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September 3, 2013

BY E-FILING

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

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

Dear Justice Kapnick:

On Friday evening, we received service copies of the objectors'¹ new request to continue the trial following the hearing dates currently scheduled for September. We write to request that the Court deny the relief without further briefing, or enter a schedule that gives the petitioners adequate time to respond. The objectors seek to re-litigate privilege issues that the Court has already heard and decided numerous times, and that easily could have been briefed weeks ago. If the Court believes that a response would be of any assistance, we respectfully request that Your Honor allow two weeks for the Trustee to file a responsive brief, given both the upcoming Jewish holidays and the substantial work necessary to get ready for the resumption of the trial on Monday.

We believe, however, that the new motion can be denied without further briefing, first, because it is not timely. As outlined in our July 18 memorandum (Doc. 908), New York law does not countenance a strategy of waiting out, and in many cases eliciting, testimony from multiple witnesses, without moving to strike, then raising new objections only after realizing that the testimony is unhelpful. Indeed, the Court invited the objectors to make this motion when they raised precisely these issues during the last trial session (Tr. 2352), but they did not do so until after five weeks of recess.

In any event, the motion is not even colorable because the objectors have not shown any waiver of the privilege by the Trustee. Much of the objectors' motion rehashes the at-issue argument that the Court rejected before trial (Mot. Seq. 31). Beyond that, the objectors' claim that the Trustee disclosed "new" information during trial rings hollow, because (i) the objectors used depositions (especially those of Mr. Kravitt and Ms. Lundberg) to elicit privilege objections and set up discovery disputes rather than to seek substantive testimony, and (ii) never took the additional half-day deposition of Mr. Kravitt (as approved by the Court in June 2013) or sought

¹ The motion was filed by AIG, the three Federal Home Loan Banks represented by Mr. Loeser, and Triaxx. No other objector signed the motion. Nor did the Attorneys General.

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additional written discovery from the Trustee or Ms. Lundberg (as suggested by the Court in October 2012). Other allegations of waiver involve trial testimony that plainly is not privileged, such as disclosure of topics of legal analysis, rather than actual work product. And yet others relate to topics that were the subject of Your Honor's order on the fiduciary exception (which was issued after discovery, thus explaining why certain previously withheld information could be disclosed at trial), or factual information that the objectors obviously received in discovery. For example, on the same page (Br. Appendix 6), they cite both Mr. Kravitt being instructed not to disclose what his client *told* him about loan file review (an attorney-client communication), and Ms. Lundberg, a non-lawyer, testifying to the unremarkable fact that the Trustee had not reviewed loan files. It is hardly "trial by ambush" that this fact—which the objectors themselves have repeated endlessly before and during trial—or the rationale for not conducting loan file review—which was discussed in non-privileged communications with all negotiating parties—came out during trial.

The motion requests "a production of all documents reflecting, discussing, or otherwise evidencing BNYM's factual and legal investigation and evaluation of the claims sought to be released by the settlement" (Br. 10). That mid-trial document review and production would be followed by depositions and the recalling of trial witnesses, at least one of whom has already testified for six days. The objectors have shown no basis, at this late stage in the proceedings, for the imposition of such substantial additional delay and burden on the litigants and the Court.

The Court can and should decline to issue the proposed order to show cause. In the alternative, we respectfully request two weeks to submit a more fulsome response.

Respectfully,



Matthew D. Ingber

cc: All counsel