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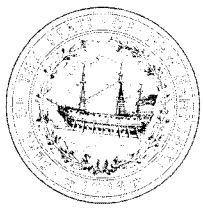

September 9, 2011

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, New Hampshire 03301

Re: In re Liquidation of Noble Trust Co.
No. 11-____

Dear Ms. Fox:

Enclosed for filing with reference to the above-captioned matter is an original plus eight copies of the State of New Hampshire's *Petition for Original Jurisdiction Pursuant to Supreme Court Rule 11.*

Thank you for your attention to this matter.

Sincerely,

Manuela Perry
Paralegal II
Environmental Protection Bureau
(603) 271-3679

/mp
cc: Parties of Record Counsel

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In re Liquidation of Noble Trust Co.

PETITION FOR ORIGINAL JURISDICTION PURSUANT TO SUPREME COURT RULE 11

ROBERT A. FLEURY
DEPUTY COMMISSIONER
NEW HAMPSHIRE BANKING DEPARTMENT
AS LIQUIDATOR OF
NOBLE TRUST CO.

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Date: September 9, 2011

TABLE OF CONTENTS

Page

Introduction 1

A. The Decisions To Be Reviewed 2

1. Order of the Merrimack County Superior Court, (Smuckler, J.), dated June 17, 2010, ... 2

2. Order of the Merrimack County Superior Court, (Smuckler, J.), dated June 25, 2010, Amending the June 17, 2010 Order 3

3. Order of the Merrimack County Superior Court, (Smuckler, J.), dated July 28, 2010, clarifying the June 17, 2010 Order 3

4. Order of the Merrimack County Superior Court, (Sullivan, J), dated November 3, 2010 3

5. Order of the Merrimack County Superior Court, (Smuckler, J.), dated January 9, 2011 3

B. The Question Presented For Review 4

C. Provisions of Law Involved 4

D. Documents Involved In The Case 6

E. Statement Of The Case 7

F. Statement Of Procedural Stage Where Issues Were Raised And Determined 10

G. Statement Of The Argument 11

H. Jurisdictional Basis 12

I. Statement That Issues Have Been Raised Below 13

J. The Parties Of Record 13

K. Availability Of Transcripts 13

Certificate of Service 15

Schedule J 16

STATE OF NEW HAMPSHIRE
SUPREME COURT

In re Liquidation of Noble Trust Co.

PETITION FOR ORIGINAL JURISDICTION PURSUANT TO SUPREME COURT RULE 11

Robert A. Fleury, Deputy Bank Commissioner of the State of New Hampshire and the court-appointed liquidator of Noble Trust Co. (hereinafter the "Liquidator"), by and through counsel, the Office of the Attorney General, and Sheehan Phinney Bass + Green, prays that the Court exercise its original jurisdiction under RSA 490:4 and Supreme Court Rule 11 and review the Merrimack Superior Court's decisions indefinitely staying all proceedings relating to Noble Trust and pending before the Superior Court, and that the Court enter an Order vacating the stay order and compelling the Superior Court to again docket and hear all matters relating to Noble Trust.

Introduction

The Liquidator brings this petition as part of his continuing effort and responsibility to achieve justice and provide a dividend for a number of individuals who lost significant sums of money in a Ponzi scheme that the Banking Department uncovered in early 2008. The Liquidator has, consistent with his statutory duty, diligently pursued claims, marshaled assets, assisted in successful criminal prosecutions, organized voluminous records, and, importantly, negotiated a number of advantageous settlements to bring money into the liquidation estate of a defunct non-depository bank that had been used to perpetrate the

fraudulent schemes of its owners and managers. The Superior Court stayed all proceedings due to an asserted lack of financial resources to compensate a specially assigned senior justice. The Liquidator more recently moved to have the case reassigned to the Chief Justice of the Superior Court upon the hope that the Chief Justice could find judicial resources elsewhere. The Superior Court has not acted upon that request since February. In addition, the Liquidator moved the Superior Court to designate the newly appointed Bank Commissioner, Ronald A. Wilbur as the liquidator. This motion, too, has not been acted upon.

This petition is brought because the stay orders entered by the Superior Court prejudice the Liquidator's efforts to marshal assets, make a distribution to victims and claimants, and fully wind up the affairs of the entity, and, significantly, because other efforts to gain relief from the Superior Court were not successful.

A. The Decisions To Be Reviewed:

1. Order of the Merrimack County Superior Court, (Smukler, J.), dated June 17, 2010, staying all matters pertaining to Noble Trust Co. ("Noble Trust") (the "First Stay").

The Superior Court's June 17, 2010 Order provides:

> This matter was specially assigned to Senior Justice David Sullivan. Due to budget amendments there is no longer funding to pay per diem salary of senior judges. Accordingly, all deadlines and scheduled dates in this proceeding are stayed pending further order of the court.

The June 17, 2010 Order was entered in docket numbers 08-E-053, 09-E-184, 09-E-323 and 10-E-034. (copy annexed hereto as App. at 1) [1]

---

[1] This order is also referred to in paragraph 51 of the Petition for Injunctive and Declaratory Relief and Writ of Mandamus, filed in Baxter et al. v. State of New Hampshire, M.C.S.C. Docket no. 2010-CV-00683 (petition to require the State Treasurer to allocate additional funds to judicial branch).

2. Order of the Merrimack County Superior Court, (Smukler, J.), dated June 25, 2010, amending the June 17, 2010 Order.

The Superior Court's June 25, 2010 Order provides:

> The June 17, 2010 stay issued by the court is amended to provide that adjudication of all contested issues are included are likewise stayed. (sic)
>
> (copy annexed hereto as App. at 3)

3. Order of the Merrimack County Superior Court, (Smukler, J.), dated July 28, 2010, clarifying the June 17, 2010 Order.

The Superior Court's July 28, 2010 Order provides:

> Motion to clarify is GRANTED in part as follows: The Court clarifies that the length of the stay is until the time that the judicial branch has sufficient judicial resources to adjudicate the parties' respective claims; a matter that at this time is more within the purview of the other two branches of government. The motion is DENIED in all remaining respects.

The Superior Court entered this order only in docket number 09-E-184. (copy annexed hereto as App. at 6).

4. Order of the Merrimack County Superior Court, (Sullivan, J.), dated November 3, 2010, lifting stay.

The Superior Court's November 3, 2010 Order provides:

> The court orders that the previous stay ordered in case numbers 08-E-0053, 09-E-184, 10-CV-175, 10-CV- 185, 10-CV-186 [all cases related to Noble Trust] is lifted. Unless the court has otherwise agreed and ordered, all pending motions and pleadings [except for the liquidation plan], which have not been responded to due to the stay, shall be responded to by December 1, 2010. The court will set a deadline for filing objections to the liquidation plan at a later date. So ordered.
>
> (copy annexed hereto as App. at 10).

5. Order of the Merrimack County Superior Court, (Smukler, J.), dated January

19, 2011, staying all matters pertaining to Noble Trust (the "Second Stay").

The Superior Court's January 19, 2011 Order provides:

> These cases were specially assigned to a senior justice. By order dated June 17, 2010, the court stayed these cases due to lack of funding to compensate the senior justice. Thereafter, the superior court chief justice asked the senior justice to preside at a November 3, 2010 status conference and to adjudicate certain pending motions. The senior justice agreed. Accordingly, by order dated November 3, 2010, the senior justice lifted the stay.
>
> The senior justice has completed the work he agreed to complete. He is unwilling to do further work without compensation. Accordingly, these cases are indefinitely STAYED. The court will lift the stay when funds are appropriated to compensate the presiding justice. So ordered.

The January 19, 2011 Order was entered in docket numbers 08-E-053, 09-E-184, 10-EQ-034, 10-CV-175, 10-CV-185, 10-CV-186. (copy annexed hereto as App. at 14.)

B. The Questions Presented For Review

Was the indefinite stay of all matters pertaining to Noble Trust pending a time when "funds are appropriated to compensate the presiding justice," an unsustainable exercise of discretion?

C. Provisions Of Law Involved

RSA 395:1, which provides, in pertinent part:

> If any institution under supervision of the bank commissioner shall . . ., or if at any time it appears to the commissioner that its business is being conducted in an unsafe or unauthorized manner, or that it is necessary for the public safety that it should not continue to transact business, the commissioner may represent the fact by petition to the superior court.

RSA 395:2, which provides:

> The court may issue an injunction prohibiting, as far as may be thought necessary, the transaction of any business of said institution and the commissioner shall cause the same to be served. Any justice of the superior court, upon petition and notice to the commissioner, may dissolve, modify, continue or extend such injunction as equity may require. If in the opinion of

said justice the public good requires he may direct the commissioner to take possession forthwith of the property and business of such institution, and he may retain possession thereof until it shall resume business, or until its affairs shall finally be liquidated as herein provided; and upon completing such liquidation the charter of such institution shall be vacated.

RSA 395:5, which provides:

Upon taking possession of the property and business of any institution to which this chapter applies, the commissioner shall have authority to collect money due the institution and to do such other acts as are necessary to conserve its assets and business. He shall collect all debts due and claims belonging to it, and, upon the order of the superior court, may sell or compound all bad or doubtful debts; and on like order may sell all or any part of the real and personal property of the institution on such terms as the court shall direct.

RSA 395:9, which provides:

For the purpose of executing and performing the powers and duties hereby conferred upon him, the commissioner may, in the name of any such institution, prosecute and defend any legal proceedings, and may in the name of the institution execute, acknowledge and deliver any instruments necessary and proper to effectuate any sale of real or personal property or any compromise authorized by the court as herein provided; and any instrument executed pursuant to such authority shall be valid and effectual for all purposes to the same extent as though executed by the institution.

RSA 395:19, which provides:

At any time after the expiration of the date fixed for the presentation of claims, upon application of the commissioner, the court may authorize:

I. Any person who holds a perfected security interest or a mortgage lien in assets of the insolvent or closed New Hampshire depository institution, which security interest or mortgage lien was granted to the person by such institution pursuant to a written contract or agreement as security for the payment of a debt or obligation deemed to be valid by the commissioner to:

(a) Dispose of or foreclose its mortgage lien on the collateral pursuant to applicable law;

(b) Satisfy such debt or obligation from the proceeds thereof;

(c) Pay the balance of the proceeds, if any, to the commissioner; and

(d) Provide a full account to the commissioner for all actions taken in connection with the disposition of or foreclosure of its mortgage lien on the collateral; and

II. The commissioner to declare out of the funds remaining in his hands, one

> or more dividends, such dividends to be paid to such persons, in such amounts, and upon such notice, as may be directed by the court. All dividends payable under this paragraph shall be paid in accordance with the priority established under RSA 395:30.

RSA 395:30, which provides:

> Payments of dividends under RSA 395:19 and any other proceeds of the property of a closed or insolvent New Hampshire depository institution shall be distributed according to the decree of the court in the following priority:
>
> I. The payment of the costs and expenses of the liquidation.
>
> II. The payment of wage, salary and other claims of employees to the same extent such claims would be accorded priority under federal bankruptcy law.
>
> III. The payment of claims for deposit accounts including but not limited to "deposits" as defined in 12 U.S.C. section 1813(l), or as it may be later amended from time to time.
>
> IV. The payment of liens accorded priority under New Hampshire law.
>
> IV-a. Reimbursement of fees or costs paid in advance by a consumer in relation to a mortgage loan application when the mortgage loan was not processed due solely to the insolvency of the institution, but only to the extent such fees or costs were not paid over to a third party for services actually rendered prior to the insolvency.
>
> V. The payment of all debts, claims, and obligations filed in accordance with RSA 395:13, not accorded priority in the preceding paragraphs.
>
> VI. The payment of delayed claims in accordance with RSA 395:16.
>
> VII. The payment of capital debentures issued under RSA 384:14-a and any other obligations expressly subordinated to deposits and to claims entitled to the priority established in the preceding paragraphs.
>
> VIII. Any funds remaining shall be divided in the case of a stock institution among the stockholders according to their respective interests or, in the case of a mutual institution, among the depositors in proportion to the respective amounts of their deposits.
>
> IX. Interest shall be given the same priority as the claim on which it is based, but no interest shall be paid on any claim until the principal of all claims within the same class and all higher-priority classes have been paid or adequately provided for in full.

D. Documents Involved In The Case.

The record at the Superior Court is voluminous. It includes numerous pleadings, petitions and complaints in several civil proceedings relating to the Liquidator's efforts to reduce the Noble Trust estate's assets (which include numerous litigation claims against third

parties) to cash, so he can make distribution to the holders of allowed claims against Noble Trust, many of whom are victims of a significant Ponzi scheme.

E. Statement Of The Case

The Superior Court stayed all matters relating to Noble Trust. Those matters included the liquidation of a non-depository trust company that had been used in unlawful ways, including the operation of a Ponzi scheme; litigation against the former officers and directors of Noble Trust to determine their liability for the failure of Noble Trust and the operation of the Ponzi scheme, and litigation against a number of other individuals brought by the Liquidator to collect claims owed to Noble Trust. The stay prejudices the Liquidator and the estate's claimants because it prevents the Liquidator from fulfilling his statutory duty to liquidate Noble Trust's estate, and to make a dividend from those assets and proceeds to the holders of allowed claims.

The stay was not sought by any party to any of the pending matters, and was instead *sua sponte* by the Superior Court. The issuance of the stay was not motivated by any particular case-driven issue, but was instead entered because of the Superior Court's inability to provide compensation for a specially assigned Senior Justice.

While the Superior Court typically has broad discretion to manage its docket, that discretion cannot be held to lawfully include an indefinite stay of a proceeding because of budgetary constraints affecting the Superior Court.

Factual Background

The Appellant is the Deputy Bank Commissioner appointed pursuant to RSA 383:1. He was appointed to serve as liquidator of Noble Trust pursuant to RSA 395:1 and previous

orders of the Superior Court.[2] In his capacity as Liquidator, the Appellant and his predecessor have, since early 2008, labored to marshal and liquidate the assets of Noble Trust's estate. To that end, he commenced civil litigation against Noble Trust's directors and officers; brought suit against a number of parties owing money to Noble Trust on contracts and under applicable equitable principles; negotiated and settled claims against insurance companies that issued policies that were obtained (often fraudulently) in furtherance of the Ponzi scheme; brought litigation in other jurisdictions to protect the interests of the Noble Trust estate; and, in June 2010, filed a liquidation plan with the Superior Court, providing for the resolution of the liquidation and distributions to classes of claimants. While he has continued to negotiate and reach settlements with other insurance companies and lenders during the interim, he has been unable to move the liquidation plan forward in any appreciable way, or attempt to obtain court approval of any of the settlements, because of the Superior Court's First and Second Stays.

Noble Trust was a non-depository bank under the supervision of the Bank Commissioner. In early 2008, the Commissioner determined that Noble Trust was being operated in an unsound and unsafe manner by its principals and that it should be liquidated. The Commissioner brought a Petition under RSA 395 on February 8, 2008, and obtained orders granting the Commissioner powers to take over the assets and business of Noble Trust and liquidate it. Noble Trust was being run as a Ponzi scheme by Colin Lindsey, its president, who has since pled guilty to two felonies and is serving a prison sentence. Lindsey and others used Noble Trust to defraud its investors of as much as $22 million. Lindsey and

[2] The present Bank Commissioner, Ronald A. Wilbur should be the appointed liquidator. The Liquidator, by counsel, moved the Superior Court on June 10, 2011, for an order substituting Mr. Wilbur as liquidator. The Superior Court has not acted on that request.

others also used Noble Trust to purchase and sell life insurance policies, many of which were fraudulently obtained and or were intended for illegal resale in a secondary market. Other policies were "stranger owned life insurance" in which the beneficial interest in the policy was unlawfully owned by other than the insured's family members or other traditional beneficiaries.

At the time of the First Stay, the Liquidator had obtained the approval of a settlement with PHL Variable, which resulted in proceeds to the Liquidator in the amount of $1.5 million, subject to the resolution of an objection of a party claiming an adverse interest in certain of the policies. The Liquidator also had pending multiparty litigation against the former officers and directors seeking recovery of some $22 million in losses, and also against nineteen other parties who had either cashed out early or owed Noble Trust money under various other legal theories. Finally, under a schedule ordered by the Superior Court, the Liquidator's Plan was filed just after the First Stay. The Plan has not been acted on since the stays.

The Liquidator is nearing completion of a number of additional settlements that he wishes to conclude with Superior Court approval, and on which parties may wish to bring objections forward for the Superior Court to decide. The settlements include another significant agreement with PHL Variable, a settlement with the individual contesting the first PHL Variable settlement, and settlements with certain other insurance carriers and a secured lender. In addition, the Liquidator is documenting a negotiated settlement with Noble Trust's directors and officers, resolving the pending multi-party litigation. These additional settlements, if approved, could in the aggregate exceed $8 million to Noble Trust's estate—but each settlement will require Superior Court review and approval. In some instances, a

factor making it difficult for the Liquidator to finalize the settlements is the uncertainty about when the Superior Court will lift the stays and allow the approval process to commence. The Liquidator is also cognizant of his legal duty to make a distribution to claimants against the estate. There are a significant number of claims filed, many of which may require objection and response in litigation before the Superior Court.

On February 11, 2011, the Liquidator moved the Superior Court to reassign the case to the Chief Justice of the Superior Court so that the Chief Justice might again reassign it to a court where perhaps judicial resources were available. App. at 16. The Superior Court did not act on this unopposed motion. In addition, on June 10, 2011, the Liquidator moved the Superior Court to designate the newly appointed Bank Commissioner, Ronald A. Wilbur, as the liquidator. App. at 23. The Superior Court has not acted on this motion either.

F. Statement Of Procedural Stage Where Issues Were Raised And Determined

The First and Second Stays were *sua sponte* orders entered by the Superior Court. On February 22, 2011, the Liquidator moved the Superior Court to transfer the stayed Noble Trust matters to the Administrative Chief Justice of the Superior Court. The motion was unopposed. The Superior Court has not held a hearing on the Liquidator's motion or acted on the motion in any way. The Liquidator believed that it was appropriate to allow a reasonable period of time for the Superior Court to act. The Liquidator did not believe that additional motions to lift the stays would be fruitful given the Superior Court's response to the February, 2011 motion, and the breadth and the basis expressed by the Superior Court in its orders imposing the stays. In light of the unusual nature of this case and the

circumstances of the Superior Court's stays, the Liquidator believes that good cause for acting now is manifest.

G. Statement Of The Argument

The Superior Court made an unsustainable exercise of discretion in issuing the stays

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.); *In re Athena D.*, __N.H.__ (decided June 30, 2011), Slip Op. at 5; *see In re Sawyer*, 161 N.H. 11, 18 (2010). Case management decisions are reviewed under the unsustainable exercise of discretion standard. *In re Sawyer*, 161 N.H. at 18. Determining whether to stay a proceeding "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. The Court will disturb decisions regarding case management if the moving party demonstrates that the decision was "clearly unreasonable to the prejudice of his case." *Id.; see Landis*, 299 U.S. at 256 ("...in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequence if the public welfare or convenience will thereby be promoted.") A decision should be deemed to violate this standard if the record does not establish an objective basis to sustain the discretionary judgment made. *State v. Lambert*, 147 N.H. 295, 296 (2001); *see Landis*, 299 U.S. at 256 ("Even so, the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the petitioners, suppliants for relief, and discretion was abused if the stay was not kept within the bounds of moderation."). An indefinite stay with no boundaries is

not within the Superior Court's discretion. *See Landis*, 299 U.S. at 257 ("Relief so drastic and unusual surpasses the limits of any reasonable need . . .").

Other than the Superior Court's understandable frustration over the limitations in State budgets, there was no record of any sort supporting the stay decisions. There was no "pressing need" for a stay from the perspective of any of the parties before the Court, nor was a stay warranted by outside events such as natural disaster or war. *See Estate of Cline v. Weddle,* 250 S.W. 3d 330, 337 (Ky. 2008) (*quoting Landis*, 299 U.S. at 255) ("...a trial court abuses its discretion by ordering a stay of indefinite duration in the absence of a pressing need."). There are no limits to the stay, and no triggers to its end that are within the control of any of the parties. At a minimum, the Superior Court should properly have held a hearing, afforded the parties an opportunity to object to the proposed action, and then conducted an analysis of the competing factors weighing on its decision to impose the indefinite stay. *See Leone v. Leone*, 161 N.H. 566, 569 (2011); *Buzzard v. F.F. Enterps.*, 161 N.H. 28, 30 (2010). Those factors might have included some weight given to the Superior Court's "economy of time and effort for itself," but must also have considered the needs of the Liquidator and the many other parties involved. *Landis*, 299 U.S. at 254. Instead, the immoderate stay imposed considered only the Superior Court's fiscal issues, with no apparent consideration given to those of the parties.

As such, the Superior Court's stays constitute unsustainable exercises of discretion and should be vacated.

H. Jurisdictional Basis

N.H. CONST., part II, art. 72-a; RSA 490:4.

I. Statement That Issues Have Been Raised Below

The issues raised herein were not raised by the parties with the Superior Court because the Stay Orders were *sua sponte*. Many of the issues are nonetheless known to the Superior Court, which has presided over the liquidation and associated litigation since 2008. Please also refer to the Liquidator's statement in part F above.

J. The Parties Of Record

Please see attached Schedule J. App. at 8.

K. Availability Of Transcripts

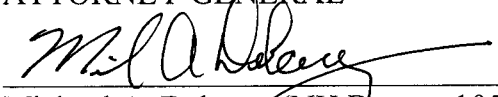
There are no transcripts because the Superior Court did not hold any hearings prior to issuing either of the two stays.

Respectfully submitted,

ROBERT A. FLEURY
DEPUTY COMMISSIONER
NEW HAMPSHIRE BANKING DEPARTMENT
AS LIQUIDATOR OF
NOBLE TRUST CO.

By his attorneys,

MICHAEL A. DELANEY
ATTORNEY GENERAL



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Dated: September 9, 2011

CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on September 9, 2011, I served a true copy of the foregoing Petition upon each of the counsel and pro se parties listed on the attached Schedule J, by U.S. Mail postage prepaid.

Dated: September 9, 2011

Peter C.L. Roth

Schedule J

Parties of Record and Counsel

1. In the Matter of the Liquidation of Noble Trust Company
Docket No. 08-E-0053

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2. Peter C. Hildreth, Bank Commissioner for the State of New Hampshire, as Liquidator for Noble Trust Company and Aegean Scotia Holdings, LLC v. Colin P. Lindsey, et al
Docket No. 09-E-0184

Liquidator: Robert A. Fleury

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Counsel for Eve Prachar Lindsey

3. Peter C. Hildreth, Bank Commissioner for the State of New Hampshire, as Liquidator for Noble Trust Company and Aegean Scotia Holdings, LLC v. Michael J. Walsh d/b/a Walsh & Company Docket No. 09-C-323

Liquidator: Robert A. Fleury

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4. Peter C. Hildreth, Bank Commissioner for the State of New Hampshire, as Liquidator for Noble Trust Company and Aegean Scotia Holdings, LLC v. Sweeney, et al
Docket No. 10-E-0034

Liquidator: Robert A. Fleury

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5. Peter C. Hildreth, Bank Commissioner for the State of New

Hampshire, as Liquidator for Noble Trust Company and Aegean Scotia Holdings, LLC v. Gerald Marino, et al.
Docket No. 10-CV-00175

Liquidator: Robert A. Fleury

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6. Peter C. Hildreth, Bank Commissioner for the State of New Hampshire, as Liquidator for Noble Trust Company and Aegean Scotia Holdings, LLC v. James M. Coull
Docket No. 10-CV-0018

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7. Peter C. Hildreth, Bank Commissioner for the State of New Hampshire, as Liquidator for Noble Trust Company and Aegean Scotia Holdings, LLC v. Terence M. Clarke
Docket No. 10-CV-00186

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