

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SEGUROS CARACAS de LIBERTY MUTUAL,)
S.A.,)
)
Plaintiff,)
)
v.) 06-cv-10035-WGY
)
GOLDMAN SACHS & CO.,)
)
Defendant.)
)

PLAINTIFF'S PROPOSED FORM OF JUDGMENT

Pursuant to the directive of the Court, plaintiff Seguros Caracas de Liberty Mutual, S.A. (Seguros) submits the proposed form of Judgment attached hereto as Exhibit A. The award reflected in this judgment was calculated as follows:

1. The jury determined that the VOOs that defendant Goldman Sachs & Co. ("Goldman") was contractually obliged to deliver to Seguros and PanAmerica were worth \$27 each on the date of breach. Thus, the aggregate value of the 220,375 VOOs that Goldman failed to deliver on the date it breached its contractual obligation to do so was \$5,950,125.

2. It was undisputed at trial that the Republic of Venezuela made payments in the amount of \$3 per VOO to holders of those securities on April 15 and October 15, 2005 (*i.e.*, prior to the breach date found by the jury, and thus not included in the value of the VOOs as of the date of breach). These payments are recoverable as damages caused by delayed performance under New York law, notwithstanding Seguros' waiver of the right to obtain delivery of the VOOs on the settlement date of each trade. *See, e.g., Mawhinney v. Millbrook Woolen Mills,*

Inc., 234 N.Y. 244, 249 (1922); Schenectady Steel Co. v. Bruno Trimpoli Gen'l Constr. Co., 350 N.Y.S.2d 920, 923 (App. Div. 1974). Consequently, the award in plaintiff's proposed judgment includes \$1,322,250 in delayed performance damages.

3. Under New York law, pre-judgment interest in a contract case accrues at the statutory rate of 9% from the date of breach. N.Y. Civil Practice Law § 5004 (Consol. 2007). "Interest shall be computed from the earliest ascertainable date the cause of action existed . . ." Id. § 5001(b). "Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." Here, since the bulk of the award consists of damages incurred on November 15, 2005, Seguros agrees that it would be unfair to Goldman to calculate interest "from a single reasonable intermediate date" between April 15 (the date of the Republic's first payment) and November 15 (the date when Goldman breached). Consequently, Seguros has calculated interest at the statutory rate of 9% simple interest (i) on \$661,125 from April 15, 2005 (the date of the Republic's first payment to holders of VOOs); (ii) on \$661,125 from October 15, 2005 (the date of the Republic's second payment); and (iii) on \$5,950,125 from November 15, 2005 (the date of breach). Consequently, the award in plaintiff's proposed judgment includes (i) interest in the amount of \$124,871.12 on \$661,125 from April 15, 2005 to May 21, 2007; (ii) interest in the amount of \$95,038.98 on \$661,125 from October 15, 2005 to May 21, 2007; and (iii) interest in the amount of \$809,869.07 on \$5,950,125 from November 15, 2005 to May 21, 2007. The aggregate amount of interest in plaintiff's proposed award is \$1,029,779.17.

CONCLUSION

For the foregoing reasons, plaintiff Seguros Caracas de Liberty Mutual, S.A. respectfully submits that the Court should enter a judgment identical in form to Exhibit A hereto in the amount of \$8,302,154.17 against defendant Goldman Sachs & Co. upon the verdict delivered by the jury in this action.

Respectfully submitted,

SEGUROS CARACAS de LIBERTY
MUTUAL, S.A.,

By its attorneys,

/s/ Michael Arthur Walsh

Michael Arthur Walsh (BBO #514875)

John R. Baraniak, Jr. (BBO #552259)

Peter Moores (BBO #658033)

CHOATE, HALL & STEWART LLP

Two International Place

Boston, MA 02110

Tel.: (617) 248-5000

DATED: May 21, 2007

CERTIFICATE OF SERVICE

I, Michael Arthur Walsh, hereby certify that the foregoing Plaintiff's Proposed Form of Judgment was filed with the Court through the ECF system on this 21st day of May and therefore will be served electronically upon counsel to Defendant Goldman Sachs & Co.

/s/ Michael Arthur Walsh

Michael Arthur Walsh

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)
SEGUROS CARACAS de LIBERTY MUTUAL,)
S.A.,)
)
Plaintiff,)
)
v.) 06-cv-10035-WGY
)
GOLDMAN SACHS & CO.,)
)
Defendant.)
_____)

JUDGMENT

This action having come before the Court for trial by jury, and the issues having been tried and the jury having rendered its verdict, IT IS ORDERED AND ADJUDGED THAT JUDGMENT BE AND HEREBY IS ENTERED for the plaintiff SEGUROS CARACAS de LIBERTY MUTUAL upon its claim against defendant GOLDMAN SACHS & CO. in the amount of \$8,302,154.17.

DATED: May 21, 2007

Clerk

Deputy Clerk

Approved and So Ordered:

United States District Judge

4. Dividends paid on VOOS prior to the date of breach are not recoverable damages because – as the jury found -- at the time of the dividend payment no breach had yet occurred: it had been waived. Unpaid dividends are not damages attributable to “delayed performance.” Timely performance had been waived.

5. Comparison to damages attributable to “delay” is inapposite. “Delay damages” are payable *because* a breach exists; they are not recoverable if the breach has been *waived*. In the example the Court employed, a builder who does not complete a house on time owes *either* (a) the difference between the contract price and the value on the due date, *or* (b) damages incurred by the buyer who awaits completion. In the latter case, the damages attributable to the “delay” in completion are payable to the buyer who “acquiesces” in the postponed performance *because* a “breach” existed on the due date – but not because he has “waived” that breach. *Mawhinney v. Millbrook Woolen Mills, Inc.*, 234 N.Y. 244 (1922), invoked by the plaintiff, stands for precisely that proposition. There, the purchaser of goods could maintain “an independent action against the vendor for damages for the delay” precisely *because* his letters did *not* “amount to an intentional relinquishment of a known right to recover for . . . delay or failure to perform the contract.” *Id.* at 249.¹

6. Awarding dividends to the plaintiff would put it in a *better* position than if timely performance had occurred pursuant to the original contract. Indeed, it would grant the plaintiff mutually inconsistent “waiver” positions: a “waiver” of the “breach,” but a *non-waiver*” of the right to dividends. It follows that dividends paid on VOOS during the

¹ A party who “acquiesces” in delayed performance does not “waive” the “breach.” Rather – and as the other case the plaintiff cites makes clear – what a party “waives” by acquiescing in a postponement is “the right to *cancel* for untimely performance.” *Schenectady Steel Co., Inc. v. Bruno Trimpoli General Construction Company, Inc.*, 350 N.Y.S.2d 920 (App. Div. 1974)(emphasis added).

period that the plaintiff “waived” performance between 2001 and the date the jury established as the date of the breach are not recoverable.

Respectfully submitted,

Dated: May 21, 2007

/s/ John D. Donovan, Jr.
John D. Donovan, Jr. (BBO# 130950)
William F. Abely (BBO# 660281)
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000

&

Michael T. Marcucci (BBO# 652186)
HANIFY & KING, P.C.
One Beacon Street
Boston, Massachusetts 02108

&

Melvin A. Brosterman
Claude G. Szyfer
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038

Of Counsel

Attorneys for Defendant
GOLDMAN, SACHS & CO.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant Goldman, Sachs & Co.'s Proposed Form of Judgment was filed through the Court's CM/ECF system on May 21, 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.

John D. Donovan, Jr.

Dated: May 21, 2007

EXHIBIT A

