

May 31, 2013

Via E-filing and Facsimile

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 write today to bring to the Court's attention serious issues affecting the Court's ability to conduct a fair trial arising from the Trustee's recent production of documents. At 11:59 p.m. ET on Wednesday, May 29, Respondents received the production by Bank of New York Mellon of documents this Court ordered be produced under motion sequence 31. As a threshold matter of concern to the Steering Committee, the produced documents are heavily redacted. Yesterday, we asked Trustee's counsel whether all of the new documents were identified on BNYM's privilege log and to specifically identify which were not. We have spoken with counsel about this issue and are awaiting their response. Further, no privilege log has been produced to explain the redactions. In addition, the Trustee has not produced any documents concerning two of the three categories this Court ordered produced—documents concerning the Trustee's decision not to provide notice to certificateholders at any point before settlement was reached and documents concerning the broad release of claims BNYM sought for itself.

Nonetheless, and most importantly, the small portions of the documents that were produced directly contradict positions that the Trustee has repeatedly taken in this case. For example, the Trustee stated in its brief opposing motion sequence 31 that "Neither evidence nor logic supports the Steering Committee's suggestion that the Trustee agreed to extend the cure period because of some fear of an Event of Default . . ." (Doc. No. 491 at 9.) Now, however, we know [REDACTED]

[REDACTED] Ex. 1 (BNYM_CW-00285997); Ex. 2 (BNYM_CW-00285731). These documents represent only two examples of the nature of the documents produced.

Petitioners have known about these documents for over two years and no doubt have incorporated them into their trial preparation and theme. Respondents, in contrast, have had just over a day to review these documents and did not have them during discovery when we could have explored and tested the Trustee's theory that it was not conflicted. In light of the importance of these documents and the fact that they represent a shift in the narrative told by the



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Trustee, targeted discovery into the communications (including depositions of witnesses on the communications) is necessary and should occur before the Trustee is allowed to argue in opening about its duties to the certificateholders and purported compliance. Without such discovery and time to consider the new information, and incorporate it into expert reports, Respondents will be denied a full and fair opportunity to present their case, which is one of the express findings the Trustee asks this Court to make in the PFOJ. *See* PFOJ ¶ e (Doc. No. 7).

The new production also provides grounds for the Court to order the Trustee to produce all of the documents requested in motion sequence 31. There is abundant good cause to order this production. We now know [REDACTED], and it makes no sense to allow the Trustee to withhold documents that may show other acts of self-dealing, and other misrepresentations. There is no longer any doubt that the fiduciary-duty exception documents are the only source of this information. No other production by anyone shows what the recently produced documents show, that contrary to its official position here, the Trustee knew [REDACTED]. Without full production, the Trustee can continue to say whatever suits its fancy in Court—when the documents it is withholding tell a very different story. *See Hoopes v. Carota*, 142 A.D.2d 906, 910 (3d Dep’t. 1988) (recognizing that the exception exists because “a fiduciary has a duty of disclosure to the beneficiaries whom he is obligated to serve as to all of his actions, and cannot subordinate the interests of the beneficiaries, directly affected by the advice sought, to his own private interests under the guise of the privilege”).

In a case of this magnitude involving billions of dollars of damages and the permanent release of claims against Countrywide and Bank of America, it is crucial that we get the whole truth so that the Trustee’s conduct can be judged based on the evidence, not the Trustee’s self-serving account of evidence it refuses to produce. Under the circumstances, it would be unfair and imprudent to start trial without testing the Trustee’s compliance with the Court’s order, revisiting the scope of production ordered under motion sequence 31, and allowing limited necessary discovery. The Steering Committee will of course work expeditiously with opposing counsel, under the Court’s direction, to accomplish these tasks as efficiently as possible.

The Steering Committee looks forward to discussing these issues with the Court on Monday.

Respectfully submitted,

Daniel M. Reilly

Enclosures

cc: Counsel of record (via ECF)

EXHIBIT 1

CONFIDENTIAL DOCUMENT

SUBMITTED TO CHAMBERS

EXHIBIT 2

CONFIDENTIAL DOCUMENT

SUBMITTED TO CHAMBERS