

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

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Seth A. Niederman
Austen C. Endersby
Fox Rothschild LLP
919 N. Market Street, Suite 1300
Wilmington, DE 19801

Alisa E. Moen
Blank Rome LLP
1201 Market Street, Suite 800
Wilmington, Delaware 19801

Re: NHB Advisors, Inc. v. Monroe Capital LLC, et al.
Civil Action No. 7322-VCG

Dear Counsel:

The Plaintiff here, NHB Advisors, Inc. (“NHB,” or “the Trustee”), seeks a declaratory judgment endorsing its proposed course of conduct as a trustee. One trust beneficiary, Monroe Capital LLC (“Monroe”), opposes the relief sought, on various grounds. This Letter Opinion addresses Monroe’s attempted imposition of the unclean hands doctrine as a bar to relief. For the reasons that follow, I find that Monroe has not met its burden to demonstrate that tainted conduct on the part of NHB, as a matter of equity, should preclude the declaratory judgment NHB seeks here, and that Monroe’s unclean hands defense must therefore fail.

I. Background

NHB is the trustee and liquidator of the Butler Liquidation Trust. One asset of that Trust is a lawsuit maintained by the Trust against certain former directors

and officers of Butler Services International, Inc. and their insurer, Chartis Insurance (the “underlying lawsuit”); that suit is currently being litigated on the Trust’s behalf by the Trustee’s litigation counsel, Bragar Wexler Eigel & Squire, P.C. A settlement offer in that litigation is pending. NHB seeks a declaratory judgment that it may accept the settlement offer without the unanimous approval of two beneficiaries who are the sole members of the Trust’s Liquidation Committee, Monroe Capital LLC (“Monroe”) and Garrison Funding 2008-1 Ltd (“Garrison”). Monroe wishes to reject the settlement offer but Garrison wishes to accept it. NHB therefore sought guidance, via this action, as to whether it is permitted to rely on advice of independent counsel opining that rejection of the settlement offer would breach NHB’s fiduciary duties to the Trust’s beneficiaries.

On June 22, 2012, I issued a bench decision on the parties’ cross Motions for Summary Judgment, determining that an advice of counsel provision in the Trust Agreement operated such that, should the Liquidation Committee refuse to accept a settlement offer, the trustee could accept the offer upon its counsel’s advice that the trustee’s fiduciary duty to the beneficiaries required it to do so; in other words, where counsel opined that failure to accept the settlement offer would constitute a

breach of NHB's fiduciary duties.¹ Subsequently, independent counsel Grover Brown opined that NHB did have a fiduciary duty to accept the settlement offer.

After I issued my June 22 bench decision, and the Supreme Court rejected Monroe's interlocutory appeal of that decision, NHB moved for entry of a final order. Monroe opposed that Motion; that opposition was the subject of my July 19, 2013 Letter Opinion. In that Letter Opinion, I found that NHB was entitled to a final order entering a declaratory judgment in its favor, unless Monroe's affirmative defenses prevailed.² I permitted the parties to submit supplemental memoranda on Monroe's remaining affirmative defense: whether NHB had acted inequitably in dealing with Monroe such that its request for a declaratory judgment should be denied under the doctrine of unclean hands.

NHB seeks a declaratory judgment that, under the terms of the Trust Agreement, it may rely on advice of counsel to accept the settlement offer; Monroe argues that because NHB has come to this litigation with unclean hands, such relief is foreclosed. Monroe alleges that NHB was not motivated by its fiduciary duties to accept the settlement offer; instead, NHB breached its fiduciary duties by participating in secret meetings with Garrison to circumvent the Trust Agreement's requirement that Garrison and Monroe unanimously approve a settlement offer; by

¹ *N H B Advisors, Inc. v. Monroe Capital LLC*, C.A. No. 7322-VCG (Del. Ch. June 22, 2012) (TRANSCRIPT).

² *N H B Advisors, Inc. v. Monroe Capital LLC*, 2013 WL 3790745, at *3 (Del. Ch. July 19, 2013).

failing to inform Monroe of those meetings or that it was seeking advice of counsel; and by acting outside the scope of its powers under the Trust Agreement by seeking advice of counsel. I address these contentions below.

II. Analysis

This case is before me on NHB's Motion for Entry of a Final Order, which followed the parties' cross Motions for Summary Judgment. "Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."³ Although Monroe has complained of receiving only "limited discovery,"⁴ it did not represent in its Motion for Summary Judgment that there existed an issue of material fact regarding its unclean hands defense or other affirmative defenses, nor has it filed a motion requesting additional discovery since that Motion was denied more than a year ago.⁵ I therefore evaluate the memoranda on Monroe's unclean hands defense

³ Ct. Ch. R. 56(h).

⁴ Def.'s Mem. of Law Regarding Affirmative Defenses at 2, 4.

⁵ In May 2012, the parties filed cross Motions for Summary Judgment; at a May 9, 2012 teleconference, I denied Monroe's request to postpone briefing on those Motions due to the expedited nature of the matter, but informed Monroe that I would permit it to supplement its briefs if, after briefing was completed, it obtained additional information helpful to its Motion. Monroe did not supplement its briefing, however. Instead, it moved for Summary Judgment in part on its affirmative defenses, and, rather than representing that there existed an issue of material fact, argued that "the record, although incomplete at this juncture, is replete with evidence of NHB conspiring . . . to force Monroe to accept the Settlement Offer." Def.'s Op. Br.

on the record which the parties deemed sufficient when they filed their cross Motions for Summary Judgment, supplemented by NHB's Motion for Entry of a Final Order and the additional fact that NHB has obtained advice from independent counsel Grover Brown advising that rejection of the settlement offer would breach NHB's fiduciary duty to its beneficiaries.

Monroe's Memorandum of Law Regarding Affirmative Defenses focuses solely on the doctrine of unclean hands.⁶ As the defendant, Monroe "bear[s] the burden of pleading and proving 'unclean hands' as an affirmative defense."⁷ Monroe is incorrect that the burden is on NHB at the summary judgment stage; as stated above, the matter is before me on cross-motions and functionally submitted upon a stipulated record, therefore the Plaintiff bears the burden for its claims and the Defendant bears the burden for its affirmative defenses. The doctrine of unclean hands provides that he who comes into equity must come with clean hands; in other words, equitable relief will be denied to a party who has engaged in

for Def.'s Mot. for Summ. J. at 49. On June 22, 2012, I entered my bench ruling on the cross Motions for Summary Judgment, and, rather than requesting additional discovery on its affirmative defenses, Monroe filed an interlocutory appeal. When that appeal was rejected, NHB moved for entry of a final order. Monroe filed its response, but rather than request additional discovery on its affirmative defenses, it stated that "[t]he record below is replete with instances where NHB repeatedly breached its duty of disclosure" Def.'s Answering Br. for Mot. for Entry of Final J. at 28, 29. While Monroe continues to suggest that it did not receive complete discovery, it has filed its motions and responses as if the record is complete and has not asked for additional discovery. I therefore consider the matter fully submitted.

⁶ I consider the other affirmative defenses pleaded by Monroe waived; in any event, they are without merit.

⁷ *Niehenke v. Right O Way Transp., Inc.*, 1996 WL 74724, at *2 (Del. Ch. Feb. 13, 1996).

inequitable conduct related to the matter in which he is seeking such relief.⁸ The purpose of the doctrine is to vindicate this Court's status as a court of equity. "The Court of Chancery jealously guards its domain as a court of equity," and accordingly, "the Court will refuse equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals."⁹

In its Memorandum, Monroe argues that NHB breached its duties "to remain impartial, to convey information, and to follow the provisions of the Trust Agreement,"¹⁰ and that those breaches constitute inequitable conduct related to this action. I will address these arguments in turn.

1. NHB's Duty to Remain Impartial

First, Monroe alleges that NHB engaged in "secret congress" with Garrison to Monroe's detriment.¹¹ Monroe contends that NHB and Garrison met without Monroe to discuss the settlement offer, and that in considering that offer NHB did not act impartially as between Monroe and Garrison.

Monroe's allegations that NHB held ex parte meetings with Garrison, even if true, do not prove that NHB breached its duty to remain impartial. Monroe has demonstrated that there were email communications among NHB's representative

⁸ See, e.g., *Keyser v. Curtis*, 2012 WL 3115453, at *18 (Del. Ch. July 31, 2012); *In re Wilbert L.*, 2010 WL 3565489, at *5 (Del. Ch. Sept. 1, 2010).

⁹ *Wagamon v. Dolan*, 2013 WL 1023884, at *3 n.19 (Del. Ch. Mar. 15, 2013) (citing *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998)).

¹⁰ Def.'s Mem. of Law Regarding Affirmative Defenses at 8.

¹¹ *Id.*

Edward Gavin, Garrison, and Mr. Bragar, NHB's contingency-fee lawyer in the underlying lawsuit, and that those communications did not include Monroe. Though NHB does, as trustee, owe to the Trust's beneficiaries a duty to act impartially, these ex parte communications are insufficient to demonstrate that NHB breached that duty. Rather, comments to Section 79 of the Restatement (Third) of Trusts clarify that the duty of impartiality does not prevent communications between a trustee and some beneficiaries, while excluding others, as long as engaging in such communications is "fair, reasonable, and impartial in light of the context and reasons for the communication."¹² Monroe has not shown that by emailing Garrison and Mr. Bragar, NHB acted unfairly, unreasonably, or partially. To the contrary, the email communications to which Monroe refers indicate that NHB's Edward Gavin believed that he had a fiduciary obligation to accept the settlement offer, and that doing so was permitted by the Trust Agreement.¹³ While these emails evidence Gavin's desire to accept what he believed was a favorable settlement offer, they do not demonstrate that he acted on

¹² See Restatement (Third) of Trusts: Duty of Impartiality; Income Productivity § 79 (2007) ("A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust, requiring that . . . (b) in consulting and otherwise communicating with beneficiaries, the trustee must proceed in a manner that fairly reflects the diversity of their concerns and beneficial interests."). The comment to this section advises that "[m]ost communications [between a trustee and beneficiaries regarding trust assets] need not include all available beneficiaries, provided the trustee's selection—or exclusion—of those to be informed or consulted is fair, reasonable, and impartial in light of the context and reasons for the communication."

¹³ Def.'s Answering Br. for NHB's Mot. for Summ. J. Ex. C, D.

the part of one beneficiary at the expense of the others; instead, they indicate that he was motivated to reach a certain outcome because he believed that outcome was required by his fiduciary duties *to all beneficiaries*.¹⁴ Regardless of whether such ex parte communications represent best practices, Monroe's unclean hands defense cannot be successfully predicated on those ex parte communications without a demonstration that they were unfair, unreasonable, or impartial, particularly where there is no indication that excluding Monroe from those communications caused it any harm, or that including Monroe in these communications could have prevented any harm. Such a demonstration is lacking here.

Monroe also claims generally that NHB improperly favored Garrison, and that in seeking advice of counsel NHB was motivated not by its fiduciary duties but by its desire to accept the settlement offer. However, these allegations are neither supported by the record nor plausible. NHB has no financial incentive to approve (or reject) the settlement offer, and Monroe has not explained what motivation NHB might have for favoring Garrison over Monroe. To the contrary, in his deposition testimony, Gavin stated that he is "agnostic" about the settlement offer, and that he is neutrally seeking a unanimous decision of the Liquidation Committee *either* to accept *or* reject the settlement offer. Monroe argues that NHB's partiality is demonstrated by the fact that this Court rejected the initial legal

¹⁴ See, e.g., *id.* Ex. D (email from Edward Gavin dated Nov. 30, 2011 considering fiduciary duty language in Trust Agreement).

opinion upon which NHB relied, because it was based on the analysis provided by its counsel in the underlying case, whose contingency fee creates a conflict. But while Monroe has previously demonstrated why *Mr. Bragar*, as a lawyer whose fee is contingent upon a favorable outcome, may be conflicted, it has not shown that *NHB* was conflicted in carrying out its fiduciary duties to all beneficiaries. The record thus does not support Monroe's contention that NHB breached its duty of impartiality to Monroe, or that an unclean hands defense could be predicated on such a breach under the facts here.

2. NHB's Duty to Convey Information

Monroe also argues that NHB breached its duty to convey information, including the facts that (1) NHB sought advice of counsel regarding whether its fiduciary duties require it to accept the settlement offer, and (2) NHB communicated with Garrison and Mr. Bragar regarding the settlement offer. The Restatement (Third) of Trusts provides that a trustee has a duty to keep beneficiaries "reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests," and to furnish additional information upon request.¹⁵ "Significant developments" typically include circumstances where a beneficiary has become

¹⁵ Restatement (Third) of Trusts: Duty to Furnish Information to Beneficiaries § 82 (2007).

entitled or ceases to be entitled to distributions or to request distributions,¹⁶ *not* where the trustee is making determinations as to the management of assets in accordance with its fiduciary duties to all beneficiaries. Monroe has failed to show that the facts allegedly wrongfully left uncommunicated—that NHB had sought advice of counsel and discussed the settlement offer outside of Monroe’s presence—were “significant developments” knowledge of which was necessary for Monroe to protect its interests. In fact, Monroe has failed to even attempt to explain how this information would have allowed it to act differently with respect to its interests here. At any rate, it makes little equitable sense to prevent NHB from obtaining a declaratory judgment—to which it would otherwise be entitled—that it may rely on advice of counsel to approve the settlement and thereby satisfy its fiduciary duties, on the basis that it failed to inform Monroe that it engaged in communications about, and sought advice on, how best to satisfy those very duties, as owed to all beneficiaries, including Monroe. Since Monroe has not demonstrated that NHB breached its duty to convey information, such a breach cannot form the basis of an unclean hands defense.

3. NHB’s Duty to Follow the Provisions of the Trust Agreement

Monroe also argues that NHB breached its fiduciary duties by acting outside the scope of its powers under the Trust Agreement. The thrust of this argument is

¹⁶ *Id.* at Comment on Subsection (1).

that the Trust Agreement required NHB to obtain the Liquidation Committee's unanimous approval prior to accepting a settlement offer, but NHB instead sought advice of counsel regarding acceptance of the settlement offer, in violation of the Trust Agreement. I have already determined that the Trust Agreement does in fact permit NHB to obtain advice of counsel regarding whether to accept the settlement offer,¹⁷ and so I must also reject this argument as a predicate for an unclean hands defense.

4. The Equities

As a final matter, I find that even if Monroe could satisfy its burden to show that NHB acted inequitably in considering the settlement offer, granting the remedy that Monroe seeks—denying NHB's request for a declaratory judgment interpreting the Trust Agreement's terms—would be inequitable here. The effect of such a ruling would not be to deprive NHB, the party who is alleged to have acted inequitably, of its own rights, but to prejudice the trust's other beneficiaries, who are entitled to have the trust administered in accordance with a correct interpretation of the Trust Agreement's terms. That Monroe feels it has been treated unfairly by NHB cannot provide a basis to deprive the other beneficiaries of

¹⁷ *N H B Advisors, Inc. v. Monroe Capital LLC*, C.A. No. 7322-VCG (Del. Ch. June 22, 2012) (TRANSCRIPT); *N H B Advisors, Inc. v. Monroe Capital LLC*, 2013 WL 3790745, at *3 (Del. Ch. July 19, 2013).

their rights under the Trust Agreement, and thus an unclean hands defense is not an appropriate basis to deny NHB's request for a declaratory judgment.

III. Conclusion

As explained above, I find that Monroe has failed to demonstrate that NHB's actions are an equitable bar to the relief it seeks. For the reasons above, and for the reasons stated in my June 22, 2012 bench ruling and July 19, 2013 Letter Opinion, NHB's Motion for Entry of a Final Order is GRANTED. The Plaintiff should submit an appropriate order.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III