

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.

**STEERING COMMITTEE'S MEMORANDUM OF LAW
IN SUPPORT OF ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT
COMPEL PRODUCTION OF CONFLICT WAIVERS**

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TABLE OF CONTENTS

INTRODUCTION..... 1

PROCEDURAL BACKGROUND 2

ARGUMENT..... 3

**I. BNYM, as Trustee Serving on Behalf of All Certificateholders in the
 530 Covered Trusts, Cannot Waive Its Duty to Avoid Conflicts of
 Interest** 3

**II. The Nature and Extent of the [REDACTED]
 [REDACTED] Is Relevant and Necessary to the Court’s Evaluation of
 BNYM’s Conduct as Trustee in Negotiating and Entering the
 Settlement Agreement** 4

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

In re Git-N-Go, Inc.,
321 B.R. 54, 60 (Bankr. N.D. Okla. 2004)..... 3, 4

Allen v. Crowell-Collier Publ'g Co.,
21 N.Y.2d 403, 406 (1968) 5

Chevron USA Inc. v. Peuler,
No. Civ. A. 02-2982, 2004 WL 224579..... 5

Dabney v. Chase Nat'l Bank,
196 F.2d 668, 670 (2d Cir. 1952)..... 3

In re Clarke's Estate,
188 N.E.2d 128 (N.Y. 1962) 4

Weingarten v. Warren,
753 F. Supp. 491, 496 (S.D.N.Y. 1990)..... 4

RULES

N.Y.R.P.C. Rule 1.7..... 6

The Steering Committee of the Intervenor-Respondents and Objectors respectfully moves under CPLR § 3124 to compel the production by the Bank of New York Mellon (including its counsel) of conflict of interest waivers [REDACTED], [REDACTED], and [REDACTED] regarding [REDACTED] of BNYM, in its capacity as Trustee of the 530 Covered Trusts.¹

INTRODUCTION

BNYM and the counsel it hires have a duty of undivided loyalty to all Certificateholders in the 530 Covered Trusts. This fiduciary duty to avoid laboring under a conflict of interest can *never* be waived. Yet, during settlement negotiations, [REDACTED]

[REDACTED] Although BNYM's counsel conceded that whether BNYM labored under a conflict of interest is relevant to this proceeding, BNYM has refused to produce the Conflict of Interest Waivers on grounds of relevance. This objection lacks merit in light of counsel's concession and because the Conflict of Interest Waivers bear directly on BNYM and its counsel's fundamental duty to avoid conflicts of interest and BNYM's conduct as Trustee for the 530 Covered Trusts.

Without production of the Conflict of Interest Waivers, the Court and Intervenor, on whose behalf BNYM should have been serving when it [REDACTED]

¹ The Steering Committee submits this memorandum on behalf of all Intervenor except: the Delaware Department of Justice; the New York State Office of the Attorney General; the Federal Housing Finance Agency; the National Credit Union Administration Board; the Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; the Washington State Plumbing and Pipefitting Pension Trust; the Knights of Columbus and the other clients represented by Talcott Franklin P.C.; Cranberry Park LLC; and Cranberry Park II LLC.

[REDACTED], are precluded from knowing the exact nature and extent of the conflicts [REDACTED]. Therefore, in order to allow the Court to fully and fairly evaluate BNYM's conduct in negotiating and entering into the Settlement Agreement, the Court should compel production of the Conflict of Interest Waivers.

PROCEDURAL BACKGROUND

On September 19, 2012, the Steering Committee deposed Jason Kravitt, an attorney with Mayer Brown. During the deposition, Mr. Kravitt testified that [REDACTED]

[REDACTED] Ex. 1 at 105:7-10; 108:12-14; 109:4-6; 114:7-12.² According to Mr. Kravitt, the purpose of [REDACTED]

[REDACTED] *Id.* at 102:19-22; 109:10-13, 16. Although Mr. Kravitt [REDACTED]

[REDACTED] *Id.* at 115:14-19.

During the deposition, the Steering Committee requested production of the Conflict of Interest Waivers. *Id.* at 105:13-15; 109:7-8. Mayer Brown took the request under advisement, agreeing to meet and confer at a later date about the waivers. *Id.* at 105:16-18. The Steering Committee sent repeated follow-up correspondence to Mayer Brown requesting copies of the Conflict of Interest Waivers. Ex. 2 ¶¶ 1-3; Ex. 3; Ex. 4. On November 8, the Steering Committee again requested the Conflict of Interest Waivers. Ex. 5 at 2-3.

In its response to the Steering Committee's November 8, 2012 letter, Mayer Brown

² Citations to "Ex. __" reference the exhibits to the Affirmation of Michael A. Rollin In Support of Order to Show Cause Regarding Conflict Waivers, dated January 13, 2013, and filed simultaneously with this brief.

Ex. 6 at 3.) The law is well-settled: “[A]n attorney for a fiduciary has the same duty of undivided loyalty to the cestui as the fiduciary himself.” *Weingarten v. Warren*, 753 F. Supp. 491, 496 (S.D.N.Y. 1990) (quoting *In re Clarke’s Estate*, 188 N.E.2d 128 (N.Y. 1962)); *see also In re Git-N-Go, Inc.*, 321 B.R. at 58-60 (stating, “[a]s a general principle, professional persons employed by the trustee should be free of any conflicting interest which might, in the view of the trustee or the bankruptcy court, affect the performance of their services or which might impair the high degree of impartiality and detached judgment expected of them during the administration of a case”) (internal quotations omitted).

[REDACTED]

[REDACTED] *See Weingarten*, 753 F. Supp. at 496. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] is

meritless. [REDACTED]

[REDACTED] Ex. 6 at 3.³

II. The Nature and Extent of the [REDACTED] Is Relevant and Necessary to the Court’s Evaluation of BNYM’s Conduct as Trustee in Negotiating and Entering the Settlement Agreement

Through its voluntary initiation of this proceeding, BNYM asks the Court not only to examine and approve the settlement and the process by which it was achieved, but also to make

³ Additionally, “the written conflict waivers . . . do not aid the cause of eliminating the adversity of interests between [the parties]” because BNYM has presented “no evidence that [it] received independent advice concerning the ramifications of [REDACTED]” *In re Git-N-Go, Inc.*, 321 B.R. 54, 60 (Bankr. N.D. Okla. 2004).

numerous factual findings about BNYM's conduct in negotiating and entering into the Settlement Agreement. *See generally* Doc. No. 7 at ¶¶ b-p. While counsel for BNYM's only objection to the production of the Conflict of Interest Waivers is relevance, BNYM already has conceded that discovery should include "documents, information and testimony concerning the basis for the Trustee's decision to enter into the Settlement Agreement (including the documents and information considered by the Trustee in making its decision)," *id.* at 1, and counsel for BNYM conceded that "whether *BNYM* labored under a conflict of interest is relevant" to this proceeding. *See* Ex. 6 at 3. Because the sole issue before the Court is whether the Conflict of Interest Waivers are relevant, the Court need not inquire any further, as BNYM's counsel has conceded their relevance.

Nevertheless, [REDACTED] waiver of conflicts of interest clearly is relevant to the matter at hand. *See generally Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968) (New York's broad discovery mandate requires "full disclosure" of "any facts bearing on the controversy."); *see also Chevron USA Inc. v. Peuler*, No. Civ. A. 02-2982, 2004 WL 224579, at *3 (E.D. La. Feb. 3, 2004) (ordering production of conflict of interest waiver, if one exists, pursuant to written discovery requests). In the first instance, it bears directly on the Court's determination of whether BNYM, [REDACTED] was laboring under a conflict of interest when it negotiated and entered the Settlement Agreement. Additionally, the Conflict of Interest Waivers will answer several questions relevant and necessary to the Court's evaluation of BNYM's conduct, including whether BNYM (1) compromised its unwavering duty of loyalty to the Certificateholders; (2) was acting in the best interest of the Certificateholders [REDACTED] [REDACTED] (3) in fact, provided

informed consent and the nature of that consent;⁴ (4) [REDACTED]
[REDACTED] and (5) [REDACTED]
[REDACTED]
[REDACTED]

The Conflict of Interest Waivers are the best and only insight into the scope and magnitude of the conflicts of interest [REDACTED] New York's Rules of Professional Conduct required that [REDACTED]
[REDACTED] *See* N.Y.R.P.C. Rule 1.7 ("Conflict of Interest: Current Clients"). When providing informed consent, [REDACTED] must have been "aware of the relevant circumstances" surrounding the conflicts of interest, "including the material and reasonably foreseeable ways that the conflict could adversely affect the[ir] interests." *Id.* at cmt. 18. In some circumstances, such as when a lawyer represents multiple clients in a single matter, the waiver "must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and the risks involved." *Id.* While the information [REDACTED] here "depends on the nature of the conflict and the nature of the risks involved," the Court and Intervenors are precluded from knowing anything related to the nature and scope of the conflicts without production of the Conflict of Interest Waivers.

Discovery thus far has revealed other evidence supporting the production of the Conflict of Interest Waivers so that the Court and Intervenors can fully and fairly evaluate BNYM's

⁴ [REDACTED]
[REDACTED] Ex. 8 at 332:7-20.

conduct in negotiating and entering the Settlement Agreement. First, there is ample evidence that BNYM was conflicted and acted in self-interest when it negotiated and entered the Settlement Agreement. (See Steering Committee’s Memo. of Law in Support of Order to Show Cause Why the Court Should Not Compel Evidence that the Trustee Has Placed At Issue and That Is Subject to the Fiduciary Exception, at 11-14 (filed Jan. 14, 2013).) Second, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵ Ex. 1 at 537:6-539:14. Finally, [REDACTED]

[REDACTED]

[REDACTED] further supports Intervenors’ right to discover the Conflict of Interest Waivers, as BNYM owes a duty of impartiality to *all* Certificateholders.

CONCLUSION

For the above reasons, the Steering Committee respectfully requests that this Court issue an order compelling the production of all conflict waivers [REDACTED]

[REDACTED]

[REDACTED]

⁵ NYRPC Rule 1.7 cmt. 13 provides that where a lawyer is paid from a source other than the client, the client must be informed of the fact, consent to it, and the arrangement cannot “compromise the lawyer’s duty of loyalty or independent judgment to the client.” NYRPC Rule 1.7 cmt. 13. [REDACTED]

[REDACTED] the Court and Intervenors are entitled to the Conflict of Interest Waivers to determine “whether the conflict is consentable and, if so, that [BNYM] ha[d] adequate information about the material risks of the representation.” *Id.*

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