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June 13, 2012

Hon. Barbara R. Kapnick
Justice
Supreme Court of the State of New York
60 Centre Street, Part 39
New York, New York 10007

Re: In re: The Bank of New York Mellon, Index No. 651786/11

Dear Justice Kapnick:

I write in response to the letter from Michael Carlinsky, Esq. dated June 12, 2012 on behalf of AIG and in opposition to the request in my letter of June 6, 2012 for a discovery ruling at the forthcoming conference on the narrow issue of the Objectors having to produce the communications referenced in the Institutional Investors' Document Request No. 5.[1] In opposition, AIG asserts a "mediation privilege" associated with the mediation of its separate securities fraud claims against Bank of America.[2]

The Document Request at issue seeks communications of central relevance to this action, since they concern the grounds on which AIG has objected to the approval of the Settlement. "Parties to an action are entitled to reasonable discovery of 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Montalvo v. CVS Pharmacy*, 83 A.D.3d 61, 915 N.Y.S.2d 865, 866 (2nd Dept. 2011) (*citing cases*). It is obvious, we submit, that statements AIG has made *about* its Objection may contain discoverable admissions that are likely to shed light, among other things, on whether the Objection itself is groundless or has been pursued for a purpose not permitted under PSA Section 10.08, such as trying to leverage a private, disproportionate settlement *for itself* by threatening to

[1] Request No. 5 seeks discovery of the Objectors' communications with Bank of America and/or BNY Mellon about their filed and/or threated to be filed Settlement Objections.

[2] Mr. Carlinsky's objection to my request as being "informal" (Carlinsky ltr at 1-2) is without merit. Your Honor has told the parties that you prefer discovery issues, particularly narrow ones, to be raised by letter, rather than by formal motion, and my letter was written consistent with that preferred practice. Given the importance and straightforward nature of this issue, we ask that the Court proceed as planned and take this issue up at the conference on Thursday.

attack and delay the overall Settlement that would benefit *all* Certificateholders.[3] This evidence is also highly relevant given that AIG, which holds only a tiny fraction of the outstanding securities issued by the Covered Trusts, has to date pursued a discovery strategy aimed at imposing *years* of delay and millions of dollars in expense on the Trusts and their Certificateholders.[4]

Importantly, the mediation privilege statute cited by Mr. Carlinsky applies solely to a communication "which is made *in the presence* of such mediator by any participant, mediator or other person." Mass. G. L. c. 233 sec. 23C (emphasis added). *See also Janko v. Janko*, 2003 WL 21474361, at *2 (Mass. App. Ct. 2003) (mediation privilege not established where no affidavit provided establishing that communication at issue "was made in the presence of the mediator"). Mr. Carlinsky's letter makes no effort to establish this applicability, despite AIG's burden to demonstrate that the mediation privilege applies.

Besides failing to identify *any* specific communications about its Settlement Objection that were made part of the securities mediation, AIG has also not produced a privilege log that would clarify this point.[5] On this basis alone, AIG's opposition should be rejected.

In addition, Massachusetts courts have held that the Massachusetts mediation privilege is not absolute. For example, courts have interpreted the mediation privilege as an evidentiary privilege, not an absolute bar on disclosure. *See Modern Continental Constr. Co. v. Zurich Am. Ins. Co.*, 2006 WL 1258760, at *7, *10 (Mass. 2006) (ruling that mediation materials were inadmissible in evidence but could still be disclosed in the litigation for other purposes); *In re Logistics Information Systems, Inc.*, 432 B.R. 1, 9 (D. Mass. 2010) (characterizing the Massachusetts mediation statute as "creating an evidentiary privilege").

AIG's letter also obscures another important point: nothing in Request No. 5 calls for the production of communications related solely to AIG's securities fraud claims *per se*, which were the subject of its mediation with Bank of America. Rather, the Request is limited *strictly* to

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[3] This Court, which has now twice construed PSA Section 10.08, is aware that it permits Certificateholders to assert rights under the PSAs *solely* for the benefit of *all* Certificateholders. The Section thus precludes Certificateholders from asserting their rights under the PSA to obtain an *individual* benefit for themselves.

[4] Exhibits to AIG's Securities Complaint establish that the AIG parties who have objected to the Settlement hold *less than .67%* of the outstanding RMBS securities.

[5] *See* CPLR § 3122(b) (requiring a party withholding documents on the grounds of privilege to disclose, among other things, "(1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum").

communications about AIG's threatened and/or filed Settlement Objection, which were not the subject of mediation.

AIG's letter also fails to establish that the Massachusetts statute could ever operate extra-territorially to preclude a New York judge, in a New York court, from ordering the production of documents relevant to a proceeding arising under New York law concerning contracts that are governed by New York law. We have been unable to locate a *single* case outside Massachusetts in which a court has applied the Massachusetts mediation statute to bar discovery in a separate proceeding.

AIG's letter is also silent concerning other facts relevant to its "mediation privilege." For example, AIG fails to disclose that this mediation occurred in July 2011, a month *before* AIG asserted its Settlement Objection in August. *Compare* Letter of Greg Joseph to Joseph J. Ybarra at pg. 4, attached as Ex. "A." ("BofA has been fully aware that AIG has been using Quinn Emmanuel continuously since [March or April], *including in the mediation in July*.") *with* AIG Settlement Objection, filed August 8, 2011 (emphasis added).[6]

In light of this timing, there are only two possibilities:

Possibility One - The Settlement Objection, filed after the July mediation, was *not* part of the mediation. If that is the case, the mediation privilege is entirely inapplicable.

Possibility Two - AIG's Settlement Objection, or more precisely *the threat thereof,* was part of the mediation, in which case AIG has now admitted what many have long suspected: AIG's Settlement Objection is simply the product of its effort to hold the Settlement—and the thousands of innocent Certificateholders and borrowers who benefit from the Settlement—hostage to AIG's attempt to extract an *individual* securities settlement from Bank of America (*i.e.,* by threatening to object and hold up the Settlement unless Bank of America settled with AIG separately and disproportionately).

The Court is entitled to consider this evidence as it examines whether AIG's grounds for objecting to the highly beneficial, $8.5 billion Settlement — and its demands for discovery — have been asserted in good faith. The Court should therefore order AIG to respond fully and completely to the Institutional Investors' Request No. 5. The Court should also compel AIG to prepare a privilege log and submit, for *in camera* review, the communications *about and/or threatening its Settlement Objection* that are allegedly subject to the mediation privilege. We believe that the documents involved are limited in number, and only an *in camera* inspection thereof can establish whether the privilege has been invoked properly.

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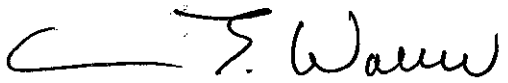
[6] The facts concerning this mediation were made public in the securities litigation between Bank of America and AIG and are available on Alison Frankel's "On the Case" legal blog. *See e.g. http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2011/10_-_October/aigvbofa--gregjosephletter1.pdf*

Thank you for your continuing attention to this matter.

Respectfully,



Kenneth E. Warner

KEW:ak
Enc.
cc: All counsel of record (via ECF)

Exhibit A

EXHIBIT F

Attorney Work Product/Privileged and Confidential
Discussion Draft 9/25/11 Doc ID 686522

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September 26, 2011

By Email
Joseph J. Ybarra, Esq.
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355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Re: ***American International Group, Inc. v. Bank of America Corp.*, 11 Civ. 6212 (BSJ) (S.D.N.Y.)**

Dear Mr. Ybarra:

We have been retained by Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), in connection with the purported conflict issue raised in your September 19, 2011 letter to Michael B. Carlinsky.

Your letter asserts that the entire Quinn Emanuel firm is subject to disqualification from representing American International Group ("AIG") in the above-referenced action (the "BoA Action") on the sole basis that your former partner, Marc Becker, is at Quinn Emanuel's UK affiliate, having left Munger Tolles in May 2008 after working on a matter (the "First Franklin Matter") concerning certain mortgage-related agreements of First Franklin Financial Corporation ("First Franklin"), which was then a subsidiary of Merrill Lynch and later became a subsidiary of Bank of America ("BoA"). This assertion is groundless.

There is no merit to any suggestion that Quinn Emanuel is subject to disqualification:

- Mr. Becker has shared no confidential information of First Franklin or Merrill Lynch with anyone at Quinn Emanuel.
- No one at Quinn Emanuel has ever sought or received any such information from Mr. Becker.
- Indeed, Mr. Becker did not recall any involvement in Munger Tolles' representation of Merrill Lynch or First Franklin until he learned of your letter of September 19.

- Even now, Mr. Becker does not recall any confidential information of First Franklin or Merrill Lynch and only vaguely recalls the nature of the work he did. (To ascertain the extent of Mr. Becker's recollection of the First Franklin Matter, we interviewed him outside the presence of any Quinn Emanuel personnel.)

- Mr. Becker did not take any First Franklin or Merrill Lynch documents with him when he left Munger Tolles, and therefore brought none to Quinn Emanuel.

- BoA, Merrill Lynch and First Franklin do not claim, and have not suffered, any prejudice by virtue of the fact that Mr. Becker has worked in Quinn Emanuel's London office since 2008.

Your letter implies that your former partner, Mr. Becker — who was your colleague for almost 20 years — would deliberately betray client confidences. Yet you do not expressly contend that he would do such a thing, and we very much doubt that you actually believe he did. In any event, he did no such thing.

Following receipt of your September 19 letter, Quinn Emanuel promptly interposed an effective screen between Mr. Becker and the BoA Action. Mr. Becker has been blocked from access to Quinn Emanuel's hard copy and electronic files concerning the BoA Action. All Quinn Emanuel lawyers and other personnel have been formally instructed not to discuss the substance of the BoA Action with Mr. Becker. Mr. Becker has been formally instructed not to discuss the substance of his work on the First Franklin Matter with other lawyers or staff at Quinn Emanuel. His compensation going forward will not partake of any fees earned by Quinn Emanuel on the BoA Action. These screening measures are more than adequate to address your stated concerns.

The sole issue before the Court on any motion to disqualify would be whether there is a substantial risk of trial taint. *See Arista Records LLC v. Lime Group LLC,* No. 06 CV 5936 (KMW), 2011 U.S. Dist. LEXIS 17434, at *16 (S.D.N.Y. Feb. 18, 2011) ("Disqualification is only warranted in the rare circumstance where an attorney's conduct poses a significant risk of trial taint") (citations and internal quotations omitted); *Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) ("disqualification is only warranted where an attorney's conduct tends to taint the underlying trial"). The Second Circuit has repeatedly held that screening and other safeguards—formal and informal—are adequate against the risk of disqualifying trial taint, and defeat any imputation of knowledge for conflict purposes. *Hempstead Video*, 409 F.3d at 138 ("We see no reason why, in appropriate cases and on convincing facts, isolation—whether it results from the intentional construction of a 'Chinese Wall,' or from *de facto* separation that effectively protects against any sharing of confidential information—cannot adequately protect against the taint."). Any presumption that Mr. Becker might have shared confidences of BoA, Merrill Lynch or First Franklin with anyone at Quinn

Emanuel is subject to factual rebuttal — *see Arista,* 2011 U.S. Dist. LEXIS 17434, at *17 ("in *Hempstead Video*, the Second Circuit joined other circuits in holding that 'the presumption of confidence sharing within a firm [can] . . . be rebutted.'") — and is rebutted on these facts.

There is no thus conceivable taint that could flow from Mr. Becker's partnership at Quinn Emanuel, screened off in London from the BoA Action and talking to no one about any work he ever did for Merrill Lynch or First Franklin. That by itself ends the disqualification discussion.

Moreover, we see no substantial relationship between the First Franklin Matter and the BoA Action.

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Tellingly, while your clients have suffered no prejudice from Mr. Becker's presence at Quinn Emanuel London, AIG would suffer grave prejudice if it were deprived of its chosen counsel in the BOA Action. Quinn Emanuel is one of AIG's leading litigation counsel. Before the BoA Action was filed, Quinn Emanuel — the premier firm in this field with extensive experience litigating RMBS fraud suits — spent thousands of hours conducting the exhaustive forensic factual investigation and analysis of sample loan files underlying the complaint (as summarized in ¶¶ 6-8 of the Complaint). Mr. Becker did not participate in this investigation or

analysis; nor, as discussed above, does he know anything from his work on the First Franklin Matter that would have been useful in Quinn Emanuel's development of the case. It would be extremely difficult for AIG to find new counsel who have the expertise and capacity to handle a case of this complexity and magnitude, let alone such counsel that is not currently representing any financial institutions adverse to AIG in this or other litigation. Even if such new counsel could be found, the inevitable duplication of work done by Quinn Emanuel would be immensely costly to AIG, and could substantially delay the proceedings.

The potential for prejudice to AIG is exacerbated by your clients' delay in raising the conflict issue. Mr. Becker's status as a partner at Quinn Emanuel has been a matter of public record since he made the move from Munger Tolles in 2008. It is our understanding that BoA, Merrill Lynch and First Franklin have known since at least January 2011, when a standstill agreement was signed, that Quinn Emanuel was actively developing RMBS-related claims against them. A month later, AIG sent BoA an extensive Power Point presentation that outlined AIG's putative $10 billion in claims, identifying multiple Merrill Lynch and First Franklin RMBS deals at issue. And, in March or April, AIG rejected BofA's express request that AIG stop seeking advice from Quinn Emanuel as a condition of allowing AIG access to settlement talks between BoA and certain institutional investors. BoA has been fully aware that AIG has been utilizing Quinn Emanuel continuously since then, including in the mediation in July. The decision of your clients to raise this issue now suggests to us that they are motivated solely by a desire for tactical advantage.[1] In this regard, we must stress that if your clients do intend to move to disqualify Quinn Emanuel, they must make the motion promptly, because further delay is inexcusable and would inflict further harm on AIG. *See, e.g., Murray v. Metro. Life Ins. Co.*, 583 F.3d 173, 180 (2d Cir. 2009) ("plaintiffs' lengthy and unexcused delay in bringing its motion to disqualify weighs against disqualification").

Finally, we are extremely surprised that you and your clients would raise this purported disqualification issue when you have a serious conflict problem of you own: Christopher Garvey, Associate General Counsel of BoA, worked on the AIG/BoA dispute while an equity partner at Goodwin Procter. During the term of Mr. Garvey's equity partnership, Goodwin had a serious conflict — multiple current representations of AIG — but was permitted to represent BoA only prior to the commencement of litigation. AIG understood that Mr. Garvey was a BoA lawyer but it now appears that he was a Goodwin partner seconded to BoA and, in that capacity,

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[1] *See, e.g., D.R.T., Inc. v. Universal City Studios, Inc.*, No. 02 Civ. 0958, 2003 U.S. Dist. LEXIS 6861, at *7 (S.D.N.Y. Apr. 24, 2003) ("motions to disqualify counsel are generally disfavored. . .[,] often tactically motivated, cause undue delay, add expense, and have 'an immediate adverse effect on the client by separating him from counsel of his choice'") (citations omitted).

subject to Goodwin's conflicts and ethical limitations. Mr. Garvey chose to work on the AIG/BoA dispute subject to the limitations AIG imposed on Goodwin, but is now flouting them by effectively running the litigation for BoA from an inhouse post. Moreover, we understand that Goodwin represented AIG in mortgage lending matters. If BoA pursues its reckless charge of disqualification against Quinn Emanuel, AIG will be forced to address Mr. Garvey's conflicts, and this will not be limited to Mr. Garvey but extend to all whom Mr. Garvey has tainted. *See* N.Y. RULES OF PROFESSIONAL CONDUCT 1.0(h) ("'Firm' or 'law firm' includes . . . lawyers employed in . . . the legal department of a corporation or other organization").

If you have any questions regarding the foregoing, or would like to discuss it, please do not hesitate to call or email me. We look forward to the prompt resolution of this issue. We request that you advise us no later than noon EDT on Wednesday, September 28, 2011, whether you intend to seek disqualification of Quinn Emanuel. If we do not hear from you, we will assume that you will not pursue the issue.

Yours sincerely,

Gregory P. Joseph

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