

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
ROYAL PARK INVESTMENTS SA/NV, : Docket #14cv4394  
 : 1:14-cv-04394-AJN-BCM  
Plaintiff, :  
- against - :  
DEUTSCHE BANK NATIONAL TRUST :  
COMPANY, : New York, New York  
Defendant. : April 7, 2017  
----- :

PROCEEDINGS BEFORE  
THE HONORABLE BARBARA C. MOSES  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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THE COURT: Good morning, counsel, this is Judge Moses. I know you're there, I can hear you rustling papers, this is Judge Moses, can you hear me?

MR. LUCAS OLTS: Yes, Your Honor, this is Lucas Olts and Chris Wood for Royal Park.

MR. BERNARD GARBUTT: Yes, Your Honor, this is Bernie Garbutt and Grant MacQueen for the trustee.

THE COURT: All right, Mr. Garbutt and Mr. MacQueen. This is, for the record, Royal Park Investments against Deutsche Bank, number 14cv -- somebody is typing, they need to stop that, number 14cv4394. If our technology is working we are making an audio recording, you gentlemen are familiar with that process. I am in chambers, my law clerk, Jenna Cohen, is with me. We also have, since this, after all, a public proceeding, which would otherwise be conducted in the courtroom, I have treated it as such and I happen to have a visitor in chambers with me today. So mind your Ps and Qs, gentlemen. That was a joke.

MR. OLTS: As always, Your Honor, as always.

THE COURT: Let me tell you where I am and that may help you focus your arguments. Having read the letter briefs starting with the March 24, 2017, letter from Robbins Geller, it seems to me that this is three motions or three potential motions combined. One way of looking at it is

1  
2 that it is a motion to enforce my cost sharing order with  
3 regard to the deposition in Brussels, that was docket number  
4 253. And to the extent that that is what this is I will  
5 deny it. My intent in issuing the cost sharing order was  
6 just that, to share costs primarily for the financial  
7 protection of the plaintiff, it was not a sanction assessed  
8 against the Deutsche Bank, whether in its corporate capacity  
9 or as trustee or in any other way. So I am not inclined to  
10 rule that indemnification violates docket number 253 in any  
11 way.

12           To the extent that the pending motion is a  
13 preliminary injunction motion, then we have a threshold  
14 problem, which is to say that preliminary injunction motions  
15 need to go to the District Judge, Judge Nathan, they are not  
16 within the scope of my reference. I will tell you that  
17 having reviewed the *VNB Realty* case from the District of New  
18 Jersey, if I were in your shoes, plaintiff, I wouldn't be  
19 terribly optimistic about the outcome of that motion. But,  
20 of course, if you wish to file it as a formal motion before  
21 the District Judge, you are free to do so.

22           Thirdly, to the extent the motion is a motion to  
23 compel the production of documents, namely invoices showing  
24 the extent and other details of the indemnification of  
25 Deutsche Bank by the trust, I'm inclined against granting it

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2 but I will certainly hear argument from both sides. The  
3 reasons why I am against granting it are as follows.

4

5 First, it does not appear to me to seek documents  
6 which are relevant to the merits of this action, it seeks  
7 documents which are relevant, if at all, to the potential  
8 preliminary injunction motion which you would have to file  
9 before the District Judge.

9

10 Second, even to the extent that such documents are  
11 relevant to that potential motion, it seems to me that while  
12 the fact of reimbursement and possibly the extent of  
13 reimbursement, that is the dollar amount, may be relevant to  
14 any preliminary injunction motion. The detail which is now  
15 sought, the month by month invoice, et cetera, strikes me as  
16 overkill in terms of what you would need to litigate that  
17 issue. And thirdly, I'm sure it has not escaped either  
18 side's attention that there are massive difficulties  
19 involving privilege and work product in a request by  
20 plaintiff to see defendants legal bills more or less in real  
21 time.

21

22 So you now have the benefit of my thoughts  
23 hopefully on every piece of the current controversy, let me  
24 hear from plaintiff.

24

25 MR. OLTS: Yes, Your Honor, Luke Olts on behalf of  
26 Royal Park. I hear and understand your points as to the cost

1  
2 sharing and what you have categorized as a preliminary  
3 injunction. So I don't think we need to address those at  
4 this point. I think the motion to compel is different,  
5 however.

6           We do believe that it is clearly relevant to the  
7 merits of this case. First, it's certainly, the issue of the  
8 attorney's fees and the taking of the money out of the trust  
9 is certainly something that is in the scope of our  
10 complaint. And it's certainly something that the Court has  
11 supplemental jurisdiction over.

12           It's certainly the fact and amount of  
13 reimbursement which the Court just mentioned is certainly  
14 relevant to both, if we were to bring a preliminary  
15 injunction motion and the merits of the case because the  
16 amount, as the Court mentioned in the VNB opinion, there the  
17 parties actually submitted the amounts that were being  
18 billed.

19           THE COURT: That's right, and the Judge wasn't  
20 very impressed because it wasn't going to bankrupt the  
21 trust.

22           MR. OLTS: Sure, but we don't know what, I mean  
23 we're unable to conduct that analysis here because we don't  
24 know how much is being billed. And certainly I think there's  
25 an additional point which is not only is the amount clearly

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relevant as demonstrated by the Court in *VNB*, but to home the indemnification is sought.

So, for example, we cite in our case that several of these governing agreements don't allow for indemnification directly from the trust, they're supposed to be seeking their indemnification from the servicer. But what they have represented to us is, no, they're just getting it directly from us or directly from the trust. So clearly to whom and the amount that they're seeking indemnification is relevant to any preliminary injunction motion or any motion, whatsoever, regarding this issue. Because even if they are allowed to unfettered indemnification, unchecked and unfettered indemnification out of the trust, that amount has to be reasonable. And they don't dispute that. And every single governing agreement says that the fees have to be reasonable. And we're certainly allowed to test that issue to see what is being billed on a monthly basis.

Now as to the privilege issue, Your Honor, that is not an impediment, whatsoever, to us getting the information we need. And the reason we know that is because there have been statements produced in this case for prior litigations, litigations that were occurring during the relevant period. And you can see the statements, those have been produced unredacted and the way that those are set up they don't

1  
2 disclose the actions that the particular bills were for.  
3 They're very general subject matters, they're clearly  
4 produced in the regular course of business in the  
5 indemnification process. And so those are, I'm sure, readily  
6 available, if they're indemnifying them they must have them,  
7 they don't include any attorney/client privilege information  
8 because they're being produced, they've already been  
9 produced, many of them.

10 THE COURT: What you're saying I think is that  
11 Deutsche Bank's practice insofar as you can tell from prior  
12 instances, is to produce a set of clean or summary invoices  
13 for indemnification purposes that don't reveal privileged  
14 information?

15 MR. OLTS: Absolutely, and I've looked at several  
16 of these and I can tell you, you know, for an example, there  
17 will be an invoice that says review of pleadings, \$200,000.  
18 And clearly Deutsche Bank doesn't believe that those are  
19 privileged because they've been produced in this case. So  
20 that type of summary could be produced here very easily  
21 without the process of having to redact them or anything  
22 like that.

23 THE COURT: Mr. Olts, let me take you back to  
24 something that you said at the outset of your remarks. You  
25 said that these invoices would be relevant not only to the

1  
2 indemnification issue, itself, which you may need to tee up  
3 on a formal preliminary injunction motion, but also to the  
4 claims that you have pleaded. Now I have not reviewed your  
5 complaint in minute detail in the last couple of months, but  
6 I recall it fairly clearly. And my recollection is that you  
7 have a breach of contract claim in there, not dealing with  
8 the indemnification provisions of the contract, but dealing  
9 with very different provisions of the contract, and you have  
10 a breach of common law trust case claim in there. How are  
11 these invoices relevant to those two counts?

12 MR. OLTS: Well but in our, in the remedies  
13 sought, Your Honor, we include all attorneys' fees and  
14 reasonable cost for bringing this case.

15 THE COURT: No. No, no. That would be your  
16 attorney's fees, that's what you prayed for, you did not  
17 pray to have Deutsche Bank's attorneys' fees unindemnified.

18 MR. OLTS: Well it says all attorneys' fees, so I  
19 would certainly argue that we're paying for their costs for  
20 litigating this case, they're coming out of the trust  
21 corpus, that's clearly included within our prayer for relief  
22 if we're seeking all attorneys' fees.

23 THE COURT: Well, to put it another way then, to  
24 look at it another way, Mr. Olts, you can't create a  
25 substantive cause of action by making a demand for a

1  
2 particular kind of damages. If it's not in the complaint  
3 substantively, it's not in the complaint substantively, and  
4 I don't think it's in the complaint. I agree with you that  
5 if it were in the complaint, it would be within the Court's  
6 supplemental jurisdiction, that's what your cases say. Your  
7 cases do not say that a Court can create supplemental  
8 jurisdiction over an unpleaded claim mid case in order to  
9 deal with this type of issue.

10 MR. OLTS: Well I think, okay, and I would  
11 obviously respectfully submit that the seeking for all  
12 attorneys' costs in our prayer would clearly cover that.  
13 Obviously at the time the complaint was filed, there were no  
14 indemnifications for this case because the case had not yet  
15 begun.

16 THE COURT: True, but you had read the contract  
17 and you knew that that provision was in there.

18 MR. OLTS: Well we don't think it's a reasonable  
19 reading of that contract to have them be indemnified for  
20 this case.

21 THE COURT: Well, but you did not seek, for  
22 example, a declaratory judgment that would, or a preliminary  
23 injunction at the outset of the case, that would prevent  
24 Deutsche Bank on a going forward basis from getting itself  
25 reimbursed out of trust funds for its litigation costs,

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right?

MR. OLTS: I mean that's true, that's not in there.

THE COURT: No, it's not in there, that's my point.

MR. OLTS: That specific language is not in the complaint.

THE COURT: All right, what else. Anything else you want to tell me?

MR. OLTS: I don't think so at this point, Your Honor.

THE COURT: All right, Mr. MacQueen or Mr. Garbutt, do you want to address yourself to that last point, and by that last point I mean viewing the plaintiff's motion really as a discovery motion for your indemnification related statements?

MR. GARBUTT: I agree with Your Honor, I don't see anything in their complaint that even remotely relates to the document requests that they're pointing to for these invoices. And under 26(B)(1) it certainly doesn't relate to any claim or defense in this case. And I would also note that when they submitted the document requests, they failed to submit our objections and we did object to those requests on relevance grounds. And I think with that, that's all I

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have to say, Your Honor. I'm sorry, not on relevance grounds, on privilege grounds.

THE COURT: All right, except, Mr. Garbutt, since we are on tape you also need to say who you are.

MR. GARBUTT: Oh, I'm sorry, and that was Bernie Garbutt from Morgan Lewis on behalf of the trustee.

THE COURT: Okay, thank you. Mr. Olts, anything else you want to tell me on anything at all?

MR. OLTS: No, Your Honor.

THE COURT: Okay.

MR. CHRISTOPHER WOOD: Your Honor, if I could, this is Mr. Wood on behalf of Royal Park, I just wanted to just point out one portion which was in our reply letter. But in the prayer for relief, we did ask that the Court award "plaintiff, the class and the covered trusts their reasonable costs and expenses incurred in this action, including counsel and expert fees." So I just wanted to point that out for the Court.

THE COURT: All right. So to the extent that the motion is a discovery motion either to enforce my prior order or to compel production of invoices or related indemnification type documents under Rule 26, I will deny it, a written order will issue.

To the extent that it is a preliminary injunction

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motion, I will advise the parties that it is beyond the scope of the Magistrate Judge's reference and you should contact the District Judge or file a formal preliminary injunction motion with the District Judge if you desire to go forward on that basis.

But let me ask you, I guess this would be Mr. Olts as well, with respect to the underlying contract issue, the issue of whether we can construe the indemnification provisions in these governing agreements as permitting indemnification of Deutsche Bank by the various trusts, isn't this, in fact, a very different contract, I know it very slightly trust to trust but not that much, but isn't this, in fact, a very different form of contract language than the language we have seen in the cases you have cited to me where Courts held that it was not sufficiently unmistakable as to create a right of what the Courts sometimes refer to as first party indemnification?

And I want to pose two sub questions to you. The first is, is really first party indemnification at all, given that the plaintiff in this case is not the trust, there is no derivative action here, you may recall there was a derivative claim but it's gone. The plaintiff here is one certificate holder, RPI. And second, isn't the language of these contractual provisions quite different from some of

1  
2 the language which got construed in the cases that you cited  
3 to me, Mr. Olts, in that in those cases there was a lot of  
4 indication that the indemnification provisions really were  
5 intended for third party claims? For example, there were  
6 notice requirements. There were provisions dealing with who  
7 got to choose counsel, and the fact that the potentially  
8 indemnified party got to choose their own counsel on certain  
9 instances but that the indemnifying party got to choose  
10 their counsel in other instances. We have not of that here.  
11 And who would possibly sue the trustee over something like  
12 this if not a certificate holder? So don't we have really a  
13 different contract interpretation situation here?

14 MR. OLTS: I don't think so at all, Your Honor, I  
15 think it's very clear that these contracts are intended for  
16 the situations in which the trustee is being sued by third  
17 parties.

18 THE COURT: Who --

19 MR. OLTS: Specifically a, or I should say the  
20 trustees are being sued by a non-indemnitor. So the  
21 indemnitor here without a doubt is the certificate holder.  
22 There is no other possible indemnitor. That's who is being  
23 asked to indemnify here.

24 So the question is that you're asking --

25 THE COURT: You're giving me an economic reality

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analysis, you're saying that the indemnitors are the certificate holders because at the end of the day the indemnification is going to come out of a pool which otherwise would go, according to the waterfall structure, to the various certificate holders, correct?

MR. OLTS: Well I think, I mean I'm saying that but I want to tie it to the legal analysis, which I think is at the heart of your question. So the legal analysis under the default rule, which we cite extensively, which is explained I think very well in the *VNB* case that we cite, is that in order for an indemnitor, for an indemnitee to be indemnified in a situation such as this where they're being sued by an indemnitor, that language must be unequivocal. It must be explicit that, yes, this indemnification provision applies in situations where the indemnitor is suing in this case the trustee. It has to be unequivocal, and that's the language.

Now there may be some differences in some of the language between the governing provisions and in some of the other cases, that's undisputable, those are different types of contracts, but the underlying principle of law that that indemnity provision must be unequivocal is not different. And I can give you an example of clearly what the intent was at the time.

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2           If, for example, a mortgage holder is foreclosed  
3 on improperly by the trustee, and that mortgage holder sues  
4 the trustee for improperly foreclosing on their home, then I  
5 think there is a strong argument that, yes, the trustee  
6 should be indemnified by the trust for that type of action.  
7 That's not the situation we have here where the law requires  
8 that indemnification provision to be unequivocal. And it is  
9 certainly not unequivocal, you can read it any way you want  
10 but it certainly does not use the language which the *VNB*  
11 Court requires to be included in order for such an  
12 indemnification provision to apply.

13           THE COURT: All right, well that begs the question  
14 of whether this really is a first party claim, do you want  
15 to address that?

16           MR. OLTS: Absolutely, I think if we were take the  
17 reading of the contract which Deutsche Bank is advocating  
18 here, there is no one who could enforce these provisions,  
19 because the only parties who are the indemnitors are the  
20 certificate holders, there are not other parties. And the  
21 question is not is it a party to the contract who is being  
22 sued, the question for the analysis under *VNB* is whether or  
23 not the indemnitor is bringing the action. And clearly the  
24 indemnitor is the certificate holder. There are no other  
25 possible parties who could be considered the indemnitor. And

1  
2 if you took their reading of it then the reading would be  
3 absolutely meaningless, the entire indemnification provision  
4 would be meaningless. And I think this is specifically  
5 addressed, Your Honor, in the *Sequa* (phonetic) case which we  
6 cite.

7           In there, in the *Sequa* case, the Court held that  
8 the effect of the interpretation, which Deutsche Bank is  
9 pushing here, would convert the agreement into a release.  
10 If no one can enforce it then the language is meaningless,  
11 and they would be able to just loot the money out of the  
12 trust without any check whatsoever.

13           THE COURT: Well, but, Mr. Olts, the *Sequa* case,  
14 which I'm sure you recall, cited and relied to some extent  
15 on a 2014 case by Judge Torres in this district, *Homeward*  
16 *Residential v. Sand Canyon*. I don't know if you're familiar  
17 with that case or not, but there was a claim for  
18 indemnification in *Homeward Residential* by a servicer  
19 against an originator in an RMBS trust situation. So the  
20 cause of action, there was an affirmative cause of action  
21 for indemnification by the servicer against the originator,  
22 and the parties argued up and down and back and forth over  
23 precisely the issues we've just been discussing, namely was  
24 it a first party or a third party claim and was  
25 indemnification a first party claim (inaudible) because the

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contract was not unmistakable.

And there is some very interesting dicta in that case. The plaintiff argued, among other things, it would be difficult to imagine how a third party can bring an action for breach of the representations that defendant made to the trustees. And Judge Torres wrote, "plaintiff is incorrect, an action where the certificate holders sue the trustee for failing to enforce the repurchase remedy requires little imagination."

Now I recognize that's dicta, but it's also pointed dicta with respect to the discussion that we are just having now. Mr. Garbutt, anything you want to jump in on?

MR. GARBUTT: Your Honor, we'll address any of their argument if and when they make that motion for a preliminary injunction.

THE COURT: All right. While I have you gentlemen on the phone, I have received two more letter motions from the plaintiff which are not fully briefed and therefore which we will not be arguing about today. But I wanted to take the opportunity to talk about scheduling with you. I will be out of the office and, in fact, out of town, next week. Are you going to want to argue either of the most recent letter motions orally, one dated April 3<sup>rd</sup> and one

1  
2 dated April 6<sup>th</sup>?

3 MR. OLTS: Plaintiff is happy to stand on the  
4 papers, Your Honor, but we're also willing to be on a call  
5 or on oral argument if the Court has any questions.

6 THE COURT: Mr. Garbutt?

7 MR. GARBUTT: Yes, Your Honor, one of my  
8 colleagues who was on a couple of the prior calls, Rollin  
9 Chippey, is handling the oppositions to both the plaintiff's  
10 motions, and I think given that they were plaintiff's  
11 motions, we would probably like an opportunity to orally  
12 argue them given that they're going to have the last word on  
13 the reply. And he's not on the phone with me right now so I  
14 would say tentatively that we would like oral argument on  
15 both of those motions.

16 THE COURT: All right, well why don't you  
17 coordinate schedules with my clerk, Ms. Cohen, by telephone  
18 next week.

19 MR. GARBUTT: Okay.

20 THE COURT: And we can try and set something up  
21 for the following week when I am back in chambers. I do  
22 want to pose one issue to both sides with respect to the  
23 April 4<sup>th</sup>, I guess it's actually April 3<sup>rd</sup>, the April 3<sup>rd</sup>  
24 letter motion. I note, Mr. Olts, that one of your requests  
25 in that letter motion is that the Court compel production of

1  
2 documents responsive to Deutsche Bank's 25<sup>th</sup> affirmative  
3 defense. What I assume you actually mean there is that I  
4 should deem that the advice of counsel defense has been  
5 asserted and require production of otherwise privileged  
6 documents that are relevant to the 25<sup>th</sup> defense, right? Is  
7 that what you're saying to me?

8 MR. OLTS: Well I'm not -- produce privileged  
9 documents, I think the issue here as we discussed before is  
10 that if they are going to rely on this defense, which they  
11 have not as of yet waived, we want all the documents that  
12 they intend to rely upon. So if those are privileged and  
13 they intend to rely upon them, then yes, we do want them. if  
14 they are not privileged, we should have them anyway. So I  
15 think the short answer is yes.

16 THE COURT: Right, okay. So before you finish the  
17 motion briefing cycle on that issue, I would encourage the  
18 two sides to meet and confer once again. I am certainly not  
19 inclined to declare the privilege waived at this time. That  
20 is I am not inclined to sort of deem Deutsche Bank to have  
21 asserted the advice of counsel defense such that those  
22 documents are no longer privileged.

23 On the other hand, as we discussed when Mr.  
24 Chippey was on the phone last time, I can't wait forever for  
25 Deutsche Bank to fish or cut bait on this issue. I've done

1  
2 a little research since we last spoke, I have seen that a  
3 number of judges in this court have in similar situations  
4 given the defendant who is weighing the assertion of an  
5 advice of counsel defense a deadline within which to fish or  
6 cut bait. That is likely what I will do here, so the two of  
7 you may want to chat about how to figure out when that  
8 deadline should be. I hope that is helpful --

9 MR. OLTS: This is Mr. Olts, Your Honor, I  
10 understand that Mr. Chippey is not on the phone. As always,  
11 we're happy to meet and confer on this. I will say that we  
12 have met and conferred extensively already and I would just  
13 request that it's clear for the record that we would greatly  
14 prefer to have no extensions in opposition to our motion so  
15 that further meet and confers can continue. We're happy to  
16 meet today with Mr. Chippey again, but we have already  
17 discussed this with him and --

18 THE COURT: I'm sure you can meet, confer and  
19 write letter briefs at the same time, I have the highest  
20 degree of confidence in your ability to multitask.

21 MR. OLTS: Okay, I just wanted to be clear, what  
22 you're not ordering is that there should be an extension of  
23 time for them to respond?

24 THE COURT: No, I'm not, but please keep in mind,  
25 for example, Judge Netburn, Magistrate Judge Netburn in some

1  
2 of Royal Park's other cases, as I'm sure you know, Mr. Olts,  
3 gave, who was it in that case, HSBC two months when this  
4 issue came up. She gave HSBC two months to decide whether it  
5 was or was not going to assert the advice of counsel  
6 defense. So that's the kind of approach that I'm looking at.

7 MR. WOOD: And, Your Honor, this is Mr. Wood on  
8 behalf of Royal Park.

9 THE COURT: Yes.

10 MR. WOOD: I was involved in all of those  
11 proceedings in HSBC, and Judge Scheindlin initially told  
12 HSBC that they needed to assert the defense at some point,  
13 Judge Netburn later gave them another deadline, and the end  
14 result there was that HSBC, and it was my position at least,  
15 simply refused to say whether or not they intended to assert  
16 the defense at all basically prior to summary judgment,  
17 which is obviously too late. And we ended up I think  
18 yesterday or the day before, filing a renewed motion to  
19 strike that defense because they simply refused to tell us  
20 the extent to which they were going to rely on advice of  
21 counsel. And so our experience at least in other cases has  
22 been that there aren't timely decisions on this and I think  
23 that that is going to be a similar issue here.

24 THE COURT: Well --

25 MR. OLTS: And Your Honor, this is Mr. Olts, just

1  
2 to follow up on that, I mean obviously the deadline for that  
3 is very important and we appreciate the Court giving us  
4 guidance on that. I think there's a slightly different issue  
5 which is the discovery deadline is running, and to the  
6 extent that, I mean the document discovery cutoff has  
7 already occurred. So to the extent they're intending to rely  
8 upon any documents in the assertion of that defense is a  
9 slightly different analysis. And if they haven't produced  
10 those documents then they need to immediately regardless of  
11 whether or not they're actually going to assert the defense  
12 or not.

13 THE COURT: Well, there's another way to skin that  
14 cat. Obviously I can extend the document discovery deadline  
15 for this limited purpose if necessary.

16 MR. OLTS: That is true and we would also note any  
17 depositions that we are taking or are in the process of  
18 taking, we would need to possibly reopen those depositions  
19 in order to address this issue.

20 THE COURT: Well you can always ask.

21 MR. OLTS: Right.

22 THE COURT: All right, anything further,  
23 gentlemen?

24 MR. GARBUTT: No, Your Honor, from Bernie Garbutt.

25 THE COURT: Anything further from the plaintiff?

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MR. OLTS: No, Your Honor.

THE COURT: All right, thank you very much. We're adjourned.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Royal Park Investments SA/NV v. Deutsche Bank National Trust Company, Docket #14cv4394, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

*Carole Ludwig*

Signature \_\_\_\_\_

Date: April 11, 2017