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May 17, 2013

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

Re: Application of Bank of New York Mellon; Index No. 651786/11

Dear Justice Kapnick:

We write concerning the depositions of the corporate representatives of AIG, Triaxx, and the Federal Home Loan Banks of Indianapolis, Boston and San Francisco. The CPLR mandates these depositions and basic fairness requires that these Objectors proffer a witness for deposition to ensure their positions are clearly understood before the Article 77 hearing begins.

These depositions are specifically authorized by the CPLR: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the proof," CPLR §3010 (a). "After an action is commenced, any party may take the deposition of any person by deposition upon oral or written questions." CPLR §3106. Objectors, who have taken more than two dozen depositions, nevertheless claim the settlement proponents are entitled to none.

The Objectors cannot avoid deposition testimony by asserting that no corporate representative will testify at trial. The Objectors have filed pleadings, *signed on their behalf and in their name*, attacking the settlement asserting conflict of interest, improper loan modifications, and that the settlement amount is allegedly too low. Having made a corporate decision to assert these objections, they must produce a corporate representative to explain that decision. CPLR § 3106.

Few principles are more fundamental to litigation than requiring a party who asserts a claim to testify during discovery to defend and explain that position. We cite a few examples of its relevance below (although no examples are needed when a *party* deposition is involved).

Triaxx and Federal Home Loan Bank Objections

The objections by Triaxx and the Federal Home Loan Banks assert for the first time, in this case,[1] that the Trustee failed to consider losses the trusts allegedly suffered from "wrongful"

[1] This argument was asserted in the *Greenwich* action, which was dismissed before discovery on the merits.

loan modifications by Bank of America. This objection encompasses two arguments: 1) that these modifications were "wrongful," and 2) that the Trustee allegedly failed to consider them. If the evidence shows the modifications were permitted by the PSAs or applicable law, the objection would be invalid. That requires an understanding of what the loans are and how and why they were modified. These Objectors, however, have refused to identify the loans in question, have declined to produce the purported "data mining" documents on which the objection is premised (though they have discussed them with the New York Times)[2], and now refuse to produce a corporate witness to be cross-examined to determine whether these "wrongful" modifications were wrongful at all.

The CPLR requires that if Triaxx and the Federal Home Loan Banks intend to make this argument at the Article 77 hearing, they should produce the documents that support it and provide a witness to testify about it, so the settlement proponents can prepare adequately to defend against this objection.

AIG

AIG has been the self-proclaimed advocate of "transparency" in this proceeding, even as it has lowered an iron curtain to prohibit discovery from itself about its objections or its conduct in this Article 77 Proceeding. AIG cannot be permitted to argue points at the hearing if it refuses to provide discovery to test whether AIG's allegations are true. For example, AIG's pleadings have asserted from the outset that the $8.5 billion settlement payment was unreasonably low and unfair. This week, however, AIG's statistical expert, Dr. Charles Cowan, withdrew the entirety of his previously submitted statistical study during his deposition. This study had argued the settlement amount was too low. AIG's counsel then instructed Dr. Cowan not to answer any questions concerning why this study was being withdrawn. We were permitted no questions concerning whether the study was withdrawn because it was wrong, when it was that AIG and Dr. Cowan concluded it was wrong, or whether—as we believe to be the case—AIG withdrew the study because, when its errors were corrected, the study confirmed the settlement was fair. These extraordinary events concluded with this testimony by Dr. Cowan:

> Q: Are you telling the Court that the $8 ½ billion settlement payment is unfair or unreasonable in light of the litigation risks?
>
> A: Well, I didn't consider the litigation risks, so I don't have an opinion.

Cowan Dep. Tr. 137. AIG cannot be permitted to continue to press its claim about the settlement amount if it cannot—or will not—produce a party witness to be cross-examined on this central point.

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[2] *See* G. Morgenson, *How to Find Weeds in a Mortgage Pool*. Setpember 8, 2012. New York Times (quoting Triaxx's counsel in this case as claiming that "Using years of data and cross-referencing it, Triaxx has figured out where the bad loans are.").

In addition, AIG's objection asserts as "fact" something AIG's most senior executives surely know to be false; namely, that AIG was excluded from settlement discussions regarding the RMBS Trusts' repurchase claims. The settlement proponents are entitled to take testimony from AIG to establish this allegation is false; if AIG is unwilling to submit sworn deposition testimony on this point, that portion of its objection should be stricken.

Cranberry Park

Objector Cranberry Park is an anonymous LLC. It was created three weeks after the settlement—evidently for the purpose of objecting to it. Cranberry Park's pleading contains repeated references to data that has not been produced; also included are a purportedly expert argument concerning why the settlement is allegedly unfair or too low. None of this "evidence" has been produced and Cranberry Park's pleading is not evidence. If Cranberry Park is unwilling to produce the documents on which its objection rests and unwilling to produce a witness to be explain and test the analysis in Cranberry Park's pleadings, then the Court should decline to consider its objection.

It really is that simple. These Objectors have filed pleadings, citing purported "evidence" that has not been produced and about which they are unwilling to produce a party witness to testify. Parties who have filed pleadings must present themselves to testify about their allegations and the evidence on which they rest. CPLR 3101 and 3106 mandate that this discovery be permitted, so the Court should order each of these Objectors to produce a corporate representative forthwith to testify about their filed objections.

Finally, I want the Court to know that I contacted Mr. Reilly this week asking him to advise regarding the availability of the corporate witnesses, so we could work out a tentative schedule for depositions next week if on Monday Your Honor confirmed your prior oral ruling from May 9. Mr. Reilly refused to discuss this scheduling until *after* your ruling on Monday. For that reason on Monday we will ask Your Honor to impose deposition dates on the parties to take place during the coming week. The Steering Committee's intransigence shows that the normal courtesies of mutual scheduling will be simply used to create more delay.

Respectfully,

/s/ Kenneth E. Warner

Kenneth E. Warner

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cc: All counsel of record