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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM : PART 39

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In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee  
under various Pooling and Servicing  
Agreements and Indenture Trustee under  
various Indentures),

Index No.  
651786/2011

Petitioner, **Telephone Conference**

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Transcript of Motion Proceedings  
New York Supreme Court  
60 Centre Street  
New York, New York 10007  
March 19, 2012

B E F O R E:

HON. BARBARA R. KAPNICK, Justice of the Supreme Court

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A P P E A R A N C E S: (continued)

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\* \* \* \* \*

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Proceedings

THE COURT: Okay, good morning, everybody. This is Judge Kapnick. How are you?

MS. PATRICK: Good morning, Your Honor.

MR. INGBER: Good morning, Judge.

THE COURT: Let me just tell you, just in case, we asked our court reporter to be here. I just thought that in case there were anything that we discussed that might need to be on the record, so she is here and she is taking this down, that's why you're on speaker phone. I also have my court attorney Christine Rodriguez on the phone just in case I miss anything, and so I got two backups here.

I know that based on your letters on behalf of the Petitioner we have Matthew Ingber from Mayer Brown on behalf of the Bank of New York Mellon, and we have Kathy Patrick on behalf of the Institutional Investors, and I know we have Mr. Reilly on behalf of the Steering Committee, I guess for the Respondents.

I just have to tell you, Mr. Reilly, your email of a few moments ago -- your fax came through. Somebody actually left the yellow Post-It note on there with my phone numbers, knocking out half of the letter, so it's kind of weird.

Who else, other than the three of you, if anybody, is on this phone call?

## Proceedings

1  
2 MR. CARROLL: Teige Carroll for the New York  
3 Attorney General's Office, Your Honor.

4 THE COURT: Could you just repeat and spell your  
5 name?

6 MR. CARROLL: It's Teige, T-E-I-G-E, Carroll,  
7 C-A-R-R-O-L-L.

8 THE COURT: Okay. And anybody else?

9 MR. GOTTO: Your Honor, Gary Gotto, Keller  
10 Rohrback on behalf of the Federal Home Loan Bank of Boston,  
11 Chicago & Indianapolis.

12 THE COURT: Okay, wait a second. Because we are  
13 on speaker phone and there are so many people, could you  
14 just state your name once again, please?

15 MR. GOTTO: Yes, Your Honor, Gary Gotto --

16 THE COURT: Gary Gotto? Could you spell that?

17 MR. GOTTO: Sure, G-O-T-T-O.

18 THE COURT: Okay.

19 MR. GOTTO: -- of Keller Rohrback on behalf of  
20 the Federal Home Loan Banks of Chicago, Indianapolis and  
21 Boston, and we are a member of the Steering Committee.

22 THE COURT: Is anybody else on the phone call?

23 MR. CYRULNIK: Owen Cyrulnik from Graiss &  
24 Ellsworth for Walnut Place and Federal Home Loan Banks of  
25 San Francisco & Seattle, among others.

26 MS. EVANS: Martha --

1 Proceedings

2 THE COURT: Wait, wait, we didn't hear your name.

3 MS. EVANS: Martha Evans.

4 THE COURT: What's your first name, Martha?

5 MS. EVANS: Martha.

6 THE COURT: Evans?

7 MS. EVANS: Yes.

8 THE COURT: Where are you from, Ms. Evans?

9 MS. EVANS: From Talcott Franklin PC.

10 THE COURT: From what?

11 MS. EVANS: Talcott Franklin PC, and the clients  
12 are Knights of Columbus, along with --

13 THE COURT: Are you on this list somewhere?

14 MS. EVANS: Yes, I'm on the attachment to the  
15 letter.

16 THE COURT: All right.

17 MS. PATRICK: Your Honor, this is Kathy Patrick.

18 I think that the confusion is that Mr. Reilly invited a  
19 number of counsel and parties who do not intend to speak,  
20 and so I wonder whether it might be easier for the Court to  
21 simply take his letter, if he could re-fax it with the  
22 attachment as an indication of those who are in attendance  
23 because it seems like the peoples' phones are having  
24 difficulty.

25 THE COURT: Well, maybe you could do that if  
26 you're listing other people here. The letter didn't come

## Proceedings

1  
2 through, so I --

3 MR. REILLY: This is Mr. Reilly, and we will be  
4 glad to do that. We'll try to keep the letter -- I do  
5 think it will be difficult for the Court to get a good  
6 record over the phone. We have, I think, a good record in  
7 the letter and it should be clear. I do believe that there  
8 is only going to be five people speaking, Mr. Ingber,  
9 Ms. Patrick, myself, Mr. Cyrulnik and then Mr. Carroll from  
10 the Attorney General's office.

11 That's the formal group that we know will speak,  
12 and we would be glad to give you a list of others that  
13 participated. And if anyone else does speak and they  
14 identify themselves, we will give you that too.

15 THE COURT: Okay, well, if anybody does speak,  
16 please, even if you're speaking for the 27th time, just  
17 identify your name. You know, on the phone it's just not  
18 very clear.

19 I'm not planning to have the entire conference  
20 here on the telephone, but, as you know, I received your  
21 letters last week and I wanted to set up a conference, and  
22 we thought that maybe even before the conference there  
23 might be a couple of things that we can get rolling so that  
24 the time is not wasted, even if the conference is in the  
25 next couple of weeks.

26 MR. INGBER: Thank you, Your Honor. This is

## Proceedings

1  
2 Matthew Ingber from Mayer Brown for Bank of New York  
3 Mellon, which I agree wholeheartedly that we can get a  
4 significant amount of work accomplished between now and the  
5 conference that Your Honor had talked about scheduling on  
6 April 9th or 10th. And so with Your Honor's permission, I  
7 would like to make a proposal for the Court's  
8 consideration.

9 THE COURT: All right.

10 MR. INGBER: So, Your Honor, just by way of very  
11 brief background, we explained in our letter to the Court  
12 what has happened in this case over the past several  
13 months. We filed in this Court and in Federal Court papers  
14 explaining why we filed an Article 77 proceeding and why we  
15 believe that's the right vehicle.

16 And pursuant to this Court's order in October, we  
17 filed substantive responses to all of the objections that  
18 had been filed. The Institution Investors did the same  
19 thing. And I'm happy going into any detail that the Court  
20 wishes, but unless the Court has questions about the  
21 background and those papers that we filed, I would like to  
22 go to the heart of what we view as the issue for this call,  
23 and that is where do we go from here?

24 THE COURT: Now, when you say you filed  
25 substantive responses in October, so I guess you mean in  
26 Federal Court?

## Proceedings

1  
2 MR. INGBER: That is exactly right, Your Honor.  
3 At the time we were in Federal Court for the removal of  
4 this case to be improper, we had filed a motion to remand  
5 and --

6 THE COURT: Well, I know all that. I know all  
7 that. Obviously, I know all that.

8 MR. INGBER: With Your Honor's June 2011 order,  
9 we were supposed to respond to objections by October 31st,  
10 and so we didn't want to let that date pass, and so we  
11 filed a very detailed response, as did the Institutional  
12 Investors, which shed additional light on all of the  
13 issues, really all of the key issues in this matter.

14 We filed our petition back in June. We attached  
15 the settlement agreement to the petition. We made expert  
16 reports available on a publicly available website. We  
17 produced voluntarily thousands of pages of documents. We  
18 have been, despite the investors' letters, very transparent  
19 about this settlement agreement, the terms of the  
20 settlement and the bases on which the bank made its  
21 decision to enter into the settlement.

22 And so that October filing responds directly to  
23 all of the objections that had been filed, allegations of  
24 conflict of interest and the like. So that should be  
25 transferred back, as I understand it, from Federal Court to  
26 this Court. But in the meantime, Your Honor, we are happy



## Proceedings

1  
2 to send you a copy of that document directly.

3 THE COURT: Okay. So what other discovery did  
4 you engage in over there because that was one of the big  
5 issues that was raised in Mr. Reilly's letter obviously  
6 about the scope of the discovery?

7 MR. INGBER: Sure. And unfortunately, Your  
8 Honor, discovery has been very one-sided and the bulk of  
9 discovery has been on a voluntary basis by the Bank of New  
10 York, and that started back in October or November before  
11 there were any formal document requests and we found  
12 ourselves in a position where we thought we were improperly  
13 in Federal Court.

14 We suspected that we would be back in State  
15 Court, and there were a number of key threshold issues that  
16 we had talked about back in August that we knew needed to  
17 be resolved; questions like what is the standard of review  
18 that applies to the trustees' decision? We think the law  
19 is crystal clear on that, but we knew that the other side  
20 was taking a different position.

21 Second issue, and these are the two issues we  
22 laid out in our letter, and it's very much related to the  
23 first, is what is the scope of discovery that flows from  
24 the standard of review that applies to the trustees'  
25 decision? So while new were in Federal Court we tried to  
26 make as much progress as we could, that is the trustee, by

## Proceedings

1  
2 producing documents that we thought the objectors would be  
3 entitled to and that were consistent with what we believe  
4 and the case law supports is the standard of review and the  
5 scope of discovery in this case.

6 We've gotten nothing from or very little from the  
7 objectors in response to our document requests, which were  
8 very basic and very straightforward, and that is we asked  
9 for holdings information. We want to make sure that they  
10 actually have standing to object.

11 Mr. Reilly said there is 125 objectors.  
12 Actually, about half of those objectors have no substantive  
13 objection. They are just seeking information about the  
14 terms of the settlement. And of the remaining half, when  
15 you take into account affiliates, there is actually just  
16 about 20 or so, 25 groups of objectors. So the number is  
17 actually not quite 125 objectors.

18 But we wanted from those groups of objectors in  
19 particular, the ones who have filed substantive objections,  
20 the ones who have intervened, we wanted to make sure that  
21 we have holdings information from them so we can determine  
22 whether they actually have standing to object.

23 So it's been very one-sided. We have produced  
24 documents, but the key issues that we have identified in  
25 our letter were issues that in our view needed to be  
26 resolved by a Court of unquestionable jurisdiction, and we

## Proceedings

1  
2 are now in a court of unquestionable jurisdiction after  
3 unfortunately, seven months delay. So it's our view that  
4 the parties, based on the letters, are in real agreement  
5 that these issues need to get resolved before any  
6 additional discovery can take place.

7 THE COURT: Okay.

8 MR. INGBER: Those document productions, for  
9 example, will be based on what the standard of review and  
10 what the scope of discovery should be. The number and  
11 scope of the depositions will also be related to those  
12 issues, so the parties seem to be in agreement on that  
13 issue.

14 THE COURT: Well, you know, I got that. So  
15 anything else, otherwise I will -- I mean, I can  
16 understand --

17 MR. INGBER: Your Honor, we make as meaningful a  
18 conference in April as we can, and that we brief these  
19 issues in advance of the conference. We have been talking  
20 about these issues for many months now. The objectors have  
21 had many months to research the issues.

22 We think we should all get to work and our  
23 proposal is that opening briefs on these threshold issues  
24 be filed by March 26th, opposition briefs be filed by  
25 April 3rd, and reply briefs be filed by April 6th, and then  
26 we have a conference on these issues, as Your Honor had

## Proceedings

1  
2 suggested, on either April 9th or April 10th.

3           So we think these two issues in particular need  
4 to get or should get T'd up right now for the Court. I  
5 know Mr. Reilly has raised related issues, but our view is  
6 that all of the issues that he raised relating to loan  
7 files and settlement communications and discovery into the  
8 underlying claims, which will transform that special  
9 proceeding into a plenary litigation, that is all subsumed  
10 in the two broad issues that we outlined in our letter, and  
11 we think that all issues should be briefed right away to  
12 avoid addition delay.

13           THE COURT: I got it. Can I hear from  
14 Mr. Reilly?

15           MR. INGBER: Yes, Your Honor, thank you.

16           We are in agreement on one thing, that discovery  
17 should not start until the Court makes it clear what you  
18 view this proceeding is about and what the key issues are.  
19 So in that regard, we do agree.

20           Where we don't agree is what are the issues that  
21 the Court needs to address? And I think those are clear  
22 from our letter. Mr. Ingber says there are only two  
23 issues, but it's clear that fundamentally we believe that  
24 there is some question about whether this proceeding should  
25 continue under Article 77. I'll ask Mr. Cyrulnik to  
26 address that in a minute.

## Proceedings

1  
2           But we do believe that we can avoid some of the  
3 problems that occurred in Federal Court. We did not make  
4 much progress in Federal Court on discovery. Judge Pauley  
5 entered a discovery schedule in three phases; two months  
6 for document discovery, three months for fact discovery,  
7 two months for expert discovery, and we didn't get through  
8 the first phase.

9           Instead of getting what we thought would be an  
10 insight into what our group needs to try and decide whether  
11 we can ever say yes to this agreement, we were met with  
12 multiple privilege assertions, multiple work product  
13 assertions, a common interest privilege asserted by --

14           THE COURT: What was the last thing you just  
15 said?

16           MR. REILLY: A common interest privilege.

17           THE COURT: What did you say after that?

18           MR. REILLY: That was first brought by the three  
19 settlement proponents. In the settlement proponents are  
20 Mr. Ingber's client, Bank of New York Mellon, Ms. Patrick's  
21 client, Institutional Investors --

22           THE COURT: Go ahead.

23           MR. REILLY: Sorry. I was saying that the  
24 proponents of the settlement are Mr. Ingber's clients, the  
25 Bank of New York Mellon, Ms. Patrick's client,  
26 Institutional Investors, who are the insiders who

## Proceedings

1 negotiated this arrangement --

2  
3 THE COURT: I just have to -- I mean, when you're  
4 speaking, it sounds like you think I never heard of the  
5 case. I mean, I have been following this nonstop since it  
6 was here and when it left. So I kind of know -- I mean, I  
7 know about the case. You're acting like I don't know who  
8 all these people are; I do.

9 I mean, I have got to say partially in reaction  
10 to what you said, we go back to the conference I must have  
11 had last summer, I mean, this is an Article 77 proceeding,  
12 if you don't think -- and there aren't too many Article 77  
13 proceedings to look at and see what the scope of discovery  
14 is, but certainly, it's much more limited than a plenary  
15 action, which at the moment it is not.

16 If you think that this should be a plenary  
17 action, then you have got to do something like bring an  
18 order to show cause or a motion. I mean, you mentioned it  
19 in your papers, but I can assure you sua sponte I am not  
20 going to turn this into a plenary action. You can argue,  
21 both of you, which I think you did a little bit in your  
22 papers, about what the Second Circuit said in their  
23 decision, which I reread last night.

24 I don't think they said, you know, that this is  
25 it and that's the last word, it can never be something  
26 else. But it certainly is what it is at the moment, an

## Proceedings

1  
2 Article 77 proceeding, and just like I said at the  
3 beginning, I'm working within the parameters of that being  
4 the proceeding that is before me. If you think that that's  
5 not what it is --

6 I mean, what you chose to do is take it to  
7 Federal Court and that didn't -- you know, we know what  
8 happened to that now. If you think that it should be  
9 transferred, then you have got to do something to  
10 immediately make an application. But right now I have an  
11 Article 77 proceeding. As I said, I am not going to sua  
12 sponte turn this into a plenary action because that is not  
13 what's before me and that's not what I'm going to do.

14 I would like to also say that if there are going  
15 to be privilege issues and work product issues and other  
16 attorney/client privilege and all those other things, I'm  
17 going to tell you right now that we, myself and my two law  
18 clerks, are never going to be able to do massive, massive  
19 privilege reviews of documents, and you will have to find  
20 somebody that you all agree to that you will hire that will  
21 have to go through all those things.

22 I mean, we don't have magistrates here, I know  
23 you know that, and the JHO's all got fired, and I know you  
24 know that. So you are going to have to get somebody  
25 outside to deal with it. You're going to have to talk  
26 about in the event that there are these massive discovery

## Proceedings

1  
2 **disputes, who on the outside is going to be able to deal**  
3 **with it because there is no way that I and my two law**  
4 **clerks will ever be able to do this.** So I'm just telling  
5 you all those things right know. That's how I see it.

6 I do think that, Mr. Ingber, if you think you  
7 want to bring on a motion for -- I mean, I don't know if  
8 it's really a motion, but I guess it's just a determination  
9 of the scope of the review. There aren't that many Article  
10 77 proceedings to look at. We know what the standard is.  
11 I mean, the cases sort of tell us that. So that's what I  
12 have before me. Anything else, I think you might have to  
13 bring on quickly some orders to show cause if you think it  
14 should be expanded beyond what I think probably this kind  
15 of a proceeding is about.

16 Some of the other documents that you're asking  
17 for like the loan files that they say they didn't rely on,  
18 well, that's something that we can talk about further when  
19 we see each other. When you talk about settlement  
20 communications, that is also something that we can talk  
21 about.

22 Interestingly, the case that you cite,  
23 Mr. Reilly, is a case that, although it's not my decision,  
24 it became my case, so I'm somewhat familiar with the case  
25 and the underpinnings of it and that NYP Holdings versus  
26 McClier, and then he terms depositions and expert



## Proceedings

1  
2 disclosure, expert discovery. I mean, it seems to me that  
3 it might make some sense to have some limited depositions  
4 and expert disclosures of the people whose documents  
5 clearly were relied upon or whose expertise was clearly  
6 relied upon and that those documents have already been  
7 produced on line or during the course of the discovery.

8 But I think that, Mr. Reilly, your position is --  
9 I mean, to change this to another proceeding is not  
10 something I'm just going to do sitting on the bench  
11 because, you know, without some -- I mean, that's a major  
12 application and you've got to T that up immediately if  
13 that's really one of the approaches you want to take.

14 MR. CYRULNIK: Your Honor, this is Owen Cyrulnik  
15 from Grais & Ellsworth. If I may talk on that point for a  
16 moment.

17 THE COURT: Yes.

18 MR. CYRULNIK: I think it is our view -- I think  
19 there are two points that I want to make on the subject of  
20 the Article 77 proceeding and the limited scope of the case  
21 of the Bank of New York Mellon fraud. The first is that  
22 the presentation in their letter that Mr. Ingber makes in  
23 his letter about the single issue before you, before the  
24 Court, the standard of the trustee discretion of the  
25 language, in our view is flatly inconsistent with the  
26 proposed order that they are asking this Court to sign, and

## Proceedings

1  
2 we think that the scope of relief they are asking for in  
3 this proceeding is much broader than what they are  
4 suggesting in their letter, and we think that it's frankly  
5 inconsistent with what Article 77 was designed to do.

6 THE COURT: Even the Federal Court said that  
7 would ultimately be for me to decide, but I think -- I  
8 mean, that's something that you could raise, that the scope  
9 of the relief that they are ultimately seeking may be  
10 broader than what's permitted. We didn't get to the relief  
11 stage yet, but I mean, that's certainly an application, but  
12 I wanted to deal in the first instance with the scope of  
13 the discovery, which you can do with or without the scope  
14 of the relief, but I understand that point.

15 MR. CYRULNIK: Owen Cyrulnik. I think that the  
16 problem is that the scope of relief is bound up in the  
17 scope of what discovery has to take place and what kind of  
18 proceeding the Court has to have in order to make a  
19 determination. I think it's clear from their proposed  
20 order they are asking the Court not to rule on whether a  
21 trustee had discretion to settle, but also whether this  
22 settlement is a fair deal for the funds in their trust they  
23 are settling on behalf of.

24 If that's not what they want, then I think they  
25 should have said it, you know, frankly, amend their  
26 petition and their proposed order in order to reflect that,

## Proceedings

1  
2 and right now that's what they are asking for, and I don't  
3 think it's fair to ask the Court to enter into that kind of  
4 a decision and put that kind of a stamp on this proceeding  
5 without taking serious and robust discovery, not  
6 necessarily inefficient or lengthy, but discovery about the  
7 kinds of claims they are settling and what those claims  
8 would have looked like if they litigated them.

9 And I think the Court -- we take the Court's  
10 point, and I think we will want to, with the Court's  
11 permission, obviously, raise by order to show cause or by  
12 motion an application to convert this to a plenary  
13 proceeding or to dramatically clarify the scope of relief  
14 that they are seeking, and we're going to do that really in  
15 Federal Court because Article 77 doesn't exist in the  
16 federal rules --

17 THE COURT: I'm aware of that.

18 MR. CYRULNIK: -- before Your Honor, and I think  
19 that we should do that in an as efficient and timely way as  
20 we can so that it can be resolved. The Court should look  
21 at this question, consider it and resolve it before it goes  
22 much further, and I would ask if perhaps that we figure out  
23 a schedule for that. Maybe we can confer with the other  
24 side about that and come back to Your Honor and have a  
25 regular briefing schedule before the conference is  
26 scheduled.

## Proceedings

1  
2           Maybe the conference can be a week after  
3 April 9th to accommodate that. I don't know if that is  
4 necessary or not, but I do think that is something that we  
5 think is a serious issue here and that we think the  
6 presentation that the Bank of New York Mellon is making is  
7 riding on the true nature of this proceeding and I want to  
8 be able to raise that to Your Honor in a full and clear  
9 way.

10           MS. PATRICK: Your Honor, this is Kathy Patrick  
11 for the Institutional Investors. May I be heard for a  
12 moment?

13           THE COURT: Sure.

14           MS. PATRICK: Your Honor, first Mr. Warner asked  
15 me to send his regrets. He's at a court ordered deposition  
16 or he would have been here to speak for the Institutional  
17 Investors. I appreciate the Court's courtesy in allowing  
18 me to speak instead.

19           The issue before the Court, at least as I  
20 understand it, is what is the schedule on which we should  
21 brief issues so that the Court has them in such time to  
22 proceed to the hearing, the preferred hearing date the  
23 Court has expressed, which I understand is April 9th or  
24 10th?

25           Mr. Cyrulnik's issue and Mr. Reilly's issue with  
26 the Article 77 proceeding is not news to them. They have

## Proceedings

1  
2 been arguing about it with Judge Pauley and with the Second  
3 Circuit for the last seven months. There is no reason why  
4 they cannot file whatever moving papers they want to file  
5 on that point by March 26th. We will certainly be able to  
6 respond by April 2nd or 3rd. We can certainly -- and we  
7 can file our submission on the scope of review on the same  
8 timeframe. All briefing could be concluded by April 6th,  
9 which will give the Court time to hear this.

10 THE COURT: Well, let me also be fair to you;  
11 April 6th begins Passover. I observe Passover. I don't  
12 even think I can work on April 6th because of preparations.  
13 I mean, I take very few days off, but that's a major Jewish  
14 holiday, and I believe it's also Easter. It's a major  
15 holiday weekend. I don't anticipate that I'll be at work  
16 on the 6th, and that is a bad weekend because the whole  
17 weekend is the holiday for me and for most people it's  
18 either one or the other.

19 The 9th I have an emergency hearing I must have.  
20 I can see you either the 10th or the 12th, but I'm not  
21 going to start getting papers in on a day I'm not here when  
22 I'm celebrating a holiday when, as I said, so many people,  
23 including all my staff, celebrates one holiday or the  
24 other.

25 You know, I guess, I mean, we can put it on -- if  
26 we did it on the 12th, which day I am also free the whole

## Proceedings

1  
2 day, that might give us an extra couple of days that would  
3 be there and you can get me papers by the 9th, but whoever  
4 wants to make an order to show cause I think should do it  
5 as quickly as possible. You can talk about how much time  
6 you think you need to respond to it, and if possible you  
7 will give a very, very brief reply and we will deal with it  
8 on those days. I can't promises you I'm going to decide  
9 everything on the record. We will look through absolutely  
10 as much as you can give us, as long as it's not ridiculous,  
11 but I think those are the two interrelated issues.

12 I know the Respondents and the objectors have  
13 wanted this to be a different kind of proceeding, and it's  
14 been talked about since the very beginning. So that can be  
15 done. I know that you are concerned about the scope of the  
16 discovery, and those seem to be two of the major issues  
17 because if they want the proceeding changed, then the scope  
18 of the discovery changes. If it stays as an Article 77,  
19 then we have to figure out what is the scope of discovery  
20 within that. And then I think everything else will flow  
21 from those things, but I think those are the two major  
22 things that have to be dealt with in the first instance.

23 MS. PATRICK: So, Your Honor, I completely agree  
24 with you. So if the conference is on the 12th, then I  
25 think certainly we can confer on the briefing schedule. I  
26 think as soon as possible is the right way to do it. Would

## Proceedings

1  
2 you prefer it on the schedule with the 12th as a hard  
3 conference date with the idea that all the briefs will be  
4 to the Court by the 9th and then we'll back up from there?

5 I'm confident that Mr. Reilly, Mr. Cyrulnik,  
6 Mr. Ingber and I can agree that schedule of those two  
7 issues to be briefed before the Court.

8 The only other thing, Your Honor, that we would  
9 want to take up on the 12th is a particular issue that has  
10 been -- is part of 3 of Mr. Ingber's letter, and that has  
11 to do with what discovery we get from the objectors. And  
12 let me kind of lay the table for you just a bit about that.  
13 I know the Court is familiar with many of these points.

14 As a result of the Court's worldwide notice  
15 provision, we now know that the vast majority of  
16 certificate holders do not oppose the settlement. They did  
17 not appear even to seek information when they were offered  
18 the opportunity to do that. And so under the law we  
19 believe those certificates holders, like our clients who  
20 hold \$40 billion of certificates, should be treated as  
21 supporting the settlement.

22 Many of the information objectors are simply  
23 seeking additional information for some reason, and so we  
24 do believe that a sequential discovery schedule is  
25 appropriate. That is, once the Court establishes the  
26 standard of review and gives us a period of time in which

## Proceedings

1  
2 discovery would be provided by the trustee concerning the  
3 basis of its decision, at which point, as we say down here,  
4 objectors would have to fish or cut bait.

5 Are they opposed to the settlement or do they  
6 want the \$8.5 million and the servicing penalty and the  
7 servicing improvement and the documents or do they want all  
8 of those benefits? Because if they decide to oppose the  
9 settlement, at that point, the proponents of the settlement  
10 are entitled to discovery concerning the basis of the  
11 objection. We are not going to be -- we cannot be in a  
12 position of having to try this case blind. That is, we  
13 know --

14 THE COURT: Well, I understand, but it seems like  
15 that issue is a bit premature right now.

16 MS. PATRICK: Correct, I think it is. But I  
17 think that the key thing we're going to need from the Court  
18 on the 12th is an ultimate cutoff date for the people who  
19 have sought information only to take a position. That is,  
20 do they oppose the settlement or not? Because right now,  
21 of the 44 filed objections, only two, AIG and Walnut,  
22 oppose the settlement. The rest are information  
23 objections. So that issue --

24 MR. REILLY: Your Honor --

25 MS. PATRICK: Mr. Reilly, excuse me --that issue,  
26 that is when --



## Proceedings

1  
2 THE COURT: I got it, you don't have to repeat  
3 it. I heard it.

4 Okay, well, did you want to respond to that  
5 Mr. Reilly?

6 MR. REILLY: Yes, please, Your Honor.

7 There are a number of things that are not clear  
8 about the settlement yet, and including how much money is  
9 actually going to be paid to any certificate holder and  
10 whether or not Bank of New York can walk away from this  
11 settlement, even if you would ultimately approve it, and  
12 how much money would go into this particular trust.

13 All of these things have to get clarified through  
14 the discovery process before anybody could know whether  
15 they are going to approve it or agree with it or whether  
16 they would object to it. And I think your comments are  
17 absolutely correct. It's way too early to be forcing  
18 anybody to take a position on this when, in fact, we don't  
19 have the transparency that we need, and then we do need  
20 that information.

21 THE COURT: I mean, at some point, Ms. Patrick,  
22 there is going to have to be a cutoff date, but I think  
23 that comes afterwards, not like now. I don't think today  
24 I'm going to think about a cutoff date. You can raise it  
25 again when we meet, but I'm not sure -- I mean, I think  
26 that is one of the later things, not one of the sooner

## Proceedings

1  
2 things.

3 MS. PATRICK: I completely agree, Your Honor. I  
4 was simply talking about once the Court determines the  
5 scope of review, it sets the schedule for the discovery  
6 concerning the trustees' decision. On the back end of  
7 that, we will need some limited period of time once people  
8 take a position on the settlement to take discovery from  
9 those who decide to oppose.

10 THE COURT: Of course. I mean, of course, but I  
11 don't think that's a big issue right at the moment.

12 All right. Well, when on the 12th do you want to  
13 meet? Is the morning better for everybody or is the  
14 afternoon better for everybody?

15 MR. REILLY: This is Dan Reilly on behalf of the  
16 Steering Committee.

17 THE COURT: Yes.

18 MR. REILLY: And when I say the Steering  
19 Committee, I think the Court made that clear in the letter  
20 who that is.

21 THE COURT: Yes.

22 MR. REILLY: That is one thing that is apparent.  
23 If we try to coordinate what could be, but it's not 125  
24 submissions, we work hard to try to get a consolidated  
25 submission to the Court so that you only have to look at  
26 one letter or one brief. And generally, we have been able

## Proceedings

1  
2 to do that. However, as you can imagine, with 24 law firms  
3 involved and multiple lawyers within those, it takes  
4 sometime to do that.

5 And if we are going to engage in this briefing  
6 that would be relatively substantive, I would ask for a  
7 little bit more time, and if we can move the hearing back a  
8 week or ten days so that we're not rushing through this  
9 process, that will, I think, give you a cleaner and shorter  
10 product, rather than potentially not being able to get  
11 everyone on board on our side. And you might have to read  
12 additional briefs.

13 So I would ask you to think about whether from  
14 the Steering Committee's standpoint and more than 100  
15 intervenors that we look at a hearing on the week of  
16 April 16th or April 23rd. Any time in there would be  
17 acceptable. And then I think we can work back from there  
18 on briefing the issues you identified.

19 And I do think that we will also T up to some of  
20 the issues that are related to discovery, not because they  
21 are imminent right now, but because they are so related and  
22 intertwined to this Court's decision on how to proceed.

23 And then if we can use the hearing, as you've  
24 identified, to get as far as we could and to potentially to  
25 discuss the discovery schedule, I think if the Court  
26 directed us to, the parties should confer so we can

## Proceedings

1  
2 hopefully present to you on that.

3 And then if I hear you correctly, you want us to  
4 get going on finding a third party to dig into these  
5 privilege issues and some of the issues that are complex  
6 and would take a load of time that this Court just frankly  
7 doesn't have.

8 MR. CARROLL: Your Honor, may I be heard? It's  
9 Teige Carroll from the New York Attorney General's Office.

10 THE COURT: Yes.

11 MR. CARROLL: I want to second what Mr. Reilly is  
12 saying in terms of the delay. The reason for that is that,  
13 as you may have read in our short letter to you on Friday,  
14 our status together with that of the Delaware Attorney  
15 General is still an open question, and while we are working  
16 with the Bank of New York to resolve the issues surrounding  
17 that expeditiously, if for some reason, things -- we are  
18 unable to work it out, we may find ourselves in a position  
19 of hurrying to do some motion practice. So we also would  
20 prefer at least a week or two more in the schedule.

21 THE COURT: Well, look, I know that the  
22 Plaintiffs are anxious to move the case or the Petitioners,  
23 but I'm also aware that this is taking a long time and in  
24 the scheme of the world, a week or so, I don't think that  
25 makes all that much difference. I will tell you when I  
26 have time and maybe you guys can -- well, I'm available all

## Proceedings

1  
2 day on Friday April 20th, so that whole day is open. And I  
3 could probably do the 23rd, which is the following Monday  
4 or the 24th, the following Tuesday.

5 So those days, the 20th, the 23rd and the 24th  
6 seem to be pretty open days. I had a very big trial that  
7 got put over until May, so it's left me a couple of days I  
8 have not filled up yet. So any of those days would be fine  
9 for me.

10 I did read your letter, Mr. Carroll, which  
11 honestly, I don't think came -- I mean, we didn't see it  
12 until this morning, and I obviously, at the time that your  
13 motion to intervene were supposed to be returnable, the  
14 case was no longer here, so I no longer had any authority  
15 to do anything except mark them as moot because it wasn't  
16 my case anymore, it was in the Federal Court.

17 So I'm aware of that, and hopefully you will be  
18 able to work that out with everybody else. But to the  
19 extent it's a week or ten days later, I mean, that's fine  
20 with me because, as I said, it's the holiday and there's a  
21 lot going on and I wouldn't mind that at all personally.  
22 So any of those days that work out for you guys, I don't  
23 know if you want to decide it now or if you want to talk to  
24 each other, work out a schedule and let me know in the next  
25 day or so. I'll just hold those three days for the next  
26 day or so until you confirm with me when you want to have

## Proceedings

1  
2 it on.

3 MR. REILLY: This is Dan Reilly. That would be  
4 great. We'll get back to you in the next 24 hours on which  
5 of those three days works best.

6 MS. PATRICK: Your Honor, this is Kathy Patrick.  
7 I just wanted to not leave unresponded to something  
8 Mr. Reilly said. I take very seriously the Court's  
9 comments about its resource limitations for detailed  
10 privilege review, but Mr. Reilly had somewhat got the cart  
11 before the horse. Depending on what the Court determines  
12 on the standard of review and what is discoverable, there  
13 may or may not be a need for a massive master driven  
14 privilege review.

15 THE COURT: I understand that, but, you know, to  
16 the extent you counsel will be meeting and conferring to  
17 the extent that you will be on various things, you might  
18 want to keep that in the back of your mind as something  
19 which I'm sure you've heard from other judges in this  
20 Court, to the extent some of you practice in this Court,  
21 about the realities of what we can accomplish. And I think  
22 all of my colleagues in the Commercial Division, we kind of  
23 agree at the moment we all have to do the same thing  
24 because there is just nobody here to do that kind of labor  
25 intensive stuff.

26 I understand, but it's just we are trying to deal

## Proceedings

1  
2 with -- see through to some of the issues so that we are  
3 not caught off guard and at least think about the things,  
4 raise some of the issues. I suggest that the way that  
5 you're going to bring these issues to me, whether it's  
6 April 20th or the 23rd or the 24th, is by order to show  
7 cause because then I have the papers here.

8           You have an obligation to E-File them as well as  
9 to bring hard copies here to the courtroom and I can  
10 control them and see the papers as they come in. So  
11 whatever applications -- I mean, it sounds like the  
12 Defendants -- or the Respondents may make something  
13 relating to transferring this case or transforming it into  
14 a different type of case and the Petitioners may bring  
15 something dealing with what is the scope of review, and  
16 those may be the two threshold issues we have to deal with  
17 and once we decide them, other things can flow.

18           So it may be that each side is bringing one order  
19 to show cause that I'll make returnable on the same day at  
20 the same time, and then you can kind of work out when you  
21 think opposition and when you think reply. And even though  
22 we are going a little later, I mean, I need more than one  
23 day for the reply. You know, it's not my only case. So we  
24 need a couple of days before the return date to have the  
25 papers filed so we have an opportunity to at least review  
26 them a little bit.

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1  
2           So you can work out the dates within that  
3 parameters, which gives everybody a little bit more  
4 breathing room. You can work out when you want the papers,  
5 you know, given the parameters that I've said and there  
6 will probably be two orders to show cause. And as  
7 Mr. Reilly said, hopefully you can coordinate so I don't  
8 have 75 briefs in opposition that say the same thing. And  
9 it sounds like you have been working that way as you have  
10 moved along in the Federal Court, so that would be good.

11           So why don't I just -- why don't you just get  
12 back to me by fax without a Post-It note on top of it in  
13 the next day or so so I know when it is and then we will  
14 make that as the date?

15           I just bring your attention to the fact that, at  
16 least as of now, we are still under a restriction that we  
17 do have to close our courts at 4:30 in the afternoon. So  
18 to the extent you think it might make sense to start  
19 something earlier in the day in case it has to go over into  
20 the afternoon, that might be an idea because if we do it in  
21 the afternoon, at 4:30 we like really have to close these  
22 courts down. I don't really have much -- it doesn't matter  
23 what kind of case it is, they don't let us stay open.  
24 There is just no money for that at the moment in the  
25 budget. So sorry about that, but for those of you not in  
26 New York, that's how it works here.



## Proceedings

1  
2           So why don't you see what you want to work out?  
3 I will hold those dates. And the only other thing somebody  
4 said, I think it was -- I guess it was Mr. Reilly, that  
5 there have been a bunch of objections filed and although  
6 you think that the case is going to come across the street,  
7 I'm not sure the papers ever really will, and so at some  
8 point during this period of time perhaps you can give me  
9 one copy of the objections, which probably have not been  
10 E-Filed in the State Court anyway because the case was not  
11 open then. So you might either need to E-file them here  
12 and then send a copy of it just so I have it with the box  
13 of materials I'm saving on this case so far.

14           MR. INGBER: Your Honor, this is Matthew Ingber.

15           THE COURT: Mr. Inger, is that you?

16           MR. INGBER: Yes. It was the response to the  
17 objections that had been filed and it was filed by Bank of  
18 New York and also by the Institutional Investors, and so  
19 it's two sets of papers that we will be sure to get that to  
20 you right away.

21           THE COURT: Okay, I'm not going to look at it  
22 today, but you can send those over because, as I said, I'm  
23 not sure if they really -- I mean, if I can expect the  
24 marshals to be knocking on my door with boxes or this would  
25 be a better guarantee that they get here.

26           MS. PATRICK: Your Honor?

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1  
2 THE COURT: Yes.

3 MS. PATRICK: Kathy Patrick.

4 Would it be helpful for you to have in one binder  
5 the objections that have been filed and their attachment so  
6 that your court attorney has a reference binder because we  
7 can put that together easily enough for you if she would  
8 like?

9 THE COURT: Anything that can be put together to  
10 make it easier for us, we like that and just so that we  
11 have everything in one place. That's not a bad idea. And  
12 then, of course, hopefully, the Attorney General's issue  
13 could be resolved. And if there is a problem with that  
14 then I guess there will have to be an order to show cause  
15 there, but I'm hopeful that maybe the intervention or  
16 whatever status you're going to be can be worked out with  
17 the other people. And I know, Mr. Carroll, you've  
18 indicated that you and the Attorney General of Delaware are  
19 attempting to work that out.

20 MR. CARROLL: That's correct, Your Honor.

21 THE COURT: Okay, so I think that like moves us  
22 along a little bit. At least that's a parameter. And you  
23 guys will fax me back with a date, which I guess once you  
24 all agree you will make sure that everybody is aware of it  
25 and then we'll put all the subsequent orders to show cause  
26 and any other issues on for that next date.

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MR. CARROLL: Thank you, Your Honor.

MS. PATRICK: Thank you.

THE COURT: All right, thank you all very, very much, and we will look forward to hearing from you. Have a great day.

\* \* \* \* \*

Certified to be a true and accurate record of the within proceedings.

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Laura L. Ludovico  
Senior Court Reporter