

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK CIVIL TERM PART 60

-----X

In the Matter of the Application of,

US BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK
MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY,
NA, WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW
DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO
BANK, NATIONAL ASSOCIATION, HSBC BANK USA, NA, and
DEUTSCHE BANK NATIONAL TRUST (as Trustees under
Various Pooling and Servicing Agreements and
Indenture Trustees under various Indentures),
AEGON USA Investment Management, LLC (Intervenor),
BAYERISCHE LANDESBANK (Intervenor), Blackrock
Financial Management, Inc., (Intervenor), CASCADE
INVESTMENT, LLC, (Intervenor), the Federal Home
Loan Bank of Atlanta (Intervenor), The Federal Home
Mortgage Corporation (Freddie Mac) (Intervenor), the
Federal National Mortgage Association (Fannie
Mae) (Intervenor), GOLDMAN SACHS ASSET MANAGEMENT,
LP, (Intervenor), VOYA INVESTMENT MANAGEMENT, LLC,
(F/k/a ING Investment) (Intervenor), INVESCO ADVISORS,
INC., (Intervenor), Kore Advisors, LP, (Intervenor),
LANDESBANK BADEN-WURTTENBERG, (Intervenor),
METROPOLITAN LIFE INSURANCE COMPANY (Intervenor),
PACIFIC INVESTMENT MANAGEMENT COMPANY, LLC,
(Intervenor), SEALINK FUNDING LIMITED (Intervenor),
TEACHERS INSURANCE and ANNUITY ASSOCIATION of AMERICA,
(Intervenor), The Prudential Insurance Company of
America, (Intervenor), The TCW Group, Inc.
(Intervenor), Thrivent Financial for Lutherans
(Intervenor), and WESTERN ASSET MANAGEMENT COMPANY
(Intervenor),

Petitioners,

- against -

TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO
2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD.,
(Intervenors), QVT FUND V LP, QVT FUND IV LP,
QUINTESSENCE FUND, LP, QVT FINANCIAL LP,
(Intervenors), AMBAC ASSURANCE CORPORATION,

CONTINUED ON NEXT PAGE...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

And the SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION
(Intervenors), and W&L INVESTMENTS, LLC
(Intervenor),

Respondents,

For an order, pursuant to CPLR 7701, seeking judicial
instruction.

-----X
INDEX NUMBER 652382/14

60 Centre Street
New York, New York
January 6, 2016

B E F O R E:

HONORABLE MARCY S. FRIEDMAN,
Supreme Court Justice.

A P P E A R A N C E S:

FOR THE PETITIONERS:
US BANK ASSOCIATION, THE BANK of NEW YORK MELLON, THE
BANK OF NEW YORK MELLON TRUST COMPANY, NA, WILMINGTON
TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY
OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBS
BANK USA, NS, DEUTSCHE BANK NATIONAL TRUST COMPANY BY:
KIRSTEN ROSE VOGEL, JOSEPH BRUSETT SCONYERS, ROBERT C.
MICHELETTO, NIDHI YADAVA, CHRISTOPHER J. HOUP, HARMAN
DOUGLAS RUSSELL, MATTHEW D. INGBER, MICHAEL E. JOHNSON,
CHRISTINA SPILLER, JAMES MATTHEW TOURANGEAU, WILLIAM M.
MUNNO, DALE C. CHRISTENSEN, THOMAS R. HOOPER, MICHAEL
KRAUSS, JEAN MARIE L. ATAMAIN, JAMES ANCONE, HOAH LIBEN,
MATTHEW V. WARGIN, LAUREN AMBER JACOBSON, IAN JOSEPH
ZACK, MICHAEL S. KRAUT, KURT W. RADEMACHER.

AEGON USA INVESTMENT MANAGEMENT, LLC (Intervenor),
BAYERISCHE LANDESBANK (Intervenor), BLACKROCK FINANCIAL
MANAGEMENT, INC. (Intervenor), CASCADE INVESTMENT, LLC,
(Intervenor), THE FEDERAL HOME LOAN BANK OF ATLANTA
(Intervenor), THE FEDERAL HOME MORTGAGE CORPORATION
(Intervenor), THE FEDERAL HOME LOAN MORTGAGE CORPORATION,
FREDDIE MAC (Intervenor), THE FEDERAL NATIONAL MORTGAGE
ASSOCIATION, FANNIE MAE (Intervenor), GOLDMAN SACHS ASSET
MANAGEMENT LP (Intervenor), VOYA INVESTMENT MANAGEMENT
LLC (f/k/a) ING INVESTMENT LLC, (Intervenor), INVESCO
ADVISERS, INC., (Intervenor), KORE ADVISORS, LP,
(Intervenor), LANDESBANK BADEN-WURTTENBERG (Intervenor),

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

METROPOLITAN LIFE INSURANCE COMPANY (Intervenor), PACIFIC INVESTMENT MANAGEMENT COMPANY, LLC (Intervenor), SEALINK FUNDING LIMITED (Intervenor), TEACHES INSURANCE and ANNUITY ASSOCIATION OF AMERICA (Intervenor), THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (Intervenor), THE TCW GROUP, INC., (Intervenor), THRIVENT FINANCIAL FOR LUTHERANS (Intervenor), WESTERN ASSET MANAGEMENT COMPANY (Intervenor)

FOR THE RESPONDENTS:

FEDERAL HOME LOAN BANK of BOSTON, (Intervenor Respondent), TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD. BY DAVID KO, DEREK W. LESTER, JOHN G. MOON, AMANDA F. PARSELS, CHARLES R. JACOB.

QVT FUND V LP, QVT FUND IV LP, QUINTESSENTIAL FUND, LP, QVT FINANCIAL LP BY JAYANT NIRAJ PAREKH.

W&L INVESTMENTS BY MICHAEL A. ROLLIN, MICHAEL C. LEDLEY, DAVID S. PREMINGER, DONALD W. HAWTHORNE, MAGDALENA HALE SPENCER.

JP MORGAN CHASE & CO. BY DARRELL SCOTT CAFASSO, ROBERT A. SACHS.

AEGON USA INVESTMENT MANAGEMENT, LLC, BAYERISCHE LANDESBANK, BLACKROCK FINANCIAL MANAGEMENT, INC., CASCADE INVESTMENT, LLC, THE FEDERAL HOME LOAN BANK OF ATLANTA, et al, BY WARNER E. KENNETH.

Gloria Ann Brandon,
Senior Court Reporter.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

THE COURT: On the record.

Good morning, and Happy New Year to everyone.

May I have the appearances of counsel in the well starting with the trustees?

MR. INGBER: Good morning, your Honor.

Matthew Ingber, Meyer Brown, on behalf of Bank of New York Mellon.

Mr. SCHNELL: Good morning, your Honor.

Robert Schnell from Faegre, Baker, Daniels on behalf of Wells Fargo.

MR. SACHS: Robert Sacks from Sullivan & Cromwell on behalf of JP Morgan.

MISS PATRICK: Good morning, your Honor.

Kathy Patrick, Gibbs & Bruns, for the Institutional Investors, the Petitioners.

MR. GORDON: Good morning.

Harold Gordon from Jones Day firm for U.S. Bank.

MR. WOLLMUTH: Good morning, your Honor.

Dave Wollmuth from Wollmuth, Maher & Deutsch for Ambac.

MR. LEDLEY: Good morning, your Honor.

Michael Ledley, also from Wollmuth, Maher for QVT Fund.

MR. ROLLIN: Good morning, your Honor.

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

Michael Rollin, Rollin, Brown & Fisher for
W&L Investments.

MR. JACOB: Good morning, your Honor.

Charles Jacob from Miller Wrubel for Triaxx.

THE COURT: Thank you.

And we have a sheet with the names of the
other counsel who are present. I assume I am going
to be hearing almost exclusively from counsel who are
seated at the table, but if any of the other counsel
wishes to be heard on any issue, you may let me know.

Based on my review of the papers submitted by
the parties before this appearance, I have identified
four subject matter areas to be addressed at today's
pre-trial conference.

The first is motions in limine;

The second, QVT's summary judgment motion;

The third, the issues discussed in the
parties December 7th and 10th letters;

And the fourth, what I will broadly term
housekeeping issues, including trial procedures.

I also expect to make time to hear other
issues that counsel wish to address today.

I'd like to begin with the motions in limine.

Based on the parties' January 4th, 2016,
letter submission, it is my understanding that the

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

trustees do not intend to file any motions in limine, and I'm going to use the term trustees to include Institutional Investors. If there's any point at which the interests diverge, or they have different positions, the parties will have the opportunity to call that to my attention.

In any event, my understanding is that the trustees do not intend to file any motions in limine, and Respondents Ambac, and QVT seek to file two.

The first concerns Mr. Fischel's opinions.

I see no need for a written motion regarding Mr. Fischel, and would prefer to hear oral argument on the motion to preclude at the hearing.

I will, however, give you my preliminary assessment of the motion regarding Mr. Fischel. After I've done so, I will hear from counsel before I make a final determination not to authorize a written motion in limine with respect to Mr. Fischel.

As a preliminary matter, I am not persuaded as to the merit of the first ground for preclusion; namely, that his opinion concerns the exercise of business judgment, a matter within the trustee's knowledge, and that expert testimony on the issue is, therefore, not appropriate.

The second asserted ground for preclusion is

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

that Mr. Fischel is not qualified to give opinions on certain subject matter areas, or that there is not a foundation for certain opinions. This is a ground that in my opinion must be decided at the hearing, on the foundation laid at the hearing for the various opinions.

A third issue raised by the objectors in connection with Mr. Fischel is that the trustees have wrongly designated him as a, "fact witness." The trustees, in fact, confirm in the January 4th letter that they are not offering the testimony of Mr. Fischel as a testifying expert witness, but rather are offering him to testify as to the facts concerning the work he performed in evaluating the merits of the settlement offer. I cannot fathom how Mr. Fischel could be viewed as anything, other than an expert witness, and indeed, the first amended petition refers to the trustee's reliance on expert advice, including the advice of Compass Lexecon with which Mr. Fischel is associated.

See, for example, the first amended petition paragraphs 354-55 and 75.

I understand that Mr. Fischel has already been deposed, but if he is going to testify to any opinions he reached, or gave to the trustees as to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

what to consider in evaluating this settlement, or whether to accept it, or as to any methodology he used, or analyses he performed, or accepted in connection with such opinions, then if the deposition of Mr. Fischel has not covered such topics, it should be reopened in order to avoid the risk of preclusion of his testimony.

That concludes my preliminary thinking on the motion in limine with respect to Mr. Fischel.

I'll hear briefly if counsel wish to address the matter, perhaps, 5 to 10 minutes per side.

MR. WOLLMUTH: Your Honor, I think it won't take that long.

The concept on this point of the motion in limine was to provide the Court some background law that we thought might be useful and we expected that the other side would present their view of the law. We did not expect that your Honor would necessarily rule on these things. As you said before, the foundation is laid at trial. We thought it just might be helpful for you to have what we have developed before you, and as to that, we are more than willing to make that submission, or we're more than willing to abide your Honor's advice to let it wait for trial in your preliminary assessment of the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

issue, so we'll be -- we would like to submit the law if your Honor would accept it, and if not, it's not a problem. We understand the position, and I'll address secondly in the other points that you may be interested in.

MR. INGBER: Thank you, your Honor.

It's really just one point, and it's with respect to the third prong of the motion in limine. It's the question of whether Professor Fischel is testifying in his capacity as a fact witness, or an expert witness. We recognize that there's a fine distinction that we're drawing.

What we are saying in our papers is that as a technical matter, Professor Fischel is appearing as a fact witness because he was part of the process that led to the trustee's acceptance of the settlement with respect to the substantial majority of these trusts. There's no question that he was hired because he has expertise. He is an expert. That is something that we will establish at this hearing, and in fact, one of the key questions in this case is whether --

THE COURT: What is the purpose of calling him as a fact witness?

MR. INGBER: What's the purpose?

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

THE COURT: Yes. What is to be gained by doing that as opposed to acknowledging that he is an expert witness? Is there some argument that's going to be made? Is there some discovery that has not been done because you have taken the position that he is a fact witness as opposed to an expert witness?

MR. INGBER: I don't think it matters. The reason this came up is because the objectors asked us pointedly is Professor Fischel appearing at trial as a fact witness, or an expert witness, and what we said was he's appearing as a fact witness, but will be giving testimony about the work that he did as an expert. We don't think there's a real distinction.

What we're going to have to establish at trial is that again --

THE COURT: I hope we're not going to have too many disputes like this because this -- if this is the case, if all the discovery has been done, and he's going to be offering the opinions of an expert, I really don't see what the issue is.

MR. INGBER: We agree with you. We think this motion in limine was unnecessary. We're going to have a trial. Professor Fischel is going to testify live. We are going to establish at trial that he was more than qualified to give the opinions that he

Proceedings

1
2 gave. He's going to testify about his background.
3 He's going to testify about the process which he was
4 engaged, and the work that he did -- with the work
5 that he did with the trustees, and the information
6 flow. He's going to testify about his opinions, and
7 the support for his opinions, so in effect, he is
8 giving expert testimony, but it's also factual in the
9 sense that your Honor needs to decide at the end of
10 the trial whether the trustees' process was
11 reasonable, and that -- and we believe, we
12 certainly believe it was in part because we hired an
13 expert whose qualified to give the opinions that he
14 gave, so we agree with your Honor;

15 It's not a distinction that is all that
16 relevant to this motion. We were asked the question
17 is he appearing as a fact witness, or an expert
18 witness, and the objectors wanted an answer from us.
19 That's the answer that we gave because we believe
20 that it's true. He's testifying a fact witness about
21 the process, about the opinions that he gave, and
22 there is clearly an expert component to that.

23 MR. SCHNELL: And, your Honor, just to answer
24 your question about discovery, he was deposed at some
25 length, all day, basically, and his deposition was
26 not foreshortened. They asked him all the questions

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

they wanted to ask. He answered them. His deposition was finished, so there hasn't been any preclusion of discovery around this issue.

THE COURT: Is there anything further on this subject?

MR. WOLLMUTH: Just one; I want to let your Honor know, we have no objection about the scope of discovery we have taken. The point is exactly the one your Honor touched, about the ability to develop the foundation for expert opinions being offered outside of what we consider this area to be, and we will address that at trial.

THE COURT: Let's turn to the second request by Ambac and QVT for a motion in limine.

Objectors seek to preclude the trustees from offering evidence of their reliance on counsel in evaluating and accepting the proposed settlement. The trustees respond that they do not intend to present evidence of reliance on advice of counsel at trial to show good faith. Rather, they intend to present evidence of the fact that the trustees' counsel was involved in the evaluation of the settlement, and "the facts that the trustees learned from their counsel." I do not see the need for a written motion in limine with respect to this issue,

Proceedings

1
2 but what I do think we may need here is an offer of
3 proof by the trustees of what evidence they intend to
4 present as to the facts that they learned from their
5 counsel, or what information they received from their
6 counsel. I think only if I see that offer of proof
7 can I then make an informed determination as to
8 whether the attorney/client privilege applies, or has
9 been waived, and once I see the offer of proof, I
10 will also want further briefing on the issue of
11 whether the privilege has been waived, and I will
12 want briefing under New York law. I continue to
13 find it interesting that the parties cite cases from
14 the Eastern District of Kentucky, which I'm sure is a
15 very fine Court, but we have an extremely well
16 developed body of New York Appellate law on privilege
17 issues, and that is the law that I would like to see.

18 I am also willing to see Federal cases,
19 particularly cases from the Second Circuit and the
20 Southern District, which are our own Appellate Court
21 tend to cite increasingly, but in the first instance,
22 I impress upon you the importance of giving me New
23 York law from the Appellate Court where it exists,
24 which it usually does.

25 Do counsel wish to be heard on this second
26 motion in limine?

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

MR. WOLLMUTH: Your Honor, we're more than fine with that procedure. It touches exactly what our concern was. It is unclear to us how the advice of counsel is being used. We note that the key lynch pin of Professor Fischel's opinion is that he assumes the trustees had no obligation whatsoever to do anything under any of the 300, plus governing agreements, unless they were directed to do so by a 25 percent holder that posted an indemnity. He does not state what the basis of that belief is. He disavows exercising his legal expertise, and has not disclosed what advice he may have received. We think that's important both for the value of his opinion, but also because it is in disagreement with the plain language of the governing agreements, so we think that the proffer of how they're using legal advice is important, and we are more than prepared to abide your Honor's proposed procedure.

MR. INGBER: I'm not sure how what Mr. Wollmuth just said bears on the question of whether testimony about the trustees' consulting counsel and having retained counsel throughout this process, I don't know how that bears on the question of whether that is a waiver of any sort of privilege.

We are happy to submit an offer of proof. We
Gloria Ann Brandon, Sr. Court Reporter

1 Proceedings

2 can get into this in a bit, but we also propose
3 submitting written direct examinations, which will
4 layout exactly how counsel was used here, what
5 factual information trustee witnesses learned from
6 counsel, and your Honor will know upon reading those
7 written directs whether we've waived any sort of
8 attorney/client privilege. We think with respect to
9 the case law that the Trialings case, which is a
10 First Department case cited by the objectors and
11 cited by us, is dispositive on this issue. There
12 was --

13 I'll just point to one, if I may, just one
14 excerpt from that opinion; the First Department in
15 the Trialings decision was analyzing deposition
16 testimony that one of the witnesses gave, and the
17 question asked to this witness was:

18 "What factors did you consider in approving
19 the settlement of the WMI action?"

20 THE COURT: Where are you, what page?

21 MR. INGBER: This is on page 68 of the
22 opinion.

23 The answer was: "I'm afraid that a
24 discussion of that analysis would involve discussion
25 of advice from attorneys," and there was a follow-up
26 question;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

"Did you rely on the advise of counsel in determining whether or not to approve, in determining whether to approve the settlement of the WMI action?

Answer: Yes."

And there was a question of whether that was a waiver, and the Court said no, that's not a waiver.

THE COURT: I read that, but I do not think this is an easy issue when a party can simply say that it relied on the advice of counsel. It may turn out to be an easy issue.

MR. INGBER: Sure.

THE COURT: I just haven't exhaustively reviewed the case law yet, and on the face of it, it does not seem to be an easy issue.

MR. INGBER: Sure, and we understand. I think, and I hope we made it in clear in our papers that we are not -- in this proceeding our witnesses are not going to be saying that they entered into this settlement because counsel told them to enter into this settlement. That is the testimony that I think the objectors are concerned about. We're not going to be -- you're not going to be hearing testimony along those lines, but I think you will be hearing testimony that counsel was retained, counsel was involved in this process, counsel was consulting

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

the trustees throughout this process, and that's the type of -- and counsel was relaying facts to the trustees about the process, so if counsel was having communications with experts --

THE COURT: What kind of facts?

MR. INGBER: So, I'll give you an example.

THE COURT: I think that is possibly critical.

MR. INGBER: Sure.

So, you will learn I believe through the written directs that there were periodic calls among the trustees and their counsel, and on those calls, there would be discussions about outside counsels' discussions with the experts, what information the experts wanted, what information they have received, what information is still outstanding.

That's factual information that counsel, because of their role in this process, was conveying to the trustees, so the trustees will be in a position where they know that there was a massive amount of information given to the experts at their request. That's factual. That was shared by counsel with the trustees, and in particular, the witnesses who will be testifying at trial either through written directs, or you know, in the objectors' case

Proceedings

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

in chief.

That's not a waiver of any privilege. That's purely factual information. This isn't legal advice. Counsel is relaying a fact, there was a discussion with the experts, this is the information the experts wanted. This is the information we got for them. This is the information that's still outstanding. These are the discussions we're having with JP Morgan about getting that information.

That's just one example, but that to me --

THE COURT: Excuse me, is this issue addressed in the Country-Wide Article 77?

MR. INGBER: I recall in the Country-Wide Article 77 arguing ad nauseam about the trial in this case, and how that applied, and how what the trustees were doing in that case was not putting counsels' advice at issue in demonstrating that, so I don't remember if there was a specific motion on this issue.

I do know there was plenty of argument about privilege issues that came up before trial. It certainly came up at trial, as well, and ultimately, I believe the Court ruled that the trustees were entitled to show that they acted in good faith in part by offering testimony that they were guided by

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

counsel throughout this process.

THE COURT: I certainly will want to see any motions or opinions in the Country-Wide case that addressed this issue.

MR. INGBER: I just don't remember specifically whether it was this issue. I know the question of whether in the proposed order by putting our good faith at issue, we were somehow waiving the attorney/client privilege. I know that that was addressed, and we can pull the papers on that, but that's related to this issue because we are putting our good faith at issue, but that doesn't mean that all attorney/client communications are subject to discovery. We're entitled to show that we acted reasonably by --

THE COURT: You will have further briefing by this issue, and we can discuss the timing for that at a different time after we have gotten through the substantive issues.

Does anyone on the Petitioners' side wanted to be heard on this second motion in limine before I hear again from the objectors?

I see that Mr. Wollmuth wants to weigh in.

MR. INGBER: I just have one question, and that is whether with respect to the offer of proof

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

it's okay for us -- assuming we are all on board with the idea of the written directs, for us to layout in the written directs the information that is at issue here. I think that would present to your Honor the question of whether we're putting any legal advice at issue.

THE COURT: I agree with you. That would obviate the need for an offer of proof.

MR. INGBER: Okay.

THE COURT: And if everyone is in agreement on written directs, then we can go from there and have the briefing after the written direct is exchanged, but let's go back for a moment again;

Does anyone else on the Petitioners' side want to be heard on the second motion in limine?

MR. SCHNELL: Nothing further, your Honor.

MR. SACKS: No, your Honor.

THE COURT: So, we'll hear then from Mr. Wollmuth.

MR. WOLLMUTH: I didn't want to be heard much, your Honor.

I think this issue was considered by Kapnick in the Country-Wide proceeding, and she ordered discovery into three otherwise privileged areas based on these issues, and as Mr. Ingber correctly said, we

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

can pull the papers and submit them to your Honor,
and we are fine. If we are going to proceed by
written direct, if that contains the proffer, we're
okay with that, and we'll address whether we're
proceeding that way I assume in a few minutes, or
whether it's a separate proffer as long as we have
some time to evaluate it and determine whether it
needs a motion, or whether no motion is required.

THE COURT: Before you respond, Mr. Ingber,
I know that there is a dispute about what was decided
in the Country-Wide case on the privilege issue. I
don't remember where I read it, but I know that I
read about a dispute, so I am not leaving this
courtroom today with any preconception about what was
or was not decided. That is something that the
parties will address with copies of the appropriate
papers if the issue was argued on paper, or copies of
briefs and any decisions at an appropriate time.

I think this is a good time to go to that
next issue, which was raised in the parties' December
letters about whether Direct Examination may be
conducted in the form of affidavits.

Are all of the petitioners', the trustees,
and the Institutional Investors in agreement as to
the use of affidavits for the Direct testimony?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

MR. INGBER: Yes, your Honor.

THE COURT: Would it be for all of the witnesses that you intend to call on your Direct case, or for only some of them?

MR. INGBER: It would be for the trustee witnesses who we intend to call in our case in chief. It would not be for Professor Fischel, so the way we are thinking about our case right now is that our witnesses will be the trustee witnesses whose affidavits we submit as written directs, and one witness testifying live, and that is Professor Fischel. I think the objectors will have to decide whether they -- I don't know that it matters much, but whether they are going to cross-examine any trustee witnesses based on the direct, written Direct Examinations, or call them in their case in chief, but once we submit our written directs and call Professor Fischel, I expect, we all expect that we will rest and will turn it over to the objectors.

THE COURT: Have you thought about the date by which you could have the written directs prepared, and the date by which you would be willing to exchange it with the objectors?

MR. INGBER: We have thought about it, and first and foremost, we were going to be guided by

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

what the Court wanted. We expected that the Court the would want to see the directs in advance of the trial.

THE COURT: That is true.

MR. INGBER: So, we're going to take guidance from the Court.

Mr. Ledley and I talked about this just before the hearing, and we thought by the end of next week we would be able to provide written directs both to the Court and to the objectors.

THE COURT: That is too soon. I have other things to do.

MR. INGBER: Okay.

THE COURT: I'm just kidding. I mean, if it gets here, I won't be able to resist. I have a lot of papers work to do before we start this trial because I know that it will be neglected --

MR. INGBER: Well, my concern was that --

THE COURT: My concern here is that you exchange that on a date that is fair to both sides.

MR. INGBER: Sure.

THE COURT: If you are willing to exchange it by next week, and the objectors are willing to accept it, then it's fine with me.

MR. INGBER: There's one caveat that I should

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

add, and that is that I was speaking to Mr. Ledley -- this was literally before your Honor came into the courtroom about Bank New York Mellon. There are other trustees, and we may need a few extra days, but we anticipate getting it to them before the trial starts, and getting it to your Honor before the trial starts, so we will have a discussion about that that date is, and we will certainly do our best to turn them over as quickly as possible.

THE COURT: Excuse me for a moment.

(Brief pause.)

THE COURT: Is it correct that we have eight trusts?

MR. INGBER: Eight trusts that are subject to objections?

This is what we have, your Honor; there are as I understand it 319 total accepting trusts. There are 24 objecting trusts. Eight are Ambac, subject to an Ambac objection. 13 are subject to a Triaxx objection, two subject to a W&L objection, and one subject to a QVT objection, so that leaves, by my math, almost 300 trusts that are subject to no objection.

THE COURT: And how many different trustees are there for these eight?

1 Proceedings

2 MR. INGBER: Okay, I think I can get this
3 right.

4 THE COURT: I'm sorry, the objections affect
5 --

6 MR. INGBER: Everyone, but HSBC and Deutsche
7 Bank. I can break it down. I believe I can break it
8 down by objector, but HSBC and Deutsche Bank have
9 trusts, accepting trusts, that are subject to no
10 objection at all.

11 THE COURT: And so how many trustees does
12 that leave with trusts that are subject to
13 objections?

14 MR. INGBER: I believe it's five, so it's Bank
15 of New York Mellon, US Bank, Wells, Law Debenture,
16 and Wilmington Trust.

17 THE COURT: Do we have them all here today?

18 MR. INGBER: Every trustee is represented here
19 today.

20 THE COURT: So, it should be possible to
21 confer for a few minutes and see --

22 You are authorized to speak for the other
23 trusts to say that they agree to the Direct testimony
24 by affidavit?

25 MR. INGBER: I am.

26 THE COURT: But, you should be able to

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

confer with them, should you not, to see if they can get the affidavits by the end of the week?

MR. INGBER: Sure, and I was conferring informally here while you were speaking to your clerk. I think we're all in agreement that Friday of next week is doable for us.

THE COURT: Is that acceptable to the objectors?

MR. WOLLMUTH: Your Honor, firstly, we have no objection to the concept of proceeding by written direct.

Second, the end of next week is five days I believe before trial, two of which are over that weekend, which of course, we'll be working. That seems a little tight, and we would ask if we could get them by Wednesday, or --

THE COURT: Mr. Wollmuth, if you did not have the testimony by affidavits, you would not even hear what it was until the 20th.

MR. WOLLMUTH: We realize that, although, you know, the counterveiling factor in our view is that the -- I often find direct more difficult than cross, and the witness would be under the pressure of testifying spontaneously, rather than having their testimony crafted outside of the courtroom, but we do

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

understand the point.

THE COURT: May I say, my experience is to the contrary.

MR. WOLLMUTH: Okay, but we do understand the point. Certainly, Friday we can accept, your Honor.

The concern is driven in part by your Honor's request for a proffer earlier. If the proposed Direct testimony that is submitted is going to be also the proffer regarding the privilege issue, I have some concerns that that does not leave adequate time to tee the issue up prior to trial. If your Honor wants further briefing on a point, it will leave only three business days, so even if we accept Friday as to the proposed Direct testimony in writing, we would request that the proffer as to the legal point your Honor touched earlier, privilege point your Honor touched earlier, be submitted earlier, if possible.

THE COURT: Mr. Wollmuth, you are speaking for QVT.

Are you authorized also by the other three objectors; Ambac, W&L, and Triaxx to agree to the Direct testimony by the trustees in the form of affidavits?

MR. WOLLMUTH: I am speaking primarily for
Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

Ambac, your Honor, and our firm also represents QVT, so as to those two objectors, the answer is yes, and as to the other two objectors, the answer is yes, also.

MR. JACOB: Yes.

THE COURT: Is Friday satisfactory for the receiving of the affidavits?

MR. JACOB: As long as your Honor gives us some flexibility on briefing the legal issue, I think that is the concern Mr. Wollmuth is saying.

THE COURT: Why don't we just have the briefs a week later, the following Friday?

MR. INGBER: That's fine, your Honor.

THE COURT: So, the briefs on the privilege issue will be January 22nd, and we can have them -- we can have those briefs served simultaneously on the 22nd, and have them e-filed by that day, and perhaps, we can arrange -- if you can't e-file before the close of business on January 22nd, if you're going to do a midnight, or 11:59 e-filing, then I would like to have a copy messengered to my apartment in Manhattan, so that I can read it over the weekend, if possible, and if it is e-filed by the end of the day, we'll print the briefs off, and we can just have a hard copies filed with the part clerk on the 25th.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

The next issue is the December letters, the objection to the declaratory judgment requested in the first amended complaint, paragraph 77. This is also an issue that is raised in the December letters.

I know that my clerk spoke with you earlier this morning about that.

At this time I think it would be useful if both sides briefly put their positions on the record as to whether the new proposed order that the trustees have submitted moots the objection to paragraph 77 set forth in the objectors' December 7th letter, so I will hear first from Mr. Wollmuth.

MR. WOLLMUTH: Thank you, your Honor.

As your Honor noted, on December 7th we sent a letter requesting a move to strike certain relief requested in paragraph 77, and we note that in the Citibank conference on May 19th, your Honor expressed concerns regarding two aspects of the trustees' petition;

First, that they sought a finding that they complied with 68 differing agreements in full with respect to their evaluation of the settlement, and second, that they complied with a myriad of applicable laws. Those concerns I would submit are more pronounced here because there's 300 trusts at

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

issue, rather than 68, and the second point is whether the holders of certificates in the affected trusts should be barred from asserting claims with respect to compliance with those differing governing agreements, and the myriad of applicable laws.

In their proposed amended order, they have addressed your Honor's first point, compliance with the governing agreements and myriad laws. They have removed that, but that point was only in there to begin with because of the collateral effect they hoped to achieve with those findings.

The collateral effect they wanted was to bar of the claims of holders with respect to the governing agreements, or laws; such as the Trust Indenture Act, New York Street Act, New York Common-Law, so they've left in the ultimate conclusion while taking out the findings. They would still seek to bar such claims in orders submitted to your Honor, proposed amended orders, paragraphs --

THE COURT: Where do they do that? This is identical to -- the new proposed order is identical to the Citigroup proposed order, and I certainly did not see that in the Citigroup order.

MR. WOLLMUTH: So, if I could direct your Honor to paragraphs four and six of the proposed

Proceedings

1
2 order, it says all objections to the trustees'
3 conduct in connection with the settlement are
4 overruled, and any objections, or claims related to
5 the settlement agreement that have not been raised
6 have been waived, and skipping to paragraph six, it
7 says certificate holders, note holders, and any other
8 parties, many of which are already litigating these
9 issues and are not before this Court, claiming rights
10 in any accepted trusts are barred from asserting
11 claims against any trustee with respect to such
12 trustees' evaluation and acceptance of the settlement
13 agreement.

14 Again, that's paragraph six, and it's an
15 absolute bar on the assertion of such claims with the
16 omission only of the findings that purported to
17 support the bar to begin with, and whether those
18 claims have merit is currently being litigated in the
19 State and Federal Courts of New York, and it turns on
20 factual issues that are discreet as to each trust
21 under the myriad of laws your Honor pointed to, and
22 under the discreet provisions of the separate
23 agreements that govern the trusts that are
24 implicated. For this reason --

25 THE COURT: These are claims related to the
26 settlement in paragraph four and six. Six is

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

identical to five in the Citigroup order, and four is a little different, but it's related to the settlement.

MR. WOLLMUTH: I understand.

THE COURT: Your concern is that this affects your litigation in the Southern District?

MR. WOLLMUTH: This affects not only -- while Ambac has no litigation concerning in Southern District I don't believe, your Honor, but our concern is that it forecloses claims that we would have that would be based on the facts relating to our particular trust. Whether their evaluation they did through Professor Fischel here is sufficient turns in part on what their duties are under the governing agreements.

That duty depends, one, on the specific terms of the agreement, and two, whether the facts relating to that trust triggered heightened duties or not under that agreement, and that is exactly the concern that your Honor previously expressed. They have to come forward to sustain their request for these findings with evidence sufficient to support a motion for summary judgment, and they have not done so, and the discovery we have taken establishes that they cannot do so, and therefore, we think the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

findings are inappropriate.

MR. INGBER: Your Honor, I'm not sure that I really understand the basis for this objection to our proposed order, but I'll make the point that I made to your clerk right before this hearing; that is, number one, which your Honor already knows, this is identical to the final order, or almost verbatim, almost identical to the final order that your Honor issued in the Citigroup case.

That's number one.

Number two, this is our proposed order for relief. We're going to have a trial, and your Honor will hear evidence, and we hope at the end of that trial your Honor will determine that the trustees acted reasonably in connection with their evaluation and entry into the settlement, and your Honor will decide whether we're entitled to the relief that we're requesting now.

This is no time to strike provisions of this proposed order, and finally, I just want to be clear about what we're seeking; I think it's pretty clear from this proposed order itself, if at the end of this trial your Honor determines that we acted reasonably in connection with the evaluation and entry into this settlement, there should be a bar of

Proceedings

1
2 claims asserted by any certificate holder, any
3 interested party who either appeared, or had the
4 right to appear. There should be a bar of claims
5 that we acted unreasonably in entering into the
6 settlement, that we violated duties by entering into
7 this settlement. This decision from your Honor
8 should have res judicata effect. This proceeding is
9 the opportunity for these objectors to raise whatever
10 issues they have with respect to the trustees'
11 process of evaluating and entering into the
12 settlement, and at the end of the day, your Honor
13 will either accept the objections and not give us the
14 relief that we want, or will overrule the objections
15 and give us the relief that we request, and if we get
16 that relief, we believe we're entitled to a bar
17 order, so that six months, or a year, or two years
18 from now Mr. Wollmuth on behalf of some clients of
19 his can't go into the Southern District, or can't go
20 into some State Court in some other jurisdiction and
21 challenge the reasonableness of the trustees' conduct
22 in connection with the evaluation and entry into the
23 settlement.

24 Thank you.

25 THE COURT: I find that there is no basis
26 for this Court to entertain a motion to strike the

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

request for a declaratory judgment in light of the petitioners' submission of a revised proposed order limiting the findings that it seeks in this proceeding if it is successful.

The parties will have an opportunity to argue the force of the language in the new proposed order in the event that the petitioners are successful at the hearing. If there is some language that opens the way for litigation that should be precluded, or the opposite, the language can be the subject of refinement.

Now, let's move on to the next issue, which is QVT's summary judgment motion.

I have preliminarily reviewed that motion. I will hear argument on the motion at the trial, but my preliminary assessment is that there are triable issues of fact, and that QVT should be prepared to proceed at the evidentiary hearing.

The next issue is housekeeping issues;

My clerk may have talked with you briefly today about technology. We are willing to go along with whatever technology you want to use at the trial. My law clerk, Mr. Hammeran, will talk further with you about it if you need to. My part clerk, Debora Baker, is out this week, but I know

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

that she will be more than happy to work with you to find convenient times when you can have your technology people come in to set up the equipment. If there are any problems, though, please don't hesitate to let us know.

I mentioned on a conference call in December that I am not partial to PowerPoint presentations. I will not preclude your use of PowerPoint presentations with witnesses if you feel it necessary to your questioning, or cross-examination, but do not use PowerPoint for me in connection with openings or closings.

If you do use PowerPoint with witnesses, however, you must meet and confer in advance of the questioning of the witnesses to determine whether there are any objections to the PowerPoint, and you should redact any objected material prior to use of the PowerPoint for questioning. My experience with PowerPoint has been that it has been a very fertile ground for objections because the PowerPoint presentations refer to material that is not in evidence, or they allied quotes in ways that opposing counsel consider misleading, and so I will permit its use, but only if counsel confer in advance and redact any objected to material, and perhaps, knowing that

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

objected to material will need to be redacted will bring some proportion to the preparation of the PowerPoint in the first place.

I would like to have discs of any exhibits, as well as to hard copy binders of any exhibits.

Counsel should meet and confer in advance of the hearing to determine what exhibits will be marked into evidence on consent, and they should mark those exhibits themselves. If there are exhibits that will be for ID only because there are going to be objections, counsel should mark the exhibits themselves for ID only. If there are going to be objections to exhibits that are going to be used in connection with certain witnesses and for which the witnesses will be asked to lay a foundation, please try to bring the objected to exhibits to my attention as much in advance of the questioning of the witness as possible, and if there are objections that fall into categories, it would be useful if counsel could group representative documents together, and perhaps, if I rule on some of them, it will either obviate the objections to other similar documents, or at least enable counsel to preserve their objections, but note on the record that they recognize that the documents would be admissible under the ruling with respect to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

other similar documents.

I indicated during the December conference call that I would hear openings and closings. I believe that I said that I would like the openings to be about 20 minutes long. That may be a little too short. If counsel wants to extend the time, you can do that. I don't think the opening should be more than 45 minutes per side, though, and please, confer in advance as to how you will divide up those openings and what you will cover. If you really don't think you can do it in 45 minutes per side, you can let me know, but 20 minutes did seem a bit short.

That concluded my issues. If any other housekeeping matters come up, we'll let you know, and I want to use the rest of the morning to give counsel the opportunity to bring up any issues that are of concern to them.

MR. WOLLMUTH: We have only one I believe, your Honor, subject to -- we assume that the Court and the Petitioners would not want us to call as our witnesses the witnesses for which they are submitting written Direct, and therefore, we also assume and would request that we not be confined on Cross to matters addressed in the Direct testimony. If we called them as our witnesses, we would examine them

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

on points of Cross we developed in the discovery, so we assume that will be acceptable, and we can work it out with Petitioners, but we just want to put that one issue on the table.

THE COURT: I'm very glad you brought that up. You do not want to -- you want just to call the witnesses for whom affidavits are submitted on your own case?

MR. WOLLMUTH: No.

To the extent they submit affidavits for their witnesses, we could have called those witnesses for our case in chief. We assume that it will be acceptable to Petitioners if we Cross the witness not only on the matters addressed in their written Direct, but on their Cross points that we developed in discovery, and I believe I saw some nodding, and if that can be worked out, we'd like to work that out. If not, we will call them as witnesses, but that seems terribly insufficient.

THE COURT: So, you would Cross them and adopt them as your own witness?

MR. WOLLMUTH: To the extent that it exceeds the scope of the Direct.

MISS PATRICK: I think his point is, he doesn't want to be limited to asking questions in the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

scope of the Direct. There's no objection to that, so whenever he cross-examines the witness, he can ask about Cross questions on the Direct, or whatever additional Cross he would have, so the witnesses doesn't have to testify twice.

We would ask, however, your Honor, that since some of these witnesses are from out of town, as Mr. Ingber indicated, Mr. Fischel will testify live, and then the rest by written direct. If they can give us 48 hours notice of which witness from the trustees they are going to call in their case in chief, so that we can be sure those people are here, otherwise they'll be sitting in the hall for the duration of the trial.

MR. INGBER: Right. In other words, we're going to call Professor Fischel. He will testify for as long as he testifies on Direct and Cross. We will submit written directs, and then at that point it's up to them, up to the objectors who they decide to call of the trustee witnesses. We need to know whether it's going to be a US Bank witness, a Wells witness, a Bank of New York witness, or some other witness, so that we can tell our witnesses in advance.

THE COURT: How long do you anticipate the
Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

Direct testimony of Mr. Fischel will be?

MR. INGBER: The Direct; I don't expect the Direct to take longer than a day. I don't know for sure yet, but this is not going to be a multiple day Direct Examination. I wouldn't expect it to be.

THE COURT: He will be the only live witness you will call on the Direct, correct?

MR. INGBER: That's the only live witness, the only witness who will testify live in our case in chief.

There may be rebuttal witnesses we need to call to testify live.

THE COURT: I want you to know that I have always been very parsimonious when it comes to permitting the calling of rebuttal witnesses, so if you think you need something in your case, you really should plan to have it on the Direct.

MR. INGBER: Sure.

THE COURT: Or on the defense when you put the defense on.

MR. INGBER: Sure.

THE COURT: I don't expect to see many rebuttal witnesses.

MR. INGBER: No one is saving anything for a rebuttal case. We will submit our Directs.

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

THE COURT: Stranger things have happened.

MR. INGBER: But, with respect to Professor Fischel, again, I think we'll know better in the next several days how long it will take, but I would expect it to be probably shorter than a full day, and no longer than a day and-a-half, two days.

THE COURT: And do the objectors have any sense of how long the cross-examination might be, and again, I'm not holding anyone to this?

MR. WOLLMUTH: You know, I don't have a good sense at this time because we have not seen the proffers yet, but I would expect at least a couple of hours of Cross for the fact witnesses from the trustees that we will be examining, and then Mr. Fischel, I would guess that the Cross will at least -- it should be a little longer than the Direct I would think.

THE COURT: So, I think you have an agreement that you will cross-examine the witnesses who give Direct testimony by affidavit, and then the objectors will adopt those witnesses as their own witnesses and examine further.

Is there any reason why you can't give the 48 hours notice that Miss Patrick has requested?

MR. WOLLMUTH: Not that we see at this time.

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

We think that's reasonable. We have no desire to inconvenience these people, so we don't see a problem, and if we do, we'll highlight it immediately.

MR. INGBER: I should have two other questions, your Honor.

I assume that with respect to exhibits, you want binders and a disc of both the documents, the exhibits that are marked for admission, and the documents that are marked just for identification.

THE COURT: Yes.

MR. INGBER: Okay, we will submit those.

And second; with respect to pretrial briefs, on our call I believe that you said that the briefs should be submitted on January 18th, and they should be limited to 15 pages per side. We understood that to be mean 15 pages for Petitioners, 15 pages for the Respondents.

There may be some disagreement about that, about what you intended. We just wanted clarity on that. It was not ambiguous to me, but I thought we should get clarity on that before we leave today.

THE COURT: I did mean 15 pages per side, and I can't imagine what else I could have said.

MR. WOLLMUTH: Your Honor, whether that is

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

sufficient, we don't see necessarily ambiguity, but these four objectors each object on very different issues, and I'm not sure 15 pages is sufficient to tee all of them up for your Honor.

THE COURT: Well, it is sufficient for me --

MR. WOLLMUTH: Okay.

THE COURT: -- for the preliminary briefs, and if I think that there are issues that require further depth, I will let you know.

I think part of the thinking about this is that this would give the parties a preliminary opportunity to put out issues on which they thought they needed briefing, and if I agree, I can always get further briefs, but once again, I want to impress upon you how important it is to me that I have New York Appellate law, although I'm also interested in seeing Federal law, particularly from the Second Circuit and the Southern District, and that I would like to be sure that you give me cites to official reporters, those books that I have on my bookshelves, which I still pull, rather than New York Supp 2nd, and if you give -- if there are no official cites, and you use reporters, please give us both Westlaw and Lexis.

MR. WOLLMUTH: That's great, your Honor, and
Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

we're fine with one brief for our side.

Could we request the Court's indulgence if we need a page or two --

THE COURT: Let's just keep this to 15 pages for these preliminary briefs, and please, do not mar them with foot notes less than -- is it 8-point or 12-point type, what is the usual?

MR. INGBER: 12.

MISS PATRICK: 12.

THE COURT: And one inch margins.

MR. WOLLMUTH: Okay, that's fine, your Honor.

THE COURT: Thank you. I do know all of the devices.

MR. WOLLMUTH: I know.

THE COURT: Did you see the article recently, there's a Federal Judge in, I think in California who wrote a scathing decision about foot notes, and failure to comply with page limits?

You do want a Court that reads every page you write I think.

MR. WOLLMUTH: We couldn't agree more. That's why I asked your Honor, I think the foot noting can be distracting, but we take your Honor's guidance, and we will confine ourselves to 15 normal pages.

THE COURT: Thank you.

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

MR. WOLLMUTH: Okay.

THE COURT: If you need more, I'm sure we will be able to work it out if there are issues that call for it. I understand how important these issues are to all of the parties.

MR. WOLLMUTH: Thank you, your Honor.

THE COURT: Miss Patrick?

MISS PATRICK: A logistical question for the Court;

Would it be helpful to you to have of a bench book that had in it the trustees live pleading, which is the first amended petition, each of the objectors' objections, the proposed form of order, and then each of the written directs, so that you have that in one notebook?

THE COURT: Yes, that would be very helpful, and if you would show it to the opposing counsel so we're sure there are no objections, that would be --

MISS PATRICK: Would you also like the exhibit list to be in that notebook --

THE COURT: A good idea.

MISS PATRICK: -- or a separate one for you?

THE COURT: I think a separate one.

MISS PATRICK: All right.

And then, the last question;

Gloria Ann Brandon, Sr. Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

We had mentioned to your law clerk, we are going to have -- we assume the Court wants live stream testimony, and we were going to place a monitor on the bench for you, so that you would have access to it. If you prefer not, no problem.

I just wanted to get your guidance on that.

THE COURT: I think my law clerk would appreciate that.

MISS PATRICK: Fair enough. Those are my --

THE COURT: Thank you very much for those suggestions, and may I add insult to injury, and ask for two copies of each of the binders.

MISS PATRICK: Of course.

THE COURT: Does anyone have anything else?

Well, I think we're all set. If anything comes up, though, in the next week and-a-half, please be sure to let us know. I think we have put the word out that we are going to work day to day, and that the Court day is relatively short because of limits on overtime due to fiscal constraints.

If there is an out-of-state witness, I would consider trying to request overtime, so that we could finish the testimony if we had a chance to do that, but as a general rule, the Court day ends at 4:30. We'll start at ten, work until 12:45, resume at 2:15,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

and work until 4:30. I will try to take only one 10 or 15-minute recess during each Court session because I know how short these days really are, but I expect you will understand that. Because I am going day-to-day, other business may have to be addressed during the day. Mostly I can do it before we start in the morning, at the end of proceedings, but there may be some exceptions to that, so I'll close the record for today's proceedings.

Please, obtain a copy of the transcript. As I mentioned in the past, I reserve the right to correct errors in the transcript, therefore, if it is needed for any further purpose, you should have a copy so-ordered by me, and not merely signed by the court reporter.

The record is closed.

* * * * *

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

Gloria Ann Brandon,
Senior Court Reporter