UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. FABRICE TOURRE, Defendant.	:	Civil Action No.: 10-cv-3229 (BSJ) (MHD) ELECTRONICALLY FILED

MEMORANDUM OF LAW OF FABRICE TOURRE IN SUPPORT OF HIS MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

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Dated: August 26, 2011
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Defendant Fabrice Tourre respectfully submits this memorandum of law in support of his motion pursuant to 28 U.S.C. § 1292(b) for certification of an interlocutory appeal of the Court's Order dated June 10, 2011 (the "June 10 Order") to the extent it sustained the SEC's claim against Mr. Tourre under the Securities Act of 1933 as to "offers" allegedly made to German bank IKB Deutsche Industriebank AG ("IKB") and Dutch bank ABN Amro N.V. ("ABN").

PRELIMINARY STATEMENT

In its June 10 Order, the Court dismissed the SEC's Exchange Act claims relating to the note purchase entered into by IKB and the credit default swap entered into by ABN, on the ground that the SEC had failed to plead that those transactions were domestic for purposes of the transactional test prescribed by *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010). For the same reason, the Court dismissed the SEC's Securities Act claim to the extent it was predicated on alleged "sales" of those foreign transactions to IKB and ABN. Yet the Court sustained the Securities Act claim as to "offers" allegedly made to IKB and ABN to enter into these foreign transactions, based only on allegations that Mr. Tourre engaged in pre-transactional, preparatory conduct in the United States that the Court viewed as sufficient to satisfy the statute's expansive definition of "offer."

Mr. Tourre now seeks an interlocutory appeal of the June 10 Order so that the Second Circuit can rule on the novel and controlling question of securities law raised by this Court's ruling, *i.e.*, does the broad definition of "offer" in the Securities Act mean that the Act regulates conduct in the United States that is preparatory to a consummated foreign securities transaction that does not satisfy the transactional test prescribed by *Morrison*?

Certification is warranted because there is, at a minimum, substantial ground for difference of opinion as to this Court's ruling, which ruling is contrary to *Morrison* and unsupported by the language, statutory history, and case-law under the Securities Act. Moreover, certification of an interlocutory appeal would materially advance the ultimate termination of this

litigation. It would narrow discovery, including problematic foreign discovery into these foreign transactions, simplify the dispositive motion practice, limit the scope of admissible evidence at trial, and shorten and simplify trial. Unless the error in the June 10 Order is corrected now, it will infect all those stages of the litigation, and may well result in the Court of Appeals, post-trial, reversing and remanding for a second trial. In addition, certification at this stage would permit the Second Circuit to deliver a ruling that will have wider precedential value, not only for SEC enforcement actions, but also for private civil actions under the Securities Act.

STANDARD OF LAW

A district court may certify an order for interlocutory appeal if it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal of the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Section 1292(b) appeals are a "rare exception to the final judgment rule that generally prohibits piecemeal appeals," and are "reserved for those cases where an intermediate appeal may avoid protracted litigation." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865-66 (2d Cir. 1996) (citing *Milbert v. Bison Labs.*, 260 F.2d 431, 433-35 (3d Cir. 1958)).

ARGUMENT

I. SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION EXISTS AS TO THE COURT'S RULING SUSTAINING THE SECURITIES ACT CLAIM CONCERNING "OFFERS" ALLEGEDLY MADE TO IKB AND ABN

Under Section 1292(b), an interlocutory appeal may be certified if there is "substantial ground for difference of opinion" as to the court's ruling. The Court of Appeals has held that this condition is satisfied when "the issues are difficult and of first impression." *See Klinghoffer v. Palestine Liberation Organization*, 921 F.2d 21, 25 (2d Cir. 1990); *see also In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (requiring the court to "analyze the strength of the

arguments in opposition to the challenged ruling" to determine whether there is substantial ground for difference of opinion) (internal quotation omitted).

In *Pollack v. Laidlaw Holdings, Inc.*, No. 90 Civ. 5799 (PKL), 1993 WL 254932 (S.D.N.Y. June 25, 1993), for example, the court certified a question that no appellate court had previously addressed as to whether mortgage participations are "securities" under the federal securities laws, an issue that was "on the fringe of the law in this developing area," creating "substantial ground for difference of opinion in this area of the law that has, as yet, undefined boundaries." *Id.* at *3. Similarly, in *In re WorldCom, Inc. Securities Litigation*, No. 02 Civ. 3288, 2003 WL 22953644 (S.D.N.Y. Dec. 16, 2003), the court held that, in light of two conflicting statutes and in the absence of any appellate ruling on the issue, there was substantial ground for difference of opinion as to whether Securities Act claims can be removed to federal court on the ground that they are "related to" a pending bankruptcy case. *See id.* at *5-6.[1]

The Second Circuit has regularly approved the use of 1292(b) certification to allow it to rule on the correct application of a controlling Supreme Court decision. *See*, *e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (addressing the impact of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), on Alien Tort Statute claims); *Weintraub v. Bd. of Educ. of the City of N.Y.*, 593 F.3d 196 (2d Cir. 2010) (addressing the impact of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), on First Amendment employment retaliation claims), *cert. denied*, 131 S.Ct. 444 (2010).[2]

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[1] *Accord N.Y. v. Gutierrez*, 623 F. Supp. 2d 301, 317 (E.D.N.Y. 2009) (finding substantial ground for difference of opinion because "reasonable minds could differ" as to the court's ruling on "an issue of first impression in this circuit," in a case in which both sides had "strong legal arguments"), *rev'd on other grounds sub nom. New York v. Atlantic States Marine Fisheries Com'n*, 609 F.3d 524 (2d Cir. 2010); *Plofsky v. Giuliano*, No. 06-cv-0789(JCH), 2009 WL 1468719, at *3-4 (D. Conn. May 20, 2009) (adhering to a decision to distinguish a Second Circuit case, but finding substantial ground for difference of opinion and acknowledging that the court had "grappled with its decision").

[2] *See also Gerosa v. Savasta & Co., Inc.*, 329 F.3d 317 (2d Cir. 2003) (addressing the impact of Supreme Court decisions on *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992)); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998) (addressing the impact of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), on federal securities claims); *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808 (2d Cir. 1994) (addressing the impact of *Reves v. Ernst & Young*, 494 U.S. 56 (1990), on federal securities claims).

There is, at a minimum, substantial ground for difference of opinion as to this Court's ruling sustaining the Securities Act claim against Mr. Tourre as to "offers" allegedly made to IKB and ABN. This appears to be the first case addressing the application of *Morrison* to Section 17 claims, and the Court opined that *Morrison* provides "little guidance" as to how its transactional test applies to transactions that, like those at issue here, do not take place on an exchange. *See* June 10 Order at 19. Indeed, although the Court held in its order denying Mr. Tourre's motion for reconsideration of the June 10 Order that "Tourre point[s] to no controlling decisions or data that alter the conclusion reached by the court," Aug. 22, 2011 Order, ECF No. 101, at 1 (citation and internal quotation omitted; alteration in original), the absence of any controlling decision in support of the Court's ruling sustaining the claims as to "offers" to IKB and ABN creates substantial ground for difference of opinion. Under these circumstances, there is no question that the June 10 Order raises issues that are "difficult and of first impression," *Klinghoffer*, 921 F.2d at 25, and that are "on the fringe of the law in this developing area," *Pollack*, 1993 WL 254932, at *3.

In the June 10 Order, the Court dismissed the Exchange Act claims relating to the IKB and ABN transactions, and dismissed the Securities Act claim to the extent it was predicated on "sales" to IKB and ABN, because the SEC had failed to plead that German bank IKB's purchase of ABACUS 2007-AC1 notes from London-based Goldman Sachs International ("GSI") in an overseas transaction under SEC Regulation S, and Dutch bank ABN's entry into an English law-governed credit default swap with GSI, are domestic transactions under the bright-line "transactional test" mandated by *Morrison*. *See* June 10 Order at 21-28, 35-37. The Court's dismissal of the Exchange Act claims and the Securities Act claim to the extent it was based on "sales" to IKB and ABN necessarily followed from its correct ruling that the SEC alleged only "U.S.-based *conduct* by Tourre," which conduct, under *Morrison*, simply does not plead a domestic transaction. *Id.* at 21-22 (emphasis added).

Based on the expansive definition of "offer" in the Securities Act, however, the Court declined to dismiss the Securities Act claim as to "offers" allegedly made to IKB and ABN.

See id. at 37-39. The Court thereby ruled that the very "U.S.-based conduct by Tourre" that did not plead an actionable domestic transaction nonetheless pled an actionable "offer." *See id.* For the reasons set forth below, the Court's ruling, which rests on grounds that neither party advocated, is inconsistent with *Morrison*, and also unsupported by the language and legislative and case-law history of the Securities Act. There is, therefore, substantial ground for difference of opinion sufficient to warrant certification of the June 10 Order under Section 1292(b).

First, as Mr. Tourre demonstrated in his motion for reconsideration of the June 10 Order,[3] the Court's ruling sustaining the Securities Act claim based on alleged "offers" to IKB and ABN is inconsistent with the Supreme Court's decision in *Morrison*. *See* Reconsideration Mem. at 3-5; Reconsideration Reply at 2-3. *Morrison* made clear that the federal securities laws apply only to protect "parties or prospective parties," *i.e.*, purchasers and offerees, to domestic securities transactions, and that preparatory domestic conduct that leads to a foreign transaction, *i.e.*, the only conduct alleged against Mr. Tourre, does not transmogrify it into a domestic transaction. *See* Reconsideration Mem. at 3; Reconsideration Reply at 2. The Court's ruling, which subjects two foreign transactions to the federal securities laws based only on allegations of preparatory domestic conduct, is wholly inconsistent with *Morrison*.

Second, the open-ended definition of "offer" in the Securities Act, a definition of a kind that the Supreme Court itself has dismissed as "'unhelpful,'" *see* June 10 Order at 20 n.9 (quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 466 (1969)), does not support the June 10 Order. *See* Reconsideration Mem. at 3-4; Reconsideration Reply at 2-5. The Court's focus on the location of the alleged offeror as determinative of whether the alleged "offer" is subject to federal securities laws is neither supported by the statute, nor consistent with the SEC's focus on the location of the offeree when it adopted Regulation S to exempt foreign transactions from the

[3] The memorandum of law in support of Mr. Tourre's motion for limited reconsideration of the June 10 Order, ECF No. 96, is cited in the format "Reconsideration Mem.," and Mr. Tourre's reply memorandum in support of the same motion, ECF No. 100, is cited in the format "Reconsideration Reply."

registration provisions of the Securities Act based on a "territorial approach" that is highly analogous to the "transactional test" set forth in *Morrison*. *See* Reconsideration Reply at 4-5.

Further, the Court's ruling is inconsistent with the holding of the Honorable John G. Koeltl in *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166 (S.D.N.Y. 2010), that the term "purchase" cannot bear its expansive Exchange Act definition for *Morrison* purposes, because that would create the regulatory multiplicity that *Morrison* specifically directs the courts to avoid. *See id.* at 177-78. The June 10 Order contravenes *Morrison* by exposing the foreign IKB and ABN transactions and those who were involved in them to regulatory multiplicity under the federal securities laws and the laws of the foreign jurisdictions where the transactions actually took place. *See* Reconsideration Mem. at 3-4; Reconsideration Reply at 2.

Third, Mr. Tourre demonstrated that the Court's bifurcation of completed transactions into separately-actionable "offer" and "sale" components is not supported by any decision in the 78-year history of the Securities Act, including the out-of-circuit decisions on which the June 10 Order relies, and is inconsistent with the legislative history of the statute, which clearly shows that Congress never intended to create two separately-actionable claims under Section 17 for a single transaction. By creating a claim that Congress never authorized, the June 10 Order engaged in the kind of judicial lawmaking that has plagued the securities laws and that the Supreme Court disapproved in *Morrison*. *See* Reconsideration Mem. at 5-7; Reconsideration Reply at 5-7.

As the June 10 Order is inconsistent with *Morrison* and with Judge Koeltl's decision in *Plumbers' Union*, and is unsupported by the language and statutory and case-law history of the Securities Act, Mr. Tourre has demonstrated substantial ground for difference of opinion as to the Court's ruling sustaining the Securities Act claim in relation to IKB and ABN.

II. THE COURT'S RULING PRESENTS A CONTROLLING QUESTION OF LAW THE RESOLUTION OF WHICH WOULD MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION

To determine whether the remaining conditions for certification are satisfied, *i.e.*, whether the order presents a "controlling question of law" the resolution of which "may materially advance the ultimate termination of the litigation," *see* 28 U.S.C. § 1292(b), the courts of this Circuit consider whether "'reversal of the district court's opinion could result in dismissal of the action; reversal of the district court's opinion, even though not resulting in dismissal could significantly affect the conduct of the action; or, the certified issue has precedential value for a large number of cases.'" *N.Y. v. Gutierrez*, 623 F. Supp. 2d 301, 316 (E.D.N.Y. 2009) (quoting *Primavera Familienstifung v. Askin*, 139 F. Supp. 2d 567, 570 (S.D.N.Y. 2001)), *rev'd on other grounds sub nom. New York v. Atlantic States Marine Fisheries Com'n*, 609 F.3d 524 (2d Cir. 2010).[4]

An order may be certified under Section 1292(b) when reversal would "avoid protracted litigation," *Koehler*, 101 F.3d at 866, by narrowing the claims at issue, thereby avoiding futile discovery into non-viable claims, simplifying future motion practice, narrowing the scope of evidence admissible at trial, and shortening and simplifying trial. In *German v. Federal Home Loan Mortgage Corp.*, No. 93 CIV. 6941 NRB, 2000 WL 1006521 (S.D.N.Y. July 19, 2000), for example, the court certified a Section 1292(b) appeal because reversal would resolve certain claims and greatly simplify discovery and trial on the remaining claims. *See id.* at *1. Similarly, in *Northstar Financial Advisors Inc. v. Schwab Investments*, No C 08-4119 SI, 2009 WL 1126854 (N.D. Cal. Apr. 27, 2009), the court granted a Section 1292(b) appeal

[4] As the Court of Appeals noted in *Klinghoffer v. Palestine Liberation Organization*, 921 F.2d 21, 24 (2d Cir. 1990), a question need not be dispositive of the entire litigation to be "controlling" under Section 1292(b). *See also Bilello v. JPMorgan Chase Retirement Plan*, 603 F. Supp. 2d 590, 592-93 (S.D.N.Y. 2009) (noting that limiting Section 1292(b) appeals to case-dispositive questions would "read[] the phrase 'materially advance' out of the statute").

because if the district court's ruling were reversed "the issues will be significantly narrowed, thus shaping the scope of discovery and motion practice." *Id.* at *1.[5]

For the same reasons, certification is warranted here because a ruling on the controlling question identified by Mr. Tourre, which raises a "discrete legal issue not dependent on disputed facts that can easily be briefed promptly," *In re Adelphia Communications Corp. Sec. and Derivative Litig.*, No. 03 MDL 1529(LMM), 2006 WL 708303, at *4 (S.D.N.Y. Mar. 20, 2006), would significantly affect the future conduct of the action. It would limit the scope of discovery, including discovery that, as a result of the foreign nature of the subject transactions, is proving highly problematic because the witnesses and documents are located overseas,[6] and would shorten and simplify trial of this matter. It would, moreover, avoid the need to litigate this matter to trial under a novel and incorrect standard of law that, unless corrected now, will infect the summary judgment phase, the admissibility of evidence at trial, and the jury charge, all of which could result in the Court of Appeals reversing and remanding the case for a second round of dispositive motion practice and a second trial.

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[5] *Accord Bilello*, 603 F. Supp. 2d at 593-95 (holding that a ruling presented a controlling question of law the resolution of which would materially advance the ultimate termination of the litigation, because it would terminate most of the claims, remove the possibility of class certification, and diminish the maximum potential recovery, but denying certification because there was no substantial ground for a difference of opinion); *Consol. Co., Inc. v. Union Pac. R.R. Co.*, No. Civ. A. 98-1804L-O, 2006 WL 950198, at *1 (W.D. La. Apr. 11, 2006) (certifying a Section 1292(b) appeal because reversal "will have widespread ramifications on the scope of discovery and greatly affect the scope of evidence at trial"); *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 743 (D. Md. 2003) (certifying under Section 1292(b) because reversal would affect the scope both of discovery and the scope of evidence admissible at trial); *In re Managed Care Litig.*, Nos. MDL 1334, 00-1334MDMORENO., 2002 WL 1359736, at *2 (S.D. Fla. Mar. 25, 2002) (certifying a question because "the scope of future discovery, motion practice and trial activities would be limited significantly if the Order were reversed"); *Larsen v. Pennsylvania*, 965 F. Supp. 607, 610 (M.D. Pa. 1997) (certifying a Section 1292(b) appeal because reversal "could avoid expensive and protracted discovery on Larsen's due process claims and ultimately eliminate a trial on these issues").

[6] For example, Mr. Tourre is unable to obtain documents from IKB because Germany does not provide pre-trial document discovery under the Hague Convention and because the Magistrate Judge declined to order the SEC to utilize its memoranda of understanding with its German counterpart to obtain such evidence, *see* ECF Nos. 68, 84 (Orders of Dolinger, J. dated Feb. 1, 2011 and Apr. 8, 2011), a decision affirmed by this Court, *see* ECF No. 91 (Order of Jones, J. dated June 10, 2011).

Certification is also warranted because a ruling from the Second Circuit would have wider precedential value. Although a question need not have wide precedential value to be "controlling," the fact that a ruling will have precedential value in other cases may be taken into account in determining whether to certify an appeal under Section 1292(b). *See Klinghoffer*, 921 F.2d at 24. Indeed, in light of its preeminence in securities matters, the Second Circuit has frequently accepted Section 1292(b) appeals to resolve novel and important questions of securities law.[7]

A decision from the Second Circuit reversing the June 10 Order would have wide precedential value, both for other SEC enforcement actions under Section 17, and also for private securities claims under Section 12 of the Securities Act.

Employing language that is materially similar to the "offer or sale" language of Section 17, Section 12 provides investors a private right of action against a defendant who "[o]ffers or sells" securities by means of a materially misleading prospectus or oral statement. *See* 15 U.S.C. § 77l(a)(2). Under the logic of the June 10 Order, a foreign investor in a foreign securities transaction has a claim under Section 12 if there is some minimal amount of pre-transactional conduct in the United States that satisfies the statute's very broad definition of "offer"—conduct that would never have been sufficient even to satisfy the pre-*Morrison* conduct

[7] *See, e.g.*, *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008) (addressing an investment advisor's standing to assert federal securities claims on behalf of its client); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190 (2d Cir. 2008) (addressing the standard for pleading corporate scienter for Exchange Act claims); *Litzler v. CC Inv., L.D.C.*, 362 F.3d 203 (2d Cir. 2004) (addressing the tolling of claims under Section 16(b) of the Exchange Act); *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004) (addressing whether Securities Act claims can be removed to federal court as "related to" a pending bankruptcy case); *SEC v. U.S. Environmental, Inc.*, 155 F.3d 107 (2d Cir. 1998) (addressing the scienter standard for market manipulation claims under the Exchange Act); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998) (addressing the viability of private claims for conspiracy to commit securities fraud); *McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044 (2d Cir. 1995) (addressing the measure of damages available under the Securities and Exchange Acts); *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808 (2d Cir. 1994) (addressing whether an instrument constituted a "security" for purposes of the Securities and Exchange Acts); *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir. 1984) (Friendly, J.) (addressing whether instruments constituted "securities" for purposes of the Securities and Exchange Acts, and whether certain conduct fell within the scope of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act).

test, under which the defendant's U.S.-based conduct had to be "more than merely preparatory" to a securities fraud. *See*, *e.g.*, *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003) (internal citation omitted), *abrogated by Morrison*, 130 S.Ct. at 2879-83.

If the Court's ruling were correct, investors who previously would have sued under Section 10(b) of the Exchange Act and/or Section 11 of the Securities Act but whose claims under those provisions are barred by *Morrison* will in many instances simply assert claims under Section 12 instead. That would not only be inconsistent with the Second Circuit's holding that "§ 12 does not reach further than § 10(b)," *Europe and Overseas Commodity Traders*, *S.A.*, *v. Banque Paribas London*, 147 F.3d 118, 128 n.10 (2d Cir. 1998), *abrogated on other grounds by Morrison*, 130 S.Ct. at 2879-83, but it would invite the reopening of all the cases from this district that have dismissed Section 11 and Section 10(b) claims, to see whether the plaintiff can plead a Section 12 claim by alleging some minimal amount of U.S. conduct sufficient to meet the definition of "offer."[8]

Under these circumstances, certification is appropriate to resolve this controlling question of law that would materially advance the ultimate termination of this lawsuit, and to allow the Second Circuit to rule on an important and novel issue of securities law.

[8] *See*, *e.g.*, *In re Royal Bank of Scotland Group PLC Sec. Litig.*, 765 F. Supp. 2d 327 (S.D.N.Y. 2011); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166 (S.D.N.Y. 2010); *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010); *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495(RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469 (S.D.N.Y. 2010); *Sgalambo v. McKenzie*, 739 F. Supp. 2d 453 (S.D.N.Y. 2010).

CONCLUSION

For all the foregoing reasons, Fabrice Tourre respectfully requests that the Court amend its Order of June 10, 2011 to state that, to the extent the Order sustained the SEC's claim against Mr. Tourre under the Securities Act of 1933 as to "offers" allegedly made to IKB and ABN, it involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation, and grant such other and further relief as the Court may consider appropriate.

Dated: August 26, 2011
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