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

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 603431/2008
SEBASTIAN HOLDINGS, INC.,
vs
DEUTSCHE BANK, AG,
Sequence Number : 005
DISMISS ACTION

INDEX NO. 603431/08
MOTION DATE
MOTION SEQ. NO.
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 11/8/12

BARBARA R. KAPNICK J.S.C.

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

SEBASTIAN HOLDINGS, INC.,

Plaintiff,

- against -

DEUTSCHE BANK, AG,

Defendant.

----------X

DECISION/ORDER
Index No. 603431/08
Motion Seq. No. 005

BARBARA R. KAPNICK, J.:

Plaintiff served its Original Complaint on January 20, 2009. Defendant subsequently moved to dismiss the Complaint or stay the action. On December 10, 2009, this Court issued its decision dismissing plaintiff's breach of fiduciary duty, fraudulent concealment, fraud, and negligent misrepresentation claims. *Sebastian Holdings, Inc. v Deutsche Bank, A.G.*, 35 Misc3d 1227(A). On November 9, 2010 the Appellate Division, First Department affirmed this Court's Order. *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 AD3d 446 (1st Dep't 2010). On November 22, 2010 the parties entered into a Stipulation allowing defendant to serve and file its Answer to the first, second, fourth, fifth, sixth and tenth causes of action on or before December 6, 2010, and giving plaintiff until January 10, 2011 to serve and file any amendment to its Complaint pursuant to CPLR 3025(a), and/or any reply to counterclaims asserted by defendants.

Defendant now moves for an Order dismissing the second, and fourth through fourteenth causes of action in the Amended Complaint, dated January 10, 2011, and the requests for consequential and punitive damages, pursuant to CPLR 3211(a)(1) and (7).

Brief Background

The parties' relationship began in 2004 when plaintiff opened an "advisory relationship account" with Deutsche Bank (Suisse) S.A. ("Deutsche Bank Suisse") in Geneva, Switzerland. Following this initial account, plaintiff, in 2006 and 2008, opened a series of accounts with Deutsche Bank Suisse and Deutsche Bank's London Branch ("Deutsche Bank London") for the purposes of engaging in foreign-exchange ("FX") and equities trading, respectively.

Plaintiff opened the FX-trading account (the "FX Account") in November 2006. In connection therewith, plaintiff and Deutsche Bank London entered into a November 3, 2006 Prime Brokerage Agreement (the "FX PB Agreement")[1] describing the parties' agreement as to plaintiff's authority to engage in FX transactions. The parties also signed a November 22, 2006 ISDA Master Agreement

[1] This agreement has a non-exclusive New York forum selection clause.

and Schedule (the "FX ISDA Agreement"),[2] including a Credit Support Annex (the "FX Credit Support Annex"), describing the parties' obligations with respect to FX trading. Assets for plaintiff's FX trading were held in a separate account (the "Pledged Account") pursuant to a Pledge and Pledgeholder Agreement dated November 28, 2006 (the "Pledge Agreement"). The FX PB Agreement, the FX ISDA Agreement, and the Pledge Agreement are referred to collectively as the "FX Agreements."

In connection with the FX Agreements, plaintiff executed a November 28, 2006 letter to Deutsche Bank that granted Klaus Said ("Said") authority to engage in trades on plaintiff's behalf (the "Authority Letter"). The Authority Letter designated Said as plaintiff's agent, and expressly subjected plaintiff "to the terms and obligations of, and liabilities contained in, any FX or Options Transaction . . . executed by" Said. In addition, plaintiff claims that the parties also entered into a Collateral Limitation Agreement (the "CLA") which provided, *inter alia*, that plaintiff would allocate capital with the Bank in the sum of $35 million and its maximum exposure in connection with the FX trading of Said in the FX PB Account was limited to $35 million.

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[2] The FX ISDA Agreement has a non-exclusive jurisdiction clause in London which, according to plaintiff, would allow it to bring an action based on defendant's breach in New York.

[* 5]

On May 8, 2006, plaintiff and Deutsche Bank AG signed an ISDA Master Agreement and Schedule, along with a Credit Support Annex (together, the "Equities ISDA Agreement"), relating to plaintiff's trading in various derivative instruments, excluding, however, trading in those certain foreign-currency transactions which are covered by the FX ISDA Master Agreement. In January 2008, plaintiff opened a related account with Deutsche Bank London for the purpose of trading equities and corporate bonds (the "Equities Account").

On January 30, 2008, plaintiff and Deutsche Bank London entered into the following agreements: (1) a Prime Brokerage Agreement (the "Equities PB Agreement"); (2) a Listed F&O Agreement (together with the Equities ISDA Agreement, OSL Agreement, and Equities PB Agreement, the "Underlying Agreements"); and (3) a Master Netting Agreement (the "Master Netting Agreement," and collectively with the Underlying Agreements, the "Equities Agreements"). The Equities Agreements collectively governed all matters related to the Equities Account. All of the agreements related to the Equities Account are governed by English law, and the parties irrevocably submitted to the *exclusive* jurisdiction of the English courts.

From 2006 through 2008, Said engaged in FX trading as plaintiff's authorized agent, initially through private bankers in Switzerland. At first, plaintiff and Deutsche Bank agreed that the

margin required for credit support of the FX Account would be 200% of the value at risk ("VaR"). Until August 2008, this initial margin requirement was considered sufficient, and plaintiff traded and profited from the FX Account. But by the middle of October 2008, plaintiff's FX Account had accumulated hundreds of millions of dollars of losses.

The FX ISDA Agreement explicitly governs margin calls, and pursuant thereto, Deutsche Bank London requested an increase in the collateral on the FX Account. From October 14 through October 21, 2008, Deutsche Bank London made four margin calls totaling $436,505,142.00. Plaintiff satisfied those margin calls. However, on October 23, 2008, Deutsche Bank notified plaintiff that it had failed to comply with an October 22, 2008 margin call relating to the Equities Account. On October 24, 2008, Deutsche Bank notified plaintiff that it was terminating the Agreement and the FX PB Account. Subsequently, Deutsche Bank also terminated the Equities Account.

On January 21, 2009, Deutsche Bank commenced the London Action in the Commercial Court for the High Court of Justice in London, seeking $246,173,252.00, the amount owed by plaintiff to Deutsche Bank following the liquidation and netting of plaintiff's accounts. That action is currently pending.

Discussion

I. Judicial Estoppel

Defendant argues that the Original Complaint in this action survived the first motion to dismiss because plaintiff claimed that all of its causes of action were governed by the FX PB Agreement. In fact, defendant maintains that plaintiff's claims are actually governed by and require the interpretation of the FX ISDA Agreement, the Pledge Agreement and the Equities Agreements, which all contain forum-selection clauses in favor of London and Geneva and require the application of English and Swiss law. Defendant contends that plaintiff fiercely denied the relevance of the FX ISDA Agreement on the previous motion, and that this Court relied heavily on that representation in making its decision on the issue of *forum non conveniens*. According to defendant, plaintiff now returns to this Court with an amended pleading that asserts new claims squarely based on the very agreements it claimed were irrelevant to the parties' dispute here. Defendant urges that "[u]nder the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier or assumed position in the same proceeding." *Nestor v Britt*, 270 AD2d 192, 193 (1st Dep't 2000); *Maas v Cornell Univ.*, 253 AD2d 1, 5 (3rd Dep't 1999), *aff'd* 94 NY2d 87 (1999).

Specifically, defendant argues that the second, fourth, fifth, ninth, tenth and fourteenth causes of action are actually claims under the FX ISDA Agreement, the Pledge Agreement, and the Equities Agreements, contradicting plaintiff's earlier position that those agreements were irrelevant. As such, Deutsche Bank continues to assert its CPLR 3211(a)(1) defense that the forum-selection clauses in the Equities Agreements provide a complete defense to plaintiff's claims in New York as to those claims governed by the Equities Agreements.

In opposition, plaintiff argues that since the filing of its Original Complaint in January 2009, it has gathered further information through discovery and has included in the Amended Complaint details augmenting its allegations of Deutsche Bank's wrongdoing in handling its accounts, including, but not limited to:

> (a) allowing and engaging in unauthorized exotic derivative transactions that [Deutsche Bank] knew or should have known were improper; (b) failing to report [plaintiff's] exposure of its positions; (c) failing to properly value [plaintiff's] positions; (d) improperly and surreptitiously extending credit to [plaintiff]; (e) improperly booking FX transactions in [plaintiff's] accounts; (f) erroneously, untimely and falsely reporting [plaintiff's] positions; (g) failing to correctly book and account or even execute certain transactions according to [plaintiff's] instructions; (h) making numerous and massive mistakes in its internal systems relating to [plaintiff's] accounts causing catastrophic damages; (i) improperly

> and wrongfully making "margin" calls to [plaintiff]; (j) wrongfully demanding that [plaintiff] prematurely close otherwise profitable positions; (k) liquidating and converting positions; and (l) wrongfully taking and transferring [plaintiff's] funds and assets to itself.

Plaintiff's Memo in Opp, at 3.

Moreover, it is still Sebastian Holding's position that Deutsche Bank's wrongdoings concerning the FX PB Account and plaintiff's FX trading are what led to the massive losses and eventual conversion of assets from Sebastian Holding's other accounts. In any event, plaintiff claims that the Amended Complaint only alleges defendant's breach of the FX ISDA Agreement in three of its fourteen causes of action.

Plaintiff further argues that Deutsche Bank's effort to assert the doctrine of judicial estoppel is wrong and is merely an improper attempt to relitigate its *forum non conveniens* argument which this Court, and the Appellate Division, denied as a matter of law.

First of all, plaintiff argues that judicial estoppel does not apply here because the doctrine only applies when the purported "inconsistent positions" are being asserted in different actions, *not in the same action. See e.g. Olszewski v Park Terrace Gardens,*

Inc., 18 AD3d 349, 351 (1st Dep't 2005); *All Terrain Props v Hoy*, 265 AD2d 87, 93 (1st Dep't 2000). Defendant cites to *Casper v Cushman & Wakefield*, 74 *AD3d 669 (1st Dep't 2010), lv dism 16 NY3d 766 (2011); Nestor v Britt, supra and Maas v Cornell Univ., supra* for the opposite proposition.

It appears that there are cases which apply the doctrine of judicial estoppel to positions previously taken in both the same *and* different proceedings. However, this doctrine does not appear to be relevant to this case, in any event, as defendant is not moving to renew its motion to dismiss on *forum non conveniens* grounds, but is rather seeking to dismiss the individual causes of action in plaintiff's Amended Complaint. To the extent that defendant claims that some of these newly asserted or restated causes of action now rely on some of the other agreements between the parties, this Court will review each of these causes of action individually and determine whether they are legally sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(1) and/or (7) under the standards set forth in *Leon v Martinez*, 84 NY2d 83 (1994), or whether they should otherwise be heard in London.

II. Second, Fourth, Fifth, Ninth, Tenth and Fourteenth Causes of Action

The second cause of action alleges that Deutsche Bank breached the FX PB Agreement and FX ISDA Agreement by "failing to meet its

reporting and calculation requirements and obligation to use only capital in the Pledged Account for all FX trading." Amended Complaint, ¶315. Defendant argues that the entire claim is governed by either the FX ISDA Agreement or the Pledge Agreement and the Account Opening Documents.

The fourth cause of action alleges a breach of the previously disclaimed FX ISDA Agreement as well as the FX PB Agreement by "making the purported margin calls and sending the transfer instructions in October 2008." *Id.*, ¶ 325. Defendant argues that this claim is also governed exclusively by the FX ISDA Agreement and the Credit Support Annex, which expressly provide for margin calls. In fact, defendant contends that the FX PB Agreement itself explicitly defers to the FX ISDA Agreement and Credit Support Annex with respect to demands for collateral and credit support.

The fifth and tenth causes of action allege a breach of contract claim with respect to instructions concerning a gold position and certain other transactions. Defendant argues that no matter the account in which these positions were held, it appears that any instructions concerning such positions would have been part of and subject to the Equities ISDA Agreement, which mandates a forum in England, the FX ISDA Agreement, or the Account Opening Agreement.

The ninth cause of action contains allegations that Deutsche Bank breached the FX PB Agreement and the FX ISDA Agreement by settling certain FX trades improperly, using assets of the Equities Account, failing to accurately calculate and report Sebastian Holding's exposure and capital requirements, and allowing Said to trade in excess of his authority. However, defendant argues that the various ISDA Agreements actually govern trade settlements.

Finally, according to defendant, the fourteenth cause of action contains new factual allegations concerning plaintiff's request for a judgment declaring that it has no obligation or liability to pay any amounts to the Bank in connection with any purported deficiencies or margin calls (*id.*, 371) which defendant argues is governed by the Equities Agreements, despite plaintiff's earlier protestations to the contrary.

As to these causes of action, plaintiff argues that defendant relied completely upon the purported defense of judicial estoppel. In fact, defendant made additional arguments in its Memorandum of Law as to the fifth, ninth and tenth causes of action which this Court has addressed separately.

As to the second and fourth causes of action, plaintiff alleges that defendant breached the FX PB Agreement and FX ISDA

Agreement while defendant asserts that these two specific claims of breach of contract are governed exclusively by the FX ISDA Agreement. However, both Agreements are mentioned in these two causes of action, and as plaintiff points out, pursuant to the FX ISDA Agreement, each party

> waives any objection which it may have at any time to the laying of venue of any Proceeding brought in any such court [the English Courts, or the Court of the State of New York or the USDC in Manhattan], waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party.

FX ISDA Agreement, ¶ 13(b).

Which agreement or agreements apply to these claims is an issue of fact. Defendant may assert whatever defenses it has to these causes of action in its Amended Answer.

Thus, the Court will not dismiss the second or fourth causes of action at this time, nor the fourteenth cause of action which merely states that plaintiff "is entitled to judgment declaring that it has no obligation or liability to pay any amounts to the Bank in connection with any purported deficiencies or margin calls as alleged in paragraphs 248 et seq. of this amended complaint." Amended Complaint, ¶ 371.

III. Eighth Cause of Action

Defendant also argues that the plaintiff's eighth cause of action for negligence should be dismissed on the ground that it merely restates plaintiff's breach-of-contract claims, and alleges no duty independent of the purported obligations under the FX Agreements or the Equities Agreements.

> It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract.

Clark-Fitzpatrick, Inc. v Long Is. R.R.Co., 70 NY2d 382, 389 (1987) (internal citations omitted). *See also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320 (1995).

Plaintiff alleges that Deutsche Bank owed a duty of reasonable care to Sebastian Holdings. Amended Complaint, ¶ 346. However, defendant insists that all of the duties Sebastian Holdings alleges throughout the Amended Complaint (i.e., duties with respect to the valuation of plaintiff's positions, record keeping, execution of transactions, settlement procedures and extension of credit) are governed by the parties' Agreements. Moreover, defendant argues that the purported breaches of duty are expressly duplicative of those in the first to sixth, ninth and tenth causes of action of

the Amended Complaint, and, therefore, this cause of action should be dismissed.

Plaintiff argues that defendant is wrong to rely solely on the argument that plaintiff's claim for negligence is duplicative of its breach of contract claims, because after *Clark-Fitzpatrick* was decided by the Court of Appeals in 1987, the Court of Appeals decided *Sommer v Federal Signal Corp.*, 79 NY2d 540 (1992) which set forth specific factors to be considered in determining whether a negligence claim may be asserted with a breach of contract claim. The Court in *Sommer*, citing *Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382, 390 (1882) stated that

> [b]etween actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult.

Sommer v Federal Signal, 79 NY2d at 550-551.

The Court went on to recognize that "[t]hese borderland situations most often arise where the parties' relationship initially is formed by contract, but there is a claim that the contract was performed negligently." *Id* at 551. The Court further pointed out that it had, over the years, identified several

"guideposts for separating tort from contract claims . . . A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship, . . [while] where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory." *Id* at 551-552.

The *Sommer* case involved a 42-story skyscraper in Manhattan, the owner of which had contracted with a fire alarm company to provide central station monitoring service - meaning that the company would receive any alarms sounded on the building's premises and immediately notify the fire department. Due to confusion on the part of an allegedly untrained, inexperienced dispatcher at the fire alarm company, signals received from the building as a result of a four-alarm fire on the 28th floor on a particular day were not reported directly to the fire department by the fire alarm company resulting in extensive property damage. Several actions were commenced and consolidated, and the fire alarm company moved for summary judgment dismissing all claims for, *inter alia*, negligence and breach of contract, relying on a contractual exculpatory clause in the fire alarm company's contract with the building owner. The Court of Appeals held that the clause would not bar recovery by the customer for the company's grossly negligent conduct and that an issue of fact regarding gross negligence precluded summary judgment for the company.

Clearly, the facts there were very different from the facts in the instant case. Nonetheless, Sebastian Holdings contends that it is not credible for Deutsche Bank to contend that it had no legal duty independent of the agreements at issue. Plaintiff insists that throughout its Amended Complaint, it details the wrongdoings of defendant's prime brokers and private bankers that are independent from any explicit contractual obligation. Plaintiff argues that like the fire alarm monitoring company in *Sommer*, if Deutsche Bank "had followed its industry guidelines in the regular performance of its services at minimal marginal cost, the 'catastrophic consequences' of its negligent conduct could have been avoided." Memo in Opp, at 12, fn. 8.

Plaintiff also contends that a prime broker is akin to the list of "[p]rofessionals, common carriers and bailees" cited by the Court in *Sommer* as being "subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (*Sommer*, at 551), and thus, it does not have to show that the manner of its harm resulted from an "abrupt, cataclysmic occurrence" *Id* at 552. Yet, plaintiff argues that like the fire in the *Sommer* case, the global financial meltdown in September and October of 2008 *was* an "abrupt, cataclysmic occurrence" and the damage resulting therefrom could have been ameliorated if Deutsche Bank, like the fire alarm monitoring company, had not performed its duties negligently.

Finally, plaintiff contends that it has asserted that defendant both negligently performed its duties *and* failed to act by not performing, *inter alia*, risk management duties undertaken by its prime brokers and private bankers that could have stemmed plaintiff's losses or, at least, caused plaintiff's exposure to be reported to Alexander Vik, Sebastian Holding's sole shareholder and director.

Defendant insists that plaintiff's reliance on *Sommer* is misplaced, noting the Court's warning that "merely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort." *Sommer* at 551 (*citing Clark-Fitzpatrick*, 70 NY2d at 389; *Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY at 398). The Court in *Sommer* states that its conclusion rested in part on the nature of the injury, the manner in which the injury arose and the resulting harm, which were typical of tort claims, such as personal injury and property damage. *Id* at 552-553. However, "where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory." *Id* at 552. "Additionally, a contracting party seeking only a benefit of the bargain recovery, viz., economic loss under the contract, may not sue in tort notwithstanding the use of familiar tort language in its pleadings." *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 83 (1st Dep't 1999) (*citing Bellevue S. Assocs.*

v HRH Constr. Corp., 78 NY2d 282, 294-295 [1991], *rearg den* 78 NY2d 1008 [1991]; *Sommer*).

Finally, defendant argues that plaintiff's attempts to circumvent this Court's prior ruling dismissing plaintiff's breach of fiduciary claims, which was affirmed by the Appellate Division (*Sebastian*, 78 AD3d at 447) ("[p]laintiff's alleged reliance on defendant's superior knowledge and expertise in connection with its foreign exchange trading account ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties"), by repeating its claims with a "negligence" label, does not alter the fact that the only duties between these two parties were based in contract.

On August 13, 2012, well after this motion was argued and submitted, plaintiff's counsel forwarded to this Court a copy of a decision by the Second Circuit Court of Appeals in the case of *Bayerische Landesbank, New York Branch v Aladdin Capital Management*, 692 F3d 42 (2nd Cir. 2012) which plaintiff claimed addressed several issues of law involved in this motion. Although Rule 18 of the Commercial Division Rules (22 NYCRR 202.70[g]) permits counsel to "inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues," it also states that "there shall be no additional

argument" in said submission. Rule 18 further provides that "[m]aterials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind." Nonetheless, plaintiff's counsel's letter did include "additional argument", which was followed by a responsive letter from defendant's counsel and a reply letter from plaintiff's counsel. It thus appears that both counsel are in violation of this Rule.

However, after independently reviewing the Second Circuit's decision, this Court finds that the factual underpinnings are different, given that the plaintiffs there, investors in a Collaterized Debt Obligation ("CDO") managed by defendant, were not parties to any contract with defendant. On a motion to dismiss, the Second Circuit held that plaintiffs sufficiently alleged that they were third-party beneficiaries of the defendant's contract with the issuer of the CDOs, and that the complaint stated a claim for gross negligence against the defendant, based on plaintiffs' allegations that they were induced by defendants' many misrepresentations, on which they justifiably relied, to invest in the CDO, as a result of which they lost their entire investment.

This scenario is factually and legally distinguishable from this case and does not change this Court's finding that the

negligence claim in this case must fail for the reasons asserted by defendant, based on the Court of Appeals' analysis in *Sommer*.

Accordingly, this Court dismisses the eighth cause of action in the Amended Complaint.

IV. Eleventh, Twelfth and Thirteenth Causes of Action

As to the eleventh cause of action, plaintiff alleges that Deutsche Bank's wrongful and intentional liquidation and transfer to itself of assets contained in Sebastian Holding's accounts at the Bank in London and Geneva in or about October and November 2008 constituted conversion. Amended Complaint, ¶¶ 358-359. This cause of action is identical to the fourth cause of action in the Original Complaint which was not dismissed by this Court, or by the Appellate Division, which held that the conversion claim was "not a mere restatement of the claims for breach of contract, as plaintiff has not alleged any breach of agreement that directly relates to the allegedly converted funds," 78 AD3d at 447-448. Now, however, defendant argues, plaintiff alleges in its ninth cause of action that Deutsche Bank breached the FX ISDA and FX PB Agreement by "wrongfully and improperly taking assets of Sebastian Holdings from its accounts with the Bank in London." Amended Complaint, ¶ 350. Thus, defendant contends that these two claims now overlap and allege identical wrongs, namely, the alleged

improper liquidation of Sebastian Holding's positions and taking of its assets in the London accounts.

Defendant argues that it owed no duties independent of those set forth in the agreement of the parties, citing *Clark-Fitzpatrick* 70 NY2d at 389, and that a conversion claim cannot be predicated on a mere breach of contract. *Kopel v Bandwidth Tech Corp.*, 56 AD3d 320 (1st Dep't 2008), *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 (1st Dep't 2007). Since plaintiff's new allegations, according to defendant, reveal that the parties' agreement governs the issue, Deutsche Bank argues that the conversion claim must be dismissed.

Defendant also argues that the twelfth and thirteenth causes of action for money had and received and unjust enrichment, respectively, should be dismissed because they are also duplicative of the breach of contract claims.

The First Department previously ruled that the unjust enrichment claim should not be dismissed because it could not be said "at [that] early stage of the proceeding that [that claim was] duplicative of the breach-of-contract claims, ..." *Sebastian Holdings*, 78 AD3d at 448. However, defendant argues that now with the filing of the Amended Complaint, the additional breach of

contract claims can be held to be duplicative of these quasi-contract claims.

Specifically, defendant insists that plaintiff's claims in these two causes of action alleging that Deutsche Bank is liable for making margin calls and improperly closing plaintiff's position and accounts to cover plaintiff's debts (Amended Complaint, ¶¶ 363, 367) are duplicative of plaintiff's breach of contract claims in the fourth and ninth causes of action. Moreover, defendant claims that these quasi-contract claims do not arise from "facts wholly independent" of the parties' contracts (*see Sebastian Holdings*, 78 AD3d at 448); rather, they are governed by the parties Agreements, as alleged by plaintiff in the Amended Complaint, ¶ 240.

Plaintiff argues that the law of the case doctrine bars relitigation of the sufficiency of these claims. The Appellate Division specifically upheld the sufficiency of plaintiff's claims for conversion and unjust enrichment in the Original Complaint, and found defendant's "remaining contentions," including its arguments as to dismissing plaintiff's money had and received cause of action, "unavailing." *Sebastian*, 78 AD3d at 447-48. While plaintiff did serve an Amended Complaint, which this motion is addressed to, plaintiff argues that the Amended Complaint merely supplements the factual allegations underlying these three causes of action and thus does "not undermine the legal effect of [the Appellate

Division's] determination involving the original complaint." *Jeferne, Inc. v Capanegro*, 96 AD2d 577, 578 (2nd Dep't 1983).

Moreover, plaintiff insists that Deutsche Bank's continued "mantra-like" reliance on *Clark-Fitzpatrick, supra* is misplaced, citing *Joseph Sternberger, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 227-228 (1st Dep't 1993), which held that *Clark-Fitzpatrick* "does not hold that a claim in contract and one in quasi contract are mutually exclusive in all events and under all circumstances. Indeed, this has never been the law in New York."

Plaintiff contends that the converted funds and securities, which were beyond those in the FX PB Account and the Pledged Account, are still outside the "silo" of FX Agreements, and thus that these claims are not a mere restatement of the claims for breach of contract and can stand on their own. While Sebastian Holdings claims that it has fully performed under the FX Agreements, the parties sharply dispute whether the "scope" of the FX Agreements "clearly covers" Deutsche Bank's alleged taking of any fund or securities subject to the Equities Agreements outside the FX Agreements "silo". Therefore, plaintiff argues, as the Appellate Division said the first time around, these claims cannot at this stage of the litigation be said to be "duplicative of the breach-of-contract claims, and the rule of [*Clark-Fitzpatrick*] does not apply." 78 AD2d at 448. Moreover, as plaintiff points out,

the CPLR permits a party to plead causes of action in the alternative. *See* CPLR 3014, 3017; *Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 (1st Dep't 2008).

In reply, defendant points out that plaintiff's argument that the law-of-the-case doctrine should save its conversion and quasi-contract claims from dismissal is wrong, because

> where an amended complaint is served, the original complaint cannot in any manner constitute the law of the case. It was plaintiff's decision to restate her . . . claim, based on enlarged factual allegations, which has given rise to the need for this court to reconsider the claim. Therefore, the law of the case doctrine does not apply, and review of the merits of the amended . . . claim is appropriate.

Rabouin v Metropolitan Life Ins. Co., 2002 WL 34358061 (Sup Ct, NY Co. 2002) (internal quotation marks and citations omitted); *see also Thompson v Cooper*, 24 AD3d 203, 205 (1st Dep't 2005).

Defendant argues that plaintiff makes clear in its Amended Complaint that the quasi-contractual claims are now entirely duplicative of plaintiff's breach of contract claims, and thus must be dismissed.

While the Original Complaint contained only two causes of action for breach of contract, which claims defendant has not moved

to dismiss here, the Amended Complaint contains eight separate causes of action for breach of contract. The six new breach of contract claims are much more expansive than the two claims contained in the Original Complaint and contain significantly more detailed factual allegations which reveal that the parties' actions were much circumscribed by the scope of their Agreements than was originally pled. It now appears that plaintiff's conversion claim is based on the same facts alleged in the ninth cause of action for breach of contract, and that the parties' Agreements govern their actions. Thus, plaintiff's conversion claim must be dismissed.

Similarly, plaintiff's twelfth and thirteenth causes of action allege that defendant received funds from plaintiff "in payment of . . . improper and wrongful margin calls and transfer instructions . . . and closing of positions". Amended Complaint, ¶¶ 363, 367. However, these allegations are duplicative of plaintiff's breach of contract claims in the fourth cause of action (Amended Complaint, ¶ 350), which this Court has not dismissed herein. Given the expanded allegations in the Amended Complaint, this Court can no longer find, as the Appellate Division did on the first appeal, that these claims do "not depend on the existence of valid and enforceable written contracts between the parties" or that they arise "from facts wholly independent of any contract upon which plaintiff sues." *Sebastian*, 78 AD3d at 448.

Accordingly, this Court now respectfully dismisses plaintiff's eleventh, twelfth and thirteenth quasi-contractual causes of action.

V. Sixth and Ninth Causes of Action

With respect to the sixth and ninth causes of action, defendant argues that although the Amended Complaint alleges that Deutsche Bank breached the Authority Letter by allowing Said to engage in "exotic derivative transactions" (Amended Complaint, ¶¶ 336, 356), the Authority Letter imposed absolutely no obligations upon Deutsche Bank.

Rather, according to Deutsche Bank, Sebastian Holdings expressly granted Said authority "to trade on behalf of [plaintiff] for the purpose of executing spot, tom next and forward foreign exchange transactions and currency options[.]" Moreover, the Authority Letter unequivocally states that Sebastian Holdings "recognizes[s] and agree[s] that [Deutsche Bank] shall have no duty to inquire as to the nature of the relationship between [Sebastian Holdings] and [Said] nor as to any restrictions upon the activities of [Said] in connection with [his] execution of FX and Option Transactions on [Sebastian Holding's] behalf." It is defendant's position that if Sebastian Holdings intended to reign in Said's trading, it was incumbent upon plaintiff to do so itself in

accordance with the revocation procedures in the Authority Letter, but that Deutsche Bank assumed no responsibilities thereunder.

In addition, defendant asserts that as principal, plaintiff could not disclaim knowledge of its agent's, i.e. Said's actions, (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]) for which Deutsche Bank cannot be held liable. Even assuming, *arguendo*, that Said exceeded the scope of his authority under the Authority Letter, defendant contends that plaintiff is presumed to have knowledge of his activities (*id* at 466) and thus Deutsche Bank cannot be liable for his trading.

Plaintiff asserts that Deutsche Bank completely misconstrues these causes of action concerning the types of transactions in which Said and defendant were authorized to engage, by ignoring the breaches of the FX PB Agreement and CLA alleged and only focusing on the Said Authority Letter. According to plaintiff, the Amended Complaint alleges throughout that the FX PB Agreement only permitted and contemplated that plaintiff and defendant would enter into "plain vanilla" FX transactions, which did not include the "exotic derivative transactions", which also exceeded the $35 million capital limitation in the CLA. See Amended Complaint, ¶¶ 110-115, 127-129.

Plaintiff further contends that the Authority Letter was actually drafted by Deutsche Bank and was required by the Bank prior to allowing Said to commence trading on plaintiff's behalf. It served to memorialize plaintiff and defendant's agreement, as evidenced by the explicit language of the FX PB Agreement, that the authority of Said and defendant to do FX trades on behalf of plaintiff was limited to only plain vanilla transactions. Thus plaintiff insists that the sixth and ninth causes of action adequately allege breaches by Deutsche Bank of the relevant agreements.

In reply, defendant argues again that the Authority Letter provides a complete defense to the claims that it breached any of the agreements listed in the sixth and ninth causes of action because, pursuant to the Authority Letter, Deutsche Bank had no duty to regulate Said's trading activities, and thus cannot be found liable for permitting Said to have engaged in the exotic derivative transactions. Moreover, defendant points out that plaintiff failed to allege that either the FX PB Agreement or the alleged CLA address defendant's duties with respect to overseeing Said's trading activities. Amended Complaint, ¶¶ 336, 350.

For the reasons stated by Deutsche Bank, this Court agrees that the Authority Letter acts as a complete defense to plaintiff's

allegations that defendant could be held liable for Said's trading activities.

Accordingly, this Court dismisses plaintiff's sixth cause of action entirely, and that portion of the ninth cause of action which relies on the Authority Letter.

VI. Seventh Cause of Action

Defendant also argues that plaintiff's seventh cause of action alleging breach of the implied covenant of good faith and fair dealing is duplicative of its more specific breach of contract claims, since both claims arise from the same facts. *See e.g. Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dep't 2010), *lv den* 15 NY3d 704 (2010). Deutsche Bank argues that Sebastian Holdings doesn't even attempt to allege any breach aside from those that underlie the alleged breach of the FX PB Agreement, the seventh cause of action merely stating that the covenant of good faith and fair dealing "was breached by the Bank when it committed the wrongdoings alleged throughout this amended complaint depriving Sebastian Holdings of the intended benefits for which it bargained under the Agreement." Amended Complaint, ¶ 343.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002).

> Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promise would be justified in understanding were included. This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Dalton v Educational Testing Serv., 87 NY2d 384, 389 (1995) (internal quotation marks and citations omitted).

Plaintiff claims that here, Deutsche Bank drafted the transactional documents, and that there is no central writing that sets forth its duties and responsibilities for administering the FX PB Account. Yet, plaintiff argues that it could not intelligently trade FX without relying upon Deutsche Bank to administer the FX PB Account in a commercially reasonable manner. Thus, according to plaintiff, the FX PB Account, while including a reporting and valuation obligation (Amended Complaint, ¶ 81), also contemplated reposing in defendant other obligations not expressly stated in the FX PB Agreement or the FX ISDA Agreement, such as monitoring necessary calculations for VaR, valuing and reporting plaintiff's positions properly, properly booking certain transactions in

plaintiff's accounts, and reporting plaintiff's positions correctly and in a timely manner, which duties plaintiff claims defendant arbitrarily and irrationally exercised. Sebastian Holdings asserts that it is justified in understanding that these duties were included among the duties and responsibilities assumed by Deutsche Bank in the FX PB Agreement or FX ISDA Agreement.

Plaintiff further claims that a cause of action for breach of the implied covenant of good faith and fair dealing may be stated together with a breach of contract claim where the former is based upon matters not expressly covered by the latter, citing *Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 (1st Dep't 2010); *Dialcom, LLC v AT&T Corp.*, 20 Misc3d 1111(A) (Sup Ct, Kings Co. 2008).

In sum, plaintiff argues that since this case is still at the pre-answer motion to dismiss stage, this claim is not subject to the heightened pleading requirement of CPLR 3016, and plaintiff has alleged that Deutsche Bank had implied duties and responsibilities that were not included within the express terms of the FX PB Agreement or the FX ISDA Agreement, this claim should not be dismissed.

After reviewing the Amended Complaint, it appears to this Court that the particular duties plaintiff alleges defendant undertook in addition to those contained in the parties' agreements, are in fact duplicative of plaintiff's breach of contract claims as alleged in the first, second, fourth and ninth causes of action. Amended Complaint, ¶¶ 309-311, 315-317, 325-327 and 350-351. Since plaintiff has not identified any duty in addition to those alleged to arise under the parties' agreements, the seventh cause of action is dismissed. *See New York Univ. v Continental Ins. Co.*, 87 NY 2d at 319-20; *Amcan Holdings, supra*.

VII. Fifth and Tenth Causes of Action

Next, defendant argues that the fifth and tenth causes of action which allege that defendant breached agreements when it failed to comply with certain of plaintiff's instructions must be dismissed because they fail to identify any such instructions.

Plaintiff contends, on the other hand, that such instructions are set forth throughout the Amended Complaint.

Moreover, to supplement the Amended Complaint, plaintiff refers the Court to the Affidavit of Alexander Vik and the referenced emails between plaintiff and defendant's private bankers

acknowledging and agreeing to certain instructions, and later confirming, erroneously, that such instructions were carried out.

Plaintiff reminds the Court that it must, on a motion to dismiss, liberally construe the Amended Complaint and give plaintiff the benefit of every inference which may be drawn from the pleading, citing *Leon v Martinez, supra*.

In reply, defendant contends that even after reviewing the Vik Affidavit, the allegations contained therein rely on conclusory statements that still do not adequately allege a breach of contract for failing to comply with any instructions given to Deutsche Bank.

The Court finds that the allegations of Mr. Vik as contained in his Affidavit sworn to on April 29, 2011, in particular paragraphs 30-46, taken together with the allegations in the Amended Complaint, sufficiently allege specific instructions given by plaintiff to defendant which were allegedly not followed, so as to withstand defendant's motion to dismiss.

VII. Consequential and Punitive Damages

Finally, Deutsche Bank claims that plaintiff's claims for consequential damages (which were originally $750 million and have now risen to $2.5 billion) are too speculative and were not within

the contemplation of the parties at the time they entered into the Agreements. Defendant further argues that plaintiff's claim for punitive damages should be dismissed either because punitive damages are not available under English or Swiss law, the alleged sites of the purported wrongdoing supporting the claims for punitive damages, or if New York law applies, then there is no legal basis for those claims. *See Ross v Louise Wise Services, Inc.*, 8 NY3d 478 (2007); *Fabiano v Philip Morris, Inc.*, 54 AD3d 146 (1st Dep't 2008).

Plaintiff argues, in the first instance, that requests for consequential damages inherently involve factual determinations that render defendant's attacks wholly inappropriate on a CPLR 3211(a) motion. It is for the trier of fact to determine later along in the case whether there was a breach of contract which caused any damages, and whether the alleged lost profits were capable of proof with reasonable certainty, and "were fairly within the contemplation of the parties to the contract at the time it was made." *Kenford Co. v County of Erie*, 67 NY2d 257, 261 (1986). The Court of Appeals has stated that the "rule that damages must be within the contemplation of the parties is a rule of foreseeability" and that "[i]t is only necessary that loss from a breach is foreseeable and probable." *Ashland Mgt. v Janien*, 82 NY2d 395, 403 (1993). Plaintiff contends that it has pleaded that

the profits it lost as a result of defendant's wrongdoings were both reasonable and foreseeable, and thus its claim for consequential damages cannot be dismissed on this motion.

In reply, defendant urges that a Court may dismiss a deficient claim for consequential damages even at the pleading stage, citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 425 (1996). Defendant contends that other than plaintiff's own bald allegations that its damages were "reasonable and foreseeable", its arguments focus solely on the parties' course of dealing in 2008, *after* the execution of the contract.

This Court finds that plaintiff has adequately alleged that the profits it lost as a result of defendant's alleged wrongdoings were both reasonable and foreseeable at the time the parties entered into their many Agreements, and that it would be premature to dismiss plaintiff's request for consequential damages on this CPLR 3211 motion to dismiss.

As to punitive damages, plaintiff asserts that defendant's argument misses the mark because its punitive damages request is based upon its tort claim for conversion, not its breach of contract claims.

> Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton (citations omitted). It is for the jury to decide whether [the offending conduct was] so reprehensible as to warrant punitive damages (citations omitted). That the harm alleged might not have been aimed at the general public does not alter this result (*Giblin v Murphy*, 73 NY2d 769, 772 [1988]).

Swersky v Dreyer & Traub, 219 AD2d 321, 328 (1st Dep't 1996), *rearg den* 232 AD2d 968 (1st Dep't 1996), app wdn 89 NY2d 983 (1997).

Plaintiff contends that it would be premature to dismiss the punitive damages request on a CPLR 3211 motion which is not a vehicle to decide issues of fact. *See Sterling Natl. Bank v Ernst & Young, LLP*, 9 Misc 3d 1129(A) at *8 (Sup. Ct., NY Co 2005).

Defendant reiterates that plaintiff's claim pertains to the London and Geneva accounts which were governed by the Equities Agreements and the Pledge Agreement. Defendant points out that plaintiff did not even address, much less rebut or deny, that English and Swiss law apply to those accounts, and thus punitive damages are not available.

In addition to the fact that plaintiff never addressed this argument, this Court has now dismissed the conversion claim on

which the claim for punitive damages was based, and thus plaintiff's claim for punitive damages must be dismissed.[3]

Accordingly, defendant's motion to dismiss is granted only to the extent of dismissing plaintiff's sixth, seventh, eighth, eleventh, twelfth and thirteenth causes of action, that portion of the ninth cause of action which relies on the Authority Letter and its claim for punitive damages, and is otherwise denied.

Defendant shall serve an Amended Answer to the remaining causes of action in plaintiff's Amended Complaint within 30 days of notice of the e-filing of this decision.

This constitutes the decision and order of this Court.

Dated: November 8, 2012

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

[3] Even if the Court did not dismiss the conversion claim and would find New York law to apply, the allegations in the Amended Complaint do not suggest a wrongdoing that "has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another [so as to be] deemed willful and wanton", warranting a claim for punitive damages here.