SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LEHMAN BROTHERS INTERNATIONAL (EUROPE) (in administration), Plaintiff, - against - AG FINANCIAL PRODUCTS, INC., Defendant.	Index No. 653284/2011

DEFENDANT'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE FIRST AND THIRD CAUSES OF ACTION OF THE COMPLAINT

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Defendant AG Financial Products, Inc. ("Assured Guaranty") submits this Reply in Further Support of Its Motion to Dismiss the First and Third Causes of Action of the Complaint of Plaintiff Lehman Brothers International (Europe) (in administration) ("Lehman International") and in response to the Plaintiff's Opposition to Defendant's Motion to Dismiss the First and Third Causes of Action of the Complaint (the "Opposition").[1]

PRELIMINARY STATEMENT

While conceding in its Opposition that Assured Guaranty properly terminated the parties' Financial Insurance Contracts as a result of defaults by Lehman International, Lehman International nonetheless continues to seek from Assured Guaranty through this litigation an unjustified $1.4 billion windfall in connection with those terminations. Lehman International is pursuing that amount based on a self-serving valuation methodology that attempts to benefit from the very market illiquidity and uncertainty that it and others in the Lehman Group caused by their historic insolvency filings and that was the cause of the defaults that occurred here. Not surprisingly, the parties' Master Agreement provides Assured Guaranty (as the Non-defaulting Party) with several express contractual rights that protect it from potential attempts by Lehman International (the Defaulting Party) to claim such a windfall as a result of its own defaults. In the face of the resulting substantial difficulties it will face in proving its Second Cause of Action for breach of contract (which is not subject to this motion to dismiss), Lehman International has also asserted two claims for breach of the implied covenant of good faith and fair dealing. In asserting those claims, Lehman International effectively seeks to rewrite the parties' express contractual rights and obligations in order to upend the parties' justified expectations in a way

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[1] All capitalized terms not defined herein have the meaning ascribed to them in Assured Guaranty's opening Memorandum in Support of Its Motion to Dismiss the First and Third Causes of Action (hereinafter, the "Opening Memorandum"). In addition, unless otherwise noted, all exhibits referenced herein are attached to the affirmation of Rishi Zutshi, dated February 3, 2012 and previously submitted with the Opening Memorandum.

more favorable to its position. Lehman International's own Opposition, however, confirms that both of those claims for breach of the implied covenant fail as a matter of law.

First, Lehman International concedes that Assured Guaranty acted within its contractual rights when it terminated the nine December 2008 Transactions based on Lehman International's failure to provide contractually mandated trustee reports. Its First Cause of Action for breach of the implied covenant in connection with these transactions is thus nothing more than an improper attempt to rewrite the plain terms of the contract. The cases on which Lehman International relies only further reveal the failure of its pleadings. Those cases permitted a claim for breach of the implied covenant to go forward, but only where the plaintiff adequately alleged that the defendant deprived it of the "fruits of the contract" by engaging in improper conduct – such as a pattern of self-dealing or a scheme of collusive conduct designed to frustrate the counterparty's ability to perform its contractual obligations – not by exercising its express, bargained-for rights. Lehman International has not even come close to pleading that here, and its claim should be dismissed.

Second, the Third Cause of Action for breach of the implied covenant in connection with Assured Guaranty's valuation of the July 2009 Transactions is duplicative of Lehman International's breach of contract claim for the same transactions and thus must be dismissed under controlling New York law. Although Lehman International attempts to distinguish the factual allegations underlying its Second and Third Causes of Action in its Opposition, its arguments are belied by a side-by-side comparison of those pleadings, which are nearly identical. Additionally, Lehman International's assertion of an additional claim based on an implied covenant of good faith and fair dealing is particularly improper here given the

existence of express provisions in the Agreement that directly address the subject matter at issue (*i.e.*, the solicitation and timing of bids) and mandate the use of "good faith."

ARGUMENT

I. LEHMAN INTERNATIONAL'S FIRST CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED AS AN IMPROPER ATTEMPT TO REWRITE THE EXPRESS TERMS OF THE PARTIES' AGREEMENT

The allegations in Lehman International's Complaint and the unambiguous terms of the contractual documents between the parties – which Assured Guaranty has properly submitted as documentary evidence under CPLR 3211(a)(1) – make clear that Assured Guaranty's termination of the December 2008 Transactions was an appropriate exercise of its bargained-for contractual rights. In its Opposition, Lehman International cannot and does not dispute any of the facts underlying this conclusion, namely that:

- Lehman International failed to provide Assured Guaranty with trustee reports that were required by the Confirmations governing the December 2008 Transactions from at least August 2008 through October 2008, see Complaint, dated Nov. 28, 2011 ("Compl.") ¶ 4;
- Assured Guaranty provided notice of this failure in writing on November 13, 2008, as the Master Agreement required, see Compl. ¶ 23;
- Lehman International failed to provide the missing trustee reports or otherwise respond to this written notice within the 30-day cure period set by the Confirmations, see Compl. ¶ 24;
- After the contractual cure period elapsed, on December 23, 2008, Assured Guaranty terminated these transactions based on Lehman International's failure to provide the required reports, again giving written notice of the termination as expressly required by the Master Agreement. See Compl. ¶ 25.

Thus, expressly admitting in its Opposition that it has no basis on which to "argu[e] that [Assured Guaranty] lacked the contractual authorization to terminate the December 2008 Transactions," Opp. at 11, Lehman International has instead asserted its legally deficient

claim for breach of the implied covenant. Yet in support of this cause of action, Lehman International can only identify the following three allegations:

(1) Assured Guaranty and Lehman International "were conducting regular and productive discussions concerning possible novation of the 37 Transactions under the Agreement" in the fall of 2008;

(2) Assured Guaranty "could have requested [the trustee reports] directly in the context of the ongoing negotiations"; and

(3) Assured Guaranty "could have obtained [the reports] from other sources."

Compl. ¶ 41; see Opp. at 11-12. These allegations, even assuming their truth for purposes of this motion, are nothing more than an invitation to the Court to rewrite the parties' respective contractual rights and obligations. Specifically, with its first two allegations, Lehman International apparently asks the Court to insert into the parties' contract requirements that Assured Guaranty negotiate modifications to its contract and provide *oral* notice of Lehman International's failure to deliver reports, in addition to the *written* notice requirement to which the parties agreed. And with its third allegation, Lehman International implicitly asks the Court to erase from the contract altogether Lehman International's obligation to provide Assured Guaranty with the relevant trustee reports for the reference obligations in the nine December 2008 Transactions, and to impose on Assured Guaranty a wholly new obligation to obtain those reports from some other sources, should it seek the reports. There is no basis for the Court to rewrite the contract in this way.

It is black-letter law that "the duty of good faith cannot imply obligations inconsistent with the express terms of [an] agreement." Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A., 84 A.D.3d 588, 589 (1st Dep't 2011). Thus, in disputes regarding financial derivatives contracts where, as here, the challenged conduct involves a party merely "exercising its contractual rights" under an ISDA Master Agreement, courts in this state have

routinely held that claims for breach of the implied covenant of good faith and fair dealing fail as a matter of law. U.S. Bank Nat'l Ass'n v. Ables & Hall Builders, 696 F. Supp. 2d 428, 445 (S.D.N.Y. 2010) (rejecting breach of implied covenant claim based on counterparty's declaration of an Additional Termination Event under an ISDA Master Agreement); see also UBS AG v. Cournot Fin. Prods., LLC, No. 10-cv-494, 2010 WL 3001884, at *2 (S.D.N.Y. July 26, 2010) (dismissing breach of implied covenant claim based on alleged violation of an "implicit [term] in the ISDA Master Agreement"); Havell Capital, 84 A.D.3d at 589 (rejecting breach of implied covenant claim based on liquidation of interests after default under ISDA Master Agreement); Opening Mem. at 16-18 (citing and discussing these cases). Lehman International does not even address this critical precedent in its Opposition, and thus does not dispute its applicability and significance here. These decisions are plainly fatal to its First Cause of Action for breach of the implied covenant.

The cases on which Lehman International attempts to rely, where a breach of the implied covenant claim is predicated on allegations that a defendant deprived the plaintiff of the "fruits of the contract" by engaging in self-dealing or collusive or sham conduct separate and apart from the exercise of its contractual rights vis-à-vis the plaintiff, see Opp. at 10-12, are plainly inapt. Here, Lehman International has failed to allege either benefits flowing from the contract that it was deprived of or any activity by defendant that could possibly be characterized as constituting bad faith.

Specifically, Lehman International cannot claim that its benefits under the parties' Agreement included the right (i) to negotiate changes to the parties' contracts, (ii) to receive oral notification in addition to the written notice provided for under the Agreement, or (iii) to avoid the consequences from its failure to perform a requirement that the parties agreed would

constitute, upon written notice and a failure to cure, a breach justifying termination. Moreover, even if a contractually justified termination by itself could be viewed as deprivation of the fruits of the contract (and we submit based on the authorities discussed above that it cannot), Lehman International has not claimed any damages arising from the termination of these contracts or identified any benefits it would have obtained from their continuation.

Equally fatally, Lehman International has not alleged that Assured Guaranty did anything underhanded or in any way thwarted Lehman International's ability to perform. By contrast, in Wallace, on which Lehman International mistakenly relies, this Court permitted a claim based on the implied covenant against Merrill Lynch because it was alleged that it deprived TXU of the benefit of the full payment of the value of the debt due to it upon the termination of a swap agreement, when shortly before terminating the agreement, with knowledge that TXU would likely file for insolvency, Merrill Lynch acquired at a deep discount and for the purpose of setoff, bonds with a face value equivalent to the debt owed to TXU. See Wallace v. Merrill Lynch Cap. Servs., Inc., 10 Misc. 3d 1062(A) (Supr. Ct. N.Y. County Dec. 14, 2005) (Fried, J.). The Court noted that under well-established authority, it had the equitable power to deny or limit the right of setoff on the basis of an obligation purchased for nominal or no value with knowledge of the obligor's impending insolvency. Id. at 4.

Similarly, in Richbell, the plaintiff alleged the defendants engaged in an extensive pattern of "collusive" conduct, including entry into a "secret 'bid-rigging' agreement,'" that amounted to "a purposeful scheme to deprive plaintiffs" of "the fruits of the contract." Richbell Info. Servs. v. Jupiter Partners, 309 A.D.2d 288, 302 (1st Dep't 2003); see also Empresas Cablevision, S.A.B. de C.V. v. JPMorgan Chase Bank, N.A., 680 F. Supp. 2d 625, 626 (S.D.N.Y. 2010) (involving similar allegations that defendant entered an agreement with a

"major competitor" of the plaintiff that was designed to subvert its contract with the plaintiff). While Lehman International quotes ABN AMRO Bank NV v. MBIA, Inc. in an attempt to expand the implied covenant to require that "neither party *shall do anything* which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract," see Opp. at 10 (emphasis added by Lehman International), that decision makes clear in the very next sentence (which Lehman International fails to quote) that the court, as in Wallace and Richbell, is specifically addressing allegations of substantial sham transactions by the defendants, including one defendant "fraudulently transferring billions of dollars of its assets to [another defendant] for no consideration." ABN AMRO Bank, N.V. v. MBIA, Inc., 17 N.Y.3d 208, 228 (2011).

Rather than support Lehman International's claim, the line of cases on which it relies only highlights the claim's inadequacy. Here, Lehman International cannot and does not allege the "type of targeted malevolence, upon which the court sustained the bad faith claim in Richbell." See Harvest Court LLC v. Nanopierce Techs., Inc., No. 602281/01, 2009 WL 3516915 (Sup. Ct. N.Y. County Oct. 21, 2009). Conspicuously absent, for example, from the Complaint are any allegations that Assured Guaranty prevented Lehman International from providing the trustee reports in the first instance or subsequently inhibited Lehman International's ability to cure that failure. To the contrary, Lehman International alleges that the trustee reports it failed to provide were readily available, see Compl ¶ 41, thus suggesting that Lehman International could have easily cured its failure during the 30-day contractual period were it not for its own negligence or willful disregard of its contractual duties. In these circumstances, the Court should not permit Lehman International, a "sophisticated, counseled commercial entit[y]," to invoke the implied covenant of good faith and fair dealing to absolve

itself of express contractual obligations it has undertaken. See Flag Wharf, Inc. v. Merrill Lynch Capital Corp., 40 A.D.3d 506, 507 (1st Dep't 2007). Because Lehman International's complaint is "devoid of fact allegations approaching the kind of self-dealing and collusive conduct at the core of the 'secret' scheme alleged in Richbell," the first cause of action for breach of the implied covenant should be dismissed. Harvest Court, No. 602281/01, 2009 WL 3516915, at *8 (dismissing claim for breach of implied covenant of good faith and fair dealing).

II. LEHMAN INTERNATIONAL'S THIRD CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT SHOULD BE DISMISSED BECAUSE IT IS DUPLICATIVE OF THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT

In a decision that Lehman International concedes bears directly on the analysis of its Third Cause of Action for breach of the implied covenant, see Opp. at 13, this Court recently held:

> A breach of the implied covenant of good faith and fair dealing claim that is duplicative of a breach of contract claim must be dismissed. . . . A good faith claim will be dismissed as redundant if it merely pleads that defendant did not act in good faith in performing its contractual obligations.

MBIA Ins. Co. v. GMAC Mortg. LLC, 30 Misc. 3d 856, 865 (Sup. Ct. N.Y. County Dec. 14, 2010) (Fried, J.) (citing New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 319-320 (1995)) (dismissing breach of implied covenant claim where plaintiff "reiterat[ed] its breach of contract claims while adding bad faith to its allegations"). This is precisely what Lehman International has done in its Complaint, alleging in support of its Third Cause of Action for breach of the implied covenant that "[Assured Guaranty] breached its obligation to perform its contractual obligations under the Agreement *in good faith.*" Compl. ¶ 52 (emphasis added).

In the face of the vast number of recent decisions by the First Department as well as by this Court that have dismissed claims for breach of the implied covenant as duplicative of

breach of contract claims based on similar pleadings, see, e.g., MBIA Ins. Corp. v. Merrill Lynch, 81 A.D.3d 419, 419–20 (1st Dep't 2011); Havell Capital, 84 A.D.3 at 588; Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423, 426 (1st Dep't 2010); Hawthorne Grp. v. RRE Ventures, 7 A.D.3d 320 (1st Dep't 2004); GMAC Mortg., 30 Misc. 3d at 865; MBIA v. Royal Bank of Canada, 28 Misc. 3d 1225(A) (Sup. Ct. Westchester County Aug. 9, 2010); MBIA Ins. Corp. v. Merrill Lynch, 27 Misc. 3d 1233(A) (Sup. Ct. N.Y. County Apr. 9, 2010) (Fried, J.); MBIA Ins. Co. v. Residential Funding Co., 26 Misc. 3d 1204(A) (Sup. Ct. N.Y. County Dec. 22, 2009) (Fried, J.), Lehman International now retreats from its original pleadings and instead tries to justify its Third Cause of Action for breach of the implied covenant by asserting in its Opposition that this claim is based on completely different allegations than those underlying its Second Cause of Action for breach of contract. This attempt in its Opposition to recast its claims as factually "distinct" is flatly contradicted by what is plainly set forth in the Complaint and legally improper.

A careful explication of the claim as alleged in the Complaint makes clear that Lehman International is attempting to rewrite its pleadings. For example, the core allegations supporting the Second Cause of Action, in Paragraphs 45 through 47 of the Complaint, state:

> [Assured Guaranty] breached its obligations under the Agreement by deciding before even terminating the transactions to bypass Market Quotation, the agreed-upon payment methodology selected by the Parties in the Agreement . . . [and] proceeded to improperly calculate Loss without reference to any market information.

Lehman International argues in its Opposition that these allegations support *only* its Second Cause of Action for breach of contract. See Opp. at 13. They are nearly identical, however, to the core allegations in the Complaint setting forth Lehman International's Third Cause of Action for breach of the implied covenant. Those allegations contend that:

> [Assured Guaranty] acted to bypass the parties' selection of Market Quotation to measure the termination payment . . . [and] attempted to exploit its invented "flexible" Loss methodology to claim a termination payment from [Lehman International].

Compl. ¶ 52. The only differences are some immaterial changes in the words; the substance of the pleadings is the same.

Similarly, the allegations that Lehman International highlights in its Opposition as being different and that purportedly support *only* its Third Cause of Action for breach of the implied covenant – *i.e.*, that Assured Guaranty "waited an additional two months to solicit bids for Market Quotation, and ultimately rigged the Market Quotation auction to fail by imposing unreasonable bidding procedures to discourage the submission of bids," see Opp. at 13 – are nearly identical to allegations that Lehman International characterizes as a "breach of the Agreement" in Paragraphs 28 and 29 of its Complaint:

> On October 16, 2009, [Assured Guaranty] delivered a valuation statement in relation to the July 2009 Transactions. . . . [Assured Guaranty] provided no explanation as to why it prepared and sent this valuation statement nearly 3 months after the Early Termination Date . . . . [Assured Guaranty] stated that it had "contacted" 12 Reference Market-makers in an attempt to determine Market Quotations for the terminated transactions but that no Reference Market-maker submitted a bid. In correspondence, [Assured Guaranty] disclosed that it required all 12 Reference Market-makers to execute and return a confidentiality agreement and agree to bidding procedures established by [Assured Guaranty].

Again, the substance of the pleadings is the same, and the law is clear that courts look to the substance of a plaintiff's pleadings and reject arguments such as plaintiff's that rely on a "tenuous" parsing of substantively similar factual allegations in an "attempt to circumvent [the] prohibition" against duplicative claims for breach of contract and breach of the implied covenant. Deutsche Bank AG v. Ambac Credit Prods., LLC, No. 4-cv-5594, 2006 WL 1867497, at *16 (S.D.N.Y. July 6, 2006) (holding that plaintiff's "claim of breach of the implied covenant fails as a matter of law").

In effect, Lehman International attempts through its argument in the Opposition to amend its Third Cause of Action for breach of the implied covenant as pleaded in the Complaint. This attempt is plainly improper, and these arguments – to the extent inconsistent with the pleadings – "must be rejected." Yucyo, Ltd. v. Republic of Slovenia, 984 F. Supp. 209, 216 (S.D.N.Y. 1997) (refusing to consider theories articulated by plaintiff in its opposition to a motion to dismiss that were not contained in the amended complaint); see also Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 836 (S.D.N.Y. 1988) ("A claim for relief may not be amended by the briefs in opposition to a motion to dismiss.") (internal quotation marks and citation omitted); MediaXposure Ltd. (Cayman) v. Omnireliant Holdings, Inc., 29 Misc. 3d 1215(A) (Sup. Ct. N.Y. County Oct. 25, 2010) (Fried, J.) (same). The fact that Lehman International recognizes the need to revise its Third Cause of Action is, nonetheless, a telling admission of the legal deficiencies of that claim.

Furthermore, the allegations Lehman International identifies in support of its Third Cause of Action for breach of the implied covenant suffer two additional infirmities: either (i) the complained-of conduct is specifically authorized by the Agreement and cannot be written out of the Agreement based on the implied covenant; or (ii) the conduct at issue is already subject to express contractual provisions requiring Assured Guaranty to exercise good faith. In the first category is Lehman International's allegation that Assured Guaranty "delayed" terminating the July 2009 Transactions. This allegation fails to state a claim for a breach of the implied covenant for the same reasons discussed in connection with the First Cause of Action: Section 6(a) of the Agreement expressly permits Assured Guaranty to terminate the Master Agreement at any time based on an Event of Default (such as Lehman International's insolvency), so long as the Event of Default "is then continuing," see Agreement § 6(a) (Ex. 1),

and Lehman International cannot use the "implied covenant of good faith and fair dealing to read into the agreement obligations at odds with the express contractual rights of the parties." UBS AG v. Cournot Fin. Prods., LLC, No. 10-cv-494, 2010 WL 3001884, at *2 (S.D.N.Y. July 26, 2010) (citation omitted).

With respect to the second infirmity, it is a long-settled precept of New York jurisprudence that "'where [an] instrument contains an express covenant in regard to any subject, no covenants are to be implied in respect to the same subject.'" RJ Capital, S.A. v. Lexington Capital Funding III, Ltd., No. 10-cv-25, 2011 WL 3251554, *13 (S.D.N.Y. July 28, 2011) (quoting Burr v. Stenton, 43 N.Y. 462, 464 (1871)) (dismissing claim for breach of the implied covenant of good faith and fair dealing as duplicative of the breach of contract claim because the indenture at issue included an express covenant). Here, Lehman International argues that Assured Guaranty's alleged delay in "solicit[ing] bids for Market Quotation" constitutes a breach of the implied covenant of good faith. See Opp. at 13. Yet, Section 14 of the Agreement provides that "[t]he day and time as of which those quotations are to be obtained will be selected in *good faith*" by Assured Guaranty. Agreement § 14 (Ex. 1) (definition of Market Quotation) (emphasis added). Similarly, although Lehman International alleges that Assured Guaranty breached the implied covenant of good faith by "imposing unreasonable bidding procedures" on potential bidders, see Opp. at 13, Section 14 of the Agreement includes an explicit requirement that Assured Guaranty use good faith in selecting potential bidders. See Agreement § 14 (Ex. 1) (definition of Reference Market-makers). The existence of express good faith requirements in the Agreement demonstrates that Lehman International's Third Cause of Action for breach of the implied covenant is necessarily encompassed within – and thus, *a fortiori*, duplicative of – its Second Cause of Action for breach of contract.

Finally, Lehman International misplaces reliance on Fantozzi v. Axsys Techs., Inc., No. 07-cv-2667, 2008 WL 4866054 (S.D.N.Y. Nov. 6, 2008), which it cites for the proposition that a plaintiff may pursue a claim for breach of the implied covenant that is duplicative of its breach of contract claim so long as the claims are pleaded in the alternative. See Opp. at 14. The court in Fantozzi, however, made clear that its holding represented "an exception to the general rule" and that New York law only permits such alternative pleading "where there is a bona fide dispute concerning existence of a contract or whether the contract covers the dispute in issue." Fantozzi, No. 07-cv-2667, 2008 WL 4866054, at *7 (citation omitted). It is thus hardly surprising that in the vast majority of cases like the present one (*i.e.*, contractual disputes between sophisticated commercial parties arising out of ISDA Master Agreements and similar standardized template agreements for financial derivatives transactions), where there is no genuine dispute as to the existence and applicability of the parties' contracts, courts uniformly follow the general rule requiring dismissal of duplicative breach of the implied covenant claims. See, e.g., MBIA Ins. Corp. v. Merrill Lynch, 81 A.D.3d at 419–20; Havell Capital, 84 A.D.3 at 588; GMAC Mortg., 30 Misc. 3d at 865; MBIA Ins. Co. v. Residential Funding Co., 26 Misc. 3d at 1204(A); UBS AG v. Cournot Fin. Prods., LLC, No. 10-cv-494, 2010 WL 3001884, at *2 (S.D.N.Y. July 26, 2010); Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., No. 02-cv-1312, 2002 WL 31426310, at *4 (S.D.N.Y. Oct. 29, 2002); Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc., 215 F. Supp. 2d 395, 395 (S.D.N.Y. 2002).

In any event, Lehman International does not cite any language in the Complaint substantiating its assertion that it "pleaded [its Second and Third Causes of Action] in the alternative," see Opp. at 14, and no such language exists. Indeed, more fundamentally, nothing

in the Complaint suggests that there is any dispute as to the existence or enforceability of the parties' ISDA Master Agreement necessitating Lehman International to assert its Third Cause of Action for breach of the implied covenant in the alternative as a stop-gap measure. And, as already noted above, Lehman International may not "amend the complaint through [its] opposition brief" to recast its Third Cause of Action for breach of the implied covenant as an alternative quasi-contractual claim. MediaXposure Ltd., 29 Misc. 3d at 1215(A).

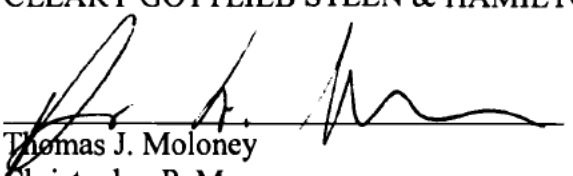
CONCLUSION

For the foregoing reasons, the Court should dismiss the First and Third Causes of Action in the Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7).

Dated: April 3, 2012

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP



Thomas J. Moloney
Christopher P. Moore
Roger A. Cooper
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
Fax: (212) 225-3999

Counsel to AG Financial Products, Inc.