

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the application of	:	
	:	Index No. 651786/2011
THE BANK OF NEW YORK MELLON (as Trustee under	:	Hon. Kapnick, J.
Various Pooling and Servicing Agreements and Indenture	:	
Trustee under various Indentures), <i>et al.</i>	:	
	:	
Petitioners,	:	
	:	
For an order, pursuant to C.P.L.R. 7701, seeking judicial	:	
Instructions and approval of a proposed settlement	:	

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**MEMORANDUM OF LAW IN SUPPORT
OF NONPARTY WILLIAM FREY'S
MOTION FOR A PROTECTIVE ORDER**

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PRELIMINARY STATEMENT

Reilly Pozner LLP, counsel for certain “AIG Entities” in this action, has served nonparty William Frey (“Frey”) with a trial subpoena pursuant to CPLR §§ 2302(a) and 2303(a) (the “Trial Subpoena”). The Trial Subpoena commands that Frey appear in this Court on June 10, 2013, or an adjourned date, to give testimony in this action. The Trial Subpoena also incorporates a demand for documents that requires Frey to bring with him on his testimony date all documents in Frey’s possession, custody or control concerning the 530 Covered Trusts that are the subject of this action.

Frey is the President of Greenwich Financial Services LLC (“GFS”), a registered broker-dealer that specializes in transactions and services concerning fixed income securities, including residential mortgage-backed securities. In connection with potential transactions concerning the 530 Covered Trusts, GFS developed and received substantial information and documents concerning certain loans and other potential transactions relating to the 530 Covered Trusts.

The Trial Subpoena is excessively burdensome and will require nonparty Frey to incur substantial expenses and legal fees in connection with compliance with the Trial Subpoena. For the reasons described below, this Court should issue an order: (a) modifying the Trial Subpoena to provide for production of documents demanded by the Trial Subpoena to Reilly Pozner LLP prior to Frey’s trial testimony rather than delivery of such documents to the Court on the day of his trial testimony; and (b) requiring the AIG Entities represented by Reilly Pozner to pay for all expenses incurred by Frey in connection with production of the documents demanded by the Trial Subpoena, including reasonable legal fees.

STATEMENT OF FACTS

Frey is President of GFS, a registered broker-dealer. Affidavit of William Frey, dated May 28, 2013 (“Frey Aff.”), ¶ 1. Neither Frey nor GFS is a party to this action. Frey Aff. ¶ 2. On May 20, 2013, Frey received the Trial Subpoena, which orders Frey to appear in Court to testify at trial and requires that he produce certain documents in Court at the time of his trial testimony. Frey Aff. ¶ 3. The document portion of the Trial Subpoena requires production of all documents concerning “530 Covered Trusts”, which are further identified in Exhibit A to the Trial Subpoena. Frey Aff. ¶ 3, Ex. A. At the time that he received the Trial Subpoena, Frey also received a witness fee in the amount of \$20.00. Frey Aff. ¶ 10, Ex. B.

As a result of potential transactions concerning the 530 Covered Trusts, GFS received and developed substantial documents and information relating to certain loans and other transactions relating to the 530 Covered Trusts. Frey Aff. ¶ 5. Frey has consulted with the outside IT firm that provides technology services to GFS regarding the work that must be performed to allow Frey to comply with the document portion of the Trial Subpoena. Based on preliminary assessments by the IT firm, more than 100 gigabytes of data, including over 1 million emails in current and archived databases, must be searched for responsive documents. Frey Aff. ¶ 6. The search process for locating responsive documents is likely to cost more than \$10,000. *Id.*

The search for responsive documents is only one part of the expenses that Frey will be forced to incur in order to comply with the Trial Subpoena. GFS is party to certain non-disclosure agreements (“NDAs”) that cover at least a portion of the documents demanded by the Trial Subpoena. Frey Aff. ¶ 7. The counter-parties to the NDAs include German and other European banks that have failed and own billions of dollars of securities concerning the 530

Covered Trusts. *Id.* It is likely that Frey and his counsel will be required to spend substantial time communicating with the counter-parties to the NDAs to explain the Trial Subpoena and provide other information in connection with the NDAs.

Furthermore, after the appropriate searches have been completed of GFS's computer files, the potentially responsive documents will still need to be reviewed for responsiveness, privilege, and confidentiality. Frey Aff. ¶ 8. In addition, to the extent that the search identifies documents that constitute attorney-client privileged communications, Frey may be required to incur additional expenses in providing information about those privileged documents. Given the scope of GFS's work and the amount of potential data, the ultimate document production by Frey in response to the Trial Subpoena will be substantial. Frey Aff. ¶ 9.

ARGUMENT

Section 2304 of the New York Civil Practice Law and Rules ("CPLR") provides that Frey may seek an order from this Court to "quash, fix conditions or modify" the Trial Subpoena. To ameliorate the excessive burdensomeness of the Trial Subpoena, Frey seeks an order from this Court that will: (a) modify the Trial Subpoena so that the documents demanded by the Trial Subpoena shall be produced in advance of Frey's trial testimony to Reilly Pozner rather than delivered to the Court on the date of Frey's trial testimony; and (b) require the AIG Entities represented by Reilly Pozner to pay all expenses incurred by Frey in connection with his compliance with the Trial Subpoena, including reasonable legal fees.

A. **This Court Should Order Modification of the Trial Subpoena to Provide For Production of Documents In Advance of Frey's Trial Testimony**

Pursuant to the Trial Subpoena, Frey is required to produce responsive documents in his possession, custody or control, including responsive documents in the possession of GFS. While

it is impossible as of the date of this memorandum to describe exactly the volume of responsive documents that will be produced in response to the Trial Subpoena, the quantity of such documents is likely to be substantial, given the amount of information and documents relating to the 530 Covered Trusts received in the past by GFS.

Neither Frey nor GFS received any pre-trial deposition or document subpoenas in this action. As a result, the Trial Subpoena will be the first time that Frey and GFS produce documents relevant to the 530 Covered Trusts. If such documents are produced in Court on the day of Frey's trial testimony, it is inevitable that the completion of Frey's trial testimony will be delayed by the simultaneous production of responsive documents. Therefore, this Court should modify the Trial Subpoena to provide that responsive documents may be produced to Reilly Pozner on a date prior to Frey's trial testimony.

**B. This Court Should Order the AIG Entities Represented
By Reilly Pozner To Pay All Expenses Incurred By Frey
In Responding To The Trial Subpoena, Including Legal Fees**

Section 2303(a) of the CPLR requires that a party issuing a subpoena pay the subpoenaed party a one day witness fee. Here, Frey received a witness fee in the amount of \$20.00. That witness fee will not cover the substantial expenses that Frey will incur in order to comply with the document production portion of the Trial Subpoena.

Rule 3122(d) of the CPLR provides that a party seeking pre-trial discovery and inspection of documents from a nonparty shall "defray" the "reasonable production expenses" incurred by a nonparty who is compelled to produce documents in response to a subpoena duces tecum. *See Tener v. Cremer*, 89 A.D.3d 75, 82, 931 N.Y.S.2d 552, 557 (1st Dept. 2011); *Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct. 2007) ("The Office of Court Administration stated in its Memorandum in support of the amendment to CPLR 3122(d) that a 'non-party can demand reimbursement of reasonable production expenses,

mirroring CPLR 3111, and may withhold such production until the expenses are paid or the issue is otherwise resolved by the court”). The same rule applies when a non-party witness must produce documents at the time of a deposition upon oral examination. CPLR 3111. Reasonable production expenses reimbursable to a non-party include those expenses related to providing electronic discovery such as email. *Klein v. Persaud*, 25 Misc.3d 1244(a), 906 N.Y.S.2d 780 (N.Y. Sup. Ct. Dec. 21, 2009) (citing *Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct. 2007)).

This Court has the authority to impose at its discretion appropriate conditions and restrictions on the document portion of the Trial Subpoena. *Kooper v. Kooper*, 74 A.D.3d 6, 10, 901 N.Y.S.2d 312, 317-18 (2d Dept. 2010) (citations omitted); *Cnty. of Suffolk v. Long Island Power Auth.*, 100 A.D.3d 944, 946, 954 N.Y.S.2d 619, 622 (2d Dept. 2012) (citations omitted). Counsel for the AIG Entities served Frey with the Trial Subpoena on May 20 with an initial return date of June 10, 2013, only three weeks after service of the Trial Subpoena. To comply with such a request Frey will be forced to immediately incur significant costs to: (a) conduct searches of approximately 100 gigabytes of data, including over 1 million emails; (b) retain counsel to review those documents for responsiveness, privilege issues, and issues concerning the NDAs; and (c) comply with the NDAs. Under these circumstances, this Court should order the AIG Entities to pay all expenses incurred by Frey in connection with the Trial Subpoena, including reasonable legal fees.

CONCLUSION

For the all the foregoing reasons, Frey respectfully requests that the Court grant his motion for an order: (a) modifying the Trial Subpoena to provide for production of responsive documents to Reilly Pozner prior to Frey's trial testimony; and (b) requiring the AIG Entities represented by Reilly Pozner to pay all expenses incurred by Frey to respond to the document production portion of the Trial Subpoena, including reasonable legal fees.

Dated: New York, New York
May 28, 2013

Respectfully submitted,

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