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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM -PART NUMBER 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), Blackrock Financial Management Inc.
(Intervenor), Kore Advisors LP (intervenor), Maiden
Lane LLC (intervenor), Metropolitan Life Insurance
Company (intervenor), Trust Company of the West and
Affiliated companies controlled by The TCW Group
Inc (intervenor) Neuberger Berman Europe Limited
(Intervenor), Pacific Investment Management Company
LLC (intervenor), Goldman Sachs Asset Management LP
(Intervenor), Teachers Insurance and Annuity Association
Of America(intervenor), Invesco Advisors Inc,
(intervenor), Thrivent Financial for Lutherans
(intervenor), Landesbank Baden-Wuerttemberg (intervenor),
LBBW Asset Management (Ireland) plc, Dublin (intervenor),
ING Bank fsb (intervenor), ING Capital LLC (intervenor),
ING Investment Management LLC (intervenor), Nationwide
Mutual Insurance Company and its affiliated companies
(Intervenor), AEGON USA Investment Management LLC,
Authorized signatory for Transamerica Life Insurance
Company, AEGON Financial Assurance Ireland Limited,
Transamerica Life International (Bermuda) Ltd,
Monumental Life Insurance Company, Transamerica Advisors
Life Insurance Company, AEGON Global Institutional
Markets plc, LIICA Re II Inc, Pine Falls Re Inc,
Transamerica Financial Life Insurance Company,
Stonebridge Life Insurance Company, and Western Reserve
Life Assurance Co of Ohio (intervenor), Federal Home Loan
Bank of Atlanta (intervenor), Bayerische Landesbank
(intervenor), Prudential Investment Management Inc
(intervenor) and Western Asset Management Company
(intervenor),

Petitioners,

Index No.
651786/11

For an order, pursuant to CPLR 7701, seeking judicial
instructions and approval for a proposed settlement.

-----X

Gloria Ann Brandon, Sr. Court Reporter

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60 Centre Street
New York, New York
June 14, 2012

B E F O R E:

HONORABLE BARBARA R. KAPNICK,
Supreme Court Justice.

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DEPARTMENT OF JUSTICE
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Office of the Attorney General
820 N. French Street, 5th floor
Wilmington, Delaware 19801
BY: GREGORY C. STRONG, Securities Commissioner

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Gloria Ann Brandon,
Senior Court Reporter

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Proceedings

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2 THE COURT: Okay, good afternoon.

3 A couple of preliminary matters;

4 I really am going to have to ask you in the
5 future, you know, this is an important case, and I
6 certainly want to treat it that way, but I can't have
7 you FAX'ing me nonstop the last 24 hours like you
8 just did. It's really not fair. I do have 370 or
9 some other cases, and did have a very important
10 meeting this morning that I had to cut short, leave
11 early, so I could read these. I think it's really
12 not fair, and I think that once it's 24 hours, you
13 got to stop. I mean, we spend an enormous amount of
14 time in this courthouse, but I don't live here on a
15 permanent basis. At some point for you to be faxing
16 us all night and all morning, I think it's really not
17 fair. Half of the issues, or three-quarter of the
18 issues you want raised were just all brought up since
19 yesterday, and I think that's really not right, and
20 you may only be dealing with this case this week, but
21 perhaps, you have read I had one case that was very
22 major here, and I still have the same 370 other
23 cases, so in the future, I would appreciate you at
24 some point stopping, at least within the 24 hours.
25 I'm not going to read them, okay, and I think that's
26 fair.

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That's the first thing.

The second thing is, now the Attorney
Generals, are they sitting at the table?

MR. STRONG: We're here, your Honor.

THE COURT: So, I just wanted to say that I
am glad to see that I was correct, that I didn't see
-- when you probably saw the note in my decision,
that I wasn't persuaded by the argument, that
perhaps, you would be causing you all the delay. I
was pleased to note they didn't even send me any
letters, so I thank you very much. It's nice to see
you back there, instead of you wanting to come in and
jumping at the table, and not being part of all that
was going on here in the past day or two where I got
this enormous number of letters, so they are now in
this case.

It seems like, unfortunately, you really
didn't accomplish very much, even with the extra
week.

I hope you had a nice vacation, Miss Patrick.

MISS PATRICK: I did.

Thank you.

THE COURT: And I guess we'll start.

I know you would like me to make every every
decision that you want me to make today. Since a lot

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2 of this wasn't raised until yesterday, I'll make what
3 I feel comfortable making. I mean, I don't think you
4 should tell me how easy the issue is and clear cut,
5 and obviously, I should make the decision on the
6 record today. I'll make the decision that I feel
7 comfortable making, and I'll take back what I have
8 to, and I'm going to put this out now, we'll talk
9 about it later, but you seem to have resolved very
10 little, and created many, many new issues since you
11 were here last time, and if you're going to do that,
12 I'm going to tell you what I tell all the other
13 cases, a lot of them are discovery issues. You're
14 going to have to think about hiring an outside
15 mediator to deal with the issues. I mean, with the
16 amount of time, energy, and money, and everything
17 else being spent, your client's time, it's not my
18 only case, and I certainly want to help things move
19 along, but you know, I feel like we took one step
20 backward, I mean, one step forward, and about 27
21 backward after reading these enormous number of
22 letters that you have sent mostly -- I mean, the
23 first 1 or 2 kindly came last week, but the rest, all
24 came pretty much within the last two days, so it
25 started with Mr. Ingber sending me a letter with a
26 proposed discovery schedule, which really is the

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2 most, you know, kind of most irrelevant thing because
3 you can't even decide, you can't agree on anything of
4 what you're going to do, so I don't really get the
5 discovery schedule, but that's nice.

6 And then, there's also a confidentiality
7 stip. I didn't get anybody, I don't think -- I did
8 read everything I believe, but I didn't think I saw
9 that anyone opposed the confidentiality stip.

10 MR. REILLY: I don't think anybody did. It was
11 stipulated that --

12 THE COURT: Well, the thing is you said you
13 stipulated on behalf of some people, but you listed a
14 lot of people that hadn't agreed, so I don't think
15 that this hearing was a secret, certainly, not for a
16 number of phone calls that came through our chambers,
17 however, when the case was on, so I thought that the
18 people who were interested in the case probably knew
19 it was on, if anybody had anything to say about the
20 stipulation, notwithstanding the fact that you did
21 not follow the City Bar format, but I will look at
22 it, if anything is really egregious.

23 Is there anybody interested personally in
24 this case?

25 MISS PATRICK: Your Honor, it was circulated
26 to all counsel who have made an appearance. I

Proceedings

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2 understand that from Mr. Reilly that the committee
3 was in communication with them. We don't believe
4 anybody has an objection to it. Certainly, the
5 people that are following the case would know, and it
6 has become an issue. It would be useful to get that
7 stip entered if you can.

8 THE COURT: I understand that.

9 MISS PATRICK: No, I'm not talking to you.

10 THE COURT: I was waiting until today, so
11 everybody would have a chance.

12 MISS PATRICK: No, I wasn't talking about
13 that.

14 THE COURT: I understand it's important. I
15 thought since you were all coming in today on many
16 issues, I just wanted to make sure, so fine. I'm
17 sure it will get done.

18 MISS PATRICK: Great.

19 THE COURT: And 1 person, 1 party wants to
20 be dismissed as an intervenor, so those are all the
21 things, so that's certainly not a problem.

22 Yes.

23 MR. STRONG: Good afternoon, your Honor. I'm
24 Gregory Strong from the Delaware AG's office.

25 I just want to let the Court know that the
26 confidentiality stipulation that you reference today

Proceedings

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2 was agreed by the parties before we were allowed in
3 the case, and we have sent over a proposal for a
4 similar stipulation, and we're working towards
5 getting a stipulation in place that would cover the
6 New York and Delaware Attorney General.

7 THE COURT: You mean, separate and apart
8 from this one?

9 MR. STRONG: Yes, your Honor.

10 THE COURT: Why wouldn't there just be one?

11 MR. STRONG: Your Honor, we had some separate
12 concerns that we feel are unique to our offices, and
13 so we'll certainly keep the Court apprised of our
14 progress there.

15 THE COURT: Do you object to this one as far
16 as it covers whoever it covers? Do you have any
17 problems with this one as opposed to everybody else?

18 MR. STRONG: No, ma'am, we don't.

19 THE COURT: So, you're going to probably
20 send an additional one you say at some point?

21 MR. STRONG: That's correct.

22 THE COURT: Okay.

23 MR. STRONG: Thank you.

24 THE COURT: Thank you.

25 So, now I guess we get to all the other
26 issues that were raised in the case, and who would

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like to start?

MISS PATRICK: Your Honor, I'll be happy to start.

I thought our issue was relatively narrow. Maybe it isn't.

THE COURT: What are you calling your issue?

MISS PATRICK: The request to Mr. Warner's letter from June 6th asking for an order compelling the objectors to produce documents pertinent to their objections; specifically, communications about their objections with Bank of America and BNY Mellon.

THE COURT: So let me ask you something, why wouldn't Bank of America and Bank of New York Mellon have copies of any correspondence with the other people? I mean, didn't they keep copies of it? Why do they have to produce copies when the Bank of New York Mellon's lawyers and Bank of America's lawyers are sitting right here. They're on your side of the table.

Why can't you get it from them? Why do they have to start running around, looking for that? I don't understand that at all.

MISS PATRICK: Well, I think the same reason in one request, copies of documents from parties. I

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2 don't know what's in their file. I don't know what's
3 in their drafts, or communications, or anything else,
4 but it certainly isn't the case that I'm not entitled
5 to get relevant information from them.

6 Is it useful for us to know what statements
7 they made about the settlement? Sure.

8 Here's an example.

9 MR. REILLY: Your Honor, can I interrupt?

10 THE COURT: Let her finish.

11 I got to tell you, I don't think that's the
12 major issue here.

13 MR. REILLY: I don't either.

14 THE COURT: Well, personally. What you
15 think -- I mean, obviously, you don't, but I do.

16 MR. REILLY: I just want you to know that I
17 agree with you.

18 THE COURT: Agree with me, but honestly, I
19 don't think that's really -- I don't even
20 understand why you need those, and why those are, how
21 that's going to help me, ultimately, in determining
22 whether or not, you know, in deciding whether or not
23 I should approve the settlement that you have asked
24 me to approve at some point down the road, so I'm not
25 really sure that that's it.

26 I'll let you finish because you stood up

Proceedings

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2 first, but then I'm going to listen to some of their
3 claims.

4 I don't see that as being the first thing
5 that has to happen here.

6 MISS PATRICK: Your Honor, we think it's
7 highly relevant. The reason that we think it's
8 relevant is that this is a contract that at its
9 bottom requires people to assert rights under it for
10 the benefit of all certificate holders. The
11 correspondence that came in, specifically, from AIG
12 yesterday now admits what we said last time, which is
13 that they have made their objection a part of an
14 effort on their part to extract an individual benefit
15 for their security claims.

16 That's highly relevant for two reasons;

17 First, the Court is entitled to know whether
18 objections are being pursued here for a proper
19 purpose that is authorized under the contract.

20 Second, it is highly relevant to know whether
21 in that correspondence objectors have said things
22 about the settlement that are inconsistent with
23 statements they have made in this Court.

24 For example, there are significant servicing
25 improvements in this settlement, servicing penalties,
26 servicing cure, document cure.

Proceedings

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THE COURT: I'm aware of it.

MISS PATRICK: Right.

If these objectors have written to Bank of America, or Bank of New York Mellon and said we like that, we think that's a good thing, the Court should know that. There should not be an opportunity for them to say one thing there, and another here. It's disingenuous. It's not candid with the Court.

It's certainly relevant to know whether this settlement, which is favored by 90 plus percent of this certificate holders, is being held hostage to something that has nothing to do with what's going on in this case; i.e. securities claims that are pending elsewhere.

Now, why does that matter?

It matters because the objectors here that are taking the lead on proposing burdensome discovery, 6, or 7,000 loan files, extensive delay, drag this case to Federal Court, and back.

Collectively, your Honor, we believe based on the pleadings they have filed elsewhere that are public record, those objectors hold less than three percent of the outstanding certificates. AIG is less than one percent. Walnut is less than a third of a percent, and if those objectors given that size of

Proceedings

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2 stake are really pursuing this objection to be a
3 thorn in Bank of America's side, to force them to
4 give them an individual benefit, we should all know
5 it.

6 THE COURT: When you say individual benefit,
7 what do you mean, more money than somebody else
8 provided, or what?

9 MISS PATRICK: An individual settlements of
10 their securities claims. They have securities claims
11 that are pending in other Courts, and so they want
12 their securities cases pending settled.

13 That's the gist of Mr. Carlinsky's letter to
14 you. He said on page two construed literally request
15 number five would encompass AIG's mediation materials
16 of its securities claim.

17 Well, request number, our request five
18 doesn't say anything about that. Our request five
19 says documents concerning communications about your
20 objection.

21 The objection was filed in August. The
22 mediation that Mr. Carlinsky is talking about in his
23 letter occurred in July and involves securities
24 claims.

25 This case doesn't settle securities claims.
26 It doesn't resolve them. There are no security

Proceedings

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2 claims at issue here, but if what's happening is AIG
3 is being an obstructionist here to try force Bank of
4 America to settle claims that have nothing to do with
5 this case at a cost to other certificate holders of a
6 million dollars a day, burdensome discovery,
7 disruption of the trustee process, that's wrong.

8 It's relevant. We should know. It's
9 astonishing to me that people who have filed
10 pleadings objecting to the settlement; AIG's
11 pleadings says we object, Walnut says we object,
12 would the position that communications about their
13 objection are not discoverable.

14 How can that be?

15 It's their filed pleading, and all we want is
16 to compel them to produce documents about their filed
17 pleading.

18 THE COURT: Mr. Carlinsky, I don't know why
19 you have chosen not to sit at the table.

20 MR. CARLINSKY: I did not know I would be up
21 first.

22 THE COURT: Well, you did write a letter, so
23 I did anticipate that we would hear from your.

24 MR. CARLINSKY: I think, your Honor, the
25 easiest question is first;

26 Any communications that Miss Patrick, rather,

Proceedings

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2 is referencing, as we've said in our letter, were
3 done in the context of privileged mediation.

4 Now just to put things into perspective, so
5 that there's not an impression left here that there
6 was some notion of a threat, or extortion I think was
7 the word Miss Patrick used; prior to our filing of a
8 securities suit against Bank of America --

9 THE COURT: Where's is your securities suit?

10 MR. CARLINSKY: The securites suit is pending
11 in both the Southern District, and half of it is in
12 Federal Court in California.

13 It was initially filed in this Court, and was
14 removed by Bank of America, and then it was split up
15 by Bank of America, so it's in two Courts.

16 That suit was filed last August.

17 Prior to the suit being filed, AIG and Bank
18 of America agreed to go to a mediation.

19 In fact, they hired Eric Green who is a
20 well-known mediator up in Boston. It was at Bank of
21 America's, in fact, suggestion we use Mr. Green, but
22 that's not here or there.

23 We entered in a confidentiality agreement,
24 like most parties do. The confidentiality agreement
25 says any discussions in the context of a mediation
26 are privileged. It is expressly references, among

Proceedings

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2 other things, Massachusetts law, which had --
3 Massachusetts has an absolute privilege statute on
4 mediation materials, but it also says none of what is
5 being disclosed. Your Honor's knows this all too
6 well. In mediation the purpose is for party to be
7 open and candid with the mediators and with each
8 other. We went up to Boston before we even had the
9 joint meeting. We executed the agreements with Eric
10 Green, and then the parties each exchanged mediation
11 statements.

12 Now, the scope of the request that the
13 Institutional Investors had posed; it reads any
14 contemplated objection to the settlement, okay, so
15 read literally, if in that mediation, let's assume,
16 hypothetically, AIG said in its mediation statement
17 to Bank of America we hope we can resolve all of our
18 issues, and be made whole for our losses, and if
19 we're made whole for our losses, thank you. Have a
20 good day. We have nothing more to do with you.

21 And let's suppose, hypothetically, because
22 there's an assumption being made by Miss Patrick,
23 although I wonder how she knows what is allegedly in
24 the statement; let's suppose AIG said, however, if
25 we're unable to reach a resolution, we're going to
26 pursue our securities claims, plus we're looking for

Proceedings

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2 recovery in that case, and we are a beneficiary of
3 what had been announced a few weeks earlier, this
4 settlement, and so let's suppose that in that
5 agreement it says, and therefore, if we are not able
6 to resolve things, we will be pursuing our securities
7 claims because Bank of America knew we were going to
8 do so, and we will be evaluating and contemplating,
9 because that's what the scope of their request, your
10 Honor, a potential intervention, or objection in
11 connection with the settlement because we don't know
12 that, we view it as adequate. We do not know enough
13 about the process. Let's suppose those things exist,
14 hypothetically.

15 (A), it is clearly in the context of
16 privilege, and the 1st Department, the 2nd
17 Department, the 3rd Department, the Court of Appeals
18 have all said when anything is done in that context,
19 and I have cases, but I don't need --

20 THE COURT: I'm not going to start reading
21 now.

22 MR. CARLINSKY: No, I know.

23 My point is, that's purely privilege. You
24 don't get to just simply say Oh, produce it; first
25 point.

26 Second point was your Honor's point;

Proceedings

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2 How is this relevant to the questions before
3 this Court?

4 The answer is, it's not.

5 If AIG, hypothetically, said if you make us
6 whole, we go home, and therefore, we don't have any
7 standing even necessarily to say boo in the
8 settlement with the Article 77 proceeding, or if they
9 said, but if we don't, obviously, we're going to be
10 seeking recovery from two pots that we can
11 potentially recover from, and made a statement that
12 says we would contemplate an objection.

13 Let's suppose that they said that, my
14 question comes back to you, so what? Does that make
15 us an extortioner?

16 Ultimately, the question is before your
17 Honor. We don't get to decide if the settlement is
18 fair, and reasonable, and the process was proper, or
19 it was somehow compromised. Your Honor does.

20 AIG has intervened and filed as a place
21 holder an objection, which under the rule I think
22 your Honor set out last summer, we have to do, and
23 AIG is saying -- and not just AIG and Walnut. These
24 gentlemen represent the Attorney Generals of New York
25 State and Delaware. We have Federal Home Loan Bank.

26 What is everybody saying to this Court?

Gloria Ann Brandon, Sr. Court Reporter

Proceedings

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2 Your Honor, I think the expression from
3 Justice Brenner is sunshine is the best disinfectant.
4 That's all that people are asking for here, and your
5 Honor is going to ultimately decide what is
6 reasonable discovery. AIG is not going to dictate
7 that. Your Honor's, ultimately, going to decide
8 whether the process that was followed in reaching a
9 settlement was fair, and it was uncompromised, and
10 there were no conflicts of interest, and, ultimately,
11 whether the settlement is fair, but the notion that
12 we're going to just disregard privileges because Miss
13 Patrick either suspects or -- I don't know where she
14 gets the basis of this, but I would tell the Court
15 that I was the lawyer who signed that mediation
16 agreement that has a confidentiality provision in it.
17 I was the lawyer when my firm prepared the mediation
18 materials. I was the lawyer who said let's be open
19 and candid on everything we were discussing because
20 we're governed by a privilege, and we exchanged those
21 documents.

22 Bank of America has been subpoenaed, your
23 Honor, for these documents, and so not only has the
24 request come to AIG, but it's also been imposed on
25 Bank of America. We told them.

26 THE COURT: Are there communications that

Proceedings

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2 don't fit into that mediation?

3 MR. CARLINSKY: Zero. That relate to the
4 scope of this issue, zero.

5 If there are, or if Bank of America thinks
6 there is anything, other than the mediation materials
7 that were exchanged in the mediation, there's a
8 handful of e-mails they're scheduling mediation.
9 They don't have any discussion of views, so the
10 answer is no, or if Bank of America thinks there are
11 some e-mails, God bless them. We don't have an
12 objection, but the mediation materials are
13 privileged.

14 THE COURT: Can I ask you one other thing?

15 MR. CARLINSKY: Of course, your Honor.

16 THE COURT: Since your firm also represents
17 the people that just spent the last month in my
18 courtroom; MBIA against Bank of America, that case
19 before Judge Bransten, is that the same basic thing
20 as your case, your AIG case against Bank of America?

21 MR. CARLINSKY: A little different. There is
22 certainly some similarities. The MBIA case, and I'm
23 not involved in the MBIA case, but I know enough.

24 THE COURT: Doesn't your firm represent them
25 in the case before Judge Bransten?

26 MR. CARLINSKY: Yes, yes, yes, but they don't

Proceedings

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2 let me that near that.

3 But, that case involved the monoline insurer,
4 so it's monoline insurance on underlying securities.

5 The AIG case, the securities case that I was
6 referring to, to which Miss Patrick is referring to,
7 is a case which says AIG was defrauded in connection
8 with RMBS that it purchased from Bank of America, or
9 Countrywide, or Merrill Lynch, so that's the nature
10 of that case. That case is proceeding, and I think
11 those are, ultimately, the facts here.

12 THE COURT: Okay.

13 Does anybody else want to address that issue?

14 I mean, do you want to respond because --

15 MISS PATRICK: Yes.

16 THE COURT: I know Mr. Warner's letter,
17 again, this is an issue that's not been, didn't
18 percolate until a couple of days ago, so I don't care
19 so much that there's not a formal motion, but I care
20 that in two days when this was not the only thing I
21 had to do, that I haven't really looked at all the
22 papers and dealt with all of this, but I mean, I saw
23 a letter that came in.

24 I guess it was from you, Mr. Warner.

25 MR. WARNER: Yes, I wrote last week.

26 THE COURT: No, I got a letter this morning.

Proceedings

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2 MR. WARNER: No. The letter I wrote this
3 morning, that's just a reply.

4 THE COURT: I understand.

5 This morning you first replied to that and
6 sort of suggested that I not bound by this, by this
7 mediation privilege.

8 MR. WARNER: Privilege, right.

9 MISS PATRICK: Your Honor, so a couple of
10 responses to this.

11 First, at bottom, this Court, every Court is
12 entitled to know that discovery is being pursued in
13 good faith for a purpose proper and pertinent to the
14 proceeding.

15 If, as Mr. Carlinsky asks, how I know this;

16 Well, I know this because our request five,
17 which only sought communications about the objectors
18 filed pleadings precipitated a response from Quinn
19 Emanuel that said Oh, our communications about our
20 objection relate to our efforts to extract a
21 settlement of our securities claims.

22 That's their statement, not ours.

23 THE COURT: Somehow I don't think that was
24 the wording they used.

25 Did you say extract?

26 MR. CARLINSKY: I'm glad your Honor asked

Proceedings

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2 that question because I was wondering what she's
3 reading.

4 MISS PATRICK: Well, actually, what he said,
5 construed literally, request number five would
6 encompass AIG's mediation materials, and thus violate
7 the privilege that governs those materials.

8 My request five said any objections or
9 threatened objection. That's it.

10 MR. CARLINSKY: No. Why don't you read
11 exactly the language, please, so we are fully candid
12 with the Court, Miss Patrick.

13 MISS PATRICK: I will. I will be glad to.

14 All documents --

15 THE COURT: I want to get it out in front of
16 the media.

17 MISS PATRICK: You bet.

18 This would be Mr. Warner's letter of
19 June 6th.

20 THE COURT: Is it an exhibit?

21 MISS PATRICK: Yes. I will hand you up my
22 copy if you need.

23 THE COURT: No, I have it. I've got it.
24 Fine. Thank you.

25 MISS PATRICK: Okay.

26 All documents constituting communications

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2 with Bank of New York Mellon, Bank of America, or any
3 Countrywide entity concerning or related to your
4 objection, or any contemplated, or threatened
5 objection to the settlement.

6 Objection is defined as, "the petition
7 intervention, notice of intent to appear and object,
8 or other pleadings filed by you in which you advised
9 the Court that you were opposed to, or sought more
10 information about the trustee settlement."

11 Not a word in that, not a word about efforts
12 to settle securities claims. I did not ask that.

13 I asked for the information that is customary
14 and usual.

15 THE COURT: Do me a favor, let her finish.
16 I will --

17 MR. CARLINSKY: Yeah.

18 MISS PATRICK: I asked for the information
19 that is customary and usual, which is, you file a
20 pleading. Tell me what you said about the
21 allegations that you made in your pleading, or the
22 allegations you threaten to make in your pleading.

23 That's clearly, clearly discoverable. It's
24 useful information. It's reasonable information.
25 It's within the scope of discovery.

26 THE COURT: Well, what you are trying to

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2 show is that doesn't really go to whether you came up
3 with a fair and reasonable settlement, but it's more
4 about trying to show what their motive may be.

5 MISS PATRICK: It goes to --

6 THE COURT: It's a little bit different.
7 I'm not sure I always -- it may be relevant at
8 some point. I'm not usually spending a lot of time
9 on discovery to show somebody else's motive.

10 MISS PATRICK: Well, your Honor, I would say
11 this to you; it's not directly related to motive.
12 It's directly related to Pooling and Servicing
13 Agreement Section 10.08, which requires parties that
14 assert rights under the Pooling and Servicing
15 Agreement to do so for the benefit of all certificate
16 holders, and if you look at 3101 of the CPLR; there
17 shall be full disclosure of all matter, material
18 necessary in the prosecution, or defense of an
19 action.

20 Is it a proper defense in this case to point
21 out that certificate holders are not here acting for
22 the benefit of all since that contract is at issue?
23 Yes.

24 Does the 1st Department in en re New York
25 County DES litigation say the ultimate test is one of
26 usefulness and reason?

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2 Is useful for this Court to know that the
3 people here pursuing this discovery have an agenda
4 that is at cross purposes with the 90 plus percent of
5 certificate holders?

6 Your Honor, what are they afraid of?

7 If it's so innocuous, if there's nothing to
8 it, let them produce the documents to you in camera
9 and you decide, but the truth of the matter is --

10 THE COURT: Oh, I have a lot of time for
11 that.

12 MISS PATRICK: Well, the truth of the
13 matter --

14 THE COURT: That's the person you're going
15 to hire after this.

16 MISS PATRICK: Yeah.

17 But, the other thing, your Honor, is, Mr.
18 Carlinsky asserts as a fix-it in his letter that
19 mediation privilege applies, could apply, could bar
20 discovery here, that he's met the criteria for it.
21 None of that is in his letter.

22 THE COURT: All of these just came in the
23 past day. I've had settlement negotiations in my
24 life. I'm not a mediator, I'm a Judge, but I
25 certainly have had plenty of settlement negotiations.
26 We know that there are CPLR rules that protect things

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2 that are discussed in settlement, not to be brought
3 into the Court, otherwise people will never want to
4 settle their cases. People will not want to mediate
5 their cases if everything that they're putting
6 forward in a mediation or settlement is then out
7 there for the world. I don't mediate or try to
8 settle my non-jury trials, because if it doesn't
9 settle, and I try them, then I know too much. We
10 will let somebody else do that. They go to someone
11 else, so I understand that concern, and I do think
12 that while in the course of that, of the mediation
13 would probably be privilege, but as I said, I spent a
14 few days researching that issue since you all raised
15 so many issues, I do -- I mean, I hear your point.

16 Again, I don't think it's the absolute
17 biggest priority, it's one of the issues raised, but
18 I'm wondering if, other than the discussions you had
19 in your mediation, and I don't really care about your
20 e-mail about setting up a mediation, if there's any
21 other discovery, or any other communications you may
22 have had with Bank of New York Mellon, or Bank of
23 America, or Countrywide--

24 I'm not sure they're represented.

25 MR. CARLINSKY: Bank of America, or
26 Countrywide is used interchangeably.

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The answer is no. The answer is no.

THE COURT: Why don't you just respond there's nothing then? That's the end of that story.

MR. CARLINSKY: We're happy to.

THE COURT: Then either I, or the person that you use, the special master, the special referee, whatever you want to call the person that you are going to look for after this hearing, can deal with some of these other privilege issues, but I still am trying to understand why you can't get this from Bank of New York Mellon and Bank of America, who I said are on your side of the table in this case.

MR. CARLINSKY: Well, let me just address that.

THE COURT: No. I'm asking her first.

MR. CARLINSKY: I'm sorry.

MISS PATRICK: Your Honor, a couple of things.

We have a subpoena outstanding to Bank of America.

THE COURT: They have not responded?

MISS PATRICK: They've responded they will produce the documents in ten days, but let me say that I don't know whether for the same reason you asked for the same category of documents from

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2 everybody, right, people produce different things.
3 People interpret requests differently. It's not the
4 first time that you serve a request to everybody, and
5 then you put and meld the documents together to see
6 what they say.

7 Here's the thing; there is no privilege log
8 from AIG about this. They don't identify these
9 documents, and for them to simply lower a veil of
10 secrecy and say nope, there's nothing. You can't
11 even know how much there was. You can't even know
12 how much our objection was embroiled in our effort to
13 settle our securities claims.

14 We have been ordered to produce a privilege
15 log. We've done that. If they're asserting a
16 privilege, the CPLR said they have to produce a
17 privilege log. They ought to at least have to log
18 it, and we'll see where it goes.

19 MR. CARLINSKY: I'm to happy log in a
20 privilege log, your Honor.

21 This issue I thought was going to be brought
22 up today, and so I wanted to make sure we address it.

23 If Miss Patrick wants just a privilege log,
24 fine.

25 I'm also happy to represent to the Court
26 that, other than the mediation material, the

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1 mediation statement, there is nothing, other than the
2 mediation materials.
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4 By the way, for the record --

5 THE COURT: I imagine that you would put
6 that in some kind of writing?

7 MR. CARLINSKY: I'm happy to.

8 And the last point, though, is with respect
9 to Bank of America;

10 Bank of America has been served with a
11 subpoena. We have, obviously, objected to their
12 producing our mediation. They can do whatever they
13 want to our mediation statement, but our mediation
14 statement, they're sitting there saying well, what do
15 we do? And so I guess the point is, Bank of America
16 said they're not going to do anything for at least
17 five days. Our position is that we have objected on
18 privilege ground. There should be no production.
19 We'll produce the privilege log. If this is an issue
20 that Miss Patrick intends to pursue, we can do it on
21 a formal motion, if we ever have to get there.

22 I mean, I just I don't understand.

23 THE COURT: Could I hear from Bank of
24 America as to this issue because why don't --

25 Is there stuff that you can produce that you
26 think is responsive to request number 5 that doesn't

Proceedings

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2 violate a, potentially violate a potential privilege
3 that is alleged?

4 MISS PATRICK: Yes.

5 There are some e-mails. Some, as he says,
6 that are purely procedural. I don't think anybody is
7 very interested in them, but I'm happy to produce
8 them.

9 There's certain other e-mails relating to
10 information relating to the settlement, which I don't
11 think fall under the mediation privilege, but I would
12 be happy to produce, as well.

13 MR. CARLINSKY: I think I've seen those all.

14 MISS PATRICK: Yes, you have.

15 MR. CARLINSKY: To the extent that they're our
16 e-mails, or e-mails coming from them, so I have no
17 objection to those. It's just limited --

18 MISS PATRICK: Then the mediation statement,
19 and that's what we're discussing.

20 THE COURT: Now, will each side prepare a
21 mediation statement; is that it?

22 MISS PATRICK: Yes, but I don't think anybody
23 requested our mediation statement.

24 THE COURT: So, you are talking about his
25 mediation statement?

26 MISS PATRICK: His mediation statement.

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THE COURT: I don't want you to produce his mediation statement at this point.

MISS PATRICK: Okay, got it, got it.

THE COURT: If you want to prepare your own, and you want to do that, and he doesn't care, I don't care.

Now, is there anything else?

What about Bank of New York Mellon, were you also served with a subpoena? It's also supposed to be communications with you.

MR. INGBER: Yes.

Your Honor, there wasn't a subpoena, but there's been correspondence between Miss Patrick and my firm, and it's my understanding is that there's no documents, so it's not really an issue with respect to Bank of New York Mellon.

THE COURT: Okay, so then I think you ought to get what Bank of America has, which it doesn't sound like it's too much.

At some point we might have to pursue this privilege issue, but I'm not so quick to discard the claim. I think that settlement and mediation issues that are privilege, I understand the concept. I'm not so quick to do that. I will look at the law. I mean, sometimes things are relevant, but there are

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privileges.

If you want to put together some kind of a privilege log, let her look at it, at least that moves this issue head.

MR. CARLINSKY: Yes, your Honor.

THE COURT: I think that's all I'm going to say about this issue.

Now, the next issue that really I have some concern about is, and that you have some concern about I guess is that, the whole thing with the loan files. That's probably the issue that I think we took 1 or 2 steps forward, and like 35 steps backwards, so that's not very good. Doesn't make me feel too good.

We talked at length about this last time.

Mr. Mirvis made a suggestion of producing a very small number of files, which I think we can all agree was not supposed to be a statistic sampling of anything. It was not what I ever intended, and I don't think it's what either of you guys intended, but then you tried, you say, and you gave me a lot of affidavits and letters about it, that you met and conferred because you didn't accomplish very much. I mean, you started to exchange some stipulation, and you ran into some serious problems in terms of timing

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2 and whatever. I mean, I was pretty shocked to read
3 that 150 files, which is really a small number, was
4 going to take, perhaps, three months to produce, and
5 the documents in those files could potentially come
6 from 19 sources. I think that's what your person
7 told me. I don't understand what all the sources
8 were, but I imagine you don't either, but the guy
9 that wrote this, wrote this affidavit, I guess said
10 they're in all different kinds of places to find, so
11 that was going to take a long time.

12 Then you were going to give it to your
13 experts, and read underwriting, and they wanted to do
14 it, so seven months later I would know something
15 about 150 files, so I was going to do more. We can
16 be here for ten years discussing this, so that was
17 really not the intention. They apparently offered to
18 make some kind of rolling production, let you
19 identify the 150 files. Apparently, none of that
20 happened because you never could work out any kind of
21 arrangement.

22 Then everybody started writing me letters, so
23 I may have short circuited it a little and forgot a
24 few things.

25 That's kind of the sense of what was going on
26 here in my reading pleasure.

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2 MR. CYRULNICK: Your Honor, a better summary
3 than I could have done, your Honor, and let me try to
4 briefly cut through this.

5 In one sense, there's been no progress.

6 In another sense, I think we made a lot of
7 progress because when we were here the last time, we
8 were requesting on behalf of objectors and the
9 intervenors a statistically significant sampling.
10 Mr. Mirvis strongly opposed that. Mr. Mirvis
11 suggested a compromise, which I think the Court
12 understood, as I understood was to be a quick
13 production of a small number of loan files, so we can
14 review them and come back before your Honor in a
15 relatively short period of time and say here's what
16 the loan files look like, here's what the 150 showed
17 us, now here's why we want more, the full statistical
18 sampling. Mr. Mirvis would oppose, and your Honor
19 could issue a ruling.

20 At the end of the hearing, we agreed to meet
21 and confer with Mr. Mirvis, which we did and we
22 discussed --

23 THE COURT: I directed you to do it whether
24 you agreed or not, but I know you did.

25 MR. CYRULNICK: I apologize, your Honor.

26 You directed us to meet and confer with Mr.

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2 Mirvis, which we started to do, and we received from
3 Mr. Mirvis's office a proposed stipulation that made
4 it clear, as I stated in my letter, that this process
5 was going to take -- and this does not suggest any
6 sort of intentional ill will on the part of Mr.
7 Mirvis or Bank of America. It was going to take the
8 better part of 11 months, or longer to process this
9 150 loan files and put it front of the Court, so that
10 we can renew our application for the full statistical
11 sampling and ask your Honor to rule on that issue.
12 Our view is, that would be a monumental waste of
13 time. Any benefit that would have been achieved by
14 reviewing 150 loan files is far outweighed by the
15 delay. The 150 loan files that your Honor said was
16 never intended to be a typically significant
17 statistical sampling, we didn't think so, Mr. Mirvis
18 doesn't think so, and Mr. Ingber doesn't think so.
19 Nobody thinks so.

20 THE COURT: None of them, so we're all in
21 agreement on that 1 thing.

22 MR. CYRULNICK: So, there may be some minor
23 benefit achieved in reviewing 150 files, but if it's
24 going to take as long as it's going to take, it's far
25 better from our perspective for the Court to rule on
26 the issue that is most important here, which is are

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2 we entitled to review of the statistically
3 significantly sampling of loan files. Our strong
4 view is in order for the Court to do what Mr. Ingber,
5 and Bank of America is asking the Court to do, put a
6 stamp of approval on this settlement, we're entitled
7 to and the Court would benefit from us showing the
8 Court what the trustees would have found had it
9 reviewed these files. These are the files that will
10 tell the Court whether the number the trustee came up
11 with was reasonable, whether the expert the trustee
12 hired engaged in this reasonable process.

13 We briefed this. I'm happy to argue the
14 substance of it.

15 I think Miss Patrick made the point that I
16 want to make for me in arguing what the discovery
17 standard is, which is it has to be necessary and
18 appropriate to the case, and how expansive that is,
19 all evidence material and necessary, regardless of
20 burden, and it's supposed to be, the test is
21 usefulness and reason, and it's hard to argue that
22 this stuff is not within the scope of discovery as
23 defined in the CPLR.

24 But, the main point I want to make to your
25 Honor today is this; we believe that the compromise
26 Mr. Mirvis proposed, although it sounded at the time

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2 like it might be a useful way to move forward, would
3 actually make us take many more steps backwards. It
4 would delay this by a number of months that would get
5 to the end of this discovery before we even start
6 briefing to the Court and argue to the Court about
7 the main issue, which is can get the full significant
8 sampling, so what we would request respectfully to
9 the Court is that the Court rule on the issue that's
10 actually significant in the case, which is can we get
11 a substantially significant sampling of loan files,
12 review them, and present our findings to the Court.

13 If the Court wishes to have more argument on
14 that subject, I'm happy to address it, or we can, you
15 know, submit on the papers.

16 THE COURT: Well, you argued it the last
17 time I think.

18 MR. CYRULNICK: We argued it. I mean, it came
19 up at the very end of the hearing. I think the main
20 point was Mr. Mirvis's suggested compromise.

21 But, the main point I want to make is, your
22 Honor, we strongly believe that the reviewing 150
23 loan files is going to achieve nothing, but delay and
24 this is --

25 THE COURT: Well, I mean, this is a really
26 hard issue. This is not the other case, which is

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2 based upon the underlying. This is a very unique
3 proceeding, so you can argue, all of you, but I bet
4 you're not going to find an Article 77 proceeding
5 where these issues have come up.

6 Just like I felt with the Attorney Generals;
7 there's not a lot, so you can argue to me about a lot
8 of other kinds of cases, but this is some kind of a
9 unique situation, so what we have here, they entered
10 into a settlement. Apparently, and I never heard you
11 guys contest this, around 90 percent of the people
12 who would be affected by this settlement don't
13 object.

14 The much smaller number of people that you
15 represent, you and all the other intervenors,
16 whatever, are a smaller percent, and some of you
17 object, and some you of like didn't necessarily
18 object, you say just give us some more information,
19 so we know a little bit more, and maybe then we'll
20 object, or maybe we will say, you know, this is a
21 good idea.

22 One of the concerns here is because I can't
23 really see this case in a complete vacuum;

24 Mr. Carlinsky has his cases for AIG. I know
25 about the case before Judge Bransten, and I know that
26 there's an issue about whether or not -- and this is

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2 one of the things that certainly the petitioners took
3 into consideration; you know, down the road I don't
4 know what you think you're going to ever get from
5 Countrywide.

6 Is Bank of America going to be responsible?

7 It's my kind of my understanding that that's
8 some of the issues that are going on before Judge
9 Bransten, and I'm not going to decide that in this
10 case if she's deciding it in that case. Maybe you
11 should have said she had the related case, instead of
12 me, and gone there, but if you want to do that, I'll
13 talk to her about it, see if she likes this.

14 I think there's a lot of issues. I don't
15 really want this to go five years down the road.
16 Miss Patrick keeps saying it's costing somebody, I
17 don't know who, costing a million dollars a day every
18 day that it isn't, it isn't wound up. We know it's
19 almost a year since they first walked in and told
20 me -- not Miss Patrick herself. I'm not sure if
21 anyone here was here -- talked about the wonderful
22 settlement that they had. It was very exciting, and
23 the rest is history, and you have all been part of
24 it, so yes, I know what the scope of the discovery
25 is. I've been on this side for a long time, and I
26 know what the scope of discovery in certain actions.

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2 There's actually a motion about what's the standard.
3 I mean, it is what it is. There's no real precedent
4 on a lot of these things. I have to make an
5 intelligent decision, but what you are suggesting,
6 asking with the statistical sampling, I'm just not
7 sure that that's what I'm supposed to be doing in
8 this case to make that determination as to whether
9 what they feel what the standard here, you know,
10 whether --

11 MR. INGBER: Within the bounds of the trustees
12 reasonable discretion.

13 MR. CYRULNICK: Fair and reasonable.

14 THE COURT: You probably spent a month
15 listening to an Article 78. It wasn't a plenary
16 action. It's not where I come in and say you have
17 the burden of proof Plaintiff, and you know, it's a
18 preponderance of the evidence. Was it arbitrary and
19 capricious? If it was not the way I would have done
20 it, maybe we would all go back and do it a little
21 differently. That's not the standard, whether what
22 was done is arbitrary and capricious. Here it's
23 whether what was done is fair and reasonable. It
24 doesn't mean this is the best thing in the whole
25 world, it couldn't possibly be a better deal. It's
26 whether it was fair and reasonable under all the

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2 circumstances. I'm not sure that means you open up a
3 plenary action like you got before Judge Bransten,
4 having a very difficult time. That's why I try to
5 take Mr. Mirvis's in between idea as a proposal
6 because I thought let's see, what are you going to
7 find in here that's really going to go to what I
8 ultimately have to decide?

9 I know they gave me a lot of findings that
10 pretty much go to whether or not the settlement is
11 fair and reasonable. It's not like they came in with
12 a case, and then a year or two later they said guess
13 what, Judge, we entered into a settlement. Isn't
14 that great? And I would say well, I don't really
15 like that. I mean, they don't really care if I like
16 the settlement. The parties like the settlement,
17 that's good with me. Although some of the Judges as
18 we've been reading in many of the Courts don't
19 necessarily feel that way, but I wouldn't really be
20 looking underneath this.

21 This case came to me not to get to a
22 settlement. It came here, it was settled. It's like
23 backwards; it's settled. Now, let's do the discovery
24 and figure out if we got a good settlement, which is
25 not usually the way cases are. It's a funny kind of
26 procedural thing. I know what the standard is, but

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2 what's really the standard for this case? What
3 really makes sense, so you want -- I mean, what you
4 want is what Judge Bransten found was maybe
5 reasonable in her case, but she doesn't have an
6 Article 77, so that's really my dilemma.

7 You all make some interesting legal points.
8 You probably write about them, but when you put them
9 in the reality of this case, it's not how to do it.

10 Mr. Mirvis, can I hear from you briefly?

11 I want to understand why these 150 things
12 have to take you seven months to do?

13 I mean, it doesn't make sense to me, really
14 it doesn't, and isn't there somehow that you don't
15 have to go to all 19 sources? These I thought were,
16 I mean, I thought these were like smaller mortgages,
17 not like billion dollar mortgages.

18 Weren't these a lot of smaller mortgages?

19 Why would the information be in 19 different
20 places?

21 MR. MIRVIS: For Bank of America, Ted Mirvis.

22 I didn't know whether the right response to
23 Mr. Cyrulnik's argument in June 4th letter was to say
24 this is like Ground Hog Day, we're back all over
25 again, Yogi Berra, déjà vu.

26 I think your Honor put it best, it's a huge

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2 step backwards and for no reason I can tell.

3 Seven months is total fabrication, a total
4 and complete fabrication. We met with Mr. Cyrulnik.
5 We did work. It's all laid out in earnest detail in
6 the affirmation of my colleague, Jason Moch, about
7 how long would it take to get everything that he
8 wanted, which is not just a normal loan file. It was
9 foreclosure files, loss litigation files, repurchase
10 files, mortgage insurance claim files, and the best
11 efforts we can come up with was 90 days, but we
12 offered from the getgo to begin a rolling production
13 of the origination files, some of which are
14 electronic. It could be produced very quickly. Give
15 us we said maybe five times, almost begging, give us
16 the loan numbers, we can get started. We would be
17 almost done with the production if they had done
18 that.

19 By my count, your Honor, from the time they
20 served their subpoena in November until today, they
21 have gone radio silent on this subject for periods of
22 time that are in excess of six months.

23 The seven month thing, let me come back to
24 that.

25 THE COURT: I didn't get back here until
26 March. I guess that was part of the job.

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2 MR. MIRVIS: Indeed, your Honor. I think it
3 was instructive.

4 They served the subpoena on November, 2011,
5 and then there was a little conversation in December,
6 and then it was radio silent for two months while the
7 case was in the Federal Court at their behest, but
8 they could have pursued the loan file issue. They
9 didn't.

10 Then there was a little proposal. Maybe Mr.
11 Cyrulnik said just give me some files in my three
12 trusts, the Walnut Place trust, and we will consider
13 that, but we will give you a complete proposal. What
14 happened then? Radio silent for three months, not a
15 word until May.

16 In May, your Honor, you will recall right
17 before the May 8th conference, they came back and
18 said really let's not consider it at the May 8th
19 conference. And then, we had the conversations, May
20 8th conference, in some depth, and we argued. I
21 argued this as strenuously as I was able to, that
22 statistical significant sampling is wrong. It would
23 put this case into orbit. It would do something no
24 Court has ever done. There's been no dispute about
25 that. We cited case after case that in reviewing a
26 settlement, you never entertain the litigation on the

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2 merits of the claims, and that's what they're talking
3 about.

4 But, okay, we come back from Court and we
5 meet on May 11th and they say to us look, we're not
6 asking nothing to do with statistically significant.
7 They want 500. We say what's wrong with 150? They
8 couldn't explain why needed they more than 150. We
9 said fine, 150. We offered on May 11th to begin
10 producing, that's over a month ago, to begin
11 producing on a rolling basis get us the loan numbers.
12 We'll get in place protective order, and yes, there
13 would have to be, and nobody disputes this, a
14 stipulation to govern the procedure for how it would
15 be done.

16 We met and conferred on May 17th. Again, we
17 said we said we have done the work. If you really
18 want all these different kind of files, yes, they're
19 in a lot of different places. We think we can get it
20 done in 90 days, by the way, which would be a world
21 record compared to what's happened in the other
22 cases. MBIA is in their 3rd year of producing and
23 reviewing loan files. We said 150 files, we think we
24 can do it in 90 days. We can get you stuff much
25 faster if you will get us the loan numbers.

26 We get the loan numbers? No.

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2 On May 18th, a month ago, we sent our draft
3 stipulation saying it was all for discussion
4 purposes; no demands, no take it or leave it, no
5 seven months.

6 Your Honor, they said, they handed me this
7 morning right before we sat down this piece of paper,
8 purports to have excerpts from the stipulation. Not
9 a line of this piece of paper is accurate. We did
10 not insist on 90 days. We had it in brackets. We
11 offered rolling production beginning quicker. We
12 went weren't saying you're not going to get a piece
13 of paper for 90 days.

14 Just the opposite. We had a provision, yes,
15 that said once you have your expert do your report,
16 then give it to us, and we'll have our expert do our
17 report and we'll give it to you. It would be
18 reciprocal. That's what it always is. Yes, we don't
19 believe there should be an ambush litigation, and
20 hopefully, they don't either.

21 Then they put in their third item on this
22 page, and after delivering the report, they claim we
23 were sitting there waiting 60 business days. We put
24 60 days in brackets and we offered them,
25 specifically, on May 31st, and this is at Mr. Moch's
26 affidavit paragraphs 11 and 12 that we put 60 in

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2 brackets. It was for discussion. We offered them on
3 May 31st if you can do it in two weeks, not 60 days,
4 not 60 business days, not 82 calendar days, we said
5 in two weeks. If you can reunderwrite it in two
6 weeks, we'll undertake to reunderwrite it in two
7 weeks. They said oh, no, we need more than two
8 weeks.

9 How much time? No answer.

10 No one's talking about seven months. That is
11 totally and completely made up.

12 Then we said do you have comments on our
13 draft stipulation? This is on May 31st, on a
14 Thursday, and they said, Mr. Cyrulnik said no, this
15 is just an information exchange now, we don't have
16 comments yet, so fine, give us your comments as soon
17 as you you can.

18 What happens next?

19 On June 4th they send a letter to the Court
20 and it's Ground Hog Day. All of the sudden, not 150,
21 not 8,500 files. They wanted 6,500 files. They're
22 back to significant sampling. Fine.

23 I don't get it. What's going on here? Why
24 do they do that?

25 They charge us with delay? That's kind of
26 funny, not in a humorous way. It's funny in a

Proceedings

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2 peculiar way. They have wasted at least six months
3 of time doing nothing. Every once in a while they
4 wake up and they accuse everybody else of delaying
5 everything.

6 We are not trying to delay anything. We
7 wrote to them on the same day we got their June 4th
8 letter. Look, what are you talking about? You run
9 into Court while we're waiting for comments on the
10 stipulation? Everything is open for discussion.
11 The dates are open. Maybe we can do it faster.
12 Maybe they'll cut down on their definition of loan
13 materials. If they had been even half hard, half
14 hard about seeking the loan files, we probably would
15 be done by now.

16 In any event, as I said, virtually everything
17 they said is going to the seven months is false.

18 What really takes the cake, what really takes
19 the cake is what they don't say.

20 They complain about the 90 days, but they
21 offer nothing to dispute that 90 days is, in fact, an
22 expedited time frame. You can't just push a button
23 and get these files.

24 We're not hiding anything. That's why we
25 laid out in detail in Mr. Moch's affirmation to the
26 Court what it would take to produce these files.

Proceedings

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Now, what else do they never respond to?

We produced, we presented to the Court the affidavit of Mr. Kemp that pointed out that are we underwriting loan files that is highly subjective? No answer is going to come out of statistical sampling, just disputes. They made no response. Instead they submit the affidavit of Mr. Cowling, this is the statistical expert that they argued in the MBIA case who wants to do the same thing here that's happening in that case, which is an actual case about litigation of repurchasing claims. Obviously, this is not such a case, and no response of the fact of all the additional issues that would be created, and no response at all to the wall of case law we presented that no Court has ever considered in a proposed settlement in any action, or any context, entertained in litigation on the merits, and of course, all that's before your Honor.

So here's what we would suggest, your Honor.

There's no reason at all to do anything different than what your Honor did the last time, except, again, direct the parties to continue to meet and confer in good faith as we have been trying to do. We were waiting for comments on that stipulation. On the timing issues, maybe they can

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2 narrow the scope of what they want. Then we get a
3 letter to the Court, basically, moving to compel.
4 For some reason they want to go for broke. That
5 makes no sense. I just literally don't understand,
6 unless it's a contrivance of some sort to get a basis
7 for appeal. Maybe that's what they want. Maybe they
8 want an order from the Court denying statistical
9 sampling, so they can appeal, and then argue for more
10 delay. They'll take it to the 1st Department. In
11 the meantime, nothing should happen in this case.

12 Why would they want to do that? I don't
13 know, but at least, let's not forget, these are the
14 people who removed this case to the Federal Court,
15 wasted six months of everyone's time, and then when
16 the case back came to this Court, the first thing
17 that happened Mr. Cyrulnik wrote a letter to your
18 Honor, basically, blaming the Court for delaying. He
19 said discovery has been paralyzed for months because
20 there's been no judicial ruling on the trustee.

21 Extraordinary argument.

22 Then it was about settlement discussion.

23 Then, your Honor, it's always delay, delay,
24 delay, delay. Then it's always somebody else's
25 fault. There's no one's else fault here. We submit
26 they do not deserve a new ruling. There's no seven

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2 months. It's just made up.

3 We would propose that we be directed to
4 continue on the course. For whatever reason,
5 something happened between May 31st and June 4th.
6 Don't know what it was, but suddenly, Mr. Cyrulnik
7 said forget about trying to negotiate in good faith.
8 I'm going back to Court. I'm going back from 150, I
9 now want 6,500. I want a statistical sampling. I
10 want to go for broke. Give me a ruling.

11 Maybe he wants to appeal it and slow us all
12 down some more.

13 Thank you.

14 THE COURT: Everybody kills everything I do
15 around here, so that's just standard for the course,
16 but that's not how I do things. I do it to move the
17 case.

18 You want to address what Mr. Mirvis said?

19 MR. CYRULNICK: If I may, I would like to
20 respond briefly to Mr. Mirvis.

21 A few things that Mr. Mirvis says strikes me
22 as somewhat bizarre.

23 The first thing is the notion that loan files
24 here are not relevant. The trustee put loan files
25 directly at issue, submitted an expert report of Mr.
26 Brian Lin, and said here's the basis upon which we

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2 would concluded that \$8.5 billion is the right
3 number. We reviewed no loan files. Our experts took
4 a different universe of loans based upon experience
5 the Bank of America provided, and concluded that
6 that's enough to figure out what the right number is.
7 That's an assumption that their expert made, and
8 they're asking the Court to look at that expert
9 report, and look at what they say in their petition,
10 and say to the world this is a fair settlement, and
11 we're saying we have to test that assumption.

12 The only way to test that assumption, or the
13 best way to test that assumption is to look at the
14 loan files, and the only way to look at the loan
15 files, and me be able to stand up here and tell you
16 something that matters is to look at some thing
17 statistically significant.

18 There's 530 trusts they're trying to settle
19 at once. Loan files are going to be complicated.
20 It's a complicated case. They're trying to make it
21 sound simple. They put five 530 trusts in one little
22 package and submit it. There's a ton of loans
23 they're trying to settle, thousands upon thousands of
24 loans.

25 THE COURT: I understand, but the ultimate
26 alternative is to litigate all of them forever, which

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2 you know, is never going to happen, and it's going to
3 be a problem, and may never be enough.

4 Look --

5 MR. CYRULNIK: Your Honor --

6 THE COURT: Finish up.

7 MR. CYRULNICK: If I may say one thing about
8 Mr. Mirvis; it's bizarre to me. It's our motion to
9 compel. It's our document request. We aren't
10 interested in 150 loan files because it won't give
11 the Court anything useful. It's going to take
12 months. It won't take 7 months, it will take 5
13 months. It won't take five months, it will take four
14 and-a-half months. Most of the discovery it will
15 take for us to look at these loans, then come to the
16 Court and tell the Court that we need a statistically
17 significant sampling. I can't stand up and say
18 anything to the Court without that.

19 Now Mr. Mirvis says we may want to appeal.
20 Yes. We believe this is incredibly important to
21 adjudicating this case. If your Honor rules against
22 us, we may respectfully take it up to Appellate
23 Division, and ask the Appellate Division for its
24 point of view on this. The sooner we do that, the
25 better for everyone, including Mr. Mirvis, Miss
26 Patrick, Mr. Ingber because we can get certainty

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2 sooner, rather than later.

3 THE COURT: I'm so sorry I can't decide
4 everything that you want.

5 MR. CYRULNIK: This not about your Honor's
6 decision. It's about Mr. Mirvis's proposal to do 150
7 loan files, and then spend a lot of time achieving
8 the result.

9 The only thing I'm trying to say to this
10 Court is, we aren't interested in 150 loan files.
11 It's going to take too long to achieve that.

12 THE COURT: How long is it going to take to
13 get 6,000 loan files, did you ever figure that out?

14 MR. CYRULNICK: Yes, we have. I don't have
15 the number in front of me, but we made a
16 representation to the Court I believe in our original
17 letter on this about how long it would take.

18 THE COURT: What did you say?

19 MR. CYRULNICK: It would be a matter -- it
20 depends on how many reviewers, how will it takes Bank
21 of America to produce, I can't say, but I don't
22 think, my experience that producing several thousands
23 is not going to take the same amount of time
24 multiplied as producing several hundreds. Once they
25 get the process in place, it goes fast. I can tell
26 your Honor that other cases I'm involved in, Bank of

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2 America is producing many more thousands of loan
3 files, twenty thousand loan files.

4 THE COURT: Just out of curiosity, how many
5 of those are Article 77 proceedings?

6 MR. CYRULNICK: No, I'm not -- I'm talking
7 about timing.

8 THE COURT: You say your other proceedings.
9 You make it seem like there's a lot of Article 77's
10 going on.

11 MR. CYRULNIK: No, I'm just talking about
12 timing, how long it takes them to produce.

13 In other cases I'm involved in, they're
14 producing twenty thousand loan files in a matter of
15 months, not a matter of years, so all I'm trying to
16 say, your Honor, this is certainly a unique
17 proceeding. There's never been an Article 77 like
18 this, and I doubt there ever will be, so nobody's
19 arguing here I don't think that there's precedent for
20 what the Court is properly considering here, and we
21 certainly are sensitive to that. We think it's
22 inescapable that we have to look at loan files, and
23 the only way to deal with it is to do it in a
24 significance way, and we asked an expert who
25 testified in front of Judge Bransten what do you
26 think need to do in order to present the Court with

Proceedings

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2 something that would matter to it? He said between
3 four some odd thousand, six some thousand, and that's
4 what we presented to the Court. That's not our
5 judgment. That's a judgment of an expert that is in
6 530 trusts in hundreds of, thousands, if not millions
7 of loan files, how many would we have to look at to
8 tell the Court something to, that should matter to
9 the Court in making a judgment that they're asking
10 you to make?

11 THE COURT: So, anything else?

12 MR. CYRULNICK: The main point I'm trying to
13 make, 150 is not going to achieve anything. We're
14 the ones requesting it. We don't think it's useful.

15 THE COURT: But, if I did, I mean, you know,
16 go appeal that. I mean, go tell the Appellate
17 Division you think that's a silly interim order. I
18 mean, people feel everything I do, you can go appeal
19 it. I'll sign off on the transcript, go and appeal
20 that.

21 MR. CYRULNICK: But, the question is why does
22 that the Court want 150 loan files?

23 If the Court is interested in something, us
24 presenting something to the Court that will help you
25 in making its decision, I'm certainly happy to do,
26 but if it's a question of giving us something that

Proceedings

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2 would make us somewhat happy, I think the problem is
3 that 150 doesn't give us anything.

4 THE COURT: Okay, I don't think it's my job
5 to make people happy. I'm trying to do the right
6 thing here.

7 I did come up with the idea of the interim
8 thing, an interim suggestion. I mean, I would happy
9 to do your suggestion, which I picked up on, but a
10 whole month went by and you did not get anything
11 done. You could have been moving along. I thought
12 it might be helpful to know, to see what you're
13 actually going to find in these. There's some
14 outrageous situation that made it seem that what they
15 were doing was so ridiculous, and in coming up with
16 this \$8.5 billion number, I would say, you know, I
17 think that even though it's an Article 77, I think in
18 order for me to determine whether or not this was
19 fair and reasonable, I think you're going to have to
20 do a lot more production, a lot more discovery. I
21 just wanted to get something, I wanted to see what
22 you were actually going to find. I don't know if
23 there's any way of limiting what you are getting with
24 these files because I realize there's foreclosure
25 parts, there's all these different aspects of it. I
26 really don't know. I didn't think that that was

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2 going to be so complicated as it turned out to be. I
3 don't know how long it will take you to come up with
4 150 files in small number from each one, but I did
5 come up with some interim solution. I mean, we all
6 sometimes like to do that.

7 I know you think you are absolutely right,
8 and I know that Bank of New York Mellon and Bank of
9 America on this issue thinks they're absolutely
10 right. You can't get a decision that says you are
11 both absolutely right, make everybody happy.
12 Somebody's going to win, somebody's going to lose.
13 Then you're going to go to the Appellate Division. I
14 know. They don't usually stay things while it's
15 going on. They want you to move along, and
16 eventually, there's going to be a ruling on that, so
17 in the meantime, I thought maybe this will be
18 helpful. Maybe it will convince me. There's not
19 that much precedent.

20 You want me to run and do a decision; I'm not
21 going to do it off the bench on this because it is
22 something there's really no precedent for. I don't
23 want to sound stupid, or that I ignored something, so
24 I will to go back and look at it. It's going to take
25 me a while.

26 In the meantime, this might be of some

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2 assistance. That's what I was thinking the last
3 time. It didn't go the way I wanted, so I may as
4 well go back to it, and if you don't like it, go to
5 the Appellate Division and say you know, she made a
6 dumb ruling on the record. I think they listen to
7 almost anything. It's okay with me. I'm not
8 offended. I do pretty well. Every once in a while
9 they think I'm wrong.

10 MR. CYRULNICK: Your Honor, our concern was
11 that if we did what Mr. Mirvis was proposing, and
12 that we came back in several months and said to your
13 Honor that we finally finished the 150, now here's
14 why we want, you know, 5,000, then your Honor would
15 have said it's now a month before discovery is over,
16 and you are asking me to create an incredible --

17 THE COURT: Let me just say something; I
18 started this proceeding out by saying I really didn't
19 care too much about Mr. Ingber's discovery order. I
20 can extend the discovery as long as I want. I'm in
21 control of that, and that's what I said to the
22 Attorney Generals, even if they were going to try to
23 delay it. Look how nice they're not delaying. I'm
24 still in charge of the case. I work with discovery.
25 Very few cases, big cases, little cases, in between
26 cases have a preliminary conference order, and it

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2 goes exactly the way it says. Actually, I can't
3 think of any case that I ever had that I had a signed
4 stipulation extending the order; Judge, you know, it
5 turns out we need more time. I'm not concerned about
6 that. I'm concerned about getting the right things
7 done in the course of time that you need. I did not
8 sign off on that schedule. That seems silly to me.
9 It's like this case is putting the cart before the
10 horse. I think the case had a settlement before the
11 discovery, and then a discovery schedule before we
12 figure out what you want. You're just handling it
13 because it's a funny, it's a funny different kind of
14 case, so I'm not -- I don't care about this discovery
15 schedule. I didn't sign off on any one, and I don't
16 care about any of this. It's going to take a few
17 months, and you're going to come back and give me
18 something that maybe will convince me one way or the
19 other, or maybe in the interim I will say you know
20 what, you are absolutely right, why didn't even I do
21 that? Alright now, give him the 6,000, and you'll
22 appeal it, or maybe I'll say you know what, they're
23 absolutely right, in this case they shouldn't get it,
24 then you will appeal. Then in the meantime, maybe
25 you'll have some files and you will help a little
26 bit. Maybe I'll be able to find out, maybe I won't

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2 be able to find out. I can't really answer. It's
3 like saying what will you do if this happens, if this
4 happens, and I will say to you people I have so many
5 issues to deal with today, I can't really answer
6 that, but I find it made sense, so I was hoping it
7 would move along, and unfortunately, it didn't, so I
8 may go back to the same proposal. I'll take your
9 motion, and try to get to it when I can. I wouldn't
10 next week look for the decision, but I will try to
11 reread it and do some research on it, and in the
12 meantime, I want you to do this, so I mean, I'm
13 sorry. I know you don't agree, but as I said my job
14 isn't to make anybody happy. It's to do what I think
15 makes sense.

16 It's a different kind of case. I'm trying to
17 take an approach that makes sense. I don't expect,
18 you know, everybody to like it. Maybe nobody will,
19 but that's what I'm doing.

20 MR. REILLY: Your Honor, could we have a
21 minute in light of your comment because if we can
22 just talk to Mr. Cyrulnik for 1 second, we may be
23 able to -- in light of your comforting to us,
24 we're here every day. Everyone of them join at
25 different times says you're delaying, you're
26 delaying, you're delaying. We thought oh, here we

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2 go. We're going to show up in January because that's
3 what we thought their schedule was going to be, and
4 they're going to say it's too late, they want to
5 delay again. That's not an issue. I think we can
6 work this out.

7 THE COURT: I know they don't want to spend
8 five years on discovery. I know there's an end point
9 out there. It's several years. I mean, they were
10 hoping they would be through the Court of Appeals by
11 then, you know this case will, ultimately, go, unless
12 you settle, so now with all the problems, I am not
13 bound by his idea this is what the settlement is. I
14 mean, the time frame, I want to have a little
15 flexibility because I want you to do what I think you
16 need to do, and that's what I think, so if you want
17 to take a few minutes break, I wouldn't mind, and you
18 can talk to each other and see how quick you can get
19 Mr. Mirvis the loan documents, and then if you can
20 get it to him by tomorrow, start rolling off the
21 production. Rolling production means it starts and
22 rolls along. I'm sure you do that in the other
23 cases. Some of the things are easier to find. Some
24 of them are harder to find. I don't know that
25 aspect, but I'm sure that can get going, and in the
26 meantime, some of the other discovery issues we can

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2 deal with. I know there are a couple of other issues
3 that we have to deal with, and Miss Patrick maybe
4 will get some responses from Bank of America, and we
5 have to deal with that other privilege issue, we
6 will, and things will move along. I mean, I want to
7 move it along. That's why. I really, I also do.

8 I am serious about saying, you may want to
9 get some kind of discovery referee. There is 3214 of
10 the CPLR makes a provision for that, so obviously, if
11 the person makes a decision, someone's not happy with
12 it, you always have the right to come back to the
13 Court. Obviously, it's not like you don't have the
14 same appellate right, but it's somebody else because
15 you have to pay that person, and they'll be somebody
16 that you really trusted, and not that we don't want
17 to try to put in the time, but that person probably
18 won't have 370 cases that are banging down his or her
19 door all day like we do over here, so I think it's a
20 good suggestion. I make it a lot, especially in big
21 cases that have a lot of discovery disputes. Not
22 that we're not here, but you know, it's hard to get
23 everything together.

24 So can we take a few minutes break?

25 Then we have to 4:30. We can get to some of
26 the other issues.

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MISS PATRICK: Sure.

THE COURT: Okay, thank you.

(Brief recess taken.)

THE COURT: Okay, during the break, I so ordered your stipulation. That was quick enough.

MISS PATRICK: Thank you, your Honor.

THE COURT: And if it's not already e-filed, I will do it before the end of the day, so that's done, and also the person didn't want to object any more, I so ordered their stip.

Okay, what can we do here for the rest of the afternoon?

MR. CYRULNICK: Your Honor, if I may just briefly close the loop on the loan file discovery;

We will re-engage with Mr. Mirvis on the subject of the 150 loan files and we understand that they have proposed a stipulation. We have some objections to it. We're going to discuss this with them. If we can't reach an agreement on it, we'll come back to the Court on the subject of the stipulation, but we are hopeful we can reach an agreement with them on it, and your Honor, before I sit down and turn the floor over to Mr. Reilly, I wanted to not leave unresponded to a point that Miss

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2 Patrick made in response, or I believe Miss Patrick
3 made earlier in the hearing, which was to say that 95
4 or 97 of the certificate holders support the
5 settlement. We have done our own calculations, your
6 Honor, and as we understand it Miss Patrick
7 represents about 15 percent of the certificate
8 holders. Intervenors represent about five percent of
9 certificate holders who are strenuously here seeking
10 more information about evaluating the settlement, and
11 the vast majority of the certificate holders have not
12 expressed an opinion.

13 We strenuously take issue with Miss Patrick's
14 attempts to suggest to the Court that the fact that
15 someone hasn't sat there in favor of it, or concerned
16 about it means that they're in support of it.
17 There's no evidence to suggest that one way or the
18 other.

19 THE COURT: Well, okay, but the thing is the
20 case has been around for almost a year, so by now, if
21 they have not gotten on board to object, I don't how
22 much more we can look for them. I think we sort of
23 put this out quite a bit pursuant to the original
24 order to show cause.

25 MR. CYRULNICK: The problem is, they have not
26 got enough to support or object. They're just

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2 agnostic, which goes to the suggestion that they're
3 strongly in support of this, as Miss Patrick said.

4 THE COURT: Okay.

5 MR. CYRULNIK: Thank you, your Honor.

6 THE COURT: Mr. Reilly?

7 MR. REILLY: Thank you, your Honor.

8 The issue I'm going to address is related to
9 the fiduciary exception argument. You don't have to
10 rule on that today, all right.

11 Really what we're asking you to do today is
12 two very small steps, which we think are necessary
13 before the Court gets to the legal issue of fiduciary
14 exception.

15 Just to step back, our assertion is that Bank
16 of New York Mellon had fiduciary responsibility to
17 all certificate holders. You don't have to resolve
18 that today. That will be an issue that will get
19 presented to you somewhere down the road, probably
20 near the end where you have all of that to decide
21 what their duties were, what their responsibilities
22 were.

23 In the interim, we did make some progress.
24 We have got privilege logs; one from Bank of New York
25 Mellon, and one from Institutional Investors, right.

26 Institutional's Investors privilege log is 47

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2 pages long. It starts in November of 2010 and it
3 runs up to just before the petition to seek approval
4 was submitted, and every single privilege entry here
5 is supported by the common interest privilege.

6 THE COURT: What?

7 MR. REILLY: The common interest privilege.
8 That's not before the Court either, but it's a place
9 holder that I want to make sure is clear.

10 So far the Court has I believe ordered that
11 Bank of New York Mellon is to turn over their
12 settlement communications to the intervenors as it
13 relates to between them and Bank of America. That's
14 one prong.

15 And then, the communications between Bank of
16 New York Mellon, Bank of America, and the
17 Institutional Investors, this triangle right here.
18 That is also supposed to be turned over. We have not
19 received that yet. We have not.

20 THE COURT: That was discussed last time. I
21 think it was agreed to. You all agreed to do that.

22 MR. INGBER: Exactly, your Honor.

23 Just on that point very quickly, we told Mr.
24 Reilly and the Steering Committee precisely when they
25 would get the settlement communications, and we told
26 them precisely when they would get the settlement

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2 communications, which is next week.

3 THE COURT: Could you tell me?

4 I was just going to say, could you tell me.

5 MR. REILLY: Yeah. I'm looking forward to
6 getting this.

7 THE COURT: Oh, good.

8 MR. REILLY: But, we don't have them yet, and
9 what we also don't have, which we preferred in light
10 of the Court's comment, which is why don't you get
11 that stuff first before you come back to me and keep
12 asking for Miss Patrick's communications from Bank of
13 America, that's another prong if we don't get that,
14 or Miss Patrick's communications with Bank of New
15 York Mellon. We don't have those two prongs, but we
16 now know from the Institutional Investors' submission
17 that Miss Patrick's communications were substantial,
18 and there's 500 or so, looks like all e-mails, but I
19 assume around that, there were meetings and
20 conversations, et cetera.

21 MISS PATRICK: Your Honor, to be clear, when
22 says 500 or so, what he's talking about that
23 privilege log, we had discussions with the Bank of
24 New York Mellon. We had discussions with Bank of
25 America.

26 I'm a little surprised to hear Mr. Reilly

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2 going on at length about our privilege log, and our
3 privileges because there's nothing on the calendar
4 for today about the fiduciary exception to the
5 institutional investors privilege log.

6 Indeed, he stood up at the last hearing and
7 said he would tell the Court within seven days of
8 receiving the privilege log whether there were any
9 issues with regard to our privilege log, and he did
10 not, so I'm not prepared to be here talking about any
11 of our privileged stuff.

12 My understanding was that the only thing on
13 the calendar for today with regard to the privilege
14 log was his concern about the Bank of New York
15 Mellon's fiduciary, or fiduciary exception issue.

16 MR. REILLY: There's going to be no issue for
17 Miss Patrick, right. I'm trying the move the Court
18 forward to where we are as it relates to these two
19 issues.

20 There will be an issue on the common interest
21 privilege. We will come back to you in light of the
22 significant number of communications here.

23 We did as, it relates to this log and it
24 relates to the fiduciary exception, ask both Mr.
25 Ingber and Miss Patrick to tell us which of these
26 entries were you getting legal advice for the

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trustee?

Let's talk about Mr. Ingber's first.

Where were you getting legal advice for the trustees interest, and where were you getting legal advice for all the certificate holders? Distinguish for us whether you were protecting a trustee's interest, or you were protecting the certificate holders.

The reason that matters is because if, in fact, the Bank of New York Mellon as trustee for our clients, and the other committee members, and all the other certificate holders, if they were getting legal advice for the protection of the certificate holders, then under the fiduciary exception law, one of the prongs is met. We would argue would be entitled to get that. We're almost like the client. We are the ones who they're getting that information for, and if, in fact, some of these entries on Bank of New York Mellon's log are for the purposes of protecting the certificate holders, then we wanted to know it because then we can tee up with you the question of whether the fiduciary exception should apply.

We ask both Miss Patrick and Mr. Ingber to tell us on their logs whether any of it was for the benefit of the certificate holders.

Proceedings

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2 Miss Patrick answered question. She said,
3 you know what, on my log none of that was for the
4 protection of the other certificates holders. All of
5 it was to protect her clients, and we, therefore,
6 said fine, we withdraw our claim against you on that
7 issue. We're not going to seek your information
8 between you and your clients.

9 Mr. Ingber said no, I'm not answering that.
10 Our trustee said Oh, no, I'm not going to tell you
11 which of these entries were for the benefit of the
12 certificate holders, and which were for the benefit
13 of the Bank of New York Mellon, and I don't want to
14 have this fight. I don't want to waste this Court's
15 time if, in fact, none of this was for the benefit of
16 the certificate holders. If he says to the Court we
17 didn't do anything, we never got legal advice through
18 these negotiations to protect the certificate
19 holders, and, in fact, all of this was just to
20 protect Bank of New York Mellon. I can't get an
21 answer from him.

22 He's going to tell you it's too early to do
23 that. Why don't you prove whether or not we're a
24 fiduciary or not? That's not valid right now. It's
25 too complicated. All of these particular entries
26 would be difficult and a massive undertaking.

Proceedings

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2 You know, this privilege log, like all
3 privilege logs, was an assignment that fell to a very
4 bright person at Mayer Brown, maybe more than one
5 person, maybe a group of people. It's the kind of
6 assignment you get when you are a young lawyer. It's
7 a kind of assignment that you do nothing else for
8 days or weeks.

9 THE COURT: That's why it's a kind of
10 assignment that is going to the referee because my
11 law clerks don't have time.

12 MR. REILLY: That's very good. Well, that's
13 where we're headed, that's where we're headed, but I
14 think you're right if, in fact, somebody's got to
15 pour through this.

16 MISS PATRICK: I am allergic to the idea of a
17 referee, your Honor. I prefer to talk to you.

18 MR. REILLY: If, in fact, you're right, that
19 it requires an item by item, I don't believe that
20 it's a massive undertaking. I think there's
21 personnel, or people at Mayer Brown you can wake up
22 in the middle of night and say you know that
23 November 21st entry that was such and such a date,
24 did that have to do with the certificate holders
25 advice, or did that have to do with the protecting
26 the Bank of New York Mellon?

Proceedings

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2 THE COURT: That would be sad if they would
3 be able to answer that in the middle of the night.

4 MR. REILLY: Well, I used to be one of those
5 people, and I think most lawyers did have to have
6 that kind of an assignment, so that's the snippet
7 we're asking for right now.

8 Why can't they just tell us, and I'm willing
9 to back off because if Mr. Ingber comes up and says
10 you know what, it is a huge, huge half, and he tell
11 us this is some compelling reason about why that's
12 going to take too much time, then just represent to
13 us that either there are no entries on here for the
14 protection of the certificate holders, or there are
15 some, and if there are some, then we would say we'll
16 start moving forward arguing the fiduciary exception
17 issue.

18 That's the point number one.

19 MR. INGBER: Can I respond to that, your
20 Honor?

21 THE COURT: You want to do point number 2
22 first?

23 MR. REILLY: I'd rather.

24 THE COURT: Okay.

25 MR. REILLY: If I get a choice, sure.

26 All right, so point number two then becomes

Proceedings

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2 as we look at --

3 Excuse me just a second.

4 (Brief pause.)

5 MR. REILLY: You know what, your Honor, let's
6 do point number one. That will move along quicker.
7 We won't get mixed up

8 THE COURT: Okay.

9 MR. INGBER: Good afternoon, your Honor.

10 First let me start with a mea culpa. I am
11 one of the lawyers who sent you a letter within the
12 last 24 hours, and I did so because I received Mr.
13 Reilly's letter yesterday afternoon within 24 hours
14 of this conference, and it really required a
15 response, and so I agree wholeheartedly with your
16 Honor that we should get letters to the Court
17 24 hours, at least 24 hours before, before a
18 conference, and I would also ask for the courtesy
19 from the objector's counsel from the Steering
20 Committee that they will actually give us sufficient
21 time to get letters like that to your Honor, your
22 Honor, within that 24-hour period, or outside of that
23 24-hour period to give your Honor the chance to
24 actually consider the issues.

25 What Mr. Reilly raised yesterday were two new
26 issues, and they all relate to the question of

Proceedings

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2 whether all of the trustees' communications with its
3 counsel, in-house or outside counsel, should be
4 produced under the theory that they are subject to
5 the fiduciary exception.

6 Your Honor asked at the beginning of this
7 conference whether we're just going to disregard
8 privilege, and we think the answer in this case is
9 no. There is an attorney/client privilege that
10 applies to communications between the trustee and in
11 its in-house or outside counsel. We think that this
12 be would be an extraordinary invasion of that
13 privilege.

14 Now, what's going on here is that Mr. Reilly,
15 and the Steering Committee and the objectors filed a
16 motion to compel seeking all of the privilege
17 documents, which is asserted against the
18 Institutional Investors. It was asserted against the
19 trustee. We were prepared to argue that motion the
20 first conference we had before your Honor after the
21 motion to compel was filed.

22 It didn't come up at that time.

23 We then had a conference on May 8th. We were
24 prepared to argue the motion on that date. What Mr.
25 Reilly said was that we're going to back off of that
26 motion, we're going to rethink whether we're going to

Proceedings

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2 actually pursue it. I don't know why we stood ready
3 that date to argue the motion. We feel very
4 confident that we're going to prevail on that motion.

5 THE COURT: If he's going to back off on it,
6 I don't need to listen to argument on it, so --

7 MR. INGBER: I agree.

8 What he said was, you're going to be
9 supplementing the privilege log, a privilege log that
10 we had produced one all the way back in January.
11 We're going to supplement with additional documents.
12 Soon after the May 8th conference, he said I'm going
13 to take a look at that privilege log, and then we're
14 going to decide whether we're going abandon this
15 motion that we already filed.

16 What he's asking for now is discovery to
17 determine whether he should file his motion.

18 Now, think about what's involved with this
19 request.

20 We have produced a privilege log. There are
21 six hundred some odd entries on a privilege log.
22 What he is asking, what the Steering Committee is
23 asking is that the trustee make a distinction between
24 communications that were made on behalf of the
25 certificate holders and communications that were made
26 on behalf of trustees.

Proceedings

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2 What that will involve, your Honor, okay,
3 it's not just the burden issue. It is a burden issue
4 and it is a relevance issue.

5 On the burden issue, what it will involve is
6 going through each of these hundreds of documents,
7 and there may well be different threads of
8 communications within each document, and sitting down
9 with the author of the document, the recipients of
10 the communication, and saying you know what, a
11 year-and-a-half ago when you sent this communication,
12 when you sought legal advice, were you dispensed
13 legal advice?

14 What were you thinking?

15 Were you thinking that you were communicating
16 on behalf of certificate holders?

17 Did you think you were communicating on
18 behalf of an issue, on behalf of a trustee on issues
19 that were relevant to the trustee?

20 Now the response might be well, why are we
21 having this discussion? We're not a fiduciary to
22 begin with.

23 I think that would be the right response.

24 The second question might be well, what does
25 this have to do with?

26 What information are they looking for?

Proceedings

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2 If the information they're looking for is
3 relevant to the settlement, look at the settlement
4 agreement itself, and if you don't want to look at
5 the settlement agreement itself, how about those
6 thousands of pages of settlement communications that
7 the trustee just agreed to produce, so why are we
8 going through this exercise of having to go back a
9 year-and-a-half and distinguish between
10 communications that might have been for the benefit
11 of certificate holders, or communications that have
12 might have been for the benefit of the trustees?

13 If I were able to get an answer to that
14 question, if I could get an answer to that question,
15 if it was actually possible to draw the distinction
16 that Mr. Reilly is asking us to draw, that answer is
17 privileged, okay.

18 What he is asking is, what is the purpose of
19 the communication? What is the purpose of that
20 privileged communication?

21 That answer is privileged.

22 I don't want to mention in camera review, but
23 I could go in your Honor's chambers in camera and
24 tell you what I think the answer would be in one
25 sentence, or two sentences, but we don't need to do
26 that because it's completely irrelevant. It's

Proceedings

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2 putting the cart before the horse.

3 There are elements to the fiduciary exception
4 that they can't meet.

5 One of those elements is that the trustee is
6 a fiduciary. We have argued in this case and others
7 that we are not a fiduciary before or after an event
8 of default. We're prepared to argue that point
9 whenever they make up their mind about whether to
10 pursue the motion.

11 Before we get to the question of whether this
12 is a communication that in theory could fall within
13 the fiduciary exception because it's made on behalf
14 of the certificate holders, the Court needs to ask
15 itself is there good cause to invade the
16 attorney/client privilege?

17 That is an extraordinary step.

18 Bank of New York Mellon was communicating
19 with its outside counsel never thinking for a moment
20 that its communications would be subject to discovery
21 in this proceeding. They were cloaked with
22 attorney/client privilege, and so is there good cause
23 to allow for this extraordinary invasion of the
24 privilege, and there's factors that the Court would
25 look at.

26 Number one, is it the only source of

Proceedings

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2 information? Of course, it's not the only source for
3 information. There's a settlement agreement, and
4 now, your Honor, or in a week, it won't be just the
5 settlement agreement. There will be thousands of
6 pages of settlement communications. There's no
7 reason to invade the privilege. They have not even
8 articulated why it's necessary to get this
9 information.

10 What are they looking for here? This is, in
11 our view, your Honor, a complete waste of time. It's
12 making work for the trustee. They're seeking
13 discovery, so that they can decide whether to seek
14 more discovery. It's completely improper. It is an
15 enormous amount of work for the trustee to undertake,
16 and it's completely irrelevant.

17 Now on the question of whether a distinction
18 could actually be made, I'm not sure whether it can,
19 and let me give you an example. If the purpose of a
20 communication was to ensure that the trustee was
21 complying with its duties and its obligations under a
22 PSA, or was acting consistently with its right under
23 the PSA in a negotiation in the evaluation of the
24 settlement, a settlement that when it was entered
25 into would serve the interest of the certificate
26 holders, is that a communication that's for the

Proceedings

1
2 benefit of the trustee?

3 Is that a communication that's for the
4 benefit of the certificate holders?

5 Is it neither?

6 Is it something in between?

7 Is it both?

8 These are not distinctions that can easily be
9 drawn, so that is one example. That is one
10 hypothetical that we could confront, but the bottom
11 line is, that it's not relevant. It's not relevant
12 to the request of whether the fiduciary exception
13 applies until we get past these two threshold issues;

14 Were we a fiduciary? The answer is no.

15 And is there good cause to allow for this
16 extraordinary invasion of the privilege? And the
17 answer to that question is no.

18 I don't know why Mr. Reilly, and the Steering
19 Committee, and the objectors cannot make up their
20 minds about whether to file this motion. They filed
21 a motion without having this information. They made
22 representations in connection with that motion. They
23 made assumptions presumably about what these
24 communications entail. They are free to assume that
25 all of these communications, they can assume that all
26 of these communications were on behalf of the

Proceedings

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2 certificate holders. Let them make that assumption.
3 Let them assume that all of the communications were
4 on behalf of certificate holders and move forward
5 with the motion. They don't need an answer from us.
6 They can make up their minds.

7 What they're trying to do is extract more
8 information before they decide whether to abandon
9 this motion.

10 We're ready to argue it whenever your Honor
11 tells us it's appropriate. We're ready to argue
12 whenever the Steering Committee makes up its mind
13 that it wants to pursue it, and so, your Honor, we
14 ask that -- and look, this is not something that
15 needs to be decided today. We do think it is a
16 straight forward issue.

17 What does need to be decided, though, is
18 whether the Steering Committee, on behalf of the
19 objectors, wants to pursue this motion for our
20 attorney/client privilege communications. They don't
21 need this information to make that call.

22 We ask they make the call shortly, that we
23 set a deadline for making that call, that your Honor
24 not direct the trustee to go through this exercise
25 that we believe would be a monumental waste of time.

26 Thank you.

Proceedings

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THE COURT: Do you want to respond to him?

MR. REILLY: I do.

I don't understand it. This trustee has obligations to its certificate holders.

THE COURT: Stop. You're saying they have a fiduciary duty, and isn't that what we really have to argue, maybe not this minute, but they're claiming they're not a fiduciary.

MR. REILLY: There's a difference between being a fiduciary and having fiduciary duties, all right.

Here's where the fight is, so you know.

In the Federal Court this came up; are they an ordinary trustee? Are they an indentured trustee?

They're going to say they're an indentured trustee. They're bound only by the Pooling and Servicing Committee. They're going to argue that they are bound only by that.

Mr. Ingber actually under heavy questioning from Judge Pauley conceded no, actually, the trustee has responsibilities that are included within the New York Common Law, and the two duties that I don't think they will ever argue they don't have is the duty of loyalty to certificate holders, and the duty to avoid a conflict of interest to certificate

Proceedings

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2 holders, or with certificate holders. Those issues
3 are at the heart of our questions.

4 Did they act in a way that was to the benefit
5 of the trustee, and to the detriment of the other
6 certificate holders?

7 We have addressed this a little bit in the
8 past because we believe that they got indemnification
9 rights they weren't entitled to. They got a release
10 of their liability for settlement agreement, for
11 settlement contract that we don't think they're
12 entitled to.

13 We think they may have gotten other benefits
14 they weren't entitled to all to the detriment of the
15 certified holders.

16 THE COURT: Doesn't that go to the argument
17 that we should really deal, in the first instance,
18 with what exactly it is, what kind of fiduciary
19 relationship there is, and then whether or not you're
20 entitled to any documents under that fiduciary
21 relationship?

22 He's saying it doesn't matter what we did
23 this for, you're not entitled to this.

24 MR. REILLY: Right.

25 THE COURT: Shouldn't I have that argument
26 first before we deal with your issues?

Proceedings

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2 MR. REILLY: I don't think so, and here's why,
3 your Honor.

4 Let's assume for the moment that there are no
5 documents in there that fit within the fiduciary
6 exception.

7 Now, this a classic example of another
8 situation in this case where the cart's before the
9 horse, right.

10 THE COURT: Sounds like this whole case is
11 the cart before the horse.

12 MR. REILLY: That's right.

13 If we go through the exercises Mr. Ingber
14 suggests, you can make these rulings. You can rule
15 in our favor completely. You can say you know what,
16 they do have fiduciary obligations. They do have
17 documents, that if they exist, you have to turn over,
18 and then he can come in and say no, we did the look
19 and there's nothing in here like that.

20 THE COURT: Okay, I think that is the way to
21 do it. I don't think he should look for all these,
22 say this is this, is that it? Okay, now let's see if
23 it even matters. I mean, I think I really have to do
24 the fiduciary motion first, make that determination,
25 because otherwise he really doesn't have to look
26 through all those documents.

Proceedings

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2 MR. REILLY: Okay, that's fine. If that's
3 what you want to do, we want to get the discovery
4 going. We want to present that to you with facts,
5 right.

6 I don't think this is a pure question of law.
7 We need to know what were they doing, what is their
8 conduct, what is their activity.

9 And it goes to my point number two.

10 THE COURT: Somewhere there were two motions
11 that I have here now that I have not decided. One
12 of them is history, so that's certainly not the
13 motion.

14 MR. REILLY: Right.

15 THE COURT: There's another motion to
16 compel, and that motion deals with this fiduciary
17 situation.

18 MR. REILLY: Yeah, I've got my second point,
19 or you think it's a totally distinct motion?

20 THE COURT: I'm asking you, are one of these
21 two motions here that deal with it because I have not
22 looked at them in the past week?

23 MR. INGBER: Your Honor, there's not an
24 outstanding motion from the trustee. There's a
25 motion to compel that was filed by the objectors, and
26 one issue in that motion to compel is whether the

Proceedings

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2 trustee is required to produce documents protected by
3 the attorney/client privilege under the fiduciary
4 exception. That is the issue.

5 The issue that Mr. Reilly is about to raise
6 was actually never briefed in the motion to compel.

7 THE COURT: You mean, his second point?

8 MR. INGBER: His second.

9 It was raised for the first time yesterday,
10 and it's another request Mr. Reilly for discovery.

11 MR. REILLY: Can I make this argument, your
12 Honor?

13 MR. INGBER: For discovery, for discovery to
14 allow him to decide whether to abandon the motion he
15 already filed.

16 THE COURT: Look, whatever makes sense to go
17 first is going to go first. I mean, I don't care.
18 There is a motion by you, it's a standard of review
19 motion.

20 MR. INGBER: Yes, yes. You are correct, your
21 Honor. There is a standard of review motion.

22 MR. REILLY: There is a standard of review.

23 THE COURT: I don't know if that gets us too
24 far.

25 THE COURT: Let me listen to you.

26 MR. REILLY: Let me make one comment.

Proceedings

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2 Suddenly, over the last 2 or 3 weeks, for
3 whatever reason this side started calling this side
4 objectors, all right. I can tell you the back story,
5 but it doesn't matter, but it matters to us because
6 it's infighting some kind of stuff that eventually --

7 THE COURT: What should they call you?

8 MR. REILLY: Intervenors.

9 They're doing it for a reason, even by the
10 schedule order that we submitted, we agree that there
11 would be a final objection deadline. Now, what this
12 Court did was when you issued an order, you said, you
13 know, if you're going to get in, you're going to have
14 a file a notice of intent to object.

15 THE COURT: That was last June.

16 MR. REILLY: Yeah, months ago. You made it
17 clear, you were just a place holder there. You want
18 more information, that's what it was. It's like a
19 little thing that bugs me that I can't not mention,
20 so if that's what he wants to call them, I just want
21 you to think when he's calling them, we don't agree,
22 all right.

23 MISS PATRICK: Your Honor, just to be clear,
24 Mr. Reilly's pleading --

25 THE COURT: Everybody is so sensitive.

26 MR. REILLY: Here we go. See, I told you. I

Proceedings

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told you.

MISS PATRICK: Mr. Reilly's pleading says AIG objects. I didn't make it up.

THE COURT. All right, whatever. I mean, I feel like we're in second grade.

Don't call him names.

MR. REILLY: I don't want to be a part of this any more, okay.

THE COURT: I'll call you Mr. Reilly. That has to be right.

Mr. Reilly, what is your second point because I have to close the courtroom at 4:30?

MR. REILLY: All right, let me address the second point.

As to the question of whether or not there were fiduciary duties, whether they believe there are fiduciary duties, when we were in Federal Court, we filed a request for production 23, 24, and 25, and basically, what we said to the trustee was, give us any documents you have where you talked about nonprivileged documents. This is not a privilege issue; nonprivileged documents where you talked about what you are obligations were as a trustee to these 530 trusts, and here's how it works.

Trust companies have trust departments, all

Proceedings

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2 right. Bank of New York Mellon when they bring in
3 new business I believe -- they can tell us if this
4 isn't true -- I believe they have a new business
5 form, and they look at it, and they do checks, or
6 somebody analyzing it, and says what are we doing?
7 What are we accepting? What kind of business is it?
8 The forms I seen in another case, another bank had a
9 box fiduciary duty or not, and they checked it, and
10 then they had comments. A trust department has a
11 trust committee. They talk about how the trusts are
12 performing. They talk about issues that relate to
13 their obligations, so these requests are to start the
14 discovery process, and what did you say, Bank of New
15 York Mellon, about whether you had fiduciary
16 responsibilities or not? That's what we're asking
17 for. They exist, all right. Maybe they say
18 something we don't like, but they exist. In fact,
19 they have in their ordinary course of business
20 nonprivileged information that says you know what,
21 get a fiduciary duties, or quasi fiduciary duties,
22 or, you know, somebody can argue it, maybe we do. If
23 their trust committee or anybody else has that,
24 that's what we asked for.

25 We think that's important for us to move
26 forward.

Proceedings

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THE COURT: Thank you.

You just raised that in this case yesterday.

MR. REILLY: No. I sent a letter and sent an e-mail May 31st to Mr. Ingber telling him we were going to bring this issue up.

THE COURT: You told me yesterday.

MR. REILLY: I told you yesterday, yes, you're right.

THE COURT: Okay.

MR. REILLY: I apologize for telling you yesterday now.

THE COURT: From now on you will tell me a couple of days earlier.

MR. REILLY: I'll tell you at least 24 hours ahead of time.

MR. INGBER: Make it 48, so that we can get a letter in.

MR. REILLY: All right. If you can do the same, I'll do the same.

MR. INGBER: Why do we need these documents? The trustees' duties in every case addressing this question says the same thing. The trustees duties are defined. You have heard before before from me, your Honor, the trustees' duties are defined by the from contract. They're defined by the PSA's. We

Proceedings

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2 don't need to go back to 2004 to find documents
3 concerning the trustees acceptance of its position as
4 trustee. We don't need to dig up minutes of every
5 single trust committee meeting to see whether the
6 trustee used the word fiduciary in any of its
7 documents. We don't need to dig through dozens and
8 dozens of employees' e-mails to see whether the word
9 fiduciary shows up in those e-mails. We know that
10 we're not a fiduciary.

11 THE COURT: But, okay.

12 MR. INGBER: Because the PSA says so.

13 THE COURT: This is an argument you had
14 before Judge Pauley.

15 MR. INGBER: No, no, no, not at all.

16 THE COURT: Didn't he ask you?

17 MR. REILLY: Mr. Ingber was --

18 THE COURT: Well, maybe Judge Pauley asked
19 you questions about it.

20 MR. REILLY: He was asking about aren't you a
21 fiduciary? This issue was not addressed before Judge
22 Pauley.

23 THE COURT: Was there any common law
24 responsibility?

25 MR. INGBER: No. The duties of a trustee are
26 defined by the PSA's, okay.

Proceedings

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2 First of all, on the question of whether we
3 are a fiduciary, I can cite you cases I have in other
4 matters, and if we have to brief this issue, I
5 certainly will.

6 We have the statements that the Steering
7 Committee made to the Second Circuit. Mr. Cyrulnik
8 made this statement to the Second Circuit in this
9 case on the question of whether the case should be
10 remanded to this Court, and he said this trustee is
11 it an indentured trustee, not a fiduciary trustee.
12 They have already represented this to the Second
13 Circuit that their view is that we are not a
14 fiduciary trustee.

15 THE COURT: But, that's not the end of the
16 question.

17 MR. INGBER: Well, if the question is are we a
18 fiduciary, okay. We can look to the statements from
19 the objectors who are now saying that we're not a
20 fiduciary. It's a concession on their part. We can
21 look to the case law, and there's cases from the
22 Court of Appeals. There's cases from this Court.
23 There's cases from other New York Courts. There are
24 cases in the Federal Courts addressing the question
25 of whether a trust is a fiduciary. There are dozens
26 of cases saying the trustee is not a fiduciary.

Proceedings

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2 There are treatises that say that a securitization
3 trustee is not a fiduciary, and all of these cases
4 say that the trustees' duties are defined by the
5 contract, and I'm reading from 8 --

6 THE COURT: So, you're saying that his point
7 that if you checked off on a form when the business
8 came in fiduciary, that would not be something that
9 should be looked at to determine whether or not you
10 are a fiduciary?

11 MR. INGBER: That's correct, because the
12 contracts are unambiguous on the question of whether
13 we are a fiduciary, or not a fiduciary. What Mr.--
14 what the Steering Committee is seeking are documents,
15 a lot of documents that's requiring a lot of work, so
16 that they could have bolstered their argument that we
17 are a fiduciary, so that they can bolster their
18 argument that the fiduciary exception applies, and
19 our privileged communications should be produced, but
20 they have not explained because they can't why that's
21 relevant to the question of whether the trustee acted
22 within the bounds of its reasonable discretion in
23 entering into settlement. Whether the trustee --
24 whether Mr. Reilly and the Steering Committee think
25 that the trustee was a fiduciary or not a fiduciary
26 doesn't change anything. The trustee exercises its

Proceedings

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2 discretion. It has the right, not the duty, it had
3 the right under the contract to enter into this
4 settlement. It exercised that right, and it took
5 into account a number of different factors. It took
6 into account the value of the repurchase claims. It
7 took into account whether Countrywide at the end of a
8 five-year, or seven-year, or 10-year litigation,
9 whether Countrywide would be able to pay a judgment,
10 whether it would be able to recover anything, and
11 this gets actually to the loan file issue. If we do
12 a statistically significant sample and Mr. Cyrulnik
13 comes up to your Honor and says you know what, the
14 number, your Honor, should be 12 billion, or 15
15 billion, not eight and-a-half billion, our response
16 would be great, good luck recovering it because we
17 have an expert report that values Countrywide's
18 assets at 4.8 billion. There are challenges,
19 significant challenges trying to recover from Bank of
20 America, trying to recover successor liabilities.

21 So getting back to the question of whether we
22 are a fiduciary and whether these documents are
23 necessary to allow the Steering Committee to bolster
24 its argument that we are fiduciary, and bolster its
25 case for the fiduciary exception to apply, this,
26 again, is work, and the issue can be resolved.

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THE COURT: It's for your summer associates.

MR. INGBER: The issue can be resolved by --
Who are here, your Honor.

THE COURT: So am I.

MR. INGBER: They are very happy to hear that
they might have to go and do this.

But, whether we are fiduciary is an analysis
that can be made by reference to, first and foremost,
the PSA to the cases that say that we are not a
fiduciary. We don't need to go through this
exercise, and the question -- and this is the really
critical point, your Honor -- the question of whether
we were a fiduciary or not a fiduciary does not go to
the heart of the matter. It goes to a discovery
issue. It doesn't go to the heart of the matter,
which is whether we exercised our discretion within
the bounds of reasonableness, and so --

THE COURT: So my law clerk reminds me, we
have another case.

Did you make some of the same argument?

MR. INGBER: In fact, we did, your Honor.
Yes, there was another case brought by the Knights of
Columbus, and one threshold issue in that case is
that whether the trustee had a fiduciary duty, and in
that case the Knights of Columbus was represented by

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2 Tal Franklin, okay. He argued the motion on behalf
3 of the Knights of Columbus.

4 This is what Tal Franklin has to say about
5 whether the trustee is a fiduciary.

6 The trustee in a securitization and
7 indentured context, however, the trustee may not owe
8 a fiduciary duty. Courts have held that contractual
9 language may negate the fiduciary duty. Courts have
10 rejected breach of fiduciary claims against the trust
11 as being redundant of the claims for breach of
12 indenture.

13 The duties are defined by the contract.

14 Now the issue before Judge Pauley was whether
15 there can be implied duties, and there are two
16 recognized implied duties. We have to act with a
17 duty of care, and we have to avoid conflicts of
18 interest, but several cases, your Honor, have said
19 that those implied duties are not fiduciary duties.
20 AG Capital Funding Partner, the Court of Appeals in
21 2008, maybe your Honor is familiar with that case;
22 implied duties --

23 THE COURT: I was supposed to try that case,
24 but it settled. Yeah, I know that case.

25 MR. INGBER: Implied duties are not fiduciary
26 duties, just as Sterling Federal Bank, it's the case

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2 in the Northern District of Illinois in 2008; again,
3 implied duties are not fiduciary duties, so
4 there's --

5 THE COURT: Well, okay, finish it up.

6 MR. INGBER: There's really, in our view,
7 your Honor, no issue as to whether we were a
8 fiduciary or not. We were not a fiduciary, and
9 ultimately, it doesn't matter on the question of
10 whether the trustee exercised its reasonable
11 discretion in entering into this settlement. The
12 trustee exercised a right, okay. The question is not
13 whether we had a fiduciary duty to enter into this
14 settlement, or not enter into this settlement. We
15 exercised the right that we had under the contracts,
16 and the question is whether we exercised that right
17 reasonably and within the bounds of our reasonable
18 discretion.

19 THE COURT: Unfortunately, we are still
20 under the restriction of closing the courtroom by
21 4:30.

22 But, in any event, I think I need to hear a
23 little bit more on this issue. I mean, I'm not sure
24 it's briefed quite to where you are right now. I
25 think it's briefed as part of something else, and it
26 will be sort of helpful if you just focused on this

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2 issue.

3 I'm not going to give the discovery of those
4 documents at this point. I'm not sure you're
5 entitled to it, but you may be at some point, but I
6 need to hear a little bit more. I mean, he's reading
7 out partially the brief from the other case that we
8 remembered sort of that we had a month or two months
9 ago that I have not decided. I think that would be
10 helpful. I don't know how far -- again, I'm not sure
11 that all of this detail that you want from him makes
12 any sense. I really think we need to set a date to
13 deal with this fiduciary issue, which is an
14 underlying issue that was an over there in Federal
15 Court that didn't go away over here. I think we just
16 have to deal with it. I don't know if you feel you
17 need it submit some additional papers in addition to
18 the one you argued today, or it needs to be something
19 clean. I'm not sure. I'm going to sort of you let
20 you decide that quickly, and tell me how you're going
21 to do it.

22 We can give you a date.

23 MR. INGBER: May I can make a suggestion, your
24 Honor.

25 I think the issue was forwarded to me in the
26 remarks by response to the motion to compel that the

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2 Steering Committee filed. We can, if it's easier, we
3 could take that out of the brief that addressed many
4 other issues, as well, and submit those papers, and
5 if we need to supplement it, we will as a separate
6 submission on this issue, and then we're happy to
7 have our argument, but as you know, your Honor, our
8 view is they should either pursue the motion, or not.
9 If they're going to do, let's argue.

10 THE COURT: I don't care. I think I need to
11 hear something on this because I think this issue is
12 overriding an awful lot of other discovery issues in
13 this case. I don't really see how you get around it,
14 so --

15 MR. REILLY: Can we think about that, your
16 Honor?

17 THE COURT: Why don't you do that, and talk
18 about it, and you can let me know what you are
19 thinking.

20 I renew my suggestion that you might want to
21 think about getting someone to help you with some of
22 these discovery issues, but let me give you another
23 date to come back as a control date. Last time we
24 made a switch, but I think it's good to have
25 something in the books, and I would want to hear this
26 fiduciary issue. However, you decide it will be

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2 easiest way to present it to us. If I could read
3 pages this to this in the brief, and you need to add
4 anything else, okay, then I'll get it. If you want
5 to do something separate, let me know.

6 Give me an idea when you guys are available.

7 MR. REILLY: Does the week of July 9th work,
8 your Honor?

9 MISS PATRICK: Can we do it sooner?

10 THE COURT: No.

11 MISS PATRICK: Okay.

12 THE COURT: That's a tough week for us.

13 MR. REILLY: Okay.

14 MISS PATRICK: What works for you?

15 MR. REILLY: July 18th, 19th?

16 THE COURT: What about the 17th, does that
17 work? It's a Tuesday.

18 MR. REILLY: That's fine.

19 MISS PATRICK: That's fine, the 17th.

20 THE COURT: Off the record.

21 (Whereupon, a discussion was held off the
22 record.)

23 (Whereupon, proceedings adjourned to July
24 17th, 2012.)

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Certified to be a true and accurate transcription of the minutes taken in the above-captioned matter.

Gloria Ann Brandon,
Senior Court Reporter