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VICE CHANCELLOR

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

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

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Date Decided: July 19, 2013

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Re: N H B Advisors Inc. et al v. Monroe Capital LLC et al
Civil Action No. 7322-VCG

Dear Counsel:

On June 22, 2012, I delivered a bench decision in this matter, opining that the Plaintiff N H B Advisors, Inc., the trustee/liquidator of a liquidation trust (the "Trustee") had the power to break a voting deadlock between two beneficiaries of the liquidation trust, upon receiving certain advice from independent counsel. Specifically, NHB sought to break a deadlock between two beneficiaries of the trust as to whether to accept a settlement proposal. Under the Trust Agreement, the Trustee was authorized to take "any action that, based upon the advice of counsel, it determine[d] it is obligated to take (or fail to take) in the performance of any fiduciary or similar duty which the [Trustee] owes to the Beneficiaries or any

other person or entity.”¹ The Trustee sought the advice of independent counsel, Grover C. Brown, Esquire, who opined that “the Trustee can be said to have a ‘fiduciary or similar duty’ to accept the settlement proposal.”² Following the receipt of Brown’s opinion letter, the Defendants appealed my ruling to the Supreme Court. The Supreme Court dismissed the appeal as interlocutory because I had not entered a final judgment.³ The Plaintiff has since moved for entry of a final order in this matter. This Letter Opinion explains my decision that final judgment is appropriate, pending possible review of one Defendant’s affirmative defenses.

The Defendants, Monroe Capital LLC (“Monroe”)⁴ and Garrison Funding 2008-1 Ltd. (“Garrison”), were each unsecured creditors of Butler Services International, Inc. (“Butler”), a corporation which has since been liquidated. Monroe and Garrison are among the beneficiaries of the Butler Liquidation Trust (the “Trust”) and are the sole members of the Liquidation Trust Committee, an organ empowered under the Trust Agreement to take certain decisions on behalf of

¹ Trust Ag. Art. II § 2.2.

² Pl.’s Mot. for Entry of Final Order, Ex. A, Letter from Grover C. Brown to Miguel D. Pena 8, Aug. 3, 2012 (“Brown Op.”).

³ *Monroe Capital, LLC v. NHB Advisors, Inc.*, C.A. No. 399, 2012, at 5 (Del. Mar. 14, 2013) (ORDER).

⁴ Monroe Capital LLC is only one of the related Monroe Defendants involved in this action. Monroe Capital Management Advisors, LLC, Monroe Capital Management LLC, and MC Funding Ltd. are also Defendants here. For the sake of conciseness, I refer to these Defendants collectively as “Monroe”.

the trust. The central issue in this case is whether the Trustee may accept a settlement agreement concerning fiduciary-duty litigation brought against the former directors and officers of Butler in Florida. Under the Trust Agreement, the Trustee may accept the settlement only with the unanimous approval of both members of the Liquidation Trust Committee, Monroe and Garrison. Garrison supports the settlement; Monroe does not. However, the Trust Agreement provides an exception to the unanimity requirement. The Trustee is authorized to take action without the unanimous approval of Monroe and Garrison by the following clause:

[N]othing in this agreement shall be deemed to prevent [NHB] from taking, or failing to take, any action that, based upon the advice of counsel, it determines it is obligated to take (or fail to take) in the performance of any fiduciary or similar duty which the Liquidator owes to the Beneficiaries or any other person or entity.⁵

The Trustee initiated this action seeking a declaratory judgment that it was authorized to accept the settlement, and thus break the deadlock, because it had obtained the advice of independent counsel, Mr. Brown, who opined that the Trustee had a fiduciary duty to accept the settlement.

In my bench decision of June 22, 2012, I found that the Trustee could only act without unanimous consent to accept the settlement where a failure to do so would constitute a breach of duty as determined by the Trustee's independent

⁵ Trust Ag. Art. II §§ 2.2, 2.3.

counsel.⁶ Therefore, if the Trustee received advice of counsel that failing to accept the settlement offer would be breach of fiduciary duty, then the Trustee had the power under the Trust Agreement to accept the settlement offer. I determined that Mr. Brown had not been asked to opine on this specific issue, and that the parties' should have the opportunity to submit supplemental arguments to Mr. Brown before he provided his advice to the Trustee in accordance with my decision. Mr. Brown received supplemental briefing from both parties and rendered a decision that he was

[O]f the opinion that under the circumstances the Trustee has a fiduciary duty to accept the settlement offer, even when measured by the Court's announced standard that the "decision that advising counsel must make is whether it would be a breach of fiduciary duty to the creditor beneficiaries to fail to accept the proffered settlement."⁷

Based on the content of Mr. Brown's opinion letter, the Plaintiff requests that I enter a final order opining that the Trustee may accept the settlement.

The Monroe Defendants object to the entry of final judgment on three grounds, two of which involve the sufficiency of the Brown opinion. First, the Monroe Defendants argue that a final order is inappropriate because Mr. Brown's opinion letter does not fulfill my instructions to independent counsel announced in my bench decision. Second, the Monroe Defendants argue that I should review the substance of Mr. Brown's decision to determine whether Mr. Brown was correct in

⁶ Ct.'s Ruling Tr. 9:15-10:15, June 22, 2012 (TRANSCRIPT).

⁷ Brown Op. 5.

opining that the Trustee has a duty to accept the settlement. Both arguments are unavailing. Finally, Monroe argues that it has not had the opportunity to litigate its affirmative defenses to this suit, specifically unclean hands. I will consider each argument in turn.

First, the Monroe Defendants argue that I should forbear from entering a final order because Mr. Brown's opinion failed to apply the standard I announced in my bench decision: namely, that counsel was to determine "whether it would be a breach of fiduciary duty to the creditor beneficiaries to fail to accept the proffered settlement."⁸ The statements Mr. Brown made to summarize his opinion are the following: (1) "I am still of the opinion that under the circumstances the Trustee has a fiduciary duty to accept the settlement offer";⁹ (2) "[i]f the Trustee fails to secure this current value of the trust assets by accepting the offer . . . then in my opinion . . . it could be exposed to a claim for breach of fiduciary duty . . . which would likely survive a motion to dismiss for failure to state a claim";¹⁰ and (3) "[h]aving now considered the views of the parties involved, pro and con, . . . it is still my belief that the Trustee can be said to have a 'fiduciary or similar duty' to accept the settlement proposal."¹¹ The Monroe Defendants argue that Mr. Brown's opinion is technically deficient in that it fails to address whether the

⁸ Ct.'s Ruling Tr. 13:15-18, June 22, 2012 (TRANSCRIPT).

⁹ Brown Op. 5.

¹⁰ Brown Op. 8.

¹¹ Brown Op. 8.

Trustee would *breach* its fiduciary duties in failing to accept the settlement offer. According to the Monroe Defendants, the scope of Mr. Brown’s opinion concerned only the existence of a legal duty, and not whether the failure to act consistent with such a duty constitutes a breach of fiduciary duty.¹² I decline to read Mr. Brown’s opinion so narrowly. Mr. Brown opined that “the Trustee has a fiduciary duty to accept the settlement offer . . .” and that a breach-of-duty suit, should the Trustee fail to accept the settlement, would state a claim cognizable by a court.¹³ If a fiduciary has a duty to act, and fails to act, the failure to act is a breach of duty.¹⁴ That Mr. Brown did not specifically state that legal conclusion is not cause to invalidate his advice to the Trustee, nor the Trustee’s reliance on that advice. Therefore, this objection to the entry of a final judgment fails.

Next, the Monroe Defendants argue that Mr. Brown’s determination as to the Trustee’s duty is incorrect. I need not review the substance of Mr. Brown’s decision for its correctness under Delaware law, however. In this matter, the Plaintiff seeks a declaratory judgment as to whether it is empowered to accept the settlement offer. I have determined that, under the terms of the Trust Agreement, the answer to that question is yes. The relevant language of the Trust Agreement provides that the Trustee may so act if counsel advises that the Trustee has a

¹² Defs.’ Br. Opp’n to Pl.’s Mot. for Entry of Final Order 23.

¹³ Brown Op. 5.

¹⁴ *See, e.g.*, Black’s Law Dictionary (9th ed. 2009) (defining “breach of duty” as “. . . the failure to act as the law obligates one to act; esp., a fiduciary’s violation of an obligation owed to another”)(citations omitted).

fiduciary duty to so act; the contract does not require the Trustee to seek court approval or to ensure that the advice it received from counsel was legally correct. My review of the substance of Mr. Brown's opinion would render the advice-of-counsel provision of the agreement superfluous. The Trustee has sought, and received, advice of counsel under the Trust Agreement. A good-faith determination by the Trustee that it has a fiduciary duty to accept the settlement, based on advice of counsel, triggers the Trustee's authority. The Plaintiff need not demonstrate that Mr. Brown's advice is correct in order to demonstrate its authority under the Trust Agreement.

To be clear, the Trustee is entitled to the declaratory judgment it seeks in Count I of the Complaint: that under the advice-of-counsel provision, it has the authority to accept the settlement. Because of this decision, I need not reach Count II, which seeks an alternative declaratory judgment: that—should I first find the advice-of-counsel clause inapplicable—the unanimity requirement is unenforceable in light of the Trustee's fiduciary duty to all the beneficiaries to accept the settlement. Because the predicate to this alternative relief is not satisfied, I need not do what Monroe advocates here: determine to what extent fiduciary duty compels the Trustee to accept the settlement. The parties to the Trust Agreement permitted the Trustee the authority to act once it determined such

a duty exists based upon advice of counsel. Independent counsel having rendered such advice, after consultation with all the parties, the Trustee has the power to act.

Because I have determined that Mr. Brown's opinion letter complies with my interpretation of the advice-of-counsel provision of the Trust Agreement, I hold that the Trustee has the ability to accept the settlement offer, consistent with its obligations under the Trust Agreement, assuming it is not prevented from doing so due to affirmative defenses raised by the Monroe Defendants.

Third, and finally, the Monroe Defendants assert that the Trustee should be barred from receiving a declaratory judgment because the Trustee has come to the Court with unclean hands. The Monroe Defendants have stated conclusory allegations that the Trustee has breached its duty of candor and loyalty to Monroe by favoring Garrison over Monroe. Garrison did not respond to these arguments in its Answering Brief. The parties should confer and notify me by July 23, 2013 whether consideration of unclean hands is necessary in this action, and, if so, how they wish to proceed to present the unclean-hands defense.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III