UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW SNITZER and PAUL LIVANT, individually and as representatives of a class of similarly situated persons, on behalf of the American Federation of Musicians and Employers' Pension Plan,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, THE INVESTMENT COMMITTEE OF THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, RAYMOND M. HAIR, JR., AUGUSTINO GAGLIARDI, GARY MATTS, WILLIAM MORIARITY, BRIAN F. ROOD, LAURA ROSS, VINCE TROMBETTA, PHILLIP E. YAO, CHRISTOPHER J.G. BROCKMEYER, MICHAEL DEMARTINI, ELLIOT H. GREENE, ROBERT W. JOHNSON, ALAN H. RAPHAEL, JEFFREY RUTHIZER, BILL THOMAS, JOANN KESSLER, MARION PRESTON,

Defendants.

No. 1:17-cv-5361 (VEC)

DEFENDANTS' RESPONSE TO OBJECTION OF AD HOC COALITION OPPOSED TO THE SETTLEMENT AGREEMENT

Defendants submit this brief for the limited purpose of responding to the argument raised in the so-called "Objection Of Ad Hoc Coalition Opposed to the Settlement Agreement" ("Objector Brief") that the settlement should not be approved because the scope of the release in the Settlement Agreement may prevent the Objectors from filing new claims challenging investment-related decisions post-dating the retention of the Outsourced Chief Investment Officer ("OCIO") in October 2017.[1] Dkt No. 186 at ECF pp. 27-28. For the reasons stated below, this argument should be rejected, and thus should not deter the Court from approving the settlement, because it is based on a mistaken concern about the scope of the release. But it is important that, in rejecting this argument, the Court do so for reasons that are consistent with the interpretation of the release that was contemplated by the parties. Doing so will avoid the risk of the Court's approving terms of a settlement to which the Trustees did not agree, and to which they could not agree without potentially compromising their insurance coverage, which, following the settlement payment, will not be available for claims related to this lawsuit.

The Objector Brief expresses the concern that the release in the Settlement Agreement could be construed to bar Objectors from bringing claims challenging the continuation of investment-related decisions that were the subject of the lawsuit and that allegedly have not been rectified. *Id.* This concern is misplaced because the claims that the Objectors are anticipating would be claims directed at *new* conduct, rather than the continuation of *old* conduct, and, as such, would not be released.

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[1] Although the Trustees are, for the most part, willing to let Plaintiffs respond to the other arguments in the Objector Brief, they do wish to point out that the Objectors' conflict of interest assertions are misplaced. Dkt No. 186 at ECF pp. 22-23. Rule 1.13 of the New York Rules of Professional Conduct and its accompanying comments recognize that an attorney for an organization can represent its board members in defending claims brought on behalf of the organization. Those same principles apply here.

For reasons previously stated in the Trustees' brief in opposition to Plaintiffs' attorney fee application, Dkt No. 184 at 11, whatever claims were made in the Complaint relating to Trustee investment decisions during the period from August 9, 2010 through July 14, 2017 (when the Complaint was filed) ended as a result of the retention of the OCIO effective October 1, 2017 (the "OCIO Management Date"). The OCIO's retention fundamentally altered the allocation of decision-making responsibilities, and the decision-making process, as it related to asset allocation and Plan investments. Specifically, the decisions whether and when to retain active investment managers, and when to replace them, now rest in the hands of the OCIO. Likewise, the determination as to what percentage of Plan assets, within the broad ranges set by the Trustees, should be invested in, *e.g.*, international emerging markets equities and private equity, rests with the OCIO. The Objector Brief nevertheless complains that the Trustees still retain responsibility for setting "'return and risk objectives' as well as asset allocation targets.'" Dkt No. 186 at ECF p. 14.[2] But this is not a reason to question the release because whatever

[2] As previously noted (Dkt No. 184 at 11), the asset allocation ranges set by the Trustees are very broad – in fact, they go all the way down to 0% for private equity and private real estate – and there is no specific allocation range at all for international emerging markets equities as opposed to equities in general. Furthermore, the independent fiduciary appointed pursuant to the settlement has the responsibility to participate in Board meetings on these types of investment-related decisions and, more importantly, "to state his assessment, including his reasoning for such assessment, for all matters under deliberation or subject to a decision or vote related to the Investment Committee (including asset management and allocation)." Dkt No. 139-1 at ECF p. 14. Contrary to any misimpressions that may have been left by the Trustees' prior statement on this issue (Dkt No. 184 at 12), the Trustees did not intend to imply that the independent fiduciary would be evaluating the previous decision-making process that was the subject of the lawsuit, nor that he would simply be rubber-stamping the Investment Committee's current decision-making process. In fact, Mr. Irving has declared his intention to "add value to the Plan's trustees' investment decision-making . . . in an unbiased and independent fashion." Dkt No. 139-02 at ECF p. 3.

decisions the Trustees have made pursuant to this more limited authority are new decisions that are not connected to those that were previously made, and therefore are not released.

By way of example, in 2018, in anticipation of the filing of the MPRA application (and as reported in that application), the Trustees selected a new, more conservative, risk profile for the Plan's investments. This risk profile contrasted materially with the higher return targets that were adopted, beginning in 2011, in an effort to increase the chances that the funded status of the Plan would improve, rather than continue to deteriorate, and that the Plan might one day emerge from critical status – neither of which was possible if the Plan did not outperform the investment returns that were assumed by the actuary in making its projections. The Objectors may wish to challenge the current choice of risk profile, or the investment policies adopted pursuant to that risk profile – even though there would be no conceivable basis for doing so – but they cannot be heard to challenge these decisions as being a continuity of decisions made prior to the OCIO Management Date that were the subject of the litigation.

It is precisely for that reason that the Objectors' concerns about the scope of the release are misplaced. Pursuant to the terms of the Settlement Agreement, participants are releasing any claims "that arise out of, relate in any way to, are based on, or have any connection with any of the factual or legal allegations asserted in the Complaint or Amended Complaint."[3] Investment-related decisions post-dating the OCIO Management Date would not be encompassed by this language because these decisions are completely disconnected from the investment-related decisions that were the subject of the lawsuit.

[3] This language tracks coverage releases and/or exclusions the Trustees are providing to the Plan's insurance carriers as a condition for the settlement payment.

The Objectors nevertheless express a concern that arises from the fact that the release language is followed by an itemization of certain of the released claims that were the focus of the litigation; specifically: "(i) the Plan's asset allocation and the selection (including of the Plan's OCIO), retention, monitoring, oversight, compensation, fees, or performance of the Plan's investments or its investment managers; (ii) investment-related fees, costs, or expenses charged to, paid, or reimbursed by the Plan; (iii) disclosures or failures to disclose information regarding the Plan's investments and/or funding; or (iv) any alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties or prohibited transactions in connection with (i) through (iii) above." Consistent with the parties' intent, with respect to these delineated decisions the release is limited to the period before the OCIO Management Date. But because the delineated decisions are preceded by the phrase "including, but not limited to," the Objectors worry that the release could conceivably be construed to encompass delineated decisions that post-date the OCIO Management Date as well. As a practical matter, that interpretation would make no sense because it would render the reference to OCIO Management Date completely superfluous. If the delineated decisions included those made after the OCIO Management Date, there would be no need for a date. In any event, for the reasons stated, any such delineated decisions that post-date the OCIO Management Date would not be encompassed by the scope of the preceding release language in the first place.

In short, claims targeting the types of investment-related decisions that were the focus of the lawsuit but that post-date the OCIO Management Date would not be released because these claims – no matter how they are characterized – would necessarily be directed at new decisions, based on new factual allegations, rather than a continuity of claims previously challenged. Although it would be extremely unfortunate if disgruntled participants were to pursue such

frivolous claims, the Court need not be deterred from approving this settlement by a concern over their right to do so.

CONCLUSION

For the reasons discussed above and in the Trustees' prior submission at Dkt No. 184, this Court should finally approve the settlement and reject the challenges to the release posed by the Objectors.

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New York, NY

Respectfully submitted,

By: */s/ Myron D. Rumeld*

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