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

PRESENT: BERNARD J. FRIED J.S.C. Justice FBEM PART 60

PHILLIP WEDGEWOOD WALLACE AND JAMES v. Robert Tucker MERRILL LYNCH Capital SERVICES INC

INDEX NO. 602604/05

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
MAY 16 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/16/06

BERNARD J. FRIED J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

----------X

PHILIP WEDGWOOD WALLACE and
JAMES ROBERT TUCKER, as Administrators
of TXU EUROPE LIMITED f/k/a TXU EASTERN
HOLDINGS LIMITED,

Plaintiffs,

-against-

Index No. 602604/2005

MERRILL LYNCH CAPITAL SERVICES, INC.,
and MERRILL LYNCH & CO., INC.,

Defendants.

----------X

Appearances:

For Plaintiffs:

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& ADELMAN, LLP
by: Jeffrey Wang, Esq.
1633 Broadway
New York, NY 10019

And:
JENNER & BLOCK
by: David A. Handzo, Esq.
Ronald DeKoven, Esq.
Elaine Goldenberg, Esq.
601 13th Street, NW
Washington, DC 20005

For Defendant:

KAYE SCHOLER, LLP
by: Madlyn Gleich Primoff, Esq.
Michael Braff, Esq.
425 Park Avenue
New York, NY 10022

Fried, J.:

Plaintiffs, joint administrators of the insolvent company TXU Europe Limited ("TXU"), assert a breach of contract claim based on an ISDA swap agreement ("swap agreement") with defendant Merrill Lynch Capital Services, Inc. ("MLCS"). The swap

agreement was guaranteed by defendant Merrill Lynch & Co. ("ML & Co.")(defendants referred to collectively as "Merrill Lynch"). TXU alleges that Merrill Lynch owes approximately $20,000,000 under the swap agreement, an amount that should be fairly distributed among the creditors of TXU's estate.

In motion sequence 001, MLCS moved to dismiss, arguing that, under the terms of the swap agreement and the common law, MLCS owes nothing because TXU owes an equal amount to MLCS as the holder of certain defaulted bonds guaranteed by TXU. MLCS claimed that the parties' mutual debts extinguished each other under the theory of setoff, even though it purchased its bonds for a small fraction of face-value, approximately one month before TXU petitioned for administration proceedings in England. According to TXU, MLCS purchased these bonds knowing that TXU would become insolvent and in a bad faith attempt to avoid full payment under the swap agreement. TXU contended that Merrill Lynch sought the full face-value of the bonds knowing that all other holders of TXU bonds would receive far less then face-value.

I denied the first motion to dismiss the complaint. TXU subsequently filed an amended complaint, one making no substantive changes to the cause of action for breach of contract but adding ML & Co. as a defendant, based on its guaranty of the swap agreement.

Merrill Lynch moves to dismiss for a second time or for a stay of this action pending the outcome of a dispute resolution proceeding in England. The second motion to dismiss also asserts a setoff defense, but one now based on the terms and conditions of certain Company Voluntary Arrangements ("CVAs"), which allegedly act like a global settlement agreement between TXU and its creditors. The dispute resolution proceeding in England

relates, not to the amounts owed under the swap agreement, but rather to a dispute over the terms and conditions of the CVAs regarding setoff. Merrill claims to have initiated the dispute resolution proceeding under the applicable provisions of the CVAs.

In opposition, TXU argues that this second motion violates the one-motion rule, which precludes the filing of more than one motion to dismiss in an action. (CPLR § 3211 [e]). They also contend that the terms and conditions of the CVAs fail to provide the setoff claimed by Merrill Lynch. TXU notes that it has pursued its claim under the swap agreement from the United States Bankruptcy Court to this court, and it argues that Merrill Lynch seeks merely to transfer the case to yet another forum and cause further delay.

Because this motion raises facts and arguments not previously brought to my attention, it is useful to describe the history of this litigation, beginning with TXU's administration proceedings in England.

On November 19, 2002, one month after MLCS purchased its bonds, the High Court in London placed TXU in voluntary administration proceedings. Plaintiffs were assigned by the English court to manage TXU so that its assets could be liquidated and fairly distributed among its creditors. The plaintiffs' duties include the "realisation" and liquidation of TXU assets and "the approval of a voluntary arrangement," in accordance with English statutory law, which will govern the distribution to creditors of the realized assets. (See Hertz Aff., Ex. A, at p.2). Pursuant to their duty to seek a "voluntary arrangement," plaintiffs began negotiating with its creditors the terms and conditions of the CVAs.

Furthermore, pursuant to their duty to "realise" assets, TXU sought to recover assets located in the United States and to prevent creditors from taking or exercising possession

over those assets. To accomplish this, on March 3, 2004 plaintiffs filed a petition for a voluntary ancillary proceeding in the United States Bankruptcy Court for the Southern District of New York (Case No. 04-11335)("ancillary proceeding"). In the petition, TXU alleged that its United States assets would be distributed in accordance with the CVAs, once approved and effective.

In the same petition, and for the same purpose, TXU initiated an adversary proceeding against MLCS, requesting that the Bankruptcy Court order MLCS to turnover the monies owed under the swap agreement (Adversary Proceeding No. 04-2491)("adversary proceeding"). In its adversary complaint, TXU alleged that recovery of the monies owed under the swap agreement would "increase the total dividends to [TXU]'s creditors by approximately 10%." (Primoff Aff. of Feb. 17, 2006, Ex. C, at p.5).

MLCS sought dismissal of the adversary proceeding on jurisdictional grounds, arguing that the turnover claim was not the proper subject matter of an adversary proceeding and should have been filed in a plenary court, as a two-party contract dispute. In a memorandum dated December 2, 2004, MLCS stated before the Bankruptcy Court that "jurisdiction over Merrill Lynch is readily available in the plenary courts of New York" and "this action should proceed before a plenary court." (Handzo Aff. of March 31, 2006, Ex. A, at p.14).

After spending a year litigating the adversary proceeding, TXU alleges that, "as of right," it decided to voluntarily dismiss that proceeding "[t]o expedite resolution of the merits. . ." of its claim against MCLS. (Plaintiffs' Memorandum of Law In Opposition To Defendants' [Second] Motion To Dismiss, March 31, 2006, at p.4). On July 18, 2005, TXU

and MLCS stipulated to the voluntary dismissal of the adversary proceeding, without prejudice. (Handzo Aff. of March 31, 2006, Ex. E).

The dismissal was one in name only because, on the following day, July 19, 2005, TXU filed the complaint in this action, completing what was in effect the transfer, to a plenary court in New York, of the same claim originally filed in the Bankruptcy Court. TXU continued to seek payment on the swap agreement for distribution to its creditors.

Meanwhile, several months earlier, negotiations in the English administration proceeding had resulted in creditor approval of the CVAs on March 31, 2005, setting the stage for distribution of TXU's liquid assets.

The terms and conditions of the CVAs established how TXU's assets would be distributed and also required that creditors release all claims against TXU, once they receive payment under the CVA. Upon approval of the CVAs, their terms and conditions became "bind[ing upon] all creditors of the company who were entitled to vote at the meeting (whether or not they were present or represented at it) or would have been so entitled had they received notice." (Hertz Aff. of Feb. 10, 2006, at p. 6). In addition, the CVAs provided for a statutorily required period during which creditors could file challenges to the approval of the CVAs.

When the CVAs were approved, some of their provisions became effective immediately, while other provisions became effective only upon the satisfaction of several conditions. Those conditions included the following: Any challenges to the CVAs made during the statutorily allowed period must eventually be "withdrawn or finally dismissed without any further right of appeal." (Hertz Aff. of Feb. 10, 2006, Ex. D, at p.81, CVA Cl.

4.1 [b] [ii]). And, TXU must "obtain[] permanent injunctive relief under section 304 of the US Bankruptcy Code. . ." which will make the CVAs enforceable in the United States. (Hertz Aff. of Feb. 10, 2006, at p.10, ¶ 23, Ex. C, Annex 1).

Among the various provisions that became effective upon approval were Clauses 23 through 30, the clauses that established how creditors were to make claims against the TXU estate. As stated in Clause 23, "[d]istributions under the CVA shall only be payable on CVA Claims to the extent that such CVA Claims are Allowed Claims." (Hertz Aff. of Feb. 10, 2006, Ex. D. at p. 109, Clause 23.1). Certain CVA Supervisors, all "qualified insolvency practitioners," would manage the claim submissions and distributions made pursuant to the allowed claims. (Hertz Aff. of Feb. 10, 2006, Ex. D. at p. 103, Clause 18).

An automatic claim process exists for claims arising from TXU's public bonds, like MLCS's claim, and are governed by Clause 29. This Clause establishes the automatic filing of a single claim on each issue of public bonds, because each issue of public bonds identified a trustee who was authorized to make claims under the bonds on behalf of the bondholders. Specifically, the CVAs provide that "[e]ach Trustee shall be treated as having submitted a Claim Form in respect of the aggregate amount of the CVA Claim in respect of each issue of the . . . Bonds of which it is Trustee in the amount set out in . . . [the] Annex . . . and no Account Holder, Intermediary or Beneficial Owner shall be required to submit a Claim Form." (Hertz Aff. of Feb. 10, 2006, Ex. D., Clause 29.3).

Beneficial owners, such as MLCS, would receive their share of the estate, without filing claim forms. The amount of each trustee's claim is established in Clause 29.1(a), which states that "[e]ach CVA Creditor with an interest in the . . . Bonds agrees . . . that the

aggregate amount of the CVA Claims . . . in respect of each issue of the . . . Bonds in which it has an interest is the amount agreed by the relevant Trustee. . . ." Clause 29.1(b) states that "[e]ach CVA Creditor . . . releases any other claim . . . which it has in respect of that indebtedness against any CVA Company. . . ."

MLCS ignored the claim and release system established in Clause 29, and submitted, on May 13, 2005, its own claim ("CVA claim") against the estate of TXU for a setoff of the entire face-value of its bonds.

The setoff asserted in MLCS's CVA claim is same setoff defense it now asserts here – that the setoff provision in Clause 28 of the CVA extinguished any debt owed to TXU under the swap agreement. Merrill Lynch hoped that acceptance of this claim would moot TXU's action on the swap agreement.

Clause 28 of the CVAs provides for setoff under specified conditions. Clause 28.1 allows the setoff of "mutual credits, mutual debts or other mutual dealings between a CVA Company and any CVA Creditor. . . ." Exceptions, provided in Clauses 28.4(b) and 28.5 respectively, preclude the setoff of amounts owed to TXU by any creditor "as a result of any misfeasance or breach of duty. . ." or amounts subject to an order of "a court of competent jurisdiction . . . that set-off is not permitted." Clause 28 refers to "court[s] of competent jurisdiction" while other clauses in the CVAs identify specific English courts.

The CVA Supervisors issued no response to MLCS's CVA claim submitted on May 13, 2005. The CVAs state, in Clause 30.1, that if a claimant does not receive a response "within 21 days, such CVA Claim will be treated as being wholly disallowed. . . ."

A few other creditors, but not MLCS, pursued the challenge provision of the CVAs,

filing papers with the English Court during the period provided for making such challenges. The High Court heard argument on these objections from August 8 to August 19, 2005, after which the matter was taken under submission.

After asserting its CVA claim in England, MLCS pursued, in the New York action, a different setoff defense against the swap agreement. It filed in this case, on August 31, 2005, its first motion to dismiss (motion sequence 001) in which it asserted a setoff based, not on the setoff provision of the CVAs, but on the terms of the swap agreement and the common law. MLCS's motion papers contained no mention of its belief that the CVAs presented another, independent basis for setoff or that it had already asserted such a claim in England, three months earlier, pursuant to the CVA claim process.

Thereafter, on September 9, 2005, the High Court issued a decision dismissing the challenges to the CVAs, satisfying one of the conditions required for the CVAs to become fully effective.

A few weeks later, on October 3, 2005 the Bankruptcy Court issued a detailed Order in the ancillary proceeding, an Order that made the CVAs fully effective and allowed the plaintiffs to begin the process of distributing TXU's liquid assets to its creditors in accordance with the claims process set forth in the CVAs. The Bankruptcy Court's Order states that "the English Court shall have exclusive jurisdiction to hear and determine any . . . dispute in respect of the construction or interpretation of the CVAs."

The bankruptcy Order also addressed the impact of the CVAs on this action, by stating that "nothing in this Order shall prejudice, supplement, or otherwise affect any of [TXU's] rights, claims, defenses, arguments or positions . . . in the Merrill Lynch action (or

any action commenced by [TXU] against Merrill Lynch). . . ." Similarly, the Order does not "prejudice or supplement any of Merrill Lynch's rights, claims, defenses, arguments or positions . . . in the Merrill Lynch action. . . ." In referring to "the Merrill Lynch action," the Order specifically identified this action by index number. (Primoff Aff. of Feb. 17, 2006, Ex. F, p.8).

Three days later, on October 6, 2005, I heard argument on the first motion to dismiss (motion sequence 001), in which MLCS asserted its setoff defense based on the terms of the swap agreement and the common law. MLCS did not state that it knew of an independent setoff defense based on a provision of the CVAs or seek permission to file supplementary papers regarding that other defense. After argument I took that motion under submission, and issued, on November 14, 2005, my decision denying the first motion to dismiss.

Meanwhile, because the CVAs were fully effective, in October 2005 TXU began distributing to each creditor their respective shares of the liquid assets then held by the estate. By the end of October 2005, Merrill Lynch received payments on its bonds totaling £1,500,206.26 and $241,034.02. (Handzo Aff. of March 31, 2006, Ex. H.). These payments come from the claim automatically submitted by the trustee on behalf of Merrill Lynch.

TXU filed the amended complaint on December 29, 2006. On February 27, 2006, Merrill Lynch filed its second motion to dismiss, in which it raised, for the first time in this action, a defense based on setoff under the CVAs.

In its papers submitted on this motion (motion sequence 002), Merrill Lynch states that it did not discuss on the first motion to dismiss (motion sequence 001) the CVA setoff defense, because it sought to avoid "bombard[ing] this Court at that time with additional

motion papers. . . ." (Defendants' Memorandum of Law In Support of Defendants' [Second] Motion To Dismiss, Feb. 17, 2006, at p.2 n.2).

Merrill Lynch contends that the CVAs, and related documents, are sufficient to warrant dismissal based on documentary evidence pursuant to CPLR § 3211(a)(1), for lack of subject matter jurisdiction pursuant to CPLR § 3211(a)(2); based on another action pending pursuant to CPLR § 3211(a)(4)(which allows for dismissal in favor of actions pending "in another state or the United States"); or based on payment of TXU's claim pursuant to CPLR § 3211(a)(5). Merrill Lynch relies on the CVAs to support all of these grounds for dismissal.

Asserting Clause 28.1 of the CVA, Merrill Lynch argues that the CVA established a setoff of TXU's claims, effective retroactively at least as of March 31, 2005, a setoff which satisfied its obligations under the swap agreement and precludes TXU from pursuing claims except under the CVAs. Furthermore, Merrill Lynch contends that any disputes in this court involving the CVA must be dismissed, pursuant to CPLR § 3211(a)(4) or under the doctrine of comity, and resolved pursuant to the dispute resolution provisions of the CVAs. It claims to have already initiated a dispute resolution proceeding in England, which addresses the rejection of its CVA claim of May 13, 2005. Merrill also alleges that it has tried to return to TXU the funds paid out of the estate.

TXU, referring to the one-motion rule set forth in CPLR § 3211(e), argues that the second motion to dismiss is barred because, except for lack of subject matter jurisdiction, it raises defenses that could have been raised in the first motion to dismiss. They argue that,

despite the filing of an amended complaint, no second motion to dismiss on these grounds should be allowed because the amended complaint asserts the same cause of action as the original complaint and the legal sufficiency of that claim was already established in my prior decision.

TXU also disagrees with the merits of Merrill Lynch's arguments for dismissal, contending that the setoff under the CVA was precluded under the exceptions to Clause 28. TXU points to Clause 28.4(b), which excepts from setoff any "[a]mounts . . . payable by a CVA Creditor to a CVA Company . . . as a result of any misfeasance or breach of duty in any jurisdiction by such CVA Creditor." Under this exception, TXU contends, Merrill Lynch's setoff is not allowed because TXU's complaint alleges that Merrill Lynch breached its duties under the swap agreement and nothing in the CVAs prevents a New York court from determining that claim. TXU also notes that Clause 28.5 excludes from the setoff provision amounts ordered "by a court of competent jurisdiction" not to be "permitted" for setoff. TXU asserts this exception as well, arguing that New York courts may issue such an order in this case, and any such order would bar Merrill Lynch's alleged setoff under the CVAs.

Clause 29 forms another basis for TXU's arguments against dismissal. This clause provides for the automatic submission of a claim on each issue of TXU's public bonds. The creditors "release any other claim . . . which it has in respect of that indebtedness against any CVA Company. . . ." (Hertz Aff. of Feb. 10, 2006, Ex. D., Clause 29). According to TXU, this provision became effective on March 31, 2005, and at that time Merrill Lynch, like all the other bondholders, released all of its claims under the bonds, including any claim for

setoff.

TXU argues that MLCS had no right or need to submit to the CVA Supervisors any claim under the CVA because Clause 29 also states that the "[t]rustee [of the bonds] shall be treated as having submitted a Claim Form . . . and . . . no Beneficial Owner shall be required to submit a Claim Form." TXU notes that Merrill Lynch has already received payment from the trustee's claim on the public bonds.

TXU contends that the existence of the CVAs does not take this action out of this court's subject matter jurisdiction or establish payment on the swap agreement. Furthermore, it asserts that setoff does not preclude the action because it could be awarded damages in excess of the amount claimed under Merrill Lynch's bonds.

Merrill Lynch replies, arguing that the one-motion rule does not apply here, because the amendment of the complaint provided an opportunity to file a second motion to dismiss. It argues that, even if this was not so, Merrill Lynch's second motion to dismiss addresses grounds that could not have been raised in the first motion. Also, Merrill Lynch notes that the amended complaint brought into this action a second defendant, ML & Co.

With regard to the release contained in Clause 29, Merrill Lynch responds by arguing that while it had no affirmative duty to submit a claim under the CVAs, nothing in those agreements precluded such a submission and that, under the terms of the bond indenture, it had an independent right to make a claim for the amount owed under the bonds. It argues that the release provided in Clause 29 applies to "other claims," different from its setoff claim, and that the Clause 29 determines only the "aggregate amount" to be paid on the bonds, not the value to be assigned to Merrill Lynch's bonds. Merrill acknowledges receipt

of a payment on the trustee's claim, but alleges that it has attempted to return this payment.

In response to TXU's arguments based on the exceptions to the setoff provision, Merrill Lynch contends that Clause 28.4, the exception for amounts owed to TXU "as a result of misfeasance or breach of duty," does not apply here because Merrill Lynch's alleged failure to pay under the swap agreement does not constitute a breach of duty or wrongdoing. As to the exception for amounts subject to a court order against setoff, provided by Clause 28.5, Merrill Lynch contends that this applies only to monies owed to a creditor under the bonds and may not be asserted in the other direction, where a creditor owes money to TXU.

Finally, argues Merrill Lynch, this action must be dismissed or stayed because disputes as to the provisions of the CVAs must be determined by the English court.

Addressing the procedural arguments regarding the one-motion rule, while they are exceedingly persuasive, my decision to deny the motion does not turn exclusively on this issue. CPLR § 3211(e) provides that only one motion to dismiss may be filed, except in certain exceptions. (Ultramar Energy Limited v. Chase Manhattan Bank, N.A., 191 A.D.2d 86, 87 [1st Dep't 1993]; Schwartzman v. Weintraub, 56 A.D.2d 517, 517 [1st Dep't 1977]). This rule exists to promote efficiency in litigation by encouraging the parties to bring before the court, as soon as possible, all available bases for dismissal. (See generally Seigel, New York Practice § 273 [4th ed. 2005]). Further, additional motions to dismiss may be brought only under certain circumstances, such as where the motion is directed to a different pleading or where the grounds raised in the second motion were premature during the first motion. (CPLR § 3211 [e]; Lemberg v. John Blair Communications, Inc., 258 A.D.2d 291, 292;

Nassau Roofing & Sheet Metal Co. v. Celotex Corp., 74 A.D.2d 679, 680 [3d Dep't 1980]). Certain grounds for dismissal may be raised at any time during an action; for example, a defendant may, at any time, raise by motion to dismiss the defense of lack of subject matter jurisdiction. (CPLR § 3211 [e]). It also may be acceptable for a second motion to dismiss to be filed to address minor deficiencies in the movant's prior motion to dismiss. (See Ultramar, 191 A.D.2d at 88).

However, a second motion cannot seek dismissal of the same claim on the same grounds raised during a prior motion. (B.S.L. Owners Corp. v. Key International Manufacturing, Inc., 225 A.D.2d 643, 643 [2d Dep't 1996]; Schwartzman v. Weintraub, 56 A.D.2d at 517). Furthermore, the failure to raise in a prior motion a possible basis for dismissal constitutes a waiver of the opportunity to raise that argument in a second motion. (See CPLR § 3211 [e]; McLearn v. Cowen & Co., 60 N.Y.2d 686, 689 [1983]; Clearwater Realty Co. v. Hernandez, 256 A.D.2d 100, 101 [1st Dep't 1998]).

Here, Merrill Lynch failed to raise, in its prior motion, the defense of setoff under the CVAs as an independent basis for dismissal of the action. The documents submitted on this motion show that Merrill Lynch's CVA-based setoff claim became effective on March 31, 2005, when the TXU creditors approved the CVAs. On May 13, 2005, MLCS acted on this allegedly new defense by submitting to the CVA Supervisors a claim made pursuant to the claim procedure provided in the CVAs.

Now, Merrill Lynch argues that its argument for setoff under the CVAs was not mature by the time it filed its first motion to dismiss, because at that time challenges to the CVAs were pending in the High Court and the CVAs had yet to be approved by the

Bankruptcy Court. However, even if the setoff defense was premature when the first motion to dismiss was filed, it is clear that the CVA setoff argument finally matured no later than October 3, 2006 when the Bankruptcy court issued its Order making the CVAs enforceable in the United States. Upon the issuance of that Order, Merrill Lynch certainly knew of another alleged basis for dismissal that could have been included in its first motion to dismiss. This occurred three days before argument on that motion. Merrill Lynch could have notified me of the CVA setoff defense during or before argument on its prior motion. (See Held v. Kaufman, 91 N.Y.2d 425, 430 [1998]; Uniform Civil Rules of The Supreme and County Courts § 202.70 [g] [Rules of The Commercial Division, Rule 18]).

Merrill Lynch claims that it had no duty to notify me of the so-called new setoff defense and that to do so would have burdened the court. But, a persuasive argument can be made that there did exist a duty to inform this court of the CVA setoff defense. MLCS asserts here that the CVAs extinguish TXU's claims under the swap agreements, almost as if the CVAs acted as a settlement of the cause of action under the swap agreement. Counsel who appear in the Commercial Division of the Supreme Court of the State of New York have an affirmative duty to notify the court of the settlement or disposal of an action. (Uniform Civil Rules of The Supreme and County Courts § 202.70 [g] [Rules of The Commercial Division, Rule 2]).

Incredibly, while this motion was under submission, Merrill Lynch took the liberty of notifying me of the latest submissions it made in the dispute resolution proceeding in England, a proceeding that has not yet resulted in a conclusive outcome. Yet, Merrill Lynch explains that, on its first motion to dismiss, it was concerned that it not "bombard" me with

additional papers on an issue which it contends is dispositive.

Turning to the merits of Merrill Lynch's arguments raised in its second motion to dismiss, none warrant dismissal of this action.

On a motion to dismiss, the facts alleged in the complaint must be assumed true. A court must accord the plaintiff "the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." (E.g, Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409, 414 [2001]; Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]). Where documentary evidence is presented, "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v. Martinez, 84 N.Y.2d at 88; see Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 N.Y.2d 300 [2001]).

Regarding the argument for dismissal based on documentary evidence, far from establishing that its claim is "conclusively establish[ed] . . . as a matter of law," (Leon v. Martinez, 84 N.Y.2d at 88), the documents show that there remains a question as to whether the terms of the CVAs apply to this action. Not only do the parties dispute the effect of the CVAs here, but the terms of the CVAs themselves show that various exceptions and releases may prevent application of the CVAs in this action. It is not clear that any provision of the CVA would preclude me from making a determination as to whether Merrill Lynch breached its duty under the swap agreement. The documents fail to definitively dispose of TXU's cause of action under the swap agreement, and Merrill Lynch's request for dismissal based

on documentary evidence must be dismissed. (See CPLR § 3211 [a] [1]; Leon v. Martinez, 84 N.Y.2d at 88; e.g., Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 [1st Dep't 1995]).

Merrill Lynch has also failed to demonstrate that the CVAs remove this action from the subject matter jurisdiction of New York courts. It is true that pursuant to the terms of the CVAs, and the October 3, 2005 Order of the Bankruptcy Court, all disputes under the CVAs must be heard by the English Court. But, the Bankruptcy Court, in making the CVAs effective in the U.S. as required under the those arrangements, expressly stated that its Order does not preclude this action, and, at this time, it cannot be determined as a matter of law that the CVAs satisfy or obviate Merrill Lynch's obligations under the swap agreement or preclude this court from making a determination as to breach of duty. Considering the clear and unequivocal forum selection clause in the swap agreement, Merrill Lynch has failed to show that this court lacks subject matter jurisdiction over TXU's claim under the swap agreement. (See generally British West Indies Guar. Trust Co. Ltd. v. Banque Internationale A Luxembourg, 172 A.D.2d 234, 234 [1st Dep't 1991]).

I also reject Merrill Lynch's request for dismissal pursuant to CPLR § 3211(a)(4) on the basis that another action is pending, the dispute resolution proceeding in England regarding the CVA setoff defense. Section 3211(a)(4) by its express language applies only to other actions pending "in a court of any state or the United States." (CPLR § 3211 [a] [4]; see ABKCO Indus., Inc. v. Lennon, 85 Misc. 2d 465, 471-72 [Sup. Ct. 1975] affd in part and mod in part on other grounds 52 A.D.2d 435 [1st Dep't 1976]). Since the other action asserted by Merrill Lynch is not one pending in "any state or the United States," dismissal

on that basis is denied.

Also, I decline to dismiss under the doctrine of international comity, which provides discretion to dismiss an action in the interests of "practice, convenience and expediency," but it "is not a rule of law. . . ." (Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 580 [2003] [citations omitted]). Where "an action concerns a commercial transaction in New York, and it is a matter on which the New York Courts would otherwise have proper jurisdiction, comity does not prevent the New York courts from exercising that jurisdiction." (Sachs v. Adeli, 26 A.D.3d 52, 55 [1st Dep't 2005] [citing Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d at 582]).

Although this action arises from the swap agreement, a commercial transaction governed by New York law and specifying New York as the forum for resolution of disputes, Merrill Lynch cites several cases regarding the exercise of comity in the context of foreign insolvency proceedings, including Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B. (825 F.2d 709, 713-14 [2d Cir. 1987]); Cunard S.S. Co. v. Salen Reefer Servs. AB (773 F.2d 452, 458 [2d Cir. 1985]); and JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V. (412 F.3d 418, 424 [2d Cir. 2005]). Those cases all address situations where a creditor's action is dismissed so that all claims by creditors may be consolidated in one insolvency proceeding, already pending in a foreign court. Here, to the contrary, this case presents a situation involving an insolvent's efforts to recover its assets so that those monies may be fairly distributed to its creditors pursuant to a foreign administration proceeding.

Additionally, I decline to dismiss this action pursuant to CPLR § 3211(a)(5), based on payment of the claim asserted in the complaint. As I stated above, MLCS has failed to

conclusively establish that, based on the CVAs, it has made full payment of the amount allegedly owed under the swap agreement.

Thus, the motion to dismiss is denied in its entirety.

In the alternative, Merrill Lynch seeks a stay of this action, pursuant to CPLR § 2201 and 3211(a)(4), pending the resolution of the proceedings in England. Merrill Lynch claims that since the proceeding in England began before this action: TXU engages in forum-shopping by pursuing its action here; TXU failed to abide by the claims procedure in the CVAs; and it would waste judicial resources to litigate this action when a determination in the English proceeding might obviate TXU's cause of action.

In response, TXU notes that Merrill Lynch first suggested that this action belongs in a New York State court, rather than in the Bankruptcy Court. With regard to the claims procedure under the CVAs, TXU agrees that the CVA Supervisors did not respond to Merrill Lynch's claim submitted on May 13, 2005, but points to Clause 30.1, which provides that a claim receiving no response is treated as "wholly disallowed or admitted for the amount determined or estimated by the CVA Supervisors." TXU further argues that its action under the swap agreement was initiated before Merrill Lynch's claims under the CVA and that the pending English proceeding may not moot this action here.

CPLR § 2201 allows a New York court to stay the proceedings "in a proper case, upon such terms as may be just." Unless a stay would violate the law, New York courts have discretion to grant a stay in cases where there is a pending action elsewhere. (See Britt v. Int'l Bus Services, Inc., 255 A.D.2d 143, 144 [1st Dep't 1998]). Typically, such stays are

granted when they will avoid multiplicity of litigation and the waste of judicial resources. (Trieber v. Hopson, 27 A.D.2d 151, 152 [3rd Dep't 1967]). The existence of overlapping issues and a substantial identity of parties justifies a stay. (El Greco Inc. v. Cohn, 139 A.D.2d 615, 616-17 [2nd Dep't 1988]; Buzzell v. Mills, 32 A.D.2d 897 [1st Dep't 1969]; National Management Corp. v. Adolfi, 277 A.D.2d 553, 554-55 [3rd Dep't 2000]). However, New York courts must consider all factors when determining whether to grant a stay, including any potential prejudice to a party. (Levy v. Pacific Eastern Corp., 154 Misc. 655, 656-57 [Sup. Ct. 1935])

Here, Merrill Lynch seeks, not only to prevent the collection and distribution of an insolvent's assets, but to enjoy the full economic benefit of the face-value of the insolvent's bonds while the remaining bond holders receive only a small fraction of their investments. Such a demand carries with it the possibility of impeding plaintiffs from fulfilling their duty, as directed by the English Court, to "realise" the assets of TXU for distribution to TXU's creditors.

Also, Merrill Lynch asserted its CVA setoff defense after TXU began efforts to collect under the swap agreement. The documents show that Merrill Lynch first asserted its CVA setoff defense on May 13, 2005, approximately two weeks after the CVAs became effective. However, a little more than one year earlier, on March 3, 2004, TXU began its efforts to collect the monies owed on the swap agreement, when it initiated its adversary proceeding in the Bankruptcy Court. The complaint in that proceeding presented virtually the same cause of action alleged here.

Merrill Lynch incorrectly complains of delay by citing TXU's failure to respond to

the setoff claim submitted to the CVA Supervisors. Clause 30.1 of the CVAs provides that silence in the face of a submitted claim constitutes a proper method of rejecting the claim. (Hertz Aff. of Feb. 10, 2006, Ex. D., Clause 30.1).

There is no risk of wasting judicial resources by allowing this action to proceed. Moreover, it is not clear that the various exceptions, and the release discussed above, do not preclude TXU from recovering on its claim under the swap agreement and distributing those monies to its creditors. Merrill Lynch has not clearly established that the CVAs prevent me from making a determination as to whether it breached its duties under the swap agreement.

I decline to stay this action.

Accordingly, it is

ORDERED that the second motion to dismiss is denied; and it is further

ORDERED that the motion for a stay is denied.

Dated: 5/16/06

ENTER:

J.S.C.