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.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO CONVERT THIS SPECIAL PROCEEDING TO A PLENARY ACTION

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PRELIMINARY STATEMENT

The objectors do not dispute that a trustee may pursue an action in court to resolve issues relating to its management of a trust, and to obtain judicial approval for its actions; they hardly could contend otherwise, as such suits have been a settled part of the law, in New York and elsewhere, for well over a century. Nor do they deny that Article 77 is the *express* mechanism, and the *only* express mechanism, provided by New York statute for the resolution of such claims. But the objectors nevertheless now contend that this action should not proceed under Article 77 and instead should be converted into some other, undescribed form of "plenary action."

This contention has no merit. For one thing, it is wrong on its own terms. The Legislature enacted Article 77 to address precisely the sort of proceeding advanced by the Trustee here: one initiated to "determine a matter relating to any express trust," which is inarguably what the Trustee asks for in this case. New York courts repeatedly have entertained claims such as this one, which seek guidance on matters relating to the handling of a trust and the disposition of trust property; and so far as we are aware, no court ever has declined to entertain, or has "converted," such a suit brought under Article 77.

The objectors' argument also is defective as a matter of logic. They do not explain why their motion matters: They can identify no prejudice that would result from the Trustee's invocation of the one article of the CPLR that is expressly designed for trust matters—nor, for that matter, can they point to any material way in which an Article 77 proceeding would differ from their preferred "plenary proceeding." And having rejected Article 77, the objectors do not explain what they would put in its place, failing to articulate even the most basic details about the alternative action they seek, including who the Court should deem to be the new plaintiff(s) and defendant(s), what the claims would be, what standard of review would apply, what a hearing

would encompass, what relief could be sought, and what the final order and judgment would include. It therefore is no surprise that the objectors' "motion to convert" is supported by only a tiny fraction of the interested parties: it has not been joined by any of the non-intervening objectors, or by eleven of the intervenors. This Court should deny the motion and allow this action to proceed under Article 77.

ARGUMENT

I. This Case Should Proceed Under Article 77.

The single issue raised by the objectors is whether an action under Article 77 is the proper vehicle for resolving the trust-related claims in this case. That is answered by the plain language of Article 77: "A special proceeding may be brought to determine a matter relating to any express trust." As the Trustee explained in the brief that it filed with its Verified Petition, (1) the Trusts here are "express trusts" (*see, e.g., LaSalle Nat'l Bank Assoc. v. Nomura Asset Capital Corp.*, 180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001)), and (2) the Trustee seeks a ruling on a "matter relating to" those Trusts. *See Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 31 (2d Cir. 2010) ("relates to" is a "broad phrase"); *Mizrahi v. Gonzales*, 492 F.3d 156, 159 (2d Cir. 2007) ("Congress's use of the phrase 'relating to' . . . generally signals its expansive intent."). This language "is very broad in its application to express trusts, encompassing 'Any matter involving or relating to any express trust', and it appears that the purpose of the article was to simplify the practice in relation to express trusts and eliminate cumbersome and expensive procedures." *In re Edwards' Trust*, 142 N.Y.S.2d 169, 171 (Sup. Ct. Monroe Cnty. 1955) (quoting C.P.A. § 1308); *see also* 14 Jack B. Weinstein, *et al.*, NEW YORK CIVIL PRACTICE: CPLR ¶ 7701.05 (2010) ("The phrase 'a matter relating to a trust'

is to be broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust.").

That statutory text disposes of the objectors' motion. It is fundamental that, "[w]hen the language of a statute is clear and unambiguous, courts are obligated to construe the statute so as to give effect to the plain meaning of the words." *Cole v. Mandell Food Stores, Inc.*, 93 N.Y.2d 34, 39-40 (1999) (internal citation omitted) (interpreting the CPLR); *see also Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 56 (2011) ("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.") (internal citation omitted). And the plain text of Article 77 indicates that it "cover[s] any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust." *In re Greene v. Finley, Kumble, Wagner, Heine & Underberg*, 88 A.D.2d 547, 548 (1st Dep't 1982).[1]

CPLR 103(c), which objectors cite but do not quote, states only that the Court may convert if the proceeding otherwise would have to be "*dismissed* solely because it is not brought in the *proper form*." (Emphasis added.); *see also id.* ("the Court shall make whatever order is required for its *proper* prosecution") (emphasis added). Therefore, the Court may not convert unless it finds that this form is *improper*—that is, outside of the text of CPLR 7701. The Court may not convert the proceeding merely to comport with the objectors' views of historical

[1] Article 77 is, in fact, the only proper vehicle for resolving this trust-related issue. By its terms, Article 77 provides for notice to all beneficiaries and permits the Court to issue a single ruling that binds all beneficiaries, avoiding the risk of inconsistent judgments. It does not require, as a declaratory judgment would, a justiciable controversy with each beneficiary before the proceeding begins. And, consistent with the goal of providing judicial guidance on future actions, it is designed to be streamlined and to avoid a multiplicity of counterclaims and cross-claims.

practice (Motion 1) or better implement "Article 77's intended purpose" (*id.* at 17).[2] The objectors, however, almost entirely ignore the statutory language, and the scattershot series of arguments that they offer against the use of Article 77 in this proceeding are all wrong.

A. The Trusts Are Not "Trusts for the Benefit of Creditors."

The objectors initially assert that the use of Article 77 is inappropriate here under the express exception to Article 77 for suits that concern "trust[s] for the benefit of creditors." Motion 4-5. In making this argument, the objectors assume, without citing to *any* authority whatsoever, that any trust that has creditors is a "trust for the benefit of creditors."[3] But that reading contravenes a wealth of precedent making clear that "trust for the benefit of creditors" is a term of art that has a precise and well understood meaning: it refers to a "state law counter-part to Chapter 7 liquidation in bankruptcy, without all the requisite formalities." Jonathan T. Edwards, *The Crossroads: The Intersection of State Law Remedies and Bankruptcy*, 18 J. BANKR. L. & PRAC. 2 Art. 4 (April 2009) ("In an ABC [assignment for the benefit of creditors], the debtor (assignor) voluntarily transfers all of his or her assets by formal deed to another person (assignee), who holds the property in trust for the benefit of creditors"); *see also* 23A

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[2] Notably, the Court "may convert a motion into a special proceeding, or vice versa," "in the interests of justice." CPLR 103(c). There is no similar discretionary language that would allow the Court to convert a special proceeding into a "plenary action."

[3] The vast majority of the Trusts here did not issue debt; they issued Certificates, which state that they "represent[] a beneficial ownership interest in the Trust Fund." The Trustee respectfully disagrees with the decision in *Retirement Board of the Policemens' Annuity & Benefit Fund v. The Bank of New York Mellon*, No. 11-cv-5459 (S.D.N.Y. Apr. 3, 2012) (Pauley, J.), holding that any security issued by a trust that holds mortgage loans is debt for purposes of the federal Trust Indenture Act. That decision is unprecedented and admittedly contradicts rulings from the SEC (to which the *Retirement Board* court expressly refused to give any deference), and from other government agencies, as well as every secondary authority on this question, including a treatise written by counsel for one of the objectors in this proceeding, Talcott Franklin (whose clients declined to join in this Motion). In any event, this Court need not address the issue, because even if the Trusts had issued debt, that would in no way make them "trust[s] for the benefit of creditors."

Carmody-Wait 2d New York Practice § 142:30 ("A general assignment for the benefit of creditors differs from an ordinary assignment or sale, in that the presence or existence of a trust is an essential element of a general assignment, so that the assignee under a general assignment is thus the trustee of an express trust, and takes title to the assigned property as trustee for all the creditors under the supervision of the court.").

It is a specialized form of trust, in which a pre-existing creditor assigns his or her assets to an assignee, in trust, for the purpose of liquidating those assets to pay the debtor's *pre-existing* debts. *See, e.g., Ogden v. Peters*, 21 N.Y. 23, 24 (1860) (under a trust for the benefit of creditors, the trustee's duty is merely "to convert the estate and pay [the debtor's pre-existing] debts"). This understanding of the term "trusts for the benefit of creditors" has been recognized in New York for over 100 years; since 1909, Article 2 of the Debtor and Creditor Law has set forth comprehensive rules governing this unique form of trust, including detailed procedures for resolving related disputes. *See Paddell v. Janes*, 84 Misc. 212, 221 (Sup. Ct. N.Y. Cnty. 1914) ("The right to make an assignment for the benefit of creditors was known at common law. In this state it has become a well-known statutory proceeding."); *Compagnia Distribuzione Calzature, S.R.L. v. PSF Shoes, Ltd.*, 206 A.D.2d 343, 343, 344 (2d Dep't 1994) ("A general assignment for the benefit of creditors is an assignment by a debtor transferring all of his or her property in general terms to an assignee in trust for all creditors of the debtor").[4]

[4] *See also Gerseta Corp. v. Equitable Trust Co. of N.Y.*, 241 N.Y. 418, 425 (1926) (describing situation where an "estate has passed upon a trust to hold for and distribute among creditors" as a "trust for the benefit of creditors"); *In re Price*, 171 N.Y. 15, 19 (1902) (describing stockbrokers "assignment of all the property of the firm to the assignee" as a "trust for the benefit of creditors"); *Carpenter v. Taylor*, 164 N.Y. 171, 174 (1900) (describing plaintiff's "general assignment of all his property . . . for the conversion of the property into money, and the distribution of the same among the creditors" as a "trust for the benefit of creditors"); *First Nat'l Bank of Amsterdam v. Shuler*, 153 N.Y. 163, 166, 169 (1897) (describing a "general assignment for the benefit of creditors" as a "trust for the benefit of creditors");

Use of the term "trust for the benefit of creditors" in Article 77 must bear the same interpretation: "Words having a precise and well settled meaning in the jurisprudence of the State are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended." *Grover v. Martone*, 127 Misc. 2d 40, 41 (Sup. Ct. Chemung Cnty. 1985) (quoting *Perkins v. Smith*, 116 N.Y. 441, 448-49 (1889)); *see also Skeels v. Paul Smith Hotel Co.*, 195 A.D. 39, 42 (3d Dep't 1921) ("these words have a distinct and well-defined meaning when used in the jurisprudence of the state, and must be deemed to have the same meaning when used in the statutes"). Indeed, it is "presumed that in drafting [a] statute, the Legislature understood and adopted that well-settled meaning." *People v. Reed*, 265 A.D.2d 56, 66 (2d Dep't 2000). And "trust for the benefit of creditors" had just such a "precise and well settled meaning" when the Legislature enacted Article 77; it is plain that the Legislature excluded such trusts from the scope of Article 77 because they are expressly addressed in a separate provision.

In this case, the Trusts have none of the elements that make a trust one "for the benefit of creditor" in the relevant sense. There was no pre-existing "debtor" that transferred all of its assets to its pre-existing "creditors" for the mere liquidation and distribution of those assets. Rather, the PSAs state that the Depositor transferred the Trust Fund to the Trustee, not for distribution to creditors, but in exchange for the Certificates. *See* PSA § 2.06 ("concurrently with such transfer and assignment [of the Trust Fund to the Trustee, the Trustee] has executed and delivered to or upon the order of the Depositor, the Certificates"). The Depositor then sold those Certificates. The Article 77 exception therefore has no application in this case. And, in

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People ex. rel. Short v. Bacon, 99 N.Y. 275, 279 (1885) (noting that assignment of property to trustee for the benefit of creditors "created a *trust for the benefit of creditors*") (emphasis added); 3 John N. Pomeroy, A Treatise on Equity Jurisprudence § 993 (5th ed. 1941).

fact, this Court has previously provided judicial instructions to the trustee of a securitization trust, identical in relevant respects to those at issue here, pursuant to Article 77. *See In re IBJ Schroder Bank & Trust Co.*, No. 101530/1998, Slip Op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000).

B. The Objectors' Other Arguments Lack Merit.

The objectors' other arguments take no account of the statutory language—or purpose—at all. The statute provides that "[a] special proceeding may be brought to determine a matter relating to any express trust." CPLR 7701. The First Department has recognized that the phrase "a matter relating to an express trust" should be "broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust." *Greene*, 88 A.D.2d at 548 (citation omitted). As we have noted, other courts and commentators agree. *See* pages 2-3, *supra*. And there can be no serious doubt that (1) the Trusts here are "express trusts" and (2) the Trustee seeks a ruling on a "matter relating to" those Trusts. The objectors' arguments that the Court nevertheless should disregard the plain statutory language are wholly insupportable.

1. The Objectors' Cramped Notion of Trust Administration Has No Basis in the Statutory Text.

Although the starting point in the interpretation of a statute is the statutory text, the objectors do not even quote CPLR 7701 until page 10 of their Motion. Instead, their principal contention is that "Article 77 was developed to address issues related to 'trust accountings and administrations with incidental construction and enforcement relief.'" Motion 6 (citing *Gregory v. Wilkes*, 205 N.Y.S.2d 405, 407 (Sup. Ct. N.Y. Cnty. 1960)). They then attempt to limit these terms, seemingly arguing that this proceeding at most fits a "technical definition of 'trust administration.'" *Id.* at 9 n.4.

The objectors' disregard of the statutory language is reason enough to reject their argument. But their contention also is wrong on its own terms. In fact, "trust administration" covers all matters of oversight and management of trust assets. *See, e.g.*, *In re JP Morgan Chase Bank*, 27 Misc. 3d 1205(A), 2010 WL 1340823 at *5 (Sur. Ct. Westchester Cnty. Mar. 31, 2010) ("prudent person" and "prudent investor" rules are both "standards for trust administration"); *In re Reed's Estate*, 33 Misc. 2d 305, 307 (Sur. Ct. N.Y. Cnty. 1962) ("general principles of trust administration" apply to trustee's decision to sell trust property if beneficiaries do not consent). Thus, Section 192 of the Second Restatement of Trusts, which authorizes the trustee to "compromise . . . claims affecting the trust property, provided that in so doing he exercises reasonable prudence," appears in Chapter 7, titled "The *Administration* of the Trust." *Restatement (Second) of Trusts* § 192 (1959).

Consistent with that conception of "trust administration," Article 77 proceedings have been used for "far more than the mere approval of an account." *In re Baekeland's Trust*, 26 Misc. 2d 82, 88 (Sup. Ct. N.Y. Cnty. 1960) (noting that court had determined how to allocate taxes out of trust fund). For example, Article 77 proceedings have been used to determine the propriety of settlements by trustees (*IBJ Schroder*, *supra* at 6 (approving settlement as "reasonable and prudent" and "within the scope of the trustee's powers"); *cf. In re Tanenblatt*, N.Y.L.J. Oct. 5, 1993, at *26 (Sur. Ct. Nassau Cnty. 1993) (approving settlement in Surrogate Court "proceeding for advice and direction"); whether the trustee was liable for losses resulting from its investment decisions (*In re Cowles' Will*, 22 A.D.2d 365, 374-78 (1st Dep't 1965)); how to allocate trust property among beneficiaries (*In re Kiessling's Trust*, 11 Misc. 2d 660, 660 (Sup. Ct. N.Y. Cnty. 1958)); whether property belongs to a trust (*McHugh v. Weissman*, 46 A.D.3d 369, 369 (1st Dep't 2007); *In re Application of Forhan*, 280 A.D. 811, 812 (2d Dep't

1952)); and whether taxes should be paid out of the income or principal of a trust (*Baekeland's Trust*, 26 Misc. at 88).

The primary source for the objectors' cramped and contrary view is the Southern District's dicta about "exotic" and "arcane" Article 77 proceedings, which that court believed "are typically 'uncontested' and present 'garden-variety matters of trust administration.'" Motion 3. That reliance is misplaced. The Second Circuit "revers[ed] the order of the district court, and instruct[ed] it to vacate its decision" *in toto*, which renders that order and decision "a nullity." *Gutierrez v. Fox*, 141 F.3d 425, 426 (2d Cir. 1998); *see also Labarbera v. Clestra Hauserman, Inc.*, 369 F.3d 224, 226 n.2 (2d Cir. 2004) (when district court lacks subject matter jurisdiction, "the district court's authority is of no precedential value").

In any event, contrary to the objectors' description of the subsequent history, the Second Circuit rejected the views of the District Court on exactly this point:

> Permissible uses of Article 77 are "broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust." *Greene v. Greene (In re Greene)*, 88 A.D.2d 547 (1st Dep't 1982). Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper, and by trustees (and beneficiaries) to obtain interpretations of the meaning of trust documents. *See Gilbert v. Gilbert (In re Gilbert)*, 39 N.Y.2d 663, 666 (1976) (interpreting addendum to trust); *First Nat'l City Bank v. Palmer (In re Scarborough Props. Corp.)*, 25 N.Y.2d 553, 559–60 (1969) (approving sale of trust assets to trustee after adversarial hearing to determine fairness); *Andrews v. Trustco Bank, Nat'l Ass'n (In re Andrews)*, 289 A.D.2d 910 (3d Dep't 2001) (interpreting income provision of trust).[3]
>
> [fn3] The "matter[s] relating to a trust" that can be resolved in an Article 77 proceeding also include, among other relief, the judicial settlement of a trustee's accounts; an accounting; the modification of a trust; the compelling of payment to trust beneficiaries; a determination of trust revocation; and the removal of a trustee. *See* 14 Jack B. Weinstein, et al., New York Civil Practice: CPLR ¶ 7701.05 (2011).

BlackRock Fin. Mgmt. Inc. v. The Segregated Account of Ambac Assurance Corp., — F.3d —, No. 11-5309-cv(L), 11-5314-cv(CON), 2012 WL 611401, at *3 (2d Cir. Feb. 27, 2012). Of

course, as even the objectors recognize, the Second Circuit noted that whether Article 77 permits a "New York court . . . to grant the relief sought in this case is an issue for the New York courts." Motion 3 (quoting *id.* at *2).

In this context, the objectors' contention that the proposed findings in the Proposed Final Order and Judgment are outside the scope of the relief available in an Article 77 proceeding (Motion 7-9) is misguided; every element of those findings surely involves a "matter of interest to trustees, beneficiaries or adverse claimants concerning the trust." For instance, the objectors suggest that a court in an Article 77 proceeding is barred from finding that it has jurisdiction (proposed finding (1)), because that does not fit within their notion of "trust administration." They also argue that an Article 77 court may not determine the adequacy of the notice *of that proceeding* to trust beneficiaries (number (2)) or the *res judicata* effect of the resulting judgment (numbers (15), (16)). But that is absurd—any court in any proceeding must assure itself of its own jurisdiction and proper service or notice to the parties.[5]

The remaining proposed findings are specific findings of fact or conclusions of law that relate to the ultimate approval or disapproval of the Trustee's discretionary acceptance of the Settlement Agreement, a matter that falls well within courts' understanding both of the scope of Article 77 and of "trust administration" more generally. They are also similar to the findings sought by the trustee in the Article 77 proceeding in *IBJ Schroder*—in particular, (1) a declaration that the trustee had the authority to commence a litigation, (2) an order "approving the Proposed Settlement" and directing the trustee to "consummate" the agreement immediately,

[5] Generally speaking, a court has the power to determine its own jurisdiction. *See United States v. Mine Workers*, 330 U.S. 258, 292 n.57 (1947) ("It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction"); *Morgenthau v. Cooke*, 56 N.Y.2d 24, 29 n.3 (1982) ("Indeed, the present circumstance is not conceptually different from the situation in which the court is called on to determine the scope of its own jurisdiction, a determination which it makes with some frequency.").

(3) a declaration that the beneficiaries be bound by the agreement, (4) a declaration that the trustee would not be subject to claims for damages based on breaches of the governing trust or its duties to the beneficiaries thereunder for entering into the settlement, (5) a declaration that nothing had impaired the trustee's rights under the trust agreement to be paid its fees and expenses incurred in discharging its duties, and (6) that the court retain jurisdiction with respect to the trust and the final disposition of its assets. *See* Ingber Aff., Ex. A (Petition for Construction of Trust and Approval of Settlement Agreement at 22, filed in *In re IBJ Schroder Bank & Trust Co.*, No. 101530/1998). At bottom, *this* proceeding has been brought to settle one proposition: that the Trustee reasonably exercised its discretion to settle claims. All the other findings recited by the objectors are ancillary to or subsumed by that single finding.

2. Article 77 Does Not Require 530 Separate Proceedings.

The objectors next posit that Article 77 does not apply here because this proceeding does not involve "a single trust" (Motion 10-12), while conceding (in a footnote) that "a few cases under Article 77, and its predecessor Article 79, have adjudicated issues with regard to more than one trust." Motion 10 n.5. In fact, courts routinely adjudicate Article 77 proceedings involving more than one trust. *See, e.g.*, *Gilbert v. Gilbert*, 39 N.Y.2d 663, 668 (1976) (holding that settlor had created two different trusts); *In re Scarborough Props. Corp.*, 25 N.Y.2d 553, 555 (1969) (granting Article 77 petition by "trustees of various trusts"); *In re Matter of Beeman*, 108 A.D.2d 1010 (3d Dep't 1985) (Article 77 proceeding involving three trusts holding a majority of voting stock in a corporation); *In re Cowles' Will*, 22 A.D.2d 365, 367 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 567 (1966) (Article 79 proceeding for settlement of multiple trusts); *In re Thoms' Trust*, 9 A.D.2d 186, 186-87 (4th Dep't 1959) (same, eight trusts). The objectors concede that they are asking the Court to break with precedent, and they do so on the flimsiest of grounds.

The objectors seemingly premise this argument on the view that the phrase "any express trust" in CPLR 7701 means "any *one* express trust"—an important concession that the Trustee could have brought 530 separate Article 77 proceedings, which the Court almost certainly would have consolidated in order to avoid judicial chaos.[6] *See, e.g.*, *In re Thoms' Trust*, 9 A.D.2d 186, 186-87 (4th Dep't 1959) (addressing consolidated proceedings brought under C.P.A. Article 79 involving eight trusts). In any event, the objectors' reading of the statute is wrong—as a matter of basic statutory interpretation, "any" does not mean "one." *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one *or some* indiscriminately of whatever kind.'") (quoting WEBSTER'S THIRD NEW INT'L DICT. 97 (1976)) (emphasis added); *Shilbury v. Bd. of Sup'rs of Sullivan Cnty.*, 54 Misc. 2d 979, 982 (Sup. Ct. Sullivan Cnty. 1967) ("Significant is the word 'any' which has been defined judicially to mean 'all' or 'every' and the use of the word imports no limitation.") (citing six cases). That is consistent with dictionary definitions of the word "any." *See, e.g.*, AM. HERITAGE DICT. (4th ed. 2009) ("One, some, every, or all without specification."); MERRIAM WEBSTER'S COLLEGIATE DICT. (10th ed. 2002) ("1. one or some indiscriminately of whatever kind"; "2. one, some, or all indiscriminately of whatever quantity"; and "3. unmeasured or unlimited in amount, number, or extent" or "appreciably large or extended").

Here, the Legislature surely used the word "any," not to restrict the application of Article 77, but to make sure (as the plain language suggests) that it applies to proceedings involving any kind of trust. *See Chiantella v. Vishnick*, 84 A.D.3d 797, 798 (2d Dep't 2011) ("CPLR 7701

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[6] As noted, the objectors acknowledge that New York courts have not read any such limitation into CPLR 7701. They retreat to the position that no prior proceeding has involved "anywhere near the number or complexity of the trusts here" (Motion 10 n.5), but they do not suggest that the text of the statute actually means "any number of express trusts substantially fewer than 530 and not especially complex."

authorizes the institution of a special proceeding in the Supreme Court for the determination of matters relating to *all types* of express trusts") (emphasis added); Vincent C. Alexander, *Practice Commentaries* § 7701 (2008) ("CPLR 7701 is applicable to proceedings brought in the Supreme Court and, with a few specified exceptions, encompasses all types of express trusts"); Carmody-Wait 2d *New York Practice* § 131.2 (updated 2012) (same).

The objectors also suggest that "BNYM must necessarily reach beyond the terms of the trust agreements to justify settling all 530 trusts in one proceeding" and to allocate settlement funds. Motion 10. But they fail to explain why that is so. Each trust agreement gives the Trustee the power to litigate and settle claims as to *that* trust. If the Trustee has contractual authority to negotiate and enter into 530 separate settlement agreements, there is no reason why it needs additional authority to resolve the claims of all 530 Trusts in one agreement. And even if it did need extra-contractual authority, that consideration would go, not to the applicability of Article 77, but to the merits of the Article 77 case. The same is true of the objectors' quibble about the proposed methodology for allocating the settlement payment across many trusts—developed by the Trustee's independent expert—which has nothing to do with whether the Article 77 proceeding should be converted to an undefined "plenary action."

Indeed, *In re Fales*, 106 Misc. 2d 419 (Sur. Ct. N.Y. Cnty. 1980), involved a similar problem of coordinating the management of multiple trusts. There, the trustee decided to liquidate a corporation that the trusts, collectively, controlled. The trustee was concerned that once two of the beneficiaries died, and their trusts were liquidated, the trustee (on behalf of the remaining trusts) would lose control over the corporation. *Id.* at 420. This presented a conflict among the beneficiaries to each trust, because the sale triggered substantial tax liability. *Id.* at 421. The Court observed that the "trustee recognize[d] that the benefits [of] liquidation to the

current income beneficiaries may be more apparent than the benefits to the remaindermen, and hence s[ought] guidance and direction" in an Article 77 proceeding. *Id.* So too here. The Trustee has the opportunity to enter into a global Settlement Agreement, which the "trustee believes [is in the interests of] all the beneficiaries" (*id.*), and which provides benefits that would not have been available had the Trustee attempted to settle or litigate on behalf of each of the 530 Trusts separately.

3. Insupportable Allegations of Trustee Conflict Do Not Require Converting the Proceeding.

The objectors next argue that their allegations of conflicts of interest by the Trustee render Article 77 inappropriate. Motion 12-14. Instead of citing caselaw or other authority, or offering supporting reasoning, they advance only the conclusory assertion that "[i]t strains plausibility to argue that" an action by a supposedly conflicted trustee "is somehow a matter of mere trust administration." Motion at 14. Even if this narrow construction of "trust administration" were the standard—which it is not—it is hard to imagine an issue more central to trust administration than the question whether a trustee has acted within the bounds of its discretion in agreeing to a proposed course of action.

Thus, for example, in *Scarborough Properties* the Court of Appeals granted an Article 77 petition by "trustees of various trusts" to approve a co-trustee's purchase of trust property. 25 N.Y.2d at 555-59. The Court observed that Article 77 was appropriate precisely because the co-trustee was conflicted:

> The rule has long been established that a trustee 'should not be allowed to become a purchaser of the trust property, because of the danger in such a case that the interest of the beneficiary might be prejudiced.' However, there is little danger of such prejudice if the transaction is subjected to prior judicial scrutiny and given court approval. Accordingly, the rule against self-dealing has not been applied, and does not apply, to interdict the purchase of trust property by a trustee where the court, after conducting a full adversary hearing

> at which all interested parties are represented, approves and authorizes the sale.

25 N.Y.2d 553, 558 (1969) (citations omitted); *see also id.* at 560 (addressing and rejecting claims of conflict of interest relating to "payment of fees out of the trust estate to the petitioners' attorneys"); *Gouiran v. Gouiran*, 263 A.D.2d 393, 393 (1st Dep't 1999) (affirming grant of Article 77 petition to remove trustee because of "self-dealing with trust assets, his criminal indictment, and his flouting of court orders"); *Cowles*, 22 A.D.2d at 375 (addressing, in C.P.A. Article 79 proceeding, "objections [that] are grounded principally upon allegations that the trustee, when making the investments, acted without independent judgment solely at the direction and in furtherance of the personal interests of . . . the primary life beneficiary"); *In re Spangenberg*, 41 Misc. 2d 584, 586 (Sup. Ct. N.Y. Cnty. 1963) (deciding, in Article 77 proceeding, "whether the trustees have been faithful to their fiduciary obligations, . . . and whether the posture of the McCrory attorneys is one of undivided loyalty, unburdened by any conflict of interest.").

Similarly, the First Department addressed claims of conflict in *Sankel v. Spector*, another Article 77 proceeding, finding that one co-trustee (Spector) was not "an independent trustee" and granting the other co-trustee's petition "permitting [the co-trustee] to retain his former law firm to perform legal services" for the trust. 33 A.D.3d 167, 172, 174 (2006) ("we observe no obstacles to the retention of Sankel's former law firm as attorneys for the trust, and find Linda's claims of a 'conflict' to be, at best, disingenuous"). Likewise, the court in *Milea v. Hugunin*, another Article 77 proceeding, found that "[c]learly, th[e trustees] had a conflict of interest, which they neither recognized or apparently understood, and as a result of that conflict, clearly set upon a course of conduct to totally frustrate the very purpose and intent of the Alice Amos Trust." 24 Misc. 3d 1211(A), 2009 WL 1916400, at *6-*10 (Sup. Ct. Onondaga Cnty. June 1,

2009). Yet neither court saw any need to convert the proceeding. Other Article 77 proceedings have been brought to appoint or remove trustees. *See In re Beyer*, 21 A.D.2d 152, 153, 156 (1st Dep't 1964) (Article 77 proceeding in which Supreme Court appointed, and First Department disqualified, guardians); *Bibeau v. Campbell*, 63 Misc. 2d 107, 110 (Sup. Ct. Rockland Cnty. 1970), *aff'd*, 35 A.D. 2d 910 (2d Dep't 1970) ("This is a proceeding pursuant to Articles 77 and 78 of the CPLR which seeks an order removing and discharging certain trustees of a Union Welfare Fund"; "the evidence is overwhelming that the respondents have completely failed in their obligation as Trustees . . . . The Court is, therefore, of the opinion that the respondents should be removed as Trustees"). These precedents, among others, uniformly demonstrate that allegations of trustee conflict present a particularly *appropriate* circumstance for judicial review pursuant to Article 77.

Moreover, the objectors are unable to cite a single case converting an Article 77 to a "plenary" proceeding on this ground. Instead, ignoring all of this precedent, the objectors cite a single case, decided under Article 79 of the old Civil Procedure Act, in which the court observed that "[t]he remoteness [of the proceeding from the express trust] is emphasized by the fact that it was not even thought necessary to make the trustee a party to this proceeding." *In re Roberts v. Galbreath*, 18 Misc. 2d 599, 601-02 (Sup. Ct. Bronx Cnty. 1959). *See* Motion 14. That case involved the appointment of counsel to represent a pension plan. The petitioners agreed that the plan was not a trust but argued that the case still could proceed under Article 79 because the plan had established a trust. *Id.* at 601. And although the claim in that case related to a trust much less directly than does the one here, the court *decided* the petition. *Id.* at 602. Neither that decision, nor any other, supports the objectors' position here.

Even if allegations of conflict were relevant, the objectors have advanced none that make any sense. Their first theory is that "it is obviously in BNYM's own interest to 'settle' the claims of all 530 trusts at the same time on substantially identical terms. Otherwise, BNYM could be liable to certificateholders that believe they were treated less favorably than others." Motion 12-13. This appears to be a contention that it was in the Trustee's interest to enter into a global settlement because, if it had not, it could have been sued by Certificateholders contending that it *should* have entered into a global settlement. This is nonsensical. If the Trustee avoids liability by acting in a manner that does not give Certificateholders any basis to sue it, that hardly shows that the Trustee's interests conflict with those of Certificateholders. *See Craig v. The Bank of New York*, No. 01–7631(L) *et. al.*, 2003 WL 873999, at *2 (2d Cir. Mar. 6, 2003) ("even assuming arguendo that a party's desire to avoid potential liability prompted reliance upon the advice of counsel, that fact alone would not create a triable issue of fact with respect to good faith reliance on advice of counsel"). It also is not true that the settlement is on "substantially identical terms" for each Trust—the allocation method takes account of the losses of each Trust.

Second, the objectors assert that "BNYM negotiated for itself an indemnity from Countrywide that goes well beyond the scope of the indemnity that BNYM is otherwise entitled to under the PSAs." Motion 13. This is false. The so-called "side letter" to the Settlement Agreement does nothing more than restate the preexisting indemnity under Section 8.05 of the PSAs. The PSA indemnity covers

> *Any loss, liability or expense* (including reasonable attorney's fees and expenses) (i) incurred in connection with any claim or legal action *relating to (a) this Agreement, (b) the Certificates or (c) in connection with the performance of any of the Trustee's duties hereunder*, other than any loss, liability or expense incurred by reason of willful malfeasance, bad faith or negligence in the performance of any of the Trustee's duties hereunder or incurred by reason of any action of the Trustee taken at the direction of the

> Certificateholders or (ii) resulting from any error in any tax or information return prepared by the Master Servicer.

PSA § 8.05 (emphasis added). In the side letter to the Settlement Agreement, the Master Servicer (the party that had already provided the PSA indemnity)

> confirm[ed] that we view any actions taken by the Trustee in connection with its entry into the settlement . . . as being actions that, for purposes of the Indemnity, relate to the [PSAs], the applicable securities, or the performance of the Trustee's duties under the [PSAs]. . . .
>
> . . . We confirm that we view reasonable expenses, disbursements and advances *otherwise within the Indemnity*, if incurred or made by the Trustee in connection with the Trustee Settlement Activities, as being reimbursable by the Master Servicer under the Indemnity.

Ingber Aff., Ex. B (emphasis added).[7] Thus, the pre-existing indemnitor merely "confirm[ed]" that its pre-existing indemnity applied to the Trustee's entry into the Settlement Agreement. There can be no doubt that it did—the settlement plainly "relat[es] to" the PSAs and the Certificates and is "in connection with" the Trustee's service as Trustee. The side letter simply does not alter the scope of the PSA's indemnity provisions.

The objectors also argue that the Guaranty "puts BNYM in a substantially better position" because, although "BNYM states expressly in its petition that it doubts the solvency of Countrywide," the indemnity is guaranteed by the Master Servicer's parent, Bank of America Corporation. Motion 14. It is true that the petition states that Countrywide Home Loans, Inc. (the Seller under the PSAs) has a limited net worth. Verified Petition 26-27. But the PSA indemnity is not from Countrywide Home Loans Inc.; it is from the Master Servicer, which at the time of the Settlement was not a Countrywide entity. While the Master Servicer was initially Countrywide Home Loans Servicing, L.P., which resided within Countrywide, the ownership

[7] The side letter and the guaranty are attached as Exhibits B and C to the Ingber Affirmation filed herewith.

interest in that entity was transferred to Bank of America *immediately after the July 1, 2008 acquisition* of Countrywide Financial Corporation (the Countrywide parent company) by Bank of America Corporation; "Countrywide Home Loans Servicing, LP" was subsequently renamed "BAC Home Loans Servicing, LP." Thus, at the time of the Settlement Agreement, BAC Home Loans Servicing, LP, an entity held under Bank of America Corporation, was the Master Servicer. *See* BNYM Resp. to Objections, filed in S.D.N.Y. Oct. 31, 2011, at 10-11. (BAC Home Loans Servicing LP has since merged with Bank of America, N.A., and there is no doubt about its solvency.)

As to both the side letter and the guaranty, the objectors overlook two further points. One is that the indemnity *excludes* "willful malfeasance, bad faith or negligence," exactly what the Trustee is accused of on virtually every page of the Motion. Ingber Aff., Ex. B. Under the PSAs, the Trustee is not liable *except* for willful misconduct, bad faith, or negligence. *See* PSAs §§ 8.01, 8.02. Thus, the indemnity, like PSA Section 8.05, carves out literally every claim on which investors might plausibly recover.

Finally, trustee indemnities are not "very unusual, to say the least." Motion 13. Courts have recognized that it is appropriate for a trustee to seek even a brand new indemnity because corporate trustees are not expected to put their own balance sheets on the line while fulfilling their trust obligations. *See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) ("As to the indemnifications, the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability . . . so it was reasonable for U.S. Bank to seek indemnification once it became clear that there was a dispute."). Though the Motion suggests that there was something wrong about obtaining an indemnity from parties that are adverse to the Trusts (Motion 13), the Trustee *already* had an indemnity from one of those

parties (the Master Servicer). Waiving that indemnity for the sake of appearances and seeking a replacement from the investors or the Trusts would hardly have been in the interests of Certificateholders and would surely have prompted an objection.

4. The Size and Purported Complexity of the Proceeding Is Irrelevant.

The objectors' final argument is that the "magnitude and complexity" of this proceeding somehow precludes it from being brought under Article 77. Motion 16. Objectors do not attempt to tie this argument to the statutory text, which plainly says nothing about size or complexity; nor do they cite any decision in which a court pointed to the complexity of the proceeding as a reason to reject application of Article 77. No court has applied "complexity" as a test under Article 77, and many have decided complex issues using just this proceeding. *See, e.g.*, *Forhan*, 280 A.D. at 812 (counterclaims for declaration of rights in a property and removal of co-trustee, which would "require a determination, after a trial, at least as to the rights of petitioner, and the beneficiaries of the trust, in and to the real property which is the subject of the counterclaims, and as to whether or not petitioner's individual interests so conflict with her interests as trustee as to require her removal," were "matter[s] involving or relating to an express trust and, therefore, properly interposed in this proceeding").

Of course, it is unquestionably true that the Trustee in this case is seeking approval of a very significant settlement involving many trusts, but that does not render Article 77 inappropriate, especially when the objectors fail to cite any substantive difference between Article 77 and their proposed "plenary action." Article 77 proceedings are not always contested, but they often are, and the mere fact of "adversarial proceedings" (Motion 16) does not render Article 77's provisions inapplicable.[8] Indeed, the complexity and importance of the interests at

[8] There is also nothing novel about a special proceeding to resolve an application for judicial instructions from a trustee of a mortgage-backed securitization. In fact, several such

stake here would seem to make the "ease, speed, and economy" of the special proceeding especially desirable.

In this regard, the objectors' discussion of *IBJ Schroder* (Motion 16 n.6) is puzzling. The court in that case approved an Article 77 petition over the objection of 186 beneficiaries after finding that "the objecting beneficiaries have not submitted any evidence to show that the trustee's action may have been based on some ulterior motive or that the trustee is somehow itself interested in the transaction." Index No. 101530/1998, slip op. at 5 (quoted at *id.*). No one suggested in *IBJ Schroder* that the presence of objections or of multiple trust beneficiaries rendered Article 77 inapplicable. Thus, the objectors are driven to suggest that over the course of nearly three years' litigation it never occurred to the Supreme Court, the Appellate Division, or the 186 objectors that the special proceeding there was invalid. Motion 15-16. To say the least, that is most improbable. And if either the First Department or the Supreme Court had considered the special proceeding to be improper, it could have easily converted it *sua sponte*. *See, e.g.*, *In re Oglesby v. McKinney*, 28 A.D.3d 153, 158 (4th Dep't 2006), *aff'd*, 7 N.Y.3d 561

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proceedings are pending in other jurisdictions. In California, for example, at least two probate courts have recently addressed complex petitions by securitization trustees to modify PSAs. *In re IMPAC SAC Mortgage Pass-Through Trust Series 2007-1* is a petition to modify two PSAs to conform the waterfall provisions to the descriptions in the prospectus supplements. *See* Verified Petition of Deutsche Bank National Trust Company, ¶¶ 21-24, *In the Matter of IMPAC SAC Mortgage Pass-Through Trust Series 2007-1*, No. 30-2010-00411625 (Cal. Super. Ct. Orange Cnty. Sept. 24, 2010). In *In re IndyMac Residential Mortgage-Backed Trust, Series 2005-L1*, a California probate court ordered a modification of a PSA to redress a drafting error and retained jurisdiction to render additional instructions regarding the liquidation of outstanding mortgage loans. *See* Order Granting Petition of Deutsche Bank at 2, *In re IndyMac*, No. 30-2010-00366936 (Cal. Super. Ct. Orange Cnty. June 29, 2010); *see also* Verified Petition of Deutsche Bank National Trust Company, ¶¶ 32-33 (Apr. 27, 2010).

In addition, a Minnesota state court is now addressing a petition for judicial instruction in a special proceeding pursuant to Minn. Stat. § 501B.16, seeking appointment of a substitute trustee for prosecution of a pending mortgage loan repurchase action. *See* Petition for Instructions in the Administration of a Trust, *In re Matter of Bear Stearns Mortgage Trust Fund 2007-AR2*, 27-TR-CV-12-25 (Minn. 4th D. Ct. Feb. 12, 2012).

(2006) ("We conclude that this proceeding should be converted, *sua sponte*, to a declaratory judgment action.") (internal citation omitted)); *Scarano v. City of New York*, 86 A.D.3d 444, 445 (1st Dep't 2011) (converting Article 78 proceeding *nostra sponte* to a declaratory judgment action). That did not happen. Instead, the Supreme Court proceeded to grant final judgment on the trustee's "appli[cation] to this Court for an order pursuant to CPLR § 7701 for, *inter alia*, approval of a settlement." *IBJ Schroder*, No. 101530/1998, Judgment at 1, 3 (Oct. 3, 2000) (Ingber Aff., Ex. D).[9]

The objectors conclude with another citation to the vacated decision of the Southern District, where it suggested that the Second Circuit might certify to the Court of Appeals the question whether Article 77 may be used to litigate the issues presented here. Motion 17. The Second Circuit declined the invitation. Significantly, it recognized that BNYM's request "for a construction of the PSA and an instruction that its planned course of action complies with its obligations under that document and the law of trusts—[is] consistent with other proceedings brought under Article 77." *BlackRock*, 2012 WL 611401, at *5 (emphasis added). The Second

[9] Even if the objectors did seek to raise real counterclaims, that would not require a conversion of this Article 77 proceeding. In fact, the cases that the objectors cite on page 16 say exactly the opposite of what they cite them for—all three held that Article 77 proceedings could move forward even where trust beneficiaries seek to raise claims against the trustee. In *In re Houston's Trust*, objectors had filed a suit for fraud and conversion against a trustee, but the Appellate Division did not order the conversion of the Article 77 proceeding. It affirmed the trial court's refusal to join the proceeding with the other suit. 30 A.D. 2d 999, 1000 (3d Dep't 1968). *Gregory v. Wilkes* said the same thing, denying a motion to dismiss for "other action pending" and holding that "this [plenary] action and the article 79 proceeding are not 'for the same cause.'" 26 Misc. 2d at 642. And so did *In re Reilly's Trust*: "There is no authority in law for consolidation of an action with a special proceeding under Article 79 of the Civil Practice Act." 21 Misc. 2d 597, 598 (Sup. Ct. N.Y. Cnty. 1959). None of these cases holds that a special proceeding must be converted because of such claims.

Other cases hold that when respondents seek to raise counterclaims or cross-claims that are beyond the scope of the proceeding, the remedy is to strike the improper claims, not to convert the proceeding. *See In re Fields' Trust*, 193 Misc. 781, 782-83 (Sup. Ct. N.Y. Cnty. 1948), *aff'd and modified in part*, 276 A.D. 835 (1st Dep't 1948). *Accord Forhan*, 280 A.D. at 812.

Circuit got it right: this proceeding is well within both the plain text of CPLR 7701 and its historical use.

II. Objectors Fail To Show Why the Conversion Motion Should Matter.

The Motion misapplies the governing standard for conversion of this Article 77 proceeding based on flimsy arguments about the application of the statutory exception for "trust[s] for the benefit of creditors" and the "complexity and size" of this proceeding. But even more fundamentally, the Motion does not attempt to explain its underlying premise: why a "plenary action" is required for this proceeding. In pertinent language, a leading New York practice treatise explains:

> A special proceeding is a quick and inexpensive way to implement a right. It's as plenary as an action, culminating in a judgment, but is brought on with the ease, speed, and economy of a mere motion. Combining the best of both worlds, the special proceeding is of course preferable to the ordinary action, but it may be used only when explicitly authorized by law in a particular case. The rule is that it takes an ordinary action to prosecute a right "except where prosecution in the form of a special proceeding is authorized."

Siegel, New York Practice 973 (§ 547) (5th ed. 2011) (emphasis added) (quoting CPLR 103(b)).

The objectors state as a given that a "plenary action is necessary for the Court and certificateholders to develop a full and fair record upon which this Court may decide this action," but never explain why. Motion 1. This proceeding seeks judicial review of the Trustee's discretionary acceptance of the Settlement Agreement. No one—not the Trustee, not the Institutional Investors, not the objectors—ever argued that the *standard* for reviewing the Trustee's decision depends on what section of the CPLR the proceeding is brought under. The CPLR is a code of procedure. *See Harvey v. Hynes*, 174 Misc. 2d 174, 177 (Sup. Ct. Kings Cnty. 1997) ("Although Article 78 supersedes those common-law writs, it does so in procedure only. A party's right to relief still depends upon the substantive law of the former writs"). That standard of review is established by the decades of jurisprudence requiring deference to trustee's

discretionary decisions, confirmed here by the unambiguous language in the PSAs. Nor does anyone argue that the *scope of disclosure* depends on whether (or not) this case proceeds under Article 77; the scope of discovery follows from the standard of review. As even the objectors point out, "[d]isclosure in Article 77 special proceedings is expressly 'governed by [A]rticle 31,'" the same article that governs disclosure in an ordinary action.[10] Motion Regarding the Standard of Review and Scope of Discovery at 5; *see also id.* at 6 ("[B]ecause Article 31 governs disclosure in an Article 77 proceeding, *Allen* [*v. Crowell-Collier Publ'g Co.*]'s liberal discovery standard applies regardless of whether the action continues under Article 77 or is converted to a plenary action.") (citing 21 N.Y.2d 403, 406 (1968)).

As a consequence, the objector's motion is, literally, much ado about nothing. And that suggests that the Court should address their motion with considerable skepticism.

CONCLUSION

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

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New York, New York

Respectfully submitted,

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[10] The Discovery Motion argues this point at length, but the Trustee said exactly the same thing in its March 12, 2012 letter to the Court. *Id.* at 5 ("CPLR 3101(a) permits disclosure of 'all matter material and necessary in the prosecution or defense' of the action.").