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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELLINGTON OVERSEAS PARTNERS, LTD. and :
ELLINGTON LONG TERM FUND, LTD., :

Plaintiffs, :

- against - :

HSBC SECURITIES (USA) INC., :

Defendant. :

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06 Civ. 2353 (RMB)(FM)

Oral Argument Requested

**MEMORANDUM IN SUPPORT OF DEFENDANT HSBC SECURITIES (USA) INC.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT OR IN THE ALTERNATIVE
MOTION IN LIMINE**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF UNDISPUTED FACTS 3

 The Parties 3

 Background of the Warrant Transactions 3

 The Trades at Issue in This Litigation 4

 The Present Action 9

ARGUMENT 10

POINT I -- THE CONTRACTS WERE BREACHED ON THE RESPECTIVE
SETTLEMENT DATES WHEN HSBC WAS REQUIRED TO BUT FAILED
TO DELIVER THE OIL OBLIGATIONS..... 11

POINT II -- DAMAGES ARE MEASURED AT THE TIME WHEN THE CAUSE OF
ACTION FOR BREACH OF CONTRACT ACCRUES AND NOT AT A
SUBSEQUENT DATE OF ELLINGTON'S CHOOSING..... 14

CONCLUSION..... 18

Defendant HSBC Securities (USA) Inc. (“HSBC”) submits this memorandum of law in support of its motion for partial summary judgment pursuant to Fed. R. Civ. P. 56 by which HSBC seeks to establish the date upon which to measure damages (the “valuation date”) for the breach of contract claims asserted by Plaintiffs Ellington Overseas Partners, Ltd. and Ellington Long Term Fund, Ltd. (collectively “Ellington”). Alternatively, this motion can be construed as a *Motion In Limine* whereby HSBC seeks an Order excluding evidence at trial of a valuation date other than the subject settlement dates as described more fully below.

PRELIMINARY STATEMENT

This simple breach of contract action arises from HSBC’s failure to deliver 110,000 oil obligation certificates (“Oil Obligations” or “Warrants”) to Ellington in 2001. These Warrants were to be delivered as part of the following four trades between HSBC and Ellington wherein Ellington purchased Venezuelan Par Bonds (the “Bonds” or “Brady Bonds”) from HSBC along with the accompanying Warrants:

Trade Date	Settlement Date	Bond Qty	Warrants Attached
04/26/01	05/01/01	\$10.0 million	50,000
05/16/01	05/21/01	\$6.5 million	32,500
11/01/01	11/06/01	\$2.5 million	12,500
11/01/01	11/06/01	\$3.0 million	15,000

On or about the above settlement dates (the “Settlement Dates”) for the transactions, Ellington made full payment and HSBC delivered the Bonds, but because of an industry-wide clearing problem, HSBC failed to deliver the accompanying Warrants. It was not until five years later, when the Warrants came into the money that Ellington approached HSBC to collect and this action ensued.

In this action, HSBC has conceded its failure to deliver the Warrants. The remaining issue to be tried concerns the amount of damages to which Ellington is entitled. Because damages for a breach of contract are measured as of the date of the breach, the damages issue is itself largely dependent on the answer to one simple question: *When did the breach of contract occur?*

As will be demonstrated more fully below, the undisputed facts show that HSBC breached the contracts by failing to deliver the Oil Obligations *on the respective Settlement Dates in 2001* as called for by the terms of each respective contract. Ellington's own witnesses, its Complaint, the testimony of non-party witnesses, applicable law and documentary evidence establish that the delivery of the Oil Obligations was contractually due on the respective Settlement Dates. Ellington had fully performed its obligation by paying HSBC for the Bonds and Warrants on those Settlement Dates and HSBC's breach had fully accrued by failing to deliver the Warrants to Ellington on those Settlement Dates. Because New York contract law is clear that damages are measured at the time of the breach, and there is no material dispute that the contracts were breached on the respective Settlement Dates for each transaction, partial summary judgment establishing the respective Settlement Dates as the valuation dates is warranted.

In order to maximize its damages, Ellington incorrectly contends that the breach did not take place until five years after the subject transactions, i.e., on March 26, 2006, the date when Ellington filed its Complaint or, alternatively, on May 5, 2006, the date when HSBC filed its Answer. Ellington's position is belied not only by the allegations set forth in its own Complaint, but also by its own testimony, the testimony of its own expert witness, applicable case law and the unambiguous meaning of the term "settlement date."

In short, HSBC respectfully requests that the Court issue an Order, pursuant to Fed. R. Civ. P. 56 or as a motion in limine, declaring that the valuation dates for damages purposes are the respective Settlement Dates of the above-listed transactions. Once that determination is made, sophisticated parties like Ellington and HSBC would surely be able to eliminate all or virtually all of the remaining issues to be presented at trial.

STATEMENT OF UNDISPUTED FACTS

The facts below are taken primarily from Ellington's own pleadings, deposition testimony or uncontroverted documentary evidence.

The Parties

Plaintiffs, Ellington Overseas Partners, Ltd. ("EOP") and Ellington Long Term Fund, Ltd. ("ELT"), are companies formed in and under the laws of the Cayman Islands, each with its principal place of business in George Town, Grand Cayman, British West Indies. (Paccione Aff. Ex. A, Compl. at ¶¶ 1, 2.) EOP and ELT are large and sophisticated hedge funds managed by Ellington Management Group, LLC, which was founded in 1994 by Chief Executive Officer Michael Vranos. The Ellington funds have assets under management in excess of \$21.0 billion. See <http://www.ellington.com/team.html>. Defendant HSBC is a corporation formed in and under the laws of the state of Delaware with its principal place of business in the state and county of New York. (*Id.* at ¶ 3.)

Background of the Warrant Transactions

In the early 1990's, "Brady Bonds"¹ were issued to commercial banks in exchange for defaulted loans of certain developing countries, including Venezuela. (See *id.* at ¶ 7.) The bonds

¹ "Brady Bonds," a label given to the sovereign debt of certain emerging market countries, were created with the assistance of international monetary organizations in the late 1980's to reduce developing nations' indebtedness and minimize defaults. Named for former U.S. Treasury Secretary Nicholas Brady, U.S. Dollar denominated "Brady Bonds" typically are collateralized

issued by Venezuela included certain Par Bonds denominated in United States dollars bearing a fixed interest rate of 6.75%. (Id. at ¶ 8.) The Bonds were issued with the subject Oil Obligations attached. (Id. at ¶ 9.) For every \$1,000 principal amount of Bonds, the initial holders were to receive five “attached” Oil Obligations. (Id.)

The Oil Obligations, although initially attached to the Bonds, were detachable and transferable at any time, and, accordingly, were assigned their own unique International Security Identification Numbers (“ISINs”) separate from the Bonds upon initial issuance. (Paccione Aff. Ex. B, EMTA’s Primer on Venezuela Oil-Indexed Payment Obligations at 1.) Beginning in April 1996, if the average price per barrel of crude oil exported from Venezuela were to exceed an inflation-adjusted strike price of \$26.00, registered holders of the Oil Obligations could receive semi-annual Scheduled Payments capped at \$3.00 per Oil Obligation. (Paccione Aff. Ex. C, Form of Oil Obligation.) The conditions to payment of the Scheduled Payments on the Oil Obligations were not satisfied until October 2004. (Paccione Aff. Ex. D, October 6, 2004 Press Release – The Bolivarian Republic of Venezuela.) The Oil Obligations made no such Scheduled Payments until March 2005.² (Paccione Aff. Ex. E, February 18, 2005 Press Release – The Bolivarian Republic of Venezuela.)

By their terms, the Oil Obligations could be detached from the associated Bonds “at the option of the holder” and transferred separately commencing in 1990. However, EMTA, the principal trade group for the emerging markets trading and investment community, recommended that the Bonds and Oil Obligations trade together. (Paccione Aff. Ex. B,

by zero-coupon U.S. Treasury securities, thus assuring repayment of principal. At issuance, they frequently included other attributes, including rights, warrants, obligations or other “sweeteners” associated with the value of certain natural resources of the issuing country, that provided for the possibility of additional future payments if certain conditions were met.

² The October 2004 Scheduled Payment was delayed and not paid until March 3, 2005.

EMTA's Primer at 1.) This meant that when the purchase or sale of Bonds was ordered, the parties to the transaction were supposed to simultaneously enter separate settlement instructions for the associated Oil Obligations. (See id. at 2-3.) Many market participants, however, failed to comply, and in the absence of separate settlement instructions for both the Bonds and the Oil Obligations from both counterparties to transactions, numerous Oil Obligation transactions failed to settle. (See id. at 3.)

HSBC, like these other market participants, failed to deliver the Oil Obligations to Ellington in connection with the transactions at issue on the respective Settlement Dates in 2001 because HSBC itself was being failed to by other counterparties who were failing to them, and so on down the "daisy chain." (Paccione Aff. Ex. F, Gillen Dep. at 51-52, 60, 65.) Like many market participants, Ellington for years made no efforts to resolve the failed transactions nor to obtain delivery of the Oil Obligations. It was not until 2005 that Ellington for the first time sought to resurrect four-year-old fails in an effort to claim the Oil Obligations' newfound market value – an effort that ripened into this suit filed in March 2006.

The Trades at Issue in This Litigation

Ellington alleges that HSBC failed to deliver Oil Obligations that Ellington purchased as part of four separate transactions in the Bonds in 2001. (Paccione Aff. Ex. A, Compl. at ¶¶ 13, 21, 29, 37.) Ellington alleges that it purchased from HSBC certain Bonds with attached and corresponding Oil Obligations with the following particulars:

Trade Date	Settlement Date	Bond Qty	Warrants Attached
04/26/01	05/01/01	\$10.0 million	50,000
05/16/01	05/21/01	\$6.5 million	32,500
11/01/01	11/06/01	\$2.5 million	12,500
11/01/01	11/06/01	\$3.0 million	15,000

(See *id.* at ¶¶ 11, 19, 27, 35.) There were no special conditions attached to any of the trades and the uncontroverted evidence is that these transactions called for delivery of the securities versus payment on the standard settlement date of “T+3”³ - three business days after trade date. This is consistent with Rule 15(c)6-1 promulgated under the Securities Exchange Act of 1934 which specifically provides, “[A] broker or dealer shall not effect or enter into a contract for the purchase or sale of a security...that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.”

The contractual obligation on the respective Settlement Dates is further confirmed in Ellington’s own Complaint (Paccione Aff. Ex. A, Compl. at ¶ 13, stating that, “On or about November 1, 2001 the plaintiff, EOP, entered into a trade with HSBC for the purchase of \$3,000,000 face value Venezuela Par Bonds together with their corresponding 15,000 Warrants attached, which trade was *to settle* on November 6, 2001.”; *see also* ¶¶ 21, 29, 37.) The Settlement Dates are also clearly established in the documentary evidence, including HSBC trade confirms (Paccione Aff. Ex. G, ELL00009-00011, 00013, 00016); account statements sent to Ellington (Paccione Aff. Ex. H, ELL00023-00024, 00033-00035); Euroclear reports (Paccione Aff. Ex. I, HSBC 00653-00654, EB134); Ellington’s counsel’s November 3, 2005 letter to HSBC (Paccione Aff. Ex. J); Ellington’s claim letters to HSBC seeking to collect the Oil Obligations’ Scheduled Payments (Paccione Aff. Ex. K, ELL00002-00003), Ellington’s internal trade ticket (Paccione Aff. Ex. L, ELL00001); Ellington’s Bloomberg tickets (Paccione Aff. Ex.

³ The “T+3” settlement cycle is shorthand for “trade date plus three days” and means that investors must complete or “settle” their security transactions within three business days. *See, e.g.,* <http://www.sec.gov/answers/tplus3.htm>. Rule 221 of the International Securities Market Association Rules and Recommendations applicable to international securities specifically provides, “[T]he value date for a transaction...shall be...the third business day following the trade date.”

M, CSSU 000477-000480); account statements sent to Ellington by Credit Suisse, Ellington's prime broker (Paccione Aff. Ex. N, at CSSU 00156, 00209, 00293, 00447-00448); and Credit Suisse settlement reports (Paccione Aff. Ex. O, CSSU 000481-000488).

It is undisputed that on the respective Settlement Dates the parties were obligated to exchange securities for payment. This was conceded in the testimony of Ellington Management Group's own witnesses including its vice chairman, (Paccione Aff. Ex. P, Penn Dep. at 63) (*settlement date* represents "the date that the bonds and warrants were supposed to be delivered"); Ellington's managing director in charge of its Trade Analysis and Liquidity Management department (Paccione Aff. Ex. Q, Sugrue Dep. at 30) (a party would be obligated to deliver securities in the first instance on "[t]he *settlement date* of the trade."); and its operations manager (Paccione Aff. Ex. R, Collins Dep. at 11) ("*Settlement date* is the date that the transaction is expected to be either delivered by us or received by us and the date that we have to pay the counterparty for the bonds.")). At his deposition, Thomas Franko, Ellington's own expert witness on the subject of securities market practice, testified as follows:

- Q. What is *settlement date*?
- A. *Settlement date* on which the parties have compared the trade, the money and securities trade hands.
- Q. What was HSBC's obligations in, under these contracts, what was it supposed to do?
- A. Supposed to deliver the entire security to the purchaser.
- Q. And did it fail to do that?
- A. It partially failed in that it didn't deliver the Warrants that were part of the trade.
- Q. When was it supposed to deliver the Warrants?
- A. On – well, it should have delivered the entire security, the entire trade, if you will, on trade date. Excuse me, on *settlement date*.

(Paccione Aff. Ex. S, Franko Dep. at 40-41.)

Treatises, journals and dictionaries and glossaries all corroborate that parties are obligated to exchange securities for payment on *settlement date*. See, e.g., 17 Williston on

Contracts § 51:46 (4th ed.) (“*Settlement date*’ is the term used in financial circles to designate the day when, absent other arrangements, the seller must deliver the [security] in proper form and the buyer must make payment...”); 28 Modern Securities Transfers § 9:15 (3d ed.) (“Comparison and clearance must be completed on the day (the “*settlement date*”) when SEC rules and the applicable market rules call for settlement, that is, for delivery and payment.”); James Steven Rogers, Policy Perspectives on Revised U.C.C. Article 8, 43 U.C.L.A. L. Rev. 1431, 1439 (“At the *settlement date*, the seller is required to deliver the securities to the buyer and the buyer is required to pay the agreed-upon price to the seller.”); John Downes and Jordan Elliot Goodman, Barron’s Finance and Investment Handbook (2d ed.) (*settlement date* – “date by which an executed order must be settled, either by a buyer paying for the securities with cash or by a seller delivering the securities and receiving the proceeds of the sale for them.”); http://www.investorwords.com/4514/settlement_date.html (*settlement date* - “The date by which an executed securities transaction must be settled, by paying for a purchase or by delivering a sold asset...”); https://scs.fidelity.com/webxpress/help/topics/help_definition_s.shtml (*settlement date* - “[T]he date on which securities must be paid for (purchase) or securities must be delivered (sold).”); <http://www.investopedia.com/terms/s/settlementdate.asp> (*settlement date* - “The date by which an executed security trade must be settled. That is, the date by which a buyer must pay for the securities delivered by the seller.”); <http://ola.orcasnet.com/olt/help/glossary/s-gloss.html> (*settlement date* - “Deadline for the completion of an executed order. The seller must deliver the securities that were sold and the buyer must deliver the cash by the *settlement date*.”); <http://www.investinginbonds.com/story.asp?id=52> (*settlement date* – “The date for delivery of securities and payment of funds.”)

It is also uncontroverted that on or about each Settlement Date, HSBC delivered the Bonds but did not deliver the Oil Obligations. (Paccione Aff. Ex. A, Compl. at ¶¶ 13, 21, 29, 37.) As such, HSBC's failure to perform was established and Ellington's right to enforce its legal remedies had accrued. (Paccione Aff. Ex. S, Franko Dep. at 40-44.)

The Present Action

Ellington did not raise the issue of HSBC's failure to deliver the Oil Obligations until four years later in 2005 when, Ellington now claims, it first learned that the Oil Obligations had not been delivered. (Paccione Aff. Ex. P, Penn Dep. at 156; Ex. T, Teredesai Dep. at 20-24, 56-57, 60-64; Ex. Q, Sugrue Dep. at 31, 108.)⁴ It is no coincidence that Ellington's much-belated inquiry in 2005 occurred only after oil prices increased dramatically, the conditions to payment of the Scheduled Payments were satisfied, and the Oil Obligations attained a market value they had not previously had. (Paccione Aff. Ex. P, Penn Dep. at 157-158.)

In April 2005, Ellington sent two claim letters to HSBC seeking to collect the Scheduled Payments that had been paid on the Oil Obligations in February and April 2005. (Paccione Aff. Ex. K, ELL00002-00003.) By letter dated November 3, 2005, Ellington's outside counsel, McCarthy Fingar LLP, wrote to HSBC listing Ellington's open fails with regard to the Oil Obligations with HSBC and seeking a resolution. (Paccione Aff. Ex. J.) A series of conference calls between Ellington and HSBC followed in December 2005 and January 2006. Subsequently, Ellington commenced this action on March 27, 2006 asserting a breach of

⁴ Ellington's prime broker, Credit Suisse, acted as Ellington's agent for purposes of clearing and settling the transactions at issue. (Paccione Aff. Ex. P, Penn Dep. at 21; Ex. T, Teredesai Dep. at 58-59; Ex. Q, Sugrue Dep. at 26-27; Ex. R, Collins Dep. at 9-10, 28-30; Ex. U, Mahoney Dep. at 14, 99.) Credit Suisse received reports from Euroclear on Ellington's behalf indicating that the Oil Obligations had not been not delivered on or about each respective settlement date. (Paccione Aff. Ex. U, Mahoney Dep. at 41-44, 61, 67-69; Ex. V, Yegidis Dep. at 20-21, 29-30, 47-54; Ex. W, Battaglia Dep. at 11-13, 15-16; Ex. I, Euroclear reports HSBC 00653-00654, EB134.)

contract claim for each of the subject transactions seeking monetary damages. Towards the end of discovery, the parties responded to contention interrogatories wherein HSBC identified the date of the breach of these contracts as the four respective Settlement Dates. Ellington, however, contends that the breach occurred as of the date of the filing of its Complaint or HSBC's Answer on March 27 and May 5, 2006, respectively. This dispute is the central dispute preventing the resolution of this action.

ARGUMENT

The grounds for summary judgment pursuant to Fed. R. Civ. P. Rule 56 are well established. Summary judgment must be granted for the movant when "there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998). The movant bears the initial burden of demonstrating an absence of a genuine issue as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thereafter, the non-movant must come forward and identify a genuine issue of fact under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (holding that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

In deciding a motion for summary judgment, "The court must view the evidence in the light most favorable to the party against whom summary judgment is sought." L.B. Foster Co. v. America Piles, Inc., 138 F.3d 81, 87 (2d Cir. 1998), *aff'd after remand*, 205 F.3d 1323 (2d Cir. 2000). But the non-movant cannot rely on "conclusory allegations or unsubstantiated speculation." Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998). Rather, in order to defeat a motion for summary judgment, "concrete evidence" is required. Liberty Lobby, 477 U.S. at 256.

Because there is no genuine material dispute as to the dates of each breach and the relevant measure of damages, partial summary judgment is warranted, limiting the trial to the issues of liability and the value of the Oil Obligations in 2001.

POINT I

THE CONTRACTS WERE BREACHED ON THE RESPECTIVE SETTLEMENT DATES WHEN HSBC WAS REQUIRED TO BUT FAILED TO DELIVER THE OIL OBLIGATIONS

There is no material factual dispute about the date when HSBC's performance in connection with the trades at issue was due and not made. Taking the evidence in the light most favorable to Ellington, this case is a simple one – HSBC failed to deliver Oil Obligations to Ellington in connection with four transactions in 2001. In each transaction, Ellington purchased the Bonds with the corresponding Oil Obligations from HSBC and paid the agreed upon price. HSBC, in turn, was required to deliver the Bonds and the accompanying Oil Obligations on the respective Settlement Dates.⁵

It is undisputed that HSBC delivered the Bonds but did not deliver the Oil Obligations on the Settlement Dates. (Paccione Aff. Ex. A, Compl. at ¶¶ 13, 21, 29, 37.) It is also undisputed that HSBC's contractual obligations required it to deliver both the Bonds and the Oil Obligations on each respective Settlement Date. (See *supra*, at pp. 5-8.) Ellington was entitled to delivery of the Bonds and Oil Obligations on each Settlement Date and never told HSBC that it did not have to deliver the Oil Obligations on each Settlement Date or release HSBC from that obligation.

⁵ Indeed, for each of the trades, Ellington alleges that it “paid all sums due and owing to, and fulfilled any and all other obligations to HSBC” for trades which were to settle on each respective settlement date. (Paccione Aff. Ex. A, Compl. at ¶¶ 11-12, 19-20, 27-28, 35-36.) Consistent with the “T+3” rule, the settlement dates for each trade were all within three business days after the trade dates.

(Paccione Aff. Ex. P, Penn Dep. at 63, 68; Ex. T, Teredesai Dep. at 49-51, 67-68; Ex. R, Collins Dep. at 11, 27-28.)

Consequently, when the Oil Obligations were not delivered along with the Bonds on the specified Settlement Dates, HSBC's breach accrued as a matter of law. Indeed, it is axiomatic that a contract is breached when performance is due and not made.⁶ Franconia Assocs. v. United States, 536 U.S. 129, 142-43 (2002); see also Restatement (Second) of Contracts § 235 (1981) ("When performance of a duty under a contract is due any non-performance is a breach.")

This principle applies equally in the case of failure to deliver securities - the date of the breach is the date when performance is due and does not occur. See Jeremias v. Shearson Hayden Stone, Inc., 72 A.D.2d 506, 420 N.Y.S.2d 881, 882 (N.Y. App. Div. 1979) (plaintiff breached contract by failing to deliver securities by extended settlement date in buy-in notice); Waxman v. Envipco Pickup & Processing Servs., Inc., No. 02 Civ. 10132(GEL), 2006 WL 1788964, at * 4-5 (S.D.N.Y. June 28, 2006) (Lynch, J.) (breach arose when defendant failed to transfer securities that were required to be issued and made available at closing date).

The contracts are clear and unambiguous in requiring the parties to perform their mutual obligations on the respective Settlement Dates. When the terms of a contract are unambiguous, the obligations it imposes are to be determined without reference to extrinsic evidence. Hunt Ltd. v. Lifschultz Fast Freight, Inc., 889 F.2d 1274, 1277 (2d Cir. 1989) (citing cases). The transactions at issue were simple purchases of securities that required the parties to exchange cash and securities on the specified Settlement Dates. This plain contractual language cannot be made ambiguous simply because Ellington now urges a different interpretation as to the meaning of settlement date in securities transactions.

⁶ New York law governs the transactions at issue as set forth in the terms and conditions of the trade confirmations sent by HSBC to Ellington. (Paccione Aff. Ex. G, at ELL00010.)

Notwithstanding Ellington's feigned lack of knowledge of the breaches in 2001, it is well settled that claims accrue upon breach, not when an alleged breach is discovered. Craig v. Bank of New York, 169 F.Supp.2d 202, 207 (S.D.N.Y. 2001) (Scheidlin, J.), *aff'd*, 59 Fed.Appx. 388 (2d Cir. 2003); see also Ely-Cruikshank Co., Inc. v. Bank of Montreal, 615 N.E.2d 985, 987, 81 N.Y.2d 399, 403 (N.Y. 1993) (cause of action for breach of contract accrued upon the breach, whether plaintiff was aware of the breach or not); ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F. 3d 351, 360 (2d Cir. 1997) (under New York law action for breach of contract accrues on the date of the breach whether plaintiff was aware of the breach or not). Accordingly, Ellington's knowledge is of little import under contract law. HSBC's non-delivery established the alleged breach, and the existence of a breach at the time delivery failed is not erased by Ellington's purported unawareness of the breach. The breach remains complete when made.

Furthermore, if Ellington's knowledge of the breach is an essential element to establish a breach of contract – and it is not – there still is no material issue of fact that Ellington's prime broker, Credit Suisse,⁷ knew no later than the respective Settlement Dates that HSBC had not delivered the Oil Obligations in breach of the contracts. (Paccione Aff. Ex. U, Mahoney Dep. at 41-44, 54-61, 67-69; Ex. V, Yegidis Dep. at 20-21, 29-30, 47-54; Ex. W, Battaglia Dep. at 11-13, 15-16; Ex. I, Euroclear reports HSBC 00653-00654, EB134) As Ellington's agent for purposes of clearance and settlement of the transactions at issue, the law is clear that Credit Suisse's knowledge is imputed to Ellington. See Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of New York, No. 99 Civ. 12175 (AKH), 2004 WL 1858314, *5 (S.D.N.Y. Aug. 20, 2004) (Hellerstein, J.) (“[K]nowledge acquired by an agent acting within the scope of his agency is

⁷ Credit Suisse was Ellington's prime broker on these transactions and was responsible for the clearance and settlement of Ellington's transactions.

imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it.”)(citations omitted).

As the record makes clear, the dispute over the dates of the alleged breaches is contrived, not “colorable” or “genuine” as required to defeat summary judgment. Cf. Liberty Lobby, 477 U.S. at 249 (citations omitted). Because no material facts support Ellington’s claim that the contracts were breached at some time other than the respective settlement dates, summary judgment establishing the settlement dates as the dates of each breach of contract is warranted.

POINT II

DAMAGES ARE MEASURED AT THE TIME WHEN THE CAUSE OF ACTION FOR BREACH OF CONTRACT ACCRUES AND NOT AT A SUBSEQUENT DATE OF ELLINGTON’S CHOOSING

Contract law precludes a party from asserting a breach and measuring damages at times it unilaterally selects based on subsequent events. Contractual breach accrues at the moment in time when one party fails to perform, not years later when worthless paper serendipitously ripens into a winning lottery ticket. Ellington’s contractual rights were triggered by HSBC’s failure to deliver the Oil Obligations on the settlement dates in 2001. The trades “failed” when HSBC failed to deliver the Oil Obligations in 2001, and the breaches occurred upon that lapse. As a matter of law, Ellington’s legal right to claim damages accrued when the breaches occurred and its claims ripened in 2001. See Brushton-Moira Central Sch. Dist. v. Fred H. Thomas Assocs., P.C., 692 N.E.2d 551, 553, 669 N.Y.S.2d 520, 522 (N.Y. 1998) (damages for breach of contract actions measured on “the accrual date of plaintiff’s cause of action”) (citations omitted).

“New York courts are clear that breach of contract damages are measured from the date of the breach.” Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 196 (2d Cir. 2003) (applying New York law); see also Lucente v. Int’l Bus. Machs. Corp., 310 F.3d 243, 262 (2d Cir. 2002). “The proper measure of damages for breach of contract is determined by the loss

sustained or gain prevented at the time and place of breach.” Simon v. Electrospace Corp., 269 N.E. 2d 21, 26, 320 N.Y.S.2d 225, 232 (N.Y. 1971) (citing cases). “The rule is precisely the same when the breach of contract is nondelivery of shares of stock.” Id. Ellington’s “cause of action should not and may not be converted into carrying a market ‘call’ or ‘warrant’ to acquire the [Oil Obligations] on demand if the price rose above its value as reflected in [its] cause of action.” Id. at 26, 320 N.Y.S.2d at 233.

Here, the “breach and the loss caused was fixed and determined in [2001] from which time plaintiff’s cause of action accrued, and the Statute of Limitations started to run.” Id. “Based on clear New York law, the proper valuation for the [Oil Obligations is] the date of the breach – the date [HSBC] failed to deliver the [Oil Obligations].” Oscar Gruss, 337 F.3d at 197; see also Burns v. Richfield Securities, Inc., 43 F.3d 1482 (10th Cir. 1994) (unpublished) (in breach of contract action for failure to deliver stock on settlement date, district court correctly determined that measure of damages is difference between contract price and market price of stock on settlement date). This rule applies to securities generally, including publicly-traded securities, see Oscar Gruss, 337 F.3d at 197-98; restricted stock and stock options, see Lucente, 310 F.3d at 261-62; and restricted depository receipts, see Waxman, 2006 WL 1788964, at *2-3. Ellington cannot recover more than the value of the Oil Obligations on the settlement dates in 2001 when delivery of the Oil Obligations was due.

In Waxman, 600,000 depository receipts – tradable securities representing stock of defendant holding company – were to be transferred to plaintiffs in exchange for plaintiff company’s assets. Waxman, 2006 WL 1788964, at *1. Under the parties’ Asset Purchase and Sale Agreement, the securities were to be transferred at closing, which occurred on or about October 30, 2001. Id. The Agreement further provided that a certain number of securities were

to be issued and made available immediately at closing, and the remaining were to be held in escrow for up to one year with certain conditions attached.⁸ Id. at *1-2.

On a joint pretrial motion concerning the proper method of valuing the depository receipts that defendants had failed to transfer, this Court held that the value of the securities should be measured as of the date of the breach. Id. at *2. The Court specifically noted:

“The rule is not only well settled; it is also well reasoned. Valuing the receipts as of the date when [defendant] failed to deliver them reflects the true loss to plaintiffs at the time of breach, and eliminates any speculation concerning how long plaintiffs would have held on to the securities if they had been delivered as promised.”

Id. at *3.

Despite the foregoing, Ellington seeks to recover the market value of the Oil Obligations as of the date of the filing of its complaint on March 27, 2006, not their value in 2001. However, Ellington may not unilaterally fix its quantum of damages. See Bache & Co., Inc. v. Williams, 1970 WL 7580, at *2 (N.Y. Sup. July 29, 1970) (holding that plaintiff could not unilaterally fix quantum of damages by waiting year and a half to send buy-in notice and another year to consummate buy-in; breach and consequent rights and obligations of parties had ripened and were long complete). New York law specifically prohibits the award Ellington seeks on the theory that measuring contract damages by the value of the item at the time of the breach actually takes into account expected lost future profits. Lucente, 310 F.3d at 262. Of course, had the value of the Oil Obligations substantially decreased rather than increased during the past six years, Ellington surely would be asking the Court to measure damages at the time of the breach. Clearly, an award of damages measured six years after the breach would constitute an

⁸ The Court determined that the date of the breach as to the securities that the Agreement required to be issued and made available immediately was the date of the closing, and the date of the breach as to the securities that were to be held in escrow was a matter for the jury at trial, but was no later than the end of the one-year escrow period. Id. at *5.

unconscionable windfall. See Lucente, 310 F.3d at 262 (noting that “New York courts have rejected awards based on what the actual economic conditions and performance were in light of hindsight.”) (internal citations and quotations omitted); Sharma v. Skaarup Ship Mgmt. Corp., 916 F.2d 820, 826 (2d Cir. 1990) (recognizing that measuring damages at the time of the breach actually takes expected future profits into account); see also, Miga v. Jensen, 96 S.W.3d 207, 216 (Tex. 2002) (discussing New York and Second Circuit precedents cited herein and holding that “To award [plaintiff] damages based on the [time-of-trial] appreciated value of the stock would be to make him better off than he would have been had the agreement been honored by giving him an investment free of risk other shareholders undertook.”).⁹

The record is clear that Ellington’s claims arose in 2001 when the Oil Obligations were not delivered and Ellington’s damages must be measured by the value – if any – of the Oil Obligations in 2001 when the breaches occurred. Ellington cannot prove that the dates of the breaches are dates other than the settlement dates; therefore partial summary judgment as to the valuation date is warranted as a matter of law.

⁹ The unconscionable windfall Ellington seeks is further illustrated by the fact that it appears from Ellington’s account statements that, as to each transaction at issue, there were corresponding sales by Ellington of the identical quantity of Bonds and Oil Obligations on the exact same dates. For example, on April 26, 2001 Ellington bought from HSBC \$10 million Bonds with attached Oil Obligations to settle May 1, 2001 but also sold \$10 million Bonds with attached Oil Obligations through ING Baring Furman Selz for the same settlement date. (Paccione Aff. Ex. N, at CSSU 00155.) Similarly, Ellington bought \$6.5 million Bonds with attached Oil Obligations from HSBC (as well as \$10 million from Lehman Brothers) to settle on May 21, 2001 and sold them (\$16.5 million total) through Merrill Lynch for the same settlement date. (Paccione Aff. Ex. N, at CSSU 00209.) Lastly, the \$2.5 million and \$3 million Bonds with attached Oil Obligations purchased from HSBC for settlement November 6, 2001 were also sold through Merrill Lynch for the same settlement date. (Paccione Aff. Ex. N, at CSSU 00293, 00448.)

CONCLUSION

By virtue of the foregoing, HSBC respectfully requests that the Court enter an Order finding that Ellington's damages should be measured as of each respective Settlement Date, or alternatively, excluding evidence at trial of a valuation date other than the subject settlement dates, and for such other and further relief as the Court may deem just and proper.

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