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Via E-Filing and 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:

As counsel for American International Group, Inc. and its subsidiaries ("AIG"), we write, respectfully, in response to the letter of Kenneth Warner dated June 6, 2012, which seeks to compel the production of confidential and privileged communications between AIG and Bank of America. While Mr. Warner purports to identify in his letter and the Exhibits to the letter the basis for AIG's objections to the production of these materials, he fails to mention that AIG has objected to production on the ground that these communications are governed by a mediation privilege. The applicable mediation privilege is an absolute privilege afforded to mediations conducted pursuant to Massachusetts law.¹ AIG objects to the Court's consideration of the Inside Institutional Investors' efforts to invade the mediation privilege in the informal manner in

¹ AIG does not waive or intend to waive the privileged nature of any of the mediation materials or the conduct in connection with the mediation by describing the existence of such materials to this Court, and Bank of America has agreed that the disclosure of such information is not a waiver of any such privilege.

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which they have raised it before the Court (without an appropriate motion or notice as required by the CPLR). To the extent that the Court does consider Mr. Warner's informal request at the June 14th conference, as AIG's lead counsel in the mediation at issue, I intend to address the issue before the Court.

By way of brief background, AIG, on August 8, 2011, filed suit for more than \$10 billion against Bank of America, Merrill Lynch and Countrywide (collectively "Bank of America"), arising out of AIG's purchase of tens of billions of dollars of Residential Mortgage Backed Securities underwritten or sponsored or originated by Bank of America. That case was originally filed in New York Supreme Court and is now pending both in the Southern District of New York and in the Central District of California. As the Court is aware, AIG's fraud claims are expressly excluded from this Article 77 proceeding.

Prior to the filing of its fraud suit, AIG and Bank of America agreed to engage in formal mediation with a professional third-party mediator. The materials and communications exchanged between AIG and Bank of America are subject to strict confidentiality and a mediation privilege that protects them from disclosure.² While it is not clear whether the Inside Institutional Investors seek AIG's written mediation materials, Mr. Warner's letter asks this Court to order that all Respondents produce documents responsive to the Inside Institutional Investors' fifth Request for Production. Request No. 5, in turn, seeks "all documents constituting communications with BNY Mellon, Bank of America, or any Countrywide entity concerning or relating to your Objection, or any contemplated or threatened Objection, to the Settlement."³ Construed literally, Request No. 5 would encompass AIG's mediation materials and, thus, violate the privileges that govern those materials. To the extent that the Inside Institutional Investors do seek production of mediation materials, we respectfully request that the Court deny such request. In addition, we note that the requested materials are not relevant to the issues in this case (and certainly do not justify an attempt to invade mediation-protected communications). Specifically, communications by AIG in the course of a private mediation have no bearing on

² The mediation materials were exchanged pursuant to an express confidentiality agreement governed by Massachusetts law, including the Massachusetts mediation statute which protects as privileged all such materials. The Massachusetts mediation statute (M.G.L.A. 233 § 23C) provides an absolute privilege over mediation materials and states that "[a]ny communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding." Massachusetts courts recognize that this statute "confers blanket confidentiality protection on the mediation process, including an explicit prohibition on disclosure in judicial proceedings, without listing any exceptions." *Leary v. Geoghan*, 2002 WL 32140255, at *3 (Mass. App. Aug. 5, 2002).

³ The Inside Institutional Investors served a subpoena upon Bank of America which seeks the same information. Bank of America has stated that they will not respond to the pending subpoena until June 19, 2012.

whether the settlement proposed in this Article 77 proceeding is fair and reasonable or whether the conduct of the settling parties was free of conflicts.

We realize that no formal motion to compel has been filed by the Inside Institutional Investors and, at such time as it becomes necessary, we will file formal opposition to such a motion. We do hope, however, that the Inside Institutional Investors will respect the mediation privilege and agreement between AIG and Bank of America and clarify that their requests do not seek to violate those protections and Massachusetts law.

In the event the Court decides to address Mr. Warner's letter at the June 14th conference, we look forward to addressing these issues more fully.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael B. Carlinsky". The signature is fluid and cursive, with a large initial "M" and "C".

Michael B. Carlinsky

cc: All Counsel of Record (by ECF).