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April 17, 2013

VIA E-FILE AND FACSIMILE

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

Re: *In re the application of The Bank of New York Mellon*
(Index No. 651786/2011)

Dear Justice Kapnick:

I write on behalf of the Steering Committee to follow up with the Court regarding the at-issue waiver/fiduciary exception motion (Motion Sequence 31). On April 12, 2013, this Court granted the Steering Committee's order to show cause for an order compelling documents purportedly protected by the common interest exception to the waiver of the attorney client privilege (Motion Sequence 33) ("Common Interest Order"). *See* Doc. No. 571. The Steering Committee has conducted an initial review of these documents, many of which lend further support to Motion Sequence 31.

As this Court is aware, to the extent good cause is a requirement of the fiduciary-duty exception, one factor is whether the requesting party can show a colorable claim of self-dealing or conflict. As Mr. Ingber acknowledged at the April 12 hearing, a colorable claim is one that would survive a motion to dismiss. The documents produced by the Institutional Investors in response to the Common Interest Order provide yet more support of a colorable claim. For example, the new production shows that Jason Kravitt—the lead Mayer Brown attorney for the Trustee in the negotiations—considered Bank of America its [REDACTED] *See* II-0001299

(attached hereto as Exhibit A). Furthermore, the expert report of Professor Adam J. Levitin demonstrates that BNYM itself has a close business relationship with Bank of America, an equity position in Bank of America, and a significant interest in remaining Bank of America's "preferred trustee." *See* Doc. No. 570, ¶¶ 52-56; 187-189. This evidence calls into question whether the Certificateholders ever had a loyal advocate acting on their behalf.

The recently produced documents also raise additional concerns about the Trustee's efforts to avoid an Event of Default and the heightened duties to Certificateholders associated with an Event of Default. For example, although certain Trustee representatives have taken the position that the Event of Default 60-day cure period was never triggered, documents produced pursuant to the Common Interest Order tell a different story. In an email to Kathy Patrick, Mr. Kravitt stated that [REDACTED]

[REDACTED] *See* II-0001254 (attached hereto as Exhibit B). And in an email to Mr. Kravitt, Ms. Patrick indicated that [REDACTED]
[REDACTED] *See* II-0000718-719 (attached hereto as Exhibit C).

In addition, the Common Interest Order documents confirm that the Trustee actually negotiated a guaranty and side letter from Bank of America in an effort to secure an indemnity. *See, e.g.*, II-0012567 (attached hereto as Exhibit D); *see also* II-0000705-707 (attached hereto as Exhibit E); II-0000734-737 (attached hereto as Exhibit F). Certainly if the Trustee *negotiated* for an indemnity it was not something the Trustee already had. As set forth in the Levitin expert report and the expert report of Professor Tamar Frankel, the Trustee's use of entrusted power to bargain for itself is a clear example of the Trustee's self-dealing. *See* Doc. No. 570, ¶¶ 187-211; Doc. No. 529 at 9-10.

The Steering Committee recognizes that the Court is burdened with discovery motions in this case and a full docket of other cases. We respectfully submit that the Court's task on Motion Sequence 31 would be significantly eased if the Trustee were ordered to supplement its privilege log so that the Steering Committee and the Court could easily identify which of the numerous entries on the Trustee's privilege log fall in the discrete and narrowed categories of communications requested in Motion Sequence 31.¹

For example, as the Court noted at the April 12 hearing, some of the entries refer specifically to the forbearance agreement. *See, e.g.*, BNYM Privilege Log Entry No. 57. If the

¹ The specific categories requested in Motion Sequence 31 are: (1) communications with BNYM counsel at the June 28, 2011 Trust Committee meeting; (2) 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 (3) communications with and documents generated by counsel concerning the event of default and forbearance agreement, BNYM's assessment of its own risk and its requests for an indemnity, BNYM's decision(s) not to provide notice to Certificateholders, and BNYM's attempts to obtain an expansive release of claims held by Certificateholders.

Trustee were to indicate all the communications in the log that concern the forbearance agreement, it would not be difficult to identify the documents that concern this particular category. The same is of course true for the other discrete categories of documents sought in Motion Sequence 31. By not including obvious and no doubt readily apparent subject matter of the withheld communications, the Trustee has prevented the Steering Committee from identifying for the Court the subset of documents on the privilege log that fall into the requested categories. Such an order by the Court would be entirely appropriate and within the Court's discretion particularly since such specificity is in fact required. *See* CPLR 3122(b). A privilege log "should *specify* the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege." *Matter of Subpoena Duces Tecum to Jane Doe, Esq.*, 99 N.Y.2d 434, 442 (2003) (emphasis added); *see also In re Estate of Seelig*, 302 A.D.2d 721, 724 (3d Dept. N.Y.S.2d 2003) ("[W]hen a party objects to a disclosure of requested documents, it must *detail* both the legal basis for withholding such documents along with their distinguishing features.") (emphasis added).

As the Trustee's current privilege log makes clear, the entries are far too general and do not specify which communications relate to these topics. *See, e.g.*, BNYM Privilege Log Entry Nos. 6; 30-35; 39; 41-45; 76-78; 81; 85-86; 91-92; 96-97; 99; 102-103; 108-114; 117-120; 132-134; 229-232; 262-263; 268-276; 287-290; 292-293; 308; 321-325 (indicating only that the privileged documents are "regarding settlement negotiations"). Accordingly, in light of the Court's appropriate focus on the Trustee's privilege log during the April 12 hearing, and because the recently produced documents pursuant to the Common Interest Order reveal further evidence of the Trustee's self-dealing, the Steering Committee requests that the Court order the Trustee to add the detail necessary to determine which of the many documents on the privilege log fall into the discrete categories of documents requested in Motion Sequence 31.

Once the log is supplemented, respectfully, the Court should order production of these crucial documents or if the Court is so inclined review the narrowed set of documents *in camera*, as it deems necessary and appropriate under the circumstances.

Respectfully submitted,

/s/ Derek W. Loeser

Derek W. Loeser

cc: Counsel of record (via ECF)

EXHIBITS A - F

CONFIDENTIAL DOCUMENTS

SUBMITTED TO CHAMBERS