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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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* * * * *

LAURA L. LUDOVICO
Senior Court Reporter
60 Centre Street - Room 420
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1
2 THE COURT: Okay, good morning, everybody. This
3 is Judge Kapnick. How are you?

4 MS. PATRICK: Good morning, Your Honor.

5 MR. INGBER: Good morning, Judge.

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

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

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

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

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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 --

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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

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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

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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?

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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

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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

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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

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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

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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.

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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

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1 negotiated this arrangement --

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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

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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

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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

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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

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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,

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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.

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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

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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

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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

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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

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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 --

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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

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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

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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

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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

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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

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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

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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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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.

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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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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.

Laura L. Ludovico
Senior Court Reporter