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May 14, 2013

VIA E-FILING AND FACSIMILE

The Honorable Barbara R. Kapnick
Supreme Court of the State of New York
60 Centre Street
New York, NY 10007

Re: *In re the application of The Bank of New York Mellon*
(Index No. 651786/2011)

Dear Justice Kapnick:

Pursuant to the Court's direction during the parties' status conference on May 9, 2013, I write on behalf of the Steering Committee regarding the Institutional Investors' notice of depositions of the Steering Committee members. Based on your Honor's oral ruling, the Institutional Investors are limited to three depositions, one of each Steering Committee entity (AIG, Triaxx, and the FHLBs) on a single topic: "The allegations made in [the Steering Committee's] filed objections." *See* Doc. No. 761, Ex. A at 2.[1] Notwithstanding the Court's

[1] The Court also indicated that the Institutional Investors may ask whether AIG "paid" any objecting investor to object based on the Institutional Investors' counsel's spurious suggestion that this may have occurred. While, as noted during the hearing, this line of inquiry is irrelevant to the evaluation of the relief sought by BNYM, the answer for Triaxx and AIG is the same as it was for the FHLBs – no. No Steering Committee member has paid any other party to object. In fact, to answer the Institutional Investors' question directly, AIG confirms that it has not paid and has not agreed to pay any intervenor's or objector's costs, expenses, or attorneys' fees in connection with the pursuit or filing of an objection. No further inquiry is necessary on this topic, and, therefore, the Institutional Investors' counsel's unfounded and inflammatory accusations should stop.

narrowing of the Institutional Investors' discovery request, respectfully, the depositions on this topic are unwarranted under the circumstances present in this case.

First, the deposition request is irrelevant to this Article 77 litigation in which the Trustee is the petitioner seeking broad and expansive relief from the Court. The Court's task is to determine whether (1) the proposed settlement is fair and reasonable, (2) the Trustee complied with its fiduciary duties during the negotiations that led to the proposed settlement, and (3) the Trustee has met its burden to prove each of the *eighteen* proposed findings it has submitted for Court approval. Central to this inquiry is the examination of the evidence produced by the Trustee, the Institutional Investors, and Bank of America – the actual parties who reached the proposed settlement. Deposition testimony from Steering Committee members who were not involved in the settlement negotiations has no relevance to the fundamental questions that the Trustee has the burden of proving. *See, e.g. In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 586-87 (3d Cir. 1984) (striking deposition requests of objectors on relevancy grounds as they had no bearing on the reasonableness of the attorney's fees in a proposed settlement); *U.S. ex. rel. Singh v. Bradford Regional Med. Ctr.*, 249 F.R.D. 220, 224 (W.D.Pa. 2008) (denying motion to compel deposition on grounds that motives of party resisting discovery were irrelevant to merits of case). Discovery on collateral issues is simply not appropriate because "the discovery sought must relate to 'facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.'" *Stephen-Leedom Carpet Co., Inc. v. Arkwright-Bostom Mfrs. Mut. Ins. Co.*, 476 N.Y.S.2d 135, 137-38 (1st Dept. 1984) (quoting *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 (1968)).

Second, the practical reality is that there is little (if any) substantive information that Steering Committee representatives could provide at their depositions that would not be subject to the attorney-client privilege and work-product doctrine. *See* CPLR 4503(a); CPLR 3101(c). The bases for the objections are outlined in detail in the objections themselves, and properly substantiated with evidence developed in discovery. *See, e.g., Buonaccorso v. City of New York*, 208 A.D.2d 791, 792 (2d Dept. 1994) (vacating duplicative discovery requests). Beyond that, the information that corporate representatives may have about the objections is the result of communications with counsel, or developed in anticipation of or during this very litigation. No doubt the Institutional Investors would like to ask detailed questions about each and every criticism in the extensive objections, but it is difficult to conceive of how any of these questions could be answered.

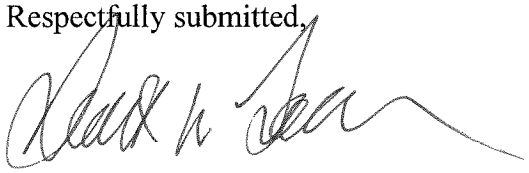
For example, in the Joint Memorandum of Law in Opposition to the Proposed Settlement, the Steering Committee explains that Brian Lin—the "expert" hired by the Trustee to determine a reasonable settlement range—grossly undervalued Bank of America's repurchase liability. *See* Doc. No. 588 at 51-59. If asked for the basis of this objection, corporate representatives would say that the information is set forth in full in the objection. If pressed for more information about what the objection "means," it is not possible to answer that question without divulging

information that is protected by the attorney-client privilege and work product doctrine because the sole source of information is work done by counsel or in anticipation of litigation. The same would be true for any number of other questions about the substance of the objections, including *inter alia* the allegations made, the evidence relied on, the shortcomings identified, and the research done in support of the objections. *See, e.g.,* CPLR 3101(c); *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dept. 1980) (The work-product doctrine applies to "materials which are uniquely the product of a lawyer's learning and professional skill, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy."); *S.E.C. v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) ("Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case . . . Such material is accorded almost absolute protection from discovery[.]") (quoting *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985)). As such, any deposition into the "allegations" contained in the Steering Committee's briefs falls squarely within the zone of protected and privileged information that is not the subject of proper discovery.

Finally, as indicated in the May 7 status call with the Court, no Steering Committee member intends to call any client representatives at trial. Since the discovery is not relevant to the relief sought by the Trustee, and largely, if not entirely privileged, there is no legitimate purpose to be served by subjecting Steering Committee representatives to hours of questioning. The Steering Committee members have expended considerable resources to step forward, lodge their objections, and seek to protect themselves from a deal that settles their claims without their consent. Respectfully, Steering Committee corporate representatives should not be subjected to harassing and irrelevant questioning because they had the temerity to step forward.

We look forward to discussing these issues with the Court on May 20.

Respectfully submitted,



Derek W. Loeser

cc: Counsel of record (via ECF)