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August 16, 2012

Via Hand Delivery
The Honorable Eileen Bransten
Supreme Court of the State of New York
60 Centre Street
New York, New,York 10007

Via E-Filing
The Honorable Barbara Kapnick
Supreme Court of the State of New York
60 Centre Street
New York, New,York 10007

Dear Justice Bransten and Justice Kapnick:

This letter responds to the letters sent to each of you by the Reilly Pozner firm, acting on behalf of American International Group and affiliates ("AIG") and a Steering Committee of objectors in the Article 77 proceeding ("Objectors"). The AIG letters are improper: they ask Justice Bransten effectively to rule that the Objectors are entitled to use discovery from the *MBIA* proceeding in a wholly separate Article 77 Proceeding pending before Justice Kapnick. If granted by Justice Bransten, this request would invade the jurisdiction of Justice Kapnick, deprive the parties to the Article 77 Proceeding of their right to object to discovery, and would circumvent and undermine important rulings already made by Justice Kapnick.

AIG's letter is first improper because it seeks discovery from the wrong court. If AIG wishes to seek discovery to be used in the Article 77 Proceeding pending before Justice Kapnick, that discovery must be sought in the Article 77 Proceeding. Despite having raised numerous discovery issues over the last several months, AIG has not pursued this discovery in the Article 77 Proceeding. In the first instance, therefore, it is Justice Kapnick who should determine whether (if at all) the information AIG seeks from the *MBIA* case is relevant to any issue pending before her. For that reason alone, Justice Bransten should abstain from considering AIG's letter.

The Objectors also blatantly seek to circumvent discovery in the Article 77 Proceeding. The Objectors have not pursued access to the *MBIA* discovery in the Article 77 Proceeding, where all parties to that case could be heard on whether this discovery should be permitted. This right to be heard *cannot* be afforded to them in the *MBIA* action, because neither The Bank of New York Mellon ("BNYM"), the Trustee Petitioner in the Article 77 Proceeding, nor any of the

other parties to the Article 77 Proceeding, is a party to the *MBIA* Action. Thus, the only case in which the Article 77 parties have standing to object and be heard is in the matter pending before Justice Kapnick.

The Objectors' request is further improper because it is a direct attack on Justice Kapnick's jurisdiction. No motion to compel this discovery has been filed in the Article 77 proceeding. *See* CPLR Rule 3124. Justice Kapnick, and only Justice Kapnick, has jurisdiction to decide whether these materials are discoverable in the Article 77 Proceeding. The parties to that proceeding were all before Justice Kapnick on August 2, 2012 for a day-long hearing concerning all pending discovery disputes. During this hearing, the Objectors never disclosed to Justice Kapnick or the parties its intention to pursue the *MBIA* discovery before Justice Bransten. AIG's attack on Justice Kapnick's jurisdiction is even more striking when one considers that the Article 77 Proceeding has been pending for over a year, with multiple hearings on discovery matters, yet the Objectors chose to raise *this issue*, for the first time, in a court without jurisdiction to consider it.

The Objectors' collateral attack on Justice Kapnick's jurisdiction is precisely why Justice Bransten should decline to consider the Objectors' request for access to the *MBIA* discovery. Justice Kapnick has already made important pretrial rulings narrowing the scope of discovery in the Article 77 case pending before her. Justice Kapnick has already ruled that the Article 77 Proceeding is not a plenary litigation. Order Dated July 24, 2012, Doc. No. 296; *see also* April 24, 2012 Hearing Tr. 100:9-18. That determination drives a very different analysis of what is relevant in the Article 77 Proceeding, one that, respectfully, cannot be made by Justice Bransten, who is presiding, as Justice Kapnick has noted, over "a different case . . . a very different postured case than this case." *In the Matter of The Bank of New York Mellon* (Index No. 651786/2011), May 8, 2012 Tr. 69:10-14; *see also* May 8, 2012 Tr. 90:14-18 (noting *MBIA* "is a different case, not this case").

Justice Kapnick has repeatedly admonished the Objectors that the MBIA case is a "very different case" from the matter pending before her. *MBIA* concerns different parties litigating entirely different issues than the Article 77 Proceeding. *None* of the 15 trusts at issue in *MBIA* is among the 530 trusts at issue in the Article 77. The particular type of securitization at issue – fully-wrapped second-lien trusts – was excluded by design from the Trustee's settlement, precisely to avoid complications with monoline insurers such as MBIA. *MBIA* also concerns insurance and indemnity contracts not at issue in the Article 77 proceeding or the Trustee's settlement. *MBIA* involves fraud claims, which are not among the claims resolved by BNYM in the settlement at issue in the Article 77 Proceeding. Most important, *MBIA* is a plenary dispute between parties who have chosen to litigate—bitterly and for years—over claims that are dissimilar from the claims the Trustee chose to settle. As Justice Kapnick has pointed out, "[*MBIA*] is a different case. *That is a lawsuit. This is an approval of a settlement* where you're right, they didn't look at loan files." May 8, 2012 Tr. 86:3-5 (emphasis added); *see also* May 8, 2012 Tr. 69:14-18. ("[W]hat Bank of New York and maybe what Bank of America have said is look, if we are going to litigate the underlying claim, loan claim, what the heck was the purpose of entering into this settlement?"); June 14, 2012 Tr. 44:3-6 (observing that what Objectors

"want is what Judge Bransten found was maybe reasonable in her case, but she doesn't have an Article 77, so that's really my dilemma."); June 14, 2012 Tr. 43:2-4 ("I'm not sure that means you open up a plenary action like you got before Judge Bransten.").

The Article 77 Proceeding concerns a single issue: did BNYM, as Trustee, act within the scope of its reasonable discretion when it decided to settle its own claims? It is up to Justice Kapnick to decide whether discovery from an unrelated, litigated dispute with MBIA—that was neither available to nor considered by BNYM when it made its settlement decision—is even remotely relevant to the single issue Justice Kapnick must determine.

For all of these reasons, AIG's request is wholly improper. We respectfully submit, therefore, that Justice Bransten should abstain from considering AIG's request.

Respectfully submitted,

Matthew Ingber w/permission
Matthew Ingber
Counsel for the Bank of New York Mellon

Kathy Patrick
Counsel for the Institutional Investor Intervenors

cc: All counsel of record