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November 16, 2012

BY E-FILING AND FACSIMILE TO (212) 401-9154

Hon. Barbara R. Kapnick
Supreme Court of the State of New York
County of New York
60 Centre Street, Room 555
New York, NY 10007

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

Dear Justice Kapnick:

On behalf of non-party Bank of America Corporation, we respectfully submit this letter in response to the Steering Committee's November 7, 2012 letter to the Court. The Steering Committee's letter states that Bank of America's production on October 25 of bilateral settlement communications between Bank of America or its counsel with the Institutional Investors or their counsel, is "only the latest example of the settlement proponents constructing roadblocks to discovery . . . only to then 'voluntarily' produce the information." The Steering Committee also states that "[t]he actual amount which will be paid to the Trusts under the settlement is unknown, as the Settlement Agreement makes clear that some of the $8.5 billion can be returned to Bank of America." Both statements are incorrect. We submit this letter to set the record straight.

Bank of America's voluntary production of bilateral settlement communications. The chronology here demonstrates the inaccuracy of the Steering Committee's attack that our production of bilateral Bank of America/Institutional Investors settlement communications was a "roadblock" of any sort:

1. On November 18, 2011, after removing this proceeding to federal court, a group of objectors, including the AIG entities, served a subpoena on Bank of America. We timely served Responses and Objections on December 16, 2011, and participated in a meet-and-confer on January 31, 2012. The Steering Committee then went silent. For the next seven and one-half months (*i.e.*, until mid-September), the Steering Committee never raised *any* discovery issue with us, other than the loan file issue that was addressed by the Court.

2. In the interim, in response to the Steering Committee's attempts to compel production *from the Institutional Investors* of bilateral communications with Bank of America, the Court ruled that such bilateral settlement communications did *not* have to be produced. At the August 2, 2012 conference, the Court ruled that the Steering Committee's request for all settlement communications was "too broad" and that "settlement negotiations are not something that are generally looked at or produced or discussed." 8/2/2012 Tr. 86. While suggesting that the Steering Committee could revisit the issue after some depositions, the Court declined to order production of the Institutional Investors' bilateral communications.

3. Then, on September 14, 2012—six months after the case was remanded to this Court, and seven and one-half months after the Steering Committee's last discussion with us regarding any discovery other than loan files—the Steering Committee served a second subpoena on Bank of America, seeking production of bilateral settlement communications (among other things). The September 14 subpoena reflected on its face that the Steering Committee understood that Bank of America was not obliged to produce those communications. The subpoena itself acknowledged (at p. 12, n2): "With respect to communications with the [Institutional Investors], the Steering Committee recognizes that the settlement communications dispute is pending before the Court and that a response to a portion of this Request is dependent upon the Court's decision with respect to the discoverability of settlement communications between Bank of America and the [Institutional Investors]."

4. We timely served Responses and Objections to this second subpoena on October 4, 2012, and produced responsive documents on October 11 (including responsive bilateral settlement communications between Bank of America and the Trustee). The Responses noted that the Court had "to date sustained the Institutional Investors' position that such [bilateral settlement communications between Bank of America and the Institutional Investors] should not be produced." We also expressly stated our willingness to meet and confer. (Six weeks later, the Steering Committee has not sought to meet and confer.)

6. At the October 12, 2012 conference, after hearing further argument from the Steering Committee on bilateral settlement communications, the Court again *denied* the Steering Committee's motion to compel their production. 10/12/2012 Tr. 134.

7. Nevertheless, mindful of the Court's expressed desire to "see as much as possible" of the settlement negotiations (10/12/2012 Tr. 117) and in the interests of moving expeditiously towards a final hearing in this matter, on October 18, 2012, we unilaterally and voluntarily proposed to the Steering Committee that we would immediately produce all bilateral

communications with the Institutional Investors and that the Bank of America witnesses would answer questions about these communications at deposition.[1]

8. The Steering Committee's response to our offer was a proposed stipulation by which they sought to condition our voluntary production on a number of requirements, including that the Institutional Investors certify the completeness of Bank of America's production *and* produce a log of all bilateral communications; that all deponents waive all objections to deposition questions about the bilateral communications; and that the Trustee agree to additional deposition days for certain of its witnesses. The Steering Committee and the Institutional Investors were unable to reach agreement on the Steering Committee's demands.

9. Notwithstanding that dispute, on October 25, 2012, we unilaterally produced *all* bilateral communications between Bank of America or its counsel and the Institutional Investors or their counsel, and our witnesses have testified, and will testify, about such communications at deposition.

In sum, we submit that far from being an "example of the settlement proponents constructing roadblocks to discovery"—as the Steering Committee claims—Bank of America's efforts to achieve compromise and its prompt voluntary production of bilateral communications, notwithstanding the Court's having twice *denied* the Steering Committee's motion against the Institutional Investors to compel such production, demonstrates Bank of America's good faith.

The amount of the settlement payment. The Steering Committee's November 7 letter states that "[t]he actual amount which will be paid to the Trusts under the settlement is unknown, as the Settlement Agreement makes clear that some of the $8.5 billion can be returned to Bank of America." With all respect, this assertion seems to be a willful failure to understand the plain terms of the Settlement Agreement. The Settlement Agreement makes clear what the amount of the Settlement Payment is: $8,500,000,000. § 3(a). Each Covered Trust will receive its "Allocable Share" of the $8.5 billion. § 3(b). What the Settlement Agreement does address, quite logically, are two possible circumstances in which the Settlement Payment would take into account either the exclusion of trusts from the settlement or interim repurchases of loans from the trusts:

1. Excluded Trusts. The Settlement Agreement provides that in the event that any trust is excluded from the settlement, the Allocable Share of the Settlement Payment that would have been otherwise payable to that trust need not be paid. § 4(a).[2] By the same token, of course, the Settlement Agreement provides that any Excluded Covered Trust is not bound by the

[1] At the Institutional Investors' request, our offer was subject to two reasonable conditions: 1) that our production would not be used as a basis to seek adjournment of any deadline; and 2) that the Steering Committee would forego production of the same bilateral communications from the Institutional Investors.

[2] If the Settlement Payment has already been made to a Trustee escrow account pursuant to Section 3(b) before the Allocable Share of each trust has been determined, then once the Allocable Shares have been determined, the share that would otherwise become payable to an Excluded Cover Trust is to be remitted to Bank of America. § 4(a).

Settlement. *Id.* Thus, the non-payment of the Allocable Share attributable to an Excluded Covered Trust is entirely logical and consistent with the fact that any Excluded Covered Trust would not be providing any release: any trust excluded from the Settlement is unaffected by the Settlement.

2. Post-signing repurchases of loans. The Settlement Agreement provides that if, after its signing but before payment of the $8.5 billion Settlement Payment, Countrywide were to repurchase mortgage loans from any Covered Trust (or make a make-whole payments with respect to any such loans), "the Settlement Payment . . . shall be reduced dollar-for-dollar by the economic benefit to the Covered Trust(s) of such repurchase or make-whole payment(s) and the Allocable Share(s) for the Covered Trust(s) from which the Mortgage Loan(s) was (or were) repurchased or to which the make-whole payment(s) was (or were) made shall be reduced by that same amount." § 15(b). This is common sense, and does not affect the economic benefit provided to the Covered Trusts. All this provision does is simply allow Countrywide to "pre-pay" part of the Settlement Payment by repurchasing identified loans, should it choose to do so; and, at the same time, avoid the double-payment that would exist absent the provision.

We appreciate the Court's consideration of these points.

Respectfully submitted,

Theodore N. Mirvis

cc: Counsel of Record (by electronic filing)