Gunthel v Deutsche Bank AG
2005 NY Slip Op 30361(U)
August 9, 2005
Supreme Court, Genesee County
Docket Number: 603668/2004
Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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RICHARD GUNTHEL, GEORGE KOUNTOURIS, DESMOND MCGOWAN, BRUCE MORRISON, MELA MEISEL, PAUL TUROVSKY, LISA ANDERSON, JUSTIN CHUTER, ROBBIN HERRING, MICHAEL MONTELIBANO, DAVID NETSER, JEMI SHIEH, PIETRO STELLA, ANDREW TRICKETT, LESLEY CHEN, and ROBIN AMBLER,

Plaintiffs,

-against-

DEUTSCHE BANK AG, DEUTSCHE BANK TRUST COMPANY AMERICAS, and DEUTSCHE BANK SECURITIES, INC.,

Defendants.

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INDEX NO. 603668/2004

MOTION DATE ______

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

FILED
AUG 16 2005
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to ____ were read on this motion to/for ______ PAPERS NUMBERED

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

Answering Affidavits — Exhibits ______

Replying Affidavits ______

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: August 9, 2005

KARLA MOSKOWITZ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 03

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RICHARD GUNTHEL, GEORGE KOUNTOURIS, DESMOND MCGOWAN, BRUCE MORRISON, PAMELA MEISEL, PAUL TUROVSKY, LISA ANDERSON, JUSTIN CHUTER, ROBBIN HERRING, MICHAEL MONTELIBANO, DAVID NETSER, JEMI SHIEH, PIETRO STELLA, ANDREW TRICKETT, LESLEY CHEN, and ROBIN AMBLER,

Index No. 603668/2004

Plaintiffs,

DECISION and ORDER

-against-

DEUTSCHE BANK AG, DEUTSCHE BANK TRUST COMPANY AMERICAS, and DEUTSCHE BANK SECURITIES, INC.,

Defendants.

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Karla Moskowitz, J.:

Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

Plaintiffs are former employees of defendants' real estate investment banking group. They claim that defendants failed to pay them millions of dollars in incentive compensation awards linked to profits from a portfolio of real estate investments that plaintiffs helped acquire and manage. Plaintiffs also claim that, when plaintiffs left defendants' employment, defendants calculated plaintiffs' compensation awards on a depressed value that defendants assigned to the investments when defendants transferred them to an affiliated investment fund. This, plaintiffs claim, violated the intent of the incentive plans and violated the duty of good faith.

Defendants contend that the incentive plan's unambiguous terms are inconsistent with these allegations and, thus, plaintiffs cannot claim breach of contract or breach of an implied covenant of good faith.

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BACKGROUND

The individual plaintiffs worked for Deutsche Bank's Real Estate Investment Banking Group (REIB) through Deutsche Bank AG and its alleged subsidiaries, Deutsche Bank Securities, Inc. and Deutsche Bank Trust Company Americas (collectively Deutsche Bank). (Complaint, ¶ 4-23, annexed as Exhibit A to Affirmation of William J. Sushon, dated January 28, 2005).

REIB Group was involved in real estate private equity investments. In January 2000, and then in January 2001, Deutsche Bank created two incentive compensation plans for REIB employees (the Carried Interest Plans). (Id., ¶ 41). These plans offered to certain REIB employees the opportunity to share in the profits that the real estate portfolio generates. (Id., ¶ 43). The Carried Interest Plans contain the same operative language. Id., ¶¶ 40-41. The plans' prefatory language provides that the purpose of the plans is to "provid[e] additional incentive to Employees of the [REIB] Group to contribute to the growth and profitability of [Deutsche Bank]." (Exhibits A and B annexed to Affidavit of Vincent T. Callahan, dated January 27, 2005, at 1). The plan participants are awarded "points" or "Carried Interests" that, when vested, represent entitlement to a percentage of the profits that certain investments generated that the REIB group acquired and managed. (Complaint, ¶ 43). The plan investments consist primarily of real property, real estate-secured loans and equity investments in joint ventures and operating companies that generate revenue from a number of sources, including proceeds from sales, rental incomes and management fees. Id.

Bonus Awards

At the end of each fiscal year, plan participants receive a Bonus Award based on the "Profits" or "Losses" that the assets within each investment class generate during the year.

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(Exhibits A and B to Callahan Aff. [the Carried Interest Plans], Section III, ¶ 5). If the Bonus Award for an investment class is positive, then the plans provide that it "will be paid in cash." (Id., Section III, ¶ 6.1). The plans define "Profits" as "all revenue realized during any Fiscal Year with respect to the Plan Investments in each Investment Class from income, gain, profit and all other sources determined in accordance with federal income tax accounting principles." (Id., Section I, at 6).

Former Employees

When the plan participants' employment with Deutsche Bank does not terminate for cause, their Carried Interests all become 100% vested. (Id., Section III, ¶ 7.3 [c]). The plans then provide that "Bonus Awards . . . will be paid to the Participant who is no longer an Employee exactly as if such Participant were still an Employee." (Id., Section III, ¶ 7.3 (h); Complaint, ¶ 48).

Estimated Fair Market Value

The plans provide that, after an investment class has run for ten years, Deutsche Bank may terminate that investment class. To terminate, Deutsche Bank was to treat any remaining assets in that class as if they had sold at a price to which management and plan participants holding a majority of the carried interests for that investment class agreed. (Exhibits A and B to Callahan Aff., Section III, ¶ 3.3). If there is no agreement as to price, the plans provide that the "price shall be the Estimated Fair Market Value of such Plan Investments as of the end of such tenth year as determined by a nationally recognized investment banker" whom management and the plan participants mutually accept. (Id.)

According to the plans, "Estimated Fair Market Value" is either: (i) the published trading price of a publicly-traded security, or (ii) for any asset that is not a publicly-traded security, a

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valuation that management completes in good faith. (Id., Section I).

Section III, paragraph 5.1, of the plans regarding the computation of Bonus Awards, first allocates expenses related to plan investments to Deutsche Bank. Then, generally, plan participants are entitled to 20% of the remaining profits. Deutsche Bank retains the balance. If Deutsche Bank receives a 12.5% internal rate of return on disposed investments, taking into account "writedowns" (net of "writeups") of all assets in the investment class, then 25% of the amount Deutsche Bank would have earned becomes reallocated to the plan participants for purposes of calculating their annual Bonus Awards. (Id., Section III, ¶ 5.1 [c]). The plans provide that writeups and writedowns mean the difference between the fair market value of a plan investment and the cost of the investment, as management reasonably determines. (Id., Section I, at 7).

Deutsche Bank's Discretion

The plans provide that "[a]ll calculations or other determinations made or approved by Management . . . shall be final and conclusive." (Id., Section II). The plans also provide that management shall have "full power and authority to interpret and administer the Plan," and the "power in its absolute discretion, to terminate or suspend the Plan or to make such modifications or amendments thereof as it shall deem advisable." (Id.) Management's power to amend, terminate or suspend the plans is subject to the provision of paragraph 8.1, that requires management to obtain the approval of those plan participants who hold a majority of the carried interests and whom the proposed change would adversely affect. (Id., Section III, ¶ 8.1).

Project Morph and the Conversion Plan

In 2002, Deutsche Bank decided to sell its private equity assets, including the real estate assets underlying the Carried Interest Plans, to reduce its exposure to high-risk private equity.

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(Complaint, ¶ 55). Deutsche Bank wanted to use the REIB Group's assets to enter into the opportunity fund business. Deutsche Bank planned to acquire and manage real estate investments with third-party investors' monies to benefit from the income stream without the risks or costs of direct ownership. (Id., ¶ 66). Deutsche Bank, therefore, established an investment fund to purchase most of the Carried Interest Plan assets, effectively converting the fund to a third-party investor fund Deutsche Bank managed. (Id., ¶¶ 59-60). Plaintiffs claim that Deutsche Bank accomplished this by selling the "crown jewels" of the REIB Group (the Morph assets) to an affiliated investment fund at discount prices, to institutional investors and high net worth individuals who comprised Deutsche Bank's most valued clients, as well as to prospective clients. (Id., ¶ 57). Plaintiffs claim that Deutsche Bank valued the Morph assets by applying a discount rate of approximately 31.5% to the valued future cash flows from the assets. (Id., ¶ 62). Plaintiffs allege that Deutsche Bank did this to help mask the losses of the bank's corporate private equity group, guarantee substantial returns for valued clients, generate goodwill, remove high risk assets from its balance sheet and earn management and incentive fees. (Id., ¶¶ 58, 65).

In late 2002 and early 2003, Deutsche Bank marketed the fund to outside investors and selected the assets for sale. (Id., ¶ 60). At the end of 2003, the $1.2 billion asset sale, known as Project Morph, closed. (Id., ¶ 71). Deutsche Bank calculated and paid Bonus Awards to plan participants based on the sums it received in the Project Morph asset sale. (Id., ¶ 76). Once the investors receive an 18% return on their investment in Project Morph, Deutsche Bank will receive incentive payments up to 22.5% of the total cash that the fund distributes. (Id., ¶ 62). These incentive payments constitute "Profits" under the plans. Plaintiffs and other plan participants will receive Bonus Awards based on these profits when Deutsche Bank receives them. (See Exhibits A and B to Callahan Aff., Section I). Plan participants also will receive shares of Deutsche Bank's management fees.

The Conversion Plan

By the end of 2003, Deutsche Bank had terminated, or was about to terminate, the plaintiffs and other plan participants, from its employ. (Complaint, ¶ 77). Deutsche Bank offered a group of Deutsche Bank employees, who continued to manage the Morph assets, the opportunity to participate in a new incentive compensation plan called the Conversion Carried Interest Plan for Employees of the Real Estate Opportunity Group of Deutsche Bank AG (the Conversion Plan). (Exhibit B to Sushon Affirm). Deutsche Bank did not offer plaintiffs this opportunity, because they were no longer employees. Instead, plaintiffs continued their participation in the earlier plans and received bonuses, in February 2004, as if the Morph transaction was a final sale of the assets. (See Complaint, ¶ 76).

The Conversion Plan was separate from the earlier plans. The Conversion Plan limited participation to certain current employees who executed a Conversion Plan Agreement. This Conversion Plan Agreement required participants to waive any right to receive bonuses under the earlier plans stemming from the Morph asset sale. (Exhibit B to Sushon Affirm., Section III, ¶ 1 [c]). These participants will receive bonus awards based on the profits the Morph assets generated as if those assets were associated with the Carried Interest Plans. (Complaint, ¶ 79).

The Complaint

In November 2004 plaintiffs commenced this action, asserting that Deutsche Bank breached the Carried Interest Plans, breached the implied covenant of good faith underlying those plans and violated the New York Labor Law. The first and fifth causes of action allege that Deutsche Bank breached Section III, paragraph 7.3 (h) of the Carried Interest Plans, by failing to pay bonus awards to plaintiffs as if plaintiffs were still employees. (Complaint, ¶¶ 94, 123). The

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second and sixth causes of action allege that Deutsche Bank breached Section I of the Carried Interest Plans by failing to pay bonus awards to plaintiffs based on the fair market value of the Morph assets. (Id., ¶¶ 101, 130). The third and seventh causes of action allege that Deutsche Bank breached the implied covenant of good faith in the Carried Interest Plans by selling the Morph assets for less than their fair market value and failing to pay plaintiffs bonus awards based on the Morph assets' fair market value. (Id., ¶¶ 108, 137). The fourth and eighth causes of action allege that Deutsche Bank breached the implied covenant of good faith in the Carried Interest Plans by refusing to offer plaintiffs the same opportunity to participate in the Conversion Plan as Deutsche Bank offered to current employees. (Id., ¶¶ 115, 144). The ninth cause of action alleges that Deutsche Bank violated New York Labor Law §§ 191 (3), 193 (1), and 193 (2) by failing to pay bonus awards under the Carried Interest Plans based on their fair market values, because the bonus awards represented "wages." (Id., ¶¶ 148-57). Finally, the tenth claim seeks a declaratory judgment declaring that plaintiffs have a right to share in future cash flows generated from the Morph assets in the same manner as current Deutsche Bank employees. (Id., ¶¶ 158-60).

Deutsche Bank's Motion

Deutsche Bank seeks dismissal of all claims, asserting that the plan documents defeat these causes of action. Deutsche Bank contends that the claims for breach of Section I fail because that section of the plans simply sets forth the definitions of terms such as "Estimated Fair Market Value." Section I does not impose any obligation on Deutsche Bank to pay plaintiffs anything. Deutsche Bank points out that the only operative provision of the plans that even refer to the term Estimated Fair Market Value pertains to Deutsche Bank's option to terminate an investment class after ten years, a provision that does not apply to Project Morph.

Deutsche Bank argues that the plans provide for payment of Bonus Awards based on the underlying assets' "Profits" or "Losses," neither of which have anything to do with Estimated Fair Market Value.

Deutsche Bank further contends that the clear language of the plans also defeats the claims based on a purported breach of paragraph 7.3 (h). Deutsche Bank asserts that paragraph 7.3 (h) only grants the participant a right to receive a cash payment of a bonus that stems from the plans' operation and that is what the plaintiffs received. It argues that the opportunity to participate in the Conversion Plan was not a cash payment or a bonus arising out of the plans.

As to the claims for breach of the implied covenant of good faith, Deutsche Bank argues that these claims completely duplicate the insufficient breach of contract claims, and, therefore, the court should dismiss them. Deutsche Bank also urges that the terms plaintiffs seek to read into the plans are inconsistent with the express provisions of those plans. The plans expressly base the calculation of the bonus awards on the actual revenues that the underlying assets generate and their actual expenses, not on the assets' fair market value. Deutsche Bank further points to the provision in the plans granting it broad discretion in interpreting and administering the plans and to the allegations in the complaint itself that Deutsche Bank had a legitimate business purpose in selling the Morph assets at the price it did.

Deutsche Bank further asserts that the Labor Law claims are deficient for several reasons: first, that the incentive compensation under the plans does not constitute "wages" under the Labor Law, second, that plaintiffs are not "employees" under the Labor Law and, third, that there was no "deduction" or "charge" against the plaintiffs' pay.

Finally, Deutsche Bank contends that the court should dismiss the declaratory judgment claim because plaintiffs have received all that they were entitled to under the Carried Interest

Plans and Deutsche Bank had no obligation to invite them to participate in the Conversion Plan.

DISCUSSION

The court grants the motion and dismisses the complaint.

Breach of Contract Claims

Deutsche Bank is entitled to dismissal of the breach of contract claims (the first, second, fifth and sixth causes of action) based on the clear and unambiguous language of the Carried Interest Plans. A court dismisses a complaint "where 'the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" (150 Broadway N.Y. Assoc., L.P. v Bodner, 14 AD3d 1, 5 [1st Dept 2004], quoting Leon v Martinez, 84 NY2d 83, 88 [1994]; see CPLR 3211 [a] [1]). Where a written contract clearly contradicts the complaint's allegation supporting a breach of contract claim, the contract itself constitutes the documentary evidence warranting dismissal under CPLR 3211 (a) (1). (Id.) Construction of an unambiguous contract is a matter of law. (See Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470 (2004); W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 (1990); Aviation Dev. Co. PLC v C & S Acquisition Corp., 1999 WL 46630, * 6 (SD NY), affd 201 F3d 430 [2d Cir 1999]). "When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document" (ABS Partnership v AirTran Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003] [citations omitted]), and the court should enforce the writing according to its terms. Vermont Teddy Bear Co. v 538 Madison Realty Co., supra; W.W.W. Assoc. v Giancontieri, supra; see Reiss v Financial Performance Corp., 97 NY2d 195, 199 (2001).

Here, the Carried Interest Plans are clear and complete documents and do not contain the obligations that plaintiffs claim Deutsche Bank breached. The first and fifth causes of action are based on Deutsche Bank's purported breach of paragraph 7.3 (h) of the Carried Interest Plans by failing to pay bonus awards to plaintiffs as if they were still employees. These claims are based on the assertions that certain current Deutsche Bank employees, who defendant did not terminate, had the opportunity to give up their benefits under the plans in exchange for a chance to participate in the Conversion Plan, while plaintiffs received only the cash payment under the Carried Interest Plans. Paragraph 7.3 (h), however, simply provides that bonus awards will be "paid to the Participant who is no longer an Employee exactly as if such Participant were still an employee." Exhibits A and B to Callahan Aff., Section III, ¶ 7.3 (h). The definition of "Bonus Awards" states that it is an award that is subject to the plan limitations and that it is the sum of all dollar awards derived from the participant's carried interests. Id., Section I. Section II, paragraph 6.1 of the plans provides that Bonus Awards "will be paid in cash." Id., Section II, ¶ 6.1. Reading these provisions together, paragraph 7.3 (h) simply gives a participant the right to receive a cash payment of a bonus award that results from the operation of the Carried Interest Plans.

Contrary to plaintiffs' apparent contention, the opportunity to participate in the Conversion Plan does not arise from the operation of the Carried Interest Plans and is not a cash payment. Therefore, it is not a "Bonus Award" as the plans define. Rather, the opportunity was separate. Deutsche Bank offered the opportunity to continuing employees who chose to relinquish their cash payment under the Carried Interest Plans and execute a new plan agreement. Plaintiffs fail to point to anything, and the court has found nothing, in either paragraph 7.3 (h), or other provisions of the Carried Interest Plans, obligating Deutsche Bank to offer this opportunity to plaintiffs. (See Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d at 475-76). Plaintiffs admit that they received their Bonus Awards in the form of cash payments as the plans require. Therefore, there is no basis for claiming that Deutsche Bank breached paragraph 7.3 (h) of the plans. Plaintiffs' contention that the intent of this provision of the plans was to prevent Deutsche Bank from having the power to diminish bonus award rights for former employees is unpersuasive. The plans manifest no intention to benefit former Deutsche Bank employees. Rather, the purpose of the plans was to provide incentive for employees to contribute to Deutsche Bank's growth and profitability. (Exhibits A and B to Callahan Aff., Preamble). Former employees can no longer contribute to this growth, so offering them the opportunity to participate in newly created plans would not advance the Carried Interest Plans' express intent. Accordingly, the court dismisses the first and fifth causes of action for breach of paragraph 7.3 (h) of the plans.

The second and sixth causes of action similarly fail to state a claim. These claims are based on allegations that Deutsche Bank breached Section I of the Carried Interest Plans by paying Bonus Awards based on the sale of the Morph Assets for less than their fair market value. Section I, however, does not impose any such obligation on Deutsche Bank and only defines the term "Estimated Fair Market Value," a term that applies only to Deutsche Bank's option to terminate after ten years. Deutsche Bank did not and could not exercise this option, because Project Morph was an asset sale occurring before any investment class had existed for ten years. Thus, Section I does not create any duty on Deutsche Bank's part. (See Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d at 475-76; Trump Village Section 3, Inc. v New York State Hous. Fin. Agency, 292 AD2d 156, 158 (1st Dept), lv dismissed 98 NY2d 671 [2002] ["recital clause" did not impose contractual obligation beyond what was specifically in it]).

The Carried Interest Plans unambiguously provide that Deutsche Bank must pay Bonus Awards based on the underlying assets' "Profits" and "Losses." The plans define those terms as revenue realized "from income, gain, profit and from all other sources" ("Profits"), and realized losses and costs incurred with respect to plan investments ("Losses"), as determined in accordance with federal income tax accounting principles. This plain contractual language makes no reference to fair market value. Moreover, there is no ambiguity just because the parties argue differing interpretations. (See Bethlehem Steel Co. v Turner Constr. Co., 2 NY2d 456, 460 (1957); Moore v Kopel, 237 AD2d 124 [1st Dept 1997]). The court rejects plaintiffs' contention that the parties' omission of fair market value from the contract creates an ambiguity, and that the court should read fair market value into the definition of "Profits." An omission in a contract does not constitute an ambiguity. "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (Reiss v Financial Performance Corp., 97 NY2d at 199, quoting Schmidt v Magnetic Head Corp., 97 AD2d 151, 157 [2d Dept 1983], and Morlee Sales Corp. v Manufacturers Trust Co., 9 NY2d 16, 19 [1961]). If the parties intended to base the Bonus Awards on the assets' fair market value, they could have negotiated and included that provision, but they did not do so. (See Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d at 476; Rowe v Great Atl. & Pac. Tea Co., 46 NY2d 62, 72 [1978]). The Carried Interest Plans are unambiguous and enforceable according to their terms. (See Reiss v Financial Performance Corp., 97 NY2d at 198-201).

The court rejects plaintiffs' argument, that while there was no explicit provision, the "intent" of the parties and the purpose of the plans was to pay bonus awards based on the fair market value of the assets. The purpose of the plans, as set forth in the preamble, is to promote the interests of Deutsche Bank by providing additional incentive to its REIB employees to contribute to Deutsche Bank's growth and profitability. (Exhibits A and B to Callahan Aff., Preamble). The plans implement this purpose by paying the employees bonuses based on all "Profits" the underlying assets generate, including the revenue realized on those assets. (Id., Section I). Plaintiffs' interpretation would limit the bonuses to fair market value of the assets at disposition, an interpretation that would not maximize both growth and profitability, because the employees would not have any incentive to maximize cash flows from rents, management fees and other revenues. Plaintiffs' arguments as to the "real intent" of the parties "cannot contravene the express intent set forth in the written agreement and the court may not, under the guise of interpretation, make a new contract or 'change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract." (Halkedis v Two East End Ave. Apt. Corp., 137 AD2d 452, 453 (1st Dept) [internal quotation marks and citation omitted], affd 72 NY2d 933 [1988]). Moreover, as defendants aptly urge, even if the plans' preambles somehow contradict the substantive terms, it would be irrelevant. Detailed operative clauses override general purpose language that cannot create obligations. (See Aramony v United Way of Am., 254 F3d 403, 413-14 (2d Cir 2001); see also Abraham Zion Corp. v Lebow, 761 F2d 93, 103 [2d Cir 1985] ["whereas" clause statement may help in interpretation of ambiguous operative clause, but cannot create rights beyond those arising from operative terms]).

Finally, plaintiffs' claim, that failing to impose an obligation to base the Bonus Awards on the assets' fair market value would lead to an absurd and manifestly unreasonable outcome, is unpersuasive. Deutsche Bank did not give away the assets. Plan participants received Bonus Awards based on Profits that included rent, management fees and other revenue. Plan participants will continue to receive Bonus Awards based on future payments that Deutsche Bank receives for the Morph assets. The Complaint alleges that once the Project Morph investors receive an 18% return on their investment, Deutsche Bank will receive incentive payments up to 22.5% of the total cash the fund distributes. (Complaint, ¶ 62). These incentive payments would constitute "Profits" under the Carried Interest Plans and Bonus Awards that Deutsche Bank will distribute to plan participants, such as plaintiffs, when Deutsche Bank receives them. In selling these assets at a discounted rate to its customers and other investors, Deutsche Bank increased its profits, earnings and goodwill, while reducing its exposure to high-risk private equity assets. This is clearly within the purpose of promoting growth and profitability.

Breach of Implied Covenant Claims

The third, fourth, seventh, and eighth causes of action for breach of the implied covenant of good faith and fair dealing also fail to state claims.

The courts, in appropriate circumstances, may find and enforce an obligation of good faith and fair dealing on the part of a party to a contract. (Sabetay v Sterling Drug, Inc., 69 NY2d 329 [1987]). This "'implied obligation is in aid and furtherance of other terms of the agreement of the parties.'" (Id. at 335, quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304-05 [1983]). Therefore, a court cannot infer an obligation that would be inconsistent with other terms of the parties' agreement. (Id.; see also SNS Bank, N.V. v Citibank, N.A., 7 AD3d 352 [1st Dept 2004]).

The terms of the parties' agreement govern their rights and obligations. "The parties' contractual rights and liabilities may not be varied, nor their terms eviscerated, by a claim that one party has exercised a contractual right but has failed to do so in good faith." (National Westminster Bank, U.S.A. v Ross, 130 BR 656, 679 [SD NY 1991], affd sub nom Yaeger v National Westminster Bank, 962 F2d 1 [2d Cir 1992]). A party acting in accordance with rights the contract expressly provides cannot be liable for breaching an implied covenant of good faith.

(In re Minpeco, USA, Inc. v Swiss Bank Corp., 237 BR 12 [Bankr SD NY 1997]). The implied covenant also does not extend so far as to undermine a party's "general right to act on its own interests in a way that may incidentally lessen" the other party's anticipated benefits from the contract. (Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publ. Co., 30 NY2d 34, 46, cert denied 409 US 875 [1972]; M/A-CQM Sec. Corp. v Galesi, 904 F2d 134 [2d Cir 1990]).

Further, a court will dismiss claims for breach of the implied covenant of good faith where they duplicate the breach of contract claims. (See Parker E. 67th Assoc., L.P. v Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York, 301 AD2d 453, 454 [1st Dept], lv denied 100 NY2d 502 [2003]; Skillgames, LLC v Brody, 1 AD3d 247 [1st Dept 2003]; Shilkoff, Inc. v 885 Third Ave. Corp., 299 AD2d 253 [1st Dept 2002]; A. Brod, Inc. v Worldwide Dreams, L.L.C., 4 Misc 3d 1006 [A] [Sup Ct, NY County 2004]).

Here, the claims involving breach of the implied covenant of good faith (the third, fourth, seventh, and eighth causes of action) fail. First, these claims duplicate the breach of contract claims, that, as discussed above, are all defective. For example, the third and seventh causes of action allege that Deutsche Bank breached the implied covenant by selling the Morph assets for less than fair market value. (Complaint, ¶¶ 108, 137). These claims allege the same underlying conduct as the insufficient second and sixth causes of action for breach of contract, that allege a breach based on the bank's acts in failing to pay bonus awards based on the fair market value of the Morph assets. (Id., ¶¶ 101, 130). Similarly, the fourth and eighth causes of action allege that Deutsche Bank breached the implied covenant by refusing to offer plaintiffs the same opportunity to participate in the Conversion Plan as it did to continuing employees. (Id., ¶¶ 115, 144). These claims are redundant and based on the identical conduct alleged in the dismissed first and fifth causes of action for breach of contract. (Id., ¶¶ 78, 80, 94, and 123). Therefore, the court dismisses them. (See Skillgames, LLC v Brody, 1 AD3d at 252; Shilkoff, Inc. v 885 Third Ave. Corp., 299 AD2d at 253; cf Frydman & Co. v Credit Suisse First Boston Corp., 272 AD2d 236 [1st Dept 2000] [breach of contract and implied covenant claims, based on separate agreements, are permitted to proceed simultaneously]).

Moreover, these implied covenant claims would require the court to read into the Carried Interest Plans obligations that are not there. As discussed supra, the plans do not obligate Deutsche Bank to pay bonus awards based on the fair market value of the assets or to offer plaintiffs the chance to participate in the Conversion Plan. Because the court cannot imply an obligation under the implied covenant of good faith that "would be inconsistent with other terms of the contractual relationship," these claims cannot stand. (Murphy v Am. Home Prods. Corp., 58 NY2d at 304; see also SNS Bank, N.V. v Citibank, N.A., 7 AD3d 352, supra). For the court to read into these plans an obligation to pay bonus awards based on fair market value would violate plaintiffs' express obligation to pay the awards based on "Profits" and "Losses" from actual revenues and expenses, in accordance with federal tax accounting principles. Further, this interpretation would conflict with the plans' provisions that Deutsche Bank had full power and authority to interpret and administer the plans, and that all calculations Deutsche Bank made and approved, consistent with the terms of the plans, were final and conclusive. (Exhibits A and B to Callahan Aff., Section II). Similarly, to require Deutsche Bank to offer plaintiffs a chance to participate in the Conversion Plan would conflict with the plan provisions that bonus awards be cash payments. Accordingly, the court dismisses the third, fourth, seventh, and eighth causes of action.

Labor Law Claim

The court dismisses the ninth cause of action, claiming that Deutsche Bank violated

Sections 191 (3) and 193 (1) and (2) of the Labor Law Article 6, for several reasons. Both those statutes prohibit an employer from wrongfully deducting an employees' wages. "Wages" under the Labor Law are defined as "earnings . . . for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." (Labor Law § 190 [1]). Incentive compensation payments that employers award based on factors falling outside of the employee's actual work are not "wages" under Labor Law § 190. (Truelove v Northeast Capital & Advisory, Inc., 95 NY2d 220, 224 [2000]; Matter of Apkon (Odyssey Partners, L.P.), 236 AD2d 225 [1st Dept], lv denied 89 NY2d 815 [1997]). Thus, Labor Law Article 6 does not cover bonus payments that are both contingent and dependent solely upon the financial success of the business. (Truelove v Northeast Capital & Advisory, Inc., 95 NY2d at 224). To be covered, plaintiff's own personal productivity must determine compensation. It cannot be entirely discretionary with the employer. (Id.) Here, the Bonus Awards do not constitute "wages" under Labor Law Article 6. The Bonus Awards depended on the future profits the assets generated if those assets performed well. Complaint, ¶ 42. The awards depended on factors outside plaintiffs' actual work: the financial success of the assets Deutsche Bank purchased, and, thus, the success as an investment entity. That plaintiffs' points or "Carried Interests" in the plans were vested does not change the fact that the awards depended solely upon whether the investments made money. (See International Bus. Machs. Corp. v Martson, 37 F Supp 2d 613, 617-18 [SD NY 1999]; see also DeLeonardis v Credit Agricole Indosuez, 2000 WL 1718543 [SD NY 2000]). That plaintiffs also received a fixed salary at Deutsche Bank further supports the conclusion that these Awards were not "wages" within the statute. (See Supplemental Affidavit of Vincent T. Callahan, dated March 15, 2005).

The Labor Law claim also fails because plaintiffs do not fall within the definition of "employee" under the Labor Law. "[E]mployees entitled to statutory protection under Labor Law § 191 are limited by definitional exclusions of one form or another for employees serving in an executive, managerial or administrative capacity." Gottlieb v Kenneth D. Laub & Co., 82 NY2d 457, 461 (1993). Thus, Labor Law claims, like those here, of executives and similar professionals are dismissible because they do not come within the definition of an "employee." (See e.g. Davidson v Regan Fund Mgt. Ltd., 13 AD3d 117, 118 [1st Dept 2004] [Labor Law § 198 claim dismissed because plaintiff was employed in an executive capacity]; Sorrentino v Bohbot Entertainment and Media, Inc., 265 AD2d 245 [1st Dept 1999] [Labor Law Article 6 does not apply to common-law contractual remuneration claims by an executive]; Taylor v Blaylock & Partners, L.P., 240 AD2d 289, 292 [1st Dept 1997] [Labor Law claim by director of real estate financial group dismissed because the statute excludes salary claimed by an executive]; Daley v Related Cos., Inc., 210 AD2d 76 [1st Dept 1994] [based on intervening change in law in Gottlieb v Kenneth D. Laub & Co., supra, Labor Law claim of executive dismissed as not within class of employees entitled to seek relief]; cf Parker v Revlon, Inc., 211 AD2d 415 [1st Dept 1995] [employees under statute includes executives, relying on earlier Daley v Related Cos., Inc., 179 AD2d 55 [1st Dept 1991]). Therefore, the court dismisses plaintiffs' ninth cause of action for violation of the Labor Law.

Finally, in the tenth cause of action, plaintiffs seek a declaration as to their rights under the plans. This claim is simply seeking different relief for the same breach of contract, particularly the failed claims of the alleged right to participate in the Conversion Plan. Therefore, the court dismisses this claim.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed without costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 9, 2005

ENTER:

J.S.C.

FILED

AUG 16 2005

COUNTY CLERK'S OFFICE
NEW YORK