MAYER·BROWN

Mayer Brown LLP
1675 Broadway
New York, New York 10019-5820

Main Tel +1 212 506 2500
Main Fax +1 212 262 1910
www.mayerbrown.com

Matthew D. Ingber
Direct Tel +1 212 506 2373
Direct Fax +1 212 849 5973
mingber@mayerbrown.com

June 14, 2012

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* (651786-2011)

Dear Justice Kapnick:

On behalf of The Bank of New York Mellon ("Trustee"), we submit this brief response to Dan Reilly's letter of June 13, 2012, which, less than 24 hours before today's conference, raises a host of new issues.

At the outset, we are compelled to note our surprise that no investor has objected to the Settlement. Although we wish that were the case, AIG's own filings make clear that it is not. AIG's Notice of Intention to Appear and *Object* (doc. 171) states, among other things, that "the filing of this *objection* in no way alters the relief AIG requests in its Verified Petition to Intervene" (at 2). The Petition to Intervene (doc. 114), in turn, states that "the proposed settlement and the resort to Article 77 approval were the product of a highly-conflicted process in which BoNY as trustee engaged in disparate treatment of trust beneficiaries, engineered for itself releases from the very beneficiaries who had no meaningful access to information, and gave undue deference to Bank of America's defenses. As a trustee, BoNY should be aggressively prosecuting Bank of America *instead of* proposing pennies-on-the-dollar settlement to its beneficiaries" (at 2-3). It adds that "the proposed settlement is presumptively unreasonable" and that "Bank of America is drastically underpaying on its liability" (at 2). It is difficult to conceive of a more obvious objection. Walnut Place, for its part, just told the Appellate Division that it "intervened in the special proceeding and alleged that the settlement was inadequate," and that "[t]he proposed settlement is grossly inadequate for CWALT 2006-OA3, CWALT 2006-OA10, and for many of the 528 other trusts that it covers" (First Dep't Br. at 10) These objections are not without consequence—discovery from intervenor-respondents that have filed substantive objections need not wait until January 2013, one month prior to the hearing. The discovery is relevant and should begin now.

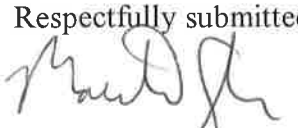
We are equally baffled by the Objectors' request for massive discovery so that they can determine whether to pursue a motion to compel that they already filed. At the May 8 conference, the Objectors asked the Court to defer ruling on the fiduciary exception until the Trustee updated its privilege log with additional privileged documents. The Objectors agreed that, within seven days of receipt of the log, they would decide whether to pursue the motion. They said nothing about either of the two issues presented to the Court yesterday for the first

time in this year-long case, and for good reason—the requested information is irrelevant to the motion, and it would be a colossal waste of time to collect and produce. If the Objectors wish to pursue their motion, we are prepared to argue it. If they do not, they should withdraw it. But they should not be allowed to use their earlier request for an adjournment as yet another opportunity for delay and for expansive and improper discovery.

More specifically, the Objectors effectively *concede* that their request for "non-privileged documents concerning its duties"—documents from any source at BNYM, from 2004 to the present, "concerning" (i) the "Trustee's acceptance of and commencement of [its] position" as Trustee, (ii) "minutes of internal BNY Mellon committee, group or department" responsible for trust administration, and (iii) "whether [BNYM] has any fiduciary duties"—has nothing to do with the Settlement and instead relates solely to the question of whether privileged documents should be produced. In other words, they seek discovery to seek discovery, all of which is irrelevant because, among other reasons, the question of whether BNYM was a "fiduciary" is answered by the PSAs.[1] This is a sideshow.

On the privilege log issue, the Objectors received the Trustee's first privilege log in January. They said nothing about any need to supplement the log along the lines described in yesterday's letter. They filed a motion to compel in April; again, they said nothing about any need to supplement. On May 8, they asked the Court to defer ruling on their motion to compel until they received the second installment of the Trustee's privilege log, which they knew would contain additional privileged documents. They said nothing to the Court, or to the Trustee, about the need to supplement. Now, purportedly because they cannot make up their minds about whether to abandon a motion that they already filed, the Objectors demand that the Trustee re-review every privileged document to state whether each communication was made "on behalf of Certificateholders." Yet they never argue that the existing log is insufficient under the CPLR, nor do they explain *why* this information is necessary to decide the motion. It is not. Assuming that it is possible to make this distinction, it could be relevant only if and when the Court decides that the Objectors have satisfied every other element of the fiduciary exception—among others, that the Trustee is a fiduciary *and* that the Objectors have demonstrated good cause to invade the privilege. The Objectors come nowhere close to meeting that burden, and we are prepared to argue these points if the Objectors decide to pursue their motion.

Respectfully submitted,



Matthew D. Ingber

---

[1] The letter asserts that BNYM has "at times argu[ed] that its decisions should be afforded the judicial deference ordinarily reserved for fiduciaries." Of course, the Objectors offer no citation, because BNYM has never actually said that. Nor can the Objectors cite any case that holds that having discretion under a contract makes a party a fiduciary.

cc: All counsel (by electronic filing)