

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

PRESENT: HON. EILEEN BRANSTEN

PART 3

Justice

Index Number : 651914/2010

BANK OF NEW YORK MELLON

VS.

TABERNA PREFERRED FUNDING

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 651914/10

MOTION DATE 10/14/11

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

<u>1</u>
<u>2</u>
<u>3</u>

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 11-28-11



HON. EILEEN BRANSTEN 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: IAS PART 3

-----X

THE BANK OF NEW YORK MELLON TRUST
COMPANY, N.A., as successor indenture trustee to
JP MORGAN CHASE BANK N.A.,

Plaintiff,

-against-

Index No. 651914/10
Motion Date: 10/14/11
Mot. Seq. Nos.: 001-004

TABERNA PREFERRED FUNDING III, LTD.;
TABERNA PREFERRED FUNDING III, INC.;
TABERNA PREFERRED FUNDING IV, LTD.;
TABERNA PREFERRED FUNDING IV, INC.;
TABERNA PREFERRED FUNDING VI, LTD.;
TABERNA PREFERRED FUNDING VI, INC.;
TABERNA PREFERRED FUNDING VII, LTD.;
TABERNA PREFERRED FUNDING VII, INC.;
MERRILL LYNCH CAPITAL SERVICES INC.;
AG FINANCIAL PRODUCTS, INC.; DEUTSCHE
BANK TRUST COMPANY AMERICAS; HSBC BANK
USA, N.A.; NATIXIS, f/k/a IXIS CORPORATE
& INVESTMENT BANK; ELLIOT INTERNATIONAL,
L.P.; LIVERPOOL LIMITED PARTNERSHIP; UBS
AG as the Attorney-in-Fact for THE SNB
STABFUND KOMMANDITGESELLSHAFT FUR
KOLLEKTIVE KAPITALANLAGEN; DEPOSITORY
TRUST & CLEARING CORPORATION and CEDE &
CO., its nominee name; and DOES 1 through
100,

Defendants.

-----X

EILEEN BRANSTEN, J.:

Motion sequence numbers 001, 002, 003 and 004 are consolidated for disposition.

This interpleader action arises out of four separate transactions in which plaintiff,
Bank of New York Mellon Trust Company, N.A. (“BONY Mellon”), as successor indenture

trustee to JPMorgan Chase Bank N.A., is a stakeholder seeking to resolve a controversy among the defendants arising out of their different interpretations of terms in the agreements governing their collateralized debt obligation (“CDO”) transactions. Defendant Merrill Lynch Capital Services, Inc., contends that there was a breach of the underlying agreements and that this breach enabled it to terminate the agreements and seek termination payments. The remaining defendants argue that there was no right to terminate the agreements and that the agreements are still in full force and effect.

In motion sequence number 001, defendant UBS AG (“USB AG”) as Attorney-in-Fact for the SNB StabFund Kommanditgesellschaft für kollektive Kapitalanlagen (“StabFund”) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s Amended Interpleader Complaint as against UBS AG and StabFund and granting StabFund’s counterclaims for declaratory relief.

In motion sequence number 002, defendant Merrill Lynch Capital Services, Inc. (“Merrill Lynch”) moves, pursuant to CPLR 3212, for summary judgment for a declaration in its favor against BONY Mellon and defendants AG Financial Products, Inc., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., Natixis, f/k/a IXIS Corporate & Investment Bank, UBS AG, Taberna Preferred Funding III Ltd., Taberna Preferred Funding III, Inc., Taberna Preferred Funding IV, Ltd., Taberna Preferred Funding IV, Inc., Taberna Preferred Funding VI, Ltd., Taberna Preferred Funding VI, Inc., Taberna Preferred Funding

VII Ltd., Taberna Preferred Funding VII, Inc. (all Taberna defendants collectively, the “Taberna entities”), Depository Trust & Clearing Corporation and Cede & Company.

In motion sequence number 003, defendants AG Financial Products Inc. (“AG Financial”) and Natixis f/k/a IXIS Corporate & Investment Bank (“Natixis”) move, pursuant to CPLR 3212, for summary judgment on their first and second requests for declaratory relief.

In motion sequence number 004, defendants Deutsche Bank Trust Company Americas (“Deutsche Bank”) and HSBC Bank USA, N.A. (“HSBC”) move, pursuant to CPLR 3212, for summary judgment on their first and second requests for declaratory relief.

BONY Mellon cross-moves, pursuant to CPLR § 1006 (f), for an order discharging it from liability and reimbursement of expenses and costs, including attorneys’ fees.

FACTS

Three of the four transactions underlying this action are virtually identical, and the fourth is similar, but has a significant difference. Therefore, the three identical transactions will be discussed jointly, while the fourth one will be addressed separately.

The underlying transactions are CDOs entered into by the Taberna entities in 2005 and 2006. The Taberna III, Taberna IV and Taberna VI transactions were virtually identical. The Taberna VII transaction differs from the others. To the extent that the facts are the same, they will be presented together. Those discrepancies that set Taberna VII apart will be noted.

The documents relating to the transactions include hedge agreements, schedules to the hedge agreements, confirmations of the hedge agreements and indentures, all of which are part of a unified agreement. All parties agree that the documents must be read together.

AG Financial is a provider of financial transaction insurance, and is obligated to make interest payments due on the notes in the event that the Taberna entities fail to make their payments. Merrill Lynch is the Hedge Counterparty. Its affiliate, Merrill Lynch, Pierce, Fenner, and Smith, originated and structured the Taberna CDOs and served as a placement agent for the notes issued by the Taberna entities.

A CDO is a structured financing arrangement in which an entity (here, the Taberna entities) issue notes to investors and holds a pool of assets that generate a stream of cash over time, in the form of interest payments and principal proceeds. The CDO uses the cash flow from the assets to repay the CDO's noteholders' principal investment with interest, provide returns to the CDO's equity holders, pay fees to the CDO's service providers (e.g., the trustee) and pay the amounts that the CDO owes to the hedge counterparties. On the closing dates of each CDO transaction, each of the Taberna entities issued notes pursuant to an indenture ("Indenture") and entered into interest rate swap agreements ("Hedge Agreement") with Merrill Lynch in order to hedge against interest rate and cash flow mismatch risks between the portfolio of collateral debt securities and the notes under the indentures.

The Hedge Agreements are based upon an industry form, known as an ISDA ("International Swaps and Derivatives Association") Master Agreement ("ISDA

Agreement”). The parties entered into schedules to the ISDA Agreements, which contained terms in addition to, or changing, that form agreement. The ISDA Agreement provides, in a section titled “Interpretation” and subtitled “Inconsistency,” that “[i]n the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement the Schedule will prevail.” Ex. M, § 1 (b).

Section 5 (a) of the ISDA Agreement provides that a default in any payment when it becomes due, if not remedied within three business days, is an “Event of Default.” Such an Event of Default entitles the non-defaulting party to designate an early termination date with respect to all outstanding transactions. The schedules do not modify either of these provisions. In the transactions involving Taberna III, Taberna IV and Taberna VI, in Part 5, titled “Other Provisions” subsection (a), titled “Definitions,” the Schedules provide:

“(ii) Terms used and not otherwise defined herein (or in the Definitions) shall have the respective meanings ascribed to such term in the Indenture. In the event of any inconsistency between the provisions of the Indenture and this Agreement, this Agreement will prevail. In the event of any inconsistency between the provisions of any Confirmation and this Agreement or the Definitions or the Indenture, the following will prevail for purposes of the Transaction set forth in such Confirmation in the order of precedence indicated: (1) such Confirmation (without reference to any definitions or provisions incorporated therein); (2) this Agreement; (3) the Indenture; and (4) the 2000 Definitions.”

Ex. N, at 25, § 5 (a) (ii). Both prior to, and following this subsection, the Schedules discuss definitions of various terms and what definitions will be used. The Schedule for the Taberna VII transaction does not contain this paragraph.

The Schedules to the Hedge Agreements further provide that Merrill Lynch acknowledges that it received the Indentures and read the provisions relating to the Hedge Agreements. Ex. N., § 5 (g). Additionally, the Schedules provide that Merrill Lynch is a third-party beneficiary under the Indenture, and that no amendment of the Indenture can be made that would adversely affect Merrill Lynch without its prior written consent. *Id.*, § 5 (g), (j). The Schedules also provide that Merrill Lynch acknowledges that any amount payable to it pursuant to the agreement

“shall be subject to the Priority of Payments and that any amount payable upon the early termination or liquidation of the Transaction entered into hereunder shall be payable only on a Distribution Date, provided, however, that Party A shall be entitled to any interest earned at the Applicable Rate pursuant to Section 6(d)(ii) of this Agreement.”

Id., § 5 (m).

The Priority of Payments, referenced in the Schedules, is contained in the Indenture.

The Priority of Payments provides:

“Notwithstanding any other provision in this Indenture, but subject to the other clauses of this Article XI and Section 13.1, on each Distribution Date, the Trustee shall disburse amounts transferred to the Payment Account from the Collection Accounts pursuant to Section 10.2(f) as follows and for application by the Trustee in accordance with the following priorities (the “Priority of Payments”).”

Ex. K at 175, § 11.1 (a). The Priority of Payments then lists 21 recipients of the proceeds of interest payments. *Id.*, § 11.1 (a) (i). The following subsection lists 15 recipients of principal proceeds. *Id.*, § 11.1 (a) (ii). The next subsections deal with the manner in which the trustee

is to distribute funds in the event that the amount available to pay is insufficient to make all required payments. *Id.*, § 11.1 (b) - (h). Then, in subsection 11.1 (j)¹, the Indenture states:

“In the event that the Issuer [the Taberna entity] defaults in the payment of its obligations under any Hedge Agreement, such default shall not entitle the Hedge Counterparty [Merrill Lynch] to terminate such Hedge Agreement but such unpaid amounts shall be deferred for payment on subsequent Distribution Dates and shall accrue interest at the agreed-upon rate stated in such Hedge Agreement documentation.”

In essence, Merrill Lynch contends that the provisions in the ISDA Agreement and Schedule, which provide for termination if there is an event of default, takes precedence over any provision in the Indenture if the Indenture conflicts with the ISDA Agreement or the Schedule. AG Financial, Natixis, Deutsche Bank and HSBC argue that the Schedules themselves adopt the provision of the Indentures contained in Article 11.1, including that subsection which prohibits Merrill Lynch from terminating the Hedge Agreements under the circumstances presented here.

With respect to StabFund, which is governed by Taberna VII, Merrill Lynch contends that there is a question of fact regarding how the contract should be construed, in view of the inconsistent provisions, and that parol evidence must be examined.

¹ This paragraph is subsection (j) in the Taberan III and VI Indentures, and subsection (k) in the Taberan IV Indenture.

DISCUSSION

Taberna VII

Motion sequence number 001 addresses the Taberna VII transaction. This transaction does not contain the language in the Schedule upon which Merrill Lynch relies in its motion for summary judgment. StabFund seeks summary judgment, arguing that Merrill Lynch was prohibited from terminating the Hedge Agreement based on a failure to pay by the explicit terms of the Indenture. Further, StabFund seeks a holding that BONY Mellon was not entitled to withhold distribution, and must make distributions to Merrill Lynch and to noteholders, such as StabFund, in accordance with the payment provisions (also called waterfall provisions) of section 11.1 of the Indenture.

Merrill Lynch contends that when the Hedge Agreement and the Indenture are read together, there is an inconsistency which requires this court to resort to parol evidence to resolve the dispute. Because such inquiry involves questions of fact, Merrill Lynch asserts that summary judgment cannot be granted at this juncture.

Merrill Lynch argues that, unlike the documents dealing with the Taberna III, IV and VI transactions, the Taberna VII Agreement does not contain any provision for dealing with inconsistent provisions among the documents. The Hedge Agreement provides that Merrill Lynch can terminate the Hedge Agreement, while the Indenture prohibits Merrill Lynch from that action. Merrill Lynch argues that because it is not a party to the Indenture, it was entitled

to assert its rights under the contract to which it was a party, and terminate the Hedge Agreement. It further argues that its status as a third-party beneficiary under the Indenture cannot override rights expressly granted to it in its contract.

It is well established that when multiple agreements govern a single transaction and reference each other, they must be read as a single, integrated agreement. Therefore, the ISDA Agreement, Schedule and Indenture must all be read together and must be construed in accordance with general rules of construction. Those rules include the requirements that a court construe a contract to give effect to all provisions of the contract, and to harmonize all the terms if possible. *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP*, 6 N.Y.3d 371, 374 (2006); *Two Guys From Harrison-N.Y. v. S.F.R. Realty Assoc.*, 63 N.Y.2d 396 (1984). Further, where a contract consists of a form contract as well as more specifically negotiated terms contained in a schedule or another additional document, the more specific and more individually negotiated terms take precedence over those contained in the form agreement. Restatement (Second) of Contracts § 203 (1981); *Trans Pac. Leasing Corp. v. Aero Micronesia, Inc.*, 26 F. Supp. 2d 698, 709 (S.D.N.Y. 1998); *see also Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v. Kvaerner a.s.*, 243 A.D.2d 1, 8 (1st Dep't 1998).

Here, when the agreements are read as a whole, there is no question that Merrill Lynch was prohibited from terminating the Taberna VII Agreement. The Schedule provides that Merrill Lynch's rights under the Indenture are those of a third-party beneficiary, and that

Merrill Lynch shall not be entitled to “any benefits or any legal or equitable rights, remedies or claims other than those specified under the Indenture” as a result of its position. Ex. Q, Taberna VII Schedule, Part 5 (h). Further, the Schedule prevails over the ISDA Agreement, and, without any provision to the contrary, the Indenture also prevails over the ISDA Agreement, since it is more specifically negotiated. Because the Indenture provides that Merrill Lynch cannot terminate the Hedge Agreement, it prevails. The fact that the Hedge Agreement also provides that Merrill Lynch has no more rights than those set forth in the Indenture further confirms that the parties intended the Indenture to prevail. Additionally, Merrill Lynch’s rights of payment under the Hedge Agreement are subject to the terms of section 11.1 of the Taberna VII Indenture (*see* Ex. N, Part 5 [m]), which includes the termination ban. Thus, when read as a whole, it is clear that the transaction agreements intended to, and did, prohibit Merrill Lynch from terminating the Hedge Agreement in the event of a payment default.

Merrill Lynch’s argument that parol evidence is needed, and further discovery is necessary to obtain the parol evidence, is unpersuasive. The court looks to parol evidence only when the terms of an agreement cannot be reconciled by any other means. *See Currier, McCabe & Assoc., Inc. v. Maher*, 75 A.D.3d 889, 891 (3d Dep’t 2010); *Hudson-Port Ewen Assoc. v. Chien Kuo*, 165 A.D.2d 301 (3d Dep’t), *affd* 78 N.Y.2d 944 (1991). Here, by reading the various documents as a whole, and giving more weight to those that were

negotiated specifically, the court can construe the agreement without resort to parol evidence. Therefore, there is no question of fact requiring trial, nor is there any need for further discovery.

Taberna III, IV and VI

The major difference between the Taberna VII transaction documents and the documents at issue in the Taberna III, IV and VI transactions is that the latter contain a sentence in the Schedule that provides that the ISDA Agreement and Schedule will prevail if there is an inconsistency between them and the Indenture. Merrill Lynch claims, on this basis, that it is entitled to terminate the Hedge Agreement despite the unambiguous language in the Indenture precluding such action. Taberna III, IV and VI argue that the sentence does not require the court to ignore the unambiguous provision of the Indenture. Rather, the court must look to all of the provisions of the contractual documents. On the basis (a) that the payment provision of the ISDA Agreement and Schedule refer to section 11.1 of the Indenture, which bars Merrill Lynch from terminating the Hedge Agreement, and (b) that under the terms of the Hedge Agreement any payment must be made in accordance with that section, the Taberna entities conclude that Merrill Lynch is bound by the provision prohibiting termination of the Hedge Agreement in the event of a payment default.

As discussed above, the court is obligated to read the various agreements comprising the transaction as a whole in order to ascertain the parties' intention. No provision should

be left without force and effect if it is possible to harmonize the provisions. Moreover, “[w]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect [internal quotation marks and citation omitted].”

Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 301 A.D.2d 23, 30 (1st Dep’t 2002).

Here, there is no question that the Indenture provides clearly and unequivocally that Merrill Lynch cannot terminate the Hedge Agreement based upon a failure to pay. The ISDA Agreement, however, provides that in the event of an uncured default, Merrill Lynch can terminate the Hedge Agreement. Thus, the court is charged with determining whether the intention of the parties can be determined, and whether the differing provisions of the contract can be harmonized.

The ISDA Agreement provides that the Schedule prevails over the ISDA Agreement if there is any discrepancy. The Schedule provides that any payment to Merrill Lynch is subject to the priority of payment section in the Indenture. That priority of payment includes the section that prohibits Merrill Lynch from terminating the Hedge Agreement for failure to pay. Thus, the Schedule incorporates the provisions of the Indenture, which thereby prevail over the ISDA Agreement.

Merrill Lynch argues that Part 5 (m) of the Schedule subjects only amounts “payable” to the priority of payments. Since it applies only to amounts that are payable, Merrill Lynch contends that it cannot bar the termination of the Hedge Agreement, and “thus prevent any

amount from being payable and triggering Part 5 (m) in the first place.” Merrill Lynch Memorandum of Law in Opp., at 12. This convoluted reasoning cannot avoid the plain language of the Indenture. Further, if taken to its logical conclusion, Merrill Lynch would be in a position where it terminated the Hedge Agreement, but the termination fees would still not be payable under the Hedge Agreement. Such a conclusion must be rejected.

In addition, the sentence upon which Merrill Lynch bases its argument that the Hedge Agreement prevails over the Indenture, even though the Indenture is more specific, is not as clear as Merrill Lynch presents. If the sentence is taken on its own, it certainly would indicate that the Hedge Agreement prevails over the Indenture. However, taken in context², that construction seems less likely. The sentence is contained not only in a section titled “Definitions,” but in the middle of a paragraph that discusses definitions as used in the documents. When read in context, the sentence seems to be referring to a conflict regarding the definitions. Such a construction would make it easier to harmonize the different sections of the documents, and would enable the court to more easily resolve the issue of the intent of the parties. If that section is read, as its placement would indicate, to mean inconsistencies in the definitions, the parties’ intent to prohibit Merrill Lynch from terminating the Hedge Agreement, as the clear language of the Indenture indicates, would not be disturbed. Such

² Merrill Lynch acknowledges the need to view provisions of the contract in context, as evidenced by its discussion of the termination provisions. Merrill Lynch Memorandum of Law in Opp., at 9.

a reading would give force and effect to all of the portions of the agreement that were specifically negotiated, rather than only to the printed form.

Consequently, based upon both the placement of the sentence that Merrill Lynch relies upon, and the priority of payment provision which was specifically incorporated into the Schedule, it is clear that the parties intended to bar Merrill Lynch from terminating the Hedge Agreement under the circumstances presented.

Cross Motion of BONY Mellon

BONY Mellon cross-moves for an order discharging it from liability, and for reimbursement of expenses and costs, including attorneys' fees. BONY Mellon submits a copy of a stipulation dated March 15, 2010, in which the claimants to the interpleaded funds stipulate that none of them has any claims against BONY Mellon in connection with the subject matter of this action.

AG Financial, Natixis, Deutsche Bank and HSBC do not oppose the cross motion for discharge for liability, but reserve their right to submit objections as to the reasonableness of the amount of fees sought to be recovered by BONY Mellon.

BONY Mellon is a disinterested stakeholder in this action. It has no interest in the retained funds, and none of the claimants have asserted a claim against it. Therefore, the motion for discharge is granted. CPLR § 1006 (f); *Downe Communications v. Aetna Cas. & Sur. Co.*, 37 N.Y.2d 903, 904 (1975), *cert. denied* 429 U.S. 804 (1976); *Lincoln Life & Annuity Co. of N.Y. v. Caswell*, 31 A.D.3d 1, 8 (1st Dep't 2006).

BONY Mellon seeks recovery of a total of \$314,718.08 in attorneys' fees and disbursements in connection with this interpleader action. While BONY Mellon attaches a list of invoices and their amounts, it does not provide any breakdown of the services provided, the time spent, or who billed the time and at what rate. Therefore, the amount of attorneys' fees sought has not been adequately supported, and the issue will be sent to a Special Referee to take evidence and calculate the appropriate fees.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (motion sequence 001) of defendant UBS AG as Attorney-in-Fact for the SNB StabFund Kommanditgesellschaft für kollektive Kapitalanlagen ("StabFund") is granted and the amended interpleader complaint is dismissed as against UBS AG and StabFund, and StabFund's counterclaims for declaratory relief is granted; and it is further

ADJUDGED AND DECLARED that defendant Merrill Lynch Capital Services Inc. ("Merrill Lynch") had no authority to terminate the Hedge Agreement with Taberna Preferred Funding VII, Ltd. and Taberna Preferred Funding VII, Inc.; and it is further

ADJUDGED AND DECLARED that Bank of New York Mellon Trust Company, N.A. ("BONY Mellon") shall not withhold distributions under that Hedge Agreement; and it is further

ADJUDGED AND DECLARED that BONY Mellon shall make distributions to Merrill Lynch and the Noteholders, such as StabFund, in accordance with the waterfall provisions in section 11.1 of the Indenture; and it is further

ORDERED that the motion of Merrill Lynch (motion sequence number 002) for summary judgment in its favor is denied; and it is further

ORDERED that the motion (motion sequence 003) of defendants AG Financial Products Inc. ("AG Financial") and Natixis f/k/a IXIS Corporate & Investment Bank ("Natixis") for summary judgment on the first and second requests for declaratory relief is granted; and it is further

ADJUDGED AND DECLARED that Merrill Lynch cannot terminate the Hedge Agreements upon the event of a payment default by Taberna III, IV or VI under the terms of the Hedge Agreements, and is not entitled to termination payments at this time; and it is further

ADJUDGED AND DECLARED that the Trustee must cease withholding payments due and owing to the Noteholders under the Indentures based upon Merrill Lynch's contention that it is entitled to termination payments; and it is further

ORDERED that the motion (motion sequence number 004) of defendants Deutsche Bank Trust Company Americas ("Deutsche Bank") and HSBC Bank USA, N.A. ("HSBC") for summary judgment on their first and second requests for declaratory relief is granted; and it is further

ADJUDGED AND DECLARED that the Trustee must cease withholding payments due and owing to the Noteholders under the Indentures based upon Merrill Lynch's contention that it is entitled to termination payments; and it is further

ORDERED that the cross motion of BONY Mellon is granted to the extent that it is discharged from liability; and it is further

ORDERED that the issue of the amount of attorneys' fees is referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of the Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for BONY Mellon shall, within 15 days from the date of this order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of the Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4320 [a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the issue of attorneys' fees shall be held in abeyance pending submission of the Report of the Special Referee and the determination of this Court thereon.

Dated: New York, New York
November 28, 2011

ENTER



Hon. Eileen Bransten, J.S.C