UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE BANK OF NEW YORK MELLON,

Petitioner,

v. 11 Civ. 5988 (WHP)

WALNUT PLACE LLC, et al.,

Respondents.

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RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, et al.,

Plaintiffs,

v. 11 Civ. 5459 (WHP)

THE BANK OF NEW YORK MELLON,

Defendant.

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New York, N.Y.
November 3, 2011
11:00 a.m.

Before:

HON. WILLIAM H. PAULEY III
District Judge

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STATE OF NEW YORK
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BY: RICHARD P. DEARING

(Case called)

THE COURT: All right, good morning.

I set this matter down for a conference to consider how this matter should proceed. I received a joint submission with very different views of how the case should proceed. So, I would like to hear from counsel.

Mr. Ingber, would you like to start us off?

MR. INGBER: I would. Thank you, your Honor. Good morning.

THE COURT: And I would ask that you use the podium.

MR. INGBER: Sure.

As you know, your Honor, this matter started in New York State Supreme Court. And it was initiated as an Article 77 proceeding. It was an equitable proceeding that started in State court. And it's our view, it's the trustees' view, that this should be an equitable proceeding that continues in federal court.

So we don't need to attach an Article 77 label to this proceeding, but we think that the essential attributes, the essential components of Article 77 should continue in federal court. And I'm not sure, frankly, that there is a fundamental disagreement on that point with some of the respondents, eight or ten respondents who were signatories to the joint case management report.

So what we envision, your Honor, is that this would be

an equitable proceeding that would have the key component of what we were seeking in state court.

Number 1, we would ask for a ruling from your Honor on the question of whether the trustees acted in good faith and reasonably in entering into the settlement.

We believe there should be the petitioners that were the petitioners in State court. And there should be respondents who were respondents in State court but now in federal court. So the parties should be aligned in the same manner.

We think what the case should proceed consistent with what was contemplated in state court; that is, an expedited summary proceeding. And we think that the Court should be able to bind certificate holders as the Court was able to bind certificate holders, whether they were objecting, supporting, or not, in state court. So that's, fundamentally, what we're looking for. We're not asking to call it an Article 77. But the Court has the ability to control and supervise and manage its case. And we think it is well within the Court's right and ability to manage the case in this fashion. We think there is support for federal courts giving guidance to trustees regarding the administration of trust. And we cited one of the cases in the joint case management report, that was the Eighth Circuit case in Redmond vs. Commerce Trust, 144 F.2d 140.

And what the Court said there, your Honor, is that; When it's reasonably prudent in the exercise of good faith, sound judgment to make a contract or compromise, the trustee may do so. But if such a compromise is made without proper court approval the trustee takes the risk of his good faith and sound judgment being attacked successfully by the beneficiaries. So the trustee may safely do this. And if he goes and he seeks court approval and he gets the judgement from the Court, then that judgment will be binding on all trust beneficiaries.

It is also consistent with what the restatement second of trusts, Section 192. If the trustee is in doubt whether he should compromise or submit to arbitration, a claim, he may ask the instruction of the Court, or he may agree conditionally upon the subsequent approval of the Court. And that's what happened here.

The trustee entered into a settlement. As we stated in the verified petition that we filed in State court. There was some concern that there would be conflicts among certificate holders about what the right way forward was, whether the settlement should be entered into, whether certificate holders would prefer to proceed with their own litigation, in some that had been filed, and some maybe that would be anticipated to be filed in a different fashion.

And so we went to court, we entered into the

settlement agreement, we went to court, we gave notice to the certificate holders, and here we are.

Judge Posner in the case, First National Bank vs. AM Castle, 180 F3d. 814. He also -- that was 1999. He also acknowledged that federal courts have the inherent power to give guidance to the trustees. This is what just Posner said: It's a traditional judicial office to give instructions to trustees who have substantial questions concerning their duties, and not one that Article III is sensibly interpreting as denying to federal courts.

So we do think it's within the inherent power of the court to give the relief that we're seeking, and we don't need to transform this proceeding into something that it was never intended to be by the party, the trustee, that commenced the proceeding.

Now, on the question of whether the Court can take into account or adopt the essential components of Article 77, there is a case, Banks, 144 F.Supp.2nd 272, that is Judge Marrero, 2001. And that was a case in which a defendant, a police officer, under a Section 1983 case asserted a cross claim against the City for indemnification. And Judge Marrero recognized that that cross claim was one that would have to be brought under Article 78 in State court. And the question was whether the judge should assert supplemental jurisdiction over that claim.

And Judge Marerro decided to assert supplemental jurisdiction. And she recognized that this is really a state court proceeding. And it is within the exclusive province, in fact, of Article 78 to seek indemnification from the City, police officer seeking indemnification from the City. And what she said was -- I'm sorry, what the judge said was: This Court believes that it should treat the indemnification cross claim as much as possible as the proceeding instituted in state court to contest an unfavorable indemnification decision by the City. It would not serve the interest of the fair administration of justice to promote a federal court resolution of this matter that would vary substantially from that which would prevail with the same issue litigated in state court. And the Judge cited xxx issue re. Judge Marrero went on to say that borrowing lessons derived from principles of diversity jurisdiction, because the appropriate method New York law provides to contest an alleged wrongful denial of indemnification to a City employee would be Article 78, this Court will apply the essential rules underlying an Article 78 proceeding. And the judge decided to apply the standard of review that applied in the Article 78 proceeding, which was abuse of discretion.

So it's our view, your Honor, that there is support for the Court to adopt these essential components of Article 77, have the petitioners and the respondents aligned as they

were in the state court proceeding. The objectors have filed their objections. There is 44 objections that were filed, 22 are just seeking more information. The other 22 are more substantive. Ten or so have now signed on to the joint management report. And it seems that, based on our reading of the joint management report, there is not a whole lot of disagreement about the idea of continuing an equitable proceeding in federal court.

There may be areas of dispute, for example, about whether there should be an opt-out. That is unquestionably an area of dispute. There may be disputes about whether there should be a partial stay pending the appeal that the trustees and the institutional investors filed on the remand decision. But as to the question of whether there should be an equitable proceeding in federal court seeking the relief that we're seeking, I don't know that there is a fundamental disagreement on that point. And we think there is ample authority for the Court to proceed in that fashion.

THE COURT: Do you agree that discovery should begin while your motion is pending in the Court of Appeals?

MR. INGBER: We have already started discovery, your Honor. We produced, just this week, voluntarily, 120,000 pages of documents. There was no formal document request. There was the request, weeks ago, that the trustees consider making a voluntary production. At the time, we said, sure. We need to

enter into a confidentiality agreement. We didn't know which court was going to have jurisdiction at the time over this matter. So we didn't even put a caption on the confidentiality agreement. We just wanted a basic confidentiality agreement that would allow us to produce confidential documents. We spent some time negotiating it. It is a pretty straightforward confidentiality agreement. We entered into it. And this week we produced documents. So, yes, we think discovery, in particular document discovery, should proceed. We think -- and we layed out a schedule that we think makes a lot of sense. November 22nd, the parties exchanged document requests. Consistent with the federal rules, we'll respond to those document requests. We'll look at the responses. We'll sit down and we'll have a meet and confer. And if there is areas of disagreement that can be narrowed and focused, we'll do that. And if we can't come to agreement on certain categories of documents and whether they should be produced, then we'll brief the motion to compel. But what we don't think should happen, your Honor, is that the Court should -- we don't think the Court should rule on substantive motions until there is more clarity from the Second Circuit on whether this Court has jurisdiction.

What we don't want to do is to do this twice. We want to move expeditiously. Consistent, totally consistent with moving expeditiously. We're going to move forward with

document discovery. If we have to brief issues in a motion to compel, we'll brief those issues. In the interim, we're going to get clarity, we hope, from the Second Circuit. And that could come within weeks.

But to get substantive decisions from your Honor on discovery motions, and intervention motions, and other substantive issues when it's certainly a possibility that this get remanded to state court, we think would be inefficient and would not be consistent with moving expeditiously.

THE COURT: With respect to the intervener's motions, they are all, at this point, essentially fully briefed, aren't they? Whether I accept the briefs that were filed across the street and then replies were filed here, why doesn't it make sense for the Court to decide those intervention motions, up or down, since if intervention is granted those parties would have the right to participate in the discovery process. And if it's denied, the way would be clear and more manageable for the parties with respect to the same discovery process.

MR. INGBER: We understand that there is tension between moving forward with discovery and holding off on intervention motions. We would be amenable to sharing discovery with the proposed intervenors, but we think we should hold off on ruling on whether they should intervene as respondents for the reasons that we mentioned in our papers. And, in particular, in the case of the AGs, I mean they want

to -- it looks like they want to assert counterclaims against the Bank of New York Mellon on issues that that we believe are unrelated to the question currently before your Honor in this proceeding, in this equitable proceeding. And so that has the risk of really transforming what we think should be a special proceeding with focused discovery, into something that it's not. And we think the substantive issues that the AG has raised would really have the effect of converting this into something that it was never intended to be and, frankly, something that I don't even think the other respondents or objectors would want. Because this could be two, three, four years of plenary litigation. And that is not what the trustee wanted certainly when it filed the Article 77 in state court. And it's not something that is necessary. Because if there are claims to be brought against the trustee, those claims can be brought against the trustee. We have said to the AGs, we have said to the objectors, to the respondents, multiple times, on telephone calls, and in meet and confers sessions that there is nothing in the settlement agreement that releases claims against the trustee. Read the settlement agreement itself. There is no release in the settlement agreement of claims against the trustee. We wrote to your Honor and to Justice Kapnick saying there is no release, whatsoever, in the settlement agreement of claims against the trustee.

I'm saying in open court today, as an officer of the

court, there are no claims that are being released against the trustee. These claims can proceed in other actions. We're not going to refer to, or cite, the settlement agreement as a reason why they can't proceed in separate litigations against the trustee.

To be sure, we have substantive arguments, and factual, and legal arguments about why they shouldn't proceed against the trustee, but that should be reserved for another time, in another case, whether it's before your Honor or another judge in this courtroom or in New York State Court.

THE COURT: Look, whatever the results of the appeal, I agree that the case should be moving forward, one way or the other. Because whichever forum the case is ultimately in, there is discovery that needs to be conducted.

If the Second Circuit grants your application for leave to appeal, do you have a view as to whether this Court would retain jurisdiction to supervise discovery while that appeal was pending?

MR. INGBER: I think it would be akin to, your Honor, this Court weighing whether to remand. And this Court did, and I think would be required, to hold off on issuing substantive decisions until that jurisdictional question was resolved. So I think that once the Second Circuit, if the Second Circuit decides to take the appeal and then wants a merits briefing, we would submit that your Honor should hold off on issuing any

substantive decisions. And that's consistent with what we have said in the joint case management report. We agree with you, your Honor. We want to move forward. Several weeks ago we told objectors' counsel that we wanted to move forward. We said to them, if you want to serve formal document requests, serve formal document requests, and we'll move forward. They didn't do that, and that's fine. But in the interim, we made our voluntary production. We worked on the comp fee and we worked toward making that voluntarily production. So we are in agreement we should move forward.

On discovery, the only area of disagreement we have with the signing respondents to that joint case management report is whether your Honor should be able to make substantive rulings. We think it makes sense to hold off until we have clarity from the Second Circuit, and they don't.

THE COURT: All right, anything further?

MR. INGBER: Thank you. Nothing further at this time. Thank you, your Honor.

THE COURT: All right.

Do the institutional investors wish to be heard.

MR. MADDEN: Just very briefly, your Honor.

We would simply reiterate two questions, who are going to be the parties, the intervention issue, and the scope of discovery. We do think that those issues need to be decided by the Court that is going to ultimately decide this. And we

think we'll have some clarity on that in a matter of weeks, not months. If the Second Circuit says we're not interested in taking this appeal, then we're here, let's move forward. If they say they're going to take the appeal, then we think in that instance, regardless of whether the Court has the power, we think probably wouldn't be prudent to rule on issues that really ought to be decided on whichever court is going to have this. And so we think that that is the way to go with respect to those issues, your Honor.

And that's all we have to say, your Honor.

THE COURT: All right, thank you.

Mr. Cyrulnik.

MR. CYRULNIK: Good morning, your Honor.

I suppose I would like to start by highlighting what I think are the important differences between our position and the position that Mr. Ingber articulated.

Probably the most obvious is that while we agree that this Court has the power to adjudicate the relief the trustee is seeking, we don't think that Article 77, per se, has any place in this proceeding now that it's in federal court.

Article 77 essentially is a device of the CPLR, a procedural device that provides for a certain matter of adjudicating a particular kind of dispute.

I think the most interesting part of Mr. Ingber's comments on this is the tension between his contention that the

federal courts have inherent power, as Judge Posner said, to provide guidance to a trustee, adjudicate disputes regarding trust, and his pointing to Judge Marerro's comments about Article 78. Because if the federal courts have their own inherent ability to resolve the kind of dispute that is in front of your Honor now, there is no need to resort, as Judge Marerro did, to a particular unique kind of state device to resolve this dispute.

We think that this Court has the inherent power to adjudicate this dispute and has the power and, indeed, the obligation to apply the Federal Rules of Civil Procedure, and whatever orders your Honor thinks are most efficient for managing this case, and that there is no need at all for looking to Article 77 to see how this case would have proceeded in State court.

And what differences does that entail? I think the first thing I would note is the trustees' proposed order to the state court that is now presumably in front of your Honor requests many more than one form of relief. I think I would divide it into three unique categories of relief that they are seeking.

One category is judgments from this Court that the trustee acted properly, reasonably in entering into a settlement agreement. That's one category of relief that sounds similar to what one might consider declaratory judgment

type relief. They're also asking for approval of, and an order to consummate a settlement agreement, which is similar to seeking conditional approval of the settlement. And the third category of relief they are seeking are releases of parties and absent parties. And they are seeking to ask the Court to bind those parties, without their presence in many instances, to be released from ever suing the trustee and Bank of America Countrywide on various claims.

And I think the Court has the power to adjudicate all of these, although with the important qualification that as to the last category, the releases, the Court has the power to do that subject to the Constitutional limitations that apply here regarding when you can release a party's claims without its presence, or without its required presence. And we believe that requires notice, and ability to object, and an ability to opt out, and that notice be provided of all three of those things.

The other salient differences that we think would arise under our proposal to just govern this as a federal proceeding without reference to Article 77 are we don't think any special expedited treatment or summary treatment is necessary or appropriate. We think the Court should fashion a case management order that takes into account whatever discovery and other process the Court thinks is appropriate and without reference or resort to Article 77 as a guide. And we

also think that there shouldn't be any curtailment or artificial shortening or limitations of the discovery process. We think the discovery process should be whatever discovery is appropriate or necessary to adjudicate the disputes that are now in this court.

I think with respect to Mr. Ingber's comments regarding Article 77 and Article 78, I think that there is no substantive rule of decision that Article 77 is supposed to provide. It is purely procedural. There is no rule or requirement or even, frankly, ability of this Court to apply a state procedural rule in the face of the CPLR. And in the face of the Federal Rules of Civil Procedure.

THE COURT: What about Mr. Ingber's point regarding distinction of substantive motions.

MR. CYRULNIK: In our view, your Honor, there is no reason why -- I think there is a strong tension between the trustees' position, having stood here, you know, several weeks ago now and told your Honor how, you know, the expedition of this case, or any delay in this case cost certificate holders millions of dollars every week. And the institutional investors' application to the Second Circuit for expedited review of their petition, arguing that a million dollars a day is cost to the trust by delay of this case. We, frankly, think that the notion of having a discovery process go forward without Court's ability to adjudicate discovery disputes and to

provide guidance to the parties, means that discovery at best will stride to a crawl until somehow a court is able to step in and have the ability to review substantive discovery motions. We also have strong doubt about the time it's going to take for the appeal to wind its way through the Second Circuit.

I'm sure the Second Circuit will deal with the appeal with all possible alacrity, but our experience in CAFA appeals, despite the statutory requirement of 60 days once the petition is decided, is that it takes several months for these cases, these appeals, to wind their way through the Second Circuit, even if the Second Circuit decides to take the appeal.

In my view, I don't see anything that would prevent this Court from issuing substantive motions, certainly now, and even if the Second Circuit decides to grant the petition and seeks merits briefing. This Court has decided for itself and assured itself that it has subject matter jurisdiction. Until it's told otherwise, I don't see why the Court doesn't have the ability to issue substantive rulings, having satisfied itself that it has subject matter jurisdiction.

THE COURT: All right. Anything further?

MR. CYRULNIK: Nothing further, your Honor.

THE COURT: By the way, what is your view on whether this Court would continue to have jurisdiction to supervise discovery if the Court of Appeals grants the trustees' motion for leave?

MR. CYRULNIK: In my view, the granting of the petition for leave to appeal does not change this Court's ability to issue substantive rulings.

I think this Court has satisfied itself that it has subject matter jurisdiction. Until it's advised otherwise by the Second Circuit, I don't think that the fact that the Second Circuit is considering its appeal would somehow deprive this Court of the ability to issue substantive rulings.

THE COURT: All right. Thank you, Mr. Cyrulnik.

MR. CYRULNIK: Thank you, your Honor.

THE COURT: Anyone else want to be heard?

MR. REILLY: Yes, your Honor, Dan Reilly for AIG.

May it please the Court.

As we indicated in our letter and in the submission, there are 10 intervenors who are working collaboratively. And we spent time to try and put together a set of discovery requests, including requests for admissions and interrogatories, and requests for production.

The fundamental distinction between the discovery scheduled proposed by our group and by Mr. Ingber is that this Court would be allowed to rule. We believe the Court should maintain jurisdiction. And we think it is incumbent upon the trustee to show that it would suffer some irreparable injury if the stay wasn't granted.

The trustee can't take that position. The trustees'

counsel has been in front of you numerous times saying we have to move forward, we need to move forward. Filed a notice of exigency. It would be ironic at this point for them to say slow down, slow down, slow down which, in essence, could result in, if we ended up in state court again, they are going to say hurry up, hurry up, hurry up.

So there are many questions that are left unanswered in the submission that the trustee has made, along with the institutional investors. And, frankly, the time we have gotten the most information out of this process is when this Court was asking counsel for Bank of New York or counsel for the institutional investors what went on.

There is a valid reason for the this Court to allow discovery to go forward, and to rule on the merits. The fact is, that those issues are gonna have to be resolved somewhere. Mr. Ingber has stated, repeatedly, that they recognize discovery must occur. And the simple question is whether it is going to be here or somewhere else. This Court can, and I believe should, maintain jurisdiction to make those rulings, including all of the rulings that this Court can make pursuant to its equitable jurisdiction and the Federal Rules of Civil Procedure.

The critical distinctions, in terms of timing. We're perfectly willing to move quickly. In a case of this magnitude involving this number of issues, we have set forth a schedule

that would result in discovery, both fact and expert, being done in about 6 months. That's quick for a case like this. We're not asking this Court to slow this down for two or three or four years.

Something Mr. Ingber said, saying that there is no release requested in the submission to the Court. When we focused on crafting discovery, we focused on the claims for relief that are being brought, what is the trustee asking this Court to do. And I agree with Mr. Ingber, this Court has the authority, the equitable power to do the things that the trustee and the institutional investors are asking it to do.

But in asking the Court to make a ruling, this Court should be fully informed. This process, the adversarial process, is how we work. They have made a claim. They are asking this Court to find certain things. And it's far beyond whether or not they acted in good faith. They're asking for a court to find that the settlement is reasonable, that their conduct is approved by this court.

And for Mr. Ingber to say, well, we're not asking for a release, sue us later, they're looking for an order that they can say in a case like that, well, Judge Pauley or Judge Kapnick, get an order that said that we acted in good faith, that the settlement was reasonable, that it approved all of our conduct. It is the equivalent of a collateral estoppel in the event such a case would proceed. And that type of request,

that is a request that only inures to the benefit of the trustee. Our trustee. We are the beneficiaries of what that trustee ought to be doing.

So we would ask that the Court enter our case management order which, in essence, allows us to file written discovery, serve the written discovery next week, that requires that the parties submit a protective order to this Court next week, that allows depositions to begin January 9th --

THE COURT: I thought, I understood that a protective order has been entered into, Mr. Ingber.

MR. REILLY: No, your Honor, not the one that would apply to this particular set of discovery. We have had discussions, Mr. Ingber and I have spoken a number of times. And two months ago I asked the trustees' counsel to provide us a chronology of events, give us something so we can sort of see what's going on.

In response to, that Mr. Ingber said we will give you a set of documents -- which I think I can fairly characterize Mr. Ingber as saying the documents that the Bank of New York considered in reaching its decision.

And so we have worked out, as to those documents, a confidentiality order that applies to those. We need to file with the Court a separate confidentiality document as to discovery that we are requesting.

THE COURT: Has that earlier confidentiality order

been so ordered by Justice Kapnick or submitted to me?

MR. REILLY: No. No, we did that voluntarily as we tried to move the case forward. And I don't think it would be the same as what would be submitted to you.

I'm confident, frankly, that we ought to be able to work out virtually all of the issues that would arise by our discovery requests. If we can't, we would like to submit those to you next week, and have you resolve and decide which of the competing orders would be entered.

What's really going on here is that we have a fundamental dispute about what the scope of discovery is. That, I believe, is what this whole fight about before you is right now. Because the institutional investors and the Bank of New York, while they say everything was public, press releases about the negotiations, and everybody knew it was going on, they have submitted in their proposed settlement agreement, paragraph 17. Paragraph 17 says That the trustee and institutional investors and the Bank of New York, this triangle that negotiated this deal, considers all the communications amongst them, between them, confidential.

So whatever it was that they say throughout their papers -- and we have seen, we have lettered a lot in the last couple of days. This process has caused them to tell us way more than they told us when they first submitted this. But what we recognize now is that there is a complete category of

what they call confidential information exchanged between and among the parties, parties who are not in an attorney/client relationship. Bank of America doesn't have any privilege when miscommunications are made to institutional investors. Bank of New York doesn't have any privilege in its communications with the institutional investors. And Bank of America and Bank of New York don't have any privilege. So within that triangle, there should be no limitation on what we as the outside intervenors and outside objectors don't know. That's what's happening. That fight about whether or not they can put a shroud of secrecy around the communications that they had is what's being pushed back by asking you to not rule on anything. And it's a little difficult to understand why that issue, which I don't think they're going to dispute for a moment, is better heard in state court by Judge Kapnick months from now, or maybe never, than heard by you, who has become familiar with the issues in this case and who, frankly, assuming the Second Circuit affirms you, will become very familiar through this sort of adversarial process, which is how we work. They make claims, we check out to see whether or not they are true, we do discovery, and then we come to you and say here's what is going on.

What all of our intervenor group agree on is two things. One, we have many questions and we need more information to decide whether or not we think these assertions

that the bank and the institutional investors have made are accurate. And, two, it's time to go to work. Let us get started. We have -- this process got started June 29th of this summer. Months have gone by. And we're learning dribbles of information. The most, as I said, we learned in the two hearings where you asked questions, then with the filing that they filed this week. And, now, let us ask, within the rules, a formal set of discovery. And when they say, which I think they're going to say here, You're not entitled to this information, it's confidential pursuant to paragraph 17 of the proposed settlement agreement.

We have all agreed it is confidential, let us come back to you, and you resolve that. There is an out in that particular provision which says it's confidential unless there is an order of the Court. And we want to come back to you once that issue is highlighted and ask you to find that, in fact, it's not confidential, that we should know whatever it is that they're trying to keep secret.

THE COURT: Are the privilege issues that you're raising in your remarks here, do the federal rules and the state rules differ in any material respect?

MR. REILLY: That's a great question. Let's start with the first rule that would apply, which is what is their agreement, how do you interpret the four corners of their agreement and the meaning of the terms that it is confidential.

I think this Court would be subject to the state court rules of interpreting a contract, that would be step number 1.

To my knowledge, and this is -- I should get to the point. I don't know, but I don't think so. I don't think that there is any privilege that would inure to the benefit of Bank of New York and Bank of America, who are adversaries supposedly if this underlying case was ever filed, in their settlement discussions. I don't think, and I'm not aware of any privilege that would inure to the institutional investors and Bank of America who were adversaries, and would be in the underlying case. We have learned today that institutional investors think if this falls apart, they will sue Bank of America. That's in their papers.

Well, it is hard for them to assert a privilege as to these communications. And the institutional investors and Bank of New York, I'm not aware of a privilege -- I don't think that the Bank of New York is saying that they have an attorney/client relationship with the institutional investors. They're just institutional investors represented by their own counsel.

So the long answer is I don't think there is any distinction. We, of course, would look into that if the Court wants to hear more on that and evaluate it.

We submitted to the Court authority in our case management report that supports the position that settlement

negotiations, in a case where the settlement is at issue, are not privileged, are not protected, and should in fact be subject to discovery. That's what this case is about. They're taking their settlement and they're putting it up, and taking their conduct and they're putting it up, and they're saying, we end up in front of you, bless this, tell us this is a fair settlement, tell us this is reasonable, tell us, Bank of New York Mellon, that we acted in good faith. That's where we are. And bottom line is, we shouldn't wait months for this.

As we look at some of the factors, your Honor, Hershfeld vs. Board of Elections of New York 984 Fed 2d. 35, sets forth the standard for a stay pending appeal. And irreparable injury by the movant is a factor.

Another factor is the public interest. Is there a public interest in granting a stay or not granting a stay. Your Honor referred in your order on remand about the public interest in this dispute. Many people are interested in knowing, many industries are interested in knowing what is the course and scope of the duties of a trustee in a mortgage backed security, what is the scope and exposure of Countrywide and Bank of America in these claims. There is no reason for us to xxx high center this case when we could move forward and have those issues resolved.

So, we would ask that the Court not only grant the case management schedule, but grant us the leave to submit the

discovery that we have asked. And that discovery, your Honor, is focused discovery on the relief they seek.

If they say the terms of the settlement are reasonable, we ask for the basis of the reasonableness. If they say the trustee acted in good faith and met all of its obligations, we say tell us what you did so we can evaluate that. If they say that, in fact, there were problems in proving the liability of Bank of America, we say did you look at any of the loans, did anybody on your side take a single loan in any one of these 530 trusts, and evaluate them, do a sampling to find out how stong was your case.

It appears they looked at no loans. The experts they hired looked at other cases, other methodologies, but did nothing to look at the trusts that this group of intervenors are certificate holders in. Those are the focus of the discovery that we're seeking.

Unless the Court has questions, I would ask the Court enter our case management order as is and continue to maintain jurisdiction over this case and enter the rulings that you see fit, pursuant to the Federal Rules of Civil Procedure and your equitable powers.

Thank you.

THE COURT: Thank you, Mr. Reilly.

Mr. Ingber

MR. INGBER: Yes.

Thank you, your Honor. Just four or five points addressing Mr. Cyrulnik's points and Mr. Reilly's.

Number 1, with respect to what Mr. Cyrulnik said about the relief that the Court can grant to the trustee. He said that we are seeking a judgement that we acted reasonably, that we're asking the Court to consummate the settlement. And he focused on third category of relief that we want, basically, a borrower, a formalization of res judicata. That is if the Court finds, after discovery and a hearing, that the trustee acted reasonably and in good faith, then there should be a borrower preventing trust beneficiaries from suing the trustee for violation of its duties in entering into the settlement. That's the relief that we were getting in the Article 77 proceeding. That's why, in part, Article 77 exists. It allows trustees who have questions about either their authority to do something, not the case here, or whether there is a -- to resolve questions about whether what they're doing is reasonable and in good faith, and to resolve conflicts among certificate holders. It allows us to alleviate that risk and to go into state court under Article 77 and to allow the Court to resolve issues relating to the administration of the trust. And when the Court does that, and the trust beneficiaries have notice, either actual or constructive notice, there is a ruling. And there is a bar order. And that binds beneficiaries. And if what Mr. Cyrulnik is suggesting is that

the Court doesn't have the power to give us that relief, then that is a real problem. And it's a problem that may well go to whether the Court has jurisdiction, separate and apart from CAFA. That is part of the relief that we're seeking.

Part of the relief that we're seeking is that if and when the Court determines that we acted reasonably, we should be freed from liability for any violation of a duty in entering into the settlement. Either the Court will find that we acted reasonably and there should be no exposure, or the Court will find that we did not act reasonably in deciding to enter into the settlement, and then we go back to square one. We go back the our presettlement positions. The statute of limitations are tolled, there is no harm to the trust beneficiaries. That is the purpose of that request for relief. And if that's not something that the Court can grant in this proceeding, then that presents a major issue, and it's something, given that Mr. Cyrulnik has raised it, it is something that the trustee would need to consider.

Second, your Honor, both Mr. Cyrulnik and Mr. Reilly said that there is tension between the arguments we made about moving expeditiously in the first conference and the notion that we want your Honor to hold off on ruling on substantive motions. Those are absolutely consistent positions for the reasons mentioned before. We don't want to go through this twice. There is going to be a number of issues that will be

presented to the Court. Your Honor may rule in favor of the bank, it may rule in favor of the objectors. We don't know. But either way, we don't want to have to start from scratch, we don't want to have to do it twice. But we think that moving this process forward on document discovery -- and we could get a lot done over the next few months while we're waiting for the Second Circuit to rule -- that is the most efficient way to proceed. And then if we're back in this Court, we'll get the rulings, and if we're not, we won't.

THE COURT: Look, I agree that, among other things, document discovery has to proceed. But if you view any dispute regarding documents to be a substantive dispute that shouldn't be decided by this Court, isn't that simply just going to stall the process? It looks magnificent on paper, but when the rubber hits the road, I have got to be in a position, don't I, to decide a motion to compel?

MR. INGBER: What we think we should do, your Honor, is engage in the process. They want the Federal Rules of Civil Procedure to apply. The Federal Rules of Civil Procedure should apply. They should serve their document requests, which they have not done yet. We have a draft that was submitted with a case management report. When your Honor saw them for the first time, we saw them for the first time. They are unsigned, they say "draft" they are signed by one of the respondents. Serve the formal discovery, we'll respond to the

formal discovery, and we'll have -- like I said before, we'll have our meet and confer. And I suspect that some issues may be able to be narrowed. Maybe there is some issues about which we can agree. And at that point there is gonna be a briefing process. And we could submit the briefs, the motions, to your Honor for -- either your Honor or ultimately Justice Kapnick, for consideration. But when we get to that point, we expect that we'll have clarity from the Second Circuit about whether this Court has jurisdiction or it has to be remanded to the state court.

The notion that we're looking to delay I think is -- belied by the fact that, two months ago, we said to the objectors, serve document requests. It doesn't matter to us that there is uncertainty about what court we're in. We agree we should move forward with document discovery. Give us formal document requests, we'll respond to them, and then we'll have the conversation that we would have under whichever rules apply. And we think we should start that process now.

THE COURT: But why, if there was a discovery dispute that could not be resolved through a meet and confer and, therefore, it was presented to the Court, why couldn't I decide on a case-by-case basis whether that was largely a procedural question that, by this Court weighing in, would give the parties the guidance they need to advance the ball while this matter is pending in the Court of Appeals?

MR. INGBER: I think the nature of the discovery disputes that could be raised with the Court are such that it has the -- it could have the effect of really changing the nature of the proceeding. We've glanced at the document requests that they're seeking. These are exceedingly broad document requests. Some of these document requests ask for documents from Bank of New York that go back to the formation of these 530 trusts.

Our initial take on these document requests is that it has nothing to do with the questions before the Court, so they will disagree with that. Your Honor may disagree or not. But, whichever way your Honor comes out, it has the ability to permeate the whole case and affect everything we do and how discovery proceeds in this case. And once the cat's out of the bag, the cat's out of the bag with respect to these documents. And if your Honor rules that the documents shouldn't be produced, well then once we're before, if we're before the state court, then they're gonna renew the motion and Justice Kapnick will have to consider that motion. And then if she were to decide that the documents should be produced, then we're just starting all over again. So we don't think that the Court doesn't have the power to rule on substantive motions. We just think that in the exercise of prudence, the better course is to make a lot of progress in document discovery. If necessary, tee up the motions and then see where we are at that

point. See if we have gotten word from Second Circuit about whether they're taking the appeal. Maybe they won't and maybe we'll know at that point with certainty that the Court has jurisdiction. Maybe they won't want merits briefing and they'll just rule based on the petition that we file. Maybe they will want merits briefing, an we'll have a sense of whether it is gonna be one month or two months.

So we just think, in the exercise of prudence, it makes a lot of sense for your Honor to hold off, at least for the time being, and we can revisit that three months from now, or two months from now, when we have more clarity from the Second Circuit.

THE COURT: Well, if I could return for a moment to the intervention question.

MR. INGBER: Sure.

THE COURT: Why isn't that really a procedural question that would best be resolved by this Court to aid in the discovery process going forward?

MR. INGBER: Well, I don't think it's gonna affect the discovery process, other than to possibly transform the entire case if the counterclaims that the AG wants to assert are made part of the case.

We have no issue with the AG participating in discovery. We have been requested by the Delaware AG to provide documents subject to our own separate confidentiality

agreement. We have not problem with that. We'll do that. They can participate in discovery. They could join us at the meat and confer sessions.

But, really, on this fundamental question of whether they should intervene and, in particular, be able to assert counterclaims against the trustee, which really does have the -- would have the effect of transforming this proceeding and, I think, extending it for several years, that's strikes us as substantive.

We believe that we have a substantive right to make a decision to enter into a settlement, to go into court and seek judicial guidance with respect to the reasonableness of our actions, and to do so expeditiously. And if the counterclaims are part of the case and this extends out for years, then that is taking the substantive right away from the trustee.

THE COURT: Could the Court grant intervention to the State Attorney Generals but decline to hear anything relating to the counterclaims at this time until such time as the Court of Appeals --

MR. INGBER: Right.

THE COURT: -- decided whether they were taking the this case and, then if they -- assuming they did --

MR. INGBER: Right, we --

THE COURT: -- until they have decided it.

MR. INGBER: It's a good question. And we've set out

all of our legal arguments for why intervention wouldn't be proper here, putting aside whether the counterclaims should be part of the case. But I don't think it's necessary to rule on whether they should be an intervening party, if the only effect of them intervening, but not being able to assert counterclaims, is that they participate in discovery when we have already said they can participate in discovery.

So those issues are somewhat related. In a way, it is two separate issues; should they be able to intervene, and should they be able to assert counterclaims. But those are two very interrelated questions. And we would be prepared to argue the aging motions upon notice from your Honor. But we just would ask that the Court hold off on ruling on those motions for the reasons I have cited.

THE COURT: When you say that you have offered to allow the State Attorneys General to participate, would you entertain any document requests from the State Attorneys General?

MR. INGBER: Yes.

THE COURT: All right.

Anything further?

MR. INGBER: Yeah. One other point with respect to the Delaware AG's reply brief.

There was a point that the Delaware Attorney General raised with respect to CAFA creating a hook for the Delaware

Attorney General to intervene. That was a new argument that was raised on reply, obviously, because the Court, in the interim, this Court, exercised jurisdiction and denied our motion to remand. And so we're planning to submit a letter to your Honor just requesting the opportunity to submit very brief sur reply on that sole issue.

THE COURT: You need not submit a letter. You can submit a sur reply.

MR. INGBER: Thank you, your Honor.

THE COURT: On that issue. Can you limit it to five pages?

MR. INGBER: Yes, we can.

THE COURT: Fine.

Anyone else.

Mr. Madden.

MR. MADDEN: Your Honor, on the issue of whether this Court should take up discovery disputes. As I mentioned, we think those should be decided by the Court, whether it is this Court or Judge Kapnick that is going to decide this issue. And here's why.

Decision on those disputes is going to really decide what is going to be the scope of this proceeding, what is going to be in front of this Court. There are going to be threshold determinations. And let's talk about one of the issues that Mr. Reilly put a lot of emphasis on in his presentation. And

that is settlement negotiations.

The issue on settlement negotiations is not that there is a confidentiality provision in the settlement agreement. The issue on settlement negotiation is that the federal courts have been abundantly clear that discovery is not to be had on settlement negotiations absent evidence, not allegations but evidence, of collusion between the negotiating party. That means this Court -- this Court or some other court, Judge Kapnick is going to need to make a factual determination on that issue. And when that determination is made, if the Court decides to allow discovery into that, we're going to open up an entirely new avenue of discovery. And what the courts have said is normally, absent some evidence of collusion, what you look at is the settlement, you look at what's being settled. That is where you find out whether something is reasonable. The proof is in the pudding. You look at what is being settled, you look at what is being gotten in return. And we believe very strongly that factual termination of that nature that is going to have such a significant impact on the scope of the proceeding and the length of the proceedings out to be made by a court that is going to be deciding the issue.

And, again, I would emphasize we should know in weeks, not months, whether or not the Second Circuit is gonna take up this appeal. If it does, then -- if it doesn't, then let's move forward, certainly. But if it is, then we certainly don't

think that this Court ought to be making what are, in essence, major decisions about how the case is going to be managed when it is uncertain and it is going to be decided on an expedited basis, whether this Court has jurisdiction. CAFA has a 60 day time limit.

Now, I know that can be extended for a short period of time, but it is a very sort period of time. So we would emphasize that point to the Court.

And I would also emphasize on the intervention point, again, we think that could substantively change what the nature of the proceeding is. And we think the Court that is actually going to hear this, ought to be able to manage that itself. And again we'll know that soon.

Thank you, your Honor.

THE COURT: Thank you, Mr. Madden.

Anything further?

MR. DEARING: Richard Dearing, for the Attorney General of New York. May we be heard on the question of the partial stay on the intervention?

THE COURT: Yes.

MR. DEARING: Your Honor, one prefatory thing. I'm an appeals lawyer, so I'm in the process of applying for admission to this Court. I am not yet admitted. So I ask your permission to be heard this morning pro hoc vice.

THE COURT: I'll hear you for this argument, but

you'll file your application and pay your fee, otherwise I'll forget what you have said.

MR. DEARING: Understood, the deal is clear. Thank you very much, your Honor.

I don't think there is any good reason to stay consideration of the Attorney General's intervention motion. I think your Honor is exactly right. The counterclaim thing is -- you know, they are trying to leverage our proposal to add counterclaims into a stay on the whole question of intervention. They shouldn't be allowed to do it. Your Honor can manage that question. You can hold off on the question of counterclaims, if you want. But as your ruling on the removal issue shows, this case is deeply infused with the public interest. The attorney generals are properly here. We should be a party to this case.

Mr. Ingber said they're going to get a lot done, they're going to make a lot of progress in the upcoming weeks. We should be part of the that, part of the discovery process as a party.

You know, I don't think it makes sense to say they'll treat us -- as a matter of grace, they promise to treat us as a party in every respect. Well, if that's so, just make us a party. And we believe the counterclaim issue can be put on a separate track. It is not our intention to transform the case, but we think there are relationships, but we definitely think

the Court has ample tools to manage that question. We think the Court should decide the intervention motions now.

THE COURT: All right, thank you, Mr. Dearing.

Anything further?

MR. FLEISCHMAN: Your Honor, Keith Fleischman, for the homeowners. We would also ask the Court to decide the intervention motion now. Discovery is proceeding. As I hear Mr. Ingber, I think that he is saying to the Court that he is willing to go forward, but really in a very artificial way with discovery, because he really doesn't want this Court to make any substantive decisions in connection with that discovery and hold it up. We have no idea what the Court of Appeals, what their schedule ultimately will be.

Our intervention motion has been pending. It's fully briefed. You know, I would argue to your Honor that the homeowners have a vital interest in this litigation. If discovery is gonna go forward, we should be a part of it.

The Attorney General, you know -- well, first of all, your Honor, this settlement, this proposed settlement, they just didn't make it a monetary settlement. They made it -- a central, critical component of this settlement is servicing and subservicing modifications which directly affect and impact all of the homeowners who are the borrowers in these trusts. They could have just made it a monetary settlement. And as the Attorney General said in his papers, the prospective servicing

modification implemented by the settlement will affect hundreds of thousands of loans and homeowners. And that is our clients, your Honor. And while we have participated in some of the phone calls and some of the meetings, we are not in this case right now.

And I would ask your Honor to decide those motions, so that if we are granted intervention, we can proceed and be a part of this.

THE COURT: All right. Anything further?

Look, in considering the parties' arguments today and their submissions to me on a case management plan, it strikes me that until this Court is instructed otherwise, I have concluded that I have subject matter jurisdiction in this case. And it is in all of the parties' interests that a schedule be put in place, and that discovery proceed. So I'm going to fix a schedule in this case that, of course, can be revisited by any party, depending upon what happens in the Court of Appeals. But I'm going to require the parties, and I'll enter a scheduling order. I have looked at dates that have been proposed. There is a certain corresponding harmony between the dates, but then they diverge because the trustee takes the view, at least I'm inferring from papers, that depositions and other nondocument discovery should not proceed. I have no idea what will happen in the Court of Appeals. But, I think if the parties have a schedule against which they can work and make

plans, everyone will be served.

And so I'm going to require the parties to make initial, that is Rule 26(a)(1) disclosures by November 17.

I'll permit discovery, including third-party discovery, to begin on November 17th.

I will not permit any depositions to occur in this case before January 17th, unless there is some extraordinary cause like the need to perpetuate a witness' testimony for health reasons.

It strikes me that there may well be expert discovery in this case. I didn't take solace from the proposal by the Walnut Place parties with respect to their expert discovery schedule. So I'm imposing something a little bit different. I want the disclosure of experts, that is the initial expert disclosures under 26(a)(2) to be made by February 17.

All fact discovery should be completed by April 17.

And then initial expert reports by the party that bears the burden of proof on the issue by May 4, with responsive expert reports by May 25, and rebuttal expert reports by June 8. And then the completion of all expert discovery by July 13.

I then set this matter down for a conference on July 18, at 11:00 a.m.

Now, this is a schedule that I put together with respect to expert discovery recognizing that I didn't have a

proposal from the trustee. And I changed some of the time periods that had been proposed by Walnut Place, just based on my own experience with expert discovery. It struck me, counsel, that it is unreasonable to require expert depositions to be concluded in two weeks. And the responsive expert reports could be produced in three weeks, rather than a month. Everybody is going to know exactly what the issues are.

Now, before I enter this order, is there any strenuous objection to any particular date that I'm fixing?

Anything from the --

MR. INGBER: No objection on the dates, your Honor.

MR. MADDEN: No objection, your Honor.

THE COURT: All right.

With respect to the other questions that are before me, I'm going to reserve decision on the motions to intervene, and consider further what the parties have presented here to me today.

Obviously, I would like to be kept abreast by the parties of any developments in the Court of Appeals, and I would ask that you notify me promptly by letter in that regard.

In the future, when there is any issue that counsel want to raise and you're authoring a letter -- I guess I direct this to Mr. Reilly. When you are sending the Court a letter the day before a conference in an effort to be helpful -- and your letter was helpful, but it would have been more helpful

had it been received yesterday. It was hand delivered. Hand deliveries go through a long, laborious process in this courthouse. And I wound up seeing your letter only by happenstance, only because I saw an envelope without any address on it upstairs about five minutes before I came down here.

So simply call chambers and ask to fax a letter in so that we are aware that something is coming and we can get it. Especially when it I is something that is intended to be helpful.

MR. REILLY: My apologies, your Honor.

THE COURT: All right. Thank you all for coming in.

MR. REILLY: Can you tell us what you envision for the conference on July 18? What is that intended to be?

THE COURT: Assuming we get to that point, that is a where-do-we-go-from-here point. But something tells me that I'll be hearing from you long before then.

All right. Have a good afternoon.

(Adjourned)