ATTACHMENT 3

Transcript of the May 20, 2013 hearing

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

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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),

Petitioner,

Index No.
651786/11

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

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Transcript of Motion Proceedings
New York Supreme Court
60 Centre Street
New York, New York 10007
May 20, 2013

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Proceedings

THE COURT: Okay, good morning, everybody.

MR. INGBER: Good morning, your Honor.

MR. REILLY: Good morning.

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

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

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

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

THE COURT: It will not.

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

those witnesses, even though they are noticed.

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

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

MS. PATRICK: Yes, your Honor.

THE COURT: -- objectors.

MS. PATRICK: Yes, your Honor.

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

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

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

THE COURT: Okay.

MR. REILLY: Your Honor, one clarification on the

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

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

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

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

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

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

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

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

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

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

So briefly, go ahead.

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

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

THE COURT: Did you give me two copies?

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

THE COURT: Thank you.

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

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

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

And that is precisely what we have here, your

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, your Honor.

THE COURT: Thank you.

Who is going to address that?

MR. REILLY: I am, your Honor.

Good morning. Dan Reilly for the steering committee.

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

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

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

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

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

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

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

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

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

One of our fundamental criticisms here in this

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

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

And just like you would do in a malpractice case

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

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

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

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

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

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

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

THE COURT: I do.

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

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

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

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

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

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

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

THE COURT: Finish up.

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

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

THE COURT: So what about the case that

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

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

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

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

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

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

THE COURT: But they did.

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

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

And they are --

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

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

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

other places.

MR. REILLY: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

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

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

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

MR. MADDEN: Let me just address that.

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

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

Number two, your Honor, over and above Palma,

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

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

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

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

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

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

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

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

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

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

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

Thank you, your Honor.

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

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

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

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

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

THE COURT: You don't have his report?

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

THE COURT: How did you find that out?

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I got it.

Mr. Ingber, can you address this?

MR. INGBER: Yes.

Good morning, your Honor.

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

THE COURT: What is he talking about?

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

MR. REILLY: Ten days ago roughly.

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

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

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

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

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

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

Proceedings

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

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

MR. INGBER: It's Professor Fischel.

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

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

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

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

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

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

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

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

THE COURT: Did you take his deposition?

MR. REILLY: I took the deposition.

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

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

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

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

THE COURT: Okay, fine. I have a representation

that there is no additional report.

Where does Professor Fischel live?

MR. INGBER: Chicago.

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

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

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

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

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

THE COURT: That's sounds --

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

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

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

MR. INGBER: Sure.

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

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

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

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

MR. INGBER: Exactly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. REILLY: Okay, that would be great.

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

(Brief recess is taken.)

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

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

THE COURT: Okay.

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

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

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

issues."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. REILLY: Whenever you have time.

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

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

THE COURT: Thursday.

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

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

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

MR. REILLY: Right.

THE COURT: -- at this point.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: She waived it.

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

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

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MS. PATRICK: Sure.

MR. REILLY: Sure.

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

MS. PATRICK: Yes, your Honor.

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

MR. REILLY: Thank you, your Honor.

MR. INGBER: Thank you, your Honor.

MS. PATRICK: Thank you, your Honor.

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

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Ellen Rubin, CSR, RPR
Senior Court Reporter