

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 REPLY TO DEFENDANT’S MEMORANDUM IN
OPPOSITION TO PLAINTIFF’S MOTION TO AMEND JUDGMENT**

Plaintiff Seguros Caracas de Liberty Mutual, S.A. (“Seguros”) submits this memorandum in reply to Defendant’s Memorandum in Opposition to Plaintiff’s Motion to Amend Judgment.

ARGUMENT

By the undisputed terms of the parties’ original contracts, Goldman was obliged to deliver an aggregate of 220,375 Venezuelan Oil Obligations (“VOOs”) on the 2001 settlement date for each trade pursuant to which Seguros purchased those securities. By its verdict, the Jury found that Seguros had waived its right to enforce delivery of the securities on the settlement dates for the trades; that the waiver was withdrawn when Seguros thereafter demanded delivery in November, 2005; and that Goldman breached its contracts with Seguros when it refused and failed to deliver the 220,375 VOOs on November 15, 2005. By its Motion to Amend Judgment, Seguros seeks to include the aggregate amount of \$1,322,250 paid in April and October, 2005 by the Republic of Venezuela (the “Republic”) to holders of the 220,375 VOOs that Seguros

purchased in 2001. In its Memorandum in Opposition to Plaintiff's Motion to Amend Judgment, Defendant Goldman Sachs & Co. ("Goldman") contends that Seguros' effort to recover those payments from Goldman is "fundamentally contradictory" with its claim that Goldman's breach of the contracts did not occur until November 15, 2005. Defendant's Mem. at 2. According to Goldman, damages in a contract case are limited to amounts *caused by the breach*. *Id.* at 3. Goldman reasons that, since the payments that Seguros seeks to recover occurred *prior* to the breach date, Seguros' failure to have received those payments could not have been *caused* by the breach – and therefore cannot be recovered. *Id.*

Goldman's argument is wrong on the law. Under New York law, a non-breaching party is entitled to receive benefit-of-the-bargain damages. Freund v. Washington Sq. Press, Inc., 314 N.E.2d 419, 420 (N.Y. 1974) ("so far as possible, the law attempts to secure to the injured party the benefit of his bargain . . ."). This measure of damages is designed to place the non-breaching party "in as good a position as he would have been put by *full performance of the contract . . .*" *Id.* (citation omitted). *See also McKinley Allsopp, Inc. v. Jetborne Int'l, Inc.*, 1990 WL 138959 at *8 (S.D.N.Y. Sept. 19, 1990). Goldman contends that, due to Seguros' waiver of delivery of VOOs on the settlement date of the trades, and its non-withdrawal of that waiver prior to November 15, 2005, its "bargain" with Goldman was that it was not entitled to receive its VOOs until that date. Based on this premise, Goldman concludes that Seguros cannot possibly be entitled to receive payments made by the Republic on *prior* dates.

Goldman's reasoning overlooks the fundamental precept that a waiver, unlike an amendment, *does not change the terms of the underlying contract*. *See, e.g., Thomson v. Poor*, 42 N.E. 13, 15 (N.Y. 1895) ("The original contract is not changed by [the] waiver, . . ."). *See also Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 436 N.E.2d 1265, 1269 (N.Y. 1982)

(distinguishing between “an oral agreement that purports to modify the terms of a prior written agreement and an oral waiver by one party to a written agreement of a right to require of the other party certain performance in compliance with that agreement.”). Thus, the “bargain” that Seguros is entitled to receive “the benefit of” in this case is embodied in the contracts that it entered into with Goldman in 2001 – contracts that were *unchanged by its waiver*.¹ Had those contracts been fully performed in accordance with their terms, Seguros would have received not only the 220,375 VOOs for which it was compensated by the jury’s verdict, but also the \$1,322,250 paid by the Republic in 2005 for which Seguros was not compensated by the verdict.² That was Seguros’ “bargain” with Goldman for purposes of determining damages under New York law. Thus the Judgment entered by the Court – which failed to include the Republic’s 2005 payments in the damages awarded – did not put Seguros “in as good a position as [it] would have been put by *full performance of the contract . . .*” Freund, 314 N.E.2d at 420. Only by amending that Judgment will Seguros receive the benefit of its bargain with Goldman. New York law on contract damages thus requires that the Judgment be amended to include the 2005 payments made by the Republic, with interest calculated at the statutory rate from the date of each payment.

¹ Goldman simply ignores New York law holding that a waiver does not change the terms of the underlying contract in arguing that “[a]fter [Seguros’] waiver, full performance of the contract would have required Goldman Sachs to deliver VOOs on November 15, 2005.” Defendant’s Mem. at 5. This argument treats Seguros’ waiver as having effected an amendment of the contract. As the law of New York makes abundantly plain, a waiver does no such thing.

² Goldman emphasizes that damages in a breach of contract case are to be determined as of the date of breach. Defendant’s Mem. at 4 (*citing Boyce v. Soundview Tech. Group, Inc.*, 464 F.3d 376, 384 (2d Cir. 2006)). Seguros does not disagree. As of the date of breach in this case (i.e., November 15, 2005), those damages were equal not only to the value of the 220,375 VOOs that Goldman had failed to deliver in response to Seguros’ buy-in demand, but also to the \$1,322,250 that Goldman had failed to pay in response to Seguros’ “coupon claim.” Tr. Ex. 33. Thus, the proposition that breach of contract damages are ascertained as of the date of breach provides no support for the argument that Goldman presses in opposition to Seguros’ motion.

This outcome is required not only by a literal application of the law of New York pertaining to contract damages, but also by the law of New York pertaining to waiver. As the Court instructed the jury, under the law of New York

[a] party's waiver must be clear, unequivocal, and unmistakable. A finding of waiver requires proof of an intentional relinquishment that [Seguros] 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.

May 16 Tr. at 15-16. Cf. Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P., 850 N.E.2d 653, 658 (N.Y. 2006) ("Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. . . . However, waiver . . . must be based on 'a clear manifestation of intent' to relinquish a contractual protection.") (citations omitted). In substance, Goldman is now arguing that in addition to waiving its right to receive the VOOs that it purchased on the settlement dates for each trade, Seguros *also* waived its separate right to receive any financial benefits that would have accrued to it in the event that the Republic made payments prior to Goldman's performance of its delivery obligation (whenever that might be). But if this is Goldman's position, then it was Goldman's burden at trial to prove that Seguros had waived not only the right to receive timely delivery of the VOOs that it purchased (as Seguros claimed), *but also the right to receive any payments that the Republic might make prior to the delivery of those securities.*³ Capitol Records, Inc. v. Naxos of Am., Inc. 372 F.3d 471, 482 (2d Cir. 2004) ("Under New York law, a claim of waiver requires proof of an intentional

³ The "relevant inquiry" thus is *not* whether Seguros would have received these payments "if Goldman Sachs' [*sic*] did not yet owe delivery until November 15, 2005." Defendant's Mem. at 4. The relevant inquiry is whether, in addition to waiving delivery of its VOOs on the settlement dates for each trade, Seguros *also* waived its right to recover for any payments that might be made by the Republic before Goldman delivered. Goldman presented no evidence of such a waiver at trial, let alone the "clear, unequivocal, and unmistakable" evidence that would have been required to prevail upon this issue.

relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.”).

Goldman failed to present *any* evidence at trial that would have permitted the jury to find that Seguros had knowingly and intentionally waived its right to receive any payments that the Republic might make prior to the delivery of the VOOs that it had purchased from Goldman. To the contrary, the evidence at trial was undisputed that Seguros *asserted* the right to receive payments from the Republic notwithstanding that Goldman had not yet made delivery of its VOOs. Not only did Seguros formally demand compensation from Goldman for these payments, Tr. Ex. 33 [Oct. 24, 2005 letter, Talambekos to Rakitta, demanding payment of \$1,332,250], but it previously inquired as to how and when Goldman intended to make it whole for these missed payments. Tr. Ex. 42 [June 9, 2005 email, Bittarelli to Rakitta: “Will Goldman also be wiring us in the \$661,125 that we should have recv’d in April on the undelivered warrants? How is Goldman going to resolve these issues?”]; Tr. Ex. 16 [Oct. 24, 2005 email, Bittarelli to Rakitta: “I am just following up on my previous email and would like to know when we will be compensated for the \$661,125 missed October payment.”]. It was presumably on the basis of this record that the Court determined that there was no factual dispute to submit to the jury with respect to any issue of waiver regarding the payments made by the Republic, thus concluding (correctly) that the resolution of this issue would follow “as a matter of law based upon undisputed facts” on the evidence presented at trial from the jury’s resolution of the issue as to when Goldman’s breach had occurred.⁴ May 15 Tr. at 176.

⁴ If the jury had determined that the breach had occurred on any date prior to the Republic’s payments, then the value of those payments (including the likelihood that they would have occurred) would have been included in the valuation of the VOOs as of the breach date. Only because the jury found that the breach occurred *after* the Republic’s 2005 payments did its verdict require that the 2005 payments be separately incorporated into the judgment.

Further, the amendment of the judgment which Seguros now seeks is also required by the New York cases dealing with the award of delay damages. Goldman argues that those cases are somehow distinguishable because

[i]n each case, the plaintiff initially acquiesced to the delay despite the existence of the breach. But in none of the cases did the plaintiff purport to waive a performance obligation altogether, as [Seguros] did here.

Defendant's Mem. at 7. Seguros admits to being unable to apprehend this passage. Obviously, as the Jury has expressly found, Seguros did not "waive a performance obligation altogether." This alleged distinction is illusory. Here, as in the delay damages cases upon which Seguros' motion (in part) relies, the substance of the performance obligation was unchanged – the only issue was the *timing* of performance. If Goldman is attempting to distinguish between an "acquiescence" in delayed performance and a "waiver" of the right to insist upon timely performance in accordance with the contract, Seguros is unable to comprehend the principle that separates one from the other for purposes of the damages analysis. In the delay damages cases that Seguros cited, the non-breaching party accepted belated performance of a contractual obligation – thus waiving the right to insist upon timely performance (or "acquiescing" in delayed performance) – yet retained the right to recover any damages caused by the delayed performance. Goldman presumably would agree that had it actually delivered 220,375 VOOs to Seguros on November 15, 2005 (as the jury found it was required to do), the delay damages cases cited by Seguros would be on all fours and would support Seguros' recovery of the \$1,322,250 lost to it by virtue of Goldman's delayed performance (even though Seguros had acquiesced in that delay). Goldman fails to explain why these cases should not apply with equal force where, as here, the performance obligation was *breached* instead of performed on November 15, 2005. In essence, the logic of Goldman's putative distinction of the delayed

damages cases compels the conclusion that Goldman has greater rights (to the tune of the \$1,322,250 that it says it gets to keep) by virtue of having *defaulted* on its delivery obligation on November 15, 2005 than it would have had if it had *complied* with its obligation. Obviously, that logic makes no sense, and the argument that Goldman advances upon it must be rejected.

Finally, the amendment of the judgment which Seguros now seeks is required not only by the application of New York law on damages and waiver, but also by the interests of justice. The evidence was undisputed that Goldman had sufficient VOOs in its proprietary accounts to deliver all or almost all of those securities to Seguros, as it was required by its contracts to do. Instead, in blatant violation of its duties as a broker-dealer of securities under New York law, Goldman placed its own interests ahead of the interests of its customer by retaining securities in its proprietary account that it had credited to the account of Seguros, and thus was duty-bound to treat as the property of its customer. N.Y. U.C.C. Law §§ 8-501, 8-503(a), 8-505(b) (McKinney 2007 Supp.). It effected this breach of its duty to deliver these securities to Seguros by deceiving Seguros into believing that Goldman could not make delivery of Seguros' VOOs because it was awaiting delivery of those securities from counterparties. By this conduct, Goldman itself collected most, if not all, of the \$1,322,250 in payments from the Republic that Seguros now seeks to recover through amendment of the Judgment.⁵ On these facts, the interests of justice require that Seguros' motion to amend the Judgment should be granted.

⁵ On this record, Goldman's argument that amending the Judgment would result in an "unwarranted windfall" to Seguros, Defendant's Mem. at 5, stands reality on its head. It is the *failure* to amend the Judgment that would result in an unwarranted windfall, and the beneficiary of that windfall would be Goldman.

CONCLUSION

For the foregoing additional reasons, plaintiff Seguros Caracas de Liberty Mutual, S.A. respectfully requests that the Court grant Plaintiff's Motion to Amend Judgment in this action.

Respectfully submitted,

SEGUROS CARACAS de LIBERTY
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By its attorneys,

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CERTIFICATE OF SERVICE

I, Michael Arthur Walsh, hereby certify that the foregoing Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Amend Judgment was filed with the Court through the ECF system on this 3rd day of July, 2007 and therefore will be served electronically upon counsel to Defendant Goldman Sachs & Co.

/s/ Michael Arthur Walsh
Michael Arthur Walsh