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

PRESENT: Hon. Herman Cahn PART 49

Justice

Tradewinds Financial

- v -

Refco Securities, Inc

INDEX NO. 606052/01

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

Dated: 9/15/03

J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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TRADEWINDS FINANCIAL CORPORATION,
a California corporation,
TRADEWINDS DEBT STRATEGIES FUND, L.P.,
a California limited partnership,
TRADEWINDS OFFSHORE FUND, LTD.,
a Cayman Islands Exempted Company,
TRADEWINDS CLIPPER FUND LTD.,
a California limited partnership, and
TRADEWINDS SECURED DEBT FUND, L.P.,
A Cayman Islands Exempted Company,

Plaintiffs,

- against -

REFCO SECURITIES, INC., a New York
Corporation, REFCO CAPITAL MARKETS LTD.,
a Bermuda corporation, and MARTIN T. LOFTUS,
an individual,

Defendants

Index No. 606052/01

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HERMAN CAHN, J.

Defendants Refco Securities, Inc., Refco Capital Markets, Ltd. (collectively, "Refco"), and Martin T. Loftus move (seq. no. 1) for summary judgment, CPLR 3212. Plaintiffs cross-move for partial summary judgment.

BACKGROUND

Plaintiff, Tradewinds Financial Corporation ("Tradewinds"), is an investment advisor, incorporated in California. It manages the assets of its clients through several private investment funds, including plaintiffs Tradewinds Offshore Fund, Ltd. (formerly Tradewinds Emerging Debt Fund, hereinafter referred to as the "EDF/Offshore Fund"), Tradewinds Secured Debt Fund, L.P. (the "Secured Debt Fund"), Tradewinds Debt Strategies Fund, L.P. ("DSF") and

Tradewinds Clipper Fund (the "Clipper Fund").

Robert Scannell and Scott Peters are shareholders, officers, and directors of Tradewinds.

Refco is a securities broker of which Loftus is a vice-president.

Between late March and early June 1996, Tradewinds opened accounts on behalf of two of its funds, EDF/Offshore Fund (account no. 4233) and DSF (account no. 4177) with Refco. The accounts were "non-discretionary," meaning, the broker could not execute any trades in the account unless they were authorized by the client.

Refco acted as plaintiffs' executing broker and, in some cases, financed plaintiffs' purchase of securities. Plaintiffs held various debt securities in their accounts, including a significant amount of Russian bonds.

The First Amended Complaint:

Plaintiffs allege that in January 1998, Refco orally agreed to provide financing for plaintiffs' trades until January 1999, and that Refco later agreed to extend the financing until February 22, 1999. They further allege that on or before July 31, 1998, Refco agreed to extend the financing until August 1999. The first cause of action alleges that Refco's calling of a margin loan constituted a breach of that financing agreement.

The second cause of action alleges that DSF and the Clipper Fund entered into Customer Agreements with Refco in June and July 1998, respectively. It is alleged that Refco had a duty thereunder to exercise due care and diligence in connection with the valuation of the securities in the account, i.e., certain bonds; that Refco improperly valued the collateral in those accounts and acted in bad faith by calling a margin loan; and that Refco's actions, thus, breached

those agreements.

The third cause of action alleges that defendants fraudulently misrepresented their experience in the financing and valuation of securities and their ability to keep financing in place through August 1999.

The fourth cause of action alleges the foregoing under a theory of negligent misrepresentation.

The fifth cause of action alleges that defendants' calling of a margin loan constituted a breach of a fiduciary duty owed to plaintiffs.

The sixth cause of action alleges that defendants were negligent in their valuation of securities in the accounts.

The seventh cause of action alleges that after repurchasing bonds used as collateral from Tradewinds at 96% of par, Refco quickly sold them to a third party at a substantial profit, and was, thereby, unjustly enriched.

Tradewinds ultimately paid the margin indebtedness to Refco. Although Refco did not foreclose upon or liquidate any portion of plaintiffs' assets, Tradewinds claims to have sustained trading losses by reason of Refco's actions.

Plaintiffs originally asserted their claims in federal court, where the actions continued through the discovery stage. The federal court, however, dismissed for lack of subject matter jurisdiction upon finding that complete diversity of citizenship did not exist. The parties stipulated that all discovery taken in the federal action may be used in this action.

The Written Agreements of the Parties:

The account opening documents included Trading Authorizations, Prime Broker

Agreements, Margin Agreements, and Global Master Repurchase Agreements (Order to Show Cause Ex. 1, collectively). Each trading authorization made Tradewinds liable to Refco on demand for all transactions, margin calls, and debts created in their account.

In the Prime Broker Agreements, Refco agreed to settle securities transactions executed by brokers other than Refco on behalf of Tradewinds. Refco had the right to terminate the agreement "for any reason at any time immediately upon notice to you."

The Margin Agreements provided that Refco "is prepared to make available to you a facility for financing transactions from time to time in various financial instruments . . . as may be agreed between us, subject in all cases to the following standard terms and conditions which shall apply to each Transaction entered into on or after the date of your acceptance of this agreement . . . ." The Margin Agreements further provided:

> 1. Except to the extent that you have expressly authorized someone else to finance on your behalf and for your account, all Transactions entered into pursuant to this Agreement shall be initiated orally or in writing by you.
>
> 2. . . . Refco will advise you of the initial collateral requirement and of the amount of collateral required to be maintained from time to time. The initial collateral and other terms and conditions for your financing facility will be negotiated on a transaction by transaction basis. . . . Refco may value any non-cash collateral on any reasonable basis. . . .
>
> 3 . . . (e) if Refco deems it reasonably necessary for its protection, then Refco may, in its discretion at any time or times thereafter and without notice, sell any and all property in any or all of your account(s) to offset any indebtedness . . . . If a default occurs or if Refco exercises its right to liquidate any of your open Transactions, Refco may. . . set off amounts which you owe to it against any amounts which it owes to you . . . .

The Global Master Repurchase Agreements each stated that its terms governed all

repurchase agreements and reverse repurchase agreements, defined below. Those agreements also provided that the terms set forth on any transaction confirmations "shall, together with this Agreement, constitute prima facie evidence of the terms agreed between Buyer and Seller for that Transaction, unless objection is made with respect to the Confirmation promptly after receipt thereof." (Global Master Repurchase Agreement ¶ 3 [b].)

The Transactions:

In July 1997, Tradewinds informed Loftus that it wanted to purchase certain collateralized loan obligations ("CLOs")[1] and asked for Refco's assistance in obtaining financing.

On August 6, 1997, DSF and the EDF/Offshore Fund each desired to purchase 15,000,000 units of PamCo Cayman Ltd. ("PamCo") CLOs. The EDF/Offshore Fund account contained sufficient cash for the purchase, but the DSF account did not. Thus, Refco made an interim margin loan to DSF based on other assets in the DSF account.

Refco refinanced this loan with a third party. In December 1997, Caisse des Depots et Consignations ("CDC"), a French bank, entered into an agreement with Refco under which CDC provided refinancing to Refco for the PamCo CLOs. In February 1998, Refco and CDC entered into an agreement that fixed an interest spread based on LIBOR (the London Interbank Offered Rate) through February 20, 1999, but which provided that either party had a right to cancel the transaction at the end of each 30-day period.

In January 1998, to document its financing of $30,000,000 CLOs ($15 million each for DSF and the EDF/Offshore Fund), Refco entered into repurchase agreements, known as

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[1] Plaintiffs' expert defines CLOs as "a subspecies of a large asset class called Collateralized Debt Obligations ('CDOs'). A CDO is a trust that raises money from investors in order to invest in debt and related instruments (mainly loans and/or bonds)." (Jones Aff. ¶ 4.)

"repos," with both the EDF/Offshore Fund and DSF. A repo transaction involves two separate but related transactions: (1) a sale by a party (the repo seller) of securities in exchange for cash; and (2) a simultaneous agreement by the repo seller to repurchase the same or equivalent securities for a specified price at a future date. Every repo is also a reverse repo; that is, a reverse purchase agreement is simply a repurchase agreement viewed from the perspective of the repo buyer *(see, Granite Partners, L.P. v Bear, Stearns & Co., Inc.*, 17 F Supp 2d 275,298-300 [SD NY 19981 [describing these types of transactions]).

Sections 3 (a) and 3 (b) of the Repo Agreements (Cross-Motion Ex. K) state in pertinent part:

> **A** Transaction may be entered into orally or in writing at the initiation of either Buyer or Seller.
>
> Upon agreeing to enter into a Transaction hereunder, Buyer or Seller (or both) . . . shall promptly deliver to the other party written confirmation of such transaction . . . . The Confirmation . . . may be in the form of Annex II hereto or may be in such other form as the parties may agree.

Section 16 (c) of the Repo Agreements states:

> This Agreement may be terminated by either party upon giving written notice to the other, except that this Agreement shall, notwithstanding such notice, remain applicable to any Transactions 'thenoutstanding.

Under the terms of those repo agreements, Refco purchased the $30,000,000 (face amount) PamCo CLOs (those of the EDF/Offshore Fund and those of DSF) for 60 percent of par, or $18,000,000, and agreed to resell those securities back to Tradewinds at that price plus interest. No fixed term was recited in the agreements, which provided that the financing was "open." According to Refco, this meant "on demand,'' i.e., either side could terminate the financing at any

time.

Trade confirmations (one for each fund) were delivered to Tradewinds confirming the terms of the January 9, 1998 repo transactions (Order to Show Cause Ex. 11). Each trade confirmation recited that Refco had purchased, as principal, $15,000,000 face amount of PamCo CLO units for $9,000,000. In effect, Refco was financing 60 percent of the purchase price of the PamCo CLO units.

The trade confirmations also recited an interest rate and stated that the termination date of the financing was "open." (Order to Show Cause Ex. 12.) The reverse side of the trade confirmation stated that "Refco may close out any transaction with Customer without notice at any time where such action is deemed advisable by Refco in its sole discretion for its protection. Refco shall not be liable to Customer for any profits that would have accrued to Customer after the date of such close out." *(Id.)*

> The back of each trade confirmation also states:
>
> All transactions between Refco and Customer shall be subject to all applicable laws, rules, practices and customs and to the terms of the applicable customer agreement and of any special agreement between Customer and Refco.

(Order to Show Cause Ex. 12.)

In May 1998, EDF/Offshore and DSF each purchased an additional $5,000,000 face value of PamCo CLOs. Refco again agreed to finance 60 percent, or $6,000,000 of the total $10,000,000 purchase price. On July 1, 1998, Refco entered into repo agreements with the EDF/Offshore Fund and DSF. Refco issued the appropriate confirmations (Order to Show Cause Ex. 15). The confirmations again recited that the termination date of the financing was "open."

(*Id.*)

This was also refinanced with CDC.

On June 23, 1998 and July 24, 1998, Tradewinds opened up accounts with Refco on behalf of the Secured Debt Fund and the Clipper Fund, respectively, for the purpose of investing in CLOs. The two funds each entered into Customer Agreements with Refco. Section B of the agreements provide, among other things, that "Refco may value non-U.S. Dollar collateral on any reasonable basis." (Cross-Motion Ex. N.) The agreements further provided as follows:

> D. NETTING
>
> > **3.** *Scope of the Agreement.* Unless otherwise agreed in writing by the parties, each Transaction . . . outstanding on the execution date of this Agreement shall be . . . governed by the Agreement and every obligation of the parties hereunder shall be an obligation under the Agreement. In addition, all Transactions entered into between the parties . . . after the execution date of this Agreement shall be governed by the Agreement.
>
> E. DEFAULT
>
> > 1. *Events of Default.* . . . (ix) if such Refco Entities deem it reasonably necessary for their protection, you will be a Defaulting Party, and such Refco entities shall be a Non-Defaulting Party.
> >
> > *2. Remedies.* If an Event of Default as set forth above has occurred and is continuing, Refco Entities, in their sole discretion and without notice, may close-out (sic) and liquidate any of your outstanding obligations (except to the extent that in the good faith opinion of the Refco Entities certain of the obligations may not be closed out and liquidated under applicable law). Such obligations may include those by and between the Refco Entities under this or any other agreement, with you or any of your affiliates.

(Id.) Section G (7) of the Customer Agreements provides that Refco "may terminate this Agreement for any reason at any time immediately upon notice to you." *(Id.)*

Subsequently, at Tradewinds' request, Refco transferred PamCo CLOs from the EDF/Offshore Fund and DSF accounts to the Secured Debt Fund and Clipper Fund accounts.

On September 14, 1998, CDC informed Refco that it elected to terminate the refinancing of the PamCo CLOs. At this time the bond market as a whole was in turmoil, in part because of defaults on Russian bonds. On September 20, 1998, the day after its refinancing from CDC ended, Refco notified Tradewinds that it was calling the entire amount of the PamCo CLO loan. Thus, Refco demanded repayment of the outstanding margin debt from the Secured Debt Fund and the Clipper Fund.[2] After receiving the margin notifications, Tradewinds transferred some of the PamCo CLOs from the Secured Debt Fund and the Clipper Fund back to the EDF/Offshore Fund and DSF accounts.

On September 25, 1998, the EDF/Offshore Fund sold $8,000,000 PamCo units, and DSF sold $2,000,000 PamCo units, to Refco at a price of 96. On the same day, Refco resold the securities to a third party at a price of 97.026, thus earning a profit of approximately $100,000. Tradewinds contends that it is entitled to this profit.

The complaint alleges that by reason of Refco's acts, Tradewinds was forced to liquidate securities, including the PamCo units, at a substantial loss in order to meet the margin call. Tradewinds also was unable to repurchase a position in the units, thereby losing substantial interest payments.

Loftus testified at his deposition that the financing was terminated because the "value of the assets could no longer be ascertained." However, Tradewinds proffers evidence

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[2] The parties dispute the precise amount of the call. Refco states that the call was for $24,179,422, while Tradewinds recites a figure of approximately $23,000,000.

indicating that Refco had received substantial bids on PamCo CLOs just days before it made the margin call, and argues that Refco, therefore, had no reason to question their value. Tradewinds contends that the agreements do not give Refco an unfettered right to make a margin call.

In his affidavit, Scannell, on behalf of Tradewinds, asserts that when Refco called the margin loan and Tradewinds did not immediately come up with the necessary cash, Refco froze the Tradewinds account. Scannell asserts that, as a result, Tradewinds was unable to meet fund redemptions that were due to shareholders on one of its funds, thus damaging its business reputation.

DISCUSSION

First Cause of Action for Breach of Oral Financing Agreement:

Plaintiffs allege that in January 1998, Refco orally agreed to provide financing for their trades until January 1999, and that Refco later agreed to extend the financing until February 22, 1999. Plaintiffs further allege that Refco agreed to extend the financing until August 1999. The first cause of action alleges that Refco's calling of the margin loan in September 1998 constituted a breach of that financing agreement.

The Customer Agreements (Order to Show Cause Ex. *5*) grant Refco the right to declare the Secured Debt Fund and the Clipper Fund in default if the "Refco Entities deem it reasonably necessary for their protection," and that, in such case, Refco may "in [its] sole discretion and without notice, . . . close-out and liquidate any. . . outstanding obligations.'' Plaintiffs' factual theory of an antecedent oral financing agreement which essentially conflicts with the written provisions of the Customer Agreements, by promising continuing credit for a term certain, runs contrary to the parol evidence rule (*Unisys* ***Corp.*** v *Hercules Inc.*, 224 AD2d

365 [1st Dept 19961).

Moreover, even if the claimed oral financing agreement was agreed to subsequent to the Customer Agreements, it cannot serve to modify the prior written agreements. The Customer Agreements provide, under the title "Scope of the Agreement," that they govern all outstanding transactions between the parties "[u]nless otherwise agreed in writing by the parties . . . ." Such language is binding and precludes any assertion that the terms, as set forth in the Customer Agreements, were modified by a subsequent oral agreement (GOL 15-301[1]; *Rose* v *Spa Realty Assocs.*, 42 NY2d 338 [19771; *O'Reilly* v *NYNEX Corp.*, 262 AD2d 207 [1st Dept 19991).

In addition, GOL 5-701 requires that any agreement which, by its terms, is not to be performed within a year of its making, must be in writing and signed by the party to be charged, in order to be enforceable. The statute refers to those contracts having no possibility of being performed within one year *(Cron* v *Hargro Fabrics, Inc.*, 91 NY2d 362 [19981). Tradewinds alleges that some time before July 1998, Refco agreed to extend the financing until August 1999. Thus, Refco's alleged commitment was to last for more than one year, requiring it to be in writing.

Plaintiffs, however, maintain that the writings and e-mails which passed between the parties established the terms of a "writing" within the meaning of the statute. They proffer the following evidence:

(a) Refco confirmations containing Tradewinds' name, the interest rate and the identity of the security (Cross-Motion Ex. W).

(b) On February 20, 1998, Loftus sent an e-mail to Scannell, Tradewinds' principal, stating as follows:

"The French are our friend. I have a one year commitment with one month two way puts. Banks seem to be more comfortable with a put but they tend not to use them . . . . [S]o, have we termed out the PAMCO CLO w/ the frenchmen?" *(Id.*, Ex. Y.)

(c) Thomas Yorke, Loftus' assistant, sent an e-mail to Tradewinds stating "official end date PamCo trade Feb 22 99." *(id.*, Ex. X.)

(d) On August 19, 1998, Scott Peters, a Tradewinds representative, sent an e-mail to Loftus asking "anything new on Pamco I1 financing for next yr?" Loftus replied, "Have a deal on that. We have our best rocket guys trying to figure the maze of break funding costs attached. [I]nterest and advance no worse, likely better" ***(id.,*** Ex. DD).

To satisfy the Statute of Frauds, the memorandum must contain substantially the whole agreement and all its material terms, such that the substance of the agreement may be discernable in one reading (*Kobre* v *Instrument Sys.* ***Corp.,*** **54** AD2d 625 [1st Dept 1976], *affd* 43 NY2d 862 [19781). Whether the patchwork of terse writings proffered by Tradewinds are taken singly or together, they do not manifest a commitment on Refco's part to provide financing for Tradewinds' margin trades. They indicate, perhaps, that Refco would be procuring a line of credit from the French bank; but there is no indication Refco would be passing on that line of credit to Tradewinds or its affiliates for any particular length of time. Thus, the documents proffered are not sufficient to satisfy the Statute of Frauds.

Tradewinds argues that even if no writing existed within the meaning of the Statute of Frauds, it may still be able to pursue its breach of contract claims under the doctrine of part performance *(see,* GOL 5-703 [4]). That doctrine applies if the parties partly performed in a manner that is "unequivocally referable" to the oral agreement (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group PLC,* 93 NY2d 229 [19991; *Lincolnshire Mgt., Inc. v Les Gantiers Holdings B.V., 303* AD2d 180 [1st Dept 20031). Tradewinds posits that its payment

of a higher premium interest rate on the margin loan is unequivocally referable to a longer-term financing agreement. This position misapprehends the heightened standard required under the doctrine.

In order to come within the part performance exception to the Statute of Frauds, the performance must be "unintelligible or at least extraordinary, explainable *only* with reference to the oral agreement." (*Anostario* v *Vicinanzo*, 59 NY2d 662, 664 [1983] [emphasis added].) Plaintiffs cannot credibly maintain that their payment of interest at a premium rate is only explainable as the result of an oral term financing agreement through August 1999. While the term of a loan may, of course, be a factor in the rate, other factors exist, such as the amount of the principal, market conditions at the time of the loan, risks associated with securities collateralizing the loan, borrower's credit rating, and the availability of competitive financing.

Accordingly, defendants' motion for summary judgment dismissing the first cause of action is granted.

Second Cause of Action for Breach of Secured Debt Fund and Clipper Fund Agreements:

Tradewinds alleges that Refco's agreements with the Secured Debt Fund and the Clipper Fund gave rise to a duty of good faith on Refco's part, requiring it to "refrain from making wrongful margin calls and . . . to base any and all margin calls upon true and accurate pricing information." (First Amended Complaint ¶ 74.)[3]

To be sure, every contract implies a covenant of good faith and fair dealing; albeit not so as to vitiate express contractual provisions *(Dalton* v *Educational Testing Service, 87*

[3] Claims for failure to deal in good faith are subsumed within plaintiffs' contract-related claims (First Amended Complaint ¶¶ 62-80).

NY2d 384 [1995]). The covenant includes "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *(Id.*, at 389; *Rowe* v *Great Atlantic & Pacific Tea Co., Inc.*, 46 NY2d 62, 69 [1978]). Moreover, the Customer Agreement explicitly requires Refco to value non-cash collateral "in a commercially reasonable manner." (Order to Show Cause Ex. 5 § E [3].) Other references in the Customer Agreement to Refco's obligation to exercise reasonableness and/or good faith in the discharge of its rights, upon the event of Tradewinds' default, are expressly found at Section E (1), (2), as follows. Refco's right to declare Tradewinds a "Defaulting Party" is constrained by "reasonabl[e] necess[ity] for their protection . . . ." Refco's duty to calculate amounts owed to it by Tradewinds is bound to the exercise of "good faith," which amounts expressly include Refco's ability to "realize upon property securing any obligation to . . . Refco . . . ." (Order to Show Cause Ex. 5 § E [1], [2].) Whether the collateral was liquidated in a reasonable way and at reasonable prices, are issues of fact, which cannot be resolved on motion.

Accordingly, resolution of plaintiffs' breach of contract claims, insofar as they allege defendants' failure to properly valuate the non-cash collateral, is reserved for trial.

The Third, Fourth, and Sixth Causes of Action Sounding in Tort:

Plaintiffs' claim for negligent misrepresentation is govemed by the Martin Act, for which no private right of action exists (GBL §§ 352 *et* ***seq.;*** *CPC Intl., Inc. v McKesson Corp.*, 70 NY2d 268 [1987]; *Horn* v *440 East 57th Co.*, 151 AD2d 112 [1st Dept 1989]). Plaintiffs have asserted that Refco negligently misrepresented the terms by which the purchase of PamCo CLOs were financed through repo agreements. Because that claim relates to the sale, purchase, exchange, and distribution of securities, it is subsumed within the Martin Act and not subject to

the civil remedies sought by plaintiffs herein.

The Martin Act does not preclude a claim for common law fraud, or for breach of contract *(885 W.E. Residents Corp. v Coronet Props. Co.,* 220 AD2d 305 [1st Dept 1995]; *Whitehall Tenants Corp. v Estate of Olnick,* 213 AD2d 200 [1st Dept], *lv denied* 86 NY2d 704 [19951). As a general rule, however, the mere failure to honor a contract does not give rise to tort damages *(Ivan Mogull Music Corp. v Madison-59th Street Corp.,* 162 AD2d 336 [1st Dept 1990]; *Non-Linear Trading Co., Inc. v Braddis Assocs.,* 243 AD2d 107 [1st Dept 19981). In order to plead a cause of action for fraud arising out of a contractual relationship, a plaintiff must allege a breach of duty which is extraneous to the contract. In other words, plaintiff must allege a type of damage that cannot be recovered under the contract theory (*Krantz* v *Chateau Stores of Canada Ltd.,* 256 AD2d 186 [1st Dept 19961).

Tradewinds alleges that its reputation was damaged by reason of Refco's short-lived freezing of Tradewinds' accounts when the margin call was made. However, a claim for damages for loss of reputation is not actionable where the parties' rights and duties derive from contract, in the absence of a showing that such damages were within the contemplation of the contracting parties at the time of contract (*Sweazey* v *Merchants Mut. Ins. Co.,* 169 AD2d 43 [3d Dept], *appeal dismissed* 78 NY2d 1072 [1991]; *Dember Constr. Corp. v Staten Island Mall,* 56 AD2d 768 [1st Dept 19771).

Accordingly, defendants' motion for summaryjudgment dismissing the third, fourth, and sixth causes of action is granted.

Fifth Cause of Action for Fiduciary Breach:

Tradewinds and Refco had a creditor-debtor and broker-customer relationship. There is generally no fiduciary relationship between a creditor and debtor (*Walts* v *First Union Mortgage Corp.*, 259 AD2d 322 [1st Dept], *lv denied* 94 NY2d 795 [1999]). Moreover, an ordinary broker-customer relationship does not give rise to a fiduciary duty *(In re Dean Witter Managed Futures Ltd. Partnership Litig.*, 282 AD2d 271 [1st Dept 20011).

Refco relies on *De Kwiatkowski* v *Bear Stearns & Co., Inc.*, (306 F3d 1293 [2nd Cir 20021) in support of its theory that a fiduciary relationship existed among the parties. It is inapposite. The court in *De Kwiatkowski* did not hold, as a broad proposition, that a broker owes a customer a fiduciary duty in a typical broker-customer transaction. Rather, the broker in that case possessed substantial advisory functions with respect to the size, placement and timing of securities transactions, and spoke to the customer as many as 20 or 30 times a day. In the instant case, Tradewinds' funds employed sophisticated traders who made all the decisions regarding the nature and timing of trades.

In addition, the Martin Act precludes claims for breach of fiduciary duty within the context of the liquidation of securities *(see, Granite Partners, L.P. v Bear, Stearns & Co., Inc.*, 17 F Supp 2d 275 [SD NY 19981).

Accordingly, defendants' motion for summary judgment dismissing the fifth cause of action is granted.

Seventh Cause of Action for Unjust Enrichment:

Unjust enrichment claims cannot be sustained where there is a valid and enforceable contract *(Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70* NY2d **382** [1987];

Granite Partners, L.P., supra).

Accordingly, defendants' motion for summary judgment dismissing the seventh cause of action is granted.

CONCLUSION

For the foregoing reasons, it is

ORDERED that defendants' motion for summary judgment is granted, except with regard to claims based on breach of contract and/or breach of the duty of good faith and fair dealing, alleging wrongful valuation by defendants of plaintiffs' collateralized securities, and as to such claims, said motion is denied; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is denied.

Dated: September 15, 2003

ENTER:

J. S. C.