

May 17, 2013

Via E-filing and Facsimile

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

Dear Justice Kapnick:

I write to the Court on behalf of the Steering Committee in advance of the hearing scheduled this Monday, May 20, to bring to the Court's attention the issues the Steering Committee anticipates will be discussed at the hearing.

First, the Steering Committee will be prepared to present oral argument in support of the jury demand and in opposition to the settlement proponents' motion to strike the jury demand (Mot. Seq. 35). Second, the Steering Committee will be prepared to discuss the corporate depositions sought by the settlement proponents (*see* Doc. No. 796, 05/14/2013 Letter from Derek Loeser to Justice Kapnick). Finally, the Steering Committee anticipates discussing with the Court the numerous unresolved issues and outstanding pretrial tasks that warrant a modest and reasonable continuance of the May 30, 2013 trial commencement date.

In light of the complexity and the circumstances presented by this case, it would be premature to commence trial on May 30, 2013. The Court has inherent power and sound discretion to manage its own calendar. *See Lipson v. Dime Savings Bank of N.Y., FSB*, 610 N.Y.S.2d 261, 262-63 (1st Dep't 1994). Moreover, this is a highly unusual case with broad ramifications. Bank of America no doubt would like to see its single largest outstanding liability resolved quickly for pennies on the dollar, but, respectfully, both the parties and the Court should be provided with enough time to prepare for trial. Simply put, whether trial is to the Court or by jury, a continuance is necessary in light of the numerous legal and factual issues that remain in dispute and the outstanding pretrial tasks that still must be completed:

- Pending At-Issue/Fiduciary Exception Order to Show Cause (Mot. Seq. 31). Motion Sequence 31, concerning the at-issue waiver and fiduciary exception doctrines, is currently pending before the Court. The information the Steering Committee seeks through Motion Sequence 31 goes to the heart of the PFOJ findings BNYM asks the Court to make, and is critical to evaluating whether BNYM fulfilled its duties to certificateholders. The parties have indicated that an appeal is likely regardless of the



Court's decision, and there is little to no chance that the First Department would be able to resolve the appeal in advance of May 30.

- Analysis of the Briefing in Opposition to and in Support of the Proposed Settlement. Within the last week and a half, nearly 400 pages have been filed with the Court related solely to the briefing in opposition to and in support of the settlement, and many more pages will be filed on May 20. Over 250 exhibits were filed with those briefs, adding hundreds of additional pages to the total page count. Just for the Court and the parties to pull and analyze the nearly 50 cases that were cited in the briefs alone will take significant time. And with the final round of briefing due on May 20, the Court and the parties will have less than 10 days to review and analyze the briefs before trial is set to commence. This makes no sense and serves no legitimate purpose.
- Additional Depositions. All parties have agreed to allow additional depositions of any trial witnesses who have not been previously deposed in this matter. In the event that additional witnesses are to appear at trial, it is unclear when these depositions can take place with only two weeks until trial is set to commence.
- Expert Discovery Is Not Yet Complete. During last week's deposition of Daniel Fischel, the Steering Committee first learned [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

It is not fair nor consistent with the letter or spirit of the Scheduling Order that counsel should have to examine witnesses conducting complex work (like Mr. Fischel's statistical "event studies") on the fly and without the assistance and consultation of their own experts. At this time, BNYM has not provided the Steering Committee with any supplemental expert reports, or any other information concerning the nature and extent of the new opinions. It also has refused to provide the Steering Committee with supplemental disclosures. Without this information, the Steering Committee cannot adequately prepare for trial or allow the remaining two expert depositions scheduled for next week to move forward because it would be unfair and a waste of the Court's and parties' resources to allow BNYM to interject new, undisclosed opinions at trial or to surprise next week's experts with these additional opinions. There was a process that was set in place and stipulated to by the parties, namely, that the expert rebuttal reports would be the last word. Experts conducting additional work and forming additional opinions after the disclosure



deadline and counsel then refusing to supplement their disclosures violates that agreement. The Steering Committee requests that the Court order that BNYM not be allowed to use or present any work done by their experts after the submission of their reports or to immediately submit supplemental reports with justification for the supplementation and make their experts available for supplemental depositions on the new work and new opinions.

- Scheduling of Pretrial Motions to Exclude and Motions in Limine. Under rule 27 of the Commercial Division rules, the parties are required to make motions in limine “no later than ten days prior to the scheduled pre-trial conference date, . . . unless otherwise directed by the court.” N.Y. Ct. Rules, § 202.70 at R. 27. The Inside Institutional Investors have alluded to potentially filing motions to exclude certain expert witness reports or testimony (*see, e.g.*, Doc. No. 740 at 46). The Steering Committee is also evaluating motions in limine. In light of the fact that no pre-trial conference has yet to be scheduled, the parties will need guidance from the Court as to when any pretrial motions in limine and motions to exclude expert witness reports or testimony are due, including the setting of briefing schedules and oral arguments.
- Other Pretrial Tasks. Furthermore, there are other joint tasks that all parties who intend to present evidence and testimony at trial must undertake. For example, the parties have yet to determine which exhibits will be offered into evidence without objection. Assuming there will be voluminous exhibits, the rule requires the parties to seek guidance from the Clerk, and thereafter, the Court “will rule upon the objections to the contested exhibits at the earliest possible time.” N.Y. Ct. Rules, § 202.70 at R. 28. In the same vein, the parties have yet to agree upon portions of the deposition testimony to be offered into evidence without objection. Under rule 29, each party is required to submit to the Court a list of deposition testimony that will be offered without objection and a list of deposition testimony where objection has been made “[a]t least ten days prior to trial or such other time as the court may set.” *Id.* at R. 29. The Court also will need time to rule on the objections before trial begins. *Id.* Finally, now that the time allotted for discovery from the settlement proponents has closed, the Court may schedule settlement and pretrial conferences pursuant to rule 30. *See id.* at R. 30(a), (b). Both conferences will be beneficial to the Court and parties and likely will prompt each party to evaluate the merits of the case, discuss settlement of this matter, resolve any outstanding pretrial matters, and finalize other pretrial tasks, which may include pretrial memoranda, exhibit books, jury instructions, and a written stipulation of undisputed facts.

The Steering Committee’s request is made in good faith and no party will be prejudiced by a reasonable continuance of the scheduled trial date. Indeed, the Settlement Agreement expressly contemplates that this proceeding could last several years and, accordingly, the agreement will not expire until December 31, 2015 (*see* Doc. No. 3 at 7 ¶ b). Despite the rhetoric that this request is sure to elicit, the Inside Institutional Investors cannot genuinely



The Honorable Barbara R. Kapnick
May 17, 2013
Page 4

contend that there has been any undue delay by the Steering Committee. Our task has been to obtain information necessary to evaluate the fairness of the settlement. The settlement proponents added months to this task by taking extreme positions that required multiple motions to compel. At any rate, as recently as last week, counsel for the Inside Institutional Investors described the case as being "on track."¹

A case of this magnitude should not be conducted in haste. A continuance will provide the Court and the parties with a reasonable and sufficient amount of time to complete outstanding pretrial tasks and to resolve disputes, some of which may require the Court's assistance. *See Lipson, supra* ("[N]o matter how pressing the need for expedition of cases, the court may not deprive the parties of the fundamental rights to which they are entitled . . ."). There is good, and, indeed, abundant cause to provide a reasonable continuance of the trial.

The Steering Committee thanks the Court for its attention to these important issues and looks forward to discussing them with the Court on Monday.

Respectfully submitted,

Daniel M. Reilly

Enclosures

cc: Counsel of record (via ECF)

¹ *Q&A: Kathy Patrick on mortgage bonds, Libor and beauty pageants*, Thomson Reuters News & Insight (May 6, 2013), available at http://newsandinsight.thomsonreuters.com/Legal/News/2013/05_May/Q_A_Kathy_Patrick_on_mortgage_bonds_Libor_and_beauty_pageants/.

Exhibit 1

CONFIDENTIAL DOCUMENT

SUBMITTED TO CHAMBERS