Merrill Lynch Cap. Mkts. AG v Controladora Comercial Mexicana S.A.B. DE C.V.
2010 NY Slip Op 34124(U)
March 16, 2010
Supreme Court, New York County
Docket Number: 603215/08
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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MERRILL LYNCH CAPITAL MARKETS AG and
MERRILL LYNCH CAPITAL SERVICES, INC.,

Plaintiffs,

-against-

Index No.: 603214/08
Motion Date: 10/14/09
Motion Seq. No.: 01

CONTROLADORA COMERCIAL MEXICANA
S.A.B. DE C.V.,

Defendant.

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BRANSTEN, J.:

This is an action for breach of contract. Beginning in 2001, defendant Controladora Comercial Mexicana S.A.B. De C.V. ("CCM"), Mexico's largest retailer, entered into numerous commercial transactions with plaintiffs Merrill Lynch Capital Markets AG ("MLCM") and Merrill Lynch Capital Services, Inc. ("MLCS" and, collectively with MLCM, "Merrill"), known as foreign exchange and interest rate derivatives. CCM also periodically entered into such transactions with several other financial institutions, including Barclays Bank PLC ("Barclays"), Goldman Sachs Paris Inc. et Cie ("GS Paris") and JPMorgan Chase Bank, N.A. ("JPMorgan"), in order to hedge its exposure to fluctuations in the U.S. dollar/Mexican peso exchange rate.

In October 2008, following a precipitous drop in the value of the Mexican peso in relation to the U.S. dollar, CCM lost money on those transactions, and defaulted in making certain payments to Merrill and the other derivatives dealers. At issue in this action are over

20 separate such foreign exchange or interest rate derivatives transactions entered into between CCM and Merrill.

In early November 2008, at the same time this action was filed, Barclays, JPMorgan and J. Aron & Company, as assignee of GS Paris, which all had separate, outstanding derivatives transactions with CCM, each filed related breach of contract actions against CCM in this court: *Barclays Bank PLC v Controladora Comercial Mexicana S.A.B. De C.V.*, Index No. 603233/08; *J. Aron & Company v Controladora Comercial Mexicana S.A.B. De C.V.*, Index No. 603225/08; and *JPMorgan Chase Bank, N.A. v Controladora Comercial Mexicana S.A.B. De C.V.*, Index No. 603215/08 (the "Related Actions"). The Related Actions are almost identical to the instant action. Like the complaint in the instant action, the Related Actions' complaints solely assert causes of action for breach of contract. In CCM's answers to the Related Actions' complaints, CCM interposes exactly the same affirmative defenses and counterclaims.

Merrill now moves, pursuant to CPLR 3212, for an order granting it summary judgment awarding (1) $170,943,078.00 to MLCM plus Default Interest at the London Interbank Offered Rate plus 1.50% per annum (the "Merrill Funding Rate") plus 1% per annum; (2) $276,182,403.94 to MLCS, plus Default Interest at the Merrill Funding Rate plus 1% per annum; and (3) Merrill's attorneys' fees and costs. Plaintiffs in the Related Actions have also moved for summary judgment.

For the reasons set forth below, Merrill's motion for summary judgment is granted. The motions for summary judgment in the Related Actions are also granted. The decisions granting such motions are filed separately under each index number in the Related Actions.

BACKGROUND

The following facts are derived from the amended complaint; the second amended answer and counterclaims; the affidavit of Gustavo Campomanes, CCM's former Treasurer and the person directly in charge of CCM's operations to hedge its currency risks; and the affidavit of Pankaj Jhamb, Merrill's managing director in charge of Merrill's global rates and currency business.

CCM is a Mexican corporation based in Mexico City. CCM operates approximately 200 general merchandise and grocery stores and 70 restaurants in Mexico (Campomanes Aff, ¶ 3; Second Amended Counterclaims, ¶ 11). CCM is one of Mexico's largest retailers, and is a competitor of U.S. discount stores such as Wal-Mart Stores, Inc. (Second Amended Counterclaims, ¶ 11).

As an importer of goods priced in dollars, and a borrower of dollar-denominated debt used to finance its operations and growth, CCM is exposed in its business to fluctuations in the exchange rates between the Mexican peso and the U.S. dollar (Campomanes Aff, ¶ 4; Second Amended Counterclaims, ¶¶ 1, 19). In light of its exposure to changes in the

peso/dollar exchange rate, CCM has, over the years, entered into numerous currency and other derivatives transactions, including swaps, forwards and options, with various financial institutions (Campomanes Aff, ¶ 6; Second Amended Counterclaims, ¶ 20). CCM also engaged in interest swap transactions designed to reduce debt service costs that are also part of its ordinary business operations (Campomanes Aff, ¶ 6).

CCM admits that it has engaged in such derivatives transactions "[s]ince the 1990's" to hedge its cross currency risks and to control its debt service costs (Second Amended Counterclaims, ¶ 2). The derivatives dealers CCM did business with included the plaintiffs in the four pending related actions – Merrill, Barclays, JPMorgan and GS Paris – and the pending actions involve a collection of derivatives transactions entered into between CCM and the derivatives dealers (Campomanes Aff, ¶¶ 7, 9). CCM dealt with the derivatives dealers over an extended period of time (*id.*, ¶ 11). CCM entered into derivatives transactions with Merrill beginning in 2002 (Jhamb Aff, ¶ 10).

Parties entering into foreign exchange or interest rate derivatives contracts typically use agreements based on the standard form Master Agreement and Credit Support Annex issued by the International Swaps and Derivatives Association, Inc. ("ISDA"), an organization that promulgates standard form agreements and ancillary documents widely employed in the derivatives market. These contracts contain a series of representations, and set forth terms governing the parties' derivatives transactions.

The parties then from time to time enter into derivatives transactions. Each transaction is memorialized in a separate trade confirmation setting forth the specific terms of each particular transaction. Pursuant to the terms of the ISDA Master Agreement, the ISDA Agreements and the confirmations together form a single agreement (ISDA Master Agreement, § 1 [c]).

On June 24, 2004, MLCM and CCM signed a Master Agreement and Credit Support Annex, which were subsequently amended from time to time (Amended Complaint, ¶ 15; Jhamb Aff, ¶ 11; *see* Ex 3). On February 3, 2006, MLCS and CCM signed a Master Agreement and Credit Support Annex (Amended Complaint, ¶ 16; Jhamb Aff, ¶ 16, *see* Ex 7). Campomanes (CCM's former Treasurer) signed these contracts and their attachments (collectively, the "ISDA Agreements") on behalf of CCM (Jhamb Aff, ¶¶ 12, 16; *see* Exs 3 and 7; Campomanes Aff, ¶ 19).

The ISDA Agreements contain "Additional Representations" which were added by the parties to the standard form, and which make clear that the parties operated at arm's length. For example, in Part 5 (2) (i) of the Schedule to each Master Agreement, CCM and Merrill represented that they were "entering into this Agreement, any Credit Support Document to which it is a party, each Transaction and any other documentation relating to this Agreement or any Transaction as principal (and not as agent or in any other capacity, fiduciary or otherwise)." Similarly, in Part 5 (2) (j) of the Schedule to each Master

Agreement, CCM and Merrill represented their "Non-Reliance" on each other. All but one Transaction confirmation repeats this non-reliance representation (*see* Jhamb Aff, Ex 18). CCM also repeatedly confirmed in writing that Campomanes had authority to sign the ISDA Agreements and enter into derivatives transactions with Merrill on behalf of CCM (*id.*, ¶¶ 13, 15, 18-19; *see* Exs 4-7).

The ISDA Agreements specifically provide that they are "governed by and construed in accordance with the laws of the State of New York without reference to choice of law doctrine" (ISDA Agreement, Schedule, Part 4 [h]).

From 2004 through the end of 2008, CCM entered into over 1,000 foreign exchange or interest rate derivatives transactions with Merrill pursuant to the ISDA Agreements (Jhamb Aff, ¶ 21; *see* Ex 8). CCM made payments to or accepted payments from Merrill in connection with the parties' derivatives transactions (*id.*, ¶ 22; *see* Ex 9). CCM also disclosed its derivatives transactions with Merrill and other financial institutions in CCM's regulatory filings (*id.*, ¶ 23; *see* Exs 10-13).

On March 10, 2005, CCM sent Merrill a letter, known as a "Big Boy Letter," signed by Campomanes, in which CCM confirmed that it was a sophisticated party, fully understood the risks associated with its derivatives transactions and that those who had signed the transaction documentation were authorized to do so:

> For more than three years Controladora Comercial Mexicana, S.A. de C.V., (CCM) has entered into several derivative

> transactions with Merrill Lynch and its affiliates which have proven to be a good tool in our financial planning.
>
> It is worth mentioning that CCM has been using interest rate swaps for years and clearly understands and acknowledges the associated risks, and potential losses that these transactions may create under stress scenarios. CCM has been selling vanilla and exotic options (FX and interest rate related), and clearly understands and acknowledges the associated risks and expected losses under stress scenarios. CCM has been using these strategies for years with several Banks. Our Board of Directors approves the general guidelines and risk limits, and our Senior Management approves the strategies followed by the company. CCM acknowledges that some derivative transactions are used for hedging purposes, and some are directional views aimed towards reducing financing costs. We have reviewed, understood and signed all appropriate documentation (ISDA, CSA, specific confirmations and Term sheets for every transaction) and the signatories have powers or attorney that allow us to enter into this kind of transaction[].
>
> Likewise we consider necessary to mention that CCM is not using derivatives for tax purposes [a]nd has consistently disclosed CCM's derivatives disclosure to the public through the corresponding regulatory bodies as the BMV, and the SEC; and we will continue to do so according to the *Sarbanes Oxley Act of 2002* which we have adopted

(*id.*, ¶ 15, *see* Exh 6; *see also* Amended Complaint, ¶ 18).

As the Big Boy Letter states, CCM disclosed its derivatives activity in regulatory filings (Jhamb Aff, ¶ 23; *see* Exs 10-13). For example, in March 2008, CCM reported a 360 million peso profit (over $30 million) on derivatives in 2007 (*id.*, ¶ 24; *see* Exhs 14-15). It is undisputed that, until this litigation, CCM never claimed to Merrill, or publically, that any of its derivatives transactions were void or unenforceable.

During 2007 and 2008, CCM entered into twenty-two derivatives transactions with Merrill (the "Transactions"), each of which was memorialized by a written trade confirmation (*id.*, ¶ 26; *see* Exs 16-36). The Transactions consisted of both foreign exchange and interest rate derivatives (*id.*, ¶ 29). CCM entered into 19 foreign exchange Transactions with Merrill. In connection with these foreign exchange Transactions, Merrill would owe CCM money if the value of the dollar to the peso or Euro stayed within specified ranges. Conversely, if the exchange rates fell outside those ranges, then CCM would owe Merrill money (*id.*, ¶¶ 30-31).

CCM also entered into three interest rate Transactions with Merrill (*id.*, ¶ 34). The interest rate Transactions were tied to movements in the London Interbank Offered Rate ("LIBOR") and the Tasa de Interes Interbancaria de Equilibrio ("TIIE"), the Mexican equivalent of the LIBOR (*id.*, ¶¶ 33-34; *see* Exs 35-37). CCM's exposure to Merrill increased if the one-month LIBOR increased or the six-month LIBOR moved outside of a specified range. If the LIBOR stayed within the range or decreased, then Merrill had obligations to CCM (*id.*, ¶ 34). On the TIIE Transactions, CCM's exposure to Merrill increased if the TIIE increased; if the TIIE decreased, then Merrill's obligations to CCM increased (*id.*, ¶ 35).

Beginning in September 2008, as the global financial crisis deepened, the value of the dollar versus both the peso and the Euro, along with the LIBOR and TIIE, significantly

increased (Amended Complaint, ¶ 19; Jhamb Aff, ¶ 36). As a result, CCM's obligations to Merrill in connection with the Transactions also significantly increased (*id.*).

From late September through early October 2008, Merrill issued a series of margin calls for CCM to post additional collateral pursuant to the ISDA Agreements (Amended Complaint, ¶ 20; Jhamb Aff, ¶ 37; *see* Ex 38). CCM partially met the first margin call, but failed to meet subsequent calls (Amended Complaint, ¶ 21; Jhamb Aff, ¶¶ 38-39).

On October 7, 2008, Merrill sent CCM written Notices of Non-Delivery of Collateral, advising CCM that it had not posted the called-for collateral and giving CCM an opportunity to cure its non-delivery (Amended Complaint, ¶ 22; Jhamb Aff, ¶ 40, *see* Exs 39-40). CCM did not deliver the called-for collateral (*id.*, ¶ 41).

On October 9, 2008, Merrill sent CCM an Early Termination Notice. Merrill therein advised CCM that CCM had defaulted on its obligations and that Merrill was exercising its rights under the ISDA Agreements to close out the Transactions and seize CCM's collateral (Amended Complaint, ¶¶ 24-25; Jhamb Aff, ¶¶ 42-46, *see* Exs 41-42).

The same day, CCM announced that it was commencing reorganization proceedings in Mexico (Amended Complaint, ¶ 28; Second Amended Counterclaims, ¶ 107). CCM publically admitted that it was in default on the Transactions, as well as other derivatives transactions that it had entered into with other financial institutions (*id.*).

On October 10, 2008, Merrill closed out the Transactions and subsequently advised CCM that it owed a balance of $170,943,078.00 to MLCM, and $276,182,403.94 to MLCS

(Jhamb Aff, ¶¶ 44, 49-54; *see* Exs 45-48). CCM admittedly has not paid any portion of the claimed amounts (Second Amended Answer, ¶ 33).

Merrill brought this action in November of 2008. The amended complaint contains two causes of action for breach of contract, the first relating to MLCM's transactions with CCM, and the second relating to MLCS's transactions with CCM.

In the amended answer, CCM originally asserted 11 affirmative defenses and 8 counterclaims. In its opposition to the summary judgment motion, CCM asserts that it is no longer interposing the following affirmative defenses: first, subpart (a) (illegal transactions under Mexican law); sixth (illegal betting under General Obligations Law [GOL] § 5-401); seventh (illegal bucket-shop transaction under GOL § 351); eighth (unauthorized transactions); and ninth (unconscionable transactions) (CCM Opp Mem, at 5, n 2). CCM also asserts that it is no longer asserting the following counterclaims: fifth (mistake); sixth (GOL § 5-419 – recovery of collateral seized on illegal betting contracts); and eighth (conversion) (*id.*). CCM's remaining counterclaims and defenses are as follows: fraud and negligent misrepresentation (second affirmative defense and first and second counterclaims); breach of fiduciary duty (third affirmative defense and third counterclaim); General Business Law (GBL) § 349 (seventh counterclaim); illegality under Mexican law (first affirmative defense, subparts [b]-[e]; participation in breach of fiduciary duty (fourth affirmative defense and fourth counterclaim); and mitigation of damages (fifth affirmative defense).

After the summary judgment motion was filed, CCM sought leave to amend the amended answer and counterclaims a second time to add a ninth counterclaim for rescission based on the same claim of illegality under Mexican law as set forth in the first affirmative defense. On January 25, 2010, this court granted CCM's motion. As such, the second amended answer and counterclaims, minus the affirmative defenses and counterclaims withdrawn by CCM in its opposition, is deemed the operative pleading for purposes of resolving the summary judgment motion.

DISCUSSION

Contract interpretation is a question of law, appropriate for resolution on summary judgment (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assocs.*, 257 AD2d 1 [1st Dept 1999]). Summary judgment on a breach of contract action should be granted where, as here, the terms of the contract are clear and unambiguous (*see Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248 [1st Dept 1997]; *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514 [1st Dept 1995]). Summary judgment is also appropriate when an affirmative defense is patently meritless (*see Citibank, N.A. v Plapinger*, 66 NY2d 90, 93 [1985] ["the language of (contractual) disclaimer ... (was) sufficiently specific to foreclose as a matter of law the defenses and counterclaims based on fraud, negligence or failure to perform a condition precedent"]).

Summary judgment is warranted here because the material facts are undisputed and CCM's counterclaims and affirmative defenses fail as a matter of law.

Merrill's Breach of Contract Claim

The ISDA Agreements specifically provide that they are governed by New York law (*see* ISDA Agreement, Schedule, Part 4 [h]). Under New York law, to establish a right to recover for breach of contract, a party must prove: (1) the existence of a contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]; *Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303 [1st Dept 2004]).

Merrill has met its burden of proof on this summary judgment motion by clearly establishing that each of these elements has been satisfied. First, CCM admits that it signed the ISDA Agreements and that it entered into the Transactions (Second Amended Answer, ¶¶ 15-17; 36-37; 48-49). Second, CCM does not contend that Merrill failed to perform its obligations. Third, CCM admits that it did not meet Merrill's margin calls as required under the ISDA Agreements (*id.*, ¶¶ 5; 24-27; 29-34; 43-44; 55-56). Fourth, there is no dispute that, after Merrill seized CCM's collateral, CCM still owes Merrill millions of dollars (*see* Jhamb Aff, ¶¶ 51-56; Second Amended Answer, ¶ 33 [CCM "admits that it has not paid the net amounts claimed by plaintiffs"]). Together, these undisputed facts establish CCM's liability.

Accordingly, Merrill's breach of contract claim is fully supported by its submitted documentary evidence and CCM's own admissions.

CCM's Affirmative Defenses and Counterclaims

Each of CCM's affirmative defenses and counterclaims fails as a matter of law. Merrill is therefore entitled to summary judgment on its breach of contract cause of action.

1. *Fraud and Negligent Misrepresentation*

In its first and second counterclaims and second affirmative defense, CCM asserts that Merrill induced CCM to enter into the Transactions by allegedly misrepresenting "the potentially ruinous risks" of the Transactions (Second Amended Counterclaims, ¶ 111). CCM's claims, however, are precluded by the unambiguous terms of the ISDA Agreements. Fraudulent inducement requires proof of "[1] a representation of a material fact, [2] the falsity of the representation, [3] knowledge by the party making the representation that it was false when made, [4] justifiable reliance ... and [5] resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). "A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given" (*Hudson River Club v Consolidated Edison*

Co. of N.Y., Inc., 275 AD2d 218, 220 [1st Dept 2000]). Thus, reasonable reliance is an element of both claims.

It is well settled that claims for fraud and negligent misrepresentation are barred where the party asserting the claim contractually agreed not to rely on the other party's representation (*see Republic Natl. Bank v Hales*, 75 F Supp 2d 300 [SD NY 1999], *affd* 4 Fed Appx 15 [2d Cir 2001] [granting summary judgment where non-reliance provision in ISDA-governed swap agreement precluded finding of reasonable reliance]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959] [dismissing fraud claim where "plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded"]; *Sorenson v Bridge Capital Corp.*, 30 AD3d 1144, 1145 [1st Dept 2006] [affirming dismissal of fraudulent inducement claim where plaintiff "acknowledged no reliance" on defendant's extra-contractual representations]; *Greater N.Y. Mut. Ins. Co. v White Knight Restoration, Ltd.*, 7 AD3d 292 [1st Dept 2004] [affirming dismissal of negligent misrepresentation claim because it was unreasonable to rely on certificates in the face of disclaimer language]).

CCM's fraud and negligent misrepresentation counterclaims and affirmative defense fail as a matter of law. In each ISDA Agreement, and in all but one Transaction confirmation, CCM expressly disclaimed any reliance on Merrill in connection with the Transactions:

> **Non-Reliance.** Each party represents to the other party (which representation will be deemed to be repeated by each party on each date on which a Transaction is entered into or amended, extended or otherwise modified) that it is acting for its own account, and has made its own independent decisions to enter into this Agreement and any Transaction hereunder and as to whether this Agreement and any Transaction hereunder is appropriate or proper for it based on its own judgment and upon advice from such advisors as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into this Agreement or any Transaction hereunder, it being understood that information and explanations related to the terms and conditions of this Agreement and any Transaction hereunder shall not be considered investment advice or a recommendation to enter into this Agreement or any Transaction hereunder. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of any Transaction hereunder

(ISDA Agreement, Schedule, Part 5 [2] [j]).

Moreover, CCM confirmed in the Big Boy Letter, among other things, that it had "for years" engaged in derivatives transactions, understood the transaction documents, and "clearly understands and acknowledges the associated risks, and potential losses ... under stress scenarios." CCM therefore cannot establish reasonable reliance.

In response to the summary judgment motion, CCM contends that there are triable issues of fact as to whether Merrill had "superior knowledge of essential facts" concerning the Transactions and fraudulently concealed such facts from CCM (CCM Opp Mem, at 6-8). In support of this contention, CCM submits Campomanes' affidavit, in which he avers that

"I now realize that I did not have the financial expertise in derivatives necessary to understand the potentially ruinous risks that were inherent in the Knock-Out Forwards, Pivots, and TARNS offered to us, and which led to the losses that are the subject of the pending lawsuits" (Campomanes Aff, ¶ 54). Campomanes further avers that "[t]here is no doubt in my mind that the representatives of the Dealers with whom I dealt never fully appreciated the risks inherent in the transactions they offered" (*id.*, ¶ 55).

However, in *Republic Natl. Bank v Hales* (*supra*), the court rejected this exact argument under almost identical factual circumstances. In *Hales*, a bank sued an individual for amounts due on, among other things, a swap transaction governed by an ISDA agreement. In seeking to avoid his obligations under that agreement, Hales interposed many of the same defenses and counterclaims as CCM, including counterclaims for fraud and negligent misrepresentation. Applying New York law, the court dismissed these claims, and granted the bank summary judgment on its claims, because it was clear that Hales was a sophisticated party:

> While Hales has made efforts to pass himself off as a "babe in the woods" who was taken advantage of by an unscrupulous banking institution possessed of superior information and resources, he nevertheless represented himself to [the bank] as a sophisticated businessman. Indeed, the very transcripts offered by Hales in connection with the instant motion reveal that Hales represented himself as having significant experience

> with swaps and options, and make rather clear Hales' own favorable assessment of his business acumen. He is neither a widow nor an orphan, however, and his effort to avoid his contractual obligations by playing the fool are not well taken

(*id.* at 313).

Likewise, here, CCM admits that it transacted extensively in derivatives with various financial institutions for over 15 years (Campomanes Aff, ¶¶ 21-34). CCM also admits in its counterclaims that the Transaction confirmations themselves described exactly how the transactions would work and the associated risks to the parties, including in a stress scenario of the type experienced in the fall of 2008 (Second Amended Counterclaims, ¶¶ 45-49). None of this information was hidden. Thus, any failure to "scrutinize the contractual provisions [Mr. Campomanes] was signing are his fault and his fault alone" (*Republic Natl. Bank v Hales*, 75 F Supp 2d at 314).

CCM next argues that, even if the terms of the contract preclude CCM's claim of reliance, the "special facts" doctrine, as set forth in *Swersky v Dreyer & Traub* (219 AD2d 321 [1st Dept 1996], *appeal withdrawn* 89 NY2d 983 [1997]), applies here. CCM is wrong. The "special facts" doctrine provides that a party with superior knowledge of essential facts must disclose those facts to the counterparty in that transaction (*id.*). However, a party cannot rely on the "special facts" doctrine where, as here, it could have independently ascertained the allegedly concealed facts "through 'the exercise of ordinary intelligence'" (*id.* at 328 [citation omitted]); *see also Republic Natl. Bank v Hales*, 75 F Supp 2d at 317 [the

special facts doctrine does not apply "where the complaining party had access to the information at issue"]). As the *Hales* court explained in rejecting the "special facts" argument:

> The actual terms of the [ISDA] Agreements were certainly not facts uniquely within [the bank's] control, and there is no question but that the ISDA definitions were available for Hales or his counsel to review - had they so wished. Similarly, the risks and advantages to the package of transactions Hales entered with [the bank] could well have been evaluated by Hales himself, and Hales cannot now seek to avoid his obligations on the ground that [the bank] should have told him that he was engaging in a risky or unsuitable transaction

(*id.*).

CCM further contends that the disclaimers in the ISDA Agreements and Transaction confirmations are "non-specific" and "boilerplate," which cannot defeat an allegation of fraud (CCM's Opp Mem, at 8-12). Rather, CCM argues, "a disclaimer will defeat an allegation of fraud only if the disclaimer refers specifically to the very subject matter of the alleged oral misrepresentations" (*id.* at 9, citing *Danann Realty Corp. v Harris*, *supra*). According to CCM, Merrill "do[es] not have a prayer" of proving that they should be enforced (*id.* at 11). CCM is again wrong.

The plaintiff in *Hales* made this same argument, which was squarely rejected by the court. The court noted that "as part of the [ISDA] agreements he signed, Hales specifically disclaimed having relied upon [the bank] for investment advice or for an evaluation of the

terms of the agreements he was entering" (*Republic Natl. Bank v Hales*, 75 F Supp 2d at 316). The court quoted the extensive disclaimers contained in the ISDA agreements that Hales signed, which are substantively identical to the disclaimers in the ISDA Agreements and Transaction confirmations that CCM signed. The court concluded that, "[u]nlike a generic 'merger' clause standing alone, the waivers signed by Hales were sufficiently particular so as to preclude Hales' present challenge to any statements for which reliance was specifically disclaimed" (*id.*; *see also CDO Plus Master Fund Ltd. v Wachovia Bank, N.A.*, No. 07 Civ. 11078(LTS)(AJP), 2009 WL 2033048, *6 [SD NY July 13, 2009] [in enforcing swap transactions governed by an ISDA Master Agreement that included express "non-reliance" disclaimers substantially similar to those at issue here, court found that "(b)oth the ISDA Schedule and the Credit Support Annex include provisions that are specific to the parties, and thus those documents are inappropriately characterized as 'boilerplate'"]; *Emfore Corp. v Blimpie Assocs., Ltd.*, 51 AD3d 434, 435 [1st Dept 2008] [affirming dismissal of fraud claim where the disclaimers "were not generalized boilerplate exclusions, but were contained in a separate rider, which plaintiff's principal read and initialed, stating specifically that she was not relying on any representations by defendants"]).

Thus, because CCM cannot demonstrate reasonable reliance on any alleged misrepresentation or omission by Merrill, CCM's fraudulent inducement and negligent misrepresentation claims cannot stand.

2. *Breach of Fiduciary Duty*

In its third counterclaim and third affirmative defense, CCM asserts breach of fiduciary duty. This assertion is also precluded by the express terms of the ISDA Agreements.

When parties, particularly sophisticated business entities, enter into an arm's- length business transaction, the terms of their contract govern their relationship (*Northeast Gen. Corp. v Wellington Adv., Inc.*, 82 NY2d 158, 160 [1993] ["Courts look to the parties' agreements to discover, not generate, the nexus of (their) relationship"]; *Taylor Bldg. Mgt., Inc. v Global Payments Direct, Inc.*, 19 Misc 3d 1133[A], 2008 NY Slip Op 50988[U], *7 [Sup Ct, NY County 2008] [relationship of parties in an arm's-length business transaction "is contractual in nature"]; *Conwill v Arthur Andersen LLP*, 12 Misc 3d 1171[A], 2006 NY Slip Op 51142[U], *12 [Sup Ct, NY County 2006] ["an arm's length transaction with a large financial institution acting as the counterparty ... will not generally give rise to a fiduciary duty unless one is created by agreement"]).

Accordingly, where the parties' agreement specifically disclaims a fiduciary relationship, no defense of, or claim for, breach of fiduciary duty will lie (*see CIBC Bank & Trust Co. (Cayman) Ltd. v Credit Lyonnais*, 270 AD2d 138, 139 [1st Dept 2000] [affirming dismissal of breach of fiduciary duty claim where parties represented that they had not acted as "financial advisor or fiduciary"]; *AJW Partners, LLC v Cyberlux Corp.*, 21 Misc 3d

1109[A], 2008 NY Slip Op 52020[U], *3 [Sup Ct, NY County 2008] [dismissing breach of fiduciary duty counterclaim "in light of the plain contractual language disavowing a fiduciary relationship"]).

In the ISDA Agreements, CCM explicitly disclaimed any fiduciary relationship with Merrill. Specifically, in the Schedule to the Master Agreement, CCM stated that:

> It is entering into this Agreement, any Credit Support Document to which it is a party, each Transaction and any other documentation relating to this Agreement or any Transaction ***as principal (and not as agent or in any other capacity, fiduciary or otherwise)***

(Master Agreement, Schedule, Part 5 [2] [i] [emphasis added]).

Because CCM specifically disavowed any fiduciary relationship with Merrill, CCM's breach of fiduciary counterclaim and defense fail as a matter of law.

In response to the motion, CCM asserts that Merrill possessed "superior knowledge and expertise" that "fostered a 'special relationship of trust and confidence'" with CCM, which "gave rise to fiduciary duties owed by Merrill to CCM" (CCM Opp Mem, at 19). However, it is "patently unreasonable" for a sophisticated party to rely "upon representations contrary to the plain language of the agreements" (*Republic Natl. Bank v Hales*, 75 F Supp 2d at 315).

CCM also argues that a "special relationship of trust and confidence" existed because "Merrill assiduously cultivated the idea that CCM was its 'client', and purported to be using

its expertise and knowledge to serve the interests of its 'client'" (CCM Opp Mem, at 19). However, no special relationship arose merely because Merrill occasionally referred to CCM as a "client" in term sheets (*see* Campomanes Aff, ¶ 13; *see* Ex 1). The terms sheets state that they are "for discussion purposes only" (*id*). Sophisticated entities represented by counsel do not enter into "such a solemn obligation as a fiduciary duty" through such casual means (*L-3 Communications Corp. v OSI Sys., Inc.*, 283 Fed Appx 830 [2d Cir 2008] [holding that non-binding letter of intent and later oral discussion could not give rise to a knowing agreement to enter into a fiduciary relationship]). A non-binding term sheet cannot modify the terms of the parties' executed agreements (*Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165 [1st Dept 2007]; *see also Meyers Assocs., L.P. v Conolog Corp.*, 61 AD3d 547 [1st Dept 2009]).

CCM further argues that, as in *Apple Records, Inc. v Capitol Records, Inc.* (137 AD2d 50 [1st Dept 1988]), the "long history of transactions" between CCM and GS Paris justified imposing a fiduciary relationship on Merrill (CCM Opp Mem, at 20). However, the Court's decision in that case rested not just on the length of the relationship between the parties, but on the fact that the Beatles were naive, unknown musicians who "entrusted their musical talents" to Capitol Records and "re[lied] on Capitol Records for the manufacture and distributing of their recordings" (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d at 57).

Here, in contrast, CCM was a large, sophisticated company before it ever entered into a derivatives transaction with Merrill. As CCM acknowledged in the Big Boy Letter in 2005, it had been entering into derivatives transactions for years with several banks as part of its business. Indeed, Mr. Campomanes confirms in his affidavit that CCM had engaged in derivatives transactions for approximately eight years before doing its first derivatives transaction with Merrill in 2001 (Campomanes Aff, ¶¶ 21-23, 25).

3. ***GBL § 349***

In its seventh counterclaim, CCM alleges that the Transactions are deceptive acts and practices that violate GBL § 349 (a). GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce in the furnishing of any service in this state are ... unlawful." Such a claim requires that: (1) the allegedly deceptive act or practice be consumer-oriented; (2) objectively, the act or practice be materially misleading to a reasonable consumer; and (3) injury results from the act or practice (*Stutman v Chemical Bank*, 95 NY2d 24 [2000]; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). "Such a test ... may be determined as a matter of law or fact" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A*, 85 NY2d 20, 26 [1995]).

Here, CCM's claim fails to meet the threshold requirement of "conduct that is consumer oriented" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). To

be consumer-oriented, the conduct "must have a broad impact on consumers at large" engaging in small scale transactions (*id.*). GBL § 349 was not intended to cover big-dollar financial transactions between private and sophisticated parties, like those at issue here (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d at 25 ["(p)rivate contract disputes, unique to the parties ... (do) not fall within the ambit of the statute"]). Thus, where the "contract at issue was a private, arm's length business transaction between two sophisticated entities, each with substantial prior experience in [the relevant field]," the conduct is not targeted at consumers (*U.W. Marx, Inc. v Bonded Concrete, Inc.*, 7 AD3d 856, 858 [3d Dept 2004] [holding that complaint could not be amended to add a claim under GBL § 349 because "this was a complex private business transaction, not one based on a standard-form contract addressed to consumers generally"]; *see New York Univ. v Continental Ins. Co.*, 87 NY2d at 321 [$10 million insurance policy at issue was "not the 'modest' type of transaction the statute was primarily intended to reach"]; *Quail Ridge Assocs. v Chemical Bank*, 162 AD2d 917, 920 [3d Dept], *appeal dismissed* 76 NY2d 936 [1990] ["In view of the patently complex nature of this multimillion dollar transaction ... we conclude that this is a commercial transaction ... outside the scope of (GBL § 349 [a])"]).

CCM has not alleged that the conduct of Merrill was "directed at consumers," a prerequisite for stating a cause of action under the statute (*see State of New York v Daicel Chem. Indus., Ltd.*, 42 AD3d 301, 303 [1st Dept 2007] [GBL § 349 "only applies to anti-

competitive conduct that is premised on the deception of consumers"]). As previously discussed, the Transactions were arm's-length commercial transactions between sophisticated parties. CCM also clearly had "substantial prior experience" in derivatives trading, as demonstrated by, inter alia, the Big Boy Letter and CCM's extensive derivatives trading history. Moreover, CCM admits that the Transactions worked exactly as the confirmations said they would work (*see* Second Amended Counterclaims, ¶¶ 45-57), which completely undercuts its claim that the Transactions were "deceptive."

Additionally, courts have routinely rejected attempts to apply GBL § 349 to securities transactions and other financial transactions, like the Transactions at issue here (*see Gray v Seaboard Sec., Inc.*, 14 AD3d 852 [3d Dept], *lv dismissed* 4 NY3d 846 [2005] [GBL § 349 inapplicable because securities transactions between parties are not consumer oriented]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268 [1st Dept 2003] [liquidation of securities in a trading account are not covered by GBL § 349]; *M & T Bank Corp. v Gemstone CDO VII, Ltd.*, 23 Misc 3d 1105[A], 2009 NY Slip Op 50590[U] [Sup Ct, Erie County], *affd as mod* 68 AD3d 1747 [4th Dept 2009] [GBL § 349 inapplicable to collateralized debt obligations purchased by a large banking corporation from defendants]).

Accordingly, CCM's claim under GBL § 349 is insufficient as a matter of law.

4. *Illegality of the Transactions Under Mexican Law*

In each Master Agreement, CCM expressly represented that its terms "do not violate or conflict with any law applicable to [CCM]" (ISDA Agreement, § 3 [a] [iii]). Contrary to that representation, in its first affirmative defense and ninth counterclaim, CCM asserts that the Transactions are "illegal and unenforceable under the laws of Mexico" (Second Amended Counterclaims, First Affirmative Defense), and that it "is entitled to rescind all out-of-the-money contracts and transactions that counterclaim defendant has sued on and to the return of all collateral and other assets seized ... upon the early termination of such transactions in October 2008" (*id.*, Ninth Counterclaim, ¶ 160). However, the issue of whether or not the Transactions are illegal under Mexican law is irrelevant. The Transactions are clearly enforceable under governing New York law.

It is well-settled that, "[i]n cases alleging a violation of foreign law, the existence of illegality is to be determined by the local law of the jurisdiction where the illegal act is done, while the effect of illegality upon the contractual relationship is to be determined by the law of the jurisdiction which is selected under conflicts analysis" (*Korea Life Ins. Co., Ltd. v Morgan Guar. Trust Co. of N.Y.*, 269 F Supp 2d 424, 438 [SD NY 2003]; *see also Dornberger v Metropolitan Life Ins. Co.*, 961 F Supp 506 [SD NY 1997]). Here Part 4 (h) of the Schedule to the Master Agreements specifically provides that the ISDA Agreements are governed by New York law. Thus, even if CCM could demonstrate that the Transactions

are illegal under Mexican law, "New York law governs [as to the issue of] whether defendant is liable to plaintiff under the ISDA Master Agreement and the related derivatives transactions" (*Finance One Public Co. Ltd. v Lehman Bros. Special Fin., Inc.*, No. 00 CIV 6739(CBM), 2001 WL 1543820, * 1 [SD NY December 4, 2001]).

In *Korea Life*, a Korean life insurance company argued that foreign exchange swaps and a guaranty were illegal under Korean insurance law. Although the parties submitted opinions from Korean law experts, the court did not reach the issue of illegality under Korean law. The court stated that "the effect of illegality upon a contractual relationship is determined, not by Korean law, but by the law of the jurisdiction which is selected under conflicts analysis" (*id.* at 440). The swap agreements at issue contained a clause providing that New York law was to govern disputes between the parties.

The *Korea Life* court held that the derivatives transactions, even if illegal under Korean law, were not invalid under New York law. "Under New York law, an illegal contract *malum in se*," i.e., inherently immoral, "is unenforceable and will be voided" (*id.* at 441). In contrast, "[a] contract that is illegal because performance is *malum prohibitum*," i.e., its performance would violate certain legal restrictions, "may also be voided if: (1) the contract is still executory; or (2) the parties are not *in pari delicto*," i.e., the party seeking to avoid enforcement is an innocent victim (*id.*).

Applying these rules, the court held that the derivatives transactions at issue were "not evil in themselves (*malum in se*)," and although the parties' attempted to "evade Korean regulation and to enter into an inappropriate transaction may have been questionable ... it d[id] not amount to moral turpitude" (*id.*).

The court further held that the agreements could not be voided as *malum prohibitum*. The court found that the contracts were not executory and the parties were *in pari delicto*, as both parties "intended to engage in a transaction in violation of Korean law, and endeavored to escape the eyes of regulators by setting up off-shore shell corporations and structuring the transactions as to be virtually impossible to understand to a party not familiar with it" (*id.* at 442).

The court also emphasized that it was "clear that both parties agreed to the" terms of the relevant contract, and that the plaintiff "was not tricked into engaging in a transaction that was illegal" (*id.*). The contracts stated that the plaintiff "had the 'full power, authority and legal right to enter into and perform' the obligations it took thereunder, despite the fact that such obligations violated Korean law" (*id.*). Indeed, "[a]s the Korean party to the agreement, [plaintiff] could be charged with at least as much familiarity, if not more, with Korean law as [defendant], and in making its representations, should have been aware of the potential illegality of its guarantee" (*id.*). Accordingly, the illegality claim failed.

Here, CCM admits that the Transactions were not *malum in se* (CCM Opp Mem, at 18-19). Instead, it asserts that the Transactions should be voided as *malum prohibitum* because they are executory, and CCM "is the entirely innocent party with respect to the violations of Mexican law" (*id.*).

Contrary to CCM's arguments, the Transactions cannot be voided as *malum prohibitum*. The Transactions were clearly not executory. "An executory contract is one in which a party binds itself to perform at some time in the future" (*First Intl. Bank of Israel, Ltd. v L. Blankstein & Son, Inc.*, 59 NY2d 436, 443 [1983]). In opposition to the motion, CCM asserts that the Transactions are executory because "CCM has not paid the amounts allegedly owed on its contracts" (CCM Opp Mem, at 17). However, the obligation to pay money at some future date does not make a contract executory (*see In re Chateaugay Corp.*, 130 BR 162, 165-166 [Bankr SD NY 1991] ["A debtor's obligation to pay money, standing alone, is insufficient to render a contract executory"]; *Matter of Masters, Inc.*, 141 BR 13, 17 [Bankr ED NY], *affd* 149 BR 289 [ED NY 1992] ["'a contract is not executory where the only obligation of a party ... is the payment of money'"] [citation omitted]; *see also In re Helm*, 335 BR 528, 535 [Bankr SD NY 2006] ["where one party has fully performed, and awaits only payment by the other party ... an agreement is not executory, as performance is complete, with only payment owed"]).

In addition, there is no dispute that Merrill fully performed its obligations under the ISDA Agreements. There is also no dispute that Merrill exercised its contractual right to declare an early termination date, and to terminate all outstanding Transactions under the ISDA Agreements. Once terminated, the ISDA Agreements were not, and could not be, executory.

Moreover, although CCM asserts that it is "the entirely innocent party with respect to the [alleged] violations of Mexican law" (CCM Opp Mem, at 18-19), it is clearly *in pari delicto*. Like the ISDA agreements in *Korea Life*, the Master Agreements here state that CCM had "the power to execute this Agreement and any other Agreement to which it is a party" (ISDA Agreement, § 3 [a] [ii]). Moreover, the Master Agreements also state that CCM's delivery and performance of those agreements "do not violate or conflict with any law applicable to [CCM]" (*id.*, § 3 [a] [iii]). In the Big Boy Letter, CCM further confirmed that it was a sophisticated party, fully understood the derivatives transaction that it engaged in, and that those who had signed the transaction documentation were authorized to do so. Finally, CCM, as the lone Mexican party to the Transactions, "could be charged with as much familiarity, if not more" with Mexican law than Merrill (*Korea Life Ins. Co. v Morgan Guar. Trust Co. of New York*, 269 F Supp 2d at 442).

The Transaction documents and CCM's extensive derivatives trading history clearly establish that CCM was not "entirely innocent." These documents include: (1) fully

executed ISDA Agreements containing all of the above-discussed disclaimers; (2) written authorization from CCM's board of directors that Campomanes was authorized to enter into the commercial transactions on behalf of CCM; (3) a legal opinion from CCM's counsel stating that the ISDA Agreements complied with Mexican law; and (4) Transaction confirmations repeating key disclaimers in the ISDA Agreements (Jhamb Aff, ¶¶ 11-12; 19, 26-28; *see* Exs 3-65; 16-37).

The foregoing facts render this case distinguishable from *Lehman Bros. Commercial Corp. v Minmetals Intl. Non-Ferrous Metals Trading Co.* (179 F Supp 2d 118 [SD NY 2000]), the principal case on which CCM relies. *Minmetals* involved a rogue employee who entered into unauthorized transactions and diverted profits to his own account. The court denied Lehman Brothers' motion for summary judgment, holding that there was a "question of fact" as to whether Lehman Brothers entered into derivatives transactions with a Chinese company "with 'a view to violate' Chinese law" (*id.* at 142). The court emphasized that there was evidence that Lehman was aware that the transactions may have been unauthorized and that Lehman's handling of the transactions was "characterized ... by certain irregularities" (*id.* at 131). Importantly, Lehman never obtained an executed ISDA Master Agreement and other documents required under the Master Agreement confirming that the derivatives transactions were authorized under applicable foreign law (*id.*).

Here, in contrast, there is no evidence that Merrill was aware of any alleged violation of Mexican law, or that it entered into the Transactions with "a view to violate" foreign law.

Thus, even if the Transactions are illegal under Mexican law, they cannot be invalidated under New York law. CCM's first affirmative defense and ninth counterclaim cannot defeat Merrill's summary judgment motion.

5. *Participation in Breach of Fiduciary Duty*

In the fourth affirmative defense and fourth counterclaim, CCM asserts that Merrill knowingly participated in CCM personnel's alleged breaches of fiduciary duty by "creating, recommending, implementing and benefitting from" allegedly "speculative and risky foreign exchange transactions for CCM that had no hedging risk or management purpose" (Second Amended Counterclaims, ¶ 136). CCM's assertion is defeated by the documentation.

A party asserting a claim for aiding and abetting a breach of fiduciary duty must establish: (1) a breach of fiduciary duty; (2) that the participant knowingly induced or participated in the breach; and (3) damages suffered as a result of the breach (*Kaufman v Cohen*, *supra*). The participant must have "actual knowledge" of the underlying breach of fiduciary duty; "constructive knowledge" will not suffice (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *see also Kaufman v Cohen*, 307 AD2d at 125 ["Constructive knowledge of the breach of fiduciary duty by

another is legally insufficient to impose aiding and abetting liability"]). A litigant "may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty" (*Global Minerals and Metals Corp. v Holme*, 35 AD3d at 101-102). Rather, a litigant must allege with specificity that the participant "affirmatively assist[ed], help[ed] conceal or fail[ed] to act when required to do so, thereby enabling the breach to occur" (*Kaufman v Cohen*, 307 AD2d at 126).

Here, CCM has not stated a claim against Merrill for participation in a breach of fiduciary duty. CCM it fails to offer any facts that support the assertion that Merrill knew of a breach of fiduciary duty by the duly authorized representatives of CCM. To the contrary, Campomanes's affidavit reveals that CCM draped Campomanes with apparent authority (*Hallock v State of New York*, 64 NY2d 224 [1984] [apparent authority is created when the words or acts of a principal make it reasonable for a third party to believe the agent possesses actual authority, and the third party reasonably relies on this belief), and that CCM ratified the ISDA Agreements and the Transactions (*Matter of Bennett Funding Group, Inc.*, 336 F3d 94, 100 [2d Cir 2003] ["New York law recognizes the well-established principle of ratification, which imputes an agent's conduct to a principal who 'condones those acts and accepts the benefits of them'"] [citation omitted]). Specifically, Campomanes admits in his affidavit that he "was the person who was directly in charge of, and responsible on a day-to-day basis for, CCM's operations to hedge its currency and interest-rate risks" (Campomanes

Aff, ¶ 2) and that "[w]ith respect to [all of the derivatives transactions with the dealers], all of the relevant documents were signed by me at my office in Mexico City" (*id.*, ¶ 9).

Moreover, CCM's conclusory allegations that Merrill had "actual knowledge" of and "substantially assisted" alleged breaches of fiduciary duty by CCM personnel are belied by the Transaction documents. Each party represented in the ISDA Agreements that it had the power "to execute this Agreement and any other Agreement to which it is a party" (ISDA Agreement, § 3 [a] [ii]). In addition, CCM repeatedly provided Merrill with written representations confirming that Campomanes was authorized to enter into the Transactions (Jhamb Aff, ¶¶ 13, 15; *see* Exs 4-7). CCM also specifically represented that the Transactions were "appropriate or proper for [CCM] based on its own judgment" (ISDA Agreement, Schedule, Part 5 [2] [j]). CCM further represented in the Big Boy Letter that "the signatories have powers of attorney" allowing them to execute derivatives transactions with Merrill. Finally, CCM provided Merrill with a power of attorney and a letter from its counsel, collectively confirming that Campomanes had the legal authority to enter into the Transactions on behalf of CCM (Jhamb Aff, *see* Exs 4-5; Ex 7 at Ex B]).

In opposition to the motion, CCM claims that Merrill "knowingly participated" in breaches of fiduciary duty by CCM employees and that "mere inaction" by Merrill "may well" amount to aiding and abetting those breaches (CCM's Opp Mem, at 21). CCM fails, however, to present any evidence, other than speculation, that Merrill had actual knowledge

of any breach. To the contrary, CCM repeatedly informed Merrill that Campomanes was authorized to enter into the Transactions. Given the fact that, prior to this litigation, CCM never withdrew, amended or altered those representations in any way, CCM cannot demonstrate that Merrill knowingly aided and abetted a breach of fiduciary duty, and CCM's fourth affirmative defense and fourth counterclaim fail as a matter of law.

6. *Mitigation of Damages*

In its fifth affirmative defense, CCM asserts that Merrill failed to mitigate its damages. However, as the party injured by a breach, Merrill was not obligated to use extraordinary remedies or incur extraordinary risk or expense to mitigate damages (*Murray v New York City Transit Auth.*, 20 Misc 3d 5 [App Term, 2d Dept 2008]). Rather, a plaintiff is only required to take reasonable steps to avoid additional damages (*Reichert v Spiess*, 203 App Div 134 [2d Dept 1922]; *see Korea Life Ins. Co., Ltd. v Morgan Guar. Trust Co. of N.Y.*, 2004 WL 1858314, *7 [SD NY 2004] [holding that plaintiff must make only "reasonable efforts" to mitigate and was not required to take "economically unreasonable steps or ... engage in particular transactions identified by the breaching defendant"]).

As the party injured by CCM's breach, Merrill was obligated to do only what the ISDA Agreement contemplated, namely, terminate the Transactions and calculate the Termination Amount on, or within a reasonable period of time after, the Early Termination

Date. Merrill presents undisputed evidence that it mitigated its damages in accordance with the ISDA Agreements. As CCM admits, when CCM missed margin calls, Merrill quickly terminated the Transactions, seized CCM's collateral and set off CCM's "in the money" positions against CCM's obligations (Amended Answer, ¶¶ 144-145). Thus, CCM's mitigation defense fails.

7. *CCM's Request for Additional Discovery*

Finally, CCM contends that this court should deny summary judgment and permit discovery under CPLR 3212 (f) because "[t]here are many factual issues requiring discovery" (CCM's Opp Mem, at 24), and "because CCM's evidence indicates that information in plaintiffs' control may support CCM's defenses" (*id.* at 25). The court rejects this contention. CCM fails to "demonstrate that the needed proof is within the exclusive knowledge of [Merrill], that the claims in opposition are supported by something other than mere hope or conjecture, and that [CCM] has at least made some attempt to discover facts at variance with [Merrill's] proof [interior citation omitted]" (*Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007]).

For the reasons stated herein, Merrill's motion for summary judgment is granted. Pursuant to section 11 of the ISDA Agreements, Merrill is also entitled to an award of its legal fees and costs. Such an award is appropriate where an express contractual provision so provides (*Levine v Infidelity, Inc.*, 2 AD3d 691 [2d Dept 2003]).

However, because CCM contends that Merrill has not provided it "with the information necessary to challenge their claim figures," and given the fact that "there are complex factual issues surrounding the calculation of the values of exotic derivatives" (CCM Opp Mem, at 25), summary judgment is granted as to liability only. Consequently, the issue of the total amount of damages due Merrill, including interest and the amount of costs and attorneys' fees to which it is entitled, will be referred to a Special Referee to hear and report.

The court has considered the remaining arguments, and finds them to be without merit.

ORDER

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted as to liability only; and it is further

ORDERED that the issue of the total amount of damages, including interest, costs and attorneys' fees, to which plaintiff is entitled is referred to a Special Referee to hear and report with recommendations, except in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the damages issues; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[1] upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date.

Dated: New York, New York
March 16, 2010

ENTER:

Hon. Eileen Bransten, J.S.C.

[1] Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.