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

ELECTRON TRADING LLC,

Plaintiff,

v.

MORGAN STANLEY & CO. LLC,

Defendant.

Index No. 651370/2015

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MORGAN STANLEY & CO. LLC'S MOTION TO DISMISS THE COMPLAINT

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Dated: June 12, 2015

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Morgan Stanley & Co. LLC ("Morgan Stanley") respectfully submits this memorandum of law in support of its Motion to Dismiss the Complaint (the "Complaint" or "Compl.") pursuant to N.Y. Civ. Prac. L. & R. ("CPLR") §§ 3211(a)(1) and 3211(a)(7).[1]

PRELIMINARY STATEMENT

This case arises out of an alleged breach of two contracts that were contemporaneously entered into by Plaintiff Electron Trading LLC ("Plaintiff" or "Electron") and Morgan Stanley in August 2013. In the first agreement, the Exclusive License Agreement (the "ELA"), Morgan Stanley licensed Electron's supposed intellectual property to create an alternative trading system (an "ATS"), which was defined under the ELA as "any electronic system, or facility or crossing session thereof, that matches orders in multiple securities in defined ratios in connection with corporate-action events." Morgan Stanley agreed to develop an ATS (without any agreement as to how extensive the system would be, what securities it would trade, or in what volumes). Morgan Stanley agreed to pay 25% of any resulting net revenue to Electron as a royalty. Under the second agreement, the Consulting and Services Agreement (the "CSA"), Morgan Stanley retained Electron as a consultant to assist it in the development of an ATS in return for monetary payments to Electron. Pursuant to a task order annexed to the Agreement, Morgan Stanley agreed to pay Electron $600,000 per year for those services.

Plaintiff contends that Morgan Stanley informed it in April 2014 that Morgan Stanley would not proceed further with the development of an ATS and that Morgan Stanley was terminating Electron's consulting services. Both agreements limited Morgan Stanley's potential

[1] The Complaint is attached as Exhibit A to the Affirmation of Scott A. Edelman submitted in support of this Motion to Dismiss (the "Edelman Affirmation" or "Edelman Affirm.").

liabilities in the event of termination of the agreement. On this Motion, Morgan Stanley seeks a resolution of this matter consistent with the liability caps to which Electron agreed.[2]

Under Section 9.4 of the CSA, Morgan Stanley had the right to terminate "for convenience." Under Section 9.5 of the CSA, if Morgan Stanley chose to terminate, the only obligation was to pay an amount equivalent to what would have been due to Electron for the period from termination through the date 18 months after the CSA's inception. Both parties agree that, pursuant to that provision, Electron is due $600,000 under the CSA. Under the Task Order attached to the CSA, Electron would have received $900,000 over the full 18 month period. Morgan Stanley paid Electron $300,000 prior to the termination of the CSA in April 2014. Accordingly, Section 9.5 of the CSA entitles Electron to the remaining $600,000 payment. Electron seeks that amount for the alleged breach of the CSA. (Edelman Affirm. Ex. A. (Compl.) ¶ 50).

In the case of the ELA, the parties agreed in Section 7.3 to cap their respective liabilities to one another at the amount paid under the ELA and the CSA *prior* to the date of any breach by Morgan Stanley to Electron. Section 7.3 expressly provides, in pertinent part:

> NEITHER PARTY'S TOTAL LIABILITY UNDER THIS AGREEMENT WILL EXCEED THE TOTAL AMOUNTS PREVIOUSLY PAID BY COMPANY TO LICENSOR UNDER THIS AGREEMENT AND THE CONSULTING AGREEMENT PRIOR TO THE DATE OF THE APPLICABLE CLAIM.

(Edelman Affirm. Ex. B (ELA) § 7.3 (capital letters in the original).)[3] Because Morgan Stanley has paid Electron $300,000 in total prior to the alleged breach, liability under the ELA is capped

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[2] Should this action proceed on the merits, Morgan Stanley would contest Electron's contract claim on the basis of Electron's failure to honor its obligations, as well as Electron's misrepresentations in the negotiation of the transaction. However, assuming the Court agrees that the liability cap provisions limit the amount of Electron's claims, Morgan Stanley is prepared to resolve the case at those amounts.

[3] Morgan Stanley attaches a copy of the ELA to the Edelman Affirmation because page 3 was missing from the copy of the ELA attached to the Complaint.

at that amount. On this Motion, Morgan Stanley seeks a determination that its liability under the ELA is capped at $300,000 as a matter of law pursuant to Section 7.3.[4]

Seeking to avoid the damage limitation provisions agreed to in August 2013, Electron advances two claims—fraud and unfair competition—in an effort to turn its contract claim into something more. As one of the bases for its fraud claim, Plaintiff alleges that Morgan Stanley never intended to honor its agreement to develop an ATS under the ELA. But New York law is clear that a plaintiff may not convert a contract claim into a fraud claim simply by alleging that a defendant did not intend to honor its contract at the time of its execution. Electron's first fraud theory thus fails as a matter of law. *See* Point II.A.

Plaintiff's other fraud theory fares no better. Plaintiff contends that Morgan Stanley represented orally during contractual negotiations that it would build an ATS, or dark pool,[5] that would be "truly dark,"[6] which Electron claims was a representation that Morgan Stanley would protect the anonymity of customer trades, and prevent high frequency traders ("HFTs")[7] from engaging in predatory trading. As Plaintiff's story goes, after execution of the agreements, Morgan Stanley advised Electron of its decision not to develop the ATS. Some time after that

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[4] Morgan Stanley is prepared to resolve this case for $900,000 (with prejudgment interest), which represents the maximum amount that Electron would be entitled to receive if it prevails on its breach of contract claims ($600,000 for the CSA and $300,000 for the ELA). Indeed, Morgan Stanley has tendered $900,000, plus an amount to cover prejudgment interest from the earliest conceivable date that Plaintiff could possibly argue that breach occurred, pursuant to CPLR § 3219, (Edelman Affirm. Ex. C.), and offered to liquidate damages conditionally for $900,000 plus applicable interest with costs to date pursuant to CPLR § 3220. (Edelman Affirm. Ex. D.) Morgan Stanley reserves the right to argue that Electron's acceptance of Morgan Stanley's tender would provide another reason to preclude Plaintiff from proceeding with the tort claims it has asserted in this action.

[5] A "dark pool" is a particular type of ATS.

[6] As noted in the Complaint, "truly dark pools [are] those that allow orders to passively interact while eliminating pre-trade information leakage and market impact" (Compl. ¶ 18 (quoting Andrew Silverman, Managing Director, Morgan Stanley, U.S. Securities and Exchange Commission Market Structure Roundtable: Undisplayed Liquidity Panel (June 2, 2010))). What makes a dark pool "truly dark" is that it does not disseminate information about orders resting in the pool that would provide an informational advantage to other market participants, including "HFTs". (Compl. ¶¶ 14,15.)

[7] High frequency traders ("HFTs") is a term that has been used to refer to traders that engage in high frequency trading, which may encompass a diverse range of trading strategies, including the use of high speed and sophisticated programs for generating, routing and executing orders. (Securities Exchange Act Release No. 61358, 75 FR 3594, 3606 (Jan. 21, 2010), *available at* https://www.sec.gov/rules/concept/2010/34-61358fr.pdf.)

initial indication, Morgan Stanley allegedly advised Electron that Morgan Stanley was investigating the adaptation of the ATS into one in which HFTs could "feast." The Complaint provides no context for this alleged remark about the potential adaptation. While the allegations about supposed adaptations of the ATS to allow feasting by HFTs are categorically false, Morgan Stanley assumes their truth—as it is required to—for purposes of this motion. In any event, Electron contends that Morgan Stanley never proceeded with the proposed adaptation.

Plaintiff's "truly dark" theory fails for multiple reasons. First, Electron fails to provide any context for the use of the term "feast" that would allow the Court to determine whether the alleged statement was at odds with the alleged pre-contractual representation that the ATS would be "truly dark." Plaintiff's own Complaint makes clear that a "dark pool" will often allow trading by HFTs. It is not inconsistent to operate a "truly dark" pool that includes a variety of market participants, including HFTs. *See* Point II.B.1.

Second, the Complaint lacks any allegation that Morgan Stanley intended to develop an ATS that was anything but "truly dark" at the time it entered into the agreements with Electron or any time thereafter. Only after entry into the agreements, and after Morgan Stanley had already allegedly advised Electron of its decision to not develop the ATS, did Morgan Stanley propose the idea of an ATS where HFTs could "feast." There is no allegation in the Complaint to support a claim that Morgan Stanley intended to create an ATS where HFTs could "feast" prior to the signing of the contracts. The lack of such an allegation is fatal to Plaintiff's fraud claim. *See* Point II.B.2.

Third, accepting Electron's allegation that Morgan Stanley represented that it would not create an ATS that allowed information leakage in favor of HFTs, *i.e.*, a "truly dark" ATS, the Complaint establishes that Morgan Stanley never deviated from that representation. Thus, the

Complaint fails to state a claim because Morgan Stanley never breached its alleged representation about the ATS being "truly dark." *See* Point II.B.3.

Fourth, the fraud claims must be dismissed under New York's "out-of-pocket" rule for damages in fraud claims. Under that rule, New York courts only allow a party to recover for what it loses due to the fraud, *i.e.*, actual "out-of-pocket" losses, not what it would have gained in the alleged fraud's absence; losses based on alternative, hypothetical transactions are deemed too speculative and undeterminable. Here, Plaintiff's fraud claim is either duplicative of its contract claim (which is subject to an enforceable damages cap), or seeks compensation for a speculative lost opportunity. Electron's claim that, but for Morgan Stanley's representations, it would have profited from an alternative arrangement with one of Morgan Stanley's competitors is precisely the type of claim barred by the "out-of-pocket" rule. *See* Point II.B.4.(i).[8]

Fifth, Electron's damages theory—based on the notion that it could have entered into a hypothetical, non-existent transaction with a firm other than Morgan Stanley—is foreclosed by Electron's simultaneous effort to recover under the contracts that Electron signed with Morgan Stanley. Electron may not seek rescissory-type damages while at the same time affirming and suing on the very contracts that the plaintiff is seeking to avoid. *See* Point II.B.4.(ii).

Finally, to state a claim for fraud, a plaintiff must establish both (1) transaction causation, *i.e.*, that the fraudulent representation caused the plaintiff to enter into the transaction, and (2) loss causation, *i.e.*, that the fraudulent representations caused the plaintiff's losses. Here, Plaintiff has alleged only the former, contending that Electron would not have entered into the ELA had it known about Morgan Stanley's alleged plans for the ATS. But Plaintiff has not and cannot make any allegations that such representations caused losses to Electron because no ATS

[8] Even assuming that any of Plaintiff's tort claims survive, Plaintiff is not entitled to punitive damages either because the Complaint does not include allegations of "high moral culpability" or fraud "actuated by evil and reprehensible motives", which are required to establish an entitlement to such damages. *See* Point IV.

was ever developed, much less one that was not "truly dark." Because Plaintiff's alleged losses arose from Morgan Stanley's decision not to build the ATS, and not a decision to build the ATS on a "non-dark" basis, Plaintiff's "truly dark" fraud theory fails as a matter of law because there is no loss causation. *See* Point II.B.4.(iii).

Plaintiff's unfair competition claim fails for similar reasons. New York law is clear that a plaintiff may not base an unfair competition claim on allegations of breach of contract. Here, Plaintiff offers nothing more, which requires dismissal of the claim. Significantly, there is no allegation—as such claim would require—that Morgan Stanley misappropriated any of Electron's property. Rather, Electron's complaint is that Morgan Stanley never used Electron's supposed intellectual property to develop an ATS. Thus, because a critical element of an unfair competition claim is missing, the claim must be dismissed. *See* Point III.[9]

SUMMARY OF ALLEGATIONS[10]

Electron is a Delaware limited liability company formed for the purpose of creating a method for configuring an alternative trading system, or ATS. (Compl. ¶¶ 1, 11, 16.) Electron's supposed invention is intellectual property that could form the basis for an ATS designed for the use of institutional investors entering "spread" orders, whereby such investors seek to profit by capturing spreads (or price differences) between related financial instruments. (*Id*. ¶¶ 11-12.)

Electron designed the system to be operated through a "dark pool", a type of ATS. (Compl. ¶ 14.) In designing the system, Electron claims that it concluded that for such an ATS to succeed, institutional investors would have to be convinced that the "dark pool" was

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[9] Plaintiff's demand for a jury trial also should be denied because Plaintiff waived its right to a jury in the CSA, which expressly applies to any claims under the CSA, "any related document," *i.e.*, the ELA, and more broadly, "any dealings between them arising out of or relating to the subject matter of this transaction or any related transactions." (Compl. Ex. B (CSA) § 13.13.) *See* Point V.

[10] For purposes of this Motion to Dismiss, Morgan Stanley presumes, as it must under New York law, that all facts pleaded by Plaintiff are true.

"anonymous," *i.e.*, no predatory HFTs would be able to obtain information about trades within the dark pool to profit at investors' expense. (*Id.* ¶ 15.)

To fully develop and operate the ATS, Electron needed to engage an established broker-dealer like Morgan Stanley, "with the technological, financial, and other resources necessary to operate the [ATS] and market it to institutional investors." (Compl. ¶¶ 16-17.) Electron claims to have focused its discussion on Morgan Stanley based on, among other things, Morgan Stanley's publicly-stated commitment to scrupulously observing customer anonymity in its dark pools. (*Id.* ¶¶ 17-18.) Electron contends that anonymity of customer trades served to protect institutional investors in a dark pool against predatory trading by HFTs. (*Id.* ¶ 15.)

Over the course of almost an entire year the parties engaged in discussions and negotiations about a potential arrangement. (Compl. ¶ 26.) Those discussions culminated in the execution of two agreements on August 27, 2013. (*Id.* ¶ 27.)

First, Electron and Morgan Stanley entered into the ELA, which required Morgan Stanley to, among other things, (i) develop and implement the software and systems necessary for the operation of an ATS, (ii) operate, market, and promote use of an ATS, and (iii) launch an ATS within one year. (Compl. ¶¶ 29, 45, ELA § 3.2.) In return for the license of Electron's software, Morgan Stanley agreed to pay Electron a royalty consisting of 25% of Net Revenue (as defined in the ELA). (Compl. ¶ 30, ELA § 4.1.) Under Section 5.4 of the ELA, Morgan Stanley was obligated to operate the ATS for three years. (Compl. ¶ 31, ELA§ 5.4.)

The ELA gave Morgan Stanley discretion concerning the development, size, and scope of the ATS. (ELA § 3.2.) Electron did not retain any right to control, dictate, or influence any of the ATS' characteristics. Neither the ELA nor the CSA restricted the types of customers that would be permitted to trade in the ATS.

Both parties obtained two significant limitations on any potential liability arising out of their transaction under the ELA. (ELA § 7.3, CSA § 9.5.) The parties agreed that neither would have any liability for claims relating to intellectual property. That agreement, reflected in the first sentence of Section 7.3 of the ELA, reads, in pertinent part, as follows:

> NEITHER PARTY WILL HAVE ANY OBLIGATION OR LIABILITY, WHETHER ARISING IN CONTRACT OR TORT, WHETHER OR NOT ARISING FROM NEGLIGENCE OR OTHERWISE, FOR LOSS OF USE, REVENUE OR PROFIT OR FOR ANY OTHER INCIDENTAL, SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY, ECONOMIC, STATUTORY, OR CONSEQUENTIAL DAMAGES, WITH RESPECT TO ANY INTELLECTUAL PROPERTY OF THE OTHER PARTY OR ITS AFFILIATES, NON CONFORMANCE OR DEFECT IN THE LICENSED COPYRIGHTS, LICENSED PATENTS AND LICENSED KNOW-HOW OR OTHER MATERIALS OR INFORMATION PROVIDED UNDER THIS AGREEMENT BY A PARTY OR BY ANY THIRD PARTY.

(ELA § 7.3) (capital letters in the original).

The parties also agreed that neither party's liability to the other would exceed the total amounts previously paid by Morgan Stanley to Electron under the ELA and/or the CSA. (*Id.*) This agreement reflected in the second sentence of Section 7.3 reads, in pertinent part:

> NEITHER PARTY'S TOTAL LIABILITY UNDER THIS AGREEMENT WILL EXCEED THE TOTAL AMOUNTS PREVIOUSLY PAID BY COMPANY TO LICENSOR UNDER THIS AGREEMENT AND THE CONSULTING AGREEMENT PRIOR TO THE DATE OF THE APPLICABLE CLAIM.

(*Id.*) (capital letters in the original).

To emphasize the importance of Section 7.3, the parties agreed to Section 7.3 entirely in capital letters. Then, to emphasize these two provisions in Section 7.3, the parties agreed that:

> THE PARTIES ACKNOWLEDGE THAT THESE LIMITATIONS OF LIABILITY AND EXCLUSIONS OF POTENTIAL DAMAGES WERE AN ESSENTIAL ELEMENT IN SETTING CONSIDERATION UNDER THIS AGREEMENT.

(*Id.*) (capital letters in the original).

Both the ELA and the CSA contain merger clause provisions entitled "Entire Agreement." (*See* ELA § 12.11 and CSA § 13.5.) Both provisions make clear that any other agreements or understandings between the parties are superseded by the contents of the ELA and the CSA. (*Id.*) Section 12.11 of the ELA states in relevant part:

> This Agreement, together with the exhibits referenced herein, and the Consulting Agreement, contain the entire understanding and agreement of the parties with respect to the transactions completed hereby, and supersede any prior written or oral agreements between the Parties with regard to the subject matter hereof and thereof. . . . In entering into this Agreement, neither Party has relied upon any statement, estimate, forecast, projection, representation, warranty, action or agreement of the other Party except for those expressly contained in this Agreement….

(ELA § 12.11.) Section 13.5 of the CSA states:

> This Agreement and the [ELA] constitute the complete agreement and understanding between the parties, and supersede all prior agreements and understandings between the parties, with respect to the subject matter hereof and thereof.

(CSA § 13.5.)

Morgan Stanley's Purported Breach of the ELA

Electron alleges that at some point after October 2013, Morgan Stanley "advised" Electron that it had no intention of developing an ATS. (Compl. ¶ 35.) Electron further alleges, that "over the next several months" after Morgan Stanley so advised, Morgan Stanley employees told Electron that it "would proceed if Morgan Stanley could allow its HFT clients . . . to 'feast' on spread traders using the system." (*Id.* ¶ 36.) Morgan Stanley purportedly told Electron that it had started to investigate "adapting the system for that purpose." (*Id.*) Plaintiff does not explain what was meant by the term, "feast", in its Complaint. Nor does Electron provide any context that would support Plaintiff's claim that Morgan Stanley was suggesting development of a pool that was not "truly dark." To the extent that Electron insinuates that Morgan Stanley was

contemplating the creation of an ATS that would disadvantage investors, Morgan Stanley vehemently denies Electron's allegations.

Electron allegedly objected to these adaptations and requested that Morgan Stanley "honor its contractual obligations." (*Id.*) In fact, the Complaint makes clear that Morgan Stanley never attempted to adapt, and did not build, any such ATS. (Compl. ¶¶ 37, 45.)

Morgan Stanley's Purported Misrepresentations

Electron contends that Morgan Stanley made two false statements of inducement during the parties' negotiations. First, Plaintiff asserts that Morgan Stanley repeatedly represented, between October 2012 and August 2013, that its "dark pools were 'truly dark,' and that its established business practice was to protect customer anonymity scrupulously to prevent its HFT clients from engaging in predatory trading through Morgan Stanley," and that it "intended to employ this established business practice with respect to customers using the Spread Trade System." (Compl. ¶¶ 22, 26, 53 (emphasis added).) The Complaint does not contain any allegations that Morgan Stanley ever allowed such predatory activities. In fact, Morgan Stanley has not and does not condone any such activities in any of its ATS platforms. Plaintiff instead contends that this representation was false because, subsequent to August 2013, Morgan Stanley indicated that it "had begun to investigate adapting" the ATS to allow for "feasting." (*Id.* ¶ 36.)

Second, Plaintiff alleges that Morgan Stanley told Electron that it would comply with the terms of Section 3.2 of the ELA. (*Compare id.*, *with* Compl. ¶ 29.) Specifically, Plaintiff alleges that between October 2012 and August 2013, Morgan Stanley represented that it "intended . . . to develop and implement the [ATS] software, market the system to its current and prospective customers, and provide customer access to the system through Morgan Stanley's own computer

systems." (*Id*. ¶¶ 26, 53.) Plaintiff contends this representation was false because Morgan Stanley failed to develop an ATS with Electron. (*Id*. ¶ 35.)

ARGUMENT[11]

I. PLAINTIFF'S BREACH OF CONTRACT CLAIMS SHOULD BE DISMISSED.

A. The parties do not dispute the amount of damages owed under the CSA.

Section 9.4 of the CSA provides, in pertinent part, that, "Morgan Stanley may terminate this Agreement or any Task Order hereunder at any time upon prior written notice to [Electron] for any reason or no reason . . . ." (CSA § 9.4.) Under Section 9.5 of the CSA, damages for a termination made under Section 9.4, prior to the date that is eighteen months from the Effective Date, are set at "an amount equal to the amount that would have been payable pursuant to any outstanding Task Order from termination through the date eighteen months from the Effective Date. . . ." (*Id*. § 9.5.)

Morgan Stanley paid Electron $300,000.[12] It is undisputed that the remaining amount due and owing to Electron is $600,000. (*See* Compl. ¶ 51 (seeking $600,000 on its claim for breach of the CSA).) Consistent with its tender and offer under CLPR §§ 3219-20, Morgan Stanley is willing and able to pay this amount, plus interest, to Electron. (Edelman Affirm. Exs. C, D.) Accordingly, there is no need for this case to proceed with respect to Plaintiff's breach of contract claim on the CSA.

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[11] In determining whether a complaint can survive a motion to dismiss for failure to state a claim pursuant to CPLR § 3211(a)(7), New York courts look to whether "the facts as alleged fit within any cognizable legal theory." *Jaymer Commc'ns., Inc. v. Associated Locksmiths of Am., Inc.*, 84 A.D.3d 888, 888 (2d Dep't 2011) (internal citation omitted). Although it is well-settled that, for purposes of ruling on motions to dismiss, courts should treat all well-pleaded allegations of a complaint to be true, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Sud v. Sud,* 211 A.D.2d 423, 424 (1st Dep't 1995). Pursuant to CPLR § 3211(a)(1), courts may consider contracts attached to a complaint in evaluating a motion to dismiss. *Capogrosso v. Landsman*, 83 A.D.3d 638, 639 (2d Dep't 2011) (affirming dismissal where "materials submitted by the defendant in support of his motion refuted the plaintiff's allegations and established a defense as a matter of law").

[12] Although the Complaint does not affirmatively allege the $300,000 payment, it is implicit in Electron's calculation of the amount due to Electron under the CSA, and not an issue that can give rise to a factual dispute.

B. Section 7.3 of the ELA expressly caps damages for breach of the ELA.

The ELA's limitation of liability provision caps Plaintiff's recovery at the total amounts paid under the ELA and the CSA prior to the date of the applicable claim:

> LIMITATION OF LIABILITY. . . . EXCEPT AS SET FORTH IN SECTION 8 HEREOF OR IN SECTION 11 OF THE CONSULTING AGREEMENT,[13] NEITHER PARTY'S TOTAL LIABILITY UNDER THIS AGREEMENT WILL EXCEED THE TOTAL AMOUNTS PREVIOUSLY PAID BY COMPANY TO LICENSOR UNDER THIS AGREEMENT AND THE CONSULTING AGREEMENT PRIOR TO THE DATE OF THE APPLICABLE CLAIM. THE PARTIES ACKNOWLEDGE THAT THESE LIMITATIONS OF LIABILITY AND EXCLUSIONS OF POTENTIAL DAMAGES WERE AN ESSENTIAL ELEMENT IN SETTING CONSIDERATION UNDER THIS AGREEMENT.

(ELA § 7.3.)[14] Electron alleges that the ELA is a "valid, binding, and enforceable contract." (Compl. ¶¶ 26, 42.) Electron expressly acknowledged that the protections and limitations afforded under Section 7.3—which apply equally to both parties—were an "***essential element*** in setting consideration under the [ELA]." (ELA § 7.3.)

As the New York Court of Appeals has explained, "a limitation on liability provision in a contract represents the parties' agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor." *Metro. Life Ins. Co. v. Noble Lowndes Int'l., Inc.,* 84 N.Y.2d 430, 436 (1994). New York courts therefore will dismiss, based on documentary evidence pursuant to CPLR § 3211(a)(1), a demand for damages that "seeks consequential damages expressly precluded by the contractual provision limiting the parties' liability for consequential damages." *Pacnet Network Ltd. v. KDDI Corp*, 78 A.D.3d 478, 480 (1st Dep't 2010); *Metro. Life Insur. Co.*, 84 N.Y.2d at 439 (application of the limitation of liability provision to reduce judgment damages to stipulated amount); *Metro. Capital Funding, LLC v. Nomura Credit & Capital, Inc*., 22 Misc. 3d 1125(A)

[13] Sections 8 and 11, referenced herein, relate to indemnification and confidentiality, respectively, and are not applicable in this matter. (ELA §§ 8, 11.)

(Sup. Ct. 2009) (enforcing a limitation of liability and dismissing complaint seeking consequential damages for defendant's non-performance).

Here, Plaintiff had received $300,000 at the time that Morgan Stanley allegedly notified Electron that it was terminating the agreements. Because Section 7.3 of the ELA caps damages at amounts paid under the CSA and the ELA, damages under the ELA are no more than $300,000. Accordingly, Section 7.3 limits Electron's damages under the ELA to $300,000. Electron has not alleged any reason, nor could it, as to why the limitation of liability provision should not be enforced.[15] Electron's request for compensatory damages should be stricken and Electron's claim of breach of the ELA should be dismissed insofar as it seeks damages in excess of the limits set forth in Section 7.3.

II. PLAINTIFF'S FRAUD CLAIM SHOULD BE DISMISSED.

Plaintiff's fraud claim is fatally flawed for multiple reasons, each of which is an independent basis to dismiss the claim.

A. The fraud claim arising from Defendant's purported intention not to comply with the ELA should be dismissed as duplicative of the contract claim.

A claim for fraudulent inducement must allege more than "a misrepresented intent to perform" under the contract. *The Hawthorne Group, LLC v. RRE Ventures,* 7 A.D.3d 320, 323-24 (1st Dep't 2004) (citations omitted); *Gordon v. Dino DeLaurentiis Corp.*, 141 A.D.2d 435, 437 (1st Dep't 1988) (a fraudulent inducement claim is "not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it.") "Numerous Appellate Division decisions have held . . . that a cause of action for fraud cannot exist when the fraud claim arises out of the same facts as a breach of contract claim with the sole

[15] There is nothing remotely unfair about the caps to which Electron agreed in the ELA and CSA. Plaintiff stands to receive—consistent with the caps—payments aggregating $1.2 million ($300,000 prior to termination under the CSA; $300,000 under the ELA; and $600,000 under the CSA) to cover an approximately 8-month period.

additional allegation that the defendant never intended to fulfill its express contractual obligations." *PI, Inc. v. Quality Prods., Inc.*, 907 F. Supp. 752, 761 (S.D.N.Y. 1995); *see also,*

- *Coppola v. Applied Electric Corp.,* 288 A.D.2d 41, 42 (1st Dep't 2001) (dismissal of claim that defendant "harbored the undisclosed intention from the outset to never comply with the parties' stock purchase agreement");
- *Stuart Lipsky, P.C. v. Price*, 215 A.D.2d 102, 104 (1st Dep't 1995) (dismissal of a fraud claim "based upon a representation of future conduct" because it "relates solely to the underlying breach of contract, [and] does not give rise to a separate cause of action for fraud.").

Here, one of Plaintiff's theories of fraud is premised on Morgan Stanley's purported false representation that it "intended to fulfill its obligations under the [ELA]." (Compl. ¶ 53.) That theory is premised on precisely the same facts that underlie the breach of contract claim, with only the additional assertion that Morgan Stanley never intended to perform the contract. (*Compare* Compl. ¶ 45 ("Morgan Stanley . . . has failed to develop and implement the software and systems necessary to operate the [ATS]"), *with id*. ¶ 53 ("Morgan Stanley . . . falsely represent[ed] . . . that [it] . . . intended to . . . develop and implement the software . . . .").) Simply inserting the words "falsely represented" and "intended to" does not transform a breach of contract claim into one for fraud.

Nor does New York law permit a plaintiff to repackage a contract claim into one for fraud as a means of avoiding a limitation of liability provision. *See Clement v. Delaney Realty Corp.*, 45 A.D.3d 519, 521 (2d Dep't 2007) ("Nor can the plaintiffs avoid the limitation of liability provision merely by couching their claims against [defendant] in the familiar language of fraud. A cause of action sounding in fraud does not lie where, as here, 'the only fraud claim relates to a breach of contract'") (citation omitted); *Lerner v. Perry*, 61 A.D.2d 754, 754 (1st Dep't 1978) ("[T]here is no basis in law for appellant's contention that her claim was for extraneous fraud and not for breach of contract and thus not limited by the contractual provision

for liquidated damages"); *see also Renaissance Equity Holdings, LLC v. Al-An Elevator Maint. Corp.,* 121 A.D.3d 661, 664 (2d Dep't 2014) (breach of contract claim recovery limited by "limitation on liability" provision and affirming dismissal of fraud claim as duplicative of breach claim).[16]

B. Plaintiff's fraud claim arising from Morgan Stanley's "truly dark" representation fails to allege the requisite elements of a fraud claim.

1. Plaintiff has not alleged that Morgan Stanley's "truly dark" representation was false.

To allege a claim for fraud, "plaintiff must prove a misrepresentation . . . which was false . . . ." *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (1996). A claim for fraudulent inducement must allege more than just "statements of prediction or expectation"; such a claim must assert "an intentional misrepresentation of any material existing facts." *Pacnet Network Ltd.,* 78 A.D.3d at 479.

Here, Plaintiff does not allege the falsity of Morgan Stanley's representation that it intended that the ATS would be truly dark and would not allow HFTs to engage in predatory trading. (Compl. ¶ 22.) Instead, Plaintiff alleges only that some months *after* the parties had entered into their agreements, unidentified Morgan Stanley employees told Electron that Morgan Stanley would only develop the ATS if HFTs could "feast" on spread traders using that ATS. (*Id*. ¶ 36.) Setting aside the falsity of the allegations, Plaintiff provides no context for the supposed "feast" statement that would suggest what the unidentified speaker meant.[17] Plaintiff

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[16] Plaintiff's claim for punitive damages does not save its fraud claim either. A plaintiff may not add an "unelaborated request for punitive damages" to avoid a holding that its fraud claim is redundant of its breach of contract claim. *Mosaic Caribe v. AllSettled Group, Inc.*, 117 A.D.3d 421, 422 (1st Dep't 2014).

[17] These vague and conclusory allegations do not rise to the level of specificity required under New York law. *See* N.Y. CPLR § 3016(b). Allegations of misrepresentations that do not identify who made the statement, when the statement was made, or in what context are deemed insufficient under CPLR § 3016(b). *See Bramex Assocs., Inc. v. CBI Agencies, Ltd.*, 149 A.D.2d 383 (1st Dep't 1989) (fraud not pled with sufficient detail under CPLR § 3016(b) in dispute between two insurance brokers where "[t]here is no mention of the particular policies, insureds, or transactions that are involved in the alleged fraud").

also does not allege that "feasting" was mutually exclusive with either (a) maintaining customer anonymity, or (b) preventing HFTs from engaging in predatory trading. Indeed, Plaintiff does not allege that this purported "feasting" would have permitted predatory practices at all. Absent context for the statements, Electron has no basis for placing a sinister spin on the supposed remark.

This is particularly so because Electron's contention is that both Electron and Morgan Stanley would have suffered had Morgan Stanley built an ATS that allowed predatory trading by HFTs. Electron asserts that "to successfully build and maintain a customer base for the [ATS], institutional investors would need to be assured that the dark pool in which the system was operated was truly 'anonymous'" and precluded use by predatory HFT traders. (Compl. ¶ 15.) Otherwise, Electron contends that customers would have been discouraged from using the ATS and its "marketability and value" would be damaged. (*Id.*) Thus, accepting Electron's own allegations, Morgan Stanley had no motive to build an ATS that allowed predatory acts by HFTs.

2. Plaintiff has not alleged that Morgan Stanley knew that its "truly dark" representation was false at the time that it was made.

To allege a claim for fraud, "plaintiff must prove a misrepresentation . . . which was . . . known to be false by defendant" at the time that it was made. *Lama Holding*, 88 N.Y.2d at 421; *Stuart Lipsky,* 215 A.D.2d at 104 (dismissal of fraud claim, that "fail[ed] to plead any facts giving rise to an inference that the defendant, at the time the promissory representations were made, never intended to honor or act upon his statements"); *Glanzer v. Keilin & Bloom LLC*, 281 A.D.2d 371, 372 (1st Dep't 2001) (allegations that defendants made promises "with an intent not to keep them" do not state a cause of action for fraud separate from a breach of contract claim).

Here, other than conclusory allegations that "Morgan Stanley knew or was reckless in not knowing" that its representations were false (Compl. ¶ 54), the Complaint contains *no* allegations

that Morgan Stanley harbored an undisclosed intention during the negotiations that the ATS would be not be anonymous or would condone predatory behaviors. Plaintiff claims only that, months *after* the parties had signed the agreements, Morgan Stanley suggested that it was evaluating the system's adaptation. (Compl. ¶ 36.) The clear implication is that until those alleged adaptations, Morgan Stanley had not contemplated such a system. Thus, it would be inconsistent with this allegation to conclude that Morgan Stanley had decided to build a system with "feasting" by HFTs (whatever that may mean) prior to entering into Morgan Stanley's agreements with Electron.[18]

3. The Complaint is clear that Morgan Stanley's actions were consistent with the "truly dark" representation.

The Complaint establishes that Morgan Stanley never acted inconsistently with its purported representation that it would only build a dark pool without information leakage. (*Id.* ¶ 37.) At most, the Complaint alleges—without any support whatsoever—that for a brief period of time Morgan Stanley "had begun to investigate" whether it should adapt the system to permit feasting by HFTs. (*Id.* ¶ 36.) But mere contemplation of an act purportedly inconsistent with a previous statement—without commission of such act—does not give rise to liability for a false statement. (*Id.* ¶¶ 37-38.) Even accepting Plaintiff's allegations that Morgan Stanley considered (but ultimately rejected) development of an ATS that would not be "truly dark" or would leak information to HFTs, no such ATS was ever developed. (*Id.*) Accordingly, even if Morgan Stanley made such a representation (which it did not), there was no breach of Morgan Stanley's purported representation that any ATS it developed would be "truly dark."

[18] Plaintiff also does not allege that Morgan Stanley's purported representations that it would fulfill its obligations under the ELA (Compl. ¶ 53) were known to be false at that time that Morgan Stanley entered into the contract, and thus such representations cannot form the basis for a fraud claim either.

4. Plaintiff does not adequately plead an injury.

(i) Plaintiff's claims for damages are not actionable.

Plaintiff's claim for fraud also should be dismissed because Plaintiff does not assert actionable damages stemming from Morgan Stanley's purported fraudulent statements. The only injuries that the Complaint specifies are: (i) damages relating to Morgan Stanley's purported breach of the ELA; or (ii) damages arising from its forbearance from offering the ATS to Morgan Stanley's competitors. (Compl. ¶¶ 53, 55.) Neither is sufficient to state a claim.

Plaintiff cannot allege damages arising from a purported breach of the ELA as those are merely duplicative of its contract claims. *Mosaic Caribe*, 117 A.D.3d at 422 ("[F]raud claim was duplicative of the breach of contract claim" where "[a]mong other things, . . . the proposed amended complaint seeks the same damages as the breach of contract claim."); *Coppola,* 288 A.D.2d at 42 (dismissal of fraud claim that, among other things, "did not allege any damages, including those for foregone opportunities, that would not be recoverable under a contract measure of damages"); *Makastchian v. Oxford Health Plans, Inc.*, 270 A.D.2d 25, 27 (1st Dep't 2000) (dismissing claim predicated on misrepresentation that did not, *inter alia*, "seek compensation distinct from that sought under the claim for breach of contract").

Plaintiff's alternative non-contractual theory of damages—that it was injured by purportedly forbearing from offering the ATS to Morgan Stanley's competitors—also fails. (Compl. ¶¶ 24, 53.) As stated by the New York Court of Appeals: "'[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong' or what is known as the 'out-of-pocket' rule." *Lama Holding*, 88 N.Y.2d at 421 (citations omitted). "Under this rule, . . . [d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" and "there can be no recovery of profits which would have been realized in the absence of fraud." *Id*. As *Lama*

continued, "the loss of an alternative contractual bargain . . . cannot serve as a basis for fraud or misrepresentation damages because the loss of the bargain [i]s 'undeterminable and speculative.'" *Id*. at 422.[19]

Here, Plaintiff's theory of injury based on its forbearance from *offering* its intellectual property to a hypothetical firm other than Morgan Stanley (Compl. ¶ 53) is precisely the type of injury that is precluded under *Lama* and its progeny. Plaintiff does not allege any other entity to which Electron might have *offered* its supposed intellectual property, much less any that wanted to enter into a licensing agreement with Plaintiff. Even if it could allege such facts, it would still be insufficient as Plaintiff must allege a pecuniary loss because of the alleged fraud, not speculations of what it might have gained in the absence of the alleged fraud. *Lama*, 88 N.Y.2d at 421. Plaintiff makes no such allegations.

(ii) **Plaintiff's damages theory is irreconcilable with its breach of contract claims.**

Electron is not permitted to seek forbearance damages because doing so would be inconsistent with its affirmance, and claims for breach of, the ELA and the CSA. The Complaint affirmatively alleges that the CSA and ELA are valid and binding. (Compl. ¶¶ 43, 48.) New York law is clear: a party to a contract "may not both affirm and disaffirm a contract . . . or take a benefit under an instrument and repudiate it." *Sofi Classic S.A. de C.V. v. Hurowitz*, 444 F.

[19] *See also The Starr Foun. v. Am. Int'l Grp., Inc.*, 76 A.D.3d 25, 28 (1st Dep't 2010) (claim that a foundation would have sold, instead of held, its AIG stock in 2007, but for AIG's misrepresentations, was "virtually the paradigm of the kind of claim that is barred by the out-of-pocket rule") (citing *Lama Holding*); *Gordon v. Dino DeLaurentiis Corp*., 141 A.D.2d 435, 437 (1st Dep't 1988) (allegation that plaintiff would have struck a deal with a third-party, but for defendant's fraud, was insufficient to show specific damages resulting from the purported misrepresentation); *Kensington Pub. Corp. v. Kable News Co., Inc*., 100 A.D.2d 802, 802 (1st Dep't 1984) (plaintiff cannot seek to recover "the benefit of what would have been the more favorable contract," but instead may only recover "indemnity for the actual pecuniary loss sustained as the direct result of the wrong.") (citations and quotations omitted); *UBS Sec. LLC v. Angioblast Sys., Inc*., 35 Misc. 3d 1201(A) (Sup. Ct., N.Y. Cty. 2012) (claim dismissed where plaintiff alleged that had defendant not falsely represented that certain of defendant's employees would personally lead an investment engagement for plaintiff, plaintiff "would have engaged an alternative investment bank that would have successfully made a private placement of [plaintiff's] securities") (citing *Lama*, at 421).

Supp. 2d 231, 238 (S.D.N.Y. 2006) (quotations omitted) (*citing Lumber Mut. Cas. Ins. Co. of N.Y. v. Friedman*, 176 Misc. 703, 703 (Sup. Ct., N.Y. Cty. 1941)); *see also VisionChina Inc. v. S'holder Rep. Servs., LLC*., 109 A.D.3d. 49, 56-57 (1st Dep't 2013) (affirmance of a fraudulent contract by continuing to perform and keeping the benefits and rescission of the contract are mutually exclusive remedies); *Torpey v. TJ Realty of Orange Cnty. Inc*., No. 2850/2013, 2015 WL 2401237, at *6 (Sup. Ct., N.Y. Cty. May 19, 2015) (*quoting McKeever v. Aronow,* 194 N.Y.S. 475 (1st Dep't 1922) ("A party, while he may retain possession and obtain his damages for fraud, cannot rescind while retaining the fruits of the contract.")

Here, on the one hand, Electron wants to enjoy the fruits of its contracts with Morgan Stanley (*i.e.,* Electron asserts the validity of the contracts in order to obtain damages thereunder). On the other hand, Electron also wants to obtain damages on a claim that it was allegedly fraudulently induced to enter into the contract. Aside from the fact that such damages are not recoverable under New York's "out of pocket" rule, under *Sofi Classic, VisionChina*, and *Torpey,* cited *supra*, Electron is precluded from both enjoying the benefits of its contracts and seeking a remedy that would reproduce Electron's supposed gains in a world where it had not entered into those agreements. Accordingly, Electron's continued pursuit of its contract claims provides an independent, additional basis for dismissal of Electron's fraud claims to the extent they seek damages based on Electron's decision to enter into the contracts.

(iii) **Plaintiff fails to plead loss causation.**

As the First Department has held, a plaintiff alleging fraud "'must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation).'" *Water Street Leasehold LLC v. Deloitte & Touche LLP*, 19 A.D.3d 183, 185 (1st Dep't 2005) (citing *Laub v. Faessel,* 297 A.D.2d 28, 31 (1st Dep't

2002)); *see also Lama Holding*, 88 N.Y.2d at 421(no actionable fraud claim where complaint did not allege how defendant's purported failure to disclose, as opposed to repeal of a certain tax act, proximately caused plaintiff's tax liabilities). New York courts routinely dismiss fraud cases for failure to plead loss causation:

- *Megaris Furs, Inc. v. Gimbel Bros., Inc.*, 172 A.D.2d 209, 212 (1st Dep't 1991) ("Plaintiffs' pleadings are devoid of any attempt to demonstrate the requisite nexus between the misrepresentation alleged to have been made and the injury said to have been sustained" where a store's closing, and not the alleged misrepresentations about the store's potential closing, were the cause of plaintiffs' losses);

- *Mosaic Caribe v. AllSettled Group, Inc.*, 117 A.D.3d 421, 422 (1st Dep't 2014) (affirming dismissal of a fraud claim where plaintiffs alleged only that the misrepresentation caused them to purchase a life insurance policy, but did not claim "that the alleged misrepresentation, as opposed to plaintiff's failure to pay for the life insurance policy, caused plaintiff's loss");

- *Meyercord v. Curry*, 38 A.D.3d 315, 316 (1st Dep't 2007) (loss causation not adequately alleged because even if plaintiff was fraudulently induced to enter into one agreement, plaintiff was bound by a separate, pre-existing agreement to comply with the complained-of obligation);

- *Water Street Leasehold LLC v. Deloitte & Touche LLP*, 19 A.D.3d 183, 185 (1st Dep't 2005) (dismissal of fraud and negligent misrepresentation claims brought by a property owner against an accounting firm where the owner did not allege that the certification of certain financial statements by a tenant's accountants, as opposed to the tenant's failure to timely vacate the property, caused the owner's loss).

Here, Plaintiff has not alleged loss causation. This is not a case in which Plaintiff claims to have been harmed because Morgan Stanley built a dark pool that deviated from representations about the extent to which the pool would be "truly dark" or cater to the interests of HFTs or other investors.

According to the Complaint, by the time that Morgan Stanley represented that it was investigating adaptation of the ATS (Compl. ¶ 36), Morgan Stanley had already decided not to build the ATS at all. (*Id.* ¶ 35.) And no ATS was ever built. Thus, as the Complaint makes

clear, it was Morgan Stanley's determination not to proceed with the development of the ATS (*id*. ¶¶ 36, 38), not Morgan Stanley's representations about whether the ATS would be "truly dark" or preclude predatory trading, that caused any loss that can be claimed in this matter.[20]

III. PLAINTIFF'S UNFAIR COMPETITION CLAIM SHOULD BE DISMISSED

To maintain an unfair competition claim alongside a breach of contract claim, the competition claim must arise from "an independent legal duty other than [the defendant's] duty to comply with its express and implied obligations under the Agreements." *Dorset Indus., Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395, 414 (E.D.N.Y. 2012) (dismissal of unfair competition claim as duplicative of breach of contract claim where plaintiff sought to assert unfair competition claim "in the alternative"). New York law "is well-settled . . . . that no claim [for unfair competition] lies where its underlying allegations are 'merely a restatement, albeit in slightly different language, of the implied contractual obligations asserted in the cause of action for breach of contract.'" *Orange Cnty. Choppers, Inc. v. Olaes Enter., Inc*., 497 F. Supp. 2d 541, 558 (S.D.N.Y. 2007) (dismissal of unfair competition claim as duplicative of breach of contract claim) (citation omitted); *Washington v. Kellywood Co.*, No. 05 Civ. 10034, 2009 WL 855652, at *7 (S.D.N.Y. Mar. 24, 2009) (same).

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[20] In contrast to its articulation of the supposed misrepresentation within the fraud cause of action (Compl. ¶ 53), one sentence in the preliminary statement suggests that Morgan Stanley represented to Electron that the contemplated ATS would not allow any HFTs at all, without regard to whether trading was set up in a way that sought to avoid providing an unfair advantage to any particular participants. (Compl. ¶ 4.) The Complaint contains no particularized allegation of any Morgan Stanley representative making such a statement. There is none of the required: who, what, and when needed to establish a fraudulent statement. *See* CPLR § 3016(b). When Electron ultimately alleges the supposed misrepresentation about the operation of its pools at paragraph 53 of the Complaint, Electron alleges that Morgan Stanley misrepresented whether the pool would be "truly dark" and permit HFT clients to engage in *predatory* trading, and not whether the pool would have participation from some HFTs. Finally, to the extent that there are particularized allegations as to what Morgan Stanley said about whether its pools would be "dark," those allegations establish that Morgan Stanley described pools in which it sought to preserve anonymity and minimize information leakage. (Compl. ¶¶ 22-23.) Thus, Electron's own allegation, taken as true, indicate that it would have clearly been on notice that HFTs did participate in Morgan Stanley's pools. In any event, even assuming *arguendo* that Electron had asserted a claim based on a supposed misrepresentation about a lack of HFTs in Morgan Stanley's "dark pools," that claim would fail for the same reasons outlined above with respect to the alleged "truly dark" misrepresentation claims.

Here, Plaintiff's unfair competition claim is no more than a repurposed version of its breach of contract claim. Plaintiff does not point to any independent legal duty that Morgan Stanley owed it outside of its contractual obligations under the ELA and the CSA. Plaintiff's conclusory statements that Morgan Stanley allegedly "misappropriated" and "destroyed the value" of Electron's intellectual property (Compl. ¶¶ 61-62) are insufficient to state a claim. *See Clark-Fitzpatrick Inc.*, *v. Long Island R.R.,* 70 N.Y.2d 382, 390 (1987) (allegation that defendant did not exercise due care was insufficiently distinct from and merely rephrased implied contractual obligations); *Bangkok Crafts Corp. v. Capitolo di San Pietro in Vaticano*, 331 F. Supp. 2d 247, 255 (S.D.N.Y. 2004) (unfair competition claim dismissed where plaintiff did not allege any anti-competitive conduct).

For Plaintiff to allege an unfair competition claim, it must show the "bad faith misappropriation of a 'commercial advantage or property which belonged exclusively to [plaintiff].'" *Bongo Apparel v. Iconix Brand Group, Inc.,* 18 Misc. 3d 1108 (A) (Sup. Ct., N.Y. Cty. Jan. 2, 2008) (dismissal of unfair competition claim where plaintiff failed to allege how defendants sought to capitalize on plaintiff's goodwill and defendants had an exclusive license to the goodwill associated with plaintiff's brand). Plaintiff's own allegations establish that Morgan Stanley never developed the ATS that Plaintiff claims to be the basis for its invention. (Compl. ¶ 37.) Thus, Morgan Stanley never used Plaintiff's purported intellectual property outside the terms of the ELA. Accordingly, Plaintiff's unfair competition claim must be dismissed.

IV. PLAINTIFF IS NOT ENTITLED TO PUNITIVE DAMAGES.

To the extent that any of the Plaintiff's claims survive this motion to dismiss, Plaintiff's prayer for punitive damages should be stricken. "Punitive damages are not available 'in the ordinary fraud and deceit case but are permitted only when a 'defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such

wanton dishonesty as to imply a criminal indifference to civil obligations.'" *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dep't 2011) (quoting *Walker v. Sheldon*, 10 N.Y.2d 401, 405 (1961)) (internal citations omitted); *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 315-16 (1995) (punitive damages are only appropriate where the alleged conduct, "may be characterized as 'gross' and 'morally reprehensible,' and of 'such wanton dishonesty as to imply a criminal indifference to civil obligations'") (citation omitted). In *Hoeffner,* the First Department recently held that "[c]ases involving mere fraudulent misrepresentations to induce a party to accept an employment agreement" do not give rise to punitive damages. *Hoeffner*, 85 A.D.3d at 458; *see also Universe Antiques, Inc. v. Vareika,* 826 F.Supp.2d 595, 610 (S.D.N.Y. 2011), *aff'd*, 510 F. App'x 74 (2d Cir. 2013) (denying punitive damages for fraud in the inducement where buyer was misled regarding the craftsman of a purchased window, because the misrepresentation was not a fraud aimed at the public generally and the misrepresentation did not rise to the level of "evil").

Plaintiff's only allegations of intent are that Morgan Stanley's actions were "knowingly, willfully, and in wanton and reckless disregard of Electron's rights." (Compl. ¶¶ 57, 65.) These conclusory allegations do not meet the pleading standard, which requires allegations of "high moral culpability" or fraud "actuated by evil and reprehensible motives." *Walker*, 10 N.Y. 2d at 404-05.

V. PLAINTIFF WAIVED ITS RIGHT TO A JURY.

In the CSA, Plaintiff expressly waived its right to a jury trial on any claims relating to the CSA, the ELA, or more broadly, "the subject matter of this transaction or any related transactions." (CSA § 13.13.) Its demand for a jury trial therefore should be denied.

Section 13.13 of the CSA unambiguously provides that:

> THE PARTIES UNCONDITIONALLY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL FOR ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR RELATING TO, . . . THIS AGREEMENT, ANY OF THE RELATED DOCUMENTS, OR ANY DEALINGS BETWEEN THEM ARISING OUT OF OR RELATING TO THE SUBJECT MATTER OF THIS TRANSACTION OR ANY RELATED TRANSACTIONS.

(CSA § 13.13.) The ELA is plainly a "related document," as that term is used in the CSA's jury waiver provision. The ELA and the CSA are both dated August 27, 2013, and acknowledge contemporaneous execution with the companion document. (ELA at Background (C); CSA Preamble.) The ELA reads, in relevant part: "This Agreement, together with . . . the [CSA], contain the entire understanding and agreement of the Parties." (ELA § 12.11.)

The plain language of Section 13.13 of the CSA makes clear that Plaintiff has waived its right to a jury for any claim or cause of action arising from the CSA *and* the ELA. It explicitly states that it applies to "this agreement, any of the related documents, or any dealings between them arising out of or relating to the subject matter of this transaction or any related transactions." (*Id.*)[21] By its terms, the provision also applies to all of Plaintiff's fraud and unfair competition claims because such claims arise out of the "dealings between" the parties "relating to the subject matter of [the CSA] and related transactions." (*Id.*)[22]

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[21] New York law has consistently held that "[t]he right to a jury trial may be waived in an instrument other than that representing the agreement upon which the action is founded." *Franklin Nat'l. Bank of Long Island v. Capobianco*, 25 A.D.2d 445, 445 (1966); *Cohn v. Adler*, 139 A.D.2d 481 (1988) (jury waiver provision of one agreement applied to related agreements). Language in the agreements acknowledging contemporaneous execution and references within each agreement signaling that they operate in concert supports a finding that the parties intended to waive a jury trial for both agreements. *Bank of China, New York Branch v. NBM L.L.C.*, No. 01 CIV.0815 (DC), 2002 WL 1072235 at *4 (S.D.N.Y. May 28, 2002).

[22] Because Plaintiff affirms the validity of the CSA by seeking a recovery thereon (Compl. ¶ 48), Plaintiff's fraud claim does not escape the reach of the jury waiver provision. *See Sherry Assocs. v. Sherry-Netherland, Inc.*, 273 A.D.2d 14, 15-16 (1st Dep't 2000) ("Plaintiffs 'may not at the same time rely upon the lease as the foundation of their claim for damages and repudiate the provisions by which they waived their constitutional right to a jury trial.'") (citation omitted).

CONCLUSION

For the above-stated reasons, Defendant respectfully requests that the Court dismiss the Complaint with prejudice.

Dated: New York, New York
June 12, 2015

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