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Redacted

October 11, 2012

BY HAND DELIVERY, FAX, AND ELECTRONIC FILING

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 Bank of New York Mellon*
(Index No. 651786/2011)

Dear Justice Kapnick:

We represent The Bank of New York Mellon (the "Trustee" or "BNY Mellon") in the above-captioned case and write in response to the letter that the Objectors filed Tuesday afternoon.

The Objectors' refrain throughout this proceeding has been that, as the "outsiders," they just want to know "what happened."[1] It is now obvious that their purported interest in conducting real discovery is far outweighed by their interest in re-litigating discovery disputes and issuing endless demands for more, irrelevant documents.

What is truly "shocking" and "disturbing" is that in the ten weeks since we urged (and Your Honor directed) the Objectors to take depositions, they have noticed only three, and taken only two; that in the two-day deposition of one of the key negotiators of the Settlement Agreement, the Objectors—who have cast themselves as parties who "had no role in negotiating or drafting the Settlement Agreement" and "only seek to understand" it, and claimed that "there are numerous provisions of the proposed agreement that are ambiguous and that require discovery" (Reply on Mot. to Compel (doc. 278) at 9)—never showed the witness the actual Settlement Agreement or a single draft of that document; that after receiving nearly 3,000 substantive answers in four days of depositions, the Objectors feel compelled to highlight roughly 25 of them—which they distort and take out of context—and on that basis ask for an extraordinary invasion of the attorney-client privilege because they supposedly need more information; that instead of using the depositions to seek the information they claim to lack, the Objectors spent nearly half of the depositions focused on building a record to justify more discovery that the Court has already denied; and that after 16 months of litigating this matter, the Objectors are asserting nearly the same debunked theories of conflict.

[1] *See, e.g.*, 8/2/12 Tr. 32 ("I sent a letter in September of last fall to Trustee's counsel saying give us some background, give us a skeleton of what happened here").

It is difficult to respond to all of the factual distortions in the Objectors' letter; the eventual hearing will accomplish that. For now, we ask the Court to deny (again) the Objectors' request for confidential, privileged communications between BNY Mellon and its counsel, and to direct the Objectors to commence whatever remaining depositions they intend to conduct.

Further Depositions

The October 9 letter raises four issues.[2] We first address the third and fourth because they are undisputed.

The Objectors state that "Additional Depositions Are Necessary" (13-14). We agree, and so does the Court: "I really do think you should get going on scheduling the depositions that you need of Bank of New York." 8/2/12 Tr. 163.

We do not know how to compel the Objectors to take their remaining depositions. (They have taken only two.) In response to the Objectors' bizarre inaction, the Trustee, on September 28, sent a letter to Mr. Reilly (Exhibit A hereto), reminding him

> that the fact discovery cutoff is rapidly approaching, and you have not noticed any additional depositions. Please confirm that you do not intend to conduct any further fact depositions or identify names and dates for your next depositions.

We also raised this issue orally at the most recent deposition, but have heard nothing. The Objectors seem to suggest some kind of dispute that requires the Court to order further depositions. There is no dispute.

Additional Document Requests

The Objectors also note that they have served nine new document requests—apparently for any document that any witness mentioned at a deposition. The Trustee responded to the first five on September 28 (*see* Ex. A),[3] requesting that the Objectors explain what relevance these documents, including a decade-old opinion by Jason Kravitt (a Mayer Brown lawyer and lead BNYM negotiator) and Mayer Brown's bills, could possibly have to this case. They never responded. Any dispute about these documents is wholly premature, and to raise the issue now violates the Commercial Division's meet-and-confer rule (Rule 8(a)).

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[2] The remaining issues relate to the Institutional Investors' bilateral settlement communications, the common interest privilege, and the fiduciary exception. We understand that Ms. Patrick is responding to the two former issues, and the Trustee responds to the fiduciary exception issue below.

[3] The Objectors did not make the last four demands until October 8, three days ago. The Trustee is responding by letter today, requesting a meet-and-confer on those as well, for the same reason.

"New, Disturbing Facts"

The Objectors' letter begins with a litany of "new, disturbing facts" (1-3). In reality, these issues are not new—they have been raised by the Objectors many times before. They are not "disturbing"; in fact, they are irrelevant. And in many cases, they are not even "facts," but fabrications. To address a few:

The Trustee's "release" and indemnity. Without any citation, the Objectors argue that "the Trustee spent time and effort securing a release and indemnity from its own liability in connection with the proposed settlement." That is false. There is no release of the Trustee anywhere in the Settlement Agreement.[4] Of course, if this Court concludes that entry into the Settlement did not breach the Trustee's duties, then Certificateholders will be bound by *res judicata*. But under no plausible meaning of the term can a proposed judicial finding, entered after an adversarial proceeding including discovery and trial, that a party is not liable, be described as a "release" of liability.

Nor do the Objectors defend the assertion that the Trustee "secured" an indemnity. As the Trustee has explained *ad nauseum*,[5] the Side Letter to the Settlement Agreement merely confirms that the pre-existing indemnity in the PSAs already applies to its conduct in connection with the Settlement. The Objectors have never had any rejoinder and have resorted instead to begging the Court not to consider the merits of their own allegation: "But, we don't have to, again, we don't have to prove self-dealing. We don't have to prove a conflict to get this information. We just need a colorable claim." 8/2/12 Tr. 116. This allegation is not true, and it is not even colorable—it is frivolous, and the Objectors know it.

The Trustee's concern for its own liability. In another blatant misstatement, the Objectors assert that "[t]he Trustee's concern with its own liability was sufficiently high that BNYM involved its internal risk officers and its senior management in the settlement process." In fact, Ms. Lundberg testified that [redacted]

[4] *See, e.g.*, 5/8/12 Tr. 52-53 ("We will not stand here and say [claims against the Trustee] are released by the settlement agreement, because that is a lie. There are no releases of claims against the trustee in the settlement agreement. I have made this point, your Honor, probably a dozen times in this court and in federal court. I don't know what else I can do. It is in the document itself. You could scour the settlement agreement. You will not find a release of the trustee."). When the Court asked, in *Knights of Columbus v. BNYM*, Index No. 651442/11, whether the claims against the Trustee in that case were released, the Trustee's counsel explained that "[w]e have said numerous times in the context of the Article 77 in response to allegations that the trustee was conflicted because it negotiated a release for itself, we said look at the settlement agreement. There is no release of claims against the trustee. . . . There is no release." 4/25/12 Tr. at 33.

[5] The Trustee has lost count of how many times the Objectors have repeated this falsehood and how many times the Trustee has responded to it—as of April 23, 2012, we were up to seven, and the Objectors have made it in nearly every filing since then. *See* BNYM Resp. to NYAG Mem. re: Standard of Review (doc 294), at 4.

[redacted]

Most importantly, Ms. Lundberg testified that [redacted] So did Jason Kravitt, who said both what the Settlement Agreement makes obvious—that the Settlement does not release any claims against the Trustee (Kravitt Tr. 426:10-13)—and that [redacted]

Even if the Trustee considered whether its *entry into the Settlement* could expose it to liability, that obviously does not create a conflict of interest. By making the Trustee liable for certain types of actions that can harm investors, the contracts and applicable law *align* the Trustee's interests with those of investors. Indeed, had Ms. Lundberg testified that the Trustee signed the Settlement *without* any regard for those duties, the Objectors surely would argue that the Trustee acted in bad faith.

Bank of America indemnity. The Objectors also contend that the Trustee was conflicted because it received an indemnity from Bank of America. This is not "new." The indemnity by the Master Servicer—a Bank of America entity—is in the governing contracts for every one of the 530 trusts. The terms of the Settlement Agreement likewise have been public since the first day of this proceeding. The Objectors have been arguing about the supposed impropriety of the indemnity since July 2011.

Nor is it "disturbing." The PSAs guarantee that the Trustee need not expend or risk its own funds or subject itself to liability (§ 8.02(vi)). The only question is who will pay: Bank of America—the party whose alleged wrongdoing has caused the Trustee to incur these expenses and has the contractual obligation to pay—or the innocent Certificateholders. Judge Rakoff addressed precisely this argument in *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450 (S.D.N.Y. 2010). When an investor alleged that a trustee was conflicted because it received an indemnity from an adverse party, Judge Rakoff held that "it was reasonable for [the trustee] to seek indemnification [from CGML] once it became clear that there was a dispute between the [trust] and CGML with respect to the Lyondell substitutions." *Id.* at 475. The court also noted that allegations that a corporate trustee received an indemnity from an adverse party were precisely what the Second Circuit rejected in *Elliott Associates v. J. Henry Schroder Bank & Trust Co.* as "bald assertions of conflict of interest" that supported "no serious claim that [the

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[6] *See also* [redacted]

trustee] personally benefitted." 838 F. 2d 66, 70 (1988); *CFIP*, 738 F. Supp. 2d at 475 n.28 (quoting *Elliott Associates* complaint).

Finally, in suggesting that the indemnity somehow gives Bank of America control over "the parties that should have been its adversaries," the Objectors again ignore the testimony that [redacted] The Objectors know this because they asked the question and received this precise answer (Kravitt Tr. 540:20-23). The "discovery" that Bank of America was paying the fees of the Trustee's advisors—the express purpose of the contractual indemnity—is evidence of nothing.

Law firm conflicts. [redacted]

Further, this law firm-conflict theory is merely a more attenuated version of the previously rejected allegations against the Trustee. Claims that a corporate trustee is conflicted because the trustee *itself* receives business from the adverse party are invalid as a matter of law. *See CFIP*, 738 F. Supp. 2d at 475 (rejecting as "bald assertion[] of conflict," the allegation that trustee "was conflicted because it served as indenture trustee for other Beach Street transactions, thus generating at least $185,000 in annual revenues"); *Elliott Assocs.*, 838 F. 2d at 70 (same); *In re E.F. Hutton Sw. Props. II, Ltd.*, 953 F.2d 963, 972 (5th Cir. 1972) (under New York law, "[a] mere hypothetical possibility that the indenture trustee might favor the interests of the issuer merely because the former is an indenture trustee does not suffice" to show conflict). [redacted]

The Forbearance Agreement. The Objectors continue to make various assertions about the Forbearance Agreement. They still do not dispute, however, that the Forbearance Agreements applied only to the Notice of Non-Performance sent by the Institutional Investors and did not affect the rights of any other Certificateholder to send its own such notice and possibly trigger an Event of Default. Nor do they even attempt to argue that notice of such an agreement is required either by contract or applicable law. Lundberg Tr. 393:20–395:13.

The Trustee's Attorney-Client Privileged Communications and Attorney Work Product

The remainder of the Objectors' letter seeks to capitalize on their gamesmanship at the first two depositions. In their effort to suggest that privilege kept them from discovering key facts—a point we dispute— the Objectors systematically asked Mr. Kravitt questions about the legal opinions that he formed during the case and the advice that he gave to his client, and then asked Ms. Lundberg questions about her communications with Mayer Brown or BNYM's in-house counsel. Even with this effort, the Objectors' "record" of trying and failing to obtain information is abysmal: they asked Ms. Lundberg well over 1,600 questions with only 28 non-answers based on attorney-client privilege, and they asked Mr. Kravitt nearly 1,400 questions with only 46 non-answers based on attorney-client and/or work product privileges. At every turn, Mr. Kravitt and Ms. Lundberg attempted to provide the Objectors with the information they sought while preserving all privileges.

The Objectors intentionally elicited privilege objections

Perhaps the most perverse example of the Objectors' misuse of these depositions is their questioning about settlement negotiations. No party has ever asserted any privilege over the "trilateral" meetings among the Trustee, the Institutional Investors, and Bank of America, and Jason Kravitt answered every question directed to him about what happened during those meetings. The Objectors created an exhibit (Exhibit B hereto, the accuracy of which we do not concede) of 48 meetings and phone calls among those three parties. As the exhibit notes, Mr. Kravitt participated in virtually all of them. Yet in a *two-day* deposition, the Objectors asked Mr. Kravitt about only five of them.

At Ms. Lundberg's deposition, by contrast, they did address that same topic—meetings that they knew Ms. Lundberg had not attended and which they had not bothered to ask Mr. Kravitt about. When she volunteered to answer those questions anyway, even though her knowledge of the meetings was based entirely on privileged communications, the Objectors quickly shut down that source of information by insisting that the disclosure even of underlying facts would waive the privilege.[7] Lundberg Tr. 180:12–181:5, 188:10–189:18.

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[7] Remarkably, the same Objectors who adamantly maintained that the answers to those questions could constitute a waiver of the attorney-client privilege (and also require disclosure of *written* communications between attorney and client) now argue that those same answers were "not even arguably privileged" (12). *Compare* Lundberg Tr. 180:18–181:5:

> Mr. Ingber: Will you agree that to the extent she is revealing *facts* that were communicated to her by counsel, you won't argue that her testimony here today about those *underlying facts* constitutes a waiver of the attorney-client privilege?
>
> Mr. Reilly: I can't do that.
>
> Mr. Ingber: Why not?

(cont'd)

This is the tip of the iceberg. Hours were wasted asking Ms. Lundberg about the negotiating history of provisions in the Settlement Agreement and Forbearance Agreement that Mr. Kravitt had been tasked with negotiating, and about the Proposed Final Order and Judgment that she testified she had no role in preparing. Likewise, Mr. Kravitt was asked extensively for legal opinions on the meaning of the PSAs (*e.g.*, Kravitt Tr. 53:10–57:18), whether BNY Mellon had appropriately "operated during the settlement negotiations as if it had fiduciary obligations" (*id.* at 208:18-22), and the ways in which the common-interest and attorney-client privileges themselves may be waived (*id.* at 177:15–181:22, 447:1–450:10). In two days of depositions, Mr. Kravitt was never shown the Settlement Agreement, which was never marked as an exhibit at his deposition.

The Objectors blatantly misstate the extent of the witnesses' testimony

On page 11, the Objectors list "topics" on which Ms. Lundberg "was repeatedly instructed not to answer questions." What they neglect to mention is that Ms. Lundberg did provide testimony on virtually all of those topics, and the only questions that she refused to answer were those that asked specifically about her *communications* with counsel or as to which the Objectors' counsel had stated (probably incorrectly) that an answer would waive privilege.

One especially absurd allegation is that Ms. Lundberg refused to testify about "[t]he information she was provided with which allowed her to sign the Verified Petition" (11). Far from refusing to answer, she testified that [redacted] The only question that she refused to answer was what had been communicated to her *by counsel*, the answer to which has no relevance, other than to elicit another privilege objection. Lundberg Tr. 167:3–170:12.

Yet another flat misstatement is the assertion that the Objectors could not learn "[t]he reason the Trustee failed to review a single loan file" (12). Mr. Kravitt discussed this topic at great length, including a two-page explanation on cross-examination. *See* Kravitt Tr. 287:9–288:11; 627:8–629:4. Whether *Ms. Lundberg* testified to that point is irrelevant, because Mr. Kravitt was able to provide a complete answer by describing statements that he made in non-privileged conversations with the other parties.

(… cont'd)

> Mr. Reilly: Because I don't think it's true. She's talking about conversations she had with her counsel voluntarily.

Id. at 182:21-25 ("You should be on notice that if I believe that she has answered questions that are part of the attorney-client privilege, that we're going to assert it as a waiver."); *id.* at 186:3-5 ("I can appreciate your not wanting to waive the privilege by letting this witness answer questions.").

The Objectors still cannot establish good cause for the fiduciary exception

As the Court is aware, having already denied this application once, invading the attorney-client privilege through the fiduciary exception requires a showing of good cause. *See generally Hoopes v. Carota*, 142 A.D.2d 906, 910 (3d Dep't 1988). The Objectors' attempt to revisit the Court's ruling on that issue rests entirely on their refusal to ask the right questions of the right witnesses.

Initially, we note that the theory on which they argue that the fiduciary exception applies—the Trustee "represented the absent certificateholders' interests during negotiations, thus any legal advice it sought concerning the settlement was necessarily sought for the benefit of certificateholders" (13)—directly contradicts the theories of self-dealing that they employ as "good cause." *See Fitzpatrick v. AIG, Inc.*, 272 F.R.D. 100, 111 (S.D.N.Y. 2010) ("If the role of . . . attorneys was to advise [a fiduciary] as to how to protect its own interests when they potentially diverged from those of the beneficiaries of any fiduciary relationship, then communications to that end are not subject to the fiduciary exception."). The Objectors now make three arguments for good cause, none of them new and none of them persuasive.

First, they argue that "the Trustee's actions are highly relevant," and "[t]he Trustee's deliberations and decision-making occurred completely in conjunction with counsel" (13). The First Department's 2007 decision in *Deutsche Bank Trust Co. v. Tri-Links Investment Trust* is exactly on-point. In that case, brought by a lending agent that had to prove that its settlement of the lenders' claims was reasonable and in good faith in order to receive its indemnity, the First Department held that waiver does not "arise from the existence of issues as to the good faith and reasonableness of the settlement." 43 A.D.3d 56, 63 (2007); *see also Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner.").[8]

The *Tri-Links* court addressed directly the same argument that the Objectors have made repeatedly here—that the Trustee's communications with counsel "are highly relevant to the ultimate question before the Court" (13): "Of course, that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit; if that were the case, a privilege would have little effect." 43 A.D.3d at 64. Rather, discovery of privileged communications is appropriate only "when the party has asserted a claim or defense that he intends to prove by use

[8] While *Tri-Links* was decided under the rubric of at-issue waiver, rather than the fiduciary exception, the relevant standard was the same as one of the good-cause factors that the Objectors must prove here—that "the application of the attorney-client privilege and work product doctrine will . . . 'deprive [opposing parties] of vital information.'" *Id.* at 66 (quoting *Credit Suisse First Boston v. Utrecht-Am. Fin. Co.*, 27 A.D.3d 253, 254 (1st Dep't 2006)).

of the privileged materials." *Id.* (quoting *N. River Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792, at *6 (S.D.N.Y. 1995)).

There, the trustee's representative testified that he actually relied on advice of counsel but still refused to answer, on privilege grounds, even the question "What factors did you consider in approving the settlement of the WMI action?" 43 A.D.2d at 68. The First Department held that testimony that the trustee "considered the advice of its attorneys" was "not surprising[]," did not seek "to justify the decision to settle . . . on the ground that it was based on the advice of counsel," and "does not constitute a waiver of privilege." *Id.* at 68-69. The court went on to decide that the non-privileged documents already produced, which apparently did not include a single internal document of the trustee, "provides a more-than-ample basis for the parties to litigate the reasonableness—an objective standard—of [the trustee]'s decision to settle . . . rather than take the risk of going to trial; of the amount it paid to settle the case; and of the amount it spent on its defense." *Id.* at 65.[9]

CFIP is almost directly on-point as well. There, the court found that a trustee was "not asserting an 'advice of counsel' defense, which would require the waiver of attorney-client privilege, by referring to the fact of its communication with counsel in the context of demonstrating its good faith. . . . The focus of [the trustee]'s 'good faith' defense is on the nature of the inquiry that [the trustee] undertook, not the substance of the legal advice that was eventually provided." 738 F. Supp. 2d at 474. Here, too, the Trustee does not contend that it is protected absolutely because it did *what counsel told it to do*, but only that its process for evaluating the legal settlement of these claims included consultations with lawyers.

Second, the Objectors state that they "cannot get information about the Trustee's deliberations and decision-making *any other way*" (13). That is nonsense. One way that they could find out is by *asking the Trustee*, an approach that they were determined not to take. Loretta Lundberg, for example, was not asked a single question about why she or other BNY Mellon employees concluded that the Settlement was a good deal or how she evaluated the expert reports that she and the Trust Committee members received. The Objectors falsely assert

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[9] *See also Am. Re-Insurance Co. v. United States Fidelity & Guaranty Co.*, 40 A.D.3d 486, 492 (1st Dep't 2007) (rejecting claim that insurer "waived any privilege by placing 'at issue' the reasonableness and good faith of the settlement of the underlying action"); *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 62 A.D.3d 581 (1st Dep't 2009) ("the question of the reasonableness of the settlement amount that plaintiff seeks to recover, without more, [did not] put plaintiff's privileged communications with its attorneys concerning the settlement 'in issue'"); *Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP*, 52 A.D.3d 370, 372 (1st Dep't 2008) ("[t]he assertion of a cause of action with a claim for damages arising out of the settlement agreement does not constitute a waiver of the work product immunity"; as such, "analyses and evaluations of plaintiffs' rationale for entering into the settlement agreement with the regulators" could not be disclosed); *Bank of NY v. River Terrace Assocs., LLC*, 23 A.D.3d 308, 311 (1st Dep't 2005) (lending agent's claim requiring proof of good faith, non-negligence, and absence of willful misconduct did not waive privilege; "If such allegations constituted a waiver, a waiver would have to be found in a huge number of lawsuits, a disfavored result.")

that the Trustee "conceal[ed] the rationale for its decision-making" (12)—a rationale that the Trustee has disclosed countless times in court. The reality is that they never bothered to ask.

Perversely, the Objectors *did* ask that question of Jason Kravitt (Kravitt Tr. 636:12-638:9). Though he was forced to respond based on statements that the Trustee has already made, rather than his privileged communications, he provided a page-long response detailing the key factors supporting the Settlement—[redacted], *she never asked that question of the Trustee*. The Objectors did ask Ms. Lundberg whether the difficulty of litigating claims against Bank of America was "the primary issue that BNYM took into consideration in its decision to settle the matter," and the witness answered. Lundberg Tr. 137:21–138:13, 142:2–143:10.

In short, the only reason that the Objectors cannot obtain the information that they purport to seek is that they are determined not to seriously conduct discovery. If they wanted to know what the Trustee thought, they could have asked the Trustee's employee, who is not a lawyer and whose mental impressions are not work product. If they wanted to know what occurred during settlement negotiations, they could have asked the lawyer who participated in those negotiations, none of which were the subject of privilege claims. Instead, for the most part, they asked the lawyer what the client thought and the client what the lawyer did, a path that they knew would maximize the number of privilege objections and minimize the amount of relevant information that they learned.

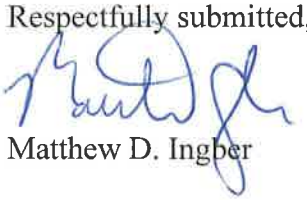
Third, the Objectors assert that "one of the Trustee's aims in entering into the proposed settlement was to protect against its own potential liability" (13). As noted above, this evidently was what the Objectors were hoping to hear, but it is exactly the opposite of what the witnesses actually testified. [redacted]

Fourth, the Objectors suggest (at 3) that they issued document demands on what they call the "Narrowed Subjects." That list obviously is not a narrowing but merely an enumeration of every conceivable subject on which the Trustee could have sought advice—it includes, for example, all privileged documents concerning "the $8.5 billion settlement amount" and "the purported servicing improvements contemplated by the settlement." This is just the kind of "blind[] fishing" that *Garner* (the seminal case on the fiduciary exception) and its New York

progeny reject. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1104 (5th Cir. 1970); *Stenovich*, 195 Misc. 2d at 114 (proponent of discovery must show that "the information sought is . . . specific").

For all of these reasons, we respectfully request that the Court deny the Objectors' latest request for BNYM's privileged communications.

Respectfully submitted,



Matthew D. Ingber

cc: All counsel (by electronic filing only)

Attachments

Exhibit A

Houpt, Christopher J.

From: Houpt, Christopher J.
Sent: Friday, September 28, 2012 3:33 PM
To: dreilly@rplaw.com
Cc: Kathy D. Patrick; Ingber, Matthew D.
Subject: In re The Bank of New York Mellon (Index No. 6517876-2011)
Attachments: Letter.pdf

Dan,

Please see the attached letter.

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September 28, 2012

VIA ELECTRONIC MAIL

Daniel Reilly, Esq.
Reilly Pozner LLP
1900 Sixteenth Street, Suite 1700
Denver, CO 80202

Re: *In re The Bank of New York Mellon* (651786-2011)

Dear Dan:

I am writing in response to your September 24, 2012 letter. We suggest scheduling a meet-and-confer over the next week to discuss the additional document requests in your letter. We are not taking a position, yet, on the discoverability of the requested documents until we have a chance to better understand your position on relevance.

We also note that the fact discovery cutoff is rapidly approaching, and you have not noticed any additional depositions. Please either confirm that you do not intend to conduct any further fact depositions or identify names and dates for your next depositions.

Very truly yours,

Matthew D. Ingber

Matthew D. Ingber

cc: Kathy Patrick, Esq.

Exhibit B

DATE	TYPE	PARTICIPANTS
2010-07-15	Call	Kathy Patrick and Jeanne Naughton-Carr
2010-08-02	Meeting	Kathy Patrick and Bank of New York Mellon ("BNYM")
2010-11-03	Meeting	Kathy Patrick and Jason Kravitt
2010-11-08	Call	Christopher Garvey and Jason Kravitt
2010-11-08	Meeting	Kathy Patrick, Robert Madden, Scott Humphries, Jason Kravitt, Christopher Garvey, Jana Litsey, Terry Laughlin, Ted Mirvis, Elain Golin, Meyer Koplow
2010-11-19	Meeting	Ted Mirvis, Meyer Koplow, Matthew Ingber and Jason Kravitt
2010-12-01	Meeting	Jason Kravitt, Matthew Ingber, Ted Mirvis and Meyer Koplow
2010-12-01	Meeting	Jason Kravitt, Matthew Ingber, Ted Mirvis and Meyer Koplow
2010-12-10	Call	Mayer Brown, Wachtell Lipton Rosen and Katz ("Wachtell"), and Gibbs & Bruns
2010-12-15	Call	Ted Mirvis and Jason Kravitt
2010-12-15	Call	Mayer Brown, Wachtell and Gibbs & Bruns
2010-12-16	Meeting	Kathy Patrick, Scott Humphries, Robert Madden, Jason Kravitt and Mathew Ingber
2011-01-06	Call	Wachtell, Mayer Brown, and Gibbs & Bruns
2011-01-12	Meeting	Meyer Koplow, Elain Golin, Jana Litsey, Matthew Guest, Kathy Patrick, Jason Kravitt, Matthew Ingber
2011-01-25	Call	Jason Kravitt and Ted Mirvis
2011-01-27	Meeting	Wachtell, Mayer Brown, and Gibbs & Bruns
2011-02-10 to 2011-02-11	Meeting	Wachtell, Mayer Brown, Gibbs & Bruns, Blackrock, Freddie Mac, ING, MetLife and PIMCO
2011-02-16	Meeting	Wachtell, Mayer Brown and Robert Bailey of BNYM
2011-02-24	Call	Wachtell, Mayer Brown and Gibbs & Bruns
2011-03-04	Call	Wachtell, Mayer Brown and Gibbs & Bruns
2011-03-09	Call	Jason Kravitt and Meyer Koplow
2011-03-16	Meeting	Wachtell, Proffessor Langbein, Mayer Brown and Gibbs & Bruns

DATE	TYPE	PARTICIPANTS
2011-04-05	Meeting	Tony Meola, Wacthell, Mayer Brown, Gibbs & Bruns, Representatives from Institutional Investors, and BNYM's experts (telephonically).
2011-04-13	Call	Wachtell, Mayer Brown and Gibbs & Bruns
2011-04-18	Meeting	Wachtell, Mayer Brown, Gibbs & Bruns, Brian Lin and Allen Gutterman
2011-04-21	Meeting	Wachtell, Mayer Brown, Gibbs & Bruns, Brian Lin and Allen Gutterman
2011-05-03	Meeting	Wachetll and Mayer Brown
2011-05-23	Call	Wachtell and Mayer Brown
2011-05-05	Call	Wachtell, Mayer Brown and BNYM experts Robert Daines & Capstone
2011-05-10	Meeting	Wachtell, Mayer Brown and Gibbs & Bruns
2011-05-10	Call	Wachtell, Mayer Brown and Gibbs & Bruns
2011-05-13	Call	Matthew Ingber, Jason Kravitt, Ted Mirvis, Meyer Koplow and Elaine Golin
2011-05-18	Meeting	Elaine Golin, Jason Kravitt, Ted Mirvis, Matthew Ingber, Martin Arms, Meyer Koplow
2011-05-18	Call	Sean Scott, Martin Arms, Ted Mirvis, Matthew Ingber, Capstone and Roberts Daines
2011-05-19	Meeting	Kathy Patrick, Matthew Ingber, Jason Kravitt and Meyer Koplow
2011-05-20	Call	Wachtell Lipton Rosen and Katz and Mayer Brown with BNYM experts
2011-05-25	Call	Elaine Golin, Jason Kravitt, Matthew Ingber, David Hakim and "K&L Gates gentleman"
2011-06-01	Meeting	Wachtell and Mayer Brown
2011-06-01	Meeting/Call	Wachtell, Mayer Brown and Gibbs & Bruns
2011-06-07	Call	Wachtell, Mayer Brown, and Gibbs & Bruns
2011-06-09	Call	Wachtell, Mayer Brown, Gibbs & Bruns and Bill Ding
2011-06-09	Call	Matthew Ingber and Elaine Golin
2011-06-14	Call	Wachtell, Mayer Brown, and Gibbs & Bruns
2011-06-15	Call	Wachtell, Mayer Brown, Gibbs & Bruns, Luke Scolastico and Mike Schloessman

DATE	TYPE	PARTICIPANTS
2011-06-20	Call	Charles Cording, Elaine Golin, Elizabeth Chen, and Sagi Tamir
2011-06-20	Call	Wachtell, Mayer Brown, Gibbs & Bruns and NERA
2011-06-21	Meeting	Wachtell and Mayer Brown
2011-06-28	Call	Mayer Brown and Sidley Austin