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 ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT EXCLUDE CERTAIN EVIDENCE AND TESTIMONY FROM TRIAL

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4 Newberg on Class Actions § 11:43 (4th ed.) 4 n.5

Objectors ask the Court for three preclusive orders. All lack merit, particularly in the context of this non-jury Article 77 proceeding. They should all be denied.

I. OBJECTORS' MOTION TO EXCLUDE "UNSWORN TESTIMONY" BY COUNSEL SHOULD BE DENIED.

Objectors urge the Court to enter an order barring the settlement proponents' counsel from revealing their personal knowledge or views of the Settlement during the hearing unless they are testifying under oath. OSC 1-4. The motion supplies no basis to conclude that counsel will do anything at the hearing other than properly advocate for their clients, as they have done to date.[1] At bottom, Objectors assume wrongly that the Court in this non-jury proceeding is unable to distinguish between arguments of counsel (which are not evidence) and testimony under oath (which is). *See In re Donte W.*, 99 A.D.3d 490, 491 (1st Dep't 2012) ("[A] judge sitting as trier of fact is presumed capable of disregarding inadmissible evidence.").[2] A prior restraint on counsel's arguments is unwarranted; the effort to impose one is unworthy of the Court's attention.

II. OBJECTORS' MOTION TO EXCLUDE TESTIMONY AND EVIDENCE FROM THE INSTITUTIONAL INVESTORS WITH REGARD TO THE SETTLEMENT SHOULD BE DENIED.

Objectors next seek to exclude evidence regarding the reasons for the Institutional Investors' support of the Settlement and their strategy in negotiating it. They base this sweeping request on the Institutional Investors' assertion of the attorney-client and common interest

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[1] For nearly two years, lawyers who were involved in the settlement negotiations have appeared before the Court and have not sought to interject their personal knowledge or views. Moreover, Objectors' Steering Committee has already expressly agreed that it will not argue that the mere fact that some of the lawyers here are also potential fact witnesses is disqualifying. *See* Warner Affirmation, Ex. 1.

[2] *See also People v. Moreno*, 70 N.Y.2d 403, 406 (1987) ("Unlike a lay jury, a judge by reasons of learning, experience and judicial discipline is uniquely capable of distinguishing the issues and of making an objective determination based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision." (internal quotations omitted)). Unsurprisingly, the cases Objectors cite in their motion involve jury trials, and none of those cases involved a cautionary advisory ruling; they were *ex post* rulings based on flagrant violations in front of a jury. *See, e.g.*, *Sanchez v. Manhattan & Bronx Surface Transit Operating Auth.*, 170 A.D.2d 402, 405 (1st Dep't 1991); *Valenzuela v. City of N.Y.*, 59 A.D.3d 40, 41-42, 44-45 (1st Dep't 2008); *Senn v. Scudieri*, 165 A.D.2d 346, 355, 357 (1st Dep't 1991).

privileges in certain instances during discovery. But Objectors do not contend that those assertions of privilege were improper, nor can Objectors show that they were denied ample discovery on the topics they now seek to preclude. In fact, representatives of the Institutional Investors gave *non-privileged* testimony and evidence related to each one of the issues cited by Objectors. Kent Smith of PIMCO, for instance, testified in detail to the Institutional Investors' negotiating strategy (Warner Affirmation, Ex. 2, Smith Tr. at 54:16-55:5), to his rationale for recommending that PIMCO enter into the Settlement, and to his evaluation of the merits of the Settlement. In these latter two respects, Smith testified that he [redacted] *Id*. at 53:16-54:15. The Institutional Investors' proper assertions of privilege in response to specific questions cannot bar them from offering non-privileged evidence that was not shielded from discovery. *See Cary Oil Co. v. MG Refining & Mktg., Inc.*, 257 F. Supp. 2d 751, 761 (S.D.N.Y. 2003) (allowing trial testimony and evidence on a relevant issue while precluding only the "*same testimony or evidence* [that] was *withheld* from Plaintiffs during discovery based on attorney-client privilege" (emphasis added)).[3]

The evidence that Objectors are trying to block is highly relevant to the Court's assessment of the Settlement. Representatives of the Institutional Investors were among the Settlement's negotiators and are thus key fact witnesses. Moreover, the support for the Settlement offered by a substantial percentage of the Covered Trusts' beneficiaries, including some of the nation's largest money managers, weighs in favor of this Court's approval. *See, e.g.*, Institutional Investors' Statement in Support of the Settlement, Doc. 740, at 2-3. Objectors'

[3] *If* the Institutional Investors attempt to offer facts that were actually blocked from discovery on privilege grounds, Objectors themselves already offer the proper remedy when they note that "[d]uring trial, [Objectors] will object to such testimony and evidence if and when the issue arises, and will be prepared to direct the Court and parties to the pinpoint citations where that specific information was previously blocked by privilege during discovery." OSC 6. Again, there is no need for an advance ruling from the Court.

claim that there is a "lack of evidence of the Institutional Investors' rationale," OSC 6, is a *non sequitur*.[4] The hearing will permit *all* certificateholders (and not just those who oppose the Settlement) to present their views. Objectors' claim that they do not know "the rationale" for the Institutional Investors' support, *id.*, is also wrong: the Institutional Investors' depositions, as well as their pleadings, make an abundant record of the reasons they support the Settlement.

III. OBJECTORS' MOTION TO EXCLUDE REFERENCES TO THE DECISION BY ABSENT CERTIFICATEHOLDERS NOT TO OBJECT TO THE SETTLEMENT SHOULD BE DENIED.

Objectors represent less than 7% of the certificates in the Covered Trusts. The Institutional Investors represent 28%. Other certificateholders—representing in excess of 60% of the certificates—decided not to object to the Settlement. Given the Settlement's immediate, tangible benefits to certificateholders, including an $8.5 billion cash payment and landmark servicing reforms, this is not surprising.

Apparently recognizing the power of the inference that the certificateholders who determined not to object *support* the Settlement, Objectors ask the Court for an advance order precluding the settlement proponents from making any "reference or argument that all certificateholders absent from this proceeding support the settlement." OSC 7. This attempt to preclude attorney argument is again wholly unnecessary in the context of this non-jury proceeding: the Court can and undoubtedly will decide for itself how much weight to give to such arguments. Moreover, Objectors' request is legally and factually baseless. It is routine for courts considering settlements to take into account the absence of objections as a factor weighing in favor of approval. *See, e.g.*, *Cox v. Microsoft Corp.*, No. 105193/2000, 2006 WL 6554176, at

[4] This is a remarkable claim from Objectors, particularly after they themselves refused to provide discovery into their rationale for objecting to the Settlement or to allow any of their own employees to be deposed. *See* Memorandum of Law in Support of Order to Show Cause Why the Court Should Not Vacate the Inside Institutional Investors' Discovery Demands, Doc. 559.

¶ IV.2 (Sup. Ct. N.Y. Cnty. July 19, 2006) ("small number of . . . objections from Class members compared to the size of the Class supports approval of the Settlement"); *Michels v. Phoenix Home Life Mut. Ins. Co.*, No. 95/5318, 1997 WL 1161145, at *28 (Sup. Ct. N.Y. Cnty. Jan. 7, 1997) (similar); *State of N.Y. v. Keds Corp.*, No. 93 Civ. 6708(CSH), 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994) ("paucity of objections . . . militates in favor of the settlement[]").[5]

The limited number of objections is particularly telling in this highly publicized case, in which the Trustee undertook a massive, worldwide notice program endorsed by the Court. The Court's order approving the notice program, and the notice itself, which was mailed to all certificateholders and posted on the Trustee's website, clearly announced the deadline for objection. *See* Endorsed Order to Show Cause, Doc. 13; Form of Notice, Doc. 11-2. The notice made clear that any person who failed to object in the prescribed manner would forever waive the right to do so. In addition, the Court authorized certificateholders to intervene to receive information without having to make an immediate decision whether to object. And a large number of those certificateholders and governmental entities who initially appeared to receive information either ultimately withdrew or chose not to object (including the New York and Delaware Attorneys General, the FDIC, and the Federal Housing Finance Agency, as conservator for Fannie Mae and Freddie Mac). Moreover, two large certificateholders, Fir Tree and Monarch, affirmatively informed the Court of their support for the Settlement.[6] These facts are highly relevant to the hearing.

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[5] "*Qui tacet consentire videtur*"—he who is silent is seen to agree—"is an old and familiar maxim of the law." *Cowen v. Paddock*, 17 N.Y.S. 387, 389 (1st Dep't 1891); *see also, e.g.*, 4 Newberg on Class Actions § 11:43 (4th ed.) (when assessing whether "a settlement is fair, reasonable, and adequate," a court should consider, among other things, the "number of objectors and nature of objections"); *Lasker v. Kanas*, No. 103557/2006, 2007 WL 3142959, at ¶ V.C (Sup. Ct. N.Y. Cnty. Sept. 26, 2007) (similar).

[6] Contrary to Objectors' argument that filing an objection is costly, OSC 7, certificateholders could have expressed their disapproval merely by filing a letter with the Court. Vertical Capital LLC, for example, faxed an objection letter to the Court in August 2011, apparently without hiring outside counsel. *See* Warner Affirmation,

CONCLUSION

Petitioners respectfully request that the Court deny each of Objectors' motions in limine.

Dated: New York, New York
June 2, 2013

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Ex. 3. And in May 2013, Vertical Capital withdrew from the proceeding by letter, again from a businessperson. *See* Warner Affirmation, Ex. 4.

LLC, as investment manager, Nationwide Mutual Insurance Company and its affiliated companies, 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, Federal Home Loan Bank of Atlanta, Bayerische Landesbank, Prudential Investment Management, Inc., and Western Asset Management Company.

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