February 12, 2018

VIA NYSCEF AND HAND DELIVERY

Hon. Marcy S. Friedman
Supreme Court of the State of New York
New York County, Commercial Division, Room 248
60 Centre Street
New York, NY 10007

Re: *In re: Wells Fargo Bank, National Association, et al.* (No. 657387/2017)

Dear Justice Friedman:

Pursuant to Your Honor's request, Nover Ventures, LLC ("Nover") and the undersigned Institutional Investors and AIG Investors respectfully submit this joint letter regarding the proposed scheduling orders at Docket Entries 187 and 188. A copy of the transcript from the proceedings on February 9, 2018 is attached hereto as Exhibit A.

NOVER'S POSITION

Nover's proposed scheduling order (Docket Entry 188) raises four issues for resolution by the Court. First, Nover objects to the Institutional Investors' proposal requiring the exchange of confidential, proprietary and trade secret information with other investors (its competitors) when such information is irrelevant, unnecessary, and inconsistent with to the requirements of Article 77. That other investors seek such information, over Nover's objections and without the opportunity for full briefing and argument, is tantamount to an end-run around the discovery process (to which discovery process Nover is clearly entitled, and through which Nover believes it will prove that such information is not properly subject to disclosure obligations to adverse parties). The proper process—followed in each of the prior Article 77 proceedings relating to RMBS global settlements—is for investors to provide more detailed information to the Trustees on a confidential basis and to share additional information with other parties as they deem appropriate during settlement negotiations.

Article 77 provides for "joinder and representation of persons interested in trust property." *See* CPLR § 7703. Article 77 does not require, as the Institutional Investors contest, that the person joined have a specific or direct interest in trust property. To the contrary, section 7703 implies that those with indirect interests may participate because Article 77 permits the "representation of persons" who have an interest in trust property. *See id.* Indeed, the First Department held that CPLR § 7703 does not preclude the joining "**those who are only remotely interested** and who, under the terms of the statute, are not necessary parties." *See In re Bank of New York*, 255 N.Y.S.2d 160, 166 (1st Dept. 1965) (emphasis added). On that basis, the First Department affirmed the trial court's decision to permit two infants to participate so that they could be heard about a decree that could materially augment their **possible** interest in the remainder of a trust estate. *Id.* at 167.

Regardless, the Institutional Investors (and perhaps others) contend that only direct certificateholders of a trust may participate in this proceeding. Nover has offered to identify those trusts in which it is a direct certificateholder. Such identification is sufficient. Nonetheless, the Institutional Investors' proposal requires the parties to identify their holdings by CUSIP or Bloomberg ID number, which is the unique number that identifies a specific bond. Under the law, however, verification that a party owns a certificate in any class is sufficient. Indeed, the Trustees initiated this proceeding to interpret various provisions of the Governing Agreements, and such interpretation will affect all classes of certificates, regardless of whether they ultimately receive any portion of the Settlement Payment. Accordingly, the only information other investors need to know regarding a direct interest is that a party owns a certificate in a trust.

Here, Nover has an interest in 120 of the 250 trusts at issue. Given the sheer number of trusts, identifying Nover's CUSIP Numbers to other investors necessarily discloses Nover's investment strategies, which are commercially sensitive and proprietary.[1] Article 77 requires only "an interest in trust property," and no other court has required this disclosure. Your Honor should not change the well-settled practice.[2]

Nor do other investors need to know the source of any indirect interests to challenge standing. The Institutional Investors' proposal seeks disclosure of the form of indirect interest, whether through a collateralized debt obligation, re-REMIC, NIM Trust, or credit default swap. In each of these types of structured investment products, certificates in RMBS trusts are held in another type of trust with the distributions from the RMBS trust ultimately flowing to those who hold an interest in such structured investment, either alone or in combination with other investments. Thus, persons with an interest in the structured investments have an interest in the trust property here because they ultimately receive funds from the trust. Such receipt of funds is more than the possible or remote interest that is allowed under the standards set forth in *In re Bank of New York*. 255 N.Y.S.2d at 166. Accordingly, a description regarding the structured product itself is unnecessary to demonstrate an interest in trust property—the only information other investors need to know to challenge standing is that the person claims to ultimately receive funds from the trusts at issue, even though the funds are not received through direct ownership of a certificate. Any more detail necessarily discloses investment strategy and is unwarranted.

In sum, the only information other investors are entitled to know to challenge standing is (a) the name of the trust in which a party claims an interest; and (b) whether the party has a direct or indirect interest in the trust. Nover is willing to follow the procedure from prior Article 77

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[1] The Institutional Investors cannot contend that such information is *not* commercially sensitive information. In fact, in the Article 77 proceeding in which Your Honor evaluated the JP Morgan Chase & Co. RMBS settlement offer, the Institutional Investors objected to an interrogatory asking for CUSIP numbers on the basis that the interrogatory sought "the production of material that is commercially sensitive information, and contains trade secrets and/or confidential information concerning investment holdings and strategies." *See* Index No. 652382/2014, NYSCEF No. 372 at p. 2

[2] An "outside counsel's eyes only" designation is not sufficient to protect Nover's investment strategies. Despite counsel's best efforts, the knowledge of which certificates and classes an investor owns necessarily will color the advice provided to their clients, even if any information is not disclosed.

proceedings and make more fulsome disclosures to the Trustees, and is willing to consider the voluntary disclosure of additional information for settlement purposes. Nover respectfully requests that the Court decline to order the exchange of any other information.

Second, Nover's proposed order requests that any agreed proposed form of judgment and severance order relating to particular trusts be submitted only after the resolution of standing challenges, if any. Because standing serves as a gating issue, unless and until standing is addressed, Nover need not take a position on the appropriateness of severance. The process and procedure argued for by the Institutional Investors would risk the irregular application of standing and inconsistent results for parties with the same type of interests in different trusts whose governing agreements have similar or identical language. Such a process is unfair and antithetical to the efficient and orderly resolution of the issues in this action. Which interests confer standing should be applied uniformly across investors and across trusts. Given that there is $4.5 billion at stake, expediency should not forsake accuracy.

Third, the Institutional Investors' proposal purports to require any affirmation regarding holdings to be provided by someone other than "external counsel." Nover cannot discern any reason (much less a legitimate one) for such a limitation. Anyone who can verify an investor's interests should be permitted to do so and other interested parties are not entitled to place limits thereon. In an effort to compromise, Nover is amenable to agreeing to provide a verified affidavit from someone other than counsel of record.

Finally, one of Nover's decision makers is travelling internationally through February 18, 2018. Nover therefore respectfully requests that any deadlines for submissions to the Court be set for February 28, 2018 or after.

THE INSTITUTIONAL INVESTORS' AND AIG INVESTORS' POSITION

Despite their competing interests in this Article 77 proceeding, ***nineteen out of the twenty*** parties who have appeared do not oppose the form of proposed scheduling order submitted by the Institutional Investors (Docket No. 187).[3] The sole exception is Nover Ventures, LLC ("Nover"), a Delaware LLC which claims an undefined "interest" in 121 of the 270 trusts. Nover's principal objection is to the requirement that all parties (a) describe the nature of their claimed interests in each trust; and (b) specify the relevant class (by CUSIP or Bloomberg ID) of each certificate they claim to hold. Nover claims this information would disclose confidential information regarding trading strategy and is not relevant to establish standing to appear. Neither position is availing.

Any Legitimate Confidentiality Concerns are Already Addressed in the Proposed Order

First, under the Proposed Order, the information required to be provided by each party will not be shared with the other parties but only with the trustees and "external counsel of record." Accordingly, even if the information disclosed would somehow reveal a party's confidential trading strategy, the information will not be accessible to other parties.

[3] This letter is submitted solely by the Institutional Investors and AIG.

Second, the suggestion that the information required by the Proposed Order would reveal a party's confidential trading strategy is incorrect. Merely identifying the nature and class of the interest held, without disclosing the amount of any holdings, or when, why, or how they were acquired, does not disclose confidential "trading strategy." It simply identifies "an interest" that the party claims to be protectable in this proceeding.[4]

The Information Called for by the Proposed Order is Necessary to Assess Standing

Article 77 provides for the "joinder and representation of persons *interested* in trust property."[5] Standing, in turn, requires the Court to determine whether "the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast [ ] the dispute in a form traditionally capable of judicial resolution." *Graziano v County of Albany*, 3 N.Y.3d 475, 479 (2004).

This Article 77 proceeding was commenced by the Trustees to obtain judicial guidance on how to distribute settlement proceeds to the Trusts' certificateholders. That being the issue before the Court, only those having a "cognizable stake" in how the settlement proceeds are distributed have standing to appear. Plainly, certificateholders of the Trusts that will receive more or less of the settlement funds depending on how they are distributed have a cognizable stake in that issue and thus have standing. On the other hand, because the Trusts were created pursuant to governing documents stating that the Trustees' duties run exclusively to the Trusts' certificateholders and providing for distributions solely to such certificateholders (or those standing in their shoes, such as certificate insurers),[6] it is at best dubious to suggest that non-certificateholders could have a sufficiently cognizable stake in the settlement proceeds to confer standing. Indeed, even an entity that *is* a certificateholder may lack standing if it holds certificates that would not be entitled to any portion of the settlement payment, or any associated "write up" of certificate balances, under any of the possible distribution methodologies described in the petition, or if the choice of methodology at issue in this proceeding would otherwise have no impact on the distribution of the settlement payment for that class of securities.

Nover's inability to state unequivocally that it owns certificates issued by the Trusts suggests it has *no* interest in the Trusts themselves. Instead, it appears its alleged "interest" may

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[4] Finally, we must correct the record from the February 9 conference. Counsel to Nover referred to the Institutional Investors' response to a holdings discovery request served on them in the previous JPMorgan Article 77 proceeding concerning the approval of the settlement. *See* Dkt. Docket No. 372 (Index No. 652382/2014). In fact, upon entry of a protective order, the Institutional Investors produced their holdings, including CUSIPs and amounts held, as of three different dates. That holdings disclosure was far greater than the disclosure Nover resists here.

[5] C.P.L.R. § 7703 (emphasis added).

[6] *See, e.g.*, BSABS 2006-AC1 PSA § 2.06 ("The Trustee agrees to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future Holders[6] of the Certificates and the Insurer and to perform the duties set forth in this Agreement in accordance with its terms."); *id.* § 10.01 ("The Trustee, prior to the occurrence of an Event of Default . . . and the Securities Administrator each undertake to perform such duties and only such duties as are specifically set forth in this Agreement as duties of the Trustee and the Securities Administrator, respectively.").

be in entirely separate financial products whose performance is derivative of the Trusts' performance. Whether such an interest confers standing depends on the particulars of how those products are structured. For example, after the Trusts were formed, certain of their certificates may have been "re-packaged" into entirely different trusts, ranging from Re-REMICS (new securitizations backed by RMBS certificates); NIM trusts (new trusts backed by interest-only RMBS certificates); CDOs (new structures typically backed by junior RMBS certificates); or CDO-squareds (CDOs that invest in other CDOs). Holders of interests in such derivative structures do not themselves hold interests in the Trusts at issue here. Instead, in this scenario, it would be the derivative structures themselves that would hold interests in the Trusts at issue here, and in all likelihood the only parties authorized to assert claims on behalf of those derivative structures in this proceeding would be their trustees, not Nover.[7]

It is, therefore, essential that the parties understand the nature and class of each others' interests if they are to have an ability to assess and, where necessary, challenge standing. Nover's counter-proposal– that it state whether it holds a "direct" or "indirect" interest—would not provide any useful information to assess its standing, because it does not establish *how* it has *any* cognizable interest in the property of *these* Trusts.

The Holdings Information Should be Disclosed Now

The Court is vested with broad discretion to control its calendar and supervise disclosure in order to facilitate the efficient resolution of this case. *Alveranga-Duran v New Whitehall Apartments, L.L.C.*, 40 A.D.3d 287, 289 (1st Dep't 2007). That is particularly true in an Article 77 proceeding, which is summary in nature. *See* C.P.L.R. § 409(b). The Court should exercise its discretion to require disclosure of holdings information now, rather than months from now in the course of ordinary discovery.

Significant inefficiencies and prejudice would result if Nover is permitted to delay disclosing basic holdings information until ordinary discovery. In 94 of the 121 trusts in which Nover claims an "interest," the Institutional Investors and/or AIG are the only other investors who have appeared. Those 94 trusts will receive over $660 million in settlement proceeds. If Nover lacks standing to be heard on those trusts, but if its lack of standing is only confirmed after a lengthy discovery process, then over $660 million in settlement proceeds would have been unnecessarily "held up" during the resulting delay. Nover, on the other hand, has not offered any reason why information relevant to standing should not be disclosed now. To the contrary, Nover has already agreed the Trustees *are* entitled to detailed holdings verifications, a concession that all but admits that this information *is* relevant to its standing. Given that, it is unclear what purpose Nover seeks to serve by refusing to provide basic holdings information to the other parties *now*.

[7] As a further example, investors might hold an interest in a Credit Default Swap (CDS), the payment on which might be tied to *non*-payment on Trust-issued certificates. In that case, an investor holding such a CDS has effectively placed a "bet" tied to Trust cash flows, but has no interest in the Trust property itself and will never receive Trust cash flows, either. Instead, it will receive cash flows based on its contract rights under the swap, which are the only property interests it holds.

Respectfully submitted,

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EXHIBIT A

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

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In the Matter of the Application of
WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. WILMINGTON TRUST, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts,
Petitioners,

For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment

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Index No. 657387/2017

60 Centre Street
New York, New York
February 9, 2018

B E F O R E :

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DEBRA SMITH,
OFFICIAL COURT REPORTER

THE COURT: Good afternoon, Counsel. This is Judge Friedman. I have a court reporter here. I am going to ask just the counsel who are going to be speaking to state their names for the record and identify their clients and we will ask that some time next week you send us a list identifying all of the counsel who were present on the call and their clients.

I have asked my law clerk, Mr. Hamerin (phon), to confer with you in advance of my going on the record in hopes that we could expedite the matter. Let's see how far we can get given that we're coming close to the end of the court day.

May I have speaking counsels' names, please.

MS. KLEIN: Good afternoon, Your Honor.

This is Gayle Klein with McKool Smith for Nover Ventures LLC.

MS. PATRICK: Kathy Patrick for the institutional investors Blackrock, PIMCO and others.

MR. GOLDSTEIN: Jordan Goldstein from Quinn Emanuel for the AIG parties.

THE COURT: I understand that that should be it so let's begin. I have looked over the redline. My understanding is that only Nover is objecting to the proposed scheduling order submitted by the institutional investors.

The first item seems to be a request for a modification of the provision of the agreement setting forth a procedure for providing information as to the nature of the interest held by the various investors. There is a dispute, as I understand it, about what information should be included.

Ms. Klein, your position on that issue?

MS. KLEIN: Yes, Your Honor. Thank you.

We viewed the proposed language by the institutional investors and the discovery exercise that is shrouded in standing fight. They are putting into a proposed scheduling order an order requiring the parties to produce certain information that should more properly be coming in discovery requests where we can review it, object based on relevance or confidential proprietary sensitive information, and then brief it in a motion to compel to the Court if necessary.

We have not had the opportunity for full briefing and we would request the opportunity to do so if the Court is inclined to grant the language proposed by the institutional investors.

THE COURT: What are -- I'm sorry, there is a bit of a lag here so sometimes counsel can't hear when I start to speak. We'll get through that, though.

Ms. Klein, what are you proposing to disclose

about Nover's interest?

MS. KLEIN: Well, pursuant to docket entry 65, Your Honor's clarifying order, we propose to disclose to the trustees on a confidential basis the information regarding what we hold. We then propose to disclose to the other investors the names of the trusts in which we claim an interest as well as whether that interest is direct or indirect which would allow anyone who claims that an indirect interest does not convey standing to then object and bring that claim.

We don't believe that having an indirect interest precludes standing because Article 77 is clear that it provides for joinders of parties who are interested in trust property.

In the Article 77 proceeding context, the First Department has held that even persons who have a possible interest in the remainder in a trust estate have standing and are appropriate parties in an Article 77 proceeding.

THE COURT: Can you be a bit more specific when you say you are going to disclose information regarding what we hold and whether the interest is direct or indirect?

MS. KLEIN: To the trustees, Your Honor, or to the other investors?

THE COURT: The information regarding what we hold, what would be a specific statement as to what we hold?

MS. KLEIN: Well, it would be a statement as to the trust in which we claim an interest so it would be the name of the trust and, if required, we would say the class that we hold or claim an interest in and then with respect to information provided to trustees, we could provide the information requested in the institutional investors' proposed order, which is how we claim that interest, be it through a CDO or otherwise.

The point being, Your Honor, that this is proprietary confidential commercially sensitive information that contains trade secrets that investors very clearly guard and do not want other investors in the same space to know and, in fact, in the last Article 77 proceeding relating to the approval of the settlement, the Court did not require it for standing purposes and when the institutional investors were asked for it in discovery, they objected to disclosure on this very basis, "The type of information sought was commercially sensitive, contains trade secrets, and/or confidential information concerning investment holdings and strategies." And that was docket number 372 in the

prior Article 77 proceeding, index number 652382/2014.

THE COURT: Is there anything else before I hear from Ms. Patrick?

MS. KLEIN: One other item, Your Honor.

I think the reasons that Nover is standing alone here is that we are alleging interest in 120 of the 250 trusts. No other investors are claiming an interest in that significant of a number of trusts, or if they are, they are already required to publicly disclose the information that is in the institutional investors' proposed order and, therefore, we believe that we are more sensitive to this information and that is why we more astringently object than others who may have decided to agree to the proposed order.

THE COURT: Why isn't it satisfactory that the information would be for attorneys' eyes only?

MS. KLEIN: Yes, Your Honor, that is a good question. We believe that even if it is for attorneys' eyes only, it would inform advice necessarily that counsel would provide to their clients.

We understand that at least counsel for the institutional investors have a Bloomberg terminal, which would allow them on attorneys' eyes only basis to run information regarding our holdings and our strategies and evaluate information to try to gain an

advantage.

I am not saying they will do this, but it will allow them to do this, gain an advantage in settlement discussions relating to these trusts. We are quite sensitive to that.

There were proposals that suggested that the information could be used for standing purposes only and those were rejected, which has further caused us concern.

THE COURT: Ms. Patrick?

MS. PATRICK: Yes, Your Honor. Let's start at the beginning. Sometimes the reference has been to language in the institutional investors' order. As the Court noted, this is language that was prepared by all the investors.

THE COURT: This was information that was proposed by?

MS. PATRICK: This was information by all of the investors except Nover in an effort to expedite the resolution of all issues. So, there is broad consensus among investors who are very differently situated that this is the best procedural past forward. The reason that all of the investors have --

THE COURT: You are fading in and out, Ms. Patrick, and that last sentence starting with "The

reason," we didn't get any of it. I think it's coming from your end.

MS. PATRICK: Can you hear me?

THE COURT: I can hear you now. Let's see if it happens again.

MS. PATRICK: I am so sorry. I tried to use the phone in my hotel room and it wouldn't let me dial so I am on my cell phone. Please accept my apologies, Your Honor.

THE COURT: That's not a problem.

MS. PATRICK: It might make sense since you are on a landline if we will try one more time and if it doesn't work, I am going to suggest Mr. Goldstein proceed, but let me try again.

The reason that a simple averment of direct or indirect is not sufficient to establish standing is because it begs the question of what is an interest in trust property. This proceeding is one that concerns duties the trustees owe under the governing agreements.

The type of interest held is essential to permit the Court to assess whether the person appearing has an actual protectable interest in the trust property. Providing that information to the trustees is not sufficient because the investors who do claim an interest in trust property and are entitled to be heard

are also entitled to know whether the people standing up and speaking in court about these matters are strangers to the trust or actually have a cognizable legal interest in it. So the proposal that the trustees get the information but the rest of the parties do not is not workable.

As to the point that this is allegedly commercially sensitive information, I will note that nothing in the order the investors except Nover has submitted requires the disclosure of the amount of any holdings and our clients did not object to the disclosure of the existence of holdings on a charge by charge basis in the prior proceeding, it was simply to the disclosure of amounts. This order does not require amounts.

Whether somebody owns one certificate or a million in a given trust will not be disclosed, only enough information to ascertain whether they have an interest that is cognizable in trust property.

As to the Court's question about why attorneys' eyes only are not sufficient, it is ordinarily understood that counsel for all parties will adhere to the strictures of a protective order and the suggestion that because our firm or any of the firms on the phone have access to a Bloomberg terminal that we

would breach the strictures of an order of this Court regarding confidentiality is not worthy of credence, it is not a valid objection.

From our perspective, it is quite clear that standing is a threshold issue and detail about the nature of the holdings that are claimed is necessary for the Court to know whether it even has to listen to somebody, and if we don't have to listen to anybody, we don't have standing, then we ought to know that at the outset.

So that's the basis on which we have asked for the level of detail that is set forth and we adopt, the Court along with the other investors, do adopt the language in our version on Page 2.

THE COURT: Ms. Patrick, can you --

MR. GOLDSTEIN: Your Honor --

THE COURT: Mr. Goldstein, I want to ask Ms. Patrick a question first, a question or two, and then we will have to figure out what to do about the time and I will, of course, hear from you. If not today, on a continued conference.

Ms. Patrick, I think I heard you say that we needed specific information about the interest because it bears on the trustees' duties to different parties with different interests.

MS. PATRICK: Your Honor, no, what I meant to say, and let me rephrase it to avoid any confusion, if someone has an interest in trust property that is legally and cognizably protectable under the terms of the trust instrument, then they would have standing to appear under Article 77.

What we are concerned about is person to appear and say I have an interest as an ipsa dixit without providing any concrete information about what that interest is or might be and given the variety of synthetic and artificial structures in the financial markets, someone might have financial exposure to the performance of the trust and yet not have any actual interest in trust property.

That's why clarity around the nature of the interest that is held is essential to understand whether someone has standing to be heard in this proceeding, which concerns the duties the trustees have under these governing agreements to those with an interest in the trust's property.

THE COURT: I think I am going to need to have a much more concrete example of how this plays out and how it might be that there would be no protectable interest in the trust, some concrete examples of that.

Just bear with me for a minute, though, we

have to figure out how to proceed here given the lateness of the hour.

(Pause.)

THE COURT: Counsel, I think I have said before that the administration is very clear that overtime cannot be authorized in ordinary circumstances. I am willing to continue this call on Tuesday morning -- we are closed on Monday -- and I would like to get a joint letter on Monday morning before the call that concretizes both sides' positions on why it is or is not sufficient to give the more limited information that Ms. Klein is suggesting should be offered.

Also, I heard something in there about being willing to provide information about whether the interest is held through CDOs. I think you need to confer about that and see if there is a possibility of resolving any of these disputes.

In any event, can you get me a five-page letter on Tuesday morning, say, by 10:00 a.m., to be e-filed with a hard copy to the clerk of Part 60 and can you also arrange with the court reporter from today, if she can do it, to arrange for the transcript from this call on an expedited basis so that I have it also on Tuesday morning before the call and can we

resume at 11:30 a.m. on Tuesday morning?

MS. PATRICK: Yes, Your Honor.

One point of clarification. That's a five-page joint letter?

THE COURT: Yes. That's two and a half pages each.

Mr. Goldstein, are you also available?

MR. GOLDSTEIN: Yes, Your Honor, I am. I will, of course, defer my remarks until we can speak again.

THE COURT: Rest assured I will hear from you on Tuesday. I'm sorry, I did not realize that this call was going to take as long as it has so hopefully we will have enough time on Tuesday morning to finish up.

I know there was some concern about missed deadlines. I think we may need to adjust the first deadline, which is the February 9 deadline, so we may need to put that over for a couple of days after the continued conference call. My thinking is that the rest of the dates could presumably be maintained but we can discuss that further on Tuesday morning.

I will leave the call so that counsel can get the court reporter's information. Thank you.

It is hereby certified that the foregoing is a true and accurate transcript of the stenographic

record.

DEBRA SMITH,
Official Court Reporter