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

Kapnick, J.

Motion Sequence No. 24

THE BANK OF NEW YORK MELLON'S RESPONSE TO THE AMICUS MEMORANDUM OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK REGARDING THE STANDARD OF REVIEW AND SCOPE OF DISCOVERY

DECHERT LLP
Hector Gonzalez
James M. McGuire
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Jason H. P. Kravitt
Matthew D. Ingber
Christopher J. Houpt
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

Most of the New York Attorney General's ("NYAG") amicus brief repeats arguments that have been raised and refuted multiple times in this proceeding. Rather than repeating all of the Trustee's responses, we will address only a few of the more significant misstatements contained in the brief:

"This Court should decline BNYM's invitation to transform this Article 77 proceeding into a rubber stamp." / "BNYM[] attempts to narrow this Court's authority to evaluate the proposed settlement." Br. 2. BNYM would never ask this Court to be a "rubber stamp." The Trustee had no expectation that, by filing this proceeding, giving worldwide notice directed to all investors and subjecting its actions to judicial review, it could somehow insulate its decision from scrutiny. Although one might think from the NYAG's brief that the Trustee is making up the legal standards for judicial review of trustees' discretionary decisions, a long line of New York State cases, including some that the NYAG cites, says the same thing: where a trustee's decision is discretionary under the relevant trust instrument and where the transaction is not self-dealing, the trustee's decision is valid if it is not so unreasonable as to be an abuse of discretion.[1] The PSAs at issue here make the litigation and settlement of Trust claims a

---

[1] *See, e.g.*, *Robinson v. Robinson*, 173 Misc. 985, 990 (Sup. Ct. Erie Cnty. 1940) ("The court should not substitute its judgment and discretion for that of the trustee so long as it acts within proper limits"); Restatement (Third) of Trusts § 87 ("When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."); AmJur Trusts § 315 ("When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."); C.J.S. Trusts § 356 ("Although the discretion of a trustee is subject to the control of the court, the court has a limited role in supervising the exercise of a trustee's discretion. The court will not assume that the trustee will abuse the discretion lodged in him or her in the management of the trust estate . . . . Under the common-law standard for review of trustee actions, so long as trustees act in good faith and from proper motives and within the bounds of a reasonable judgment under the terms and conditions of the trust, the court has no right to interfere with discretionary decisions.") (footnotes omitted); *Bogert on Trusts* § 560 ("If the terms and extent of the power are clear, the court will not do the trustee's work for him and tell him what to do, but will oblige him to give the beneficiary that which the settlor directed should

discretionary decision. *See* Trustee Mem. ISO Motion re: Standard of Review 9-10. The Trustee does not seek a "rubber stamp"; it asks only that the Court review its decision to enter into the Settlement Agreement under the relevant legal standard, imposed by the PSAs and applicable law—namely, whether the decision was within the bounds of the Trustee's contractual discretion.

The Trustee's request for judicial review under Article 77 was not an attempt to get a "rubber stamp," but rather exactly what established trust law contemplates. A trustee is encouraged to make a litigation settlement conditional on judicial review (*e.g.*, Restatement (Second) of Trusts § 192 cmt. d), as BNYM did here, but it *cannot* delegate to the Court the decision on whether to settle—that is a basis for denying judicial review altogether. *See In re Baylies' Estate*, 104 N.Y.S.2d 238, 242 (Sur. Ct. N.Y. Cnty. 1950) ("No ruling, however, will be made at this time prescribing [a course of conduct]. The power . . . is by its nature discretionary and like any other such power its exercise will be controlled only upon a showing that it has been improperly used."); cases cited in *Bogert on Trusts* § 560 nn.70-71; *Harris Trust & Savs. Bank v. E-II Holdings, Inc.*, 926 F.2d 636, 641 (7th Cir. 1991) ("the vision of [indenture] trustees without judicial guidance, however unpleasant, is eclipsed by a more disturbing vision—trustee after trustee . . . coming into federal court and pleading, 'We do not know what to do, Judge. Give us some instruction.'").

"[T]he scope of discovery is [not] determined . . . by the standard of review." Br. 3. The sweeping assertion that the law applicable to the case has no bearing on the scope of discovery is belied by the very authorities that are cited. On page 3, CPLR 3101(a) is quoted,

---

be accorded to the beneficiary, the use of the judgment and discretion of the trustee. The court rarely advises a trustee as to the action he should take with regard to a discretionary power. It usually requires him to make up his mind without the benefit of the judgment of the court as to when and how to act.") (footnotes omitted).

which allows "full disclosure of all matter *material and necessary* in the prosecution or defense of an action." (Emphasis added.) And on page 7, *IBJ Schroder* is quoted, which said that the Court must "consider all *relevant* factors in determining whether approval of [a settlement] is warranted." 271 A.D.2d 322, 322 (1st Dep't 2000) (emphasis added). The NYAG cites no authority for the proposition that a court can determine what is "material," "necessary," or "relevant" without first knowing what facts the parties are legally required to prove. *See* 22 Fed. Prac. & Pro. Evid. § 5162 (1st ed. 2012 update) ("the notion of relevance means that [a party's] selection of a substantive rule will serve to limit what kinds of proof he can introduce in support of his claim"). And the NYAG neglects to mention that in *IBJ Schroder*, the trial court did *not* conduct a free-ranging inquiry into the merits of the settled litigation. *In re IBJ Schroder Bank & Trust Co.*, No. 101530/1998, slip op. at 4-5 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000). Instead, it approved the settlement over the objections of 186 beneficiaries (a majority, according to the objectors in that case), including objections that the trustee had settled the claims "despite having failed to take any discovery" in the underlying litigation. *See id*. at 5-6.

"[T]he assertion that [the Trustee's] discretionary decisions cannot be questioned absent affirmative misconduct . . . is wrong." Br. 7. That assertion is indeed wrong, and the Trustee has never made it. The NYAG complains that the Trustee advanced an "unjustifiably narrow standard of review" (*id.* at 9), but in fact, the Trustee and the NYAG agree that "New York law is clear as to the standard of judicial review of trustee's discretionary action. 'If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.'" Trustee Mem. 7 (quoting *In re Stillman*, 107 Misc. 2d 102,

110 (Sur. Ct. N.Y. Cnty. 1980) (quoting Restatement (Second) of Trusts § 187 cmt. e (1959)). *Compare* NYAG Br. 7 ("Even where a trust instrument gives the trustee discretionary powers, the trustee's decision must still be *reasonable*."; trustee may not act "beyond the bounds of a reasonable judgment") (quoting Restatement (Third) of Trusts § 87 cmt. c (2003) and citing *IBJ Schroder* and *Stillman*).

"[A] 'side letter' appended to the proposed settlement expands the benefit of the PSA's indemnification provisions." Br. 9. On at least seven[2] occasions, the Trustee has responded to these allegations, which misstate the content of the documents.

BNYM "acted 'in a careless or negligent manner.'" Br. 10. The Trustee has said all along that "[t]he objectors are free to argue that the process BNYM undertook in reaching its decision was unreasonable because it decided not to review loan files, but *they do not need to look at loan files to do so*." BNYM Opp. to Mot. to Compel Discovery 5 (emphasis added and quotation marks omitted). The NYAG appears to agree, in that the amicus brief argues that "*even if* the loan files in fact support the reasonableness of the proposed settlement, it was careless and negligent for BNYM to refuse to review them *at all*." *Id.* That such a definitive conclusion could be reached without looking at the loan files is yet further proof of the illogic in asserting that one must review the loan files to evaluate whether it was "careless or negligent" not to review them.

* * *

[2] *See* BNYM Resp. to Walnut Place LLC's Pet. to Intervene 5-6 (7/11/11); BNYM Opp. to Mot. to Intervene by NYAG 20-21 (8/16/11); BNYM Resp. to Obj. (S.D.N.Y. Doc. 126), at 9-11; BNYM Reply Br. 15 n.6 (2d Cir. Doc. 99); BNYM Opp. to Mot. to Compel Discovery 20-22 (4/13/12); BNYM Opp. to Mot. to Convert 17-20 (4/13/12); BNYM Reply ISO Mot. re: Standard of Review 3-4 (4/19/12).

The NYAG's amicus submission simply repeats groundless accusations that the Objectors have already made. Most importantly, the NYAG agrees that the Trustee has correctly stated the standard of review. The brief provides no basis for denying the Motion.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Motion.

Dated: April 23, 2012
New York, New York

Respectfully submitted,

s/Matthew D. Ingber

Hector Gonzalez
James M. McGuire
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

Jason H.P. Kravitt
Matthew D. Ingber
Christopher J. Houpt
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon