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March 11, 2013

VIA HAND DELIVERY

The Honorable Barbara R. Kapnick Supreme Court of the State of New York 60 Centre Street New York, New York 10007

Re:

In re the Application of The Bank of New York Mellon (Index No. 651786/2011)

Dear Justice Kapnick:

I am writing on behalf of The Bank of New York Mellon and the Institutional Investors. During Thursday's teleconference, Mr. Madden (representing the Institutional Investors) made a proposal in which the Petitioners would produce the materials subject to motion sequence no. 33, and the Court would enter an order that the production would not constitute a waiver of any privilege that might apply to any *other* document or information. Beth Kaswan, representing certain pension funds both in this matter and in a case pending against BNYM before Judge Pauley, *Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago et al. v. The Bank of New York Mellon*, 1:11-CV-05459 (WHP) ("SDNY Action"), told the Court and the parties, in no uncertain terms, that she believes and would argue that the production of these materials would constitute a broad waiver of the attorney-client privilege and work product doctrine applicable to *other* documents over which Petitioners have asserted privilege. She reserved the right to assert waiver in the SDNY Action or any other.

Ms. Kaswan's position leaves Petitioners in an untenable position, choosing between compromise in response to the motion, and substantial risk that one or more intervenors asserts waiver arguments in separate proceedings by virtue of our good faith efforts to compromise here. To be clear, the issue is not with respect to the materials we have offered to produce; once produced, Petitioners could not assert privilege over those documents. The issue concerns other documents, protected by the attorney-client and/or work product privileges, as to which Ms. Kaswan (or other objectors) would argue waiver in *separate* proceedings before *separate* courts as a result of our compromise here.

Ms. Kaswan's "sword/shield" argument is, of course, baseless – these documents are not being affirmatively offered by us but instead have been demanded by the Steering Committee on the ground that they are *not* privileged. But her threat to argue waiver (on the ground that these documents *are* privileged, and that we would have waived privilege as to other documents in other cases by producing them) is too significant to ignore, even if we obtained a no-waiver order from the Court over Ms. Kaswan's objection. As long as Ms. Kaswan persists in her "compromise this motion at your peril" stance, the only way for us to avoid waiver arguments as

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to *other* documents – and to guarantee that those arguments do not prevail – is to litigate our privilege assertion before Your Honor. In other words, unless the objectors agree not to argue – in any case – that by acceding to their demands, we have waived either the attorney-client privilege or the work product doctrine as to other documents, we cannot agree to voluntarily produce the materials called for in the motion.

We had hoped that, in the interests of removing another motion from the Court's docket and moving the case forward, the objectors would *all* agree to one reasonable concession. They cannot. Although motion sequence no. 33 (which was briefed and fully argued at the February 7 conference) remains on Your Honor's docket, to resolve motion sequence no. 32, we will produce the conflict waiver letters, redacted along the lines agreed to by the objectors.

Respectfully,

Matthew D. Ingber

cc: All counsel