

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BANK OF AMERICA  
CORPORATION STOCKHOLDER  
DERIVATIVE LITIGATION

:  
:  
: Civil Action  
: No. 4307-CS  
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Chancery Court Chambers  
New Castle County Courthouse  
Wilmington, Delaware  
Friday, May 4, 2012  
11:00 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., CHANCELLOR

- - -

TELECONFERENCE

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CHANCERY COURT REPORTERS  
500 North King Street - Suite 11400  
Wilmington, Delaware 19801-3759  
(302) 255-0525

1 APPEARANCES:  
2 (By telephone)

3 PAMELA S. TIKELLIS, ESQ.  
4 ROBERT J. KRINER, JR., ESQ.  
5 SCOTT M. TUCKER, ESQ.  
6 Chimicles & Tikellis LLP

7 -and-

8 PETER HARRAR, ESQ.  
9 of the New York bar  
10 Wolf Haldenstein Adler Freeman & Herz LLP

11 -and-

12 PAUL O. PARADIS, ESQ.  
13 MICHAEL A. SCHWARTZ, ESQ.  
14 of the New York  
15 Horwitz, Horwitz & Paradis, Attorneys at Law  
16 for Co-Lead and Liaison Counsel for  
17 Plaintiffs

18 DONALD J. WOLFE, JR., ESQ.  
19 MATTHEW E. FISCHER, ESQ.  
20 DAWN M. JONES, ESQ.  
21 Potter, Anderson & Corroon LLP

22 -and-

23 MITCHELL A. LOWENTHAL, ESQ.  
24 JENNIFER KENNEDY PARK, ESQ.  
of the New York bar  
Cleary, Gottlieb, Steen & Hamilton LLP  
for Nominal Defendant Bank of America  
Corporation

DANIEL A. DREISBACH, ESQ.  
LISA M. SCHMIDT, ESQ.  
Richards, Layton & Finger, P.A.

-and-

LAWRENCE PORTNOY, ESQ.  
CHARLES S. DUGGAN, ESQ.  
BRIAN M. BURNOVSKI, ESQ.  
of the New York bar  
Davis Polk Wardwell, LLP  
for Individual Defendants

1 Appearances continued:

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GREGORY F. SMOLAR, ESQ.  
of the New York bar  
Debevoise & Plimpton LLP  
for Defendant Kenneth Lewis

Also present: Jeff Healy, Bloomberg News

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1 THE COURT: Good morning. May we have  
2 appearances for the record please?

3 MR. KRINER: Good morning, Your Honor.  
4 For the plaintiffs, Robert Kriner. Also here with me  
5 is my partner, Pam Tikellis and Scott Tucker. Also on  
6 the line are my co-lead counsel, Michael Schwartz and  
7 Paul Paradis from the Horwitz, Horwitz firm, and Peter  
8 Harrar from the Wolf Haldenstein firm.

9 MR. PORTNOY: Good morning, Your  
10 Honor. Lawrence Portnoy, Davis Polk & Wardwell for  
11 the defendants, and with me are Charles Duggan and  
12 Brian Burnovski.

13 MR. WOLFE: Your Honor, for the bank,  
14 Potter, Anderson & Corroon, Don Wolfe, Matt Fischer  
15 and Dawn Jones. From Cleary Gottlieb in New York,  
16 Mitchell Lowenthal and Jim Kennedy Park.

17 MR. DREISBACH: Also for the  
18 individual defendants, Dan Dreisbach and Lisa Schmidt  
19 of Richards, Layton.

20 MR. SMOLAR: On behalf of Ken Lewis,  
21 you have Gregory Smolar from Debevoise & Plimpton.

22 THE COURT: Do we have anyone else on  
23 the call?

24 MR. KRINER: I believe Bloomberg is

1 on, Jeff Healy.

2 MR. HEALY: Yes, Judge. Jeff Healy  
3 from Bloomberg.

4 THE COURT: I'm going to be brief and  
5 to the point. The plaintiffs have brought a motion  
6 for preliminary injunction to enjoin the defendants  
7 from proceeding to present a settlement to a federal  
8 court.

9 As most of the practitioners are  
10 familiar with, one thing that this Court tends to try  
11 to avoid is causing train wrecks. We're pretty  
12 consistent about that, and I particularly have never  
13 enjoyed train wrecks. I don't think they're something  
14 that we lightly go about.

15 Although I think in many situations,  
16 unfortunately in recent years, the ability to work  
17 through issues has not seemed to be as good as it used  
18 to be. The reality is, in most situations, things get  
19 worked out in a sensible fashion.

20 From the beginning, the plaintiffs  
21 here have known that there's been a fair amount of  
22 activity up in New York around securities cases.  
23 That's no secret to anyone. Although I have obviously  
24 expressed my view in the past, and I continue to

1 adhere to this view, that with respect to the  
2 application of principles of law to the question of  
3 whether the directors of Bank of America breached any  
4 duties to their stockholders, is one that's an  
5 important one under Delaware law.

6           That plain reality which, frankly, is  
7 inarguable under United States Supreme Court  
8 authority, and which my learned colleague in the  
9 Federal Court in New York will no doubt take into  
10 account, that reality is not one which authorizes a  
11 judge of the Delaware Court of Chancery to do things  
12 which are not within his power. Nor does it suggest  
13 that the Court ought to take actions which are  
14 imprudent in the sense of being inefficient or causing  
15 a train wreck.

16           The reality is that you can be in a  
17 situation where it seems sensible for something to  
18 proceed primarily in the state whose law is at stake  
19 and not view that as a license then for judicial  
20 action which is beyond the Court's legal authority to  
21 mandate, or, frankly, that would cause a train wreck  
22 if not everyone shares that view.

23           So with that premise in mind, in terms  
24 of -- the plaintiffs have virtually no game on their

1 argument that it is within the authority of a state  
2 judge to enjoin parties to a federal proceeding. They  
3 duck that issue, and since -- if you want to put it in  
4 terms of our constitutional tradition, whether  
5 Chancellor Strine is with Lincoln or John C. Calhoun,  
6 in case anybody is unclear about this, and I have  
7 spoken to this before, I am kind of with Lincoln in a  
8 rather major way.

9           So I have no confidence that I have  
10 the *authorité*, in the Eric Cartman sense, to enjoin  
11 parties to a federal proceeding.

12           Secondarily, and as importantly, that  
13 is not the natural order of things, and this is not  
14 how Chancellor Strine or members of this Court would  
15 tend to proceed. The reality is there has to be  
16 irreparable injury to grant an injunction.

17           I have no doubt that my esteemed  
18 colleague, Judge Castel, will give the Delaware  
19 plaintiffs every opportunity to present their  
20 arguments. If the plaintiffs don't like my trial  
21 court colleague's ruling, they can then go to a very  
22 esteemed federal Court of Appeals and complain about  
23 it. This opportunity to present one's arguments on a  
24 full record to distinguished courts obviates, in my

1 mind, any potential irreparable injury.

2                   So for those two reasons, I'm going to  
3 deny the preliminary injunction. I am not going to  
4 speak to the back and forth, the to and fro, the  
5 confusing record. I only have a selective window into  
6 it on this.

7                   The parties will have an opportunity  
8 to present that fully before my federal colleague, and  
9 of course, the Court was prepared to, and had,  
10 scheduled the trial.

11                   I have every expectation that the  
12 Delaware plaintiffs' arguments about the settlement  
13 will be taken seriously by my federal colleague. I  
14 also have every expectation that they will be treated  
15 fairly in terms of their contribution to bringing  
16 about the settlement because of their vigor in pushing  
17 forward to a trial here.

18                   Frankly, it doesn't take -- anyone who  
19 can order lunch from McDonald's can understand that  
20 the fact that there was a trial date here would be on  
21 the mind of the defendants in reaching a settlement.  
22 But I'm not going to get into the merits of it all.  
23 It's a very complicated question, a settlement in this  
24 kind of context, because there is, even from the



1 standpoint of investors in Bank of America, an  
2 important issue about the utility of litigation as  
3 compared to the benefits of, frankly, a global  
4 resolution allowing the company to move forward.

5           These things are compounded by things  
6 like exculpatory charter provisions and other  
7 realities of the differences between independent  
8 directors and insiders, and frankly, the cost of  
9 litigation and insurance and all those kind of  
10 wonderful things that we're familiar with.

11           I am quite sure that a very  
12 distinguished court in New York will allow the  
13 Delaware plaintiffs to make every argument that they  
14 think is relevant in considering the settlement.

15           Given that, I am going to deny the  
16 request for a preliminary injunction. I also agree  
17 with the defendants that in the environment where  
18 there are scarce resources, it serves no one's  
19 purpose, including, frankly, the Court's here, for the  
20 parties to be expending further resources until a  
21 decision is reached in New York.

22           I will tell this to the defendants  
23 though. If your settlement in New York -- what I mean  
24 is I will grant your stay. But then you better be

1 prepared to go to trial. And that means trial. And  
2 that means if there is delay threatened by the summary  
3 judgment motions, the summary judgment motions will  
4 just be denied, and we'll go right to trial.

5 Understood?

6 MR. WOLFE: Yes, Your Honor.

7 THE COURT: I just think that's a fair  
8 balance, Mr. Portnoy and Mr. Wolfe. If you want a  
9 stay, I get that. If your settlement doesn't hold up  
10 and you had a trial here, all the defendants will go  
11 to trial. We're not going to have a delay for a  
12 summary judgment schedule.

13 Then, honestly speaking, I think  
14 there's another factor that will counsel in favor of  
15 that in terms of the equities, which is my sense that  
16 the context in which that will be the case will be if  
17 my colleague in the Federal Court concludes that,  
18 frankly, the settlement that has been achieved does  
19 not provide sufficient benefit to Bank of America to  
20 justify the release.

21 So if there had been some -- I don't  
22 want to say perfect overlap. I'm not saying that at  
23 all. It's a Rule 56 standard. But if we get to that  
24 context where, frankly, the Delaware plaintiffs have

1 expended an awful lot of resources preparing for  
2 trial, have now had to fight it out in New York, and  
3 have successfully convinced a federal judge not to  
4 uphold the settlement, then I think they should be  
5 prepared to go -- they should have the right to go to  
6 trial on the schedule that the defendants agreed upon.

7           And the defendants, having, by their  
8 own efforts, altered the course of events, are going  
9 to have to suffer the consequences.

10           So my final view, so it's clear up in  
11 New York, is if this settlement goes away, the trial  
12 date stands. So that will provide clarity for  
13 everybody. I wanted to get you an answer so that you  
14 could focus your attentions in an efficient way.

15           The motion for preliminary injunction  
16 is denied. The motion for a stay is granted. You can  
17 submit an order referring to the reasons given on this  
18 transcript, and then good luck to everyone, and let me  
19 know how things come out in Gotham.

20           MR. KRINER: Thank you, Your Honor.

21           THE COURT: Thank you.

22           (The teleconference concluded at  
23 11:15 a.m.)

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## CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 11 contain a true and correct transcription of the proceedings as stenographically reported by me at the teleconference in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 5th day of May, 2012.

/s/Maureen M. McCaffery

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Maureen M. McCaffery  
Official Court Reporter  
of the Chancery Court  
State of Delaware