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Letter from Rabobank's Counsel to Judge Fried of Supreme Court of NY

Jonathan Pickhardt

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May 11, 2010

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Bernard J. Fried
Supreme Court of the State of New York
60 Centre Street
New York, New York 10007

Re: Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A ("Rabobank") v. Merrill Lynch & Co., Inc. ("Merrill"), Index No. 601832/09 (Fried, J.)

Dear Justice Fried:

We represent plaintiff Rabobank in the above referenced action and write to request a pre-motion conference for a motion to compel third party Magnetar Capital LLC ("Magnetar") to comply with Rabobank's subpoena *duces tecum* dated August 12, 2009 (the "Subpoena," see Exhibit A).

In this action, Rabobank seeks to recover the balance on its \$58 million loan to Norma CDO I Ltd ("Norma"). Merrill solicited Rabobank's loan based on numerous misrepresentations, including that Norma's portfolio had been rigorously selected by an independent collateral manager, NIR Capital Management, LLC ("NIR"). In fact — as discovery is demonstrating — Merrill knew NIR had abdicated its asset selection duties to Magnetar, an important Merrill client that was also Norma's equity investor. As Merrill understood, Magnetar's real interest in Norma was not in its long equity investment, but rather in using Norma to take a much more substantial *short* position in the very assets Magnetar was selecting for Norma's portfolio. By falsely touting NIR's role, Merrill Lynch thus concealed from Rabobank and Norma's other investors that Norma's assets were actually being selected by a party that stood to profit when Norma failed. For its part, understanding the impropriety of its having selected CDO assets, Magnetar has flatly denied any such involvement. See April 16, 2010 Letter from Pickhardt to Court; Ex. B at 4-5 (Magnetar Investor Letter: "Magnetar ... did not select or have control over the assets that went into a CDO."). However, as initial discovery from Merrill has revealed:

- As early as August 2006, Magnetar assumed NIR's role in directing Merrill on what purchases to execute for Norma. See, e.g., Ex. C (ML01395145) (James Prusko of Magnetar: "Here is the first batch of protection purchases I'm planning for NIR.").

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- By November 2006, Magnetar had executed approximately \$600 million in trades for Norma without NIR's apparent involvement or knowledge. *See, e.g.*, Ex. D (ML01396714) ("Apparently NIR allowed Magnetar to do some trading for their portfolio (in the area of 600MM). This accounted for a large chunk of trading that NIR originally didn't recognize.") This prompted a Merrill corporate risk manager to ask: "Dumb question. Is Magnetar allowed to trade for NIR?" *Id.*
- Even on trades that NIR did execute for Norma, Magnetar exercised veto rights over the selection of each asset. *See, e.g.*, Ex. E (ML01396692) (Prusko to NIR: "I definitely want to approve any CDO's that go in the deal, don't recall seeing any, so I assume 'Approved' [in NIR spreadsheet] means only that NIR has internally approved the credit."); Ex. F (ML01400671) (Prusko rejecting NIR request to include TABS 2006-6A cash bond in the portfolio: "Afraid so, tabs in particular I don't want the cash in there.").
- By January 2007 (when Merrill first approached Rabobank), Magnetar was already the short "counterparty" on \$600 million of synthetic assets in Norma's portfolio. *See, e.g.*, Ex. G (ML01486349). Merrill recognized that such short positions were more important to Magnetar than its long investments. *See, e.g.*, Ex. H (ML01488729) ("I think Jim [Prusko] is less worried about his deal pricings and more worried about where he can short paper in the aftermarket."). Indeed, Magnetar's equity investment in Norma totaled less than \$50 million after receiving undisclosed discounts funded through the loan from Rabobank. *See, e.g.*, Ex. I (ML01475982). This meant that Magnetar stood to make *10 times* more from its \$600 million short position if Norma failed than Magnetar had invested in Norma's equity.

Merrill recently contended that no fraudulent intent can be inferred from Magnetar's involvement in selecting assets in light of Merrill's own investment in Norma's Class A-1 Notes. *See* April 19, 2010 Letter from Musoff to Court. However, documents produced by Merrill show that it "bought protection" that resulted in it being "long short netted" on its Norma Class A-1 Note exposure. *See* Ex. J (ML01378403) Thus, Merrill's own purported investment in Norma provides no basis for negating any inference that it intended to defraud Rabobank.

Rabobank therefore seeks discovery from Magnetar regarding its involvement in Norma, its relationships with Merrill and NIR, and the creation of Norma as a shorting vehicle. Magnetar has refused to respond to Rabobank's subpoena, citing cost and other issues. Rabobank requests a Rule 24(c) pre-motion conference in order that it may move to compel Magnetar's response.

Respectfully submitted,


Jonathan Pickhardt

cc: Scott D. Musoff, Esq. (counsel for Merrill Lynch) (via electronic filing)
Thomas L. Kirsch, Esq. (counsel for Magnetar) (via email)