

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

DOCKETED

OCT 26 2011

DURATION CAPITAL MANAGEMENT : APRIL TERM, 2009
ADVISORS, INC., :
: NO. 00531
Plaintiff, :
: COMMERCE PROGRAM
v. :
: Control Nos.: 11013151, 11013175,
J.P. MORGAN SECURITIES INC., J.P. : 11025010, 11013178
MORGAN FUTURES INC., and J.P. :
MORGAN CHASE BANK N. A., :
: Defendants. :

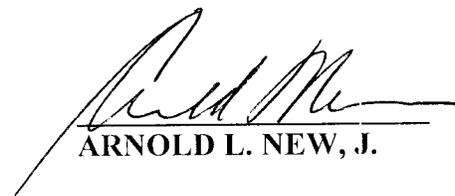
C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 25th day of October, 2011, upon consideration of the parties' Motions for Summary Judgment, the responses thereto, and all other matters of record, after hearing oral argument, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. Plaintiff's Motion for Partial Summary Judgment on its claims is **DENIED**;
2. Defendants' Motion for Summary Judgment is **GRANTED**, and all of plaintiff's claims are **DISMISSED**;
3. Plaintiff's Motion for Summary Judgment on defendants' Counterclaim is **GRANTED** and the Counterclaim is **DISMISSED**;
4. Defendants' Motion to Bifurcate is **DISMISSED** as **MOOT**.

BY THE COURT


ARNOLD L. NEW, J.

Duration Capital Manage-ORDOP



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MORGAN CHASE BANK N. A.,	:	
	:	
Defendants.	:	

OPINION

Plaintiff Duration Capital Management Advisors, Inc. (“Duration”) established and managed the investments of the Duration Municipal Fund, L.P. and the Duration Municipal Offshore Fund, Ltd. (collectively, the “Funds”). The Funds were municipal bond hedge funds.

Beginning in 2003, defendant J.P. Morgan Securities Inc.¹ solicited Duration in the hopes of entering into a business relationship with the Funds. JP Morgan’s solicitations were successful, and the Funds entered into several agreements with JP Morgan, namely the ISDA Master Agreement and Credit Support Annex (“ISDA”) and the Global Master Securities Lending Agreement (“GMSLA”).

Under the GMSLA, the Funds delivered bonds to JP Morgan, and JP Morgan provided cash to the Funds equal to a set percentage of the market value of the bonds, *i.e.*, at a fixed “margin.” If the market value of the bonds increased, JP Morgan would give more cash to the Funds. If the market value of the bonds decreased, the Funds would have to return some of the

¹ The other defendants, JP Morgan Futures, Inc. and JP Morgan Chase Bank N.A. are affiliated entities who allegedly performed some acts in connection with the Funds. Since the parties do not differentiate between the three entities and call them, collectively, “JP Morgan,” the court will do the same

cash to JP Morgan. Based on the fluctuations in market prices, the parties requested more cash from each other in “margin calls.”

The GMSLA gives the courts of England exclusive jurisdiction to hear disputes connected with the GMSLA.² It also provides:

This Agreement constitutes the entire agreement and understanding of the Parties with respect to its subject matter and supersedes all oral communications and prior writings with respect thereto.

* * *

No amendment in respect of this Agreement will be effective unless in writing . . . and executed by each of the Parties[.]³

Pursuant to a January 2008 Amendment to the GMSLA (the “2008 Amendment”), JP Morgan was supposed to value the Funds’ bonds “in good faith . . . based upon generally acceptable market practices and pricing sources.”⁴ The 2008 Amendment further provides:

[The Parties are] not relying . . . upon any advice, counsel or representations (whether written or oral) of the other party to the Agreement, other than the representations expressly set forth in the Agreement[.]⁵

Under the ISDA, the Funds and JP Morgan entered into a more complicated “Tender Option Bond” arrangement. The Funds pledged derivatives of their bonds, called drivers, to JP Morgan as security for loans made by JP Morgan to the Funds. In the ISDA, JP Morgan was charged with valuing this collateral “in good faith and in a commercially reasonable manner.”⁶

The ISDA also provides:

This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communications and prior writings with respect thereto.

² GMSLA, ¶ 24.2.

³ *Id.* at ¶¶ 28.1, 28.3

⁴ GMSLA 2008 Amendment, ¶ 1.4.

⁵ *Id.* at ¶ 11.

⁶ ISDA Credit Support Annex, ¶ 11(d).

* * *

No amendment, modification or waiver in respect of this Agreement will be effective unless in writing . . . and executed by each of the parties[.]⁷

During the parties' course of performance under the ISDA and GMSLA, JP Morgan apparently used J.J. Kenney pricing to value the Funds' bonds held as collateral. According to Duration, J.J. Kenney is a reliable independent source for valuing municipal bonds.

"In February, 2008, the municipal bond market experienced a significant, short-term dislocation, with prices falling for a period of approximately two weeks amid diminished market liquidity."⁸ During that month, JP Morgan valued the Funds' collateral bonds at significantly less than J.J. Kenney prices, which resulted in large margin calls by JP Morgan on the Funds. The Funds were unable to meet these margin calls with cash on hand and were forced to liquidate their bond portfolios at distress prices. As a result, the Funds went out of business, and Duration had nothing left to manage.

The Funds are pursuing claims against JP Morgan under the ISDA and GMSLA in the courts of New York and England.⁹ Duration filed the present lawsuit on its own behalf based on JP Morgan's alleged improper pricing of the Funds' collateral and the resultant excessive margin calls on the Funds. Duration asserts claims against JP Morgan for breach of implied contract,

⁷ISDA, ¶¶ 9(a), (b).

⁸ Complaint, ¶ 97.

⁹ The Funds' November 2008 Complaint filed in New York state court set forth a claim for breach of contract based on JP Morgan's improper pricing of the Funds' bonds. However, the Funds did not claim JP Morgan breached the GMSLA and ISDA. Instead, the Funds claimed JP Morgan breached two earlier Prime Broker Account Agreements, which require litigation be brought in New York courts. The Funds' claims under those Agreements were apparently dismissed.

In 2011, the Funds filed a second action against JP Morgan in New York, again based on the improper pricing of the Funds' bonds. In that Complaint, the Funds asserted claims for breach of the ISDA and tortious interference by one JP Morgan entity with another JP Morgan entity's performance under the GMSLA and ISDA.

misappropriation of trade secrets, and unfair competition.¹⁰ JP Morgan has moved for summary judgment on all of Duration's claims, which motion is presently before the court.

In order to succeed on its claim for breach of contract, Duration must prove: "the existence of a contract [between Duration and JP Morgan], including its essential terms; 2) [JP Morgan's] breach of a duty imposed by the contract; and 3) resultant damage" to Duration.¹¹ JP Morgan claims Duration has failed to satisfy the first element of its claim – the existence of a contract. Specifically, JP Morgan argues its only legally cognizable relationship was with the Funds. Duration asserts it had an oral contract with JP Morgan in which JP Morgan promised to use J.J. Kenney pricing for all collateral, promised to act in good faith and not in its own self-interest, and promised to maintain the confidentiality of Duration's bond investment strategies.¹²

It is clear from the record the relevant relationships between these sophisticated parties were codified in two written contracts, the ISDA and GMSLA, between the Funds and JP Morgan. JP Morgan's alleged improper valuations of the Funds' bonds and resulting excessive margin calls occurred during the course of performance of these two contracts. Each written contract expressly provided it was "the entire agreement and understanding of the parties with respect to its subject matter and supersede[d] all oral communications and prior writings with respect thereto." These written agreements between the Funds and JP Morgan leave no room for an additional implied or oral agreement between Duration and JP Morgan with regard to the same subject matter.

¹⁰ Duration originally asserted a claim for conversion, but has since abandoned it.

¹¹ Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 580 (Pa. Super. 2003).

¹² As set forth in the discussion of Duration's tort claims, *infra* p. 5, Duration has not shown that JP Morgan improperly disseminated any of Duration's investment strategies.

Duration also claimed JP Morgan promised to continue to lend money to the Funds in the future, but Duration has since abandoned its claim to enforce this open-ended promise.

There was no separate unwritten contract between JP Morgan and Duration which continued in existence after the integrated written agreements with the Funds were executed.¹³ Any breach of duty by JP Morgan was a breach of a duty it owed to the Funds under the written ISDA and GMSLA, and not a breach of a duty owed to Duration pursuant to some vague unwritten understanding. Since Duration has not shown there was any enforceable agreement between it and JP Morgan, Duration's claim against JP Morgan for breach of contract necessarily fails.

Duration's tort claims suffer from similar fatal defects. Duration alleges JP Morgan's private banking arm, which held the Funds' bonds as collateral, conspired with JP Morgan's public trading arm, which traded in the same bonds the Funds did, to undervalue the Fund's bonds, resulting in excessive margin calls and forcing the Funds to liquidate. Duration claims JP Morgan's public trading arm hoped to benefit from this wrongful conduct by purchasing the Funds' bonds very cheaply¹⁴ and JP Morgan's private banking arm hoped to avoid suffering further losses in an ongoing "swap" transaction it was engaged in with the Funds.

In order to turn these allegations into a viable claim for misappropriation of trade secrets, Duration must prove JP Morgan improperly made use of Duration's trade secrets.¹⁵ Duration alleges its investment strategies, *i.e.*, which bonds it chose to buy and when, were protectable trade secrets. However, there is no evidence JP Morgan used Duration's investment strategies

¹³ See Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 198, 519 A.2d 385, 388 (1986) ("The law will not imply a different contract than that which the parties have expressly adopted. To imply covenants on matters specifically addressed in the contract itself would violate this doctrine."); Hart v. Arnold, 884 A.2d 316, 341 (Pa. Super. 2005) ("The effect of an integration clause is to make the parol evidence rule particularly applicable. Thus the written contract, if unambiguous, must be held to express all of the negotiations, conversations, and agreements made prior to its execution, and neither oral testimony, nor prior written agreements, or other writings, are admissible to explain or vary the terms of the contract.")

¹⁴ Duration admits JP Morgan's public trading arm did not succeed in buying the Funds' bonds; instead, a third party bought them.

¹⁵ See A.M. Skier Agency, Inc. v. Gold, 747 A.2d 936, 940 (Pa. Super. 2000) ("To obtain relief for misappropriation of a trade secret, a plaintiff must show : 1) that there was a trade secret . . .")

for its own purposes, such as to purchase bonds for itself or to set up its own municipal bond funds. Instead, Duration claims JP Morgan tried to obtain the Funds' bonds themselves, which Duration does not claim are trade secrets. Therefore, Duration has not shown JP Morgan attempted to misappropriate any trade secret of Duration's.

In order to prove its claim for unfair competition, Duration must show JP Morgan "for the purpose of advancing a rival business interest procure[d] by improper means information about [Duration's] business" and caused harm by its "possession, disclosure or use of the information."¹⁶ The information allegedly procured and used by JP Morgan was not Duration's investment strategies, it was simply the identity of the Funds' bonds. It does not appear JP Morgan obtained the identity of the Funds' bonds by improper means, since the Funds disclosed this information to JP Morgan willingly under the ISDA and GMSLA. Furthermore, the identity of the Funds' bonds is information about the Funds' business, not about Duration's. Therefore, Duration has not proffered evidence showing it was the victim of any unfair competition by JP Morgan.

Duration's contract and tort claims fail for yet another reason – Duration's claimed damages do not flow directly from JP Morgan's alleged breaches of its legal duties. Instead, any harm caused by JP Morgan's misconduct was harm suffered first and foremost by the Funds, and only derivatively by Duration.¹⁷

Duration asserts its "demise is compensable in terms of the loss of Duration's enterprise value, including the loss of potential income and economic opportunities caused by the

¹⁶ Pestco, Inc. v. Associated Prods., Inc., 880 A.2d 700, 708 (Pa. Super. 2005).

¹⁷ See Holmes v. Sec. Investor Prot. Corp., 112 S. Ct. 1311, 1319 (U.S. 1992) ("a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover.")

destruction of its investment track record.”¹⁸ The Funds are Duration’s “investment track record.”¹⁹ If the Funds performed well, then Duration looked good; if they performed badly, then Duration looked bad. If the Funds prevail in their lawsuits against JP Morgan, then Duration is redeemed. If the Funds do not, then Duration is not entitled to redemption.

Duration also claims to have lost the management fees the Funds would have paid it based on their net assets if the Funds had stayed in business. The Funds have asserted claims for their losses against JP Morgan in other litigation. If the Funds prevail, then Duration may seek its share of any such recovery from the Funds with whom Duration had its management contract. Duration cannot ignore the chain of privity and jump ahead of the Funds to recover its fees from JP Morgan directly.

Similarly, any harm caused by JP Morgan’s alleged misuse of the Funds’ bond information was suffered by the Funds, not by Duration. It was the Funds which lost any profit on their “swap” transaction with JP Morgan, and it was the Funds which had to answer the excessive margin calls by selling their bonds at very low prices. Since Duration was not directly damaged by JP Morgan’s alleged wrongful conduct, Duration cannot sustain its burden of proving any of its claims against JP Morgan.

¹⁸ Duration’s Response to JP Morgan’s Motion for Summary Judgment, p. 98. Duration’s principal testified by affidavit:

As a result of J.P. Morgan’s conduct, the value of Duration Capital as an ongoing business and as an acquisition candidate has been destroyed. Duration Capital is [sic] no longer has the potential to earn significant management fees, has a track record improperly blemished by J.P. Morgan’s misconduct, and has lost its value as a business enterprise.

Affidavit of Jonathan Fiebach, ¶ 61.

¹⁹ In oral argument, Duration claimed it was planning to set up a new fund at the time the existing Funds had to be liquidated, but Duration has not proffered evidence of the losses it allegedly suffered with respect to this proposed new fund. Substantial evidence is required to prove lost profits for a new and untried business. *See Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*, 462 A.2d 686, 696 (Pa. Super. 1983) (“Because there is no business history from which to reasonably predict subsequent events, the evidence must be substantial and it must be shown to have a close relationship to the individual firm in question as well as the relevant economic and financial conditions prevailing at the time the losses occurred.”)

Since neither Duration's contract or tort claims are viable, they must be dismissed. For these same reasons, Duration's Motion seeking partial summary judgment in its favor on these dismissed claims must be denied. Furthermore, JP Morgan's contingent counterclaim seeking to enforce certain provisions of the ISDA and GMSLA against Duration must be dismissed because Duration was not a party to those agreements.

BY THE COURT



ARNOLD L. NEW, J.