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

PRESENT: MARCY S. FRIEDMAN *Justice* PART 60

LEHMAN BROTHERS INTERNATIONAL (EUROPE) (in administration),

INDEX NO. 653284/2011

-against-

MOTION DATE

AG FINANCIAL PRODUCTS, INC.

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). _____

Answering Affidavits — Exhibits _____ No (s). _____

Replying Affidavits _____ No (s). _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ORDERED that this motion is granted to the extent set forth in the attached decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3.12.13

MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

LEHMAN BROTHERS INTERNATIONAL
(EUROPE) (in administration)

Plaintiff,

Index No.: 653284/2011

- against -

AG FINANCIAL PRODUCTS, INC.

Defendant.

DECISION/ORDER

This action arises out of a series of credit derivative transactions entered into between plaintiff Lehman Brothers International (Europe) (LBIE) and defendant AG Financial Products, Inc. (Assured Guaranty). Plaintiff alleges that defendant breached the contracts and the implied covenants of good faith and fair dealing by terminating nine transactions in December 2008 and 28 transactions in July 2009. Defendant moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the first and the third causes of action of the complaint, both for breach of the implied covenant.

Facts

The facts, as alleged in the complaint, are undisputed unless otherwise stated. The parties, sophisticated commercial entities with the benefit of counsel, entered into 37 credit derivative transactions, each governed by three documents that form the contract for the transaction: a Master Agreement based on a 1992 template promulgated by the International Swaps and Derivatives Association; a negotiated Schedule to the Master Agreement; and a

negotiated Confirmation for each transaction. (Complaint, ¶¶ 1, 12; Master Agreement, § 1[c].) The stated maturity date for each transaction is the maturity date of the underlying notes, referred to as the Reference Obligation. (See e.g. Primus CLO I, Ltd. Confirmation, dated May 8, 2008 [Primus Confirmation], § 1.)[1]

As discussed below, the Master Agreement provides for termination of transactions upon "Event[s] of Default" which include bankruptcy, while the Confirmations for the transactions that were terminated in December 2008 enumerate "Additional Termination Events." (Primus Confirmation, § 8[a][iii][b].) The December 2008 terminations were based on the occurrence of an Additional Termination Event – namely, LBIE's failure to provide trustee reports for the underlying obligations. The July 2009 terminations were based on the occurrence of an Event of Default – namely, LBIE's entry into administration, the United Kingdom analogue of bankruptcy. The contractual methodologies for calculating the payments due upon termination differ significantly for these different grounds for termination.

Discussion

It is well settled that on a motion to dismiss addressed to the face of the pleading, "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See also 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual

[1]As the Confirmations contain substantially identical terms, the Primus Confirmation is cited as an exemplar.

allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

It is further settled that every contract contains an implied covenant of good faith and fair dealing. (Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995]; Wieder v Skala, 80 NY2d 628, 634 [1992].) The implied covenant "'embraces a pledge 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.'" (ABN AMRO Bank, N.V. v MBIA Inc., 17 NY3d 208, 228 [2011], quoting Dalton, 87 NY2d at 389.) Where the contract contemplates the exercise of discretion, the implied obligation requires that the discretion not be exercised in bad faith so as to deprive the other party of the benefits of the contract. (Dalton, 87 NY2d at 389; Kaszirer v Kaszirer, 298 AD2d 109, 110 [2002].) Thus, encompassed within the implied obligation "are any promises which a reasonable person in the position of the promisee would be justified in understanding were included." (Dalton, 87 NY2d at 389 [internal quotation marks and citations omitted].)

However, "the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship." (Murphy v American Home Products Corp., 58

NY2d 293, 304 [1983]; accord Dalton, 87 NY2d at 389; Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A., 84 AD3d 588, 589 [1st Dept 2011].) In short, "[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights." (National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp., 25 AD3d 309, 310 [1st Dept 2006], lv dismissed 7 NY3d 886.)

As this Department explained in Richbell Information Services, Inc. v Jupiter Partners, L.P. (309 AD2d 288, 302 [1st Dept 2003]), there is "tension between, on the one hand, the imposition of a good faith limitation on the exercise of a contract right and, on the other, the avoidance of using the implied covenant of good faith to create new duties that negate explicit rights under a contract." In the face of this tension, cases which uphold causes of action for breach of the implied covenant appear to fall into two main categories:

In the first, an implied covenant claim may be recognized where a contract provides for a party's exercise of discretion but does not expressly require that the discretion be exercised reasonably. (See e.g. Dalton, 87 NY2d at 392 [where testing service had contractual obligation to consider relevant material submitted by test-taker before exercising discretion to cancel allegedly invalid exam, court found "implied in law" obligation not to exercise such discretion "arbitrarily or irrationally"]; Matter of Kaszirer, 298 AD2d at 110 [where trustee had discretion to make distributions from trust, court found issue of fact as to whether trustee acted in manner that was arbitrary, irrational or not in good faith]; 1-10 Indus. Assoc. v Trim Corp. of Am., 297 AD2d 630, 631-632 [2d Dept 2002] [where letter agreement that provided for defendant's relocation did not contain express provision requiring defendant to act reasonably in approving proposed relocation sites, court held that defendant had "implied obligation to exercise good faith

in reaching its determination"].)

In the second, an implied covenant claim may be recognized where a party "exercise[s] a [contractual] right malevolently, for its own gain as part of a purposeful scheme to deprive plaintiffs of the benefits" of the contract. In support of the claim, a party may not merely assert that the opposing party should not be permitted to exercise an explicit contractual right or seek to "create new duties that negate specific rights under a contract" but, rather, must allege "bad faith targeted malevolence in the guise of business dealings." (Richbell Info. Servs., 309 AD2d at 302 [denying motion to dismiss implied covenant claim where complaint alleged that defendant not only exercised contractual right to veto IPO that would have provided plaintiff with funds to repay note, but also entered into secret "bid rigging agreement" to orchestrate plaintiff's default on note, all for the purpose of enabling defendant to purchase plaintiff's stock at artificially low price]; see also ABN AMRO Bank, N.V., 17 NY3d at 228-229 [denying motion to dismiss implied covenant claim by plaintiff-holders of financial guarantee insurance policies on structured finance products, based on allegation that defendants, by fraudulently transferring billions of dollars to subsidiary for no consideration, rendered defendant unable to meet its obligations under policies]; Wallace v Merrill Lynch Capital Servs., Inc., 29 AD3d 382 [1st Dept 2006], affg 10 Misc3d 1062[A][Sup Ct, NY County 2005] [denying motion to dismiss implied covenant claim where, notwithstanding contractual provision permitting set-off of debt owed by defendant to plaintiff, issue of fact existed as to whether defendant purchased severely distressed bonds guaranteed by plaintiff for purpose of avoiding its obligation to plaintiff]; Merzon v Lefkowitz, 289 AD2d 142, 143 [1st Dept 2001] [denying motion for summary judgment dismissing implied covenant claim where contract provided for additional compensation to

plaintiffs for sale of interests in real property if condominium development occurred and triable issue of fact existed as to whether defendant, by abandoning condominium project, acted in bad faith "in engineering the outcome"]; Empresas Cablevision, S.A.B de C.V. v JPMorgan Chase Bank, N.A., 680 F Supp 2d 625, 632-633 [SD NY 2010] [on preliminary injunction motion, finding that plaintiff demonstrated likelihood of success on merits of implied covenant claim under New York law, where defendant gave third-party participation interest in loan made by defendant to plaintiff, thereby making an "end-run" around plaintiff's contractual right to veto assignments of loan by defendant].)

A negotiated contract provision cannot, however, be nullified by a conclusory allegation that a defendant acted "unfairly" or "contrived" to deprive the opposing party of the benefits of the contract. (Phoenix Capital Invs. LLC v Ellington Mgt. Group, 51 AD3d 549, 550 [2008].) Nor, where a contract contains an express covenant governing a subject, will the courts imply a covenant with respect to the same subject. (RJ Capital, S.A. v Lexington Capital Funding III, Ltd., 2011 WL 3251554 * 13 [SD NY 2011] [applying New York law]; see Cohen PDC, LLC v Cheslock-Bakker Opportunity Fund, LP, 94 AD3d 539, 540 [1st Dept 2012] [on summary judgment motion, dismissing implied covenant claim where "buy/sell calculation at issue is subject to and governed by the express terms and conditions contained in the parties' 2002 Operating Agreement" and non-movant failed to establish that movant "engaged in any arbitrary, unreasonable, oppressive, or underhanded conduct"]; Fesseha v TD Waterhouse Inv. Servs., Inc., 305 AD2d 268 [1st Dept 2003] [dismissing implied covenant claim based on plaintiff-customer's allegation that "TD Waterhouse violated the covenant of good faith and fair dealing in liquidating his securities without notice and opportunity to cure" where "the Customer

Agreement expressly granted TD Waterhouse the right to liquidate plaintiff's positions 'when it deem[ed] it necessary for its protection' and nothing in the Truth in Lending Disclosure Statement limited that right"]; Staffenberg v Fairfield Pagma Assocs, L.P., 95 AD3d 873, 875 [2d Dept 2012] [on summary judgment motion, dismissing implied covenant claim where limited partnership agreement provided that client funds were to be invested with Madoff and "no other obligation to invest" could be implied under the agreement].)

December 2008 Terminations

As noted above, the December 2008 terminations were based not on the Master Agreement but on the Confirmations which require that LBIE "obtain and provide [Assured Guaranty] with copies of all reports and other information relating to the Reference Obligation" that were required to be delivered to the holders of the Reference Obligation by any Reference Entity or its manager or servicer, or by a trustee. (Primus Confirmation, § 8[a][ii].) The Confirmations further provide that if LBIE fails to deliver the reports "promptly" or fails to cure within a 30-day period after written notice from Assured Guaranty, Assured Guaranty "may . . . declare an Additional Termination Event" and "designate an Early Termination Date" with respect to the subject transaction. (Primus Confirmation, § 8[a][iii][b].)

On November 13, 2008, Assured Guaranty sent LBIE nine "Notices of Failure to Deliver Reports," stating that LBIE had failed to provide Assured Guaranty with monthly trustee reports relating to the underlying Reference Obligations as required by Section 8(a)(ii) of the Confirmations. (Complaint, ¶ 23; Zutshi Aff., Ex. 12 [Notices].) LBIE did not cure and, on December 23, 2008, Assured Guaranty sent Notices of Termination, designating December 24, 2008 as the Early Termination Date. (Complaint, ¶ 25; Zutshi Aff., Ex. 13 [Notices].)

As the December 2008 terminations were based on an "Additional Termination Event," the Confirmations require LBIE to pay an Accrued Fixed Payment Amount. (Primus Confirmation, §8[a][iii][b].) As pleaded in the complaint, and undisputed by defendant, the Accrued Fixed Payment Amount consists of the accrued and unpaid premiums that LBIE owed to Assured Guaranty as of the Early Termination Date. Upon the occurrence of an Additional Termination Event, "no amount (other than amounts due and not paid) is payable by either party in respect of the termination" of the transaction. (Complaint, ¶ 25; Def.'s Memo. In Support at 11.)[2] Both LBIE and Assured Guaranty refer to the Accrued Fixed Payment Amount as "walk-away money." (Sept. 27, 2012 Oral Argument, Transcript at 6, 19.) On October 7, 2009, Assured Guaranty delivered a valuation statement, asserting that LBIE owed it an Accrued Fixed Payment Amount of $3,960,319.86. (Complaint, ¶ 26.)

LBIE argues that at the time of the terminations, the parties were engaged in settlement negotiations concerning possible novation of all 37 transactions, and that Assured Guaranty could have requested the reports from the negotiators or obtained them from other sources, including the trustee. LBIE acknowledges that Assured Guaranty had contractual authorization for the December 2008 terminations. However, LBIE contends that "act[s] consistent with a contract's express terms" do not bar a claim of breach of the implied covenant (P.'s Memo. In Opp. at 10), and that the parties' "course of dealing" must be considered. Assured Guaranty, it claims, used the reports as a "pretext for termination" so that it could avail itself of the "more

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[2]The Accrued Fixed Payment Amount is defined as follows: "[A]s of any Early Termination Date, the accrued and unpaid Fixed Payments under the Transaction for the period from and including the [premium payment date] immediately preceding the Early Termination Date to but excluding the Early Termination Date, plus any Unpaid Amounts payable to [Assured Guaranty] and outstanding on the Early Termination Date." (Primus Confirmation, § 8[a][iii][b].)

advantageous termination methodology" (the Accrued Fixed Payment Amount) available upon termination based on an Additional Termination Event. (See Complaint, ¶ 41; P.'s Memo. In Opp. at 12.)

Assured Guaranty contends that the implied covenant claim must be dismissed because it acted within its express contractual rights in terminating the transactions based on LBIE's failure to provide trustee reports. It further contends that in claiming a breach of the implied covenant, LBIE in effect invites the court to rewrite the parties' respective contractual rights and obligations by requiring Assured Guaranty to provide oral notice of LBIE's failure to deliver the reports in addition to the written notice provided for by the Confirmations, or to undertake an additional obligation to obtain the reports from other sources. (D.'s Memo. In Reply at 4.) Assured Guaranty argues that such obligations are inconsistent with the terms of the contract. (See id.)

The court holds that LBIE fails to state a claim for breach of the implied covenant based on the December 2008 terminations. It is undisputed that Assured Guaranty's right to terminate the transactions based on LBIE's failure to provide trustee reports was a bargained-for provision of the contract, and that the transactions were terminated in compliance with that provision. LBIE's conclusory assertion that Assured Guaranty terminated the transactions pursuant to the provision in order to avail itself of a favorable payment methodology falls far short of alleging the kind of fraudulent or malevolent scheme to deprive LBIE of the benefits of the contract that would support an implied covenant claim. Moreover, to hold that Assured Guaranty was required to have requested the reports from the parties engaged in settlement negotiations or to have obtained the reports on its own would, as Assured Guaranty correctly argues, impose

obligations upon it additional to those imposed by the Confirmations, and therefore inconsistent with its right under the Confirmations to terminate the transactions upon LBIE's failure to provide the reports. (See generally Dalton, 87 NY2d at 389.)

The courts have repeatedly rejected implied covenant claims that are inconsistent with the express notice or termination provisions of the contract. (See Phoenix Capital Invs. LLC, 51 AD3d at 550 [dismissing implied covenant claim where "plaintiff acted entirely within the agreement termination provision" in terminating contract, and noting that "[t]he stark inconsistency between the claim and the negotiated terms of the contract requires that the claim be dismissed"]; TAG 380, LLC v ComMet 380, Inc., 40 AD3d 1, 8 [1st Dept 2007], modified on other grounds 10 NY3d 507 [2008] [dismissing implied covenant claim based on allegation that tenant had obligation to give notice (of procurement of insurance) inconsistent with obligation imposed by notice provision of lease]; U.S. Bank Natl. Assn. v Ables & Hall Bldrs., 696 F Supp 2d 428, 445 [SD NY 2010] [holding, under New York law, that Bank's exercise of right to declare Additional Termination Event under ISDA Agreement governing interest rate swap transaction did not violate implied covenant, as covenant "does not extend so far as to undermine a party's general right to act on its own interests" and may not be employed to "forc[e] the Bank to forbear from exercising its contractual rights"] [internal quotation marks and citation omitted].) Here, similarly, the implied covenant claim based on the December 2008 terminations will be dismissed.

July 2009 Terminations

The July 2009 terminations were based on the Early Termination provision of the Master Agreement which provides in pertinent part: "If at any time an Event of Default with respect to a

party (the 'Defaulting Party') has occurred and is then continuing, the other party (the 'Non-defaulting Party') may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions." (Master Agreement, § 6[a].) Under the Master Agreement, the bankruptcy of a party constitutes an Event of Default. (Complaint, ¶ 14; Master Agreement, § 5[a][vii].)

On September 15, 2008, LBIE entered into administration in the United Kingdom. (Complaint, ¶ 22; Ex. A [Order of the High Court of Justice, Chancery Division, Companies Court, dated Sept. 15, 2008].) On July 23, 2009, Assured Guaranty gave notice terminating the remaining 28 Transactions based on LBIE's entrance into bankruptcy administration, and designated July 23, 2009 as the Early Termination Date. (Complaint, ¶ 27; Zutshi Aff., Ex. 14 [Notices].)

As the termination of these transactions was based on an Event of Default, the Master Agreement provides for the early termination payment to be "determined by the Non-defaulting Party." (Master Agreement, § 6[e][i][3].) The Schedule in turn provides that in calculating the payment, the Non-defaulting Party must first use the "Market Quotation" payment measure and "Second [payment] Method." (Schedule, Part 1[f].)

The Market Quotation methodology requires the Non-defaulting Party to obtain quotations from leading dealers in the relevant market, known as "Reference Market-makers," to "step into the shoes" of the Defaulting Party for a replacement transaction. (P.'s Memo. In Opp.

at 5; D.'s Memo. In Support at 12.)[3] Under the Master Agreement, if three quotations cannot be obtained, "it will be deemed that the Market Quotation in respect of such Terminated Transaction or group of Terminated Transactions cannot be determined." (Master Agreement, § 14 "Market Quotation" Definition.) The alternative Loss methodology may be used to calculate the early termination payment if "a Market Quotation cannot be determined or would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result." (Id., "Settlement Amount [b]" Definition.) Loss is defined as "an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with . . . [the] group of Terminated Transactions . . . ." (Id., "Loss" Definition.) The Loss methodology requires that a party "determine its Loss as of the relevant Early Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets." (Id.)

According to plaintiff, Assured Guaranty represented that it could not obtain bids from at least three Reference Market-makers. Assured Guaranty therefore took the position that it could

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[3]As provided in the Master Agreement, a "Market Quotation" is:
"an amount determined on the basis of quotations from Reference Market-makers . . . for an amount, if any, that would be paid to such party (expressed as a negative number) or by such party (expressed as a positive number) in consideration of an agreement between such party . . . and the quoting Reference Market-maker to enter into a transaction (the 'Replacement Transaction') that would have the effect of preserving for such party the economic equivalent of any payment or delivery . . . by the parties under Section 2(a)(i) in respect of such Terminated Transaction or group of Terminated Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date. "
(Master Agreement, § 14 "Market Quotation" Definition.)

not use the Market Quotation method and instead applied the Loss method, determining that LBIE owed Assured Guaranty $24,799,972.85 for the July 2009 Terminations. (Complaint, ¶¶ 29, 33.)

LBIE alleges that Assured Guaranty breached the implied covenant with respect to the July 2009 terminations by making the use of Market Quotation "impossible" in that it delayed its request for quotations "until well after the Early Termination Date," and then required the Reference Market-makers to agree to Assured Guaranty's onerous bidding procedures, including execution of a confidentiality agreement, thereby "effectively discouraging them from submitting bids." (Complaint, ¶¶ 52, 28-29.) LBIE further contends that Assured Guaranty not only "bypass[ed]" the contractual requirement that the Market Quotation method be used, but also misapplied the Loss method. (Id., ¶ 52.) More particularly, LBIE claims that it is "accepted market practice to determine Loss by reference to the market price . . . for replacing the terminated transactions," but that Assured Guaranty instead determined Loss by "calculating the purported present value of all payments that [Assured Guaranty] expected to receive from LBIE during the entire term of each Transaction and subtracting from it the sum of all payments [Assured Guaranty] purportedly determined that it would likely have to pay to LBIE during the term of each Transaction. . . ." (Id., ¶¶ 31-32.) Further, LBIE alleges that Assured Guaranty used its "own undisclosed internal assumptions and models about the shortfalls that would occur on the underlying securities" to determine the present value and "ignored the then-market consensus as to the likelihood of defaults." (Id., ¶ 32.)

In moving to dismiss the implied covenant claim based on the July 2009 terminations, Assured Guaranty contends that it is duplicative of the second cause of action for breach of

contract. Assured Guaranty points to allegations in the breach of contract cause of action that Assured Guaranty "bypass[ed] Market Quotation" and "improperly calculate[d] Loss without reference to any market information and in a manner that was commercially unreasonable." (Complaint, ¶¶ 45-46.)

A cause of action for breach of the implied covenant will be dismissed as duplicative of a breach of contract cause of action where both claims arise from the same facts and seek identical damages. (Amcan Holding, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 [1st Dept 2010]; see MBIA Ins. Corp. v Merrill Lynch, 81 AD3d 419, 419-420 [1st Dept 2011].)

Here, the allegations of the breach of contract and implied covenant causes of action overlap in significant respects. As discussed above, both allege that Assured Guaranty "bypassed" the contractually required Market Quotation and then applied the Loss methodology in an improper manner. The issue is therefore whether the implied covenant claim is maintainable based on the additional allegations, on which LBIE relies, that Assured Guaranty made the use of Market Quotation "impossible" by delaying its request for quotations and imposing unreasonable bidding procedures.

As to the allegation regarding delay, the Master Agreement contains a specific term requiring the party making the determination to request the Reference Market-makers to provide their quotations "to the extent reasonably practicable as of the same day and time . . . on or as soon as reasonably practicable after the relevant Early Termination Date," and further providing that "[t]he day and time on which those quotations are to be obtained will be selected in good faith." (Master Agreement, §14 "Market Quotation" Definition.") The implied covenant cause of action, to the extent based on timing of the request for quotations, is thus duplicative of the

contract cause of action.[4]

As to the allegation regarding bidding, the Master Agreement imposes several requirements that the Market Quotation determination be made in good faith, including a requirement that the Replacement Transaction be "subject to such documentation as [the party making the calculation] and the Reference Market-maker may, in good faith, agree" (Master Agreement, § 14 "Market Quotation" Definition), and a requirement that the Reference Market-makers be selected "in good faith." (Id., "Reference Market-makers" Definition.)

Significantly, the Master Agreement and other contract documents do not contain express directives as to the bidding procedures to be followed in obtaining the Market Quotations. Assured Guaranty has acknowledged that in making the determination of the Early Termination payment, it "had to act reasonably and in good faith subject to rights the contract specifically provided us." (Sept. 27, 2012 Tr. at 17.) At this early juncture, however, the rights provided by the contract with respect to the bidding procedures are not settled.[5] The implied covenant claim, to the extent based on Assured Guaranty's conduct in the bidding process therefore cannot be said to be duplicative of the breach of contract cause of action. (See Hard Rock Café Intl., (USA), Inc. v Hard Rock Hotel Holdings, LLC, 808 F Supp2d 552, 567 [SD NY 2011] [holding that "where the existence or meaning of a contract is in doubt, a party may plead a claim for

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[4]To the extent that the implied covenant claim is also based on an allegation that Assured Guaranty excessively delayed in declaring an Early Termination based on LBIE's entry into administration, that claim is also barred by the express terms of the contract. The Master Agreement permits Early Termination if an Event of Default "has occurred and is then continuing" (Master Agreement, § 6[a]), and provides that "[a] failure or delay in exercising any right . . . will not be presumed to operate as a waiver. . . ." (Id., § 9[f].)

[5] Similarly, the Master Agreement does not set forth a detailed methodology for calculating Loss in the event a Market Quotation cannot be determined or would not produce a commercially reasonable result. (See Master Agreement, § 14 "Loss" Definition.)

breach of the covenant of good faith and fair dealing in the alternative"]); Fantozzi v Axsys Technologies, Inc., 2008 WL 4866054 [SD NY 2008] [same].)[6] Moreover, LBIE's allegations regarding the bidding process, viewed in the light most favorable to LBIE, could rise to the level of deliberate conduct designed to deprive LBIE of the benefit of its bargain. Defendant's motion to dismiss will therefore be denied as to the implied covenant cause of action with respect to the July 2009 terminations.

It is accordingly hereby ORDERED that the motion of defendant AG Financial Products, Inc. to dismiss the first and third causes of action of the complaint is granted solely to the extent of dismissing the first cause of action.

This constitutes the decision and order of the court.

Dated: New York, New York
March 12, 2013

MARCY FRIEDMAN, J.S.C.

[6]These cases, although decided under New York law, do not cite New York cases. However, the stated proposition is consistent with the settled New York procedural law permitting causes of action to be pleaded in the alternative and ordinarily not requiring a party to elect theories of recovery until hearing of the issues on the merits, whether on a summary judgment motion or at trial. (See CPLR 3014.) It is also consistent with the settled New York substantive doctrine (discussed supra at 3-4) that an implied covenant claim may not be based on an implied obligation that is inconsistent with the terms of the express contract.