

Lehman Brothers, Inc. v Piper Jaffray & Co.
2008 NY Slip Op 33211(U)
May 20, 2008
Supreme Court, New York County
Docket Number: 600629/06
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Lehman Brothers

INDEX NO. 600629/04

MOTION DATE 2/7/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

Piper Jaffey & Co

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

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 28 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/20/08

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
LEHMAN BROTHERS, INC.,

Plaintiff,

-against-

Index No. 600629/06

PIPER JAFFRAY & CO.,

Defendant.

-----X
PIPER JAFFRAY & CO.,

Third-Party Plaintiff,

-against-

Index No. 590235/06

NATIONWIDE LIFE INSURANCE COMPANY
OF AMERICA,

Third-Party Defendant.

-----X
PIPER JAFFRAY & CO.,

Third-Party Plaintiff,

-against-

Index No. 590733/06

DALTON INVESTMENTS LLC,

Third-Party Defendant.

-----X
RICHARD B. LOWE, III, J.:

This case involves a series of transactions in which numerous sophisticated investors were mistaken about a fundamental term of the deal – the amount of the securities that were being sold. All mistakenly believed that the \$853,487.80 amount listed on the physical securities certificates in question represented a face amount, when in fact, that number was only the denominator of a fraction that yielded the holder's percentage ownership interest in each of

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the 11 underlying trusts.

Motion Sequence Nos. 002, 003 and 004 are consolidation for disposition, and are disposed of in accordance with this decision. In Motion Sequence No. 002, third-party defendant Dalton Investments LLC (Dalton) moves for an order: (1) granting it summary judgment dismissing the third-party complaint; and (2) granting it summary judgment on liability with respect to its counterclaim against defendant/third-party plaintiff Piper Jaffray & Co. (Piper), and scheduling a hearing to determine its damages. Piper cross-moves for summary judgment on its claims against Dalton. In Motion Sequence No. 003, plaintiff Lehman Brothers, Inc. (Lehman) moves for summary judgment on the complaint. In Motion Sequence No. 004, third-party defendant Nationwide Life Insurance Company of America (Nationwide) moves for summary judgment dismissing Piper's third-party complaint. Piper cross-moves for summary judgment on its claims against Nationwide.

For the reasons set forth below, Lehman's motion for summary judgment is granted, and third-party defendants' motions and Piper's cross motions are denied.

FACTS

The parties to this lawsuit bought and sold interests in an aircraft statutory trust known as the "US Airways Statutory Trust" (the US Air Trust). Aircraft statutory trusts borrow money from investors to finance the purchase of airplanes and then use the revenue, earned from leasing these airplanes, to make principal and interest payments to the holder of the debt instruments, i.e., "Certificates of Beneficial Interest" (the Certificates). The general framework of the transactions between the parties is as follows: in October 2004, Nationwide sold the Certificates to Piper for \$2.148 million. Piper simultaneously sold the Certificates to Dalton for

\$2.253 million. In March 2005, Piper purchased the Certificates back from Dalton for \$3.896 million, and simultaneously sold the Certificates to Lehman for \$4.06 million.

Specifically, sometime prior to November 2003, Nationwide, an insurance company based in Columbus, Ohio, invested \$2 million in the US Air Trust, and received a "Certificate of Beneficial Interest" which indicated this \$2 million investment. As of November 2003, Nationwide had received 57.5% of its investment back, leaving Nationwide with a \$853,487.80 investment remaining in the US Air Trust. In late 2003, the U.S. Bank National Trust Association (U.S. Bank), the trustee of the US Air Trust, notified Certificate holders that the US Air Trust would be reorganized and split into 11 new trusts, and that the Certificate holders would receive 11 new Certificates, one Certificate in each of the 11 new trusts. Each trust owned one aircraft. U.S. Bank informed the Certificate holders that their interest would not change due to the reorganization. Around November 13, 2003, Nationwide received 11 new Certificates, each having the amount of \$853,487.80 featured at the top of the Certificate. The writing immediately below the \$853,487.80 amount stated that the holder's beneficial interest in the US Air Trust is equal to dividing the \$853,487.80 amount by \$160,997,386.00, giving the Certificate holder a 0.53% interest in one of the 11 US Air Trusts.

In August 2004, Jeffrey Golbus of Nationwide approached Steven Welo of Piper, a securities broker-dealer based in Minneapolis, Minnesota, to purchase from Nationwide the 11 Certificates in the US Air Trust. Piper alleges that Nationwide represented that the 11 Certificates each had a "face amount" of \$853,487.80, giving all 11 Certificates together a total value of \$9,388,365.80, and that, because of the recent US Airways bankruptcy, Nationwide would sell the Certificates to Piper at a discounted rate.

Following a conversation with Golbus, Welo drafted an e-mail that memorialized the conversation he had just had with Golbus, which was circulated to the Piper sales force by another Piper employee, John Kuny:

US AIRWAYS LEASES FOR SALE

**** account has 11X\$853,487.80 of leases = \$9,388,365.80
offered at \$25

Aff. of Alexandra Wald, Exh D; see also Welo Dep., at 140-144; 146 (Wald Aff., Exh R).

Piper personnel worked for several weeks locating a buyer for the Certificates. Third-party defendant Dalton, the prospective buyer, was a limited liability corporation providing investment management for institutional and private clients with its principal place of business in Los Angeles, California. At all times relevant to the transactions at issue in this case, Dalton managed certain investment funds, including the Dalton Distressed Debt Master Account LP (the Fund) (see Aff. of Arthur Herbert, Dalton's Chief Financial Officer, ¶ 2). The Fund invested in distressed debt.

Dalton had an ongoing business relationship with Piper through the regular purchase and sale by the Fund of securities until the Fund closed. John Pinto (Pinto), the Piper salesman assigned to the Dalton account, frequently conducted business with Marc Sherman (Sherman), Dalton's analyst. Pinto communicated with Sherman on a regular basis by phone and/or e-mail to describe securities and opportunities that might be of interest to Dalton (Pinto Dep., at 33-36; 39-40 [Aff. of Harry H. Rimm, Exh H]).

In October 2004, Pinto contacted Sherman, and solicited Dalton's interest in potentially purchasing the 11 Certificates. In connection with the Certificates, Pinto advised Sherman that he had a total position of approximately \$9.3 million in value; that the position was

[6]

in the form of 11 certificates, each with a value of approximately \$853,000; and that “11 times \$853,000 was how we got to 9.3 something” (Sherman Dep., at 46; 230-231 [Rimm Aff., Exh A]).

Pinto suggested to Sherman that Dalton could purchase the position at a dollar price “somewhere in the twenties,” meaning approximately 20 cents on the dollar (Sherman Dep., at 46; 230). The price for the interests was discounted because U.S. Airways had just filed for bankruptcy the second time (*id.* at 42; 62; 84).

On October 13, 2004, Piper agreed to purchase the Certificates from Nationwide, and immediately resell them to Dalton in a back-to-back “riskless principal” transaction, meaning that Piper never came into possession of the Certificates. Subsequent to consummating the trade on October 13, 2004, both Nationwide and Piper independently confirmed the terms of the contract, including the \$9,388,365.80 principal amount. Nationwide’s own electronic trade system (the T-Memo) recorded the identical contract terms that Piper did (*see* Wald Aff., Exh B). The “T-Memos” created by Golbus reflect Nationwide’s sale to Piper of 11 separate securities, each having an “Original Face” and “Current Par” amount of “\$853,487.80” (*see id.*). According to Richard Breeden, Nationwide’s expert, this price meant “an amount equal to 22.875 % of a face amount” (Breeden Dep., at 13-14 [Wald Aff., Exh S]; *see also* Welo Dep., at 230).

Piper’s 11 separate trade confirmations addressed to Nationwide each stated “You Sold \$853,487.8” at a “Price 22.8875” (Wald Aff., Exh C). Again, this price reflects a sale based on face amount (Breeden Dep., at 13-14).

Pursuant to the terms of the trust agreements, certain paperwork was required to re-register the Certificates from Nationwide’s name to that of Dalton. In connection with the re-

registration, Nationwide provided Piper with 11 separate bond powers. Each of the 11 bond powers signed on behalf of Nationwide provides: "I hereby sell, assign and transfer ... one bond" of each Aircraft Statutory Trust "for Eight Hundred Fifty Three Thousand Four Hundred Eight-Seven and 80/100 (\$853,487.80)" (Wald Aff., Exh E). In addition, Nationwide's PAM electronic accounting system shows that Nationwide booked the sale as follows: the Certificates each had a book value of \$9,877.10 and were sold for \$195,235.33 each, thus resulting in a gain of approximately \$185,000 per Certificate (see Wald Aff., Exh G).

Nationwide had a mechanism in place to check for and identify discrepancies in trade terms (Golbus Dep., at 60-61). However, no one at Nationwide objected to Piper's confirmations, or challenged the settlement of the trade based on Golbus's T-memos reflecting 11 sales of \$853,487.80 "original face" and "current par."

On October 13, 2004, Piper sold the Certificates to the Fund at a price of 24 cents on the dollar, for a total of approximately \$2.253 million (24% of 11 x \$853,487.80) (Sherman Dep., at 96). On October 13, 2004, Pinto sent e-mails to Steven Perksy (Persky), the Fund's portfolio manager, confirming that Dalton had purchased "11x \$853,487.80 of leases = \$9,388,365.80 at .24=\$204,837.07/trust cert" (Rimm Aff., Exh B]). The e-mail also listed each of the 11 tail numbers for the aircraft that were the subject of the 11 aircraft statutory trusts (see id; Sherman Dep., at 17; 95; 101).

Upon Dalton's receipt of certain documents prior to settlement, including the Certificates, Sherman confirmed that each of the 11 tail numbers corresponded with the tail numbers of the planes that Piper had represented to him were the subject of the Certificates, and he noted that the value of \$853,487.80 was listed on each of the 11 Certificates, adding up to the

approximate \$9.3 million total value that Piper had represented to him that he was purchasing (id. at 167-168). Sherman believed that he had purchased a position from Piper valued at approximately \$9.3 million (id. at 101-104).

After reviewing the certificates of beneficial interest forwarded by Piper, Sherman called Pinto and inquired whether the Fund's ownership interest was "\$853[,487] times 11 and not just 853[,487])" (id. at 169). He testified that he could not ascertain this from the physical certificates (id. at 232). Pinto reiterated that the Fund's ownership interest was "\$853,487.80 times 11" (id. at 169-170).

In its role as a riskless principal, Piper never became a registered holder of the Certificates, but rather, sold them to Dalton as represented by Nationwide on the day it purchased them from Nationwide (Welo Dep., at 113; Dep. of Tom Tisell of Piper, at 81-81 [Wald Aff., Exh R]; Dep. of Deborah Ibrahim, U.S. Bank account manager, at 120 [Wald Dep., Exh R]). Piper provided Dalton with all of the documentation necessary to re-register the Certificates in its name, and to fully understand the terms and amount of the Certificates it had purchased, including the physical Certificates, the Liquidating Trust Agreements, and the Remedial Term Sheet (Sherman Dep., at 93, 115-116). Indeed, as a condition to becoming a registered holder of the Certificates, Dalton was required to sign, and did sign, a written representation stating that "in connection with [the] purchase" of the Certificates, "[w]e have received a copy of the Liquidating Trust Agreement dated as of March 31, 2003 ... relating to the Beneficial Interest Certificate and we acknowledge that we have read and agreed to the matters stated therein" [Wald Aff., Exh H]). In fact, Sherman testified that he did read the Liquidating Trust Agreement (Sherman Dep., at 118). Though Sherman also personally reviewed the physical certificates, he

mistakenly believed that the \$853,478.80 amount listed on each Certificate was the current face value of each of the 11 Certificates, yielding a total face value of about \$9.3 million (id. at 104-105; 108; 131).

Fact witnesses and the trustee in this case testified to the effect that “trustees don’t talk to you if you’re not a ... holder” (Sherman Dep., at 124, 188-189; Ibrahim Dep., at 49; 90; Pinto Dep., at 122). Dalton, unlike Piper, was a registered holder of the Certificates for more than three months. Dalton spoke with the Trustee “quite often,” participating in approximately 12 to 20 phone calls concerning the Certificates with the trustee and other holders (Sherman Dep., at 129-132). Sherman discussed with the trustee terms for the potential sale of the aircraft held in the liquidating trusts (Sherman Dep., at 129), as well as reserve and re-marketing issues with respect to the Certificates (see Wald Aff., Exh H).

As a registered holder, Dalton was twice called upon to calculate its percentage ownership interest in the Certificates (see id. [Trustee requested that Dalton complete the following: “Beneficial Interest Certificates ____%”). Persky, Dalton’s managing partner, erroneously represented to the trustee that it possessed Certificates totaling “\$14,466,272 original face” (Sherman Dep., at 112). Sherman stated that Persky did not “know what his beneficial interest” was in the Certificates at this time (id.).

In February of 2005, Dalton was again required to state its percentage holding. This time, Dalton represented that the aggregate amount of Certificates held in each trust was \$9,388,365.80 (id. at 129; 131). Sherman admits that he made no effort to confirm with the trustee the amount of Certificates that Dalton purchased from Piper (id. at 126).

In March 2005, Pinto again initiated contact with Dalton, and inquired whether

the Fund might be interested in selling back to Piper the same Certificates that it had sold to the Fund five months before, as the price of the Certificates had increased (id. at 153-155; 212-215; Pinto Dep., at 197-199). Piper, again acting only as a riskless principal, located a purchaser – plaintiff Lehman, a securities-broker dealer based in New York – for the Certificates.

At an aviation industry conference in early March 2005, Evan Wallach, a managing director and fixed income salesperson at Piper specializing in fixed income products pertaining to the airline industry (Lehman Statement of Undisputed Facts, ¶ 2¹), approached Josh Tarnow, a Lehman managing director and director of Lehman's Aviation Finance Group (id., ¶ 4), and inquired whether Tarnow would have an interest in purchasing the Certificates (id.; Tarnow Dep., at 32-35 [Aff. of Anthony J. Albanese, Exh I]).

Over the next several days, through in-person discussions, e-mails and phone calls, Wallach provided additional information about the Certificates to Tarnow, including:

1. Piper was offering for sale 11 Certificates each with a face amount of \$853,487.80 for a total face amount of \$9,388,365.80.
2. The Certificates represented an ownership interest in a US Airways Operating Lease that was formed in 1989, and that had been restructured into five-year operating leases. Piper told Lehman that the leases concerned 11 planes.
3. These Certificates were offered for sale at a discount to face value because they were distressed debt, in that US Airways had been placed in and come out of bankruptcy.

(Lehman Statement of Undisputed Facts, ¶¶ 6-9).

Based on Piper's representation, Tarnow believed he was purchasing

¹ On November 1, 2007, Lehman and Piper entered into a so-ordered stipulation as to certain facts.

\$9,388,365.80 face amount of Certificates (Tarnow Dep., at 53-54). Wallach also believed and represented to Lehman that he was selling Lehman \$9,388,365.80 in face amount of the Certificates, composed of 11 Certificates, each of which had a face amount of \$853,487.80:

Q. Throughout this, in all the emails that we have seen discussing these transactions, you were representing to Mr. Tarnow that you were selling certificates with a total face value of \$9,388,365.80 for 43.25, right?

A. That was what was agreed to.

Wallach Dep., at 121 (Albanese Aff., Exh I).

* * *

A. [J]ust to be very clear, what I was offering to Lehman or what Piper was offering to Lehman, was the 853,487.80 times 11 at the agreed price.

Id. at 132-133.

The \$9,388,365.80 in total face amount that Piper represented it was selling constituted a 5.83% ownership interest in the monthly lease payments of \$90,000 per month for each of the 11 planes, as well as the proceeds of the resulting sale of the 11 planes (id. at 148-149). This 5.83% ownership interest is what Michael Pellicci, Piper's aircraft and airline fixed income trader, believed Piper was selling (Pellicci Dep., at 170 ["My belief was that we were transacting in 5.83% of the [planes]").

Based on the information provided to him, Tarnow bid \$43.25 on the Certificates, which was equivalent to offering \$4,060,468 for all 11 Certificates (Lehman Statement of Undisputed Facts, ¶ 10). On March 11, 2005, Wallach sent an e-mail to Tarnow asking Tarnow if his \$43.25 bid for the 11 Certificates was good and, if so, that the parties might be "done" on

the trade (see Albanese Aff., Exh J). That same day, Tarnow e-mailed Wallach, indicated that his bid of \$43.25 was still good, and confirmed that he was “done” (see id.). By stating he was “done,” he had informed Wallach that they had a binding agreement: he had agreed to buy the Certificates from Piper at the terms specified (Tarnow Dep., at 102-103; 108).

That same day, Wallach e-mailed Tarnow, and similarly confirmed that the parties were “done” (see Albanese Aff., Exh J). Wallach also testified that the term “done” in the world of securities trading is a term of art with a very special and well known meaning (Wallach Dep., at 109-110), i.e., that once both parties agree that the deal is “done,” the parties have a binding agreement (id. at 112).

On March 11, 2005, Piper purchased back the Certificates from the Fund at a price of 41.5 cents on the dollar, for a total of \$3.896 million (41.5% of 11 x \$853,487.80) (Sherman Dep., at 213-215; 3/11/05 Persky e-mails [Rimm Aff., Exh C]). Dalton explicitly acknowledged the terms of its contract with Piper when it delivered the physical Certificates to Piper with a letter stating: “Enclosed are 11 U.S. Air Statutory Trust Certificates of face value \$9,388,365.80 ... The sale was executed at 41.50 for net proceeds of \$3,896,171.80” (see Wald Aff., Exh H). Sherman understood that Dalton had an obligation to deliver securities with a \$9.83 million par value (Sherman Dep., at 216-217). The Certificates that Dalton delivered to Piper did not, however, have a \$9,388,365.80 face value, but rather, represented an ownership interest of .53% in the underlying airline trusts.

Piper then sold the Certificates to Lehman on the same day that Dalton sold them at a price of 43.25 cents on the dollar, for a total of approximately \$4,060,468.21, the contractually agreed to price (Lehman Statement of Undisputed Facts, ¶ 11; see also Answer

[“Piper admits that on or about March 16, 2005, Lehman wired Piper \$4,060,468.21 in completion of the above trade”).

Multiple e-mails confirm that it was the clear and unambiguous intent of the parties for Piper to deliver 11 Certificates each with a face amount of \$853,487.80 for a total face amount of \$9,388,365.80. In a March 11, 2005 e-mail from Wallach’s sales assistant, Nolan C. Heske, to Jay Kilpatrick, Tarnow’s sales assistant, Piper confirmed the terms of the trade:

Piper sells Lehman Aircraft Finance:

US Air Operating Lease ... These are 11 separate physical statutory trust certificates \$853,487.80 (face) @ \$43.25

* * *

Settlement Terms:

\$9,388,365.80 (Orig Face=\$853,487.80 x 11 planes)

x \$43.25

\$4,060,468.21 (Settlement money on 3/16)

Albanese Aff., Exh J.

On March 30, 2005, Wallach again confirmed the details of the trade in an e-mail to Tarnow:

We sold you the following eleven US Air ETCs/Ownership Certificates on March 11:

Eleven individual aircraft ownership certificates of \$853,487.80 face amount each.

Total \$9,388,365.80 face at \$43.25 for \$4,060,468.21 investment.

Total debt outstanding: \$161mm

Id.

Finally, on September 8, 2005, Wallach again confirmed the details of the trade in an e-mail to Tarnow:

My records show that you bought \$9,388,365 total of the U.S. Air 9.33s and 9.82s ownership certificates. Cusip 91154FAA7. Lehman paid \$43.25. Trade date was March 11, 2005.

Id.

On June 20, 2005, U.S. Bank informed Certificate holders, which now included Lehman, that the 11 airplanes had been sold (Statement of Undisputed Facts, ¶¶ 13, 17). Certificate holders, including Lehman, were instructed to deliver their Certificates to U.S. Bank on or before July 11, 2005 in order to receive their share of the sale proceeds (id., ¶ 18).

Lehman delivered its Certificates to U.S. Bank (id., ¶ 19), expecting to be redeemed at a dollar price of \$43.875 and to receive a total distribution of \$4,119,191.35 – Lehman's purchase price plus a modest profit (Tarnow Dep., at 185). However, U.S. Bank wired to Lehman funds totaling only \$374,471.96 (Statement of Undisputed Facts, ¶ 20), or 1/11th of the amount expected by Lehman. Lehman contacted U.S. Bank, which informed Lehman that the 11 Certificates had a total face value of \$853,487.80, not \$9,388.366.

It is undisputed that Piper did not deliver to Lehman 11 Certificates each with a face amount of \$853,487.80 for a total face amount of \$9,388,365.80 worth of Certificates, as it had contractually committed to do; the 11 Certificates that Piper had available for sale, and in fact sold to Lehman, did not each have a face amount of \$853,487.80 (Ibrahim Dep., at 63-64). Nor did the 11 Certificates represent a 5.83% ownership interest in the 11 planes (id. at 59). Instead, the \$853,487.80 that Piper represented as the face amount of each Certificate was the numerator of a fraction, that when calculated, would provide the actual face amount of the Certificates (id. at 40). Specifically, to calculate the actual face amount of each Certificate, one must divide \$853,487 into \$160,997,386 (which represents the total principal outstanding of all

11 planes) (id.). When the calculation is done for all 11 Certificates, it is clear that Piper delivered 11 Certificates that had a total face amount of \$853,487, and that the 11 Certificates represented a total ownership interest of .53% in the 11 planes (id. at 59). In other words, Piper only delivered 1/11 of the face amount of the Certificates that it was contractually obligated to sell to Lehman.

In February 2006, Lehman sued Piper for breach of contract and mutual mistake, seeking damages and/or rescission of the March 2005 sales agreement. In March 2006, Piper filed a third-party complaint against Nationwide alleging breach of contract, fraud, negligent misrepresentation, unilateral mistake, unjust enrichment and indemnity in connection with the October 2004 sales agreement. Piper seeks damages and/or rescission. In August 2006, Piper filed a third-party complaint against Dalton alleging breach of contract, rescission based on mistake, unjust enrichment, and implied indemnity. Piper seeks damages and/or partial rescission and disgorgement. Dalton has asserted a counterclaim against Piper for attorneys' fees, costs and expenses that it has been forced to incur as a result of Piper's lawsuit.

DISCUSSION

A. Lehman's Motion for Summary Judgment (Motion Sequence No. 003)

Lehman's first cause of action is for breach of contract. To establish a right to recover for breach of contract, a party must prove (1) the existence of a contract and the respective obligations under the agreement; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages (Noise In Attic Prods., Inc. v London Records, 10 AD3d 303 [1st Dept 2004]; accord J&L Am. Enters., Ltd. v DSA Direct, LLC, 10 Misc 3d 1076[A], 2006 NY Slip Op 50101[U] [Sup Ct, NY County 2006]).

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]; accord R/S Assoc. v New York Job Dev. Auth., 98 NY2d 29 [2002]). Thus, “[w]here the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment” (American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st Dept 1990], appeal denied 77 NY2d 807 [1991] [citations omitted]). Accordingly, where, as here, evidence of the terms of a contract and of one party’s breach is clear, summary judgment is appropriate (Singer Asset Fin. Co., LLC v Melvin, 33 AD3d 355 [1st Dept 2006]; Baby Togs, Inc. v IMI Sys., Inc., 205 AD2d 335 [1st Dept 1994], lv dismissed 84 NY2d 1026 [1995]; Benjamin Elec. Eng’g. Works v Rampart Constr. Assoc., 173 AD2d 370 [1st Dept], appeal dismissed 78 NY2d 1006 [1991]).

Lehman has met its burden of proof on this summary judgment motion by clearly establishing, through Piper’s own admissions, that: (1) an agreement existed between Lehman and Piper; (2) Piper was obligated to deliver 11 Certificates each with a face amount of \$853,487.80 for a total face amount of \$9,388,368.80, and Lehman was obligated to pay \$4,060,468.21 for the Certificates; (3) Lehman performed its obligations; (4) Piper breached the agreement by failing to perform its obligations; and (5) Lehman suffered damages as a result of the breach. Accordingly, Lehman’s motion for summary judgment on its claim for breach of contract is granted.

There is no dispute that Lehman and Piper entered into a binding agreement. In its answer, Piper admits that it offered to sell, and Lehman accepted Piper’s offer to sell, 11

Certificates each with a face amount of \$853,487.80 for a total face amount of \$9,388,365.80: "Piper admits that on or about March 11, 2005, Tarnow, on behalf of Lehman, accepted Piper's offer to sell the 11 notes with a total face amount of \$9,388,365.80 for the sum of \$4,060,468.21" (Answer, ¶ 7); see also Wallach Dep., at 112). It is black-letter law that the acceptance of an offer forms a binding contract (see Matter of Sherry, 222 AD2d 681 [2d Dept 1995], ly denied 89 NY2d 803 [1996]; see also Nesbitt v Penalver, 40 AD3d 596 [2d Dept 2007]).

There is also no dispute about the respective obligations under the contract. Piper's own witnesses admitted that, pursuant to the agreement, Piper promised to deliver 11 Certificates, each of which had a face amount of \$853,487.80, for an aggregate face amount of \$9,388,365.80 (see also Piper's Second Set of Responses and Objections to Nationwide's First Notice to Admit Request, ¶¶ 86, 88 [Albanese Aff., Exh G] ["Piper represented to Lehman that each of the Certificates had a face amount of \$853,487.80 ... [and that] the aggregate face amount of the Certificates was approximately \$9,388,365.80"]). As such, Piper was obligated to provide Lehman with Certificates that had the contractually agreed upon face amounts.

Lehman performed its obligations under the agreement, as it is undisputed that Lehman paid \$4,060,468.21 for the Certificates – the contractually agreed to price (Answer, ¶ 10 ["Piper admits that on or about March 16, 2005, Lehman wired Piper \$4,060,468.21 in completion of the above trade"]).

It is also undisputed that Piper breached the agreement by failing to deliver the full \$9,388,365.80 worth of certificates. Piper, through the testimony of its traders, has admitted that it misunderstood the face amount of the Certificates it had available for sale, and that it consequently misrepresented their face value. Piper simply did not have available and did not

deliver to Lehman 11 Certificates with the face amount that Piper was contractually obligated to provide. The testimony of Pellicci, Piper's aircraft and airline fixed income trader, makes this clear:

As I'm sitting here today as we've not [sic] uncovered that these are not – this is not 11 pieces of 853,487.80, that it's actually something different than that, that leads me – because we sold to Dalton, we made that error to Dalton, and then also we made that error to Lehman. Because we did not know the right facts, obviously.

Pellicci Dep., at 208-209.

Pellicci transmitted this mistaken belief about the face amount of the Certificates to his salesman, Wallach, who transmitted this false information to his customer, Lehman's trader, Tarnow (Wallach Dep., at 124 [“A: All the information that I had with regard to the bond and the price, was given to me by (Pellicci). Q: And you faithfully passed that on to Lehman Brothers, your customer? A: Yes]).

Moreover, every Piper trader testified that Lehman could not have possibly realized the mistake Piper had made, and that it was entitled to rely on what Wallach represented. In the fixed income trading industry, a seller's “word is his bond,” and a buyer of securities has the unequivocal right to rely on a seller's representation as to the face amount of the securities the seller is offering for sale (see Pellicci Dep., at 148 [“if you tell me you have \$100,000 worth (of securities) I take it as face value ... It's a business that's done off of your word]; Welo, at 169 [“the way our business is conducted is on the phone ... It's conducted with (the seller) telling me what he is selling me (and) if he tells me, that's my source of the amount”]; Pinto Dep., at 114 [“you have to rely on the faith of the seller that he's providing the truth”]).

Because Tarnow was relying on Wallach's representations, he would have had no reason to think that the \$853,487.80 that Piper represented as the face amount of each Certificate was instead the numerator of a fraction that had to be calculated to determine the actual face amount of the Certificates. Wallach's testimony makes this clear:

Q: And so the \$853,487 in face value is what you thought you were selling at a discount, right?

A: Yes.

Q: Not that 853,000 was in fact part of the formula which converted into a percentage of value of interest in the trust?

A: I had no reason to think that.

Q: And neither would Lehman, right, based on these communications?

A: Based on what I was showing them, that's correct.

Wallach Dep., at 133.

Lehman has also established that it is entitled to be made whole. "Damages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position as it would have been had the contract been performed" (Brushton-Moira Cent. School Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256, 261 [1998]). Here, Lehman's damages are equal to the difference between what Lehman paid for the Certificates and what it received from U.S. Bank when it redeemed the Certificates, plus lost profits and statutory interest (see Alesayi Beverage Corp. v Canada Dry Corp., 947 F Supp 658, 671 [SD NY 1996], affd 122 F3d 1055 [2d Cir 1997] [applying New York law and awarding lost profits; recognizing that "[p]roof of lost profits is one method of proving the amount necessary to restore a plaintiff to

the economic position it would have been in absent the breach”]). There is no dispute that Lehman is entitled to recover these damages, or regarding how such damages should be calculated.

In response to the summary judgment motion, Piper completely fails to address the evidence submitted by Lehman. Rather, Piper suggests that this court should deny summary judgment because of the prior transactions that Piper had with Nationwide and Dalton with respect to the Certificates. The court rejects this argument. Lehman’s contract was made only with Piper, and no evidence has been presented demonstrating that Lehman had any knowledge concerning Piper’s prior history of trading the Certificates. Thus, Piper’s prior history of trading these securities cannot create a disputed issue of material fact regarding Lehman’s claims of breach of contract. Moreover, Piper’s argument that it only misrepresented the face amount of the Certificates to Lehman because Nationwide or Dalton misrepresented the face amount of the Certificates to it only explains why Piper misrepresented the face amount to Lehman. However, Piper’s motive here is legally irrelevant. A defendant’s motive for breach is not a defense to a breach of contract claim, as a defendant’s good or bad faith is not an element of the cause of action (see Koufakis v Carvel, 425 F2d 892, 906 [2d Cir 1970] [“A breach is a breach; it is of marginal relevance what motivations led to it”]).

Furthermore, with respect to the breach of contract claim, Piper does not argue that it has not committed a breach. Rather, it argues that Lehman has “conceded” that Piper has an “affirmative defense” of mutual mistake on Lehman’s breach of contract claim because Lehman argues that both parties were mistaken as to the face amount of the certificates. However, Piper never asserted this affirmative defense in its answer, and has never, during the

two year history of this litigation, asserted mutual mistake as a defense. In any event, mutual mistake as an affirmative defense never permits a defendant to reap the rewards of the contract it seeks to repudiate. Rather, mutual mistake, whether offered as a cause of action or as an affirmative defense, leads to rescission of the contract, which would result in Piper returning Lehman's purchase price – the exact relief that Lehman seeks to recover in its breach of contract cause of action (see Symphony Space, Inc. v Pergola Properties, Inc., 214 AD2d 66, 80 [1st Dept 1995], affd 88 NY2d 466 [1996] [remedy for mutual mistake is “to declare the contract void from its inception and to put or restore the parties to status quo”] [citation omitted]); In re WorldCom, Inc., 377 BR 77, 91 [Bankr SD NY 2007] [holding that where plaintiff seeks claim for rescission “when the plaintiff no longer owns or possesses the security ... it is well settled that a court should award damages equal to rescission”]). Therefore, Piper's mutual mistake defense does not raise an issue of fact.

Accordingly, Lehman's motion for summary judgment on its breach of contract cause of action is granted. Lehman is entitled to damages in the amount of \$3,685,996 (the difference between the purchase price and the amount received from U.S. Bank), plus lost profits and statutory interest from the date of Piper's breach, i.e., March 11, 2005. However, because no papers have been submitted on the issue of the total amount of damages, including lost profits, that issue is referred to a Special Referee to hear and report.

In light of this determination, it is unnecessary to address Lehman's alternative claim for rescission of contract based on mutual mistake, which seeks the same amount of damages.

B. Dalton's Motion for Summary Judgment (Motion Sequence No. 002)

Dalton moves for summary judgment dismissing the third-party complaint against it. As set forth below, Dalton is not entitled to judgment with respect to any of Piper's claims.

1. Proper Party

Dalton argues, as a threshold matter, that it is entitled to summary judgment dismissing Piper's third-party complaint because it is not a proper party to Piper's lawsuit. According to Dalton, "Dalton Investments LLC," the entity that Piper has named as a third-party defendant, manages a group of investment funds, including a particular fund – the Dalton Distressed Debt Master Account LP – that owned the Certificates for a brief period of time (see Hebert Aff., ¶ 2). Dalton contends that "Dalton Investments, LLC" never purchased, sold or owned the Certificates that are the subject of Piper's third-party complaint, and therefore, has been improperly sued (see id., ¶¶ 7-8).

The court rejects this argument, as Dalton has waived the affirmative defense of "improper party," and is estopped from asserting the defense. Although Dalton now claims that it is not a proper party, it has previously made sworn representations to Piper, to the other parties in the lawsuit, and to this court, to the exact opposite effect. For example, on December 6, 2006, Dalton provided verified responses to Piper's interrogatories. In its responses, Dalton defined "Dalton" to mean "Dalton Investments LLC," and verified that "Piper sold the Notes to Dalton on or about October 20, 2004," that "Dalton purchased interests in 11 U.S. Air Statutory Trusts ... and that on or about March 16, 2005, it sold interests in 11 U.S. Air Statutory Trusts" (Dalton's Verified Responses and Objections to Piper's First Set of Interrogatories, at 1, Responses Nos. 2, 11 [Wald Aff., Exh N]).

In addition, Dalton's attorney, the Anderson Kill law firm, appeared at each court conference and deposition in this case, and entered into numerous stipulations on behalf of "Dalton Investments LLC" (see e.g. 12/7/06 and 8/10/07 stipulations [Wald Aff., Exh N]). Anderson Kill also produced documents on behalf of "Dalton Investments LLC" (see 12/6/06 and 3/1/07 Letters from Counsel [Wald Aff., Exh N]). After asking the court for time to mediate this case, Anderson Kill signed a mediation agreement on behalf of "Dalton Investments LLC," expressly acknowledging that it "was essential to have the appropriate representatives who have complete settlement authority" attend the mediation (see 8/29/07 JAMS Letter [Wald Aff., Exh N]).

Moreover, it is clear that Piper would be significantly prejudiced if it were required to prove at this late date, after the close of discovery, that Dalton and the Fund should not be treated as separate legal entities. Under these circumstances, Dalton is clearly estopped from raising the affirmative defense that it is an improper party to this action (see River Seafoods, Inc. v JPMorgan Chase Bank, 19 AD3d 120 [1st Dept], appeal withdrawn 6 NY3d 751 [2005]).

2. Mistake/Rescission

Piper's claim for rescission of its contract with Dalton is brought on the ground that both parties labored under a mutual mistake of fact about a basic assumption of the agreement – i.e., that neither party understood the correct amount being transacted. It is well settled that a party may void a contract based on mutual mistake where the mistake concerns a basic assumption of the contract, and materially affects the agreement (Gould v Board of Educ. of Sewanhaka Cent. High School Dist., 81 NY2d 446 [1993]). There is no dispute that a mistake

as to the amount of the Certificates being transacted concerns a basic assumption of the subject matter of the contract, and thus materially affected the price paid by Piper (see Broadway-111th Street Assocs. v Morris, 160 AD2d 182 [1st Dept 1990] [mistake as to number of shares being transferred, upon which basis total price time share per price was calculated, was material]; Janowitz Bros. Venture v 25-30 120th St. Queens Corp., 75 AD2d 203 [2d Dept 1980] [mistake concerning price term of contract deemed material]).

Dalton moves for summary judgment on Piper's claim for rescission, arguing that Piper alone was mistaken and that, therefore, the mistake here is unilateral: because "[i]n March of 2005, Dalton merely sold to Piper the same interests that Piper had sold to Dalton five months earlier, the value of which Piper had specifically confirmed. ... the mistake in this case was truly unilateral on the part of Piper" (Dalton Mem., at 15).

However, it is clear that disputed issues of material fact exist as to whether *both* Piper and Dalton were mistaken as to face amount of the Certificates. Sherman of Dalton testified that he entered into the March 2005 transaction under the erroneous belief that the Certificates had a total face value of approximately \$9.3 million (Sherman Dep., at 104-105; 108; 131). Dalton also sent a March 16, 2005 cover letter to Piper confirming that it was delivering 11 "Certificates of face value \$9,388,365.80" (Wald Aff., Exh H). There is thus sufficient evidence in the record to raise an issue of fact as to whether *both* parties labored under a critical mistake of fact.

Dalton next argues that summary judgment is warranted on Piper's rescission claim because any mistake was caused by Piper's own alleged negligence. However, the question of Piper's purported negligence is necessarily a fact-intensive question, and cannot be

resolved on this motion for summary judgment. Indeed, there is evidence in the record supporting Piper's position that it acted reasonably under the circumstances, and did not fail to exercise ordinary care by failing to discover the mistake when it purchased the securities from Nationwide or from Dalton (see Expert Report of Gerald Guild, Piper's expert, at 18 [Wald Aff., Exh S] ["The fact that three highly sophisticated parties with aircraft securities expertise accepted the seller's representation of what was being sold – even after receiving the physical certificates ... does not represent any deviation from ordinary care in the industry"]; Dep. of Bella Borg Brenner, Lehman's expert, at 82-83 [Wald Aff., Exh R] [a purchaser is entitled to rely on the representations of the seller as to the amount of securities being sold]).

Dalton also contends that Piper alone bore the risk of any mistake taking place. A party bears the risk of mistake if that party "in the exercise of ordinary care, should have known or could easily have ascertained" the true facts (P.K. Dev., Inc. v Elvem Dev. Corp., 226 AD2d 200, 202 [1st Dept 1996]). However, there is sufficient evidence in the record to raise issues of fact as to whether Dalton, rather than Piper, should bear the risk of mistake.

While Piper held the Certificates for just a few hours between purchasing them from Nationwide and selling them to Dalton, Dalton owned the Certificates for three months before it sold them back to Piper. During that time, Dalton was a registered holder. As a registered holder, Dalton had access to U.S. Bank, the trustee, something that was not available to non-holders like Piper. During those three months, Dalton certified that "in connection with its proposed purchase" of the Certificates, it "read and understood" the Liquidating Trust Agreements for the trusts. Dalton was called upon by the trustee at least twice to state its percentage interest, voted to authorize certain actions as a holder of the Certificates, and

participated in "between 12 and 20" phone calls with the trustee and other holders. The allocation of the risk of the mistake, and the determination of potential negligence among the sellers and purchasers of the Certificates in this matter are thus triable issues of fact, precluding summary judgment on Piper's rescission claim.

Dalton also contends that rescission is unavailable because, since the trusts that were the subject of the Certificates have been liquidated, and final distributions of the proceeds of the trusts have been made, the parties cannot be returned to their status quo before Piper purchased and sold the Certificates. The court rejects this argument. It is well settled that "when the plaintiff no longer owns or possesses the security ... a court should award damages equal to rescission" (In re WorldCom, Inc., 377 BR at 91).

Accordingly, Dalton's motion to dismiss Piper's rescission cause of action is denied.

3. Unjust Enrichment

To prove a cause of action for unjust enrichment, a plaintiff must prove that (1) the defendant was enriched; (2) at the plaintiff's expense; and (3) it would be "against equity and good conscience to permit the defendant to retain what is sought to be recovered" (Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 [1972]; see also Wiener v Lazard Freres & Co., 241 AD2d 114 [1st Dept 1998]). Piper claims that if it is required to pay Lehman its purchase price for the Certificates, "equity and good conscience" militate that Dalton pay Piper the proceeds and profits it earned as a result of its sale of the Certificates to Piper (Dalton Third-Party Complaint, ¶¶ 49-52). Dalton contends that Piper's unjust enrichment claim must be dismissed because, since Piper knew exactly what it was buying, it cannot demonstrate that

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“equity and good conscience” entitles it to the relief sought.

However, the fact that Piper paid 11 times more for the Certificates than it intended, due to its mistaken understanding as to what Dalton was delivering, resulting in a windfall to Dalton of approximately \$3.5 million, raises disputed issues of fact as to whether Dalton was unjustly enriched, precluding Dalton’s motion for summary judgment on this cause of action (see Mandarin Trading Ltd. v Wildenstein, 17 Misc 3d 1118[A], 2007 NY Slip Op 52059[U], * 8 [Sup Ct, NY County 2007] [“in considering an unjust enrichment claim, ‘courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law’”] [citation omitted]; see also Eber-NDC, LLC v Star Industries, Inc., 42 AD3d 873 [4th Dept 2007] [issues of fact precluded summary judgment on unjust enrichment claim]; Kalt v Ritman, 21 AD3d 321 [1st Dept 2005] [same]).

4. **Implied Indemnity**

Dalton also moves for summary judgment on Piper’s claim for implied indemnity, arguing that because the mistake was allegedly caused by Piper, and because Dalton allegedly committed no wrongdoing, implied indemnification is not available as a matter of law (see Trustees of Columbia Univ. in City of N.Y. v Mitchell/Giurgola Assoc., 109 AD2d 449 [1st Dept 1985] [the party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of implied indemnity]). As set forth above, however, disputed issues of fact exist regarding the proper allocation of fault as between the parties. Similarly, whether Piper or Dalton acted negligently in the various transactions is also a contested issue of fact. Accordingly, summary judgment on Piper’s implied indemnity claim must be denied (see Pennisi v Standard Fruit & S.S. Co., 206 AD2d 290 [1st Dept 1994] [material issues of fact

precluded summary judgment on implied indemnity claim]; Draiss v Ira S. Salk Constr. Corp., 201 AD2d 698 [2d Dept 1994] [same]).

5. Breach of Contract

Dalton does not dispute the existence of a binding contract between Piper and Dalton, or that Piper performed its contractual obligations. Rather, Dalton argues that Piper's breach of contract claim is barred by the common law doctrine of in pari delicto.

Under this doctrine, a plaintiff who is an active, voluntary participant in an unlawful activity or scheme that is the subject of the suit is prohibited from recovering damages resulting from its wrongdoing (see Stecher v 85th Estates Co., 43 AD3d 732, 736 [1st Dept 2007] [the doctrine of in pari delicto applies to "fraudulent or illegal transaction"])). As the contract between Dalton and Piper was lawful, and did not contemplate or entail unlawful conduct, this defense does not excuse Dalton's failure to perform (see Hilgendorff v Hilgendorff, 241 AD2d 481, 482 [2d Dept 1997] [doctrine of in pari delicto did not apply as "the contract at issue here is lawful on its face and there is no implication that it was entered into with fraudulent design"])).

Dalton also argues that Piper cannot successfully maintain a cause of action for breach of contract when the alleged breach was caused by Piper's own conduct (see Stardial Comm. Corp. v Turner Constr. Corp., 305 AD2d 126, 126 [1st Dept 2003] [“it is undisputedly the rule that one who frustrates another's performance cannot hold that party in breach”] [citation omitted]). Dalton contends that because its alleged breach was caused by Piper's wrongdoing, Piper's claim for breach of contract must fail. However, because, as stated above, there are issues of fact as to whether Piper engaged in any wrongdoing, this defense also fails.

Accordingly, Dalton's motion for summary judgment dismissing the third-party

complaint against it is denied. As such, Dalton's motion for summary judgment on its counterclaim for costs and fees is also denied.

C. Nationwide's Motion for Summary Judgment (Motion Sequence No. 004)

Nationwide moves for summary judgment dismissing the third-party complaint against it. As set forth below, Nationwide is not entitled to judgment with respect to any of Piper's claims.

1. Fraud

To properly plead a common-law fraud claim, a plaintiff must allege a misrepresentation of a material fact, falsity of the misrepresentation, scienter, plaintiff's reasonable reliance on the alleged misrepresentation, and injury resulting from the reliance (Small v Lorillard Tobacco Co., Inc., 94 NY2d 43 [1999]).

Nationwide argues that Piper's fraud claim fails because Piper has no evidence that Nationwide made any actionable misrepresentation by Piper. Nationwide argues that because Welo of Piper did not recall if Golbus of Nationwide stated that he had 11 certificates of \$853,487.80 each, versus telling him to actually multiply that amount by 11, yielding \$9.33 million, Piper "cannot establish any misrepresentation by Nationwide" (Nationwide Mem., at 15).

This argument, however, does not entitle Nationwide to summary judgment. Piper presents evidence that, prior to his deposition, Welo stated in a June 12, 2006 affidavit that Golbus offered to sell to Piper "9.38 million in aggregate par value in the eleven U.S. Airways restructured trusts" (Welo Aff., ¶ 4 [Wald Aff., Exh L]). Thus, even assuming that there is an inconsistency between Welo's affidavit and his deposition testimony, that inconsistency would

be an issue of fact for the jury (see Yaziciyan v Blancato, 267 AD2d 152, 152 [1st Dept 1999] [“The deponent’s arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact”]; see also Knepka v Tallman, 278 AD2d 811 [4th Dept 2000] [same]).

Nationwide also argues that Piper has failed to create a genuine issue of fact as to whether Nationwide intentionally defrauded Piper. However, intent to defraud “is ordinarily a question of fact which cannot be resolved on a motion for summary judgment” (Shisgal v Brown, 21 AD3d 845, 847 [1st Dept 2005] [citation omitted]). Scienter can be shown by the fact that the deceiving party knowingly or recklessly made a false statement of fact that was “offered to deceive [plaintiff] and to induce [plaintiff] to act upon it, causing injury” (Jo Ann Homes at Bellmore, Inc. v Dworetz, 25 NY2d 112, 119 [1969]). Here, the record reveals evidence from which a jury might draw an inference of scienter in connection with Golbus’s representations.

Golbus was an experienced, sophisticated trader who managed a distressed debt portfolio of between \$5 and \$10 billion (Golbus Dep., at 184). He had access to Nationwide’s PAM accounting system, on which the Certificates were valued at under \$10,000 apiece as of the date of the trade (see Wald Aff., Exh G). Yet, he negotiated, confirmed and settled a trade in which those securities sold for more than \$195,000 apiece, without objection (*id.*). Thus, a jury might fairly conclude that Golbus’s decision to keep silent about Piper’s error and pocket nearly \$2 million was intentional.

Nationwide further argues that because Piper could have read the Certificates and determined that Nationwide misrepresented the amount being sold, the court should find as a matter of law that Piper cannot have justifiably relied on Nationwide’s fraudulent

misrepresentation. However, the issue of whether or not reliance is justified cannot be determined on summary judgment (Brunetti v Musallam, 11 AD3d 280, 281 [1st Dept 2004] [issue of “reasonable reliance, (an) essential element() of a fraud claim, (is) not subject to summary disposition”]; Talansky v Schulman, 2 AD3d 355, 361 [1st Dept 2003] [“resolution of a reasonable reliance claim is generally left to a finder of fact”]; see e.g. Swersky v Dreyer and Traub, 219 AD2d 321 [1st Dept 1996], appeal withdrawn 89 NY2d 983 [1997] [summary judgment denied as issue of fact was raised as to whether plaintiff reasonably relied on alleged statements]). Accordingly, summary judgment is clearly inappropriate on this basis.

Nationwide also argues that it is entitled to summary judgment on Piper’s fraud claim because Piper has not incurred any damages, and any damages that Piper might subsequently incur as a result of its sale of the Certificates to Lehman may only be brought as a claim for indemnification. Nationwide cites no authority for this proposition. In any event, an adjudicated liability of \$4 million to Lehman does constitute a form of consequential damages that is cognizable as fraud damages (see Clearview Concrete Products Corp. v S. Charles Gherardi, Inc., 88 AD2d 461, 468 [2d Dept 1982] [consequential damages proximately caused by reliance on misrepresentation are recoverable under fraud theory; thus, where “reliance on the false misrepresentation resulted in expenditures which would not otherwise have been incurred,” recovery of those expenditures was permissible]).

Although Nationwide also argues that its misrepresentations did not proximately cause Piper’s losses because of the intervening transactions between Piper and Dalton and between Piper and Lehman, questions of intervening or superseding cause are generally for the fact finder to resolve (see Derdiarian v Felix Contr. Corp., 51 NY2d 308 [1980]).

Accordingly, Nationwide's motion to dismiss Piper's cause of action for fraud is denied.

2. **Rescission**

Nationwide moves for summary judgment on Piper's claims for rescission based on mistake, arguing that (1) rescission is inappropriate because the parties cannot be restored to the status quo; (2) Piper was not mistaken about the subject matter of the sale, but rather, made a mathematical mistake in determining the value of the securities; (3) a claim of unilateral mistake must be coupled with fraud; (4) Piper bore the risk of any mistake, and failed to exercise ordinary care; and (5) Piper is not entitled to rescission because it ratified the trade, and failed to promptly disaffirm the transaction. None of these arguments supports the grant of summary judgment to Nationwide.

First, Nationwide can plainly be restored to the status quo. Nationwide admits that what it sold was a .53% interest, "if and when the aircraft were sold" (Nationwide Mem., at 11-12). The aircraft were ultimately sold, and Lehman received .53% of the proceeds, or approximately \$374,471.97. As previously discussed, when the plaintiff no longer owns the security, a court may award rescissory damages (see In re WorldCom, Inc., 377 BR 77, supra).

Although Nationwide argues that rescission is not warranted because Piper was not mistaken as to "what it bought" (Nationwide Mem., at 29), Piper presents ample evidence raising issues of fact that it was fundamentally mistaken about the amount it bought – Piper paid \$195,000 apiece for securities booked by Nationwide at \$10,000 each. This is the type of material mistake that justifies rescission (see Broadway-111th St. Assocs. v Morris, 160 AD2d 182, supra).

Nationwide also contends that Piper's unilateral mistake claim fails because such a claim must be coupled with fraud (see Travelers Indem. Co. of Ill. v CDL Hotels USA, Inc., 322 F Supp 2d 482 [SD NY 2004]). Here, however, Piper has clearly alleged fraud.

Moreover, material issues of fact exist as to whether Piper exercised ordinary care, or bore the risk of mistake in this case. A party seeking to recover on the grounds of a mistake need not show perfect knowledge. Rather, that party is required to show that "despite the exercise of ordinary care," it had no knowledge of the mistake (see Desiderato v N & A Taxi, Inc., 190 AD2d 250, 253 [1st Dept 1993]). Whether a party was negligent in a mistake case is an issue of fact (see Broadway-111th St. Assocs. v Morris, 160 AD2d 182, supra). Here, substantial fact disputes exist regarding whether Piper used ordinary care in its purchase from Nationwide, i.e., whether Piper was entitled to rely on Nationwide's representations over the telephone concerning the amount being sold.

Evidence of actions taken in accordance with industry custom may establish due care (see Trimarco v Klein, 56 NY2d 98 [1982]). Many of the fact and expert witnesses in this case agree that sales of securities are conducted on the basis of the seller's representation of the amount of a given type of security the seller owns (see Pellicci Dep., at 81 ["The normal course of how we do it ... would be if you're the owner and you're going to sell these, you would tell me what you own, and then as the broker-dealer I would go out and find you a buyer"]; Tarnow Dep., at 54 ["the normal protocol in the space in that trading sector is that they represent something as fact and you accept it"]; Guild Dep., at 397 ["it is industry custom and practice for the buyer to accept (the seller's representations as to what they are selling) as truthful and complete"]; Borg Brenner Dep., at 82-83, 138 [a purchaser is entitled to rely on the

representations of the seller as to the amount of securities being sold]). Thus, the record provides factual support for Piper's claim that it acted reasonably and consistently with industry expectations of due care by relying on Nationwide's representations as to the value of the Certificates.

Finally, Nationwide argues that Piper is not entitled to rescission because it did not promptly disaffirm the transaction, and move for rescission, but instead, went on to subsequently trade the Certificates with Dalton and with Lehman, before realizing any problem. Nationwide's argument, however, is flatly contradicted by the authorities it cites in its brief (see Wachovia Securities, Inc. v Joseph, 14 Misc 3d 1228[A], 2007 NY Slip Op 50206[U] [Sup Ct, NY County 2007], *5 ["it is beyond cavil that an action for rescission of a sale must be brought promptly after discovery of the fraud"]). That is precisely what Piper did in this action.

Accordingly, Nationwide's motion to dismiss Piper's cause of action for rescission is denied.

3. **Breach of the UCC Transfer Warranties**

Section 8-108 (a) of the New York Uniform Commercial Code governs the transfer of certificated securities, and provides that: "A person who transfers a certificated security to a purchaser for value warrants to the purchaser ... that:

* * *

(2) the transferor or indorser does not know of any fact that might impair the validity of the security; (3) there is no adverse claim to the security; (4) the transfer does not violate any restriction on transfer; ... and (6) the transfer is otherwise effective and rightful.

If the transfer is by endorsement, these warranties extend to any subsequent purchaser (id.).

Here, Nationwide transferred the Certificates to Piper for value, and by endorsement, by conveying bond powers to Piper to be provided to Dalton.

Nationwide argues, without any citation, that because the trustee paid Lehman some amount for the securities, there can be no breach of any UCC warranties made on transfer. The warranties made on transfer convey on their face, however, much more than the mere assurance that a purchaser might get something. The warranty of validity is breached when a seller is on notice of possible fraud and, nevertheless, proceeds with the transaction (see Morgan Guar. Trust Co. of N.Y. v New England Merchants Natl. Bank, 438 F Supp 97 [D Mass 1977]). The warranties of genuineness, and effective and rightful transfer are breached where the securities convey materially less than represented (see Manufacturers Hanover Trust Co. v Stiller, 1970 WL 12571 [Civ Ct, NY County 1970] [transfers of certificate that stated 1,000 shares on its face but in reality represented only 200 shares due to restructuring, breached warranty of genuineness]).

Because material issues of fact exist regarding Nationwide's alleged fraud, there remains a triable issue concerning the breach of the warranty of validity, as well as of effective and "rightful" transfer. Likewise, Nationwide's transfer of the Certificates pursuant to confirmations stating that they represented \$9.3 million face, and its provision of 11 separate bond powers for the sale of \$853,487.80 each in connection with the re-registration to Dalton, raises issues of fact as to whether Nationwide breached the warranties of genuineness, effective and rightful transfer, and lack of awareness of facts that might bear on the validity of the security. Thus, Nationwide is not entitled to summary judgment on this cause of action.

4. Negligent misrepresentation

Nationwide attacks Piper's negligent misrepresentation claim on the ground that Piper and Nationwide had no "special relationship." However, as this court already noted in denying Nationwide's motion to dismiss on the same ground, "contrary to Nationwide's contentions, a 'special relationship' can exist between parties in a general buyer-seller relationship" (9/12/06 Decision and Order Denying Nationwide Motion to Dismiss, at 7, citing Berkshire Fashions, Inc. v F.W. Woolworth Co., 256 AD2d 246 [1st Dept 1998] [special relationship existed between an umbrella manufacturer and Woolworth's department store]; Kimmell v Schaefer, 224 AD2d 217 [1st Dept], affd 89 NY2d 257 [1996] [defendant, the director of a company which the plaintiff purchased, was in a special relationship for the purposes of negligent misrepresentation]). Accordingly, Nationwide's motion to dismiss the negligent misrepresentation claim is denied.

5. Unjust Enrichment

Piper brings its cause of action for unjust enrichment as an alternative to breach of contract in the event that this court rescinds the October 2004 agreement. Nationwide argues that if Piper's claim for rescission is dismissed, the cause of action for unjust enrichment must also be dismissed. Because the rescission claim is not being dismissed, Nationwide's motion for summary judgment dismissing the unjust enrichment claim is denied.

6. Implied Indemnity

Nationwide contends that Piper cannot be indemnified by Nationwide for damages resulting from the sale of the same securities to Lehman because any liability to Lehman was "Piper's own fault" (Nationwide Mem., at 32). However, as set forth above, triable issues of fact exist concerning any claimed "negligence" or "wrongdoing" in Piper's having

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accepted the Certificates from Nationwide, and Nationwide's motion to dismiss this cause of action is denied.

Accordingly, Nationwide's motion for summary judgment dismissing the third-party complaint is denied.

D. Piper's Cross Motion for Summary Judgment

Piper cross-moves for recovery of certain monies that it claims to have overpaid to both Dalton and Nationwide. Piper's cross motion for summary judgment is denied.

Pursuant to the parties' stipulation, which was "so ordered" by this court, all motions for summary judgment, or any other dispositive motions, were to be filed on or before November 16, 2007 (see 11/1/07 Stipulation, at 1). In addition, and before the November 16, 2007 deadline, Piper's counsel orally advised Dalton's counsel that Piper would not be filing a motion for summary judgment against Dalton. Despite the deadline and counsel's representation, on December 17, 2007, Piper filed separate motions for partial summary judgment, styled as cross motions, against both Dalton and Nationwide.

This court unambiguously set a date after which no summary judgment motions may be made (see CPLR 3212 [a]). Piper never sought relief from the court-imposed deadline, and offers no justification for its failure to have moved for summary judgment by November 16, 2007. Thus, Piper's cross motion for partial summary judgment must be denied as untimely (see Rahman y Domber, 45 AD3d 497 [1st Dept 2007] [finding lower court erred in reaching merits of summary judgment motion where motion served 21 days after dispositive motion deadline delineated in scheduling order, and no good cause proffered for delay]).

In any event, Piper's third-party complaints against Dalton and Nationwide make

no mention of any “mistaken overpayment” claim as a basis for any recovery or otherwise.

Because Piper’s third-party complaints fail to contain an actual claim that supports – or would permit – the requested summary relief, Piper’s cross motion based on a “mistaken overpayment” theory must be denied.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment (Motion Sequence No. 003) is granted as to liability only; and it is further

ORDERED that the motion of third-party defendant Dalton Investments LLC for summary judgment (Motion Sequence No. 002) is denied; and it is further

ORDERED that the motion of third-party defendant Nationwide Life Insurance Company of America (Motion Sequence No. 004) is denied; and it is further

ORDERED that the cross motion of defendant/third-party plaintiff Piper Jaffray & Co. (Motion Sequence No. 002) is denied; and it is further

ORDERED that the cross motion of defendant/third-party plaintiff Piper Jaffray & Co. (Motion Sequence No. 004) is denied; and it is further

ORDERED that the issue of the total amount of damages to which plaintiff is entitled is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet² upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date.

Dated: May 20, 2008

ENTER:



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

FILED
MAY 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

²Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.