Repsol, S.A. v Bank of N.Y. Mellon
2014 NY Slip Op 30352(U)
February 4, 2014
Sup Ct, New York County
Docket Number: Sup Ct, New York County
Judge: Eileen Bransten
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[* 1]
FILED: NEW YORK COUNTY CLERK 02/06/2014
INDEX NO. 652653/2012
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _______________ *Justice*

PART 3

Index Number : 652653/2012
REPSOL, S.A.
vs.
BANK OF NEW YORK MELLON
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 652653/2012
MOTION DATE 9/11/2013
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1
Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s). 3, 4

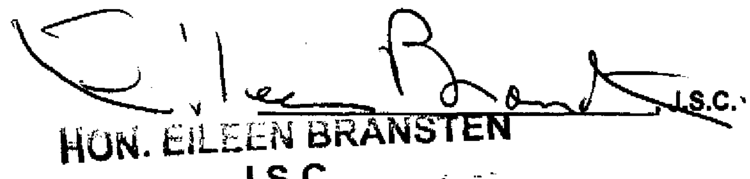
Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2-4-14



J.S.C.

HON. EILEEN BRANSTEN
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 3
---x
REPSOL, S.A.,

Plaintiff,

-against-

Index No. 652653/2012
Motion Date: 9/11/13
Motion Seq. Nos.: 001& 002

THE BANK OF NEW YORK MELLON and
YPF SOCIEDAD ANÓNIMA ,

Defendants.
---x

Bransten, J.:

Motion sequence numbers 001 and 002 are consolidated herein for disposition. Defendants The Bank of New York Mellon ("BNYM") and YPF Sociedad Anónima ("YPF") each seek dismissal of plaintiff Repsol, S.A.'s ("Repsol") complaint in its entirety, pursuant to CPLR 3211(a)(1) and (7) and 3016(b). Plaintiff opposes the motions. For the reasons that follow, defendants' motions are granted.

I. Background[1]

The action arises from BNYM's failure to carry out Repsol's voting instructions, at a June 4, 2012 shareholders' meeting. These voting instructions were issued in connection with the election of the Board of Directors of YPF, a major Argentine energy company.

Historically, the Argentine government owned YPF. However, in 1992, the company was privatized, and its shares were offered on stock exchanges in the form of American Depositary Shares ("ADS").[2] *Id.* ¶¶ 15-17. BNYM served as YPF's depositary institution, issuing the American Depositary Receipts ("ADR") to the beneficial owners of the ADS. As the depositary, BNYM was the shareholder of record for the YPF shares backing those ADS and effectuated the voting rights associated with the ADS, pursuant to the Amended and Restated Deposit Agreement between YPF, BNYM, and the owners of YPF's ADS ("Deposit Agreement"). *Id.* ¶ 9; *see* Affirmation of Mauricio A. España ("España Affirm.") Ex. B ("Deposit Agreement").

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[1] The facts as described in this section are drawn from the complaint unless otherwise noted.

[2] ADS "are shares of a foreign corporation that are deposited with an American financial institution and are considered United States securities." *Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, 2004 WL 359138, at *1 & n.4 (S.D.N.Y. Feb. 26, 2004). ADS allow U.S. investors to trade foreign securities within the U.S.

In 1999, plaintiff Repsol became the majority and controlling shareholder of YPF's capital stock, as represented by YPF's Class D shares. (Compl. ¶ 20.) In 2008, the Petersen Energia, S.A. and its affiliate (collectively "Petersen") purchased plaintiffs YPF ADS, representing approximately 15% of YPF's stock, and, in 2011, exercised an option to purchase an additional 10% of plaintiffs YPF ADS, pursuant to Seller Credit Agreements. *Id.* ¶ 21. Petersen pledged certain of the YPF ADS (the "Petersen ADS") as collateral for the loans from plaintiff used to finance the purchase. *Id.* ¶ 24. BNYM served as the collateral agent under the Petersen security and pledge agreements. *Id.* ¶ 25.

As collateral agent, BNYM was authorized to take such actions on behalf of the Petersen ADS, and to exercise such powers as delegated to it by the loan documents. *Id.*). In the pledge and security agreements, Petersen granted to BNYM, as collateral agent for the benefit of plaintiff, a security interest in all of Petersen's "right, title and interest" in the pledged Petersen ADS. Further, the pledge and security agreements provided that Petersen "shall have the right to exercise all voting, consensual and other powers of ownership" for those ADS only for "[s]o long as no Event of Default shall have occurred." *See* España Affirm. Exs. D & E §§ 3, 4.04(b); Compl. ¶ 42.

In April 2012, the Argentine government intervened in YPF, nationalizing it and expropriating plaintiffs stock (totaling 51% of YPF's Class D shares). (Compl. ¶ 2.) As a result, Repsol was left as only a minority shareholder in YPF, with voting rights as to

6% of YPF shares. *Id.* ¶¶ 27-33. Plaintiffs 6% minority interest is not at issue in this action, as only the Petersen ADS are at issue.

Shortly after the government intervention, the Argentine regulatory authority scheduled a June 4, 2012 general meeting of YPF's shareholders to vote on a new board of directors. *Id.* ¶ 35. On May 23, 2012, BNYM as Depositary provided plaintiff with a proxy card so that it could provide instructions to BNYM regarding how to vote the underlying YPF ADS. This proxy card stated that the voting instructions had to be received prior to 5:00 p.m. on May 30, 2012. *Id.* ¶ 38.

On May 30, 2012, plaintiff Repsol, in its capacity as lender under the Seller Credit Agreements, notified Petersen that certain events of default had occurred with regard to the loans. *Id.* ¶ 41. Accordingly, Repsol declared Petersen's loans due and payable immediately. *Id.* Petersen then provided written confirmations to plaintiff in which Petersen acknowledged that, as a consequence of the default and loan accelerations, Petersen was no longer entitled to exercise its voting rights with regard to the Petersen ADS. *Id.* ¶ 43; *see* Affirmation of Robert Sidorsky ("Sidorsky Affirm.") Exs. 4 & 6.

On May 30, 2012, at 2:07 p.m., plaintiff faxed its voting instructions with regard to the Petersen ADS to BNYM as Collateral Agent, requesting it to provide the voting instructions to BNYM as Depositary. *See* Sidorsky Affirm. Ex. 5. Copies of these instructions were sent to Mr. Edgar Piedras in BNYM's depositary department and to

BNYM's corporate counsel. (Compl. ¶¶ 44-45.) Plaintiff also faxed copies of the voting rights confirmations signed on behalf of Petersen to BNYM as Collateral Agent. (Sidorsky Affirm. Ex. 5.)

On May 31, 2012, BNYM as Depositary advised plaintiff that its voting instructions with regard to the Petersen ADS were disallowed by YPF because they arrived after the 5 p.m. deadline. (Compl. ¶ 49.) BNYM as Collateral Agent failed to internally transmit plaintiff's instructions to BNYM as Depositary until shortly after 5 p.m. on May 30, 2012. *Id.* ¶ 50. Thus, BNYM as Depositary failed to vote the Petersen ADS in accordance with plaintiff's instructions at the June 4, 2012 shareholders' meeting.

In its complaint, plaintiff alleges claims against BNYM for breach of the Deposit Agreement, breach of fiduciary duty, breach of the implied duty of good faith, breach of the Seller Credit Agreements, and gross negligence. Plaintiff likewise brings claims against YPF for breach of the Deposit Agreement, aiding and abetting breach of fiduciary duty, and tortious interference with contract. Defendants' motions to dismiss are presently before the Court.

II. <u>Discussion</u>

Defendants seek dismissal of Repsol's claims in their entirety based on documentary evidence and for failure to state a claim. In addition, Defendant BNYM

argues that the breach of fiduciary duty claim asserted against it must be dismissed for failure to plead such claim with the requisite particularity under CPLR 3106(b).

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiff and the plaintiff must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are

contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Defendant BNYM's Motion to Dismiss*

BNYM now seeks dismissal of the breach of the Deposit Agreement, breach of fiduciary duty, breach of the implied duty of good faith, breach of the Seller Credit Agreements, and gross negligence asserted against it by Repsol.

1. Breach of Deposit Agreement

In its first cause of action, plaintiff alleges that the Deposit Agreement was a valid and binding contract among itself, BNYM and YPF, and that it was a beneficiary of that agreement. Repsol further contends that BNYM breached its obligations under Sections 4.07 and 5.03 of the Deposit Agreement, by failing to accept plaintiff's timely voting instructions, and that BNYM's acts were not taken in good faith. Repsol claims that it was damaged by the reduced value of its minority interest in YPF's capital stock, since it

lost the ability to appoint two additional directors and a second alternate director. (Compl. ¶¶ 63-68.)

a. **Standing**

BNYM first challenges this claim on the grounds that plaintiff lacks standing to sue. The Court agrees.

The Deposit Agreement is a contract among YPF, BNYM as Depositary, and all "Owners" of the YPF ADS. Section 1.10 of the Deposit Agreement clearly defines "Owners" as "the person in whose name a Receipt is registered on the books of the Depositary maintained for such purpose." *See* Deposit Agreement at 3. Although Plaintiff admits it was not an "Owner" of the Petersen ADS when it sent its voting instructions with regard to those securities, plaintiff nonetheless urges that it may assert its claim based on the rights conferred on it by operation of the loan documents, which transferred all of Petersen's contractual rights regarding the pledged Petersen ADS to BNYM as Collateral Agent.

Plaintiff urges that upon Petersen's default on May 30, 2012, Petersen's ownership rights, including its voting rights, vested in BNYM as Collateral Agent, which was acting as agent on behalf of plaintiff. *See* Compl. ¶¶ 41-43. The Deposit Agreement, however, provides that it "is for the exclusive benefit of the parties hereto and shall not be deemed

to give and legal or equitable right, remedy or claim whatsoever to any person." (Deposit Agreement at 26.) More specifically, Section 2.01, entitled "Form and Transferability of Receipts," provides that BNYM as the Depositary "may treat the Owner thereof as the absolute owner . . . for all [] purposes and . . neither the Depositary [BNYM] nor the Company [YPF] shall have any obligation or be subject to any liability under this Deposit Agreement to any holder of a Receipt unless such holder is the Owner thereof." *Id.* ¶ 2.01 at 4. That section specifically addressed the transferability of the ADS, including the transfer of Petersen's voting rights under the ADS to plaintiff, and the obligations of BNYM and YPF upon the transfer.

Plaintiff's reliance on the agency relationship allegedly existing between itself and BNYM as Collateral Agent under the Seller Credit Agreements lacks merit. While that relationship may create standing under the Seller Credit Agreements, it does not create standing to sue BNYM as Depositary under the Deposit Agreement. This is particularly so where the Seller Credit Agreements, or the other loan documents, are not related to or incorporated into the Deposit Agreement. Instead, the Deposit Agreement specifically provided to whom BNYM and YPF owed an obligation or to whom it was subject to liability. Other persons, even if they were beneficial holders, such as plaintiff, lack standing to sue. *See Springwell Nav. Corp. v. Sanluis Corporación, S.A.*, 46 A.D.3d 377, 377 (1st Dep't 2007) (holding that beneficial holder of a note lacked standing to sue on

indenture agreement where indenture agreement specifically reserved that right to the registered holder of note); *MacKay Shields v. Sea Containers*, 300 A.D.2d 165, 166 (1st Dep't 2002) (dismissing contract claim where plaintiff lacked standing to sue on indentures because such right was expressly reserved to "holder," defined as one in whose name note is registered, regardless of fact that plaintiff was beneficial holder); *Caplan v. Unimax Holdings Corp.*, 188 A.D.2d 325, 326 (1st Dep't 1992) (dismissing contract claim because agreement specifically stated that only holders of record could seek remedy for nonpayment); *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F. Supp. 2d 375, 383 (S.D.N.Y. 2011).

Moreover, Section 4.07, entitled "Voting of Deposited Shares," provides, in relevant part that: "[u]pon the written request of an Owner on such record date, received on or before the date established by the Depositary for such purpose, the Depositary shall endeavor, in so far as practicable, to vote or cause to be voted" the ADS in accordance with the instructions set forth in such request. (Deposit Agreement at 16.) Again, this provision specifically requires that the party providing voting instructions be the "Owner on such record date," not a "holder." *Id.*

Plaintiff's reliance on *IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 759 F. Supp. 2d 363 (S.D.N.Y. 2010) is misplaced. In that case, the lender of a licensee sued the licensor for breach of the license agreement, asserting that the licensee's rights under the

agreement had been assigned to the lender's agent, and the lender could bring the action as the principal. *Id.* at 375. However, unlike the instant Deposit Agreement, the license agreement in *IMG Fragrance Brands* did not contain a clause such as Section 2.01, which clearly defined and limited who was obligated or subject to liability under that agreement. In addition, the defendant licensor, the licensee, and the lenders were all parties to the collateral assignment agreement, demonstrating their intent to render the lenders able to enforce the licensee's rights under the license agreement. *Id.*

Allan Applestein TTEE FBO D.C.A. Grantor Trust v. Province of Buenos Aires, 415 F.3d 242 (2d Cir. 2005), also is distinguishable. There, the court determined that plaintiff had standing on the grounds that the defendant waived such defense by failing to raise it in its answer, and the defendant had previously conceded that the permission to sue which the plaintiff had obtained was effective. *Id.* at 245-246. Here, the defense has been been raised appropriately in this pre-answer motion to dismiss, and there have been no concessions.

b. **Exculpatory Provision**

The court also notes that the Deposit Agreement's exculpatory provision limits BNYM's liability for failing to carry out an Owner's voting instruction so long as it acts in good faith. Section 5.03 of the Deposit Agreement provides, in relevant part:

> The Depositary shall not be responsible for any failure to carry out any instructions to vote any of the Deposited Securities . . . provided that any such action or nonaction is in good faith.

(Deposit Agreement § 5.03.)

While the complaint alleges in conclusory terms that BNYM as Depositary did not act in good faith, plaintiff only alleges that it provided notice to BNYM as Collateral Agent before the 5 p.m. deadline. Plaintiff then contends that that BNYM as Collateral Agent did not provide the instructions to BNYM as Depositary until after the deadline. Plaintiff fails to plead any facts that BNYM as Depositary acted in bad faith by waiting until it received the instructions from BNYM as Collateral Agent before voting the Petersen ADS.

Section 4.05(a) of the Pledge and Security Agreements provides that upon a default by Petersen, BNYM as Collateral Agent "shall have all the rights and remedies with respect to the Collateral of a secured party under the NYUCC . . . including the right, to the fullest extent permitted by law, to exercise all voting, consensual and other powers of ownership pertaining to the Collateral as if the Collateral Agent were the sole and absolute owner thereof . . . " *See* España Affirm. Ex. D § 4.05(a) at 6; Ex. E at § 4.05(a) at 6. Plaintiff concedes that it could not instruct BNYM as Depositary directly to vote for the Petersen ADS, but could only vote by instructing the Collateral Agent to instruct

the Depositary. (Compl. ¶¶ 43-45.) Accordingly, Plaintiff fails to plead facts supporting its claim that BNYM as Depositary acted in bad faith by waiting for instructions from BNYM as Collateral Agent before voting the Petersen ADS. Plaintiff also ignores the fact that BNYM was acting in two distinct capacities when it alleges that BNYM as Depositary's inaction was in bad faith. There are no factual allegations that BNYM as Depositary acted with a bad intent to prevent plaintiff from voting the Petersen ADS. Thus, even if plaintiff had standing to bring this claim, it has failed to plead bad faith as required by the Deposit Agreement to assert such a claim. Accordingly, the first claim is dismissed with prejudice.

2. Breach of Fiduciary Duty

Plaintiff next contends that BNYM has an independent duty as depositary – separate and distinct from the Deposit Agreement – to exercise reasonable skill and due care as plaintiff's proxy and agent in voting the pledged Petersen ADS in accordance with plaintiff's instructions. Repsol further alleges that BNYM breached its duty by failing to internally record or process plaintiff's timely voting instructions regarding the Petersen ADS prior to 5 p.m. on May 30, 2012. (Compl. ¶¶ 70-76.)

To state a claim for breach of fiduciary duty, the plaintiff must allege that the defendant owed it a fiduciary duty, committed misconduct breaching that duty, and that

the plaintiff suffered damages caused by the misconduct. *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011). The circumstances constituting the wrong must be stated in detail in accordance with CPLR 3016(b). *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2d Dep't 2011). Where the breach of fiduciary duty claim is based on the same allegations as the plaintiff's breach of contract claim, it will be dismissed as duplicative. *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 302 (1st Dep't 2008); *LaSalle Hotel Lessee, Inc. v. Marriott Hotel Serv., Inc.*, 29 A.D.3d 464, 465 (1st Dep't 2006).

First, plaintiff's breach of fiduciary duty claim fails as duplicative of its breach of contract claim. Repsol premises its fiduciary duty claim on allegations that BNYM refused and failed "to carry out Repsol's voting instructions with respect to the pledged ADS" and failed to internally record the voting instructions prior to 5 p.m. on May 30, 2012. *See* Compl. ¶¶ 72-74. The breach of contract claim is premised on the same allegations. *See id.* ¶ 65 ("BNY[M] materially breached its contractual obligations under the Deposit Agreement by refusing to accept the timely voting instructions provided by Repsol on May 30, 2012 ... and by refusing and failing to carry out these voting instructions at the YPF shareholders meeting held on June 4, 2012".); ¶ 85 ("BNY[M], as Collateral Agent, breached its contractual duty to follow and carry out Repsol's voting instructions with respect to the underlying YPF Class D shares pledged by Petersen ...").

Repsol nonetheless contends that its claim "arises from the separate and independent relationship created by the Depositary's role in voting the underlying YPF shares on behalf of the owners of ADS at the YPF shareholders meeting." (Pl.'s Opp. Br. at 19.) However, BNYM's role in seeking and accepting proxies from owners of YPF ADS is not a role separate and independent from the contract. In fact, this role is defined by Section 4.07 of the Deposit Agreement. *See* Deposit Agreement § 4.07 (entitled Voting of Deposited Securities). Accordingly, the Court concludes that plaintiff's breach of fiduciary duty claim merely restates its breach of contract claim and must be dismissed as duplicative. *See LaSalle Hotel Lessee, Inc. v. Marriott Hotel Serv., Inc.*, 29 A.D.3d 464, 465 (1st Dep't 2006) ("The cause of action for breach of fiduciary duty, based on the same allegations as for breach of contract, was also properly dismissed."); *see also Celle*, 48 A.D.3d at 302 (deeming breach of fiduciary duty claim "properly dismissed" where the agreement at issue "covers the precise subject matter of the alleged fiduciary duty.").

Moreover, plaintiff fails to plead the existence of a fiduciary relationship between BNYM and Repsol. Plaintiff's bare allegation that Section 4.07 of the Deposit Agreement created an agency relationship between BNYM as depositary and Repsol is insufficient. Plaintiff fails to plead that it exercised – or could exercise – the type of direction or control over BNYM that is an essential characteristic of an agency relationship that could provide a basis for a finding of a fiduciary duty. Plaintiff fails to provide a sufficient

basis for finding a special relationship of trust and confidence between a depositary bank, such as BNYM, and ADS holders, such as plaintiff, such that BNYM would owe a duty extraneous to the Deposit Agreement. *See Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, 2004 WL 359138 at * 5 (S.D.N.Y. Feb. 26, 2004). "A conclusory pleading of a fiduciary duty is insufficient to plead a cause of action in the face of the contrary terms in the contract which governed the parties' relationship." *Id.* at *7.

With regard to the Seller Credit Agreement, Article VIII specifically provides that "no [Collateral] Agent shall be subject to any fiduciary or other implied duties." *See* España Affirm. Ex. C, Art. VII at 38 (Seller Credit Agreement). Plaintiff fails to plead that BNYM as Collateral Agent had the kind of discretionary authority with regard to the collateral (the Petersen ADS) that might form the basis for a fiduciary relationship. *See Levitin v. PaineWebber, Inc.*, 159 F.3d 698, 707 (2d Cir. 1998); *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 535 (S.D.N.Y. 2009). In addition, there is no claim for breach of fiduciary duty where, as here, the agreement covers the precise subject matter of the alleged duty. *Superior Officers Council Health & Welfare Fund v. Empire HealthChoice Assur., Inc.*, 85 A.D.3d 680, 682 (1st Dep't 2011), *aff'd* 17 N.Y.3d 930 (2011); *Pane v. Citibank, N.A.*, 19 A.D.3d 278, 279 (1st Dep't 2005). Thus, the second cause of action is dismissed with prejudice.

3. Breach of Covenant of Good Faith and Fair Dealing

In its third claim, Plaintiff alleges that the Deposit Agreement included an implied covenant of good faith, which BNYM breached by its unreasonable refusal to accept and to carry out plaintiff's voting instructions. Plaintiff alleges that it was damaged by the diminution in the value of its minority interest in the YPF ADS, and the loss of its right and ability to appoint additional directors to the YPF board of directors. (Compl. ¶¶ 77-80.)

This claim is dismissed as redundant of the first claim for breach of contract. *Credit Suisse First Boston v. Utrecht-Am. Fin. Co.*, 80 A.D.3d 485, 488 (1st Dep't 2011) ("The cause of action for breach of the duty [of good faith and fair dealing] merely duplicates the cause of action for breach of contract and was properly dismissed as redundant."). A claim for breach of covenant of good will be dismissed where it is merely a substitute for a nonviable breach of contract claim. *See Triton Partners LLC v. Prudential Sec. Inc.*, 301 A.D.2d 411, 411 (1st Dep't 2003). Also, where, as here, "the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract," the claim cannot be maintained. *Bostany v. Trump Org. LLC*, 73 A.D.3d 479, 481 (1st Dep't 2010); *see Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 257-258 (1st Dep't 2004).

4. Breach of Seller Credit Agreements

Plaintiff's fourth cause of action alleges that BNYM breached the Seller Credit Agreements by failing to exercise its "binding, non-discretionary duty to follow [plaintiff's] voting instructions" after plaintiff notified BNYM of Petersen's default and acceleration of the loans. (Compl. ¶ 84.)

The Seller Credit Agreements set forth plaintiff's rights as lender, Petersen's rights as borrower and pledgee, and BNYM's obligations as collateral agent. Most notably, for the purpose of the instant motion, the Seller Credit Agreements contain an exculpatory clause. Article VIII of the Seller Credit Agreements provides that "[n]o Agent shall be liable for any action taken or not taken by it with the consent or at the request of the Majority Lenders or in the absence of its own gross negligence or willful misconduct." *See* España Affirm. Exs. C & F at 39.

Contractual limitation on liability clauses are enforceable, except that a party cannot avoid liability for damages caused by its own gross negligence or intentional acts. *Obremski v. Image Bank, Inc.*, 30 A.D.3d 1141, 1141-1142 (1st Dep't 2006); *see 261 E. 78th Realty Corp. v. William N. Bernstein, Architects, PLLC*, 98 A.D.3d 893, 894 (1st Dep't 2012). "[G]ross negligence contemplates 'conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing.'" *Obremski*, 30 A.D.3d at 1142 (quoting *Colnaghi, U.S.A. v. Jewelers Protection Servs.*, 81 N.Y.2d 821, 823-824

1993)). On a motion to dismiss, the Court need not accept as true conclusory allegations that the defendant acted willfully or was grossly negligent. *Lawrence v. Kennedy*, 95 A.D.3d 955, 959 (2d Dep't 2012); *SNS Bank v. Citibank*, 7 A.D.3d 352, 355 (1st Dep't 2004). The complaint must contain specific factual allegations of conduct of the required "aggravated character." *Sutton Park Dev. Corp. Trading Co. v. Guerin & Guerin Agency*, 297 A.D.2d 430, 431 (3d Dep't 2002).

Here, the complaint contains only a conclusory assertion, and no factual allegations, that BNYM acted in a "grossly negligent" manner. (Compl. ¶ 87.) It does not explain how the failure to notify BNYM as Depositary before the 5 p.m. deadline smacked of intentional wrongdoing. Thus, there is no basis to find intentional wrongdoing or even recklessness. *See SNS Bank v. Citibank*, 7 A.D.3d at 355; *Retty Fin. v. Morgan Stanley Dean Witter & Co.*, 293 A.D.2d 341, 341 (1st Dep't 2002).

Further, Article VIII of the agreements also states that BNYM:

> shall be under no obligation to exercise any of the rights or powers vested in it by this Agreement at the request or direction of any of the Lenders pursuant to the Agreement, unless such Lenders shall have offered to the Collateral Agent security or indemnity satisfactory to the Collateral Agent . . .

(*id.*). Thus, in order for BNYM as Collateral Agent to be obligated to exercise the voting rights vested in it at plaintiff's request or direction, plaintiff had to offer security or indemnity satisfactory to BNYM. Plaintiff fails to plead that it offered any such security

or indemnity. Therefore, plaintiff fails to plead a breach of the Seller Credit Agreements by BNYM, and this claim is dismissed without prejudice.

5. Gross Negligence

Plaintiff alleges in the fifth cause of action that BNYM was grossly negligent in willfully refusing, and failing, to carry out plaintiff's voting instructions. Repsol claims the same damages as alleged in all previous causes of action. (Compl. ¶¶ 90-95.)

Plaintiff's claim for gross negligence sounds in contract rather than tort, and the addition of allegations that BNYM acted willfully and recklessly do not create a separate tort claim. Without the Deposit and Seller Credit Agreements, BNYM would have had no duty to plaintiff. The obligations owed by BNYM as Depositary with regard to the voting of ADS were defined in the Deposit Agreement, and its obligation to plaintiff as the collateral agent for the pledged Petersen ADS were spelled out in the Seller Credit Agreements. *See Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, 2004 WL 359138 at *5 (S.D.N.Y. Feb. 26, 2004). BNYM did not assume all duties of an agent, and the agreements explicitly limited its duties as depositary and collateral agent. *See OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce*, 82 A.D.3d 537, 539 (1st Dep't 2011). Finally, as noted above, even if Repsol had pleaded the existence of an independent duty to support its gross negligence claim, it nonetheless has failed to plead that BNYM's

conduct "evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing," as required for such a claim. *See Colnaghi, U.S.A. v. Jewelers Protection Serv.*, 81 N.Y.2d 821, 823 (1993). Thus, the motion to dismiss the fifth cause of action is granted with prejudice.

B. *Defendant YPF's Motion to Dismiss*

YPF next moves for dismissal of those claims asserted against it by plaintiff: breach of the Deposit Agreement; aiding and abetting breach of fiduciary duty, and tortious interference with contract.

1. Breach of Deposit Agreement

The sixth cause of action alleges that YPF breached the Deposit Agreement by instructing BNYM to disallow Repsol's voting instructions with regard to the Petersen ADS on the ground that they arrived after the 5pm deadline on May 30, 2012. Further, Repsol alleges that YPF acted in bad faith.

a. **Standing**

This claim is dismissed for lack of standing. In response to YPF's standing defense, plaintiff contends that it was a holder of Petersen's ADS, due to Petersen's

"effective assignment" of all of its ownership rights in the ADS to Repsol. *See* Pl.'s Opp. Br. at 8. Thus, accordingly to plaintiff, it was a party to the Deposit Agreement under Section 7.04.

While Section 7.04 generally provides that "holders and Owners of Receipts from time to time shall be parties to this Deposit Agreement," the agreement does not contain any definition of "holder." *See* Deposit Agreement at 27. In addition, as discussed above, Section 2.01, which sets forth provisions regarding the transfer of the ADS to holders, provides that YPF and BNYM "notwithstanding any notice to the contrary, may treat the Owner thereof as the absolute owner thereof . . . for all other purposes and neither [BNYM] nor [YPF] shall have any obligation or be subject to any liability under this Deposit Agreement to any holder of a Receipt unless such holder is the Owner thereof." *Id.* at 4. Thus, although Section 7.04 generally states that "holders and Owners from time to time" are parties to the agreement, under Section 2.01 only holders who were also "Owners," that is, were registered as such on BNYM's depositary books, have standing to sue YPF and BNYM for their obligations under the Deposit Agreement.

Plaintiff argues that the Petersen ADS were transferred to it under the Pledge and Security Agreements upon Petersen's default on May 30, 2012, and that it notified BNYM as Depositary of this before the 5 p.m. deadline. Under Section 2.01, however, even with such notice, YPF and BNYM had no obligation or liability to plaintiff, because it was a

holder, and not the "Owner" registered on BNYM's books as Depositary for the Petersen ADS. Again, Section 4.07 provided that BNYM shall vote the ADS only at the "written request of an Owner on such record date," not at the request of a holder. Plaintiff contends that it had all the rights of a registered owner when Petersen defaulted, and that it just needed to perform the ministerial act of changing the name of the record owner on BNYM as Depositary's books, which it did on November 8, 2012. *See* Supplemental Affidavit of Robert Sidorsky ¶ 8. However, that ministerial act was performed too late. Respol cannot retroactively impose obligations on YPF and BNYM by registering Petersen's ADS in its own name *five months* after bringing suit based on the alleged breach.

Plaintiff's reliance on *Springwell Nav. Corp. v. Sanluis Corporación, S.A.*, 81 A.D.3d 557 (1st Dep't 2011), is unavailing. In that case, the court first dismissed plaintiff's action on the grounds that plaintiff, as a beneficial owner, lacked standing to sue under an indenture. However, the indenture contract at issue expressly permitted the registered holder to assign its rights to bring an action to an appointed proxy, and plaintiff obtained the registered holder's authorization to sue. *Id.* at 558. After the assignment, the court held that plaintiff had standing to bring suit on the indenture. One salient difference here lies in the timing. The plaintiff in *Springwell* cured its standing defect before

bringing suit. Repsol here attempted to cure its standing issues five months after it brought suit. Thus, *Springwell* does not salvage Repsol's claim.

b. Exculpatory Provision

As addressed above, the Deposit Agreement contains an exculpatory provision. Section 5.03 provides that YPF assumed no obligation and was not subject to any liability thereunder to any Owner or holder, except that it agreed "to perform its obligations specifically set forth in this Deposit Agreement without negligence or bad faith." This provision fails to provide a basis for standing for plaintiff. However, even if plaintiff had standing, the provision exculpates YPF from liability with regard to its specific obligations unless it was negligent or acted in bad faith.

Plaintiffs conclusory pleading of bad faith is insufficient. Plaintiff was not an Owner, that is, it was not a registered holder when it sent the voting instructions, and it admitted that its voting instructions reached YPF past the 5 p.m. deadline. Thus, for the reasons stated above, the sixth claim is dismissed with prejudice.

2. Aiding and Abetting Breach of Fiduciary Duty

In the seventh claim, plaintiff alleges that YPF aided and abetted BNYM's breach of fiduciary duty by "knowingly inducing or participating in those breaches of fiduciary

duties by improperly instructing [BNYM] that, as communicated to [plaintiff] by [BNYM], 'the instructions were disallowed by YPF because they arrived after the 5 pm deadline.'" (Compl. ¶ 104.) Plaintiff further alleges that this was without any contractual basis or justification since the deadline was set by BNYM for its benefit, and the YPF shareholder meeting was not until days later. *Id.* ¶ 105.

To plead a claim for aiding and abetting a breach of fiduciary duty, the plaintiff must allege that the defendant knowingly induced or participated in the breach by the fiduciary, and damages caused by the breach. *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 101 (1st Dep't 2006); *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). To allege knowing participation, plaintiff must allege that the defendant provided "'substantial assistance' to the primary violator." *Kaufman v. Cohen*, 307 A.D.2d at 126 (citation omitted). Actual, not constructive, knowledge is required. The plaintiff may not rely on conclusory allegations that the aider and abettor knew or should have known. *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d at 101.

Here, as determined above, BNYM did not owe a fiduciary duty to plaintiff, and, therefore, there can be no liability for aiding and abetting. In addition, while plaintiff uses the language of knowingly inducing, its simply alleges that BNYM delivered the voting instructions to YPF after the 5 p.m. deadline, and that YPF refused to accept them because they were late. There is no allegation that YPF was responsible for, or complicit

in, the untimely delivery by BNYM as Collateral Agent of the voting instructions to BNYM as Depositary. The conclusory allegations of knowing participation are insufficient. The seventh claim is dismissed with prejudice.

3. Tortious Interference with Contract

In the eighth cause of action, plaintiff alleges that YPF tortiously interfered with the Deposit Agreement by disallowing plaintiff's voting instructions.

To state a claim for tortious interference with contract, the plaintiff must plead "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). The plaintiff must allege that the contract would not have been breached "but for" the defendant's interference, and the allegations cannot be vague and conclusory. *Ferrandino & Son, Inc. v. Wheaton Bldg., Inc., LLC*, 82 A.D.3d 1035, 1036 (2d Dept 2011); *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006). Plaintiff's claim fails as a matter of law because YPF, as a party to the Deposit Agreement, cannot tortiously interfere with that agreement. "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." *Ashby v. ALM Media, LLC*, 110 A.D.3d 459,

459 (1st Dep't 2013) (citation and quotation marks omitted). Therefore, the eighth cause of action is dismissed with prejudice.

III. Conclusion

Accordingly, it is

ORDERED that defendant Bank of New York Mellon's motion to dismiss is granted with prejudice as to the first, second, third, and fifth causes of action and granted without prejudice as to the fourth cause of action; and it is further

ORDERED that YPF Sociedad Anónima's motions to dismiss is granted as to all causes of action asserted against it with prejudice, and the complaint is dismissed; and it is further

ORDERED that the action is severed and continued against defendant Bank of New York Mellon; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendant YPF Sociedad Anónima and that all future papers filed with the court bear the amended caption;

ORDERED that plaintiff is granted leave to serve an amended complaint so as to replead the fourth cause of action for breach of contract against defendant Bank of New

York Mellon within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that counsel for defendant YPF Sociedad Anónima shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158), and the Clerk of the E-File Support Office (Room 119), who are directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.

Dated: February 4, 2014

ENTER:

J.S.C.

HON. EILEEN BRANSTEN
J.S.C.