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

ELECTRON TRADING LLC,

Plaintiff,

-against-

MORGAN STANLEY & CO. LLC,

Defendants.

Index No.: 651370/2015
Commercial Division Part 39
Justice Saliann Scarpulla

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Order in the above matter concerning Motion Sequence #1, issued by Justice Scarpulla on April 25, 2017.

Dated: New York, New York
May 24, 2017

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

PRESENT: SCARPULLA, SALIANN **PART** 39

Justice

ELECTRON TRADING LLC

INDEX NO. 651370/2015

MOTION DATE

- v -

MORGAN STANLEY & CO. LLC

MOTION SEQ. NO. 001

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

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits ..... No(s) _____

Answering Affidavits - Exhibits ..... No(s) _____

Replying ..... No(s) _____

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying memorandum decision.

DATE : 4/25/17

SALIANN SCARPULLA, JSC

1. CHECK ONE	:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
2. APPLICATION	:	☐ 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 39

----------X
ELECTRON TRADING LLC

Plaintiff,

-against-

MORGAN STANLEY & CO. LLC,

Defendant.

----------X

DECISION/ORDER

Index No. 651370/2015
Motion Seq. No. 001

HON. SALIANN SCARPULLA, J.:

In this action for breach of contract, fraud and unfair competition, defendant Morgan Stanley & Co. LLC ("Morgan Stanley") moves to dismiss the amended complaint of plaintiff Electron Trading LLC ("Electron"), pursuant to CPLR §§ 3211(a)(1) and CPLR 3211(a)(7). Electron opposes Morgan Stanley's motion to dismiss and cross moves, pursuant to CPLR § 3212, for an order granting summary judgment on Electron's second cause of action for breach of contract.

Background

Electron invented a trading system for institutional investors to use as an alternative forum for trading securities, generally known as an alternative trading system ("ATS"). ATSs, including the one that is the subject of this action, are designed to match buyers and sellers of securities to capture spread orders, *i.e.*, profits gained from the price difference between a bid and ask of a security. An ATS may operate as a dark pool, and unlike the public stock exchange, dark pool ATSs are private exchanges that lack informational transparency.[1] By eliminating pre-trade

[1] A dark pool is a private securities exchange in which investors, typically large financial institutions, are able to make trades anonymously.

information leakage, dark pool ATSs limit high-frequency trading ("HFT"), which uses complex algorithms to quickly execute orders, thereby leveling out the playing field for investors.

Morgan Stanley is a financial services firm. Morgan Stanley licensed Electron's ATS (the "licensed ATS") on August 27, 2013, pursuant to an Exclusive License Agreement ("ELA"). The ELA provides, *inter alia*, that in exchange for Electron granting Morgan Stanley an exclusive license for the licensed ATS, Morgan Stanley would use commercially reasonable efforts to:

> (a) develop and implement the software and systems necessary for the operation of the [licensed ATS] and the related front-end access tools and connectivity;
> (b) operate the [licensed ATS] and the related front-end access tools;
> (c) market or promote use of the [licensed ATS] among its and its Affiliates' existing and prospective customers and, in [Morgan Stanley']s reasonable business judgment and, subject to compliance with applicable Law and any contractual provisions, provide Schanzer, Tan, and other [Electron] personnel agreed to by the Parties from time-to-time, access to its and its Affiliates' customers for the purpose of marketing or promoting use of the [licensed ATS];
> (d) provide access to the [licensed ATS] through [Morgan Stanley']s or its Affiliates' systems (as applicable);
> (e) develop a graphical user interface for use by end users of the [licensed ATS];
> (f) provide adequate capacity, processing and connectivity for the [licensed ATS]; and
> (g) launch the [licensed ATS] prior to the later of (i) the one-year anniversary of the Effective Date and (ii) the one-year anniversary of the execution date of the first Task Order (as such term is defined in the Consulting Agreement).

Further, pursuant to section 7.3, the ELA contains a limitation of liability provision, which states that:

> EXCEPT WITH RESPECT TO THIRD PARTY CLAIMS FOR WHICH A PARTY IS INDEMNIFIED BY THE OTHER PARTY HEREUNDER OR UNDER THE CONSULTING AGREEMENT OR THE OBLIGATIONS OF EITHER PARTY FOR ITS VIOLATION OF THE CONFIDENTIALITY OBLIGATIONS UNDER SECTION 11, 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,

NONCONFORMANCE 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. EXCEPT AS SET FORTH IN SECTION 8 HEREOF OR IN SECTION 11 OF THE CONSULTING AGREEMENT, 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. THE PARTIES ACKNOWLEDGE THAT THESE LIMITATIONS OF LIABILITY AND EXCLUSIONS OF POTENTIAL DAMAGES WERE AN ESSENTIAL ELEMENT IN SETTING CONSIDERATION UNDER THIS AGREEMENT." (capital letters in original).

Contemporaneously, the parties entered into a Consulting Services Agreement ("CSA"), in which Electron's principals, David Schanzer ("Schanzer") and Stan Tan ("Tan"), agreed to assist in the development of the licensed ATS. Pursuant to the Task Order annexed to the CSA, Electron would receive no more than $600,000.00 annually in exchange for its services. Prior to commencing this action, Morgan Stanley paid Electron a total of $300,000.00 pursuant to the CSA and the Task Order.

Shortly after executing the ELA and CSA, Schanzer and Tan reported to Morgan Stanley, where both allegedly discovered that Morgan Stanley had not allocated sufficient resources to develop and implement the licensed ATS. When Electron approached Morgan Stanley about this failure to comply with its contractual obligation, Morgan Stanley allegedly agreed to proceed if Morgan Stanley could use the licensed ATS for HFT.

Electron objected, and specifically alleges that prior to entering into the relevant agreements, Morgan Stanley had publicly and personally represented its business policy and practice as excluding HFT, *i.e.*, to provide clients with dark pool trading fora. Electron further alleges that Morgan Stanley represented it would employ that same policy and practice (excluding HFT) when implementing Electron's licensed ATS.

Even though the ELA does not contain any provisions excluding HFT, Electron alleges that during negotiations, it stressed to Morgan Stanley the importance of a policy and practice of excluding HFT because, according to Electron, without such a policy and practice the licensed ATS would be lost. In response, Morgan Stanley 's Global Co-Heads of Electronic Trading, Andrew Silverman ("Silverman") and William Neuberger ("Neuberger") allegedly assured Electron that Morgan Stanley was committed to protecting their client interests against predatory HFT.

Electron further alleges that, despite its alleged oral representations to the contrary, Schanzer and Tan observed extensive HFT in Morgan Stanley's dark pools. Electron alleges that such conduct constitutes an illegal scheme, which Morgan Stanley wrongfully demanded Electron join.

On April 22, 2014, Morgan Stanley informed Electron that it would not proceed with implementing and developing the licensed ATS and would permissively terminate the CSA pursuant to section 9.4.[2] Electron then commenced this action, pleading causes of action for: (1) breach of the ELA; (2) breach of the CSA; (3) fraud; and (4) unfair competition.

Morgan Stanley moved to dismiss the complaint and Electron cross moved for summary judgment on the second cause of action for breach of the CSA, demanding damages of $600,000.00 pursuant to section 9.5 of the CSA.[3] Though Morgan Stanley has tendered, pursuant CPLR §§ 3219-20, an amount inclusive of the amount Electron demanded in its cross motion, the parties

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[2] Section 9.4 of the CSA provides in relevant part that "[Morgan Stanley] may terminate [the CSA] or any Task Order hereunder at any time upon prior written notice . . . for any reason or no reason . . . ."

[3] Section 9.5 of the CSA provides in relevant part that "[u]pon a termination of [the CSA] or any Task Order by [Morgan Stanley] pursuant to Section 9.4 hereof prior to the date that is eighteen months from the Effective Date, [Morgan Stanley] shall pay to [Electron] in immediately available funds 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, but in no event less than an amount equal to the amount that would have been payable over a six-month period under such Task Order."

continue to dispute liability and damages. Electron then amended the complaint, pleading additional claims for: (5) negligent misrepresentation; and (6) reformation. Morgan Stanley has moved to dismiss those additional causes of action, and the parties have now submitted all papers as one motion for me to consider here.

Discussion

As an initial matter, I note that Electron properly amended the complaint as of right by filing the verified amended complaint after Morgan Stanley moved to dismiss the original complaint. *See* CPLR § 3025(a); *see Johnson v Spence*, 286 A.D.2d 481, 483 (2d Dep't 2001) (stating that "plaintiff could have amended her complaint as of right, since the defendant's motion to dismiss the complaint, which extended his time to answer the complaint, also extended the plaintiff's time to amend the complaint."). "As a result, the amended complaint superseded the original complaint and became the only complaint in the case." *D'Amico v Correctional Med. Care, Inc.*, 120 A.D.3d 956, 957 (4th Dep't 2014) (citation omitted).[4]

I. Morgan Stanley's Motion to Dismiss

"On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings [and] '[t]he scope of a court's inquiry . . . [is] to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action.'" *1199 Hous. Corp. v Intl. Fid. Ins. Co.*, 14 A.D.3d 383, 384 (1st Dep't 2005). However, dismissal of a complaint is required when the "documentary evidence submitted

[4] Electron requests leave to amend the first amended complaint by leave of court to the extent that I grant any portion of Morgan Stanley's motion to dismiss. Electron, however, has not satisfied the minimum requirements of CPLR § 3025(b), which allows a party to amend after "setting forth additional or subsequent transactions or occurrences" and "accompanied by the proposed amended . . . pleading clearly showing the changes or additions to be made to the pleading." Accordingly, I deny Electron's request for leave to amend.

conclusively establishes a defense to the asserted claims as a matter of law." *Beal Sav. Bank v Sommer*, 8 N.Y.3d 318, 324 (2007).

A. Breach of the ELA

For purposes of the motion and cross-motion the parties do not dispute that Morgan Stanley breached the ELA. Rather, the parties dispute whether the limitation of liability provision is applicable to Electron's cause of action for breach of the ELA, and Morgan Stanley moves to dismiss that cause of action only to the extent it seeks damages in excess of the provision's liability cap.

The disputed portion of section 7.3 of the ELA provides that "EXCEPT AS SET FORTH IN SECTION 8 HEREOF OR IN SECTION 11 OF THE CONSULTING AGREEMENT [i.e., the indemnification provisions for the respective relevant agreements], 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." (capital letters in original). Electron contends that the liability cap only applies to breach of confidentiality claims in relation to the licensed ATS, while Morgan Stanley asserts that the liability cap plainly applies to all claims.

Where, as here, a contract is unambiguous, it should be interpreted in accordance with its plain meaning. *Firtell v Crest Builders, Inc.*, 159 A.D.2d 352 (1st Dep't 1990). In the limitation of liability provision of the ELA "total liability under this agreement" plainly means the full amount of damages either party may recover for claims arising out of or related to the ELA, including breach of the ELA. Electron and Morgan Stanley are sophisticated commercial entities. Had the parties intended to limit damages solely to claims arising from breach of confidentiality the parties could

have drafted the contract to express that meaning. Instead, the parties drafted a broad limitation of liability provision that only excludes indemnification claims.[5]

Electron argues that if I accept the plain meaning of the limitation of liability provision I would render the contract illusory, because then Morgan Stanley could theoretically breach the ELA prior to making any payment, leaving Electron without a remedy. Merely because Electron is able to construct a hypothetical scenario under which its damages might be de minimus, that does not make the ELA an illusory contract. The parties operated under the relevant agreements for almost seven months prior to Morgan Stanley's alleged breach and during that time, Electron received significant monetary compensation from Morgan Stanley. *See Ferguson v Ferguson*, 97 A.D.2d 891, 892 (3d Dep't 1983) (stating that even assuming that the contract is illusory, the "absence of mutuality of obligation 'may be remedied by the subsequent conduct of the parties'"); *see also Faust Harrison Pianos Corp. v Allegro Pianos, LLC*, No. 09 Civ. 6707(ER), at 39 (S.D.N.Y. May 24, 2013) (same). The fact that Electron is now dissatisfied with the consequences of the provision's application is no reason to void the provision. Accordingly, I find that the ELA is valid and the provision's plain meaning enforceable.

B. Fraud & Negligent Misrepresentation

Morgan Stanley moves to dismiss Electron's fraud and negligent misrepresentation claim for failure to state a claim. "To state a legally cognizable claim of fraudulent inducement based on a misrepresentation or omission, the complaint must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff

[5] The explicit exclusion of indemnification claims from the disputed portion of section 7.3 contradicts the position Electron later argues with respect to reformation, in which Electron alleges that section 7.3 only applies to indemnification claims, rather than confidentiality claims as argued here. *See infra* Part I.D.

reasonably relied on the misrepresentation and suffered damages as a result." *Connaughton v Chipotle Mexican Grill, Inc.,* 135 A.D.3d 535, 537 (1st Dep't 2016). "A claim for negligent misrepresentation [, on the other hand,] requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky*, 8 N.Y.3d 144, 148 (2007).

Electron's claims for fraud and negligent misrepresentation must be dismissed for failure to allege a cognizable theory of damages. New York law requires that a party demonstrate actual pecuniary loss sustained as the direct result of the wrong, *i.e.*, actual out of pocket losses, on a claim of fraud. *See Lama Holding Co. v. Smith Barney,* 88 N.Y.2d 413 (1996). Here, Electron has not pled any out-of- pocket damages, its damages theory relies on the supposition that the licensed ATS would eventually become a valuable trading tool to Morgan Stanley.

Electron argues that damages were sufficiently alleged because it seeks the difference between the licensed ATS before entering into the ELA and the value of the licensed ATS after entering into the ELA, *i.e.,* projected future value of the licensed ATS. In actuality, Electron seeks the value of the licensed ATS using the trading forums Morgan Stanley represented. However, that damages calculation assumes that had Morgan Stanley provided Electron with the trading forums as allegedly represented, the licensed ATS would have done as projected, or would have done as well with another institutional investor using trading forums as represented. This proposed measure of damages is legally insufficient *See Geary v Hunton & Williams*, 257 A.D.2d 482, 482 (1st Dep't 1999) (explaining that "[p]laintiff's fraudulent inducement cause of action, which seeks recovery for the loss of enhanced earning potential that plaintiff allegedly would have realized had defendant's banking litigation practice been as substantial as allegedly represented, or if he had accepted a job with a different employer, is legally insufficient"); *see also Starr Found. v Am. Intern. Group, Inc.*,

76 A.D.3d 25, 28 (1st Dep't 2010) ("the loss of an alternative contractual bargain ... cannot serve as a basis for fraud or misrepresentation damages because the loss of the bargain was 'undeterminable and speculative'").

As Electron fails to allege recoverable damages resulting from Morgan Stanley's alleged misrepresentation that it would not use the licensed ATS for HFT, the fraud cause of action is dismissed. I also dismiss Electron's negligent misrepresentation claim on the same ground, which equally applies in the context of negligent misrepresentation as in fraud.[6] *See Serino v Lipper*, 123 A.D.3d 34, 42 (1st Dep't 2014) (mentioning that the "out-of-pocket damages rule [is] applicable to both [] fraud and negligent misrepresentation [] claims"). Lastly, to the extent Electron seeks punitive damages for fraud and negligent misrepresentation, I also dismiss that claim which "was dependent upon the viability of their cause action to recover damages for fraud[.]" *Elsky v KM Ins. Brokers*, 139 A.D.2d 691 (2d Dep't 1988).

C. Unfair Competition

A claim for unfair competition must "allege the bad faith misappropriation of a commercial advantage which belonged exclusively to [plaintiff]." *LoPresti v Massachusetts Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006); *see Ahead Realty LLC v India House, Inc.*, 92 A.D.3d 424, 425 (1st Dep't 2012). In the amended complaint, Electron alleges that it spent a substantial amount of time developing the licensed ATS, and that Morgan Stanley misappropriated the licensed ATS by fraudulent inducement, which Morgan Stanley then abandoned.

Electron extensively cites a single, eighty-year-old case to support its theory, *Dior v Milton*, 9 Misc. 2d 425 (Sup. Ct. 1956), *affd*, 2 A.D.2d 878 (1st Dep't 1956). In *Dior*, plaintiff had alleged,

[6] Because I dismiss both causes of action for fraud and negligent misrepresentation for failure to allege recoverable damages, I do not address the other arguments Morgan Stanley raised to dismiss either claim.

inter alia, that defendant wrongfully obtained copies of plaintiff's designs and, without any payment to plaintiff, traded and profited on those misappropriated designs. By contrast, here, Electron alleges that Morgan Stanley fraudulently induced the ELA and, with payment to Electron, abandoned the licensed ATS. This allegation, however, does not bootstrap Electron's "claim [for] unfair competition [which] requires more than a showing of 'commercial unfairness.'" *Miller v Walters*, 46 Misc. 3d 417, 426 (N.Y. Sup. 2014) (citing *Ruder & Finn v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 671 (1981)).

"Under New York law, 'an unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiffs own use of the same property' " *ITC Ltd. v Punchgini, Inc.*, 9 N.Y.3d 467, 478 (2007). Electron cannot allege that Morgan Stanley misappropriated the licensed ATS, because Electron licensed it to Morgan Stanly under a contract. Further, Electron does not allege that Morgan Stanley made any use, let alone extra-contractual use, of the licensed ATS. Instead, Electron alleges that Morgan Stanley abandoned the licensed ATS after Electron objected to Morgan Stanley's suggestion that the parties use the licensed ATS for HFT. *C.f. Roy Export Co. Establishment of Vaduz, Liechtenstein v Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir.1982) (finding unfair competition where defendant used plaintiff's copyright despite repeated objections to license the material to defendant).

Morgan Stanley's purported non-use of the licensed ATS, merely restates that Morgan Stanley did not comply with the terms of the ELA, which does not equate to "appropriate[ing] . . . the expenditures, labor, skill and knowledge of plaintiff[]" *Dior*, 9 Misc. 2d at 429. The inadequacy of Electron's claim is further underscored by Electron's failure to allege the commercial advantage Morgan Stanley obtained from its allegedly wrongful acts. Accordingly, I dismiss Electron's claim for unfair competition for failure to state a claim.

D. Reformation

In its amended complaint, Electron requests that I reform the ELA to reflect the parties' intentions because the disputed portion of section 7.3 was only supposed to limit damages relating to indemnification for certain third-party claims, and not all claims relating to the ELA. In requesting this relief, Electron pleads both mutual and unilateral mistake. Morgan Stanley opposes, arguing that Electron's request for reformation is conclusory and baseless, and that the ELA itself contradicts reaching any result other than affirming section 7.3's plain and unambiguous meaning.

"Reformation is permitted where there is mutual mistake, *e.g.*, 'where the parties have a real and existing agreement on particular terms and subsequently find themselves signatories to a writing which does not accurately reflect that agreement' " *Ribacoff v Chubb Group of Ins. Companies*, 2 A.D.3d 153, 154 (1st Dep't 2003) "whereas in the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement" *Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 (1st Dep't 2007) (citations omitted).

Electron has failed to set forth a claim for mutual mistake as there is no allegation that Morgan Stanley signed the ELA in the mistaken belief that the disputed portion of section 7.3 only applied to indemnification for certain third-party claims. *See Aventine Inv. Mgt., Inc. v Can. Imperial Bank of Commerce*, 265 A.D.2d 513, 514 (2d Dep't 1999) (finding that by "unilaterally misunderst[anding] the parties' agreement [plaintiff] does not provide a basis for reformation [by mutual mistake].")

Electron has also failed sufficiently to allege a claim for unilateral mistake because there is no allegation that Morgan Stanley fraudulently misled Electron in negotiating or understanding section 7.3's meaning. The bare, conclusory allegation that Electron had a belief contrary to the unambiguous meaning of section 7.3 prior to signing the ELA does not satisfy the pleading

requirements to avoid dismissal. *See Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 (1st Dep't 2007) ("A bare, conclusory claim of unilateral mistake, which is unsupported by legally sufficient allegations of fraud, fails to state a cause of action for reformation"). Neither does the ambiguity Electron attempts to create through submitting earlier drafts create an inference of fraud that would prevent the enforcement of this clear and unambiguous provision. *See Burnside Bargain Store, Inc. v Carmel*, 156 A.D.2d 248 (1st Dep't 1989) (dismissing a claim for reformation where the party only submitted an earlier draft of the agreement, which was negotiated at arm's length and drafted by his attorney). Accordingly, I dismiss Electron's claim for reformation for failure to state a claim.

II. Electron's Cross-Motion for Summary Judgment

Summary judgment is granted "only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action' " *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012) (citation omitted). Electron argues that summary judgment for breach of the CSA is proper because Morgan Stanley has admitted breach and damages.

Section 9.4 of the CSA provides Morgan Stanley with the option to "terminate [the CSA] . . . at any time upon prior written notice to [Electron] for any reason or no reason." Section 9.5 further provides that if Morgan Stanley terminates pursuant to section 9.4 prior to eighteen months from the "Effective Date," then Morgan Stanley shall pay "an amount equal to the amount that would have been payable pursuant to the outstanding Task Order from termination through the date eighteen months from the Effective Date . . . ." The Task Order provides a billing rate for Schanzer and Tan each at "$150/hour, not to exceed . . . USD $300,000 in the aggregate per year." Consistent with section 9.5, Electron seeks $600,000.00 for breach of the CSA, which represents

the payable amount for eighteen months after subtracting Morgan Stanley's previous $300,000.00 payment.

Morgan Stanley moves to dismiss the claim for breach of the CSA, arguing that the parties do not dispute the amount of the cap under the CSA, and has tendered and offered, pursuant CPLR §§ 3219-20, an amount inclusive of the $600,000.00 Electron seeks. In response, Electron filed a cross-motion for summary judgment, arguing that Morgan Stanley admitted breach for purposes of liability and damages. However, "[a] motion for summary judgment may not be made before issue is joined (CPLR 3212 (a)) and the requirement is strictly adhered to." *City of Rochester v Chiarella*, 65 N.Y.2d 92, 101 (1985); *Leff v Leff*, 182 A.D.2d 401, 402 (1st Dep't 1992) (stating that "the rule prohibiting the grant of summary judgment prior to joinder of issue is strictly adhered to."). Morgan Stanley reserved its right to contest liability and damages despite the CPLR §§ 3219-20 tender and offer and because Morgan Stanley has not submitted an answer, Electron's CPLR § 3212 motion for summary judgment preceded joinder of issue and is premature. Accordingly, I deny Electron's cross-motion for summary judgment, and I deny Morgan Stanley 's motion to dismiss the claim for breach of the CSA as moot.

III. Jury Trial

Morgan Stanley requests that I deny Electron's demand for a jury trial because Electron waived that right in section 13.13 of the CSA, which provides that "THE PARTIES UNCONDITIONALLY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL FOR ANY CLAIM . . . ARISING OUT OF OR RELATING TO, . . . THIS AGREEMENT, [OR] ANY OF THE RELATED DOCUMENTS." (capital letters in original). Electron narrowly opposes the application of this provision to Electron's claim for breach of the ELA, arguing that the relevant agreements lack an incorporation provision. Electron does not otherwise dispute the provision's application to Electron's other asserted causes of action.

As a general proposition, provisions waiving a jury trial are "valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party." *Fordham Univ. v Manufacturers Hanover Trust Co.*, 145 A.D.2d 332, 333 (1st Dep't 1988). "The right to a jury trial may [even] be waived in an instrument other than that representing the agreement upon which the action is founded." *Franklin Nat. Bank of Long Is. v Capobianco*, 25 A.D.2d 445, 445 (2d Dep't 1966). Contrary to Electron's assertion, section 13.13 of the CSA's reference to "related documents" demonstrates the parties' intention for the jury waiver to apply to the ELA, a contract contemporaneously executed with the CSA. Accordingly, I find that section 13.13 equally applies to Electron's claim for breach of the ELA, even absent a general incorporation provision.

In accordance with the foregoing, it is hereby

ORDERED that the motion to dismiss by defendant Morgan Stanley & Co. LLC is granted to the extent that the fraud, unfair competition, negligent misrepresentation, and reformation causes of action of the first amended complaint are dismissed, and otherwise denied; and it is further

ORDERED that defendant Morgan Stanley & Co. LLC's motion to strike plaintiff Electronic Trading LLC's jury demand and prayer for punitive damages is granted; and it is further

ORDERED that plaintiff Electronic Trading LLC's request for leave to amend the amended complaint is denied; and it is further

ORDERED that plaintiff Electronic Trading LLC's cross-motion for summary judgment is denied; and it is further

ORDERED that defendant Morgan Stanley is directed to serve an answer to the amended complaint pursuant to the time limits set forth in the CPLR as of the date of this order; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 208, 60 Centre Street, on May 24, 2017, at 2:15 p.m.

This constitutes the decision and order of the Court.

DATE: 4/25/17

SCARPULLA, SALIANN, JSC