UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BE3NEFIT FUND OF THE CITY OF CHICAGO,

Plaintiff,

v. 11 CV 5988 (WHP)

THE BANK OF NEW YORK MELLON, et al.,

Petitioner.

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New York, N.Y.
January 18, 2012
11:15 a.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

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(In the robing room)

THE COURT: Good morning, everyone. This is District Judge Pauley. You're on a speakerphone in my robing room and a court reporter is now present, recording what's being said. I understand from my law clerk that there are a large number of participants in this call; and, Mr. Reilly, since you initiated this call, I'm going to ask you, after the call is over, to fax to my chambers a list of the participants so that the court reporter can include them as appearances on the face of the transcript.

Do you understand?

MR. REILLY: I do, your Honor, of course.

THE COURT: All right, Mr. Reilly, it's your dime. Do you want to be heard?

MR. REILLY: All right. Thank you, your Honor.

I hope you have seen Mr. Ingber's letter that was filed this morning also. I think it sets the dispute squarely in front of you. We obviously have a dispute about whether my letter is an appropriate method to address the Court. I'm glad to address that and recognize that it's an unusual situation and thank the Court for allowing us to speak.

The reason that we took this approach is that in light of the letter from Mr. Ingber that I received Friday afternoon and my extensive conversation with him over the weekend, it became apparent to me that this deposition that we have

scheduled for Thursday was not going to occur unless the Court was asked to get involved. I don't need to go through all the details of that phone call but it was a very long phone call. Mr. Ingber and I spoke quite frankly about the disputes and his concerns.

And the reason, frankly, that we are submitting this to the Court at this point, in response to Mr. Ingber's comment that my letter is late -- I'm sorry, that my letter is -- because I think his letter was late. But setting that aside -- and if the Court wants me to address the procedures, I'll be glad to in more detail -- setting that aside, what we became convinced of is that the settlement proponents do not want to, and do not I believe intend to, proceed with deposition discovery until the Second Circuit rules.

Mr. Ingber can obviously comment on that, but the practical fact of every part of the conversation that I had with him Sunday night was that there would be no deposition on Thursday, that my impression was he was not going to file a motion for protective order, which I think were his two options, either show up or file motions, and then if in fact we agreed to everything that he suggested, we would not have a formal agreement that a deposition would ever occur. And as a result of that, it seemed to me that they were granting themselves a de facto cancelation of the deposition and an extension of the deadline for us to complete discovery.

That is what I was convinced of, and I am still convinced of that. And faced with this Court's scheduling order and this Court's clear directive that you do have jurisdiction and that discovery is to continue, we felt the only way to proceed was to ask the Court to give us guidance on this.

I'm sure the Court recalls that on November 4th you issued your scheduling order. On that date you indicated you would supervise discovery in this action pending the Court of Appeals' decision in the Second Circuit, and that discovery was to proceed according to the schedule that you indicated. We have been complying with that. All of the written discovery that we issued was issued on the date that you allowed that. And the third item was that depositions could occur after January 17th, so we intended to proceed with the 30(b)(6) notice depositions on the 19th, with the view that that was an efficient and effective way for us to get an idea fundamentally of what activity the trustee engaged in.

And we have not yet received any written or formal document responses to our written discovery. I now can tell the Court that we have a protective order that is agreed to by my client and many of the intervenors. Not all of them have yet signed off on it and some of them have some concerns about some nuances individual to them, but we are still awaiting the document production and our belief was that, let's get the

skeleton chronology clear in our minds so that we know on what date -- and who is participating in the process of this particular settlement process.

The context of this, again, is that Bank of New York Mellon and the institutional investors have gone to the Court and seek relief that includes a finding that they acted in good faith, a finding that the terms of the settlement agreement are reasonable and seek a court order to that effect. And we on the institutional investor side, collectively I believe, want to know more about that. And in order to make sure we get that done in what I think all would agree is a condensed discovery process, we thought we had to move forward now.

The proposal that Mr. Ingber made to me over the weekend, in essence, was let's get documents exchanged, let's identify any discovery disputes, but let's not do any depositions until the Second Circuit rules, which, as we all know, could be February 24th, but there's no guarantee of that. I've spoken to counsel in the Greenwich case, and in that case the Court held a hearing and then granted itself or requested an extension for the parties; and it was, as I understand it, many weeks or months before the Court issued its order on a jurisdictional question.

We have a discovery cutoff of April 17th. All fact discovery should be completed by then, and if I agree to Mr. Ingber's approach, which was in essence formally putting

back the depositions, talking about what our disputes are, it wasn't even clear from that that we were going to present those issues to the Court for resolution; we would be, at best, if the Second Circuit ruled on February 24th, a month and a half or so out, assuming the Court confirms your ruling on jurisdiction, we'd have roughly 50 days to complete what is a substantial amount of fact discovery. And we could not be in that position, we didn't want to be in that position, and as a consequence we reached out to the Court.

Now that I have seen Mr. Ingber's letter, I think the fundamental issue is whether or not we can move forward with depositions before the Second Circuit rules. All of the other sort of logistic and procedural complaints about where we are, I think, are minor and, frankly, as I told Mr. Ingber on the call Sunday, all logistic issues can be dealt with. We have experienced counsel here, we have an experienced Court; it's really not a question of how is a deposition going to proceed. My belief is that any deposition in this case will have one speaker do 80 to 90 percent of the questioning and the other parties will have an opportunity to supplement questions on topics that were covered and ask new questions that were covered. And for the most part, that ought to be able to be done within the durational rules that apply. So that's the big picture.

The key thing again, the letter that I got from

Mr. Ingber on the 13th was the first time that they had indicated they were not going to appear for the deposition. And the second to last sentence in it, I think, states clearly what their view is, and it states, "The difference is in procedural rules that would govern any deposition in state court reinforce the conclusion that the intervenor's deposition of BNY's corporate representative should not proceed until the Second Circuit rules on the Court's jurisdiction."

We do not believe that anything this Court has said would support that, and believe that it's time to move forward and find out what we can find out in order to comply with discovery.

It is plainly true that even if the Second Circuit found that the Court didn't have jurisdiction, that we would still be entitled in discovery in the state court, we would still be entitled to the trustee's deposition, we would still be entitled to know the chronology of the settlement negotiations and who participated in them and what alternatives were considered by the trustee and what concessions were made by the trustee. So, to me, I don't quite get why we can't move forward at this point when in fact -- and I think Mr. Ingber will concede that we're entitled to discovery and that even if we got sent back, that would happen.

So big picture, your Honor: We'd ask that we move forward with the deposition on Thursday with the topics that I

had identified. And I saw the Court had asked for the deposition notice, so hopefully you have that before you and I just wanted to give you some background as to our thinking on this deposition notice.

We did circulate these topics amongst the intervenors. And I don't want to state that every single one had input or participated in the choices, but we certainly had a good representative group help us identify these topics, and I think I'm comfortable saying that they cover the majority, if not every topic that would ultimately be covered in deposition in this case. So, first of all, we tried to make sure that it covered the issues.

Secondly, I believe that a 30(b)(6) approach is an effective and efficient way, particularly in a setting where you've got condensed discovery, to get the information, to find out what the trustee's position is about why they entered into settlement and understand some of the opaque terms in the agreement, like how much are people going to get paid and how are the distributions going to be made, and at what point did Bank of America pull out of this settlement. So that was our fundamental thoughts.

The second thought was that we would try and put together topics that made sense on a particular day so that we could be sure Bank of New York Mellon could identify a witness who would be comfortable talking about topics that were

related. So the first day, which was to be Thursday, was really about the activities of the trustee -- what did you do in this process, who did you talk to, what did you look at, what did you consider, what did you reject? And that's fundamentally topic number 4, the respective actions taken by the Bank of New York Mellon.

Mr. Ingber was concerned that we would be delving into settlement communication issues, which is topic number 1, and was noted for that day. I assured him that I understood that that issue was before this Court. The Court now should have our letter, joint letter, that sets forth the parties' respective positions on the discoverability of the settlement communications. I assured him I would not suggest questions or inquire into that area and that if he felt that I was getting close to that particular area, that he should let me know and that I would honor his objections in that way.

So I think we have tried as best we could to move forward with our fundamental approach and not have the bank trustee's concerns ignored.

The other question that I see from Mr. Ingber's letter is meeting and conferring. When I talked to Mr. Ingber Sunday night -- and candidly it was a difficult, first part of the conversation was difficult but it was extensive -- I offered to go through his letter in detail and he candidly, and I accepted, said that he was at his inlaws' home and didn't have

it in front of him and so we did not go over the subjects, the topical objections, but we did go through every single logistic objection.

And those included the questions of multiple questioners at the deposition. I told him I didn't think that was an issue.

A significant concern of his is that this notice wasn't signed off by all intervenors. That's true, but as I said, I think most of the intervenors had input. And I've talked to intervenor counsel, they can chime in, but I do believe that the majority of the intervenor counsel would agree that they're not going to issue another notice that's identical to this on the same topics. I think some people were hoping to reserve the right to perhaps issue another notice on a new topic and the Court could easily address that question because I think that's one that at this stage I'm not speaking for all the group anyway but I think that's a valid concern on trustee's counsel's point.

The protective order issue, as I said, we've got that in front of the Court now. Or we'll have that in front of the Court now and Mr. Ingber has agreed that we will expeditiously ask that that be entered amongst those parties who have agreed to sign off on it. It's most of the intervenors at this point, and that could be in place by Thursday.

The one issue that we did not -- and I'm not

suggesting we reached resolution on the others but I think the one issue we probably could reach resolution on if we were ordered to sit down and talk -- but if we couldn't it would be just five minutes for the Court to hear the issues and resolve it -- is just whether or not we're entitled to more than one 30(b)(6) deposition. We noticed it that way because again we thought it was efficient, we think that there are a number of topics that were all together. And Mr. Ingber has said to me that he won't go forward with this deposition without knowing whether there are other 30(b)(6) depositions coming down the road. And I understand that; I don't agree with it but I appreciate that that's his concern.

We also spread out the notice that there would be two-week intervals between the sessions, that the first one was on the 19th of January, the second one wouldn't be until February 2nd, the third one would be February 16th and the fourth would be March 1st of this year. And by that time, we would have had, I believe, a clear, hopefully clear, understanding of the trustee's position on why the settlement ought to be approved.

I didn't mean to suggest in the notice, and don't want to suggest to the Court, that we don't expect to also take depositions of individuals who may have unique knowledge about the process, and that obviously includes some of the people identified by Mr. Ingber on the 26(a) disclosures who have

knowledge of the process as well as institutional investors that also actively participated in the negotiations.

So, big picture --

THE COURT: Quite frankly, you've given the refrain "big picture" several times. I have the big picture.

MR. REILLY: All right.

THE COURT: And I want to first hear -- before I hear from Mr. Ingber, I'd like to hear from Mr. Cyrulnik because I don't see Walnut Place taking any position in this matter.

MR. CYRULNIK: Your Honor, Owen Cyrulnik for Walnut Place.

I don't have any objection to the 30(b)(6) notice that AIG served. We agree with the topic and, as Mr. Reilly represented, we're willing to agree to address Mr. Ingber's concerns not to serve any deposition notice that duplicates the topics on that 30(b)(6).

We're in the process of working with Mr. Reilly to resolve some coordination issues that I don't think we'll have to burden the Court with. But for now, we're comfortable with the deposition notice and we agree that it's an appropriate deposition that should be taken, and we also certainly agree that the Court has jurisdiction, and that in order for the schedule to be maintained as the Court set it, discovery must proceed before the Second Circuit rules.

THE COURT: All right, thank you, Mr. Cyrulnik.

Mr. Ingber?

MR. INGBER: Thank you, your Honor, and good morning.

I hear an echo, so I would just ask all counsel to mute their lines to try to avoid that. I'll do my best to work through the echo.

Your Honor, Mr. Reilly said that there were two options for the trustee, either to show up on Thursday or to file a motion for a protective order. We disagree with Mr. Reilly. We think ultimately if the parties can't reach resolution of the issues that we have raised in our letter to the Court, we would need to file a motion for protective order. But we think there's a third option here, and that option was to meet and confer. As contemplated by the rules, that's how litigants in a typical case would operate, and that was the purpose of the very detailed letter that we sent to Mr. Reilly last week. We told him that we invited him to meet and confer about those issues, they were substantive, they were logistical, they were procedural, they were real concerns that the trustee had.

We did speak on Sunday night. And the reason we didn't get into substantive topics and we just discussed logistics is because he was on the phone and I was on the phone. He asked to have a call on Sunday night, I agreed to it, we spoke for two hours. Ms. Patrick, representing the institutional investors, wasn't on the call, and none of the

intervenor respondents or objectors were on that call.

What I told Mr. Reilly was that this is a productive conversation we're having, this is why we sent the letter, we think we should meet and confer again this week. I offered to do it on Tuesday. And then we heard from Mr. Reilly the next day, that he would be either calling the Court or sending a letter to the Court raising this issue. And we asked him to meet and confer again this Thursday and to send us a letter explaining the issues that he had with our January 13th letter.

So for us, this is an issue of process. We do not object to any depositions taking place before the Second Circuit rules. We have not refused to move forward with depositions. We think that as a practical matter, that might be the best approach because there are a number of issues that the parties need to work through.

And I reinforced this point to Mr. Reilly on Sunday. He asked me pointblank, are you telling me that you're not going to proceed with the depositions until the Second Circuit rules? And I said no. I said, let's meet and confer, let's try to work through these issues, I don't know whether we can work through every one of these logistical and substantive issues but let's take a stab at it; and if we can, we will think about making someone available at the end of January and early February but we've first got to work through these issues.

That's what I told Mr. Reilly on Sunday, and that's our position, your Honor. But the reason we think that as a practical matter it makes sense to wait on this 30(b)(6) deposition and other depositions until the Second Circuit rules is because there's a number of discovery disputes that I anticipate the parties will have and that will come up in these depositions.

Now, there's one issue that the parties have teed up for the Court, and that's the question of discoverability of settlement communications. But we served our responses to the objectors' document requests, and there are a number of objectionable requests. We have made our objections known. There haven't been a meet-and-confer about any of those issues. We're happy to meet and confer. The onus is not on the trustee to call up the objectors and say we have objected to your document requests, if you don't agree with our objections, let's have a meet-and-confer and talk through them. If the objectors' were interested in having a discussion with them, we would have assumed that they would have called and started that discussion.

What we don't want to happen is for depositions to take place piecemeal and then for the objectors to come forward and say, hey, you guys didn't produce these documents, and for us to say, well, we objected to those documents, to producing those documents, you didn't raise those issues, and then they

go ahead and raise the issue with the Court, the deposition is behind us, and then they ask for a second bite at the apple. Those are the types of issues that we're trying to avoid.

With respect to this 30(b)(6) notice in particular, we have laid out all of the issues that we have with respect to this notice. I want to point out just a few, your Honor.

Number one, it's signed by a handful of the 42 groups of objectors. That's an issue, from our perspective. We have talked about trying to avoid piecemeal discovery, and it's very important to us that we do this in a coordinated fashion.

It strikes us as fairly obvious that the objectors themselves aren't coordinated, by virtue of the fact that only a few of them signed this notice in particular; by virtue of the fact that they haven't coordinated on how to proceed with depositions generally, the logistics of that, they haven't communicated that to us. Mr. Reilly, on the call on Sunday and in the call this morning, your Honor, said that it's his position that he'll speak for 80 percent of the time and others will speak for 20 percent of the time, and it may be the case that other intervenor respondents or objectors will file a subsequent 30(b)(6) notice, and that's an issue that he recognizes that the trustee has and one that needs to be worked through.

He's making representations to me -- he made representations to me in the call on Sunday night about how he

would like things to proceed, that he would agree not to redepose a 30(b)(6) witness based on newly produced documents. But we don't know what the other objectors and intervenors, what their view is on these issues, and it's very important that we all get in a room and we talk through these issues.

We need a comprehensive plan, your Honor, about how depositions are going to be taken. Is Mr. Reilly going to take the lead? If so, that's fine. Are the objectors in agreement about who's going to be deposed? Are the objectors going to seek another 30(b)(6) deposition? If they don't like the questions that Mr. Reilly asks, will they seek to subsequently depose that witness again?

These are issues that are of significant importance to the trustee and should be important to anyone participating in this process, because we want to make sure that the process is efficient, is productive, and achieves the goal that everybody wants here, which is to give the objectors the information to which they're entitled.

So, on the narrow question of whether we should go forward tomorrow, we have raised the concerns that we have in our letters, the small minority of objectors who seem to want to go forward with this, they asked for the deposition protocol. A protective order, when we sent our letter on Friday, hadn't been agreed to, and as Mr. Reilly pointed out, some of the objectors still have concerns about that protective

order.

We have issues -- and this could take probably many hours to do, but we could go through each of the topics and explain the issues that we have with many of these topics and why we don't think they're relevant to the question that's before the Court.

We have mentioned, your Honor, in the letter that the deposition is scheduled for four days. We understand there's a lot that the objectors may want to delve into, and we have an open mind about the duration of the deposition. But under the rules, the objectors are entitled to seven hours with one witness, and we may well put forward one corporate representative to testify on these issues. That's not to say that we wouldn't agree to more time, but it's an issue that needs to be worked out and it's an issue that Mr. Reilly and other objectors assumed would be a nonissue. They scheduled the deposition for four days without reaching out and having a discussion about whether that made sense and a discussion about the topics.

We mentioned document review and production. It's not just an issue with respect to newly produced documents and the question of whether objectors are going to seek to redepose Bank of New York witnesses. We also need these documents for a 30(b)(6) deposition. It's not as if this is a deposition of a single bank witness about that witness' personal knowledge of

issues, where we can produce the documents pertaining to that witness and have a fulsome deposition. This is a deposition notice that was 26 topics and the corporate representative rightly will not have personal knowledge about each of those 26 topics, assuming all 26 topics are part of this deposition. It's important for us to make sure that we have been through all the documents and that those documents are produced so that we can adequately prepare our witnesses to give the information that Mr. Reilly is looking for.

So those are the key issues that we have with this notice. This was the purpose of the letter that we sent to Mr. Reilly on January 13th. What I have proposed to Mr. Reilly, and what I have proposed to all the objectors on this call now, and a proposal that I would make if there were a meet-and-confer taking place, is that we try to work through these issues, we try to deal with whatever document issues we're going to have now, we discuss deposition logistics, we understand who's taking the lead, what the position of each of the objectors is going forward with respect to depositions, we raise issues with the Court if we need to raise those issues with the Court, and, if necessary, we brief those issues, and then by then we believe we'll have a decision from the Second Circuit. The Second Circuit has indicated as much; the merits brief was filed yesterday on behalf of the Bank of New York and the institutional investors, two separate briefs. Briefing

will be finished by February 9th and as I understand it, your Honor, it is on the Court's calendar for the 13th; and by statute, and I think by the Court's order, a decision will be rendered by February 24th.

So over the next few weeks, we think that the parties can work together in a very constructive fashion so that whatever issues we have are vetted, are addressed to the Court, and then can be resolved by the Court shortly after the Second Circuit rules.

So for us this is more about process right now than substance, although substance will be a key issue going forward, as reflected, for example, in the settlement communications letter that was jointly submitted by the parties.

That's all I have for your, your Honor, but I'm obviously happy to answer any questions that you have.

THE COURT: All right. Look, let me try to give all of you some guidance at this point in time.

First, it seems to me that there is a little fault to go all around. I don't understand why the trustee waited until January 13 to lodge objections to the Rule 30(b)(6) notice that was served in December. But at the same time, it's clear to me from listening to counsel that there is a lack of coordination here about how discovery is going to proceed. The very first thing I want all of you to do is to meet and confer regarding

the document discovery that's still outstanding because it strikes me that when it comes to a Rule 30(b)(6) deposition, the trustee has a legitimate concern that he doesn't want to have his client subjected to repeated multiple 30(b)(6) depositions, seeing if the witness can come up with a different answer to the same question.

Therefore, I think that the parties -- and now I'm speaking to the objectors and the intervenors -- better get on the same piece of music, because at the end of the day there really should not be multiple 30(b)(6) depositions of the same witnesses. There may need to be multiple 30(b)(6) witnesses to cover a variety of topics but that's a different matter.

I also think that these substantive disputes, like the issue that's been raised with me regarding the discoverability of settlement discussions, should be, and can be, carefully teed up. I tell you that the Court of Appeals has said that it is going to make a determination in this matter in late February. That is not that far off.

And in the end, when it comes to a substantive issue, like any privilege attaching to settlement negotiations, the outcome of such an application may be different in my court than it would be in Judge Kapnick's court. So I think that it may be appropriate for me to wait until the Second Circuit has decided the issue before it. But that doesn't mean that procedural matters can't be resolved and that depositions can't

go forward where the content is undisputed, because at the end of the day nobody's being served by a delay in these proceedings.

So I want you to meet and confer. I want a protective order to be agreed to and submitted to me. It would be foolhardy for the trustee to go forward with a deposition in the absence of a protective order. These are things that need to be discussed face to face and resolved. And to the extent there's a dispute, you can present it to me and I'll act on it. I haven't begun to dip into the settlement privilege question that's been raised, but that is obviously a significant legal question, and I may want some more briefing on that.

Now, the bottom line is, there will be no deposition tomorrow, but I'm not staying depositions in this case because I don't think that the prerequisites for going forward with the deposition have been satisfied, namely a meet-and-confer. And there certainly could be subjects on which the parties agree and therefore a deposition could begin, but the ground rules need to be worked out.

Are there any questions that the parties want to raise with the Court while we're all together here on the record? And just identify yourself.

MR. REILLY: It is Dan Reilly. And I understand clearly what you're saying. We are scheduled to be in New York tomorrow and would agree to do that tomorrow so we can keep it

all moving.

THE COURT: That's fine, Mr. Reilly. And I might suggest that I guess I could understand why you'd rather talk to Mr. Ingber on Sunday night than watch the Denver Broncos.

MR. REILLY: Oh, Judge, that hurt, that hurt. Congratulations to the Giants.

THE COURT: Anything further from counsel?

MS. PATRICK: Your Honor, it's Cathy Patrick for the institutional investors.

THE COURT: Thank you. Go ahead.

MS. PATRICK: The conference tomorrow that Mr. Reilly is going to have, do you anticipate that all objectors -- I'm terribly sorry for the echo -- that all objectors and intervenors should be present for that for purposes of coordination, or is that to continue to be binary?

THE COURT: Well, in the absence of having some written agreement among the parties, that's a joint agreement; it's hard for it to be binding on everyone if it's only a binary discussion, but I don't think that that means that everybody has to be present in the same room but they have to be available to provide their input so that the trustee knows that when he's sitting across the table talking to Mr. Reilly or Mr. Cyrulnik or anyone else, that he's not going to have to have the same conversation with 40 other parties.

MS. PATRICK: All right, thank you, your Honor. I

just wanted to understand our attendance.

THE COURT: That's fine.

Any other questions?

MR. INGBER: No, thank you, your Honor.

THE COURT: Mr. Reilly, apart from submitting the list of participants for the court reporters benefit, I'm going to direct you to make arrangements to purchase this transcript.

MR. INGBER: All right, we'll do that.

THE COURT: Thank you.

MR. INGBER: Your Honor, if I could ask everyone who's on the call to shoot me an email so I'm sure I have the right list, I'd appreciate it.

THE COURT: That's fine.

All right, everyone.

COUNSEL: Thank you, your Honor.

THE COURT: Thank you.

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