

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

SEGUROS CARACAS DE LIBERTY, S.A.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 06-10035-WGY
)	
GOLDMAN, SACHS & CO.,)	
)	
Defendant.)	
)	
)	

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT GOLDMAN, SACHS & CO.’S
MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR
A NEW TRIAL**

Goldman, Sachs & Co. (“Goldman Sachs”) respectfully submits this Reply Memorandum in further support of its motion for judgment as a matter of law, or in the alternative for a new trial, to respond to erroneous factual and legal contentions in Liberty’s Opposition.

I. Liberty’s Invention of a Distinction Between a “Waiver” of Goldman Sachs’s Obligation to “Deliver” and the “Timing” of Delivery Misapplies the Doctrine of “Waiver”

To escape the undisputed law that a party may not waive a “material part of the agreed exchange for the performance of the duty,” RESTATEMENT (SECOND) OF CONTRACTS, § 84(1)(a) (1981); *see also* CORBIN ON CONTRACTS § 40.1 at 514 (rev. ed. 1999), Liberty conjures up a

purported distinction between Goldman Sachs's duty to "deliver" – which it *now* says it did *not* "waive" – and the "timing" of the delivery obligation – which it says it *did* excuse.

The newly minted contention that Liberty only "waived" a temporal condition to the delivery obligation is specious. In a securities transaction – where by definition what is to be delivered fluctuates in value – "timing is everything": Markets move. The ten agreements at issue in this litigation required Goldman Sachs to deliver VOOS to Liberty on specified "settlement dates." Delivery was the *only* obligation Goldman Sachs undertook under these agreements, and it was thus self-evidently a *material* term to the agreements. Delivery of VOOS of specific value "on the settlement dates" was the entire essence of Goldman Sachs' performance obligation. That "material term" cannot be divorced from the obligation as a whole, and thus was not waivable. RESTATEMENT (SECOND) OF CONTRACTS, § 84(1)(a) (1981). Otherwise, the "waiver" converts transactions calling for delivery of a fixed number of securities at a fixed price on a fixed date into a call option of unlimited duration, unilaterally exposing Goldman Sachs to unlimited market risk.

The notion that "delivery" and the "timing of delivery" are respectively "material terms" and mere "conditions" to performance is illusory. If Goldman Sachs was not bound to deliver VOOS on the settlement dates, what else was it obliged to do? If Liberty's "waiver" altered only the "timing" of what it bought, the *value* of what it purchased must also be unchanged. But Liberty insisted upon a *different* value, measured at the time it "withdrew" its unilateral "waiver." If altering the "time" for "delivery" doesn't change a "material term" of the contract when "delivery" was the *only* obligation Goldman Sachs undertook -- and the effect is to change the value of what was to be delivered altogether -- then the concept that "material terms" cannot be "waived" evaporates entirely.

Quite apart from Liberty's misapplication of law and logic, the evidence its Opposition points to could not have supported a reasonable conclusion by the jury that Liberty "clearly, unmistakably, and unequivocally" waived any rights whatsoever – whether of Goldman Sachs's obligation to "deliver" at all, or to "deliver" on some date Liberty chose after-the-fact. Liberty points to internal Goldman Sachs emails as evidence of waiver. *Pl. Opp.* at 6-8. But that glosses over the fact that only the words or conduct of Liberty can effect a waiver, and ignores that Liberty's words and conduct exhibited the obverse of waiver by *demanding* delivery, not deferring it. Likewise, Ms. Marsjanik's testimony that she and Mr. Yoo communicated a "policy" of requiring "assurances of ultimate delivery" cannot establish a "clear, unmistakable or unequivocal" "waiver" of delivery obligations for trades that did not take place until at least six months later. And Ms. Marsjanik's expedient assertion that her practice was to insist upon such "assurances" "whenever she placed trades with Goldman," *id.* at 6, would not permit a reasonable factfinder to conclude that such a communication was made on any *one* of the ten disputed transactions – not to mention the "vast majority" that were effected by Mr. Yoo. *See* May 11 Trial Tr. at 153. There is simply no evidence to support a finding consistent with the Court's instruction that the jurors must treat *each* transaction as a separate contract and that Liberty had the burden to prove waiver as to each of these transactions. *See* May 16 Trial Tr. at 67-68.

II. The Court Erroneously Responded to the Jury's Question Whether a "Waiver" Must Be "Explicit" and Goldman Sachs Properly Preserved Its Objection to the Court's Answer

Liberty does not even begin to argue that the Court's response: "No" to the jury's inquiry whether a "waiver" must be "explicit" was correct. Other than the cavalier quip that "[t]his case is [not] governed by Webster's New College Dictionary," *Pl. Opp.* at 14, Liberty makes no attempt to argue that the term "explicit" is *not* synonymous with the words "clear, unequivocal and

unmistakable” that it concedes establish the conditions for “waiver” as a matter of law. The point is that when it comes to words that have legal meaning, the dictionary *does* govern. As a matter of common English usage, the Court’s response “No” to the jury’s question effectively instructed that a “waiver” could be “*unclear, equivocal and mistakable.*”¹ There is no principled argument that the answer “No” was correct – and Liberty makes none.

Instead, Liberty flatly misrepresents the record to assert that Goldman Sachs did not properly preserve an objection to the Court’s erroneous response. That is simply false. When the Court advised the parties of its intent to respond “No” to the jury’s question, counsel for Goldman Sachs immediately took issue with the Court’s proposed response. Counsel specifically objected “that you did not intend to say it needed to be explicit.” May 16 Trial Tr. at 66. Counsel further invoked the definition of “waiver” previously used, meaning “manifest, [and] intentional.”² *Id.* The Court heard Goldman Sachs’ objection but rejected it and declined to engage in further discussion on the issue. *Id.* at 67. Although Goldman Sachs did not use the specific word “object,” it clearly interposed its disagreement with the proposed instruction. More is not required. “The word ‘objection’ does not have talismanic significance.” *United States v. Flores*, 968 F.2d 1366, 1369 (1st Cir. 1992). What is important is that counsel’s expression put the court on notice of an objection. *Id.* But there simply is no way to construe Goldman Sachs’s counsel’s challenge -- “that you did not intend to say it needed to be explicit” -- as either a failure to protest or an omission to alert the Court to the basis for Goldman Sachs’s opposition to the proposed response to the jury’s inquiry.

¹ Liberty’s fallback that the balance of the Court’s response – “but it must still be a waiver” – was sufficient to erase the problem makes no sense. The qualifier was tautological: it does not respond to an inquiry about the *meaning* of a “waiver” to *use* the word “waiver” in the answer. Words don’t define themselves.

² The record as to this last point clearly contains a slight error in transcription. The words “manifest and intentional” somehow were transcribed as “manifest, unintentional”; “*and*” became “*un.*” In context, of course, the word “unintentional” makes no sense.

If more proof were needed that Goldman Sachs made a timely objection, it was supplied in a brief dedicated to the issue – expressly contending that the response “No” contradicted prior instructions on the elements of “waiver” – filed the very next morning, and a full day *before* the jury resumed deliberating. The jury posed its question late in the afternoon of Wednesday, May 16, 2007, at 4:50 p.m. *See* May 16 Trial Tr. at 68. The Court gave its (erroneous) response, and immediately discharged the jury, *id.* at 73, instructing the jurors to return on Friday as previously arranged to resume their deliberations. Goldman Sachs filed its brief in the interim on Thursday, affording the Court ample opportunity to correct its error before the jury resumed deliberating – which, of course, is the whole point of an objection. *See* Docket # 86, May 17, 2007. But although the Court had both the time and the basis to issue the correction, it rejected the opportunity. That omission only exaggerated its error: the very last thing put into the jurors’ minds before their day off, and the very last thing they heard on the subject before resuming deliberations, was: “No,” a “waiver” did *not* need to be “explicit.” That was materially misleading because it was flatly inconsistent with the original instructions, and amounted to error as a matter of law.

With respect, Goldman Sachs could not have done more to alert the Court to the erroneous response; and it could not have done more to afford the Court the chance to correct the error. Liberty’s contention that there was not a sufficient objection is flatly wrong.³

³ Unable fairly to contend either that the response “No” was correct or that Goldman Sachs did not make a sufficient objection, Liberty makes the argument that Goldman Sachs somehow waived any objection to the *supplemental* instruction because it “never objected to the Court’s *initial* instruction to the jury on the ground that the jury had not been charged that Liberty’s waiver had to be ‘explicit.’” *Pl. Opp.* at 13. That argument is odd, indeed. Self-evidently, Goldman Sachs did not object to the initial instruction’s failure to insist that any “waiver” be “explicit” for the simple reason that the Court initially *did* instruct that any “waiver” must be “clear, unequivocal and unmistakable” – in other words: “explicit.” For the same reasons, Goldman Sachs did not object to the failure to use the words “unambiguous,” or “clear cut” or any other synonym for “clear, unequivocal and unmistakable.” The Court’s “failure to be redundant” is not a cognizable objection. An omission to *insist* upon every interchangeable word – the department of redundancy department (?) -- in no way amounts to a blanket waiver of any subsequent supplemental jury instruction saying that the *opposite* is true. A party is not required to anticipate potential questions from the jury and object to the initial jury instructions on the grounds that they fail to properly answer an unlimited range of hypothetical questions.

III. The Court Improperly Denied Goldman Sachs's Exercise of a Peremptory Challenge

To sustain a *Batson* challenge to the exercise of peremptory challenges to prospective jurors, the Court must conclude that “the objecting party has carried the ultimate burden of proving that the strike constituted purposeful discrimination on the basis of race.” *Richards v. Relentless, Inc.*, 341 F.3d 35, 44 (1st Cir. 2003). It is not enough to discredit a party’s asserted reasons; or even that a race-neutral explanation “rings hollow,” although those may be factors in the analysis. *Id.* Rather, “direct or circumstantial proof” of racial *animus* is required. *United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994). That obliges a party to “come forward with facts, not just numbers alone.” *Id.* Here, Liberty has not “come forward” with anything to “buttress the naked statistic” that *one* juror challenged by Goldman Sachs was black. *Id.* That sole “fact” accordingly does not even permit the inference – much less sustain the burden of proof – that Goldman Sachs’s challenge was racially motivated. *United States v. Vasquez-Lopez*, 22 F.3d 900 (3d Cir. 1994) (“The one fact supporting [the] *Batson* claim was the juror’s status as the sole Black prospective juror. More is required.”).

Liberty illogically leaps to the conclusion of racial *animus* from the assertion that the parties had limited information about the prospective jurors. According to Liberty, Goldman Sachs’ peremptory challenge of Mr. Desravines was “based entirely on speculation.” *Pl. Opp.* at 18–19. But the absence of detailed information may be precisely why a party opts to challenge a prospective juror; indeed, it is why challenges are labeled “peremptory.” A decision to challenge a juror for *any* reason – or even, with limited information, for *no* reason discernible beyond its “peremptory” nature – does not permit an inference of a *race-based* motivation. If Goldman Sachs’s decision to

Goldman Sachs did not waive its right to object when the Court gave a supplemental instruction that was improper as a matter of law, created confusion on a controlling issue of the case, and was prejudicial to Goldman Sachs.

challenge Mr. Desravines was “based entirely on speculation,” it must have been the “speculation” that he would not understand, or sympathize with, the arguments Goldman Sachs expected to make. But none of that logically has anything to do with his race. And if there is no logical inference amounting to proof that the decision was race-based, then the conclusion of purposeful discrimination that the Court was obliged to reach is untenable.

The flaw in Liberty’s logic is exposed by its own conduct. Liberty relied on equally “limited” information to strike three jurors with extensive academic credentials or backgrounds in subjects like accounting that were likely to come up during the trial, including a CPA, an accounting director, and a retired scientist. *See, e.g.*, May 7 Trial Tr. at 30–33. One could logically “speculate” that Liberty cynically sought to exclude from the jury veniremen who *would* understand Goldman Sachs’s arguments (including, for example, Liberty’s failure ever to record VOOS as an “asset” or otherwise reflect the VOOS trades on its books and records for four years). But indulging that “speculation” would not permit an inference that Liberty’s peremptory challenges were race-based – or predicated on religious belief, national origin, age, or any other protected classification. If it is no more logical that Liberty’s strikes “speculated” on the jurors’ reactions to the case than Goldman Sachs’s challenges, no inference of racially motivated decision making arises.⁴

Liberty’s only other contention is, if anything, even less logical. It professes to find “evidence” of a race-based motivation to strike a black (presumably Haitian-American) juror in Goldman Sachs’s separate decision to challenge a juror with a Hispanic surname – asserting that it

⁴ The limits of Liberty’s argument are stunning: if a party struck a juror with no relevant background, training or experience in the subject of the trial; or a juror whose employment or education did not suggest a ready understanding for the subject matter; or even a juror (like Mr. Desravines) who so lacked fluency in the English language that the court-reporter could not even understand what he said when he named his employer, an opponent could sustain a *Batson* objection to the exercise of a peremptory challenge of such a juror simply because of that juror’s race. With respect, that is neither the law nor sound policy.

somehow reflects a “pattern.” But a “pattern” of what? It cannot be a “pattern” of striking black veniremen; there was only one. It cannot be a “pattern” of striking Hispanics; others with Spanish names were seated or were in the venire. *See, e.g.*, May 7 Trial Tr. at 32. Simply put, a decision to strike a single juror does not reflect a “pattern” of anything. One could no sooner conclude that Liberty employed a “pattern” of discrimination against Russian-Americans from the fact that Liberty used a peremptory challenge against Mr. Anatoly Tretyakov, the only member of the panel with a traditional Russian name. *See* May 7 Trial Tr. at 35.

It is bad enough to be accused of racism; but it is worse for the label to be applied without foundation. The simple fact is that the Court questioned Goldman Sachs’s exercise of a peremptory challenge without adequate basis and had no reason for rejecting the accurate and race-neutral explanation made in response. The Court had no basis on which to conclude that Goldman Sachs’ challenge was motivated by racial discrimination or to reject the race-neutral explanation as a valid reason for keeping a person off of the jury. And Liberty has not supplied one now.

This Court’s oft-expressed passion for jury trials, its faith in the capacity of lay juries to resolve matters that parties delegate to them, and its deference to the rule of law that accords juries that power, is well documented. *See, e.g., Delavventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 152-56 & nn. 4, 6, 7 (D. Mass. 2006). But those values are undermined when the Court intrudes on the delicate assessments that the *parties* are entitled to make when they entrust their disputes to jurors – including the subtle judgments associated with choosing the jury’s composition. By injecting itself into the process of jury selection by raising the question of race – and then rejecting a peremptory challenge without a factual predicate for the required finding of racial *animus* – the Court acted both beyond its power and inconsistently with the principles of jury primacy it has so passionately espoused. And it repeated precisely what the First Circuit already held – on identical

facts – it could not do. *United States v. Serino*, 163 F.3d 91, 93 (1st Cir. 1998). Because the Court rejected Goldman Sachs’s challenge for reasons *other* than racial bias, Goldman Sachs is entitled to a new trial. *Id.*

Respectfully submitted,

Dated: July 9, 2007

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Memorandum in Support of Defendant Goldman, Sachs & Co.'s Motion for Judgment as a Matter of Law or, In the Alternative, for a New Trial was filed through the Court's CM/ECF system on July 9, 2007 and electronic copies will be served on counsel of record listed on the Notice of Electronic Filing. I am not at this time aware of any counsel upon whom paper copies must be served.

/s/ John D. Donovan, Jr.
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