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

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GALOPY CORPORATION INTERNATIONAL N.V., Index No.: 151766/2015

Plaintiff, **DECISION & ORDER**

-against-

DEUTSCHE BANK, AG,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Deutsche Bank AG (Deutsche Bank) moves, pursuant to CPLR 3211 and 327(a), to dismiss the Amended Complaint (the AC). Plaintiff Galopy Corporation International, N.V. (Galopy) opposes the motion. Deutsche Bank's motion is granted in part and denied in part for the reasons that follow.

I. Background

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 51)[1] and the documentary evidence submitted by the parties.[2]

This action concerns approximately $62.7 million of proceeds from the unwinding of a bond forward transaction (BFT). The defendant in this action, Deutsche Bank, remitted the proceeds to non-party U21 Casa de Bolsa, C.A. (U21), a Venezuelan brokerage firm that was

[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.

[2] As explained more fully below, the court has considered the parties' extensive supplemental submissions. These submissions include those directed after the originally scheduled February 4, 2016 oral argument, and also those directed after the April 19, 2016 argument. The motion was marked fully submitted on July 1, 2016, after Deutsche Bank filed the "mirror-image" hedge. *See* Dkt. 131.

taken over[3] by the Venezuelan government. Galopy, the plaintiff in this action, claims it was entitled to such proceeds pursuant to an oral agreement between it and Deutsche Bank.

According to the AC, "Galopy is a [Curaçaoan] holding company of an industrial group that originated in the food production and distribution industries in Venezuela." *See* AC ¶ 8. Galopy alleges that, in 2009, it sought to diversify its portfolio by investing in the banking and financial sector in Venezuela which, at the time, like much of the global banking system, was in turmoil. Galopy claims to have paid approximately $200 million in May 2009 to acquire a controlling interest in U21's parent company, Consorcio Credican, C.A. (Consorcio). This acquisition was subject to approval by Venezuelan regulators.[4] According to Galopy, the Venezuelan regulators' chief concern was the need to balance U21's books. Galopy, however, did not wish to actually inject capital into U21 until it knew that its ownership of Concorcio would receive regulatory approval. Galopy sought Deutsche Bank's help in structuring a derivatives transaction that would, from an accounting perspective, satisfy the Venezuelan regulators' concerns and result in regulatory approval. Galopy claims it always intended to capitalize U21 after it received the regulators' blessing, but, apparently, did not want to expose its capital to political risk until actual approval was received.

Galopy, thus far, has proffered a number of conflicting stories regarding its alleged relationship with Deutsche Bank – a hotly disputed issue that remains unclear. Galopy does admit that it never had an account at Deutsche Bank. As a result, all of the subject transactions

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[3] The parties describe the take-over as an "intervention", which they suggest is akin to bankruptcy. The Venezuelan laws applicable to this intervention have not been explained to the court. Therefore, nothing herein should be construed as the court opining on the legitimacy of U21's intervention.

[4] Galopy explains that the regulatory body was called "Comision Nacional de Valores", abbreviated "CNV", and which roughly translates to "National Securities Commission".

were entered into using Deutsche Bank accounts of Galopy's subsidiaries and affiliates, or its Venezuelan financial advisor, non-party Activos Corporativos AG (Activos).[5] Activos was involved in the first of the two derivatives transactions at issue.

While the structure of derivatives can be complex, their purpose, in this instance, was straightforward. Again, the Venezuelan regulators would not permit the Concorcio acquisition to close unless U21's balance sheet reflected ownership of sufficient non-toxic assets. Prior to receiving regulatory approval, Galopy had no intention of actually providing U21 with such assets. Galopy, therefore, sought a means to temporarily improve U21's balance sheet without injecting capital directly into U21. Galopy first attempted to do this with a total return swap (TRS). After that idea was rejected by the regulators, Galopy decided to enter into a BFT, hoping the bond used as the reference security and its notional value would meet the regulators' requirements. This proved troublesome.

TRS and BFT are two types of derivatives. While there are many different types of derivatives (forwards, futures, swaps, etc.), the following is a simplistic example of a derivative. On January 1, A and B agree that, on January 31, A will give one share of IBM to B; and B will give one share of Apple to A. On January 1, shares of IBM and Apple are each worth $1. The risk of this trade is the relative price fluctuation of IBM and Apple between January 1 and January 31. A is taking the long position on Apple – if Apple increases in value relative to IBM, A profits. A has taken the short position on IBM and loses the value of the IBM security it trades to B. The same is true of B's losses and profits in regard to IBM and Apple – if IBM

[5] Without further explanation, Galopy avers that Deutsche Bank "could not accept a direct multi-million dollar transfer from Galopy" due to certain unstated "compliance requirements" related to Galopy being incorporated in Curacao. *See* Dkt. 129 at 26. Galopy claims to have transacted with Deutsche Bank through other companies to not "fall afoul of [Deutsche Bank's] compliance requirements." *See id.*

increases in value relative to Apple, B profits, but Apple's value must be deducted from the value of IBM. In other words, when assessing the value of this trade to A or B, the correct answer is *not* the notional value of the security either is set to receive on January 31. Rather, the value of the derivative is the expected spread between the securities on January 31 – the difference in the value of the securities. On January 31, while A's balance sheet might reflect a marginal increase in the amount of the price of Apple, it also will reflect a marginal decrease in the amount of the price of IBM. Hence, on January 31, the marginal balance sheet effect for A is Apple minus IBM.[6]

Continuing the example above, A and B, ordinarily, do not transact directly. A and B separately transact with a bank via mirror image transactions. In other words, A and B are not in privity with each other; they are in privity with the bank. To explain, A, a client of the bank, asks the bank to enter into an IBM-Apple derivative because A wants to bet on Apple increasing relative to IBM. The bank then finds a counterparty, B, who wants to take the opposite bet, that is, IBM increasing relative to Apple. Two agreements are entered into: (1) A agrees to give IBM to the bank in exchange for Apple on January 31; and (2) B agrees to give Apple to the bank in exchange for IBM on January 31. Under the agreements, on January 31, A provides IBM to the bank, which then gives those shares of IBM to B; and B provides Apple to the bank, which then gives those shares of Apple to A.[7] The bank is net neutral on this trade. A and B take the market

[6] Ergo, here, the value of the BFT to U21 is not $500 million, which is the notional value of the bonds (nor is it the market value of the bonds), but the spread between the bonds' value on the termination date and the value of the money paid for it on that date. The price is locked in at the outset, but the value of the dollar (i.e., the currency) and the value of the bonds will fluctuate between the contract date and the termination date.

[7] Of course, since banks own many shares of publicly traded stocks, which are fungible, A may not get the exact share that B gave the bank. The mechanics of how shares are transferred and

risk, not the bank.[8] For its trouble, the bank gets fees from A and B. This is called market making. Deutsche Bank's role as a market maker in this case is essential to understanding Galopy's allegations, particularly with respect to how the subject BFT was supposedly funded.

Galopy refers to the derivative transactions in this case as "window dressing". *See* Dkt. 129 at 32. It justifies the entry into the BFT as a means to make U21 appear as if its balance sheet had increased in value *in the notional amount* of the reference securities (i.e., the Venezuelan bonds discussed below). Galopy claims it agreed to collateralize the derivative trades between U21 and Deutsche Bank so that U21 could report to the regulators that it had a legal right to approximately $500 million in stable Venezuelan bonds – thereby allegedly demonstrating solvency on the basis of the notional value of the reference securities. Galopy contends that this was legal under Venezuelan law. *See id.* The court expresses no opinion on that contention or the ways in which Venezuelan regulators assess a company's balance sheet. Nonetheless, understanding who allegedly funded the BFT and who was allegedly entitled to claim the BFT's value on their balance sheet is critical to ascertaining the cogency of Galopy's claims in this case.

II. Galopy's Allegations

Galopy alleges that it first attempted to balance U21's books with a TRS,[9] a swap designed to synthetically mirror a transfer of rights in securities without actually transferring title

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the way in which clients' rights to the shares are recorded not relevant to this opinion. *See generally In re Appraisal of Dell Inc.*, 2015 WL 4313206 (Del Ch July 30, 2015).

[8] The bank may take counterparty credit risk (i.e., the risk that A or B becomes insolvent before January 31 and cannot deliver the stock), but the implications of this risk, too, are not relevant here.

[9] It should be noted that in June 2009, before deciding on the TRS, the parties appeared to be contemplating a BFT. *See* Dkt. 106 at 2. However, according to Botella (who was not involved with the TRS), "this bond forward transaction should not be confused with the [BFT] as

to the securities.[10] Galopy claims the TRS operated as follows: "(1) Galopy would deposit $30 million with [Deutsche] Bank; (2) [Deutsche] Bank would then purchase Venezuelan sovereign bonds; and (3) these bonds would be swapped against other bonds held by U21." In other words, a TRS between U21 and Deutsche Bank would be funded by Galopy. As stated above, Galopy, however, was not a client of the Bank and was not a counterparty to the TRS. Contrary to the allegations in the AC, the actual counterparty to the TRS was Activos, Galopy's financial advisor.[11]

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described in the [AC] and was a separate hedging transaction not involving Galopy or U21." *See* Dkt. 100 at 4.

[10] As noted by this court in *Emmet & Co. v Catholic Health E.*, 49 Misc3d 1058, 1064 n.7 (Sup Ct, NY County 2015): "Total return swaps 'are synthetic instruments designed to mimic all aspects (i.e., the 'total return') of a [security] as though the [security] had been purchased itself.' (*In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 995 F Supp 2d 291, 297 [SD NY 2014]; *see CSX Corp. v Children's Inv. Fund Mgt. [UK] LLP*, 654 F3d 276, 279 [2d Cir 2011] ['Total-return swaps are contracts in which parties agree to exchange sums equivalent to the income streams produced by specified assets. ... These contracts do not transfer title to the underlying assets or require that either party actually own them....'].) A total return swap can be used as a regulatory arbitrage mechanism for the purpose of synthetically mirroring the sale of a security without actually transferring title to the purchaser. (*See e.g.* Matt Levine, BloombergView, *Bank of America Mixed Serious Banking and Fun Swaps*, http://www.bloombergview.com/articles/2015-02-11/bank-of-america-mixed-serious-banking-and-fun-swaps [Feb. 11, 2015].)."

[11] Galopy's allegation that it was a counterparty on the TRS is demonstrably false. As discussed further herein, the court-ordered discovery produced by Deutsche Bank, including ESI and recorded telephone calls, make clear that the TRS was a transaction between Activos and Deutsche Bank. *See* Dkt. 102 (9/25/09 email to Bissone, with Botella cc'd, indicating that U21 is the TRS counterparty; Galopy is not mentioned). While Galopy claims that its money was used to fund Activos' TRS trade, that Activos' trade was specifically for the benefit of Galopy, and that Deutsche Bank supposedly knew this, these allegations (the truth and relevance of which are disputed) do not change the actual identity of the swap counterparties. As discussed further herein, while Deutsche Bank may have known the TRS and BFT were for the benefit of Galopy's principal, nothing in the record indicates that the identity of Galopy itself (i.e., the specific legal entity) was ever disclosed to Deutsche Bank. Yet, the alleged oral agreement was not, according to Galopy, with Galopy's principal, but with Galopy itself. Deutsche Bank, however, could not have entered into a contract with an entity whose identity had never been revealed until this lawsuit was threatened. In fact, in Botella's September 19, 2012 email

Galopy explains that on June 11, 2009, it directed Activos to transfer $30 million of money supposedly belonging to Galopy to Deutsche Bank to fund the TRS. Thus, Galopy's alleged right to the money stems from its privity with Activos, not with Deutsche Bank.[12] Regardless, mere weeks after the TRS was entered into, Venezuelan regulators rejected its proposed use to balance U21's books. Activos and Deutsche Bank, therefore, agreed to unwind the TRS. The unwind resulted in a profit of approximately $2 million for Activos. The $32 million[13] of the TRS unwind funds continued to be held by Deutsche Bank, and such funds, indisputably, were held on behalf of Activos. Those TRS unwind funds were later novated by

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(discussed further herein), he did not even expressly claim that the collateral belonged to Galopy. Rather, while claiming to represent Galopy, he stated that the collateral transferred to Deutsche Bank in 2009 belonged to "my group" and that the assets were managed by U21, which, in 2009, was part of that "group". *See* Dkt. 103. He never actually states that the assets belonged to Galopy. This, again, suggests that while the collateral may have belonged to one of Fernandez's companies, Galopy's involvement was never revealed until 2012. This notion is further bolstered by Botella's April 6, 2016 affidavit, where he admits he disclosed his representation of Fernandez's "group" of companies, but does not state that he specifically disclosed Galopy. *See* Dkt. 100 at 2; *see also id.* at 4 ("Galopy's name is not mentioned in the June Recordings. However, Federico Infantino of the Bank does acknowledge in one conversation that Activos is acting on behalf of 'clients.'"). In Galopy's recent interrogatory responses, it states that the "group" includes "literally hundreds" of companies. *See* Dkt. 129 at 27. In any event, in a subsequent, October 3, 2012 email, Botella did expressly take the position that the collateral belonged to Galopy. *See* Dkt. 120. In that email, Botella stated that the securities provided by Galopy "were **intended to be the collateral** for a transaction between Deutsche Bank and [U2l] ... in which [Galopy] **was to be the guarantor** by pledging the abovementioned securities." *See id.* (emphasis added). As discussed herein, in response to the statute of frauds argument raised by Deutsche Bank, Galopy has now repudiated its allegation (also made in the AC) that it was guaranteeing U21's BFT obligations.

[12] The precise identification of swap counterparties is an extremely important issue. Banks must be mindful of the myriad implications that turn on the actual contractual counterparties, such as bankruptcy risk and regulatory issues.

[13] Botella now claims that "the amount was closer to $33.5 million." *See* Dkt. 100 at 6.

Activos to U21 to fund the BFT.[14] It is uncontroverted that those funds were never held in an account belonging to Galopy since it had no account in its own name at Deutsche Bank.

After the regulators rejected the TRS, Galopy sought to enter into an alternative derivatives transaction. In October 2009, Galopy claims to have "seconded" its Managing Director, Pablo Botella, to U21.[15] Galopy alleges that "Botella was tasked with reviewing U21's books and conducting due diligence on the company, seeking ways to improve U21's business operations and financial condition so that [Venezuelan] regulators could approve Galopy's proposed acquisition of [U21's] parent company." *See* AC ¶ 14. Galopy further alleges that Botella began communicating with two Deutsche Bank employees located in its New York office, Juan Bissone and Federico Infantino, to arrange a transaction to do what the TRS failed to accomplish.

The AC alleges:

> Botella [] discussed with Bissone and Infantino the time requirements for any derivative transaction, namely that the transaction would ideally be consummated in the first quarter of 2010. Galopy and the Bank negotiated the terms of the derivative transaction with the understanding that the [Venezuelan regulators] could approve U21's books and the proposed transaction before the end of 2009, allowing Galopy to proceed with its acquisition of U21's parent company. Galopy and the Bank both understood that if this did indeed happen by the end of 2009, then Galopy would infuse U21 with capital in the first quarter of 2010 so that it could recommence operations in the financial sector, and the derivative transaction would be completed at that time, as there would be no more need for the transaction to be carried on U21's books.

See AC ¶ 15. Accordingly, the transaction was intended to be unwound by early 2010, after regulatory approval was granted, at which time Galopy intended to actually infuse capital into

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[14] According to Botella, the TRS was not actually assigned from Activos, but from "AVC Valores", which "is another company within the Activos group." *See* Dkt. 100 at 5.

[15] Botella recently clarified that he "now recall[s] that this actually occurred sometime in late September 2009." *See* Dkt. 100 at 5.

U21. Galopy claims that time was of the essence and that it wanted the transaction submitted for regulatory approval by the middle of November 2009.

In early November 2009, Deutsche Bank proposed structuring the transaction as a BFT. In essence, the BFT was a contract that obligated Deutsche Bank's counterparty to purchase Venezuelan bonds for a sum certain on a designated future date, with collateral provided both upfront and as necessary based on market fluctuations.[16] The AC alleges the following with respect to the BFT:

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[16] Investopedia explains: "The basic characteristics of a forward contract on a bond are very much like those of equity. A bond pays a coupon similar to an equity paying a dividend. The differences are: 1. Bonds mature; this means that contracts must also mature before the maturity date. 2. Bonds can have calls and convertibility. 3. Bonds have a default risk, which means the contract must include remedies for this risk in case it occurs." *See* http://www.investopedia.com/exam-guide/cfa-level-1/derivatives/forward-contracts-on-bonds.asp. Since the parties decided on using a BFT instead of a TRS, it is useful to note that "[t]he difference between a forward contract and a swap is that a swap involves a series of payments in the future, whereas a forward has a single future payment." *See* http://www.investopedia.com/exam-guide/cfa-level-1/derivatives/swaps.asp. Investopedia describes BFTs as follows:

> A bond forward or bond futures contract is an agreement whereby the short position agrees to deliver pre-specified bonds to the long at a set price and within a certain time window. The forward contract is an agreement between two counterparties to exchange bonds at an agreed price and time in the future. The futures contract is typically traded on an exchange and the underlying bond is "standardized". "Standardized" means that it is a fictional bond. The real bonds that can be delivered into the contract are translated into units of the standardized bond through a system of price factors (conversion factors) calculated according to rules determined by the exchange. The individual exchange publishes the criteria determining which bonds can be delivered, as well as the official list of bonds meeting these criteria and their conversion factors. As with other futures contracts, the futures price is set in such a way that no cash changes hands when a contract is entered into. The payments associated with the contract occur as daily price movements are reflected in cash flows into or out of the margin accounts of the contract parties. Bond futures are often very liquid instruments, which gives the user the certainty that he can establish and unwind positions easily and cheaply. The contract is used for hedging, speculation, and arbitrage.

See http://www.fincad.com/resources/resource-library/wiki/bond-forwards-and-futures (paragraph breaks omitted).

[Deutsche] Bank proposed that the BFT would add $400 million of value to U21's books, whereby [Deutsche] Bank would issue a certificate to U21 for $400 million, representing the face value of a bond that U21 could purchase at a later date. Bissone proposed that **Galopy would secure the obligations of U21 by providing approximately $60 million as collateral for the transaction**, noting to Botella that [Deutsche] Bank was holding $32 million of **Galopy's** [really, Activos'] cash from the abandoned TRS transaction that could be used by Galopy as collateral for the BFT. At that time, however, U21 required approximately $500 million in capital to balance its books, and Botella requested that [Deutsche] Bank structure the BFT to cover this $500 million gap in U21's books.[17]

Bissone recalculated the collateral requirement for a $500 million BFT and informed Botella that Galopy's collateral requirements would be increased to $104.5 million. Thus, in addition to the $32 million of Galopy's cash held in the Collateral Account, Galopy would have to deposit an additional $72.5 million with [Deutsche] Bank as collateral. [Deutsche] Bank and Galopy agreed that **the collateral would be designated as having been deposited by Galopy** and that **in the event the BFT was abandoned, the collateral would either remain with [Deutsche] Bank as credited to Galopy** for use as collateral in another transaction that could add value to U21's books **or [Deutsche] Bank would return the collateral to Galopy at Galopy's request**.

[Deutsche] Bank and **Galopy** agreed that the bond that would be the subject of the BFT would be one issued by Petróleos de Venezuela, S.A ("PDVSA"), an oil and gas company owned by [Venezuela]. This bond issuer was chosen because it would increase the likelihood that the BFT would be approved by [the Venezuelan regulators, as they] would not be inclined to declare a PDVSA bond an insubstantial asset that did not add adequate value to U21's books. Galopy and [Deutsche] Bank believed that using the PDVSA bond for the BFT would

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[17] The court relies on this allegation regarding the $500 million to conclude that Galopy wanted to use the notional value of the reference securities to compute the marginal balance sheet impact, as opposed to the value of the BFT itself. If Galopy was indeed agreeing to pay the entire purchase price, instead of U21, then U21 might be able to claim the entire $500 million on its balance sheet since, essentially, U21 was being gifted the bonds. However, as explained herein, Galopy admits it never intended to pay the full purchase price, nor, under the alleged contract, did Galopy have the obligation to do so. Hence, U21 had no basis to expect the receipt of $500 million in bonds since it knew no one was ever going to pay for them. If, however, U21 had the contractual payment obligation to pay for the bonds (as the Confirmation provides), U21 could represent its expectation of receiving $500 million in bonds; but U21 could not represent that the marginal balance sheet impact was $500 million since, as explained earlier, the value of the BFT is the notional or market value of the bonds minus the dollar value of the purchase price on the day it was unwound. Since the bonds cost more than $400 million under the terms of the BFT, the marginal value of the BFT to U21 – if U21 was paying the purchase price – was nowhere near $500 million. The BFT, therefore, could not have resulted in U21's balance sheet increasing in the marginal amount of $500 million.

> facilitate [Venezuelan regulatory] approval of Galopy's acquisition of U21's parent company which both parties expected would happen by the end of 2009. Galopy and [Deutsche] Bank agreed that the BFT would allow for the transaction to be completed in the first quarter of 2010, as Galopy intended on infusing U21 with capital at that time and the bond subject to the BFT could be taken off U21's books. For the BFT, [Deutsche] Bank selected a PDVSA bond with a face value of $500 million that would mature on July 10, 2011, but Galopy and [Deutsche] Bank agreed that the terms of the BFT would allow for completion of the BFT in the first quarter of 2010.

See AC ¶¶ 17-19 (emphasis added).

Even assuming the truth of these allegations, they raise a host of questions, including the conceit that U21's balance sheet assets would increase in the amount of the notional value of the bonds when Galopy's stated intention was to unwind the BFT before U21 would actually receive the bonds [*see supra* n.17]. If, as Galopy alleges, it was never intended that U21 acquire the Bonds at maturity and the BFT was to be unwound and the collateral returned to Galopy,[18] no sane regulator, if apprised of these facts, would assume the BFT would add $500 million in value to U21.[19] The BFT, as alleged, was nothing more than a means for Galopy to avoid injecting the

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[18] As explained below, U21 was never going to own the bonds since neither Galopy nor U21 ever agreed to pay for them. The Confirmation, as discussed below, was never signed by U21. According to Deutsche Bank, this resulted in conflict between it and U21's intervenors that was eventually resolved.

[19] It should be noted that, with respect to the TRS, Galopy states in its interrogatory responses: "consistent with Venezuelan regulatory standards applicable at the time, U21's balance sheet could reflect the notional value of the Venezuelan bonds instead of the market value." *See* Dkt. 129 at 30. With respect to the BFT, Galopy claims: "U21's balance sheet could reflect the notional value of the [Petroleos Bonds] instead of its market value. Specifically, according to the terms of the BFT, Galopy was to provide the collateral and [Deutsche Bank] was to provide U21 with a custody certificate so that U21 could reflect the [Petroleos Bonds] on its balance sheet using the maximum solvency rating as an asset in order to calculate the solvency ratios required. This was an accounting device that was legal in Venezuela at the time." *See id.* at 31. These interrogatory responses miss the point. The issue is not the creditworthiness of the company that issued the bond or the conflation between the notional and market value of the bonds, but the conflation between the value of the BFT itself (the spread between the value of the bonds and the cash paid for them) and the value (notional or market) of the reference securities. U21 entering into a derivatives contract could not result in U21's balance sheet suddenly increasing in the

very capital into U21 that the regulators wanted on U21's books *before* approving the sale. Notwithstanding the fact that Galopy claims it intended to capitalize U21 after regulatory approval, the regulators clearly cared about U21 being capitalized prior to approval. If Galopy's mere promise to capitalize U21 would have assuaged the regulators concerns, there would have been no need to enter into a derivatives transaction with Deutsche Bank.

Turning now to the specifics of the BFT, the AC alleges that on or about November 11, 2009, Botella reached an agreement with Deutsche Bank to post the $104.5 million of collateral in two tranches – the first on November 19, 2009, and the second on November 27, 2009. The first recorded call in the record regarding the BFT occurred on November 13, 2009.[20] Galopy was not discussed on this or any other recorded call in the record. *See* Dkt. 121 at 7 ("On [the November 13] call, Botella states that he would be sending part of the funding for the 'new structure' involving U21 [the BFT] to 'my custody account with [Deutsche Bank].' U21 is the only entity that had a custody account with Deutsche Bank, and Botella does not, as his affidavit suggests, reference Galopy on the call. ... Botella later states, in the same call, that U21 would be obtaining other assets to fund its obligations on the BFT from Banco Canarias (not Galopy), which was U21's indirect parent company.") (citations omitted).

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amount of either the notional or market value of the reference securities. Galopy does not claim that this machination is a legal "accounting device" in Venezuela. On the contrary, it only explains why notional/market value distinction was permitted.

[20] *See* Dkt. 108-115 (calls regarding the BFT between November 13 and 23, 2009); *see also* Dkt. 104-107 (calls regarding the TRS between June 8 and 19, 2009). The parties spoke Spanish on these calls. Both the actual Spanish transcriptions and English translations were submitted by Deutsche Bank. Galopy submitted its own translation with minor differences that do not warrant review at this juncture. *See* Dkt. 97. As discussed at oral argument, since the November 13 call between Botella and Bissone, placed by Bissone from his work phone to Botella's cell phone, began with Bissone referring to Botella as "Pablo", it appears this was not the first time they had spoken. *See* Dkt. 108 at 1. It also appears that there were unrecorded calls.

It was further agreed on a November 16, 2009 call that the first tranche would be comprised of the approximately $32 million in TRS unwind proceeds plus the cash proceeds of a separate sale of bonds alleged to be owned by Galopy, which were held in a Bear Stearns account in New York (the BS Bonds).[21] Since the TRS proceeds were in an account belonging to Activos, Activos novated the right to those proceeds to U21 for use as BFT collateral. On November 17, 2009, Bear Stearns transferred the BS Bonds to U21's account at Deutsche Bank. After accounting for the TRS proceeds and the proceeds from the BS Bonds liquidation, the balance of the required collateral (i.e., $104.5 million minus the TRS proceeds minus the cash generated from the BS Bonds sale) was to be provided on November 27, 2009.

On November 19, 2009, the BS Bonds were sold for approximately $30.7 million, bringing the total collateral contributed to approximately $62.7 million. This meant that approximately $41.8 million of additional collateral had to be provided on November 27, 2009. The day after the BS Bonds were sold, on November 20, 2009, Deutsche Bank sent Botella a "confirmation" that set forth the terms of the BFT (the Confirmation). *See* Dkt. 52.

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[21] Again, Botella does not quite allege that the BS Bonds belonged to Galopy, but that they were "owned by companies within Fernandez's group of companies, deposited at U21 in a brokerage account, and cash from 'Interbursa, another brokerage firm of the group,' again meaning Fernandez's group of companies." *See* Dkt. 100 at 7-8. Botella further claims that "[t]his was perfectly clear to Bissone, and when we spoke about the 'Group,' we were on the same page that this meant the group of companies of which Galopy was a part. Interbursa had absolutely nothing to do with U21." *See id.* at 8. While Botella alleges that Bissone understood that Botella was acting on behalf of the "group", Botella (either intentionally or inartfully) often avoids expressly alleging that he specifically disclosed and intended Galopy, as opposed to the "group", as the party entering into the alleged oral agreement with Deutsche Bank. He does, however, occasionally expressly allege that Galopy was the discussed counterparty, but the conversations where Galopy was supposedly mentioned are not within the universe of recorded calls in the record. *See id.* ("It was on this call that Bissone promised to include Galopy in the Confirmation ... as the party responsible for depositing the collateral for the BFT. I initiated this call, and, as described above, [Deutsche Bank] has not produced any calls originating from me. I may have called his cell phone in that instance and perhaps a recording of this call does not exist.").

By way of background, the contract governing derivatives takes the form of what is known as the "ISDA Master Agreement"[22] as amended by transaction specific confirmations.[23] The ISDA Master Agreement sets forth the general terms governing the parties' trades, and the confirmations set forth transaction specific detail. In this case, the Confirmation makes clear that the BFT was a transaction between U21 and Deutsche Bank. It begins by stating that "[t]he purpose of this [Confirmation] is to confirm the terms and conditions of the [BFT] entered into between [Deutsche Bank, defined as "Party A"] and [U21, defined as "Party B"] on the date hereof (the "Transaction")". *See* Dkt. 52 at 2 (emphasis omitted). It then provides:

> This Confirmation evidences a complete and binding agreement between you and us as to the terms of the Transaction to which this Confirmation relates. In addition, you and we agree to use all reasonable efforts promptly to negotiate, execute and deliver an agreement in the form of an ISDA Master Agreement, (the "Agreement") with such modifications as you and we will in good faith agree. Upon the execution by you and us of such an agreement, this Confirmation will supplement, form part of, and be subject to that agreement. All provisions contained in or incorporated by reference in that agreement upon its execution will govern this Confirmation except as expressly modified below. Until we execute and deliver that agreement, this Confirmation, together with all other documents referring to an ISDA Master Agreement (each a "Confirmation") confirming transactions (each a "Transaction") entered into between us (notwithstanding anything to the contrary in a Confirmation), shall supplement, form a part of, and be subject to, an agreement in the form of the 1992 ISDA

[22] Deutsche Bank submitted the 1992 version for "Multicurrency – Cross Border", which is the version the Confirmation purports to be governed by. *See* Dkt. 68.

[23] *See, e.g., Merrill Lynch Capital Servs., Inc. v Prairie Pride, Inc.*, 2011 WL 1044887, at *1 (SDNY 2011) ("The ISDA Master Agreement sets forth the general terms that govern the interest rate swaps, while the economic terms of a specific interest rate swap transaction are memorialized by a confirmation"); *see also Rodoanel Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 104 (1st Dept 2012), citing *Thrifty Oil Co. v Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F3d 1039, 1043 (9th Cir 2003) ("Almost all interest rate swaps are documented with (1) a confirmation and (2) master agreement. Typically, master agreements are standard form agreements prepared by the International Swaps and Derivatives Association ("ISDA"). The master agreement governs all interest swap transactions between the counterparties. It includes provisions generally applicable to all swap transactions including: payment netting, events of default, cross-default provisions, early termination events and closeout netting").

> Master Agreement (Multicurrency – Cross Border) as if we had executed an agreement on the Trade Date of the first such Transaction between us in such form with the Schedule thereto (i) specifying only that (a) the governing law is New York law, (b) the Termination Currency is U.S. Dollars and (c) Second Method and Loss is applicable, (ii) incorporating the addition to the definition of "Indemnifiable Tax" contained in page 48 of the ISDA "User's Guide to the ISDA 1992 Master Agreements" and incorporating any other modifications to the ISDA Form specified below. In the event of any inconsistency between the provisions of that agreement and this Confirmation, this Confirmation will prevail for the purpose of this Transaction.

See id.[24]

After these prefatory provisions, the Confirmation sets forth the terms of the BFT. Section 1 contains General Terms, including the Trade Date (November 16, 2009), the Effective Date (November 19, 2009), and Scheduled Termination Date (July 10, 2011). *See id.* at 3. In other words, the trade was agreed to in November 2009 and, at the latest, had to be unwound by July 10, 2011. Section 1 details the bonds being swapped (the Reference Obligation) – bonds of Petroleos de Venezuela S.A. with a Maturity Date of July 10, 2011, a (notional) Face Amount of $500 million, and a market value of $400 million (the Petroleos Bonds). *See id.*

Section 2 then sets forth the terms of how the collateral is to be exchanged. As stated in the AC, approximately $62.7 million would be provided on November 19, 2009 and approximately $41.8 million would be provided on November 27, 2009. *See id.* Section 2

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[24] The Confirmation also provides:

> The definitions and provisions contained in (a) the 2006 ISDA Definitions and (b) the 2003 ISDA Credit Derivatives Definitions as supplemented by the May 2003 Supplement to the 2003 ISDA Credit Derivatives Definitions (together, the "Credit Derivatives Definitions"), each as published by the International Swaps and Derivatives Association, Inc., are incorporated into this Confirmation. In the event of any inconsistency between the 2006 ISDA Definitions and the Credit Derivatives Definitions, the 2006 ISDA Definitions will govern. In the event of any inconsistency between either the 2006 ISDA Definitions or the Credit Derivatives Definitions and this Confirmation, this Confirmation will govern.

See Dkt. 52 at 2.

makes clear that only Party B (U21) is providing collateral and that Party A (Deutsche Bank) is not putting up any collateral. *See id.*

Section 3 specifies the settlement terms, that is, the cash and securities to be provided on the scheduled settlement date of July 10, 2011. *See id.* at 4. Section 3 states that "[o]n the Settlement Date, (a) Party B shall pay to Party A the USD Notional Amount and (b) subject to the provisions relating to Settlement Disruption and Accelerated Termination, Party A shall deliver to Party B the Reference Obligation." *See id.* That is, U21 would send the rest of the cash owed on the BFT to Deutsche Bank and Deutsche Bank would send the Petroleos Bonds to U21. The notional cash balance was $334.25 million.

The above quoted language from section 3 provides that settlement could occur on a date other than July 10, 2011 upon a Settlement Disruption or Accelerated Termination (or, as discussed below, upon an Event of Default). Settlement Disruption is defined in section 3 to address "an event beyond the control of the parties hereto that prevents settlement pursuant to this Section 3 on a day that but for the occurrence of such event (a "Settlement Disruption Event") would have been the Settlement Date." Early unwind also was permitted under the Accelerated Termination Provisions in section 4,[25] which lists five possible Accelerated Termination Events: "(a) Failure to Pay; (b) Obligation Default; (c) Repudiation/Moratorium; (d) Restructuring; and (e) the termination of any Hedging Transaction that Party A has entered into in connection with this Transaction, including, for the avoidance of doubt, the Bond Forward

[25] As noted, Galopy was hoping to have regulatory approval and unwind the BFT by December 2009 or January 2010.

Transaction."[26] *See id.* This section contains extensive definitions of these events and sets forth how the BFT is to be unwound. *See id.* at 5-9.

Section 7 addresses Deutsche Bank's right to use U21's collateral to secure its obligations under the Confirmation. *See id.* at 12. Section 7(b)(iii) provides that failure by U21 to furnish all required collateral is an Event of Default that permits Deutsche Bank to terminate and conduct an early unwind of the BFT. *See id.* at 12-13. In addition to the collateral provided at the outset, Deutsche Bank was entitled to demand additional cash collateral depending on changes in the market value of the Petroleos Bonds. *See id.* at 13.

Section 10 asserts that the parties' are acting in an arms' length capacity and are not fiduciaries. *See id.* at 15. Section 10(c) continues: "[t]he parties hereby agree that this Confirmation shall supersede and replace all prior communication between the parties hereto with respect to this Transaction." *See id.* The Confirmation, which was executed by Deutsche Bank, concludes by stating: "Please confirm your agreement to be bound by the terms of the foregoing by executing a copy of this Confirmation and returning it to us by facsimile". *See id.* at 16. U21's signature line is left blank. *See id.*

Galopy alleges that Botella never signed the Confirmation because:

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[26] Here, as discussed further below, Deutsche Bank entered into a "mirror image" hedging transaction with another client that would be the source of the Petroleos Bonds that were required to be produced on July 10, 2011, and which, allegedly, was intended to be unwound early along with U21's BFT (it is unclear if the mirror-image counterparty knew of the intention to unwind early). *See* Dkt. 131 (November 20, 2009 confirmation of mirror-image hedge between Deutsche Bank and Factor AG Servicios Financieros CA [Factor]) (the Hedge Confirmation). The hedge was discussed with Botella on the November 16 call. *See* Dkt. 110 at 6. It should be noted that the version of the Hedge Confirmation submitted by Deutsche Bank is executed by Deutsche Bank, but is not signed by Factor. *See* Dkt. 131 at 15. It is unclear from the record whether it was ever signed by Factor, nor is it clear how much money and/or Petroleos Bonds were exchanged between Deutsche Bank and Factor.

> In the morning of November 20, 2009, [Deutsche] Bank sent Galopy [the Confirmation] ... When Botella reviewed the Confirmation, which had only been signed by [Deutsche] Bank, **he noticed several errors that were inconsistent with the terms of the BFT agreed to by the parties**, the most glaring of which was that **[it] failed to state that Galopy was the responsible party for the collateral for the BFT**. Later that morning, Botella called Bissone in New York, noting that the Confirmation failed to state that Galopy was the source of funds transferred to [Deutsche] Bank and that the deposit made by Galopy had to be designated as collateral for the transaction, rather than a payment to [Deutsche] Bank from U21. Botella communicated to Bissone his concern that the Confirmation as drafted would have put U21 in a precarious situation, jeopardizing Galopy's acquisition of U21's parent company.

See AC ¶ 25 (emphasis added).[27] In other words, according to Galopy, the agreement was not to merely enter into a BFT with U21 and Deutsche Bank as counterparties, but to paper Galopy's role as the party responsible for putting up the collateral.[28]

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[27] Deutsche Bank claims no such conversation occurred:

> ... no such call was among the more than 190 hours of calls reviewed. Instead, there are three recorded phone calls from Monday, November 23, 2009, which indicate that the Bank was willing to accept an amendment proposed by U21 to downsize the BFT to an amount consistent with the $62.7 million [Deutsche] Bank had already received from U21, because U21 would not be able to generate the cash for the second installment. There is no discussion about documenting Galopy's purported role in any of these November 23, 2009 calls.
>
> As discussed on the November 23, 2009 calls, [Deutsche] Bank sent a proposed amended confirmation to Botella (at his U21 email address) on that same date. That amended confirmation was never signed, and there are no emails from Botella to anyone at the Bank between November 23, 2009 and September 19, 2012.

See Dkt. 121 at 10-11 (citations omitted). Botella, however, claims that the November 20 call may have been initiated from his cell phone, which may not have been captured by the court ordered discovery. This is not implausible, as it appears the parties did indeed communicate by cell phone. *See* Dkt. 107 at 2-3 (6/19/09 call indicating the parties would text and talk using cell phones); *see also* Dkt. 108 at 1.

[28] The court must (for the purposes of this motion) assume this allegation to be true, but notes that the prior TRS, which Galopy claims to have funded, never identified Galopy in the governing documents or wire transfers. Perhaps more fundamentally, even if U21's collateral obligations were being met by another entity, Deutsche Bank could not have identified Galopy as the party responsible for the collateral if Botella never disclosed the name of the entity he was

Galopy also claims that it was concerned the Confirmation could impact Venezuelan regulatory approval. It explains:

> The Confirmation erroneously stated that U21 had made a payment of $62,706,319.96 on November 19, 2009 and was to make a further payment of $41,793,680.04 on November 27, 2009. **As the Confirmation would have been submitted for review by [the Venezuelan regulators]**[29] in connection with U21's financial statements, [the Venezuelan regulators] could have accused U21 of misrepresentation of its financial situation as contained in those financial statements, as the payments of $104,500,000 would not and could not have been accounted for in U21's books. Botella conveyed to Bissone how this situation could jeopardize Galopy's planned acquisition of U21's parent company, and **Bissone agreed that the Confirmation needed to be revised.**

See AC ¶ 26 (citation omitted; emphasis added).

Galopy alleges that "Bissone promised Botella that he would redraft the Confirmation to correctly reflect, among other things, that Galopy had placed the $62,706,319.96 as collateral for the BFT and was the party responsible for depositing the remainder of the collateral by November 27, 2009." *See* AC ¶ 27. "Ultimately, however, Bissone never sent Galopy a revised Confirmation, which remains unsigned except for the Bank's signature." *Id.*[30] Nonetheless,

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working for. While Bissone may have understood that Botella's role at U21 and the BFT were for the benefit of U21's parent, it is far from clear that Botella specifically disclosed Galopy as the entity he was working for until 2012. *See* Dkt. 103.

[29] This allegation cuts against the notion that Galopy was trying to deceive the regulators about its role in the transaction. However, the BFT, as alleged in the AC, should not have added $500 million in value to U21's balance sheet if only the collateral was being provided by Galopy, while the actual obligation to pay for the Petroleos Bonds belonged to U21. As discussed, that would mean U21's balance sheet should, at most, only increase in the amount of the Petroleos Bonds minus $334.25 million, the remaining amount owed for the Petroleos Bonds. Moreover, if Galopy contends it agreed to be obligated to make full payment for the Petroleos Bonds if the BFT was not unwound before July 2011, that obligation, a guaranty *and* an obligation that cannot be performed within one year, would run afoul of the statute of frauds.

[30] A proposed amended confirmation, which reduced the transaction size from $500 million to $283.5 million, was allegedly sent to Botella's U21 email address, but Botella claims to have never seen it. *See* Dkt. 94 at 7 (Botella "never received or read the Amended Confirmation until Defendant's document production of March 18, 2016, and attributes this to the fact that he could

Galopy insists that certain provisions in the Confirmation evidence the terms of the parties' oral agreement. *See id.*

Bissone and Botella were to meet in Venezuela during the last week of November 2009. That meeting never occurred. Galopy claims that "[a]round this time, Venezuela's then-President Hugo Chavez was embarking on a plan to bring financial institutions under the State's control in order to fund Venezuela's enormous public debt and fund social programs on which his popularity was dependent." *See* AC ¶ 29. Galopy explains that "[p]rivate sector takeovers were a hallmark of Chavez's tenure as President, and in 2009-2010, he focused his attention on the finance industry, seizing more than a dozen banks in 2010 alone." *See id.* Galopy further explains that "[i]n the afternoon of November 20, 2009, Galopy's beneficial owner, Ricardo Fernández Barrueco [Fernandez], was arrested by Venezuelan authorities on politically-motivated charges, for which he was eventually acquitted" and that "Botella was forced to flee the country the following week." *See* AC ¶ 30.

Six days after Fernandez's arrest, on November 26, 2009, "the Venezuelan government announced the intervention and takeover of U21 and began to seize U21's assets. Venezuelan government officials entered U21's offices and began communicating with U21's counterparties, including [Deutsche] Bank." *See* AC ¶ 31. At this point, Botella could no longer act on behalf of U21. Venezuelan government officials were negotiating with Deutsche Bank to unwind the

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only access his U21 email account from U21's offices and may have not visited the offices between his conversations with Bissone on November 23 and his flight from Caracas on November 27, 2009."); *see also* Dkt. 100 at 9 ("I do not remember if I ever returned to the office that day or in the days leading up to my flight from Caracas on November 27, 2009. I can confirm, however, that I never received the email and attachment sent by Bissone to me at my U21 email address on November 23, 2009, whereby he transmits the 'amended' Confirmation. I did not have remote access to my U21 email account and only had access to it when I was physically at U21's offices.") (citation omitted). The amended confirmation was never signed, either by Deutsche Bank or U21. *See* Dkt. 99 at 17.

BFT and remit the collateral to the Venezuelan government (via U21). Galopy claims the Venezuelan government pressured Deutsche Bank, threatening Deutsche Bank's ability to conduct lucrative business with the Venezuelan government unless it acceded to the government's demands regarding the BFT collateral.[31]

In January 2010, Deutsche Bank agreed to unwind the BFT. The proceeds of the unwind – approximately $20 million in cash and $40 million in Petroleos Bonds – were remitted to U21 minus a $6 million fee. Botella had expressly agreed to pay Deutsche Bank a $6 million fee on the November 16, 2009 call. *See* Dkt. 110 at 5. Galopy claims that the Venezuelan government shut down U21 after the BFT unwind was completed.

After "the legal problems in Venezuela began to subside for Galopy and its principal, … Botella reached out on September 19, 2012 in an email to [Deutsche] Bank to inquire about the status of the [BFT] transaction." *See* AC ¶ 37.[32] On October 1, 2012, Botella received the following response: "Deutsche Bank does not discuss confidential information with third parties. Any further requests will be dealt with by DB Corporate Security." *See id.* The AC claims that by letter dated October 4, 2012,[33] Botella took the position that the BFT collateral was Galopy's and sought "guidance on how to address this issue." *See* AC ¶ 38. Galopy claims it first became

[31] Deutsche Bank denies these allegations and maintains that all of its actions, including its transfer of the collateral to U21, were not only legal, but expressly required by Venezuelan law.

[32] The September 19, 2012 email is the first time that the word "Galopy" appears in any of the documents, emails, or telephone call transcripts in the record. Despite the terms of the BFT being negotiated orally on recorded telephone calls that are devoid of the word "Galopy", Galopy claims that it was agreed that Galopy was one of the contracting parties. To be sure, as noted herein, Deutsche Bank may have understood that the collateral was not being provided by U21, but from another company represented by Botella. However, the allegation that such company was Galopy, as opposed to some unknown, unstated entity (i.e., part of the "group"), is not supported by any evidence in the record (but is nonetheless assumed to be true on this motion to dismiss). As previously noted, Galopy admits that its owner, Fernandez, owns myriad companies with connections to U21.

[33] Galopy, perhaps, meant to refer to Botella's October 3, 2012 email. *See* Dkt. 120.

aware that the collateral had been liquidated five months later, in March 2013. Galopy then retained a Spanish law firm, which sent letters to Deutsche Bank regarding the collateral in June 2013. Deutsche Bank responded to that law firm on September 5, 2013, writing:

> To date, we have been unable to locate a record of a business relationship between Deutsche Bank and Galopy. Indeed, the securities listed in your letter were not held by or on behalf of Galopy. Because Deutsche Bank cannot discuss confidential information with third parties, it cannot provide you with more details at this time. If your client has any information that contradicts the above, please provide it to Deutsche Bank as soon as possible.

See AC ¶ 40. Further negotiations proved fruitless.

III. Procedural History

On February 23, 2015, Galopy commenced this action by filing its original complaint, which contains six causes of action: (1) breach of fiduciary duty; (2) money had and received; (3) unjust enrichment; (4) aiding and abetting (the Venezuelan government's alleged) fraud; (5) commercial bad faith; and (6) negligence. *See* Dkt. 1. Galopy's theory, essentially, was that the Venezuelan government's takeover of U21 and seizure of the BFT collateral was fraudulent and that Deutsche Bank should be held liable for aiding that fraud. On April 3, 2015, Deutsche Bank moved to dismiss the original complaint. Aside from arguing that Galopy failed to properly plead its causes of action, it sought dismissal under the "Act of State Doctrine" and on the basis of *forum non conveniens*. At oral argument, the court made clear that it would not dismiss the case on *forum non conveniens* grounds given the extensive involvement of Deutsche Bank's New York employees in the underlying events. *See* Dkt. 48 (8/20/15 Tr.). The court, however, reserved on the motion to address the other (apparently meritorious) arguments raised by Deutsche Bank regarding the viability of Galopy's tort and quasi-contract claims. Notwithstanding the merits of those claims, and notwithstanding Galopy's original (erroneous)

belief that any contract claim would run afoul of the statute of frauds, it was clear to the court that, if Galopy has a meritorious claim, it is breach of an alleged oral agreement with respect to the BFT collateral. If no such agreement was reached, then Galopy could not have been wronged by Deutsche Bank. In other words, if Deutsche Bank never agreed to return the collateral to Galopy when the BFT was unwound, then Deutsche Bank did nothing wrong. The alleged oral agreement is the lynchpin of Galopy's claims.

Pursuant to a stipulation so-ordered on October 19, 2015, Deutsche Bank consented to Galopy filing an amended complaint, and agreed that its original motion to dismiss should be denied as moot. *See* Dkt. 53. Given Galopy's troubling allegations and its complete lack of access to proof in light of what happened to Fernandez and Botella,[34] the court ordered limited financial discovery regarding the TRS and BFT transactions.

Galopy filed the AC on October 15, 2015. *See* Dkt. 51. It contains four causes of action: (1) breach of contract; (2) promissory estoppel; (3) money had and received; and (4) unjust enrichment. Simply put, Galopy wants damages in the amount of the BFT unwind proceeds (approximately $62.7 million) pursuant to its alleged oral agreement with Deutsche Bank. It also claims a right to quasi-contract recovery of Deutsche Bank's $6 million fee, which it contends was taken by Deutsche Bank in breach of their alleged oral agreement.[35]

On November 10, 2015, Deutsche Bank moved to dismiss the AC. It argues that the statute of frauds bars Galopy's claim for breach of the alleged oral agreement, that the quasi-

[34] In addition to their legal troubles in Venezuela, Botella lost his ability to access his U21 email account, including his emails with Deutsche Bank.

[35] This claim, as explained below, is duplicative at best. If there was no agreement with Galopy, it cannot claim entitlement to the $6 million fee. That fee was taken out of the BFT unwind proceeds that were otherwise remitted to U21. If Galopy has no right to the funds sent to U21, it has no claim to the $6 million fee.

contract claims cannot be maintained where the contract claim is barred by the statute of frauds, and that the alleged oral agreement is not pleaded sufficiently because its essential terms are not clearly set forth in the AC. Moreover, Deutsche Bank continues to maintain that this case should be litigated in Venezuela.[36]

Oral argument, originally, was scheduled for February 4, 2016, but was adjourned pending the submission of limited ESI and the discussed recorded phone conversations, which, presumably, would evidence the parties' agreement with respect to the TRS and BFT. *See* Dkt. 92 (2/4/16 Tr.). Deutsche Bank's production obligations are set forth in an order dated February 11, 2016. *See* Dkt. 89. After submission of supplemental briefing to address this discovery, which included translated transcripts of the telephone calls, the court reserved on the motion after oral argument. *See* Dkt. 123 (4/19/16 Tr.).

During a discovery conference held immediately thereafter, it became apparent that there are serious holes in the story set forth in the AC. Galopy's counsel could not provide answers to basic questions regarding the TRS and BFT. To address these concerns, Galopy was ordered to respond to Deutsche Bank's interrogatories regarding these issues. *See* Dkt. 125. Deutsche Bank was ordered to produce the Hedge Confirmation. *See id.* On June 3, 2016, Galopy's newly retained co-counsel filed notices of appearance. On June 14, 2016, at the court's direction, Galopy e-filed its interrogatory responses. *See* Dkt. 129. On July 1, 2016, Deutsche Bank filed the Hedge Confirmation. *See* Dkt. 131.

[36] While this argument was rejected on the August 20, 2015 record, Deutsche Bank asserts it here to preserve the issue on appeal. Since the prior motion was denied as moot, and not formally on the merits, Deutsche Bank could not appeal the court's forum non conveniens decision if it did not raise the argument on this motion.

Galopy's newly retained co-counsel also took the liberty of filing an unsolicited letter in which it, in the clearest form to date, articulates Galopy's allegations. *See* Dkt. 128. While that submission violates the court's rules, the court reproduces the letter's description of Galopy's allegations:

> ➢ [Galopy] was to provide $104.5 million as collateral in exchange for [Deutsche Bank's] issuance of a certificate to [U21] evidencing [Deutsche Bank's] custody of a $500 million bond [i.e., the Petroleos Bonds] on U21's behalf, to bolster U21's balance sheet in order for [Galopy] to obtain regulatory approval by the end of 2009 for its acquisition of U21 in early 2010. (As it turned out, as of November 20, 2009, [Galopy] had provided $62.7 million in collateral out of the $104.5 million.)[37]
>
> ➢ The parties understood and agreed that after securing regulatory approval in late 2009, the [BFT] would be unwound in 2010 so that [Galopy] could inject new capital into U21 in the form of the collateral (less [Deutsche Bank's] fees) and other funds.
>
> ➢ Once the [BFT] was unwound as planned, [Deutsche Bank] would receive a $6 million fee out of the second tranche of collateral to be deposited by [Galopy] in return for providing the certificate. Thus, in exchange for the custodial certificate, [Deutsche Bank] would receive $104.5 million as collateral; and upon the return of the certificate, a $6 million transaction fee.
>
> ➢ If the transaction [was] abandoned or not consummated (as occurred here), Defendant would return to Plaintiff its collateral and take no fees.
>
> ➢ These terms were to be confirmed in writing by [Deutsche Bank].

See Dkt. 128 (arrows in original).

According to these allegations, the intention was to unwind the BFT in early 2010 and, upon such unwind: (1) the collateral for the BFT plus additional money would be given to U21; (2) Deutsche Bank would keep the Petroleos Bonds (and presumably remit them to Factor, its

[37] The bracketed text is added by the court, but the text in parenthesis (e.g., "As it turned out ...) is in the original.

mirror image hedge counterparty);[38] and (3) Deutsche Bank would get a $6 million fee. Moreover, if the BFT was "abandoned or not consummated" (e.g., as here, based on non-payment of the second tranche of collateral), the first tranche of collateral was to be refunded to Galopy, and Deutsche Bank would not get any fee.[39]

These allegations do not address how the balance of the purchase price ($334.25 million), due on July 10, 2011, would be funded, an unnecessary allegation if, as Galopy has consistently contended, the BFT was to be unwound prior to the purchase of the Petroleos Bonds. In effect, Galopy contends that it and Deutsche Bank *never reached an agreement regarding payment for the Petroleos Bonds.* Rather, they agreed that Galopy would temporarily deposit $104.5 million with Deutsche Bank for a period of approximately two months; Deutsche Bank would tell the Venezuelan regulators that U21 had the right to $500 million in Petroleos Bonds; and after the Venezuelan regulators approved Galopy's acquisition of U21's parent company, Galopy would get its $104.5 million back minus Deutsche Bank's $6 million fee. Essentially, the parties'

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[38] As noted earlier, the Hedge Confirmation was not executed by Factor. The court, therefore, will not speculate about how the Petroleos Bonds were intended on being transferred since it is not clear if the terms set forth in the Hedge Confirmation were actually agreed to. Nor is it clear if Factor understood that Galopy and Deutsche Bank intended to unwind the BFT by January 2010 or if the Petroleos Bonds (or the Collateral owed by Deutsche Bank to Factor under section 2 of the Hedge Confirmation, which mirrors U21's collateral deadlines of November 19 and 27, but differs in amount) (*see* Dkt. 131 at 3) were ever meant to change hands at all. These questions can be clarified in discovery. It should be noted, however, that while the Hedge Confirmation mirrors the Confirmation in many respects, such as having a July 10, 2011 termination date, it addresses a situation where the trade with Factor is terminated before January 15, 2010. *See id.* at 7. This January 15, 2010 deadline appears in the corresponding section in the Confirmation. *See* Dkt. 52 at 8.

[39] This implies that Deutsche Bank would have to enter into a hedge transaction in connection with the first collateral tranche before its right to a fee became certain. As noted, both Confirmations have identical cash collateral deadlines. Yet, since nether of the Confirmations were fully executed, it is unclear what happened to the cash collateral transfers or if the TRS unwind proceeds or the BS Bonds sale proceeds were used to fulfill Deutsche Bank's collateral obligations to Factor.

alleged agreement was that Galopy would post collateral and pay a $6 million fee in consideration for Deutsche Bank telling the Venezuelan regulators that U21 had the right to $500 million in Petroleos Bonds. Ergo, in reality, the parties do not appear to have agreed to a bona fide bond forward transaction, since an essential element of a BFT is payment for the bonds.[40] Hence, the Confirmation, which documents a bona fide BFT, does not reflect the alleged oral agreement.

With this background in mind, the court now turns to the issues raised in Deutsche Bank's motion.

IV. Discussion

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 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

[40] Galopy never alleges who had the obligation to pay for the bonds. At oral argument, the court asked Galopy's counsel to explain which funds were meant to be used as collateral and which funds were meant to be used to actually pay for the Petroleos Bonds. *See* Dkt. 123 (4/19/16 Tr. at 36). He had no idea. *See id.* ("THE COURT: So where was the money going to come from for the transaction itself? MR. SELVARATNAM: I guess in part from these funds, Your Honor."). Galopy then refused to provide a clear answer to this question in its interrogatory responses. *See* Dkt. 129 at 32 ("Galopy objects to this Interrogatory on the grounds that [Deutsche Bank], as the party that held the collateral for Galopy's benefit in one of [Deutsche Bank] bank accounts, knows exactly what happened to the collateral and how it was applied and used during the relevant time period.").

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 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).

Despite the parties' breadth of disagreement, they do agree on one legal issue – if Galopy's allegation is that it orally agreed to guaranty U21's payment obligations on the BFT, such claim would be barred by the statute of frauds. *See* General Obligation Law (GOL) § 5-701(a)(2). While the AC alleges that "Galopy had deposited the Collateral for the BFT and served as guarantor for the transaction" [*see, e.g.*, AC ¶ 38], Galopy now abandons that position. Galopy now contends that its agreement with Deutsche Bank was only to post collateral in consideration for Deutsche Bank presenting the regulators with documentation demonstrating that U21 had the right to the Petroleos Bonds. As Galopy correctly avers, this allegation does not involve Galopy agreeing to answer for U21's liability on the BFT and, thus, is not a "an agreement to pay a debt owed by another which creates a secondary liability." *See Midland Steel Warehouse Corp. v Godinger Silver Art Ltd.*, 276 AD2d 341, 343 (1st Dept 2000).

Deutsche Bank, however, contends that the alleged oral agreement could not be performed within one year and, therefore, is barred by the statute of frauds. *See* GOL § 5-701(a)(1). "In order to remove an agreement from the application of the statute of frauds, both

parties must be able to complete their performance of the contract within one year." *Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 560 (2004), citing *Cron*, 91 NY2d at 367-68. "It matters not that completion of performance within one year may be unlikely or improbable." *Foster v Kovner*, 44 AD3d 23, 26 (1st Dept 2007). The relevant inquiry is whether the agreement has "**absolutely no possibility** in fact and law of full performance within one year." *JNG Const., Ltd. v Roussopoulos*, 135 AD3d 709, 710 (2d Dept 2016) (emphasis added), quoting *D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 454 (1984) ("courts have generally been reluctant to give too broad an interpretation to this provision of the Statute and instead have limited it to those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year"); *see also Fin. Structures Ltd. v UBS AG*, 77 AD3d 417, 418 (1st Dept 2010) ("The fact that full performance within one year was unlikely or improbable does not make the agreement subject to the statute of frauds"). Simply put, "[a]s long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame." *JNG*, 135 AD3d at 710, quoting *Cron*, 91 NY2d at 366.

In this case, the alleged oral agreement was capable of being performed within one year. According to Galopy, the parties' intention was to unwind the BFT within 2-3 months. In fact, even if the Confirmation reflected the parties' actual agreement, the Confirmation sets forth myriad circumstances in which the BFT could be unwound within one year, prior to its July 2011 termination date. Consequently, under any permutation of the proposed BFT transaction, the

parties' agreement *could* be fully performed within one year. Consequently, the statute of frauds does not apply.[41]

Next, Deutsche Bank contends that the oral agreement alleged in the AC is pleaded in such an indefinite manner that it fails to include all material terms of the contract. "The doctrine of definiteness or certainty is well established in contract law. In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to." *166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 (1991). "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract." *Id.*, quoting *Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Express Indus. & Terminal Corp. v N.Y. State Dep't of Transp.*, 93 NY2d 584, 589 (1999), citing *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 (1981). That being said, the Court of Appeals has long cautioned against an overly rigid application of the definiteness requirement. *See id.* ("Of course, not all terms of a contract need be fixed with absolute

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[41] Deutsche Bank correctly argues that, if Galopy's breach of contract was barred by the statute of frauds, the claim could not be reasserted with promissory estoppel, unjust enrichment or money had and received claims. "[Q]uasi contract and tort claims are 'not viable when [they] merely seek[ ] the enforcement of the unenforceable contract itself.'" *Komolov v Segal*, 2015 WL 3989028, at *5 (Sup Ct, NY County 2015), quoting *Komolov v Segal*, 40 Misc3d 1228(A), at *4 (Sup Ct, NY County 2013) ("This would permit an end- run around the statute of frauds; every time a claim for breach of a real estate contract was dismissed for lack of a written contract, a plaintiff, nonetheless, could enforce the contract by maintaining an unjust enrichment claim."), *aff'd* 117 AD3d 557 (1st Dept 2014) (The ... cause of action for unjust enrichment is precluded in this case because it seeks precisely the same relief that was barred by the statute of frauds."); *see also Almeciga v Ctr. for Investigative Reporting, Inc.*, 2016 WL 2621131, at *5 (SDNY 2016) (Rakoff, J.) (same; collecting cases), accord *Kocourek v Booz Allen Hamilton Inc.*, 71 AD3d 511, 512 (1st Dept 2010) ("The unjust enrichment claim was also properly dismissed, as litigants may not use such a claim to evade New York's statute of frauds"). This issue, however, is academic because the statute of frauds does not apply.

certainty; at some point virtually every agreement can be said to have a degree of indefiniteness [...]. While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be pedantic or meticulous in interpreting contract expressions") (citations and quotation marks omitted); *see also Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 61 (1st Dept 2015) ("all the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy"); *Basu v Alphabet Mgmt. LLC*, 127 AD3d 450 (1st Dept 2015) ("The court correctly found that the claimed oral agreements are not as a matter of law unenforceable for indefiniteness, since there may exist an objective method for supplying the missing terms").

Applying these principles, and being mindful that the court must construe "the complaint liberally," grant plaintiff "every favorable inference" [*see Chanko v Am. Broad. Cos.*, 27 NY3d 46, 56 (2016)], permit the plaintiff "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims" with supplemental affidavits [*see Cron*, 91 NY2d at 366], the court denies Deutsche Bank's motion to dismiss Galopy's breach of contract claim. It is of no moment that Deutsche Bank contends that the alleged oral agreement seems suspect or that, in light of the recorded conversations, Galopy's allegations do not smack of plausibility. To dismiss a breach of contract claim, an essential element must be omitted from the complaint or the documentary evidence must utterly refute the claim's viability. There is no requirement, in this court, that the allegations be plausible. On the contrary, pursuant to CPLR 3013 and 3014, plaintiff is merely required to satisfy a "notice pleading" standard.[42]

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[42] *Cf. Catalano v BMW of N. Am., LLC*, 2016 WL 3406125, at *2 (SDNY 2016) ("If the court can infer no more than 'the mere possibility of misconduct' from the factual averments—in other words, if the well-pleaded allegations of the complaint have not "nudged claims across the line from conceivable to plausible,' dismissal is appropriate.)", quoting *Bell Atl. Corp. v Twombly*, 550 US 544, 555 (2007); *see* Robert L. Haig, 2 N.Y. Prac., Com. Litig. in New York State

Nevertheless, Galoply's allegations all turn on whether it reached a meeting of the minds with Deutsche Bank in the manner alleged. Either the parties reached an agreement on Galoply's right to the collateral or they did not. If they did not, the only reasonable inference that can be drawn from the AC is that the collateral provided to Deutsche Bank was U21's money. After all, the TRS funds were novated by Activos to U21, and the BS Bonds were placed in U21's account. That Galopy may have been the ultimate beneficiary of the BFT is of no moment. All parent entities have an indirect interest in their affiliates' transactions. Yet, if an affiliate enters into a transaction that goes awry, the parent, under ordinary circumstances, has no claim for relief. Here, if Galopy did not actually reach an agreement with Deutsche Bank that made clear that the collateral was Galopy's property, then such collateral, as far as Deutsche Bank was concerned, belonged to U21. Indeed, if the collateral, once deposited in U21's account, was U21's property under Venezuelan law, and if Venezuelan law required Deutsche Bank to remit the funds to the Venezuelan government after U21 was intervened, Galopy cannot claim a right to the collateral. Even if Galopy was the source of the funds, it, as a sophisticated commercial actor, must have been aware of the implications of depositing money into an account belonging to a subsidiary – especially an entity it did not yet own. If Deutsche Bank is correct that it had a legal obligation to remit the funds to U21's intervenors, it cannot have liability for breaching its alleged agreement with Galopy since performance of that agreement was legally impossible, and

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Courts § 12:28 (4th ed.) ("Perhaps the most important distinction [between state and federal pleading standards] is the 'plausibility' standard in federal practice under the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, *Ashcroft v. Iqbal* and their progeny. Under this precedent, a complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level' so as to state 'a claim to relief that is plausible on its face,' rather than merely 'conceivable.' ... **There is no equivalent to the federal 'plausibility' requirement in state court**. Rather, CPLR 3013 merely requires pleadings to be 'sufficiently particular to give the court and parties notice' of the facts underlying the parties' claims and defenses. For most causes of action, this liberal standard is met 'so long as the pleading gives notice to an adversary of the transactions or occurrences giving rise to a claim.'") (citations omitted).

such impossibility was not Deutsche Bank's fault. Even if Galopy's allegations are true, it took serious counterparty credit risk. Galopy's claim against Deutsche Bank seeks to disclaim the manifestation of such risk.

In sum, while Galopy's contract claim survives, it faces serious hurdles. Those hurdles, however, need not be cleared until the completion of discovery since, plausibility aside, Galopy has alleged the material terms of the parties' purported oral agreement.

That said, Galopy's quasi-contract claims must be dismissed. They are premised on Deutsche Bank acting inequitably in retaining a $6 million fee from the collateral remitted to the Venezuelan government. Galopy contends that Deutsche Bank agreed to help it with its regulatory problem by arranging a mirror image, BFT hedge in exchange for a fee. Botella personally agreed to a $6 million fee. Deutsche Bank acted pursuant to this agreement and did not do so gratuitously. Nonetheless, Galopy claims it only agreed to pay the fee out of the second tranche of collateral, which was never transmitted. This allegation, however, necessarily sounds in contract. If Galopy fails to prove its contract claim – the sole basis for its claim to the collateral – it has no basis to recover the $6 million taken from that collateral. In short, if Galopy's contract is not proven, there is no basis for a reasonable finder of fact to conclude that equity mandates the $6 million be disgorged to Galopy. *See Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 (2012) ("[I]n order to adequately plead [unjust enrichment], the plaintiff must allege 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.'"), quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011). Galopy's quasi-contract claims all rise and fall with the alleged oral agreement and, therefore, are dismissed as alternative causes of actions.

Finally, the court again rejects Deutsche Bank's contention that a forum non conveniens dismissal in favor of a new action in Venezuela is appropriate. CPLR 327(a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court ... may stay or dismiss the action in whole or in part on any conditions that may be just." *See Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 135 (2014). "In general, a decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion." *Id.* at 137. The court must determine if "the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Century Indem. Co. v Liberty Mut. Ins. Co.*, 107 AD3d 421, 423 (1st Dept 2013) (emphasis added), quoting *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 (1984). "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which the plaintiff may bring suit. The court 'may also' consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction." *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 (1st Dept 2006), accord *Pahlavi*, 62 NY2d at 479. "No one factor is controlling. The great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience." *Pahlavi*, 62 NY2d at 479 (citations omitted).

Botella and Deutsche Bank's witnesses are in New York. While there may well be non-party witnesses in Venezuela, such as U21's former employees, that fact does not mean this action lacks a sufficient nexus to New York. Deutsche Bank also has not demonstrated Venezuela to be an adequate alternative forum, particularly in light of what occurred to Fernandez and Botella when U21 was intervened. They appear to have been wrongly implicated

in alleged criminal activity at a time, according to Galopy, that politically motived government expropriation of U21 was being conducted. Fernandez was jailed – but, importantly, acquitted. Botella had to flee the country. While the court expresses no opinion on the legitimacy of U21's intervention, the context of the alleged oral agreement (e.g., the impression the BFT was supposed to give the regulators about the $500 million belonging to U21), it is not unsurprising that Galopy would rather not litigate its claims in Venezuela. The court sees no compelling reason to disturb plaintiff's chosen forum. *See Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431 (1st Dept 2015) ("unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed").

Nor is it the case that Deutsche Bank cannot mount an adequate defense if U21's witnesses cannot be subpoenaed. This case turns on the alleged oral agreement between Galopy and Deutsche Bank. Galopy, not Deutsche Bank, will have to come forward with evidence of such a contract. While U21's former employees may have some knowledge of this agreement, the recordings and any documentary evidence is available to Deutsche Bank. Discovery from U21 and witnesses in Venezuela, while not irrelevant, is not crucial. *See Kahn v Leo Schachter Diamonds, LLC*, 139 AD3d 635 (1st Dept 2016) ("Plaintiff failed to establish that the discovery he seeks from nonparty entities in Brazil is 'crucial' to the resolution of a key issue in this case. He contends that the discovery will show that he was responsible for introducing the Brazilian entities to defendants, and will establish the amount of commissions owed to him. However, he does not seek to request anything from the Brazilian entities that he could not obtain (or has not already obtained) from defendants"), citing *Richbell Info. Servs., Inc. v Jupiter Partners L.P.*, 32 AD3d 150, 156-57 (1st Dept 2006). For these reasons, along with those set forth on the August

20, 2015 record, the court finds that New York is the proper forum for this action. Accordingly, it is

ORDERED that Deutsche Bank's motion to dismiss the AC is granted with respect to the second (promissory estoppel), third (money had and received), and fourth (unjust enrichment) causes of action and is otherwise denied; and it is further

ORDERED that the parties shall appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a status conference on September 1, 2016, at 11:00 in the forenoon.

Dated: August 18, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C