

UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MASSACHUSETTS

IN RE BANK OF AMERICA HOME )  
AFFORDABLE MODIFICATION )  
PROGRAM (HAMP) CONTRACT ) Civil Action  
LITIGATION, ) No. 10-md-2193-RWZ  
)  
)

**SCHEDULING CONFERENCE**

BEFORE THE HONORABLE RYA W. ZOBEL  
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT  
John J. Moakley U.S. Courthouse  
1 Courthouse Way  
Boston, Massachusetts 02210  
December 1, 2010  
3:05 p.m.

\* \* \* \*

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38 (Appearances continued on next page.)

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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on December 1, 2010.)

COURTROOM DEPUTY CLERK URSO: This is In Re: Bank of America Home Affordable Modification Program, 10-md-2193. If counsel could please identify themselves for the record.

THE COURT: Let me start with plaintiffs.

MS. KAVANAGH: Good afternoon, your Honor. Shennan Kavanagh on behalf of the plaintiffs. With me is Ari Brown --

THE COURT: Wait a minute. From which case do you emanate?

MS. KAVANAGH: The Johnson matter in the District of Massachusetts.

THE COURT: I got you. Shennan Kavanagh?

MS. KAVANAGH: Correct.

THE COURT: Okay.

MR. BROWN: Good afternoon. Ari Brown from Hagens Berman. With me is Tom Sobol from -- our managing partner.

THE COURT: Wait one second. I have pages and pages of lawyer listings.

MR. BROWN: I'm sorry, your Honor.

THE COURT: It is an issue, by the way, that will

1 ultimately go to your proposed order. I talked with the Clerk  
2 about it and she points out that if we do what you want us to  
3 do, every time an order of any kind is entered or a filing of  
4 any kind is made, the computer will spit out 75 pages, as it  
5 has in another case, of just lawyers. So, we're going to  
6 avoid that, but let me just find you.

7 Okay. Mr. Brown?

8 MR. BROWN: Yes.

9 THE COURT: Okay, got you.

10 Who else is here for the plaintiff? Mr. Klein?

11 MR. KLEIN: Gary Klein, your Honor, Roddy Klein &  
12 Ryan.

13 THE COURT: Okay.

14 MR. SOBOL: Good afternoon, your Honor. Thomas Sobol  
15 with Hagens Berman Sobol Shapiro. I filed an appearance  
16 earlier today on the ECF. So, you won't find it, I don't  
17 think, in front of you. With Mr. Brown of my firm.

18 THE COURT: Anybody else?

19 MR. DELBAUM: Your Honor, Charles Delbaum with the  
20 National Consumer Law Center, co-counsel with Roddy Klein Ryan  
21 on the Johnson case.

22 THE COURT: You're Mr. Rossman?

23 MR. DELBAUM: I'm Mr. Delbaum, underneath Mr.  
24 Rossman's name, most likely.

25 THE COURT: Oh, yes, that's right. Anybody else?

1 MR. TERRELL: Richard Terrell. The Wilkerson matter.  
2 I'm here for the plaintiff.

3 THE COURT: I'm sorry, your last name again?

4 MR. TERRELL: Terrell, T-e-r-r-e-l-l.

5 THE COURT: Oh, yes.

6 You say Wilkerson?

7 MR. TERRELL: Correct.

8 THE COURT: Oh, here you are. Okay.

9 MR. SHAPIRO: Good afternoon, your Honor. Jonathan  
10 Shapiro. I'm here on the Darren Kunsky related case.

11 THE COURT: Well, you're welcome to observe, but at  
12 the moment you're not in this, right?

13 MR. SHAPIRO: Well, we did file a motion in the  
14 Kunsky case. I'm here with Eric Lechtzin from the firm of --

15 THE COURT: But the case isn't here yet. It is not  
16 part of this proceeding yet.

17 MR. SHAPIRO: It is not formally part of the MDL.

18 THE COURT: Right. So, I think you're welcome to  
19 observe, but you're not welcome to participate because you're  
20 not part of this proceeding as yet.

21 MR. SHAPIRO: Although, the motion does address an  
22 issue which I think is important to address --

23 THE COURT: Well, you want me to appoint you in some  
24 way, but until you're here, I don't think I want to do that,  
25 okay? I'm sure it will happen. I just got notice a few

1 minutes ago that multi-district has sent two more cases, which  
2 haven't yet arrived. So, in due course, yours will come, too.

3 Who else for the plaintiff, on the plaintiffs' side?

4 (No response).

5 THE COURT: Okay. Now, let me find the defendants.

6 Okay. For the defendants?

7 MR. MCGARRY: Good afternoon, your Honor. Jim  
8 McGarry, on behalf of all of the Bank of America entities in  
9 all of the cases.

10 MR. KNIGHTS: Mark Knights, your Honor. I'm here  
11 with Mr. McGarry, representing the defendants.

12 THE COURT: Okay. That's it.

13 Who is here with Mr. Shapiro?

14 MR. LECHTZIN: Eric Lechtzin from Berger & Montague,  
15 also --

16 THE COURT: How do you spell your last name?

17 MR. LECHTZIN: L-e-c-h-t-z-i-n.

18 THE COURT: Okay.

19 I want to thank those of you who are officially in  
20 the case for your very good and helpful joint statement, and  
21 let me just see where we are on that.

22 I think it is appropriate to suspend all deadlines  
23 that have been previously imposed elsewhere, as you have both  
24 requested.

25 Why will it take until sort of the end of January to

1 file a consolidated amended complaint?

2 MR. BROWN: Mostly because the number of cases that  
3 are coming in. We would like some time to get a better handle  
4 on how many cases are coming in, get as many of them  
5 consolidated into this consolidated complaint.

6 THE COURT: Once they arrive, they're in.

7 MR. BROWN: Once they arrive --

8 THE COURT: Once they come from multi-district,  
9 they're in. They're part of this proceeding.

10 MR. BROWN: Right, but there are multiple states  
11 coming in. We want to get a better handle on which states we  
12 have in this case, which states we don't, and we are working  
13 -- we're working to decide as to which claims are going to be  
14 brought on behalf of the nationwide class, if any, and which  
15 will be state by state. So, we just want some time to get the  
16 states together and get them in. We think we can get them in  
17 very shortly. We also didn't want to fall up against the  
18 holidays. That's why we want the additional time.

19 THE COURT: Does anybody know how many more cases  
20 there are that are likely to come here and the time frame for  
21 that to happen?

22 MR. BROWN: The majority of the claims will come in  
23 by mid January, in time to file a consolidated amended  
24 complaint. We will get at least the representation from the  
25 majority of the states that will be ultimately brought in.



1 I'm sure there will be additional cases filed by others, but I  
2 think by that point we will have a significant corpus.

3 THE COURT: And I gather the defendants really don't  
4 object to that?

5 MR. MCGARRY: To the timing of the consolidated  
6 amended complaint, we don't, your Honor.

7 THE COURT: And until that is done, the pending  
8 motions to dismiss just simply have to wait, right? I mean,  
9 they're sort of -- there's no sense in dismissing the  
10 complaint that's going to go away, anyhow.

11 MR. MCGARRY: I think that's probably logical, your  
12 Honor.

13 THE COURT: So, if the deadline for filing the  
14 consolidated complaint is January 21st, presumably the primary  
15 basis for the motion to dismiss will be substantially the same  
16 as it is in the now-pending cases, right?

17 MR. MCGARRY: As I said to plaintiffs' counsel the  
18 other day, unless you come up with some other theory, that's  
19 probably right. The one caveat would be, you know, each case  
20 in each state has a separate claim under its consumer  
21 protection law and they do vary. 93A has --

22 THE COURT: Yes, they do. I think there's only one  
23 that doesn't so far.

24 MR. MCGARRY: Yes. And so, the -- I think in terms  
25 of the -- there are only three or four states in which a

1 motion to dismiss was filed. The *Johnson* case before you, the  
2 *Kahlo* case in the Western District of Washington, and there  
3 were two other cases, one in the District of Arizona and one  
4 in the Northern District of California, if I'm not mistaken,  
5 in which motions were filed, but no responses were made, as  
6 the parties agreed to hold off all that pending the resolution  
7 of the consolidated proceedings.

8 So, there are two, maybe three, motions where the  
9 Consumer Protection Act claims have been dealt with, but with,  
10 you know, half a dozen or ten more states, I think that adds a  
11 layer of complexity, but the basic arguments I think is  
12 probably right, unless the plaintiffs come up with additional  
13 claims or additional theories. I think that makes sense --

14 THE COURT: Would it make sense to agree that the  
15 motion to dismiss will include only the breach of contract  
16 claims and what goes with them, at least to begin with?

17 MR. MCGARRY: I think it would be -- I think it would  
18 be premature to make that representation at this time because  
19 there are going to be some cases where -- in certain states  
20 where the Consumer Protection Act claim is going to be barred  
21 if the underlying claim is barred. There are going to be  
22 other states where the Consumer Protection Act claim has its  
23 own separate elements and maybe they need to be addressed in a  
24 slightly different way. So, I'm concerned that making the  
25 representation across the board that, you know, we put all the

1 state Consumer Protection Act law claims aside will not give  
2 us the opportunity to, perhaps, get rid of, you know, one --  
3 or attempt to get rid of one or more of the Consumer  
4 Protection Act claims, where I think we can do it on the  
5 pleadings.

6 THE COURT: Well, if they go away separately from the  
7 breach of contract claims, you're right. If not, then we  
8 could -- while I normally dislike serial dispositive motions,  
9 it makes a certain amount of sense. I mean, if, for example,  
10 the motion to dismiss is successful on the breach of contract  
11 claims and the appendages thereto, breach of good faith and  
12 the -- some of these have third-party beneficiary claims --  
13 then it may very well be that the plaintiffs would want to  
14 appeal that and not go to -- not even worry about the state  
15 claims at the moment. I don't know. I don't know.

16 Obviously, if they're not successful, then you would want to  
17 go back and do the state claims to the extent that you can.

18 MR. McGARRY: Yes. And it may be, your Honor, that  
19 once we actually see the consolidated amended complaint and  
20 see the causes of action advanced, that we may ask you, with  
21 your permission, to address only, say, the breach of contract  
22 claims and the breach of contract-like claims and hold the  
23 others off, but without actually seeing what the plaintiffs  
24 propose to file, I think it's hard to make that decision in a  
25 vacuum.

1 THE COURT: So, how much time do you need to file  
2 this motion after January 21st?

3 MR. MCGARRY: I think in our proposed schedule, we  
4 ask for six weeks. I'd be happy to do it in 30 days, your  
5 Honor.

6 THE COURT: Well, let me digress for a moment.

7 What I'm concerned about is that there's also pending  
8 a motion for preliminary injunction against foreclosures. Is  
9 there any possibility that we can agree to maintain the status  
10 quo until the motion to dismiss is decided?

11 MR. MCGARRY: I can't make that representation here  
12 today. We certainly --

13 THE COURT: Can you inquire and let us know?

14 MR. MCGARRY: I'm sorry?

15 THE COURT: Can you inquire and let us know?

16 MR. MCGARRY: We can. And we certainly have done it  
17 with respect to individual plaintiffs, your Honor. I mean,  
18 part of the problem we have is that in addition to a motion  
19 for preliminary injunction, there's this attendant motion for  
20 preliminary class certification, which we don't think is  
21 proper at all.

22 THE COURT: Well, the class certification I think we  
23 will need to postpone until we've dealt with the motion to  
24 dismiss and maybe a motion for an injunction.

25 MR. MCGARRY: I guess, just to respond to that -- I

1 mean -- I think if the answer is can we -- and I can't make  
2 the representation today, but I think I could comfortably say  
3 I can probably get back to the Court and achieve this.

4           If the goal is to hold off on any foreclosure for any  
5 of the named plaintiffs in the cases that have been filed, I  
6 think we're already doing that informally and I might be able  
7 to do that formally. If we're talking about holding off on  
8 all foreclosures for anyone who fits within the plaintiffs'  
9 purported class definition, that I don't think I can do.

10           THE COURT: No. I agree. I didn't really ask it  
11 very specifically.

12           Ms. Kavanagh?

13           MS. KAVANAGH: The plaintiffs do intend, your Honor,  
14 to file a motion for preliminary injunctive relief that  
15 would --

16           THE COURT: You already -- I think it's already on  
17 file.

18           MS. KAVANAGH: Right. We filed a motion to hold that  
19 in abeyance because of the coordination that we have to do  
20 with all of the cases coming in the MDL proceeding. That  
21 motion for preliminary injunctive relief related only to the  
22 Massachusetts borrowers.

23           THE COURT: I assume, Ms. Kavanagh, you don't object  
24 to the forthcoming agreement to not foreclose on any of the  
25 named plaintiffs.

1 MS. KAVANAGH: I don't object to that, your Honor,  
2 but it's just insufficient for the purposes of this case.  
3 What we would like --

4 THE COURT: You're not going to get even a motion  
5 until you have the consolidated complaint, right?

6 MS. KAVANAGH: We intend to file a motion for  
7 preliminary injunctive relief before the filing of a  
8 consolidated amended complaint because there is an urgency  
9 here with people losing homes to foreclosure that we don't  
10 know because we don't have them identified.

11 THE COURT: Who would it address? We don't even have  
12 a class yet. As to who would you file that motion?

13 MS. KAVANAGH: We would file them on behalf of  
14 borrowers who otherwise would be getting permanent loan  
15 modifications.

16 THE COURT: Named borrowers?

17 MS. KAVANAGH: It's borrowers who -- named borrowers  
18 in addition to borrowers that we do not know of yet who are in  
19 the same -- similarly situated to the named plaintiffs.

20 THE COURT: Well, you can file it, but I must say  
21 that just hearing you talk now, I'm not inclined to enter an  
22 injunction with respect to people who are not named in the  
23 lawsuit as yet where nobody knows who they are.

24 Why don't we leave it until you know --

25 MS. KAVANAGH: When we file a motion, then we can

1 decide it then, your Honor.

2 THE COURT: Right.

3 MS. KAVANAGH: But the point being is that with  
4 regard to defendant's representations about the named  
5 plaintiffs, it's our position that simply saying that they  
6 won't foreclose on the named plaintiffs doesn't solve the  
7 overall problem right now of people losing their homes.

8 THE COURT: It may not, but we may not be able to do  
9 that until we get a little bit more substance in the case,  
10 until we get -- the facts become a little clearer than they  
11 are now, primarily about who is involved in this.

12 So, I think that Mr. McGarry is going to try to see  
13 what he can do with respect to the named plaintiffs in all of  
14 the actions, and you will, in due course, file your motion for  
15 preliminary injunction and we'll deal with it, but think about  
16 that, because I -- it's hard for me to see how I can enjoin  
17 them from foreclosing some unnamed plaintiff when we don't  
18 even know who the plaintiff is, but, you know, whatever you  
19 fashion in the way of a motion, I'll obviously look at, I will  
20 hear you, and I will decide it.

21 But for the moment, what we're doing is seeking some  
22 kind of -- or I am seeking some kind of assurance with respect  
23 to the named plaintiffs only because they are the named  
24 plaintiffs right now and we know who they are, and it may not  
25 come even as to them.

1 MR. BROWN: If I may, your Honor. One thing we have  
2 been wrestling with -- and we had asked -- we had discussed  
3 maybe a short moratorium on the foreclosures until we can at  
4 least get the consolidated amended complaint filed. I know  
5 the Bank of America has an informal policy where not much  
6 happens --

7 THE COURT: Talk to them.

8 MR. BROWN: -- during Christmas.

9 THE COURT: I'm not going to make an order because  
10 it's not before me. I was simply inquiring whether it is  
11 possible to agree to certain limitations on foreclosures at  
12 the moment, and that's what Mr. McGarry is going to try to do,  
13 and you will then decide how you're going to proceed from  
14 there, but we know now that the likelihood is that not much is  
15 going to happen until you file your amended complaint, your  
16 consolidated complaint. So, it seems to me -- but, you know,  
17 if you file it, as I say, I will look at it and I will decide  
18 it.

19 So, the motion to dismiss will be filed by  
20 January 21st; is that what you said?

21 MS. KAVANAGH: At the latest, your Honor.

22 THE COURT: Okay.

23 MR. MCGARRY: Excuse me, your Honor. You said, "the  
24 motion to dismiss." I think you meant "the consolidated  
25 amended complaint."



1 THE COURT: The consolidated amended complaint by  
2 January 21st. The motion to dismiss -- I'm sorry. That was  
3 your motion. And you wanted 60 days?

4 MR. MCGARRY: I had asked for six weeks until  
5 March 4th, but we'll try to do it in 30 days.

6 THE COURT: Okay. So, that would be February 20th,  
7 or thereabouts.

8 COURTROOM DEPUTY CLERK URSO: 21.

9 THE COURT: February 21st.

10 COURTROOM DEPUTY CLERK URSO: Yes.

11 THE COURT: How much time for opposition?

12 MS. KAVANAGH: Your Honor, the plaintiffs propose  
13 March 30th to respond to the motion to dismiss.

14 THE COURT: I don't think you need more time than  
15 they need to prepare the motion. So, give me a closer date.

16 MS. KAVANAGH: March 21st.

17 THE COURT: March 21st.

18 COURTROOM DEPUTY CLERK URSO: Yes.

19 THE COURT: Mr. McGarry, any reply?

20 MR. MCGARRY: Two weeks, your Honor.

21 THE COURT: It's only going to be five pages.

22 MR. MCGARRY: Ten days.

23 THE COURT: March 31st. Is that a holiday?

24 COURTROOM DEPUTY CLERK URSO: March -- let me see.

25 No.

1 THE COURT: So, March --

2 COURTROOM DEPUTY CLERK URSO: March 31st for five-  
3 page reply.

4 THE COURT: And I would prefer not to have you ask  
5 for more pages on the main briefs either.

6 I assume you want to have a hearing on it?

7 MR. MCGARRY: I would assume we do, your Honor.

8 COURTROOM DEPUTY CLERK URSO: We can do March 7th, at  
9 2:00.

10 THE COURT: I'm sorry?

11 COURTROOM DEPUTY CLERK URSO: March 7th -- I mean  
12 April 7th, I'm sorry. April 7th, at 2:00.

13 THE COURT: Will that work for you?

14 MS. KAVANAGH: That's fine. Is that more than  
15 two weeks out from the March 21st deadline?

16 THE COURT: It's about two weeks.

17 MS. KAVANAGH: For oral arguments. And you've had --  
18 he's had time to do --

19 THE COURT: It's a week after they file their five-  
20 page reply.

21 MR. MCGARRY: The date works for the defendants, your  
22 Honor.

23 THE COURT: And this is at 2:00.

24 COURTROOM DEPUTY CLERK URSO: Yes.

25 THE COURT: So that takes care of the motion to

1 dismiss for the time being.

2           Then you raise some other issues, such as the -- let  
3 me pass the management order at the moment -- procedures for  
4 further amendments to the complaint as more cases are  
5 transferred. Hopefully, after January 21st, we won't have to  
6 worry too much about that, but whatever you suggest is likely  
7 to be fine with me.

8           MS. KAVANAGH: Your Honor, to the extent that there's  
9 later-filed cases, then we would have to amend the complaint  
10 to consider those and we would just follow the Rule 15 rule to  
11 seek leave, if necessary, if the defendants don't agree.

12           THE COURT: That seems reasonable.

13           MR. MCGARRY: I think that's fine, your Honor. The  
14 only concern that I have that I've expressed to various other  
15 plaintiffs' counsel before is to the extent there are cases  
16 trickling in after the consolidated amended complaint is  
17 filed, I think it would be sent -- and we've talked about the  
18 idea conceptually, but I don't know if we've come up with a  
19 solution. I think it would make sense to come up with some  
20 way to deal with responsive deadlines, dispositive motions  
21 deadlines, some sort of thing. So, if a complaint comes in  
22 while the motion to dismiss is being briefed, for instance,  
23 we're not going back and having to file another series of  
24 motions before you, your Honor.

25           So, I'm not sure that it's something that we -- and

1 maybe it will take care of itself once the motion to dismiss  
2 is resolved one way or another, but I'm -- I just don't want  
3 to have to be filing, you know, serial answers if there's a  
4 whole bunch of different cases coming. I know Mr. Brown seems  
5 to think it will all be in by mid January.

6 THE COURT: Well, the motion to dismiss initially  
7 will address the new consolidated complaint of however many  
8 plaintiffs -- cases are here now. Anybody who comes in after  
9 that will be subject to the same complaint changed only to  
10 include them, but, in substance, the same.

11 Counsel -- there will be interim lead counsel  
12 appointed today, as they requested, and they will also be the  
13 interim lead counsel, unless they're made permanent lead  
14 counsel, with respect to anybody who comes in after that. So,  
15 it seems to me that the people who come later are kind of  
16 bound by what's going on as a practical matter, aren't they?

17 MS. KAVANAGH: That is true, your Honor. There could  
18 be a circumstance where somebody files a complaint that raises  
19 a different legal theory, but, presumably, that wouldn't get  
20 transferred. We have to just wait and see.

21 THE COURT: Yes. I think it's not a serious issue at  
22 the moment. If it becomes one, obviously, you'll bring it to  
23 my attention and we'll see what we can work out.

24 MR. MCGARRY: Thank you.

25 THE COURT: Okay. So, the protocol for E discovery,

1 I expect you to come up with that and adhere to it, and I hope  
2 I never have to see any of it.

3 I must tell you, I have gone to a program run by the  
4 Federal Judicial Center on E discovery. I spent two days  
5 learning about E discovery and I truly don't know a whole lot  
6 more now than I did before I started. So, I'm not a very good  
7 person to rule on anything in that regard. I'll have to send  
8 it to a magistrate, who were the people who were teaching the  
9 course.

10 I don't think we need to deal with class  
11 certification merits and damages today. I presume that at the  
12 moment, you will be busy briefing the motion to dismiss and  
13 then you will begin discovery, starting with the automatic  
14 discovery, right? And then at some point after the motion to  
15 dismiss is decided, which I want very much to do as quickly as  
16 I can, then I think we need to address class certification,  
17 which will go -- whatever discovery you need on that should  
18 certainly begin even before the motion is decided, probably,  
19 and then after that we'll decide about merits and damages.

20 I don't have strong feelings either way on that and  
21 I'm happy to hear you, but I don't think I need to decide it  
22 today.

23 MS. KAVANAGH: If I could just have a word, your  
24 Honor.

25 The merits and class certification discovery in this

1 case are completely intertwined and because, also, plaintiffs  
2 are going to be moving for preliminary injunctive relief  
3 immediately, there's discovery necessary to that that goes  
4 straight to the merits of the case.

5 THE COURT: Go ahead.

6 MS. KAVANAGH: And the types of discovery we would be  
7 seeking that are relevant to class certification are also  
8 completely relevant to the merits. So, while we want to start  
9 discovery as soon as possible and, certainly, you know, even  
10 before the motion to dismiss is decided, if so permitted, the  
11 discovery should go forward as all of the discovery at once  
12 because it will take so much more time to go through the  
13 disputes that are inevitably going to arise about what is  
14 class certification --

15 THE COURT: All of which you will work out.

16 MS. KAVANAGH: -- discovery and merits discovery.

17 What?

18 THE COURT: All of which you will work out.

19 MS. KAVANAGH: Well, the problem is -- and we will  
20 work out -- we have a good relationship with Mr. McGarry, your  
21 Honor, but the problem is this case is a special case because  
22 of the urgency of the foreclosure issues and plaintiffs  
23 anticipate -- and want to move this case as quickly as  
24 possible so that people will be able to act on their rights  
25 before unnecessarily losing their homes to foreclosure, and

1 the discovery in this case is going to be hugely important for  
2 making sure this doesn't happen.

3 So, in this case, in particular, the claims at issue  
4 and the facts at issue and the urgency of the situation that  
5 these homeowners are in really warrants having discovery move  
6 quickly and to move together.

7 THE COURT: I hadn't intended to have argument on the  
8 issue today.

9 MS. KAVANAGH: Just a few words.

10 THE COURT: Okay. I hear you. I have heard you.

11 MS. KAVANAGH: Okay.

12 THE COURT: Did you want to add anything?

13 MR. MCGARRY: I guess just that there's inevitably  
14 this fight about whether there should be merits and class  
15 discovery and among this group here, I think we've done enough  
16 class action work together that, invariably, we can work out  
17 those disputes -- the vast majority of the disputes without  
18 involving the Court. To the extent --

19 THE COURT: I look forward to that.

20 MR. MCGARRY: We try very hard, your Honor, and I  
21 think we're successful most of the time.

22 THE COURT: I know.

23 MR. MCGARRY: To the extent we're talking about, you  
24 know, immediately beginning discovery of individual potential  
25 class members that are not named plaintiffs, then, perhaps, we

1 do need to talk about that today because that's -- that's the  
2 real issue. The damages and all the individual circumstances  
3 of potential class members, that's really where the substance  
4 of the divide comes, from the defendant's perspective.

5 There's not -- you know, the merits discovery into what my  
6 client's policies and procedures and practices are, of course,  
7 that's relevant to class certification and, of course, they're  
8 entitled to that, but if we start getting down the road of  
9 getting into discovery about individual class members at this  
10 stage potentially nationwide will bog us down incredibly and  
11 that's the primary concern we have.

12 THE COURT: How do you anticipate that to come up?  
13 By the plaintiffs asking for the names of all people who have  
14 applied under this program?

15 MR. MCGARRY: I don't know because I haven't seen  
16 their discovery requests, but Ms. Kavanagh got up and talked  
17 about how these things are critically important, but she  
18 didn't actually tell you one thing she specifically needed.  
19 So, I just wanted to make sure that I was on the record  
20 talking about what our concerns are about getting into, you  
21 know, all of the individual records of every conceivable  
22 person who was in the HAMP program at any point in time.

23 THE COURT: Well, why don't we agree that the  
24 automatic discovery shall take place as you had said it would  
25 and then to the extent that Ms. Kavanagh wants to do



1 additional discovery that you find objectionable or too broad  
2 at this stage, whatever you can't resolve by talking to each  
3 other, let us know and we'll have another meeting and see what  
4 we can hash out.

5 MR. MCGARRY: Thank you, your Honor.

6 THE COURT: Ms. Urso is always available.

7 So, we also defer any question of the number --  
8 limits on the number of depositions and interrogatories, and  
9 all that. Protective orders, I'll sign whatever you give me.  
10 And I think that takes care of the discovery issues that you  
11 had posited in your joint statement.

12 MR. MCGARRY: There was one issue, your Honor, which  
13 is the -- in the *Kahlo* case, which was the case in the Western  
14 District of Washington where discovery -- some discovery did  
15 commence. We have responded to the discovery as it relates to  
16 the individual *Kahlo* plaintiffs, given the plaintiffs' own  
17 documents and the records that relate to the *Kahlos*, but have  
18 asked that we do this discovery in a -- that relates to the  
19 broader issue of my client's policies and practices and  
20 procedures, and the like, in a consolidated proceeding.

21 The whole purpose of having these proceedings  
22 consolidated is to make the discovery consistent and  
23 consolidated, and there's been some resistance that -- from  
24 the plaintiffs' side that we may get involved in a motion to  
25 compel broader discovery in that particular case, and our

1 position, as we articulate in our papers, is just that we  
2 should have discovery starting in these consolidated  
3 proceedings in a consolidated matter.

4 MS. KAVANAGH: The *Kahlo* discovery was served and  
5 it's well overdue now, your Honor, and a number of those  
6 requests might be on the individual plaintiffs' requests and  
7 we would not duplicate those requests in the MDL proceeding,  
8 and a lot of that information we would actually use in  
9 addition to the MDL proceeding, and that's not waiving our  
10 rights to seek additional information, but it's a timing issue  
11 because that discovery has been pending now for a couple of  
12 months and it's due --

13 THE COURT: I thought we agreed at the very beginning  
14 to suspend all existing deadlines.

15 MS. KAVANAGH: Well, that -- actually, that was a  
16 question I was going to ask you, if you were including that  
17 discovery in the --

18 THE COURT: I'm including that in the suspension.

19 MS. KAVANAGH: Okay.

20 THE COURT: Now, I think that's all on the joint  
21 statement.

22 With respect to your proposed order number one, I  
23 have no problem with appointing as interim lead counsel the  
24 four lawyers that you had suggested, Mr. Klein, Mr. -- whoever  
25 they were.

1 MS. KAVANAGH: It's the two law firms, your Honor,  
2 the Roddy Klein --

3 THE COURT: It was specifically four lawyers, was it  
4 not, not just the law firms?

5 MS. KAVANAGH: I don't believe it was --

6 THE COURT: Mr. Klein, Ms. Kavanagh, Mr. Costello,  
7 Mr. Berman, I think.

8 MR. BROWN: And Mr. Brown. That would be me.

9 THE COURT: You're on the proposal here. The firm of  
10 Hagens Berman Sobol and Shapiro.

11 MR. BROWN: Right.

12 THE COURT: No "and."

13 Mr. Berman. Mr. Brown, Roddy Klein & Ryan, Mr. Klein  
14 and Ms. Kavanagh. Oh, and Mr. Costello. So, five. Okay?  
15 So, you are interim lead counsel, and we'll go with that.

16 Now, there is -- you also want to have an executive  
17 committee and, as best as I can tell, the only purpose of the  
18 executive committee is to have those lawyers also get enhanced  
19 fees. Is there anything else to that?

20 MR. BROWN: As poignant as that observation may be,  
21 there are some powers of the executive committee. These are  
22 the group that we can recognize and help manage this case and  
23 look to them for their expertise and help. This is a group  
24 that's been very active to consolidate --

25 THE COURT: Why can't you do that without their being

1 members of an executive committee?

2 MR. BROWN: We probably can.

3 THE COURT: Why don't we do it that way. We have  
4 such a huge structure and I don't really want to be in charge  
5 of appointing a structure for plaintiffs' counsel. I would  
6 like you to work that out. So, if you want to deal with them  
7 in some way, that's fine.

8 MR. BROWN: Our hope is that this is the last time  
9 you'll have to deal with it. That's our hope, and I think it  
10 would actually speed things along for everybody if we had an  
11 order from the Court, which may be revisited, if necessary --  
12 we don't anticipate that -- that we can get an order  
13 recognizing who the executive committee is made up of.

14 THE COURT: I think I would prefer to start with five  
15 interim lead counsel, which seems a fairly high number, and if  
16 a problem arises later on and that you need more recognition  
17 of who the people are with whom you wish to consult, come  
18 back.

19 MR. BROWN: Okay.

20 THE COURT: The portions of the -- oh, there is one  
21 other part of the proposed order that has me making all kinds  
22 of orders about the internal workings of the plaintiffs'  
23 counsel's group, all of them, keeping track of records and how  
24 they are to be dealt with, and all of that. I feel  
25 uncomfortable getting into that, frankly. It's not clear to

1 me why the Court needs to do that.

2 MR. BROWN: Which -- are there particular provisions?

3 THE COURT: Let me see if I can find them.

4 (Pause.)

5 THE COURT: I don't know where it was, but there was  
6 a provision some -- maybe it was in the order itself.

7 MR. McGARRY: Your Honor, if I could help you, the  
8 paragraphs that talked about counsel keeping records of their  
9 time was Paragraphs 19 and 20.

10 THE COURT: Of the order?

11 MR. McGARRY: Of the proposed order, yes.

12 (Pause.)

13 THE COURT: I don't know why I can't find it.

14 MR. BROWN: Your Honor, these were -- Paragraphs 19  
15 and 20 are just --

16 THE COURT: Yes, that's it.

17 MR. BROWN: These are things we can deal with amongst  
18 ourselves.

19 THE COURT: I think so.

20 MR. BROWN: The only purpose is to -- if we had the  
21 imprimatur of the Court, it makes things easier going forward.

22 THE COURT: If you have a problem down the line, let  
23 me know, but I really would prefer that you work that out. It  
24 doesn't seem seemingly for me to tell the lawyers how to work  
25 with each other with respect to their billing, and such.

1 MR. BROWN: Very good.

2 THE COURT: Of course, that doesn't mean I won't  
3 criticize it later on, which is what you're trying to avoid,  
4 but I'll be gentle.

5 MR. BROWN: Thank you.

6 THE COURT: Now, the other piece of this has to do  
7 with what the Clerk's Office has to do and, as I said before,  
8 the Clerk has some objections to some of the provisions in  
9 here.

10 MS. KAVANAGH: Are we looking at Paragraphs 8 and 9,  
11 your Honor?

12 THE COURT: Let me just find it.

13 Well, already starting out with coordination of  
14 related counsel. The Clerk had some problem with how to deal  
15 with new cases as they come in. Clearly, we would have a  
16 provision that I think you also have in here that they do not  
17 have to again enter an appearance, that counsel in the cases  
18 don't have to enter an appearance here. We will not notify  
19 them of anything. We will notify lead counsel only and lead  
20 counsel then have to notify them of anything that happens, for  
21 the reason I mentioned earlier, that we end up with these  
22 humongous service lists that overshadow everything in the  
23 docket.

24 What I propose to do is to fiddle with this and come  
25 up with a draft that our Clerk finds acceptable, taking as

1 much of what you have here, and not entering it until you have  
2 seen it. You know, I'll send you what I propose to enter and  
3 you can tell me wherein it doesn't work from your perspective.  
4 This is less of a problem for you, obviously. So, that was  
5 the only other thing. Mr. Klein.

6 MR. KLEIN: Your Honor, just having had some  
7 experience with big MDL cases and bigger than this, the one  
8 thing that would be very, very helpful to us if we still had  
9 the ability to use the ECF system and the services associated  
10 with the electronic ECF system so that the notice goes out  
11 through the court system so that we don't have glitches and  
12 problems with people claiming they didn't get notice through  
13 co-lead counsel.

14 So, I would ask that, perhaps, we could inquire of  
15 the Clerk's Office whether there's a way, even without the  
16 long service list, to make sure that service is made through  
17 the ECF system rather than some other way.

18 THE COURT: I think that's exactly what she objects  
19 to, but I'll talk to her about it.

20 Paragraph No. 5 of the proposed order talks about the  
21 Clerk mailing a copy of the order to all counsel, "Clerk shall  
22 mail." I don't think we mail anything anymore. So, we'll  
23 need to fix that and make sure that it is all electronic.

24 And with respect to the caption, we should probably  
25 indicate in the caption -- have some provision indicating when

1 a pleading is filed on behalf of a case only and not on behalf  
2 of the consolidated, but, as I say, I want to review this and  
3 want to come up with an edited version, which I will submit to  
4 you, all of you, so that you can see whether it works or not  
5 and if it doesn't, obviously, then we'll have to reconsider.

6 MR. KLEIN: Just a couple of things, your Honor.

7 First, it would be very helpful to us if you included  
8 the Paragraph 16 that's incorporated in our proposed order,  
9 which lays out the duties of interim co-lead counsel. What  
10 that does, it gives the defendant comfort, for example, that  
11 we have authority to speak for the group, among other things.

12 THE COURT: Probably makes sense. Are there things  
13 in here that you object to?

14 MR. MCGARRY: No, there aren't at all, your Honor.  
15 We would actually -- and Mr. Klein and I talked about this  
16 briefly before we started today. We'd actually like to add a  
17 sentence that says to the effect of defendants can rely on the  
18 representations of co-lead counsel. We want to be in a  
19 position where, like the Court only wants to serve co-lead  
20 counsel, we would only like to have to serve co-lead counsel.  
21 I'd like to make sure that it's explicit that we strike  
22 agreements with co-lead counsel and they're binding on the  
23 entire group, but we have no problem with what already exists  
24 in Paragraph 16.

25 THE COURT: Well, let me suggest then that I play



1 with that part of the order that deals with the Clerk's  
2 Office. I will submit it to you. You can either -- you can  
3 both edit that and add anything else or subtract anything else  
4 that doesn't work for you and get it back to me and then we  
5 can enter it.

6 MR. BROWN: By when would you like that?

7 THE COURT: Well, you won't be able to do it until  
8 you get mine. So, I'll try and get it to you next week.

9 MS. KAVANAGH: We'll get it back to you immediately,  
10 your Honor.

11 THE COURT: And then you can get it back to me when  
12 you get it back from me, but I think we all need to work with  
13 some dispatch.

14 What else, Mr. Klein, Ms. Kavanagh or Mr. Brown?

15 MR. KLEIN: Your Honor, with respect to the case  
16 management issues and your position on the executive  
17 committee, which we understand, I think there's a possibility  
18 that we may come back to you with a proposed order and second  
19 case management order down the road as we see how the case  
20 goes and I want to reserve the right to ask you again about an  
21 executive committee down the road.

22 THE COURT: You have it. I told you that.

23 MR. KLEIN: One of the issues is that the committee  
24 -- there are a lot of lawyers in this case and it may be very,  
25 very helpful to us as lead counsel to have an executive

1 committee, particularly in a case like this where there are  
2 state law claims and some lawyers may know issues -- know  
3 about issues that come up in other states, and that kind of  
4 thing. So, I hope that you would retain an open mind about  
5 the possibility that we might want --

6 THE COURT: I already told you that.

7 MR. KLEIN: Thank you, your Honor. Thank you.

8 THE COURT: Ms. Kavanagh, anything else?

9 MS. KAVANAGH: No, your Honor.

10 THE COURT: Anything else, Mr. Brown?

11 MR. BROWN: No, your Honor. Thank you.

12 THE COURT: Mr. McGarry?

13 MR. MCGARRY: No, your Honor.

14 THE COURT: Well, good luck to us all, and thank you  
15 very much, and we'll keep going and communicating with each  
16 other.

17 MR. MCGARRY: Thank you, your Honor.

18 THE COURT: Thank you very much.

19 MS. KAVANAGH: Thank you.

20 MR. BROWN: Thank you.

21 THE COURT: Court is in recess.

22 (Adjourned, 3:48 p.m.)  
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C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 34, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Civil Action No. 10-md-2193-RWZ, In Re: Bank of America Home Affordable Modification Program (HAMP) Contract litigation.

February 10, 2010  
Date

/s/ Catherine A. Handel  
Catherine A. Handel, RPR-CM, CRR