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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:

Per the Court's request on June 21, the parties have met and conferred through multiple emails over the last ten days and had a teleconference on Friday June 28 regarding the remainder of the trial schedule. I write to report the issues discussed during the meet and confer process.

The Steering Committee expressed to Petitioners that in order for Respondents to have sufficient time to put on their evidence and have closing arguments by Friday, July 26, Petitioners would need to significantly cut their witness list and rest no later than July 9. Petitioners have refused to do so.[1] Consequently, and as explained in greater detail below, unless the Court imposes a deadline for Petitioners to submit their direct case on or about July 9, the Steering Committee is greatly concerned that Respondents' ability to put on their case will be unduly prejudiced if trial ends on July 26.

During the first two weeks of trial, Petitioners completed only four witnesses and began the testimony of a fifth. Notwithstanding the Court's request that the parties revisit their witness lists before trial resumes in July, Petitioners have refused (with one exception) to cut any witnesses. In fact, Petitioners still have 8 witnesses to call and have estimated they will need 12 additional hours of direct examination, bringing the total of their direct examination time to approximately 21 hours.

The dozens of Respondents each have a right to cross-examine Petitioners' witnesses. *People v. Ramistella*, 306 N.Y. 379, 384 (1954) ("The right to cross-examine is basic in our judicial system, and has been from the earliest times.") (citations omitted). As the Court has previously recognized, Respondents have worked and will continue to work diligently on coordinating their cross-examinations to avoid duplication. Notwithstanding these efforts, the

[1] In contrast, Respondents have significantly cut their witness list. Respondents currently plan on calling 21 witnesses and estimate this will require a maximum of 25 hours of direct examination time. The parties are exploring whether any stipulations can be reached to further streamline the direct examinations but, even if not, Respondents' projected direct examination time is reasonable in a case of this magnitude.

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crosses of Petitioners' remaining 8 witnesses will take time. And the cross-examination of some of those witnesses will take significantly longer than the other witnesses. For example, Jason Kravitt—the first witness representing the Trustee to take the stand in two weeks of trial, notwithstanding that this is supposedly the Trustee's settlement and the Trustee's conduct is at issue—had a wide-ranging scope of involvement in the settlement process. There is no question that Mr. Kravitt's actions and communications are material and relevant to every one of the eighteen findings that the Trustee has requested this Court make in the Proposed Final Order and Judgment and will need to be explored on cross-examination.

Petitioners complain that Respondents' cross-examination of the witnesses took longer in the first two weeks of trial than the direct examinations took. This fact is hardly surprising and, in fact, is the norm in trial proceedings where thorough cross examination of an adverse witness on any particular topic necessarily takes more time than questioning one's own witness, with the benefit of preparation of direct testimony. The cross-examination of Mr. Kravitt—or any other witness being put on the stand—cannot and should not be arbitrarily curtailed before the witness has even testified.[2]

Petitioners have suggested that the parties split the *remaining* time 50-50. This "solution" is problematic, unrealistic and, more importantly, in conflict with any notion of fairness and due process. This is because Petitioners have already expended 5.5 days (excluding the two days used for pre-trial matters and opening statements) to present evidence and the only way to equitably divide the remaining time is to allot the Respondents at least 5 days *more* of the remaining time than Petitioners. Thus, even with efficient examinations, minimal breaks, and few objections, the only way to finish trial by July 26 would be to end Petitioners case on or about July 9. The only alternative would be to drastically curtail Respondents' time for either conducting cross-examination (without regard to the content of the examination), putting on their case-in-chief, or conducting closing arguments. Such a result would unquestionably deny the Respondents a full and fair opportunity to be heard, in contravention of due process as well as one of the express findings the Trustee asks this Court to make. *See* PFOJ ¶ e (Doc. No. 7); *Habenicht v. R.K.O. Theatres, Inc.*, 23 A.D.2d 378, 381 (1st Dep't 1965) ("All litigants . . . are entitled to a fair trial."). And "no matter how pressing the need for expedition of cases, the court may not deprive the parties of the fundamental rights to which they are entitled . . . ." *Lipson v. Dime Savings Bank of N.Y., FSB*, 610 N.Y.S.2d 261, 262-63 (1st Dep't 1994).

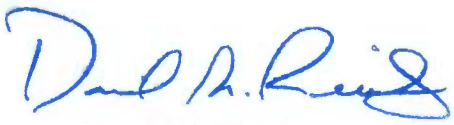
As the Court has previously acknowledged, the scope and magnitude of this case is immense; indeed, the release provided by the proposed settlement would be one of the most far reaching in the history of global jurisprudence. The settlement, if approved, will extinguish tens of billions of dollars in liability and will be binding on all certificateholders in the 530 Covered

[2] To the extent the Court determines that any given cross-examination is unnecessarily repetitive or is straying into collateral matters, the Court can make appropriate rulings at that time. *See Feldsberg v. Nitschke*, 49 N.Y.2d 636, 643 (1980).

Trusts. The dozens of parties before the Court all have the right to present evidence and cross-examine the witnesses put on by the other side. Consequently, a full and fair trial requires more time here than in a typical case – even the typical large and complex commercial case. Notably, this trial would not be necessary *at all* had the Trustee simply entered into the settlement, not conditioned on Court approval, rather than seek judicial blessing. But because the Trustee and Bank of America seek releases for their conduct with respect to the settlement, this case is before the Court. Respondents must be given a full and fair opportunity to put on their evidence.

I look forward to discussing these issues with the Court during today's conference call.

Respectfully submitted,



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cc: Counsel of record (via ECF)