

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

COMMERZBANK AG, LONDON BRANCH

INDEX NO. 650722/12

- v -

DEUTSCHE TRUSTEE COMPANY LIMITED,
as Trustee

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by plaintiff for a preliminary injunction is DENIED for the attached Decision and Order.

Dated: April 26, 2012

Melvin L. Schweitzer
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X
COMMERZBANK AG, LONDON BRANCH, :
 :
 : Plaintiff, : Index No. 650722/12
 :
 : -against- : DECISION AND ORDER
 :
 : DEUTSCHE TRUSTEE COMPANY LIMITED, as : Sequence No. 001
 : Trustee, :
 :
 : Defendant. :
-----X

MELVIN L. SCHWEITZER, J.:

Facts

Plaintiff brings on this motion for a preliminary injunction in this declaratory judgment action to stop a proposed amendment to an Indenture under which it is a Noteholder. The facts are as follows.

In 1997 Gleneagles Funding Limited (Gleneagles) issued Guaranteed Extendable Floating Rate Notes (Notes) due in 2012 (and extendable until December 2037) pursuant to the terms of an indenture dated May 28, 1997 among Gleneagles, Financial Security Assurance Inc., Bankers Trust Company Limited, Trustee, and Deutsche Bank AG London, principal paying agent (Indenture). The Notes are secured by bonds and other securities. Payment of the Notes at maturity is guaranteed by financial guaranty insurance policies issued by Assured Guaranty.

The Notes were issued in a \$520,000,000 CBO transaction. The Notes are held by Deutsche Bank AG, London Branch, in its capacity as Depository pursuant to a June 17, 1997 Deposit Agreement. Defendant Deutsche Trustee Company Limited (f/k/a Bankers Trust Company Limited) is now the Trustee under the Deposit Agreement and the Indenture.

The Depositary Receipts (Receipts) at issue here represent an undivided interest in the Notes. The Receipts give the holders the right to receive the amounts paid to the Depositary in respect of principal and interest on the Notes. The Depositary holds the Notes. The holders of the Receipts control the voting rights of the related Notes under the Indenture by instructing the Depositary to vote the pro rata portion of the Notes represented by the Receipts held by the holder.

Plaintiff, Commerzbank AG, London Branch (Commerzbank) is a banking corporation organized under the laws of the Federal Republic of Germany. It acquired \$29,500,000 principal amount of the Receipts, which represents a 5.82% voting position in the Notes, shortly after their issuance. It contends it purchased them as part of a long-term investment strategy that contemplated holding them to maturity.

Recently two institutional investors acquired significant positions in the Receipts and proposed amending the Indenture to add an optional redemption feature to the Notes. A notice was sent to the holders describing the proposed amendment in August 2011, setting September 6, 2011 as the deadline for a vote thereon. 94.18% of the holders consented to the amendment (Amendment). Commerzbank, alone, (5.82%) voted against it.

Pursuant to the Amendment, the Indenture would permit any holder the option – but not the obligation – to redeem its Receipts and receive an in-kind distribution of its pro-rata share of each financial asset that comprises the collateral under the Indenture (i.e. the bonds and other securities that secure the Notes) as of a payment date. This vertical slicing would permit a redeeming holder to liquidate its holdings in the Notes while preserving the remaining holders' interests in Notes and underlying portfolio.

Commerzbank notified the Trustee that unanimous consent was required because it would result in modifications of the type set forth in Section 10.01 (b) of the Indenture and that the Amendment would be materially prejudicial and would materially affect Commerzbank. The Trustee retained a financial advisor who advised it that the Amendment would not be materially prejudicial to, or would not otherwise have a materially adverse affect on the holders.

The Trustee moved forward with the Amendment and Commerzbank initiated this action for a preliminary injunction.

The sole issue in this case is whether or not the Indenture can be amended to add the proposed optional redemption feature to the Notes without the consent of Commerzbank.

Discussion

A preliminary injunction should issue where the moving party demonstrates: (1) a probability of success on the merits; (2) a danger of irreparable injury in the absence of an injunction; and (3) a balance of equities tipping in its favor. *Mabry v Neighborhood Defender Serv., Inc.*, 930 NYS2d 193, 194 (1st Dept 2011); *61 W. 62 Owners Corp. v. CGM EMP LLC*, 906 NYS2d 549, 555 (1st Dept 2010). Preliminary injunctive relief “serves the salutary purpose of maintaining the status quo pending resolution of the underlying controversy,” *Blass v Cuomo*, 547 NYS2d 237, 237 (2d Dept 1989), and, in a declaratory judgment case, “assure[s] the efficacy of any declaratory judgment” that ultimately settles the parties’ rights, *M&A Oasis, Inc. v MTM Assocs., L.P.*, 764 NYS2d 9, 10 (1st Dept 2003).

The relevant sections of the Indenture are as set forth here.

Section 10.01 (b). No Modification of the Notes. No modification of the Notes or the provisions of this Indenture . . . shall, without the consent of the Holder of each Note *affected* thereby: (emphasis added)

* * *

- (ii) reduce the amount of principal of or reduce the amount or extend the term of payment of interest on any Note, or change the currency of payment of principal of or interest, Supplement Cash Payment or Additional Amounts on any Note;

* * *

- (iv) change the obligation of the Company or Financial Security to pay Additional Amounts in respect of the Notes or pursuant to the Insurance Policies;
- (v) release Financial Security from all or any part of its obligation to make each and every payment under an Insurance Policy; or
- (vi) release the Swap Counterparty from all or any part of its obligation to make each and every payment under the Swap Agreement except in accordance with the terms thereof.

Section 11.01. Supplemental Indentures without Consent of Holders of Notes.

(a) Subject to the provisions of Section 10.05 (d), without the consent of the Holders of the Notes, the Company, when authorized by resolutions of its Board of Directors, Financial Security, the Trustee and the Principal Paying Agent, may from time to time and at any time enter into an indenture or indentures supplemental hereto for one or more of the following purposes:

* * *

- (iii) to cure any ambiguity or to correct or supplement any provision contained in this Indenture which may be defective or inconsistent with any other provision contained in this Indenture or any supplemental indenture or to make any modification that is of a formal, minor or technical nature or which is made to correct a manifest error; to grant any property to the Trustee; to agree to such modification of, or to such waiver or authorization of any breach or any proposed breach, of the Notes or any provisions of this Indenture, to agree to such modification of the Insurance Policy, or to make such other provisions, modifications or changes to this Indenture as shall not in the opinion of the Trustee be materially prejudicial to the interests of the Holders of the Notes; . . .

Section 11.02. Supplemental Indentures with Consent of Holders of Notes.

(a) The Company and the Trustee and the Principal Paying Agent, with the consent of the Holders of Notes as provided in subsection (b) below, may from time to time and at any time execute supplemental indentures adding any provision to or changing in any manner or eliminating any of the provisions of this Indenture or any supplemental indenture or modifying in any manner the rights of the Holders of the Notes of one or more Issues; provided that, no such supplemental indenture shall, without the consent of the Holder of each such Note affected thereby, modify any of the matters set forth in Section 10.01 (b).

(b) The execution of any supplemental indenture pursuant to subsection (a) above shall require the unanimous consent by a resolution of the Holders of Notes of any Issue as to which in the opinion of the Trustee the execution of such supplemental indenture would be materially prejudicial or which may thereby be otherwise materially affected; provided that, no such resolution shall be required if all of such Holders consent to such supplemental indenture in writing.

* * *

Commerzbank contends that the terms of Sections 10.01 (b) and 11.02 (a) are clear: no modification of the Indenture can occur that could potentially result in any change enumerated in 10.01 (b) without the consent of each affected holder.

Commerzbank's argument here distills down to the proposition, for example, that any reduction in the principal amount of any Note, even though it does not reduce Commerzbank's holdings, requires the consent of Commerzbank because it is affected thereby. This, according to Commerzbank, is the command of Sections 10.01 (b) and 11.02 (a).

Commerzbank draws an exclamation point after this argument by emphasizing that over 90% of the holders voted in favor of the Amendment and thus can be expected to redeem their Notes. This, it contends, unless it follows suit, will leave it as the sole holder of a minor portion in a formerly \$520,000,000 CBO. This, it says, radically affects it. This argument is speculation.

It is possible that some of the holders who will have consented to the Amendment providing a redemption feature will redeem at this time, or at some time prior to maturity, but it is also possible that none will. They will have voted only to assure such an option.

The core issue is whether by adding an optional redemption feature to all of the Notes which, upon exercise by any holder, will reduce the principal of its Note requires the consent of all holders because each Note would be affected thereby. Put another way, does the language of Section 11.02 (a) "provided that, no such supplemental indenture shall, without the consent of the Holder of each such Note affected thereby, modify any of the matters set forth in 10.01 (b)" require Commerzbank's consent to the Amendment.

In the first instance, the Trustee attempts to avoid this issue by contending that Section 11.01 (a) (iii) permits a supplemental indenture of the nature of the Amendment to be entered into without the consent of the Holders of the Notes pursuant to the language ". . . to make such other provisions, modifications or changes to this Indenture as shall not in the opinion of the Trustee be materially prejudicial to the interests of the Holders of the Notes." This language follows a litany of items including curing ambiguities, correcting defective or inconsistent provisions, or correcting manifest error, which may be corrected without the consent of the Noteholders. The Trustee's contention is wrong. The antecedent language relates to standard boilerplate minor corrections and the word "such" makes it clear the quoted language is a catch all provision for changes of that nature. The proposed Amendment is anything but that. The Trustee may not use this Section to justify adopting the proposed Amendment without the consent of the Holders of the Notes.

Section 11.02 (a) permits the Company and the Trustee and the Principal Paying Agent to execute supplemental indentures changing in any manner any provisions of the Indenture. But, as referenced above, if the supplemental indenture modifies any of the matters set forth in Section 10.01 (b), the consent of the holder of each Note affected thereby is needed. The unanimous consent of the Holders of the Notes is also required by 11.02 (b) if the Trustee is of the opinion that a supplemental indenture would be materially prejudicial to the Holders of the Notes of any Issue or if such Holders may thereby be otherwise materially affected.

Commerzbank argues that if the Amendment is enacted, thereby enabling holders to redeem their Depositary Receipts, the principal amounts of the Notes and related Depositary Receipts will be reduced immediately upon the cancellation of the redeemed Notes. Commerzbank reasons that if any holder redeems, this necessarily would reduce the overall principal balance of the Notes. And because the terms of Section 10.01 (b) (ii) plainly and unambiguously require consent where there is a modification to the Indenture reducing the amount of principal of *any* Note, it does not matter if the principal amount of Commerzbank's holding would be reduced (through redemption). According to Commerzbank, the applicability of Section 10.01 is not dependent upon it choosing to redeem. So long as *any* redemption will occur – which of course is the very purpose of the Amendment – Commerzbank's consent is required to allow such a change. The Amendment fits squarely within Section 10.01 (b) (ii) and Commerzbank thus concludes that its consent, as an affected holder, is required before the Indenture is modified in such a way that would allow a reduction in the amount of the principal of any Note.

The Trustee counters that the Amendment provides that a non-redeeming holder's interests will be undisturbed by a redemption in-kind. A non-redeeming holder retains the same pro rata share of the Notes and the corresponding collateral, the same insurance coverage to maturity, and the same revenue stream. Because a non-redeeming holder's pro rata interest in the Notes will not be "modified" by any redeeming holder's redemption in-kind, the proviso of Section 11.02 (a) does not apply here and plaintiff does not have a "de facto veto right" over the Amendment.

The court agrees with the Trustee that Commerzbank does not have such a "de facto veto right." To interpret the provision as Commerzbank would have it would read out the words "affected thereby" from Sections 11.02 (a) and 10.01 (b) of the Indenture. The court is of the view that to amend the Indenture to include the proposed optional redemption feature in the Notes will not affect Commerzbank in any of the matters set forth in 10.01 (b). A holder's option to redeem its Notes certainly will have the consequences listed in Section 10.01 (b), but not as such Section relates to Commerzbank, but, rather, as to such redeeming Holder. Commerzbank's principal amount of Notes will remain the same, as will its protection under the Insurance Policies and the Swap Agreement.

Commerzbank further contends that the proposed Amendment materially affects it and, as such, requires the consent of it pursuant to Section 11.02 (b). The court is of the opinion that Commerzbank cannot prevail on this point. The unanimous consent requirements of 11.02 (b) are triggered by the Trustee's opinion that the proposed Amendment would be materially prejudicial or otherwise materially affect the Holders. The Indenture put this determination squarely within the purview of the Trustee who may consult with qualified counsel and financial

advisers in making this discretionary determination. *See* Indenture, Section 8.02 (c); *Elliot Assocs. v Schroder Bank & Trust Co.*, 838 F2d 66, 72 (2d Cir 1988) (“although the trustee may reasonably insist on the full 50-day notice in the event of a complete redemption, it nevertheless has the discretion [pursuant to the trust indenture] to accept shorter notice when it deems such shorter notice satisfactory”); *New York State Med. Care Facilities Fin. Agency v Bank of Tokyo Trust Co.*, 163 Misc 2d 551, 556 (NY Sup Ct 1994) (Cahn, J.) (“The courts in New York . . . have held that the duties of an indenture trustee . . . are governed by the terms of the indenture.”). There is no contention here that the Trustee is of such opinion. Consequently, 11.02 (b) is not triggered by the proposed Amendment.

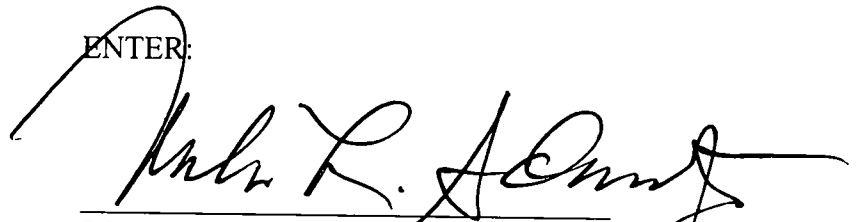
It is the court’s opinion that Commerzbank has not demonstrated a probability of success on the merits of its contention that its consent is required in connection with the Amendment. Accordingly, the court need not address the danger of irreparable harm or the balance of equities in these circumstances.

Accordingly, it is

ORDERED that plaintiff’s motion for a preliminary injunction is denied.

Dated: April 26, 2012

ENTER:



J.S.C.
MELVIN L. SCHWEITZER
J.S.C.