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March 1, 2013

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

Dear Justice Kapnick:

We write on behalf of The Bank of New York Mellon (the "Trustee") and the Institutional Investors (collectively, the "Petitioners") to follow up on our February 15 letter to the Court. Despite substantial concessions by the Petitioners, the Steering Committee apparently is unwilling to compromise on the four remaining orders to show cause (motion sequences 29, 31-33). We therefore ask for a conference call with the Court to determine how best to proceed with respect to the remaining orders to show cause.

As explained in our February 15 letter, the Petitioners offered a reasonable compromise that would have avoided the need for further hearings on this matter. The compromise involved, as all compromises do, an exchange: the Trustee and the Institutional Investors would agree to disclose all common-interest communications among the Institutional Investors and the Trustee (motion sequence 33), another four hours of deposition for Jason Kravitt, disclosure of all communications between ETI and either the Trustee or Mayer Brown (motion sequence 29), and another four hours of deposition for David Anthony of ETI *if* we received modest agreements in exchange: principally, withdrawal of the orders to show cause and agreement by all intervenors (and a Court order) that this agreed-upon production would not constitute a waiver of the privilege as to other documents, in this case or in any others.

In response, the Steering Committee essentially offered no compromise at all. It demanded that the Trustee and the Institutional Investors provide all that they had offered and more – five hours of depositions vs. four, plus the production of conflict waivers sought on motion sequence 32. With respect to motion sequence 31 (at issue waiver/fiduciary exception), the Steering Committee conceded nothing: it suggested instead that the motion be heard by a special master, with an inevitable appeal to follow to this court.

The only concession in this "offer" was to allow redaction of the conflict waivers. Even that was hardly a concession: the Steering Committee still wants descriptions of "the character, nature, and/or extent of the conflict posed by Mayer Brown's representation of the Trustee"—that is, the only parts of the letters that it ever argued were relevant. Aside from that, the Steering

Committee would receive all of the discovery that it sought on two orders to show cause, while reserving all of its rights as to the third.[1]

This was not a good faith effort to compromise. Nonetheless, instead of shutting down negotiations, and mindful of the Court's guidance at the last conference, we responded with additional concessions: five hours (rather than four) of Kravitt and Anthony testimony and production of the redacted conflict letters. In other words, we were willing to concede on all but one order to show cause. The Steering Committee has rejected our offer.

Accordingly, we respectfully request a call with the Court to discuss how best to proceed in light of these events. We are available at any time that is convenient for the Court.

Respectfully,

Matthew D. Ingber

cc: All counsel

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[1] As we discussed in our February 15 letter, on that third order to show cause – the at issue waiver/fiduciary exception filing – it makes no sense to refer it to a special master. It does not require *in camera* review of documents. It requires a single ruling, as a matter of law—a ruling that this Court already made last August—on whether the Trustee can assert privilege at all.