

Upwood Invs. Ltd. v U.S. Bank Natl. Assoc.
2012 NY Slip Op 33367(U)
July 16, 2012
Supreme Court, New York County
Docket Number: 652046/10
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~BARBARA R. KAPNICK~~

PART 31

Index Number : 652046/2010

UPWOOD INVESTMENT LIMITED

vs.

U.S. BANK NATIONAL

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

Dated: 7/16/12



J.S.C.

BARBARA R. KAPNICK

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: IA PART 39

-----X
UPWOOD INVESTMENTS LIMITED,

Plaintiff,

- against -

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 652046/10

Motion Seq. No. 001

This action involves certain guaranteed, secured notes (the "IK Finance 06 Notes" or the "Notes") due in 2006, issued by Indah Kiat International Finance Company, B.V. ("IK Finance" or the "Issuer") and guaranteed by P.T. Indah Kiat Pulp & Paper Corporation Tbk. ("PTIK" or the "Guarantor"). Defendant U.S. Bank National Association is the trustee ("US Bank" or the "Trustee") of the Notes pursuant to a Trust Indenture, dated as of June 29, 1994 (the "Indenture"). Plaintiff Upwood Investments Limited ("Upwood") owns approximately fifty-five percent (55%) of these IK Finance 06 Notes. Complaint, ¶ 1.

Background

Related to the instant action are two separate actions pending before this Court: *Bernal Ventures, Ltd., Upwood Investments Limited, et al. v. APP Int'l Fin. Co. B.V., et al.* (Index No.

603315/02) (the "Bernal/Gryphon Action")¹, and *U.S. Bank Nat'l Ass'n v. APP Int'l Fin. Co. B.V., et al.* (Index No. 600405/04) (the "Trustee's Action").

The Bernal/Gryphon Action was commenced in this Court in or about March 2003 to recover, *inter alia*, principal and interest due in connection with certain notes, including the IK Finance 06 Notes, which were issued and/or guaranteed by IK Finance and PTIK, among others. Complaint, ¶¶ 7-8.

The Trustee's Action was commenced in this Court in or about February 2004 by US Bank, in its capacity as Indenture Trustee, in connection with certain notes, including the IK Finance 06 Notes, against IK Finance, PTIK and others to recover principal, interest, and default interest on the notes, and for damages, indemnification and attorneys' fees. *Id.*, ¶ 14.

Judgments were entered against IK Finance, PTIK and other judgment debtors (together the "Judgment Debtors") in both the Trustee's Action and the Bernal/Gryphon Action, as follows:

- (a) on March 10, 2005, in relation to the IK Finance 06 Notes, in the amount of \$118,946,398 in the Trustee's Action; and

¹ The Bernal/Gryphon Action was formerly captioned *Gryphon Domestic VI, LLC, et al. v. APP Int'l Fin. Co. B.V., et al.*

(b) on February 24, 2006, in relation to the IK Finance 06 Notes in the amount of \$62,472,876.91 in the Bernal/Gryphon Action.²

Id., ¶ 1.

Following entry of Judgment in the Bernal/Gryphon Action, the judgment creditors began enforcement proceedings to collect on the Judgment. In particular, the judgment creditors served restraining notices and document and information subpoenas; procured turnover orders and injunctions, and commenced proceedings in jurisdictions other than New York. *Id.*, ¶ 12.

In the Trustee's Action, US Bank has pursued enforcement proceedings against IK Finance and PTIK, as Judgment Debtors. US Bank's efforts have included, *inter alia*, pursuing foreclosure proceedings against certain assets of PTIK located in Indonesia and serving information subpoenas and document subpoenas on the Judgment Debtors. *Id.*, ¶ 16.

Despite these efforts to enforce the Judgments entered in the related Actions, the judgment creditors in the Bernal/Gryphon Action have been unsuccessful in recovering any amount of the

² Upwood is a principal judgment creditor in the Bernal/Gryphon Action, and specifically, is a judgment creditor with respect to the judgment on the IK Finance 06 Notes in that action.

Judgment. In addition, none of the Trustee's enforcement efforts have led to any recovery related to the Notes in its Action. *Id.*, ¶¶ 13, 17.

Plaintiff asserts that PTIK has restructured a substantial portion of its outstanding debt as part of an ongoing global restructuring. Related to those efforts, plaintiff has engaged in negotiations with certain of the Judgment Debtors, and others, in an attempt to reach a resolution regarding plaintiff's Judgment against them. While these negotiations have "progressed substantially since March 2, 2010," plaintiff argues that the Noteholders will be unable to reach a consensual resolution of their claims as part of an overall debt restructuring "[u]nless and until U.S. Bank ceases any further judgment enforcement efforts" on behalf of the Noteholders, including plaintiff. *Id.*, ¶¶ 2, 20-21.

Plaintiff, as the majority holder of the Notes, relies on Section 4.8 of the Indenture, which provides:

Control by Noteholders. The holders of a Majority in aggregate principal amount of the Notes at the time Outstanding shall have the right to direct the time, method, and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred on the Trustee by this Indenture; provided that such direction shall not be otherwise than in accordance with law and the provisions of this Indenture, and provided, further, that (subject to the provisions of Section 5.1) the Trustee shall have the

right to decline to follow any such direction if the Trustee shall determine that the action or proceeding so directed may not lawfully be taken or if the Trustee in good faith by its board of directors, the executive committee, or a trust committee of directors or responsible officers of the Trustee shall determine that the action or proceedings so directed would involve the Trustee in personal liability or if the Trustee in good faith shall so determine that the actions or forbearances specified in or pursuant to such direction shall be unduly prejudicial to the interests of holders of the Notes not joining in the giving of said direction, it being understood that, subject to Section 5.1, the Trustee shall have no duty to ascertain whether or not such actions or forbearances are unduly prejudicial to such holders.

Nothing in this Indenture shall impair the right of the Trustee at its discretion to take any action deemed proper by the Trustee and which is not inconsistent with such direction by Noteholders.

In addition, Section 5.1 of the Indenture provides, in pertinent part:

Duties and Responsibilities of the Trustee During Default; Prior to Default. The Trustee, prior to the occurrence of an Event of Default and after the curing or waiving of all Events of Default which may have occurred, undertakes to perform such duties and only such duties as are specifically set forth in this Indenture. In case an Event of Default has occurred (which has not been cured or waived) the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

No provision of this Indenture shall be construed to relieve the Trustee from liability for its own gross negligence or its own willful misconduct, except that

* * * *

- (b) the Trustee shall not be liable for any error of judgment made in good faith by a responsible officer or responsible officers of the Trustee, unless it shall be proved that the Trustee was grossly negligent in ascertaining the pertinent facts; and
- (c) the Trustee shall not be liable with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the holders of not less than a Majority in aggregate principal amount of the Notes at the time Outstanding relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee, under this Indenture.

None of the provisions contained in this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur financial liability in the performance of any of its duties or in the exercise of any of its rights or powers, if it shall have reasonable ground for believing that the repayment of such funds or adequate indemnity against such liability is not reasonably assured to it.

This Section 5.1 is in furtherance of and subject to Sections 315 and 316 of the Trust Indenture Act of 1939.

In accordance with Section 4.8 of the Indenture, plaintiff, as holder of the majority in aggregate principal amount of the outstanding Notes, wrote to US Bank on May 19, 2009 and instructed the Trustee to:

- (a) forthwith take all actions and steps to, and instruct, (P.T. Bank Mizuho Indonesia, formerly known as PT Bank Fuji International Indonesia [the "Collateral Agent"]), to, fully and unreservedly withdraw and terminate and procure the withdrawal

and termination of any and all actions, proceedings, claims, or filings (in each case howsoever described or arising) existing or taken against the Issuer, the Guarantor or any other person (or any of their respective assets) under or in connection with the Indenture, the Notes, the Collateral Agency Agreement, any collateral or security agreement or document or otherwise including, without limitation, the taking of all actions and steps to fully and unreservedly withdraw and terminate any and all proceedings, claims and/or actions in connection with the Petition for a Ruling for Attachment under Foreclosure dated 7 October 2003 and the Request for Summons dated 4 November 2003, each filed with the Chief of Bengkalis District Court, the Republic of Indonesia; and

- (b) cease and desist from taking or participating in any and all actions, proceedings or complaints (howsoever described or arising) against the Issuer, the Guarantor or any other person (or any of their respective assets) without our prior written consent.

Plaintiff alleges that on June 2, 2009, the Trustee responded to the May 19th Letter with requests for information which it imposed as conditions precedent to be satisfied in order for the Trustee to comply with plaintiff's Directions. Complaint, ¶ 26.

Plaintiff asserts that it provided appropriate responses to "all reasonable inquiries" of the Trustee and, notwithstanding this fact, the Trustee has failed and refused to comply with plaintiff's May 19th Letter. Further, plaintiff contends that the Trustee continues to impose unreasonable conditions to its compliance with

said letter. *Id.*

In particular, plaintiff alleges that it provided the Trustee with documentation of its ownership of a majority of the outstanding Notes; an explanation of the reasons underlying its directions to the Trustee, and the legal and practical effect of such directions; copies of Upwood's certificate of incorporation, register of directors, register of members, Memorandum and Articles of Association, and certificate of good standing; and a letter of introduction of Suryawan Anwar ("Anwar"), the principal owner of Upwood. *Id.*, ¶¶ 27-30.

By letter dated October 6, 2009, plaintiff also provided, at the Trustee's request, a representation and warranty "that neither Upwood, Mr. Anwar nor any of its beneficial owners is directly or indirectly affiliated with or otherwise related to [IK Finance], P.T. Indah Kiat Pulp & Paper Corporation, Asia Pulp & Paper Company Ltd., and/or any of their respective affiliates or principals." *Id.*, ¶ 31.

Moreover, plaintiff agreed to indemnify and hold the Trustee, its directors, officers and employees, harmless from any losses, liabilities, judgments, claims, causes of action, costs and expenses arising out of compliance with the May 19th Letter.

Finally, Upwood limited its cease and desist instructions, as previously delineated in the May 19th Letter, to a period of 120 days. *Id.*, ¶¶ 32, 34.

The Trustee, by letter dated August 18, 2009, stated that "any instruction to forbear from enforcing rights against the Issuer and Guarantor will need to provide for the payment of our accrued fees and expenses," which the Trustee later revealed were "in excess of several million dollars." Plaintiff subsequently requested by letter dated December 23, 2009 that the Trustee provide a detailed breakdown of said fees. Plaintiff alleges that the Trustee has never provided this information. *Id.*, ¶¶ 33, 35.

Further, by letter dated February 10, 2010, the Trustee asserted as an objection to its compliance with plaintiff's May 19th Letter that, *inter alia*, it did not have "concrete identity information as to the location and contact points" of Anwar - despite the Trustee allegedly having the contact information for Upwood's attorneys in Singapore and for Anwar in Indonesia. *Id.*, ¶ 30.

Finally, plaintiff asserts that, throughout its communications with the Trustee, plaintiff has repeatedly advised the Trustee of the rationale behind its Directions that the Trustee suspend its judgment enforcement efforts, namely that the previous lawsuits and other actions undertaken by the Trustee over many years and in many

jurisdictions have been fruitless and have actually destroyed value for bondholders. Further, plaintiff represented to the Trustee in various letters its belief that a consensual settlement would be in the best interest of all bondholders. *Id.*, ¶ 36.

Despite the foregoing, plaintiff alleges that US Bank has failed and refused to comply with plaintiff's Directions. *Id.*, ¶¶ 37-39.

Upwood filed this Complaint, dated November 16, 2010, asserting causes of action for (1) a judgment declaring plaintiff's right under the IK Finance 06 Indenture to have the Trustee comply with plaintiff's Directions and to refrain from any further enforcement efforts for a period of at least 120 days, and (2) breach of the defendant's obligations under the Indenture.

Plaintiff seeks the following relief:

- (a) a declaration that defendant is obligated to comply with the Directions provided by plaintiff pursuant to the Indenture without imposing conditions not set forth in the Indenture, or, in the alternative, directing defendant to specifically perform in accordance with its obligations under the Indenture by complying with plaintiff's Directions;
- (b) compensatory damages; and
- (c) costs, disbursements and fees.

Defendant now moves to:

- (i) dismiss the Complaint with prejudice pursuant to CPLR 3211(a)(1) and (a)(7), or, alternatively, pursuant to Bus. Corp. Law 1312(a) on the ground that plaintiff, a foreign corporation not authorized to do business in the State of New York, may not continue this action as a matter of law; and
- (ii) staying discovery pending disposition of this motion pursuant to CPLR 3214(b) and Rule 11(d) of the Commercial Division Rules.

Discussion

The Trustee argues in support of its motion to dismiss the Complaint that it had the right under Section 4.8 of the Indenture to decline to follow the Directions from plaintiff under certain circumstances, including a determination by the Trustee that "the action or proceeding so directed may not lawfully be taken" or "would involve the Trustee in personal liability" or "shall be unduly prejudicial to the interests of holders of the Notes not joining in the giving of said direction." US Bank claims that it would clearly be prejudicial to the non-joining noteholders to terminate foreclosure proceedings in Indonesia which are a powerful remedy to enforce the Trustee's Judgment, and would conflict with prior directions to the Trustee from the Oaktree plaintiffs in the Bernal/Gryphon Action whose interests in the Notes were not necessarily acquired by Upwood.

The Trustee further argues that complying with plaintiff's Directions would ultimately result in unlawful action to the

prejudice of other holders whose interests the Trustee is obligated to protect, because the Complaint does not allege that Upwood is prepared to share its recovery from any settlement of its share of the judgments in the Bernal/Gryphon Action on a *pro rata* basis with all other holders, as required under Section 4.5³ of the Indenture

³ SECTION 4.5. Limitations on Suits by Holders
Except as provided in Section 4.6. , no holder of any Note shall have any right by virtue of or by availing itself of any provision of this Indenture or of the Notes to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Indenture or of the Notes or for the appointment of a receiver or trustee, or for any other remedy hereunder or under the Notes, unless (a) such holder previously shall have given to the Trustee written notice of default and of the continuance thereof with respect to the Notes, (b) the holders of not less than 25% in aggregate principal amount of the Notes then Outstanding shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby and (c) the Trustee for 30 days after its receipt of such notice, request and offer of indemnity, shall have failed to institute any such action, suit or proceeding and no direction inconsistent with such written request shall have been given to the Trustee pursuant to Section 4.8, it being understood and intended, and being expressly covenanted by every Noteholder with every other Noteholder and the Trustee, that no one or more Noteholder shall have any right in any manner whatever by virtue or by availing itself of any provision of this Indenture or of the Notes to affect, disturb or prejudice the rights of the holders of any other of such Notes or to obtain priority over or preference to any other such holder, or to enforce any right under this Indenture or under the Notes, except in the manner herein provided and for the equal, ratable and common benefit of all holders of the Notes. For the protection and enforcement of this Section, each

and the Judgments entered in the related Actions.

Third, US Bank contends that it was within its contractual rights to decline to follow the Directions to avoid potential personal liability from the other holders if the Trustee were to instruct the Collateral Agent to terminate the foreclosure proceedings or judgment enforcement proceedings or otherwise act in a manner inconsistent with a prior holder direction. Moreover, the Trustee asserts that Upwood declined to offer the Trustee adequate indemnity against such exposure, in accordance with the Indenture's provisions governing the indemnification of the Trustee against potential liabilities (see, Sections 5.1 and 5.2[d]) and failed to provide evidence of its "financial condition and credit worthiness," especially since Upwood has recently revealed that it does not do business in New York.

Even assuming, *arguendo*, that the Trustee had a contractual duty to follow the Directions, which the Trustee strongly disputes, it claims it is protected against any liability by the exculpatory provision of Section 5.1(b) of the Indenture which protects the Trustee from liability for any good faith error in judgment, or Section 5.2(c) and (e) which insulate the Trustee against liability based on its reliance on the advice of counsel or belief that its

and every Noteholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

acts or omissions are authorized or within its rights and discretion.

The Trustee concludes that because the Complaint alleges only conclusory allegations of bad faith, it would not be liable to Upwood for any damages as a matter of law.⁴

In opposition, plaintiff asserts that defendant's argument that it had the right under section 4.8 to decline to follow Upwood's Directions is fatally flawed, or at least raises an issue of fact which would require that defendant's motion be denied.

First of all, Upwood claims that the Directions do not seek any action or inaction by the Trustee that is in any way unlawful, and refers to its representation that it would negotiate for participation in a debt restructuring that would equally benefit Upwood as well as all minority noteholders.

As to the risk of potential liability defendant runs by adhering to the Directions, Upwood argues that it is minimal, if not non-existent, and is enormously outweighed by the risk of potential liability defendant runs by its prolonged refusal to follow the Directions and its insistence on engaging in a

⁴ US Bank specifically contends that it was not bad faith for the Trustee to seek payment of its accrued fees and expenses, pursuant to the specific terms of the Indenture.

protracted collection effort at the ultimate expense of the noteholders.

In fact, Upwood contends that defendant's conduct is so unjustified as to constitute gross negligence if not willful misconduct, especially given that the enforcement effort has yielded nothing to date and apparently has little or no prospect of ever yielding anything. In any event, plaintiff insists that by issuing the Directions, Upwood recognizes that defendant would not be guilty of gross negligence or willful misconduct for its compliance, which would be confirmed by an order from this Court declaring defendant's obligation to comply with the Directions.

Moreover, Upwood claims that there will be no undue prejudice suffered by any noteholder by cooperating in the effort to create an atmosphere where the parties might be able to negotiate a practical resolution to a problem that has for years been beyond the ability and resources of defendant to resolve. On the contrary, the Trustee claims that Upwood's premise ignores that its policy of appeasing APP International Finance Company, B.V., another of the judgment debtors, does not benefit non-joining holders who prefer that the Trustee pursue recovery on its Judgment.

Upwood further argues that it not only has provided defendant a reasonable assurance of being indemnified, as alleged in the

Complaint, but also questions whether there will ever be a need for defendant to take advantage of that assurance. According to Upwood, the Trustee cannot be held liable for any harm it might cause unless it is grossly negligent or willfully engages in misconduct, and standing still for 120 days is not likely to rise to that level.

Upwood certainly could not accuse defendant of such gross misconduct for complying with its Directions, and if Upwood's negotiations are successful, the minority noteholders are not going to accuse defendant of such misconduct either. If, on the other hand, plaintiff postures, the negotiations are unsuccessful, defendant can then resume its enforcement efforts with no likelihood of any harm having been suffered in the interim that could possibly expose US Bank to liability.

In reply, the Trustee contends that it is not required to accept Upwood's self-serving speculation that a need for indemnity is extremely unlikely. In fact, US Bank states that the very purpose of the contractually-mandated indemnity is to protect against the potential for claims by other holders or third parties.

US Bank next argues that Upwood's action is barred by the Indenture's "Limitations on Suits by Holders" provision in Section 4.5 of the Indenture, the "no action" clause, which is predicated on the satisfaction of five conditions precedent to suit by

holders.

US Bank claims that this action is barred because Upwood has not, and cannot, allege that it has complied with at least three of these conditions precedent.

Upwood, on the other hand, argues that Section 4.5 applies not to suits by a noteholder against the Trustee, but to suits to be initiated by the Trustee that a noteholder might wish to bring against others such as the issuer or guarantor of the notes or third parties, which may only be brought by the noteholder after certain prerequisites have been satisfied. Plaintiff contends that the limitations of Section 4.5 are imposed on noteholders only in circumstances where there has been a default under the Indenture or the Notes, and do not address suits brought by a noteholder against the Trustee relating to the Trustee's conduct, against which there is no prohibition in the Indenture.

US Bank contends that there is no "carve out" or exception in the "no action" clause for suits against the Trustee. It asserts that "no action" clauses are strictly construed so as to effectuate their major purpose, namely, to deter an individual holder, such as Upwood, from bringing unworthy or unjustifiable lawsuits that prejudice the rights of other holders. Upwood's attempt, the Trustee argues, to circumvent the "no action" clause, defeats the purpose by upsetting other holders' expectations that the Trustee

will tirelessly pursue enforcement of the Judgment rendered for their benefit.

[T]he purpose of no-action clauses...is to 'prevent [] individual bondholders from pursuing an individual course of action and thus harassing their common debtor and jeopardizing the fund provided for the common benefit,' *Batchelder v. Council Grove Water Co.*, 131 NY 42, 46... (1892), [and to] 'deter individual debenture holders from bringing independent law suits which are more effectively brought by the indenture trustee,' *Feder v. Union Carbide Corp.*, 141 AD2d 799, 800 (2d Dep't 1988),...

Walnut Place LLC v. Countrywide Home Loans, Inc., 35 Misc3d 1207(A) at *3 (Sup Ct NY Co., March 28, 2012), *aff'd* __ AD3d __, 2012 WL 2428258 (1st Dep't 2012).

This Court agrees with plaintiff and finds that the Complaint is not barred by either the language or the intent of the "no action" clause in Section 4.5 of the Indenture. Moreover, the Court finds that defendant's other arguments in support of its motion to dismiss merely raise numerous defenses to plaintiff's causes of action and issues of fact as to whether plaintiff can succeed on its claims which cannot be resolved on this motion to dismiss.

Defendant next argues, in the alternative, that the Complaint must be dismissed pursuant to Bus. Corp. Law 1312(a) because plaintiff, a foreign corporation, has not alleged that it is authorized to do business in New York.

In opposition, plaintiff asserts that it has not alleged that it is doing business in New York, and that this fact is confirmed by the Affidavit of Mr. Anwar submitted in opposition to this motion. Thus, plaintiff maintains it has no obligation, pursuant to Bus. Corp. Law 1312(a), to obtain authorization to do business in New York in order to maintain this action.

Bus. Corp. Law 1312(a) provides in relevant part that: "[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state..."

Taking plaintiff's allegations as true, and given that the Trustee made no arguments on this issue in its Reply memorandum, defendant's motion to dismiss the Complaint pursuant to Bus. Corp. Law 1312(a) is denied. See *Uribe v. Merchants Bank of N.Y.*, 266 AD2d 21, 22 (1st Dep't 1999).

That portion of the motion seeking to stay discovery pending disposition of this motion was not specifically discussed during oral argument, and now, of course, is moot.

Defendant shall serve an Answer to the Complaint within 30 days of notice of the electronic filing of this Decision.

The parties shall appear for a conference in IA Part 39, 60
Centre St., Rm. 208 on September 19, 2012 at 10:00 AM.

This constitutes the decision and order of this Court.

Date: *July 16, 2012*



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.