

# **Exhibit 5**



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*Via E-mail and U.S. Mail*

Matthew D. Ingber, Esq.  
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**Re: In re the Application of The Bank of New York Mellon  
(Index No. 651786/2011)**

Dear Matt:

I write in an effort to meet and confer on the issues set forth in our letters dated September 24, October 8, and October 24 regarding documents requested in the depositions of or by subpoenas to Jason Kravitt, Loretta Lundberg, and RRMS Advisors.

**I. Scope of Discovery**

As has become clear through your most recent correspondence, BNYM's definition of relevance is unjustifiably narrow, and the Steering Committee is concerned that BNYM's document production and RRMS's subpoena response have been correspondingly narrow. For example, in RRMS's response to our subpoena, you objected "to the extent it calls for the production of documents that are not relevant . . . including but not limited to documents that were not reviewed by Ms. Loretta Lundberg." (Oct. 2, 2012 Letter at 1 ¶ 4.) Similarly, in your November 2 correspondence, you objected to the request for documents "that the Trustee never saw."

There is no provision of the CPLR that would so narrowly define the scope of discovery, and by continuing to draw the line at what Ms. Lundberg, the "Trustee," or its purported experts saw or relied on as a basis for withholding responsive and relevant discovery, you are erecting barriers to the full, fair, and final adjudication of this case. Your allegations of delay by the intervenors are belied by the settlement proponents' (and now RRMS's) refusal to produce documents plainly probative of the rulings BNYM seeks and has placed before the Court, often only to "voluntarily" produce them much later and after the expenditure of substantial resources.



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To ensure the Steering Committee has a clear understanding of the positions you are taking regarding relevance, I ask that you answer the following questions on behalf of your clients BNYM and RRMS Advisors:

1. Is it your clients' position that the only information relevant in this case is what Ms. Lundberg and/or BNYM's identified experts saw or relied on?
  - (a) If not, please inform us of what, in addition, you agree is relevant.
  - (b) If so, please inform us whether your document productions have been limited to such information.
2. Is it your clients' position that the scope of discovery is co-extensive with relevant information?

I would appreciate your response at your earliest convenience so as to avoid delay.

## II. Outstanding Document Requests From the Prior Depositions and Subpoenas

During or shortly after the depositions of Jason Kravitt, Loretta Lundberg, and Brian Lin, the Steering Committee requested certain documents referenced in each witness's respective testimony. All of the requests remain outstanding:

1. From the deposition of Jason Kravitt:

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]
- e. A copy of Mr. Kravitt's written securitization opinion concerning the matter involving a class of bondholders against the FDIC. (*See Kravitt Dep. 17:6-24.*)

Although the Steering Committee regards all of these items as relevant and discoverable, we will agree to withdraw our requests 1(d) and 1(e), above, if BNYM will immediately produce



the documents requested in 1(a)-1(c). As you know, whether BNYM labored under a conflict of interest is relevant to the Court's determination of the issues before it, even under BNYM's narrow definition of the standard of review. (*See, e.g.*, Doc. No. 244 at 4-5.) Here, BNYM chose to employ counsel that required conflict waivers from Bank of America and certain Inside Institutional Investors, and then delegated to that counsel the authority to perform substantive evaluations of the proposed settlement. (*See, e.g.*, Lundberg Dep. 170:4-17; 177:15-21; 192:25-193:19; 242:10-244:1.) [REDACTED] (Lundberg Dep. 213:24-214:6; 389:12-19), we have the right to know what those conflicts were. We reasonably expect that the conflicts will be described in the [REDACTED]. *See* 22 NYCRR 1200.0, Rule 1.7(b)(4) (requiring informed consent).

2. From the deposition of Loretta Lundberg:

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]

As you know, BNYM negotiated for certain releases of its own liability in the course of its Trustee Settlement Activities. While BNYM did not ultimately obtain the all-encompassing release it repeatedly proposed in drafts of the Proposed Final Order and Judgment ("PFOJ"), BNYM did include a release for all Trustee Settlement Activities in paragraph "p" of the filed PFOJ. Each of items 2(b)-2(d) go to the issue of the Trustee's self-interest in the settlement and the process by which it was reached, which is indisputably a factor the Court will have to consider. *See Sankel v. Spector*, 33 A.D.3d 167, 172 (1st Dep't 2006) ("[The] inflexible duty of loyalty prohibits a trustee from even placing himself in a position of potential conflict . . ."); *see also* PFOJ ¶¶ k-1. Consequently, the requested information is well within what is discoverable under CPLR § 3101. For these same reasons, please provide dates for the deposition of Mr. Brian Rogan. If BNYM agrees to produce items 2(b)-2(d), the Steering Committee will withdraw its request for item 2(a) as well as its request to take the deposition of Gavin Tsang.<sup>1</sup>

<sup>1</sup> We are also willing to defer scheduling the deposition of Courtney Bartholomew, provided that one of the other deposition witnesses will have knowledge to testify about BNYM's receipt of the documents required to be provided to the Trustee under the Governing Agreements. Please identify for us who that witness will be.



3. From the subpoena to RRMS and the deposition of Brian Lin:

- a. A copy of *all* facts, data and other documents Mr. Lin relied upon in forming the opinions in his reports, including but not limited to certain [REDACTED]. It is also not at all clear that RRMS and/or BNYM has produced all of the information Mr. Lin or his staff [REDACTED] (responsive to Document Request No. 2 of the Steering Committee's subpoena to RRMS).
- b. All drafts to both reports prepared by Mr. Lin and RRMS, as well as all notes and calculations made by Mr. Lin (responsive to Document Request No. 3 of the Steering Committee's subpoena to RRMS).
- c. All time records, invoices and bills evidencing payment for all work performed by Mr. Lin and RRMS in connection with BNYM's retention of Mr. Lin and RRMS (responsive to Document Request No. 5 of the Steering Committee's subpoena to RRMS).
- d. [REDACTED]
- e. [REDACTED] In the November 2 correspondence, you indicated that BNYM [REDACTED].

[REDACTED] (See Lundberg Dep. 459:2-461:16; 464:21-465:19). BNYM has therefore placed in issue what its purported experts did and did not do, considered and did not consider, relied on and rejected. The Steering Committee and the Court are entitled to know whether the Trustee's purported experts' opinions in this matter are consistent or inconsistent with the positions they have taken in other matters, whether they are founded on accurate or inaccurate information, and whether there are any indicia of bias. All of these factors go to whether BNYM's reliance on the experts was in good faith. (PSA § 8.02(ii); PFOJ ¶ k.)

[REDACTED] (See Lin Dep. 399:11-24). There can be no dispute that at a minimum, items in 3(a)-(c) above are responsive and relevant to the RRMS subpoena and should be produced without any further delay. If RRMS and/or BNYM will agree to produce the documents requested above, the Steering Committee will withdraw its request for



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one additional day of deposition pending our review of those documents, and will confer with you thereafter if it concludes in good faith that additional deposition time is warranted.

We look forward to discussing and resolving these outstanding issues. Please let us know when you are available to conclude our meet and confer on these documents.

Sincerely,

Michael A. Rollin