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Via ECF & Hand Delivery

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:

The Steering Committee followed the Court's instructions by beginning depositions and by narrowing its request for all settlement communications. Unfortunately, depositions have made clear the settlement proponents are continuing to block the Intervenors and this Court from obtaining the information necessary to fully and fairly evaluate whether the Trustee conducted an appropriate "factual and legal investigation," whether the negotiations were "arms-length," whether the Trustee's deliberations were "appropriately focused," and whether the Trustee's conduct should be approved in "all respects." (PFOJ ¶¶ e, h-n.) We now know from the depositions that [REDACTED]

[REDACTED] Accordingly, settlement communications between Bank of America ("BoFA") and the Inside Institutional Investors are necessary to fill the gap in the record; indeed, in the Residential Capital bankruptcy, another RMBS settlement negotiated by Gibbs & Bruns, the Inside Institutional Investors' settlement communications are being produced. Separately, we now also know that, while BNYM will continue to use the nature of their communications with the Inside Institutional Investors and their own counsel as a sword to promote the reasonableness of the settlement process, their strategy is to use the privilege as an impermissible shield against any meaningful inquiry into the content of those communications.

The Steering Committee has taken the deposition of Jason H.P. Kravitt, the lead negotiator for BNYM, and Loretta Lundberg, a managing director in BNYM's Corporate Trust Division who signed the proposed Settlement Agreement, BNYM's Article 77 Verified Petition (Doc. No. 1), and other documents central to the proposed settlement and the court case that ensued. These depositions revealed a number of new, disturbing facts, which establish the importance of the information that the settlement proponents continue to conceal:¹

¹ The Steering Committee will provide the Court with a copy of the complete transcript of each deposition. Because the transcripts contain information designated by BNYM as "Confidential," the transcripts will be delivered to the Court only and will not be electronically filed. Likewise, portions of



- The Trustee Was [REDACTED] BNYM [REDACTED]
[REDACTED]
This [REDACTED] is problematic, as BNYM was [REDACTED]
[REDACTED]
And Ms. [REDACTED]
Lundberg admitted that [REDACTED]
[REDACTED]
Furthermore, [REDACTED] Mayer Brown [REDACTED]
[REDACTED]
[REDACTED]
- BofA is [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

this letter have been redacted to protect purportedly Confidential Information. The Steering Committee will provide the Court and all counsel with an unredacted version of the letter.



- BNYM Entered the Forbearance Agreement [REDACTED]
[REDACTED] In December 2010, the settlement proponents entered into a forbearance agreement aimed purportedly at preventing an event of default from occurring, which would have triggered certain rights of certificateholders (including the right to sue) under the PSAs. The Trustee entered the forbearance agreement in an effort to [REDACTED]
[REDACTED]
- BNYM Agreed to [REDACTED]
[REDACTED]
- The Trustee Had [REDACTED]
[REDACTED]

The Steering Committee also served new discovery requests since the August 2 hearing before Your Honor which narrowed the demand for settlement communications to ten subjects that are critical to evaluating the proposed settlement: (1) the forbearance agreements, [REDACTED]; (2) potential or actual events of default, which would have materially impacted certificateholders' rights and the Trustee's duties; (3) BNYM's indemnification, [REDACTED]; (4) the calculated lack of notice to certificateholders; (5) the \$8.5 billion settlement amount; (6) the number of covered trusts; (7) the negotiation of Gibbs & Bruns attorney's fees, [REDACTED]; (8) the proposed final order and judgment; (9) actual or proposed limitations on certificateholders' ability to object [REDACTED] and (10) the purported servicing improvements contemplated by the settlement (the "Narrowed Subjects"). Nonetheless, the settlement proponents continue to refuse production of any of the Inside Institutional Investors' binary settlement communications, which are squarely before the Court.

The Steering Committee continues to seek discovery into the Inside Institutional Investors' binary settlement communications with BofA, their binary settlement communications



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Kravitt, BNYM's lead negotiator, testified

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The final settlement amount is

[REDACTED]

there is no way for the Intervenors or this Court to know whether the settlement payment came down as the fee payment went up. In November 2010, the Trustee and the Inside Institutional Investors were negotiating

[REDACTED]

B. The Trustee

[REDACTED] Ms.

Lundberg, BNYM's signatory on both the proposed Settlement Agreement and the Verified Petition, testified that

[REDACTED]



[REDACTED]

[REDACTED]

• [REDACTED]

C. There is Ample Justification for Compelling Production of The Inside Institutional Investors' Communications With BofA on the Narrowed Subjects

[REDACTED]—that the proposed settlement and process by which it was reached cannot be fairly and fully evaluated without production of the Institutional Investors' communications with Bank of America. As is apparent now, [REDACTED]

[REDACTED] Neither the Intervenor nor this Court can possibly evaluate whether this proposed settlement and the troubling manner in which it was reached are justified without this critical information. The settlement proponents have argued that collusion must be shown before these patently relevant settlement communications can be produced. (*See, e.g.*, Doc. No. 349.) For the reasons previously argued by Intervenor, a showing of collusion is simply not required under New York law and should not be imposed in the unique circumstances of this case. (*See* Doc. No. 278 at 5 n.3; 8/2/12 Hearing Tr. at 26:13-27:20; 30:17-33:23; 82:9-19.)

Even if such a showing were required, however, the record supports a finding of collusion sufficient to allow discovery. The irregularities of this settlement process are numerous, as detailed throughout this letter. [REDACTED]

² Ms. Lundberg's [REDACTED]



[REDACTED]

This hardly constituted zealous representation of absent certificateholders' interests.

In short, the highly irregular circumstances under which the settlement was negotiated more than justify production of the Inside Institutional Investors' settlement communications with BofA. To evaluate whether these negotiations were "arms-length," whether the settlement should be approved in "all respects," and whether the Trustee's conduct should be approved "in all respects," it is critical to know what occurred between the Inside Institutional Investors and BofA during the negotiations in which the Trustee was absent. The Inside Institutional Investors and BofA should accordingly be required to produce their binary communications relevant to the Narrowed Subjects.

Notably, in the Residential Capital bankruptcy (another matter in which Gibbs & Bruns, representing many of the same Inside Institutional Investors as here, have negotiated an RMBS settlement for which judicial approval is sought), Residential Capital and its parent company, Ally Financial Inc., are producing all settlement communications with the Inside Institutional Investors and Gibbs & Bruns. *See* Gibbs & Bruns' Response In Opposition to the Motion of the Official Committee of Unsecured Creditors to Compel Gibbs & Bruns to Produce Settlement Communications at 2 (Doc. No. 1597), *In re Residential Capital, LLC*, Case No. 12-12020 (Bankr. S.D.N.Y.). Gibbs & Bruns even produced a 90-page log listing all settlement communications in its possession, to "ensure" that the production captured all settlement communications. *Id.* Thus, the Inside Institutional Investors have allowed disclosure of their settlement communications in another matter, while continuing to completely stonewall this Court and the Intervenor from obtaining such information here.

II. BNYM Should Be Required to Produce Its Communications With the Inside Institutional Investors and With Counsel Regarding the Settlement

Huge volumes of BNYM's communications are likewise being withheld based on various



privilege assertions, [REDACTED]

[REDACTED] The Trustee has squarely put its investigation, deliberation, and conduct at issue and yet is withholding the discovery necessary to evaluate the findings sought in the PFOJ. BNYM's use of privilege as both a sword and a shield should not be allowed.

A. Communications Between the Inside Institutional Investors and BNYM Are Not Protected By the Common Interest Privilege

Mr. Kravitt testified that [REDACTED]

The Court expressly deferred a decision on the common interest privilege claim at the last hearing. (8/2/12 Hearing Tr. 90:10-13) ("I appreciate Mr. Madden speaking about the common interest privilege. I don't think we reach it at this point. We might, at some other point. The law, I am sure, won't change much between now and then.") For all the reasons the Intervenor have previously briefed and argued, the invocation of a purported common interest privilege between BNYM and the Inside Institutional Investors to block absent certificateholders from learning what occurred during the settlement negotiations is meritless. (*See* Doc. No. 337.) The recent depositions further undercut the common interest claim, which should now be flatly rejected by the Court.

Mr. Kravitt admitted during his deposition that [REDACTED]

[REDACTED] Specifically with regard to the negotiation of the forbearance agreement, Mr. Kravitt testified [REDACTED]

[REDACTED] there can be no common interest privilege between BNYM and the Inside Institutional Investors.

Furthermore, Mr. Kravitt testified that [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] With respect to the forbearance agreement specifically, Mr. Kravitt

[REDACTED]

[REDACTED]

[REDACTED]

The depositions have also shown that [REDACTED]

[REDACTED]

B. Communications Between BNYM and Its Counsel Should Likewise Be Produced

The Trustee has come to this Court and requested findings that the Settlement Agreement is “the result of factual and legal investigation by the Trustee,” that the “Trustee appropriately evaluated the terms, benefits and consequences of the Settlement and the strengths and weaknesses of the claims being settled,” that the “actions of the Trustee” should be approved “in all respects” (PFOJ ¶¶ h-n), and that in its decision the Trustee was “guided by counsel” (Verified Pet. ¶ 61). Yet when questioned about these issues, Ms. Lundberg [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

Similarly, Mr. Kravitt [REDACTED]

[REDACTED]

[REDACTED] BNYM should not be able to continue concealing the rationale for its decision-making about the proposed settlement while at the same time asking the Court to approve that very decision-making. For at least three reasons, BNYM's privilege claims should be rejected.

First, it became apparent during the deposition of Ms. Lundberg that [REDACTED]

[REDACTED]

[REDACTED] BNYM should be ordered to immediately produce all facts communicated from counsel to BNYM which have previously been improperly withheld, and should further be instructed to answer questions regarding factual issues in future depositions.

Second, the depositions have made abundantly clear that [REDACTED]

[REDACTED] The Verified Petition states that the Trustee "has been guided by counsel on the legal issues" (Verified Pet. ¶ 61), and Ms. Lundberg [REDACTED]

[REDACTED] Having asked this Court to approve the Trustee's legal investigation, (PFOJ ¶ h), BNYM cannot now hide behind

[REDACTED]



privilege claims to block inquiry into that investigation. Further, as demonstrated by the list above, [REDACTED]

BNYM has placed the actions of its counsel squarely at issue and BNYM has waived its attorney-client privilege over advice obtained with regard to the proposed settlement.

Finally, the fiduciary exception should be applied here to allow discovery into communications between BNYM and counsel pertaining to advice sought on behalf of the trust beneficiaries. “[T]he controlling feature for the applicability of the fiduciary exception is whether the legal advice was sought for the benefit of the party seeking disclosure as a result of a fiduciary relationship.” *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 381 (N.Y. Sup. Ct. 2003). Here, the Trustee has admitted that [REDACTED]

[REDACTED], thus any legal advice it sought concerning the settlement was necessarily sought for the benefit of certificateholders. Further, the good cause which the Court sought at the last hearing has been established by the recent depositions. (8/2/12 Hearing Tr. 160:24-162:7.) [REDACTED]

[REDACTED] there is no dispute that the Trustee’s actions are highly relevant to the ultimate question before the Court.

[REDACTED] the Intervenor’s cannot get information about the Trustee’s deliberations and decision-making *any other way*. [REDACTED]

[REDACTED] As such, when balancing all of these considerations—which notably establish that the Trustee was operating under a conflict—good cause exists for application of the fiduciary exception and production of these highly relevant documents to evaluate whether the Trustee’s conduct should be “approved in all respects.”

III. Additional Depositions Are Necessary

[REDACTED]



[REDACTED]

the Intervenor are in the process of noticing or subpoenaing those additional depositions. Beyond the Trustee, the Intervenor will also be seeking depositions of representatives of the Inside Institutional Investors and BofA.

IV. Document Requests to BNYM

Following the depositions of Mr. Kravitt and Ms. Lundberg, the Intervenor have requested the following documents:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



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The Steering Committee intends to raise these requests at the October 12 hearing if BNYM does not agree to produce them. We look forward to appearing before Your Honor at that time.

Respectfully submitted,


Daniel M. Reilly

cc: All counsel