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November 7, 2013

Hon. Barbara R. Kapnick
Justice
Supreme Court of the State of New York
60 Centre Street, Room 555
New York, New York 10007

Re: Application of Bank of New York Mellon; Index No. 651786/11

Dear Justice Kapnick:

I write in response to Mr. Moon's letter of yesterday in which he tries to explain why he ignored Commercial Division Rule 24 and why his client Triaxx should be permitted to ignore the briefing protocol carefully and specifically decided upon and directed by Your Honor after detailed written and oral argument, and adhered to by all parties with the sole exception of Triaxx.

Counsel for Triaxx has violated Commercial Division Rule 24, and Mr. Moon is wrong in saying that that Rule – because it is supposedly narrowed by Your Honor's Individual Practices for Part 39 -- applies only to "dispositive motions filed before the note of issue."

Rule 24(b) sets forth the only exceptions to the general requirement that -- to aid the Court in managing its docket -- notice must be given in advance of motion practice: *i.e.,* "b) This rule shall not apply to disclosure disputes covered by Rule 14 nor to dispositive motions pursuant to CPLR 3211, 3212 or 3213 made at the time of the filing of the Request for Judicial Intervention or after discovery is complete. Nor shall the rule apply to motions to be relieved as counsel, for pro hac vice admission, for reargument or in limine." Triaxx's motion was made pursuant to CPLR 4401, so it is not covered by subsection (b).

Nor can Triaxx rely on Your Honor's written Practices to narrow Rule 24 further. Practice 1 states that the Court's Practices are intended to "supplement" the Commercial Division Rules, not limit them. Therefore, our understanding is that Motion Practice Rule 2 should be read as clarifying that Rule 24(b) does apply to dispositive motions made after an RJI has been filed, not that it *only* applies in that situation. Moreover, even if Mr. Moon is right in his view that a motion conference is not needed after a note of issue has been filed, Triaxx is still in violation *because here no note of issue has yet been filed by any party.*

But something far more fundamental applies here, obviating the need for any Talmudic-like exegesis of Rule 24 – common sense and simple courtesy. The Court and counsel spent time and effort discussing the briefing protocol – how many pages would be allotted and what would be the order of briefing. Strong feelings were expressed by all sides on this issue and the

Court decided it. If Triaxx, alone among all the parties, had a plan to make that protocol irrelevant, it should have said so ("Your Honor, there's no need to make any briefing protocol ruling for Triaxx, because it will be irrelevant; I'm going to label my opposition papers – which will address the same issues and seek the same relief some or all of the other Objectors do -- as a motion, which will exempt my client from any protocol you order and enable it, unlike any of the other Objectors, all of whom are going to follow your protocol, to submit a sur-reply").

Is there any doubt how Your Honor would have responded?

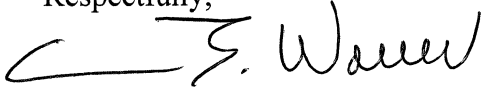
Counsel's description of the relief requested by Triaxx in its so-called "motion" show it is no different substantively from all the other opposition papers submitted pursuant to the Court-directed briefing protocol. Triaxx's amendment argument is also raised in AIG's brief, and its loan modification argument is just one of the things the Objectors say the Trustee wrongly failed to do or look at. Only the label of Triaxx's submission is different.

This re-labeling maneuver by Triaxx should not be countenanced or rewarded; it elevates form over substance, it evades the clear and considered briefing instructions, the parties, and it disadvantages Petitioners with an unauthorized sur-reply. Treating Triaxx's "motion" as an opposition submission seeking the relief requested but with no right of reply, on the other hand, preserves that request for Triaxx and allows it to make any further argument it believes is needed in its closing statement.

In fact, Triaxx lacks standing -- as a single certificateholder, acting alone and outside a 25% group -- to seek judgment on any claim without first meeting the requirements of the "no action" clause, §10.08, of the PSAs.[1] Indeed, Triaxx has not even suggested that it has satisfied the requirements of the "no action" clause. But the Court need not reach that issue to resolve this procedural briefing question. Triaxx's so-called "motion," if treated as an opposition submission, will be resolved in the context of the Final Order and Judgment; the issues raised by Triaxx are all subsumed in the issues that will be decided in approving or disapproving the Settlement and granting or denying the Petition. Indeed, the same is true for all the other Objectors, even though none of them except Triaxx has proceeded by "motion".

Thank you for your continued attention to this matter.

Respectfully,



Kenneth E. Warner

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cc: All Counsel of Record (via e-filing)

[1] *In Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't. 2012), the First Department held that certificateholders' right to sue is limited to those instances that satisfy the "no action" clause.