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*By Fax*

Honorable Barbara R. Kapnick  
Supreme Court, New York County  
60 Centre Street, Room 555  
New York, New York 10007

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

Dear Justice Kapnick:

We write on behalf of the members of the Steering Committee of Intervenor-Respondents. Bank of America submitted a 25-page brief yesterday, ostensibly in “opposition” to the part of respondents’ motion to compel (Motion Sequence No. 22) that seeks the production of mortgage-loan files.<sup>1</sup> BofA submitted that brief in blatant defiance of this Court’s order that oppositions to that motion were due by no later than April 13,<sup>2</sup> and without asking for leave of Court to file an untimely submission.

Moreover, on Tuesday May 1, the *day before* BofA filed its submission, the parties met and conferred about discovery. We agreed to narrow by orders of magnitude the number of loan files that we intend to request, and we stated that we intend to make a specific proposal to that effect. BofA omitted to mention this fact in its letter to the Court. We intend to present a unified proposal to counsel for BNYM, the Institutional Investors, and BofA by no later than May 10.

Under these circumstances, we respectfully submit that the part of the motion to compel that seeks production of loan files is no longer ripe for the Court’s consideration at the upcoming conference on May 8. Even if the parties cannot reach an agreement through a meet and confer process, basic fairness dictates that if the Court is inclined to consider Bank of America’s untimely and lengthy submission, then respondents must have adequate time to respond, and the Court must have adequate time to review the papers before hearing argument.

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<sup>1</sup> The Steering Committee submitted the motion to compel on behalf of all respondents except those that were expressly excluded in footnote 1 of the Reply Memorandum of Law in Support of the Order to Show Cause Why the Court Should Not Compel Discovery.

<sup>2</sup> Order to Show Cause, dated April 4, 2012, in Motion Sequence No. 22.

We respectfully request that the Court remove the question of loan files from the crowded agenda for May 8, and instead set a separate hearing date on that issue. We will call the Court today to request available dates for that hearing.

Eliminating the question of loan files from consideration on May 8 will also ensure that the Court has sufficient time at that conference to consider the critical issues that are ripe for the Court's consideration: (1) the Trustee's refusal to produce any communications among BNYM, the Institutional Investors, and BofA about the negotiation of the settlement (also a subject of Motion Sequence No. 22); and (2) a schedule for discovery.

Discovery has been paralyzed for months because there has been no judicial ruling on the Trustee's extraordinary argument that it can shield from production all of its communications with the other parties to the settlement. BNYM seeks judicial approval of a settlement that would bind *all* investors in the Trusts, and seeks rulings by this Court that the settlement negotiations were "arms-length" and that it acted in "good faith." But BNYM nevertheless argues that the settlement communications are not "relevant" and that they are "privileged." As respondents argued at length in their briefs in support of their motion to compel, the settlement communications are not merely relevant, they go to the heart of this proceeding, and there is simply no plausible legal argument that they are privileged – particularly where, as here, the settlement would resolve the claims of the parties against whom the privilege is being asserted.

BNYM confirmed during the meet and confer on May 1 that it stands on its objections and refuses categorically to produce any settlement communications. This issue is thus fully briefed and ripe for resolution on May 8. Moreover, all parties agree that it is impossible as a practical matter to start taking depositions before this question about settlement communications is resolved. BofA's sudden untimely submission about loan files that are still the subject of ongoing meet and confer discussions is simply an attempt to distract the Court from the critical issue of settlement communications.

For all of these reasons, the Steering Committee respectfully requests that the Court devote the hearing on May 8 to resolving this critical dispute regarding settlement communications and setting a schedule and framework for discovery – and defer to another day the dispute regarding loan files.

Respectfully yours,



Owen L. Cyrulnik

Copies to: Counsel of record by email