SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39
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SLAM BRANDS, INC.,

Plaintiff,

Index No.: 653444/2011
Motion Seq. 005 & 006

-against-

DECISION AND ORDER

WELLS FARGO TRADE CAPITAL SERVICES, INC., d/b/a WELLS FARGO TRADE CAPITAL, INC. f/k/a WELLS FARGO CENTURY, INC.,

Defendant.
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HON. SALIANN SCARPULLA, J.:

In this commercial action, defendant Wells Fargo Trade Capital Services, Inc. ("Wells Fargo") moves for summary judgment as to all claims in the complaint, all claims asserted by Wells Fargo in its counterclaim in this action and all claims asserted by Wells Fargo in its complaint for declaratory judgment, in an action entitled *Wells Fargo Trade Capital Services, Inc. v Slam Brands Inc.*, bearing the index no. 652709/2012, in Supreme Court, New York County (motion sequence 005).[1] Plaintiff Slam Brands, Inc. ("Slam Brands") moves for summary judgment on its causes of action for breach of the factoring agreement, promissory estoppel and unjust enrichment against Wells Fargo (motion sequence 006). These motions have been consolidated for disposition.

[1]By decision dated November 7, 2012, the court consolidated the action bearing Index No. 652709/2012 with this action for joint disposition.

Slam Brands is a wholesale distribution company that sells goods to national retail chains. Wells Fargo offers factoring and trade financing for mid-sized companies that serve retail marketplaces. In 2005, the parties entered into a factoring agreement ("Agreement") and, according to the Agreement, Slam Brands assigned all of its accounts receivable to Wells Fargo. As per the Agreement, Slam Brands and Wells Fargo agreed that Wells Fargo would accept the risk of nonpayment of invoices by particular customers on Slam Brands' sales. According to the parties' submissions, Slam Brands' assignment of a receivable to Wells Fargo, and the acceptance of such assignment by Wells Fargo, did not mean that Wells Fargo accepted the risk of non-payment in the event Slam Brands' customers failed to pay on an invoice. At the crux of this dispute is the process by which Wells Fargo would consent to accepting that risk.

On these motions, the parties ask this court to determine which party, Slam Brands, as client, or Wells Fargo, as factor, bore the risk of loss when Circuit City, one of Slam Brands' customers, declared bankruptcy in November 2008 and left over one million dollars in unpaid receivables for goods purchased from Slam Brands in 2008. In support of their motions, both parties rely upon the language in section 1.2 of the Agreement, which mandates that if Wells Fargo agreed to make a guarantee, it had to be in writing, and could take the form of either: (1) establishing a credit line limited to a specific amount for a specific customer for a specific duration; or (2) approving all, or a portion of, a purchase order submitted by Slam Brands.

Section 1.2 of the Agreement provides:

> "Written Credit Approval. Client shall submit to Factor the principal terms of each customers' orders for written credit approval. Factor may, in its discretion, approve in writing all or a portion of Client's customers' orders either by establishing a credit line limited to a specific amount for a specific customer, or by approving all or a portion of a proposed purchase order submitted by Client ("Approved Receivables"). No credit approval shall be effective unless in writing and unless the goods are shipped or the services rendered within the time specified in the written credit approval or within 30 days after the approval is given, if no time is specified. No written credit approval or terms of sale shall be changed without Factor's written approval ..."

In August 2006, Wells Fargo provided a client service guide to Slam Brands, which explained how Slam Brands could request that Wells Fargo "'guarantee' payment of invoices to Slam Brands' customers ... by requesting approval of customer orders either by phone, fax, or online." The client service guide also provided that Slam Brands "could initiate that process" by submitting a "Customer Credit Request" form, and an example of that form was annexed to the guide. According to Wells Fargo, its written acceptance or denial of a request by Slam Brands that Wells Fargo accept the risk of nonpayment by a Slam Brands customer required the use of a notification of credit form. An example of this form is attached to the client service guide, yet there is no language in the client guide mandating its use.

Wells Fargo provided a notification of credit form to Slam Brands to accept the risk of nonpayment for sales to Circuit City on two occasions. On December 6, 2005, Wells Fargo provided Slam Brands with a notification of credit approval form, accepting

the risk of nonpayment for sales to Circuit City of up to $250,000 through May 31, 2006. In 2007, Wells Fargo provided Slam Brands with another notification of credit approval form, accepting the risk for Circuit City nonpayment in the amount of two million dollars, which expired on December 31, 2007. According to Wells Fargo, Slam Brands did not make a request that Wells Fargo continue to accept this risk after December 31, 2007.

In April 2007, the parties executed an amendment to the Agreement, which included an amendment of section 4.1, concerning the factoring commission paid to Wells Fargo by Slam Brands. The amended section states:

> "[f]or its services hereunder, (a) Factor shall receive a commission equal to 0.65% of the gross amount of Receivables ... Notwithstanding anything to the contrary in this Agreement, with respect to each of Target, Wal-Mart and Costco and such other customers of client that Factor agrees to from time to time in writing, each Receivable due and payable by such customer shall not be or become an Approved Receivable, shall be with full recourse to Client and the commission payable to Factor shall be equal to 0.25% of the gross amount of such Receivable."

Following this amendment, Slam Brands paid Wells Fargo a factoring commission of 0.25% for Target, Wal-Mart and Costco, and a factoring commission equal to 0.65% for the Circuit City receivables.

Subsequently, on July 24, 2008, Kevin Sullivan, an Executive Vice President of Wells Fargo, sent an email to Jason Lemelson, of Slam Brands, proposing changes to the Agreement. In that email, Sullivan wrote: "on those accounts on which WFTC accepts credit risk reduce commission from .65 to .60. Client risk remains at .25... ." From July 2008 through October 2008, Wells Fargo charged Slam Brands a 0.65% factoring

commission for the Circuit City receivables. Sullivan testified at his deposition that this commission rate of 0.65% did not mean that Wells Fargo automatically accepted the risk for the Circuit City account, and that it was still necessary for Slam Brands to obtain a credit approval on those accounts.

Sullivan, in an internal Wells Fargo email to Christopher L. Rogers, a Wells Fargo executive ("Rogers"), dated July 16, 2008, seemed to suggest that Wells Fargo had extended a credit line to Slam Brands for Circuit City in 2008. The email states in relevant part:

> "On the customer credit side, [Lemelson] wants to be sure that we give him sufficient lead time if we decide to pull the line on Circuit City. He can write as much business with them as he wants and would pay more for credit coverage if need be, but doesn't want to accept the risk on his own."

In April 2008, Wells Fargo prepared a written credit modification request ("CMR") for Slam Brands, which covered the period from March 31, 2008 to December 31, 2008. A CMR is an internal Wells Fargo document to approve credit lines for its clients, which contains "an outline of the borrowing request being made." During his deposition, Rogers testified that the CMR is created when a client requests a credit line, "which would cause us to fill out the credit modification request for approval." The CMR is always in writing and made after the client request.

Wells Fargo employee Earl Wooten prepared the April 2008 CMR and an April 2008 memo that was attached to the CMR states: "The account debtor exposure of Circuit City is currently $858M. We have received approval from the customer credit department

of a $1MM limit to accommodate Circuit City. Ken Newberger [a Wells Fargo employee] reviewed the customer outstanding A/R and noted that the account was satisfactory."

Wells Fargo prepared another document for the client, Slam Brands, entitled "Client Review/Customer Credit," in April 2008, which states: "Total Outstanding A/R as of April 15, 2008: $1,919,554." The document indicates, under the heading "concentrations," "44% Target Stores, 43% Circuit City" and under "comments," the document reads: "[s]atisfactory customer base, All were credit approved." In its memorandum of law, Well Fargo offers an explanation of A/R approval, as distinct from A/R assignment: "One component in factoring is A/R Assignment, whereby a client assigns its accounts receivable to a factor, which is distinct from, and takes place after, A/R Approval, whereby the factor considers and responds to a request by a client to accept the risk of non-payment by a customer."

According to the deposition testimony of Jason Lemelson, the President of Slam Brands, Wells Fargo issued a "Daily Aged Trial Balance" on October 3, 2008 that indicated there was a credit line for Circuit City that was subsequently not included on the "Daily Aged Trial Balance" of October 6, 2008. Regarding this change in the credit line, on October 29, 2008, Slam Brands sent a "letter of objection" to Wells Fargo. In the letter, Lemelson writes: "[t]he October 6, 2008 Daily Aged Trial Balance, however, curiously omits and deletes any reference to the Circuit City Receivables and excludes the

Circuit City Receivables from all calculations." The letter further states that the omission of the Circuit City receivables is "inconsistent" with the terms of the Factoring Agreement and its administration over three years.

In his affidavit on this motion, Lemelson avers that:

> "in early October 2008, Wells Fargo suddenly, and without notice, refused to accept the credit risk associated with Slam Brands' Circuit City accounts receivables based upon a contrived technicality (Notification of Credit Approval). On October 3, 2008, Wells Fargo's Client Status report, containing the Circuit City account receivables at dispute, listed "client risk" at zero. On October 6, 2008, Wells Fargo unilaterally re-classified the Circuit City account receivables from unallocated risk to "client risk" - an unprecedented accounting procedure. In the almost four-year relationship there had never been a re-classification of accounts receivables nor any attempt to alter the classification of receivables after acceptance of customer receivables.
>
> Almost immediately thereafter, on October 29, 2008, I sent Wells Fargo an official objection letter (Objection Letter) that outlined the specific reasons why Wells Fargo's unilateral refusal to accept the credit risk associated with Slam Brands' Circuit City accounts receivables was improper and in violation of the Factoring Agreement."

In November 2008, when Circuit City declared bankruptcy, there was $1,137,813.12 in unpaid receivables for Circuit City. Slam Brands and Wells Fargo disputed who was liable for those Circuit City receivables. At the end of July 2012, Wells Fargo received a distribution of $113,781.32 from the Circuit City Stores, Inc. Liquidating Trust. Pursuant to this Court's November 7, 2012 order, Wells Fargo deposited this distribution with the Clerk of Court, pending final adjudication of this matter.

In December 2008, pursuant to section 2.2 of the Agreement, Wells Fargo charged Slam Brands' account for the unpaid Circuit City receivables, and this "chargeback," in the amount of $1,769,858.93 was reflected by Wells Fargo on the December 2008 account statement it provided to Slam Brands. Both section 4.4 of the Agreement, and the account statement itself, required Slam Brands to raise any disputes regarding the statement in writing within 30 days. Slam Brands did not issue a dispute within 30 days of this statement.

Section 4.4 of the Agreement provides, in part:

> "4.4 Monthly Statement and Calculation of Interest. Factor will send Client a monthly account current as of the end of each month. Unless Factor receives a written objection to any account current rendered by Factor within thirty (30) days after the mailing of such account current, it shall be deemed accepted by Client and shall become conclusive and binding upon Client..."

The December 2008 account statement states: "THIS STATEMENT OF ACCOUNT SHALL BE DEEMED FINAL AND BINDING UPON YOU UNLESS WRITTEN NOTICE OF CORRECTION IS RECEIVED BY US WITHIN THIRTY (30) DAYS."

In March 2011, Whalen Manufacturing Inc. ("Whalen") purchased select assets of Slam Brands. On or about March 4, 2011, Whalen, Slam Brands, and Wells Fargo entered into a payment and indemnity agreement ("Payoff Letter"). The terms of the agreement are set forth in a letter addressed to Wells Fargo from Whalen and state, in part:

> "[Wells Fargo] confirm[s] that, other than the amounts to be paid to you pursuant to Paragraph 2, there is no other amount for borrowed money due and owing to you by [Slam Brands] and that no additional amounts may be borrowed by [Slam Brands] from you
>
> ...
>
> "[Wells Fargo] confirm[s] and agree[s] that upon receipt of payment in full of all sums due to you pursuant to Paragraph 1, you shall have no further claims against [Slam Brands] or their assets or us with the exception that you may continue to have recourse only against [Slam Brands] under the Factoring Agreement with respect to the Excluded Receivables, or as set forth in this Payment and Indemnity Agreement"

Wells Fargo now moves for summary judgment on the grounds that: (1) Wells Fargo did not agree to guarantee the Circuit City receivables; (2) Slam Brands waived any rights to Wells Fargo's liability; (3) Slam Brands failed to establish a cause of action for promissory estoppel, a breach of the duty of good faith and fair dealing, unjust enrichment and a violation of New York General Business Law § 349; (4) Wells Fargo is entitled to recover its attorneys' fees and costs; (5) Wells Fargo is entitled to offset the Circuit City Bankruptcy distribution against Slam Brands' indebtedness.

Slam Brands moves for summary judgment on its breach of contract, promissory estoppel, and unjust enrichment claims.

Discussion

Summary judgment is a drastic remedy and should be granted only if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012),

citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Regardless of the sufficiency of the opposing papers, the "[f]ailure to make such showing requires denial of the motion." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Wells Fargo argues that it is not liable to Slam Brands, because it did not guarantee in writing the Circuit City receivables for Slam Brands in 2008, as per the Agreement, section 1.2. Wells Fargo argues that it guaranteed Circuit City receivables until the notification of credit expired on December 31, 2007, and there was no further request from Slam Brands that Wells Fargo continue to accept the risk of nonpayment on Slam Brands' sales to Circuit City. According to Wells Fargo, the notification of credit form was the only means by which Wells Fargo extended this type of approval and this was made clear on the two occasions that it was issued by Wells Fargo to Slam Brands for Circuit City receivables, and by the language of the Agreement and the client service guide.

Wells Fargo further argues that, as a factor, it provides several services to its client. In addition to collecting receivables from its clients' customers and assuming the risk that a client's customer may fail to pay for its purchases, Wells Fargo provides

advances or loans to a client based upon the value of the client's assets. To determine the total amount which Wells Fargo will consider advancing to a client, Wells Fargo uses the CMR. The CMR "contains an outline of the borrowing request being made by the client, the client's financial information and a description of the lending relationship and terms."

Wells Fargo argues that Slam Brands cannot rely on the CMR as written proof of Wells Fargo's acceptance of risk of sales for Circuit City receivables. According to Wells Fargo, the CMR is not requested by the client, but is an internal form generated by Wells Fargo when a client requests a change to their "overall line of credit for advances from Wells Fargo ... even if it contains references to the financial strength of a particular customer of the client, [it] does not constitute written acceptance of the risk of non-payment for the client's sales to that particular customer because it is not provided to the client." Moreover, Wells Fargo argues that Slam Brands cannot rely on the internal Wells Fargo documents, because they were not seen by Slam Brands at the relevant time, and, therefore, could not have constituted notice of approval, and Slam Brands could not have relied upon them.

Further, Wells Fargo contends that the amount of its commission fee did not have any relation to the allocation of risk, because:

> "(1) the contractual mechanism for Wells Fargo to accept such risk in accordance with Section 1.2 of the Factoring Agreement was to either provide a Notification of Credit Approval or written confirmation of an individual order approval; (2) commissions were not applied until after the sale; and (3) Lemelson conceded the Factoring Agreement did not provide that all .65% receivables were non-recourse."

Wells Fargo argues that the factoring commission rate was .65% whether or not the invoices were recourse or nonrecourse. "An exception to that rate was for Slam Brands' sales to Target, Wal-Mart and Costco, which were factored at .25%. This rate was lower than the standard rate of .65% because Wells Fargo's collection staff did not typically have to expend much effort to collect receivables from Target, Wal-Mart and Costco, but it was not an allocation of risk of non-payment between Slam Brands and Wells Fargo."

Finally, Wells Fargo argues that Slam Brands' failure to timely object to the chargeback that appeared in the December 2008 account statement now acts as a waiver against Slam Brands' claims. According to Wells Fargo, not only did Slam Brands not timely dispute the December 2008 account statement, but it continued its factoring relationship with Wells Fargo. Both section 4.4 of the Agreement, and the statement itself required Slam Brands to notify Wells Fargo of any disputes regarding the statement in writing within 30 days. Moreover, Wells Fargo argues that Slam Brands October 29, 2008 objection cannot satisfy this requirement, because it was made prior to the December 2008 chargeback and in response to the October 6, 2008 daily aged trial balance. Wells Fargo argues that in the October 6th entry it did not re-classify Circuit City as client risk, as Slam Brands argues, because those sales were already made, and that, instead, the designation represented eligibility for lending to the client, and not customer credit approval.

In opposition, and in support of its own motion, Slam Brands argues that Section 1.2 of the Agreement states there must be written approval, but it does not say that writing must be a "notification of credit approval." In fact, Slam Brands argues, the Agreement does not mandate how Slam Brands was supposed to make the requests for credit approval, nor does it say how Wells Fargo was to notify Slam Brands of its credit approval. Instead, the Agreement states, in section 1.2, that there are two methods of providing approval for Slam Brands' customer credit line, and those are: (1) establishing a credit line limited to a specific amount for a specific customer; or (2) approving all or a portion of a proposed purchase order submitted by Client (Purchase Order Approval).

According to Slam Brands, the conditions set forth in section 1.2 of the Agreement were satisfied for this account, in that Wells Fargo extended credit approval when it generated a written credit request, the CMR. According to Lemelson, "Wells Fargo regularly provided me with oral confirmation of credit approval that was then confirmed in writing on Wells Fargo's online system."

In his affidavit in support of Slam Brands' motion, Lemelson avers that the "actual" credit approval process used by Slam Brands and Wells Fargo was consistent with section 1.2 of the Agreement and operated as follows:

> "Slam Brands employees, including myself, and Wells Fargo's employees, communicated in-person, via email and via telephone on a weekly basis. These communications typically involved discussions concerning Slam Brands' accounts receivables generally, and more specifically, Slam Brands' financial projections for customer accounts receivable, credit requirements, as well as cash flow, among other things. During these

> communications, Wells Fargo's employees provided Slam Brands confirmation that Wells Fargo had either approved or declined Slam Brands' overall and customer-specific credit needs. In addition, Wells Fargo's inclusion of the factored accounts receivables into Wells Fargo's online reporting system, and subsequently the aged trial balances and client status report constituted approval in writing due to how the factored receivables were classified and what commission was charged ... ."

With respect to the 2008 CMR, Lemelson states:

> "I was personally informed of Wells Fargo's decision with respect to the April 2008 CMR verbally via the telephone. Indeed, in April 2008, I had a lengthy discussion with Christopher Rogers and Eric Ackman wherein they represented that Wells Fargo has increased Slam Brands[']overall credit line from $7.5 million to $10.0 million, and had approved a Circuit City credit line in the amount of $1,000,000."

According to Slam Brands, "[f]rom August 29, 2008 through September 25, 2008, Wells Fargo accepted the assignment of thirteen (13) commercial invoices for the Circuit City receivables totaling $1,137,813. These 13 Circuit City receivables were initially deemed non-client risk or nonrecourse (no recourse to the client) receivables, but then unilaterally re-classified them to client risk by Wells Fargo on October 6, 2008."

Slam Brands further argues that it paid Wells Fargo a commission, the amount of which correlated with the risk associated with the underlying receivable. According to Slam Brands, "[t]he parties understood that the different factoring commissions related to the allocation of risk, and this notion was reflected in an email communication between Mr. Sullivan and Mr. Lemelson." The July 24, 2008 email states "on those accounts on

which WFTC accepts credit risk reduce commission from .65 to .60. Client risk to remain at .25."

To further establish that Wells Fargo maintained a customer credit line for Circuit City in July 2008, Slam Brands relies on another July 2008 Sullivan email that was written after Sullivan and other Wells Fargo representatives met with Lemelson, concerning their factoring relationship. The email states, in part: "[o]n the customer credit side, he [Jason Lemelson] wants to be sure that we give him sufficient lead time if we decide to pull the line on Circuit City."

Finally, Slam Brands opposes Wells Fargo's motion on the ground that it did make a timely objection to the December 2008 chargeback, when Slam Brands sent the October 29, 2008 email, with the caption: "Slam Brands Objection Letter." Although sent prior to the December 2008 "chargeback" entry in the account statement, the email challenges the precise subject matter represented by the chargeback: Wells Fargo's failure to guarantee the 2008 Circuit City receivables. The October 29th email states in part: "[a]s discussed, attached please find an official objection letter and supporting documentation regarding WFTC's handling of the Circuit City receivables in early October. I was very surprised to see receivables previously on the trial balance removed retroactively and feel this is outside of the terms of our agreement."

The court finds that the parties' submissions raise questions of fact that cannot be resolved on a summary judgment motion, and therefore the parties' motions must be denied. Although Wells Fargo relies upon the language in the Agreement, section 1.2, to support the premise that the credit approval must be in writing by Wells Fargo, it has not established that there is any written or verbal requirement that the "notification of credit approval" document is the sole writing qualified to provide this approval. The court notes that Wells Fargo argues that its inclusion in the client service guide suggests that it was clear to Slam Brands that this form was the only means by which Wells Fargo would approve credit, and that Wells Fargo has provided testimony to this effect, and evidence of two instances in which the notification form was used by Wells Fargo to approve credit. However, the Agreement does not contain that language, nor does the Wells Fargo client service guide mandate use of these forms.

Section 2.1 of the Agreement states that Wells Fargo may approve this credit in writing by two means, and one of those is: "establishing a credit line limited to a specific amount for a specific customer ..." Thus, the language of the Agreement appears consistent with Slam Brands' argument as well. Slam Brands argues that Wells Fargo would establish credit lines by memorializing verbal directions through these other documents. This process appears to satisfy the requirements under the Agreement, in that it relies upon writings that pertain to credit lines for Circuit City for specific amounts. For example, the April 2008 Wells Fargo memorandum to the CMR states that the

approval from the customer credit department increased the monetary limit to "accommodate Circuit City," from "$858M" to "$1MM," and the Client Review/Customer Credit document reveals "total outstanding A/R as of April 15, 2008: $1,919,554" with a 43% concentration for Circuit City. Although Wells Fargo disputes the significance of these documents and their place in the factoring relationship between the parties, it is not for the court to resolve those differences on this motion.

This is likewise true with respect to the parties' dispute over the significance of the disparity in the commission fees. That Slam Brands paid the higher rate for the Circuit City receivables does not alone permit a finding that Wells Fargo bore the risk for this account. And yet, a finding as to which explanation of the commission fees is more believable is appropriate at trial, in order to support the ultimate findings on Slam Brands' claims.

Finally, this court cannot find that Slam Brands' failure to issue a dispute within 30 days of the December 2008 chargeback waived its claims. This chargeback was based upon discussions between the parties going back to July 2008. Both the December chargeback and the October account statement concern the same issue: Wells Fargo's "handling" of the Circuit City receivables. Presumably, Slam Brands' reaction to the December chargeback was identical to that for the October 6th account statement. These circumstances raise a question as to whether Slam Brands believed it had already objected to the December chargeback in its letter disputing the October 6th account entry. Thus,

Slam Brands' October 29, 2008 objection letter, pursuant to section 4.4 of the Agreement, may arguably suffice. At a minimum, this court may not dismiss this case where there exists a question of fact regarding the timing of the objection, and whether it is a sufficient objection under section 4.4 of the Agreement. Wells Fargo further argues that, pursuant to the language in the Payoff Letter, Slam Brands waived its claims against Wells Fargo regarding the Circuit City accounts. Specifically, Wells Fargo argues that "[t]he Payoff Letter also indicated that as of the payoff date there would be no debt owed by Slam Brands to Wells Fargo or Wells Fargo to Slam Brands and that any outstanding receivables would be with full recourse to Slam Brands...'." Yet, Wells Fargo does not offer language from the Payoff Letter that conveys this meaning. As set forth above, there is language in the Payoff Letter to the effect that Wells Fargo has no further claims against Slam Brands and that, as of the date of the agreement, there are no more monies owed by Slam Brands to Wells Fargo. Because there does not appear to be language in the letter supporting the interpretation by Wells Fargo, the court does not find that by signing the Payoff Letter, Slam Brands waived it claims, and therefore denies this portion of Wells Fargo's motion.

Wells Fargo also contends that Slam Brands' claim for promissory estoppel fails, because it is duplicative of its breach of contract claim. According to Wells Fargo, Slam Brands cannot allege any duty owed to it by Wells Fargo that is independent of those set forth in the Agreement.

In the complaint, Slam Brands alleges, as its second cause of action, promissory estoppel based upon Wells Fargo's promise to assume "the risk associated with all Non-recourse Approved Client Receivables." Slam Brands alleges that it relied upon this promise, and did not take any further action to protect its pecuniary interest in the Circuit City receivables to its detriment.

At the heart of this claim is Wells Fargo's alleged duty under the contract to guarantee credit for Slam Brands' customers when the contractual conditions have been met. Slam Brands is not alleging a duty independent of the Agreement and therefore this claim fails as duplicative of the breach of contract claim. *See Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D.3d 614, 615 (1st Dept 2009).

Slam Brands has likewise failed to establish a cause of action for unjust enrichment, the fourth cause of action. A plaintiff may seek relief under the doctrine of unjust enrichment only where there is no agreement between the parties governing the particular subject matter. *IDT Corp. v. Morgan Stanley Dean Witter & Co.* 12 N.Y.3d 132, 142 (2009). Here, the claims all arise from the written Agreement governing the parties' relationship.

Similarly, this court dismisses Slam Brands' claim for the breach of the duty of good faith and fair dealing. To support this claim, Slam Brands alleges again that Wells Fargo breached its duty to Slam Brands when it failed to pay for the Circuit City receivables, despite its obligations under the Agreement. Because this cause of action

arises from the same set of facts as Slam Brands' breach of contract claim, it is duplicative of that claim, and is dismissed. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 297 [1st Dept 2011]; *Engelhard Corp. v. Research Corp.*, 268 A.D.2d 358, 358-359 (1st Dept 2000).

Further, this court dismisses the fifth cause of action, the alleged violation of New York General Business Law § 349. Slam Brands alleges that Wells Fargo's breach of the Agreement, by refusing to recognize the Circuit City receivables as "a Non-Recourse Approved Client Receivable," was "misleading in a material way" and it was "directed at consumers."

A claim brought pursuant to New York General Business Law ("GBL") § 349 must be "'predicated on a deceptive act or practice that is consumer oriented'." *American Home Assur. Co. v. Port Auth. of N.Y. & N.J.*, 40 Misc.3d 1236(A), *4, 2013 NY Slip Op 51435(U) (Sup. Ct., NY County 2013), quoting *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d at 330, 344 (1999). GBL §349 only applies to "anticompetitive conduct that is premised on the deception of consumers." *State of New York v. Daicel Chem. Indus., Ltd.*, 42 A.D.3d 301, 303 (1st Dept 2007). Thus, to satisfy the requirements under the statute to bring such a claim, plaintiff must allege acts with "a broad impact on consumers at large" and not on "sophisticated entities." *American Home Assur. Co.*, 40 Misc.3d 1236(A) at *4 (internal quotations and citation omitted). Essentially, "'[p]rivate contract disputes, unique to the parties, for example would not fall within the ambit of the statute'." *Id.*

Because Slam Brands is a sophisticated commercial entity, and is complaining about conduct pursuant to a private contract between two business entities, it is not entitled to protection under this statute.

Further, Wells Fargo argues that Slam Brands cannot sustain its breach of contract claim, because it continued to enjoy the benefits of the Agreement, after the alleged breach in October 2008. Wells Fargo relies upon *In re Stillwater Capital Partners Inc. Litig.* (851 F.Supp 2d 556, 570 [S.D.N.Y. 2012]), for the proposition that "[a] party cannot elect to continue with the contract, continue to receive benefits from it, and thereafter bring an action for rescission or total breach (internal quotation marks omitted)." Here, however, Slam Brands has not brought a claim for rescission nor is it suing for breach of the entire contract. Rather, Slam Brands claims breach of the contract pertaining only to Wells Fargo's handling of the Circuit Receivables, about which it lodged an objection, and therefore the court denies Wells Fargo's motion on this ground. *See also El-Ad 250 W. LLC v. 30 Hubert St. LLC*, 67 A.D.3d 520, 521 (1st Dept 2009).

Wells Fargo also claims that it is entitled to payment of its attorneys fees and costs, pursuant to section 7.1 of the Agreement, and to offset the proceeds from the distribution of the proceeds from the Circuit City Bankruptcy proceedings. The court denies these portions of Wells Fargo's motion without prejudice to renewal at the conclusion of the proceedings.

In accordance with the foregoing, it is hereby

ORDERED that defendant Wells Fargo Trade Capital Services, Inc.'s motion for summary judgment is granted only to the extent that this court dismisses the second, third, fourth and fifth causes of action and the motion is otherwise denied; and it is further

ORDERED that plaintiff Slam Brands Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 7, 2014

ENTER:

J.S.C.
SALIANN SCARPULLA