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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA, Justice

PART 39

Index Number : 652341/2012
SOLUS ALTERNATIVE ASSET
vs
PERRY CORP.
Sequence Number : 004
SUMMARY JUDGEMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

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

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

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

and cross motion are decided in accordance with the accompanying decision and order.

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

Dated: 7/13/15

[signature], J.S.C.
HON. SALIANN SCARPULLA

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

2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

---X

SOLUS ALTERNATIVE ASSET MANAGEMENT LP,

Plaintiff,

Index No. 652341/12
Motion Seq. No. 004

-against-

PERRY CORP. d/b/a PERRY CAPITAL,

Defendant.

---X

HON. SALIANN SCARPULLA, J.:

This action involves a dispute over the existence and enforceability of defendant Perry Corp.'s ("Perry") agreement to sell a $195 million participation interest in certain claims against the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS") to plaintiff Solus Alternative Asset Management LP's ("Solus"). The five-count complaint asserts causes of action for breach of contract, breach of the obligation to negotiate in good faith, and unjust enrichment. Solus seeks both monetary damages and specific performance. In its answer, Perry asserts one counterclaim, seeking a declaration that the parties did not enter into an enforceable agreement, and that Perry had no obligation to negotiate in good faith.

Perry now moves for summary judgment dismissing the complaint and for judgment on its counterclaim. Solus cross moves for summary judgment on its claims.

Background

This action stems from claims arising out of the notorious Ponzi scheme of Bernard Madoff ("Madoff") through his investment company, BLMIS. Nonparties

Kingate Global Fund Ltd. and Kingate Euro Fund Ltd. (together, "Kingate") were feeder funds that invested in BLMIS. When Madoff's Ponzi scheme was revealed, Kingate was left with billions of dollars of claims against BLMIS's estate ("Kingate Claims"). Kingate and Deutsche Bank Securities Inc. ("Deutsche Bank") began negotiating to purchase the Kingate Claims. Pursuant to a "Confirmation Letter" dated August 24, 2011, Deutsche Bank sought to purchase $1,624,748,095 in Kingate Claims for 66% of their value. *See Kingate Global Fund Ltd. v Deutsche Bank Sec. Inc.*, 2011 WL 6401186, (SD NY 2011, No. 11 CIV 9364).

Also on August 24, 2011, Deutsche Bank agreed to sell participation interests in the Kingate Claims to third parties, including funds managed by Perry and Solus. Perry's funds agreed to purchase $195 million in participation interests, and Solus's funds agreed to purchase $25 million, with both entities paying at a rate of 66.5%. These transactions were memorialized in "Trade Confirmation[s]" dated August 24 and 31, 2011, executed by Solus and Perry on behalf of their respectI've funds. All of the Trade Confirmations provided that the transactions "shall be subject to the successful completion of the purchase" by Deutsche Bank of the Kingate Claims. The Trade Confirmations were signed on behalf of Deutsche Bank by its managing directors, C.J. Lanktree ("Lanktree") and Scott G. Martin ("Martin"). Martin also signed Deutsche Bank's Confirmation Letter with Kingate.

In December 2011, Kingate commenced an action against Deutsche Bank, seeking to enforce Deutsche Bank's alleged "commitment to purchase" the Kingate Claims pursuant to the August 24, 2011 Confirmation Letter ("Kingate Federal Action"). *See Kingate Global Fund Ltd.*, 2011 WL 6401186. In its counterclaim, Deutsche Bank sought a declaration that the Confirmation Letter was not binding, because the parties were "unable to reach agreement on a number of critical terms." By stipulation dated December 11, 2013, Kingate and Deutsche Bank agreed to dismiss the Kingate Federal Action without prejudice. It is undisputed that, as of the date of the parties' briefing on the instant motions, Deutsche Bank has not acquired the Kingate Claims.

On March 1, 2012, Lanktree and Martin both left Deutsche Bank and joined Solus. Shortly after joining Solus, Lanktree and Robert Carroll ("Carroll"), a trader at Perry, began discussing Solus's desire to obtain Perry's participation interest in the Kingate Claims. These discussions continued through June 2012.

On March 29, 2012, Lanktree, at the time working for Solus, exchanged the following "Instant Bloomberg messages" ("Bloomberg messages") with Carroll:

> Lanktree (Solus): "we are good 1.5pts below original purchase and we take on litigation risk"
>
> Carroll (Perry): "ok will speak to rick"
>
> Lanktree (Solus): "we are happy to discuss a couple different structures as you guys see fit"
>
> Carroll (Perry): "thanks for the call"

Lanktree (Solus): "perfect"

At 2:04 p.m. on April 10, 2012, Carroll sent Lanktree a Bloomberg message, stating "give me a ring . . . going to sell you our piece." Lanktree testified that, during a telephone conversation that day, he told Carroll that Solus was willing to pay 66.5% to obtain the participation interests that Perry had agreed to purchase from Deutsche Bank.

In a Bloomberg message at 3:53 p.m. on April 10, 2012, Carroll stated "195,000,000." Lanktree responded at 4:12 p.m., "call you back in 5 . . . just going through with scott now." Lanktree asked Carroll "whether Perry would 'pay [its] portion' of legal fees incurred . . . in connection with the [Kingate Federal Action]." Carroll stated "that he would 'get back to [Solus]' with Perry's response." Lanktree also asked Carroll for a "bad acts carve-out," whereby Perry would "represent[] to [Solus] that in no way did they taint the paper while . . . they owned it." According to Lanktree, Carroll said, "I'll get back to you" concerning the "bad acts carve-out." In response to Lanktree's request for the "bad acts carve-out" and "liability waiver," Carroll testified: "I said I couldn't give it to him at the time. I said, 'You're going to take us out at cost; we're going to rip the ticket up; you're going to face Deutsche Bank. And this is all subject to docs.' He agreed to it."

It is undisputed that Lanktree and Perry "agreed to leave the structure of the Trade to the lawyers."[1] Carroll testified that the "framework" for the transaction was that Solus would "have to step into our [Perry's] shoes, take over our open Kingate trade with Deutsche Bank. We didn't want any of the liabilities that come with it. We don't want to be involved in it anymore. We just want to rip up the ticket, that we were never there, that it never happened."

After the April 10, 2012 conversation between Lanktree and Carroll, Lanktree explains in his affidavit, Solus and Perry "contacted [their] respective representatives at Deutsche Bank to inform them of the Trade," for the purpose of "let[ting] Deutsche Bank know that the Participation would be changing hands, and also to tell Deutsche Bank that as a matter of structure the parties were proposing that Perry would terminate its existing participation agreement and Deutsche Bank and Solus would enter into a new participation agreement."

Martin, at the time with Solus, called Chad Valerio ("Valerio") at Deutsche Bank. On that recorded call, the parties had the following conversation:

> Martin (Solus): "On – on Kingate. We bought Perry's piece. . . . And we want to run it through you."

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[1]Solus admitted in response to notice to admit that the parties agreed to direct their respective attorneys to draft documentation memorializing the agreed-upon transfer of the Participation Interest from Perry to Solus. Additionally, Lanktree testified that, during one of his April 10th telephone conversations with Carroll, Carroll said that the "trade was subject to documentation," and that "we let it go to documentation and the lawyers figure it out."

. . .

Valerio (Deutsche Bank): "So you want me to buy it from Perry and then sell it to you?"

Martin (Solus): "No. No, no, no. We already did the trade. So we just want to step in their shoes, and that way, you can get Perry out of your syndicate, who I think was trying to – you know, was not the easiest guy to deal with and, you know, we just become a bigger part of your syndicate. . . . I think, ideally, the way – the cleanest way to do it is just let them out of – let – you know, tear up the ticket with them. . . . And then write the ticket with us. And so, the question is, you know, we just step in their shoes."

. . .

Valerio (Deutsche Bank): "So I need to rip up – I need to call Perry?"

Martin (Solus): "You – think of it this way. They have a commitment – they have a commitment to you to purchase 195 million Kingate at 66 ½. . . . We're going to take that commitment off their hands. So to the extent that, you know, the trade moves up or down, we would – we would have – we would have their obligation. Ideally, it comes in at 195 Million. And if and when that trade is ultimately consummated with Kingate, we would be obligated to fund you the purchase price. . . . Which is – which is 66 ½."

Valerio (Deutsche Bank): "Right. So that's between you and Perry."

Martin (Solus): "Yes. Well, I'm going to pay you –"

Valerio (Deutsche Bank): "Now what do I do?"

Martin (Solus): "I'm going to pay you an eighth on it. So I'm going to fund at 66 5/8, if and when – if and when it's funded. . . . So, so you make a profit on it, and you tear up – you tear

> up the obligation from Perry. And now I assume that obligation. So you're going to write a ticket with me and assign that obligation to me and the rights that go with it. We're just doing – we're just trading the commitment. It's like an unfunded revolver."
>
> . . .
>
> Valerio (Deutsche Bank): "What? Like, do we need to approve it or something?"
>
> Martin (Solus): "No. No, I mean, you don't – I guess you don't need – if I just wanted to do a part with Perry and just have them part the rights to us directly and have Perry stay in the middle, then, no, I wouldn't need your approval. But I want your approval because we want to get Perry out of the middle. . . . I think that's self-serving for all parties."
>
> . . .
>
> Valerio (Deutsche Bank): "I have no problem with that. Let me – before I – anytime I do anything Kingate related, I just always need to run it by like Mac and Curreri."

Lanktree, and Justin Ramos ("Ramos") of Deutsche Bank, then joined the call, and the parties had the following recorded conversation:

> Lanktree (Solus): "Well, hopefully, we can actually get Kingate – you know, this is a good trade for everybody. This is a good trade for us. This is a great trade for Perry, and we're trying to be fair, paying commissions on something that we probably – in all likelihood probably shouldn't be. But whatever."
>
> Ramos (Deutsche Bank): "Well, obviously, they're going to discuss it here. So –"
>
> Martin (Solus): "The trade is done so –"

> Ramos (Deutsche Bank): "Yes."
>
> Lanktree (Solus): "I'm going to call – I'm going to call RBS and just run it through them. It's easy. . . . So not a big deal. If you guys can't trade it because of compliance reasons, I doubt . . . Just let us know because we want – we want – we booked the trade date as of a little bit from our side."

Id. at 9-11.

At 4:33 p.m. on April 10, 2012, Carroll then made a recorded call to Cathy Yamashita ("Yamashita") at Deutsche Bank, informing her that Perry was going to "step out of the trade [it] did with [Deutsche Bank] and [Solus is going to] step in at my cost and [Solus is going to] pay you on top of that, to sort of make sure everyone's cool." Carroll stated that, "[b]asically . . . , I'm gonna step out, they're gonna step in, they get all my rights and everything and all that good stuff." After the call with Yamashita, Carroll sent an internal email to Perry personnel, informing them that Perry "stepped out of our potential Madoff trade claim transaction with DB at no cost. 195mm face @ $66.5 we had it on the sheets marked at zero." At 4:38 p.m., Carroll forwarded that email to Perry's "back-office personnel," instructing them to "[r]ip up Madoff ticket and take off sheets." Also at 4:38 p.m., Carroll sent Lanktree a Bloomberg messages, stating: "all set . . . thanks again."

It is undisputed that, "[a]s a result of Carroll's 4:38 p.m. e-mail, Perry's back-office personnel generated a trade ticket titled 'Madoff Unfunded TRD-SEL 195000000.0000 @ 0.0000 Unfunded Private Equity Commitment.'" This effectively

"removed from Perry's portfolio management system Perry's unfunded commitment relating to its August 2011 trade with Deutsche Bank." Michael Neus ("Neus"), Perry's general counsel, testified that, on April 10, 2012, "Carroll instructed the trade processing group . . . that he had agreed to rip up the ticket, meaning that Solus would step into . . . Perry's shoes on behalf of Deutsche Bank, and the instruction was then to remove the ticket from the portfolio management system." According to Neus, Perry "booked as a sale . . . the [Kingate] position as of April 10th" although in July, the position was put back on Perry's books as an "unfunded commitment."

Later that evening, Lanktree sent an email to another Solus employee, stating: "[w]e bought 195mm of the Madoff Kingate at the equivalent of 62 this morning vs this paper 64-66. The price we will book it at is 66.625 (but this is pre 4.5% distribution that the optimal is trading net of). Also we do not have to fund it until the trade is agreed to."

The next day, on April 11, 2012, Carroll called Yamashita and asked: "What do we, do I have to do anything for that? I think we're all set, right?" Yamashita responded: "No – we're, as I understand it, we were looking through the docs to see how and what to do to effect this transfer. . . . I think our guys are looking through the docs to make sure that, that they can do whatever needs to be done."

In a Bloomberg message dated April 16, 2012, Lanktree told Carroll that he had "called DB 4 times asking for a trade confirm on the madoff that we did and [had] not gotten anything yet. Have you received anything yet?" Carroll responded: "nada I have

nothing from them[.]" Later that day, Yamashita told Carroll that Deutsche Bank was "looking at the documentation to make sure . . . that there weren't any issues."

By email dated April 18, 2012, Carroll sent Yamashita a draft of a "Termination and Release Agreement," whereby Deutsche Bank would terminate the Perry funds' obligation to purchase the Kingate Claims, and the Perry funds would be released from the transaction.

On April 25, 2012, Yamashita and Carroll had the following recorded telephone conversation:

> Yamashita (Deutsche Bank): "I know you sent us a document. But apparently, it was not – it was not what we were advised it would look like by the buyer. . . . this thing has got such legal hair on it . . . But go ahead. Tell me what your understanding was."
>
> Carroll (Perry): "My understanding [was] that we were going to basically rip up the ticket with you guys, and they were going to step into our shoes, right?"
>
> . . .
>
> Yamashita (Deutsche Bank): "And I've not been given any information other than what I've conveyed to you in the couple of times you asked me for an update. So, you know, you have to appreciate our situation here. You know, the legal situation, plus this – we were presented with this after the fact. . . . I know that there have been ongoing conversations with them and our legal guy here."
>
> . . .
>
> Carroll (Perry): "So, in your mind – in your mind, do I still own this paper or does –"

> Yamashita (Deutsche Bank): "I have no – I can't even answer that question for you. I mean, I have – I don't know what was – I only know what you've told me."

In a call later the same day, Yamashita informed Carroll that Martin and Lanktree "had the information that's needed that told them how [Deutsche Bank was] comfortable structuring" the transaction, and that "the way [Deutsche Bank] see[s] it is primarily a negotiation between the two of you [Perry and Solus]." Yamashita stated that Solus had "the information needed to draft a document that works for [Deutsche Bank]." She said, "I think you can just go back to them and say, look, please explain to us what structure DB has told you is acceptable and we'll redraft the document. Or at least tell us and actually not even just redraft, but you have to hear that for yourselves . . . and figure out if that works for you."

By email dated April 26, 2012, Carroll told Lanktree: "I feel like Madoff is up in the air right now I want to make sure we get this done right and have confirms agreed to by everyone." Lanktree responded: "Not up in the air. We have a trade just need to figure out the best doc for you and us."

It is undisputed that, on April 30, 2012, Perry sent Solus a draft of an "Assignment and Assumption Agreement" ("Proposed Assignment Agreement"), whereby Perry would assign its purchase rights concerning the Kingate Claims to Solus and Perry would be released from its obligations to Deutsche Bank. Between April 30 and May 8, 2012, Perry and Solus exchanged five drafts of the Proposed Assignment Agreement.

By email dated May 10, 2012, Perry sent the Proposed Assignment Agreement to Deutsche Bank. By email dated May 16, 2012, Solus's attorney informed Perry's attorney that "DB does not want to stand in the middle of the trade." Richard Vichaidith (Vichaidith) at Deutsche Bank testified that, if Deutsche Bank was "going to agree to an assignment of the participation from Perry to Solus, [then Deutsche Bank] wanted to make sure that [its] rights were fully protected." Vichaidith testified that, "the way the document was drafted, Perry was asking for a full release of all its obligations and there wasn't any language to cover that Solus was going to assume all of the obligations of Perry from August 2011 all the way up until that current date."

On May 30, 2012, as the parties' negotiations devolved, Perry and Deutsche Bank held a recorded conference call, where Deutsche Bank stated:

> "it was kind of discussed here internally as well, it's like we view it, you know, the Solus-Perry, that's a transaction obviously between you guys, if there is a transaction there. And you know, where DB – you know, kind of we were spending a lot of time working on this. It was just kind of agreed here, and this is what we explained to Solus is like we'd just rather not get involved in that transaction at all, and that's something that Solus and Perry should work out on it."

By email dated May 31, 2012, Solus's attorney informed Perry's attorney that "Solus has spoken to DB and we have a good sense for what they will and will not accept in our document. Along those lines, we will mark up the document to reflect their comments, any comments we have in respect thereof, and send it to you later today."

Later that evening, "based on Solus' conversation with DB," Solus sent Perry an updated draft of the Proposed Assignment Agreement. The next day, Perry responded, providing "one clarifying comment" and requesting that Solus "send the proposed draft on to the contact at Deutsche Bank." Solus' attorney responded: "This is acceptable to Solus. We will make the change and send it to DB." By email dated June 1, 2012, Solus's attorney sent Deutsche Bank "a clean and redline of the Perry to Solus assignment agreement," but without copying Perry on the email.

Perry claims that, between June 1st and 5th, it did not receive any response from Deutsche Bank. Perry claims that, on June 5, 2012, "it believed, from an investment-strategy perspective, that the economics of holding a conditional obligation to fund [the] Participation at 66.5 cents were compelling relative to the economics of the Proposed Transaction." At that point, Perry believed that the interest it held "presented the possibility of positive returns that reflected a significant upside for Perry," and Perry "understood that the Proposed Transaction presented no such possibility of positive returns that reflected a chance of a significant upside for Perry."

On June 5, 2012, at 2:47 p.m., Deutsche Bank sent an email to Solus with edits to the Proposed Assignment Agreement. The email stated: "Please see our initial comments attached. They're still being reviewed by general counsel internally, but wanted to get this to you in the meantime." Perry was not copied on this email. According to Solus, at this point, "the only thing that remained was execution," and "the closing document was

substantially complete." Later the same day, at 5:24 p.m., Perry's counsel informed Deutsche Bank that Perry "discontinued discussions with Solus regarding a proposed assignment of Perry's interest," and Perry "confirm[ed] . . . that Perry will proceed with the Kingate claim transaction in accordance with the terms of the trade confirmations signed with Deutsche Bank."

By letter dated June 13, 2012, Solus informed Perry that the parties had entered into an enforceable contract, and that Perry's failure to "honor its contractual obligations to complete the assignment of its Participation to Solus" constituted a breach of contract.

Solus created a "Trade Ticket," date- and time-stamped "27 June '12 PM 4:08," for the purchase of $195 million in Kingate claims, at a price of "66 ½." This Trade Ticket identified "Perry Capital" as the "Counterparty," and contained the following handwritten notation: "Paying Deutsche Bank 1/8 pt commission on trade to document & facilitate. AS OF TD 4-10-12" (where "TD" referred to "Trade Date"). Lanktree testified that he created this Trade Ticket sometime between June 5 and June 27, 2012.

Solus commenced this action on July 3, 2012. Prior to discovery, Perry moved for summary judgment on the complaint and on its counterclaim, and Solus cross moved from summary judgment as Perry's liability. In a decision and order dated April 10, 2013, this Court (J. Kapnick) denied both motions, finding that discovery was needed on the issue of whether or not a contract was formed.

Discussion

It is undisputed that the parties' agreement was never memorialized in a signed contract, but rather, the purported agreement is comprised of the above-referenced emails, Bloomberg messages, recorded telephone calls, trade tickets, and draft agreements. At the heart of the parties' dispute is the issue of whether Perry and Solus agreed on all material terms and entered into a binding agreement on April 10, 2012, whereby Solus would purchase Perry's participation interest in the Kingate Claims. All of Solus's causes of action, and Perry's counterclaim, are grounded in the resolution of this central issue.

The existence of a contract need not be evidenced by a signed writing if it is a "qualified financial contract," which includes agreements "for the assignment, sale, trade, participation or exchange of indebtedness or claims relating thereto . . . ." General Obligations Law § 5-701 (b) (2) (I). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 (1999). "Even if parties intend to be bound by a contract, it is unenforceable if there is no meeting of the minds, i.e., if the parties understand the contract's material terms differently." *Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516, 518 (1st Dept 2010). To this end, "definiteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do," and "a mere agreement to agree, in which a material term is left

for future negotiations, is unenforceable." *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 (1981) (citations omitted).

Whether terms of a contract are "material" often raises an issue of fact, "which are matters to be resolved at trial and which precludes summary judgment." *Khazzam v Tremont Advisers*, 214 AD2d 515, 517 - 518 (1st Dept 1995) ("issues of fact exist with regard to material terms of the agreement and as to whether there was a meeting of the minds to formulate a valid contract"). *See also Breslin Realty Dev. Corp. v 112 Leaseholds*, 270 AD2d 299, 299 (2d Dept 2000) (factual issues existed "as to whether there was a brokerage agreement between the parties and, if so, what the material terms of that agreement were"); *see also Cinema N. Corp. v Plaza At Latham Assoc.*, 867 F2d 135, 140 (2d Cir 1988) ("[w]hether any terms omitted from the proposal were indeed material remains a question of fact").

Additionally, in some instances "usage and custom of the industry" may be considered "in determining whether parties intend to be bound absent a writing." *Consarc Corp. v Marine Midland Bank, N.A.*, 996 F2d 568, 575 (2d Cir 1993). *See also Louis Dreyfus Energy Corp. v. MG Ref. & Mktg.*, 4 A.D.3d 149, 149-150 (1st Dep't 2004) ("In light of the custom in the industry favoring such 'flexible' oral agreements, the trial court correctly found that the parties were bound by the terms of their 'done deal,' notwithstanding the absence of a formal written confirmation which, we note, was sent shortly thereafter"); *Lehman Commercial Paper Inc. v First Tennessee Bank Natl. Assn.*,

1996 WL 640931, *2, 1996 US Dist LEXIS 16432, *4-5 (SD NY 1996) (denying motion to dismiss, relying on allegation that the "custom and practice in the industry" was for the parties to "reach a 'binding agreement' of this type on the telephone before preparing documentation confirming the agreement").

As stated by the Court of Appeals, "the existence of a binding contract is not dependent on the subjective intent of [the parties]," but rather:

> [i]n determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain.

Brown Bros. Elec. Contrs. v Beam Constr. Corp., 41 NY2d 397, 399-400 (1977) (internal citations omitted); *Zheng v City of New York*, 19 NY3d 556, 572-573 (2012) (same).

Here, the undisputed facts demonstrate that Perry and Solus had agreed on the Kingate Claims to be traded, their price, and quantity. However, factual issues exist as to the materiality of the following items, which were expressly left open to further negotiation: "documentation" upon which the trade was contingent; which of the "different structures" the parties would select to implement the trade; which party was "tak[ing] on litigation risk;" which party would pay legal fees in connection with the Kingate Federal Action; and whether Perry would provide a "bad acts carve-out". Whether these items were material and made part of the parties' trade raise factual issues,

the resolution of which will determine whether the parties were "truly in agreement with respect to all material terms." *Matter of Express Indus. & Term. Corp.*, 93 NY2d at 589.

It is undisputed that "documentation memorializing the agreed-upon transfer of the Participation Interest from Perry to Solus" remained outstanding on April 10, 2012 and throughout the parties' dealings. Moreover, the actual language used by the parties at the time they negotiated the trade expressly contemplated "different structures" for the transaction. Solus concedes that the "structure the parties were proposing" required "terminat[ion of Perry's] existing participation agreement," with Deutsche Bank and Solus entering into a new participation agreement. This is consistent with the parties' various communications with each other and Deutsche Bank, indicating their mutual intent for Solus to "step in [Perry's] shoes" so that Deutsche Bank could "tear up the ticket with them" and "assign the obligation to [Solus] and the rights that go with it," all in an effort "to get Perry out of the middle." Between May 31 and June 5, 2012, the parties were still working on a document that would be acceptable to Solus, Perry, and Deutsche Bank. Solus concedes that "the only thing that remained" was "execution" of this document, which never occurred. This evidence suggests that the trade was not consummated.

However, Solus argues that "this structure was by no means a condition to the consummation of the Trade" between Solus and Perry, because both parties' subsequent internal company communications, and their communications with Deutsche Bank,

indicated that the trade was complete. On April 10 and 26, 2012, Solus informed Deutsche Bank, "[w]e already did the trade." Lanktree and Carroll informed their respective companies to "[r]ip up Madoff ticket and take off sheets," and Perry also conveyed to Deutsche Bank its "understanding that we were going to basically rip up the ticket," and that Solus was "going to step into [Perry's] shoes." This evidence of the parties' conflicting communications and conduct underscores the factual issues that preclude summary judgment.

The parties submit expert reports to establish the customs and standards for creating a binding trade in the industry of claims trading. Solus submits the expert report of Peter Schellbach ("Schellbach"), and Perry submits the expert report of David Wolinsky ("Wolinsky"). Both experts refer to the "standard terms" of the Loan Syndications and Trading Association ("LSTA"), but they disagree as to whether LSTA terms applied to the trade at issue here.

The experts agree that the material terms of a trade include identifying the asset, quantity, and price, but unlike Schellbach, Wolinsky claims that "the form or structure of the transaction" is also a material term. They also disagree as to whether trades are immediately binding on the parties, even prior to the execution of a written agreement, or whether material terms must be documented.

Schellbach maintains that "the phrase 'subject to documentation' does not mean that an oral trade is not binding until a written document is signed," but rather, "it simply

means that an oral trade will need to be set forth in writing at a later date." According to Wolinksy, the material terms of the trade between Solus and Perry included Perry's interest in exiting its participation interests in the Kingate Claims, Solus's willingness to take on litigation risks, resolution of which of the "different structures" would be used for the transaction, Deutsche Bank's release of Perry, the "bad acts carve-out," and Perry's payment of legal fees incurred by Deutsche Bank's counsel in its dispute with Kingate. They also disagree as to whether the parties' dealing required Perry to continue negotiating in good faith.

Thus, Schellbach and Wolinsky's expert reports take differing views as to the applicable industry custom, which terms were material to the parties' trade, and whether they agreed on all material terms. This conflict in the experts' reports fails to resolve the issues of fact which prevent the granting of summary judgment. *See Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 (1st Dept 2004) ("[c]onflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment"); *see also Lopez v Gem Gravure Co., Inc.*, 50 AD3d 1102, 1103 (2d Dept 2008) (denying summary judgment where parties submitted conflicting expert opinions, and defendants' expert affidavits "assail[ed] the opinions of the plaintiff's experts, which merely raised issues of credibility that are for a jury to resolve").

I have reviewed the cases relied on by the parties, both in their moving papers and those provided to the court post-submission, and find that none resolve the issues of fact.

I find that the evidence submitted by the parties raises factual issues as to which terms were material to the parties' trade, and whether the parties agreed to all material terms, sufficient to create a binding contract. Accordingly, the summary judgment motions are denied to the extent that they are based upon the existence of a binding agreement or lack thereof, an issue central to all of the parties' claims.

Solus also argues that, even if the parties intended not to be bound, "they may nevertheless bind themselves to negotiate in good faith toward that written contract." Whether Perry had a good faith obligation to negotiate after April 10, 2012 will depend on the existence of an underlying binding agreement requiring them to do so. *IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213-214 (2009) (where "parties entered into a valid settlement agreement" that contemplated future agreements, they "were required to negotiate the terms of [subsequent] agreements in good faith"). Therefore, Solus's argument must await resolution of the factual issues described herein.

Perry argues that Solus suffered no damages from the purported breach and is not entitled to specific performance. Citing *Credit Suisse First Boston v Utrecht-America Fin. Co.*, Perry argues that, where "the breach in question involves the failure to deliver an asset, damages are determined by the difference between the contract price for the asset and the fair market value of the asset at the time of the breach." 84 AD3d 579, 580 (1st Dept 2011). Here, Solus's claims are based on its assertion that the parties agreed to a contract "price" of "66.5 cents on the dollar" for the Kingate Claims. Perry claims that

when it withdrew from the parties' negotiations, on June 5, 2012, Solus had marked its own $25 million participation interests in the Kingate Claims at a "price" of 66.25%, thereby demonstrating that the market price was lower than the parties' contract price at the time that Perry ended negotiations.

However, Perry concedes that, on June 5, 2012, "it believed, from an investment-strategy perspective, that the economics of holding a conditional obligation to fund [the] Participation at 66.5 cents were compelling relative to the economics of the Proposed Transaction." This evidence suggests that Perry itself believed the Kingate Claims had more value than the price Solus agreed to pay, regardless of any value that Solus assigned to these claims. The evidence does not establish Solus's lack of damages as a matter of law, but rather, raises a factual issue concerning the actual value of the Kingate Claims at the time of the alleged breach. In any event, as the existence of a binding contract, and any breach of that contract, have not been established, Perry's damages argument is premature at this juncture. If Solus succeeds in demonstrating that Perry is liable, its damages, if any, will be established at trial. *Lyon v Chemical Bank*, 118 AD2d 689, 690 (2d Dept 1986).

Two of Solus's causes of action, for breach of contract and breach of the obligation to negotiate in good faith (the first and third causes of action, respectively), seek specific performance as a remedy, requiring Perry to transfer the Kingate Claims to

Solus. Perry argues that these claims should be dismissed, because money damages provide Solus an adequate remedy.[2]

"Specific performance is an appropriate remedy for a breach of contract concerning goods that 'are unique in kind, quality or personal association' where suitable substitutes are unobtainable or unreasonably difficult or inconvenient to procure." *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 (2001) (internal citations omitted). In the event that Solus prevails on the merits, it is not clear on the record presented that suitable substitutes for the Kingate Claims exist in the market. *Compare Doherty v Aaron Mach. Co.*, 18 AD2d 915, 915-916 (2d Dept 1963) (specific performance denied where "the machines were available to plaintiff and purchasable in the market," and the "plaintiff could be adequately compensated by an award of money damages").

There are also questions of fact as to how the parties would value the Kingate Claims to provide a remedy at law, because the trade between Kingate and Deutsche Bank has not settled. Indeed, it appears that part of the value of the Kingate Claims is the fact that Kingate's underlying trade with Deutsche Bank has not settled. As a result, the holders of these claims have not been required to fund their purchase and are able to invest their assets elsewhere. Therefore, there is a question as to whether a remedy at law

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[2]In substance, the allegations of these cause of action are identical to Solus's second and fourth causes of action, which seek money damages.

would afford Solus complete relief. *See e.g. Matter of Brion*, 37 Misc 3d 1218 (A), 2012 NY Slip Op 52076 (U) (Sur Ct, Kings County 2012) (inadequate remedy at law where "it will be difficult . . . to compute and obtain complete relief for . . . damages"). Therefore, Perry's motion for summary judgment dismissing Solus's specific performance claims is denied.

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendant Perry Corp. d/b/a Perry Capital for summary judgment is denied; and it is further

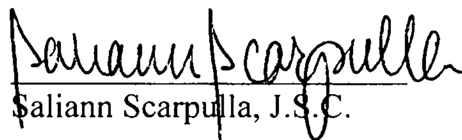
ORDERED that the cross motion by plaintiff Solus Alternative Asset Management LP for summary judgment is denied; and it is further

ORDERED that the action shall continue; and it is further

ORDERED that all parties are directed to appear for a pretrial conference at 60 Centre Street, in Room 208, on October 7, 2015, at 3:00 p.m.

Dated: New York, New York
July 13, 2015

ENTER:



Saliann Scarpulla, J.S.C.