

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION FOR JUDGMENT AS A
MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL**

Plaintiff, Seguros Caracas de Liberty Mutual, S.A. (“Seguros”), hereby opposes Defendant Goldman Sachs & Co.’s Motion for Judgment as a Matter of Law or, in the Alternative, For a New Trial.

BACKGROUND

This breach of contract case involves the sale of securities called Venezuelan Oil Obligations (“VOOs”). Those securities were sold by the defendant, Goldman Sachs & Co. (“Goldman”), to Seguros in twelve separate trades placed by Seguros in 2001. It was undisputed at trial that Goldman failed to deliver the VOOs purchased by Seguros in the last ten of those trades. Goldman admitted liability for breach. The sole issues submitted to the Jury were the date when each breach occurred and the value of a VOO on those dates. Goldman contended that the breaches occurred on the settlement dates for each trade, and that VOOs were worthless on each of those dates. Seguros contended that the breaches occurred on November 15, 2005, after it withdrew its waiver of Goldman’s failure to have made delivery of the securities within the time period required by the contract and upon Goldman’s refusal to comply with Seguros’ written buy-in demand.

The Jury returned its verdict on May 18. In response to the question “On what date was the contract for each of the disputed transactions breached?”, the jury answered “November 15, 2005.” The Jury found that the value of a VOO on that date was \$27. Goldman now moves for judgment as a matter of law notwithstanding the Jury’s verdict or, in the alternative, for a new trial.

ARGUMENT

A motion under Rule 50 for judgment as a matter of law following a jury verdict can be granted “only if the evidence, when taken in a light most favorable to the non-movant, is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome.” St. Paul Fire and Marine Ins. Co. v. Ellis & Ellis, 262 F.3d 53, 61 (1st Cir. 2001) (quotation and citation omitted); *see also* McDonough v. City of Quincy, 452 F.3d 8, 17 (1st Cir. 2006) (“review is weighted toward preservation of the jury’s verdict, for we must affirm unless the evidence was so strongly and overwhelmingly inconsistent with the verdict that no reasonable jury could have returned it.” (quotation and citation omitted)). “In carrying out this analysis the court may not take into account the credibility of witnesses, resolve evidentiary conflicts, nor ponder the weight of the evidence introduced at trial.” Figuroa-Torres v. Toledo-Davila, 232 F.3d 270, 273 (1st Cir. 2000) (quotation and citation omitted). In short, judgment as a matter of law notwithstanding a contrary jury verdict “is appropriate only where ‘there is a total lack of evidence in support of [the] plaintiff’s case.’” Astrolabe, Inc. v. Esoteric Techs., Pty, Ltd., 2002 WL 511520, at *2 (D. Mass. 2002) (*quoting* Censullo v. Brenka Video, Inc., 989 F.2d 40, 42 (1st Cir. 1993)). A motion for a new trial may be granted “only if ‘the verdict is against the clear weight of the evidence, such that letting it stand would result in a miscarriage of justice.’” Acevedo-Luis v. Pagán, 478 F.3d 35, 40 (1st Cir. 2007) (*quoting* Valentín-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 104 (1st Cir. 2006)).

Goldman has failed to carry its heavy burden of showing that it is entitled to either of these extraordinary remedies upon the record of the trial in this action.

I. GOLDMAN’S ARGUMENT THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE EVIDENCE PRESENTED AT TRIAL DOES NOT PERMIT THE JURY’S FINDING THAT SEGUROS HAD WAIVED THE TIME REQUIRED BY THE CONTRACTS FOR THE PERFORMANCE OF GOLDMAN’S DELIVERY OBLIGATION IS WITHOUT MERIT.

Goldman argues that it is entitled to judgment as a matter of law because (i) the time for performance of Goldman’s obligation to deliver the VOOs purchased by Seguros could not, as a matter of law, be the subject of a waiver, Memorandum of Law in Support of Defendant Goldman & Sachs Co.’s Motion for Judgment As a Matter of Law or, In the Alternative, for a New Trial (hereafter cited as “Defendant’s Mem.”), at 3-7; and (ii) even if it could, the evidence at trial was insufficient, as a matter of law, to permit the Jury to find that Seguros’ waiver of the time for Goldman’s performance of its delivery obligations was clear, unequivocal and unmistakable. *Id.* at 7-13. In support of the first of these arguments, Goldman cites no New York authority that holds, opines, intimates, or even hints that a purchaser may not waive a seller’s obligation to make delivery on the date specified in a contract. Nor does Goldman cite any authority from any other jurisdiction for this remarkable and novel proposition. Nor does Goldman cite any secondary authority that actually says any such thing.¹

¹ While Professor Corbin conceptualizes waiver as operating in the context of “conditions,” *Corbin on Contracts*, §40.1 at 515-516 (rev. ed. 1999), this conception of the doctrine, if limiting at all, would not limit its application in this case. *Id.* (“The vendor who merely states to the purchaser that payment in time will not be demanded thereby eliminates time as a condition.”). Under Professor Corbin’s model of the waiver doctrine, Goldman’s delivery of VOOs on the settlement date was a condition to Seguros’ performance of its obligation to pay. Professor Corbin would not limit Seguros’ ability to waive this condition (*i.e.*, the *timing* of Goldman’s delivery of VOOs) and the application of his “condition” model to the waiver in the case would change nothing apart from the vocabulary of the analysis. Similarly, Professor Farnsworth conceives of a waiver not as the relinquishment of a right, but as “the excuse of the nonoccurrence of *or a delay in the occurrence of* a condition of a duty.” A. Farnsworth, *Contracts* §8.5 at 447 (emphasis added) (2004). Professor Farnsworth, like Professor Corbin, would treat the requirement of timely delivery of VOOs as a condition to Seguros’ obligation to pay. Like Professor Corbin, Professor Farnsworth would permit waiver of the time for delivery, but not of the requirement that VOOs ultimately be delivered. *Id.* at §8.6 at 453. (“Waiver is often invoked to excuse delay in the occurrence of a condition . . .”). In this respect, Professor Farnsworth’s view of waiver is similar to the view adopted by the Restatement (Second) of Contracts, which Goldman

Instead, Goldman leaps from the premise that “a party may not ‘waive’ a ‘material part of the agreed exchange for the performance of the duty,’” Defendant’s Mem. at 3 (*quoting* Restatement (Second) of Contracts, § 84(1)(a) (1981)), to the conclusion that the time within which a security must be delivered cannot be waived because it is a material part of the agreed exchange in a contract for the purchase of securities.² Defendant’s Mem. at 4-5. Thus, reasons Goldman, Seguros’ alleged waiver in this case was “flatly inconsistent with the ‘black letter rule’ that the ‘waived’ condition not constitute ‘a material part of the agreed exchange for the performance of the duty.’” Defendant’s Mem. at 5 (*quoting* Restatement (Second) of Contracts). Of course, the supposed limitation on the doctrine of waiver on which this argument is based finds no support whatsoever in the applicable jurisprudence (*i.e.*, the law of New York) – which Goldman simply ignores *in toto*. Under New York law, a party may waive any contractual requirement that is intended for its benefit. Nassau Trust Co. v. Montrose Concrete Prods. Corp., 436 N.E.2d 1265, 1269 (N.Y. 1982) (party to an agreement may waive “a right to require of the other party certain performance in compliance with [the] agreement.”); Knight v. Kitchin, 261 N.Y.S. 809, 816-17 (4th App. Div. 1933) (“it is fundamental that either party to a contract is at liberty to waive any of its provisions which are made for his benefit”). But even if it were to be assumed that the legal premise of Goldman’s argument is valid, that argument still would fail.

also cites. None of these authorities support Goldman’s argument that Seguros could not waive the requirement that Goldman make delivery of VOOs on the settlement date for each trade.

² In pressing this argument, Goldman seems to be saying that because securities fluctuate in value, as a matter of law a seller’s breach of an agreement to sell securities occurs on the settlement date, and the buyer cannot alter the breach date by waiving the time within which the seller agrees to deliver them. Defendant’s Mem. at 4-5. On the law, it is sufficient to observe in response to this argument that no case has ever so held, and the law of New York flatly contradicts it. Jeremias v. Shearson Hayden Stone, Inc., 420 N.Y.S. 2d 881, 882 (N.Y. App. Div. 1979) (no breach on settlement date for sale of securities where buyer waived delivery requirement on settlement date); *cf.* Oscar Gruss & Son v. Hollander, 337 F.3d 186, 196 (2d Cir. 2003) (opining that breach of agreement to sell securities would not occur upon seller’s initial failure to make delivery on date required by contract where plaintiff “was justified in assuming that the defendant would honor its [delivery] obligation . . .”). On the facts, even if it were true as a general rule that daily fluctuations in value would render the date of performance of a securities sales contract a material part of the agreed exchange, that rule would not apply to this case, since it was undisputed at trial that the VOOs that Goldman failed to deliver in 2001 were not then subject to fluctuations in value. To the contrary, there was no market for VOOs in 2001. Trial Ex. 1 [EMTA announcement]; May 14 Trial Tr. at 31; 46.

The “agreed exchange” in this case was the transfer of securities for money. The waiver that Seguros proved to the jury did not in any way alter this exchange. The only term of the agreement that Seguros waived, or ever claimed to have waived, had to do with *when* Goldman was required to perform its part of the bargain, not *what* it was required to do. Thus Goldman’s statement that “[t]he *only* ‘condition’ that Liberty purported to waive was the *only* obligation that Goldman Sachs undertook: to deliver,” Defendant’s Mem. at 5-6 (emphases in original), is flatly erroneous. Seguros *never* waived Goldman’s obligation to deliver the VOOs that Seguros purchased, and the waiver in this case self-evidently did not alter “a material part of the agreed exchange.” Thus, even if this supposed limitation upon the doctrine of waiver were applicable under the law of New York, Goldman’s reliance upon it would be misplaced.

Equally misplaced is Goldman’s reliance upon its argument that the evidence at trial was insufficient, as a matter of law, to support the jury’s verdict because it did not permit the jury to find that the waiver alleged by Seguros was “clear, unequivocal and unmistakable.” Under the law of New York, a party claiming waiver can meet this standard even where the waiver is communicated only by conduct. Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 850 N.E.2d 653, 658 (N.Y. 2006) (waiver “may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage.”); Taylor v. Blaylock Partners, 659 N.Y.S.2d 257, 258 (N.Y. App. Div. 1997) (“waiver may be demonstrated by words or conduct . . .”). Goldman does not dispute this axiomatic proposition of law. Defendant’s Mem. at 8 (“a waiver must be communicated *through words or conduct* . . .”). Here, the evidence at trial established Seguros’ clear, unequivocal and unmistakable waiver by both words *and* conduct.

Before Seguros made its initial purchase of Venezuelan Brady bonds and VOOs from Goldman, it was aware that “there was turmoil in the market in terms of being able to get delivery . . . of your

VOOs [on] a timely basis.” May 11 Trial Tr. at 51. In fact, Goldman’s account representative for the Seguros account, Paul Mutter, had specifically informed Seguros of the problems of obtaining timely delivery of VOOs before Seguros purchased its first Venezuelan Brady bond from Goldman in 2001. *Id.* at 57-58. As Goldman’s Marcela Rakitta testified at trial, “the street” routinely was not delivering VOOs to buyers of Venezuelan Brady bonds in 2001, and any buyer who was aware of that situation would have known that there could be problems receiving delivery of VOOs on the settlement dates of trades involving purchases of those securities. May 15 Trial Tr. at 58. Knowing these circumstances, Seguros’ representatives Renee Marsjanik and Joon Yoo told Mr. Mutter before the first purchase of a Venezuelan Brady bond from Goldman “that we absolutely wanted our VOOs,” but that “*it didn’t necessarily have to be on the settlement date.*” May 11 Trial Tr. at 61 (emphasis added). As Ms. Marsjanik testified, during these pre-trading discussions “we were seeking an assurance that *ultimately* we would receive our oil obligations.” *Id.* at 62 (emphasis added).

In addition, in response to the shortage of VOOs in the marketplace in 2001, Seguros adopted a policy of requiring verbal assurances of ultimate delivery of VOOs from dealers at the time it placed each order for Venezuelan Brady bonds. Trial Ex. 28 [Declaration of Marsjanik] at ¶¶ 4-5; May 14 Trial Tr. at 43. Ms. Marsjanik personally placed several trades for Venezuelan par bonds and accompanying VOOs with Goldman, although she could not specifically recall which trades she placed. May 11 Trial Tr. at 75-76, 127. Ms. Marsjanik testified that whenever she placed trades with Goldman, she followed Seguros’ policy by requesting and obtaining Mr. Mutter’s assurance that Goldman *ultimately* would deliver the VOOs that Seguros was buying. *Id.* at 76, 146.

The documented facts surrounding Seguros’ initial three purchases of Venezuelan bonds and VOOs from Goldman corroborated this testimony. The first trade was executed on January 9, 2001, with a settlement date of January 12. Trial Ex. 31 [Seguros January 2001 account statement]. Although

the bonds purchased by Seguros were delivered on January 12, the accompanying 22,000 VOOs were not delivered until January 31. *Id.* During the weeks between the settlement date and the delivery date for these VOOs, internal email correspondence among Goldman employees memorialized that Mr. Mutter had been told that obtaining the VOOs was “a big issue” for Seguros. Trial Ex. 6 [internal Goldman email string] at 2. At the request of Mr. Mutter, Goldman representative Jake Kosek contacted Seguros and “told them that we are working on getting these [VOOs] for them, *but it may take a long time.*” *Id.* at 1 (emphasis added). There was no evidence that Seguros ever objected to having to wait “a long time” for the delivery of the VOOs purchased in this trade; the Jury certainly was permitted to draw the inference from the record that Seguros was willing, if necessary, to wait the “long time” that Mr. Kosek told Seguros that it might have to wait for delivery of its VOOs.

Similarly, internal Goldman email surrounding the June 6 trade evidenced that Goldman had specifically “promised [Seguros] delivery of VOOs with bonds” at the time of the trade. Trial Ex. 57 [internal Goldman email string]. Internal Goldman email surrounding the June 28 trade also established that Mr. Mutter had been “reminded” by Seguros “that they would need to have [VOOs] delivered,” and memorialized Mr. Mutter’s “indication to [Mr. Yoo] . . . that he would get them [*i.e.*, the purchased VOOs] if we traded.” Trial Ex. 59 [internal Goldman email string] at 1, 2. This documentary evidence corroborated Ms. Marsjanik’s testimony that Seguros had obtained Goldman’s assurance of ultimate delivery of VOOs purchased from Goldman on each of the first three trades executed by Seguros in 2001 (including the June 28 trade, which was the first trade of the ten in which Goldman failed to make delivery of VOOs). Goldman’s own contemporaneous documentation pertaining to these trades demonstrated, as Ms. Marsjanik had testified, that Goldman had been informed that delivery of VOOs to Seguros in connection with its purchase of Brady bonds was “critical” to Seguros. Trial Ex. 57; Trial Ex. 59 at 2. Goldman’s own contemporaneous documentation established in the context of the June 28

trade – a trade in which Goldman failed to deliver the 44,625 VOOs purchased by Seguros – that unless Goldman could satisfy Seguros regarding the delivery of those VOOs, Seguros would “threaten to break this trade, cutoff all business with the division, etc.” Trial Ex. 59 at 1.

Notwithstanding that Goldman failed to deliver the 44,625 VOOs that Seguros purchased in the June 28 trade, Seguros did not break the June 28 trade or “cutoff all business” with Mr. Mutter’s division. To the contrary, it thereafter executed nine additional trades in which it purchased Brady bonds and VOOs from Goldman, beginning on September 4 (two months after the settlement date for the June 28 trade) and ending on December 13, 2001. Trial Ex. 25 [summary of transactions at issue]. Seguros was aware of Goldman’s failure to have delivered the VOOs purchased on June 28 at the time of the September 4 trade. May 11 Trial Tr. at 79-80. Seguros was likewise aware at the time of each subsequent trade that the VOOs purchased on all prior trades listed on Trial Exhibit 25 had not yet been delivered. May 11 Trial Tr. at 80, 147-48.

There are only two possible inferences that could be drawn by the Jury from these facts. One possibility is that Goldman told Seguros after the June 28 trade that it could not deliver the VOOs that Seguros had purchased on June 28; that Seguros completely and inexplicably changed its mind about the importance of receiving those VOOs (and thus simply no longer cared whether they were delivered); and that Seguros placed the subsequent nine trades knowing (but not caring) that Goldman was not going to deliver the VOOs that Seguros was purchasing. But this inference, in addition to being completely unsupported by any evidence and in the teeth of Ms. Marsjanik’s contrary testimony, would also have been implausible in light of the absence of any evidence explaining how securities that Seguros indisputably regarded as “critical” in June of 2001 could suddenly have become unimportant to Seguros in September.

The other possible inference from the undisputed facts surrounding Seguros' trading conduct in 2001 is the only one that is plausible: Seguros expected to receive the VOOs that it had purchased from Goldman in previous trades at the time it placed each trade from September 4 through December 13, 2001 notwithstanding that the settlement dates of those trades had long passed, and it was willing to wait the "long time," if necessary, that Mr. Kosek had told it in January that it might have to wait for delivery of VOOs. This inference is completely consistent with, and thus corroborative of, the other evidence of waiver presented by Seguros. And this inference was not only corroborated by Ms. Marsjanik's express testimony, May 11 Trial Tr. at 79-80, it is also the only inference that makes sense, given Seguros' prior communication to Goldman that it would not continue to purchase Venezuelan Brady bonds from Goldman unless Goldman was going to be able to deliver the VOOs that Seguros was also purchasing.

This evidence of the express communications and conduct of the parties in 2001 is certainly sufficient to support the Jury's finding of waiver in this case. But there was yet additional evidence of waiver presented at trial. Ms. Marsjanik testified that in 2002 she had one or more conversations with Mr. Mutter about delivery of the VOOs purchased by Seguros the previous year. May 11 Trial Tr. at 83, 94. Specifically, Ms. Marsjanik inquired whether Mr. Mutter "had any additional news with regard to when we would be getting delivery of our oil warrants." May 11 Trial Tr. at 85. Mr. Mutter informed Ms. Marsjanik that "he did not have any news as of yet." *Id.* Mr. Mutter also told Ms. Marsjanik "that he was waiting for delivery from counterparts for his VOO position so that he could then deliver the VOOs to [Seguros'] account." May 11 Trial Tr. at 94. Mr. Mutter told Ms. Marsjanik "that he could not give a time frame in terms of when the VOOs would be delivered into [Seguros'] account;" assured her that "[y]ou will get your VOOs;" and asked her to be patient. May 11 Trial Tr. at 95, 158. In view of these representations, Ms. Marsjanik made no demand for delivery at that juncture, but instead asked that Mr. Mutter continue to keep her updated. May 11 Trial Tr. at 94-95. This evidence further corroborates

that Seguros had waived and (as of 2002) was continuing to waive Goldman's obligation to make delivery of the VOOs that Seguros had purchased the prior year on the settlement dates for each trade.³

In sum, there was an abundance of evidence at trial that Seguros clearly, unequivocally and unmistakably waived the requirement of delivery by Goldman of the VOOs purchased by Seguros on the 2001 settlement dates for those trades. Not only did the record permit the Jury to make that finding, it virtually required it. There are no grounds upon which this finding can be set aside upon a motion for judgment as a matter of law or for a new trial.

II. GOLDMAN'S ARGUMENT THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL BECAUSE SEGUROS' WAIVER WAS WITHDRAWN "LONG BEFORE" NOVEMBER, 2005 IS ALSO WITHOUT MERIT.

Goldman next argues that "as a matter of law, if there was any waiver at all, it was retracted no later than February, 2005." Defendant's Mem. at 14. This argument is premised on Goldman's view that the evidence, including Ms. Marsjanik's testimony that she instructed her colleague, Alarico Bittarelli, to "pursue delivery" of the VOOs from Goldman "in late 2004 or early 2005," May 14 Trial Tr. at 15-16, could have supported the conclusion that Seguros withdrew its waiver prior to November, 2005.

This argument requires little discussion. Even if it is assumed, for sake of argument, that the evidence could have warranted the finding that Seguros' waiver was withdrawn prior to November, 2005, it does not follow that the jury was *required* to make such a finding. Nor therefore does it follow that the evidence does not support the finding that the jury in fact made as to when the waiver was

³ This evidence also would have been sufficient to support the jury's waiver finding in and of itself, since "one can relinquish a right [through waiver] after it has been infringed as well as before . . ." Cole Taylor Bank v. Truack Ins. Co., 51 F.3d 736, 740 (7th Cir. 1995). Oddly, Goldman cites Cole Taylor Bank with approval. Defendant's Mem. at 4-6. While on the factual record of that case (which involved no communications between the contracting parties alleged to have given rise to the waiver), the Cole Taylor Bank court found insufficient evidence to create a genuine dispute of fact on the waiver issue, the court's analysis of that issue in no way supports any argument that Goldman advances in this case. Nor did the court "refus[e] to find waiver on 'subjective' self-serving evidence because oral testimony altered [the] written contract." Defendant's Mem. at 4. To the contrary, the Cole Taylor Bank court took

withdrawn. Goldman fails to point to any evidence of any communication *from Seguros to Goldman* prior to Seguros' November 3, 2005 buy-in demand that it claims constitutes a demand for delivery of the VOOs that Seguros purchased – as distinct from a demand for information as to when those VOOs would be obtained by Goldman from counterparties so that they could be delivered to Seguros. The evidence showed that the parties did not even reach a reconciliation of the number of VOOs that Goldman owed to Seguros until June 24, 2005. Trial Ex. 14 [email, Rakitta to Bittarelli]. Prior to that time, Mr. Bittarelli's communications with Goldman were limited to attempting to obtain that reconciliation of Goldman's delivery obligations to Seguros. Trial Ex. 14 [emails, Bittarelli to Rakitta]. Although during the three months following the completion of the reconciliation process Mr. Bittarelli frequently queried Goldman for "updates" on whether Goldman's counterparties had delivered VOOs,⁴ Trial Ex. 13 [emails, Bittarelli to Rakitta, Bittarelli to Hernandez] it was not until October 20, 2005 that Mr. Bittarelli informed Goldman, in connection with yet another inquiry "as to the status of the [VOOs] owed to us by Goldman," that "I will need more of an answer than you are waiting for counterparties to deliver to you." Trial Ex. 17 [email, Bittarelli to Rakitta]. In his October 20 email, Mr. Bittarelli informed Goldman that "if you can't provide us with a time frame as to when we can expect delivery, could you please provide us with Goldman's buy in procedures." *Id.*

On November 3, 2005 Seguros made its buy-in demand, thereby demanding delivery of VOOs instead of delivery of information as to when Goldman expected to be in a position to make delivery of VOOs. Trial Ex. 34 [Seguros' buy-in demand]; May 11 Trial Tr. at 98-99. As Ms. Marsjanik testified, the November 3 buy-in demand "was the first demand for delivery of the VOOs." May 11 Trial Tr. at 99. Further, it was not until November 15, 2001, in response to the oral repetition of this buy-in demand,

pains to point out that there was no such "subjective" evidence in the record before it, thus permitting it to find that a waiver had not occurred on undisputed, "objective" evidence. *Cole Taylor Bank*, 51 F.3d at 740.

⁴ The Court will recall that in 2005 Seguros was being told (falsely) by Goldman that it was awaiting delivery of VOOs by counterparties in order to make delivery to Seguros.

that Goldman informed Seguros that it would not deliver the VOOs in response to Seguros' buy-in demand. May 11 Trial Tr. at 99, 102-03. Ms. Marsjanik described the substance of the November 15, 2005 conference call between the parties:

We demanded delivery. We told them we were intending to sell the entire position. They told us no to the buy-in demand. And they told us no with regard to delivery.

May 11 Trial Tr. at 103. On this record, the Jury was certainly permitted to find – as it did – that the breach occurred on November 15, 2001. Such a finding plainly is supported by the clear weight of the evidence.

III. GOLDMAN'S ARGUMENT THAT IT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT ERRONEOUSLY INSTRUCTED THE JURY IN RESPONSE TO A JURY QUESTION IS ALSO WITHOUT MERIT.

Goldman also argues that the Court erred in responding to a question posed by the Jury regarding the standard by which a waiver had to be proven. Defendant's Mem. at 15-16. During its initial charge to the Jury, the Court instructed the jury (in pertinent part) as follows:

And on the issue of waiver, I want to tell you what the law requires. Here's the standard. In certain circumstances a party to a contract like Liberty Mutual may waive the performance obligation, the time of performance, of the other party, Goldman Sachs. A party's waiver must be clear, unequivocal, and unmistakable. A finding of waiver requires proof of an intentional relinquishment that Liberty Mutual was aware, was aware that it possessed a right and purposefully and intentionally renounced the right. The party asserting the waiver bears the burden of proving these requirements have been met. And waiver requires something else. It requires that Liberty communicate to Goldman, writing, orally, that it was waiving the time of performance so that Goldman understood then. But there has to be communication. Because Goldman could have said, wait a minute, no, no, no, we can't do it. We'll pay you whatever they're worth now. So there has to be a communi -- Liberty has to prove waiver, it's disputed, and Liberty has to prove communication that they were waiving. The contract's still on, but the time of performance is waived.

May 16 Trial Tr. at 15-16. Thereafter, during the course of the Jury's deliberations, the Jury posited the following question to the Court: "Do the terms of the waiver have to be explicit?" Id. at 67-68. After conferring with counsel, the Court responded to the question as follows: "No. But it must be clear that it's a waiver. And I've told you the indicia of a waiver." Id. at 69.

Goldman made no objection to the Court's response to this Jury question at trial (even though the Court previewed its proposed response with counsel and provided counsel with the opportunity for objection and argument, *id.* at 65-67). Instead, on the following day Goldman filed a request for a "Request for a Supplemental Instruction." The Supplemental Instruction requested by Goldman would have charged the Jury, in response to its question, that Seguros had to prove that the terms of the waiver were explicit. The Court did not give Goldman's requested supplemental instruction,⁵ and Goldman made no objection to the Court's refusal to do so. Nevertheless, Goldman now claims that the Court's response to the jury's question was erroneous and, in fact, that the correct response should have been "No."

Rule 51 of the Federal Rules of Civil Procedure provides that a party must object to any post argument instruction and to the Court's refusal to give any requested post-argument instruction "promptly after learning that the instruction or request will be, or has been, given or refused." The requirements of the Rule apply to instructions given in response to questions posed by the Jury during deliberation, as well as to the Court's pre-deliberation charge. Smith v. Massachusetts Institute of Technology, 877 F.2d 1106, 1108-10 (1st Cir. 1989). Goldman never objected to the Court's initial instruction to the Jury on the ground that the Jury had not been charged that Seguros' waiver had to be "explicit;" it never objected to the Court's supplemental instruction to the Jury in response to the Jury's question as to whether "the terms of the waiver have to be explicit;" and it never objected to the Court's refusal to give Goldman's subsequently proposed supplemental instruction in response to that question. On this record, Goldman has waived this objection. *See* Davis v. Rennie, 264 F.3d 86, 100 (1st Cir.

⁵ An electronic order formally denying Goldman's request for such an instruction was entered on May 18. No objection was made by Goldman to the Court's refusal to give the supplemental instruction that Goldman had requested.

2001) (requirements of Rule 51 construed “strictly;” failure to make timely and express objection on the record results in waiver).

But even if it were assumed, for sake of argument, that Goldman had properly preserved its objection to the Court’s supplemental instruction to the Jury in response to its question, Goldman’s reliance upon that objection as a grounds for seeking a new trial still must be rejected. Goldman’s argument that the Court erroneously responded to the Jury’s question relies not on any legal authority, but instead on the definition of the word “explicit” in Webster’s New College Dictionary (among other dictionaries). This case is governed by the law of New York, not Webster’s New College Dictionary. Under the law of New York, a “waiver may be demonstrated by words or conduct . . .” Taylor, 659 N.Y.S.2d at 258; *see also* Fundamental Portfolio Advisors, 850 N.E.2d at 658; Alsens Am. Portland Cement Works v. Degnan Contracting Co., 118 N.E. 210, 210 (N.Y. 1917). Plainly, therefore, a waiver need not be explicit under New York law. The Court’s answer to the Jury’s question was therefore entirely correct. Moreover, in the context of the entire instruction given by the Court on this point – an instruction that included the admonition that any waiver “must be clear, unequivocal, and unmistakable” and the Court’s repetition, in response to the jury’s question, that although the waiver did not have to be explicit it “must be clear” – there is no possibility that the jury could have been “confuse[d] or misle[d]” on this issue. Davet v. MacCarone, 973 F.2d 22, 26 (1st Cir. 1992). A new trial cannot be granted upon this ground.

IV. DEFENDANT’S ARGUMENT THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL BECAUSE THE EVIDENCE ESTABLISHED “AS A MATTER OF LAW” THAT LIBERTY FAILED IN ITS DUTY TO MITIGATE DAMAGES IS ALSO WITHOUT MERIT.

Goldman argues that “[a]s a matter of law, [Seguros] did not act reasonably to mitigate its damages.” Defendant’s Mem. at 17. Goldman’s reliance on its mitigation defense as a ground for obtaining judgment as a matter of law or a new trial must be rejected for three reasons. First, it is basic

that a duty to mitigate damages in a breach of contract case arises, if at all, only *after* a breach has occurred. Cornell v. T.V. Dev. Corp., 215 N.E.2d 349, 352 (N.Y. 1966) (“plaintiff is required to mitigate damages upon breach”). *See also* Brown v. Pressner Trading Group, 101 A.D.2d 761, 762 (1st Dept. 1984). Goldman has never disputed that basic proposition of law. *See* Memorandum in Support of Motion for Summary Judgment of Defendant Goldman Sachs & Co., at 15 (“Liberty was required to take reasonable steps to mitigate its damages *once Goldman Sachs breached its contractual obligations*”) (emphasis added) (citations omitted).

Here the jury found that the breach occurred on November 15, 2005. Thus, Seguros’ mitigation obligation arose, if at all, on November 15, 2005. It was undisputed at trial that on that date, Seguros entered the market and *sold* its entire position in VOOs. May 11 Trial Tr. at 104; Trial Ex. 35 [confirmation of sale]. That action effectively mitigated the damages that Seguros could recover in this case by capping those damages at the price of a VOO on November 15, 2005. Had Seguros entered the market on November 15, 2005 – the very same day that the breach occurred – and *bought* the VOOs that Goldman had failed to deliver, as Goldman claims it should have in mitigation of its damages, then Seguros would have been entitled to recover from Goldman the entire price it would have paid for those securities (since Goldman was obligated to deliver those VOOs to Seguros for no additional payment). Thus Seguros’ damages, as so “mitigated,” would have been equal to exactly same amount that the Jury awarded Seguros: \$27 per VOO, the market price of the securities on November 15, 2005. In other words, Goldman’s mitigation argument would make factual sense if Seguros were seeking to recover the value of the VOOs that Goldman failed to deliver as of some date *after* the breach (and if the value of the VOOs as of that date was higher than the value as of the date of breach), but it makes no sense where the

recovery is limited to the value of the securities *as of the date of the breach*.⁶ For this initial factual reason, Goldman's mitigation argument must be rejected.

Goldman's mitigation argument fails on the law as well as on the facts. Under New York law a party to a failed securities delivery has no duty to independently acquire the security from a third party in order to mitigate its damages. See Schultz v. Commodity Futures Trading Comm'n, 716 F.2d 136, 140 (2d Cir. 1983) (where a broker has failed to deliver securities the "injured party is not actually required to reenter the market."). Since damages in such a case are measured by the value of the security *as of the date of breach* (as opposed to some later date), to impose a duty requiring a plaintiff to purchase undelivered securities in the name of "mitigation" would be as likely to lead to *increased* damages as to *reduced* damages, in light of the fluctuating values of securities in the marketplace. Id. Further, under New York law "the victim of a breach of contract need not make expenditures to mitigate damages where the breaching party had the same opportunity to prevent damages." Travelers Indem. Co. v. Maho Mach. Tool Corp., 952 F.2d 26, 31 (2d Cir. 1991) (emphasis added). Goldman's *ex post facto* suggestion that Seguros should have acquired VOOs in the market ignores the fact that Goldman, one of the leading broker dealers in the world, was in at least as good a position as Seguros to obtain VOOs in the market. In these circumstances, a mitigation defense cannot lie as a matter of law.

Third and finally, even if it were assumed, for sake of argument, that a mitigation duty could have arisen in this case prior to the November 15, 2005 date of Goldman's breach (as found by the Jury), the question of whether such a duty was abridged turns entirely on whether Seguros acted reasonably in failing to purchase VOOs in the market prior to November, 2005. Carlisle Ventures, Inc. v. Banco

⁶ On these facts, Goldman's continual protest that Seguros' waiver in effect exposed it to "unlimited market risk," Defendant's Mem. at 4, makes no sense. Goldman could have eliminated all such risk simply by informing Seguros in 2001 that it would not be delivering the VOOs that Seguros purchased. If it had, its breach would have occurred at that time. But it did not. Instead, Goldman itself, by providing affirmative assurances of its intent to make ultimate delivery of the VOOs that Seguros had purchased, knowingly undertook the market risk that those securities would increase in value between the settlement dates of its trades and the date on which it either delivered the securities to

Espanol de Credito, S.A., 176 F.3d 601, 609 (2d Cir. 1999). The Jury certainly was entitled to find that Seguros acted reasonably by continuing to await the promised performance by Goldman of its obligation to deliver the VOOs that Seguros had purchased in 2001.⁷

For each of these reasons, Goldman's mitigation arguments must be rejected. Goldman cannot obtain judgment as a matter of law or a new trial upon this ground.

V. GOLDMAN'S ARGUMENT THAT IT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT IMPROPERLY DENIED ITS ATTEMPT TO PEREMPTORILY CHALLENGE THE ONLY AFRICAN-AMERICAN JUROR ON THE PANEL IS WITHOUT MERIT.

Goldman also argues that it is entitled to a new trial because the Court denied its peremptory challenge of the only African American on the panel, Colbert Desravines. Defendant's Mem. at 18-20. A peremptory challenge in a civil case may not be exercised based on race or ethnic heritage. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Batson v. Kentucky, 476 U.S. 79 (1986). In determining whether a peremptory challenge has been improperly exercised, a court must consider the totality of the circumstances. Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855 (1st Cir. 1998). Among other things, whether a party's strikes develop a pattern, United States v. Escobar-DeJesus, 187 F.3d 148, 165 (1st Cir. 1999), the percentage of strikes directed against members of a minority group, Paulino v. Castro, 371 F.3d 1083, 1091 (9th Cir. 2004), the percentage of a particular group removed from the venire by the challenged strikes, Turner v. Marshall, 63 F.3d 807, 813 (9th Cir. 1995), and whether similarly situated jurors from outside the allegedly targeted group were challenged,

Seguros in accordance with its assurances, or Seguros withdrew its waiver of Goldman's obligation to have made delivery as required by the contracts.

⁷ It is ironic, to say the least, that Goldman's mitigation argument is at bottom premised on the proposition it was unreasonable as a matter of law for Seguros to have believed that Goldman actually would honor its assurances that it would deliver the VOOs that Seguros had purchased. While those assurances turned out to have been falsely given (in light of the fact – unbeknownst to Seguros – that Goldman actually had VOOs to deliver to Seguros when it claimed to need more time to obtain those securities from unnamed counterparties), it does not follow that Seguros acted unreasonably as a matter of law by relying on Goldman's representations. This was an issue for the Jury to determine. It certainly was permitted to find, on the evidence before it, that Seguros did not violate any duty it might

United States v. Allison, 908 F.2d 1531, 1538 (11th Cir. 1990), are all factors that courts have considered in determining whether a peremptory challenge has been improperly interposed. As a corporation organized under the laws of Venezuela bringing a case against an established Wall Street financial institution, Seguros had an interest in ensuring that the jury that heard its case was representative of the entire community.

In this case, Goldman exercised all three of its peremptory strikes. May 7 Trial Tr. at 32, 34. Two of those strikes were directed against members of a minority group: first it objected to Monica Medeiros, the only Latina on the panel (and at the time the only member of a minority group who had thus far been seated), and then it objected to Mr. Desravines, the only African American in the venire. Id. Seguros objected to Goldman's peremptory challenge of Ms. Medeiros, but the Court declined to conduct inquiry under Batson on the ground that Ms. Medeiros was not the only Hispanic in the venire. May 7 Trial Tr. at 32. Thus, Goldman's attempted strike of Mr. Desravines was its *second* peremptory strike of the member of a minority group. That is a pattern. See Caldwell v. Maloney, 159 F.3d 639, 651 (1st Cir. 1998) ("The whole may be greater than the sum of its parts. When a number of jurors are struck an explanation for a particular challenge need not necessarily be pigeon-holed as wholly acceptable or wholly unacceptable" (quotation and citation omitted)).

Second, as the Court observed, Mr. Desravines was the only African American in the venire (and thus on the panel). May 7 Trial Tr. at 35. Consequently, the strike, if allowed, would have reduced the panel's membership of African Americans by 100%, from one to zero.

Third, at the time of the exercise of Goldman's attempted challenge to Mr. Desravines, the only thing that the parties knew about him, apart from what they could tell by looking at him, was that he worked at "Hotel Marriott Rows Wharf" and that his wife was a head nurse. May 7 Trial Tr. at 34.

arguably have had to mitigate its damages prior to the date of Goldman's breach by continuing to await Goldman's promised performance of its delivery obligation.

Unlike other jurors who sought to be excused because they could not hear well, *id.* at 14-16, or because they had trouble understanding, *id.* at 24-25, Mr. Desravines never sought to be excused on those or any other grounds, and he gave no indication that he failed to understand anything. Goldman did not seek to peremptorily challenge jurors who, by all appearances, were similarly situated, but were not African American.

In these circumstances, there certainly was a *prima facie* showing that Goldman's exercise of its peremptory strike was based upon race. United States v. Escobar-DeJesus, 187 F.3d 148, 164 (1st Cir. 1999) (*prima facie* showing requirement "not onerous").⁸ The burden then shifted to Goldman to articulate a race-neutral explanation for the strike. *Id.* When asked by the Court why it was challenging Mr. Desravines, Goldman initially attempted to avoid providing any explanation at all by insisting that "it's a peremptory challenge." May 7 Trial Tr. at 34-35. When pressed again by the Court for an explanation, Goldman responded as follows:

Judge, I'm not sure he understands. I think difficulty with language may be a problem for him. It has nothing to do with him being black.

Id. at 35. The Court then denied the challenge. *Id.*

As the Court implicitly found, Goldman's proffered "difficulty with language" explanation for striking Mr. Desravines "rang hollow." Richards v. Relentless, Inc., 341 F.3d 35, 45 (1st Cir. 2003). Goldman's explanation was based entirely on speculation that could as easily have been targeted at other members of the panel. Nothing that Mr. Desravines had to that point done or said indicated that he had any trouble understanding anything. But unlike other jurors who could equally have been challenged on this ground, it was Mr. Desravines – the only African American juror – who was singled out for this

⁸ Goldman appears to think that the Court acted improperly by making the Batson inquiry *sua sponte*, and that Goldman's improper exercise of a peremptory strike cannot be challenged because Seguros did not object. In fact, Seguros did interpose a Batson objection. May 7 Trial Tr. at 35: 8-9. Nevertheless, in view of the *prima facie* appearance of a race-based strike, the Court did not require such an objection in order to conduct inquiry under

challenge. In these circumstances, the Court's implicit finding that the explanation offered was pretextual, and the strike race-based, is supported by the record.

"[A] trial judge's Batson findings are given substantial weight because the trial judge is in the best position to evaluate context, nuance, and the demeanor of the prospective jurors and the attorneys." Caldwell, 159 F.3d at 649; *see also* United States v. Lara, 181 F.3d 183, 194 (1st Cir. 1999) (because Batson determination "often pivots on credibility, appellate tribunals must scrutinize the trial court's response under a highly deferential glass."). The court's refusal to allow Goldman to peremptorily challenge juror Desravines will be affirmed in the absence of clear error. Rodriguez-Hernandez, 132 F.3d at 855. There was no error. A new trial cannot be granted on this ground.

CONCLUSION

For the reasons set forth above, plaintiff Seguros Caracas de Liberty Mutual, S.A. respectfully submits that Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, For a New Trial should be denied.

SEGUROS CARACAS de LIBERTY MUTUAL, S.A.

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Batson. *See* Alexis v. Leporati, No. Civ. A. 93-10003, 1996 WL 463675, at *3 (D. Mass. July 30, 1996). *See also* United States v. Stephens, 421 F.3d 503, 510-11 (7th Cir. 2005).

CERTIFICATE OF SERVICE

I, John R. Baraniak, Jr., hereby certify that a true copy of Plaintiff's Opposition to Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, For a New Trial was filed with the Court through the ECF system on this 29th day of June and therefore will be served electronically upon counsel to Defendant Goldman Sachs & Co.

/s/ John R. Baraniak, Jr.
John R. Baraniak, Jr.