

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

191YBANC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

THE BANK OF NEW YORK
MELLON, as trustee under
various pooling and servicing
agreements,

Petitioner,

v.

11 Civil 5988 (WHP)

WALNUT PLACE, LLC, et al.,

Respondents.

-----x

September 1, 2011
11:15 a.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

1 APPEARANCES

2 MAYER BROWN, LLP
Attorneys for Petitioner
3 1675 Broadway
New York, New York
4 MATTHEW D. INGBER, ESQ.,
Of counsel
5

6 DECHERT, LLP
Attorneys for Petitioner
7 1095 Avenue of the Americas
New York, New York
8 HECTOR GONZALEZ, ESQ.,
Of counsel
9

10 GRAIS & ELLSWORTH, LLP
Attorneys for Respondent Walnut Place, Inc.,
11 40 East 52nd Street
New York, New York
12 OWEN L. CYRULNIK, ESQ.,
DAVID J. GAIS, ESQ.,
13 Of counsel

14 KENNETH WARNER, ESQ.,
Attorney for Blackstone
15 Of counsel

16 GIBBS & BRUNS, LLP
Attorneys for Blackstone
17 1100 Louisiana
Houston, Texas
18 KATHY PATRICK, ESQ.,
19 Of counsel

20 REILLY POZNER, LLP
Attorneys for AIG
21 1900 Sixteenth Street
Denver, Colorado
22 DANIEL M. REILLY, ESQ.,
23 MICHAEL A. ROLLIN, ESQ.,
Of counsel

24 (Continue on next page)

25

APPEARANCES (Continued)

1
2
3 SCOTT & SCOTT, LLP
4 Attorneys for Policemen's Annuity Benefit Fund, Chicago
5 500 Fifth Avenue
6 New York, New York
7 MAX SCHWARTZ, ESQ.,
8 JOSEPH GUGLIELMO, ESQ.,
9 Of counsel
10

11
12 FLEISCHMAN LAW FIRM
13 Attorneys for Mary Ellen Iesu, Mildred Barrett, et al.,
14 565 Fifth Avenue
15 New York, New York
16 KEITH FLEISCHMAN, ESQ.,
17 Of counsel
18

19
20
21 WOLLMUTH MAHER & DEUTSCH, LLP
22 Attorneys for The Western and Southern Life Insurance Co.
23 500 Fifth Avenue
24 New York, New York
25 STEVEN S. FITZGERALD, ESQ.,
Of counsel

KELLER ROHRBACK, LLP
Attorneys for Federal Home Loan Bank of Chicago, et al
770 Broadway
New York, New York
DAVID S. PREMINGER, ESQ.,
Of counsel

1 THE COURT: Good morning, counsel.

2 THE CLERK: The case is Bank of New York Mellon
3 against Walnut Place and related cases.

4 Counsel for petitioner for Bank of New York Mellon
5 please state your appearance.

6 MR. INGBER: Good morning, your Honor. Matthew Ingber
7 on behalf of trustee The Bank of New York Mellon.

8 MR. GONZALEZ: Good morning, your Honor.

9 Hector Gonzales as well on behalf of the bank.

10 MR. WARNER: Ken Warner on behalf of the 22
11 institutional investors who intervened as petitioner
12 intervenors in the state court case, and with me is Kathy
13 Patrick of Gibson Group in Texas who has had a major role in
14 the settlement that is at issue here and I hope she will be
15 able to address the court if necessary. She is admitted pro
16 hac voice in the state court case.

17 THE COURT: All right. Good morning Mr. Warner.

18 MS. PATRICK: Good morning, your Honor. Thank you for
19 the privilege to allow me to appear here. I very much
20 appreciate it.

21 THE COURT: Well, I don't recall saying that I have
22 already allowed that.

23 MS. PATRICK: I apologize, your Honor.

24 THE COURT: Let's see if it's necessary.

25 THE CLERK: For the respondents.

1 MR. CYRULNIK: Owen Cyrulnik for Walnut Place.

2 MR. GRAIS: And David Grais as well for Walnut Place.

3 THE COURT: Good morning, gentlemen.

4 THE CLERK: Appearances for other respondents or
5 intervenors.

6 MR. REILLY: Dan Reilly on Michael Rollin. We
7 represent AIG. We have an intervention petition pending in the
8 state court and we filed a notice of objections here.

9 I'm not officially admitted yet under the rules. I
10 have to await the court's ruling on that.

11 THE COURT: Very well.

12 MR. PREMINGER: David Preminger. We represent the
13 proposed intervenors, Federal Home Loan Banks of Boston,
14 Chicago and Indianapolis.

15 MR. SCHWARTZ: Good morning, your Honor. My name is
16 Max Schwartz, with Joseph Guglielmo.

17 We represent the Chicago Police and Firemen's Public
18 Pension fund and also public pension funds both in the removal
19 case and the related case.

20 MR. FITZGERALD: Steven Fitzgerald for the Western and
21 Southern Life Insurance Company intervenors in the state court
22 action.

23 THE COURT: Good morning.

24 MR. FLEISCHMAN: Good morning, your Honor. Keith
25 Fleischman. We represent the borrowers that underlie these

1 trusts proposed intervenors in this action in the settlement.
2 I represent Mary Ellen Iesu, Mildred Barrett and a putative
3 class.

4 THE COURT: Now, the court has before it an
5 application for an order to show cause for expedited briefing
6 with respect to Bank of New York Mellon's application for
7 remand.

8 Can someone begin by providing me with a brief
9 overview of the substance of the other two state court
10 proceedings, Walnut Place against Countywide and Knights of
11 Columbus versus Bank of New York Mellon.

12 MR. INGBER: Your Honor. Matthew Ingber for The Bank
13 of New York Mellon.

14 Let me give that a shot.

15 There is the Article 77 proceeding before Justice
16 Kapnick in New York State court.

17 There is also as you mentioned two other somewhat
18 related matters. One is the Walnut Place matter and the Walnut
19 Place entities have filed claims against certain Bank of
20 America and Countywide entities and they also named Bank of New
21 York Mellon in its capacity as a trustee as a nominal
22 defendant.

23 There are actually two Walnut Place actions against
24 those very same parties and they assert claims against Bank of
25 America and Countywide arising out of the pooling and servicing

1 agreements and they are seeking the repurchase of loans as a
2 result of alleged conduct or misconduct by Bank of America and
3 Countrywide.

4 As I mentioned, The Bank of New York Mellon is a
5 nominal defendant in that case and the trusts that are at issue
6 in the Walnut Place case are three of the same trusts that are
7 the subject of the settlement in the Article 77 proceeding.

8 The Knights of Columbus action is an action that was
9 filed in New York State court and assigned initially to Judge
10 Kornreich. It's currently pending before Judge Kornreich.

11 The Bank of New York Mellon has filed a motion to
12 transfer the case to Judge Kapnick, or in the alternative a
13 motion to stay the case pending resolution of the Article 77
14 proceeding.

15 After that motion was filed Knights of Columbus
16 consented to the transfer to Judge Kapnick, submitted a
17 proposed order to justice Kornreich and that order has not yet
18 been entered.

19 THE COURT: What are the claims in the Knights of
20 Columbus case?

21 MR. INGBER: Sure. The case started out as an
22 accounting with Bank of New York Mellon as trustee as the
23 defendant.

24 After the motion to transfer and stay was filed and
25 after Knights of Columbus consented to that motion, the Knights

1 of Columbus then filed an amended complaint and they have
2 asserted, among other claims, breach of contract claims against
3 The Bank of New York Mellon arising from The Bank of New York
4 Mellon's pre-settlement conduct relating to its roles and
5 responsibilities as trustee, it's alleged duties with respect
6 to the maintenance of loan files or collateral files.

7 So that right now is pending before Justice Kornreich
8 and remains to be seen if Justice Kornreich signs that proposed
9 order to transfer it to Judge Kapnick.

10 If I got anything of that wrong, I know Mr. Grais is
11 representing the Walnut entities and he can correct the record.

12 THE COURT: All right, thank you, Mr. Ingber.

13 Mr. Grais, did Mr. Ingber get any of it wrong?

14 MR. CYRULNIK: No, your Honor. He accurately
15 characterized the Walnut Place litigation.

16 MR. INGBER: There is one piece of information
17 relating to the Knights of Columbus which I neglected to
18 mention which I think is relevant.

19 I believe there are 18 trusts that are at issue in the
20 Knights of Columbus matter, 16 or 17 of which are the same
21 trusts that are the subject of the settlement in the Article 77
22 proceeding.

23 THE COURT: All right.

24 Now, Mr. Grais or Mr. Cyrulnik, do you want to be
25 heard on the question of scheduling here?

1 MR. CYRULNIK: We do, your Honor.

2 There are three reasons why we think the court, we
3 respectfully submit the court should reject the schedule
4 proposed by The Bank of New York Mellon and, instead, enter an
5 alternative schedule or perhaps order the parties to meet and
6 confer as to a reasonable schedule for briefing the motion for
7 remand.

8 The trustee's proposed schedule is based on a false
9 sense of urgency and exigency that we think exists here.

10 Second, we think that the trustee's proposed schedule
11 would deprive the court of a full and complete briefing on some
12 complex and in some cases novel issues of law that we think
13 should be fully briefed in a reasonable and, you know, fairly
14 concert fashion.

15 And, third, it would impose an undue burden,
16 unnecessary burden on Walnut Place to brief a complex response
17 of 21 page motion in less than three business days over a
18 holiday weekend.

19 To go through that in a little more detail.

20 The false sense of urgency.

21 The Bank of America, The Bank of New York Mellon and
22 some of the other intervenor petitioners clearly have a sense
23 of urgency about getting this settlement approved and in order
24 to create a sense of urgency in this court to try to expedite
25 the briefing on the motion to remand they tried to convince

1 your Honor that there is a sense of urgency here, but we don't
2 think they put forward any facts that should move the court.

3 First, there are a number of facts that The Bank of
4 New York has not brought to the court's attention that I think
5 belie the sense of urgency and exigency that they are trying to
6 create.

7 The first fact is that this settlement has been a long
8 time in the making. The public announcement of the negotiation
9 of it started in June 2010 and it has been going on for at
10 least a year. They can't possibly be approved even on the
11 schedule that is now set until November and payment can't
12 possibly happen until several months after that. A delay of a
13 few days or even a few weeks to have a reasonable and fair
14 briefing schedule on a complex motion to remand doesn't seem
15 like it should be an inordinate burden giving the overall
16 timing of the settlement.

17 Second, the settlement agreement itself specifically
18 says that Bank of America is bound to the settlement so long as
19 judicial approval is achieved by the end of 2015. There is
20 plenty of time for this court or any other court to fully and
21 completely explore the issues, including the issues of
22 jurisdiction, without the need for the sense of urgency and
23 exigency that The Bank of New York is trying to create.

24 Third, the trustee initiated this proceeding in state
25 court by filing a petition, an Article 77 petition, but it also

1 filed at the same time an order to show cause. It presented
2 that order to show cause to Justice Kapnick, new York State
3 Supreme Court, without informing the court that there were
4 already adverse parties and without inviting adverse parties to
5 appear and be heard before Justice Kapnick before she signed
6 the ordered to show cause.

7 The order to show cause is to set the schedule that
8 the trustee is trying to protect in this case by expediting the
9 briefing on the motion to remand, and I respectfully submit
10 that this schedule was entirely of their own making. It wasn't
11 Justice Kapnick or the state court set a magic date of November
12 or September for any of the T deadlines here, it was the
13 trustee's request. It was signed without any other opposing
14 parties being heard, and that schedule is really the only thing
15 the trustee is trying to protect by expedited briefing on this
16 motion.

17 One other point. Since the Article 77 petition was
18 filed in the state court before Justice Kapnick, 44 separate
19 groups of investors, some of which groups include many
20 individual members, has either intervened to oppose the
21 settlement or filed objections to the settlement. These are
22 investors large and small, public and private, and they are not
23 all the same, the objections are different, but virtually every
24 single one of them has said The Bank of New York has not
25 provided enough information to allow investors to decide

1 whether the settlement is fair, and perhaps more importantly
2 every single one of these objections almost to a letter have
3 said that they need more time to evaluate the information they
4 get in discovery in order to figure out whether they think it's
5 a fair settlement and present any objections to the court.

6 Some examples of those intervenors are here. We
7 represent the Federal Home Loan Bank of San Francisco and
8 Seattle, the Federal Home Loan Banks of Boston and Indianapolis
9 and Chicago have also intervened, the Home Loan Bank of
10 Pittsburgh has intervened, AIG has intervened, the FDIC has
11 filed objections.

12 All of these parties -- none of these parties would be
13 in any way prejudiced or even noticed if this proceeding were
14 delayed by a few days or a few weeks to permit a fair hearing
15 on a motion to remand. All of these parties are asking for
16 some delay, some pause in the proceeding to allow them to
17 evaluate the settlement fairly.

18 The trustees submitted a declaration of exigency to
19 explain why it is that it thinks the court should order a
20 dramatically expedited briefing schedule on this complicated
21 motion to remand. The only thing they pointed to is that the
22 removal and a non-expedited decision on a motion to demand
23 could somehow delay the dates that are set up in the state
24 court, and in particular they point to a September 5 date when
25 the parties are supposed to meet and confer about discovery, a

1 hearing the week of September 15 to resolve disputes about
2 discovery and a November 17 final approval hearing date.

3 We respectfully submit that every time a case is
4 removed to a federal court and a motion to remand is filed some
5 hopefully brief but some delay of the state court proceeding
6 can ensue.

7 By way of example, our firm has filed more than 15
8 cases in state court over the past two years, every single one
9 of them was removed, every single one of them was remanded.
10 Did it cause some delay in the schedule that we had in the
11 state court? Of course it did. Did they file a motion to
12 expedite, order to show cause to expedite briefing every single
13 time a case was removed? We did it because that's the way the
14 system works and we are as interested in efficiency to anyone
15 else, but not in a false sense of urgency to create efficiency
16 that is not necessary.

17 There is nothing special about the date the trustee is
18 trying to protect. September 5 is a date when the parties are
19 supposed to meet and confer about discovery. The parties can
20 meet and confer with discovery the week of September 5 whether
21 the case is in this court or in the state court, whether
22 motions to remand are still being briefed or already briefed.

23 There is supposed to be a hearing to resolve disputes
24 about discovery the following week, the week of September 15.
25 This court certainly could chose to hold such a hearing and

1 consider the scope of or program for discovery.

2 This court obviously also could decide to defer its
3 consideration of discovery until it has more of an opportunity
4 to review the jurisdictional issues. Either way we are not
5 talking about the kind of delay or the kind of prejudice that
6 would justify a dramatically accelerated briefing schedule on a
7 complicated motion to remand.

8 As for the hearing date that is supposed to be on
9 November 17, the trustee points out in its declaration of
10 exigency that changing the hearing date would somehow confuse
11 investors who received notice of a program initiated by the
12 trustee that the hearing was going to be on November 17.

13 I point out that the notice the trustee sent
14 specifically says in the next sentence after November 17 was
15 disclosed that that date could be changed by the court at any
16 time without notice.

17 I would also note that of at a hearing that Justice
18 Kapnick conducted on August 5 the court specifically noticed if
19 it was determined that discovery would take longer than
20 permitted by the November 17 date, the court could easily
21 change the November 17 date.

22 None of these dates are set in stone. No one would
23 suffer any actual prejudice if there were a few days or a few
24 weeks more built into the schedule to allow the parties to
25 fully brief the questions on the motion to remand and to allow

1 the court to fully consider the issues that are presented by
2 this removal.

3 My second point is related and it goes to the complex
4 matters that are presented by this motion to remand.

5 The trustee, I think, also in order to create the
6 sense of urgency uses rhetoric like frivolous removal. Without
7 getting too deeply into the merits because I know it would be a
8 waste of the court's time and we have had their papers for
9 about 24 hours at this point, suffice it to say that we believe
10 this removal was far from frivolous.

11 There are three requirements for removal of
12 jurisdiction under CAPA. There has to be minimum diversity.
13 And I think everyone agree there is minimal diversity here.

14 There has to be more than \$5 million in controversy.
15 As far as I can tell everyone agrees that an 8.5 billion dollar
16 settlement of a 150 billion dollar claim or claims suffices to
17 satisfy the \$5 million amount in controversy requirement.

18 There also has to be a class action or a mass action.
19 The trustee argues that there is no class action here and no
20 mass action.

21 Just to very briefly address that one point, the crux
22 of the trustee's argument appears to be that The Bank of New
23 York Mellon is the only petitioner in this case. I think in
24 order to see why that's not the case the court need only look
25 at the first sentence in the petition that started this entire

1 Article 77 proceeding.

2 The petition says The Bank of New York Mellon solely
3 in its capacity as a trustee for 530 trusts initiates this
4 Article 77 proceeding.

5 There is a reason why The bank of New York Mellon,
6 when it writes these papers, is always careful to note that
7 it's The bank of New York Mellon solely in its capacity as a
8 trustee. The reason is The Bank of New York Mellon in its
9 capacity as trustee is acting as a trust, it's not acting as
10 The Bank of New York Mellon. The trustee is the arm of the
11 trust. Each trust acts only through the trustee, but it's not
12 the case that because it happens to be the same trustee for
13 each of these trusts that the trusts are not individual
14 entities.

15 One example of how we know that is the law in New York
16 has always been at least since 1934, which is the first case we
17 found on the subject, that The Bank of New York Mellon acting
18 in its capacity as trustee if it gets a judgment is not bound
19 in its individual corporate capacity by that judgment, only the
20 trust is bound. The Bank of New York Mellon itself in its own
21 individual corporate capacity is not participating in this
22 proceeding, it's participating in its capacity as trustee, and
23 there is no such thing as The Bank of New York Mellon as
24 trustee of 530 trusts, it's The Bank of New York Mellon as
25 trustee of the first trust, The Bank of New York Mellon solely

1 in its capacity of the second trust.

2 However you characterize this, there are 530 trusts
3 and The Bank of New York Mellon is the trustee of each one and
4 each one of those trusts is seeking a judgment from the court.

5 The last point I will make on the substance unless the
6 court has any questions about it is The Bank of New York tries
7 to characterize this as a request for a single indivisible form
8 of equitable relief. They argue in their papers that all they
9 are seeking in the Article 77 proceeding is a single judgment
10 from the court that The Bank of New York Mellon as trustee
11 acted reasonably.

12 And if that were all they were seeking then they might
13 have a point, a point I would probably disagree with but they
14 probably would have a point. I think it's important to note,
15 though, that they are not seeking solely a judgment that they
16 acted reasonably, if the court were to look at, and I could
17 hand up a copy of the final judgment that The Bank of New York
18 Mellon is seeking from the state court and would seek from this
19 court if they were to be before it, the first few pages of the
20 final judgment they are seeking refers to the Bank of New York
21 Mellon's conduct and its reasonableness, but the crux of the
22 order they are seeking from the state court is a direction from
23 the court that the parties consummate the settlement and
24 implying that the money be paid and an order from the court
25 that the settlement agreement is approved in all respects and

1 is solely enforceable in all respects and an order from the
2 court to order releases provided in the settlement agreement.

3 This is not an Article 77 proceeding designed solely
4 to get a judgment from the court that The Bank of New York
5 Mellon is reasonable, this is a proceeding that is designed to
6 get the court to approve a settlement of 530 trusts with the
7 Bank of America and Countrywide to settle 150 billion dollar
8 liability for 8.5 billion dollars.

9 The idea this is simply a simple matter between The
10 Bank of New York Mellon and the court and not a matter on
11 behalf of 530 trusts and not a matter that relates to monetary
12 relief simply defines logic.

13 The final point I would make to your Honor is about
14 the burden.

15 We got The Bank of New York Mellon's papers yesterday
16 morning. We are hear before your Honor this morning. Their
17 request is that we file responsive papers by no later than
18 Tuesday, the day after the holiday weekend.

19 We respectfully submit that there is no exigency or
20 urgency here that requires this motion to remand to be treated
21 differently than any other motion to demand from this court and
22 we request the court to enter a reasonable schedule or order
23 the parties to confer about a reasonable schedule.

24 In the event, though, the court is inclined to
25 expedite review of this motion to remand, we would respectfully

1 submit that there is no reason why The Bank of New York should
2 not be able to give us the minimal 14 days that we are entitled
3 to under the Federal Rules.

4 If the Bank of New York is still prepared to file its
5 reply in three days after it gets our response papers, then the
6 briefing of the entire motion to remand would be complete by
7 the end of the week after next, a seven day delay over the
8 schedule The Bank of New York is proposing in its order to show
9 cause, and at least would provide some fair amount of time for
10 this to be briefed in a complete and robust fashion for the
11 court.

12 THE COURT: Thank you.

13 MR. INGBER: May I, your Honor?

14 Let me actually start with the last point that
15 Mr. Cyrulnik made and that is with respect to the burden.

16 This was an issue that was obviously created by the
17 notice of removal that the Walnut Place entities filed on
18 Friday. They have an obligation, a Rule 11 obligation to make
19 sure that there is a basis for removal. They have the burden
20 on this motion to remand to establish that there is
21 jurisdiction in this court so presumably they have looked into
22 all of the issues that we have raised on our motion to remand,
23 they presumably would have researched them, carefully
24 considered them --

25 THE COURT: What is the extreme exigency here other

1 than the fact that you are supposed to meet and confer next
2 week, which you could do in any event?

3 MR. INGBER: The exigency, your Honor, is that The
4 Bank of New York as trustee entered into this settlement with
5 Bank of America and Countrywide that calls for eight and a half
6 billion dollars to be distributed to 530 trusts upon approval
7 of the settlement. It calls for industry leading servicing
8 improvements that won't be into effect until the settlement is
9 approved.

10 THE COURT: If all of that is such an exigency, why
11 didn't the trustee notify all the beneficiaries that it was
12 presenting an order to show cause in a proceeding to approve a
13 settlement to which they would be bound? Why didn't you do
14 that?

15 MR. INGBER: Your Honor, we presented the order to
16 show cause to Justice Kapnick --

17 THE COURT: No. Would you just answer my question?

18 MR. INGBER: Certainly, your Honor.

19 THE COURT: If it's a matter of such exigency, why
20 didn't you notify all of the beneficiaries that you were
21 presenting such an application?

22 MR. INGBER: Because we knew that there was a massive
23 notice program that we expected the court would sign off on and
24 then beneficiaries of the trust would receive notice of this
25 schedule very soon after the schedule was --

1 THE COURT: Don't you have obligations to the
2 beneficiaries of the trust as a fiduciary?

3 MR. INGBER: Well, your Honor, we have obligations to
4 the beneficiaries of the trust in this case -- well, let me
5 take a step back.

6 We filed this Article 77 proceeding in part because we
7 wanted to give notice to trust beneficiaries and to give them
8 an opportunity to weigh in either in support of the settlement
9 or in opposition to the settlement.

10 THE COURT: Is Mr. Cyrulnik correct that you
11 unilaterally selected the dates by which objections would be
12 filed and when the matter would be concluded?

13 MR. INGBER: We presented the order to show cause with
14 those dates that were selected by, by the trustee and then --

15 THE COURT: Fine. So you did unilaterally fix those
16 dates and the state court judge just went along with it because
17 she didn't have anybody else before her at the time to raise an
18 objection?

19 MR. INGBER: Right.

20 THE COURT: Okay.

21 MR. INGBER: Its correct, your Honor, we presented
22 those dates to Justice Kapnick and Justice Kapnick signed the
23 order --

24 THE COURT: In a vacuum, right?

25 MR. INGBER: There was --

1 THE COURT: In a vacuum?

2 MR. INGBER: Correct. There were no other parties to
3 present an alternative schedule, but there has been since.

4 THE COURT: Isn't it unusual to use an Article 77
5 proceeding to seek approval for a settlement of this type?

6 MR. INGBER: Your Honor, the trustee believes and
7 continues to believe that the Article 77 proceeding is the best
8 mechanism to seek approval of a settlement of this type.

9 THE COURT: Well, isn't it odd that the trustee
10 appears to have chosen such a proceeding whose main benefit
11 appears to be to limit the rights of the trust beneficiaries to
12 opt out of the settlement?

13 MR. INGBER: Your Honor, one of the reasons why we
14 filed the Article 77 proceeding as I mentioned was to give
15 trust beneficiaries an opportunity to be heard in support or in
16 opposition to the settlement, but on the opt out question, once
17 the trustee has acted in this way, the ability of certificate
18 holders to bring their own claims doesn't exist. They have no
19 standing to bring those claims once the trustee has acted in
20 this way. There is a no action clause in the pooling and
21 servicing agreements that requires that before certificate
22 holders can bring claims --

23 THE COURT: Was the Article 77 proceeding selected by
24 the trustee to insure that there was no opt out?

25 MR. INGBER: No, no, it wasn't --

1 THE COURT: So what was the reason for the Article 77
2 proceeding?

3 MR. INGBER: The Article 77 proceeding was filed
4 because it's an expedited proceeding because of its simplicity.
5 One petitioner could go in and seek approval of a settlement on
6 an expedited basis and give an opportunity to beneficiaries to
7 weigh in.

8 We filed the Article 77 --

9 THE COURT: You don't think that that is in any way at
10 odds with the trustee's fiduciary obligation to the
11 beneficiaries of the trust?

12 MR. INGBER: Well, your Honor, let me, let me first
13 say that, that whatever duties the trustee had to the trusts
14 and the trusts' beneficiaries we certainly felt we were
15 fulfilling those duties by filing this Article 77 proceeding
16 and being open and transparent about what we were doing.

17 One alternative is not to file a proceeding, one
18 alternative is to enter into this settlement and to not give
19 trust beneficiaries an opportunity to be heard, but that was
20 the very reason to file this Article 77 proceeding.

21 We entered into this settlement because in our good
22 faith judgment we believe that this was a very good settlement
23 for the trust for a variety of reasons and we -- and the goal
24 is to get the settlement approved because we believe it's in
25 the best interest of the trusts and we want to do it

1 expeditiously. That is one of the reasons why we filed a
2 special proceeding under Article 77 and that's one of the
3 reasons why we submitted the schedule to Justice Kapnick that
4 we did, and that, I would suggest, your Honor, is one of the
5 reasons why Justice Kapnick didn't alter the schedule that we
6 proposed to her. It's also one of the reasons why she didn't
7 move the deadlines that were established when Mr. Grais and
8 others tried to move those dates.

9 THE COURT: But, of course, judges get the most
10 clarity from an adversarial proceeding, right, and if there is
11 nobody there to speak against something that you proposed, it's
12 easy to see why a judge would approve it.

13 Wouldn't you agree with that as a matter of common
14 sense, Mr. Ingber?

15 MR. INGBER: Your Honor, once, once this agreement --

16 THE COURT: Do you agree with that or not?

17 MR. INGBER: No, I don't. I respectfully disagree
18 with the premise that we're not giving others an opportunity to
19 be heard mere. There was a conference on August 5 before
20 Justice Kapnick. There are orders to show cause that were
21 filed by Mr. Grais and counsel representing some of the other
22 intervenors and the subject of that conference was the
23 schedule, was the schedule that was put in place by the order
24 to show cause.

25 There were many people in the courtroom on that day.

1 There were many people who had an opportunity to be heard and
2 were heard by Justice Kapnick. Mr. Grais was one of them. And
3 they were pushing for a change in the schedule, they were
4 pushing to move the August 30 objection date and Justice
5 Kapnick recognized that this was an expedited proceeding and
6 she kept that date in place.

7 They also submitted an order to show cause to seek an
8 opt out and Justice Kapnick recognized this isn't a class
9 action that would allow for opt outs, this is something
10 different. This is a proceeding that the trustee in its
11 discretion decided to file. It's an Article 77 proceeding,
12 it's not a class action and the trustee --

13 THE COURT: But any action that the trustee takes has
14 to be consistent with its fiduciary obligations, doesn't it?

15 MR. INGBER: Again, without getting into the question
16 of whether the trustee is a fiduciary or not, the duties that
17 we have that run to the certificate holders and to the trusts
18 we felt were being achieved and accomplished through a
19 proceeding in which we were transparent about what we have were
20 doing.

21 We filed the petition and we laid out all of the
22 reasons why we thought this was a settlement that was in the
23 best interests of the trusts.

24 THE COURT: Well, who, if anyone -- you weren't
25 specific in the papers before me. Who evaluated the

1 reasonableness of this settlement?

2 MR. INGBER: The Bank of New York Mellon as trustee
3 that evaluated the reasonableness of the settlement based on a
4 number of different factors that were laid out in the petition.

5 THE COURT: But you say you engaged various experts.

6 MR. INGBER: We did.

7 THE COURT: Who did you engage?

8 MR. INGBER: We engaged several experts and the
9 experts -- the reports of those experts have been posted to a
10 website that was created --

11 THE COURT: I just asked a simple question, who. The
12 answer is not several or I can go to a website and surf around.

13 MR. INGBER: We engaged Professor Robert Gaines of
14 Stanford to consider the question of corporate separateness and
15 successor liability theories.

16 We engaged Professor Barry Adler, who is a NYU law
17 professor, to consider the impact of certainly language in the
18 pooling and servicing agreement, language that states that the
19 breach, any breach of a representation and warranty has to have
20 a material and adverse impact on the interests of certificate
21 holders, so we asked Professor Adler to consider that issue.

22 Would hired Bruce Bingham of Capstone to consider the
23 financial wherewithal of Countrywide which we believe would be
24 primarily liable to pay on any claims that the trustee could
25 assert.

1 We hired Brian Lynn of RRMS to consider the settlement
2 number and to consider the servicing improvements --

3 THE COURT: How can any expert opine on the amount
4 that certificate holders could expect to recover through
5 litigation?

6 MR. INGBER: Well, in this case, your Honor, there was
7 a methodology that the expert used based in part on a review
8 of -- I'm sorry. It was based in part on a real life
9 experience with a GSE settlement that Bank of America and
10 Countrywide had entered into. So that was based on a review of
11 150 or 200,000 loan files by Bank of America, and the expert
12 considered Bank of America's methodology, IT considered the
13 institutional investors' methodology to arrival at a number.
14 It looked at both of those methodologies, applied it's own and
15 came up with an estimate.

16 THE COURT: Was that number figured out before or
17 after the parties came up with their settlement number?

18 MR. INGBER: The expert's did not know what the
19 settlement number was when they came up with their range.

20 THE COURT: My question was whether they came up with
21 their number before or after the parties came up with their
22 settlement figure?

23 MR. INGBER: Their number -- they arrived at their
24 number before the parties agreed on what the final number would
25 be.

1 THE COURT: Do you find it odd that the trustee would
2 seek to execute a side letter of indemnification against suits
3 by the very beneficiaries that the trustee owes a duty to?

4 MR. INGBER: Your Honor, the trustee is entitled to an
5 indemnity under the contract, under the pooling and servicing
6 agreement, and the side letter added nothing to that
7 contractual indemnity. The side letter was a confirmation that
8 the contractual indemnity --

9 THE COURT: If it added nothing, why did you need it?
10 Why did you negotiate for it?

11 MR. INGBER: Your Honor, your Honor, it is belt and
12 suspenders. It is confirmation that the indemnity under the
13 contract applies.

14 THE COURT: All right.

15 Let's turn back to the question of the urgency of this
16 matter.

17 MR. INGBER: Okay. Obviously what we have been
18 discussing goes to the merit of the underlying question of
19 whether the settlement should be approved. It is our position
20 it should be and that the trustee acted in good faith and
21 reasonably.

22 But we are moving for -- we are seeking expedited
23 briefing here because the benefits that we see in this
24 settlement, the payment of eight and a half billion dollars,
25 the industry leading servicing improvements won't go into

1 effect until there is an approval of this settlement.

2 As I said, we filed this special proceeding which is
3 supposed to be an expedited proceeding. Justice Kapnick seems
4 to recognize not only in signing the order to show cause but in
5 insuring that there would be no delay in the proceeding that
6 there should be an expedited proceeding.

7 There is uncertainty right now arising out of this
8 notice of removal. The trustee has received e-mails about
9 where filings should be made and what the status of pending
10 motions should be.

11 We also think based on our papers, your Honor, that
12 there is no basis for removal. We have laid out all of our
13 arguments there. We don't think this is a mass action for the
14 reasons we described.

15 We think the exception, the securities exception, even
16 if you accept that this is a mass action, the securities
17 exception applies squaring to these issues. This is a
18 securities exception that was argued by Mr. Grais successfully
19 in the Second Circuit. And so we think there is no basis
20 whatsoever to seek removal of this state court proceeding under
21 Article 77 to federal court and we think it should be in the
22 court where in our view it belongs, which is state court. And
23 there is uncertainty arising out of this removal notice that we
24 believe should get resolved as expeditiously as possible.

25 Now, there is a meet and confer next week, there is a

1 conference before Justice Kapnick the week of September 15.
2 That conference will raise, we believe, very important issues
3 relating to discovery and the scope of discovery and that will
4 really drive how the next few weeks and months play out.

5 We as the trustee, we want to move forward with that
6 schedule, we don't want to waste any time, we want to move
7 forward with that meet and confer. We would like to have that
8 conference with Justice Kapnick and like to T up what we
9 believe is very important discovery issues and important issues
10 relating to what the standard of review is and that should
11 define the scope of discovery.

12 So there is a schedule in place, it was a scheduled
13 that was ordered by Justice Kapnick recognizing that we need to
14 move forward, we need to get into discovery and we need to get
15 finally to the merits of what this is about, that is, whether
16 the trustee acted in good faith and acted reasonably.

17 We got these papers on Friday. We turned them
18 around -- we turned around our motion to remand very quickly.
19 We submitted the papers to your Honor very early on Wednesday
20 morning.

21 There are issues here. There is a ton of issues that
22 we have identified, all reasons why removal is improper. We
23 said it's frivolous and it's not a word that we use often. We
24 said it was frivolous because we believe it's frivolous.

25 We believed based on all the research we have done

1 that this doesn't come close to a mass action. We believe
2 based on the research that we've done and that Mr. Grais and
3 Mr. Cyrulnik are familiar with that the securities exception
4 applies. There is binding controlling precedent from the
5 Second Circuit that says that if the case is as Mr. Grais and
6 Mr. Cyrulnik has described it, that is, claims of a hundred or
7 more persons for monetary relief against defendants, which in
8 this case would have to be Countrywide and Bank of America and
9 not the Walnut Place entity, if that's the case, then the
10 securities exception applies because it relates to duties
11 arising out of the TSA.

12 The Second Circuit was actually very clear on this
13 point. The Greenwich case that we cited in our paper, the
14 Second Circuit case, it's on all fours with the case that they
15 have described, the fictional case that Mr. Grais has described
16 in the notice of removal. The only thing that is different
17 would be that you would need to plug in trustee instead of
18 Greenwich, which was the plaintiff in that case. So if the
19 case is as Mr. Grais imagination it to be, then this Greenwich
20 case, the Second Circuit's case is dispositive.

21 If I can, your Honor, let me read you one paragraph
22 from this case.

23 THE COURT: It's really not necessary.

24 MR. INGBER: Okay.

25 So we think that there really is no basis for removal.

1 We have argued that in our papers, and given that, given what
2 we believe is the strength of our papers and our view that this
3 belongs in state court and there is a schedule in state court
4 that we should be abiding by and respecting, to avoid the
5 uncertain and to get this to the court where we believe it
6 belongs and where it started out two months ago, we think
7 expedited briefing is appropriate.

8 THE COURT: All right. Thank you, Mr. Ingber.

9 Mr. Schwartz, I have a question for you.

10 I think you amended your complaint overnight. I
11 haven't waded through it, but does your complaint include a
12 breach of fiduciary duty claim related to the trustee's
13 handling of the settlement negotiations?

14 MR. SCHWARTZ: No, your Honor, it includes a breach of
15 fiduciary duty claim relating to the trustee's actions prior to
16 the settlement in conducting its responsibilities as the
17 trustee on behalf of the covered trusts.

18 THE COURT: Do you intend to amend your complaint to
19 make such a claim?

20 MR. SCHWARTZ: Not at this time, your Honor.

21 THE COURT: All right.

22 Anybody else want to be heard?

23 (Pause)

24 Look, it strikes me that there are some novel and
25 complex issues here and I think the court would benefit from

1 fulsome briefing on the question.

2 Accordingly, I'm going to require the Walnut Place
3 parties to file their briefing in this case by September 14.

4 How much time do you want to reply, Mr. Ingber?

5 MR. INGBER: One week, your Honor.

6 THE COURT: Okay. So now it's not so expedited.

7 MR. INGBER: Your Honor, we are happy to do it in
8 three or four days.

9 THE COURT: But you just want to take time away from
10 me. If you want to have a resolution of this matter in
11 September, I would have thought that you would be prepared to
12 push your brief in two days later.

13 MR. INGBER: Two days it is.

14 THE COURT: Good. September 16.

15 And I'll fix a return date -- I will set this matter
16 down for oral argument on September 21 at 10:30.

17 Anything further?

18 MR. REILLY: Your Honor, if I may, we are --

19 THE COURT: Just identify yourself.

20 MR. REILLY: Dan Reilly on behalf of the AIG.

21 We are not officially in the case. I assume that if
22 we move to intervene, whatever the court's ruling is, that that
23 deadline of September 14 would apply to all objectors and other
24 certificate holders and I just thought a clarification on that
25 would be helpful.

1 THE COURT: Well, at the current time I have several
2 motions to intervene that have been filed in the last day. By
3 my count one by Ambach Insurance entities, another one by
4 Commonwealth Advisors and then there is the Homeowners case
5 which was, I guess, filed yesterday.

6 Is there any objection to intervention by these
7 parties to this proceeding to participate in the briefing?

8 MR. INGBER: Your Honor, there may well be. We want
9 to consider a little more closely the motions that were filed
10 obviously yesterday or the day before and we would like the
11 opportunity to respond, and certainly if there is going to be
12 no objection then we will make it clear to the court and to the
13 proposed intervenors that we have no objection.

14 THE COURT: All right.

15 And so until that issue is decided, I don't see how I
16 can entertain any application, Mr. Reilly.

17 MR. REILLY: We will confer with Mr. Ingber and see if
18 we can get a proceeding that works for him and us and the
19 court.

20 THE COURT: All right.

21 Mr. Fleischman.

22 MR. FLEISCHMAN: When you said the Homeowners case, I
23 assume you were referring to the borrowers underlying trust.

24 THE COURT: That's correct.

25 MR. FLEISCHMAN: Thank you, your Honor.

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

THE COURT: All right.
Have a good afternoon.

- - -