SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SOLEIL CAPITAL LIMITED and GRANDALE ENTERPRISES LIMITED,

Index No.: 653451/2015

DECISION & ORDER

Plaintiffs,

-against-

EMERGING MARKETS INTRINSIC, LTD. and ERIC M. MAASS,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Emerging Markets Intrinsic, Ltd. (EMI) and Eric M. Maass move, pursuant to CPLR 3211, to dismiss the complaint. Plaintiffs Soleil Capital Limited (Soleil) and Grandale Enterprises Limited (Grandale) oppose. The motion is granted in part and denied in part for the reasons that follow.

I. Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties. That said, this action concerns the same transactions at issue in a related case before this court, styled *SRT Capital Ltd. v Soleil Capital Limited*, Index No. 651987/2015 (the Related Action). The underlying facts are extensively set forth in the court's March 25, 2016 decision in the Related Action and are not repeated here. *See SRT Capital Ltd. v Soleil Capital Ltd.*, 2016 WL 1182111, at *1-3 (Sup Ct, NY County 2016) (the March 25 Decision). Familiarity with the March 25 Decision is assumed.

Simply put, the plaintiffs in this action, Soleil and Grandale, are the defendants in the Related Action, where they were sued by SRT Capital Ltd. (SRT) for allegedly defaulting on non-recourse, margin loans. SRT is not a party to the instant action. Soleil and Grandale

counterclaimed against SRT, contesting their alleged default. Soleil and Grandale, moreover, also sought to assert claims against SRT's affiliate, EMI, and its principal, Maass. However, rather than file third-party claims against EMI and Maass in the Related Action, on October 15, 2015, they filed this new action.

The instant complaint contains the following causes of action, numbered here as in the complaint: (1) aiding and abetting (SRT's alleged) conversion, asserted by Grandale; (2) aiding and abetting conversion, asserted by Soleil; (3) breach of fiduciary duty, asserted by Grandale; (4) breach of fiduciary duty, asserted by Soleil; (5) aiding and abetting breach of fiduciary duty, asserted by Grandale; (6) aiding and abetting breach of fiduciary duty, asserted by Soleil; (7) breach of the covenant of good faith and fair dealing, asserted by Soleil; and (8) breach of the covenant of good faith and fair dealing, asserted by Grandale. *See* Dkt. 1.[1] On December 16, 2015, EMI and Maass moved to dismiss the complaint. The court reserved on the motion after oral argument. *See* Dkt. 28 (5/19/16 Tr.).

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

The claims in this action concern the same wrongdoing and counterclaims alleged in the Related Action. Those claims have two components. First, two loans were to be made – one to Soleil and one to Grandale. Grandale contends that while SRT made the agreed-upon margin loan to Soleil, it never actually loaned money to Grandale. As discussed in the March 25 Decision, the loans were governed by independent agreements, with separate counterparties. The loans, moreover, were made using distinct Cayman Islands segregated portfolio accounts, which, under Cayman Islands law, had to be kept separate. SRT, however, allegedly used Grandale's collateral (the CIL Shares) to satisfy its margin call on the Soleil loan. Grandale takes the position that, regardless of the merits of the claims between SRT and Soleil, it is entitled to return of its collateral since SRT never loaned it any money. Grandale claims there is no basis under the parties' agreements or Cayman Islands law to permit its collateral to be taken

by SRT. Simply put, Grandale avers that it could not be subject to a margin call prior to being loaned any money.

The second issue is that the margin calls made by SRT were based on the precipitous drop in the CIL Shares' market price. As explained in the March 25 Decision, SRT was permitted to demand additional cash collateral from Soleil and Grandale if the Shares declined in value. However, Soleil and Grandale allege that the Shares dropped due to SRT engaging in market manipulation by selling the very CIL Shares it was supposed to be holding as collateral. Indeed, Soleil and Grandale allege they were given explicit assurances that SRT would not transact with the Shares and that the margin call was caused by SRT's trading of the Shares. Soleil and Grandale, therefore, argue that SRT's alleged market manipulation renders the margin calls and subsequent alleged defaults on the loans to be nullities.

The court has no occasion to opine on the merits of these issues with respect to SRT. SRT, as noted, is not a party to this case. Additionally, these issues are not pleaded by Soleil and Grandale as express breach of contract claims against EMI and Maass. Rather, Soleil's and Grandale's claims to hold EMI and Maass liable for aiding in SRT's alleged wrongful conduct are pleaded as implied covenant and fiduciary duty breaches as well as aiding and abetting conversion. EMI and Maass take the position that what they are accused of are mere breaches of contract, and that since no express breach of contract claim is asserted against them in this action, their motion to dismiss should be granted.

To explain, EMI, a company organized under the laws of the British Virgin Islands, is SRT's fund manager. Mass is EMI's managing partner and is a Portfolio Manager for SRT. Under the Margin Lending Agreements (the MLAs) (*see* Dkt. 15 & 17), EMI was defined as the

"Agent" for both "Lender" (SRT) and "Borrower" (Soleil and Grandale). *See* Dkt. 15 at 1.

Section 4 of the MLAs provides:

> (a) Lender and Borrower (the "Principal") each appoints Agent to act as agent with regard to any all actions necessary to effect Loans as described in this Agreement, and Agent acknowledges and accepts such appointment.
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> (b) As agent of each of the Principals and in compliance with all applicable regulations, Agent will arrange all Loans.
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> (c) In connection with each Loan, Agent acts solely in its capacity as agent for the Principals pursuant to instructions from the Principals or pursuant to discretionary authority granted to it by Borrower under the applicable Subscription Documents. **Agent shall have no responsibility or personal liability to either Principal arising from any failure by a Principal to pay or perform any obligation hereunder**. Notwithstanding anything herein to the contrary, **Agent shall not have any responsibility for or any obligation or liability to either Principal with respect to the monitoring of margin maintenance hereunder**. **Each Principal agrees to proceed solely against the Collateral (as defined below) or the other Principal to recover any amount owing to it or to enforce any of its other rights in connection with, or as a result of any Loan**. The Principals acknowledge that Agent is acting solely as an agent hereunder, and **the Principals agree to hold Agent harmless from all liability except for losses or damages caused by Agent's gross negligence or willful misconduct**.
>
> (d) Each Principal and Agent hereby agree that any and all notices, demands, communications, payments or deliveries of any kind relating to any Loan may be delivered or made solely through Agent.

See id. at 1-2 (emphasis added).

EMI's role as Agent is further addressed in sections 5(b) and (e):

> (b) ... Borrower agrees that any Collateral may be registered and held in the name of Agent or its designee. Borrower shall execute such documents and take such other action as Lender shall reasonably request in order to perfect Lender's rights with respect to any Collateral. In addition, Borrower hereby appoints Agent and each of its affiliates as Borrower's agent and attorney-in-fact to take any action, including without limitation to sign seal, execute and deliver all documents, as may be required to perfect Lender's interest in and to realize upon all of Lender's rights in the Collateral or to otherwise accomplish the purposes of this Agreement, including the filing of one or more financing statements under the Uniform Commercial Code identifying Borrower as Debtor and Lender as Secured Party ... .

...

> (e) Borrower authorizes and requests Agent, as agent for Borrower, to transfer cash or securities from the account(s) of Borrower opened and maintained pursuant to the Subscription Agreement to Lender's Account as Collateral under this Agreement. In addition, if, at any time, Borrower has provided excess collateral under this Agreement and also is required to deliver margin, collateral or other credit support (including title transfer credit support) to Lender under this or any other agreement, then Borrower authorizes and requests Lender to transfer such excess collateral to itself on Borrower's behalf in order to satisfy (to the extent possible) Borrower's obligation to deliver margin or credit support under this or such other agreement ...

See id. at 3-4.

As these sections make clear, notwithstanding EMI being defined as "Agent", its role was ministerial. As a result of this and the liability limitations in section 4(c), EMI argues that it cannot have liability regarding the Shares. Maass contends that there is no basis for holding him personally liable since all of his actions were conducted in his capacity as employee of SRT and EMI. Moreover, EMI and Maass aver, any remedy Soleil and Grandale may have against EMI is limited to a breach of the MLAs since no fiduciary duties exist and conversion claims are barred when the dispute is governed by contract.

The court agrees with EMI and Maass with respect to the breach of fiduciary duty claims. "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005) (citations and quotation marks omitted). "Before courts can infer and superimpose a duty of the finest loyalty, the contract and relationship of the parties must be plumbed." *N.E. Gen. Corp. v Wellington Advertising, Inc.*, 82 NY2d 158, 162

(1993). "If the parties find themselves or place themselves in the milieu of the 'workaday' mundane marketplace, and if they do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." *Id.*

"Generally, where parties have entered into a contract, courts look to that agreement to discover ... the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency." *EBC I*, 5 NY3d at 19-20 (citations and quotation marks omitted). "However, it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary **but results from the relation**." *Id.* at 20 (emphasis added; citations and quotation marks omitted). In other words, the existence of a fiduciary relationship turns on the reality of the parties' relationship. If the relationship merely requires the defendant to carry out contractually mandated duties, any remedy lies in a breach of contract claim. Critically, it is the reality of the parties' relationship that matters, not the terms used to define their roles in the contract. *See N.E. Gen. Corp.*, 82 NY2d at 163 ("Ultimately, the dispositive issue of fiduciary-like duty or no such duty is determined not by the nomenclature 'finder' or 'broker' or even 'agent,' but instead by the services agreed to under the contract between the parties.").

Here, notwithstanding the MLAs' use of the word "Agent", it is evident that EMI was not charged with providing any advice to Soleil and Grandale, either before or after the contracts were executed. EMI merely was contractually obligated to carry out the ministerial duties delegated to it by SRT, Soleil and Grandale. Specifically, it was required to follow SRT's instructions with respect to the collateral. EMI's authority as "Agent" of Soleil and Grandale served the purpose of granting EMI the legal authority to transact with the collateral to effectuate

SRT's directions in the event of a margin call. *See* Dkt. 15 at 2 (section 5(a) of the MLAs, providing that margin calls may be made at SRT's "sole and absolute discretion" consistent with the NRLAs). To be sure, Soleil and Grandale claim that SRT's margin calls were rife with irregularities. However, EMI is not alleged to have done anything other than follow the directions of SRT.

This is not a fiduciary context.[2] To the extent Soleil and Grandale claim that EMI acted wrongfully, at best, they may have a claim for breach of the MLAs against EMI, a cause of action not asserted here.[3] To the extent there is a viable breach of contract claim against EMI, as set forth below, it must be pleaded in the Related Action.[4]

That said, in this action, Soleil and Grandale do plead claims for breach of the implied covenant of good faith and fair dealing, which is part of every contract. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). "This covenant 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.'" *Id.*, quoting *Dalton v Educational Testing*

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[2] EMI was designated as "Agent" for both lender and borrower, whose interests were adverse. Then too, Soleil and Grandale knew EMI was SRT's fund manager. It, thus, is hard to see how EMI could ever be expected to adhere to "the punctilio of an honor the most sensitive". *See N.E. Gen. Corp.*, 82 NY2d at 162, quoting *Meinhard v Salmon*, 249 NY 458, 464 (1928). This refutes the notion that the parties were in a fiduciary relationship. The court asked counsel for Soleil and Grandale to address this issue at oral argument. *See* Dkt. 28 (5/19/16 Tr. at 22) ("And so how can you rely on EMI as only your agent when the [MLAs] specifically say[] EMI is going to be both agents? It explains that there's no [] real liability on behalf of EMI except that they were willful or grossly negligent, which may or may not have occurred and where you know EMI is connected to SRT"). Counsel declined to answer the court's question, merely responding: "Maybe it wasn't --I'm not conceding that, but that is a question of fact and is not a proper decision to be made on the motion to dismiss stage." *See id.*

[3] Section 4(c) of the MLAs, however, limits EMI's liability to acts of gross negligence or willful misconduct.

[4] At oral argument, counsel for Soleil and Grandale stated that he has no objection to the two actions being consolidated. *See* Dkt. 28 (5/19/16 Tr. at 11-12).

Serv., 87 NY2d 384, 389 (1995). "While the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship,' they do encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *Id.*, quoting *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 (1983) and *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978).

This may well be a case where the implied covenant comes into play. Engaging in market manipulation to induce a margin call is (unsurprisingly) not expressly addressed by the MLAs. Notwithstanding the alleged oral agreement not to transact with the Shares,[5] it is reasonable to assume that a party posting collateral on a margin loan has a reasonable expectation that the lender will not manipulate the market for the collateral in a manner that, absent such manipulation, would not have resulted in a margin call. Nevertheless, the implied covenant claim must be repleaded and, if repleaded, must be in the Related Action.

To begin, the specifics of the alleged market manipulation are not set forth in the complaint. Nor, to date, has the court been provided with a cogent explanation of what the alleged manipulation entailed and the reasons why SRT and EMI would want to transact with the Shares to the detriment of Soleil and Grandale. After all, the loans were non-recourse and, hence, devaluing the collateral would appear to harm SRT. While the alleged market manipulation, therefore, would seem irrational, Soleil and Grandale suggest that SRT's motive

[5] *See* Complaint ¶ 16 ("In early March 2015, Dai and Burke began negotiating the terms of non-recourse lending agreements, pursuant to which Plaintiffs would transfer CIL shares to accounts designated by SRT as collateral for loans to be disbursed by SRT. Notably, during the course of these negotiations, Dai asked Burke what was to stop SRT from selling off the collateral, thereby depressing the share price and resulting in a reduced loan amount. In response, Burke, on behalf of SRT, assured Dai that 'the lender is not going to be selling the shares.'"); *see also* ¶ 34 ("After transferring its first tranche of 7 million CIL shares to SRT, Soleil discovered that the share price had dropped precipitously. Concerned that the reduced price was caused by SRT's unauthorized sale of the collateral, Dai asked Maass whether that was the case. In response, Maass assured Dai that 'not a single share has been traded.'").

had nothing to do with recovery on the loans but, instead, that SRT issued the loans to gain access to the Shares in order to facilitate its alleged market manipulation scheme. That said, even if these allegations can be inferred from the complaint, they are speculative and conclusory. The complaint is devoid of factual allegations regarding the alleged market manipulation. A more robust amended pleading is required.[6]

Also, and perhaps more fundamentally, the complaint does not explain EMI's role in the market manipulation, that is, the way in which EMI (as opposed to SRT) is alleged to have breached the implied covenant. Even assuming the alleged scheme is pleaded sufficiently to state a claim against SRT, the roles of SRT and EMI were different. SRT was the lender; EMI was the collateral agent. The complaint makes it appear that SRT benefited from the manipulation, but does not explain EMI's role other than as an entity charged with carrying out SRT's ministerial directives. As noted, SRT had sole discretion to issue margin calls as permitted by the NRLAs. The parties do not address the question of whether EMI was permitted to refuse SRT's directions.[7] To be sure, since SRT and EMI were both controlled by Maass, overlapping motive may exist. Nonetheless, the implied covenant is, by definition, a contractual obligation; defining the contours of SRT's and EMI's separate express and implied contractual obligations under the MLAs is necessary to state a claim. *See Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 (1st Dept 2014) ("breach of the implied covenant of good

[6] The allegations must be pleaded, not proffered as speculation by counsel at oral argument. *See* Dkt. 28 (5/19/16 Tr. at 20) ("This was a conspiracy to basically get their hands on the [] shares and to misappropriate them or to use them for whatever sort of high law, buy low and sell strategy that they intended to do until this came out in the wash. I think discovery will probably enlighten us to what the real intentions was."); *see also id.* at 21 ("it was bogus from the get go, and [] EMI basically was all about getting their hands on the shares.").

[7] Even if SRT's margin calls were wrongful, EMI may not have had the contractual right to refuse to effectuate them. The court expresses no view on this issue since the claim, if it proceeds, must be repleaded for the other reasons set forth herein.

faith and fair dealing is not a tort; rather, it is a contract claim") (quotation marks omitted).[8] The complaint conflates the allegations against SRT and EMI. Discerning the bounds of their implied covenants is virtually impossible on this record. This is a pleading deficiency that may be remedied by amending the claim, which, as noted, should be done in the Related Action.

To the extent the complaint seeks to impose liability for aiding and abetting a fiduciary breach or conversion onto EMI and Maass, such a basis for liability is unavailing. EMI cannot be held liable for aiding SRT's alleged breach of fiduciary duty since SRT, as lender, was not in a fiduciary relationship with Soleil and Grandale. *See Oddo Asset Mgmt. v Barclays Bank PLC*, 19 NY3d 584, 593 (2012) ("there is generally no fiduciary obligation in a contractual arm's length relationship between a debtor and a note-holding creditor. A debtor and creditor have no special relationship of confidence and trust and the relationship is generally controlled by contract.") (internal citations and quotations marks omitted), citing *Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 (1st Dept 2009); *AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568 (1st Dept 2009); *SNS Bank v Citibank, N.A.*, 7 AD3d 352, 354 (1st Dept 2004). SRT, Soleil and Grandale were arms' length lender-borrower counterparties whose duties are governed exclusively by contract. Likewise, Maass cannot be held liable for aiding and abetting EMI's alleged fiduciary breaches since, as discussed, EMI did not have fiduciary duties to Soleil and

[8] At oral argument, counsel for Soleil and Grandale erroneously suggested that the implied covenant sounds in tort because such a breach is a "very, very bad thing." *See* Dkt. 28 (5/19/16 Tr. at 12). That view of the implied covenant is simply wrong and has been rejected by the First Department. *See Smile Train,* 117 AD3d at 630, citing *Canstar v J.A. Jones Const. Co.*, 212 AD2d 452, 453 (1st Dept 1995); *see also Orient Overseas Assocs. v XL Ins. Am., Inc.*, 132 AD3d 574, 576 n.1 (1st Dept 2015) (distinguishing tort and implied covenant claims); *KSW Mech. Servs., Inc. v Am. Protection Ins. Co.*, 40 AD3d 709, 710 (1st Dept 2007) ("[Plaintiff's] allegations of bad faith, in the context of this breach of contract action, 'amount[ ] to nothing more than a claim based on the alleged breach of the implied covenant of good faith and fair dealing, and the use of familiar tort language in the pleading does not change the cause of action to a tort claim in the absence of an underlying tort duty.'"), quoting *N.Y. Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-20 (1995).

Grandale. The aiding and abetting breach of fiduciary duty claims are dismissed. *See Genger v Genger*, 121 AD3d 270, 279 (1st Dept 2014) ("Since [defendant] did not owe a fiduciary duty to plaintiffs, the claims for aiding and abetting [defendant's] purported breach are unavailing").

Nor is there a basis to maintain an aiding abetting conversion claim. Where, as here, the parties' rights to the collateral are expressly governed by contract, a conversion claim does not lie. *See Jeffers v Am. Univ. of Antigua*, 125 AD3d 440, 443 (1st Dept 2015), citing *Fesseha v TD Waterhouse Investor Servs., Inc.*, 305 AD2d 268, 269 (1st Dept 2003). Soleil and Grandale do not plead a duty on the part of SRT arising independently from the MLAs. *See Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320 (1st Dept 2008). Since no viable conversion claim could be maintained against SRT, an aiding and abetting claim is infirm.[9]

Finally, there is no valid, proffered basis to state a claim against Maass personally. EMI's obligations, as discussed, are purely contractual.[10] Maass is not a party to the contracts. *See Leonard v Gateway II, LLC*, 68 AD3d 408 (1st Dept 2009) (breach of contract claim requires privity). Nor is a veil piercing theory of liability asserted. Consequently, the claims against Maass are dismissed. Accordingly, it is

ORDERED that the motion by defendants Emerging Markets Intrinsic, Ltd. (EMI) and Eric M. Maass to dismiss the claims asserted in the complaint is granted with prejudice, except

[9] It should be noted that Soleil and Grandale do not assert conversion claims directly against EMI and Maass. They only assert claims for aiding and abetting SRT's alleged conversion. *See* Complaint at 12-13. Moreover, contrary to the suggestions at oral argument, recovery due to an improper collateral call or the use of Grandale's collateral to meet Soleil's margin call does not require a conversion claim. If the MLA's did not permit SRT to liquidate Soleil's collateral, Soleil may recover under a breach of contract claim. Likewise, if Grandale's collateral was used in a manner not permitted by the MLAs, Grandale also may recover with a breach of contract claim. Conversion, therefore, is not necessary, even as an alternative claim.

[10] The court has no occasion to opine on the question of whether Maass owed a fiduciary duty even though he is not a party to the MLAs. Since EMI was not a fiduciary, any involvement by Maass, who acted on behalf of EMI, could not have amounted to a fiduciary role.

with respect to plaintiffs Soleil Capital Limited's and Grandale Enterprises Limited's claims for breach of the duty of good faith and fair dealing against EMI, which are dismissed without prejudice and with leave to replead in accordance with this decision within 21 days of the entry of this order on the NYSCEF system by filing such claims as third-party claims in the Related Action (Index No. 651987/2015); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 5, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C