

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

**AFFIRMATION OF  
CLARE PENNINGTON  
IN SUPPORT OF  
ORDER TO SHOW  
CAUSE REGARDING  
AT ISSUE AND  
FIDUCIARY  
EXCEPTION**

I, Clare Pennington, hereby affirm under the penalty of perjury that the following is true and correct:

1. I am a member of the Bar of the State of Colorado and admitted to appear before this Court *pro hac vice*. I am a member of Reilly Pozner LLP, counsel for the AIG entities in this matter. I have personal knowledge of the facts set forth below.

2. This relief is requested by order to show cause because during the December 7, 2012, conference call with the Court, the parties were directed to file orders to show cause to address outstanding discovery matters.

3. AIG is one of several Intervenor-Respondents (collectively with Objectors, "Intervenors") in this matter and my firm is a member of the Steering Committee. I submit this Affirmation in support of the Steering Committee's motion for an order pursuant to CPLR § 3124:

- (a) compelling BNYM to produce communications with counsel at the [REDACTED] meeting; and
- (b) compelling BNYM to produce communications with and documents generated by counsel concerning BNYM's evaluation of the settlement amount, including its decision to retain RRMS Advisors and to forego a review of loan files; and
- (c) compelling communications with and documents generated by counsel concerning its own apparent self-dealing, including with respect to any event of default and the forbearance agreements, BNYM's assessment of its own risk and [REDACTED], and BNYM's [REDACTED]; and
- (d) compelling BNYM to produce one or more witnesses to testify on the above topics; and
- (e) awarding such other and further relief as the Court may deem just and proper.

4. Through its Verified Petition and Proposed Final Order and Judgment, BNYM asks this Court to approve a settlement that it seeks to consummate on behalf of 530 trusts (the "Covered Trusts"), in its capacity as Trustee for those trusts, and to make at least eighteen separate factual findings related to the Trustee's conduct.

5. By doing so, BNYM has placed at issue much, if not all of its communications with counsel and work product. The Steering Committee does not seek production of all materials over which BNYM has claimed privilege. Rather, the Steering Committee's request is narrowly focused on the categories listed above, all of which concern matters essential for the Court to be able to rule on the relief sought in the Proposed Final Order and Judgment.

6. Investors are also entitled to BNYM's communications with counsel concerning the above topics under the fiduciary exception. On August 2, 2012, this Court held that BNYM owed investors fiduciary duties and that the fiduciary exception could apply to BNYM's communications with counsel, on a showing of good cause. *See* Ex. 12. The Court instructed the Steering Committee to begin depositions and, if necessary, return to the Court to argue good cause exists under the fiduciary exception. The Steering Committee has now conducted 25 depositions, and has been able to narrow its request to the categories listed above. In addition to these materials now being at issue in this case, the Steering Committee is also entitled to these communications under the fiduciary exception.

7. Attached as Exhibit 1, is a true and accurate copy of excerpts from the Deposition Transcript of Robert E. Bailey (Dec. 3, 2012).

8. Attached as Exhibit 2, is a true and accurate copy of excerpts from the Deposition Transcript of Robert Griffin (Jan. 3, 2013).

9. Attached as Exhibit 3, is a true and accurate copy of excerpts from the Deposition Transcript of Richard P. Stanley (Jan. 8, 2013).

10. Attached as Exhibit 4, is a true and accurate copy of excerpts from the Deposition Transcript of Kelly Crosson (Nov. 9, 2012).

11. Attached as Exhibit 5, is a true and accurate copy of excerpts from the Deposition Transcript of Loretta A. Lundberg (Oct. 2 & 3, 2012).

12. Attached as Exhibit 6, is a true and accurate copy of excerpts from the Deposition Transcript of Douglas Chapman (Dec. 11, 2012).

13. Attached as Exhibit 7, is a true and accurate copy of excerpts from the Deposition Transcript of Jason H.P. Kravitt (Sept. 19 & 20, 2012).

14. Attached as Exhibit 8, is a true and accurate copy of excerpts from the Deposition Transcript of Theodore Mirvis (Nov. 28, 2012).

15. Attached as Exhibit 9, is a true and accurate copy of a December 1, 2010 e-mail from Jason H.P. Kravitt, Bates stamped BNYM\_CW-00270970.

16. Attached as Exhibit 10, is a true and accurate copy of a December 2, 2010 e-mail from Jason H.P. Kravitt, Bates stamped BNYM\_CW-00270959-270960.

17. Attached as Exhibit 11, is a true and accurate copy of a June 23, 2011 e-mail from Robert J. Madden and attachment, Bates stamped BNYM\_CW-00254990-254998.

18. Attached as Exhibit 12, is a true and accurate copy of excerpts from the August 2, 2012 hearing in this matter.

19. Attached as Exhibit 13, is a true and accurate copy of the Minutes of the [REDACTED], Bates stamped BNYM\_CW-00249885.

20. The parties have met and conferred with respect to BNYM's privilege assertions.

21. At the deposition of Richard Stanley on January 8, 2013, BNYM offered, subject to several conditions, to permit the witness to testify as to BNYM's communications with its counsel Robert Bailey at the [REDACTED] meeting. BNYM insisted that the Steering Committee agree that: it would not argue that it could redepose witnesses who had already refused to answer questions concerning Mr. Bailey's communications at the meeting based solely on this new position; that the Steering Committee would not use this testimony to argue that BNYM had more broadly waived the privilege; and that the entire Steering Committee agree to the terms. Even though BNYM had already blocked this testimony with respect to six of the eight attendees at the [REDACTED] meeting whose depositions the Steering Committee has noticed, the Steering Committee was willing to agree to these terms.

22. However, BNYM also asked that other intervenors involved in other litigation against the Trustee agree not to argue waiver in the other litigation. The other intervenors did not agree to forego any of their rights in other litigation. BNYM refused to drop this condition, and so no agreement was reached. The Steering Committee has now taken the deposition of all eight individuals who were at the [REDACTED] meeting whose depositions were noticed by the Steering Committee, and has been blocked from obtaining discovery about these communications.

23. The Court previously directed the parties to address outstanding discovery matters by way of orders to show cause and set the following schedule:

- January 14, 2013: Orders to Show Cause Filed
- January 28, 2013: Response Briefs Due
- February 1, 2013: Reply Briefs Due.

Dated this 13th day of January, 2013.

  
Clare Pennington