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

PRESENT: MARCY S. FRIEDMAN **PART** 60
Justice

THE PEOPLE OF THE STATE OF NEW YORK, et al. **INDEX NO.** 114735/2009

-against- **MOTION DATE** _____

THE BANK OF NEW YORK MELLON CORP. **MOTION SEQ. NO.** 002

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

It is ordered that this motion is decided in accordance with the accompanying decision/order dated August 5, 2013.

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

Dated: 8-5-13

Mary S. Friedman J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

PRESENT HON. MARCY S. FRIEDMAN, J.S.C.

----------X

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York;

JOHN C. LIU, Comptroller of the City of New York; NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM; TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK; NEW YORK CITY POLICE PENSION FUND, SUBCHAPTER 2; NEW YORK CITY FIRE DEPARTMENT PENSION FUND, SUBCHAPTER 2; NEW YORK CITY BOARD OF EDUCATION RETIREMENT SYSTEM; NEW YORK CITY POLICE OFFICERS' VARIABLE SUPPLEMENTS FUND; NEW YORK CITY POLICE SUPERIOR OFFICERS' VARIABLE SUPPLEMENTS FUND; NEW YORK CITY FIREFIGHTERS' VARIABLE SUPPLEMENTS FUND; NEW YORK CITY FIRE OFFICERS' VARIABLE SUPPLEMENTS FUND; TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK VARIABLE ANNUITY FUNDS; THE CITY OF NEW YORK GROUP TRUST; and THE NEW YORK CITY DEFERRED COMPENSATION PLAN;

STATE OF NEW YORK, *ex rel. FX Analytics*,

DECISION/ORDER

Plaintiffs,

-against-

Index No. 114735/09

THE BANK OF NEW YORK MELLON CORPORATION and THE BANK OF NEW YORK MELLON,

Defendants.

----------X

FRIEDMAN, J.:

In this action for injunctive relief and damages, the Attorney General of the State of New

York, the Comptroller of the City of New York, and various Funds that provide pension and other benefits to New York City employees (the City Funds) allege that defendant The Bank of New York Mellon (BNYM or Bank) perpetrated a 10-year fraud in executing foreign exchange transactions for the City Funds, pursuant to standing instructions.[1]

The "Amended Complaint and Superseding Complaint" (Complaint) alleges that the Bank offered two types of foreign exchange transactions (FX transactions) to the City Funds, its custodial clients. The first consisted of transactions in which clients who wished to purchase or sell foreign currency negotiated a price with the Bank's trading desk. The second consisted of "non-negotiated transactions," made pursuant to BNYM's "standing instruction program," under which clients gave BNYM standing authorizations to execute foreign exchange transactions without negotiating the price of the purchase or sale. (Complaint, ¶¶ 17-18.) The standing instructions covered conversions of income distributions, tax refunds, and dividends received by clients in foreign currencies, and currency conversions incident to purchases or sales of foreign securities. (Id., ¶ 18.) According to plaintiffs, BNYM promoted its standing instruction program by making representations, among others, that in executing FX transactions pursuant to standing instructions, it would provide "best execution," "the best rate of the day," and/or "the most attractive/competitive rate available to the Bank." (Id., ¶ 20.)[2] Plaintiffs claim that, instead,

---

[1]By stipulation dated December 13, 2011, plaintiffs discontinued this action against The Bank of New York Mellon Corporation. BNYM is therefore the sole defendant in the action.

[2]More particularly, the Complaint catalogues the Bank's allegedly fraudulent misrepresentations in Requests for Proposals [RFPs] as follows:

> "From 2001 to the present, the Bank wrote hundreds of misleading responses to RFP questions regarding FX trading and conversions. These included representations that in executing FX transactions pursuant to SI [Standing Instructions], the Bank:
>
> a. obtains the 'best rate of the day' for clients, and 'gives

BNYM intentionally charged its clients "the worst rate at which the currency had traded during the trading day rather than [] the market rate at the time of the trade. The Bank then pocketed for itself the difference between the worst price of the day it had given clients and the market price existing at the time it executed the transaction." (Id., ¶¶ 1, 20.) Plaintiffs further allege that FX transactions executed pursuant to standing instructions are "far more profitable" to the Bank than negotiated FX transactions; that from 2001 to 2009, BNYM earned an average of 2.5 basis points on negotiated transactions but 17.5 basis points on standing instruction orders; and that BNYM earned $2 billion during the decade, from 2001 to the filing of the Complaint in 2011, in which it

---

> our clients the most competitive/attractive FX rate available to us;'
> b. prices: (i) at levels 'reflecting the interbank market at the time the trade is executed;' (ii) 'a[t] the prevailing market rates at the time of the client instruction to execute the FX conversion;' and (iii) 'based on current foreign exchange rate input;'
> c. executes FX conversions 'pursuant to best execution;'
> d. 'actively engages in making markets and taking positions in numerous currencies to obtain the best rates for our clients;'
> e. gives SI clients 'the same . . . competitive pricing' that Investment Advisors who negotiate prices directly with the Bank's trading desk receive;
> f. executes foreign exchange transactions for restricted currencies with local sub-custodians 'to ensure that the best rate is attained for our clients;' and
> g. discloses to clients any conflict of interest."

(Complaint, ¶ 26.)

Plaintiffs further contend that the Bank's website made the following misrepresentations: that standing instruction trades were "executed according to best execution standards" (id., ¶ 29 [internal quotation marks omitted]); that the Bank would "aggregate and net SI trades" (id., ¶ 31); and that standing instruction transactions were "free of charge" (id., ¶ 34 [internal quotation marks omitted]).

Plaintiffs also allege misrepresentations in "Welcome Packages" sent to investment managers, including statements that the standing instruction transactions were "free of charge"; that "[t]he terms of FX transactions would not be less favorable to clients 'than terms offered by the Bank of New York to unrelated parties in a comparable arm's length FX Transaction'"; and that "[n]o rates would be posted for SI transactions in restricted currencies, but such transactions would 'be executed according to market practice.'" (Id., ¶ 36.)

executed FX transactions for plaintiffs. (Id., ¶¶ 19, 1, 4.)

The Complaint pleads 13 causes of action: The first through fourth are brought solely by the Attorney General, on behalf of the People of the State of New York, and allege fraud-based claims under sections 352, 352-c, and 353 of the Martin Act (General Business Law [GBL]). The fifth, also brought solely by the Attorney General, alleges violation of section 63(12) of the New York Executive Law. The sixth through eighth, brought by all plaintiffs as successors to the claims of a qui tam plaintiff, allege violations of sections 189(1)(a), (b), and (g) of the New York State False Claims Act (NY State Finance Law). The thirteenth, brought by the Comptroller and City Funds, alleges similar claims under section 7-801 the New York City False Claims Act (Admin. Code of City of NY). The ninth, brought by all plaintiffs, alleges unjust enrichment. The tenth, brought by all plaintiffs, alleges common law fraud based on the Bank's alleged failure to disclose material information about its pricing. The eleventh and twelfth, brought only on behalf of the Comptroller and City Funds, allege breach of fiduciary duty and breach of contract. This action raises claims similar to those brought against BNYM in jurisdictions around the country, alleging misconduct by BNYM in its pricing of foreign exchange transactions.[3] The Martin Act claims are, however, distinct.

BNYM now moves to dismiss the Complaint, pursuant to CPLR 3211(a)(1) and (7), based upon documentary evidence and for failure to state a cause of action.

It is well settled that, on a motion to dismiss addressed to the face of the pleading, "the

[3]See e.g. Commonwealth of Virginia ex rel. FX Analytics v The Bank of New York Mellon Corp., Cir Court, Fairfax County, Virginia, CL-2009-15377, Ney J., 2009; International Union of Operating Engr. v The Bank of New York Mellon Corp., US Dist Ct, ND Cal, 11 Civ 3620, Alsup, J., 2011; Ex rel. FX Analytics, Los Angeles County Empl. Retirement Assn. v Bank of New York Mellon Corp., US Dist Ct, ND Cal, 11 Civ 5683, Alsup, J., 2011; United States v Bank of New York Mellon, US Dist Ct. SD NY, 11 Civ 6969, Kaplan, J., 2011; Southeastern Pennsylvania Transp. Auth. v The Bank of

pleading is to be afforded a liberal construction (see, CPLR 3026). [The court] accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) When documentary evidence under CPLR 3211(a)(1) is considered, "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Id. at 88.) "[T]he court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003] [internal citations omitted].)

I. MARTIN ACT CLAIMS (First through Fourth Causes of Action)

The provisions of the Martin Act on which the Attorney General relies, General Business Law sections 352, 352-c, and 353, authorize "the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State." (Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, 12 NY3d 236, 243 [2009] [internal citations omitted].)[4]

GBL § 352(1) authorizes the Attorney General to investigate fraudulent practices "in the issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution within or from this state" of securities. This section defines "security or securities"

New York Corp., US Dist Ct, SD NY, 12 Civ 3066, Kaplan, J., 2012 [and other cases cited therein].

[4]The four causes of action plead violations of the Martin Act under these different sections. However, all are based on the same factual allegations regarding the standing instruction FX transactions.

as:

> "any stocks, bonds, notes, evidences of interest or indebtedness or other securities, including oil and mineral deeds or leases and any interest therein, sold or transferred in whole or in part to the purchaser where the same do not effect a transfer of the title in fee simple to the land, or negotiable documents of title, or foreign currency orders, calls or options therefor hereinafter called security or securities. . . ."

Section 352-c(1)(c) makes it illegal for any person to use any fraudulent practices "to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities . . . as defined in section [352]." Section 353 authorizes the Attorney General to bring an action on behalf of the People of the State of New York to enjoin such fraudulent practices.[5]

A. Coverage

The parties' threshold dispute is whether the Martin Act applies to the standing instruction FX transactions. The specific term "foreign currency orders" is not defined in the Martin Act. Moreover, the term "foreign currency orders" does not appear to be in current use in financial parlance. There is also no evidence in the record as to the meaning of the term "foreign currency orders" as of 1925, when the Martin Act was amended to add such orders to the definition of securities.

The court is therefore presented with a question of statutory construction, and must "ascertain and give effect to the intention of the Legislature." (Matter of DaimlerChrysler Corp.

---

[5]The Martin Act also authorizes the Attorney General to investigate and prosecute fraud in the marketing and sale of commodities, which are defined as "any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title . . . ." (GBL § 352[1].) There is no claim in this action that the standing instruction FX transactions involve commodities.

v Spitzer, 7 NY3d 653, 660 [2006] [internal quotation marks and citation omitted].) "The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." (Id.; accord Roberts v Tishman Speyer Props., L.P., 13 NY3d 270, 286 [2009].) Resort to rules of statutory construction may be had "'when it is necessary to apply them to ascertain the meaning of a statute.'" (Naldi v Grunberg, 80 AD3d 1, 8 n 4 [1st Dept 2010] [quoting McKinney's Cons Laws of NY Book 1, Statutes, § 91, Comment], lv denied 16 NY3d 711 [2011].) Under these rules, "[w]hen the Legislature has failed to assign definition to a statutory term, the courts will generally construe that term according to its ordinary and accepted meaning as it was understood at the time" of enactment of the statute. (People v Eulo, 63 NY2d 341, 354 [1984] [internal quotation marks omitted].) However, the term must always "be read in accordance with the apparent purpose of the statute in which it is found." (Id.) "[E]ffect and meaning should be given to the entire statute and every part and word thereof." (People v Finley, 10 NY3d 647, 655 [2008] [internal quotation marks & citations omitted].) In addition, the meaning of an ambiguous word should ordinarily be interpreted "in relation to the meanings of adjacent words." (Matter of Kese Indus. v Roslyn Torah Found., 15 NY3d 485, 491 [2010] [citing Statutes § 239: "words employed in a statute are construed in connection with, and their meaning is ascertained by reference to the words and phrases with which they are associated"].) Finally, "[i]f the [statutory] language is ambiguous, [the court] may examine the statute's legislative history." (Roberts, 13 NY3d at 286 [internal citation omitted].)

Under the above rules of statutory construction, the court must consider the meaning of the specific statutory term "foreign currency orders" in relation to the meaning of the adjacent

words, including the general term "securities" as used in the Martin Act. In construing the statutory terms, however, the court will be guided not only by the rules of statutory construction but also by case law that has been developed, largely by the federal courts, in construing the term "securities" under the federal securities laws. As the Court of Appeals has explained, although the Martin Act and the federal securities laws do not contain identical definitions of securities, their "remedial purpose of protecting the public from fraudulent exploitation in the offer and sale of securities" is the same. (All Seasons Resorts v Abrams , 68 NY2d 81, 86-87 [1986].) Thus, the federal cases construing the term "security" under the federal statutes are "persuasive authority." (Id. at 87.) As discussed more fully below, the courts apply a two-fold analysis, first determining whether a transaction falls within the definition of a security that is specifically enumerated in the statute's definitional section and, if the transaction does not, then determining whether the transaction falls within the definition of the general term "security." (Id. at 87-88.) The latter question will often be answered by analyzing the transaction under the test for an "investment contract" developed by the Supreme Court in Securities & Exchange Commission v W.J. Howey Co. (328 US 293 [1946].)

The Parties' Contentions

In moving to dismiss the Martin Act claims, BNYM first argues that "purchases and sales of foreign currency do not involve 'securities' covered by the Martin Act." (D.'s Memo. In Support at 7.) Plaintiffs counter that "the Complaint alleges fraud in standing instruction foreign currency orders, not foreign currency itself." (Ps.' Memo. In Opp. at 23-24 [emphasis in original].) Thus, plaintiffs characterize the standing instructions as a type of foreign currency order, and then assert that they therefore fall within a defined category of securities enumerated

in the Act. (See id. at 22.) Plaintiffs also appear to assert, however, that the "actual exchange of foreign currency positions" is a security covered by the Martin Act. (Id. at 23 [internal quotation marks omitted].) In reply, BNYM emphasizes that a "foreign currency order" must be a negotiable instrument, not a mere request to purchase currency, and that the instrument must represent an "interest in property, but not the property itself." (D.'s Reply Memo. at 2-3.) It argues, in the alternative, that the standing instructions do not meet the Howey test. (D's. Memo. In Support at 9.) Plaintiffs counter, in a single sentence footnote, that "[b]ecause the Martin Act explicitly defines securities as including 'foreign currency orders,' the Howey test . . . [is] inapplicable." (Id. at 22, n 14.)

Plaintiffs' characterization of the standing instructions as "standing instruction foreign currency orders" is clearly not controlling. (All Seasons Resorts, 68 NY2d at 88 ["Whether the label of a particular interest and the description given to it by the parties brings it literally within one of the enumerated categories in section 352-e is not determinative. . . . [The court] must . . . search for substance over form with emphasis on economic reality to see if it displays the characteristics of 'securities' in the general sense of the term as used in section 352 and 352-e."] [internal quotation marks & citations omitted].) Plaintiffs' further claim that the meaning of the specific term "foreign currency orders" does not have to be construed lacks merit in light of Supreme Court precedents construing enumerated categories of securities in the definitional sections of the federal securities laws. (Landreth Timber Co. v Landreth, 471 US 681 [1985] [construing statutorily enumerated term "stock"]; Reves v Ernst & Young, 494 US 56 [1990] [construing statutorily enumerated term "notes"].)

But it is BNYM that has the burden on this motion to dismiss of demonstrating that the

standing instruction transactions do not qualify as "foreign currency orders" and do not meet the definition of the general term "securities" under the Martin Act. While it recognizes that statutory construction is necessary, it fails, for the reasons stated below, to meet this burden.

"Foreign Currency Orders"

In support of its contention that the standing instructions are not "foreign currency orders," BNYM relies on definitions of the term "order," as opposed to "foreign currency order," from statutes outside the securities context whose applicability is not discussed. First, it cites Uniform Commercial Code (UCC) section 3-107(2) in support of its claim that a foreign currency order is a negotiable instrument consisting of a promise or order to pay foreign currency on demand or by a specified date. By its terms, however, Article 3 of the UCC "does not apply to money, documents of title or investment securities." (UCC § 3-103[1].) It applies to commercial paper – that is, "drafts, checks, certificates of deposit and notes as defined in section 3-104(2)." (UCC § 3-103, Comment 1.) BNYM also cites a statutory provision which, although roughly contemporaneous with the amendment to the Martin Act that brought "foreign currency orders" within its scope, defines the term "document of title to goods." (D.'s Reply Memo. at 5 [quoting Personal Prop. Law § 156 [L 1909, ch 45] ["'Document of title to goods' includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods. . . ."].) The Bank makes no showing that the meaning of the term "foreign currency orders" is appropriately determined with reference to a provision that defines a negotiable instrument with respect to commercial paper or goods, as opposed to securities. Put another way, while it may be that the meaning of negotiable instrument is similar in these separate

contexts, that showing is not made here. The Bank also submits no authority addressing the term "order," as applied to foreign currency in particular, at the time of the enactment of the Martin Act amendment.

The legislative history on which the Bank relies is similarly inconclusive. The parties agree that this legislative history consists solely of a letter, dated April 1, 1925, from the Attorney General to the Governor. The letter addresses not only the amendment that added "foreign currency orders, calls or options therefor" to the list of "securities," but also a second amendment that brought commodities within the purview of the Martin Act and, as noted above, defined commodities separately from securities as "any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title. . . ." The letter refers to foreign currency transactions using the vague term "dealings in foreign money and exchange." It states that the newly added subjects of regulation – commodities futures and foreign exchange – all involve "transfers of value by means of delivery of documents of title." However, it also emphasizes a need for regulation of bucketing in both the commodities futures and foreign exchange areas,[6] but does not identify the

---

[6]The 1925 letter initially states: "Section 352 is amended so that the Act will cover the sale of commodities for future delivery, dealt in on exchanges; also, dealings in foreign money and exchange." It then explains:

> "These new fields – 'futures' and foreign exchange – are recognized as fertile ground for swindling similar to that in connection with transactions in stocks and bonds. You can 'bucket' futures and foreign exchange just as well. It happens. All the types of transactions to be included in the Act as amended, are, therefore, closely akin. They all involve transfers of value by means of delivery of documents of title. Delivery is made through daily clearings and adjustment of balances. Public market quotations play an important part in these transactions, but concealment and secrecy as to the actual steps taken in any transaction, are all too feasible. Hence, the bucketeer.
>
> . . .
>
> I would call attention to the words 'negotiable documents of title' as

bucketing practices involving foreign exchange that were of concern at the time.[7] Nor does the letter, or any other authority cited in the record, identify the types of transactions encompassed by the term "foreign currency orders," or explain why the legislature used this term, in addition to the terms "calls" and "options," to describe the foreign exchange dealings at issue. The scant legislative history thus does not assist the court with its interpretive task of giving meaning to all words of the statute, and is otherwise too ambiguous to clarify the meaning of the amendment.[8]

The court accordingly holds that the limited record on this motion to dismiss provides an insufficient basis on which to construe the term "foreign currency orders." The record also does not indicate whether there is any evidence – for example, evidence that could be presented by a financial historian – that would be probative of the meaning of the term at the time of the amendment adding it to the Martin Act. Even if it were proper for the court to construe the general term "securities" without first ascertaining whether it is possible to construe the term "foreign currency orders," the court could not do so on this record. BNYM does not address

---

> used in the new section 352. Their use is designed to and does exclude from the purview of the Act ordinary 'over the counter' dealings. It is, of course, unnecessary to include them."

It is noted that the term "negotiable documents of title" is used only in the amendment that adds commodities to the transactions regulated by section 352, not in the amendment that adds foreign currency dealings. Section 352, as it existed prior to the amendments, did include the term "negotiable documents of title," but apparently as one of the enumerated categories of securities.

[7]The court rejects BNYM's contention that the court should not find that section 352 covers bucketing of foreign exchange because the legislature also amended the Martin Act in 1925 to add section 351 (based on former Penal Law section 390), providing for criminal prosecution of "bucketing over-the-counter commodities." (D.'s Reply Memo. at 5 n 6.) Defendant invokes the precept of statutory construction that statutes enacted at the same session of the legislature should receive a construction that will give effect to each. (Id.) In this case, however, a statute authorizing criminal prosecution is by no means inconsistent with a statute authorizing civil proceedings based on the same wrong.

[8]BNYM further contends that "the Martin Act includes 'foreign currency' in the definition of 'commodity'" in GBL § 359-e(14)(a)(i), a registration provision, and that such inclusion "confirms" that foreign currency is not a security. (D.'s Memo. In Support at 8-9.) This contention is puzzling, as section

whether the Howey investment contract test is the appropriate test to be applied, and does not discuss the large and complex body of case law applying the Howey test and otherwise construing the term "securities." [9] The court therefore will not resolve the issue of the coverage of the Martin Act on this motion.

Based on the court's own review of the case law, however, the court notes that the cases not only cast doubt on BNYM's insistence that a security may not be found in the absence of a negotiable instrument, but also indicate that plaintiffs may have at least a colorable claim that the standing instruction transactions are securities under the Martin Act. Brief review of the major precedents is in order here.

The Howey Test and Cases Construing the Term "Securities"

Any discussion of federal law construing the term "securities" must begin with the Supreme Court's decision in Howey (328 US 293, supra), which defined the term "investment contract," one of the specifically enumerated securities in section 2(1), the definitional section of the Securities Act of 1933 (15 USC § 77b[a][1]).[10] As the Court explained in Howey, section

---

352 also specifically includes "foreign currency orders" in the definition of securities.

[9]The Supreme Court has described the construction of the securities laws as the "judicial oak which has grown from little more than a legislative acorn." (Blue Chip Stamps v Manor Drug Stores, 421 US 723, 737 [1975] [referring to judicial interpretation of § 10[b] of the Securities Exchange Act of 1934], reh denied 423 US 884 [1975].) Commentators have "criticized the 'elusiveness' or lack of judicial guidance in defining 'security.'" (Loss, Seligman and Paredes, Securities Regulation, Vol II Ch 3 § [A][1], at 858 n 6 [4th ed 2007] [and authorities cited therein] [Loss, Seligman].) At a minimum, there can be no real disagreement that the case law is both extensive and complex.

[10]Like section 352 of the Martin Act, the sections of the federal securities laws defining the term "security" – section 2(1) of the Securities Act of 1933 (15 USC § 77a et seq.) and section 3(a)(10) of the Securities Exchange Act of 1934 (15 USC § 78a et seq.) – enumerate specific categories of securities including stocks, bonds, and notes, and contain more general or catch-all categories, including any "instrument commonly known as a security" and the term "investment contract." The categories in the 1933 and 1934 Acts have been held to differ slightly from each other but to be virtually identical in meaning. (Securities & Exch. Commn. v Edwards, 540 US 389, 393 [2004].) Martin Act § 352 similarly

2(1) of the 1933 Act "defines the term 'security' to include the commonly known documents traded for speculation or investment," but also includes securities "of a more variable character," including those described by the term "investment contract." (Id. at 297.) As articulated by the Court, "[t]he test [of an investment contract] is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." (Id. at 301.) Under this test, form is disregarded for substance and emphasis placed on "economic reality." (Id. at 298.) Applying the test, the Court found that an "investment contract" existed where a contract for the sale of land – citrus grove plots – was offered by the promoters with an optional service contract for maintenance of and cultivation of crops on the plots. The sales and maintenance contracts were both integral to the Court's finding of an investment contract because the owners of the plots lacked access to the plots and could not have obtained profits from the cultivation of crops without the services of the promoters under the maintenance contract.

Howey was limited in Landreth Timber Co. v Landreth (471 US 681 [1985]), which clarified that the Howey test will not be applied to instruments such as traditional common stock that are "plainly within the statutory definition" of a specifically enumerated security, as opposed to "unusual instruments that [do] not fit squarely within one of the enumerated specific kinds of securities" or that are "not easily characterized as 'securities.'" (Id. at 689 n 4, 690; see generally Loss, Seligman at 857-866; Thomas Lee Hazen, Federal Securities Law, § II[A], at 11-15 [3d ed

---

follows the pattern of enumerating specific categories of securities and more general categories. Although it does not include the general term "investment contract," as will be discussed more fully in the text, the test for an investment contract has been adopted by New York cases in construing the term "security."

Federal Judicial Center 2011] [Hazen].) Landreth held that the Howey test would not be applied to an instrument with the classic attributes of a security – there, an instrument bearing the label "stock," which had stock's usual characteristics including the right to receive dividends contingent on profits; negotiability; and the capacity to appreciate in value – and which therefore fell within the definition of "stock," one of the enumerated categories of securities in section 3(a)(10) of the 1934 Act. (Landreth, 471 US at 686-692.)[11]

Notwithstanding the extensive case law refining and applying Howey, it remains the leading case on the definition of an investment contract. As the legislative purpose in enacting the securities laws was "'to regulate investments, in whatever form they are made and by whatever name they are called'" (Edwards, 540 US at 393 [emphasis in original], quoting Reves, 494 US at 61), the Howey test of an investment contract provides a useful framework for construing the general term "securities," at least where the courts are presented with unusual instruments that are not easily characterized as securities. (See Loss, Seligman at 860; Hazen at 11 [commenting that the term investment contract "captures the generic concept of what a security is"].) As observed by the Supreme Court, the test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes

---

[11]Reves v Ernst & Young (494 US 56 [1990], reh denied 494 US 1092 [1990]), another of the landmark cases, held that the Howey test was not applicable to demand notes, where the notes satisfied the statutory definition of "notes," one of the enumerated categories of securities in section 3(a)(10) of the 1934 Act. The Court applied a "family resemblance test" under which it considered whether the notes at issue resembled the types of notes that were specifically exempted from the definition of securities. (Id. at 64-65.) The Court identified the factors to be considered in making this determination as whether the purpose of the notes was to raise money for a business enterprise rather than to facilitate a commercial or consumer purpose; whether there was "common trading" in the notes; whether the reasonable expectations of the public were that the notes were investments; and whether "some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary." (Id. at 66-67.) The Court held that the "common trading" factor was met although the notes were not traded on an exchange, because they were offered to

devised by those who seek the use of the money of others on the promise of profits." (Howey, 328 US at 299; accord Edwards, 540 US at 393-395.)

The New York Court of Appeals followed Howey and Landreth in All Seasons Resorts, Inc. v Abrams (68 NY2d 81, supra), which determined whether a membership interest in a real estate venture was a security within the meaning of section 352-e(1)(a) of the Martin Act. That section provides for regulation of securities identified as participation interests or investments in real estate, but also incorporates the definition of securities in section 352. First, the Court applied the Landreth "two-fold analysis" (68 NY2d at 88), holding that it must determine whether the interest at issue "falls within one of the specific categories [in the list of securities] and, if not, whether, on examination of its characteristics in the light of decisional law, it meets the broader general definition of 'securities' in section 352." (Id. at 87-88.) After concluding that the membership interest at issue did not fall within a specific category, the Court adopted the Howey "economic reality" test in construing the general term "securities," although the Martin Act does not include the term "investment contract" among the securities it enumerates. (Id. at 88.)

In People v First Meridian Planning Corp. (86 NY2d 608 [1995]), the Court of Appeals again applied the Howey test in determining that a transaction involving a portfolio of numismatic coins and other properties satisfied the definition of an investment contact. The Court rejected the claim that a finding of a "security" requires some "document, akin to a bond, note, etc. evidencing an interest in tangible or intangible property, and cannot refer to the property or commodity itself, in this case numismatic coins." (Id. at 619 [emphasis in original].)

---

a broad segment of the public. (Id. at 68.)

It further clarified that Howey "specifically eschewed requiring the existence of some 'paper' formally evidencing the interest offered or sold, 'it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical asset employed in the enterprise.'" (Id. [emphasis in original], quoting Howey, 328 US at 299.) In concluding that the transaction involved a security, the Court noted that "[t]he sales pitch used to induce these purchases offered a package which included not only the tangible coins but a spectrum of supposedly profit-enhancing services, all part of an investment plan," including the expertise of dealers in selecting the coins to be purchased and in "monitoring their value in a fluctuating market . . . ." (Id. at 621.) Although the case appears to have involved an interest in the portfolio, as opposed to the outright sale, the Court cited federal cases for the proposition that Howey has been applied "to find that arrangements for the purchase of various tangible properties or commodities . . . constituted the sale of securities," where the requirements of an investment contract have been met. (Id. at 619-620.)

In the cases involving sales of tangible property, an investment contract has been found where there was also a services or other contract which provided for acts on the part of the promoter that would generate profit. (See e.g. Howey, 328 US 293, supra [sale of citrus grove plots with maintenance contract]; Edwards, 540 US 389, supra [sale of payphones with leaseback providing for promoter to maintain phones and pay fixed annual rate of return]; Miller v Central Chinchilla Group, 494 F2d 414 [8th Cir 1974] [sale of chinchillas with repurchase agreement]; see generally Group, Inc. v First Meridian Planning Corp., 86 NY2d at 619, supra.)[12]

---

[12]This line of cases must, however, be reconciled with separate authority, also not discussed by BNYM, summarizing cases as finding a "security" "where the person found to have been an investor chose to give up a specific consideration in return for a financial interest with the characteristics of a

Moreover, the courts have adopted an elastic definition of "profit" that varies with the nature of the transaction. The Supreme Court has declined to "bind [itself] unnecessarily" to a definition "that would frustrate Congress' intent to regulate all of the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." (Edwards, 540 US at 396 [holding that fixed rate of return qualified as profit, and noting that prior cases, which had defined profit as "capital appreciation resulting from the development of the initial investment" or "participation in earnings resulting from the use of investors' funds," did not set forth exclusive definition]; see also Reves, 494 US at 68 n 4 [in context of debt instruments, rejecting definition of profit as capital appreciation or participation in earnings].)

The cases have also relaxed the Howey requirement that the profits be made "solely" from the efforts of the promoter or a third party. (Howey, 328 US at 298.) This element will be found satisfied where "the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." (E.g. Securities & Exch. Commn. v Glenn W. Turner Enters., Inc., 474 F2d 476, 482 [1973], cert denied 414 US 821; accord People v First Meridian Planning Corp., 86 NY2d at 620-621.)

Here, the complaint does not allege in terms that the transactions were an investment. However, the foreign currency exchanges were made in connection with the City Funds' investments in foreign securities – either to obtain foreign currency to purchase the foreign securities or to convert dividends or income from the sale of foreign securities into dollars.

---

security." (International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v Daniel, 439 US 551, 559 [1979].)

(Complaint, ¶ 18.) The FX transactions were included in custodian agreements which provided for BNYM to effect purchases and sales of securities at the directive of the Funds' investment advisors and to provide services for foreign exchange. (See e.g. Custodian Agreement for Assets of the New York City Retirement Systems, dated Mar. 1, 2004, §§ 4, 5, Ex. B - Scope of Services.) The City Funds could opt out of the standing instructions and negotiate the rates on specific transactions, either with BNYM or at a different bank. (See generally 2002 FX Procedures [D.'s Ex. 7]; 2008 FX Procedures [D.'s Ex. 8].) As discussed more fully above (supra at 2-3), BNYM allegedly promoted its standing instructions by misrepresenting that it would give the City Funds "best execution," "the best rate of the day," and the "most attractive/competitive rate available to the Bank." (Complaint, ¶ 20.) BNYM also allegedly made more specific misrepresentations that it was a market maker and therefore in a position "to obtain the best rates for [its] clients" (id., ¶ 26 [d]), and that it would pool the City Funds' exchange transactions with those of other customers. ("Proposal to provide Custodial Services To the New York City Retirement Systems and Certain Other New York City Funds," Oct. 2003 at 129 [NYC Retirement Systems RFP] [D.'s Ex. 6] ["Clients benefit from our attractive rates because we aggregate all client income in any given currency to obtain 'the best rate of the day'"].)

The sufficiency of these allegations to satisfy the Howey test should not be evaluated on this record in which BNYM has neither addressed the extensive case law applying Howey nor discussed its applicability to the pleaded allegations. BNYM raises a serious question as to whether the standing instruction transactions are securities within the meaning of the Martin Act. The standing instructions themselves are not negotiable or transferable. As BNYM notes, and

plaintiffs do not dispute, the underlying foreign currency exchanges are spot transactions which are not subject to securities regulations. (Oral Argument Transcript at 27.) Further, the exchanges resulted in the acquisition of property, not an interest in property. But, in its insistence that a security will not be found absent a negotiable instrument or an instrument evidencing an interest in property (D.'s Reply Memo. at 2-3), BNYM focuses solely on instruments with the classic attributes of securities such as common stock. (See Landreth, 471 US at 686.) It wholly fails to address the legal significance of the line of cases discussed above (supra at 16-17), which holds that transactions involving the sale or purchase of property are securities transactions if conducted under circumstances that satisfy the Howey test. Significantly, also, whether the Howey test is met cannot be determined by treating the standing instructions as entirely separate from the underlying foreign exchanges, as BNYM apparently seeks to do. Rather, the issue is whether the services that BNYM provided in connection with the exchanges are sufficiently akin to the services that have been held to give rise to an investment contract where tangible property has been sold. Put another way, the issue is whether the representations made by BNYM as to the favorable rates it would provide gave rise to a reasonable expectation on the City Funds' part that "profit," as defined in the cases, would be realized in connection with the exchanges. On this record, it appears that plaintiffs have at least stated a potentially viable claim that should be fully addressed by the parties.[13]

---

[13]Interestingly, the Securities & Exchange Commission filed a complaint against a former Merrill Lynch portfolio and currency manager and foreign exchange trader, Edward Gobora, alleging a claim, among others, that he violated section 10(b) of the 1934 Exchange Act and Rule 10(b)(5) by delaying the execution of foreign exchange trades, causing clients to pay more in US dollars for securities purchased or to receive fewer US dollars for securities sold. (Securities & Exch. Commn. v Gobora, 1:02CV01136 [US DC 2002], SEC Complaint, ¶ 14.) The scheme was more fully described as one in which the foreign exchange desk received orders to buy or sell foreign currencies for investment companies managed by Merrill Lynch. Upon receiving such an order, Gobora sometimes delayed execution until after the

Finally, the court notes that Lehman Bros. Commercial Corp. v Minmetals Intl. Non-Ferrous Metals Trading Co. (179 F Supp 2d 159 [SD NY 2001]), is of limited precedential value in resolving the Martin Act coverage issue. This case, which involved interest-rate swaps, is apparently the only case that has determined the applicability of the Act to a foreign exchange transaction. The Court did not make a finding as to whether the term "foreign currency orders" was ambiguous, and did not apply the New York rules of statutory construction. Instead, in holding that the swaps were not foreign currency orders, the Court reasoned that "[n]o physical exchange of the underlying foreign currencies took place in connection with the trading activity. . . . As such, these transactions resemble a contractual wager based on movements in specified foreign-currency prices, without the real possibility of foreign currency positions changing hands. Unlike with an option, neither party . . . had a right to take possession of foreign currency." (Id. at 163.) In further analyzing the transactions under the Howey test, the Court held that it must employ a vertical commonality approach, which it stated requires "that there be a direct nexus between the efforts of the promoter and the return of the investor's investment." (Id., quoting the Appellate Division opinion in People v First Meridian Planning Corp., 201 AD2d 145.)[14] The Court held that the transactions did "not meet the commonality

---

London market closed, and then directed a Merrill Lynch office to execute the currency trade on behalf of a generically named client. Usually on the next trading day, he checked the London foreign exchange prices and, if the market had moved negatively, sometimes allocated the trade to the client for whom he had received the original foreign currency order the previous day. However, if the market had moved positively, he sometimes allocated the original position to one or more favored clients. Gobora then executed the original trade for the client on a future date at a different price, thus at times causing the client to pay more in US dollars or other currencies than needed for the settlement. (SEC Complaint, ¶ 10.)

The SEC's interpretation of Section 10(b) is not determinative. Moreover, this complaint was filed as a settled action and thus was not tested by a motion to dismiss on coverage grounds. However, the complaint does provide some support for the bona fides of the coverage claim in the instant case.

[14]In fact, the Court of Appeals opinion in this case also applied a vertical commonality test, but

prong because the structure of the transactions indicates that any gain likely would result in large part from market movements, not from capital appreciation due to [the promoter's] efforts." (Id. at 164.)

Both sides claim Lehman as support for their respective positions on whether the standing instruction transactions are securities. Plaintiffs contend that Lehman held that the touchstone of a security is the actual exchange of foreign currency positions. (Ps.' Memo. In Opp at 23.) This contention is incorrect, as the case did not craft a new test for a "security" but, rather, applied the traditional Howey test. BNYM claims that Lehman held that a "'foreign currency order' must be read in context to mean something like an option – that is, a negotiable instrument that conveys a 'right to take possession.'" (D.'s Reply Memo. at 4 [emphasis in original].) While the Court noted the difference between an interest-rate swap and an option, it did not hold that the Martin Act covers only foreign exchange transactions involving negotiable instruments. It also did not discuss the import of the legislature's inclusion in the foreign currency grouping of the separate term "foreign currency order." More importantly, Lehman casts no light on the critical issue here of whether the standing instructions and underlying foreign currency exchanges, considered together, can be found to have led to a reasonable expectation of gain or "profit" from the promoter's efforts, not merely gain that would be the result of market forces.[15]

---

defined the test in slightly different terms as whether "the fortunes of all investors are inextricably tied to the efficacy of those seeking the investment or a third party." (86 NY2d at 620 [internal quotation marks, citations & brackets omitted].)

[15]BNYM also argues that if the Martin Act is held to cover the standing instruction FX transactions for the City Funds, every foreign currency exchange transaction made at any kiosk or ATM would also be covered. (D.'s Memo. In Support at 9-10.) This argument wholly ignores that ordinary foreign currency exchanges are just that, as they do not involve standing instructions issued in response to alleged misrepresentations about pricing. The issue here, in contrast, is whether the exchanges, together

Summary

The limited record on this motion to dismiss does not provide an adequate basis on which to construe the statutory term "foreign currency orders." Of particular concern is the lack of any information about the foreign exchange practices at the time of the amendment that led to the inclusion of "foreign currency orders" as one of the enumerated categories of securities to be regulated by the Martin Act – an issue on which a financial historian might cast light when the term is construed on a more fully developed record at a later stage of the litigation. The record on this motion also does not provide an adequate basis on which to determine whether the standing instruction FX transactions satisfy the Howey test of an investment contract. Apart from cursory references to Howey, there is almost no discussion of the complex and extensive case law defining the term "securities." Moreover, although the applicability of another regulatory scheme to the transactions would be relevant to whether they are regulated under the Martin Act, BNYM fails to situate the transactions in the vast network of securities and commodities regulations. Thus, BNYM omits any discussion of how they resemble or differ from the FX or forex transactions that are now or may have been subject to regulation in the past.

As the Court of Appeals has explained, the purpose of the Martin Act is to give the Attorney General "broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public." (Kerusa Co., 12 NY3d at 244 [internal quotation marks & citation omitted].) Given the significant impact on the public of a judicial determination as to whether the Martin Act covers

---

with the standing instructions, meet the test for an "investment contract" or otherwise satisfy the definition of a "security" within the meaning of the Martin Act.

BNYM's broad-based provision of standing instruction services to public entities, this determination should not be made on anything less than a record that is fully developed to include necessary factual detail and comprehensive legal authority. The branch of the motion to dismiss the Martin Act claims on coverage grounds will accordingly be denied.[16]

B. Sufficiency of the Allegations

Representations

Having concluded that plaintiffs' claim to coverage under the Martin Act should survive the motion to dismiss, the court turns to the issue of the sufficiency of the alleged misrepresentations and omissions to support plaintiffs' fraud claim under the Act. The court is unpersuaded by BNYM's contention that the allegations constitute non-actionable opinion or puffery. The cases on which BNYM relies in support of this contention all involve advertisements or sales pitches aimed at the general public. (See e.g. Bader v Siegel, 238 AD2d 272 [1st Dept 1997] [rejecting fraud and breach of contract claims based on promise, in materials for lifestyle course, to demonstrate strategies for self-improvement]; Sutton Assocs. v LexisNexis, 196 Misc 2d 30, 32-33 [Sup Ct, Nassau County 2003] [rejecting fraud claim based on LexisNexis' representatives' representations that subscription rates offered to plaintiff were the "best rates Lexis could offer," and that similar businesses were not receiving "lower rate"]; Archer v Nissan Motor Acceptance Corp., 550 F3d 506, 510 [5th Cir 2008] [describing as "puffing," car dealers' representation to plaintiff car-buyers that financing rates they received were the "best rate"]; Crofton v Bank of Am. Home Loans, 2011 WL 1298747, *8, 2011 US

[16]The court notes that this decision will not have an impact on the scope of discovery in this case because the Martin Act claims are based on a number of the same representations as the contract claim, and on the same omissions as the common law fraud claim, which will also survive the motion to dismiss,

Dist Lexis 34860 [ED Mich, Mar. 31, 2011, No. 11-10124] [rejecting fraud claim based on representation, which Court characterized as "salesmen's talk," that interest rate offered to residential mortgagor was "'the best rate' available"].)

In contrast, in determining whether a representation is misleading under the securities laws, the test is "'whether defendants' representations, taken together and in context, would have [misled] a reasonable investor' about the nature of the investment." (Acacia Natl. Life Ins. Co. v Kay Jewelers, Inc., 203 AD2d 40, 44 [1st Dept 1994] [brackets in original] [quoting I. Meyer Pincus & Assocs. v Oppenheimer & Co., 936 F2d 759, 761 [2d Cir 1991] [in determining whether plaintiff alleged violation of section 11 of Securities Act of 1933, court adopted test set forth in Pincus & Assocs.]; Phoenix Light SF Ltd. v Ace Secs. Corp., 39 Misc 3d 1218[A], 2013 WL 1788007, *4, 2013 NY Misc Lexis 1723 [Sup Ct, New York County 2013] [Kornreich, J.] [adopting same test for common law fraud claim]; Rombach v Chang, 355 F3d 164, 172 n 7 [2d Cir 2004] [adopting same test for sections 10(b) and 11 of the Securities Acts].) Moreover, a fraud claim under the Martin Act does not require proof of "either scienter or intentional fraud." (State of New York v Rachmani Corp., 71 NY2d 718, 725 n 6 [1988]; accord Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc., 18 NY3d 341, 350 [2011].)

Applying these standards, the court holds that the Complaint alleges misrepresentations sufficient to support the Martin Act fraud claims. These allegations fall into several categories, including allegations that BNYM obtains "the best rate of the day" for clients and gives clients the most competitive/attractive rate available to BNYM; prices FX transactions at levels reflecting the interbank market at the time the trade is executed; and executes FX conversions

---

as discussed further below.

pursuant to "best execution." (See Complaint, ¶ 26, quoted at 2 n 2, supra.)

The Complaint alleges that BNYM's misleading representations were made in "hundreds" of responses to Requests for Proposals. (Id.) Only one RFP Response to the City Funds is attached to BNYM's motion. (See NYC Retirement Systems RFP [D.'s Ex. 6].) By its terms, this proposal does not apply to all of the plaintiffs and does not contain all of the representations that plaintiffs allege were made in the proposals. For example, the representation as to "best execution" does not appear in the NYC Retirement Systems RFP, and apparently appeared on the Bank's website, a screenshot of which has not been provided to the court. The Complaint also lacks detail as to the dates on which the representations were allegedly made. As BNYM does not identify the plaintiffs to which specific alleged representations were or were not made, the court also will not do so, and will address the sufficiency of the representations to support the Martin Act fraud claims, assuming they were made to one or more of the plaintiffs.

In a recent decision in United States v Bank of New York Mellon (__ F Supp __, 2013 WL 1749418, 2013 US Dist Lexis 58816 [SD NY, April 24, 2013, No. 11 Civ 6969] [US v BNYM],[17] the Court found many of the virtually identical representations sufficient to support a fraud claim under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) (12 USC § 1833a), a statute which, like the Martin Act, requires a misleading representation or omission, but also requires proof of intent to deceive and to cause harm. (Id., *16.) Focusing on the representation as to "best execution," the Court rejected the argument, which BNYM also makes here, that the term "best execution" lacks sufficiently well-accepted meaning in the foreign exchange context to support a fraud claim. (See D.'s Memo. In Support at 16.) The

[17] All pincites are for the WestLaw citation.

Court found a triable issue of fact as to whether the term "best execution" has the same meaning in the FX markets as it does in securities markets – namely, "that the bank provides to the customer the best price available in the circumstances." (US v BNYM, 2013 WL 1749418, *17-18.) The Court also rejected the assertion that the term "best available price" was so vague that a representation that it would be provided could not be found materially false or misleading. (Id., *18; see also Newton v Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F3d 266, 270-271 [3d Cir 1998], cert denied sub nom Merrill Lynch, Pierce, Fenner & Smith, Inc. v Kravitz, 525 US 811 [1998] [applying common law duty of best execution in securities transaction, Court held: "While ascertaining what prices are reasonably available in any particular situation may require a factual inquiry into all of the surrounding circumstances, the existence of a broker-dealer's duty to execute at the best of those prices that are reasonably available is . . . not so vague as to be without ascertainable content in the context of a particular trade or trades."].) Noting that even best execution would not necessarily require BNYM to trade at the interbank rate itself, the Court held it "at least plausible that BNYM's practices – which allegedly produced spreads ten times that of negotiated transactions – sufficiently exceeded the bounds of any reasonable industry understanding of best execution to make the representation false or, at a minimum, misleading." (US v BNYM, 2013 WL 1749418, *18.) This court adopts the federal Court's reasoning here, and holds that the Martin Act claims are maintainable based on the "best execution" representation.

This court, however, parts way with the federal Court to the extent that it held that the "best rate of day" representation is insufficient as a matter of law to support a fraud claim. (See id., *27.) Contrary to BNYM's contention, the allegations that BNYM gives clients the "best

rate of the day" or the "most competitive rate available" are not analogous to the representations given in a sales pitch to a consumer. Rather, they are representations made in the context of formal bids (i.e., the RFPs), addressed to highly sophisticated investors, in response to the investors' formal written requests for information. The "best rate" representation was made in response to a specific inquiry in the NYC Retirement Systems RFP about the competitiveness of the Bank's foreign exchange rates.[18] The meaning reasonably ascribed by plaintiffs to the term

---

[18]Question 12 states that foreign exchange is needed for the settlement of trades in international markets, and asks: "How do[es BNYM] determine the competitiveness of [its] foreign exchange and the timeliness of [its] execution for international transactions?" (NYC Retirement Systems RFP at 129 [D.'s Ex. 6.) BNYM responded as follows:

> " . . .[W]e actively engage in making markets and taking positions in numerous currencies to obtain the best rates for our clients. Our book of business is not restricted to our custody clients. The majority of our business comes from non-custody clients, including import/export firms, insurance companies, mutual funds, and money managers.
>
> > Clients benefit from our attractive rates because we aggregate all client income in any given currency to obtain the "best rate of the day." That "best rate of the day" is applied to all of the income conversions that we execute for that day, regardless of amount.
>
> In order to judge whether foreign exchange transactions are competitive, we supply a daily range of U.S. high-low foreign exchange rates from Reuters, enabling Bureau of Assets Management staff to compare our rates with others in the industry. In addition, the Bureau of Asset Management's investment managers can periodically "shop" a particular transaction with several institutions to compare the rates and services offered. This approach serves as an incentive to retain our clients by guaranteeing that our service remains competitive."

(Id. [emphasis in original].)

Question 17 asked whether BNYM relied on "local brokers to execute foreign currency to settle trades," and whether BNYM independently reviews and documents the "quality and execution cost of local brokers." (Id. at 131.) BNYM responded that it "executes all foreign exchange transactions for restricted currencies with the local subcustodians to ensure that the best rate is attained for our clients," and that for countries with restricted currencies, BNYM "closely monitor[s] market trends and corresponding FX rates in order to ensure that clients receive the fair market price for their currency exchange." (Id.)

"best rate" must be considered in the context of BNYM's other representations as to the steps it took to ensure the competitiveness of its rates, including its representation that it was a market maker.

BNYM asserts that it was not "literally guaranteeing the best rate available for any kind of transaction, anywhere," and that if it had given such a guarantee, "no rational customer would ever have undertaken to negotiate terms for FX transactions, because they could never negotiate a better price." (D.'s Memo. In Support at 15.) In this regard, BNYM misperceives plaintiffs' assertion, which is not that the "best rate" representation amounted to such a guarantee but, rather, that the term "best rate" should be read in light of BNYM's representations about its competitiveness in foreign exchange transactions. (Ps.' Memo. In Opp. at 12.)

Significantly, the Complaint stops short of alleging that the Bank should have charged the same rates for both standing instruction and negotiated transactions; should have given plaintiffs the interbank rate itself; or should not have received any compensation for the standing instruction transactions – all claims that do not appear to be commercially reasonable. Rather, the Complaint, read in its totality and given the benefit of favorable inferences, alleges that the "best rate of the day" cannot mean "the worst price at which the currency has traded in the interbank market during the 20 hour trading day." (See Complaint, ¶ 27[a]; ¶ 62 [alleging that BNYM "breached its fiduciary duty to the City Funds by giving the City Funds the worst rate at which the currency had traded in the interbank market that day"].)[19] In this case, then, plaintiffs

[19]BNYM cites paragraph 27(e) of the Complaint for the proposition that plaintiffs contend that they should have received the same rates for standing instructions as for negotiated trades. (See D.'s Memo. In Support at 32-33.) This paragraph does not support BNYM's position. It alleges that the Bank "does not give clients using SI [standing instructions] the 'same competitive prices' it gives clients who trade directly with the Bank's trading desks." Although the paragraph also alleges that the spreads for standing instruction transactions are significantly greater than those for negotiated foreign exchange

do not urge the literal reading of the term "best rate" that the federal court rejected as implausible and held could not be misleading as a matter of law. (Compare US v BNYM, 2013 WL 1749418, *27, supra.)

As the federal Court also held, the fraud claim is maintainable based on the additional representation that BNYM executes at levels reflecting the interbank market at the time the trade is executed. (US v BNYM, 2013 WL 1749418, *24-25, supra.) BNYM asserts that "interbank market at the time the trade was executed" meant only that the price would be set within the interbank range on the day of the trade. This contention is based on a representation in an RFP to the following effect: "[W]e price foreign exchange at levels generally reflecting the interbank market at the time the trade is executed by the foreign exchange desk. The vast majority of our trades will be priced within the interbank range applicable on trade date." (D.'s Memo. In Support at 18.) However, this representation appears to have been made in an RFP for an Ohio Fund, not a New York Fund. (Id.) In any event, the arguable conflict between the two statements raises a factual issue that should not be resolved on a motion to dismiss. (US v BNYM, 2013 WL 1749418, *24-25, supra.)

---

transactions, it does not go on to claim that the rates should be the same. The Complaint also alleges that BNYM took for itself the difference between the worst price of the day that it charged the client and the interbank market price at the time it executed the transaction. (See e.g. ¶¶ 20, 57.) It gives examples of foreign currency transactions in which BNYM gave plaintiffs an exchange rate lower than the best rate of the day and thus "underpaid" the Fund by the amount of the difference. (See id., ¶¶ 55-56.) However, the Complaint never affirmatively alleges that the "best rate of the day" means the actual lowest market rate of the day or the rate the Bank could itself have obtained in interbank trading. Moreover, the Attorney General does not argue for such meanings. (See Ps.' Memo. In Opp. at 12 ["Whatever arguments the Bank puts forth as to the meaning of 'best price,' no reasonable person would understand that term to mean the worst price of the day"].)

The City Fund plaintiffs' opposing brief does appear to argue that the "best rate" means the best rate provided to any customer or the best rate available in the interbank market. (Supp. Memo. Of P. City Funds In Opp. at 7.) At the oral argument, however, the City Fund plaintiffs did not advance this meaning which, as found above, is not alleged in the Complaint. Instead, they argued that the meaning of the term "best rate" is a "fact question." (See Oral Argument Transcript at 67.)

BNYM contends, in conclusory fashion, that the Martin Act claim is not maintainable based on several other alleged misrepresentations – among them, that BNYM falsely asserted that it discloses any conflicts of interest to clients. (Complaint, ¶ 26[g].) As discussed at length in connection with plaintiffs' claims that BNYM breached its fiduciary duties, the sufficiency of BNYM's disclosures of its alleged conflicts of interest is not demonstrated on this record. (See infra at 46-48.) The Martin Act claims based on representations regarding the disclosure of conflicts of interest will therefore withstand this motion to dismiss.

The remaining representations that BNYM claims are insufficient to support the Martin Act claims involve aggregation and netting of a client's trades, transactions being "free of charge," terms not being less favorable to clients than terms offered to "unrelated parties," and execution of restricted currencies "according to market practice." (D.'s Memo. In Support at 19-20.) The court declines to address these representations as BNYM does not clearly identify the documents in which the representations were made (see id.), and it appears that some of these representations were made on the website or in welcome packages provided to the City Funds' investment managers, copies of which are not included in the record. (See Ps.' Memo. In Opp. at 5.) It is therefore not possible to consider these representations in context.

Omissions

BNYM also challenges the Martin Act claim insofar as it is based on fraudulent omissions – in particular, BNYM's alleged concealment and failure to disclose: "(1) how it priced SI [standing instruction] transactions; and (2) that regardless of the market price at the time the Bank executed a SI order, the client always received a price reflecting the worst price at which the currency had traded in the interbank market during the previous 20 hours."

(Complaint, ¶ 42.) In moving to dismiss the fraudulent omissions allegations, BNYM contends that its "pricing methodology and profit margins are not information that BNYM was legally obligated to disclose." (D.'s Memo. In Support at 11.)

The standard for determining the materiality of an omission under the federal securities laws has been expressly adopted by the Court of Appeals as the standard for determining the materiality of an omission under the Martin Act:

> "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

(Rachmani Corp., 71 NY2d at 726 [internal quotation marks and citations omitted] [emphasis in original].) In assessing whether the omitted fact would have significance, the court must presume that a reasonable investor has "knowledge of information that has already been disclosed or is readily available." (Id. at 727; see also Congress Fin. Corp. v John Morrell & Co., 790 F Supp 459, 470-471 [SD NY 1992], mod denied 1992 WL 135581, 1992 US Dist Lexis 8302 [1992] [plaintiff's access to information bars claim that defendant had duty to disclose].)

The court holds that the Martin Act claim is maintainable under this standard, based on plaintiffs' allegations of fraudulent concealment. In contending otherwise, BNYM relies on Matter of Mexico Money Transfer Litigation (267 F3d 743 [7th Cir 2001], cert denied sub nom Garcia v Western Union Fin. Serv., Inc., 535 US 1018 [2002]), which held that it was not fraud

for the wire transfer defendants to fail to disclose the difference between the retail currency exchange rate quoted to customers and the wholesale (interbank) rate.[20] Here, in contrast, BNYM made affirmative representations to sophisticated investors about the competitiveness of its pricing and the favorable rates it would charge. As these representations were allegedly misleading, its unwillingness to provide information about its pricing practices supports plaintiffs' claim of a fraudulent practice. (See US v BNYM, 2013 WL 1749418, *20;[21] see also Stevenson Equip. v Chemig Constr. Corp., 170 AD2d 769, 771 [3d Dept 1991], affd for reasons stated below 79 NY 2d 989 [1992] [under common law fraud doctrine, "where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge, there is a duty to disclose that information"] [internal quotation marks and citation omitted].)

In moving for dismissal, BNYM cites its RFP which expressly offered to "supply a daily range of U.S. high-low foreign exchange rates from Reuters, enabling Bureau of Assets Management staff to compare [BNYM's] rates with others in the industry." (NYC Retirement Systems RFP at 129 [D.'s Ex. 6].) BNYM also cites plaintiffs' acknowledgment that BNYM "presented the City Funds with a trade confirmation or account statement reflecting [each]

---

[20]In Matter of Mexico Money Transfer Litigation, the Court approved a settlement of a class action brought by plaintiffs against defendant wire transfer companies. As the Court colorfully stated: "But since when is failure to disclose the precise difference between wholesale and retail prices for any commodity 'fraud'? . . . Neiman Marcus does not tell customers what it paid for the clothes they buy. . . ." (267 F3d at 749.)

[21]While the federal court rejected plaintiffs' claim that BNYM had an "independent obligation" to provide any particular form of transparency (US v BNYM, 2013 WL 1749418, *20), it held that "to the extent that the Bank is charged with making affirmative misrepresentations about its practices, its unwillingness to provide the transparency that might have revealed the truth arguably supports an inference of intent to deceive." (Id.) The Court thus allowed the omissions for their bearing on the element of the FIRREA count requiring intent to deceive, but did not permit the omissions to serve as an

transaction and the price at which the currency was converted." (Complaint, ¶ 53.) It argues that plaintiffs therefore had all of the material information they needed to assess the trades. According to BNYM, plaintiffs could have compared the rates they actually received, as reported on the trade confirmations and account statements, to the published interbank rates and other trade options in the market for the relevant currencies on the relevant trade dates. Plaintiffs counter that the trade confirmations and account statements were not "time-stamp[ed]," making it impossible for them to "discover by consulting published rates that the price on the confirmation did not reflect the market price at the time the trade was executed." (Ps.' Memo. In Opp. at 20.)

It is possible that, based upon the information provided by BNYM, plaintiffs could have ascertained the discrepancy between the prices they received and the prices they expected, even without time stamps. Currently, currency exchange rates are easily ascertainable on various websites.[22] However, it is not clear to what extent this information was available to plaintiffs as of 2001 when BNYM's alleged fraudulent practice began. Moreover, although BNYM represented in its RFP that "we supply" a daily range of Reuters high-low foreign exchange rates (NYC Retirement Systems RFP at 129 [D.'s Ex. 6]), the record does not show that Reuters information was in fact supplied or that it contained the data necessary to compare the exchanges actually executed for plaintiffs with the rates at the time of execution. BNYM also fails to

---

independent basis for the FIRREA count. (Id., *30-31.)

[22]Such websites include the Federal Reserve Bank of New York (www.ny.frb.org), the Federal Reserve (www.federalreserve.gov), and Bloomberg (www.bloomberg.com). (See Hoya Saxa, Inc. v Gowan, 149 Misc 2d 191, 192 [App Term, 1st Dept 1991] ["'judicial notice may be and is taken' of public records"]; Headley v New York City Tr. Auth., 100 AD3d 700, 701 [2d Dept 2012] [same].) The published exchange rate information includes rates at the market opening and closing, high and low daily rates, and spot rates at particular times during each trade day.

submit documentary evidence of a single trade confirmation or account statement.[23] Even if it had, whether these documents would have provided "the means to discover the true nature of the transaction" (Stuart Silver Assoc., Inc. v Baco Dev. Corp., 245 AD2d 96, 98 [1st Dept 1997]) raises a factual issue that is not properly resolved at this juncture in the litigation. (Compare Rachmani Corp., 71 NY2d at 721 [dismissing Martin Act claim where fully developed trial record showed that allegedly omitted information was previously disclosed]; Compania Sud-Americana De Vapores, S.A. v IBJ Schroder Bank & Trust Co., 785 F Supp 411 [SD NY 1992] [holding on full record on summary judgment motion that bank had no duty to disclose difference between FX rate charged plaintiff by bank and interbank rate].)

Finally, even if the information could have been discovered by plaintiffs, an issue exists as to the practice of investment managers in reviewing trade confirmations at the time of the standing instruction transactions in question. Plaintiffs' counsel represented at oral argument that this case involved "[t]housands of sophisticated money managers" who "could have and should have examined the publically [sic] available range of the day – not look at one transaction – but look at a number of transactions, and they would have noticed a pattern and that pattern would have been that the Bank was at the extremes of the day, the worst price of the day." (Oral Argument Transcript at 51.) However, he also maintained: "But nobody [did] it." (Id.) The practice of investment managers in reviewing trade confirmations is relevant to the issue of whether disclosure of BNYM's pricing information would have "assumed actual significance" for the City Funds' investment managers (see Rachmani Corp., 71 NY2d at 726), and therefore

---

[23]BNYM's 2002 FX Procedures stated that, for FX transactions pursuant to standing instructions, BNYM's confirmations contained "the same information as that for directed transactions." (D.'s Ex. 7 at 4.) "Directed Transaction Confirmations," in turn, identified the account name, transaction date,

whether BNYM's non-disclosure was material. Resolution of this issue too is fact-based, and therefore not appropriate on this motion to dismiss.

Transactions Outside New York

The complaint alleges that the foreign exchange transactions took place within or from this State (Complaint, ¶ 83), and therefore sufficiently pleads this final element of the Martin Act causes of action. To the extent that BNYM claims that certain of the transactions were effectuated entirely outside New York, that claim requires resolution of factual issues that is not appropriate on a motion to dismiss.

The court accordingly holds that the branch of BNYM's motion to dismiss the Martin Act claims should be denied.

II. EXECUTIVE LAW § 63(12) (Fifth Cause of Action)

Section 63(12) of New York's Executive Law authorizes the Attorney General to institute a proceeding to enjoin the continuance of fraudulent or illegal activity in the conduct of a business and to obtain restitution and damages. "Under section 63(12), the test for fraud is whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." (People v General Elec. Co., 302 AD2d 314, 314 [1st Dept 2003].) Moreover, "neither bad faith nor scienter is required under Executive Law § 63(12)." (Id. at 315.)

In moving to dismiss the Executive Law § 63(12) claim, BNYM treats the claim as co-extensive with the Martin Act claims. It also argues that the Executive Law claim should be dismissed because its disclosures preclude any inference that plaintiffs were misled. (See D.'s

---

settlement date, exchange rates, and the currency and amount sold or purchased. (Id. at 3.)

Memo. In Support at 30.)

As the court has held that the Martin Act claims will survive the motion to dismiss, the Executive Law claim will also survive. With respect to BNYM's disclosures, in particular, BNYM argues that it accurately reported the actual exchange rates applied to standing instructions by providing plaintiffs with trade confirmations and account statements containing the actual prices of the currency conversions. As discussed above, a question of fact exists as to whether these purported disclosures negated BNYM's allegedly deceptive conduct in misrepresenting the competitiveness of its rates while charging plaintiffs the "worst rate of the day."

Accordingly, the branch of BNYM's motion to dismiss plaintiffs' fifth cause of action should be denied.

III. BREACH OF CONTRACT (Twelfth Cause of Action)

The breach of contract cause of action is asserted only by the Comptroller of the City of New York and the City Funds. (Complaint, ¶¶ 109-111.) The Complaint alleges that "[t]he custody agreement" with the City Funds provided that the Bank would "discharge its duties thereunder as a fiduciary and for the exclusive benefit of the Funds and their beneficiaries, and that it would disclose all conflicts of interest with respect to FX transactions." (Id., ¶ 110.) The Complaint further alleges that the custody agreement "incorporated by reference [BNYM's] response to the City Fund's RFP, which made the representations with respect to SI [standing instruction] execution" set forth in the Complaint. (Id. [referencing ¶¶ 48-62 of the Complaint].) Plaintiffs claim, in particular, that BNYM breached the custody agreement in that "it did not: (i) obtain the 'best rate of the day' with respect to income items; (ii) obtain the 'best rate' attainable

with respect to restricted currencies; (iii) act in accordance with fiduciary standards; and (iv) disclose its conflict of interest." (Id., ¶ 111.)

To state a cause of action for breach of contract, the City Funds and the Comptroller must allege "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010].) A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (Greenfield v Philles Records, 98 NY2d 562, 569 [2002].) The court's "aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations.'" (Brown Bros. Elec. Contrs. v Beam Constr. Corp., 41 NY2d 397, 400 [1977].) A contract "should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." (Matter of Lipper Holdings, LLC v Trident Holdings, LLC, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted].) In addition, "contracts must be read as a whole and all terms of a contract must be harmonized whenever reasonably possible." (Madison Hudson Assocs. LLC v Neumann, 44 AD3d 473, 480 [1st Dept 2007].)

Although the complaint alleges a single "custody agreement," plaintiff City Funds are subject to three sets of agreements. The Custodian Agreement, dated March 1, 2004 (D.'s Ex. 1) and the City of New York Group Trust, dated April 1, 2004 (Group Trust) (D.'s Ex. 2), apply to all of the Funds other than the Teachers' Retirement System of the City of New York Variable Annuity Funds (Teachers' Funds) and the City of New York Deferred Compensation Plan (Deferred Compensation Plan). The Teachers' Funds are subject to the Master Custodial Agreement for Variable Annuity Plan A, dated July 1, 2002 (D.'s Ex. 3), and the Master

Custodial Agreement for Variable Annuity Plan C, dated July 1, 2008 (D.'s Ex. 4) (2002 and 2008 Teachers' Master Custodial Agreements). The Deferred Compensation Plan is subject to the Global Custody Agreement, dated January 1, 2003 (D.'s Ex. 5) (DCP Global Custody Agreement). In considering whether the City Funds state a cause of action for breach of contract, the court must consider the terms of each of the separate agreements.

A. Best Rates

The "best rate" representations are made only in the agreements to which plaintiff City Funds, other than the Teachers' Funds and the Deferred Compensation Plan, were parties. The Custodian Agreement, sections 4(a) and 42(E), incorporates the NYC Retirement Systems RFP. The Group Trust, section 11.3, incorporates the Custodian Agreement. The RFP, in turn, sets forth the "best rate" representations which are quoted above in full. (See supra at 28, n 18.)

BNYM contends, as it did in the branch of its motion to dismiss the Martin Act claims, that plaintiffs urge two implausible interpretations of the term "best rate." (See D.'s Memo. In Support at 32.) First, BNYM claims that plaintiffs contend that they should have received the rates given to customers who negotiated their FX transactions. (Id. at 32-33.) As previously held, paragraph 27(e) of the Complaint, on which BNYM relies, does not support the reading of the term "best rate" that BNYM ascribes to plaintiffs. (See supra at 29, n 19.) Second, BNYM claims that plaintiffs contend that they should have been given the best interbank rate of the day. (D.'s Memo. In Support at 33.) It cites no allegation of the Complaint in support of this claim. As also previously held, plaintiffs do not advance these apparently commercially unreasonable readings of the term "best rate of the day" but, rather, allege that the term is inconsistent with the "worst price" of the day. The court finds that this allegation is not commercially unreasonable

and is sufficiently definite, for pleading purposes, to support the breach of contract cause of action.

The 2002 and 2008 Master Custodial Agreements for the Teachers' Funds and the Global Custody Agreement for the Deferred Compensation Plan do not contain "best rate" representations or incorporate the NYC Retirement Systems RFP. The breach of contract claim alleged by these Funds will accordingly be dismissed to the extent based on the "best rate" representations.

B. Failure to Act in Accordance with Fiduciary Standards and to Disclose Conflict of Interest

It is well settled that "[a] fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005] [internal quotation marks & citation omitted].) A fiduciary relationship may be established not only by contract, but may also "result[] from the relation" between the parties. (Id. at 20 [internal quotation marks & citation omitted]; Sergeants Benevolent Assn. v Renck, 19 AD3d 107, 110 [1st Dept 2005].)

"[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." (Birnbaum v Birnbaum, 73 NY2d 461, 466 [1989], rearg denied 74 NY2d 843 [1989], citing Meinhard v Salmon, 249 NY 458, 463-64 [1928].) "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with

the interest of those owed a fiduciary duty." (Id. [internal citation omitted].) "To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." (Burry v Madison Park Owner LLC, 84 AD3d 699, 699-700 [1st Dept 2011].)

Funds Subject to the Custodian Agreement and Group Trust Agreement

The Custodian Agreement expressly imposes a fiduciary duty on BNYM. Section 3 provides in pertinent part:

> "The Bank acknowledges that this Agreement places it in a fiduciary relationship with the Comptroller, Systems and other Funds. As such, the Bank shall discharge each of its duties and exercise each of its powers under this Agreement with the highest duty of care ('Standard of Care') to which any of the following is subject: (i) a prudent expert acting with the competence, care, skill, prudence and diligence prevailing in the professional custodial industry and acting on behalf of a like enterprise with like aims; (ii) a trustee of an express trust under the laws of the State of New York; or (iii) a fiduciary under § 404 of the Employee Retirement Income Security Act of 1974 or, if such a law is enacted, any other law affecting the Comptroller, Systems or other Funds, which may impose a higher or comparable standard.
>
> As a fiduciary, [BNYM] shall also discharge its duties under this Agreement for the exclusive benefit of the Funds and their beneficiaries."

Section 4 enumerates the duties of the Bank. Subdivisions (i)-(v) of this section specify that the Bank will hold Fund accounts; effect purchases and sales of securities; collect income; make payments from the accounts as directed by the Comptroller; and maintain books and records. Subdivision (vi) states that the Bank will "provide all other services as specified in Exhibit B hereto and in the Bank's Proposal [the NYC Retirement Systems RFP], which Proposal is incorporated herein by reference." Exhibit B is entitled "Scope of Services," and provides in section F for "Foreign Exchange." The services listed under the Foreign Exchange

heading include that "[t]he Custodian has a desk of foreign exchange traders that can execute transactions in the inter-bank market"; "[t]he Custodian gives clients 24-hour access to foreign exchange markets"; and "[t]he Custodian can execute a significant number of foreign exchange trades directly in the market. The Custodian does not have to rely on a local broker." Section F also provides: "The Custodian discloses to clients any conflicts of interest."

BNYM does not appear to dispute that it had fiduciary obligations under the Custodian Agreement with respect to custodial responsibilities. However, it contends that its "core custodial responsibilities" under the Custodian Agreement were limited to those duties specified in subdivisions (i) through (v) of section 4, and that the services specified in subdivision (vi) – namely, those specified in Exhibit B and the RFP, which include foreign exchange services – were not "duties." (See D.'s Memo. In Support at 37-38.) There is no basis in the contractual language for the distinction BNYM makes. The services in Exhibit B and the RFP are incorporated in the list of BNYM's duties by the unambiguous terms of subdivision (vi). The court rejects BNYM's further argument that the terms in which the foreign exchange services are described in Exhibit B (e.g., that BNYM has a desk of foreign exchange traders or gives clients access to foreign exchange markets) evidence anything about whether BNYM was to act as a principal, rather than as a fiduciary, in foreign exchange transactions. (See D.'s Memo. In Support at 38.) Had BNYM intended to convey that it was acting as a principal, it could have expressly done so, as it did in section 3(d) of the DCP Global Custody Agreement.

Contrary to BNYM's further contention, the Custodian Agreement is not one in which BNYM was divested of all discretionary duties once the duties involving investments in securities were transferred from BNYM to the City Funds' investment managers. In support of

this contention, BNYM cites section 5 of the Custodian Agreement, which authorizes the Bank to act upon instructions from duly appointed Investment Advisors, and section 3.5 of the Group Trust Agreement, which provides that the Bank "may perform foreign exchange transactions with respect to the assets of the Group Trust, provided, however, that in each case such property shall remain subject to the management and control of the Investment Manager." (See D.'s Memo. In Support at 35, 39.) While the City Funds had investment managers who decided whether to negotiate trades or have BNYM execute the trades pursuant to standing instructions, this is not a case in which the Bank was divested of all discretion with respect to FX transactions. Rather, as held above, BNYM retained foreign exchange duties, the performance of which continued to be subject to its fiduciary obligations under section 3 of the Custodian Agreement. (Compare e.g. Beddall v State St. Bank, 137 F3d 12, 21 [1st Cir 1998] [Bank was not fiduciary with respect to real estate investments under ERISA plan, where investment manager was appointed to make investments that it was initially contemplated Bank would make, and Bank was relegated by terms of contract to "role of an administrative functionary"].)

Moreover, the Complaint adequately alleges that BNYM exercised discretion in the performance of its foreign exchange duties. (See e.g. Complaint, ¶ 20 [Whether the client is buying or selling currency, the Bank "give[s] clients the worst price of the day in the interbank market. . . . The Bank takes the other side of this conversion. . . ."]; ¶ 27[c] ["Instead of executing at the best price available at the time of execution or, indeed, any market price available at the time of execution, the Bank executes at the worst price at which the currency has traded in the interbank market that day"].) The NYC Retirement Systems RFP also contains representations regarding BNYM's exercise of discretion, including its practice of "making

markets" and its ability to "shop" transactions. (NYC Retirement Systems RFP at 129 [D.'s Ex. 6].) In addition, BNYM represents on this motion that "[i]t risk manages its positions according to the judgment of its traders." (D.'s Memo. In Support at 11, n 16.) The court accordingly holds that the breach of fiduciary duty claim is maintainable on behalf of the Funds subject to the Custodian Agreement.

The Teachers' Funds Master Custodial Agreements, like the Custodian Agreement, expressly impose a fiduciary duty on the Bank. Section 7.03 of each of the Agreements provides: "In performing its duties under this Agreement, the Custodian shall maintain the highest duty of care to which any of the following is subject: (x) a professional fiduciary; (y) a trustee of an express trust under the laws of New York; or (z) a fiduciary under § 404 of [ERISA]. . . ." Section 4.01(a)(7) includes, among the "Powers of Custodian": "to settle transactions in futures and/or options, contracts, short-selling programs, foreign exchange or foreign exchange contracts, swaps and other derivative investments." BNYM does not argue on this motion that the enumeration of foreign exchange transactions in the Powers, as opposed to Duties, section of the Agreement precludes a finding that the Bank had fiduciary duties with respect to foreign exchange transactions. The court holds that the breach of fiduciary claim is maintainable at this juncture by the Teachers' Funds, based on the Custodial Agreements to which they are subject.

The Global Custody Agreement for the Deferred Compensation Plan presents different issues. Section 18(c) provides that BNYM "shall be responsible as a fiduciary with respect to all matters for which it has assumed or will assume responsibility with to [sic] the Plans." However, section 3(d) of this Agreement, which sets forth BNYM's duties in connection with foreign

exchange transactions, provides that contracts for spot or forward foreign exchange transactions "may be entered into with [BNYM] . . . acting as principal . . . and they may retain any profits from such FX Transactions." Section 3(d) also provides that FX transactions "shall be effected only in accordance with BNY's established procedures for effecting FX transactions." This Agreement is the only one of the custody agreements at issue in this action that expressly incorporates BNYM's 2002 and 2008 FX Procedures. (D.'s Exs. 7, 8.)

These Procedures contain detailed provisions regarding FX transactions. The 2002 FX procedures include, among other provisions, that FX transactions "may be effected pursuant to standing instructions of an independent Plan fiduciary . . . ." (2002 FX Procedures § 2, Standing Instructions for Income Item Conversions Equal to or Less than $300,000); that "[t]he terms of FX Transactions with any Plan shall not be less favorable to the Plan than terms offered by BNY to unrelated parties in a comparable arm's length FX Transaction" (id., General Provisions, § 4); and that "income item conversions will be bundled by the relevant custody/fiduciary area" and executed by the Brussels Desk at 11:00 a.m. New York time "at or within the range of buy/sell rates in effect at 11:00 a.m." (Id., Standing Instructions, § 2[b].) The 2008 FX Procedures provide, among other things, that FX transaction requests will be executed on the day received "with BNYM on a principal basis at rates that will not deviate by more or less than three (3) percent from the relevant Interbank bid or ask rates and will not be less favorable to the account than the corresponding rates indicated on the Daily Schedule for that day." (2008 FX Procedures, Program Procedures, at 1-2.)[24]

[24]The parties have not discussed the applicability of the FX Procedures to the transactions involving plaintiff Funds, other than the Deferred Compensation Plan, which are governed by custody agreements that do not expressly incorporate the FX Procedures. This issue must ultimately be addressed in light of the provisions in such agreements that they constitute the entire understanding of the parties.

In moving to dismiss the fiduciary duty claim under the DCP Global Custody Agreement, BNYM is silent as to the proper interpretation of this Agreement and, in particular, the reconciliation between section 18(c), imposing a fiduciary duty on the Bank, and section 3(d) and the incorporated FX Procedures, stating that BNYM will act as a "principal" in connection with the FX transactions. This may not prove to be a difficult issue to resolve under the settled rule of contract interpretation that a general provision should be read in light of, and is limited by, the specific provision. (See 22 NY Jur2d, Contracts § 251.)

The more difficult issue, which BNYM also does not address, is whether BNYM, even if acting as a principal, continued to have fiduciary obligations or obligations akin to that of a fiduciary, to disclose information about its own interest in the transactions. In the federal multi-district litigation involving BNYM's pricing of FX transactions, the Court recently denied a motion to dismiss a public fund's breach of fiduciary duty claim, notwithstanding the existence of FX Procedures which, like those incorporated in the DCP Global Custody Agreement, disclosed that BNYM would act as a principal. The Court held that BNYM's mere disclosure that it would act on a "principal basis" did not foreclose a plausible claim that the disclosures were insufficient. (Southeastern Pennsylvania Transp. Auth. v Bank of New York Mellon Corp. [SEPTA], 2013 WL 440628, *18, 2013 US Dist Lexis 9345 [SD NY, Jan. 23, 2013, No. 12 Civ 3066].)[25] Under New York law, a similar claim is potentially viable. (See generally Northeast

---

(Custodian Agreement, § 42[E]; Teachers' Fund Master Custodial Agreements, § 17.)

[25]The court cited federal authority that "where a fiduciary seeks to profit by acting in a principal capacity in matters sufficiently related to the subject of its fiduciary duties, the fiduciary may do so only if, at a minimum, it fully and fairly discloses the nature of the relationship and its duties." (SEPTA, 2013 WL 440628, *17.) Based on the terms of the custody agreement and FX Procedures, the Court concluded that BNYM was not in fact acting in its "custodial fiduciary capacity" in providing standing instruction trades. (Id.) It found, however, that the plaintiff had plausibly alleged that "the FX trading

Gen. Corp. v Wellington Adv., Inc., 82 NY2d 158, 163 [1993] [noting that issue of whether "fiduciary-like duty" existed was "determined not by the nomenclature . . . but instead by the services agreed to under the contract between the parties"]; TPL Assocs. v Helmsley-Spear, Inc., 146 AD2d 468 [1st Dept 1989] [finding triable issue of fact as to adequacy of disclosure where fiduciary disclosed that it might also act as principal in transaction]; see also Bestolife Corp. v American Amicable Life, 5 AD3d 211, 216 [1st Dept 2004] [finding triable issue of fact as to existence of fiduciary duty on part of investment advisor, notwithstanding statement in advisory agreement that plaintiff alone would assess risks and suitability of asset purchase transaction, where complaint alleged that advisor urged transaction in order to secure fees for itself].)

Unresolved issues thus exist as to the extent of BNYM's fiduciary obligations to the Deferred Compensation Plan under the Global Custody Agreement. In light of these issues, the court holds that BNYM fails to meet its burden on this motion of demonstrating that the Deferred Compensation Plan's breach of contract claim is not maintainable, at the pleading stage, based on a claim of breach of a contractual fiduciary duty.

Finally, having held that all of the City Funds may maintain the breach of contract cause of action based on a claim that BNYM breached a contractual fiduciary duty to the Funds, the court turns to the sufficiency of the allegations as to such breach. Plaintiffs premise the breach of contract claim on two asserted breaches of fiduciary duty. (Complaint, ¶ 111.)

First, plaintiffs allege that BNYM did not "disclose its conflict of interest." (Id.) A contractual duty to disclose conflicts of interest is expressly imposed by section 39 of the Custodian Agreement and sections 9.05 and 10.03 of the Teachers' Funds Master Custodial

---

relationship was sufficiently related to [BNYM's] custodial business to trigger [an] obligation of candor with respect to those trades." (Id.)

Agreements. A duty to disclose is not expressly included in the DCP Global Custody Agreement. However, such a duty may arise as an incident to a contractual fiduciary relationship which, as held above, is sufficiently pleaded on behalf of the Deferred Compensation Plan to withstand this motion to dismiss. As also held above, the sufficiency of BNYM's disclosures of its interest in the FX transactions has not been demonstrated on this record. (See supra at 31-36, 46-47.)

The breach of contract cause of action also alleges generally that BNYM did not "act in accordance with fiduciary standards." This cause of action does not identify the fiduciary standards that are claimed to have been violated. However, it incorporates prior allegations, including that BNYM gave clients the worst price of the day in the interbank market, took the other side of the conversion, and effectively engaged in self-dealing by "pocket[ing] for itself the difference between the worse price of the day it [] charged the client and the interbank market price at the time it execute[d] the transaction." (See Complaint, ¶ 20.) The incorporated allegations also include that the Bank had a duty to execute foreign exchange transactions "for the exclusive benefit of the client," and that it breached its fiduciary duty by giving plaintiffs the worst price of the day. (See id., ¶¶ 61-62.)

As discussed above, plaintiffs do not argue that BNYM was obligated to afford them the actual "best" rate of the day, but allege misconduct as a result of BNYM's taking advantage of the standing instructions to increase its profit margin at plaintiffs' expense. At the pleading stage, these allegations are sufficient to state a cause of action for breach of fiduciary duties arising under the parties' agreements.

IV. BREACH OF FIDUCIARY DUTY (Eleventh Cause of Action)

The common law breach of fiduciary duty cause of action is asserted by the Comptroller and the City Funds only. (Complaint, ¶¶ 106-108.) This cause of action alleges that BNYM "had a duty to execute SI transactions for the Funds at a price no higher than a fiduciary executing in accordance with fiduciary standards could obtain. . . ." (Id., ¶ 107.) It further alleges that BNYM breached its fiduciary duty by failing to disclose material facts concerning its execution and pricing of foreign exchange transactions; failing to act "for the exclusive benefit of the Funds"; executing the trades "at prices that were far more unfavorable to the client than the market price at the time of execution"; and taking "for itself the difference between the market price at the time of execution and the price at which it executed the trade." (Id., ¶108.)

For the reasons discussed above, plaintiffs have stated a cause of action for breach of fiduciary duty. While BNYM argues that this cause of action should be dismissed as duplicative of the breach of contract cause of action, at the pleading stage plaintiffs may state causes of action "alternatively or hypothetically." (CPLR 3014.) The branch of BNYM's motion to dismiss the eleventh cause of action will accordingly be denied.

V. COMMON LAW FRAUD (Tenth Cause of Action)

Plaintiffs' tenth cause of action for common law fraud is based solely upon a claim of fraudulent non-disclosure of material information. The Complaint alleges that by accepting standing instruction authorizations, "the Bank established a relationship of trust and confidence with clients" with respect to standing instruction execution, which imposed upon it a "duty to disclose to the clients and IMs [Investment Managers] all information regarding the Bank's SI execution that would be of significance to them." (Complaint, ¶ 102.) According to plaintiffs,

this information included its pricing practices for standing instruction transactions and, in particular, BNYM's practice of pricing currency trades at the worst price of trades on the interbank market, regardless of the market price at the time the transactions were executed. (Id., ¶ 103.) BNYM argues that it had no duty to disclose its pricing methodology for standing instruction FX transactions; that its disclosure of how it priced these trades negates any claim of fraud; and that plaintiffs could have discovered the information that was allegedly concealed, because BNYM sent trade confirmations and account statements containing the actual prices of the trades. (See D.'s Memo. In Support at 6, 13.)

A cause of action for fraudulent concealment requires a showing of the traditional elements of fraudulent misrepresentation – a material misrepresentation of fact with intent to mislead the plaintiffs, reasonable reliance, and damages – and also "an allegation that the defendant had a duty to disclose material information and that it failed to do so." (P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept 2003] [internal citations omitted].) The duty to disclose may arise from a fiduciary relationship (Dembeck v 220 Cent. Park S., LLC, 33 AD3d 491, 492 [1st Dept 2006]), or under the "special facts doctrine." (Jana L. v W. 129th St. Realty Corp., 22 AD3d 274, 277 [1st Dept 2005].) The "special facts doctrine" applies where "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." (Id. [internal quotation marks and citations omitted].) A duty to disclose may also arise when a party with superior knowledge knows that the other is acting on the basis of mistaken information. (Stevenson Equip. Inc., 170 AD2d at 771.) The duty to disclose arises "when nondisclosure would 'le[a]d the person to whom it was or should have been made to forego action that might otherwise have been taken for the

protection of that person.'" (Strasser v Prudential Sec., 218 AD2d 526, 527 [1st Dept 1995] [internal citation omitted].) However, "[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations." (See Stuart Silver Assoc. v Baco Dev. Corp., 245 AD2d 96, 98-99 [1st Dept 1997]; accord McDonald v McBain, 99 AD3d 436, 436-437 [1st Dept 2012], lv denied 21 NY3d 854 [2013].)

For the reasons discussed above, the Complaint adequately alleges that a fiduciary relationship between the City Funds and BNYM arose under the parties' contracts and at common law. Moreover, as held in connection with the Martin Act claims, the allegations of the complaint are sufficient to support a claim that BNYM had a duty to disclose information about its pricing practices. As also held, BNYM's contention that information was readily available to plaintiffs about the prices at which the standing instruction transactions were executed raises an issue of fact. (See supra at 31-36.) The branch of BNYM's motion to dismiss the common law fraud claim will accordingly be denied.

VI. NEW YORK STATE AND CITY FALSE CLAIMS ACTS (Sixth through Eighth and Thirteenth Causes of Action)

BNYM moves to dismiss plaintiffs' claims under the New York State and City False Claims Acts. These causes of action are based upon allegations that BNYM executed thousands of FX transactions for the City Funds pursuant to standing instructions, and in each instance: (1) "demanded and removed money from a City Funds account to execute the transaction and then purported to fulfill its obligation to place back into the account money in a different currency using the worst exchange rate of the day"; and (2) "presented the City Funds with a trade confirmation or account statement reflecting the transaction and the price at which the currency

was converted." (Complaint, ¶ 53.) According to plaintiffs, because BNYM had previously represented that it would obtain the "best rate of the day" and would act as a fiduciary, "each confirmation and account statement falsely represented that the prices thereon were the best price of the day . . . , and that the prices were those a fiduciary would obtain." (Id., ¶ 54.) Plaintiffs seek recovery under sections 189(1)(a), (b), and (g) of the 2007 New York State False Claims Act (2007 FCA), and under the same provisions as amended in 2010 (2010 FCA).

Section 189(1)(a) of the 2007 FCA applies to "any person who . . . knowingly presents, or causes to be presented, to any employee, officer or agent of the state or a local government, a false or fraudulent claim for payment or approval." Section 189(1)(b) of the 2007 FCA applies to "any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the state or a local government." As amended by the 2010 FCA, section 189(1)(a) removed the requirement that the claim be presented to "any employee, officer or agent of the state or a local government." The 2010 FCA also amended section 189(1)(b) to remove such requirement, and applies to "any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[26]

By their terms, sections 189(1)(a) and (b) both require the existence of a "claim." Section 188 of the 2007 FCA defines "claim," in pertinent part, as "any request or demand, whether under a contract or otherwise, for money or property," which is "made" to a state or local government, or to a contractor if the government provides any portion of the money or property requested or demanded. Section 188 of the 2010 FCA defines "claim" to mean any

[26]The New York City False Claims Act contains virtually identical provisions. (See Admin Code

request or demand "presented" to a state or local government or "made" to such a contractor.

As the New York State False Claims Act follows the federal False Claims Act (31 USC § 3729 et seq.),"it is appropriate to look toward federal law when interpreting the New York act." (State of New York ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 71 [1st Dept 2012], lv denied 19 NY3d 810 [2012].) Under federal FCA sections 3729 (a)(1) and (a)(2), the analogues of New York State FCA sections 189(1)(a) and (1)(b), liability attaches to an actual claim or demand for payment. (E.g., US ex rel. Cafasso v General Dynamics C4 Sys., Inc., 637 F3d 1047, 1055 [9th Cir 2011] [section [a][1] requires "an actual demand for payment"]; United States ex rel. Hendow v University of Phoenix, 461 F3d 1166, 1174 [9th Cir 2006], cert denied 550 US 903 [2007] ["[T]here must exist a claim – a call on the government fisc" [emphasis in original]]; Harrison v Westinghouse Savannah River Co., 176 F3d 776, 785 [4th Cir 1999] [False Claims Act "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment'"].)[27]

Courts which have considered False Claims Act causes of action brought against BNYM under these sections have dismissed them, holding that because BNYM's trade confirmations and account statements did not contain a request or demand for payment or approval, they do not

---

§ 7-803[a][1], [a][2], 7 NYCRR ch 8, § 803[a][1], [a][2].)

[27]Prior to the amendment of the federal and New York State FCAs in 2009 and 2010, respectively, there was considerable litigation over whether the "presentment" of the false claim was required to be made directly to the government or could be made to a contractor receiving government funds. (See e.g. Allison Engine Co., Inc. v United States ex rel. Sanders, 553 US 662 [2008] [holding that under section [a][2], false statement could be submitted by subcontractor to prime contractor provided that contractor intended "the statement to be used by the prime contractor to get the Government to pay its claim"]; United States ex rel. Totten v Bombardier Corp., 380 F3d 488, 490 [DC Cir 2004], cert denied 544 US 1032 [2005]; United States ex rel. Sterling v Health Ins. Plan of Greater N.Y., Inc., 2008 WL 4449448, *6, 2008 US Dist Lexis 76874, *15 [SD NY, Sept. 30, 2008, No. 06 Civ 1141].) These cases did not eliminate the requirement of a demand for payment under section (a)(2) but, rather, considered the proper recipient of the demand.

constitute "claims." (Commonwealth of Va. ex rel. FX Analytics v The Bank of New York Mellon Corp., 84 Va Cir 473 [Circuit Court, Fairfax County 2012] [dismissing section [a][2] claim under analogous Virginia Fraud Against Taxpayers Act]; Matter of Bank of New York Mellon Corp. False Claims Act Foreign Exch. Litigation, ex rel. FX Analytics, 851 F Supp 2d 1190 [ND Cal 2012] [dismissing [a][1] and [a][2] claims under California FCA].)

Here, similarly, the Complaint does not allege that the trade confirmations or account statements requested or demanded money or otherwise sought payment or approval from plaintiff Funds. The court accordingly holds that they are not claims within the meaning of New York State FCA sections 189(1)(a) and (1)(b).

In so holding, the court rejects plaintiffs' contention that the withdrawal of money from the City Funds' accounts constituted a demand for payment. (See Ps.' Memo. In Opp. at 30.) In support of this contention, plaintiffs rely on United States ex rel. Howard v Urban Inv. Trust, Inc. (2007 WL 2893031, 2007 US Dist Lexis 76010 [ND Il, Sept. 28, 2007, No. 03 Civ 7668]). This case is factually inapposite, as it involved embezzlement of funds from government accounts, a crime that is not alleged here. To the extent that the Court stated that "the taking of government money by a defendant for her own benefit constitutes a false claim even when an actual demand for the money was never made" (id., 2007 WL 2893031, *7-8), the decision is inconsistent with the unambiguous terms of the statute and the weight of authority, which holds that a demand for payment or approval is a prerequisite of liability. United States v McLeod (721 F2d 282 [9th Cir 1983]), on which plaintiffs also rely, is similarly unpersuasive. There, the defendant cashed government checks that were mistakenly issued to him, and then repeatedly refused to return the money. The Court stated that the fact that the defendant "did not make an

actual demand for the money [was] irrelevant." (Id. at 284.) However, the Court's statement was dictum, as the endorsement of the checks constituted a demand for payment.

Plaintiffs also contend that the withdrawals of money from the City Funds' accounts were false claims because made pursuant to a fraudulently induced contract. (Ps.' Memo. In Opp. at 31.) The cases on which plaintiffs rely for this proposition held that each claim submitted to the government under a contract that was originally obtained through fraud was a false claim. (See e.g. Harrison, 176 F3d at 793-794, citing United States ex rel. Marcus v Hess, 317 US 537 [1943], reh denied 318 US 799; United States v Science Applications Intl. Corp., 626 F3d 1257 [DC Cir 2010].) These cases did not dispense with the requirement that a demand for payment or approval be submitted in order for FCA liability to attach under sections (a)(1) or (a)(2).

Finally, plaintiffs assert claims under FCA section 189(1)(g). This section of the 2007 FCA applies to "any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or a local government." Section 189(1)(g), "the so-called reverse false claims provision . . . gives the [government] a means to recover from someone who makes a material misrepresentation to avoid paying some obligation owed to the government." (United States v Q International Courier, Inc., 131 F3d 770, 772 [8th Cir 1997] [interpreting federal analogue § 3729[a][7].) As amended in 2010, section 189(1)(g) applies to "any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government." Section 188(4) of the 2010 FCA introduced a definition for the word "obligation" as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or

licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."

Plaintiffs argue that "[a]t the end of every FX SI [standing instruction] transaction the Bank executed on behalf of the Governmental Funds, it was contractually obliged to return to the governmental account an amount reflecting 'the best rate' for the currency involved," and that by returning "amount[s] reflecting the worst rate," BNYM "returned less money than it was obligated to return under the contract." (Ps.' Memo. In Opp. at 33.)

As explained in Q International, a leading case on the meaning of "obligation" under the version of federal FCA section 3279(a)(7) that was analogous to the 2007 version of section 189(1)(g):

> "To recover under the False Claims Act . . . [the government] must demonstrate that it was owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used. The obligation cannot be merely a potential liability: instead, in order to be subject to the penalties of the False Claims Act, a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness. The duty, in other words, must have been an obligation in the nature of those that gave rise to actions of debt at common law for money or things owed."

Q International further held that "obligation . . . must be for a fixed sum that is immediately due." (Id. at 774.) There was widespread agreement with Q International that the "obligation" necessary to support reverse false claim liability "must arise from a source independent of the allegedly fraudulent acts taken to avoid it," and must pre-exist the false statements themselves. (United States ex rel. Bahrani v Conagra, Inc., 465 F3d 1189, 1202 [10th Cir 2006], cert denied 552 US 950 [2007] [internal quotation marks & citation omitted]; United States v Bourseau, 531

F3d 1159 [9th Cir 2008], cert denied 555 US 1212 [2009] [and cases cited therein].) However, some of these authorities differed with Q International on the need for a "fixed" obligation, and held that the "'obligation' need not be for a precise amount in order to be actionable." (Bahrani, 465 F3d at 1202.) Thus, even under the 2007 FCA, there were cases that held, consistent with the later amendment, that the obligation need not be fixed.

Further, while an "obligation" sufficient to support reverse false claim liability may arise under a contract (Q International, 131 F3d at 774), the mere fact that breach of a contractual obligation is alleged is not sufficient to plead a reverse false claim. (See generally Cafasso, 637 F3d at 1057 [FCA section [a][7] case reasoning: "[B]reach of contract claims are not the same as fraudulent conduct claims, and the normal run of contractual disputes are not cognizable under the [FCA]"] [internal quotation marks & citation omitted]; United States ex rel. Owens v First Kuwaiti Gen. Trading & Contr. Co., 612 F3d 724, 734 [4th Cir 2010] [FCA section [a][2] case stating that "an FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision"] [internal quotation marks, citation, & brackets omitted].) Thus, in United States ex rel. S. Prawer & Co. v Verrill & Dana (946 F Supp 87 [D Me 1996], reconsideration denied 962 F Supp 206 [D Me 1997]), the Court held, as a matter of law, that the terms of the parties' agreement did not create a specific contractual obligation to pay or transmit money. Based on its interpretation of the contract, the Court dismissed the (a)(7) claim. In contrast, in United States v Pemco Aeroplex, Inc. (195 F3d 1234 [11th Cir 1999]), the Court held that the complaint pleaded sufficient (a)(7) allegations to survive a motion to dismiss. In particular, the Court held that the defendant, a defense contractor, had an obligation under the terms of its contracts with the government to notify the government of

property within its possession that it did not need in order to perform the contract, and to dispose of the property in accordance with the government's instructions. The Court concluded that the defendant "clearly" had an existing contractual obligation "either to return (i.e., 'transmit' under § 3729(a)(7)) or to purchase (i.e., 'pay' for under § 3729(a)(7)) the excess government property it possessed." (Id. at 1237.) In Pemco, moreover, the contractor did not dispute that it had "excess property" in its possession – that is, property which it knew belonged to the government. It thus notified the government of its possession of the property and offered to purchase it. The government's claim under the FCA was that the contractor incorrectly identified the property and offered to purchase it for a substantially lower price than it was worth.

In the instant case, the court has determined that plaintiffs' breach of contract claim is sufficiently pleaded to withstand BNYM's motion to dismiss. Unlike Prawer, this is not a case in which the court has concluded as a matter of law that plaintiffs' breach of contract claim cannot be established. But it is also not a case, like Premco, in which the court makes an affirmative finding that defendant clearly has an obligation to transmit or pay money to the government. Not only is the amount of the breach of contract claim unfixed, but plaintiffs' very claim as to the existence of a breach is the subject of a bona fide dispute. Under these circumstances, the breach of contract claim is not an adequate premise for the reverse false claim under either the 2007 or the 2010 FCA. To hold otherwise would be to impermissibly "transform the FCA into an all-purpose antifraud statute." (See generally Allison Engine Co., 553 US at 672.)

Plaintiffs' sixth through eighth causes of action under the New York State FCA, and thirteenth cause of action under the New York City FCA, will accordingly be dismissed. In view

of this holding, the court does not reach BNYM's claims that the amendments to the FCAs are not retroactive or that retroactive application would violate the ex post facto clause of the Constitution.

VII. UNJUST ENRICHMENT (Ninth Cause of Action)

BNYM seeks dismissal of plaintiffs' unjust enrichment cause of action, on the ground that it is precluded by the parties' written agreements. The Complaint alleges that the standing instruction FX transactions are governed by the parties' custodial contracts. (Complaint, ¶¶ 51-52.) This branch of BNYM's motion will be granted without opposition and based on the settled principle that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987] [internal citation omitted].)

VIII. Time-Barred Claims

According to the Complaint, BNYM's improper FX transactions date back to "at least 2001." (Complaint, ¶ 4.) BNYM argues that most of plaintiffs' claims are barred by the statute of limitations, as this action was not commenced until October 4, 2011. Plaintiffs acknowledge that the unjust enrichment and breach of contract causes of action are time-barred to the extent based upon transactions that occurred prior to October 5, 2005. (Ps.' Memo. In Opp. at 38.)

Plaintiffs' common law fraud claim is subject to a six-year statute of limitations. (CPLR 213[8].) Plaintiffs' breach of fiduciary duty cause of action is also subject to a six-year statute of limitations, because it is based upon allegations of fraud. (Kaufman v Cohen, 307 AD2d 113, 119 [1st Dept 2003].) The discovery accrual rule applies to fraud claims (CPLR 213[8]), and to

"fraud-based breach of fiduciary duty claims." (Kaufman, 307 AD2d at 122 [internal citations omitted].) "An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud 'turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred.'" (Id. at 123 [internal citation omitted].)

Based on this court's holding that issues of fact exist as to whether plaintiffs could have discovered from the trade confirmations and account statements that BNYM had perpetrated a fraud upon them, the motion to dismiss the fraud and breach of fiduciary duty claims as time-barred will be denied. (See supra at 33-36; see also Trepuk v Frank, 44 NY2d 723, 725 [1978] ["Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of facts"].)

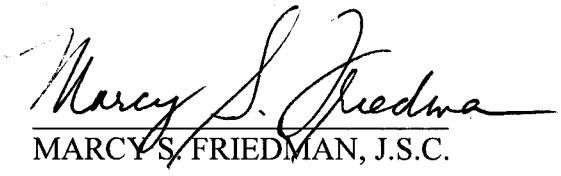
It is accordingly hereby ORDERED that the motion of defendant The Bank of New York Mellon to dismiss the Amended Complaint and Superseding Complaint is granted to the extent of dismissing: (1) the sixth, seventh, eighth, and thirteenth causes of action for violations of the New York State and City False Claims Acts; (2) the ninth cause of action for unjust enrichment; and (3) the twelfth cause of action for breach of contract (i) as asserted by the Teachers' Retirement System of the City of New York Variable Annuity Funds and the New York City Deferred Compensation Plan to the extent based on representations as to "best rate" set forth in the New York City Retirement Systems RFP; and (ii) as asserted by all plaintiffs to the extent based upon all transactions that occurred prior to October 5, 2005; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that defendant The Bank of New York Mellon is directed to serve an answer to the pleading within 30 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
August 5, 2013



MARCY S. FRIEDMAN, J.S.C.