34, 40 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HBN-X821-F04K-J07N-00000-00&context=). "It is . . . unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply." *Id.* (quoting [*Schwimmer, 892 F.2d at 244*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7NM0-003B-54NV-00000-00&context=)) (alterations omitted). However, "[t]he common interest rule does not apply merely . . . because one party has an interest in a litigation involving another**[\*19]** party," [*Egiazaryan, 290 F.R.D. at 434*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57Y1-1KS1-F04F-0435-00000-00&context=), and "only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected." [*Schaeffler, 806 F.3d at 40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HBN-X821-F04K-J07N-00000-00&context=) (quoting [*Schwimmer, 892 F.2d at 243*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7NM0-003B-54NV-00000-00&context=)) (alterations omitted). The "communication must also relate to litigation, either pending or anticipated, in order for the exception to apply." [*Ambac Assur. Corp., 27 N.Y.3d at 620*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JYW-B4R1-F04J-60NF-00000-00&context=).

3. Work Product Doctrine

Federal law governs the applicability of the work product doctrine[[9]](#footnote-8)9 and is codified in *Rule 26(b)(3) of the Federal Rules of Civil Procedure*, which provides that a party is not entitled to obtain discovery of "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or its representative" unless a showing of substantial need and lack of undue hardship is made. *Fed. R. Civ. P. 26(b)(3)*; *see, e.g.,* [*Tudor Ins. Co. v. Stay Secure Const. Corp., 290 F.R.D. 37, 39-41 (S.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57VJ-WR01-F04F-02PN-00000-00&context=). "Courts in this Circuit interpret *Rule 26(b)(3)* to afford work product protection to a document 'created because of the prospect of litigation,' even if it was simultaneously created to 'assist with a business decision;' however, protection is withheld from documents 'that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'" [*Travelers Prop. Cas. Co. of Am., LLC v. Daimler Trucks N. Am., LLC, No. 14-CV-1889 (JPO) (JLC), 2015 U.S. Dist. LEXIS 48760, 2015 WL 1728682, at \*2 (S.D.N.Y. Apr. 14, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FRW-SSV1-F04F-01SG-00000-00&context=) (quoting**[\*20]** [*United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S35-S1B0-0038-X0TH-00000-00&context=). Work product protection will not be lost simply by disclosure of the work to a third party; it is "waived only when documents are used in a manner contrary to the doctrine's purpose, when disclosure substantially increases the opportunity for potential adversaries to obtain the information." [*Schanfield v. Sojitz Corp. of Am., 258 F.R.D. 211, 214 (S.D.N.Y. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VT5-D2J0-TXFR-J2WN-00000-00&context=) (quotation marks omitted).

**B. Analysis**

1. Sand Canyon's Omnibus Motion

a. The "State of the Economy" Requests Are Not Proportional to the Needs of the Case

Sand Canyon argues its "state of the economy" requests are relevant for a number of reasons. It contends that the documents sought are necessary to explain the economic conditions of the housing crisis and contextualize default rates, which in turn will enable Sand Canyon to challenge Homeward's arguments that Sand Canyon "must have had lax underwriting standards because loans went into default," and that high default rates put Sand Canyon on notice of problems with the loans. Omnibus at 4-6;[[10]](#footnote-9)10 Defendant Sand Canyon's Supplemental Memorandum ("Sand Canyon Suppl."), dated July 28, 2017, Dkt. No. 245, at 2-4.[[11]](#footnote-10)11 Sand Canyon further argues that it is entitled to documents that demonstrate Homeward's knowledge of economic conditions**[\*21]** because of certain remedies Homeward is seeking, and also that the documents sought are relevant to Sand Canyon's defenses because they will "likely call into question the credibility" of Homeward's position that high rates of default were caused by the quality of the loans rather than the collapse of the real estate market. Omnibus at 10-11. Finally, Sand Canyon contends that the documents would allow it to challenge Homeward's claims in the case with its own documents and testimony. Sand Canyon Suppl. at 4.

Homeward responds that the requests are overbroad and unduly burdensome, not relevant, and fail the proportionality test. It also contends that discovery is unwarranted because it will admit the truth of the statements made in its Radian pleading (which is itself an admission, as it acknowledges) in response to requests for admission. Omnibus Opp. at 1, 3, 7, 12.

*Rule 26* was amended in 2015 to restore the proportionality factors to the subsection defining the scope of discovery, a position the factors had occupied prior to an amendment in 1993. *See* *Fed. R. Civ. P. 26(b)(1)* Advisory Committee's Notes to 2015 Amendment. The 2015 amendments were intended, at least in part, to encourage judges to be more aggressive in policing discovery overreaching. *See, e.g.,* [*Henry v. Morgan's Hotel Grp., Inc., No. 15-CV-1789 (ER) (JLC), 2016 U.S. Dist. LEXIS 8406, 2016 WL 303114 \*2 (S.D.N.Y. Jan. 25, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HXX-TJ11-F04F-03G8-00000-00&context=)**[\*22]**; [*State Farm Mut. Auto. Ins. Co. v. Fayda, No. 14-CV-9792 (WHP) (JCF), 2015 U.S. Dist. LEXIS 162164, 2015 WL 7871037, at \*2 (S.D.N.Y. Dec. 3, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HHK-93X1-F04F-00HY-00000-00&context=). Indeed, the amendments make proportionality "the new black." [*Vaigasi v. Solow Mgmt. Corp., No. 11-CV-5088 (RMB) (HBP), 2016 U.S. Dist. LEXIS 18460, 2016 WL 616386, at \*14 (S.D.N.Y. Feb. 16, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J3K-Y3K1-F04F-0520-00000-00&context=) (quotation marks omitted). Furthermore, "[p]roportionality and relevance are conjoined concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate." *Id.* (quotation marks omitted).

On the record presented, the Court concludes that the "state of the economy" requests are not proportional to the needs of the case. Both parties recognize the number of documents at issue is considerable. Homeward contends that responding to just one of Sand Canyon's "state of the economy" requests would likely produce thousands of documents and, among other things, require Homeward to search for and produce irrelevant articles that make references to real estate prices. Omnibus Opp. at 4-5. Sand Canyon acknowledges that the number of responsive documents could be significant. Omnibus at 3 ("And responsive documents *do* exist, as counsel for Homeward acknowledged during a . . . meet and confer that there were a 'huge' number of documents just in response to Request No. 1").[[12]](#footnote-11)12

**[\*23]**Such discovery is not warranted in light of the "importance of the discovery in resolving the issues," and in considering "whether the burden . . . outweighs its likely benefit." *Fed. R. Civ. P. 26(b)(1)*. The Court does not find plausible any of the explanations offered regarding the importance of the documents sought. To the extent that an open issue in these cases is the cause of default rates, it seems tenuous at best that Sand Canyon would need Homeward's internal documents to explain and develop evidence about economic conditions at the time of the alleged breaches and misrepresentations. Sand Canyon will undoubtedly retain experts to testify about default rates, economic conditions, and other issues of material significance to the action.

With regard to rebutting a willful blindness theory of notice, what Homeward knew about the state of the economy at the relevant times is not probative of what Sand Canyon knew or did not know. In a similar case regarding alleged breaches of warranties and representations made about mortgage loans, the court denied discovery of documents related to plaintiff's knowledge about overall market conditions, rejecting as questionable defendant's assertion that such discovery**[\*24]** was relevant to its potential defenses. [*Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc., No. 12-CV-1579 (HB) (JCF), 2012 U.S. Dist. LEXIS 167981, 2012 WL 5927379, at \*4 (S.D.N.Y. Nov. 21, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:574T-6T41-F04F-02JR-00000-00&context=) ("Assured's general knowledge of the RMBS market, however, is too tenuously related to any plausible defense to be a proper subject of discovery").

Furthermore, particularly as Homeward is willing to admit to the truth of the statements it made in its Radian complaint, the burden of engaging in further discovery does not outweigh any alleged benefit. Here, the Court cannot find that the potentially voluminous and burdensome discovery Sand Canyon seeks is warranted simply because it would like to use Homeward's internal documents to demonstrate that Homeward had knowledge of matters it is already willing to admit to.

Given that the Court is unpersuaded that Sand Canyon would need Homeward's internal documents to explain or develop evidence about economic conditions that it would not already have from its own experts, as well as Homeward's willingness to admit that the statements it made are true in response to Requests for Admission, the benefit of discovery related to the statements does not outweigh the burden that would be posed in requiring its production. The Court thus**[\*25]** denies Sand Canyon's omnibus motion to the extent it seeks to compel a response to its "state of the economy" requests on the ground that the production sought is not proportional to the needs of the case.

b. Documents Withheld in the Privilege Log

i. Ocwen may assert work product protection

As a threshold matter, the parties do not appear to dispute whether Homeward's parent company, Ocwen, can assert attorney-client privilege, but there is a dispute as to whether Ocwen can assert work product protection. Omnibus at 19; Omnibus Opp. at 18; Omnibus Reply at 9. Sand Canyon cites a case in which biological, rather than corporate, parents were not permitted to assert work product protection in a case they brought on behalf of their minor child. Omnibus at 19 (citing [*Ramsey v. NYP Holdings, Inc., No. 00-CV-3478 (VM) (MHD), 2002 U.S. Dist. LEXIS 11728, 2002 WL 1402055, at \*6 (S.D.N.Y. June 27, 2002))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4666-WWP0-0038-Y54K-00000-00&context=). This case is inapposite. In [*Ramsey*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4666-WWP0-0038-Y54K-00000-00&context=), the court found that a murder victim's parents, who had initiated an investigation allegedly in anticipation of criminal charges being brought against themselves, could not assert work product protection as to documents generated during the investigation in the context of an unrelated libel suit brought on behalf of their other child. *Ramsey* is distinguishable because it features biological**[\*26]** parents, because the underlying action was unrelated to the anticipated criminal action for which the materials were allegedly prepared, and because the parents ultimately did not carry the burden of showing that the materials were generated in anticipation of *any* litigation at all. [*In re Veeco Instruments, Inc. Sec. Litig., No. 05-MD-1695 (CM) (GAY), 2007 U.S. Dist. LEXIS 16922, 2007 WL 724555, at \*6 (S.D.N.Y. Mar. 9, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N7T-77G0-0038-Y31M-00000-00&context=) (rejecting applicability of *Ramsey* because "[u]nlike the present case, . . . the parents asserting work product privilege had entirely neglected to address the issue of whether they would have undertaken the investigation absent the prospect of prosecution and therefore failed to carry their burden of proof).

Homeward cites [*Bass Pub. Co. v. Promus Cos. Inc., 868 F. Supp. 615 (S.D.N.Y. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-6SC0-003B-V2T5-00000-00&context=), for the proposition that a new corporate parent inherits the privilege assertions of its subsidiary, and thus Ocwen has the right to assert privileges that Homeward would be entitled to assert. Omnibus Opp. at 18 n.17. Given the extent to which the law joins the rights of a parent company and its subsidiary to assert privilege in certain circumstances,[[13]](#footnote-12)13 the Court considers it permissible for Ocwen, in theory, to assert work product protection in these cases.[[14]](#footnote-13)14 However, Ocwen must establish that the circumstances justify its assertion here, and, additionally,**[\*27]** even if Ocwen anticipated this litigation at the time each document was created, there is still the "burden of demonstrating that the documents would not have been prepared but for the litigation." [*Grinnell Corp. v. ITT Corp., 222 F.R.D. 74, 78 (S.D.N.Y. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48B6-Y0Y0-0038-Y1B4-00000-00&context=) (quoting [*Weber v. Paduano, No. 02-CV- 3392 (GEL), 2003 U.S. Dist. LEXIS 858, 2003 WL 161340, at \*7 (S.D.N.Y. January 22, 2003))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47S7-44W0-0038-Y4F4-00000-00&context=). "That burden must be satisfied for each document individually on the basis of its privilege log entries, affidavits, and/or the documents themselves." *Id.*

At this time, however, the Court addresses only the issue of whether Ocwen can, as a matter of law, assert work product protection in this lawsuit. It does not reach the issue as to whether the privilege applies to specific documents because it cannot ascertain from Sand Canyon's filings which documents subject to privilege are being sought. Sand Canyon refers to "several documents concerning litigation against originators and mortgage insurers" that were shared with Wells Fargo, as well as to 12 other documents that were shared with Altisource. Omnibus at 19 n.24. If the parties find that disputes remain as to particular documents withheld as privileged, Sand Canyon may make a further application to the Court in which it specifies which documents from the privilege logs are being sought.

ii. Homeward and LBF**[\*28]** share a common interest such that privilege was not waived through the sharing of documents with Quinn Emanuel

Sand Canyon has moved to compel the production of 121 documents Homeward shared with Quinn Emanuel, counsel to certificateholder LBF, 113 of which Homeward listed in its privilege log as protected by attorney-client privilege, and 43 of which it listed as work product protected. Omnibus at 12, 17. Sand Canyon argues that the documents are not privileged because they were shared with a third party, Quinn Emanuel, and thus any privilege has been waived. Omnibus at 12. Homeward contends that documents shared with Quinn Emanuel satisfy the requirements for attorney-client privilege, and that the privilege was not waived because LBF and Homeward had a common legal interest such that the "common interest" doctrine applies, and, in the alternative, because the agency exception applies. Omnibus Opp. at 14, 16. Sand Canyon responds that the common interest doctrine is inapplicable because LBF threatened to sue Homeward if Homeward did not sue Sand Canyon, and additionally, to the extent that LBF and Homeward did develop a common interest at some point in time, their earlier communications are not privileged. Omnibus at 14. Sand Canyon further argues**[\*29]** that the agency exception does not apply, and challenges the assertion of work product protection. Omnibus at 16-17.

In order to qualify for attorney-client privilege protection, material shared between Quinn Emanuel and Homeward must be "confidential communications between attorney and client relating to legal advice," [*Millenium, 2015 U.S. Dist. LEXIS 169563, 2015 WL 9257444, at \*1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMT-J2K1-F04F-01GV-00000-00&context=), and LBF and Homeward must have had a common interest "of a sufficient legal character to prevent a waiver by the sharing of those communications." [*Schaeffler, 806 F.3d at 41*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HBN-X821-F04K-J07N-00000-00&context=). Given that neither side disputes that the communications would be subject to attorney-client privilege but for having been shared with Quinn Emanuel,[[15]](#footnote-14)15 the Court's inquiry will focus on whether a common legal interest exists such that communications with LBF's counsel do not constitute waiver.

Here, Homeward and LBF share a sufficient common legal interest in breach of warranty and representation claims made regarding loans in the Homeward I trust such that, under the common interest doctrine, communications made in furtherance of that interest are protected by attorney-client privilege. LBF has more than merely a general "interest in a litigation." [*Egiazaryan, 290 F.R.D. at 434*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57Y1-1KS1-F04F-0435-00000-00&context=). The very existence of the Homeward I case is a consequence of LBF's actions to investigate**[\*30]** and then enforce the legal rights of the trust. Furthermore, one of the agreements that governs the trust, the Pooling and Service Agreement ("PSA"), requires that Homeward, as the loan servicer, enforce repurchase obligations for the benefit of certificateholders, including LBF. Omnibus Opp. at 15; *see also* Omnibus Otero Decl. Ex. C at 6-7 ("for the benefit of the Trustee and the Certificateholders, [Homeward] shall enforce the obligations ... of the Originator" including any obligation "to purchase a Mortgage Loan on account of... a breach of a representation, warranty or covenant"). Sand Canyon recognizes as much in a declaration it filed in support of its motion: "Homeward is suing pursuant to a contractual obligation to the Trustees, which in turn act for the certificateholders of the Trusts. Should Homeward recover on behalf of the Trusts, the benefit will ultimately flow to the Trusts' certificateholders." Omnibus Calhoon Decl. ¶ 3. Additionally, LBF is seeking to intervene in the Homeward I case.

Homeward cites a recent New York case in which a trustee sued a mortgage sponsor for breaches of warranties and representations and the court found that communications between the trustee and one of the trust's**[\*31]** certificateholders concerned a "common legal interest," and were properly withheld as privileged. [*ACE Sec. Corp. v. DB Structured Prods., Inc., 55 Misc. 3d 544, 559-63, 40 N.Y.S.3d 723 (N.Y. Sup. Ct. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KYV-9R51-F04J-8039-00000-00&context=). The court reasoned that communications about "repurchase demands to coordinate a legal strategy regarding how to enforce the rights of the trust" were privileged, noting that a "common legal interest need not be identical" but rather exists "where an interlocking relationship or a limited common purpose necessitates disclosure to certain parties." [*Id. at 561*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KYV-9R51-F04J-8039-00000-00&context=) (quoting [*GUS Consulting GMBH v. Chadbourne & Parke LLP, 20 Misc. 3d 539, 542, 858 N.Y.S.2d 591 (N.Y. Sup. Ct. 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SMV-7S90-TX4N-G0W7-00000-00&context=) (quotation marks omitted). According to the court, the communications were "exchanged in furtherance of [the trustee] and the certificateholders' legal strategy to put back defective loans," were "necessary to coordinate their position," and the parties' "joint desire to put back defective loans constituted a common legal interest." *Id.* Here, as in [*ACE*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KYV-9R51-F04J-8039-00000-00&context=), the communications were needed to "coordinate a legal strategy regarding how to enforce the rights of the [t]rust." *Id.*

Sand Canyon argues that the potential for a lawsuit between LBF and Homeward destroys common interest. However, in New York, the possibility of a lawsuit between two parties does not prevent them from sharing confidential information for the purpose of a common legal interest.**[\*32]** [*ACE Sec. Corp., 55 Misc. 3d at 560*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KYV-9R51-F04J-8039-00000-00&context=) (common legal doctrine may apply "despite an adversarial relationship between the two parties asserting it").[[16]](#footnote-15)16

Finally, Sand Canyon argues that even if a common legal interest was developed at some "particular point" in time, waiver would still apply as to earlier communications. Omnibus at 14. Sand Canyon cites a case in which the Fourth Circuit made a temporal distinction between earlier and later communications exchanged between two parties, and found that only the later ones were privileged under the common legal interest doctrine. Omnibus at 14 (citing [*Hunton & Williams v. U.S. Dep't of Justice, 590 F.3d 272, 286 (4th Cir. 2010))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XG7-RK60-YB0V-G03D-00000-00&context=). However, this case is not helpful to Sand Canyon. In [*Hunton*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XG7-RK60-YB0V-G03D-00000-00&context=), a private defendant reached out in March 2005 to individuals at the U.S. Department of Justice ("DOJ") to lobby the government to become involved in the lawsuit. The Fourth Circuit found that the common interest doctrine protected material communicated between the parties after DOJ filed a Statement of Interest in the litigation in November 2005, and "expressed no opinion on the ultimate merits" of whether the doctrine protected earlier materials, remanding the case while observing that there were "a number of items in the record suggesting that DOJ may not have decided to partner [in the] litigation**[\*33]** much before November 2005." [*Hunton, 590 F.3d at 286*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XG7-RK60-YB0V-G03D-00000-00&context=). The Fourth Circuit held that "[t]he common interest doctrine requires a meeting of the minds, but it does not require that the agreement be reduced to writing or that litigation actually have commenced." [*Id. at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XG7-RK60-YB0V-G03D-00000-00&context=). In the cases at bar, as discussed above, the purpose behind the communications at issue was *always* LBF's interest in the enforcement of rights in the trust. Homeward was not therefore like the litigant in [*Hunton*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XG7-RK60-YB0V-G03D-00000-00&context=), which communicated with DOJ in an effort to entice it to join the suit.

The Court thus finds that Homeward and LBF, who are joined by the Homeward I trust PSA and through their pursuit of the warranty and representation-related claims made in the Homeward I case, have an "interlocking relationship or a limited common purpose," [*ACE, 55 Misc. 3d at 561*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KYV-9R51-F04J-8039-00000-00&context=) (quotation marks omitted), and "an ongoing common enterprise," [*Schaeffler, 806 F.3d at 40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HBN-X821-F04K-J07N-00000-00&context=) (quotation marks omitted), such that the common interest doctrine can successfully be invoked to defeat waiver of attorney-client privilege.[[17]](#footnote-16)17

As to the 43 documents that Sand Canyon claimed were improperly classified as work product protected, Homeward did not defend its assertion of work product in its opposition papers, and thus the Court cannot find that it has**[\*34]** met its "burden of demonstrating that the documents would not have been prepared but for the litigation." [*Grinnell Corp., 222 F.R.D. at 78*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48B6-Y0Y0-0038-Y1B4-00000-00&context=) (quoting [*Weber, 2003 U.S. Dist. LEXIS 858, 2003 WL 161340, at \*7)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47S7-44W0-0038-Y4F4-00000-00&context=).

Thus, Sand Canyon's motion to compel the production of materials exchanged with Quinn Emanuel and protected by attorney-client privilege is denied. Sand Canyon's motion to compel the production of material exchanged with Quinn Emanuel and withheld as work product is granted.

iii. Homeward and Wells Fargo share a common interest such that privilege was not waived

Sand Canyon also seeks communications between Homeward and Wells Fargo. Homeward withheld these communications on the grounds of attorney-client privilege. Omnibus at 17.[[18]](#footnote-17)18 Homeward argues that the common interest doctrine and the agency exception apply such that privilege was not waived. Omnibus Opp. at 16, 18. Sand Canyon contends that the communications are not privileged because they relate to "ordinary trust business" and are not legal in nature. Omnibus at 17. In the alternative, it rejects the applicability of the common interest doctrine, at least as to any communications that pre-date an agreement between Wells Fargo and Homeward to coordinate and cooperate in repurchase litigation against Sand Canyon. *Id.* at 17-18, 18 n.23.

For many of the reasons already discussed related**[\*35]** to LBF, Wells Fargo and Homeward have a sufficiently common legal interest such that communications made in furtherance of that interest are protected by attorney-client privilege. LBF originally informed Wells Fargo of the alleged breaches of representations and warranties that are at issue in Homeward I, and Wells Fargo filed many of the repurchase requests at issue here. As noted, the governing PSA requires that Homeward, the loan servicer, "enforce [repurchase] obligations" "for the benefit of' Wells Fargo and the certificateholders. Omnibus Otero Decl. Ex. C at 6. *See also* [*LaSalle Bank, 209 F.R.D. at 116*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46F2-Y9Y0-0038-Y3C7-00000-00&context=) (finding PSA was "key document establishing the existence of [a] common legal interest" between trustee and loan servicer). Wells Fargo and Homeward have an "interlocking relationship," [*ACE, 55 Misc. 3d at 561*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KYV-9R51-F04J-8039-00000-00&context=) (quotation marks omitted), and "an ongoing common enterprise," [*Schaeffler, 806 F.3d at 40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HBN-X821-F04K-J07N-00000-00&context=) (quotation marks omitted), such that their communications "made in furtherance of' their common legal interest are privileged. [*Ambac, 27 N.Y.3d at 620*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JYW-B4R1-F04J-60NF-00000-00&context=).

Sand Canyon rightly notes that material created in the ordinary course of business is not privileged. However, while Sand Canyon asserts that "much of the material concerns ordinary trust business," Omnibus at 17, Homeward counters that it has already**[\*36]** provided Sand Canyon with the material created in the ordinary course of business and is withholding only material pertaining to legal matters. Omnibus Opp. at 16. As Homeward observes, Omnibus Opp. at 17, Sand Canyon inaccurately characterizes the relevant log entries. For example, Sand Canyon describes a log entry as "status of case," when the log entry in its entirety reads: "[e]mail chain between or among attorney(s) and client(s) requesting and providing information to facilitate the rendering of legal advice and revealing legal strategy regarding status of case." *Compare* Omnibus at 18; *with* Omnibus Calhoon Decl. Ex. 24 at 4. Sand Canyon describes another entry thusly: "communications from law firm involved in trustee litigation," but the corresponding entry reads in full: "[e]mail chain between or among attorney(s) memorializing confidential communications with counsel regarding communications from law firm involved in trustee litigation." *Compare* Omnibus at 18; *with* Omnibus Calhoon Decl. Ex. 24 at 7. Homeward's descriptions are consistent with the requirements of New York's attorney-client privilege, which protects "confidential communications between attorney and client relating to legal advice," [*Millenium, 2015 U.S. Dist. LEXIS 169563, 2015 WL 9257444, at \*1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMT-J2K1-F04F-01GV-00000-00&context=), and do not suggest that the communications were part**[\*37]** of the ordinary course of business between the trustee and the loan servicer.

Because the Court determines that the communications with Wells Fargo are covered by the common interest doctrine, it is unnecessary to decide whether the material is covered by the agency exception. Thus, Sand Canyon's application to compel the discovery of the materials exchanged with Wells Fargo and protected by attorney-client privilege is denied.[[19]](#footnote-18)19

iv. Homeward and Ocwen waived privilege by sharing documents with Altisource

Sand Canyon seeks 25 documents involving communications with Altisource and withheld by Ocwen and Homeward on the basis of attorney-client privilege and/or work product protection. Omnibus at 19; Omnibus Opp. at 18.[[20]](#footnote-19)20 Homeward contends that attorney-client privilege was not waived as to any of the documents because Altisource employees were the "functional equivalent" of Homeward and Ocwen employees and, alternatively, that Altisource employees were agents of Homeward and Ocwen. *Id.* at 18, 21. According to its Senior Vice President of Default Servicing, Ocwen collaborated extensively with Altisource to develop new process flows, data fields, and data setups, and if Ocwen had not worked with Altisource, it would otherwise have been**[\*38]** required to employ additional people to service its loans and meet ***regulatory*** obligations. Omnibus Cox Decl. ¶ 9. Sand Canyon responds that neither the agency nor the "functional equivalent" exception applies, Omnibus Rep. at 8, and that material created in the normal course of business is not eligible for work product protection. Omnibus at 19 n.24.

The agency exception prevents waiver of communications made through an agent where the agent is facilitating communications between the attorney and the client and where disclosure of the communications to the agent is necessary (not merely useful) for the *client* to obtain informed legal advice. *See, e.g.,* [*Allied Irish Banks, 240 F.R.D. at 103-04*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MWH-9T40-0038-Y1W2-00000-00&context=). Furthermore, "courts applying the agency exception under New York law have required that the third party 'be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.'" [*Egiazaryan, 290 F.R.D. at 432*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57Y1-1KS1-F04F-0435-00000-00&context=) (quoting [*Nat'l Educ. Training Grp., Inc., v. SkillSoft Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 8680, 1999 WL 378337, at \*4 (S.D.N.Y. June 10, 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WPP-T4K0-0038-Y145-00000-00&context=) (noting that one court characterized New York law as a "conservative approach that recognizes the doctrine only in narrow circumstances in which the non-lawyer's services are absolutely necessary to effectuate the lawyer's legal services") (quotation marks and alterations omitted).**[\*39]**

The agency exception is not applicable here. While Ocwen and Homeward (and their counsel) presumably had good reasons for communicating with Altisource, the reasons proffered are not sufficient to satisfy the requirements of the agency exception. Homeward has not established that communication with Altisource was necessary in order to facilitate communication between *Ocwen* and *Ocwen's counsel*, or between *Homeward and Homeward's counsel.* *See, e.g.,* [*id. at 431*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57Y1-1KS1-F04F-0435-00000-00&context=) (agency exception inapplicable to third-party retained to develop key messages in support of lawsuit because party claiming privilege failed to show that third-party's "involvement was necessary to facilitate communications between [party claiming privilege] *and his counsel*, as in the case of a translator or an accountant clarifying communications between an attorney and client") (emphasis in original). Altisource, a company that Ocwen worked with to handle Ocwen's data on a routine basis, does not, based on the record presented, appear to have had an indispensable role in translating, interpreting, or helping with the communications between Ocwen and counsel. *See, e.g.,* [*Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41VG-2WK0-0038-Y469-00000-00&context=) (agency exception inapplicable where communications with third-party**[\*40]** may have been helpful to counsel in formulating legal strategy but where third-party, "far from serving the kind of 'translator' function served by [an] accountant," was "simply providing ordinary public relations advice").

Homeward's examples, such as emails exchanged between Ocwen, Ocwen's counsel, and Altisource in order to ensure that Altisource's data management system complied with relevant laws, Omnibus Opp. at 20-21, do not satisfy the agency exception because they do not support the claim that Altisource was an agent of Ocwen or of Ocwen's counsel or was necessary (not merely useful) for the provision of legal advice to Ocwen. [*Allied Irish Banks, 240 F.R.D. at 104*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MWH-9T40-0038-Y1W2-00000-00&context=) (agency exception not applicable where "no factual record" supported claim that third-party was "acting merely as an agent or employee" or their presence was "'necessary' for the provision of legal advice, as an interpreter's presence might be"). Altisource is a company with which Ocwen does business; it does not qualify as an agent of Ocwen simply because it has communicated with Ocwen's lawyers or discussed legal issues with them.

In its opposition to Sand Canyon's motion, Homeward asserts the agency exception as an alternative, and argues that the proper mode of analysis**[\*41]** is the "functional equivalent" exception to waiver of privilege. Under this exception, sharing communications with a third party does not destroy privilege if the "third-party employees acted as the 'functional equivalent' of a party's own employees." Omnibus Opp. at 19. Without reaching the question of whether or not the functional equivalent exception to waiver is valid, the Court finds that Homeward has failed to satisfy its burden under the functional equivalent analysis.[[21]](#footnote-20)21

To determine whether a third party can be considered the "functional equivalent" of an employee, courts look to (1) whether the third party had "primary responsibility for a key corporate job," (2) "whether there was a continuous and close working relationship between the [third party] and the company's principals on matters critical to the company's position in litigation," and (3) "whether the [third party] is likely to possess information possessed by no one else at the company." [*Exp.-Imp. Bank, 232 F.R.D. at 113*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HM8-TJS0-TVW3-P32C-00000-00&context=).

None of these factors weighs in favor of Altisource employees being characterized as the functional equivalent of Ocwen employees. Altisource was not given primary responsibility for a key corporate job. Altisource is an independent**[\*42]** company that provides services and technology to multiple clients. Its role in storing and managing data for Ocwen did not integrate it into Ocwen's "corporate structure." [*Exp.-Imp. Bank., 232 F.R.D. at 113*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HM8-TJS0-TVW3-P32C-00000-00&context=). Homeward has not alleged that any of the communications between Ocwen and Altisource relate to Ocwen or Homeward's position in these cases. Even if Altisource had information possessed by no one at Ocwen, such a fact alone cannot transform the relationship such that Altisource's employees are the "functional equivalent" of Ocwen's employees. Businesses routinely rely on other companies to carry out important functions and services, including but not limited to shipping, accounting, customer service, and, as here, data storage and management. If this relationship satisfied the functional equivalent standard, the exception could well swallow the rule.

Homeward relies on three cases whose facts are distinguishable. Omnibus Opp. at 19-20. In [*Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc., No. 01-CV-3016 (AGS) (HBP), 2002 U.S. Dist. LEXIS 22215, 2002 WL 31556383 (S.D.N.Y. Nov. 15, 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4788-ST80-0038-Y438-00000-00&context=), the court found that Fox Film Corp.'s disclosure of communications to non-employee independent contractors did not constitute waiver because the non-employees "were the functional equivalent of employees." [*2002 U.S. Dist. LEXIS 22215, [WL] at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4788-ST80-0038-Y438-00000-00&context=). The court relied heavily**[\*43]** on "[t]he fact that the nature of the industry dictates the use of independent contractors over employees," and noted that "Fox's determination to conduct its business through the use of independent contractors is a result of the sporadic nature of employment in the motion picture industry." *Id.* Homeward has not argued that the nature of loan servicing dictates the use of independent contractors, or that its needs for data maintenance and management are sporadic.

The court in *In re Copper* found that a Japanese company did not waive privilege over communications it shared with a "crisis management" public relations firm that was retained to handle matters arising from a trading scandal. [*In re Copper, 200 F.R.D. at 215*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42YM-PNT0-0038-Y4SR-00000-00&context=). The company hired the firm because it had "no prior experience in dealing with issues relating to publicity arising from high profile litigation," and because it "lacked experience in dealing with the Western media." *Id.* Unlike in *Copper*, Altisource was not "essentially, incorporated into [Ocwen's] staff to perform a corporate function that was necessary in the context of the government investigation, actual and anticipated private litigation, and heavy press scrutiny," nor was it retained "to deal with**[\*44]** . . . problems following" an unexpected incident such as "the exposure of the copper trading scandal." [*Id. at 219*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42YM-PNT0-0038-Y4SR-00000-00&context=).

Finally, *In re Flonase*, the court rejected the "very narrow" approach taken in *Exp.-Imp. Bank* and adopted a "broad practical approach." *In re Flonase* ***Antitrust*** *Litig., 879 F. Supp. 2d 454, 458-60 (E.D. Pa. 2012))*. It found that an independent consultant was the functional equivalent of a pharmaceutical company's employee. *Id. at 460*. However, in *Flonase*, the consultant was part of a specific team with a specific purpose (a "brand maturation team"), "played a crucial role in the team, assisting in an administrative, managerial, and analytic capacity," and assisted with "legal and ***regulatory*** work." *Id. at 455, 460*. Homeward has not alleged that Altisource employees were integrated onto teams at Ocwen, or played crucial roles in specific projects. Rather, based on the record presented, it appears that Altisource was an entirely separate company that simply provided ongoing and general services to Ocwen.

As neither the agency nor functional equivalent exceptions apply, Homeward and Ocwen waived attorney-client privilege when they shared material with Altisource (and, it appears, LPS Default Solutions).[[22]](#footnote-21)22

As to the documents that Sand Canyon claimed were improperly classified as work product,**[\*45]** Homeward did not defend its assertion of work product in its opposition papers. Omnibus Opp. at 18-22.[[23]](#footnote-22)23 Thus, the Court concludes that it failed to meet its "burden of demonstrating that the documents would not have been prepared but for the litigation." [*Grinnell Corp., 222 F.R.D. at 78*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48B6-Y0Y0-0038-Y1B4-00000-00&context=) (quoting [*Weber, 2003 U.S. Dist. LEXIS 858, 2003 WL 161340, at \*7)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47S7-44W0-0038-Y4F4-00000-00&context=).

For the foregoing reasons, Sand Canyon's motion to compel the production of material exchanged with Altisource is granted.

2. Subpoenaed Consultant Motions

Two of the pending motions relate to subpoenas served by Sand Canyon on the consultants, Opus and PIR, who were retained by certificateholders and their attorneys in order to analyze the loans in the trusts. As discussed in Section I.A, the consultants' summaries were eventually shared with Sand Canyon in the context of repurchase requests and also attached to the complaints in both cases. Homeward and proposed-intervenor LBF have represented that the consultants' work will not be used to prove breaches of representations and warranties, and that Homeward will use its own expert to prove its claims. PIR at 4, 12, PIR Reply at 10 n.10, Opus Opp. at 12, Omnibus Otero Decl. Ex. A at 18.

Sand Canyon's subpoenas, which are similar but not identical to each other, seek two types of production. The first category involves**[\*46]** documents related to the consultants' work on the loans. Opus Calhoon Decl. Ex. 4 at 5-6; PIR Otero Decl. Ex. A at 9-10. Specifically, Sand Canyon requested documents concerning "any work" performed by Opus or "any analysis" performed by PIR, including "all documents . . . considered, received, or reviewed," as well as documents that describe methodology, and "any internal or external directions, guidance or instructions" pursuant to which the consultants performed their work. *Id.* The second category involves compensation and communication with the certificateholders who retained the consultants. Opus Calhoon Decl. Ex. 4 at 6; PIR Otero Decl. Ex. A at 10. It requests all agreements and communications concerning the loans, including all communications with or concerning the certificateholders, as well as documents about compensation, personnel, rates, and time for work. *Id.*

Sand Canyon argues that the consultants' documents are relevant, first because they will help defend against Homeward's notice theory, and second, to enable Sand Canyon to compare the consultants' analyses with other analyses, including those of Homeward's experts. Opus at 9-10; PIR Opp. at 18-19. On the notice theory, according to Sand Canyon,**[\*47]** Homeward is implementing a "sword and shield strategy" by arguing that the repurchase requests are relevant but "on the other hand . . . trying to hide the Opus and PIR analyses that concern the very repurchase demands at issue." Sand Canyon Suppl. at 5. Sand Canyon "believes that the requested discovery will show that the analysis performed by Opus and PIR is cursory and based largely on the fact that the loans performed poorly." *Id.* Sand Canyon argues that the materials are not protected by work product, Opus at 15-16, PIR Opp. at 15-17, and that privilege as to the documents sought was waived through disclosure of the consultants' summaries, first through the chain of correspondence from the certificateholders' attorneys to Sand Canyon, and then also through attachment to the complaints. Opus at 11-14; PIR Opp. at 11-15.

Proposed intervenor-plaintiff LBF, in its opposition to the motion to compel production of documents from Opus, argues that the materials sought by Sand Canyon are protected by the work product doctrine and the attorney-client privilege, which has not been waived, and are not relevant given that Homeward will hire its own experts. Opus Opp. at 5, 12-14. In response to Sand Canyon's relevancy argument, LBF contends that Sand Canyon has not provided any "record or legal**[\*48]** authority to support the connection" between Opus' work and Sand Canyon's rebuttal of Homeward's notice theory. Opus Opp. at 12. LBF argues that "Opus's methodology for identifying the loans that ultimately were included in the repurchase demand delivered to Sand Canyon is not probative of what *Sand Canyon* knew or discovered about the defects in its own underwriting of loans . . . ." LBF Suppl. at 2 (emphasis in original). As to the protective order to quash the subpoena to PIR, Homeward argues that the materials sought are irrelevant to the resolution of the issues in the case because its expert will testify about the alleged breaches, and that Sand Canyon's broad requests pose a burden of collecting, reviewing, and producing material that is not justified given the lack of relevance of PIR's work to the issues in the case. PIR at 4, 11-12. Homeward also argues that the materials are its work product and the protection has not been waived. PIR at 5, 9.

a. No Waiver of Objections by Opus

Before proceeding to the merits of these motions, the Court considers whether Opus waived its right to object by failing to do so in a timely manner. While Sand Canyon served its subpoena to PIR on March 20, 2017, PIR Otero Decl. Ex. A, the subpoena to Opus**[\*49]** was served on January 21, 2015, Opus Calhoon Decl. ¶ 5, and, according to Sand Canyon, Opus did not respond or object by the return date of February 5, 2015. *Id.* ¶ 1.

Under [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=), a "person commanded to produce documents . . . may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials," but the objection "must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." [*Fed. R. Civ. P. 45(d)(2)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=). Furthermore, a "person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." [*Fed. R. Civ. P. 45(e)(2)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=).

While "[t]he failure to serve written objections to a subpoena within the time specified by [*Rule 45(c)(2)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) typically constitutes a waiver of such objections," [*Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48 (S.D.N.Y. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-98F0-006F-P0N8-00000-00&context=) (citing [*United States v. Int'l Bus. Mach. Corp., 70 F.R.D. 700, 701-02 (S.D.N.Y. 1976))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-K480-0054-618B-00000-00&context=),[[24]](#footnote-23)24 "such failure may be forgiven 'in unusual circumstances and for good cause.'" [*Motorola Credit Corp. v. Uzan, 293 F.R.D. 595, 601 (S.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:594G-VYJ1-F04F-0155-00000-00&context=) (quoting [*Concord Boat Corp., 169 F.R.D. at 48*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-98F0-006F-P0N8-00000-00&context=)) (alterations omitted), *rev'd on other grounds****[\*50]*** *on reconsideration*, [*73 F. Supp. 3d 397 (S.D.N.Y. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DWV-6D41-F04F-04YH-00000-00&context=), *on reconsideration*, [*132 F. Supp. 3d 518 (S.D.N.Y. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H0V-VG91-F04F-01HT-00000-00&context=).

In determining whether such circumstances exist, courts consider whether "(1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery, (2) the subpoenaed witness is a non-party acting in good faith, and (3) counsel for witness and counsel for subpoenaing party were in contact concerning the witness' compliance prior to the time the witness challenged legal basis for the subpoena." [*Concord Boat Corp., 169 F.R.D. at 48*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-98F0-006F-P0N8-00000-00&context=) (citations and quotation marks omitted); *see also* [*In re Rule 45 Subpoena Issued to Cablevision Sys. Corp. Regarding IP Address 69.120.35.31, No. 08-CV-347 (ARR) (MDG), 2010 U.S. Dist. LEXIS 40653, 2010 WL 2219343, at \*6 (E.D.N.Y. Feb. 5, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YB8-Y8R0-YB0N-V03V-00000-00&context=), *report and recommendation adopted in part*, [*2010 U.S. Dist. LEXIS 71061, 2010 WL 1686811 (E.D.N.Y. Apr. 26, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YYB-K531-2RHM-4001-00000-00&context=).

In this case, Opus' failure to act on Sand Canyon's subpoena in a timely fashion should not constitute waiver of objections or bar consideration of the motion on the merits. As to the first consideration, as discussed below, the Court finds the subpoena subjects Opus to an undue burden, though this finding relies on considerations beyond the face of the subpoena. Moreover, both the second and third considerations are also satisfied. While neither LBF nor Sand Canyon disputes that Opus failed to respond to the subpoena within the**[\*51]** time frame required by [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=), neither do they dispute that Opus and Sand Canyon were in contact in the months after the subpoena was served. Opus at 8-9; Opus Opp. at 3 n.3, 4 n.4. It appears Opus did (eventually, after Sand Canyon followed up) explain in July and again in August 2015 that it could not release the documents without the consent of its client, Quinn Emanuel, and it provided Sand Canyon with contact information for Quinn Emanuel. Opus Calhoon Decl. Ex. 5. While one could certainly take issue with the delay in Opus' responses, there is no suggestion that Opus was acting in bad faith. Once Opus received a file with the relevant loan numbers in the format it requested, it informed Sand Canyon within four business days that Quinn Emanuel would not consent to the production. Opus Calhoon Decl. Ex. 6 at 2-3. It appears that, based on what has been presented to the Court, Sand Canyon then dropped the matter until the end of February 2017.[[25]](#footnote-24)25 As to the third consideration, Opus and Sand Canyon were in contact concerning Opus' compliance, as discussed at footnote 25. Under these circumstances, Opus' failure to respond to the subpoena can be excused, such that its failure to object in a timely and appropriate manner did**[\*52]** not constitute a waiver of objections. The Court will therefore consider the motion on the merits. *See, e.g.,* [*In re Rule 45 Subpoena, 2010 U.S. Dist. LEXIS 40653, 2010 WL 2219343, at \*6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YB8-Y8R0-YB0N-V03V-00000-00&context=) (finding no waiver where subpoenaed party acted in good faith and was in contact with counsel for subpoenaing party, thus "clearly satisfie[d]" second and third considerations in *Concord Boat Corp.*).

b. The Subpoenas Would Subject the Consultants to an Undue Burden

"Subpoenas issued under [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) are subject to the relevance requirement of *Rule 26(b)(1)*." [*In re Refco Sec. Litig., 759 F. Supp. 2d 342, 345 (S.D.N.Y. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:525Y-8Y31-652J-D2F9-00000-00&context=) (citing [*During v. City Univ. of N.Y., No. 05-CV-6992 (RCC), 2006 U.S. Dist. LEXIS 53684, 2006 WL 2192843, at \*2 (S.D.N.Y. Aug. 1, 2006))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KJV-6C80-TVW3-P3CN-00000-00&context=). As previously discussed, *Rule 26(b)(1)* permits the discovery of material if it is relevant to a party's claim or defense and proportional to the needs of the case. A court can, for good cause, issue an order to protect a party or person from undue burden. *Fed. R. Civ. P. 26(c)(1)*. Additionally, a party issuing a subpoena must take reasonable steps to avoid imposing an undue burden on the person subject to the subpoena, and a court must, on a timely motion, quash or modify a subpoena if it subjects a person to undue burden. [*Fed. R. Civ. P. 45(d)(1)-(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=).

The Court finds that the material sought from PIR and Opus is not sufficiently relevant to the claims or defenses at issue in these cases so as to justify its production. In light of Homeward and LBF's representations that Homeward will not rely on the**[\*53]** work of PIR or Opus to prove the alleged breaches of representations and warranties, PIR at 4, 12; PIR Reply at 10 n.10; Opus Opp. at 12; Omnibus Otero Decl. Ex. A at 18, it is not evident what relevance the subpoenaed material would have. *See, e.g.,* [*Deutsche Bank Nat. Tr. Co. v. WMC Mortg., LLC, No. 12-CV-1699 (CSH), 2015 U.S. Dist. LEXIS 49158, 2015 WL 1650835, at \*40-41 (D. Conn. Apr. 14, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FRX-X5R1-F04C-W055-00000-00&context=) (finding loan reviews conducted by or for trustee-plaintiff were not permissible area of discovery because "[t]he relevance of the requested information to the issues of consequence in determining the action is zero" and there was "no substance" to defendant's "protestations" that reviews were relevant to certain defenses) (quotation marks omitted).

Two New York state courts (applying New York rather than federal law) have also rejected the relevancy of work performed by consultants retained by certificateholders, including where some of the consultants' work was relied upon in the complaint. *See* [*Home Equity Mortg. Tr. Series 2006-5 v. DLJ Mortg. Capital, Inc., 2014 N.Y. Misc. LEXIS 3441, at \*8, 2014 N.Y. Slip Op 32020(U) (N.Y. Sup. Ct. July 28, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CV5-N3N1-F04J-814R-00000-00&context=) ("Defendants' request for documentation concerning the . . . Certificateholders' investigation and loan analysis is either irrelevant to the breach of contract claim or protected under attorney-client privilege and the work-product doctrine."); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 35 Misc. 3d 1205[A], 950 N.Y.S.2d 724, 2011 N.Y. Slip Op. 52505[U], 2011 WL 7640152, at \*7 (N.Y. Sup. Ct. Jan. 25, 2011)* (applying New York trial preparation privilege and denying motion to compel where consultants'**[\*54]** work was basis for loan repurchase requests and relied upon in complaint because defendant did "not have substantial need . . . as claims made by [plaintiff] must be supported and [defendant] is and will be in full possession of documents to refute and/or examine [plaintiffs] claims"), *aff'd*, [*93 A.D.3d 574, 941 N.Y.S.2d 56 (1st Dep't 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:558J-D621-F04J-731D-00000-00&context=).

Sand Canyon has also failed to articulate a credible theory of the relevance of the material it seeks. It first claims that the material sought is relevant to the issue of notice. Specifically, it contends that the material will rebut Homeward's willful blindness notice argument by showing that the repurchase demands were frivolous. Opus at 10; PIR Opp. at 18. However, the material Sand Canyon seeks is not probative of the issue of notice. Except for the consultants' summaries that were originally sent to Sand Canyon with the repurchase demands, the consultants' work is not in any way related to Sand Canyon's knowledge about its loans at the time in question, and thus the work is not relevant to the issue of willful blindness.

Second, Sand Canyon argues that the material sought is relevant because it could compare the consultants' work to that of others, including Homeward's expert. Opus at 10; PIR Opp. at 18-19. While it is beyond dispute that**[\*55]** Sand Canyon could, if it received the consultants' material, undertake such a comparison, Sand Canyon has only stated *ipse dixit* that these comparisons would be relevant, without explaining how they would shed light on the claims and defenses in these cases. Given that the Court finds that the material sought would not be relevant in the circumstances of these cases, it will not compel production. [*In re Refco Sec. Litig., 759 F. Supp. 2d at 345*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:525Y-8Y31-652J-D2F9-00000-00&context=) ("Thus, the relevance *vel non* of the E-mail to the MDL is key to whether or not it is discoverable, and it was an abuse of discretion for the Special Master, having found that the E-mail was irrelevant to the MDL, to nonetheless order its production.").

Additionally, the Court finds that the material sought would pose a burden on the non-parties involved. Sand Canyon's requests are broad, and would require the collection and review of material that is not justified given the irrelevance of consultants' work to the issues in the case.

Based on the finding that the material sought is not relevant, and because production would pose a burden to non-parties, the Court finds that the subpoenas would subject the consultants to undue burdens. Thus, Homeward's motion for a protective order quashing**[\*56]** Sand Canyon's subpoena to PIR is granted, and Sand Canyon's motion to compel Opus is denied.[[26]](#footnote-25)26

3. Settlement and Tolling Agreement Motion

The last motion before the Court is Homeward's motion to compel Sand Canyon to produce copies of all settlement and tolling agreements it entered into in connection with mortgage repurchase demands. Homeward claims that the information sought is "highly relevant" because it can be used to prove notice. Agreements at 3. Specifically, it contends that the agreements are likely to demonstrate the "broad scope and increasing severity" of the problem that Sand Canyon was facing, and will provide circumstantial evidence that Sand Canyon knew it had a substantial and pervasive problem with loans, including those sold into the Homeward I and Homeward II trusts. *Id.* (citing [*U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc., 205 F. Supp. 3d 386, 425 (S.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KMW-1DM1-F04F-048X-00000-00&context=) ("UBS") for proposition that "notice can be established through circumstantial evidence that a defendant was 'willfully blind' to knowledge that representations and warranties had been breached"). Homeward also argues that these materials are relevant for the purpose of impeaching former and current Sand Canyon executives who claimed that they did not know, nor could have known, about the**[\*57]** scope and severity of the problems with Sand Canyon's loans. *Id.* Homeward further argues that the production would not impose a significant burden, and notes that Sand Canyon's counsel did not oppose the production as burdensome at the July 19 conference. *Id.* at 2.

Sand Canyon counters that the settlement and tolling agreements cannot be used to prove notice. It argues, *inter alia*, that the decision to settle or toll disputes is routinely made for reasons unrelated to the merits of the litigation, such as to avoid legal fees or an acrimonious dispute, and that the mere existence of such agreements does not support the inference Homeward seeks to draw. Agreements Opp. at 2. Sand Canyon challenges the applicability of the *UBS* decision on the grounds that Homeward seeks agreements made regarding loans not at issue in this suit, and the court in *UBS* analyzed whether a company was willfully blind based on actions the company had taken regarding loans that were actually at issue in the suit. *Id.* at 4. Sand Canyon further claims that the agreements cannot be used for impeachment purposes because no current or former employees have denied that the company entered into the agreements. In the event that the**[\*58]** Court grants the motion, however, Sand Canyon requests that the material be given attorney's-eyes-only treatment and that it be permitted to redact unrelated terms. *Id.* at 5.

*Rule 26* permits discovery of non-privileged material relevant to a party's claim or defense and proportional to the needs of the case, given, *inter alia*, "the importance of the issues at stake in the action," "the parties' relative access to relevant information," "the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Fed. R. Civ. P. 26(b)(1)*. The Court will assume for the purpose of this motion that, to prove its claims, Homeward must show that Sand Canyon was on notice of each individual breach of a representation or warranty for the loans at issue in the case.[[27]](#footnote-26)27 A party may "rely on evidence of willful blindness on the part of [a loan originator] to prove that [the loan originator] had knowledge that the representations and warranties had been breached," and "where a party 'had sufficient information to impose a duty upon it to make further inquiry . . . its failure to do so constituted willful blindness.'" [*UBS, 205 F. Supp. 3d at 425*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KMW-1DM1-F04F-048X-00000-00&context=) (quoting [*Scher Law Firm, LLP v. DB Partners I, LLC, 97 A.D.3d 590, 591-92, 948 N.Y.S.2d 335, (1st Dep't 2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:561X-0601-F04J-73XY-00000-00&context=) (quotation marks omitted). "A willfully**[\*59]** blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* (quoting [*Scher, 97 A.D.3d at 592*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:561X-0601-F04J-73XY-00000-00&context=)) (quotation marks and alterations omitted).

The Court finds that the agreements are sufficiently relevant to Homeward's claims and that their production is proportional to the needs of the case. As the Court noted at the July 19 conference, "the notice element is a significant part of this case, and circumstantial evidence certainly can be used to prove notice." Sand Canyon Suppl. at 2. Homeward could plausibly use the settlement and tolling agreements to mount a case that Sand Canyon was willfully blind to widespread and severe problems with its loans, and that Sand Canyon "can almost be said to have actually known the critical facts." [*UBS, 205 F. Supp. 3d at 425*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KMW-1DM1-F04F-048X-00000-00&context=). In so finding, the Court rejects Sand Canyon's effort to distinguish these cases from the facts in *UBS*. Nothing in that decision—neither the authority cited nor the analysis—restricts the circumstantial evidence that may be used to prove willful blindness to evidence exclusively related to loans at issue in a suit. [*Id. at 425-27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KMW-1DM1-F04F-048X-00000-00&context=). To be clear, the Court is not expressing any opinion as to whether Homeward**[\*60]** will be able to establish that Sand Canyon *was* willfully blind to problems with its loans; it is merely finding that the argument is available, and that the agreements are sufficiently probative so as to justify their production.

The proportionality factors of *Rule 26* weigh in favor of disclosure, because Sand Canyon has not argued that the production would pose a burden, it is the only party with access to the agreements, and the issue of notice is significant in these cases.

Accordingly, Homeward's motion to compel the production of copies of all settlement and tolling agreements entered into by Sand Canyon in connection with mortgage repurchase demands is granted, subject to a protective order limiting them to attorney's eyes only and with the Court's permission to redact the name of the counterparty to each agreement (but not any other "unrelated terms" as Sand Canyon had proposed).

**III. CONCLUSION**

For the foregoing reasons, the Court:

• denies Sand Canyon's omnibus motion to compel to the extent it seeks a response to its "state of the economy" requests;

• denies Sand Canyon's omnibus motion to compel to the extent it seeks the production of materials exchanged with Quinn Emanuel and withheld**[\*61]** as privileged, on the ground that the common interest doctrine applies, but grants the omnibus motion to the extent that it seeks material withheld as work product, as Homeward did not defend this basis for withholding;

• denies Sand Canyon's omnibus motion to compel to the extent it seeks the production of materials exchanged with Wells Fargo and withheld as privileged, on the ground that the common interest doctrine applies;

• grants Sand Canyon's omnibus motion to compel to the extent it seeks the production of material exchanged with Altisource and withheld as privileged and/or protected by work product protection, on the grounds that privilege was waived and neither the agency nor the functional equivalent exception applies, and that Homeward did not defend the work product basis for withholding;

• grants Homeward's motion for a protective order quashing Sand Canyon's subpoena of PIR, and denies Sand Canyon's motion to compel Opus to produce documents; and

• grants Homeward's motion to compel the production of settlement and tolling agreements, subject to a protective order limiting the agreements to attorney's eyes only and with the Court's permission to redact only the name of the**[\*62]** counterparty to each agreement.

The Clerk is directed to close Docket Numbers 196, 198, 203, 211, 214, and 244 in 12-CV-5067, Docket Numbers 173, 177, 180, 187, 190, and 218 in 12-CV-7319, and Docket Number 1 in 17-CV-2097.

**SO ORDERED**.

Dated: New York, New York

October 17, 2017

/s/ James L. Cott

JAMES L. COTT

United States Magistrate Judge

**End of Document**

1. 1For a fuller recitation of the underlying facts, see Judge Torres' decisions dated March 31, 2014, Dkt. No. 51 in 12-CV-5067, and dated February 14, 2014, Dkt. No. 58 in 12-CV-7319, as well as Judge Keenan's decision, dated August 22, 2017, Dkt. No. 227 in 12-CV-7319. [↑](#footnote-ref-0)
2. 2Except where noted, docket numbers refer to the filings in 12-CV-5067. [↑](#footnote-ref-1)
3. 3*See*Homeward I Compl. at 5; Second Amended Complaint ("Homeward II Compl."), dated Oct. 6, 2016, Dkt. No. 126 in 12-CV-7319, at 6. [↑](#footnote-ref-2)
4. 4To the extent that certain exhibits among the parties' filings lack pagination, citations to page numbers of filings refer to the pagination generated by this District's Electronic Case Files ("ECF") system. [↑](#footnote-ref-3)
5. 5Sand Canyon subsequently moved for reconsideration of the September 30 Order granting Homeward leave to file the Second Amended Complaint, and also moved to dismiss the complaint in part. Dkt. Nos. 128, 139 in 12-CV-7319. Homeward's motion for reconsideration was denied, and the motion to dismiss was granted in part and denied in part. Opinion and Order, dated Aug. 22, 2017, Dkt. No. 227 in 12-CV-7319. [↑](#footnote-ref-4)
6. 6Two disputes Sand Canyon initially raised in its omnibus motion have since been resolved. Sand Canyon originally sought Homeward's communications with two non-parties who had responded to rescission notices from mortgage loan insurers on behalf of Homeward. Omnibus at 21-23. However, in its reply, Sand Canyon withdrew this application due to representations that were made in declarations filed with Homeward's opposition. Omnibus Rep. at 10 n.24. Additionally, Sand Canyon initially sought documents that Homeward contended were potentially protected by a privilege belonging to the Consumer Financial Protection Bureau ("CFPB"). Omnibus at 23; Omnibus Opp. at 19 n.19. However, as a result of the CFPB authorizing Homeward and Ocwen to produce the documents, and Homeward's undisputed July 5 representation that it has done so, Dkt. No. 235, the Court considers Sand Canyon's application for documents withheld solely on the basis of CFPB privilege to be moot. [↑](#footnote-ref-5)
7. 7In diversity actions such as this one, "where state law supplies the rules of decision, state law also controls privilege issues." [*AIU Ins. Co., 2008 U.S. Dist. LEXIS 66370, 2008 WL 4067437, at \*5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TC1-TCB0-TX4N-G0B0-00000-00&context=) (citations omitted). The parties do not dispute that New York law controls here. *See* Omnibus at 9 n.9; Omnibus Opp. at 15 n.12. [↑](#footnote-ref-6)
8. 8"New York courts applying the common interest rule to civil proceedings have often looked to federal case law for guidance." [*Egiazaryan, 290 F.R.D. at 433*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57Y1-1KS1-F04F-0435-00000-00&context=) (collecting cases). Therefore, it is appropriate to consider both New York and federal case law to determine the applicability of the rule. *See, e.g., id.* [↑](#footnote-ref-7)
9. 9"As for the work-product rule, it is always assessed under federal law in the federal courts." [*Byrnes v. Empire Blue Cross Blue Shield, No. 98-CV-8520 (BSJ) (MHD), 1999 U.S. Dist. LEXIS 17281, 1999 WL 1006312, at \*1 (S.D.N.Y. Nov. 4, 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XVN-H110-0038-Y342-00000-00&context=). [↑](#footnote-ref-8)
10. 10In a number of the motions the Court is resolving in this Memorandum Order, Sand Canyon contends that the material sought is relevant because it relates to Homeward's argument that it can meet a notice requirement by using circumstantial evidence to prove that Sand Canyon was so willfully blind to loan deficiencies that it was on notice of breaches. *See* Agreements, Ex. A at 5-6 (Homeward's counsel's explanation of willful blindness notice theory). [↑](#footnote-ref-9)
11. 11In light of the Court's rulings at the July 19 conference, Sand Canyon and LBF submitted supplemental filings. Sand Canyon Suppl.; Letter from Lyndon M. Tretter, Esq. ("LBF Suppl."), dated Aug. 3, 2017, Dkt. No 246. [↑](#footnote-ref-10)
12. 12Request 1 seeks "[a]ll documents concerning that, through 2007, real estate prices flattened and began to decrease nationally in the first sustained nationwide home-price depreciation since the Great Depression, which led to substantial increases in default and foreclosure rates, and that the rising rates and home price declines were the primary drivers of the increase in default rates." Omnibus Opp. at 3. The scope of the request itself is problematic, as blanket requests for "all documents" of this kind are plainly overbroad and impermissible. *See* [*Henry, 2016 U.S. Dist. LEXIS 8406, 2016 WL 303114, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HXX-TJ11-F04F-03G8-00000-00&context=) (collecting cases). [↑](#footnote-ref-11)
13. 13*See, e.g.*, [*Restatement (Third) of the Law Governing Lawyers § 73 cmt. d*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42GD-2HR0-00YG-H05T-00000-00&context=) (2000) ("For purpose of the privilege, when a parent corporation owns controlling interest in a corporate subsidiary, the parent corporation's agents who are responsible for legal matters of the subsidiary are considered agents of the subsidiary. The subsidiary corporation's agents who are responsible for affairs of the parent are also considered agents of the parent for the purpose of the privilege."); [*Bowne of N.Y.C., Inc. v. AmBase Corp., 150 F.R.D. 465, 491 (S.D.N.Y. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MWG0-001T-6487-00000-00&context=) ("A number of courts have upheld the privilege for communications shared by the parent with its wholly- owned subsidiary, but they have done so only upon a showing that a common attorney was representing both corporate entities or that the two corporations shared a common legal interest and thus came within the joint-client rule, or that the disclosure was made to an employee of the subsidiary for the principal or sole purpose of eliciting assistance to the attorney in rendering legal advice or other legal services.") (citations omitted). [↑](#footnote-ref-12)
14. 14A Maryland district court followed similar logic in finding that a non-party loan servicer could assert work product protection in a suit brought by the trustee, after the court found that the loan servicer had a common legal interest with the trustee. *See* [*LaSalle Bank Nat. Ass'n v. Lehman Bros. Holdings, 209 F.R.D. 112, 117 (D. Md. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46F2-Y9Y0-0038-Y3C7-00000-00&context=) ("Nor is there any merit to defendant's contention that CMSLP as a non-party cannot rely on the work product doctrine."). [↑](#footnote-ref-13)
15. 15Sand Canyon does not dispute that the communications were legal in nature; it characterizes the communications as about "contractual obligations to enforce the repurchase remedy," and argues that the "communications with Quinn Emanuel and LBF were not confidential as a matter of law and, therefore, are not privileged." Omnibus at 12. [↑](#footnote-ref-14)
16. 16Sand Canyon alleges that LBF threatened to sue Homeward, and that because of this threat, a common legal interest could not exist: "[c]ommunications threatening litigation are 'antithetical to the expectation of confidentiality,'" Omnibus Reply at 6, and "[j]udging by the log, Quinn Emanuel threatened to sue Homeward if it did not sue Sand Canyon to enforce the repurchase remedy." Omnibus at 14. Sand Canyon provides the text of three privilege log entries in support of its assertion, which state: "[d]raft tolling agreement communicated between attorney and client pursuant to common interest," and "[d]raft letter communicated between attorney and client pursuant to common interest concerning directions to servicer regarding its enforcement of Sand Canyon's repurchase obligations." Omnibus at 14. These log entries constitute the only evidence Sand Canyon has offered to support its assertion that LBF threatened to sue Homeward, and the Court cannot reasonably draw such an inference from these entries. [↑](#footnote-ref-15)
17. 17Because the Court determines that the communications with Quinn Emanuel are covered by the common interest doctrine, it is unnecessary to decide whether the material is covered by the agency exception. Accordingly, the Court declines to reach the issue. [↑](#footnote-ref-16)
18. 18Sand Canyon does not specify which (or how many) log entries it seeks to challenge. *See* Omnibus at 17. [↑](#footnote-ref-17)
19. 19As Sand Canyon did not specify which items from the privilege logs it seeks to compel, the Court cannot review the individual descriptions. If the parties find that disputes remain as to particular documents, Sand Canyon may make a further application to the Court. [↑](#footnote-ref-18)
20. 20Sand Canyon also asserts that Ocwen, as a non-party to these actions, cannot assert work product protection for documents it shared with Altisource, Omnibus at 19 n.24, an issue the Court resolved *supra*, at Section II.B.1.b.i of this Memorandum Order. [↑](#footnote-ref-19)
21. 21Neither party cited to New York case law in its discussion of the functional equivalent exception. To the extent that the Court has found New York courts that have considered the exception, those courts have cited to cases applying federal common law. Thus, the Court will also apply federal common law in its analysis. *See, e.g.,* [*William Tell Servs., LLC v. Capital Fin. Planning, LLC, 46 Misc. 3d 577, 582, 999 N.Y.S.2d 327 (N.Y. Sup. Ct. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DJ4-R6M1-F04J-81V3-00000-00&context=) (citing [*Export—Import Bank of the United States v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. 103, 113 (S.D.N.Y. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HM8-TJS0-TVW3-P32C-00000-00&context=) (applying federal law); [*In re Copper Mkt.* ***Antitrust*** *Litig., 200 F.R.D. 213, 219 (S.D.N.Y. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42YM-PNT0-0038-Y4SR-00000-00&context=) (applying federal law)). However, federal common law is not settled as to the existence of the functional equivalency exception. "Although a number of courts around the country, including several within this Circuit, have adopted this exception, it has never been recognized by the Second Circuit." [*Church & Dwight Co. Inc. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-CV-585 (AJN), 2014 U.S. Dist. LEXIS 175552, 2014 WL 7238354, at \*1 (S.D.N.Y. Dec. 19, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DW6-8V91-F04F-04WT-00000-00&context=). In addition, "[b]ecause the Second Circuit has recognized very limited exceptions to privilege waiver," some courts have expressed "doubts as to whether it would endorse such an approach." [*2014 U.S. Dist. LEXIS 175552, [WL] at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DW6-8V91-F04F-04WT-00000-00&context=). *But cf.,* [*Exp.-Imp. Bank, 232 F.R.D. at 113*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HM8-TJS0-TVW3-P32C-00000-00&context=) (collecting cases). [↑](#footnote-ref-20)
22. 22For the same reasons that materials shared with Altisource are not privileged, based on the very limited record that is before the Court on the issue, emails that Homeward shared with Deanna Thompson, an employee of another mortgage technology vendor, LPS Default Solutions, are not privileged either. Sand Canyon raised these emails in a footnote, Omnibus at 21 n.27, and Homeward responded, also in a footnote, arguing that communications with LPS are "privileged for the same reasons as Ocwen's communications with Altisource," and "[i]n any event, Ms. Thompson was an addressee on only three oldest-in-time emails of a lengthy e-mail chain." Omnibus Opp. at 21 n.22. [↑](#footnote-ref-21)
23. 23While Homeward did defend the ability of Ocwen to assert work product protection in these cases, Omnibus Opp. at 18 n.17, and made passing reference to its assertion of work product, *see, e.g., id.* at 20 n.20, it did not explain if or how the documents were created in anticipation of litigation and met the requirements of ***Rule 26(b)(3)***. [↑](#footnote-ref-22)
24. 24The *Concord Boat Corp.* court referred to [*Rule 45(c)(2)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=). In 2013, [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) was amended and a new [*subdivision (c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) was introduced, such that [*subdivision (d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) now contains the provisions formerly in [*subdivision (c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=). *See* [*Fed. R. Civ. P. 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) Advisory Committee's Notes to 2013 Amendment. [↑](#footnote-ref-23)
25. 25On February 28, 2017, Sand Canyon reached out to Opus via email. Opus Calhoon Decl. Ex. 7 at 2. On March 8, Opus replied that its position remained unchanged. *Id.* at 1. The next day, Sand Canyon filed a motion to compel in the Northern District of Illinois and, pursuant to [*Rule 45(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=), the motion was transferred to this Court. Opus at 9. [↑](#footnote-ref-24)
26. 26Given its ruling, the Court does not reach the issue of whether the material sought could be withheld on the grounds of work product protection or attorney-client privilege, or whether either was waived. [↑](#footnote-ref-25)
27. 27Sand Canyon asserts as much; Homeward assumes so for the sake of argument. Agreements Opp. at 1; Agreements at 3. [↑](#footnote-ref-26)