

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached are true and correct copies of (1) the Decision and Order made by the Honorable Barbara Kapnick on May 20, 2013, and entered in the office of the County Clerk, New York County, on May 21, 2013, (2) the NYSCEF Confirmation Notice of the Decision and Order, and (3) the transcript of the May 20, 2013 hearing before Justice Kapnick, incorporated by reference into the aforementioned Decision and Order.

DATED: May 28, 2013

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ATTACHMENT 1

Decision and Order Dated May 20, 2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. Justice

PART 39

Index Number : 651786/2011
BANK OF NEW YORK MELLON
vs.
FOR AN ORDER PURSUANT TO
SEQUENCE NUMBER : 035
STRIKE JURY DEMAND

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is brought by order to show cause to strike the objectors' jury demand is granted in accordance with the decision dictated on the record on May 20, 2013.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/20/13

Signature of BARBARA R. KAPNICK J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

ATTACHMENT 2

NYSCEF Confirmation Notice of the Decision and Order



NYSCEF - New York County Supreme Court

Confirmation Notice

This is an automated response for Supreme Court / Court of Claims cases. The NYSCEF site has received your electronically filed document(s) for:

In the Matter of the Application of THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) et al - v. - for an Order, pursuant to CPLR 7701, seeking judicial instructions and approval of a proposed settlement et al

651786/2011

Documents Received

Doc #	Document Type	Motion #	Date Received
826	DECISION + ORDER ON MOTION	035	05/21/2013 03:18 PM

Court User

E-mail Notifications

An e-mail notification regarding this filing has been sent to the following address(es) on 05/21/2013 03:18 PM:

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NYSCEF - New York County Supreme Court

Confirmation Notice

In the Matter of the Application of THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) et al - v. - for an Order, pursuant to CPLR 7701, seeking judicial instructions and approval of a proposed settlement et al

651786/2011

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NYSCEF - New York County Supreme Court

Confirmation Notice

In the Matter of the Application of THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) et al - v. - for an Order, pursuant to CPLR 7701, seeking judicial instructions and approval of a proposed settlement
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651786/2011

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NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

ATTACHMENT 3

Transcript of the May 20, 2013 hearing

1
2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK: CIVIL TERM : PART 39

4 -----X
5 IN THE MATTER OF THE APPLICATION OF
6 THE BANK OF NEW YORK MELLON, (as Trustee
7 under various Pooling and Servicing
8 Agreements and Indenture Trustee under
9 various Indentures),

10
11 Petitioner,

12 Index No.
13 651786/11

14 for an order, pursuant to CPLR § 7701,
15 seeking judicial instructions and
16 approval of a proposed settlement.

17 -----X
18 Transcript of Motion Proceedings
19 New York Supreme Court
20 60 Centre Street
21 New York, New York 10007
22 May 20, 2013

23 B E F O R E:

24 HON. BARBARA R. KAPNICK, JSC

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

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43 (continued on next page)

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2 A P P E A R A N C E S: (continued)

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Proceedings

1
2 THE COURT: Okay, good morning, everybody.

3 MR. INGBER: Good morning, your Honor.

4 MR. REILLY: Good morning.

5 THE COURT: I'm sorry we didn't get you this
6 decision until this morning, but that's because we were
7 here really late last night rewriting this and rewriting
8 it.

9 So now we have it and we made a bunch of copies
10 so you can read it. It's being uploaded. So at least
11 that's taken care of.

12 Before we go into the motion to strike the jury
13 demand, I'm just wondering if you can give me any brief
14 update of what's going on. I mean, I've got all your
15 letters, but is there anything that you think you want to
16 bring up? Otherwise, we will just go straight to that
17 motion. So I don't know, Mr. Ingber, Ms. Patrick, is there
18 anything you want to bring up before we start on that?

19 MS. PATRICK: Your Honor, we are prepared to
20 argue the motion for continuance. It will not surprise you
21 that we are opposed.

22 THE COURT: It will not.

23 MS. PATRICK: There are two expert depositions
24 that we would need the Court to address, because they are
25 scheduled for tomorrow and Thursday. And Mr. Reilly
26 unilaterally indicated he was no longer going to produce

Proceedings

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2 those witnesses, even though they are noticed.

3 And separately, we need to talk about the
4 division of time in the days the Court has allotted for
5 trial.

6 THE COURT: We will get to that, I think,
7 probably in connection with the motion. And I know there
8 is also the issue about the depositions of the three
9 major --

10 MS. PATRICK: Yes, your Honor.

11 THE COURT: -- objectors.

12 MS. PATRICK: Yes, your Honor.

13 And as we read the motion for continuance, that
14 is being argued as a basis on which to obtain a continuance
15 on the theory that even though that discovery was allotted
16 for this period of time, they simply can't do it. And if
17 that's the issue and if that's what it takes to hold the
18 hearing as scheduled, we will simply not go forward with
19 those fact depositions. It is too important for this
20 hearing to go forward and we are not going to cooperate in
21 their efforts to delay.

22 THE COURT: Anything, Mr. Ingber, do you have
23 anything else?

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

25 THE COURT: Okay.

26 MR. REILLY: Your Honor, one clarification on the

Proceedings

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2 expert depositions. I did not unilaterally say that they
3 would not go forward. I said we were concerned. We can
4 address that question whenever you want as relates to new
5 testimony and new opinions coming out from their experts.
6 So whatever the Court rules today, our position is that
7 those experts should not be exposed to undisclosed opinions
8 tomorrow or Thursday that we haven't received. And if, in
9 fact, the Court addresses that, then we will clarify that
10 they will be available to testify depending on what the
11 Court says.

12 So I think that's one issue. Obviously, thank
13 you for the order. I just had a chance to scan through it.

14 THE COURT: Well, I mean, it says what it says,
15 so...

16 MR. REILLY: Sure. But I do think it has
17 ramifications for how we go forward and when we go forward,
18 because, as you might recall, when we discussed this a
19 while back, both parties had indicated that however you
20 ruled they were going to take appeal on it.

21 THE COURT: I mean, it's not a guarantee.
22 Usually you wait to see it first.

23 MR. REILLY: Right. But I think it's relevant to
24 what happens today in terms of going forward. Certainly,
25 when we get this information will be significant. Our
26 experts are testifying this week. We will need this

Proceedings

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2 information, they'll need to review it and I'm sure will
3 supplement their opinions. And as relates to those
4 depositions, it may not make sense if they're going to turn
5 this stuff over, for us to go through a deposition and then
6 give the folks information, have them do a supplemental
7 report, have them go through another deposition. So I
8 mention that as it relates to the order that came out
9 today.

10 Other than that, we are ready to proceed on
11 whatever issue you want to hear.

12 THE COURT: So why don't we deal with the jury
13 demand motion, which is the formal motion that's out there
14 today.

15 As you recall -- this sort of is a backwards kind
16 of thing, that the objectors served notice for a jury
17 demand as part of the papers that they served, I believe,
18 on May 3rd. So the petitioners brought an order to show
19 cause to strike the jury demand and I allowed them to put
20 in some additional opposition. So kind of like started
21 with the opposition, then there was motion, then there was
22 the opposition. But anyway, that's just for the record,
23 but that's how it came in.

24 So briefly, go ahead.

25 MR. MADDEN: Thank you, your Honor. Robert
26 Madden for the institutional investors.

Proceedings

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2 And if I can approach the bench, I have a couple
3 of copies of a presentation that I'm going to show your
4 Honor. I have provided them to the other side.

5 THE COURT: Did you give me two copies?

6 MR. MADDEN: Yes, I did, your Honor.

7 THE COURT: Thank you.

8 MR. MADDEN: So as your Honor mentioned, that we
9 are talking about the motion to strike the jury demand. I
10 think what we need to start off is just a little bit of
11 background on -- because it's very much tied up with what
12 kind of a proceeding is this -- we need to just go back a
13 little bit and talk about what the proceeding is.

14 Here the trustee exercised its discretion and
15 made a judgment to enter into this settlement. It filed
16 this proceeding and it made that agreement contingent, and
17 that's very important, your Honor, that settlement
18 agreement is contingent on court approval. And that is
19 consistent with well-established procedure.

20 Here, your Honor, and in our brief, we've quoted
21 the Restatement (Second) of Trusts that references, "If the
22 trustee is in doubt whether he should compromise or submit
23 to arbitration a claim, he may ask the instruction of the
24 court or he may agree thereto conditionally upon the
25 subsequent approval of the court."

26 And that is precisely what we have here, your

Proceedings

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2 Honor. The settlement agreement is subject to the
3 condition it only becomes effective if and when your Honor
4 approves it. The trustee then filled this Article 77
5 proceeding to give the certificate holders an opportunity
6 to be heard, but also important, your Honor, to ensure that
7 by entering into the settlement agreement, it was not
8 breaching its obligations to trust beneficiaries.

9 The final order and judgment that your Honor has
10 asked to enter here specifically asks the Court to approve
11 the actions of the trustee in entering into the settlement
12 agreement in all respects. That's what we are talking
13 about here, your Honor. That's what the Court is being
14 asked to approve. In other words, the question that's
15 before your Honor is, if the trustee enters into this and
16 finalizes this settlement agreement, can it do so in
17 accordance with its obligations to certificate holders?

18 If your Honor answers yes, then there is no harm
19 to beneficiaries, because the trustee met its obligations.
20 If your Honor answers no, then the certificate holders
21 won't be harmed because there has been no release. Now
22 this, your Honor, is an equitable proceeding. That's
23 undisputed. We pointed out those authorities in our brief.
24 The objectors have not in any way contradicted that. It's
25 also undisputed that New York law is in an equitable
26 proceeding there is no right to a jury trial.

Proceedings

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2 THE COURT: But the thing is, to sort of cut to
3 the chase, because last year in May I went through the
4 exact same thing, as some of the press people here know
5 because they were here, with an Article 78. And there is a
6 whole issue about whether it should be a jury trial or
7 trial, witness, a hearing, whatever. I went through the
8 exact same thing. So I became knowledgeable about it and
9 that's good, because now, once again in May, I get to do it
10 again. And you know that there is CPLR 400, 409, 410 which
11 specifically deals with procedures during a special
12 proceeding, which obviously this is.

13 And that's really what this boils down to. I
14 mean, you guys put in a lot of other stuff in your papers,
15 but the bottom line is, that even if I say, okay, it's an
16 equitable proceeding, the CPLR says that, "If triable
17 issues of fact are raised," that's in a special proceeding,
18 that's CPLR 410, "If triable issues of fact are raised they
19 shall be tried forthwith and the court shall make a final
20 determination thereon."

21 That's really, I think, what they are hanging
22 their hat on. You both argued a lot of other things, but I
23 thought very superfluous in this case, and I don't think
24 made sense. That is really my concern. And when they get
25 up I'm going to say, what issues of fact are there that you
26 think I'm supposed to try? Because clearly, this whole

Proceedings

1 proceeding cannot be a jury trial. So how they expect this
2 to go on is beyond my comprehension. But maybe they will
3 be able to explain it to me. But that's what it is.
4

5 So I know what kind of a proceeding it is, but
6 there is a special part of the CPLR that says special
7 proceedings can have juries under certain circumstances.
8 And that's what I am trying to -- that's what I think you
9 really have to cover.

10 MR. MADDEN: Understood exactly, your Honor. But
11 I didn't hear your Honor say when you read 410 that it says
12 fact issues shall be tried by a jury.

13 THE COURT: If triable issues of fact are raised,
14 they shall be tried forthwith and the court shall make a
15 determination if the issues are triable of right by a jury.
16 So there if there are triable issues of fact, it should be
17 tried by a jury, then that's what I have to deal with.

18 MR. MADDEN: That is exactly right, your Honor.
19 So what your Honor has to decide is are there triable
20 issues of fact. The question is not whether there are fact
21 issues. 410 does not say if there is a fact issue, they
22 are triable by a jury. Equitable courts try factual issues
23 all the time. That's the issue, your Honor. That's why
24 this comes down to -- that's why equitable versus legal is
25 the whole issue. All the cases that interpret 410 and all
26 the cases that interpret the general right to a jury trial

Proceedings

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2 in New York say that's the critical issue. Are there legal
3 issues that have to be tried?

4 And so, your Honor, here we have some guidance
5 from the courts. Matter of Palma, directly on point. This
6 is a case where an executor filed a proceeding. He sought
7 judicial approval to compromise a claim, exactly like this,
8 and the benefish -- one of the residual beneficiaries came
9 in and said, no, no, I don't want him to do that. There is
10 disputed factual issues about whether that's a reasonable
11 claim.

12 There it was an issue where there was on the
13 books of the decedent he had recorded amounts that were
14 given to his wife as a loan. And so the question was: Was
15 that really a loan or was it not a loan? Those were
16 factual issues that needed to be resolved in that case.
17 And the Appellate Division held there was no right to a
18 jury trial in that case because the proceeding was
19 essentially equitable in nature. Directly on point, your
20 Honor and I would suggest answers that question.

21 And they haven't offered to you and they haven't
22 shown you a single case in which -- in a trustee approval
23 proceeding, a trustee instruction proceeding, or a
24 settlement approval proceeding where a court has held that
25 factual issues are to be tried by a jury, because in
26 equitable actions the court tries factual issues.

Proceedings

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2 What they rely on, your Honor, what they point
3 your Honor to is and say, they don't -- let me be very
4 clear, your Honor -- they don't take the position, in fact,
5 they disavowed it in their papers, that factual issues and
6 an equitable proceeding are tried by a jury. We said they
7 were claiming that. We pointed out how that was
8 ridiculous. They said, we never said that. So no one is
9 saying that factual issues in an equitable proceeding are
10 tried by a jury.

11 What they point your Honor to is a line of
12 inapposite cases. And they cite your Honor to the
13 Appellate Division opinion in Gordon. They say it's the
14 artful pleading, the race to the courthouse type of
15 declaratory judgment case. They say a defendant -- a
16 plaintiff cannot, by artful pleading, deprive a defendant
17 of his constitutionally guaranteed right to a jury trial by
18 limiting his demand for relief to a declaration of his
19 rights or by making purely equitable demand for relief,
20 upon facts -- and this is key -- facts constituting a legal
21 cause.

22 That's what they say, your Honor. They say this
23 is like a case where the party that breached their contract
24 and owes money to someone else runs to court first and
25 said, I want a declaration that I didn't breach my
26 contract. If that's what happened and they're otherwise

Proceedings

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2 entitled to a jury trial, you can't jump the gun and
3 prevent that.

4 Now that rule does not apply here, your Honor,
5 for two reasons. First, in New York courts on this very --
6 let's assume they were suing the trustee for breaching its
7 duty. In New York courts there is no right to a jury on
8 that claim. That is an equitable claim that's -- where
9 factual issues are tried to the court. So even if they had
10 a claim, no jury.

11 Moreover, this is not a case where the trustee is
12 making what Gordon called a purely equitable demand for
13 relief upon facts constituting a legal cause. Because
14 there is no legal cause here because the operative fact of
15 entering into the settlement has not yet occurred. There
16 cannot be harm that has befallen certificate holders by the
17 trustee entering into the settlement, because the
18 settlement has not been consummated. That's why this
19 proceeding was filed, your Honor, to prevent that from
20 happening.

21 But let's go to the first point first. We cited
22 all of these cases in our brief. They didn't respond to a
23 single one of them. New York courts have consistently said
24 if you are suing your trustee for trust administration,
25 breach of the trust agreement, it's not triable to a jury.
26 We would submit, your Honor, that ends the inquiry. This

Proceedings

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2 whole, you're trying to flip this around and deprive us of
3 a jury, they wouldn't be entitled to one anyway.

4 Secondly, let's look at the Gordon case because,
5 your Honor, that illustrates exactly what the rule that
6 they are talking about, how it's properly applied. That
7 was a case where an insured brought a claim against its
8 insurer saying, you breached the agreement, you didn't pay
9 me money I was owed. And so it sought a declaration. And
10 the insurer said, wait, I'm entitled to a declaratory
11 judgment. That was a jump the gun, rush out ahead. That's
12 not what this case is.

13 What this case is like, your Honor -- and we
14 didn't cite this in our brief because it came up after we
15 received theirs. I have a copy I can provide to the Court
16 if I could. This is the Shubin case. I would be happy to
17 hand it up and provide to the court later. I have a copy
18 for opposing counsel.

19 This, the Shubin case, your Honor, in the 9th
20 Circuit, this tells you this is what this case is really
21 about. It's very similar. It's a declaratory judgment
22 action that's about prospective action, like what the
23 trustees propose to do here. I propose to enter into this
24 settlement. Here, the plaintiff says I want to manufacture
25 a product, but they're saying if I do so I'm going to
26 breach their patent. I'm going to be in violation of their

Proceedings

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2 patent. So I'm going to go to court and ask for ruling
3 that that patent is invalid on a prospective basis.

4 The court said, even though we were talking about
5 a breach of patent case, that wouldn't be triable to a
6 jury. Because it hasn't happened yet, it's not triable to
7 a jury. And your Honor, that's exactly what we're talking
8 about here. The trustee proposes to enter into the
9 settlement and finalize it contingent on your Honor's
10 approval.

11 So your Honor, it's an equitable proceeding. In
12 equity, there is no right to a trial by jury. 401 doesn't
13 change that in any way. The Appellate Division's opinion
14 in the matter of Palma is directly on point. No right to a
15 jury charge. And unlike the Gordon case, unlike the
16 declaratory judgment they cite, here there is no harm to
17 certificate holders.

18 And finally, your Honor, I want to point out one
19 other case to the Court and I have a copy of it here. It's
20 Trepuk versus Frank and it's 104 AD2d 780. I've got copies
21 for the Court here, copies for counsel. And this, your
22 Honor, goes directly to -- I am also going to hand up the
23 Shubin case, your Honor. Trepuk is important, your Honor,
24 because they say, wait a second, your Honor, this isn't
25 just about entering into the settlement agreement, even
26 though that's all that's the final order and judgment

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2 proves is entering into the settlement agreement. They
3 say, this is about the failure to give notice. This is
4 about things the trustee has already done, that's why we
5 have to have a jury trial. These are the fact issues that
6 your Honor has to resolve.

7 And Trepuk says, and I will quote, your Honor.
8 It says: "We observe further that even a defendant will
9 not be entitled to a jury trial where the main thrust of
10 the plaintiff's action is for equitable relief." As is the
11 case here. And so even if it is the case, and it's not,
12 but even if it were the case that there were some marginal
13 legal issues that were pulled in here, that were subsumed
14 within the trustee entering into the settlement agreement,
15 the main thrust, which is what's important here, and the
16 Appellate Division has said, is equitable relief.
17 Therefore, there is no right to a jury trial.

18 Thank you, your Honor.

19 THE COURT: Thank you.

20 Who is going to address that?

21 MR. REILLY: I am, your Honor.

22 Good morning. Dan Reilly for the steering
23 committee.

24 Mr. Madden didn't answer your question. What
25 issues of fact will be triable by a jury? That's the
26 question. The best place to look for which issues of fact

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2 would be triable by a jury are the proposed findings --
3 proposed final order and judgment that they submitted.

4 They listed 18 different separate findings that
5 this court has to make. And for this court to make those
6 findings, you will have to make a decision as to whether or
7 not the trustee breached its obligations under the
8 governing agreements, under the PSA's. Did they breach
9 that contract or not?

10 You will have to make a decision as to whether or
11 not the trustee violated its fiduciary duties by entering
12 into this agreement, by forbearing on the event of the
13 default, by not giving notice to certificate holders before
14 the settlement was entered into. You will have to
15 determine whether or not the trustee acted in good faith,
16 which they are specifically alleging. And you will have to
17 determine whether or not the trustee met its duties of due
18 care, meaning negligence. Were they negligent in entering
19 into this agreement to the process that they chose to
20 follow?

21 Every one of those issues, breach of contract,
22 breach of fiduciary duty, negligence, are issues triable by
23 a jury. This court tries issues like that I don't know if
24 it's day in and day out, but week in and week out in front
25 of this court. Those issues exist in this case. And if,
26 in fact, this court has to make factual determinations on

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1 those issues, then a jury should be entitled to do so.

2 They have taken a complete about face on their
3 fundamental position for coming to this Article 77
4 proceeding, for pursuing this Article 77 proceeding. They
5 had told you that they were seeking direction from you,
6 that they were seeking instruction. And now they are
7 emphasizing that they are seeking instruction, they are
8 seeking direction; that this is really prospective; that
9 they need guidance from this court to tell them what to do.
10

11 They already did it. They already settled this
12 case. They already acted. They are looking for a blessing
13 for their past conduct. And the best place to find that
14 again is in the proposed final order and judgment, section
15 paragraph K. They asked the court to find that Bank of New
16 York Mellon, quote, "acted in good faith in negotiating and
17 entering the post-settlement agreement."

18 That's not an instruction from you. That's not a
19 direction from you. That is an assessment of what they
20 did. Acted is a past tense word. PFOJ G, they asked the
21 Court to find that BONY's decision to enter into the
22 proposed settlement agreement was within the trustee's
23 discretion under the governing agreements. That isn't
24 something that you need to help them make a decision on.
25 They made that decision.

26 One of our fundamental criticisms here in this

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2 case is that they could have come to this court back in
3 October of 2010, in November of 2010, in December of 2010
4 and said, your Honor, you know what, we got a notice from
5 Ms. Patrick's firm and we don't know what to do because
6 there is 115 trusts listed in that notice. And it says
7 that Countrywide has sold a bunch of terrible loans. And
8 it says that Countrywide has done terrible servicing. And
9 it says Bank of America is doing terrible servicing. And
10 it tells us that we need to investigate that.

11 And they didn't come to the court and say what
12 should we do. They didn't come to the court and say should
13 we give notice to certificate holders. They made the
14 decision, we will not give notice. We will enter a
15 forbearance agreement that is nowhere allowed in the
16 pooling and servicing agreements. We will expand the
17 settlement number of trusts beyond the trust that
18 Ms. Patrick actually had 25 percent holdings in. We will
19 seek indemnification for not seeking notice. We will
20 settle the case. We will sign the settlement agreement.
21 They tell you they haven't done anything? The settlement
22 agreement is signed. It's executed by every single of the
23 22 institutional investors and by the Bank of New York
24 Mellon and by Bank of America and by Countrywide. It's
25 over.

26 And just like you would do in a malpractice case

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2 involving a doctor, in a car collision, the facts are done.
3 The question becomes what do they mean. Did they breach
4 their obligations under the pooling and servicing
5 agreements? Did they violate their fiduciary duties? Did
6 they fail to meet the standard of care that is imposed upon
7 them, meaning the trustee, by accepting their
8 responsibilities under the governing agreements?

9 It's very strange to me, by the way, your Honor,
10 that it's not the trustee standing up here arguing about
11 whether or not we're entitled to a jury trial on these
12 issues. It's the institutional investors' counsel. What
13 role do they have in this process? The question is whether
14 the trustee's conduct, which is the focus of this court's
15 assessment in this Article 77 proceeding, has questions
16 that are triable by fact. The interesting thing, and you
17 put your finger right on it, right out of the box, their
18 brief doesn't have a single reference to Rule 410. Their
19 argument didn't have a single reference to 410. Everything
20 in this presentation ignores that if, in fact, there are
21 triable issues by a jury, this court should give a right to
22 a jury trial.

23 THE COURT: Would you try to explain to me how
24 you think that's going to work? I would like to know.

25 MR. REILLY: Yes. And I think, your Honor,
26 that's a great question. Because you have the fundamental

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2 decision to make in this case. You have to decide whether
3 or not you are going to sign the proposed final order and
4 judgment. That is what they came to you for. And you have
5 looked at that document, I know I have brought it up every
6 single time, but that's ultimately the question that you
7 have to sign.

8 THE COURT: Just in case you didn't, I brought a
9 copy.

10 MR. REILLY: Well, I don't have one today,
11 ironically.

12 THE COURT: I do.

13 MR. REILLY: But you have to sign that. So there
14 is nothing about the fundamental relief that they are
15 asking for that takes this away from you. But in sight --
16 and, you know, the difference between the Chancery Court
17 and the Kings Bench, all that historical stuff -- actually,
18 I find it fascinating and interesting -- it's all been
19 subsumed in this issue. But this court can, and I believe
20 should say you know what, you want to ask that -- to make a
21 finding that the governing agreements -- that we didn't
22 breach the governing agreements, we didn't breach the
23 contract, the jury decides that.

24 THE COURT: So what do you do? You make them
25 come in and out, like, every five minutes, in and out, in
26 and out, and you let them do it and you give them a list of

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2 questions. They have to decide and thank you very much,
3 the judge makes the decision.

4 MR. REILLY: No, that's not what I say. What I
5 say we have a trial to a jury. And we identify -- I have
6 just given you a list of questions. I have more that I
7 can -- I can give you a specific list, but fundamentally it
8 falls into three categories. Did the trustee breach its
9 obligations under the governing agreements, under the
10 pooling and serving agreements? And there is a set of
11 questions that are related to the proposed final order and
12 judgment. And they've got them in there. Paragraph K,
13 paragraph G, paragraph F, all of those are things that they
14 are asking a fact-finder to find, that they acted in good
15 faith in negotiating and entering; that their decision to
16 enter was within their discretion; that they acted pursuant
17 to the governing agreements; that they acted pursuant --
18 when they decided to settle. That would be the question
19 the jury would ask -- be asked.

20 As to breach of fiduciary duty, this court has
21 found that they have some fiduciary duties. They have a
22 duty of due care and they have a duty of loyalty. And in
23 order for those -- that determination to be made, a jury
24 should be asked: Did they, when entering into the
25 forbearance agreement, act and protect a duty of loyalty
26 that they had to all certificate holders? Did they, when

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2 they entered into the side letter, which manifests the
3 conflict of interest, we believe, meet their duty of
4 loyalty to the certificate holders? Did they, when they --
5 demonstrate a prudent exercise of trustee functions when
6 they entered into this settlement?

7 Mechanically then -- I'm sorry, are you going to
8 ask me a question?

9 THE COURT: Finish up.

10 MR. REILLY: Mechanically then, this court sits
11 and listens to that evidence and at the end of it, a jury
12 comes back. And let's give them every benefit of the
13 doubt. Let's say the jury says, you know what, they didn't
14 breach their agreement. We find that they met, that it was
15 okay to enter into the forbearance agreement, that it was
16 okay not to give notice, that it was okay to request
17 indemnity in exchange for notice, it was okay to expand
18 beyond the trust Ms. Patrick had holdings in. Then when
19 you look to the proposed findings on those issues, those
20 facts are done.

21 Let's give them the same thing on fiduciary duty.
22 Let's say the jury finds they didn't breach their fiduciary
23 duty. And then go to negligence, they didn't breach their
24 negligence. Then the court takes those facts and applies
25 them as you see fit to the proposed final order.

26 THE COURT: So what about the case that

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2 Mr. Madden cited to, The Matter of Palma case, which is a
3 Third Department, which talks about whether if the
4 proceeding is essentially equitable in nature and it's a
5 very similar type of proceeding where the statute expressly
6 contemplated judicial advice or approval of a proposed
7 compromise or settlement? This is -- I mean I understand
8 it's signed by some people, but it's not so-ordered by me
9 and it can't go through, the settlement, it can't -- they
10 can't put this settlement into effect unless I approve it.

11 So there is a settlement, but it's not like a
12 settlement between parties in most cases, it doesn't matter
13 if I agree or not. In this one, it does. So they say
14 they're using this case and saying it's a very similar
15 situation. The case is basically equitable in nature. If
16 the case is equitable in nature, you don't get a jury, end
17 of story and I try the issues of fact. I mean, obviously,
18 there are issues to be tried, otherwise I don't know what
19 the heck I was going to give you three weeks to listen to,
20 if they all hug each other and agree on everything.
21 Obviously, that's not the case.

22 MR. REILLY: Even in three weeks together that
23 won't happen.

24 THE COURT: So obviously, there is always an
25 issue of fact and in any case or trial, what have you,
26 otherwise what would I be doing here? Then I have to make

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2 the ultimate legal determination as to whether or not this
3 was in your discretion. Just because -- if you have a
4 breach of contract case, you could demand a trial. I'm not
5 sure that that means in this case, which is basically
6 equitable in nature, you get to pick and choose certain
7 questions to ask the jury, which doesn't really ultimately
8 decide this. I mean, I'm not -- I don't really see how it
9 makes any sense, but this case seems to be pretty strong
10 and I wonder how you could distinguish our case from that
11 case.

12 MR. REILLY: Sure. And let me start with this,
13 your Honor. Recall what their asking for. Why is the
14 trustee here? There is nothing about the pooling and
15 servicing agreements that require the trustee to obtain
16 court approval to settle a claim. They did not have to
17 come here. This is completely voluntary on their part.

18 THE COURT: But they did.

19 MR. REILLY: Okay, but they did. But why did
20 they? They did because at the end they are asking you to
21 find that no certificate holder, those who are objecting,
22 those who were in the case and withdrew, and all those
23 others who haven't said anything one way or the other, are
24 barred from suing the trustee. They are asking you to take
25 that claim of breach contract and extinguish it. Because
26 that's what the effect of this is going to be. If you

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2 approve this settlement, then if we came in and sued them
3 the next day and said, you know what, you breached the
4 contract, you breached the fiduciary duty, you breached the
5 negligence, we have a right to a jury trial on those
6 claims.

7 And they are --

8 THE COURT: Just because you -- I agree with
9 that, but that's not what this case is. I never saw a case
10 that said just because you might come in and bring that
11 case, because those are being extinguished, that gives you
12 a right to a jury trial on issues in this case. I find
13 that sort of a contorted argument.

14 MR. REILLY: Let me see if I can uncontort it.
15 The reality is that we don't have an option. We are bound
16 by this -- if this court makes that finding, we have
17 nowhere to go. There is no way to get out of this
18 settlement. The court will be making a finding that says
19 not only do I find that they didn't breach the contract,
20 and they didn't breach their fiduciary duties, and they
21 didn't breach negligence obligations, but you have to be
22 bound by that. And that's the difference here. That is
23 what's going on is --

24 THE COURT: But there are certain claims that are
25 not subsumed by this case. And Mr. Ingber knows, we have
26 another case here. And I know there is other cases in

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2 other places.

3 MR. REILLY: Sure.

4 THE COURT: So this does -- in terms of the
5 settlement agreement, I agree. There are other claims,
6 things that happened prior to the settlement, those claims
7 are not extinguished by this settlement, as we know by
8 other cases both that I have and that other courts have.

9 MR. REILLY: Right. And I'm just talking
10 about -- and you are correct -- I'm just talking about the
11 settlement conduct, the question of whether or not the
12 trustee should have given notice to all the certificate
13 holders; what would have happened if that notice had gone
14 out; in fact, we believe the notice should have said, by
15 the way, Bank of America is in default.

16 THE COURT: I understand. And that's what I'm
17 going to be hearing. In the end, if I find that I can't
18 make these findings, then I'm not going to make them. You
19 are -- I guess since you are still objecting, you are going
20 to try to convince me that I shouldn't sign this or I
21 shouldn't sign all of these things.

22 MR. REILLY: Absolutely, we are. And we have
23 experts who have made it very clear that the conduct, they
24 believe, is a violation of the governing agreements. And
25 the conduct violated fiduciary duties. And that they
26 didn't exercise due care. We have competing experts,

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2 again, on a standard that we believe is in dispute and that
3 juries would typically resolve.

4 So back to the mechanics, that is fundamentally
5 the way that the case should proceed. We have a right to a
6 jury on whether this trustee met its obligations under the
7 contract. We have a right to a jury on whether they met
8 the fiduciary duties. There is -- if, in fact, what they
9 say is true, then they are turning the ball upside down,
10 because they could pick a forum, which is really what their
11 argument is. We picked an equitable forum. We picked a
12 situation in which there is no jury allowed.

13 Now they forgot to talk about 410 because there
14 is a jury allowed, but that was their fundamental argument
15 this morning and in their briefs. If we can pick a place
16 where if you don't have juries, you don't have a jury. New
17 York law in all their cases say no, no, no. If there was a
18 jury before 1894, if there was a jury before 1938, if there
19 was a jury before they filed this, then we're entitled to
20 it.

21 And let me talk about Palma for a second. To say
22 that it is fundamentally on point, there is nothing like
23 that proposed final order and judgment in there. There is
24 nothing like a question about whether they breached their
25 governing agreement obligations. There is nothing in that
26 case in which they are saying finds that we met our

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2 fiduciary duties. And there is nothing in that case that
3 says that when it's over, we want the court to say, I think
4 you did a great job in all respects. That's where they're
5 going is that you -- they want you to sign the order that
6 says they did a great job in all respects.

7 Many of the certificate holders don't believe
8 that. Also, in Palma the court relies on, it says,
9 "Notably in situations where the SCPA proceedings are,
10 'essentially equitable in nature,' they do not require jury
11 trials." Then the court goes on, "In any event, given
12 respondent's waiver and the circumstances presented herein,
13 we find no basis to disturb the Surrogate Court's ruling
14 denying respondent's request for a jury trial."

15 That's not a ringing endorsement of their
16 position. We haven't waived any jury question here. And
17 the fact is that this -- if, in fact, this was an equitable
18 proceeding, wouldn't matter. That argument is irrelevant
19 to whether or not there is a jury right here.

20 I also want to note, your Honor, that we can all
21 agree there's never been a case like this before. For them
22 to say that this case is directly on point or any of these
23 cases is directly on point, there is no case directly on
24 point. The court has to go through the analysis as the
25 other courts have in determining whether or not the issues
26 triable have a jury right before this case was filed.

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2 And if this court finds, I believe your Honor,
3 that you say, I'm going to have to decide that; I'm going
4 to have to make a factual determination on breach of
5 contract; I'm going to have to make a factual determination
6 on breach of fiduciary duty; I'm going to decide whether
7 they met their duty of care; then those are the type of
8 issues that do entitle us to a jury and do justify our jury
9 demand. And we would ask, your Honor, that, in fact,
10 mechanically we handle it in a way that we go through the
11 proposed final order and judgment. The jury is asked those
12 questions.

13 If, in fact, at the end -- let's go the other
14 way. Let's give them the worst case scenario. Let's say
15 the jury finds, uh, uh, uh. They breached their governing
16 agreement obligations by failing to give notice in the
17 event of default; they breached it by entering into a
18 forbearance agreement which is nowhere allowed; they
19 breached it by allowing Ms. Patrick to negotiate the
20 settlement for those trusts in which she didn't have
21 25 percent, that was a breach of the agreement.

22 Or they alternatively find, no, they didn't act
23 in good faith. They did not act in good faith by being
24 concerned about getting release for themselves when, in
25 fact, they should have been protecting the interests of the
26 certificate holders. Or the jury finds that no, they

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2 didn't meet their duty of loyalty. They did have a
3 conflict in each one of those decisions and they allowed
4 their interests and their interest in protecting themselves
5 to overcome whether or not they should protect the
6 certificate holders.

7 In that setting, your Honor, then you would apply
8 those factual findings to the proposed final order and
9 judgment and decide whether you believed at that point that
10 the settlement could be approved.

11 That's what we ask for. We ask that you allow
12 the jury to make those decisions because we believe we are
13 entitled to them.

14 Thank you.

15 MR. MADDEN: Just a few points, your Honor.

16 What we have heard over and over again is the
17 declaration that there is a right to a jury trial. What we
18 haven't seen is a smidgen, any, zero authority supporting
19 that. Where is the case in which -- in a New York court
20 where that was permitted? Number one, Palma, directly on
21 point. It's the trustee -- it's seeking approval for a
22 transaction that is yet to be concluded.

23 THE COURT: Yes, but what he said is -- because I
24 said, how do you distinguish that? That's what I asked.
25 And he said, well, there don't appear to be any findings of
26 fact to the -- similar to the findings that you are asking

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2 me to make, that you didn't breach your obligations, that
3 it was in their discretion, that they acted in good faith,
4 all those findings which you are asking me to make, were
5 not necessarily asked to have been made by the court at
6 that time. And also, as Mr. Reilly read, he said, given
7 the respondent's waiver and the circumstances presented,
8 that they agreed. So it's a little bit of a different
9 situation.

10 MR. MADDEN: Let me just address that.

11 The court did say there was a waiver, but it said
12 even if there wasn't a waiver, you still wouldn't be
13 entitled to a jury trial in this proceeding. That's what
14 we are talking about. The waiver doesn't change that
15 that's what the court said.

16 Let me also address the supposed factual
17 differences. The question is not what facts were before
18 the court. The question is if there are fact issues, who
19 decides them? In Palma there was a dispute. The defendant
20 wanted a jury. It said, I want a jury to decide whether
21 that debt that I say is a debt was a debt or not. And the
22 court said, in determining those factual issues there is no
23 right to a jury trial. The court decides factual issues.
24 It doesn't matter what the factual issues are; the court
25 decides them.

26 Number two, your Honor, over and above Palma,

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2 they say, if we'd gone out and filed a lawsuit against the
3 trustee here for breaching its duty, for entering into the
4 settlement agreement, we would have had a right to a jury
5 trial. Wrong. For two reasons. One, under New York law
6 there is no right to a jury trial in a case for trust
7 administration, breach of trust against a trustee. We have
8 cited those cases in our brief. They didn't distinguish
9 them, they ignored them.

10 Number two, how could they bring a case against
11 the trustee for breaching its duties for entering into the
12 settlement agreement, when that settlement has not been
13 consummated? I'll tell you how they could. They could
14 bring it as a declaratory action, which would be equitable
15 in nature because it would be talking about something that
16 the trustee proposes to finish. That's the Shubin case,
17 your Honor. If they brought that action, there would be no
18 right to a jury trial.

19 So under none of these circumstances is there a
20 right to a jury trial. That's why Mr. Reilly tried so hard
21 to ignore and play down the fact that this is not -- he
22 said, this is done, it's done. It's not done, your Honor.
23 That's why the eight and a half billion dollars is still
24 sitting in Bank of America's bank account. That's why for
25 the last two years certificate holders have lost out on
26 nearly a billion dollars of interest, because these

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2 objectors have drawn out this proceeding. It's not done.
3 It is inchoate.

4 It is exactly like, exactly like what the
5 restatement says you are supposed to do. This is not
6 something -- they say this has never been done before.
7 Really? Well, the Restatement has heard about it. They
8 said, the trustee "may agree thereto conditionally upon the
9 subsequent approval of the court." This is nothing new.

10 Your Honor, the Court of Appeals of New York has
11 addressed an Article 77 case in which a trustee came before
12 it seeking approval of a proposed transaction. It held
13 that that was an equitable proceeding. That's in the
14 Matter of Scarborough case. We have cited that in our
15 brief, your Honor.

16 We have cited, your Honor, to the IBJ Schroder
17 case, where another Supreme Court in almost precisely the
18 same situation here, a trustee on a securitization vehicle
19 came in seeking approval over the objection of other
20 certificate holders of the settlement of a claim. These
21 cases don't come through the courts every day, that's
22 right, but there is nothing new about this. This is a
23 long-understood and long-used equitable proceeding.

24 410 does not answer the question. 410 poses the
25 question. It says, if there are factual issues, the court
26 has to determine who is going to try those; are they

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2 triable as a matter of right to a jury or not. The answer
3 here is, these claims are not triable as a matter of right
4 to the jury.

5 If the trustee had entered into the settlement
6 complete and it was done, they wouldn't have that claim.
7 Now, that it's not done, they don't have that claim.

8 And so, your Honor, I would ask where is the
9 authority? They simply say over and over because there are
10 fact issues, there is a right to a jury trial. It's not
11 the case, your Honor. The law is very clear on this. And
12 we submit that there is no right to a jury in this case.

13 Thank you, your Honor.

14 THE COURT: Okay. Well, at some point we will go
15 back and I can't write on this, because I don't have time,
16 so we'll just have to say something on the record.

17 So it's hard to talk about this without knowing
18 if it's going to be a jury trial or not, but what's the
19 problem with the expert depositions? I think it was
20 alluded to in your letter, you're saying that you think the
21 experts are coming up with new opinions and therefore, how
22 can you depose them if they have come up with new opinions
23 that you don't have. That's probably over simplification.

24 MR. REILLY: That's fine. That's better than
25 what I said. But that's the bottom line. I was taking
26 Mr. Fischel's deposition, I think it was the week before

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2 last. And late in the day he said something, and I
3 stumbled onto it, that he had done something since the --
4 since the closure of discovery. And Mr. Fischel had
5 done -- one of the things he did is what is called an
6 "event study." And it's some type of statistical analysis
7 that they measure the market depending on information that
8 the market gets.

9 And he concluded, because on the day the
10 settlement wasn't -- was announced that the market didn't
11 react in any particular way and therefore, it must not be a
12 windfall settlement for Bank of America. Right? So -- but
13 it's got all kinds of statistical formulas in it and all
14 kinds of --

15 THE COURT: You don't have his report?

16 MR. REILLY: No, I had that, right? But I found
17 out he had done another one since his report, that he had
18 done something else with a new opinion. And I got upset --

19 THE COURT: How did you find that out?

20 MR. REILLY: Because as I was asking him
21 questions, he said something to the effect about recently
22 or, you know, I mean, that's basically it. So he mentions
23 it. I got upset. I said to Mr. Ingber, I don't have any
24 evidence of this. I don't have a report on this. I can't
25 examine him on this. This is complicated, statistical
26 stuff. This is what I ran away from in college. This is

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2 why I went to English and history and things that I could
3 understand.

4 So for me to engage in another discussion with
5 him on a new issue, I don't think is fair. I specifically
6 refused to do it. I said, I'm not going to go into this
7 right now, because I know what's going to happen. You're
8 going to say, you already asked him questions. You already
9 covered it. So I said, I am not going to cover it. And
10 then I asked Mr. Ingber, is any other expert doing any of
11 this?

12 Because our people are now going through the
13 process of responding to the reports that were submitted
14 originally by their side. And you remember, your Honor,
15 the sequence here. We had a long discussion about this.
16 We had disputes about this. But ultimately, the order was
17 entered. We would issue reports. They would issue
18 reports. We would issue rebuttal reports.

19 And we believed, apparently wrongly, that that
20 meant we were going to have the last word on expert
21 opinions. And we find now that after we issued our
22 rebuttal reports, they are doing work. I should have known
23 that before the deposition. I should have been given a
24 report or at least something should have been submitted to
25 court that says, we're going to ask to submit a
26 supplemental report. None of that happened.

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2 So the bottom line is, I don't know whether other
3 experts are doing additional work or not.

4 THE COURT: Okay. Who is the other expert -- who
5 is the second expert deposition that you are referring to?
6 There was some indication maybe it's --

7 MR. REILLY: They are taking the last two expert
8 depositions of our people this week. All right? So
9 Professor Frankel and Professor Levitin. And they have
10 given opinions and responded to, or rebutted is a better
11 term, rebutted their experts, including this guy,
12 Mr. Fischel.

13 THE COURT: So are you saying you need to finish
14 Dr. Fischel's deposition? Is that what you are saying?

15 MR. REILLY: The bottom line is I would like to
16 get a report that says here's what I did. I would like to
17 be able to share it with Dr -- Professor Frankel and
18 Levitin, my witnesses who are being deposed this week so
19 that they can opine on it. Then I would like to decide
20 whether I take their deposition. And I would like it also
21 for anybody else that's doing additional work after the
22 rebuttal deadline.

23 But tomorrow -- I think it's tomorrow -- they are
24 going to take Professor Frankel. She doesn't know what
25 this opinion is. She's never been given it. And it seems
26 like a complete waste of time for her to be deposed

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2 tomorrow and then find out that there is a supplemental
3 report.

4 THE COURT: I got it.

5 Mr. Ingber, can you address this?

6 MR. INGBER: Yes.

7 Good morning, your Honor.

8 Let me start with the most fundamental point
9 which is that none of our experts are issuing any new
10 opinions. I sent an e-mail to Mr. Reilly on May 14 and I
11 said to him, this should be a nonissue because our experts
12 are issuing no new opinions. Which is why I was surprised
13 when got Mr. Reilly's letter saying he is concerned about
14 undisclosed and new opinions. There are no new opinions.

15 THE COURT: What is he talking about?

16 MR. INGBER: This is the issue, your Honor.

17 There was a schedule in place. There would be
18 expert reports issued by the objectors. We would respond
19 to them. And then they would issue reply expert reports.
20 When our experts receive those reply expert reports, which
21 are critical of our expert's analysis, they read those
22 reports and they had thoughts about those criticisms. They
23 believe that those criticisms are baseless. And they may
24 well have a response to criticisms if asked questions on
25 cross-examination at trial.

26 At the deposition, Mr. Reilly said, well, when

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2 you received those rebuttal reports, did you do anything?
3 And of course, Dr. Fischel, Professor Fischel, said yes, I
4 read the reports and I thought about how they were
5 criticizing my reports. And I looked into the issues that
6 they raised. And instead of saying, well, what was your
7 response? What did you do? How would you respond to these
8 criticisms?

9 He said, Mr. Reilly said, we need a supplemental
10 report. And my response to that was: No. This isn't a
11 game of ping pong. There were three sets of reports.
12 Dr. Fischel, just because he has a reaction to criticisms
13 of his report, isn't then going to submit a supplemental
14 report. Because then what happens when your experts get
15 Professor Fischel's report? They're going to have
16 reactions to that. Do they then need to submit a
17 supplemental report to us? And do we go back and forth
18 until one of the experts takes the witness stand? That's
19 not how it works.

20 We have expert depositions so that you can ask
21 the expert how he responds to the last rebuttal report. I
22 said on the record at the end of the deposition,
23 Mr. Reilly, you have taken five and a half hours of
24 on-the-record testimony. We will be here all night if you
25 would like us to be here all night. Take Professor Fischel
26 through the rebuttal reports, ask him what his response is

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2 to each sentence, to each criticism. Go sentence by
3 sentence. That's why we are here. But this is just make
4 work.

5 And the bottom line is there are no new opinions.
6 If Mr. Reilly wants to cross-examine our experts at trial,
7 they can't just stay silent because their experts happened
8 to put in the last report. They can respond to it. And
9 they will respond to it. But they don't need to issue a
10 supplemental report. This, to us, is a fake issue, your
11 Honor.

12 THE COURT: Okay.

13 MR. REILLY: Mr. Ingber didn't describe for you
14 the event study that the witness said he did. He said he
15 did another study. If --

16 THE COURT: They're saying he doesn't have any
17 other reports and he didn't do anything else. He was just
18 reading -- I mean, I don't think that just because your
19 people rebutted his, he says, you know what, Mr. Reilly is
20 right. I'll throw in the towel. Obviously, that's not
21 what he is doing. He says, look, I read that. And this is
22 what I agree with and whatever. And that's what you are
23 going to depose him on.

24 He didn't issue another report, so there is no
25 report to give you because there is no other report. End
26 of story.

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2 MR. REILLY: What he didn't say though was that
3 he had done another event study, which I believe is an
4 entirely new set of data.

5 THE COURT: I don't understand. He said he
6 didn't do a report. What's an event study? Are we playing
7 semantics here? I wasn't at the deposition. What's an
8 event study?

9 MR. INGBER: Your Honor, there is no new event
10 study. He issued a report that had an event study.
11 Professor Levitin tried to poke holes in some aspects of
12 this event study. Professor Fischel, I believe, testified
13 that he looked at Professor Levitin's criticisms and he has
14 responses to them. That's it.

15 He didn't ask what those responses were. I don't
16 know exactly what Professor Fischel is going to say in
17 response. He is not issuing a new opinion. His opinion
18 that the trustee's decision was reasonable, that the
19 settlement is substantively fair, remains unchanged. There
20 are no new opinions. But he is entitled to respond to
21 criticisms. And it's not going to be with a brand new
22 event study. That's not what he's doing.

23 THE COURT: When did you have Fischel's
24 deposition?

25 MR. REILLY: Ten days ago roughly.

26 MR. INGBER: It was May 9, your Honor.

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2 THE COURT: So you didn't ask him these
3 questions, like, well, why do you still disagree or now you
4 have read Dr. Frankel's or Levitin's report and after
5 reading that, have you now changed your opinion? No. Why?
6 Why, because this seems very good to you I guess, but I
7 guess it doesn't seem very good to them.

8 So I think he is allowed to talk about that. We
9 realize that everybody is going to react to each other. So
10 that would have been a good thing to depose him on.

11 MR. REILLY: That wasn't the impression I got. I
12 got he had done another statistical analysis. And I didn't
13 want to get into one blind, with no support from my people
14 to say here's what's wrong with what he did.

15 So that's the impression he gave me. And I asked
16 him, did you form new opinions? And his answer was yes.
17 So that was my concern, is that I don't know what he did
18 and I don't know what data there was. And I didn't think
19 it was fair to have to take that on in the blind, without
20 my consulting expert.

21 MR. INGBER: Professor Fischel did not say that
22 he formed new opinions. And before I wrote back to
23 Mr. Reilly on May 14, I asked Professor Fischel: Are you
24 issuing any new opinions? And his answer was, no, which is
25 why I wrote Mr. Reilly on May 14, our experts are issuing
26 no new opinions.

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2 MR. REILLY: "Issuing" is a tricky word here
3 though.

4 THE COURT: Sir, there is no formal written
5 reports or documents that he is going to submit. And since
6 he is representing that to me on the record here, he is not
7 going to be able to do it. If -- is it professor?

8 MR. INGBER: It's Professor Fischel.

9 THE COURT: If Professor Fischel has some
10 reactions because you had the last word in terms of reports
11 and papers on that, the expert issue, so if Professor
12 Fischel said, look, I've now read Levitin's and let me tell
13 you why I disagree with him/her on this issue, and why I
14 still feel this way. And I just want to point this out to
15 you.

16 I mean, he is allowed to distinguish, just like
17 we would do in a legal thing, the reply person, you know,
18 gets the last word. And the other side says, oh, but I
19 wanted surreply because I came up with a great idea. No.
20 But if you have a new case or you want to bring something
21 up, you argue it because I assume you still think you're
22 right even if they reply to what you said in opposition.

23 So at some point we stop the procedure. He is
24 not going to give any more reports. So are you telling me
25 you did not finish the deposition?

26 MR. REILLY: Yes. If that's what you are saying,

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2 yes, I didn't. And I understand he is not going to issue
3 any more reports and I know he is not going to issue any
4 more new opinions, but I don't think it's fair if he has
5 new opinions that we haven't heard.

6 THE COURT: So why didn't you ask him about his
7 new opinions when you were deposing --

8 MR. REILLY: Your Honor, the statistical analysis
9 and event study is not my area of expertise. Because
10 here's what he would be saying today: He asked him all the
11 questions. It's already done.

12 I want to see what he was going to say so I could
13 consult. That's what we did before the deposition.

14 THE COURT: Did you take his deposition?

15 MR. REILLY: I took the deposition.

16 THE COURT: So you obviously read everything,
17 even though you are not an expert on that.

18 MR. REILLY: I hadn't read what I didn't know he
19 had done.

20 THE COURT: But he didn't do anything. He just
21 read it and said, you know, now that I have read this,
22 I'm -- I mean, he is allowed to say, I went back and looked
23 at my report and I compared them to Dr. Levitin's.

24 MR. REILLY: That isn't what happened. He said
25 he did another --

26 THE COURT: Okay, fine. I have a representation

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2 that there is no additional report.

3 Where does Professor Fischel live?

4 MR. INGBER: Chicago.

5 THE COURT: Go to Chicago. Or have him come -- I
6 don't know where you are doing your depositions. You all
7 live all over the country. Finish the deposition and just
8 ask him why does he still agree, how does he distinguish.
9 Like I asked you, how do you distinguish the Matter of
10 Palma and you tell me. You answer the question. I mean, I
11 didn't do a new legal analysis. I came up with a question.
12 Now I read both sides, now I have a question. I think it's
13 sort off the same thing.

14 So, I think you could have done this in a
15 telephone call or whatever, I mean, you know, this kind of
16 easy stuff. But I think that if there is no final report,
17 then you can finish up Fischel and I assume that's all you
18 are doing for the next ten days. So fit him in somewhere,
19 I don't know, wherever you are going to be.

20 MR. INGBER: Sure. And obviously, your Honor, we
21 think they could have done that on May 9. But we will put
22 Professor Fischel forward for the remainder of his
23 deposition. I would just ask that we put a limit on the
24 length of that deposition. We are all, obviously, very
25 busy including Professor Fischel, getting ready for trial.
26 This is something that really could have and should have

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2 happened on my May 9th. So I would ask your Honor to place
3 a reasonable limit on that deposition.

4 MR. REILLY: One hour is fine, your Honor.

5 THE COURT: That's sounds --

6 MR. INGBER: That's fine with me. Thank you.

7 THE COURT: So what other outstanding -- well, I
8 guess one thing I have to ask, and I'm not sure you can
9 answer it right at this moment is, obviously -- a few
10 things. There is some documents that now have to be
11 produced by -- if you follow my order and don't go to the
12 Appellate Division -- as a result of the order that I
13 issued this morning. So I gather that those shouldn't take
14 that long because I think you went through the privilege
15 log so they must have been found at some point or
16 segregated or whatever.

17 So you have to produce that to them. I don't
18 know how long that's going to take and I also don't know
19 and I'm not sure you are able to tell me yet, if somebody
20 is going to the Appellate Division, you know, I would like
21 to know that and when you are planning to do that.

22 MR. INGBER: Sure.

23 I'm sure, as your Honor can appreciate, we
24 received the opinion this morning. We are digesting it.
25 We need to speak to the client about what options we want
26 to take. I agree with you that if we are going to be

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2 producing these documents, and we are not going to ask your
3 Honor to stay the order so that we can take it up to the
4 Appellate Division, it should not take very long to produce
5 those documents. I think there is a very limited number of
6 documents that will fall into the categories of documents
7 that you have identified.

8 But of course, we understand the importance of
9 the question that your Honor has raised. We are going to
10 consult with our client about what we view as the next step
11 and we will tell the court in very short order. I
12 obviously can't speak for what the objectors are doing.

13 THE COURT: Obviously. Since you can't really
14 speak for what you're doing.

15 MR. INGBER: Exactly.

16 MR. REILLY: And I can't speak for what they're
17 doing.

18 Obviously, we consider the documents to be
19 critically important. There isn't any doubt that if we got
20 them tomorrow, we would give them to our experts. These
21 issues are fundamental to, we believe, the question of
22 whether they met their obligations under the agreement, the
23 fiduciary question, the negligence question.

24 THE COURT: What deposition do you have scheduled
25 for tomorrow?

26 MR. REILLY: They are taking one of our experts.

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2 And then -- I think it's tomorrow. Then they are taking
3 another one of our experts on Thursday. But both of those
4 experts and maybe others, depending on what is in the
5 documents, will be issuing supplemental reports. I assume
6 we're going to ask them to decide what is significant about
7 this. As we said, we think this stuff is critical. I
8 don't know what they're doing to do. I can't tell you what
9 we're going to do. But the bottom line is that we think
10 it's important. And we are going to certainly evaluate it
11 and issue supplemental reports.

12 MR. INGBER: We see no reason why the depositions
13 shouldn't go forward this week. The experts have issued
14 reports. We are going to depose them on the reports. We
15 are going to ask them for their responses to our expert's
16 rebuttal reports. So we'll go forward. If the documents
17 are produced and the experts feel a need, based on those
18 documents, to issue supplemental reports, then they'll do
19 so. And we may -- we may not have to depose them; we'll
20 just cross-examine them at trial. It's something that we
21 will have to decide.

22 MR. REILLY: Your Honor, I'm not intimately
23 familiar with the effects. My partner, Mike Rollin, is
24 handling those depositions tomorrow and Thursday. And I
25 can't tell you, although I have concern, that the experts
26 are now taking positions on part of the record, not all of

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2 the record. And I would ask, if I have a chance, because
3 Mr. Rollin may know about this, but he hasn't read it yet,
4 if we could take a break and I could talk to him about
5 whether he is concerned about whether the experts go
6 forward tomorrow, so that they have a full record before
7 them. Because if they are going to have to come back and
8 give another deposition, why would they do it twice and why
9 would they be asked questions when they don't have a whole
10 record?

11 THE COURT: Because I think at this stage I don't
12 think you should adjourn those depositions. I mean, it's
13 like with Professor Fischel. So I said, okay, you can have
14 an extra hour if there are some things that there was a
15 dispute about there.

16 I think that you should go ahead with these
17 depositions and if some additional things come up that
18 requires some additional deposition testimony, you will do
19 that. I realize it's hard to talk about what you might do,
20 what you might do. I mean, I do not plan to stay my order.
21 If you want to go to the Appellate Division, get a stay,
22 either of you, then go up there and get a stay.

23 I'm not -- I mean, I don't write these decisions
24 because I think they are wrong. I mean, I didn't take
25 until this morning to do it because I thought I was making
26 the wrong decision. We spent all this time because we

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2 spent a lot of time. So we think that ultimately we made
3 the right decision obviously. There wasn't a lot of prior
4 law to go on that clearly this is right. That's been a
5 problem in this case. Clearly, this has not been decided
6 before, so much so it's clearly it's a little harder.

7 So you look and you make the decision that you
8 think is right. I'm sure the Appellate Division will not
9 be able to give you a decision like that (snapping fingers)
10 either. If somebody wants a stay, you can get it from them
11 on an order or on anything else and that would affect
12 everything.

13 So if we want to take a short break now, we will
14 go into the back and I want to look at some of the cases
15 that I have already looked at, a couple of ones I didn't
16 look at because you just mentioned them today. So we can
17 see if we can at least deal with the jury trial issue and
18 then see if there is anything else. And it just may be
19 that we have to have a conference call later in the week
20 when everybody decides. I understand we've got a lot of
21 pieces that we are juggling. I can't do anything about
22 that.

23 MR. REILLY: Okay, that would be great.

24 THE COURT: All right, so let's take a short
25 break.

26 (Brief recess is taken.)

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2 THE COURT: Okay, so anything that you discussed
3 that you want to talk about or no?

4 MR. INGBER: I wish, your Honor, that I had an
5 answer to your question about what the next step is, but we
6 are still digesting the opinion and we will have an answer
7 very shortly.

8 THE COURT: Okay.

9 MR. REILLY: Your Honor, as to the depositions
10 this week, we are going to go forward with them, assuming
11 they want to go forward. We will, you know, assuming we
12 get the documents from the response to the ruling today, we
13 will supplement reports and make them available for
14 supplemental depositions.

15 THE COURT: Okay. So we have taken a look again
16 at your case and your memos, which we previously had looked
17 at. CPLR 409(b) states that, "The court shall make a
18 summary determination upon the pleadings," which I guess
19 there is not so much pleadings, "but pleadings, papers and
20 admissions to the extent that no triable issues of fact are
21 raised."

22 CPLR 410 goes on to say that, "If triable issue
23 of fact are raised, they shall be tried forthwith and the
24 court shall make a final determination thereon. If issues
25 are triable of right by jury, the court shall give the
26 parties an opportunity to demand a jury trial of such

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2 issues."

3 Now, so I have to determine really if the issues
4 are triable of right by jury.

5 I agree with Mr. Reilly that if this was a breach
6 of contract case or a case on negligence or other things
7 that are entitled to jury trials, you would get a jury
8 trial. You would have a right to make a jury trial. Of
9 course, there is no question here that you waived any right
10 to make a demand for a jury trial. You had a right to make
11 it, you made it, and they made a motion to strike the jury
12 demand.

13 I have gone back and looked at Matter of Palma.
14 In that case the court, which was the Appellate Division
15 reviewing a determination made -- in that case it was by
16 Surrogate's Court because of a lot of these Article 77
17 trust issues obviously arise out of issues that involve
18 Surrogate's Court. The Appellate Division said, a question
19 remains as to whether a jury trial would be available given
20 the fact that the language -- and there it was in the
21 Surrogate's Court procedure -- expressly contemplates
22 judicial, and that's italicized, judicial advice or
23 approval of a proposed compromise or settlement.

24 This case is not a case for breach of contract,
25 that's not what it is. It's a case -- it's a special
26 proceeding in which the petitioners ask the court for

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2 judicial instructions and approval of a proposed
3 settlement. They want my instructions and my approval of a
4 proposed settlement. This is not a case where somebody is
5 bringing a case for breach of contract. I understand that
6 they are asking for judicial findings, including whether or
7 not the trustee in any way breached the trust. But that
8 doesn't turn this into a case for -- does not turn this
9 into a breach of contract case or a case for negligence or
10 a case for breach of fiduciary duty. It still stays an
11 Article 77 proceeding which is seeking judicial
12 instructions and approval of a proposed settlement.

13 I find this type of a proceeding is essentially
14 equitable in nature and, therefore, that you are not
15 entitled to a jury trial.

16 And I don't have to go back and read 409 and 410,
17 but just because there might be issues of fact, does not
18 mean that you get a trial by jury. So I think this case is
19 equitable in nature and therefore, you are not entitled to
20 a jury trial. And therefore, I grant the petitioner's or
21 institutional investors' motion to strike the jury demand.

22 So we are not going to have a jury. I don't know
23 if there is anything else to discuss today. There may not
24 be. And you may have to go back and see what it is that
25 you are going to do and get a conference call in a couple
26 of days. I don't know.

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2 I mean, I've still got a bunch of days carved out
3 of my calendar to accommodate this case, as I believe we
4 talked about early either last time you were here or on the
5 phone or both. Starting next Thursday May 30, May 31st,
6 the 3rd, the 4th, the 6th, the 7th, the 10th. The 11th, I
7 told you I will get out of probably what I need to do. The
8 morning of the 13th I can't get out of that. So I have the
9 afternoon of the 13th and the 14. So however many days
10 that is, those many days I have nothing else scheduled
11 except you guys.

12 So I think you probably just have to go back and
13 see what you can arrange. I mean, I don't think it's even
14 possible right now to go through how many hours are you
15 going to do what. I mean, I was kind of hoping you could
16 figure that out. I have given you the number of days.
17 We'll start right at 10. We've got to close the courtroom
18 at 1:00. We will start as close to 2:00 as we can. We've
19 got to close the courtroom at 4:30. We have got to have a
20 break in the morning because the court reporter and I can't
21 sit here for three hours listening to everything.

22 So that's pretty much what I have to tell you.

23 MR. REILLY: Your Honor, we asked in the letter
24 on Friday for a continuance. And obviously, with the court
25 order this morning and this order just now, I think
26 everybody has a lot to think about. So we will immediately

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2 turn our attention to that. And I expect that we will get
3 back to you -- is a couple of days okay?

4 THE COURT: Do you want to get back to me on a
5 conference call, instead of sending me a lot of cross
6 letters?

7 MR. REILLY: Sure. We've got other people
8 traveling, but I would rather do a conference call if we
9 can. But if you want us back here, we can come back here.

10 THE COURT: I don't think I need you back here.
11 But I think I need to have a conference call, because -- do
12 you see all those piles over there? Those are all motions
13 that I don't have any time to schedule until, like, August.
14 I'm afraid people are going to go nuts. I mean, I'm
15 holding a lot of days out for this case and I'm going to
16 need to know whether that's happening.

17 I will tell you that I'm not inclined at this
18 point, unless you all agreed, to put this over. If the
19 Appellate Division does it, then far be it from me -- then
20 I don't have any say in the matter. If you all agree, then
21 we will figure something out. Other than that, I'm not
22 anxious to do that or planning to do that. But I need to
23 know what you are going to do with the orders.

24 I appreciate that I just issued this one on the
25 record and I just gave you the other one this morning, not
26 from lack of putting in enormous amount of time to get it

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2 done. But now it's done. I understand you've got to talk
3 to your clients, see what you plan to do about this. So
4 maybe you want to call me by the end of the day Thursday.

5 MR. REILLY: Whenever you have time.

6 THE COURT: Would that give you enough time to
7 see what you are going to do?

8 MR. INGBER: That would be fine, your Honor.
9 Thursday.

10 THE COURT: Thursday.

11 MS. PATRICK: Yes, your Honor, that's fine.

12 Mr. Reilly set forth of a number of arguments as
13 to why he wanted a continuance. We could obviously respond
14 to that, but I don't think there is a need to do that
15 because I don't want to burden the court with more paper.
16 We will deal with that by phone. But as you know, it is
17 our firmly held view that we should go forward as
18 scheduled.

19 THE COURT: I just think that there is too many
20 other moving pieces, so to speak, to really waste your time
21 on dealing with that --

22 MR. REILLY: Right.

23 THE COURT: -- at this point.

24 MR. REILLY: And that's fine, your Honor.
25 Obviously, we put in there what we thought mattered. And I
26 can tell you that I expect that if Bank of New York Mellon

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2 produces documents as a result of your order in the next 24
3 hours, 48 hours, that we are going to have a lot to do
4 that's pretrial. And I expect that we would come to you
5 and ask you to give us time to do that. So, you know, I
6 just believe that's going to happen.

7 Obviously, depends on when they give them to us,
8 if they give them to us and what they do. But I just need
9 to make sure that both that issue, which is brand-new today
10 and all the reasons that we put in our letter originally,
11 are still there; that there are significant things that
12 still have to happen and we, as a steering committee, do
13 not believe that it's realistic for us to be ready for you
14 by that date.

15 And today you are getting, as I know you know,
16 another set of briefs which is probably another two, three
17 hundred pages with loads of stuff. So that's where we are,
18 bottom line. I think we have to get some clarity on your
19 order today and see what the Bank of New York Mellon does.
20 And we will do that and talk to you on Thursday.

21 THE COURT: What about the issue of the
22 depositions of the three -- AIG, Triaxx and --

23 MS. PATRICK: As long as the trial -- the
24 settings that we have, the May 30 setting doesn't move, we
25 will forgo those depositions, so that we can keep the
26 hearing on calendar for the 30th.

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2 We don't, frankly, believe that the very minimal
3 discovery we were asking for was sufficiently disruptive
4 that they couldn't prepare, but we will take that argument
5 off the table. We won't take them. We will just move
6 forward. It is tremendously important that this hearing
7 proceed on May 30.

8 You have ordered that the documents be produced.
9 You have said there will be no further depositions about
10 them. They can read the documents. There is not a large
11 volume of documents that are at issue here. And so from
12 our perspective, your Honor, all that's going to happen now
13 is the production of some additional documents. Their
14 experts are going to do some supplemental reports. And we
15 have said we won't even take depositions on their
16 supplemental reports.

17 We are trying as hard as we can to keep this date
18 so that this can move forward. And I could go through with
19 you, chapter and verse, of why their continuance arguments
20 are nonsensical and don't amount to good cause to move this
21 case off calendar. But there's-- we're really talking
22 about they are going to finish two expert depositions this
23 week. They'll be done. They have to cut a deposition of
24 one unavailable witness, that's it. Look at a few
25 documents. Let's show up, let's get moving.

26 The only thing that we need to do, your Honor, is

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1
2 agree on pretrial exchange dates in anticipation of the
3 May 30 hearing. And we have offered to agree to all of the
4 dates they've proposed. So I don't understand -- there
5 should be no controversy here if the date is the date. If
6 it's May 30 and if the court is not inclined to grant it,
7 if it's objected to -- I will tell you right now, a
8 continuance, I'll tell you right now, if it's going to be
9 objected to, because we are going to object.

10 So given that, we can go forward, sit in the hall
11 here afterward and finalize those exchange dates and get
12 moving. We know what we need to do. Everybody here is a
13 skilled lawyer. We can all get ready.

14 MR. LOESER: Your Honor, just very briefly to
15 close the loop on the deposition question.

16 As you know, we don't think there is any reason
17 to have our corporate representatives' depositions taken.

18 THE COURT: She waived it.

19 MR. LOESER: I just want to put a place holder.
20 If for some reason the trial date does move, I will just
21 put a place holder in the fact that we intend to argue
22 against those depositions, understanding that if the trial
23 date is not moved, that counsel has waived taking those
24 depositions.

25 THE COURT: So can you give me a call at -- how
26 about four?

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1
2 MS. PATRICK: Sure.

3 MR. REILLY: Sure.

4 THE COURT: How is 4 o'clock on Thursday? If
5 anything happens between now and then, would you be kind
6 enough to just let me know?

7 MS. PATRICK: Yes, your Honor.

8 THE COURT: If you produce anything, if you
9 choose to go to the Appellate Division, whatever, I would
10 like to sort of know what's going on, obviously. Okay?
11 Okay. So have a good week and I'll speak to you at
12 4 o'clock on Thursday.

13 MR. REILLY: Thank you, your Honor.

14 MR. INGBER: Thank you, your Honor.

15 MS. PATRICK: Thank you, your Honor.

16 * * * * *

17 Certified to be a true and accurate record of the
18 within proceedings.

19
20 _____
21 Ellen Rubin, CSR, RPR
22 Senior Court Reporter
23
24
25
26

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NYSCEF - New York County Supreme Court

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In the Matter of the Application of THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) et al - v. - for an Order, pursuant to CPLR 7701, seeking judicial instructions and approval of a proposed settlement et al

651786/2011

Documents Received

Doc #	Document Type	Motion #	Date Received
834	NOTICE OF ENTRY		05/28/2013 01:14 PM
835	EXHIBIT(S) 1		05/28/2013 01:14 PM
836	EXHIBIT(S) 2		05/28/2013 01:14 PM
837	EXHIBIT(S) 3		05/28/2013 01:14 PM

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