

INTRODUCTION

Liberty Mutual averred – from its Complaint and through trial – that the *terms* of the ten disputed contracts for the purchase and sale of securities obliged Goldman Sachs “to deliver . . . [VOOS] on the settlement date[s].” Complaint (Exhibit 18) ¶¶ 9-15. The evidence corroborated that allegation without contradiction. Delivery was contractually due “on the settlement dates” according to every scrap of documentary evidence – including the written trade confirmations, the account statements, the parties’ internal books and records, their stipulated summary of the transactions’ terms, and Mr. Bittarelli’s correspondence – as well as Ms. Marsjanik’s testimony. Liberty’s case theory, accordingly, was that it unilaterally “waived” strict compliance with the undisputed contractual term requiring delivery “on the settlement dates.” According to Liberty, by “waiving” delivery according to the contract terms, it “waived” the contractual “breach,” and thereby *moved* the date of breach until – again unilaterally – it retracted its “waiver,” leaving Goldman Sachs exposed during the hiatus to infinite market risk.

That theory was fundamentally flawed. A “waiver” of a material contract term – here the *only* contractual duty Goldman Sachs assumed – is not legally cognizable: it would turn every contract into an option upon the oral assertion of “waiver” and invite contracting parties to game the system the law of contracts has established. Indeed, it would permit contracting parties orally to “rewrite” agreements memorialized in writing for the purpose of moving the date of a breach to enhance damages, or evade statutes of limitations. But in all events, the evidence was not sufficient for a reasonable and properly instructed jury to conclude that a “waiver” was effected under the exacting standards the law erects to establish a viable “waiver.” And the Court’s instructions improperly diluted the definition of “waiver” at the pivotal eleventh hour of the jury’s deliberations with a facially erroneous response to their key question whether a “waiver” need be “explicit.”

This case should never have reached the jury. The jury was then misguided with an erroneous instruction. The Court should correct the manifest error and injustice that resulted by granting judgment as a matter of law to Goldman Sachs, or ordering a new trial.

ARGUMENT

I. A Party's "Waiver" of Compliance With Contractual Terms Cannot Operate to Modify The Agreement's Terms and Thereby Alter the "Time" of Breach

"Waiver" is among the most misunderstood concepts in contract law, provoking "much discussion," "misleading definitions," and "judicial fondness" for its "indefinite connotation" that "like a cloak, covers a multitude of sins." E. ALLAN FARNSWORTH, *CONTRACTS* § 8.5 at 447-48 (2004); *see* CORBIN ON *CONTRACTS* § 40.1 at 514 (rev. ed. 1999). Among the most frequent "sins" that waiver "cloaks" is the rigor applicable to analysis of performance (*i.e.*, the existence of a "breach") or modification. "By characterizing conduct as a 'waiver' rather than a 'modification,' a court may avoid" requirements like assent, writings, consideration or detrimental reliance. FARNSWORTH, *supra*, at 448. That is what makes loose invocation of the doctrine so problematic – and that is exactly what Liberty did here.

As a result of both the general misunderstanding and the erosion of the strict rules of contractual performance that the concept of "waiver" has provoked, application of "the concept of waiver is restricted to conditions that are relatively minor." *Id.* at 452-53. The Restatement of Contracts makes this abundantly clear: 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). While parties may (and frequently do) "waive" compliance with *conditions* to full performance – including warranties, certifications and the like – "waiver" of *complete* performance is not recognized. "Waiver" does not swallow "breach."

Similarly, though parties may (and frequently do) "waive" certain *aspects* of performance, the "waiver" concept does not contemplate *changes* in the ultimate duty of the obligor to perform according to

the contract's material terms. As Judge Posner famously observed: "There is no more vexing question in contract law than when a written contract can be rewritten by oral testimony." *Cole Taylor Bank v. Truck Ins. Exch.*, 51 F.3d 736, 737 (7th Cir. 1995) (refusing to find waiver on "subjective" self-serving evidence because oral testimony altered written contract). "Waiver" also does not swallow "modification."

Properly understood, then, "waiver" refers *only* to the "excuse of conditions," CORBIN, *supra* at 514, and *not* to the discharge of obligations or the modification of performance terms. Although "waiver" may be defined in many ways depending upon the factual context, the "excuse of conditions" explanation illustrates the limits of the concept. "Conditions" to full performance may be "excused" or waived. But a material breach of an obligor's ultimate duty may not be ignored: upon a complete failure of performance the breach fully exists, triggering the obligee's contractual remedies. "Conditions" like temporal prerequisites also may be "excused" or waived. But an assertion of "waiver" cannot fundamentally alter the performance requirement, and "rewrite" through oral testimony the terms of a written contract. *Cole Taylor Bank*, 51 F.3d at 739.

Here, Liberty's entire case theory turned those essential concepts on their head. By contending that it "waived" delivery of VOOS "on the settlement dates" set forth in the written contracts, Liberty purported to "waive" Goldman Sachs' conceded "breach" altogether – when damages were \$0. And by asserting that its "waiver" of the "breach" continued until subsequent and unilateral "retraction," Liberty purported orally and "subjectively" to "rewrite" the written contracts requiring delivery "on the settlement dates" to command delivery instead on dates chosen only in hindsight by Liberty's say-so – when damages were at their highest conceivable point. That unilateral, oral amendment to the written agreements was without consideration; indeed, it exposed Goldman Sachs to unlimited market risk until Liberty supposedly changed its mind. Importantly, Liberty's ostensible "waiver" of the breach did not merely "waive" some minor temporal condition. Delivery "on the settlement dates" was material because securities like VOOS have fluctuating

value. The contract did not call for delivery of VOOS in the abstract – but VOOS at a particular point in time, with a related and specific value. Delivery at the “time” specified was accordingly a fundamental element of the parties’ agreement.

Unlike circumstances where parties waive *conditions* to full performance like “time-of-the-essence” provisions, “express” warranties, or other circumstances attendant to satisfaction of contractual obligations, here Goldman Sachs’ *only* obligation under the written contracts was to deliver VOOS “on the settlement dates.” Its conceded failure established a complete breach. *See, e.g., AM Cosmetics, Inc. v. Solomon*, 67 F. Supp. 2d 312, 317 (S.D.N.Y. 1999). That breach triggered Liberty’s rights, its obligation to mitigate, and the duty to elect its remedies. *See, e.g., National Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 675 (S.D.N.Y. 1991) (a party to an agreement that has been breached “may elect to continue to perform the agreement rather than terminate it, and later sue for breach”). *See also Medinol, Ltd. v. Boston Scientific Corp.*, 346 F. Supp. 2d 575, 620 (S.D.N.Y. 2004); *Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 668-69 (S.D.N.Y. 1996). Liberty’s failure to declare the breach and elect a remedy – whether denominated “waiver,” “excusal of performance” or any other label – simply does not erase the complete breach. The breach exists, and nothing in the concept of “waiver” can change that. This incontrovertible principle is why the case should never have reached the jury, and why the jury’s decision cannot stand.

Liberty’s entire case theory – that it “waived” Goldman Sachs’ performance and the “breach” effected by nondelivery – was thus 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,” RESTATEMENT (SECOND) OF CONTRACTS § 84(1)(a) (1981)¹ The *only* “condition” that Liberty purported to waive was the

¹ Corbin forms these concepts into the following “working rule of law”: “A condition of a promisor’s duty can be eliminated by a mere voluntary expression of willingness to waive it, if its performance does not constitute a material part of the agreed equivalent of the promise and its nonperformance does not materially affect the value the promisor received.” CORBIN ON CONTRACTS § 40.2 at 522. In short, if the waived condition is full performance, the purported “waiver” is ineffective as a matter of law.

only obligation that Goldman Sachs undertook: to deliver. Liberty's "waiver" contention thus swallows Goldman Sachs' "breach" entirely.

Liberty's related theory – that the "time of breach" was deferred until the unilateral "retraction" of its waiver – is similarly inconsistent with these elementary concepts of "waiver" as an "excuse of conditions." If "waiver" cannot excuse performance and breach altogether, neither can "waiver" *change* the terms of performance to modify the date of breach to some time unilaterally chosen by Liberty. That effects precisely the sort of "rewriting" by subjective oral testimony of a contract committed to writing that Judge Posner warned against in *Cole*. Only a novation or modification supported by consideration could have substituted a different delivery date – but that was never Liberty's theory, which relied exclusively on unilateral "waiver."

The effect of Liberty's contentions that it could unilaterally "waive" performance of the only obligation Goldman Sachs assumed in the contracts, or "alter" the date of breach by the same tactic, would be to permit it to speculate in the market at Goldman Sachs' expense. The concept of "efficient breach" that underlies all contemporary contract jurisprudence and that the Court explained to the jury – which *permits* a party like Goldman Sachs to breach a contract so long as it is prepared to pay the damages associated with the breach – the value of the VOOS on the date delivery was due – is simply extinguished by Liberty's case theory.

Moreover, the concern that Judge Posner expressed in *Cole* about the "subjective" testimony of a party who self-servingly claims "waiver" in order to escape ordinary contractual consequences is spotlighted here by the absence of documentary evidence to corroborate Liberty's contention. Liberty relied exclusively on the testimony of Ms. Marsjanik to establish its ostensible "waiver" of Goldman Sachs' delivery obligation. Her testimony that she and Mr. Joon Yoo "insisted" upon delivery of VOOS as a condition to trading Venezuelan Brady Bonds with Goldman Sachs and her statements that Mr. Mutter made "assurances of

ultimate delivery” were not only self-servingly “subjective,” they were flatly contradicted by a complete absence of documentary support. Liberty did not record VOOS “due” from Goldman on its books and records. It did not include them as an asset on its financial statements. As an insurance company obliged to report assets and liabilities to the Massachusetts Commissioner of Insurance, it omitted to include VOOS as an asset – or even as a receivable. Ms. Marsjanik claims to have advised Liberty’s “back room” of Goldman Sachs’ deferred obligation “orally,” but the “back room” maintained no record, no writing, no e-mail, no memorandum and nothing else to corroborate Ms. Marsjanik’s assertion. Mr. Yoo retired; had Ms. Marsjanik left the company no record would have alerted the investment department, the finance staff or Liberty’s regulators that it “owned” an asset it claims was worth millions, and was “due” delivery of such valuable securities. The lack of written corroboration of Ms. Marsjanik’s testimony is stark confirmation that a “waiver” predicated on such evidence must be examined skeptically. A “waiver” that eliminates performance entirely, or changes it radically, is not recognizable as a matter of law – and certainly cannot be woven from such skimpy evidentiary cloth.

It follows that all of Liberty’s evidence of “waiver” was simply beside the point. As a matter of law, Goldman Sachs’ conceded breach of the duty of delivery “on the settlement dates” that the undisputed contract terms required establishes the “date” of the breach as a matter of law and measures damages accordingly. That “breach” could not be unilaterally waived and the written “settlement date” that defined Goldman Sachs’ only material obligation could not be unilaterally changed. Judgment for Goldman Sachs on Liberty’s fundamental case theory was required as a matter of law.

II. The Evidence Was In All Events Insufficient to Establish a “Clear, Unequivocal and Unmistakable” “Waiver” as a Matter of Law

Even if the doctrine of “waiver” could be used to erase or drastically modify Goldman Sachs’ delivery obligation under the ten disputed contracts, the evidence was still insufficient to the jury to

conclude that Liberty Mutual made and communicated to Goldman Sachs an effective “waiver” of its “right” to delivery on *each* of the ten disputed transactions.

To establish “waiver,” Liberty Mutual bore the burden to prove that it “intentionally relinquished its known right” to timely delivery of VOOS, and that its surrender of that right was “clear, unequivocal, and unmistakable.” *See, e.g., Mooney v. City of New York*, 219 F.3d 123,131 (2d Cir. 2000). “Waiver” requires proof of an “intentional relinquishment” – that the party was fully *aware* that it possessed a right and *purposefully* renounced it. *See, e.g., Capitol Records, Inc. v. Naxos of America, Inc.* 372 F.3d 471, 482 (2d Cir. 2004). Moreover, a “waiver” is not effective absent evidence of a “clear manifestation” made to the contractual counterpart of the renunciation. *Globecon Group, LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165 (2d Cir. 2006); *Gruppo, Levey & Co. v. ICOM Info. & Comm’ns, Inc.*, No. 01 Civ. 8922, 2003 WL 21511943 (S.D.N.Y. Jul. 1, 2003) (“waiver must be unmistakably manifested and not simply inferred from a doubtful or equivocal act”). A “waiver” cannot merely be perceived in hindsight; rather, waiver only occurs when a party makes a “conscious” and “intentional” choice to waive its rights and engages in deliberate “conduct” sufficient to express that waiver in a clear and unequivocal manner. In short, a “waiver” must be communicated through words or conduct, so that the obliged party knows and understands that full performance is not required, and can change its position in consequence.

These requirements of a “clear, unequivocal and unmistakable” waiver of “known rights” that are effectively “communicated” to the obliged party implement the policy that a “waiver” not shift the risk of non-performance to an unknowing obliged party. Stated differently, a “waiver” must be unmistakable so that it “put[s] the defendant in a position” to rescind, perform, pay damages, or otherwise escape the consequences of a “waiver” of timely performance. *Mawhinney v. Millbrook Woolen Mills, Inc.*, 234 N.Y. 244, 250 (1922). The “unmistakable” manifestation rule executes the concept the Court articulated

in its pre-charge to the jury: one may not “waive” performance simply to shift market risk to a contractual counterparty.

In this case, Liberty Mutual failed to set forth any evidence – much less evidence approaching the stringent standard the law exacts – that it made a deliberate or conscious decision to “waive” its “right” to delivery of VOOS according to the contractual term “on the settlement dates” and communicated that “waiver” to Goldman Sachs sufficiently for Goldman to act. To the contrary, the evidence only supports the *opposite* conclusion: that Liberty Mutual continually *insisted* upon immediate performance through delivery of VOOS. Simply put, the evidence of “waiver” was insufficiently clear and unmistakable that it could trigger the exercise of the defendant’s right to avoid the effect of Liberty’s “waiver.”

The entire body of evidence that Liberty presented at trial to support its theory of waiver embraced four elements:

(i) Ms. Marsjanik’s testimony that, in a conference call with Paul Mutter prior to any trading, she and Joon Yoo jointly insisted on delivery of VOOS as a pre-condition to doing business with Goldman Sachs in Venezuelan Brady Bonds and communicated a “policy” of insistence on delivery (*see* May 11 Trial Tr. at 61, 125);

(ii) Goldman Sachs’ internal e-mails corroborating its understanding of that “policy,” including the expression of concern that Liberty would terminate all business with Goldman absent immediate delivery of VOOS (*see* Exhibits 6, 8, 57, 58, 59);

(iii) Ms. Marsjanik’s testimony about statements at the time of execution of trades, in which Mr. Mutter purportedly made “assurances of ultimate delivery” (*see* May 11 Trial Tr. at 75–76); and

(iv) Ms. Marsjanik’s testimony of a single, post-trade communication with Mr. Mutter reiterating the “waiver” (*see* May 11 Trial Tr. at 155 – 56).²

Taken either individually or together, these items of evidence would not have permitted a reasonable jury to infer a “clear, unequivocal and unmistakable” act by Liberty Mutual “communicating” to Goldman Sachs its “intentional relinquishment” of the right to delivery of VOOS “on the settlement dates” for each of the ten disputed transactions, in favor of some other ambiguous and undefined time for performance. Likewise, no reasonable jury could conclude from this evidence that Liberty Mutual made such a “clear manifestation” of its intent to waive delivery “on the settlement dates” for each transaction such that Goldman Sachs could have acted to avoid or reduce the exposure to the indefinite market risk threatened by Liberty’s decision.

First, Ms. Marsjanik’s testimony that she and Mr. Yoo jointly insisted on delivery of VOOS as a precondition to doing any trading with Goldman Sachs in Venezuelan Brady Bonds did not permit an inference of “waiver” of a current delivery requirement in favor of some extended, undefined permission to deliver later. It commands the *opposite* inference – that delivery was *insisted* upon and *not* waived at all. Ms. Marsjanik testified that, during this conversation, “we reiterated to him that we absolutely wanted our VOOS.” May 11 Trial Tr. at 61. This testimony cannot support the inference Liberty Mutual intentionally “relinquished” a right to delivery “on the settlement dates,” or that it unambiguously communicated such a surrender of its expectations. Indeed, Ms. Marsjanik affirmatively establishes that this call did *not* include discussion about “when” VOOS would be delivered. *Id.* In

² Of course, that evidence was flatly contradicted by Goldman Sachs’ evidence. Most importantly, the evidence established without contradiction that any commitment to extend delivery obligations – for even a day, much less indefinitely – required multiple approvals and documentation as an extension of credit, which of course never happened. *See, e.g.*, May 15 Trial Tr. at 46 – 48 (testimony of M. Rakitta); *id.* at 110 – 111 (testimony of P. Mutter).

short, the evidence demonstrates only that Liberty Mutual knew of the difficulties in the market but still *insisted* upon delivery of VOOS notwithstanding the market “short.”

Second, Goldman Sachs’ internal e-mails compel the inference that Liberty Mutual resolutely *insisted* upon delivery of VOOS rather than “waiving” delivery “on the settlement dates.” They affirmatively demonstrate that Liberty Mutual desired, expected, and demanded timely delivery of VOOS as it executed the associated trades with Goldman Sachs. *See, e.g.*, Exhibit 6 (e-mail chain including January 24, 2001 e-mail from Paul Mutter noting that Liberty Mutual is “EXTREMELY frustrated” that they had not received delivery of VOOS from a January 9, 2001 trade); Exhibit 8 (e-mail chain including January 26, 2001 e-mail from Paul Mutter explaining that Joon Yoo “called threatening to terminate all Liberty Mutual business with Goldman Sachs (system-wide) if this problem is not resolved today”); Exhibit 59 (June 28, 2001 e-mail from Paul Mutter that Liberty Mutual “will threaten to break this trade, cutoff all business with the division, etc.,” if Goldman Sachs failed to deliver VOOS). The expression of frustration at the absence of delivery, and making threats to compel delivery, are fundamentally inconsistent with the “waiver” of a known right. This evidence does not begin to establish waiver; it contradicts it.

Third, Ms. Marsjanik’s testimony that Liberty Mutual communicated its “waiver” of current delivery obligation to Paul Mutter on each of the ten disputed trades “at the time of execution” reflects a complete lack of proof on the issue. Ms. Marsjanik affirmatively testified that she did *not* have such communications herself on each trade, because she did not *do* each trade. To the contrary, Mr. Yoo executed “the vast majority” of Liberty’s trades with Goldman. May 11 Trial Tr. at 153. And even if Ms. Marsjanik did some of them, she could not identify either how many or which ones:

Q And you don’t have a memory of any specific transaction where you purchased par bonds from Goldman Sachs, do you?

A Not specifically, but I have a general recollection of being involved in several trades.

* * *

Q Stated another way, if you have no memory of either placing a trade or having a conversation specifically, you can't tell us, can you, what happened in any of those conversations, can you?

A I can't recall a specific trade or specific date, but I have a general recollection of being involved --

May 11 Trial Tr. at 127 - 28.

Although the jury was obliged on the Court's instructions to find that Liberty Mutual effected a "waiver" as to *each* of the ten transactions individually, on this testimony they were necessarily at a complete loss to do so. Since there was no evidence of a *blanket* "waiver" as to all transactions Liberty did with Goldman – to the contrary, the evidence established only the *insistence* on "immediate" delivery for the first transactions – the jury was in no position to say whether Liberty communicated its "waiver" on the September 4 transactions, or the September 18 trade; whether Liberty "waived" delivery on the October 19 contract or the November 19 order; whether Liberty "deferred" delivery on the December 7 purchases or the December 13 investments. *See* Exhibit 25. Without evidence that tied the communication of "waiver" – in Ms. Marsjanik's words "at the time of execution" – to each specific trade through individuals who actually effected each execution, the jury had no evidence upon which to assess the existence of "waiver" on each contract at all.

Finally, the only "post-trade" evidence of waiver is Ms. Marsjanik's statement that in "early 2002" she called Mr. Mutter to "ask why delivery had not been made and to request immediate delivery." *See* May 11 Trial Tr. at 156. On its face, the testimony contradicts the existence of a prior "waiver." Self-evidently, an inquiry to "ask *why* delivery had not been made" was superfluous if it had been waived. Likewise, the "request" for "immediate delivery" is inconsistent with "waiver." If Goldman Sachs'

obligation to deliver had been relinquished by Liberty Mutual, there was no reason to “request immediate delivery.” Again, and fairly read, this evidence does not tend to establish waiver, it rebuts it. Whatever Goldman Sachs’ representatives said in response to Ms. Marsjanik’s request for delivery – even if Goldman Sachs offered “assurances of ultimate delivery” – could not possibly matter. What Goldman Sachs said could not possibly constitute a clear, unequivocal and unmistakable act of “communication” by Liberty Mutual of the intentional relinquishment of *its* right.³

Once again, the evidence Liberty Mutual relied upon to *establish* waiver is more consistent with the *absence* of waiver is highlighted by the absence of documentation that would corroborate Liberty Mutual’s position. Every written record created or maintained by Liberty confirmed that delivery was “due” on the “settlement date.” Indeed, the omission by an investment adviser to insurance companies to maintain a single written record attesting to its “ownership” or “right to delivery” of an ostensibly valuable asset is – to be blunt – absolutely incredible. In turn, that absence of documentation emphasizes the skepticism with which courts must view “subjectively self-serving” claims of “waiver.” Since the evidence that Liberty relied upon was exclusively “subjective” and “self-serving,” and compelled an inference *inconsistent* with “waiver,” it was beyond the logical power of a reasonable jury to conclude that a “waiver” was effectively made and communicated.

III. As a Matter of Law, Any “Waiver” Was Effectively Withdrawn Long Before November 2005

In addition to a complete “waiver” of Goldman Sachs’ ultimate performance duty under the ten disputed contracts, and the resulting alteration of the delivery date and resulting “time of breach,” Liberty’s case theory depended upon establishing November, 2005 as the date it “withdrew” its “waiver.” Any earlier “retraction” of Liberty’s “waiver” would leave it with no damages. As a result,

³ As a matter of law, to the extent Liberty relies on evidence of “waiver” *after* delivery was due, the “waiver” may not be retracted. See Farnsworth, *CONTRACTS*, *supra*, § 8.5 at 451.

Liberty attempted to attribute magical qualities to its “buy-in” notice, which it characterized as the “formal” means of insisting upon delivery of VOOS to Goldman Sachs.

But as a matter of law, formalities were unnecessary. The “buy-in” notice did not possess the singular qualities that Liberty purported to attribute to it; and Liberty’s actions throughout 2005 were flatly – and concededly – inconsistent with the continued existence of any “waiver.” Simply put, one cannot simultaneously “waive” a right *and* seek to enforce it. As a result, and as a matter of law, if there was any “waiver” at all, it was retracted no later than February, 2005. No reasonable jury could conclude that the “withdrawal” that Liberty claimed temporally established the “breach” could *only* occur in November, 2005. The evidence unequivocally showed that Liberty Mutual made multiple and repeated demands for delivery of the VOOS commencing in February, 2005. In its Complaint, Liberty directly alleged that Goldman Sachs had failed to deliver VOOS “[d]espite repeated demand.” *See* Exhibit 18 at ¶16. Ms. Marsjanik testified that she “instructed” Mr. Bittarelli “to pursue delivery” of the VOOS in “late 2004 or early 2005.” May 14 Trial Tr. at 15–16. Mr. Bittarelli corroborated that instruction, acknowledging his job was to “obtain” delivery at that time. *Id.* at 54–55, 102–03. He testified that he made numerous requests for delivery commencing in February, 2005 through and until August, 2005. *Id.* at 123. He sent delivery “instructions” to Goldman Sachs on June 29, 2005, *id.* at 155-56, and instructed Goldman Sachs to “set up free deliveries to our custodian for what is owed us.” Exhibit 42. In August, 2005, Liberty recorded the VOOS “due” from Goldman Sachs on its books and records. Exhibit 38.⁴ Nothing in his oral or written correspondence is consistent with continued “waiver.” All of his communications were concededly aimed at “obtaining” for Liberty “immediate”

⁴ The significance of Liberty’s decision to record the VOOS ostensibly “due” from Goldman Sachs in its books in August, 2005 should not be overlooked. Presumably, it booked the asset because it no longer “waived” the delivery obligation – otherwise there would have been nothing to record. And it did so at value of \$3 per VOO. In short, this evidence both corroborates the “retraction” of any “waiver,” undermines the magical attributes Liberty accords the “buy-in” notice, and establishes its damages at no more than \$3 per VOO.

delivery from Goldman Sachs. As a matter of law, if any “waiver” were effected in the first place, that evidence established the “retraction” or “withdrawal” of any “waiver” that Liberty might ever have made – and did so long before November, 2005. *See, e.g., Pierson v. Willets Point Contracting Corp.*, 899 F. Supp. 1033, 1048 (E.D.N.Y. 1995) (party did not waive right “because it persisted in demanding performance throughout the relevant time frame”); *Capital Medical Systems Inc. v. Fuji Medical Systems, U.S.A., Inc.*, 658 N.Y.S.2d 475, 478 (N.Y. App. Div. 1997) (“Evidence in the record demonstrates that plaintiff timely complained. . . . Thus, plaintiff did not waive this claim.”).

IV. The Court’s Jury Instruction that Waiver Need Not Be “Explicit” was Erroneous

Even if Liberty’s theory of unilateral “waiver” were legally viable, a new trial is warranted due to the Court’s erroneous instruction on the issue of whether a waiver must be “explicit.” After the case was submitted to the jury, the jurors posed the following question to the Court: “Do the terms of the waiver have to be explicit?” *See* May 16 Trial Tr. at 67–68. The Court’s response to the jury’s question was “No. But it must be clear that it’s a waiver. And I’ve told you the indicia of a waiver.” *Id.* at 69. This instruction was improper as a matter of law, created confusion on a controlling issue of the case, and was prejudicial to Goldman Sachs.⁵

The response “no” to whether a waiver must be “explicit” was inconsistent with the Court’s instruction that a waiver must be “clear, unequivocal, and unmistakable,” May 16 Trial Tr. at 15, and with the prevailing law of New York. The word “explicit” is defined as “1a. Expressed without vagueness or ambiguity: specific. b. Clearly formulated or defined. 2. Forthright and unreserved in expression.” WEBSTER’S NEW COLLEGE DICTIONARY (3rd ed.) at 403 (2005). *See also* AMERICAN HERITAGE DICTIONARY (2006) (“Fully and clearly expressed; leaving nothing implied; Fully and clearly

⁵ Goldman Sachs properly preserved its right to bring a post-trial motion on the basis of this jury instruction by objecting before the jury resumed its deliberations. *See* May 16 Trial Tr. at 65–67.

defined or formulated"); RANDOM HOUSE UNABRIDGED DICTIONARY (2006) ("1. fully and clearly expressed or demonstrated; leaving nothing merely implied; unequivocal; 2. clearly developed or formulated; 3. definite and unreserved in expression"). Because "explicit" is uniformly defined to mean clear, unequivocal, and unambiguous – the very words in the Court's original charge on the elements of "waiver" and the antonym of "unclear, equivocal, and mistakable" – the response "no" to whether a "waiver" must be "explicit" permitted the jury to conclude a waiver could be *non*-explicit – and therefore ambiguous. Even if a "waiver" may be "communicated" by words or conduct, it cannot be either implied or unmistakable. Although the Court may not have intended its response "No" to carry that connotation, without further instruction use of that word clearly had that effect – especially inasmuch as it was the last word the jury heard from the Court before returning its verdict.

The focus in examining whether a new trial is warranted by virtue of the jury instructions "is to determine whether they adequately explained the law or 'whether they tended to confuse or mislead the jury on the controlling issues.'" *Davet v. MacCarone*, 973 F.2d 22, 26 (1st Cir. 1992) (internal citation omitted). *See also La Plante v. American Honda Motor Co.*, 27 F.3d 731,736 (1st Cir. 1994). The Court's instruction that waiver does not need to be explicit did not adequately explain the law and created a likelihood of confusing the jury on a key issue to the case. Furthermore, assuming *arguendo* that Liberty Mutual's evidence was sufficient to establish "waiver" as a matter of law, it was so weak that this erroneous and confusing answer inevitably led the jury to the wrong conclusion about the existence of a "clear, unequivocal and unmistakable" waiver. Since as shown above there was no evidence of a "blanket" waiver, and insufficient evidence to discern a "waiver" during the execution of each separate trade, the watered-down instruction on "explicitness" is the only explanation for the jury's verdict. Because this instruction was erroneous, confusing, and clearly prejudiced the jury, Goldman Sachs is entitled to an order awarding a new trial.

IV. The Evidence Established As a Matter of Law That Liberty Mutual Failed In its Duty to Mitigate Any Damage

As a matter of law, Liberty Mutual did not act reasonably to mitigate its damages. Whether or not it was either entitled to “waive” Goldman Sachs’ complete breach, and whether or not it established any such “waiver,” Liberty Mutual had an affirmative duty to mitigate its loss (1) by demanding that Goldman Sachs deliver VOOS after a secondary public market had been established in January, 2002; (2) by purchasing VOOS on the public market or otherwise covering its trade; and/or (3) by withholding VOOS it delivered to Goldman Sachs in December, 2001.

Liberty had an affirmative duty to act reasonably to mitigate its loss by “covering.” Under New York law, where a broker-dealer’s “customer fails to cover within a reasonable time, damages are limited to the potential cost to cover, measured from the time he learns of the broker’s failure and for a reasonable time thereafter in which he must decide his course of action.” *Brown v. Pressner Trading Corp.*, 475 N.Y.S.2d 405, 407 (N.Y. App. Div. 1984); *Saboundjian v. Bank Audi (USA)*, 157 A.D.2d 278, 284-85 (N.Y. App. Div. 1990) (same). The evidence established without contradiction that Liberty Mutual delivered VOOS to Goldman Sachs in December, 2001 despite the fact that Goldman Sachs owed a greater number of VOOS to Liberty Mutual at that time (May 14 Trial Tr. at 11 – 12); that a secondary market for VOOS existed after January, 2002 (Complaint (Exhibit 18) ¶ 6); that Liberty was bid \$0.10 for all of its VOOS by Merrill Lynch in April, 2004 (May 14 Trial Tr. at 20 – 21); that it only recorded VOOS on its books and records upon the existence of a reliable market price (*id.* at 20); and that as late as August 31, 2005, Liberty first recorded the 220,375 VOOS at issue on its books for \$3 per VOO (*id.* at 30). In view of such evidence, no reasonable juror could conclude that Liberty satisfied its duty to mitigate or that Goldman Sachs failed to carry its burden of persuasion on the issue.

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

A new trial is also warranted because the Court improperly rejected Goldman Sachs' peremptory challenge of a juror. During jury selection, counsel for Goldman Sachs peremptorily challenged Mr. Colbert Desravines. *See* May 7 Trial Tr. at 34. Without objection from the plaintiff, the Court *sua sponte* noted that Mr. Desravines was the only African-American member of the venire, and demanded to know the basis for the challenge. *Id.* Counsel explained that Mr. Desravines had appeared to demonstrate difficulty with the English language and accordingly could be expected to have difficulty understanding the proceedings. *Id.* at 35.⁶ The Court denied the peremptory challenge on the grounds that Mr. Desravines was the only African-American on the jury venire. *Id.* at 35.⁷ It is improper to deny a peremptory challenge as race-based without regard to the challenger's race-neutral explanation. Because the Court improperly denied Goldman Sachs's peremptory challenge, a new trial is required under Federal Rule of Civil Procedure 59(a).

Peremptory challenges predicated exclusively on a prospective juror's race are concededly prohibited. *Batson v. Kentucky*, 476 U.S. 79 (1986). The First Circuit has adopted a "three-step procedure" for evaluating a peremptory challenge under *Batson*. The objecting party must first make out a *prima facie* case of racial discrimination. *See Caldwell v. Maloney*, 159 F.3d 639, 652 (1st Cir. 1998). The party challenging the prospective juror may then offer a race-neutral explanation for the challenge. *Id.* The court "must then decide whether 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) (internal citations omitted). This obliges the court to

⁶ "MR. DONOVAN: 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.

⁷ "THE COURT: Well, he is the only black person in the venire. And we've got people of equally rather simple, how shall I say this, jobs that are not terribly complex. No, I'm denying the challenge. He's seated. Your rights are saved.

determine whether the “race-neutral explanation rings hollow,” *id.* (internal citations omitted); at this stage, “the crucial issue is whether the challenge was motivated by racial discrimination.” *Caldwell*, 159 F.3d at 652.

Here, the Court had absolutely no basis upon which to conclude that the defendant’s race-neutral explanation – that during *voir dire* the challenged juror displayed an inadequate grasp of the English language and the attendant inability to understand the evidence – conceivably “rang hollow.” No party “objecting” to the challenge even hinted that the decision was race-based, sufficient to carry the “ultimate burden” of showing discrimination. There was accordingly absolutely no basis upon which to conclude that Goldman Sachs’ challenge was motivated by racial animus. The Court’s solicitude for a juror’s “right” to serve, and its apparent interest in a jury reflecting a racial cross-section of the community, improperly substituted the Court’s view of how the jury should be constituted for the parties’ race-neutral right to decide that issue for themselves.

The First Circuit’s decision in *United States v. Serino*, 163 F.3d 91 (1st Cir. 1998), is factually indistinguishable and dispositive. There, *this* Court asked defense counsel why he was challenging the only Asian-American prospective juror on the venire and rejected the race-neutral explanation offered in response. There – as here – “[t]he defendant’s lawyer gave a perfectly understandable reason for the challenge” and there was no evidence “to prove that this reason was a pretext for actual discrimination.” *Id.* at 93.⁸ To sustain an objection to a peremptory challenge, the Court must have some basis on which to conclude that the challenge was motivated by racial discrimination, and cannot decide that the

⁸ Indeed, Goldman Sachs’ explanation for striking Mr. Desravines based on his apparent difficulty with English is evident in the record. When asked by the Court to identify his employment, Mr. Desravines was extremely difficult to comprehend. The transcript indicates that Mr. Desravines said that he works at the “Hotel Marriott Rowes Wharf,” May 7 Trial Tr. at 34. Of course, there is no Marriott hotel at Rowes Wharf; it is likely Mr. Desravines stated that he worked at the Hotel Marriott Long Wharf and was misunderstood by the court reporter due to his difficulty with the English language.

objecting party has met this burden simply because it did not accept a race-neutral explanation as a valid reason for keeping a person off of the jury. *Id.* *A fortiori*, when the Court itself *inspires* the issue by questioning whether a challenge is race-based without any predicate for even raising the issue of race-based challenges, the *sua sponte* objection cannot be sustained.

Neither “prejudice” nor “harmlessness” is a consideration. *Id.* at 93 (“to enforce the entitlement to the peremptory challenge, we reverse the conviction without proof of prejudice or proceeding to consider harmlessness”); *United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979)(same). The Court’s interference with Goldman Sachs’ legitimate exercise of a peremptory challenge requires a new trial.

CONCLUSION

For all the foregoing reasons, Goldman Sachs respectfully requests that the Court issue an order entering judgment as a matter of law, or in the alternative, ordering a new trial.

Respectfully submitted,

Dated: June 14, 2007

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 was filed through the Court's CM/ECF system on June 14, 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.