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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM: PART 36

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IN THE MATTER OF THE REHABILITATION OF
FINANCIAL GUARANTY INSURANCE COMPANY
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INDEX NO.
401265/2012

60 CENTRE STREET
NEW YORK, NEW YORK
JANUARY 15, 2013

B E F O R E:

THE HONORABLE DORIS LING-COHAN
Justice

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William Cardenuto
Senior Court Reporter

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2 THE COURT: We're on the record.

3 Let the record reflect that this matter is on
4 for a discovery conference, and, previously, this Court
5 signed an order appointing rehabilitator, and the issue is
6 whether the plan should be approved. We have a date for
7 the hearing as to whether the plan will be approved,
8 which, I believe, is January 28th and 29th. Is that
9 correct? Okay. Why don't we take the appearance of the
10 people we expect to speak.

11 MR. HOLTZER: Thank you, your Honor. Gary
12 Holtzer of Weil, Gotshal and Manges, LLP. With me at
13 counsel table is Richard Slack.

14 MR. WAGNER: Jonathan Wagner from Kramer, Levin,
15 representing the Jefferson County Warrant Holders.

16 THE COURT: I think you should come to the
17 table.

18 MS. MACHAN: Kate Machan from Linklaters, LLP,
19 for Children's Health.

20 THE COURT: Repeat your name again.

21 MS. MACHAN: Kate Machan.

22 THE COURT: I'm looking for --

23 MS. MACHAN: I may be on the second or third
24 page.

25 THE COURT: Yes, I see. Thank you very much.

26 Is there anybody else expected to speak?

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2 All right. We're just joined with a lot of
3 friends in the audience.

4 I understand that as to the issue of documentary
5 discovery that you need a few days to, perhaps, work out
6 an understanding as to that; is that correct?

7 MR. HOLTZER: Yes, your Honor. In fact, your
8 Honor, if it's okay, there are three items we wanted to
9 take up --

10 THE COURT: Very good.

11 MR. HOLTZER: -- before you today, and we very
12 much appreciate your time, because it's been incredibly
13 helpful in helping to create efficiency in our process
14 and, hopefully, make the hearing go better.

15 Those three things are, first, we have your
16 Honor's order of December 19th with respect to the filing
17 of objections and our reply, and I wanted to confirm with
18 your Honor that, first, we served and sent that to, I
19 should say, all the parties per the order, received
20 confirmation from each of the objectors that they did
21 receive it, posted it on the website per the order, and we
22 wanted to confirm, your Honor, and we think it's clear in
23 the order that the purpose of the order is for parties to
24 simply go into their existing pleadings and delete from
25 them the objections that are no longer before the Court,
26 and it's not meant to allow the party to add new arguments

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2 or objections to the previously filed pleadings.

3 THE COURT: Correct.

4 MR. HOLTZER: Thank you.

5 MR. WAGNER: Can I make a request on that?

6 There were arguments that were raised for the first time
7 in the reply brief, and we think it would be helpful in a
8 very discreet way not to redo the objections, but in a
9 very discreet way to respond to those arguments within
10 page limits that your Honor has set. I think that would
11 be helpful to the Court and the parties.

12 MR. HOLTZER: Your Honor, with all due respect,
13 there aren't new arguments in the reply.

14 THE COURT: I'm not going to do that at this
15 point. You may bring it up, if necessary, later on. I
16 may require additional memorandum, but at the conclusion
17 of the hearing. We're jumping the gun at this point.

18 MR. HOLTZER: The next thing, your Honor, has to
19 do with smoothing the trial process in the use of
20 witnesses at the trial.

21 THE COURT: Just so I understand, one, what do
22 you want to address, the issue of what objections are
23 still alive? Is that what you're saying?

24 MR. HOLTZER: No, your Honor. I think when the
25 objections were filed, it was clear from the last hearing
26 what objections were still alive. One point on that, when

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2 we go ahead and file our reply, it's helpful to your Honor
3 if we take the grid attached and simply attach a new one
4 which only contains the remaining objections per the last
5 hearing. We had showed one which had shaded areas, and we
6 can file one with your Honor that simply includes only the
7 remaining objections.

8 THE COURT: Yes.

9 MR. HOLTZER: Thank you.

10 The second area to talk about is the witnesses
11 at the hearing, two areas in particular we wanted to
12 mention to your Honor. The first is with respect to the
13 testimony by certain witnesses. We have informed the
14 objectors that for our part we intend to call three
15 witnesses, one is John DuBell (phonetic), the CEO of FGIC,
16 one is Ari Lefkowitz from Lazar (phonetic). Both of those
17 witnesses have affidavits that have been submitted. Ari
18 Lefkowitz' affidavit -- he's mentioned in the Lazar
19 (phonetic) affidavit, and he would be the Lazar (phonetic)
20 witness. The third one is Peter Giacone who is with the
21 New York Liquidation Bureau and signed the disclosure
22 statement. Mr. Giacone is actually in court today. Those
23 would be our three witnesses, your Honor.

24 THE COURT: Let me just ask you, in terms of
25 it's your expectation that the substance of their
26 testimony is contained within the affidavits; is that

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2 correct?

3 MR. HOLTZER: Mr. Giacone --

4 THE COURT: Except for Giacone who signed a
5 disclosure statement.

6 MR. HOLTZER: That's correct. The substance of
7 their testimony is in the affidavits. We would be
8 elaborating on some of that testimony in order to make
9 certain points clear at trial, but the substance is in
10 their affidavits.

11 THE COURT: Okay. Now, I throw this out, which
12 is, would people be amenable to essentially having direct
13 testimony based on the affidavit, whether it's this one or
14 a slightly expanded one? I mean, this is not a jury
15 trial. So, in terms of moving this process along, and
16 this is a hearing on a summary proceeding, I am suggesting
17 that that is how we proceed, and so cross examination,
18 frankly, if appropriate would be based on the affidavit.

19 MR. HOLTZER: I think, your Honor, there are
20 certain aspects of the affidavit that may serve the Court
21 and others well if we bring it out through live testimony.
22 What I was going to say to your Honor was there have been
23 other affidavits submitted by certain objectors, and those
24 objectors are the indenture trustees, in particular. We
25 have reached out to them, and we are in the final
26 discussions, and I believe we'll be final shortly. They

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2 are here in court and can confirm this on a stipulation
3 where their affidavits will serve as the basis for their
4 clients' direct testimony, all right, including the
5 admission into evidence of the documents referenced in
6 there. We are in the process of finalizing the accuracy
7 of some of those documents. That's the substance of our
8 stipulations with three of the four indenture trustees who
9 said they would prefer to proceed with that format. We
10 anticipate that's the format with respect to them.

11 The fourth indenture trustee has indicated that
12 they do not intend to call a witness; therefore, they are
13 not a party to that stipulation. So, we anticipate having
14 that stipulation with those indenture trustees completed
15 rather quickly.

16 With respect to FGIC's witnesses, particularly
17 in light of some of the complexities, we think it would
18 make sense to put them on as live witnesses and take them
19 through their testimony. What we were going to suggest,
20 your Honor, if your Honor determines to allow cross
21 examination, we would recommend that the objectors
22 organize themselves so that after a witness' direct
23 testimony, if the Court were to allow cross and ask if
24 anybody intends to cross, that we don't have the eight
25 objectors standing up, and that one of them amongst the
26 eight of them coordinate and take the lead, and then, if

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your Honor allows, additional questions so we don't have duplicative questioning.

THE COURT: How many objectors do we have left?

MR. HOLTZER: Eight, your Honor. Four of them are indenture trustees. Four of them are holders.

THE COURT: In terms of who they are, I understand that we have Children's Health as well as Jefferson County.

MR. HOLTZER: Yes, your Honor.

THE COURT: Who are the others?

MR. HOLTZER: Aurelius, and then the fourth one is CQS. Separate from those four, we have the four indenture trustees.

THE COURT: And aren't they here today?

MR. HOLTZER: I believe, they are, your Honor,

MR. GOTTFRIED: Yes, your Honor.

MR. MULLANEY: Yes, your Honor.

THE COURT: A whole crowd, yes.

MR. HOLTZER: So, we have all four indenture trustees.

THE COURT: Yes.

MR. HOLTZER: So, your Honor, that's how we propose to go forward at the hearing if we are able to reach agreements with the other four objectors about the witnesses, and my colleague, Richard Slack, will discuss

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2 with you the witnesses. We identified our witnesses, all
3 eight objectors. We are awaiting responses from the
4 objectors with respect to who their witnesses will be,
5 other than the indenture trustees who we have subject to
6 getting it finalized, the stipulation, how their witnesses
7 will be handled.

8 THE COURT: For the people who you are not
9 working on a stipulation, do we have a date in which they
10 must identify the witnesses? It's only fair that if I'm
11 going to allow discovery that it be on both sides.

12 MR. HOLTZER: We are not talking about discovery
13 right now. We're talking about witnesses at trial. We
14 would propose that they identify their witnesses to us by
15 this Friday.

16 THE COURT: Okay. You're proposing that, and
17 that is what people are agreeing to or --

18 MR. SLACK: Can I take a shot? So, we sent an
19 email out on December 21st asking all eight of the
20 objectors that if they had witnesses -- we had already
21 requested that they let us know by January 3rd. We
22 received from the trustees who we're working on the
23 stipulation with -- we received a response that if we
24 could agree to a stipulation to allow their affidavits to
25 come in as, you know, instead of direct and not have cross
26 examination that they would not be calling any witnesses,

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2 and we have been trying to work on a stipulation. I'm
3 somewhat confident that we'll be able to reach an
4 agreement with the trustees. We haven't yet.

5 With respect to two of the objectors, CQS and
6 Aurelius, we did not get any response with respect to
7 witnesses on January 3rd. So, it may be that they are not
8 intending on calling any, but we didn't receive any
9 response to that request.

10 With respect to both Jefferson County Warrant
11 Holders and CHP, Children's's Health, both of them have
12 said that they may call witnesses, have not identified
13 them by name, and have not given us the same kind of
14 disclosure that we've given in our affidavits, and so what
15 we would propose today is that Children's Health and the
16 Jefferson County Warrant Holders provide by Friday both
17 the names of the people that they intend to call, but also
18 give us in at least similar form, it's not form over
19 substance, I don't care whether I get it in a piece of
20 paper or email or whatever, but the same kind of
21 information that we've provided either in the affidavits
22 or the disclosure statement as to the subject of their
23 testimony.

24 THE COURT: Let me hear from Children's Health
25 as well as Jefferson County.

26 Go ahead.

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2 MR. WAGNER: On behalf of Jefferson County, I
3 think we can identify a witness by Friday, but I would
4 propose to give, at most, only a general summary of their
5 testimony in part, because their testimony would in part
6 be informed based on what they testified to at trial, and
7 I don't see the need or the requirement for an affidavit
8 from them, but we're happy to identify by Friday. I think
9 we'll probably have one witness.

10 THE COURT: Would you like to respond to that?

11 MR. SLACK: Maybe we can get both.

12 MS. MACHAN: I think that Friday is a reasonable
13 time.

14 MR. SLACK: I think identifying the witnesses is
15 only part of it, and as we get into the discovery
16 question, I think what you've just heard is monumentally
17 inconsistent. On the one hand the parties are saying we
18 need actually not just to have extensive depositions and
19 disclosure statements, a ton of information from the
20 rehabilitators, but on top of that, we want to take
21 depositions before the hearing, and what we're hearing is
22 with respect to their witnesses, they want to give us
23 names and a couple of blurbs, and I think that's
24 monumentally unfair, and the idea of saying they need to
25 hear what they say -- we have made the representation
26 directly that we made to the Court, which is the

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2 affidavits and the disclosure statement are going to be
3 the subject and the basis for the testimony. Those, as
4 your Honor knows, are enormously detailed. You know, I
5 think they know -- if they are going to have witnesses, I
6 think they know what they are going to say.

7 MR. WAGNER: May I respond briefly?

8 THE COURT: Yes.

9 MR. WAGNER: I think the inconsistency lies with
10 the FGIC. They want to give us what they want to give us.
11 They don't want to give us depositions. What we've been
12 given is not detailed. It's very bare. It has lots of
13 holes. There's no requirement that we provide affidavits.
14 There was a requirement in your Honor's original order
15 that the FGIC provide affidavits. There was no
16 requirement in that original order that the objectors
17 provide affidavits, and I think that omission is very
18 clear. They were the ones who drafted that order. Now,
19 they are coming back and saying, okay, now you give us
20 affidavits, because we did. We would make our witness
21 available for deposition if they would make their witness
22 available for deposition, but the process should be fair,
23 and this is not a fair process.

24 THE COURT: Would you like to respond?

25 MR. SLACK: Well, I think if we're going to talk
26 about depositions, then maybe we should move to that.

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2 THE COURT: Actually, before we talk about
3 depositions, I think we need to settle this issue of
4 whether witness statements -- it appears -- it is ordered
5 that if any party is going to call a witness that the
6 party identify the name of the witness by Friday, this
7 Friday. Can I have the date for this Friday?

8 MR. HOLTZER: The 18th.

9 THE COURT: January 18th. And as to the issue
10 of whether it's a general statement or an affidavit, I'm
11 going to reserve as to that, because I do have a general
12 concerning question. I don't do a lot of rehabilitations.
13 It seems to me that having looked at the insurance law it
14 does not state that there need be a hearing as to the
15 plan. There was already an order appointing the
16 rehabilitator.

17 So, what is the standard governing whether the
18 Court approves the plan? Some people are saying, well,
19 we're entitled to discovery, because there's an issue of
20 fact. Has that been raised by affidavit? Where is the
21 issue of fact? I would like people to address that.

22 MR. WAGNER: Your Honor, may I respond?

23 THE COURT: Go ahead.

24 MR. WAGNER: First of all, I think we're in
25 agreement that Section 7403 of the insurance law -- I
26 mean, the language of the statute requires a full hearing.

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2 That's the first point. The second point is there is a
3 special proceeding. There's no dispute this is a special
4 proceeding, and under CPLR 410, if there is a fact issue,
5 then there must be a trial.

6 THE COURT: Okay.

7 MR. WAGNER: And since --

8 THE COURT: I would agree with that, and how has
9 the facts been raised?

10 MR. WAGNER: There have been three fact
11 affidavits -- well, two fact affidavits submitted by the
12 rehabilitator. So, the rehabilitator has obviously put
13 facts at issue in this case.

14 THE COURT: Well, it's only facts at issue. If
15 they are opposed by an affidavit setting forth facts and
16 then the Court has to hold a hearing, it seems to me, as
17 to who's telling the truth as to the facts.

18 MR. WAGNER: But a party may also contest facts
19 by cross examining at trial, eliciting facts at trial.
20 So, there are lots of ways to establish facts. Once the
21 rehabilitator has put facts at issue, you look at Section
22 7403 of insurance law requires a full hearing.

23 THE COURT: Before we cite to 7403, could you
24 tell me which section says there must be --

25 MR. WAGNER: Hold on.

26 THE COURT: -- a hearing?

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2 MR. WAGNER: I think it's (e). 7403(d).

3 THE COURT: It says that's the termination of
4 any rehabilitation proceeding. This is not a
5 termination.

6 MR. WAGNER: It's the confirmation of a plan, if
7 not the letter, then the spirit falls under 7403(d).

8 THE COURT: To be clear, (d) says, "The
9 rehabilitator," in relevant part, 7403(d) reads, "The
10 rehabilitator, upon due notice to the superintendent, at
11 any time may apply for an order terminating any
12 rehabilitation proceeding." So, that's a termination.
13 "And permitting such insurer to resume possession of its
14 property and the conduct of its business, but no such
15 order shall be granted except when after a full hearing
16 the court shall determine that the purposes of the
17 proceeding have been fully accomplished."

18 So, that presumes that there was already an
19 ordered rehabilitation, that there was a plan that was
20 approved, and now the issue is whether the proceeding
21 should be terminated. That is, the purposes of the
22 proceeding have been fully accomplished. It does not in
23 that section provide for a hearing.

24 MR. WAGNER: Well, it does. It certainly
25 provides for a full hearing, and I think --

26 THE COURT: Upon termination, though.

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2 MR. WAGNER: Well, but the plan is certainly a
3 step along that way. Certainly, what's being asked for is
4 they go ahead and conduct their business. When you couple
5 that with the fact that this is a special proceeding, and
6 under CPLR 410, once there are facts at issue, a trial is
7 required.

8 THE COURT: So, what specific facts are at
9 issue, and what are you pointing to to raise those facts?

10 MR. WAGNER: Well, I will give you a couple of
11 for instances.

12 THE COURT: It would be interesting to me if you
13 would actually point to the specific facts that have been
14 raised by the papers.

15 MR. WAGNER: That's fine.

16 THE COURT: Because that's what is the purpose
17 of this hearing, it seems to me, to figure out what those
18 actual facts are.

19 MR. WAGNER: Okay. So, let me give you a few
20 for instances. Mr. DuBell (phonetic) asserts in his
21 affidavit that the FGIC can do a better job than the
22 Warrant Holders -- the Jefferson County Warrant Holders
23 can do in protecting the Jefferson County Warrant Holders'
24 interests, and those statements are made, and they are
25 predicated on five, six, seven examples of actions taken
26 by FGIC in the past. So, those facts are disputed.

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2 THE COURT: You're saying that they are saying
3 that the rehabilitator can watch out for the Jefferson
4 County folks. That's only one piece of all that they have
5 to do to watch out --

6 MR. WAGNER: That may be.

7 THE COURT: What's the standard in terms of the
8 rehabilitator and in terms of Court review of
9 rehabilitator's judgment?

10 MR. WAGNER: Well, it may be that that issue
11 falls away, because we say, as a matter of law, taking,
12 seizing contractual rights that don't belong to the
13 rehabilitator is arbitrary or capricious, but the fact of
14 the matter is that the FGIC is putting these facts at
15 issue in submitting this affidavit. One of the reasons is
16 claiming this plan should be confirmed, and that control
17 rights should be held by FGIC is because, because they
18 claim the difficulty, as a factual matter, of getting
19 beneficiaries to act together, and we dispute those
20 facts.

21 THE COURT: We dispute pointing to what
22 specifically? We dispute standing here talking to me, or
23 is there an affidavit which actually disputes that?

24 MR. WAGNER: Well --

25 THE COURT: I would like to see that, No. 1,
26 specifically handed up, if you have it in front of you,

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2 because I think at that point there is an issue of fact
3 raised requiring a hearing.

4 MR. WAGNER: That --

5 THE COURT: And, frankly, only if it means that
6 the standard which governs whether the Court approves the
7 rehabilitators plan is affected. In other words, it can't
8 be somebody saying, I don't like the plan. It has to be
9 that the standard for approving the plan has not been met,
10 because of "X," and I think that is a very high standard,
11 which having done some research on this, that seems to be,
12 and, frankly, I would love for anybody who is an objector
13 or the rehabilitator to actually focus in on whether there
14 has been an issue of fact raised, what those issues of
15 facts are necessitating a hearing. Okay.

16 MR. WAGNER: Let me just say, one of the points
17 that our witness would make is as, again, rebutting the
18 points that have been raised by the affidavit of
19 Mr. DuBell (phonetic), certainly, with respect to
20 Jefferson County that as a factual matter the Jefferson
21 County Warrant Holders are in a far better position than
22 FGIC to represent their interest.

23 THE COURT: Yeah, of course, because they are
24 going to say, don't pay anybody else, pay me first.

25 MR. WAGNER: No, that's not --

26 THE COURT: That would basically be how they

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2 would --

3 MR. WAGNER: No.

4 THE COURT: They would say, pay other people,
5 too, in addition to me?

6 MR. WAGNER: No. The point that Mr. DuBell
7 (phonetic) makes is it's difficult to get beneficiaries to
8 act together, and we will present facts showing that's not
9 true. We will present facts that, in fact, the warrant
10 holders have together acted very aggressively and
11 appropriate in defending their interest, which, by the
12 way, FGIC, I assume, wants us to recover as much as
13 possible as we can from Jefferson County, but they have
14 been in that proceeding, and we've been in that proceeding
15 in bankruptcy court in Alabama, tell me if I'm getting too
16 far into the facts, and we've taken the lead there, and
17 that's one of the facts that we present.

18 There's issues with Mr. Lefkowitz' testimony,
19 what are the assumptions underlying his plan, what is he
20 comparing his plan to, and CPLR 410 provides that when
21 there are facts at issue, there should be a trial, and in
22 a case involving an arm of the state for a plan that's
23 supposed to last 40 years in a case involving billions of
24 dollars --

25 THE COURT: Somebody wrote 30 years.

26 MR. WAGNER: Your Honor, I think the average is

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2 30, but the plan contemplates payouts for 40 years. So, I
3 was being a little bit too conservative in the letter, but
4 in such a situation, it's not too much to ask the parties
5 to have a full hearing. This is an important matter.
6 There's strong public policy matters at issue.

7 THE COURT: I understand your point, and 410
8 does indicate if triable issues of fact are raised, they
9 shall be tried. My question is, where is it raised and
10 it's -- okay. I view it almost as summary judgment.
11 Essentially, somebody has to rebut what has been put in
12 the petition, the order to show cause to get a hearing,
13 and it seems to me that nobody can point to something.

14 You're pointing to the petition itself,
15 essentially, as raising issues of fact, but it's up to me
16 to decide whether the standard has been met by the
17 petition, and if it hasn't, then it's denied. If it has,
18 then the burden shifts. We learned that in evidence.
19 Right? The burden shifts, and if the other side has to
20 raise those issues of fact, and then there's a hearing,
21 but, okay.

22 MR. WAGNER: Your Honor, I don't want to belabor
23 this. Just, so it's clear, we would be addressing the
24 facts that have been raised by the rehabilitator in the
25 two affidavits that have been submitted and I assume in
26 Mr. Giacone's testimony, and we would be addressing those

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1 facts with a witness.

2
3 THE COURT: Okay. I understand. All right.
4 Would the rehabilitator like to speak as to this, as to
5 the issue I've raised?

6 MR. SLACK: Well, your Honor, I think that your
7 point is well taken, that, you know, given the example
8 that was raised by Mr. Wagner, what Mr. DuBell (phonetic)
9 talked about was not any one situation, but rather said
10 that as matter of his experience, which I don't think is
11 factually at issue, that here has been his experience in a
12 number of situations where, in fact, FGIC's ability to
13 control the control rights has made a huge benefit,
14 because note holders could organize.

15 I don't think Mr. DuBell (phonetic) is trying to
16 state that in every single instance that the facts are
17 going to be the same. I do think what's at issue in the
18 papers that we filed, and I think your Honor is right on
19 the money, is that the rehabilitator is entitled to take a
20 look at those facts and say, given those facts, what's my
21 best judgment of how I should treat all of the note
22 holders. The rehabilitator, you know, has no skin in the
23 game, so to speak. So, I think your Honor has it exactly
24 right, and I don't think that even the example that was
25 raised here truly responds and says there's a factual
26 issue in Mr. DuBell's (phonetic) affidavit.

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2 MR. WAGNER: Your Honor, may I respond briefly?

3 THE COURT: You can in a minute.

4 If you don't mind just articulating what the
5 standard -- if we were to have a hearing or just for the
6 approval of a plan, what is the standard?

7 MR. HOLTZER: Your Honor, I think the standard
8 is as the rehabilitator removes the causes and conditions
9 referenced in the statute, those words, and provide a plan
10 that's fair and equitable under the rehabilitator's
11 judgment. That's what the rehabilitator is charged
12 with.

13 THE COURT: Okay. All right.

14 MR. HOLTZER: My colleague reminded me, of
15 course, he's entitled to deference in the standard, and we
16 set that forth in our brief and hasn't acted arbitrary and
17 capriciously, but we set that forth in our brief.

18 MR. WAGNER: Again, related to the examples that
19 have been given, we don't have enough information about
20 the examples to determine whether they apply, which is one
21 of the reasons we want to take depositions, but, for
22 example, I suspect that in none of these examples,
23 certainly, in some of these examples these are instances
24 of actions taken by the FGIC before the FGIC was in
25 rehabilitation. So, why they apply here --

26 THE COURT: Which examples are you speaking of?

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2 MR. WAGNER: In Paragraph 12 of Mr. DuBell's
3 (phonetic) affidavit, there's a reference to actions taken
4 with respect to a company called Entergy (phonetic). So,
5 I did a little bit of research before I came down. I
6 don't have the benefit of discovery, but what I found out
7 was that this was a bankruptcy that was filed in 2005.
8 So, it was clearly before FGIC was in rehabilitation. So,
9 why this example should apply when FGIC is in
10 rehabilitation is a real question.

11 I don't know in any of these examples whether
12 FGIC was proposing to take control rights that would
13 otherwise have been lost to FGIC. That's also relevant to
14 us as well. I don't know whether Mr. DuBell (phonetic)
15 has any personal knowledge of any of these instances or
16 whether they are being fed to him by somebody else, which
17 would question the evidentiary basis for these materials.
18 I can go on and on. The FGIC --

19 THE COURT: So, what do you think the standard
20 is for approval of the plan?

21 MR. WAGNER: The plan has to be fair and
22 equitable. I think there's no dispute about that. That's
23 another factual point we raise. We believe trusts --

24 THE COURT: When you say "we raise," we raise
25 what?

26 MR. WAGNER: We --

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2 THE COURT: Specifically.

3 MR. WAGNER: Well, we raise that in our papers,
4 in our original submission, and we will address the
5 factual points, the responses, at trial with a witness.
6 There are questions --

7 THE COURT: It has to be raised, I think, in the
8 papers. So, where in the papers do you raise that?

9 MR. WAGNER: Well, we raise it in our brief. We
10 raise it in our objection, and we'll reiterate it again
11 when we file our papers on the 22nd, and if your Honor
12 wants us to file an affidavit by the 22nd, which objects
13 to the facts, that's what we'll do. This is a plan that
14 involves billions of dollars, 40 years. A hearing is
15 warranted. We're not the ones who submitted the factual
16 affidavits to start. The FGIC submitted them. There's
17 questions concerning inequitable treatment of different
18 trusts, control rights with respect to some trusts are
19 shared, but with respect to the Jefferson County
20 indentures, and with respect to trusts that other
21 objectors administered, those control rights are being
22 seized. Why is that fair? Why is that equitable? These
23 are factual issues.

24 THE COURT: Only if they have been raised.

25 Anything else?

26 MS. MACHAN: Your Honor, I would only add that

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2 if what you think is required in order to raise an issue
3 of fact is to submit affidavits, we also would be willing
4 to submit an affidavit in connection with the amended
5 objection.

6 MR. SLACK: Your Honor, the two issues that I
7 think that we have discussed are, one, whether we should
8 have effectively new argument, and now, we have another
9 attempt to say, well, we'll file affidavits, which I'm
10 sure will just be, you know, a bevy of new argument. So,
11 I don't think that's appropriate at this stage, and the
12 second thing is I think that if, you know, this goes to
13 what we had talked about, I think that if your Honor is
14 going to have a hearing, and they are calling witnesses, I
15 think they have -- the objectors have now given you the
16 best reason that they need to be a little more detailed.
17 They have said if our witnesses come up, the proffer is
18 going to be that they are going to, you know, say that
19 Mr. DuBell (phonetic) is wrong in one, two, three
20 respects, but we're entitled to know that, and not just
21 that we're going to, you know, say something that differs
22 with Mr. DuBell (phonetic) in his affidavit. So, I think
23 we need some specifics. I think those are the two issues
24 that we talked about already.

25 I am prepared to talk about the depositions,
26 which I still think is an outstanding issue, unless your

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2 Honor is just prepared to rule on that without argument.

3 MR. WAGNER: Your Honor, prior to a ruling on
4 the deposition, I would like to address it.

5 THE COURT: No. I'm not ready to rule. I'm
6 still getting over on one hand counsel for the
7 rehabilitator is saying that we should not allow
8 affidavits, but on the other hand, we need more
9 information if we're going to go ahead with the hearing.
10 So, it seems to me that the compromise could be to allow
11 the affidavits. They may raise -- they cannot raise new
12 issues, but it would, in fairness, if we are going to have
13 a hearing that everybody should be on the same page as to,
14 essentially, what the direct testimony is going to be.

15 I understand that there seems to be a need for
16 folks to put on, but this is a bench trial, and I think
17 that -- please, be mindful of that. I will be reading the
18 affidavits, and, in fact, what probably makes sense when
19 you identify the witness that's going to be called that we
20 adjourn for a few moments for me to refresh and read the
21 affidavit, and at any point, we will have the person who
22 is on the stand adopt the affidavit as their testimony, if
23 necessary, and I will try to move this along. I'm telling
24 you ahead of time, because I've allocated two days for
25 this. I really cannot, unfortunately, given that we
26 handle about a thousand cases a year, really set out more

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2 days. It's going to be very difficult.

3 So, I'm mindful of what your needs are given
4 that there has not been, it seems to me, a strong
5 objection from counsel for the rehabilitator as to whether
6 there is a need for the hearing, which, frankly, the Court
7 is not so convinced, given that, again, if you folks have
8 cases as to when a hearing is necessary, but a statute
9 does not say that. I do not see that in the statute. But
10 given that it seems that you have not, everybody assumed
11 there would be a hearing, but, again, the way I view it is
12 it has to be raised by the papers, and so, I don't see
13 that even, necessarily. If it is raised, it's raised in
14 argument, not raised by facts, and there's a difference.
15 But given that I'm trying to make an accommodation here,
16 given that counsel for the rehabilitator has not strongly
17 objected to it, and, in fact, seems to have provided it in
18 its papers, the Court will hold the hearing. Much to, I'm
19 sure, my regret at some point, but -- that was a joke.
20 But nonetheless, given that seems what was contemplated by
21 the parties, the Court will indulge as to that.

22 I would be very much interested from all sides
23 that a memo of law specifically targeting the issue of
24 what the standard is in terms of approval of a plan, and
25 if there are any specific cases that have to deal with
26 that, that would be helpful, a short memo, five pages. We

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2 already have the 30 page memos. I've given earlier the 35
3 page memos, five pages max, just that issue. I want
4 everybody to focus. That is the issue for me and for you.
5 You have to convince me. Okay.

6 Realistically, when do you think you could have
7 that memo for me? We can go off the record so you folks
8 can consult your diaries.

9 (Pause.)

10 THE COURT: All sides have agreed that the memo
11 consisting of five pages will be submitted to the Court 10
12 days from today. Is that correct? You said 10 days from
13 today. You should put attention Monica Chang, and I
14 appreciate, normally, I don't require courtesy copies, but
15 in this case three courtesy copies.

16 MR. SLACK: Your Honor, if it helps, you since
17 that's I believe a Friday, if I have my days right, I
18 might suggest either we get those in at noon so you have
19 the afternoon before the hearing. That's up to you. We
20 would be willing to do that at noon if that would help
21 your Honor.

22 THE COURT: Absolutely. That is a problem,
23 because I just realized that's a state bar week. That's a
24 state bar week. I will be actually at the state bar.

25 MR. SLACK: How early in that week would help
26 you, your Honor, because we'll get it done whatever day

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2 that week.

3 THE COURT: Off the record.

4 (Pause.)

5 THE COURT: Let the record reflect that counsel
6 have agreed to a deadline of January 22nd at 12:00 noon
7 for the lettered memo of five pages with copies of all
8 cases cited as an appendix attached.

9 I want to return to the issue of the witness
10 statement. So, now that we have an agreement as to when
11 the names are supplied, now as a courtesy, I am allowing
12 the affidavit from the objectors, essentially, and you
13 said Friday, is that enough time, or Monday?

14 MR. WAGNER: Can we have the 22nd at noon.
15 Monday is a holiday. Friday is three days from now. So,
16 our papers -- our objection is due on the 22nd. By the
17 way, I think we're also due -- we have to be due an
18 affidavit from Mr. Giacone since he's testifying. So, we
19 would like that affidavit the same time.

20 MR. SLACK: Your Honor, what we have said was
21 that Mr. Giacone not only is going to be a witness, but
22 that he has signed the disclosure statement, and that we
23 have represented in correspondence already and today in
24 court that Mr. Giacone who, again, actually penned and
25 signed the disclosure statement will be testifying to the
26 matters contained in the disclosure statement. You can't

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2 have a more detailed set of, I should say, matters that
3 Mr. Giacone is going to represent, that he is willing to
4 put his name on, and then be cross examined on. So, I
5 would suggest that both for convenience, court
6 convenience, that we allow the disclosure statement to
7 come in in the same way we're talking about the affidavit,
8 and not do the extra work of having to do a separate
9 affidavit.

10 THE COURT: That seems fair. Is there a problem
11 with that? There's a disclosure statement that's many
12 pages.

13 MR. WAGNER: If he's going to just submit the
14 disclosure statement, then that's fine. I assume, he's
15 not going to give any testimony about it. He's just going
16 to offer it. I assume, he's going to just offer it.

17 MR. SLACK: That's not what I said. What I said
18 is he's going to testify to the matters contained in the
19 disclosure statement. So, I would expect that he will
20 provide testimony on those matters, but it's going to be
21 within the scope of the disclosure statement he's already
22 signed.

23 MR. WAGNER: I think, your Honor, it would help
24 if we had from Mr. Giacone -- the disclosure statement is
25 dozens of pages. I think to help us and your Honor to
26 have him focus precisely which provisions he's going to

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2 discuss, and what he's going to say about them. I think
3 that would be helpful.

4 MR. SLACK: I mean, the comment that my
5 colleague just made, which I think is apt, is that Mr.
6 Giacone signed a disclosure statement which relates to the
7 entire plan and all of the features of the plan. We just
8 have one small area that may be objected to by, you know,
9 by counsel. So, this seems to be not an appropriate
10 objection, and why we should in a two week period when
11 we've got all these other things going --

12 THE COURT: The Court orders that since the
13 substance of Mr. Giacone's testimony is in the disclosure
14 statement, and it discloses a lot, I think that you have
15 notice as to what his testimony is going to be. Okay. No
16 affidavit from Mr. Giacone. All right.

17 Moving on to the issue of depositions, yes?

18 MR. WAGNER: Can we agree to the 22nd for the
19 affidavit from --

20 MR. SLACK: Why don't we --

21 THE COURT: It's the statement, the affidavit
22 from --

23 MR. SLACK: It's one thing to say we're not
24 going to do it on Friday and, you know, then I think we
25 should, and Monday is a holiday, but then it should be
26 Tuesday, and by noon so we have the better part of a

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week.

THE COURT: Tuesday is the 22nd.

MR. SLACK: That's the 22?

THE COURT: Yes.

MR. SLACK: That's fine, by noon.

THE COURT: Right. Same thing, to the attention of my court attorney, Monica Chang, and, yes, courtesy copies. All right.

MR. WAGNER: Three courtesy copies.

THE COURT: Yes, with the original labeled the original. Okay. As to the issue of depositions, yes?

MR. SLACK: Okay. Your Honor, we have gone through a number of, I think, of background that I would expect to have to raise. So, let me try to short circuit that by saying the following. You know, as the Court recognized at the last hearing that we had, this proceeding is not a typical civil action, but rather a special proceeding governed by Article 40, and discovery at depositions, anyone is going to contest, are disfavored in special proceedings. That is in special proceedings. There's no automatic right to discovery. It said the Court is required to approve any of that discovery. It's based on the court's view of whether or not that discovery is material and necessary, and it's a heightened standard. So, for example, the First Department in the

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2 Stapleton Studios case, which is 7 AD3d 273, denied
3 discovery specifically, or I should say discussed the
4 standard of discovery saying that you must show that it's
5 material and necessary in order to get discovery in a
6 special proceeding.

7 Current Chief Judge Lippman, when he served in
8 Supreme Court, held that discovery in depositions are
9 disfavored in special proceedings, because, quote,
10 "Discovery tends to prolong an action and is, therefore,
11 inconsistent with the expeditious nature of a special
12 proceeding." That's in Rice versus Belfiore, which is 15
13 Misc. 3d 1105(a). Judge Lippman also held, and I think
14 it's important, that the party moving to take EBT's has
15 the burden of demonstrating the necessity of any EBT. So,
16 the burden is on the people who are trying to get the
17 depositions in a special proceeding.

18 Now, depositions are particularly disfavored
19 where you're going to have a hearing and that hearing is
20 going to allow cross examination of the witnesses. The
21 court's decision in the matter of Kaufman, which I would
22 like to hand up, is particularly on point. May I hand it
23 up?

24 THE COURT: Yes. The court officer will take
25 it. You may continue.

26 MR. SLACK: In that case the petitioner, which

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2 was a shareholders in various cab companies, sought
3 dissolution of the companies alleging misconduct by
4 various respondents who were also shareholders. The
5 petitioner sought to depose one of the respondents
6 concerning a valuation report, and the court denied it,
7 and in denying depositions, the court concluded that the
8 petitioner had not demonstrated the requisite need for the
9 proposed deposition and reached its conclusion in
10 particular based on and listed these factors, No. 1,
11 discovery is generally looked upon with disfavor in
12 summary proceeding; No. 2, the parties have exchanged
13 valuation reports; and No. 3, the parties will have the
14 opportunity to present witnesses and conduct cross
15 examination of adverse witnesses at the trial of this
16 matter.

17 Similar to Kaufman, the parties here or at least
18 the rehabilitator, frankly, has already provided extensive
19 disclosure. There's enormous disclosures in the affidavit
20 and the disclosure statement. In addition to that,
21 although we haven't talked about it here, we've been
22 talking to another one of the objectors about providing
23 additional information, and we expect that the information
24 that we provide them will be available to others on the
25 same terms. So, there will be additional very detailed
26 information in terms of certain discovery that will be

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2 provided.

3 You know, No. 2, your Honor, and I mention this
4 throughout the hearing, we talked about that there will be
5 cross examination of the witnesses. Three, we know that
6 discovery and depositions are disfavored, and No. 4, when
7 you look at the practical effect of what we're talking
8 about now, we have three witnesses that the rehabilitator
9 has. We're going to be getting witnesses and witness
10 statements not until the 22nd. We're supposed to have a
11 hearing on the 28th and 29th. I don't believe that
12 practically there is any way -- I don't think it would be
13 appropriate, but practically there's no way that all of
14 the witnesses that are going to be deposed or the
15 rehabilitator's witnesses can all be deposed prior to the
16 28th, and we don't think that they are necessary. We also
17 don't think that it makes a whole lot of sense to try to
18 jump over a lot of hoops to do that.

19 Your Honor, there's other cases on point that I
20 just want to bring to the Court's attention. For example,
21 the Empire State Building case which is 23 Misc 3d 1107,
22 and that was the case denying depositions, because, again,
23 the quote, "The petitioner has already produced a ream of
24 documents and an explanatory affidavit, and the respondent
25 will have an opportunity to cross examine petitioner's
26 witnesses," and so, again, another case where based on the

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2 discretion, the court denied it in very similar
3 circumstances to what we have here.

4 THE COURT: In any of the cases that you have
5 cited to or in your research, do any of them involve a
6 rehabilitation plan?

7 MR. SLACK: We have not found any case in
8 connection with a rehabilitation plan, certainly, not like
9 we have here where the Court has, frankly, allowed
10 depositions, but also discussed the issue.

11 What I can tell your Honor is that I'm sure that
12 there are cases out there where courts have allowed
13 depositions in certain circumstances in special
14 proceedings, and what I can tell you is that the Jefferson
15 County Warrant Holders submitted a letter to us, and then
16 submitted to your Honor, and had four cases. I think it's
17 very telling when you look at those four cases that they
18 really don't support, you know, depositions here. So, for
19 example --

20 THE COURT: Okay. You know what, why don't we
21 let Jefferson county speak for themselves, and then I'm
22 sure you'll have an opportunity to rebut.

23 MR. SLACK: Okay.

24 MR. WAGNER: Thank you, your Honor. I won't
25 reiterate the points at length that I made before with the
26 points I made in the letter. Again, given the enormous

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2 stakes at issue and the length of the plan, 40 years, not
3 30 years, as I mistakenly said, we don't think it's too
4 much to ask for the witnesses to sit for a few hours for
5 their depositions.

6 THE COURT: Is that the standard, because the
7 effect of the plan --

8 MR. WAGNER: It's sort of the standard, because
9 one of the issues is the need balanced against the
10 prejudice, and, again, there's no dispute under CPLR 408,
11 leave of the Court is required, but is --

12 THE COURT: Wait. Wait. In discovery it's need
13 versus prejudice?

14 MR. WAGNER: Those are two. There's six factors
15 that courts look at in special proceedings to determine
16 whether there should be a -- whether there should be
17 discovery, including depositions. The first is is there a
18 viable --

19 THE COURT: Based on what case?

20 MR. WAGNER: That's New York University against
21 Farkas 121 Misc 2d 643 at 647 and Conray against --

22 THE COURT: What court is that?

23 MR. WAGNER: Civil Court, New York County.

24 THE COURT: Not binding on me, but yes.

25 MR. WAGNER: I don't think there's going to be
26 much dispute about the standard. I'll also cite Conray

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2 against Newhouse 209 AD2d 440. That's Second Department
3 1996. The same standard is set out in the Weinstein,
4 Korn, and Miller, which is the leading treatise on the
5 CPLR, and the treatise states, "Discovery will generally
6 be permitted if there's issue of facts warranting a
7 hearing or trial," and the CPLR --

8 THE COURT: That doesn't help you. Again, the
9 issue of fact to me has not been necessarily raised by the
10 papers. I mean, you're pointing to, essentially, the
11 petition itself or the plan itself saying this raises
12 issues of fact. That is not how one normally determines
13 whether something raises an issue of fact.

14 MR. WAGNER: Your Honor, I apologize if I've
15 been unclear during the argument, but the issues of fact
16 are the issue of fact being raised in the DuBell
17 (phonetic) and Miller affidavits. Those are the facts,
18 and then Mr. Giacone, whatever Mr. Giacone is going to
19 say. Those are the factual issues that are raised.

20 THE COURT: The issues of fact is a very -- it's
21 a very legalistic term, I think you would agree, and an
22 issue of fact means that it's been, I think, rebutted by
23 something. So, then at the hearing you determine what the
24 actual fact is. So, I don't believe -- move on. I don't
25 think so.

26 MR. WAGNER: I don't think as of today we're

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2 having a hearing with three witnesses with the FGIC and
3 one from Jefferson and perhaps others. The standard is a
4 six part test. One is is there a viable cause of action.
5 I don't think anyone is saying that our objection
6 shouldn't be heard by this Court. Second --

7 THE COURT: Except it's a summary proceeding.
8 So, you are essentially -- it's not necessarily by summary
9 judgment.

10 MR. WAGNER: Right. These are the standards
11 that apply only in connection with discovery in a summary
12 proceeding. I don't think anyone is arguing that our
13 objection or that the objections of the others aren't
14 viable.

15 Second, is there a need to determine information
16 directly related to the cause of action, and here I've
17 given examples of my prior arguments as to the types of
18 questions we would address with Mr. DuBell (phonetic) and
19 Mr. Lefkowitz.

20 Third, is the requested disclosure carefully
21 tailored and likely to clarify disputed facts, and I'm
22 making the representation here that the deposition would
23 address only the points that are raised by the FGIC in
24 those affidavits.

25 Fourth, will prejudice result from granting the
26 motion. The only prejudice that I've heard so far is that

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2 the time is short before trial, but I asked for these
3 depositions back on December 6th. That was the first time
4 I've raised the issue. I've been pressing for these
5 depositions for quite some time now. So, it's a little
6 bit unfair to put that burden on us, but in any case, we
7 can minimize any prejudice, and that's the fifth factor,
8 if there's any prejudice, can it be diminished. We can
9 put time limits on the deposition.

10 Sixth, and related to those prior to points, can
11 the Court in its supervisory role structure the discovery
12 to protect the non-moving party. I think any issues can
13 be addressed by limiting the time of the deposition.

14 So, to sum up, given stakes, given the length of
15 this plan, the substance of the plan should be fair and
16 equitable, but also the procedure should be fair and
17 equitable, and I would also note that -- I'm sure I speak
18 for all the parties -- but we plan to be as efficient as
19 we can possibly be with the Court's time on January 28th
20 and 29th, but the examination, the cross examination at
21 the trial, I think, would go a lot quicker and a lot more
22 smoothly if we have the opportunity to take these
23 depositions.

24 THE COURT: Would you like to add anything?

25 MS. MACHAN: Yes, your Honor. I would second
26 everything that Mr. Wagner has pointed to. I would just

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2 add that our client and many of the policyholders in this
3 case are looking at the possibility of paying millions of
4 dollars of premiums for years, decades into the future,
5 and the prospect of getting a return for that, you know,
6 marginal return on any claim that might come up and given
7 the stakes are so high, we think it's only fair if you
8 provide policyholders with a reasonable set of tools that
9 we can use to challenge the rehabilitation plan to make
10 sure that it is as fair and equitable as they assert that
11 it is.

12 THE COURT: Would you like to respond?

13 MR. SLACK: Very quickly, your Honor. You know,
14 Mr. Wagner talked a lot about there being issues of fact,
15 but there's a difference of having issues of fact and
16 having disputed issues of fact, and what I haven't heard
17 in their papers are disputed issues of fact.

18 THE COURT: Exactly.

19 MR. SLACK: That's a huge problem, and I think
20 you have to go to their letter. Their letter tells you
21 what they want to do. They want a rehearsal. They want a
22 dry run of the cross examination. They say in their
23 letter, quote, "To cross the witnesses properly and
24 effectively and with a minimum of trial time so that the
25 Court and the parties are not inconvenienced, the Warrant
26 Holders need to depose Mr. DuBell (phonetic) and Miller in

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2 advance of the hearing."

3 What they are saying, your Honor, is that they
4 want a dry run, and you know what I know, and in
5 non-special proceedings, as a lawyer, it's become sort of
6 rote if someone is going to put on a witness that you get
7 a deposition. That's not the case in special proceedings.
8 I would say one other thing, and it goes to the disputed
9 issue of fact. I have cited a case to you. It was the
10 Belfiore case that Chief Judge Lippman had decided, you
11 know, back in 2007.

12 THE COURT: Is that cited in your letter to us?

13 MR. SLACK: It isn't. I have a copy.

14 THE COURT: You said it is not?

15 MR. SLACK: I don't believe it is.

16 THE COURT: Can you hand up a copy.

17 MR. SLACK: If it is, I apologize, but I don't
18 think it is.

19 THE COURT: I didn't think it was.

20 MR. SLACK: In this case in denying a deposition
21 in a special proceeding, you know, the court specifically
22 held, and I'm looking at Page 7, at least on the printout
23 that I have, that, quote, "The petitioner has failed to
24 show how the EBT's are necessary to clarify the issues in
25 this proceeding," and then the second thing is they said,
26 quote, "There's been no showing of how the EBT's of

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2 respondent Belfiore and the hearing officer are material
3 and necessary to the issue present in this proceeding,"
4 and again, there's a level in these special proceedings of
5 burden, because you have to show it's material and
6 necessary.

7 I think under the circumstances here where
8 there's extensive disclosure, and I go back to the Empire
9 case and the Kaufman case, where there's going to be
10 extensive cross examination, where there have already been
11 affidavits which are very detailed in the level of having
12 a direct examination, practically, we believe that
13 depositions would not be appropriate in this case.

14 THE COURT: All right.

15 MR. WAGNER: Your Honor, may I respond?

16 Four points. First, I neglected to reference
17 it. We did cite cases in our letter permitting
18 depositions in special proceedings.

19 THE COURT: Yes, you did.

20 MR. WAGNER: Second, we didn't ask for
21 documents. We didn't do what your Honor frowned on last
22 time, which was interrogatories with a lot of sub parts.
23 This struck us --

24 THE COURT: Was there documents that were
25 supplied on consent?

26 MR. WAGNER: No.

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2 MR. SLACK: Your Honor, only one party asked for
3 documents. That was Children's Health, and as I represent
4 to the Court, we're in the process of collecting
5 documents, and under certain conditions producing them,
6 and if and when we do, and I assume we would make those
7 available to the other parties, if they agree to the same
8 conditions.

9 MR. WAGNER: Third, there's nothing untoward
10 about asking for a deposition in advance of trial. It's
11 done all the time. It's done for a variety of reasons.

12 THE COURT: This is a special proceeding. This
13 is not a trial of a plenary action. It is a special
14 proceeding. Different rules. Highly different rules.

15 MR. WAGNER: That's true. I think the word
16 "special" is very important, because this is a special
17 special proceeding, your Honor. Your Honor has been
18 blessed with a doubly special proceeding. It's not a
19 landlord tenant case. It's not some -- I don't mean to
20 demean anyone else's special proceeding. This is a plan
21 concerning billions of dollars with a lot of sophisticated
22 financial institutions going on 40 years. I don't think
23 it's too much to ask for depositions.

24 THE COURT: The Court is prepared to issue a
25 decision on the record having heard all sides, and counsel
26 does not dispute this is a special proceeding. In special

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2 proceedings discovery is disfavored, and notwithstanding
3 that this special proceeding involves very serious issues,
4 the Court notes that not one case was provided to the
5 Court in which discovery was, particularly depositions,
6 were given in this sort of very special, special
7 proceeding involving a rehabilitators plan, and the Court
8 notes that having dealt with other special proceedings,
9 there's been an enormous amount of information given to
10 opposing counsel in this special proceeding by way of
11 affidavits, the disclosure statement, and so that it is,
12 certainly, unusual to have the parties apprised of what
13 the substance of the testimony will be prior to any
14 hearing, and for that reason, the Court declines to order
15 depositions. Okay.

16 Anything else for the record?

17 The Court cites the cases cited by counsel for
18 the rehabilitator.

19 Yes?

20 MR. SLACK: Nothing else today, your Honor.
21 Thank you.

22 MS. MACHAN: Actually, your Honor, at least I
23 would like to raise an issue of documents.

24 THE COURT: We already spoke about the issue of
25 documents previously, and you folks were going to work it
26 out.

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2 MR. SLACK: I think what your Honor said at the
3 beginning is accurate. Maybe I'll just make a
4 representation on the record, if that will satisfy you,
5 that we expect to have discussions with counsel for
6 Children's Health about, you know, what we did in response
7 to their letter, because in responding to it, we said we
8 had found primarily privileged information, and we will
9 have discussions as to what we did in order to reach that
10 conclusion, and then second, your Honor, we need to work
11 out the confidentiality and non-waiver, and I think
12 there's no objection to it, but we have to work out the
13 specific terms, and we'll do that over the next couple of
14 days.

15 THE COURT: I'm confident that you folks can
16 work it out.

17 MS. MACHAN: Just to clarify for the record,
18 with respect to the search for documents, what we would
19 want to be satisfied of is that there was a reasonable
20 search conducted both for privilege and non-privileged
21 documents, and to get some idea of the universe of
22 documents that was searched and identified.

23 THE COURT: I will let you folks work it out.
24 What I just said applies to all discovery. To the extent
25 that they are willing to give you documents, you're ahead
26 of the game.

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2 Let the record also reflect that the Court has
3 signed the order on Motion Sequence 005, and today that
4 order has been supplied. Okay. I would ask that when you
5 submit that you indicate what motion sequence number on
6 all of your submissions, because we have lots of motions
7 on this special proceeding, and it helps us separate the
8 documents, which pile they should go to.

9 Anything else for the record?

10 MR. WAGNER: Your Honor, you had deferred this
11 issue of whether we can in a surgical way respond just
12 briefly in the papers that we're submitting on the 22nd to
13 new arguments that were raised in the reply for the first
14 time. There's no prejudice, because --

15 THE COURT: No. No. Because you know what?
16 You're going to raise that at the hearing. So, you
17 already got the hearing where you're not -- it doesn't
18 seem to me that you're necessarily even entitled to the
19 hearing, but given that, essentially, all sides have
20 consented to the hearing, you're going to have that
21 opportunity. You've killed enough trees. You're going to
22 be able to present those arguments at the hearing and
23 through your witnesses. So, I don't think we need a
24 surreply anticipating that there may be things in the
25 reply that are new things, but at this point the answer is
26 no. You can even ask for a surreply. You're assuming

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2 there's going to be new things. We don't even know. So,
3 let's not anticipate. Okay.

4 MR. SLACK: Your Honor, there is one more thing
5 that I think Mr. Holtzer had raised at the beginning, and
6 I don't believe we nailed it down, which is when the
7 rehabilitator presents its witnesses, obviously, we have
8 eight objectors, and it would be our suggestion that, you
9 know, that we have a process by which the objectors get
10 together and designate one lead cross examiner. It
11 wouldn't preclude the others from cross examining, but the
12 idea would be the lead cross examiner would take that
13 lead, and the other parties would not ask duplicative
14 questions in those areas.

15 THE COURT: Is there an objection to that?
16 Frankly, I think that from your point of view that would
17 be a good thing, because the trier of fact will not lose
18 interest. If somebody asks the same question 10 times, at
19 some point it is only natural that either the person
20 decides to start thinking of other things, because they
21 have heard that question, and they will tune out. It's
22 just my experience with jurors that if they hear the same
23 question being asked you see them looking at their watch
24 or other things. So, I would suggest that on consent. Is
25 there a problem with that? That does not preclude, of
26 course, everybody at the end, if questions were not asked,

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2 to ask questions.

3 MR. WAGNER: Your Honor, I assume no one will be
4 duplicative.

5 THE COURT: You're going to assume that nobody
6 is going to be duplicative. Come on. We have a bunch of
7 lawyers. Come on.

8 MR. WAGNER: I think we're hearing this for the
9 first time. I think it would be appropriate for the
10 objectors to talk amongst themselves.

11 THE COURT: That's fair. I think that's fair.
12 Frankly, I think it's in your interest, because it seems
13 to me that one person has the primary responsibility, and
14 you can share it among the other counsel of thinking what
15 questions would be appropriate. It relieves some of the
16 burden on each one of you. I think it's frankly more
17 efficient for all of you. You might be able to actually
18 have a weekend free this way. Anyway, I suggest that you
19 talk amongst yourselves. If it's not resolved, you can
20 alert me by a letter, and we will address it -- we're
21 running out of time. So, we'll basically address it at
22 the beginning of the hearing, but I'm hopeful that the
23 objectors will see the wisdom of having a lead counsel on
24 each case.

25 Anything else? Very good.

26 (End of proceedings.)

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

William Cardenuto
Senior Court Reporter