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

PRESENT: _____ Justice

PART 56

Index Number : 600562/2008

HSH NORDBANK AG

VS.

UBS AG

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 600562-08

MOTION DATE 4/15/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

OCT 29 2008

COUNTY CLERK'S OFFICE

Dated: 10/21/08

HON. RICHARD B. LOWE, III

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 56

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HSH NORDBANK, AG,

Plaintiff,

Index No. 600562/08

-against-

UBS AG and UBS SECURITIES LLC,

Defendants.

----------X

Richard B. Lowe, III, J.:

This action for, among other things, breach of contract and fraud, arises out of a complex transaction involving defendants UBS AG and UBS Securities LLC's (together, UBS) obligation to administer a pool of securities held for the benefit of plaintiff HSH Nordbank, AG (HSH)[1] and others, as part of a synthetic collateralized debt obligation (CDO). In this motion, UBS seeks to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

I. Background

The transaction begins with a letter agreement and term sheet (Letter Agreement)(Ex. 2) entered into between the parties in January 2002, which called for the formation of a structured entity called North Street Referenced Linked Notes, 2002-4 Limited (NS4). NS4, pursuant to an Indenture (Ex. 4), issued over $500 million in stock, as described in a contemporaneous Offering

[1]The initial contracts involved in this matter were executed by UBS and an entity known as Landesbank Schleswig-Holstein Girozentrale (LB Kiel). HSH is LB Kiel's successor, and, for consistency's sake, LB Kiel will be referred to as HSH throughout this decision.

Circular. Ex. 3. UBS and NS4 next entered into a credit default swap agreement pursuant to an ISDA[2] Master Agreement, Schedule, and Confirmation (exs. 6-8), in which UBS shifted its default risk exposure on the referenced credits to NS4. HSH was not a party to this agreement. UBS then sold $500 million of NS4's notes to HSH, comprised of 100% of NS4's senior class notes. UBS purchased $74 million of subordinated classes of NS4 notes.

The parties entered into a Reference Pool Side Agreement on March 5, 2002. The Reference Pool consisted of a reference portfolio of $3 billion in asset-backed securities, commercial mortgage backed securities and real estate investment trust assets. *See* Credit Default Swap Confirmation, Ex. 8. Under this agreement, HSH and other investors agreed to cover specified losses in the Reference Pool.

UBS's role was to manage the Reference Pool assets. If UBS chose asset-backed securities of high quality and stability for the Reference Pool, as required under the various agreements, HSH stood to receive a steady, if relatively low, stream of income, based on the performance of assets in the Reference Pool. In return, and pursuant to the Credit Default Swap agreements, UBS was to receive "credit protection payments" upon the happening of certain "credit events," to cover losses in the Reference Pool. Thus, under the Credit Swap Default agreements, HSH provided credit protection to UBS in the event of defaults, which would result in reductions in the principal amount of the NS4 notes, starting with the subordinated notes held by UBS, and progressing to HSH's senior notes. As a result, defaults in the asset-backed securities held in the Reference Pool would enure to the benefit of UBS, with a corresponding decrease in value of the securities held in the Reference Pool. HSH would continue to receive

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[2]International Swap Dealers Association, Inc.

income, although the holdings in the Reference Pool would be depleted, starting with the $74 million in subordinated notes, and only then progressing to the senior class notes held for the benefit of HSH, as further defaults occurred.

According to HSH, a most important function of the Reference Pool Side Agreement was the creation of by UBS a "Commitments Committee," through which it would manage the assets in the Pool, acting so as to oversee the credit quality of the collateral within the Reference Pool. The Commitments Committee could call for the substitution of poorly performing assets with those of better quality, and, essentially, assure HSH that the Reference Pool would be made up of only the most stable, as well as high performing, assets. HSH claims that "the fundamental responsibility of the Commitments Committee was to ensure that UBS would exercise its control over the Reference Pool to protect the interests of HSH ... ." Complaint, ¶ 37.

Recent events in the financial markets have adversely affected the value of the assets in the Reference Pool. As a result, HSH claims that UBS has received huge returns in credit protection payments, while HSH has suffered significant losses in the value of its $500 million investment. HSH contends that UBS has profited from its own intentional failure to ensure the quality of the assets it chose for the Reference Pool, amounting to a breach of the various agreements.

III. Complaint

Throughout its complaint, HSH refers to itself as being inexperienced in sophisticated investment vehicles such as CDOs, and insists that UBS sold itself to HSH as a party supremely equipped to guide HSH through the intricacies of the process. HSH (that is, LB Kiel) describes itself as a "publicly owned regional bank principally serving northern Germany" with "little or

no relevant experience in structured products such as synthetic CDOs." Complaint, ¶ 20. It further describes itself as "a conservative yet inexperienced investor in this area." *Id.* UBS, on the other hand, is described as a highly sophisticated international business upon whose experience HSH was compelled to rely.

In its first cause of action for breach of contract, HSH complains that UBS breached the Reference Pool Side Agreement by deliberately selecting and substituting "unstable collateral" rather than the quality collateral it had promised, and "through which [UBS] stood to profit on the credit default swap ... ." Complaint, ¶ 43. UBS is also charged with failing to operate the Commitments Committee in the manner for which it was created, allegedly invalidating the promised oversight which might have protected HSH's investment.

HSH, in its second cause of action, alleges that UBS, "one of the largest financial institutions in the world and a global leader in structured finance products, including CDOs," committed fraud in that it "made misleading and incomplete disclosures, and omitted material information" so as to induce HSH to make its $500 million investment. Complaint, ¶ 63. The fraudulent representations include the allegedly false promise that UBS would stock the Reference Pool with "stable investment grade securities"; "substitute debt securities in the Reference Pool that were not performing ... with debt securities that would maintain or improve the Reference Pool profile"; would form the Commitments Committee to "operate consistent with the parties' agreement"; and that UBS would "maintain strict ethical walls to ensure that the decisions on the Reference Pool would be made independently of UBS's proprietary interests." Complaint, ¶ 64 (f).

HSH also maintains a third cause of action for negligent misrepresentation; a fourth

cause of action for breach of fiduciary duties; a fifth cause of action for breach of the implied covenant of good faith and fair dealing; a sixth cause of action for unjust enrichment and a constructive trust; a seventh cause of action for injunctive relief requiring the formation of a "properly functioning" Commitments Committee (Complaint, ¶ 99); and an eighth cause of action for conversion.

III. Discussion

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction." *Goshen v Mutual Life Insurance Company of New York*, 98 NY2d 314, 326 (2002). The court is to "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion." *511 West 232 Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). "We also accord plaintiffs the benefit of every possible favorable inference." *Id.*; *see also Rivietz v Wolohojian*, 38 AD3d 301 (1st Dept 2007). A complaint will only be dismissed pursuant to CPLR 3211 (a) (1) if "'the documentary evidence submitted conclusively establishes a defense ... as a matter of law.'" *511 West 232 Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152, quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Breach of Contract

HSH has alleged a cause of action for breach of contract. HSH's overarching claim is that UBS failed to maintain the promised high quality of the notes in the Reference Pool, by failing to ensure that the Commitments Committee keep an eye on the condition of the investments.

UBS counters that HSH is only complaining of alleged breaches of representations made outside the Reference Pool Side Agreement, representations which did not survive the

agreement's merger clauses. According to UBS, it had no duty to supply or substitute assets on the Reference Pool with assets of the same or better quality, but only of the same credit rating.

UBS's claim that HSH wishes to rely on such representations is challenged by language in the Reference Pool Side Agreement which does refer to the Commitments Committee's duty to oversee the "quality" of assets. It is apparent that the various documents must be addressed together to determine whether quality and ratings are intended to refer to separate or similar obligations. In fact, the overall duties of the Commitment Committee need to be clarified before it can be ascertained whether a breach or breaches have occurred. As such, the documentary evidence is not conclusive, and HSH's claim that the Commitments Committee failed in its duties to protect HSH, presumed to be true at this point, support a cause of action for breach of contract.

HSH further alleges that it was damaged by UBS's failure to create a sufficient cushion of subordinate notes to protect HSH's investment. UBS argues that HSH had no right to a higher level of subordination than the $74 million of subordinate notes, as referenced, inter alia, by the Offering Circular, Ex 3, at 87. However, HSH insists that UBS failed from the outset to provide the requisite subordination because "the referenced securities were so far below the represented credit quality at closing that the promised subordination was largely eliminated," to UBS's profit. HSH Memorandum of Law, at 11-12. In fact, HSH claims that UBS realized a profit of $120 million at the closing of the transaction, based on losses in the Reference Pool. Therefore, at this point, HSH's allegations of breach of contract, presumed to be true, are sufficient to allege a cause of action. **B. Fraud**

To support a cause of action sounding in fraud, the pleader must allege

"misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1st Dept 2006). Pursuant to CPLR 3016 (b), the details of the fraud must be pleaded with particularity. *See* CPLR 3016 (b); *Barclay Arms, Inc. v Barclay Arms Associates*, 74 NY2d 644 (1989).

HSH presents a litany of representations it alleges that UBS made to it which, at the inception of the transaction, UBS had no intention of fulfilling. However, it is inarguable that a cause of action for breach of contract cannot be expanded into a claim sounding in fraud merely by alleging that the defendant never intended to comply with the terms of the contract. "A fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract [internal quotation marks and citation omitted]." *Manas v VMS Associates, LLC*, 53 AD3d 451, 453 (1st Dept 2008). However,

> where the plaintiff pleads that it was induced to enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a preconceived and undisclosed intention of not performing the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud [internal quotation marks and citation omitted].

Id.; *see also Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 (1986)("a promise ... made with a preconceived and undisclosed intention of not performing it ... constitutes a misrepresentation [internal quotation marks and citation omitted]"). Therefore, HSH must allege, with particularity, that UBS made promises at the time that the contracts were entered into that it never intended to keep. As HSH's claims of fraud are merely reiterations of its claims for breach of contract, with the addition of allegations that UBS never intended to act

in HSH's interests, and the many ways in which UBS did not honor the agreements, HSH has failed to allege fraud in the inducement.

The many disclaimers and disclosures in the agreements also bar HSH's fraud claims. It is true that a fraud in the inducement claim will not be defeated by general disclaimers in a contract. *Danaan Realty Corporation v Harris*, 5 NY2d 317 (1959); *see also Joseph v NRT Inc.*, 43 AD3d 312 (1st Dept 2007)(a general disclaimer clause will not bar parol evidence). However, HSH may not claim reliance on representations made to it prior to execution of the documents which conflict with specific disclaimers contained in the various agreements. *See Roland v McGraime,* 22 AD3d 824 (2d Dept 2005)(claim for fraud may be barred by specific disclaimers in agreement). A cause of action for fraud will be dismissed if the disclaimer "was sufficiently specific to defeat any allegations that the contract was executed in reliance upon contrary oral representations." *Rosen v Watermill Development Corp.*, 1 AD3d 424, 426 (2d Dept 2003).

UBS argues that the transactional documents are replete with specific representations which defeat HSH's claims. It claims that the risks of the investment, the specific duties of UBS, and the possible conflicts of interest in the roles UBS was to play, were exhaustively disclosed and explained in the Offering Circular.

HSH counters that the disclaimers do not address its allegations of fraud in the inducement. Specifically, HSH claims that UBS failed to disclose the "credit quality of the Reference Pool assets," which were not suitable for the "conservative and secure investment" that HSH was seeking, and claims that UBS never revealed the conflicts of interest which would allow it to profit from the condition of the Reference Pool. Plaintiff's Memorandum of Law, at 15. HSH claims that the disclaimers do not address the representation allegedly made by UBS

that it would maintain "strict ethical walls to ensure that decisions on the Reference Pool would be made independently of UBS's proprietary interest" (*id.* at 16), and that UBS did not make clear that it "did not have interests aligned with HSH." *Id.* HSH also maintains that the disclaimers do not reveal that UBS "would be free to shift undisclosed risks and losses off its books and into the Reference Pool." *Id.* Another alleged misrepresentation is that UBS promised, but never intended to place only stable investment grade debt securities in the Reference Pool. Complaint, ¶ 64 (b). In allegedly assuring HSH that the Reference Pool would only hold investments of quality and stability, UBS, HSH argues, allowed HSH to rely on UBS's international reputation and expertise, to HSH's detriment.

This court agrees with UBS that the numerous disclaimers in the various documents are specific enough to rebuff HSH's attempts to bring in parol evidence to show that it was subject to misrepresentations prior to signing the documents, upon which it is permitted to rely. For example, HSH, in a section of the Offering Circular discussing the extent of UBS's "Conflicts of Interest," was reminded that UBS "may enter into business dealings, including the acquisition of investment securities as contemplated by the transactional documents, from which [i]t may derive revenues and profits ... without any duty to account therefore." Offering Circular, at 39. As highlighted by UBS, the Offering Circular also contains detailed discussion of the "Relationship of [UBS] with Reference Entities," in which it says:

> [UBS] and its affiliates may deal in any kind of commercial transaction or investment banking or other business transactions with any Reference Entity and may act with respect to such transactions in the same manner as if a Credit Swap, the Repurchase Agreements and the Notes did not exist and without regard to whether any such action might have an adverse effect on the Reference Entity, the Issuer or the holders of the Notes.

In other words, UBS's authority was very broadly laid out to HSH, which cannot now claim, in a

cause of action for fraud, that it was not warned of this fact. Any failure on UBS's part to fulfill the agreements to HSH's satisfaction constitute a breach of contract, not fraud.

HSH includes a claim for punitive damages in this cause of action. Even assuming that the cause of action was valid, punitive damages would not be warranted. "Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as gross and morally reprehensible, and of such wanton dishonesty as to imply a criminal indifference to civil obligations [internal quotation marks and citation omitted]." *New York University v Continental Insurance Company*, 87 NY2d 308, 315-316 (1995). No such level of misconduct has been alleged herein.

C. Negligent Misrepresentation

> A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.

J.A.O. Acquisition Corporation v Stavitsky, 8 NY3d 144, 148 (2007); *see also Glanzer v Keilin & Bloom*, 281 AD2d 371, 372 (1st Dept 2001)(negligent misrepresentation requires plaintiff to show a "special relationship of trust or confidence"). Further, the relationship "must have existed prior to the transaction giving rise to the alleged wrong, and not as a result of it." *Emigrant Bank v UBS Real Estate Securities, Inc.*, 49 AD3d 382, 385 (1st Dept 2008), citing *Elghanian v Harvey*, 249 AD2d 206 (1st Dept 1998). This "special relationship of trust or confidence" (*Glanzer v Keilin & Bloom*, 281 AD2d at 372) does not arise when the transaction arises in the context of an arm's-length relationship between two competent parties. *See United Safety of America, Inc. v Consolidated Edison Company of New York, Inc.*, 213 AD2d 283, 286 (1st Dept 1995)(a "simple arm's length business

relationship is not enough" to support claim for negligent misrepresentation").

By all indications, the relationship between the parties was arm's length in nature. HSH's insistence that it was the ignorant underdog in the relationship, unschooled in the ways of the business world, is not well taken, in light of the evident experience and sophistication of HSH (and LB Keil) in the world of finance. Certainly, there was no relationship of trust between the parties pre-dating the transactions. UBS does not become a fiduciary, or enter into a special relationship, merely because it may be more experienced than HSH. Consequently, there is no cause of action for negligent misrepresentation.

D. Breach of Fiduciary Duty

This claim fails for the obvious reason that there is no such duty. "[W]here parties deal at arm's length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances [internal quotation marks and citation omitted]." *Asian Vegetable Research and Development Center v Institute of International Education*, 944 F Supp 1169, 1179 (SD NY 1996). There are no "extraordinary circumstances" here, merely because the transaction was very complex, and may have been difficult for HSH to wholly comprehend. HSH's contention that it had trust and confidence in UBS "is not extraordinary," (*Atlantis Information Technology, GmbH v CA, Inc.*, 485 F Supp 2d 224, 232 [ED NY 2007]), and no fiduciary relationship has been breached.

E. Implied Covenant of Good Faith and Fair Dealing

HSH claims that UBS, through the Reference Pool agreement, promised to deliver to HSH "Notes supported by the agreed-upon subordination and backed by high grade securities," and to manage the Pool "to maintain stable credit quality ... ." HSH Memorandum of Law, at 12.

UBS retorts that these allegedly breached terms are inconsistent with the express terms of the agreement, in that the Reference Pool Guidelines "set forth the specific parameters for the assets in the Reference Pool and for substitutions, and HSH does not allege any facts to support that any asset or substitution failed to meet those parameters." UBS Memorandum of Law, at 20. UBS asserts that HSH is merely using the covenant of good faith and fair dealing to "cut a new and better deal" between the parties. *Id.*

All New York contracts "imply a covenant of good faith and fair dealing in the course of performance." *511 West End Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 153. "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.*, quoting *Dalton v Educational Testing Services*, 87 NY2d 384, 389 (1995). "In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties." *Murphy v American Home Products Corporation*, 58 NY2d 293, 304 (1983). Of course, the application of this doctrine cannot serve to imply obligations inconsistent with the terms of the agreement. *Id.*; *see also Fitzgerald v Hudson National Golf Club*, 11 AD3d 426 (2d Dept 2004).

UBS argues that to apply a covenant of good faith and fair dealing as HSH would do would be to re-write the parties' agreements, because the agreements gave UBS broad authority to handle the assets in the Reference Pool as it saw fit, and so, the obligations HSH would impose to handle the assets in a certain manner are inconsistent with the express terms of the agreements.

This court finds that HSH has stated a claim for the breach of the implied covenant of good faith and fair dealing, in that, while UBS was authorized to maintain the Reference Pool, it

was obligated to do so in a manner that did not destroy HSH's opportunity to realize the benefit of its bargain, to receive a steady stream of income from a well-functioning investment strategy. UBS could not, as a matter of good faith, deliberately act so as to defeat the purpose of the Reference Pool by manipulating it in its own interest. Therefore, dismissal of this cause of action is denied.

F. Unjust Enrichment and Constructive Trust

HSH has no cause of action for unjust enrichment or creation of a constructive trust. "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in ths absence of any agreement." *Goldman v Metropolitan Life Insurance Company*, 5 NY3d 561, 572 (2005). Where there is a controlling contract, there is no unjust enrichment. *Id.*; *see also Clark-Fitzpatrick, Inc. v Long Island Rail Road Company*, 70 NY2d 382 (1987). Here, there are controlling contracts, and a cause of action for unjust enrichment is unneeded. In light of this reality, there is no basis for the imposition of a constructive trust.

G. Injunction

In HSH's complaint, it claims that an injunction is warranted:

> requiring UBS to establish a Commitments Committee that conforms with the requirements of the Side Agreement or to manage its conflicts of interest as swap counterparty and manager of the Reference Pool. Without a properly functioning Commitments Committee to monitor the Reference Pool and the addition of an independent party to manage the conflicts of interest to which UBS is subject, the credit quality of the Reference Pool will continue to decline due to continued adverse substitutions and failures to remove deteriorating assets, resulting in irreparable harm to HSH.

Complaint, ¶ 99.

UBS claims that an injunction is inappropriate, because HSH has an adequate remedy at

law, in that it may sue for damages arising from UBS's alleged misconduct. This is, of course, the law. *See Old Republic National Title Insurance Company v Cardinal Abstract Corporation*, 14 AD3d 678 (2d Dept 2005)(injunctive relief inappropriate when plaintiff has an adequate remedy at law); *Pencom Systems, Inc. v Shapiro*, 193 AD2d 561, 561-562 (1st Dept 1993)("injunction need not issue where plaintiff may be made whole in damages").

HSH obviously has a claim for damages flowing from alleged breaches of the various transactional documents to which it is a party. What HSH is actually asking for, beyond damages, is a court-enforced order of mandatory performance of the Reference Side Agreement; that is, an order keeping UBS in line with its alleged contractual obligations.

HSH relies on *Gonzales v Kentucky Derby Co.*, 197 App Div 277 [2d Dept 1921], *affd* 233 NY 607 [1922]) for the proposition that the court may enjoin a defendant from continuing to perpetrate harm upon a plaintiff. However, in *Gonzales*, a case involving the tort of tortious interference with contract, the grant of a permanent injunction barring defendant from continuing to interfere with plaintiff's contract effectively ended any relationship between the interests of the parties. *Gonzalez* has no bearing on the present situation, in which the relationship between the parties to a contract will continue beyond the termination of the present suit for damages. HSH is, essentially, asking this court to monitor UBS's compliance with its alleged contractual obligations in perpetuity, an obviously impossible result, for which HSH has offered no legal support. Instead, HSH has plead a valid cause of action for breach of contract, for which it will, if successful, receive money damages, making a grant of injunctive relief inappropriate. This cause of action is dismissed.

F. Conversion

"Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 (1st Dept 1982). "[A]n action for conversion cannot be validly maintained where the damages are merely being sought for breach of contract." *Id.* at 884; *see also Retty Financing, Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341 (1st Dept 2002)(conversion claim dismissed if it is duplicative of claim for breach of contract).

The heart of HSH's conversion claim is set forth in its Memorandum of Law, to wit:

> the complaint alleges that HSH's $500 million investment in the Notes has suffered losses of at least $275 million ... and the offsetting gain has been improperly enjoyed by UBS ... . UBS orchestrated this transfer in value from HSH to UBS by manipulating securities in the Reference Pool, purposefully substituting deteriorating credits into pool to offload losses UBS otherwise would have had to recognize on its books.

Id. at 25.

This explanation does not state a claim for conversion. HSH had an interest in the value of the various securities in the Reference Pool, not an ownership right to them, and UBS's alleged "manipulation" of the assets in the Pool is not an assumption of HSH interest in the assets therein. Rather, the claim is expressly duplicative of the claim for breach of contract. Therefore, it must be dismissed.

Accordingly, it is

ORDERED that the motion to dismiss the complaint brought by defendants UBS AG and UBS Securities LLC is granted solely as to the dismissal of the second, third, fourth, sixth, seventh and eighth causes of action, and is otherwise denied as to the first and fifth causes of action; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20

days of the receipt of this order with notice of entry.

Dated: October 21, 2008

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.

FILED

OCT 29 2008

COUNTY CLERK'S OFFICE
NEW YORK