

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

PRESENT: BARBARA R. KAPNICK

PART 39

Index Number : 603118/2009
GOLDMAN SACHS LENDING
vs
HIGH RIVER PARTNERSHIP
Sequence Number : 001
SUMMARY JUDGEMENT

INDEX NO. 603118/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

Dated: 12/22/11

[Signature]
BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39**

-----x
GOLDMAN SACHS LENDING PARTNERS, LLC,

Plaintiff,

- against -

HIGH RIVER LIMITED PARTNERSHIP,

Defendant.
-----x

BARBARA R. KAPNICK, J.:

Plaintiff and counterclaim-defendant Goldman Sachs Lending Partners, LLC ("GSLP"), an affiliate of Goldman, Sachs & Co., brings this action for breach of contract against defendant High River Limited Partnership ("High River"), which is owned and controlled by Carl Icahn.

According to GSLP, in the summer of 2009, High River believed that the bank debt of Delphi Corporation ("Delphi"), an automotive parts supplier then in bankruptcy, was trading at overvalued price levels, and that the market price would subsequently decline. High River allegedly hoped to profit from the anticipated price decline by purchasing the bank debt for delivery to GSLP at a depressed market price. Accordingly, between July 15 and July 30, 2009, High River entered into nine trades (the "Trades") with GSLP, pursuant to which High River agreed to sell, and GSLP agreed to buy, an aggregate face amount of \$140 million of distressed bank debt, referred to as Delphi Tranche C Bank Debt (the "Bank Debt").

However, contrary to High River's expectations, the market value of the Bank Debt soared in response to various developments in Delphi's bankruptcy. High River, which did not own the Bank Debt at the time of the Trades, never made any attempt to acquire the Bank Debt, consistently delayed the closing of the trades, and ultimately, failed to deliver the Bank Debt to GSLP. GSLP seeks to recover the benefit of its bargain - the difference between the contract prices, and the market price within a reasonable time after High River's alleged breach, in the amount of \$25,225,000.

GSLP now moves, pursuant to CPLR 3212, for summary judgment on its breach of contract claim and to dismiss defendant's counterclaim. High River cross-moves for an order granting it summary judgment on its counterclaim for breach of contract, dismissing GSLP's claims, and entering judgment in its favor in the amount of \$30,952,159.

Background

In October 2005, Delphi filed for chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. (Aff. of Mark DeNatale [a Managing Director of Goldman, Sachs & Co] ¶ 2). On May 9, 2008, Delphi borrowed approximately \$4.5 billion from lenders by entering into a Revolving Credit, Term Loan, and Guaranty Agreement (the "Credit Agreement") (*id.*). The

credit facility consisted of three tranches, A, B, and C, each of which carried separate rights and obligations for the lenders (*id.*; Eric Weiss Dep., at 29-30). JPMorgan served as the administrative agent for the lenders (DeNatale Aff., ¶ 2; Lydia Myers Dep., at 11).

Following the execution of the Credit Agreement, the Bank Debt - the loans that were made to Delphi through the Credit Agreement - began trading (DeNatale Aff., ¶ 3). Lenders who wanted to sell their positions were able to do so to buyers who, after transfer of the Bank Debt to them, would then stand in the shoes of the original lenders and receive the interest and principal payments (*id.*). Those buyers, in turn, could sell their positions to other third parties (*id.*). Any party who sells its Bank Debt is referred to as an "upstream," and any party who purchases the Bank Debt from an upstream is referred to as a "downstream" (*id.*). Typically, such transfers of Bank Debt were made through assignments, where sellers transferred legal ownership of the Bank Debt to downstream buyers, who thereby became the lenders of record (*id.*).

Between July 15 and July 30, 2009, Courtney Mather, on behalf of GSLP, and Vincent Intrieri, on behalf of High River, entered into the Trades at purchase prices that ranged from 29.5 to 46.25 cents on the dollar (DeNatale Aff., ¶ 5). Each of the agreements

was confirmed in writing through standard form Distressed Trade Confirmations ("Trade Confirmations") [attached to DeNatale Aff. as Exh A], published by the Loan Syndication and Trading Association ("LSTA"), the relevant industry association, and subject to the LSTA's Standard Terms and Conditions for Distressed Trade Confirmations ("Standard Terms and Conditions") [attached to DeNatale Aff. as Exh B]; (Complaint, ¶ 17; DeNatale Aff., ¶ 6). In each of the Trade Confirmations, the parties agreed by checking the applicable box, that the "form of purchase" would be by "assignment" (DeNatale Aff., ¶ 7).

The Standard Terms and Conditions, which are incorporated by reference in the Trade Confirmations, provide that "the transfer of the Purchase Amount ... of the Debt ... specified in the [Trade] Confirmation shall be effected as soon as practicable on or after the Trade Date," and that "[a]ny alternative agreement between Buyer and Seller as to a targeted date of settlement shall be specified in the Confirmation" (Standard Terms and Conditions, ¶ 1). The Standard Terms and Conditions further provide that "[i]f Buyer and Seller are unable to effect settlement of the Transaction as specified in the [Trade] Confirmation, a valid and binding obligation to settle the trade nevertheless continues to exist between Buyer and Seller" (*id.*). High River does not dispute that it entered into these nine binding contracts with GSLP.

The Standard Terms and Conditions also provide that "[i]f a Transaction that is to be settled by assignment cannot be settled on such basis, such Transaction shall be settled as a participation; provided that if settlement by participation cannot be effected, the Transaction shall be settled on the basis of a mutually agreeable alternative structure or other arrangement that affords Buyer and Seller the economic equivalent of the agreed-upon trade;..." (*id.*) (emphasis in original).

During her deposition, High River's counsel, Tracy Brosnan of the law firm Mandel Katz & Brosnan LLP ("Mandel Katz"), agreed that, because the parties had selected "assignment" as the method by which the Trades were to settle, under the Standard Terms and Conditions, the parties "have to in good faith proceed to close by way of assignment ... unless they in good faith can't" (Brosnan Dep., at 139), and that if the parties can close by assignment, they do not have an option to settle in any other manner (*id.* at 151).

On July 30, 2009, the Bankruptcy Court approved Delphi's Plan of Reorganization and confirmed the sale of assets to an entity named DIP Holdco 3, LLC ("DIP Holdco") (DeNatale Aff., ¶ 9). DIP Holdco offered a financing through which lenders of record, including owners of Bank Debt, could exchange a portion of the

distributions to which they were entitled under Delphi's Plan of Reorganization for new term loans, notes and equity (the "Rights Offering") (*id.*; Weiss Dep., at 71-72). The offering further fueled the increase in the price of the Bank Debt.

After it entered into the Trade Confirmations, and with the expectation that the impending Rights Offering could lead to an early deadline by which assignments could be effected, GSLP and its counsel, Richards Kibbe & Orbe ("RKO"), sought to expeditiously settle the Trades with High River (DeNatale Aff., ¶ 10). Personnel from GSLP and attorneys from RKO sent a series of emails between July 27, 2009 and August 25, 2009 to High River and its counsel, Tracy Brosnan and Kara Katz of Mandel Katz, in an effort to obtain the necessary upstream information, and to meet all other requirements to close the Trades (*id.*). High River and Mandel Katz ignored virtually all of these emails (*id.*; Aff. of Sharon Babick, ¶¶ 7-11).

In addition to these emails, several individuals at GSLP repeatedly called High River, but High River "never picked up or return[ed their] phone calls," or would "not hear [them] out," because "[High River had] basically gone, for all intents and purposes, dark" (DeNatale Dep., at 93; Mather Dep., at 170-172).

On August 25, 2009, DIP Holdco circulated a memorandum to market participants regarding the Bank Debt (DeNatale Aff., ¶ 11; see also Exh C). The memorandum provided that DIP Holdco had established a record date of September 10, 2009 (the "Record Date") for eligibility to participate in the Rights Offering (*id.*). Establishing a Record Date for eligibility to subscribe to the Rights Offering also had the effect of establishing a deadline for completing assignments of the Bank Debt (*id.*). The memorandum stated: "[t]o permit sufficient time for processing and settling trades by the September 10th record date, all pending assignments for DIP loans, and related documentation required for pending purchasers to become record holders of DIP loans by the record date, must be submitted in good form to JPMorgan no later than 12:00 noon New York City time on September 4, 2009" (DIP Holdco Mem., at 1). That memorandum further alerted holders that DIP Holdco "anticipate[s] that submissions that are incomplete at the September 4th deadline and submissions after the September 4th deadline will not be processed in time for the September 10th record date" (*id.*).

Lydia Myers, the individual at JPMorgan responsible for processing the assignments of Bank Debt from sellers to buyers, confirmed at her deposition that "as of the record date, [JPMorgan] locked the lender group ... so no further trades or assignments

could be settled." (Myers Dep., at 12-13; 20-21). Ms. Myers further testified that "[t]he September 10th record date was the final day for processing assignments under this credit agreement" and that "[n]o further assignments would be processed after that date" (*id.* at 20). She explained that if the assignment of Bank Debt to a buyer was not effectuated before the Record Date, the buyer "would not be a lender under the credit agreement or have any rights under the Delphi credit agreement," including the right to distributions made by the bankruptcy estate (*id.* at 21-22).

Ms. Brosnan confirmed that she was "aware by August 28th that the agent was about to freeze closing unless it received documents by some date certain," and that she "knew about the September 4th deadline" (Brosnan Dep., at 209; 211-213).

There were eight business days between the August 25th announcement of the September 4th deadline, and the deadline itself. Because of High River's almost complete silence, GSLP became concerned that it would miss the deadline, and began pursuing High River and Mandel Katz more aggressively to settle the Trades (DeNatale Aff., ¶ 12; DeNatale Dep., at 92-93). GSLP made numerous calls to High River and its counsel, most of which were unreturned, or were met with equivocation (DeNatale Dep., at 141-142; Dep. of Patricia Tessier [the then-Manager of the trade closing team at

GSLP], at 40, 68; Dep. of Wendy Sacks [a Managing Director at Goldman Sachs], at 84-87). In addition, GSLP and its attorneys sent several additional written communications to High River and Mandel Katz, in an effort to obtain the upstream information, and to settle the Trades (DeNatale Aff., ¶¶ 12-17; see Exhs D-H). High River and its attorneys did not respond to these communications (*id.*).

On September 3, 2009, High River finally responded to GSLP through a letter sent by Ms. Brosnan. In that letter, Ms. Brosnan stated that High River "will not be in a position to close the transaction on September 4th" (see DeNatale Aff., ¶ 18, Exh I). In a subsequent letter dated September 10, 2009, Ms. Brosnan stated that High River "intends to fulfill its contractual obligations under each of the Trade Confirmations," but that High River was "not in a position at [that] time to close the transactions contemplated by the Trade Confirmations" (DeNatale Aff., ¶ 21, Exh L).

Ultimately, High River not only failed to settle the Trades by the Record Date, it never assigned or transferred the Bank Debt to GSLP, or otherwise settled the Trades (DeNatale Aff., ¶ 23).

The reason for High River's inaction became clear during discovery. Keith Cozza, High River's Treasurer, disclosed during his deposition that "prior to October 5, 2009, and after the trades were entered into ... High River was short the tranche C debt" (Cozza Dep., at 139). Although High River was short, Mr. Cozza admitted that he was not aware "of any impediment or reason in the marketplace why, had High River wanted to try to purchase the tranche C debt, it could not have purchased it," and was "not aware" of "any efforts that were made at High River [between July and October 2009] to purchase the tranche C debt" (*id.* at 116). Mr. Cozza also conceded that "the tranche C bank debt trades with Goldman could not close by assignment as long as High River was short the tranche C bank debt." (*id.* at 191).

Similarly, Ms. Brosnan testified that the Trades could not close because High River was never "in a position to deliver whatever documentation was necessary ... to JPMorgan to close its trades with Goldman by way of assignment" (Brosnan Dep., at 217). She also testified that she did not know of anything Goldman Sachs or JPMorgan did or did not do on their ends to prevent High River from closing the trades. (*id.* at 217-219).

After September 10th, the Bank Debt was no longer transferable by assignment (DeNatale Aff., ¶ 24). Accordingly, purchasers of

the Bank Debt following that date did not purchase "Bank Debt," but rather, purchased the package of equity rights, notes and cash payments into which Bank Debt would be converted as a result of the Rights Offering and the Delphi reorganization (*id.*, ¶ 24).

While the passage of the Record Date meant that High River was not going to be able to settle the Trades by assignment, GSLP, relying on Ms. Brosnan's representations in her letter of September 10, 2009, entered into negotiations with High River in an attempt to reach a settlement of the matter (*id.*, ¶ 25). However, the parties were unable to arrive at an agreement (*id.*).

Thus, in order to meet its obligations to downstream purchasers with whom GSLP had entered into trades to sell the Bank Debt that it had expected High River to deliver, on October 5, 2009, GSLP purchased in the market, at a price of 56 cents on the dollar, \$46.5 million of Bank Debt, a price which was approximately 20 cents per dollar more than the average price at which High River had contracted to sell the Bank Debt to GSLP (*id.*, ¶ 26; see Exh N). GSLP satisfied the remainder of its obligations to its downstream purchasers by using the same proceeds received from its own inventory of the Bank Debt (*id.*). GSLP contends that, as a consequence of High River's breach of contract, it has been damaged in an amount equal to the difference between the prices set forth

in the contracts embodied in the Trade Confirmations, and the market price of 56 cents to the dollar, for a total of \$25,225,000 in damages (*id.* ¶ 27).

Discussion

“‘[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’ (citation omitted)” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369 [1977], cert denied 434 US 969 [1977]; *Indig v Finkelstein*, 23 NY2d 728 [1968]).

Under New York law, to establish a right to recover for breach of contract, a party must prove (1) the existence of a contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]). Contract interpretation is a question of law, appropriate for resolution on summary judgment. The New York Court of Appeals has consistently held that “when parties set

down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact" (*Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 [1st Dept 1996] [internal quotation marks and citation omitted]). Summary judgment on a breach of contract action should be granted where, as here, the terms of the contract are clear and unambiguous (see e.g. *Modell's N.Y. v Noodle Kidoodle*, 242 AD2d 248 [1st Dept 1997]; *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514 [1st Dept 1995]).

The Trade Confirmations are contracts which, by their terms, are governed by New York law (see Standard Terms and Conditions, ¶ 23). In accordance with the above principles of contract interpretation, it is apparent that the Trade Confirmations, and the Standard Terms and Conditions which are incorporated into the Trade Confirmations, are clear and unambiguous, and should be enforced according to their terms. As

such, GSLP is entitled to summary judgment on its cause of action for breach of contract.¹

The Standard Terms and Conditions obligated High River to close the Trades "as soon as practicable" (*id.* ¶ 1). Ms. Brosnan agreed that the phrase does not "have a special meaning," and "[is] not a term of art in the [distressed debt trading] industry" (Brosnan Dep., at 74-75). Thus, the term is to be given its ordinary and customary meaning.

Under New York law, "[t]he words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties, and in this regard it is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract" (*Mazzola v County of Suffolk*, 143 AD2d 734, 735 [2d Dept 1988] [internal citations omitted]; see also *Samba Enter., LLC v Zango, Inc.*, 2009 WL 736155 at * 3 [SDNY 2009] ["'[p]lain' and 'ordinary' means as defined by a dictionary"]).

¹ GLSP does not move for summary judgment on its alternative claim for anticipatory breach of contract, contending "that claim is unnecessary in light of High River's breach of contract" (GSLP Mem., at 15, n 2).

Webster's dictionary defines "practicable" as "capable of being done, effected, or performed; feasible." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged) (2d ed. 1979). New York courts have adopted a similar definition (see *Wallbridge v Brooklyn Trust Co.*, 143 App Div 502, 508 [2d Dept 1911] [holding that "practicable" means "capable of being performed," and that the term "as soon as practicable," when used in a contract, is "practically synonymous with 'speedily'"]).

In interpreting the language set forth in a contract, the court must apply a standard that "is necessarily flexible, varying for example with the subject of the agreement, its complexity, the purpose for which the contract was made, the circumstances under which it was made, and the relation of the parties" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482-483 [1989], *rearg den* 75 NY2d 863 (1990), *cert denied* 498 US 816 [1990]; see also *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584 [1999]). Using the word "practicable" in the context of the factual scenario underlying the establishment of the Record Date as the deadline for completing assignments of the Bank Debt, it is clear that under the plain meaning of the Trade Confirmations, settlement of the Trades by the Record Date was essential. Because all assignments of the Bank Debt had to be approved by JPMorgan, High River's failure to close by September 10

made assignment impossible. But for High River's failure to purchase the Bank Debt needed to settle the Trade, the Trades could have been settled by September 10. GSLP presents undisputed evidence that, prior to that date, Mandel Katz settled all of its clients' trades in Delphi Bank Debt, other than those of High River, often in a matter of days (see Brosterman Aff., Exh 13; Brosnan Dep., at 103-105). Likewise, between May and September of 2009, GSLP settled in excess of 550 trades of Delphi Bank Debt with parties other than High River. Many of those trades also closed in a matter of days (see Babick Aff., Exh G).

Significantly, between July 15 and September 10, 2009, JPMorgan approved the settlement of approximately 5,500 trades of Delphi Bank Debt, over 800 of which were approved between August 25 and September 10 (see Brosterman Aff., Exh 14; Myers Dep., at 32-38). After August 25th, JPMorgan dedicated a team of people to work exclusively on reviewing requests for assignment of Delphi debt, whose efforts brought the average processing time of assignments from the standard five to ten business days down to 24 hours between September 4 and 10 (Myers Dep., at 29-31). Ms. Myers, whose team at JPMorgan approved the assignment of all of the Delphi trades, testified that she was not aware of a single request for approval that JPMorgan denied between August 25 and September 10, 2009 (*id.* at 42-43). Ms. Myers further testified that had GSLP

and High River submitted all of the paperwork necessary to have the assignment of Bank Debt approved by JPMorgan, it would have been duly approved (*id.* at 47-48).

Furthermore, Ms. Brosnan testified that if High River had directed her to close, she could think of nothing that would have stopped the closing of the trades (Brosnan Dep., at 250-251). Additionally, Carl Icahn, who owns High River, agreed at his deposition that if he owned the Bank Debt, he could have "transferred that debt by way of assignment" (Icahn Dep., at 60-61).

It is clear that since High River admittedly never owned the Bank Debt, never entered into an agreement to buy the Bank Debt, and never even attempted to purchase the Bank Debt, High River could not meet its obligations under the Trade Confirmations to settle its Trades with GSLP. Indeed, High River concedes that it never delivered the Bank Debt to GSLP, and that it never attempted to do so. High River also does not dispute that JP Morgan imposed a September 10, 2009 deadline on all market participants to close outstanding trades, and that JPMorgan approved every outstanding trade that was presented to it prior to the September 10, 2009 deadline. The undisputed evidence thus conclusively demonstrates that High River failed to deliver the Delphi Bank Debt "as soon as

practicable" after entering into the Trade Confirmations in July 2009. As such, GSLP has demonstrated a prima facie entitlement to summary judgment.

In opposition to the motion, High River fails to raise any triable issues of fact regarding whether it was practicable to close its trades with GSLP by September 10. While High River contends that, because the Trade Confirmations did not contain a specific settlement date, High River had no deadline by which it was required to close the Trades, High River does not dispute that it had to close "as soon as practicable" after the Trades, and it does not dispute any of the evidence showing that it was practicable or feasible to close the Trades between the July trade dates, and the absolute final deadline for settlement of assignments of September 10. High River further contends that what is "practicable" is a factual issue that cannot be determined on a summary judgment motion, citing, *inter alia*, to *UBS AG v Highland Capital Mgt. L.P.*, 29 Misc3d 1230(A) (Sup Ct NY Co [Fried, J] Dec. 1, 2010) where Justice Fried held that "the question of whether Highland Credit's conduct was appropriate, in view of the express terms of the transfer documents and industry practice in 2007 and 2008, cannot be resolved *on the pleadings* (emphasis supplied)." (*supra* at *3). Of course, Justice Fried was deciding a pre-answer motion to dismiss, and found he could not determine whether the

defendants' actions were reasonable or justified or constituted defenses to the complaint "at [that] early stage of the litigation" "without discovery." (id.)

Here, however, after comprehensive discovery and on a motion and cross-motion for summary judgment, High River can only rely only on conjecture and supposition. For example, High River contends that "had [it] entered into trades in August to buy \$140 million in Bank Debt to cover its short position ... High River's sellers could have legitimately taken the position that High River was not entitled to demand a closing on or before September 10 ... or could have been selling short [themselves]" (High River Mem., at 3-4). In support of this contention, High River submits only the "expert affidavit" of Stanley Fortgang, the founder and managing partner of Etzion Consulting Group, L.L.C., where he specializes in consulting on fixed income markets, including the market for distressed loan trading. Mr. Fortgang previously worked at Jefferies & Co., Morgan Stanley and Goldman Sachs, among other investment banking institutions, but had no involvement with the settlement of Delphi Bank Debt trades, and never once refers to the manner and timeliness by which Delphi Bank Debt trades settled. Instead, Mr. Fortgang refers to hypothetical circumstances under which distressed debt trades may be delayed.

Thus, for example, Mr. Fortgang states that, as a general matter, administrative agents monitor and approve each transfer of bank debt, and he suggests that this can also be a source of delay in settling bank debt trades (see Fortgang Aff., ¶ 3). Mr. Fortgang, however, completely ignores the actual facts. In this case, as discussed *supra*, the record is undisputed that JPMorgan was able to process each and every trade presented to it before September 10, 2009, often in a matter of days (see Myers Dep., at 42-43).

"[M]ere conjecture and speculation, rather than admissible evidence ... [do not] raise a triable issue of fact" that will defeat a motion for summary judgment (*Wiener v City of New York*, 60 AD3d 598 [1st Dept 2009]). Furthermore, "affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief" (*Castro v New York Univ.*, 5 AD3d 135, 136 [1st Dept 2004]; see also *Deutsche Bank Sec., Inc. v Montana Bd. of Inv.*, 21 AD3d 90, 97 [1st Dept 2005], *affd* 7 NY3d 65, *cert denied* 549 US 1095 [2006] [holding that summary judgment was proper where the conclusion cited in defendant's affidavit opposing summary judgment was "wholly speculative"]).

Thus, High River cannot defeat GSLP's motion for summary judgment by conjecturing what might have occurred had it attempted to purchase the Bank Debt and attempted to deliver it to GSLP by September 10. Accordingly, High River has failed to raise a triable issue of fact as to whether it was practicable for the Trades to close by September 10.

High River further argues that Section 2 of the Standard Terms and conditions trumps the obligation set forth in Section 1 to close by "assignment" and "as soon as practicable." Section 2 provides that "[u]nless otherwise specified in the Confirmation, Buyer is assuming the obligation to purchase ... the Debt as such Debt may be reorganized, restructured, converted or otherwise modified." High River argues that "[b]ecause the Bank Debt was converted into the right to receive cash, the manner of transfer, whether assignment or otherwise, becomes academic because cash is fungible" (High River Mem., at 21). To the contrary, however, it is clear that section 2 merely confirms that where the parties cannot in good faith close by assignment before the Debt is reorganized, restructured or converted to some other form, the buyer is still obligated to purchase the Debt "as such Debt may be reorganized, restructured, converted or otherwise modified." Thus, section 2 does not alter the fundamental obligation of the parties

to proceed in good faith to close the trade by "assignment" and "as soon as practicable" following the trade date.

Indeed, High River's interpretation of section 2 is at variance with the well-settled law in New York that "[a] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" and that "courts 'are obliged to interpret a contract so as to give meaning to all of its terms' (citation omitted)" (*Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69 [1st Dept 2003], *lv dismiss 2 NY3d 794 [2004]*). "'An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation' (citation omitted)" (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 986-987 [1st Dept 2009]). Thus, High River cannot avoid section 1 of the Standard Terms and Conditions by reading it out of the contract through an interpretation of section 2 that would indefinitely extend the parties' obligation to close.

Accordingly, GSLP's motion for summary judgment is granted. High River's cross motion for summary judgment on its counterclaim for breach of contract is thus denied. High River appears to argue that it is entitled to summary judgment on its counterclaim because the Bank Debt was converted into cash distributions under the

Delphi Plan of Reorganization, and thus, under the Trades, GSLP was obligated to pay High River the purchase price of \$53,175,000 and was entitled to receive cash of \$22,222,840 and nothing more. High River further argues that GSLP's unilateral decision to terminate the Trades and "buy in" the proceeds of the DIP Holdco offering was improper (High River Mem., at 2, 20-21).

However, it is undisputed that High River never delivered the Bank Debt to GSLP. Accordingly, High River cannot now claim that GSLP breached the Trade Confirmations by failing to pay High River for the Bank Debt that High River never owned or delivered to GSLP, when High River itself breached the Trade Confirmations. Where one party materially breaches a contract, the non-breaching party is discharged from performing any further obligations under the contract (see *Duke Media Sales, Inc. v Jakel Corp.*, 215 AD2d 237 [1st Dept 1995]).

Plaintiff next argues that its damages can easily be determined by calculating the difference between the contract prices provided in the Trade Confirmations and the market price GSLP paid for the Bank Debt when it covered, plus pre-judgment interest.

In support of its claim, GSLP has submitted High River's own records (see Brosterman Aff., Exh 12) which reflect that at all times following High River's breach, the market price for the Bank Debt was never less than 56 cents per dollar.² Thus, GSLP is seeking damages of \$25,225,000, the difference between the contract prices and the market price of 56 cents on the dollar, multiplied by the specific quantities of Bank Debt sold under each contract (an aggregate of \$140 million).

Since High River marked its portfolio to market daily on its books and records, and since High River did not, either in its Memoranda or during oral argument held on the record on June 28, 2011, raise any objection to the damage calculation asserted by plaintiff, this Court will grant plaintiff damages on its cause of action for breach of contract in the amount of \$25,225,000 with interest to be calculated by the Clerk at the statutory rate of 9% from September 10, 2009.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: December 22, 2011



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

² In fact, on October 5, 2009, the market price of the Bank Debt was 57 cents per dollar.