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.

JOINT MEMORANDUM OF LAW IN SUPPORT OF JURY DEMAND

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INTRODUCTION

The undersigned Intervenor-Respondents and Objectors ("Intervenors") respectfully submit this memorandum in support of their jury demand. Parties to Article 77 and other special proceedings may demand a jury trial on all "issues [that] are triable of right by jury." CPLR § 410. In New York, even in matters seeking declaratory relief, courts determine jury trial rights by looking beyond the form of the action to the issues actually being tried. If the underlying disputed issues to be tried are legal in nature, then the right to a jury trial must be granted.

The issues here, sounding in contract and tort, are traditionally tried to juries. Those issues—including whether the Bank of New York Mellon ("BNYM") acted consistently with the contract, in good faith, and reasonably in pursuing the settlement—parallel those that certificateholders could raise against BNYM in a legal damages action challenging BNYM's conduct. The parallelism is no accident. BNYM brought this action for the express purpose of barring any such damages claims. It could have settled the underlying claims without court approval or it could have sought judicial directions before negotiating and entering a settlement that could bind all of its beneficiaries. Instead, by bringing this Article 77 proceeding after it decided to enter the proposed settlement and seeking broad findings intended to protect it from liability for its settlement conduct, BNYM raises numerous issues that are traditionally tried to a jury.

There are key issues of fact in dispute here on which a properly instructed jury should make factual and credibility findings. Many of these issues are set forth in BNYM's Proposed Final Order and Judgment ("PFOJ"), which seeks findings that, among other things, BNYM acted within the bounds of reasonableness, negotiated the settlement at arm's length, and acted in good faith. In addition to BNYM's requested findings, there are factual disputes involving not

only "what" happened—including whether as a matter of fact BNYM failed to reasonably investigate potential "Events of Default"—but also "why" BNYM took key actions such as entering a forbearance agreement and choosing not to notify its beneficiaries. Resolving factual disputes regarding whether private parties acted in bad or good faith, or negligently or reasonably, is the classic province of juries.

Accordingly, Intervenors respectfully request that a jury determine the factual findings necessary to evaluate BNYM's conduct in negotiating and entering the proposed settlement. The ultimate question of whether the settlement should be approved would be left for the Court to decide.

ARGUMENT

I. There is a Right in Special Proceedings to a Jury Trial on All "*Issues*" that are "Triable of Right by Jury"

The right to a trial by jury is guaranteed by the New York State Constitution. *See* N.Y. Const. art. 1, § 2 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."). The determination of whether a claim entitles the claimants to a trial by jury begins with an analysis of whether the right to a jury historically attached to that claim. *In re Application of Schapira*, 824 N.Y.S.2d 770, 2006 WL 2353194, at *2 (N.Y. Sup. Ct. Bronx Cnty. Feb. 27, 2006). If the claim historically was tried in the common law courts before a jury, the right to a jury trial endures. *Hudson View II Assocs. v. Gooden*, 222 A.D.2d 163, 165 (1st Dep't 1996).

In the context of a special proceeding, parties are entitled to "demand a jury trial" where the "issues are triable of right by jury." *See* CPLR § 410. CPLR § 410 "applies to all special proceedings." *Green v. Comm'r of Envt'l Conservation*, 463 N.Y.S.2d 574, 576 (3d Dep't

1983); *accord In re Application of Schapira*, 2006 WL 2353194, at *3. This Article 77 case plainly is "[a] special proceeding." CPLR § 7701; *see Chiarella v. Chiarella*, 842 N.Y.S.2d 253, 255 (N.Y. Sup. Ct. Queens Cnty. 2007) (converting case "to a special proceeding under Article 77 of the CPLR").

CPLR § 410's protection of jury trial rights in special proceedings "is fully consistent with the retention of all historical rights to jury trials." *Green*, 463 N.Y.S.2d at 576. It embodies the general rule that the nature of the underlying issues—not the form of the case—governs the right to jury trial. *See In re Application of Schapira*, 2006 WL 2353194, at *3 (even in special proceedings "for strictly non-monetary relief," "[t]he right to a jury trial depends on the facts pleaded to establish a legal duty and consequent right to relief, not on the relief sought").

Similarly, "[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." *Gordon v. Cont'l Cas. Co.*, 457 N.Y.S.2d 844, 845 (2d Dep't 1983) (reversing order denying defendant's motion for jury trial where plaintiff sought declaration of the parties' rights and obligations under the contract); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-78 (1962) ("[T]he constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."). In other words, whether a right to jury trial exists "depends on the nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970); *Halladay v. Verschoor*, 381 F.2d 100, 109 (8th Cir. 1967) ("Ordinarily, enforcement of administration of trusts and proceedings involving trusts are subjects for equity jurisdiction, but where the basic nature of the claims present only legal issues, it is entirely proper ... to treat the case as one belonging on the law docket.").

Accordingly, it is "settled" New York law "that a litigant otherwise entitled to a jury trial is not to be deprived thereof by the circumstances that the action is one for declaratory relief." *In re Allcity Ins. Co.*, 409 N.Y.S.2d 934, 935-36 (N.Y. Sup. Ct. N.Y. Cnty. 1978) (internal quotations and citation omitted); *see Strachman v. Palestinian Authority*, 73 A.D.3d 124 (1st Dep't 2010) (affirming denial of motion to strike jury demand in declaratory judgment action); *Utica Mut. Ins. Co. v. Beers Chevrolet Co.*, 250 A.D. 348, 351 (4th Dep't 1937) (Declaratory Judgment Act "was never intended to afford a sanctuary of escape from trying jury issues before a jury"). Indeed, the present Article 77 proceeding is, in essence, one for a declaratory judgment. *See BlackRock Fin. Mgmt. v. Seg. Acct. of AMBAC Assur. Corp.*, 673 F.3d 169, 177-78 (2d Cir. 2012) (discussing the "judicial determination" and "'declaration'" sought by BNYM in this Article 77 action) (quoting Appellee's Brief). Counsel for the Inside Institutional Investors conceded that, if the Court signs the PFOJ (which it should not), it "will effectively have entered a declaratory judgment that [BNYM] performed its obligations under the PSA." Ex. 1 to Rollin Aff. at 112:24-113:6 (Oct. 12, 2012 Hearing Tr.). The Court thus must look beyond the form of the action to the issues actually being tried. *See Strachman*, 73 A.D.3d at 127 ("it is necessary to examine which of the traditional common-law actions would most likely have been used to present the instant claim had the declaratory judgment action not been created . . . if the traditional action that most likely would have been used is an action at law, then the plaintiffs will be entitled to a jury trial"); *Wagenhoffer v. Bier*, 347 N.Y.S.2d 870, 872 (N.Y. Sup. Ct. Suffolk Cnty. 1973) ("An issue that would be submitted to a jury if the action were for coercive relief should similarly be submitted to the jury in an action for declaratory relief."); *cf. Piacentino v. Quinn*, 12 Misc. 3d 1057, 1060 (N.Y. Sup. Ct. Oneida Cnty. 2006) (holding that

"the underlying factual issues of the equitable estoppel asserted in this matter [were properly] tried . . . before a jury pursuant to the Plaintiff's demand").

II. BNYM Is Specifically Seeking to Wipe Out Certificateholders' Private Rights To Bring Legal Claims that Would Be Triable to a Jury

Here, BNYM does not simply seek to settle potential claims against Bank of America/Countrywide; if that were all it sought, BNYM could have done so without court approval or it could have brought an Article 77 action seeking judicial instructions *prior* to settlement. Rather, BNYM also seeks "coercive relief" (*Wagenhoffer*, 347 N.Y.S.2d at 872) *against the certificateholders* by precluding them from challenging its conduct in connection with the settlement in any separate lawsuit. BNYM's Proposed Final Order and Judgment (PFOJ) is a "wish list" of findings. *BlackRock Fin. Mgmt.*, 673 F.3d at 177; *see generally* Doc. No. 7, at 4-5 ("PFOJ") (seeking over 18 separate factual findings related to BNYM's conduct in negotiating and entering settlement). As Judge Pauley explained, in a point left undisturbed by the Second Circuit, the findings "can be reached only after the examination of evidence and determination of claims in an adversary proceeding." *BNYM v. Walnut Place LLC*, 819 F. Supp. 2d 354, 361 (S.D.N.Y. 2011).

This case is the flip-side of the money damages lawsuit certificateholders could bring against BNYM for breach of contract, breach of fiduciary duty, and negligence in connection with the settlement. It is not surprising, therefore, that BNYM's own Request for Judicial Intervention identified the causes of action in this proceeding as including "Breach of contract or fiduciary duty, fraud, misrepresentation, business tort, or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings." *See* Doc. No. 9, at 4. These representations should be dispositive to Intervenors' right to a jury.

The contract and tort lawsuits BNYM now seeks to preclude plainly would be triable to a jury. In *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, for example, a secured holder of debt certificates brought suit against the indenture trustee for breach of contract, breach of fiduciary duty, and negligence, alleging that the trustee failed to protect the value of the underlying collateral. 784 N.Y.S.2d 479, 480 (1st Dep't 2004). The court held a jury trial on all claims. *Id.* at 481. One charge to the jury was "whether the trustee's conduct was 'prudent.'" *Id.* The court upheld the $54 million jury verdict, including its determination of monetary damages suffered by the bondholders as a result of the trustee's conduct. *Id.* at 481-82; *see also LNC Investments, Inc. v. First Fidelity Bank, N.A. New Jersey*, 173 F.3d 454, 456-57 (2d Cir. 1999) (Bondholders sued the indenture trustees and, "[a]fter a trial, the jury found that the Trustees breached the prudent person standard applicable under the contract" as well as "the common law of fiduciary duty.").

Accordingly, Intervenors are entitled to have a jury determine the factual issues that BNYM brought to the forefront of this proceeding through its PFOJ, as well as those that underlie the breach of contract, breach of fiduciary duty, and negligence claims relating to the settlement that BNYM seeks to extinguish. *See* CPLR § 410. In its PFOJ, BNYM seeks factual findings regarding BNYM's conduct and intent, which plainly are triable of right by jury. *See, e.g.*, PFOJ ¶ h ("The Settlement Agreement is the result of factual and legal investigation by the Trustee."); ¶ i ("The Trustee appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled."); and ¶ k ("The Trustee acted in good faith, within its discretion, and within the bounds of reasonableness."). The jury's findings regarding BNYM's conduct will directly control whether and the extent to which BNYM is entitled to its "wish list" of further findings (*BlackRock Fin. Mgmt.*, 673 F.3d at 177).

Like *Piacentino*, where there was a jury trial on factual issues underlying an equitable estoppel claim, the underlying factual issues here should be submitted to the jury using a special verdict form. *See* 12 Misc. 3d at 1061-63. The overall question raised by this proceeding—whether the settlement should be approved—remains for the Court to decide. That decision will be informed by the jury's factual findings regarding BNYM's conduct in negotiating and entering the proposed settlement. *Cf. id.* at 1059; *In re Schapira*, 2006 WL 2353194, at *3 (while the court makes the ultimate determination in an equitable proceeding, the jury determines those disputed issues that are triable by right of jury, "such as bad faith or good faith," which must be established before the court determines whether the equitable relief should be granted).

III. The Disputed Issues Here are Jury Triable

The issues BNYM asks this Court to decide adversely to certificateholders in the PFOJ mirror the issues certificateholders otherwise could assert in private lawsuits asserting claims relating to BNYM's conduct in the settlement negotiations.[1] These issues sound in contract, fiduciary duty, and negligence. BNYM, for example, seeks a factual finding that it "complied with its 'duties and obligations' arising from the PSA." *BlackRock*, 673 F.3d at 178; *see, e.g.*, PFOJ at 4 ¶ f (whether BNYM acted "[p]ursuant to the Governing Agreements" when it decided "to assert, abandon, or compromise the Trust Released Claims," and "to enter into the Settlement Agreement"). It also seeks a finding that it complied with "its 'fiduciary duties' superimposed by state law." *BlackRock Fin. Mgmt.*, 673 F.3d at 178; *see, e.g.*, PFOJ at 4 ¶ g (whether, "[p]ursuant to . . . applicable law," BNYM could "deci[de] whether to enter into the Settlement Agreement"); *see also BNYM*, 819 F. Supp. 2d at 364 (a trustee's "mandatory duty to avoid

[1] BNYM and the other settlement proponents have stated on the record that the PFOJ in no way releases BNYM from claims relating to its pre-settlement conduct. *See, e.g.*, Ex. 1 to Rollin Aff. at 113:6-113:7 (Oct. 12, 2012 Hearing Tr.) ("There is no finding here about conduct outside the settlement[.]").

conflicts of interest," which is "grounded in New York common law," "lies at the heart of this Article 77 Proceeding"). Additionally, BNYM seeks findings that it "acted reasonably in entering into the Settlement Agreement and in accordance with its duties as trustee for all certificateholders." *BlackRock*, 673 F.3d at 177; *see, e.g.*, PFOJ at 5 ¶ k (whether BNYM "acted in good faith, within its discretion, and within the bounds of reasonableness"); *see generally id.* at 4-5.

Where the ultimate and underlying facts are disputed, and the underlying issues relate to claims that are traditionally legal in nature as they plainly are here, parties are entitled to a jury trial on all issues so triable.

A. Whether BNYM Breached the Contract is a Jury Question

Issues of fact in breach of contract actions traditionally are tried to juries. In *Mercantile & General Reinsurance Co. v. Colonial Assurance Co.*, the Court of Appeals upheld a ruling that the defendant had the right to a trial by jury on issues of fact relating to his breach of contract claim. 624 N.E.2d 629, 630 (N.Y. 1993); *see also, e.g.*, *Seward Park Housing Corp v. Greater N.Y. Mut. Ins. Co.*, 884 N.Y.S.2d 298, 300 (N.Y. Sup. Ct. N.Y. Cnty. 2009) ("[W]hether plaintiff's actions occurred within a reasonable time [as required under the contract] should go to the jury [because] this is clearly an ultimate fact which is to be decided by the jury and the answer to it will directly impact the type of liability the defendant is exposed to and the measure of damages."); *Stokes v. Johnston*, 138 A.D.2d 481, 482 (2d Dep't 1988) ("Regardless of the plaintiff's characterization of the action, . . . the action is in essence one for breach of contract and the defendants are therefore entitled to a jury trial.").

Notably, BNYM is seeking a finding that it "acted in good faith" under the governing agreements with respect to the settlement. PFOJ at 5 ¶ k; *see also* Ex. 2 to Rollin Aff. at § 8.01

(Sample PSA) (setting forth BNYM's duty to perform under contract in "good faith"). Under New York law, "whether a party to a contract has failed to act in good faith is generally a fact question for the jury." *Tepedino v. City of Long Beach*, 640 N.Y.S.2d 591, 592 (2d Dep't 1996); *see also RJ Capital, S.A. v. Lexington Capital Funding III, Ltd.*, No. 10 Civ. 25(PGG), 2011 WL 3251554, at *11 (S.D.N.Y. July 28, 2011) (rejecting BNYM's argument for dismissal of breach of contract claim involving its duties as trustee under trust indenture because "[w]hether a party to a contract acted in good faith . . . is generally a question of fact for the jury") (citations omitted); *Greenbert v. Bar Steel Constr. Corp.*, 37 A.D.2d 162, 165 (1st Dep't 1971) (whether a party performed its contractual obligations in good faith presents a question of fact).

Juries in contract cases traditionally decide not just the ultimate factual issues—whether a contract was breached and whether a party acted in good faith—but also the subsidiary facts underlying those ultimate issues. Here, those underlying facts are hotly disputed.

Critical disputes, on which BNYM and the Inside Institutional Investors have had difficulty getting their stories straight, include whether BNYM sought to avoid an "Event of Default," how and why BNYM and the Inside Institutional Investors chose to enter an extra-contractual "forbearance agreement," and what that agreement's effect was on BNYM's duties to certificateholders. As explained in Tamar Frankel's expert report, "An Event of Default triggers the Trustee's higher fiduciary duties and additional investor rights." Doc. No. 529 at 10 (Frankel Report, Feb. 28, 2013). There is evidence, however, that BNYM [redacted] *Id.*

These underlying issues bear directly on whether BNYM ultimately breached its contractual duties to certificateholders.

The underlying contract disputes thus involve both the "what" and "why" of BNYM's conduct regarding the Event of Default and forbearance agreement. Intervenors are entitled to have a jury hear from the key witnesses to make credibility determinations on such issues as whether, in performing or failing to perform its contractual duties, BNYM investigated potential Events of Default, attempted to avoid an Event of Default, failed to give notice to certificateholders, and acted in good or bad faith throughout the process. In making these credibility determinations, jurors properly could consider and resolve the underlying factual disputes regarding whether and why as part of the process BNYM negotiated an indemnity for itself at the expense of its Certificateholder beneficiaries.

B. Whether BNYM Breached its Fiduciary Duties is a Jury Question

In cases where an indenture trustee is alleged to have breached its fiduciary duties to certificateholders, the cause of action is triable of right by jury. *See, e.g.*, *Page Mill Asset Mgmt. v. Credit Suisse First Boston Corp.*, No. 98 Civ. 6907(MBM), 2001 WL 863552, at *4 (S.D.N.Y. July 30, 2001) (denying motion to strike jury demand where breach of fiduciary duty claim against indenture trustee was "predicated upon an alleged breach of indenture, a legal claim"); *Bluebird Partners*, 784 N.Y.S.2d at 480-81; *LNC Invs., Inc.*, 173 F.3d at 456-57. Also, when a breach of fiduciary duty claim primarily seeks monetary relief, the jury should decide whether there has been a breach of fiduciary duty. *Cf. Miller v. Doniger*, 742 N.Y.S.2d 191, 193 (1st Dep't 2002) (affirming trial court's denial of motion to strike plaintiff's jury demand and finding, in addition to breach of contract claim, "claims for common-law fraud and breach of fiduciary duty primarily seeking monetary relief" were "legal in nature").

Here, though at times BNYM has sought to disclaim or diminish them, consistent with hornbook trust law, it is clear that BNYM indeed owes fiduciary duties to certificateholders. *See* Ex. 3 of Rollin Aff. at 160:3-11 (Aug. 2, 2012 Hearing Tr.) (BNYM has "a fiduciary obligation . . . that extends beyond the terms of the PSA contract."); *BlackRock*, 673 F.3d at 178 (BNYM has "'fiduciary duties' superimposed by state law."). While serving as trustee on behalf of all certificateholders in the 530 Covered Trusts, BNYM was "obligat[ed] to act, so to, to refrain from engaging in any conflicts of interest and act with a singleness of purpose and a duty of loyalty." Ex. 3 at 133:13-134:9; Doc. No. 529 at 7 & n.13 (Frankel Report, Feb. 28, 2013) ("[A]t all times, before and after the Event of Default, regardless of what the relationship is called," BNYM was required to "avoid conflicts of interest.") (citing cases); *accord BNYM*, 819 F. Supp. 2d at 364 (describing BNYM's "mandatory duty to avoid conflicts of interest," as one "grounded in New York common law" and "at the heart of this Article 77 Proceeding").

There is evidence here that BNYM failed to act prudently and "violated its duty of loyalty" and "acted in a conflict of interest" in many of its actions and inactions. *See* Doc. No. 529 at 9-11 (Frankel Report, Feb. 28, 2013). It is for a properly instructed jury to make factual and credibility findings regarding what BNYM did (or did not do) and why it acted (or failed to act) as it did.

C. Whether BNYM Breached its Duty of Care is a Jury Question

Juries traditionally decide the ultimate issue of whether, under all the facts and circumstances of a particular case, a party acted reasonably or negligently. *See Butler v. Murray*, 30 N.Y. 88, 93 (N.Y. 1864) ("Negligence is in all instances a question of fact, and it is only where a question of fact is entirely free from doubt, that the court has a right to apply the law without the action of the jury."); N.Y. Pattern Jury Instr.—Civil § 2:10 (3d ed.) ("Direct or

circumstantial evidence from which the defendant's negligence may be reasonably inferred requires that the issue be submitted to the jury."; "Where reasonable minds differ concerning inferences to be deduced from circumstances, the issue of negligence must be submitted to the jury."); *Ross*, 396 U.S. at 542 (recognizing that negligence is historically a legal claim).

Here, there are disputes regarding the underlying facts and the ultimate issue of whether BNYM acted negligently or reasonably. BNYM seeks findings that it "appropriately evaluated" all the relevant circumstances (PFOJ at 4 ¶ i) and acted "within the bounds of reasonableness" in negotiating and entering the proposed settlement (*id*. at 5 ¶ k). There is contrary evidence, however, that "in negotiating the Settlement, the Trustee did not exercise the necessary level of due care" (Doc. No. 529 at 10) and that the Trustee was negligent in ascertaining the pertinent facts underlying its decision to enter the proposed settlement. Doc. No. 530 at 7-24 (Coates Report, Feb. 28, 2013) ("Trustee had available to it many steps that would have enabled it to engage in an adequate evaluation of the Claims, many of which it did not take at all, and some of which it did take but in such a constrained and limited fashion as to undermine significantly their value for arriving at an objective understanding of the potential value of the Claims, and thus for an objective evaluation of the Settlement.").

The evidence supports a finding that BNYM acted unreasonably when it: (1) [redacted]; (2) instead allowed [redacted]; (3) [redacted] departed from its [redacted]; (4) used some "experts [who] relied solely on BoA's representations rather than make independent examinations" of the case merits; and (5) used experts "not in the course of the negotiations, but mostly just before the Settlement was

submitted to the Court," suggesting this was simply a way "to put a stamp of justification post-hoc on the settlement terms that were agreed upon." Doc. No. 529 at 10-11 (Frankel Report, Feb. 28, 2013). The evidence also supports a finding that BNYM breached its obligations to certificateholders when it failed to "consider[] or [take] a number of steps that it could have taken to adequately evaluate the Settlement," while at the same time constraining the experts it hired by imposing "strong limiting assumptions that were not tested by [BNYM]" and preventing the experts "from obtaining more than minimal information." Doc. No. 530 at 1-3 (Coates Report, Feb. 28, 2013).

BNYM's recently-filed expert reports further highlight the disputed issues of fact fit for a jury.[2] For example, Professor Langbein's report raises key disputed issues of fact, such as whether (1) "the Trustee's entry into the forbearance agreements created a conflict of interest," (2) the Trustee's decision to enter into the forbearance agreements "was prudent"; (3) "the Trustee's actions in entering the Settlement demonstrated a prudent exercise of its trustee functions"; (4) the Trustee acted properly in "consulting experts after the settlement terms had been negotiated in the court of arms'-length bargaining but before the Trustee had bound itself to any of those terms in a final agreement"; (5) the Trustee's conduct in negotiations represents

[2] Notably, throughout this proceeding, the Settlement Proponents have steadfastly argued against discovery, representing that the Court and Intervenors have all of the information necessary to evaluate BNYM's conduct in negotiating and entering the proposed settlement. *See, e.g.*, Doc. No. 228 at 12-13 (arguing for narrow scope of discovery because "all documents necessary for the parties and the Court to consider the question presented here have already been or soon will be made to all available parties") (BNYM). The fact that BNYM now has submitted *eight* additional expert reports to opine on the reasonableness of BNYM's conduct is further evidence that BNYM put the cart before the horse and is looking for the Court to retroactively approve of BNYM's improper conduct and extinguish the rights of certificateholders to bring a legal action for monetary damages against BNYM. Nevertheless, BNYM cannot use this proceeding "as a means of evading trial by jury" (*In re Allcity Ins. Co.*, 409 N.Y.S.2d at 936) on all issues so triable under CPLR § 410.

"'the reasonable care, skill, and caution' that the prudence norm requires"; and (6) the Trustee's entry into the Side Letter "manifest[s] a conflict of interest." Doc. No. 543 at 6-8, 11 (Langbein Report, Mar. 14, 2013); *see also* Doc. No. 542 at 4-14 (Landau Report, Mar. 14, 2013) (discussing issues of fact related to whether the Trustee's "negotiation and evaluation of the Settlement," "entry into the Forbearance Agreement", and "receipt of . . . indemnity" were "reasonable, prudent, and consistent with industry custom and practice").

In light of these disputed issues of fact, it is "particularly appropriate" to leave to the jury the question of whether BNYM breached a duty "perhaps above all, because in the determination of issues revolving about the reasonableness of conduct, the values inherent in the jury system are rightfully believed an important instrument in the adjudicative process." *Havas v. Victory Paper Stock Co.*, 49 N.Y.2d 381, 388 (N.Y. 1980).

CONCLUSION

Intervenors and BNYM sharply dispute the facts and the findings to be drawn from them. These are precisely the type of disputes traditionally left to juries in contract and tort cases. BNYM's attempt to circumvent a damages action relating to the settlement with this Article 77 proceeding does not extinguish Intervenors' right to a jury trial under CPLR § 410. Intervenors are thus entitled to have a jury resolve these critical factual and credibility issues.

DATED: May 3, 2013

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