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October 11, 2012

REDACTED VERSION

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 on behalf of the Institutional Investors to respond to the Steering Committee's 15 page, single-spaced letter characterizing the state of discovery to date and requesting substantial relief. That letter, the equivalent of a 30 page brief, was filed with the Court three days before tomorrow's hearing, leaving the Trustee and the Institutional Investors less than two days to respond – an unfair burden on us and on the Court. Under the circumstances, our response below is necessarily incomplete, but we will provide a fuller response at the hearing tomorrow (I will be out of the country on a long-scheduled commitment, but my co-counsel will be present).

The Steering Committee's letter is largely a rehash of issues the Court has addressed already, and again fails to demonstrate any ground on which the Court should reconsider its earlier rulings. The Steering Committee's focus on old issues is striking for another reason: There are only nine weeks remaining before the conclusion of discovery. The Steering Committee—on which four prestigious law firms serve—is proceeding with discovery at a snail's pace. It has taken (or scheduled) the depositions of only three witnesses, at a rate of only one deposition every two weeks. This is a case where the costs of delay are staggering to the tens of thousands of certificateholders who want this settlement to be approved. It is also a case in which the Steering Committee's clients, *collectively*, represent [redacted] These facts and inaction should preclude any later attempt by the Steering Committee to seek a further extension of discovery or a delay of the hearing.

1. State of Depositions

The Steering Committee contends the two-day depositions of Loretta Lundberg and Jason Kravitt did not yield information they sought concerning key terms of the settlement. Their letter

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[1] Updated holdings information provided by the objectors who are pursuing discovery indicates that they hold, collectively, [redacted] of the outstanding certificates.

fails to mention that [redacted]

The Steering Committee's conscious choice to avoid asking questions about the settlement should be borne firmly in mind as the Court evaluates their remaining assertions about whether the Steering Committee was afforded an adequate *opportunity* to conduct a full examination of each of these witnesses. The Steering Committee's decision not to ask relevant questions does not mean relevant information was not available from these witnesses.

2. Settlement Back and Forth

The Steering Committee reports as "new" a fact known since the beginning of this case: there was a heated dispute between the Institutional Investors and Bank of America concerning the potential size of the Trusts' repurchase claims. This dispute was first disclosed more than a year ago in the report of BNY Mellon's expert, Brian Lin. *See* Lin Report at 3-4 (showing both the higher range calculated by the Institutional Investors and the lower range proposed by Bank of America).[3] The spreadsheet Mr. Lin discusses in his report was produced more than a year ago and is the same spreadsheet [redacted]

[redacted] The Steering Committee's failure to follow up and inquire further about this testimony was, again, their decision.

Notably, as Mr. Lin acknowledged in his report, *see* Lin Report at 8, [redacted]

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[2] [redacted]

[3] The Lin Report has been available on the Trustee's settlement website (www.cwrmbssettlement.com) for over a year.

[4] In fact, all documents relied upon by the Trustee's experts, including this spreadsheet, were produced by the Trustee over a year ago.

[5] [redacted]

[redacted] That the Steering Committee chose not to explore [redacted] does not mean the Steering Committee lacked an opportunity to explore that issue fully in these depositions. The Steering Committee's failure to ask pertinent questions does not mean BNY Mellon failed in its obligation to provide discovery to the objectors.

3. Role of the Institutional Investors

The Steering Committee again urges the Court to order the Institutional Investors to produce their binary settlement communications with Bank of America. They again cite none of the relevant law. Despite the document and deposition discovery they have had, they also cite no new evidence to establish the essential element that must be proved before settlement communications can be discovered; namely, extrinsic evidence that the Institutional Investors colluded with Bank of America or BNY Mellon in the settlement negotiations. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 24, 28 (D.D.C. 2001); *Thornton v. Syracuse Sav. Bank.*, 961 F.2d 1042, 1046 (2d Cir. 1992); MCLAUGHLIN ON CLASS ACTIONS § 6:10 (7th ed. 2010).[6] More than three months ago, the Trustee voluntarily produced all tri-party settlement communications, and all binary settlement communications between the Trustee and Bank of America. The Steering Committee has been able to review those settlement communications for several months. Armed with all of those documents, and with the depositions of Mr. Kravitt and Ms. Lundberg, the Steering Committee is *still* unable to cite even a single incident it contends establishes collusion between the Institutional Investors and either Bank of America or BNY Mellon. The Steering Committee's failure to cite any evidence of collusion must be seen for what it is: they cite no evidence because there was no collusion. The documents and the depositions establish the negotiations were vigorous, arms-length, and non-collusive.

Having failed to meet their legal and evidentiary burden, the Steering Committee is left to argue that the binary settlement communications between the Institutional Investors and Bank of America should be produced simply because BNY Mellon was not privy to each and every one of them. This, again, fails to meet the Steering Committee's burden. That the Institutional Investors played a significant role in the settlement negotiations has never been in dispute;[7] that

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[6] The threshold showing of extrinsic evidence of collusion has been briefed extensively, so we will not repeat those arguments here. *See* The Institutional Investors' Response to the Objectors' Motion to Compel Settlement and Common Interest Communications (Doc. 349) (filed July 27, 2012) at fn. 5.

[7] *See* Trustee's Verified Petition (Doc. 1) (filed June 29, 2011) at 4 ("Since November 2010, the Institutional Investors, with the participation of the Trustee, have engaged in extensive, arm's length negotiations with Countrywide and Bank of America in an attempt to reach a settlement for the benefit of the Trusts.").

fact alone, however, does not even come close to establishing collusion between the Institutional Investors and either Bank of America or BNY Mellon. The Steering Committee's demand for these documents should be denied.

4. Common Interest Communications

The Steering Committee has also provided no basis to overturn the Court's prior ruling that communications between the Institutional Investors and their trustee, BNY Mellon, are protected by the common interest privilege. A common interest privilege exists for communications shared between counsel for a trustee and counsel for trust beneficiaries when they are jointly engaged in the common goal of pursuing trust claims.[8] As the Delaware Chancery Court has noted in similar circumstances, "[i]t is difficult to see how the Noteholders and the Trustee's interest in prosecuting claims of this nature could be more closely aligned."[9]

In an attempt to overcome the obvious common interest between the Institutional Investors and BNY Mellon, the Steering Committee asserts that BNY Mellon's counsel [redacted] This mischaracterizes Mr. Kravitt's testimony. Mr. Kravitt's bare statement that [redacted] It certainly does not suggest, much less establish, that [redacted]

The Steering Committee's next claim is equally unavailing. Citing the unremarkable fact that [redacted] This ignores the fact that these were three-party negotiations in which the Trustee and

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[8] *U.S. Bank N.A. v. U.S. Timberlands Klamath Falls, L.L.C.*, 2005 WL 2037353, at *1-2 (Del. Ch. 2005) ("It is clear that the Trustee and the Noteholders share a common interest."); *Barnett Banks Trust Co., N.A. v. Compson*, 629 So.2d 849, 851 (Fla. 2d Dist. Ct. App. 1993) ("In this case, the trustee and the aligned beneficiaries share the common interest of regaining the trust assets from [the defendant].").

[9] *U.S. Bank*, 2005 WL 2037353, at *2.

[10] Moreover, as the Court has made clear, a complete alignment of interests on all fronts is not required to support the existence of the common interest. Instead, it is enough that the parties share "an interlocking relationship or limited common purpose" and a "total identity of interest among the participants is not required." *GUS Consulting GMBH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 541-42 (N.Y. Sup. Ct. N.Y. Cnty. 2008) (Kapnick, J.).

the Institutional Investors had a joint interest. It is hardly surprising that [redacted] Tellingly, the Steering Committee cites no instance in which confidential strategy discussions between BNY Mellon and the Institutional Investors were disclosed to Bank of America. Moreover, [redacted] the Steering Committee has already obtained discovery of the information that was relayed to Bank of America. They are not entitled to more.

The Steering Committee's complaint that the common interest privilege creates "artificial and cumbersome distinctions among settlement communications" is without merit. All privileges are cumbersome. By definition, they preclude examination concerning privileged matters. The Steering Committee nevertheless has access to all of the three-party communications and all of BNY Mellon's communications with Bank of America. Armed with that wealth of information, the Steering Committee made an odd choice: Rather than focus the bulk of its examination on those documents and negotiations—which the Steering Committee claims is the key issue in the case—the Steering Committee [redacted] The evident purpose of this approach was to garner an objection the Steering Committee could lever into the false argument (made now in their letter) that they were somehow deprived of access to discoverable evidence. The Steering Committee, however, has not been deprived of any discovery it was entitled to obtain. One other point: the Institutional Investors' invocation of the common interest privilege had been sustained by the Court *before* these depositions occurred. The Steering Committee's choice [redacted], rather than on matters as to which it could obtain full discovery, suggests the Steering Committee is more interested in fomenting discovery disputes and delay than it is in obtaining the relevant evidence already available to it.[11]

5. Other Arguments

a. Attorneys' Fees

The Steering Committee contends it lacks information about the amount or terms of Gibbs & Bruns' fee. This, too, is untrue. The amount of the fee was disclosed in the settlement agreement. The underlying engagement letter has, likewise, been produced. [redacted] That we are still litigating the settlement more than two years after that engagement letter was signed, and 17 months after the settlement agreement was signed confirms that [redacted]

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[11] The invocation of the common interest privilege was not a surprise to the Steering Committee: the Institutional Investors' response to the motion to compel informed them that the privilege would be invoked for binary communications between BNY Mellon and the Institutional Investors from and after November 18, 2010.

[redacted] The fact that all of this information is evident from documents already produced demonstrates the objectors have all the information they need[13] to assess whether the payment of an $85 million fee, paid on top of and not out of the $8.5 billion settlement payment, is unreasonable given the landmark settlement that was achieved here.[14]

b. Use of Article 77 Proceeding

The letter implies there is something untoward about the fact that BNY Mellon filed the Article 77 proceeding [redacted] This, however, is precisely why Article 77 exists. Trustees have long been entitled to seek court advice before taking disputed decisions.[15] This Court has already ruled the Trustee's invocation of Article 77 was proper.[16] [redacted] Further discovery on this point is unnecessary: all parties acknowledge this was one of the central purposes of the Article 77 filing.

c. Forbearance Agreement

The forbearance agreements BNY Mellon executed to maintain the status quo while it explored a possible settlement with Bank of America are equally unremarkable. It is common

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[12] An additional benefit of this structure to the Trusts is obvious. In the typical settlement of a contingent fee case, the defendant pays the entire settlement amount and counsel's fee is recovered "out of" the settlement payment. [redacted] Here, however, the Trusts received an additional benefit: they recovered the entire settlement paid by Bank of America *and* Bank of America paid counsel's attorneys' fee *on top of* the settlement amount. Thus, attorneys' fees paid to Gibbs & Bruns do not diminish the Trusts' recovery.

[13] The offensive and inaccurate innuendo in this portion of the Steering Committee's letter is not worthy of a more detailed response.

[14] By way of comparison, it has been reported that counsel in the recently announced $2.43 billion derivative settlement with Bank of America has asked the court to approve a fee of 6% of the settlement amount, or approximately $150 million. *See* Nate Raymond, *Plaintiffs' Firms Plan for $150 mln Fees in BofA Case*, *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2012/09_-_September/ Plaintiffs__firms_plan_for_$150_mln_fees_in_BofA_case/.

[15] *See In re Application of IBJ Schroder Bank & Trust Co.*, Index No. 101530/1998 (N.Y. Sup. Ct. N.Y. Cty. Aug. 16, 2000); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944); RESTATEMENT (SECOND) OF TRUSTS at § 292 cmt. d (2010) ("If the trustee is in doubt whether he should compromise or submit to arbitration a claim, he may ask the instruction of the court or he may agree thereto conditionally upon the subsequent approval of the court.").

[16] *See* Doc. No. 298 (denying objectors' attempt to convert the Article 77 into a plenary proceeding).

practice to preserve claims during settlement negotiations.[17] The forbearance agreements and the reasons they were executed have also been disclosed through discovery, so the Steering Committee does not lack information about them.

d. ResCap Bankruptcy

Unable to make the required showing of extrinsic evidence of collusion, the Steering Committee retreats to an argument based on what it alleges (incorrectly) happened in the Residential Capital LLC ("ResCap") bankruptcy. The truth is far different than what Mr. Reilly's letter suggests. The Unsecured Creditors Committee did seek initially to compel the Institutional Investors to produce their settlement communications, but that demand was later withdrawn. The Institutional Investors objected to the production of their binary settlement communications and never produced any of them.[18] There was also no ruling by the court that required the Institutional Investors to produce their settlement communications. The fact that those communications were produced voluntarily by ResCap and its indirect parent, Ally Financial, Inc. ("Ally"), does not demonstrate that they were discoverable from the Institutional Investors. It also does not demonstrate they should be produced here, where the Steering Committee has abandoned any effort to demonstrate the required extrinsic evidence of collusion, and where the central issue turns not on the Institutional Investors' actions but, instead, on the reasonableness and good faith of *the Trustee's decision* to agree to the settlement.

6. Conclusion

The Steering Committee's letter offers no new evidence that would support an order compelling the Institutional investors to produce their binary settlement communications or their common interest communications with the Trustee. [redacted] refutes categorically any claim of collusion in the negotiation of this settlement. Nor has the Steering Committee offered any basis for this Court to reconsider its decision that the Institutional Investors' common interest communications with BNY Mellon are not discoverable. Accordingly, there is no reason to revisit whether the Institutional Investors' settlement or common interest communications should be produced.

One final observation about the Steering Committee's letter: the function of a discovery conference is not to "pre-argue" one side's view of the evidence that will be adduced at the eventual Article 77 hearing. If the Court wishes to receive witness by witness "summaries" concerning the testimony of each witness as it is given, we will of course provide them. In the

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[17] Mr. Reilly's client AIG apparently did so for its own securities claims while it attempted to extract an individual settlement of its securities claims from Bank of America.

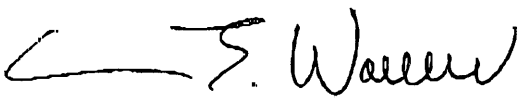
[18] *See* Gibbs & Bruns' Response in Opposition to the Motion of the Official Committee of Unsecured Creditors to Compel Gibbs & Bruns to Produce Settlement Communications (Doc. 1597) (filed Sept. 26, 2012), *In re Residential Capital*, Case. No. 12-12020 (MG) (Bankr. S.D.N.Y.).

interim, we simply note that the limited excerpts cited above confirm there was far more to the depositions of Ms. Lundberg and Mr. Kravitt than the Steering Committee's letter suggests.

We will be prepared to address any questions the Court may have at the hearing tomorrow and to provide any additional briefing the Court may request. By copy of this letter, all counsel have been advised of this correspondence.

Thank you for your continuing attention to this matter.

Respectfully,



Kenneth E. Warner

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cc: All counsel of record (by email, not via ECF)