SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Scarpulla, J.

Motion Sequence 44

THE BANK OF NEW YORK MELLON'S OPPOSITION TO MOTIONS TO REARGUE

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PRELIMINARY STATEMENT

AIG's reargument motion does not argue that Justice Kapnick "overlooked or misapprehended" any discrete issue. Instead, it argues that she overlooked the entire nine-week evidentiary hearing, including evidence that she cited in her Judgment. AIG would have this Court believe that it demanded a jury to decide a summary judgment motion, and that Justice Kapnick thought when she heard live testimony from 22 witnesses that she was presiding over a nine-week oral argument on a summary judgment motion. Its only evidence for that contention, and its separate claim that the Court applied an incorrect standard of review, is a tortured misreading of the Judgment. AIG's final point is the same one that this Court already rejected in denying AIG's motion to stay entry of the Judgment, that there are supposedly "open issues" that Justice Kapnick forgot about. Each of these issues, however, is expressly governed by the terms of the Settlement Agreement, with which Justice Kapnick found no fault.

The Scott + Scott firm, on behalf of a group that holds well under one percent of the trusts affected by the settlement, and which has its own lawsuit pending against the Trustee in federal court, filed a separate motion that likewise fails to state any grounds for relief under CPLR 2221(d). Rather than point to any "overlooked" issues, this motion retreats to "observations" and speculations that the Judgment may have had the "unintended consequence" of stopping the settlement from taking effect. Nowhere, however, does the motion identify anything the Court overlooked or misapprehended, let alone anything that the Court should do differently on reargument.

Both motions should be denied.

ARGUMENT

A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2).

The decision to grant reargument is entirely within the trial court's discretion. *See, e.g., Univ. Ave. Assoc. LLC v. Andrews Dev. Corp.*, 92 A.D.3d 516, 516 (1st Dep't 2012) (citing CPLR 2221(d); *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1992)).

I. The Motion Fails to Challenge Any of Justice Kapnick's Findings of Fact.

Part I of AIG's motion asserts that Justice Kapnick wrongly granted "summary judgment." AIG appears to argue that Justice Kapnick "overlooked or misapprehended" virtually everything that happened during the nine-week evidentiary hearing, including all the evidence that Justice Kapnick herself summarized in the Judgment. Although summary judgment would have been appropriate on most, and perhaps all, of the issues that were tried, the Judgment expressly makes specific "findings" based on the "voluminous record." It is AIG, not Justice Kapnick, that misapprehends the governing procedure and, as a result, the meaning of the Judgment.

In a passage quoted in the Judgment (at 25), the Commentary on CPLR 409 explains how special proceedings are decided:

> Subdivision (b) of CPLR 409 makes clear that the special proceeding is to be adjudicated in the same manner as a motion for summary judgment. Thus, if the papers fail to raise a triable issue of fact, the court is to grant judgment as a matter of law in favor of the appropriate party. If a triable issue of fact is raised, reference must be made to CPLR 410.

Commentary on CPLR 409 (citations omitted).

As the Commentary says, CPLR 409 requires treating the petition in a special proceeding as a motion for summary judgment. That is why the Trustee's June 29, 2011 petition is designated Motion Sequence 001 (noted in the caption of the Judgment). The Commentary further explains that treating the petition as a motion avoids the need for a separate motion. *See* Commentary on CPLR 409 ("The drafters also contemplated that the summary mode of disposition for special proceedings would eliminate the need for separate pre-hearing motions for

summary judgment"). But CPLR 409, after discussing the "papers" to be filed with the court, then provides that, if appropriate, the Court may make a summary determination "upon the pleadings, papers and admissions" only—it does not contemplate that a court's findings after taking documentary evidence and testimony, as the Court did here, are "summary" in any way.

Thus, just like any other summary judgment motion, "*if* the papers *fail* to raise a triable issue of fact, the court is to grant judgment as a matter of law," and "*[i]f* a triable issue of fact *is* raised," then the court applies CPLR 410. Commentary on CPLR 409(a) (emphasis added). CPLR 410 then provides that:

> If triable issues of fact are raised they shall be tried forthwith and the court shall make a final determination thereon. If issues are triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issues.

That is exactly what happened here. The Court did not decide Motion Sequence 001 "upon the pleadings, papers and admissions" (CPLR 409(b)). Instead, it devoted nine weeks to an "evidentiary hearing"—not an oral argument[1]—at which 22 witnesses testified. Judgment 22.

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[1] Throughout that hearing, the parties repeatedly referred to it as a "bench trial." *See* Tr. 2116 ("I realize this is a bench trial"); 1109 ("I recognize it's a bench trial"); 551 (citing "an inefficient use of time in this bench trial"). *See also* Tr. 24 (Justice Kapnick acknowledging "standard procedure at trial"); 1179 (Justice Kapnick admonishing AIG to "move the trial along"). If there were any doubt that the nine-week hearing was not a summary judgment argument, AIG filed a jury demand shortly before the hearing.

Regardless of whether the proceeding is properly characterized as a "trial" or a "hearing," it was conducted in accordance with the Court's authority to resolve disputed issues. *See Slisz v. Beyer*, 92 A.D.3d 1238, 1241 (4th Dep't 2012) ("The procedures for special proceedings are found in CPLR article 4, which . . . provides for a hearing or a trial on issues of fact (*see* CPLR 409, 410)"); *Buric v. Kelly*, 2008 WL 1923518 (Sup. Ct. N.Y. Cnty. Apr. 15, 2008) ("Under these circumstances, in which conflicting affidavits raise issues of fact as to whether petitioner had an opportunity to object, or to note his objection . . . a hearing should be held, pursuant to CPLR 7804(h), to determine whether petitioner's resignation was obtained by duress."); *Jurnove v. Lawrence*, 38 A.D.3d 895, 896 (2d Dep't 2007) (remitting the matter for an evidentiary "hearing" where a question of fact was presented).

Justice Kapnick made clear that "this hearing was held in accordance with CPLR § 409(a), which allows the Court to 'require the submission of additional proof.'" Judgment 22 n.12.

At the end of that hearing, Justice Kapnick made "a final determination." Her Judgment explains that "[t]he Court thus, throughout this decision, adopts some of the [proposed] *factual findings*, in whole or in part, in the context of discussing particular issues." *Id.* at 13 n.5 (emphasis added); *see also id.* at 22 n.13 ("the findings in this section decide that motion"). It concludes that

> *this Court finds* that, except for the *finding* below regarding the loan modification claim, the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith or outside the bounds of reasonable judgment.

Id. at 52-53 (emphasis added).

Lacking any basis to seek reargument of the Court's findings, AIG first mischaracterizes the Judgment as holding that there were not even disputed issues, and then accuses the Court of overlooking disputed issues. AIG's only reasoning is an unadorned cite to page 25 of the Judgment. Motion 4. It does not explain how Justice Kapnick could have thought that she was granting summary judgment *after* a nine-week evidentiary hearing, or why she would have repeatedly used the term "findings" to describe what AIG insists were summary determinations. As AIG would have it, Justice Kapnick not only overlooked all of the evidence, including evidence that she discussed at length in the Judgment, but she also overlooked the fact that the Court had held an evidentiary hearing at all.

The Court's reference on page 25 to "the summary judgment standard" does not support AIG's fanciful claim. As explained above, in this context, the "summary judgment standard" means that the court treats the petition as a motion for summary judgment. But "[t]he court may require the submission of additional proof" (CPLR 409(a)). And "[i]f a triable issue of fact is

raised, reference must be made to CPLR 410," which provides that disputed issues "shall be tried forthwith and the court shall make a final determination thereon" (CPLR 410). Here, the "hearing was held in accordance with CPLR § 409(a), which allows the Court to 'require the submission of additional proof'" (Judgment 22 n.12); the Court tried issues in dispute (and many that were not) (*id.* at 22); and it "made the appropriate determinations required of it by this Article 77 proceeding" (*id.* at 14 n.5).

Ironically, on almost every point, AIG cites only to the Judgment as proof of the existence of a disputed issue of fact.[2] Nonetheless, it insists that the Court "overlooked" the very disputes that it admits were "recited" by the Court. That position is self-contradictory, and the Court should deny the motion for reargument because it identifies no issue that Justice Kapnick "overlooked or misapprehended."

II. Justice Kapnick Did Not Apply an Incorrect Standard of Review.

AIG next argues that Justice Kapnick erred in not modifying the "standard of review" after making her finding on loan modifications and by supposedly shifting the burden to the Objectors to present evidence that the Trustee acted in bad faith or abused its discretion. Neither contention is correct.

A. Justice Kapnick Did Not Overlook or Misapprehend the Standard of Review.

As this Court noted, "[a]ll the Court does in an Article 77 proceeding is look at the settlement and see if there was an abuse of discretion." 2/19/2014 Hr'g Tr. 30:26-31:3. It is well-

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[2] *See, e.g.*, Motion 8 (the Court "repeated the parties' arguments") (citing Judgment 29-30); *id.* at 12 ("The Order cites the parties' arguments") (citing Judgment 18, 37); *id.* at 15 (describing "[t]he Order's recitation of these arguments"); *id.* at 16 (citing "the Order's recitation of some disputed facts"); *id.* at 16 ("the Order recited some of the parties' competing arguments"); *id.* at 18 ("The Order also recites the parties' arguments concerning the documentation and servicing claims"); *id.* at 19 ("the Court recited the parties' arguments and evidence").

established both that a "trustee has discretion whether to sue or compromise claims" of the trust (*Restatement (Second) of Trusts* § 192 cmt. a (1959)) and that "[w]here a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith." *Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010). Justice Kapnick agreed (Judgment 25 (adopting paragraphs (f) and (g) of the proposed order)).

The two cases that AIG cites on page 13 do not supersede that rule or even apply to contractual trustees. They are limited to specific types of claims that cannot be settled without court approval: derivative cases under Federal Civil Rule 23.1[3] (*Goldsholl v. Shapiro*) and claims by bankruptcy estates under Federal Bankruptcy Rule 9019[4] (*Geltzer v. Andersen Worldwide, S.C.*). Here, the Trustee's authority to settle derives from the trusts' formative documents and New York trust law, not a rule of procedure. AIG's suggestion that these cases apply whenever a settlement "seeks to bind parties that were unrepresented during settlement negotiations" (Motion 13) glosses over that critical distinction and is inapposite anyway, because the claims released in the Settlement Agreement belong not to any individual holder but exclusively to the Trustee.

AIG also argues that because the Court found that the Trustee did not act reasonably with respect to its evaluation of the loan modification claims, it should have applied some other, undefined standard to the Trustee's evaluation of the other released claims. That overlooks

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[3] *See* FED. R. CIV. P. 23.1(c) ("A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval.").

[4] *See* FED. R. BANKR. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."); *id.* 9019(b) ("After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.").

Justice Kapnick's specific findings regarding the other claims, is inappropriate for reargument because it was not raised before, and misstates the legal standard governing judicial review of trustee actions.

1. The Judgment Makes Clear Why the Loan Modification Decision Was Limited to the Loan Modification Claim.

AIG's motion depends on the new argument that a trustee's failure to exercise sufficient care in one aspect of a complex decision raises a presumption that the trustee failed to evaluate every other aspect of that decision. Even if there were some authority for that proposition, Justice Kapnick explained why she treated the loan-modification claims differently from the servicing and loan-repurchase claims. She wrote that "as the Trustee did with the 'materially and adversely affects' language [that applies to loan-repurchase claims], it could have retained an expert to opine on the interpretation of the various provisions of the PSAs that address the repurchase of modified loans." Judgment 52. By contrast, the Court noted that the Trustee did retain experts on the "material and adverse effect" clause (*id.* at 43), the value of the repurchase claims (*id.* at 36-37), the servicing improvements (*id.* at 47), the value of Countrywide (*id.* at 35), and successor liability claims against Bank of America (*id.* at 35-36).

While the Trustee respectfully disagrees with the Court's conclusion that the Trustee did not adequately evaluate the loan modification claims, it is clear from the Judgment why Justice Kapnick concluded that any failure with respect to loan modifications "did not infect the entire settlement." Motion 22-23. Thus, she did not overlook or misapprehend anything, which is the only relevant standard on this motion for reargument.

2. AIG Never Raised Its "Cross-Contamination" Theory Before the Judgment, But In Any Event, AIG Conflates the Duties of Loyalty and Care.

Justice Kapnick did not have the opportunity to address AIG's new theory more explicitly, because it was never raised before this motion. Neither AIG nor the other Objectors

suggested that a failure to evaluate one claim adequately could change the standard of review applied to the Trustee's evaluation of other claims. "Reargument is not designed to afford the unsuccessful party successive opportunities . . . to present arguments different from those originally asserted." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992). That is reason alone to deny the motion.

Even if AIG had raised this objection before, it would have failed. The cases that AIG does cite hold that a heightened standard of review applies where a trustee acts in *bad faith*. AIG cites no case where a Trustee was held to a heightened standard on every aspect of its decision merely because the court found it acted with a failure of *care* on one point. No case, and no principle of law, supports AIG's "infection" theory. Such a rule would paralyze trustees, forcing them to spend uneconomic amounts of money to "expertize" every decision—no matter how small—to ensure that decisions on other matters, however unrelated, would be upheld. Equally important, none of the cases AIG cites holds that a court is powerless to make specific findings, as Justice Kapnick did, approving a trustee's conduct in one respect while declining to do so in another.

New York State Teamsters Council v. Estate of DePerno (cited in Motion at 23) does not apply, as AIG says it does, to just any "abuse of discretion." *DePerno* required the trustee to justify its actions because it had a conflict of interest (a finding that Justice Kapnick *never* made here): "Trustee DePerno hired the cooks to do maintenance work at the Fund building in order to ensure the cooks' continued employment at Attorney DePerno's Inn, for the benefit of the DePernos and perhaps the cooks but not the Fund." 18 F.3d 179, 181 (2d Cir. 1994). *Nedd v. United Mine Workers*, cited by *DePerno*, also involved a conflict of interest, not a lack of care: "the Union, by continuing to dominate the Fund in violation of § 302(c)(5), placed itself

in a position of inherent conflict between its fiduciary obligation to the Fund beneficiaries and its duties toward the working miners." 556 F.2d 190, 210 (3d Cir. 1977). And *In re Jaeck's Will* (cited in Motion at 22) was concerned with a person who "placed herself in the position of a trustee" and was "also the beneficiary for whom the invasion has been made." 42 N.Y.S.2d 514, 519 (Sur. Ct. Nassau Cnty. 1943).[5] All of these cases involve fiduciaries who had a conflict of interest and so could not be trusted to exercise discretion properly. Here, by contrast, Justice Kapnick considered—and then *rejected*—AIG's claims that the Trustee was conflicted. She did not find that the Trustee was conflicted or acted in bad faith in any respect, including with respect to its evaluation of the loan modification claims. Judgment 52-53 ("After reviewing the voluminous record and carefully considering the arguments presented by all counsel, this Court finds that, except for the finding below regarding the loan modification claims, the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith or outside the bounds of reasonable judgment . . . With respect to the loan modification claims . . . the Court finds that the Trustee acted 'unreasonably or beyond the bounds of reasonable judgment,' (citing Judgment 25) in exercising its power to settle the loan modification claims without investigating their potential worth or strength." (citing Hr'g Tr. 2684:10-19, July 19, 2013 (parenthetical omitted)).

The best AIG can offer is a *discovery* ruling in which the Court held that the Objectors had stated a "colorable claim of conflict" in certain limited respects (while also holding that they had failed to meet even that standard on their numerous other conflict theories). Motion 20. But

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[5] *See also* George G. Bogert, et al., THE LAW OF TRUSTS AND TRUSTEES § 543, at 228 (rev. 2d ed. 1993) ("equity deems it better to . . . strike down all *disloyal* acts") (quoted in Motion 21) (emphasis added); *Meinhard v. Salmon*, 249 N.Y. 458, 466-67 (1928) (summarized at Motion 21 as holding that "once a *self-interested conflict* is demonstrated courts apply an irrebuttable presumption that conflict infected the trustee's decision-making"; "the standard of *loyalty* for those in trust relations is without the fixed divisions of a graduated scale") (emphasis added).

in arguing for additional discovery, the Objectors themselves set the bar low, urging that Justice Kapnick was not permitted to consider whether the allegations were true. *See, e.g.*, 4/12/2013 Hr'g Tr. 23:2-19 (Loeser) ("a colorable claim is a relatively easy one to make. It's simply one that would survive a motion to dismiss. It is, essentially, a notice pleading standard . . . . All of those cases uniformly say a colorable claim means one that survives a motion to dismiss. None of them say, which the trustee is saying, a colorable claim is one where you have proven there is a conflict."). The Court agreed, and reserved judgment on the conflict theories for the evidentiary hearing. Then, based on the testimony of the 22 witnesses at the hearing and the review of hundreds of hearing exhibits, Justice Kapnick rejected every single one of the Objectors' conflict theories.

B. Justice Kapnick Did Not Improperly Shift the Burden of Proof.

AIG also argues that Justice Kapnick improperly placed the burden of proof on them, rather than on the Trustee. Motion 21-23. In doing so, they again mischaracterize the Judgment and misstate the law.

AIG relies on two sentences in the Judgment, which AIG describes as "requiring Respondents to show that the Trustee abused its discretion instead of requiring Petitioners to prove that the Trustee's actions were permissible." Motion 21-22. But here is what Justice Kapnick actually said:

> The Respondents principally contend that the Trustee abused its discretion by acting in bad faith (self-interested), outside its discretion and unreasonably.
>
> Accordingly, the Court must determine whether there was any such abuse of discretion which would warrant judicial interference with the Trustee's decision to enter into the Settlement.

Judgment 25. All that the quoted language does is summarize AIG's position and then state, correctly, that the Court needed to "determine" whether there was an abuse of discretion sufficient to "interfere" with the Trustee's decision.

When Justice Kapnick actually did address the burden of proof—in a section titled "Burden of Proof"—she said that she was applying the summary judgment standard (Judgment 25), which, as AIG notes, puts the burden on the movant (here, the Trustee). In the next section (*id.* at 26-51), Justice Kapnick wrote that

> It is clear that to decide whether the Trustee abused its discretion, the Court must consider the Trustee's conduct in exercising its power and whether its discretionary power was exercised with "absolute singleness of purpose."

Id. at 26; *see also* Tr. 5180:6-8 (to Trustee's counsel: "I think you have the burden -- not I think, you do have the burden of proof."). The Court went on to cite the substantial evidence offered by the Trustee in support of its position that the settlement "was not an abuse of its discretion." Judgment 26. That included "the testimony of several witnesses who testified that the Trustee entered into the Settlement because it believed it was in the best interest of the Certificateholders" (*id.*) and evidence that "the Trustee was prepared for litigation [against Bank of America and Countrywide], but decided that the litigation alternative was not reasonable in light of the results that were achieved in the Settlement" (*id.* at 27). The Court then found that "[i]t is also clear that the Trustee placed considerable weight on the fact that the Settlement was supported by twenty-two (22) institutional investors, including arms of the federal government, prominent investment managers acting as fiduciaries for their clients, and institutions managing their own money." *Id.* Justice Kapnick then spent the next six-plus pages describing the competing evidence on each of the conflict theories offered by the Objectors to rebut the Trustee's proof of good faith and then rejecting those theories. *See, e.g.*, Judgment 32 ("this court previously found in its Decision/Order dated May 20, 2013 (NYSCEF No. 825) (motion

sequence no. 031) that the December Indemnity Agreement did not raise a 'colorable claim of conflict or self-dealing' (*id.* at 16 n.3), and since issuing that Decision/Order the Court has not been persuaded otherwise.").

No fair reader could believe that Justice Kapnick did anything remotely like what AIG suggests. She did not place the burden on the Objectors, she placed it on the Trustee. She certainly did not find that the Trustee had presented no evidence on good faith; to the contrary, she required the Trustee to put on proof and then ruled it had done so based on a "voluminous record." Finally, in no way does the Judgment suggest that the evidence was in equipoise, such that the burden of proof would have affected the outcome.

In any event, even if the Court had relied on a presumption of good faith and expected the Objectors to present evidence to the contrary, it would have been amply justified in doing so. Trustees, like corporate directors, "are *presumed* to have acted properly and in good faith, and are called to account for their actions only when they are *shown* to have engaged in self-dealing or fraud, or to have acted in bad faith." *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702 (2d Cir. 1980) (emphasis added) (addressing corporate boards). The cases that AIG cites confirm that presumption, holding, for example, that "*after* the [beneficiaries] sustained *their burden* of showing the defendants' violation of their fiduciary duty . . . , the burden should have *shifted* to the [trustees]." *DePerno*, 18 F.3d at 180 (emphasis added); *see also* Motion 21 (describing *Meinhard*, 249 N.Y. at 466-67 as holding that "*once a self-interested conflict is demonstrated* courts apply an irrebuttable presumption that conflict infected the trustee's decision-making") (emphasis added).

AIG, citing *Bogert's Trusts and Trustees*, argues that "[i]t is black-letter law that the settlement proponents bear the burden of proving that a trustee acted reasonably, complied with

its duties, and is entitled to any requested findings." Motion 22. *Bogert* relies, in turn, on two cases, one of which says precisely the opposite: "Where a trustee has power to sell when it is 'necessary and profitable', and he makes a contract of sale, *it is presumed that he has properly exercised his discretion*, and if the purchaser wishes to avoid performance he must prove that the sale was not necessary and profitable." *Bogert* § 560 n.65 (emphasis added) (citing *Keyser v. Powell*, 294 S.W.2d 932 (Ky. 1956)).[6] The other case, *Jaeck's Will*, held that an accountant acting without authorization as a trustee had to justify distributions, because she made the distributions to herself. The court made clear that had the trustees made that decision, they would have faced no such burden:

> The main difficulty presented by this objection arises by reason of the fact that the trustees appointed did not qualify or act. Had *they* done so, and had the invasions of principal occurred as a result of the exercise of *their* discretion, there would be little difficulty presented because of the discretion reposed in them by the testator which would leave the court in the position where it could or should not interfere so long as the trustees in making their determination exercised a sound discretion. However the executrix-accountant has placed herself in the position of a trustee; and *she being also the beneficiary for whom the invasion has been made*, the burden rests upon her as the court clearly pointed out at the hearings, to justify her invasion of the principal.

42 N.Y.S.2d at 519 (emphasis added) (cited in *Bogert* § 560 n.64).

Nothing in the Judgment suggests that Justice Kapnick actually did place the burden of proof on the Objectors. On the good-faith point that AIG highlights, she specifically cited evidence that would have met any burden that the Trustee had, and she told the Trustee's counsel that "you do have the burden of proof" (Tr. 5180:7-8) on the Petition generally. In short,

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[6] See also *Keyser* itself, which clearly put the burden on the non-trustee party: "No one has said that the sale in question was not to the best interest of testator's estate, or that this sale was not 'necessary or profitable,' therefore it must be presumed the trustees have used their best judgment as to whether it was necessary or profitable." 294 S.W.2d at 934.

although the Court never did so, as a matter of law it would have been entitled to rely on the good faith presumption and shift the burden to the Objectors to prove otherwise.

C. Justice Kapnick's Judgment Amply Satisfies Any Requirement to Explicate Her Reasoning.

AIG argues that Justice Kapnick's 54-page Judgment is "arbitrary" and not "reasoned," because it "omits any analysis or explanation." Motion 23. This prong of the motion merely quibbles with the drafting of the Judgment, not its ultimate conclusion, and it again fails to identify anything that Justice Kapnick overlooked or misapprehended. If AIG finds the Judgment to be unpersuasive, it has its appellate rights. But there is nothing that the trial court can do about it especially since the judge that heard all of the evidence and made all of the findings is no longer available.

Nor is there any requirement that a trial court explicate its reasoning or findings of fact in any more detail than Justice Kapnick did. *Gina P. v. Stephen S.* (cited in Motion at 23) does not set out any general rule governing judicial decisions. It held only that, under the Child Support Standards Act, a court that "determines not to apply the statutory [child support] percentage to the parties' income exceeding $80,000, . . . is required to articulate the basis for its deviation." 33 A.D.3d 412, 414 (1st Dep't 2006). That requirement came from the statute, which was designed to enforce a presumptive child support calculation and ensure that deviations are limited to extraordinary cases.[7] In any event, the appellate court did not reverse because the deviation was unexplained, it reversed because "a review of the record shows that . . . the award . . . was much

[7] *See* Family Court Act § 413(1)(g) (if the court does not follow the statutory presumption, "the court shall set forth, in a written order, the factors it considered . . . and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel"); *cf. id.* § 413(c)(vi)(B) ("the court shall: . . . (B) set forth in the order the factors it considered, . . . the reason or reasons the court did not order such [statutory] amount, and the basis for the amount awarded").

too high." *Id.* at 415. Similarly, *Nadle v. L.O. Realty Corp.* (cited in Motion at 23), after expressing its disapproval of a court's having ruled "without providing *any indication* of the reasoning supporting its decision," reversed on the merits. 286 A.D.2d 130, 131 (1st Dep't 2001) (emphasis added).

Last, AIG cites *Weckstein v. Breitbart*, 111 A.D.2d 6 (1st Dep't 1985). There, the trial court had "s[aid] only that plaintiff wholly failed to prove [its] case" (*id.* at 7), a far cry from Justice Kapnick's 54-page Judgment. The Judgment here, moreover, referred throughout to the 22 proposed findings and conclusions in the Proposed Final Order and Judgment and stated exactly which ones the Court made and did not make (and even subdivided certain findings with respect to loan modification and other claims). The Judgment, therefore, easily satisfies CPLR 4213's requirement "that the court set forth those ultimate or essential facts on which it relies to reach its decision." *Id.* Neither *Weckstein* nor any other authority requires the Court to provide some undefined level of "analysis" behind each finding.

The issue that AIG finds "particularly troubling" is "why the Trustee's abandonment of its duties and obligations [with respect to loan modifications] did not infect the entire settlement." Motion 24. It is rather audacious of AIG to criticize Justice Kapnick for failing to respond in detail to an argument that AIG never raised before. Nonetheless, as shown in part I.A.1. above, Justice Kapnick's decision did explain why she treated the loan modification claims differently from the other released claims.

Finally, reargument is entirely discretionary. The departure of the judge who sat through 36 days of evidence is by itself a compelling reason for this Court to exercise its discretion not to grant reargument to further explicate that judge's reasoning. Short of retrying the case, there is no practical way that this Court could fill in any gaps in Justice Kapnick's analysis.

III. Justice Kapnick's Judgment Addressed All Outstanding Issues.

A. AIG Points to Issues That Are Governed by the Settlement Agreement, Not Left Open.

Repeating the same issues that it raised in motion sequence 43 (to avoid entry of judgment), AIG argues that the Judgment leaves "open issues." Each of these issues, however, is addressed expressly by the Settlement Agreement, and each of AIG's objections to those provisions was either litigated and rejected by Justice Kapnick or has been waived by AIG's failure to raise it in a timely manner. As to the issues raised on pages 24-25 of the Motion:

- "the method by which losses will be calculated" is set out in paragraph 3(c) of the Settlement Agreement ("Allocation Formula"), which provides that the Trustee will identify an expert to tabulate past losses and project future losses. The Trustee identified the expert, National Economic Research Associates (NERA), which was deposed by AIG's counsel and called by AIG at the hearing. A statement of the method that NERA plans to use was attached as Exhibit E to the Verified Petition.

- "the amount of money that will be distributed to each trust" will be determined by applying the Allocation Formula in paragraph 3(c), using the calculations performed by NERA. Paragraph 3(c)(iv) provides that "[t]he Expert shall calculate the Allocable Share within ninety (90) days of the Approval Date" (*i.e.*, the date on which all appeals are exhausted).

- "the number of trusts that will be excluded from the settlement," if any, is governed by paragraph 3(d)(iv), which states that "Bank of America and Countrywide shall, up to the Approval Date, have the option to exclude" certain kinds of trusts that are described in that subparagraph.

- "the amount of money that will be retained by Bank of America," if any, is governed by paragraph 4(a), which provides that the Allocable Share for any Excluded Covered Trust will be retained, and any such trust's claims will not be released. The exact dollar amount depends on the number of exclusions and the calculation of Allocable Shares, as described above.

- "the method and amount of distributions within each trust"[8]: the *method* of intra-trust distributions is described in painstaking detail in paragraphs 3(d)(i),

[8] Paragraph 3 of the Settlement Agreement distinguishes "allocation"—the division of the $8.5 billion payment among the 530 trusts—from "distribution"—the distribution of each trust's share among its investors.

(ii), and (iii), and it is a mystery how AIG could believe this issue to be "open" in any respect. The *amount* to be distributed within each trust is the trust's Allocable Share, as described above.

- "the relationship between the amount each trust will be paid and the amount of damage suffered by each trust as a consequence of the claims being released" is simply AIG's allusion to the fact that the claims have not been fully litigated, with each trust receiving a money judgment in a specific amount. Of course they have not been litigated. The Trustee settled instead, and Justice Kapnick found that the decision to settle was reasonable, in part because it avoided protracted litigation.

AIG may have had substantive objections to some of these provisions, but they are all part of the Settlement Agreement, and Justice Kapnick found no fault in any of those terms. Whether the Judgment satisfied the conditions for the settlement to take effect (Motion 25) has nothing to do with whether these issues remain "outstanding." If, after all appeals are exhausted, the settlement agreement becomes effective, then it will be implemented as it says; if it does not become effective, then there will be nothing to implement.

It might be the case that AIG is asking the Court to consider these issues, *not* in the manner dictated by the actual Settlement Agreement, but insofar as they apply to a hypothetical amended settlement that does not release loan modification claims. That request runs afoul of two points correctly made in Scott + Scott's separate motion for reargument (motion sequence 44)—while the Court made findings about the Settlement Agreement, it lacked authority (and did not purport) to amend the Settlement Agreement; and the Court also lacked authority to opine on a hypothetical alternative settlement, which the parties had not agreed to, that excludes loan modification claims. *See State v. Philip Morris, Inc*., 179 Misc. 2d 435, 439-40 (Sup. Ct. N.Y. Cnty. 1998), *aff'd*, 236 A.D.2d 400 (1st Dep't 1999) ("The amici curiae… imply that the court can change the terms of the settlement. Many of the … goals that they lament the settlement has not achieved, as laudable as they are, cannot be inserted by the court. After all, this is a consent settlement and decree that the parties are presenting, and any change in their terms would permit

one or another of the parties to withdraw . . . . Quite the contrary, the court is confronted with a take-it-or-leave-it proposition. I must decide to approve or reject what the parties have placed before the court.")*; Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (courts cannot "delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety.") (internal quotation omitted).

B. The Scott + Scott Motion Does Not Even Ask for Reargument.

A separate motion for reargument was filed by the Scott + Scott firm on behalf of a group of investors holding well under one percent of the outstanding Certificates. Though styled a motion for reargument, the motion identifies no issue that Justice Kapnick overlooked or misapprehended, and it is not even clear what relief it seeks. Instead, the motion is a series of observations about the effect of the Judgment on the Settlement Agreement,[9] and it concludes that "the unintended consequence of the Court's entry of judgment will be that there is ***no*** Settlement." Scott + Scott Motion 4 (emphasis in original).

Given that, Scott + Scott has been arguing throughout this proceeding that there should be "***no*** Settlement," it is perverse that it seeks "re-argument" of a Judgment it claims accomplished that end. It is hard, therefore, to see what purpose Scott & Scott believes reargument would serve. It identifies neither an error in the Judgment nor anything that this Court could do to correct any error. In particular, although the finding on loan modifications is the only one that they discuss, they do not ask the Court to upset that finding. Accordingly, the Scott + Scott motion should be denied.

[9] Part B of that motion ("This Court Should Not Enter a Judgment Which Does Not Determine the Rights of the Parties") was rendered moot by this Court's entry of the Judgment on February 21, 2014.

CONCLUSION

For all of these reasons, the Court should deny the motions.

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Respectfully submitted,

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