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June 3, 2013

BY 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 write in response to Mr. Reilly's letter of Friday evening. His latest request for delay is meritless.

As we discussed with the Court on May 23, to keep the trial on schedule so that $8.5 billion can be distributed promptly to investors, BNYM was willing to abandon its right to appeal the decision on motion sequence 31. Before it mooted its appeal by producing documents, however, it wanted to know that the objectors would not delay the trial on other grounds. Knowing this, Mr. Reilly still waited more than a week even to ask for a stay pending appeal.[1] The delay in production is entirely of the objectors' own making. Taking their grievances in order:

1. Revised privilege log. The objectors requested only what they called "narrow" categories of privileged communications, and the Court granted only a small subset of that request. Parts of documents not within those categories had to be redacted, because they are privileged and not subject to the Court's order.

The objectors seem to demand that BNYM rewrite its January 2012 privilege log to identify documents that it is no longer withholding and to match up newly produced documents to log entries. That makes no sense—there is no need to log a document that has now been produced. They also want a log of redactions on the new documents. This is unnecessary, because the privileged nature of the documents was assumed by the Court's order, and the redactions simply cover portions that the Court did not order produced.

2. Categories 2 and 3. The Court ordered BNYM to produce three categories of documents. We did not produce documents on the second and third categories (the draft of the bar order and the lack of formal notice before commencement of this proceeding), because there are no documents

[1] We produced these on the same day that that request was denied. Because the objectors did not go to the First Department until Wednesday afternoon, the production occurred at night, but not, as Mr. Reilly says, at 11:59 p.m. *See* attached email.

to produce. This is obviously a blow to the objectors' case, including Professor Frankel's opinion that "[t]he quest for a release demonstrates great attention to self-protection" and the assertions that formal notice to all holders, though not required by the PSAs, was somehow "traded off" for an indemnity.

3. Other demands for a continuance. Mr. Reilly's demand for *in camera* review (stated in an email to me over the weekend), revised privilege logs, further document productions, a renewal of the fiduciary-exception motion, new expert reports, and new depositions are transparent efforts to win *de facto* the continuance that this Court and the Appellate Division already denied.

The CPLR does not require or even contemplate *in camera* review of every document withheld or redacted for privilege or non-responsiveness. Indeed, there is no question that the documents at issue here are privileged. The only basis for accusing BNYM's counsel of concealing responsive documents is that the production obviously falls short of the objectors' expectations.

The Court already denied the request for new depositions on motion sequence 31, and the emails that they highlight in their letter are all from Jason Kravitt, whose involvement is not a new discovery. Furthermore, when the Court granted the objectors' request to reopen the depositions of Jason Kravitt (based on the common-interest privilege ruling) and Professor Fischel (because he had thought about the objectors' criticisms of his report), the objectors never bothered to take them. It seems that they are more interested in requesting discovery as an excuse to push off trial than they are in actually taking discovery.

As to the rest of the fiduciary exception motion, despite Mr. Reilly's attempt at spin, these documents are the death knell of any conflict theory relating to the Forbearance Agreement. Each of the quoted documents (as well as others produced in response to the order) explains in detail why Mayer Brown advised that a disputed Event of Default was not in the interests of *holders*, because it would not advance loan file review or assist in loan repurchases, and would trigger pointless litigation about whether an Event of Default had occurred. The observation that this result also was not in the Trustee's self-interest means that the Trustee understood that its interests were *aligned* with those of the investors. The same documents note that Ms. Patrick agreed with that analysis, and concluded that the best way to obtain recovery for holders *and* avoid an Event of Default was to get Countrywide to make progress toward what ultimately became the Settlement.

Mr. Reilly's letter is a last gasp in a week filled with self-help measures to avoid trial. Not only did the objectors wait to ask for an "emergency" stay pending appeal, but they blew past and ignored every pre-trial deadline, designating witnesses and thousands of trial exhibits and serving objections to the Petitioners' designations days after the dates that the Respondents themselves had proposed. Then, five hours after his letter, at 10:13 p.m. the Friday before trial (4 days after the stipulated deadline for disclosing trial witnesses and three months after the court-

ordered deadline for disclosing expert witnesses), the Respondents named a new expert witness,[2] though they still refuse to disclose the subject of his testimony. This misconduct, like the new complaints about the Trustee's production, must be seen for what it is—an effort to avoid a trial.

Respectfully submitted,

Matthew D. Ingber

cc: All counsel

[2] Mr. Loeser suggests that this individual is actually a fact witness, despite his prior assertion that the Petitioners should be barred from taking discovery, because the objectors did not intend to call fact witnesses at trial.

## Palitz, Virginia

**From:** Uger, George
**Sent:** Wednesday, May 29, 2013 10:21 PM
**To:** dreilly@rplaw.com; mrollin@rplaw.com; cpennington@rplaw.com; scoggins@rplaw.com; sfitzgerald@wmd-law.com; jmoon@mw-law.com; aziajka@mw-law.com; dloeser@kellerrohrback.com; dko@kellerrohrback.com; wbf@federmanlaw.com; dlieberman@halperinlaw.net; sziluck@halperinlaw.net; alperstein@kolawyers.com; tal@talcottfranklin.com; dylan@talcottfranklin.com; mtlatenchi@scott-scott.com; bkaswan@scott-scott.com; bdmanning@rkmc.com; allen@sfa-law.com; ymiller@sfa-law.com
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**Subject:** In re The Bank of New York Mellon (Index No. 651786-2011)

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Good Evening:

As per the request of Domenic Cervoni, please find attached the 22nd production of documents in the "In re: The Bank of New York Mellon (Index No. 651786-2011)" case.

Please be advised that this file will expire in 1 week.

Should you experience any difficulties with this transmission please feel free to contact me.

Regards,
-George Uger

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