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), *et al.*

Petitioners,

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

Index No. 651786/2011

Assigned to: Kapnick, J.

Motion Sequence No. 35

JOINT OPPOSITION TO MOTION TO STRIKE JURY DEMAND

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INTRODUCTION

The memorandum of BNYM and the Inside Institutional Investors (collectively BNYM) (Doc. No. 760), seeking to strike the jury demand, ignores the key New York rule and refutes imaginary arguments. The jury trial argument is straightforward: CPLR § 410 allows for a jury trial in special proceedings on all "issues" triable of right by jury, and this special proceeding qualifies because BNYM seeks not just prospective guidance but to eliminate *legal* claims that would be jury-triable as a matter of constitutional right. *See* Doc. No. 704.

ARGUMENT

I. The Constitutional Right to a Jury Trial Exists in Special Proceedings Where the "Equitable" or "Declaratory" Relief Sought by Petitioners Involves Eliminating Respondents' *Legal* Claims

BNYM's major premise is that there is no right to a jury because this is an "equitable proceeding." Doc. No. 760 at 1-4, 5-7. The premise fails because jury trial rights turn not on the form of proceeding but on the nature of the underlying issues being tried. That is precisely why CPLR § 410 (inexplicably ignored in the BNYM memorandum) expressly allows parties in Article 77 and other special proceedings to demand jury trials on all jury-triable "issues."

Constitutional rights to jury trials do not turn on the overall form of the action, where (as here) the claim "in equity" seeks to preempt adversaries' legal claims. Thus, for example, the New York Court of Appeals held that a respondent had a right to jury trial in a claim for "accounting" filed in surrogate's court. *Matter of Garfield*, 14 N.Y.2d 251 (1964). Just like CPLR § 410 does here, "the Surrogate Court's Act [made] it clear that the Legislature did not intend to deprive [respondent] of that right." 14 N.Y.2d at 258-59. The Court added, however: "Nor could the Legislature deprive a party who would have had a right to jury trial at common law of such right by authorizing a court of equity to take jurisdiction." *Id*. at 258.

The same principle applies where a declaratory judgment claim—which this proceeding essentially is, *see* Restatement (Third) of Trusts § 71, cmt. a (2007)—seeks to preempt legal claims. Courts evaluating respondents' jury trial rights in that context "apply[] a kind of next-nearest-context rule, asking, in effect, what kind of action would most likely have been used to present this claim had the declaratory judgment action not been created[.]" David D. Siegel, *N.Y. Prac.* § 439 (5th ed.) (discussing *Indep. Church v. Bd. of Assessors of Nassau Cnty.*, 72 A.D.2d 554 (2d Dep't 1979)); *see also* Doc. No. 704 at 3-4 (citing numerous other cases holding that declaratory judgment action cannot preempt jury trial rights on respondents' legal claims). Here, as explained in the memorandum in support, the kinds of claims that could be brought against BNYM for its settlement conduct include breach of contract, breach of fiduciary duty, and negligence.

BNYM merely repeats its mantra that this is an "equitable proceeding" seeking "a traditional equitable remedy." Doc. No. 760 at 1-4 (citing *In re Scarborough Props. Corp.*, 25 N.Y.2d 553 (1969); *In re Lipin*, 9 Misc. 2d 708 (Sup. Ct. N.Y. Cnty. 1957), *aff'd*, 6 A.D.2d 1011 (1st Dep't 1958)). Under the cases it cites, a party's choice to seek equitable relief eliminates *that party's* jury trial rights and, where the relief would not preempt an opponent's right to bring a legal claim, neither side is entitled to a jury trial. Doc. No. 760 at 2 n.1. But none of those cases undercuts the point that a "plaintiff cannot, by artful pleading, deprive a defendant of his constitutionally guaranteed right to a jury trial by limiting his demand for relief to a declaration of his rights" or by "making a purely equitable demand for relief upon facts constituting a legal cause." *Gordon v. Cont'l Cas. Co.*, 91 A.D.2d 987, 987 (2d Dep't 1983).

II. BNYM Seeks to Eliminate Certificateholders' *Legal* Claims That Otherwise Would Be Tried of Right to Juries

Tellingly, BNYM does not dispute the contention made by Intervenors (*see* Doc. No. 704 at 7-14) that legal claims against the Trustee for money damages for its breaches and negligence would be jury triable. Nor does BNYM dispute that this Article 77 proceeding seeks to eliminate those legal claims, and it concedes the case involves disputed issues of fact. *See* Doc. No. 750 at 23-25. But it asks this Court to deny a jury trial by ruling that "no Objector has any presently existing claim" for damages against BNYM. Doc. No. 760 at 9 (emphasis in original). On this basis alone, BNYM would distinguish New York cases honoring respondents' jury trial rights where petitioners file declaratory and equitable actions seeking to eliminate legal claims. *Id*. at 9-10.

Critically, BNYM seeks not just "prospective approval of a proposed action" (*id*. at 8) but *retroactive* endorsement of consummated actions. BNYM twice urges that a trustee "'need not act first and discover later whether his act was in breach of trust.'" *Id*. at 2, 8 n.6 (quoting *Scott on Trusts*). That point might be apt had the Trustee sought judicial instructions before engaging in conflicted actions, which is what the trustees did in the Article 77 cases it cites: the *Scarborough* trustee sought approval to purchase property, while the *Lipin* trustee sought to be relieved of his duties. BNYM, in contrast, chose to "act first" in a series of actions, including seeking to prevent an Event of Default (which would have triggered higher duties) to receive a benefit for itself without informing all certificateholders. BNYM now asks this Court to bless its past actions while eliminating "any claims arising from or in connection with the Trustee's entry into the Settlement, including but not limited to" various acts (including presumably its active attempt to prevent an Event of Default) leading up thereto. *See* Doc. No. 7 (PFOJ) ¶ p.

That BNYM seeks judicial immunity for its past actions, rather than simply prospective guidance, defeats its argument that there is no right to jury in "settlement approval" proceedings. Doc. No. 760 at 4 (citing *In re Estate of Palma*, 17 A.D.3d 817, 818 (3d Dep't 2005), which suggested but did not finally decide that a jury trial would not be available in surrogate's court where the executors simply sought judicial "advice or approval" of the proposed settlement). BNYM also analogizes to "class action" settlements "extinguish[ing] the rights of class members against at least one of the settling parties." *Id*. at 5. The analogy is flawed because there are procedural safeguards in the class context, including class members' ability to "opt out," which are denied to objectors here. In any event, BNYM actually proves the point, as it would be unconstitutional to extinguish damages claims of individual class members who were denied "opt out" rights. *See In re Colt Indus. Shareholder Litig.*, 77 N.Y.2d 185, 197-99 (1991).

BNYM's entire argument therefore comes down to its contention that "no Objector has any presently existing claim" because if objections are sustained the settlement "will not be consummated and no damage will (or even could) occur." Doc. No. 760 at 9-10 (emphasis in original). This argument is entirely circular. If, as BNYM hopes, the PFOJ findings are entered and the settlement is approved, legal claims against the Trustee arising from its settlement conduct (such as for breach of contract, breach of fiduciary duty, and negligence) and for which there is a constitutional right to a jury would likely be eliminated. For this reason, a jury must decide all factual issues in this special proceeding that are "triable of right by jury." CPLR § 410. BNYM's contention is also belied by existing lawsuits against BNYM for its conduct during negotiations of the proposed settlement at issue here. Federal courts, denying BNYM's motions to dismiss, have held that challenges to BNYM's settlement conduct—involving the Event of Default in particular—state valid legal claims for damages. *Sterling Fed. Bank, F.S.B.*

v. Countrywide Fin. Corp., No. 11-cv-2012, 2012 WL 2368821, at *16-20 (N.D. Ill. June 21, 2012); *accord Bankers Ins. Co. v. Countrywide Fin. Corp.*, No. 8:11-CV-1630-T-17, 2012 WL 2594341, at *10 (M.D. Fla. July 5, 2012). Tellingly, though those plaintiffs thereafter dismissed their complaints voluntarily (with no effect on other certificateholders), each complaint demanded trial by jury.

The existence of valid legal claims against BNYM for its conduct leading up to the proposed settlement does not, as BNYM would have it, turn entirely on the Court's ultimate approval or denial of the settlement. Rather, "[i]t is the breach and not the time of complaining of it which gives the damage." *Everson v. Powers*, 89 N.Y. 527, 529 (1882). At the very least, upon such breach, "the right to nominal damages exists at once to vindicate the right, and suit may be brought." *Id.* (internal quotations omitted); *see also* 36 N.Y. Jur. 2d Damages §§ 6, 7. More importantly, as the federal courts in *Sterling* and *Bankers* recognized, certificateholders have legally cognizable current claims for actual damages resulting from BNYM's conflicted conduct and past actions.

Thus, contrary to its latest suggestion, BNYM is asking this Court to wipe out "presently existing" damages claims against it for its settlement conduct. Because those legal claims plainly would be triable to a jury, which would decide key factual disputes regarding BNYM's actions and intent, those factual disputes must be resolved by a jury before BNYM is relieved of liability for past actions.

III. BNYM's *Ad Hominem* Attacks Are Unfounded

BNYM, lacking any legal basis for denying a jury trial, is reduced to *ad hominem* attacks denigrating the undersigned's motives and re-writing the arguments. It accuses the undersigned

of making a "frivolous" jury demand in a "thinly veiled attempt[] to interfere with and delay a prompt resolution of this matter." Doc. No. 760 at 1. These attacks are unfounded.

The jury demand indisputably was timely. It was made the same day objections were due pursuant to the Court's Amended Scheduling Order and when all parties were ordered to serve notice of their intent to present evidence and testimony at trial. Further, the applicable rule simply requires, in the absence of a specified time, that the demand be made, as it was here, "before trial begins." *See* CPLR § 410.

The jury demand was not intended to (nor need it) delay resolution of this matter. Other circumstances, including motions and discovery disputes, will dictate when trial should begin. And on that day, counsel will "be ready to proceed either to select a jury or to begin presentation of proof on the scheduled trial date." *See* N.Y. Ct. Rules § 202.70, R. 25.

What will delay ultimate resolution of this matter is denial of the constitutional right to trial by jury. Precisely because the undersigned wanted this case to be tried correctly—with a proper division between the factual issues resolved by a jury and the legal issues resolved by this Court—the memorandum in support of the jury demand discussed that division of responsibilities by "*Cf.*" citations to two New York cases involving jury fact finding in nominally equitable contexts. *See* Doc. No. 704 at 6-7 (discussing *Piacentino v. Quinn*, 12 Misc. 3d 1057 (N.Y. Sup. Ct. Oneida Cnty. 2006); *In re Application of Schapira*, 824 N.Y.S.2d 770 (Table), 2006 WL 2353194 (N.Y. Sup. Ct. Bronx Cnty. Feb. 27, 2006)). The brief did not argue, as BNYM suggests, in refuting its own straw man, that all factual issues in equitable proceedings require a jury trial (Doc. No. 704 at 6-7). To reiterate: the undersigned are entitled to a jury trial because BNYM seeks to eliminate the right to bring legal claims that indisputably would be triable of right to a jury.

As the Court has heard many times now, this is an unusual proceeding. It is not a routine Article 77 proceeding involving straightforward application of trust law and equitable principles. There is no precedent for what Bank of America, the Inside Institutional Investors, and the Trustee are attempting to do here—but there are important rights that should not be disregarded in the settlement proponents' haste to push this settlement through. The right to a jury is one of those rights.

CONCLUSION

The Court should deny BNYM's motion to strike the jury demand.

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REILLY POZNER LLP

By: *s/ Michael A. Rollin*
Daniel Reilly
Michael Rollin
1900 Sixteenth St., Ste. 1700
Denver, Colorado 80202
Telephone: (303) 893-6100
Fax: (303) 893-1500
dreilly@rplaw.com
mrollin@rplaw.com

Attorneys for AIG Entities

MILLER & WRUBEL P.C.

By: *s/ John G. Moon*
John G. Moon
Claire L. Huene
570 Lexington Avenue
New York, New York 10022
Telephone: (212) 336-3500
Fax: (212) 336-3555
jmoon@mw-law.com
chuene@mw-law.com

Attorneys for the Triaxx Entities

KELLER ROHRBACK LLP

By: *s/ Derek W. Loeser*
Derek W. Loeser
David J. Ko
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Fax: (206) 623-3384
dloeser@kellerrohrback.com
dko@kellerrohrback.com

Gary A. Gotto
3101 North Central Avenue
Phoenix, Arizona 85012
Telephone: (602) 248-0088
Fax: (602) 248-2822
ggotto@krplc.com

Attorneys for Federal Home Loan Banks of Boston, Chicago, and Indianapolis

SHAPIRO FORMAN ALLEN & SAVA LLP

By: *s/ Michael I. Allen*
Michael I. Allen
Yoram Miller
380 Madison Avenue, 25th Floor
New York, NY 10017
Phone: 212-972-4900

Attorneys for Ballantyne Re plc

FEDERMAN & SHERWOOD

By: *s/ William B. Federman*
William B. Federman
10205 North Pennsylvania Ave.
Oklahoma City, OK 73120
Telephone: (405) 235-1560
Facsimile: (405) 239-2112
wbf@federmanlaw.com

Attorneys for American Fidelity Assurance Company

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: *s/ Thomas B. Hatch*
Thomas B. Hatch (*admitted pro hac vice*)
Bruce D. Manning (*admitted pro hac vice*)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Tel: (612) 349-8500
Fax: (612) 339-4181

Counsel of Federal Home Loan Bank of Pittsburgh

WOLLMUTH MAHER & DEUTSCH LLP

By: *s/ David H. Wollmuth*
David H. Wollmuth
Steven S. Fitzgerald
500 Fifth Avenue
New York, New York 10110
Tel: (212) 382-3300
Fax: (212) 382-0500

Attorneys for The Western and Southern Life Insurance Company, Western-Southern Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, National Integrity Life Insurance Company, and Fort Washington Investment Advisors, Inc.