

Amaranth LLC v JPMorgan Chase & Co.

2008 NY Slip Op 33544(U)

October 28, 2008

Supreme Court, New York County

Docket Number: 603756/07

Judge: Richard B. Lowe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. RICHARD B. LOWE, III

PAGE 56

Index Number : 603756/2007

AMARANTH LLC

vs.

J.P. MORGAN CHASE & CO.,

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 5/6/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 10 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
NOV 06 2008
NYS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL
JULIA M. MCELROY, STENOGRAPHER

Dated: 10/28/08

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

NYS SUPREME COURT E-FILED AS DOCUMENT #

25
11-10-08
JAW

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

-----X
AMARANTH LLC and AMARANTH ADVISORS LLC,

Plaintiffs,

-against-

Index No.: 603756/07

JPMORGAN CHASE & CO.,
JPMORGAN CHASE BANK, N.A. and
J.P. MORGAN FUTURES INC.,

ORDER AND DECISION

Defendants.

FILED
NOV 10 2008
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Richard B. Lowe, III:

Amaranth LLC (the Fund) and Amaranth Advisors LLC (Advisors, and the Fund, collectively, Plaintiffs) commenced this action against JPMorgan Chase & Co. (JPMC) and its subsidiaries JP Morgan Chase Bank, N.A. (JPMB) and J.P. Morgan Futures Inc. (JPMFI, together with JPMC and JPMB, collectively, Defendants), alleging that Defendants exploited the Fund's financial difficulties to reap handsome profits for themselves, and caused Plaintiffs billions of dollars of losses.

The complaint against Defendants asserts six causes of action: (1) a breach of contract claim by the Fund against JPMFI for derailing a potential business deal between the Fund and Goldman Sachs (Goldman); (2) a tortious interference with prospective economic advantage claim by the Fund against JPMC for interfering in a potential business deal between the Fund and Citadel Investment Group LLP (Citadel); (3) a claim by the Fund against JPMC for alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA); (4) a tortious interference with prospective economic advantage claim by Advisors against JPMC for interfering in a

[* 3]

potential business deal between Advisors and Citadel; (5) a claim by Advisors against JPMC for alleged violation of CUTPA; and (6) a claim by the Fund against JPMB for unjust enrichment.

Defendants move for an order dismissing the complaint and all claims asserted therein, pursuant to CPLR 3211 (a) (1) based on documentary evidence, and pursuant to CPLR 3211 (a) (7) for failure to state a claim. Plaintiffs oppose the motion to dismiss, arguing, among other things, that the disputed facts in this case are grounds for discovery and trial, not dismissal. For the reasons set forth herein, Defendants' motion for dismissal is granted in part and denied in part.

Background

The Fund was a hedge fund involved in energy (primarily natural gas) derivatives trading, and Advisors was the trading advisor that planned and executed the Fund's investment strategy. Pursuant to that certain Client Agreement between the Fund and JPMFI, dated July 8, 2004, JPMFI, a futures commission merchant, served as the Fund's clearing broker for its trades.

In 2005 and the early part of 2006, the Fund made huge gains trading in energy derivatives, and by July 2006 the value of its assets reached \$9.2 billion, making it one of the largest hedge funds in the world (*Complaint*, ¶ 1). However, by late August 2006, due to adverse and volatile changes in the price of natural gas derivatives, the Fund sustained significant losses that wiped out hundreds of millions of dollars of gains. (*Id.* ¶ 3). Indeed, by September 15, 2006, the Fund was down more than \$2 billion from its August 2006 value (*Id.* ¶ 4).

To stem further losses that would threaten its survival, the Fund (and Advisors) initiated

[* 4]

negotiations with investment banks and other hedge funds to takeover the risk associated with the Fund's natural gas derivatives portfolio (Complaint, ¶ 5). On Friday, September 16, 2006, the Fund reached a deal with Merrill Lynch (Merrill), pursuant to which Merrill agreed to assume, for a concession fee of several hundred million dollars, approximately one-quarter of the Fund's open natural gas positions via off-setting trades (*Id.* ¶ 7). On Monday, September 18, 2006, the trades for the Merrill deal were electronically transmitted to JPMFI for processing. JPMFI cleared these trades, in accordance with industry standard practices for this type of transaction, without incident.

About the time when the Merrill transaction was negotiated and finalized, Plaintiffs also negotiated with Goldman regarding most of the remainder of the Fund's natural gas book (Complaint, ¶ 6-8). On Sunday, September 17, 2006, the Fund agreed to a deal by which Goldman would assume the risk related to the Fund's gas derivatives portfolio, in return for a concession fee payment of \$1.85 billion (*Id.* ¶ 10). On Monday, September 18, 2006, Plaintiffs convened a conference call with representatives of Goldman, JPMFI and the New York Mercantile Exchange (NYMEX), to describe the potential deal with Goldman (*Id.* ¶ 11). After hearing the proposal, JPMFI refused to execute the proposed Goldman trades, which, according to Plaintiffs, constituted a breach of ¶ 3(f) of the Client Agreement (Toal Affirmation Ex B) that required JPMFI to "execute orders that would have the effect of reducing JPMFI's exposure to [the Fund]" (*Id.* ¶ 12, 13). "As a result, Goldman walked away from the trade." (Complaint, ¶ 13). The complaint alleges that Goldman's departure caused the Fund to suffer "several hundred million dollars of market losses on Monday, September 18, 2006," because the proposed Goldman deal had contemplated using the gas closing prices for the previous Friday, September

15, 2006 (*Id.*).

Promptly after the collapse of the Goldman deal, Plaintiffs entered into negotiations with Citadel, a leader in “special opportunity investing,” to discuss details of a trade with the Fund (*Id.* ¶ 14-17). According to the complaint, Citadel agreed to enter into a trade “comparable” to the defunct Goldman deal, requiring the Fund to pay Citadel the same concession fee of \$1.85 billion, but also requiring the Fund to “absorb 2/3 of the market losses from Monday’s trading.” (*Id.* ¶ 17). The complaint alleges that on September 19, 2006, Messrs. Steve Black and Bill Winters (JP Morgan executives) told Mr. Kenneth Griffin (a Citadel senior executive) on the phone that “Amaranth is not as solvent as they are telling you they are,” in an effort to deter Griffin from completing Citadel’s trade with the Fund (*Id.* ¶ 19). The complaint also alleges that in making the above false statement about the Fund’s solvency, Defendants “intentionally and maliciously sought to derail the trade between the Fund and Citadel, hoping to muscle in on Citadel’s trade to the Defendants’ financial gain” (*Id.* ¶ 20). The complaint further alleges that the false statement caused injury to the Fund’s reputation, and ultimately killed the Fund’s trade with Citadel, causing more than \$1 billion in losses to the Fund (*Id.*).

After Citadel declined to pursue a deal with the Fund, Defendants proposed a new deal, pursuant to which the Fund would trade with JPMB and, in turn, JPMC would later trade half of the Fund’s portfolio to Citadel Equity Fund Ltd. (CEFL), an affiliate of Citadel (Complaint, ¶ 21). The JPMB deal was finalized on September 19, 2006, and an agreement memorializing the terms thereof was set forth in the Transfer Agreement (Toal Affirmation Ex D).

The complaint alleges that Defendants received “massive financial benefits” from entering into the transaction with the Fund, at the expense and to the detriment of the Fund (*Id.* ¶

[* 6]

22). It also alleges that on September 29, 2006, JPMC and CEFL entered into an agreement whereby “the Defendants walked away with \$725 million almost immediately after closing the trade,” and that JPMC’s sale of the Fund’s gas derivatives to CEFL involved little or no risk to JPMC (*Id.* ¶ 22). The complaint further alleges that Defendants used their “insider status” (i.e. Plaintiffs were long-time clients of Defendants) to take “unfair advantage” of Plaintiffs, and that the profits generated from this deal “unjustly enriched the Defendants and came at [a] great expense to the Fund and Advisors” (*Id.* ¶ 23-24).

As noted above, the complaint asserts causes of action sounding in breach of contract, tortious interference with prospective economic advantage, CUTPA violations and unjust enrichment. Defendants move to dismiss the complaint and the claims therein pursuant to CPLR 3211 (a) (1) and (a) (7).

Discussion

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff’s pleadings state a cause of action. “The motion must be denied if from the pleadings’ four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]” (*Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are to be afforded a “liberal construction,” and the court is to “accord plaintiffs the benefit of every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

However, while factual allegations in a complaint should be accorded a “favorable inference,” bare legal conclusions and inherently incredible facts are not entitled to preferential

consideration. (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, “[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether she has stated one” (*Asgahar v Tringali Realty Inc.*, 18 AD3d 408, 409 [2nd Dept 2005]). If the complaint’s allegations consist of bare legal conclusions and “documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted.” (*Scott v Bell Atlantic Corp.*, 282 AD3d 180, 183 [1st Dept 2001]).

Breach of Contract Claim

Plaintiffs’ complaint alleges that on September 18, 2006, the Fund ordered JPMFI to “execute” the Goldman trades, but JPMFI refused to do so. Plaintiffs asserts that such refusal was a breach of the Client Agreement, which contained a provision that “JPMFI shall execute orders that would have the effect of reducing JPMFI’s exposure to the Client [i.e. the Fund]” (Client Agreement, ¶ 3 [f]). Specifically, Plaintiffs argue that the Goldman deal would have had the effect of “reducing JPMFI’s exposure” because JPMFI, as the Fund’s clearing broker, was protected by the collateral (i.e. the margin payments posted by the Fund in its margin account) held by JPMFI with respect to the Fund’s trades; that the margin account was “overcollateralized” by more than \$2 billion in margin payments; and that after executing the Goldman trades, JPMFI could replace the Fund’s credit risk with that of Goldman’s, “the world’s leading investment bank” (Complaint, ¶ 53). Plaintiffs allege that JPMFI’s breach of the contract “subjected the Fund to market losses that it otherwise would not have incurred, and required the Fund to pay much larger amounts to reduce the risk of its Natural Gas Book” (Complaint, ¶ 67-69).

[*8]

In response, Defendants contend, among other things, that under the proposed Goldman deal, JPMFI was asked by the Fund to prematurely release the monies in the Fund's margin account to pay Goldman's \$1.85 billion concession fees for assuming the risks relating to the Fund's portfolio. Defendants further contend that had the Goldman deal been structured like the Merrill deal, which did not require JPMFI to prematurely release margin account funds, JPMFI would have "automatically cleared any duly executed trades" between the Fund and Goldman (Defendants' Brief, p. 11-12). Defendants also contend that JPMFI's refusal to acquiesce to the Fund's demand for release of collateral was consistent with its rights under paragraph 3 (e) of the Client Agreement, which provides that "[a]ll transactions by JPMFI on behalf of [the Fund] shall be subject to the applicable ... rules, regulations ... of the exchange ... on which such transactions are executed or cleared by JPMFI" (*Id.* at p. 12).

In such regard, Defendants point to the fact that under NYMEX Rule 4.10 (F), "[w]ithdrawals of margin from a customer's account [such as the Fund] may only be permitted by a Member Firm [such as JPMFI] carrying such account if the remaining funds in such account are equal to or in excess of the then prevailing initial margin required of the applicable open positions at the time of said withdrawal request" (Toal Affirm Ex E).¹ Based on this NYMEX Rule, Defendants argue that requiring JPMFI to prematurely release monies from the margin account to pay Goldman, which Goldman had required as a condition to any trades with the Fund, would have

¹ Based on the Fund's account statement issued by JPMFI for September 15, 2006, a copy of which is annexed as Exhibit A to the affidavit of Armand Nakkab in support of defendants' motion to dismiss, the Fund's initial margin requirement was \$2.514 billion, and the Fund had a total equity of \$2.159 billion, leaving it with about \$5 million in excess margin funds.

[*9]

violated the Rule. Defendants also argue that, if JPMFI had released the margin when the Fund's positions remained open and subject to further market deterioration, as the Fund's clearing broker JPMFI would have been liable for any and all losses that were not covered by any remaining margin. In this respect, Defendants contend that the Goldman deal would not have the effect of reducing JPMFI's exposure to the Fund, but rather dramatically increasing its exposure (Defendants' Brief, p. 13).

Plaintiffs counter in their opposition to Defendants' Motion to Dismiss, that "Goldman Sachs agreed under the proposed trade to absorb *all* losses in the Fund's natural gas derivatives portfolio following the market's close on the previous Friday, September 15, 2006," and as such, the Goldman deal "met the requirements of the Client Agreement inasmuch as it clearly reduced Defendant JPMFI's exposure to the Fund by shifting that exposure to Goldman Sachs" (Plaintiffs' Opposition Brief, p. 5 (emphasis in original)).²

In light of the foregoing, it is a disputed fact as to whether the proposed Goldman deal would have reduced JPMFI's exposure to the Fund, which in turn, would impact upon whether JPMFI was justified in refusing to execute or clear the proposed trades between the Fund and Goldman. Because the "documentary evidence" submitted by Defendants does not conclusively establish a defense to the breach of contract claim as a matter of law, and because this court is required to accord Plaintiffs the benefit of every possible favorable inference in the context of a motion to dismiss, Defendants' CPLR 3211 (a) (1) motion to dismiss based on documentary

² While plaintiffs make this argument in their motion to dismiss, it is not averred or stated in their complaint.

[* 10]

evidence is denied, without prejudice.³ (*Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007])[denying defendant's motion to dismiss based on "documentary evidence" because defendants' affidavits and documents did not conclusively establish a defense to the claims asserted by plaintiff as a matter of law]).⁴

Tortious Interference With Prospective Economic Advantage Claim

In the complaint, Plaintiffs each assert a claim for tortious interference with prospective economic advantage against JPMC under Connecticut law. Both Plaintiffs and Defendants, however, agree that the analysis of this claim is similar under New York and Connecticut law, as the required elements for such claim are substantially the same in both jurisdictions. Under Connecticut law, a plaintiff must allege the following elements: (1) a business relation between itself and a third party; (2) defendant intentionally and knowingly, with an improper motive or by improper means, maliciously interfered with that relation; and (3) plaintiff suffered an actual loss due to such interference. (See e.g., *Hi-Ho Tower, Inc. v Com-Tronics, Inc.*, 255 Conn 20, 27 [Conn 2000]; *Robert S. Weiss and Associates, Inc. v Wiederlight*, 208 Conn 525, 535-36 [Conn 1988]). Likewise, in New York, a plaintiff must allege: (i) a business relation between itself and

³ Indeed, during oral argument on the motion to dismiss, Defendants' counsel stated that "[i]f there is any doubt about what the terms [of the Goldman deal] were, we can take one deposition of Goldman Sachs and the breach of contract claim will be over." Hearing Transcript of May 6, 2008, p. 22.

⁴ Because the motion to dismiss the breach of contract claim is denied, it is unnecessary to determine other related contract claim issues raised by the parties, including, whether (1) JPMFI had any obligation to "execute" the Goldman trades, since the proposed Goldman deal only required JPMFI to "clear" but not "execute" the trades, as argued by JPMFI; (2) JPMFI's refusal to execute the Goldman trades constituted an anticipatory breach or repudiation of the contract; and (3) the Fund had waived any right to recovery under the Client Agreement, to the extent that the damages related to the breach of contract claim are deemed incidental, special or consequential damages, as argued by JPMFI.

a third party; (ii) defendant interfered with that relation; (iii) defendant acted with the sole purpose of harming plaintiff or used improper or illegal means that amounted to a crime or independent tort; and (iv) such acts injured plaintiff's relation with the third party (*See e.g., Schorr v The Guardian Life Insurance Company of America*, 44 AD3d 319, 323 [1st Dept 2007]).

In this case, Plaintiffs' tortious inference claim is based on the allegation that Defendants' executives (Black and Winters) told Citadel's executive (Griffin) that "Amaranth is not as solvent as they are telling you they are." (Complaint, ¶ 19-. With respect to the Fund's tortious interference claim, Defendants argue that such claim should be dismissed because (1) the solvency statement conveyed no opinion about whether the Fund was in fact solvent, and in any event, could not rise to the level of a crime or an independent tort; (2) even if JPMC's acts were solely motivated by malice, it is entitled to the economic self-interest defense; and (3) the Fund has not sufficiently alleged facts that it suffered an actual loss due to such statement (*See e.g., Carvel Corp. v Noonan*, 3 NY3d 182 [2004][holding that defendant-franchisor's conduct in inducing plaintiff-franchisees' customers to buy defendant's ice cream did not constitute a crime or independent tort, and that absent a showing that defendant acted solely to hurt plaintiffs, defendant's motive in preserving its economic self-interest was a defense to a claim for tortious interference with prospective economic interest]; *Lobel v Maimondes Medical Center*, 39 AD3d 275, 277 [1st Dept 2007][holding that defendant's allegedly defamatory statement did not set forth grounds for a tortious interference claim, as it was clear that defendant's motivation was based on economic self-interest and not for the sole purpose of harming plaintiff]).

In response, Plaintiffs allege that Defendants acted with malice and Defendants' executives committed the independent tort of "defamation per se" by misrepresenting the Fund's

solvency (*See Ruder & Finn Inc. v Seaboard Surety Co.*, 52 NY2d 663, 670 [1981][“[w]here a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed”]; Restatement (Second) of Torts § 573 comment c (1977)(“[s]tatements concerning merchants that question their solvency or honesty in business” are defamatory per se). Moreover, Plaintiffs contend that defamation is an “independent tort” that supports a tortious interference claim, even if Defendants might have a defense based on economic self-interest. Such contention is valid. Indeed, it has been held that for a tortious interference of prospective business claim, a plaintiff must allege that “the conduct by defendant that allegedly interfered with plaintiff’s prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby” (*Jacob v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 [1st Dept 2004][emphasis added]; *Phoenix Capital Investments LLC v Ellington Mgmt. Group, LLC*, 51 AD3d 549, 551 [1st Dept 2008][same]). Also, despite Defendants’ contention that the solvency statement was only an expression of opinion and thus not actionable, such statement is “reasonably susceptible of defamatory connotation” (*Stapleton Studios, LLC v City of New York*, 26 AD3d 236, 237 [1st Dept 2006]).

In reply to the defamation issue (as an independent tort) raised by Plaintiffs, Defendants argue that the defamation claim was barred by the one year statute of limitations under CPLR § 215 (3),⁵ because the allegedly defamatory statement was made on September 18, 2006 and this action was commenced on November 13, 2007 (Defendants’ Reply Brief, p. 10). Defendants

⁵ CPLR 215 (3) provides, in relevant part, that an action to recover damages for slander, libel or false words causing special damages, is subject to a one year limitations period.

also argue that because the defamation claim was time-barred, under *Rosen v Hyundai Group (Korea)* (829 F Supp 41, 49 [ED NY 1993]), such claim “cannot provide the predicate ‘independent tort’ necessary to maintain a claim for tortious interference” (Defendants’ Reply Brief, p. 10). In *Rosen*, the court ruled that because the libel claim was barred by the one year limitations period, all state claims based on the alleged libel, including the claim of tortious interference with prospective economic advantage, should also be dismissed as time-barred.

During oral argument on the instant Motion to Dismiss, Plaintiffs were provided with an opportunity to further brief this court on the statute of limitations issue, because it was raised for the first time in Defendants’ Reply Brief in response to the defamation claim raised (as an independent tort in support of the tortious interference claim) in Plaintiffs’ Opposition Brief. In lieu of accepting the offer, Plaintiffs relied on two cases - *Riddell Sports Inc. v Brooks* (872 F Supp 73 [SD NY 1995]) and *H&P Research, Inc. v Integra Realty, Inc.* (258 AD2d 270 [1st Dept 1999]) - for the proposition of law that where a plaintiff seeks compensation for economic loss, as opposed to damages to reputation, the claim is governed instead by the three year limitations period under CLPR § 214 (Tr. 5/6/08, p. 11-14).

Plaintiffs’ reliance on the above-cited cases is misplaced. In *Riddell Sports*, supra, the federal court noted that under New York law, a claim for tortious interference with prospective economic advantage is subject to a three-year limitations period, but a claim for libel or slander is governed by the one-year statute (872 F Supp at 75). The federal court, however, also noted that “when recompense for economic loss is sought rather than damages for reputational injury,

all of these claims are governed by a three year limitations period” (*Id.*)(emphasis added).⁶ After considering the counter-plaintiffs’ allegations, the federal court found and concluded that the gist of such allegations was that “due to disparaging statements, general business opportunities and potential income were lost” (*Id.* at 76). Because the gravamen of the counter-plaintiffs’ allegations was injury to reputation, the federal court held that the one year limitations period applied, and dismissed the counterclaim as time-barred. As to the *H&P Research* case cited by Plaintiffs, *supra*, such case is inapplicable because it did not involve any discussion of a defamation claim in the context of a tortious interference of business opportunity claim (258 AD2d at 271).

Notably, the *Riddell Sports* court cited to *Noel v Interboro Mutual Indemnity Ins. Co.* (31 AD2d 54 [1st Dept 1968], *affd* 29 NY2d 743 [1971]) in support of its decision. In *Noel*, the First Department observed that, in applying a competing set of statutes of limitations, “[w]e look for the reality, and the essence of the action and not its mere name” (*Id.* at 54). In *Noel*, the court noted that the allegation which charged defendant with “willfully and maliciously issued, published and widely circulated a bulletin ... designed intentionally to discredit and harm plaintiff” and caused plaintiff to suffer “great loss and expense,” was a cause of action sounding in defamation, and plaintiff tried to circumvent the one-year limitations period for defamation by

⁶ The federal court did not cite, nor have Plaintiffs, any New York State case law in support of such statement. Indeed, in the footnote accompanying this statement, the court noted that “all of these claims” (such as injurious falsehood and abuse of process) were subject to the one year limitations period, other than the tortious interference with contract claim. *Id.*, fn. 1. Notably, in a recent decision, the federal court clarified that “all of these claims” referred to in *Riddell Sports* was meant for the claim of “prima facie tort,” which has a limitations period of three years. *McKenzie v Dow Jones & Co., Inc.*, 2008 WL 2856337 at * 3, fn. 34 (SD NY July 22, 2008). Plaintiffs here do not assert a claim sounding in prima facie tort.

mis-labeling it as “interference with economic relations” (*Id.* at 55)(*See also Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63 [1st Dept 1993][plaintiff could not avoid the one year limitations period on a defamation claim by casting it as one based on tortious interference with prospective business relations]; *Ramsay v Bassett Hosp.*, 113 AD2d 149 [3d Dept 1985][court ruled that complaint which defined damages in terms of injury to reputation should not be characterized as other torts, such as tortious interference of prospective contract or prima facie tort]; *Dobies v Brefka*, 273 AD2d 776, 778 [3d Dept 2000][court dismissed claim for tortious interference with economic advantage, because plaintiff based his claim for relief on the same substantive facts pleaded with respect to his defamation claim that alleged injury to reputation]).

In this case, Plaintiffs assert that the solvency statement regarding the Fund “was false and made with the intent to harm the Fund’s reputation so as to lower [Citadel’s] estimation of the solvency of the Fund, and to deter [Citadel] from completing [its] trade with the Fund” (Complaint, ¶ 73). They also assert that “the false statement caused injury to the Fund’s reputation and caused [Citadel] to withdraw from the trade that [it] had agreed earlier in the day.” (*Id.*). Plaintiffs also assert in their brief that they have “alleged an independent tort” of “defamation per se” and “the question of whether [Defendants} acted in part out of economic self interest is thus irrelevant” (Plaintiffs’ Opposition Brief, p. 13).

A fair reading of these assertions reflects, and Plaintiffs appear to have conceded, that Defendants’ conduct was not solely motivated by malice, and thus Defendants’ purported economic self interest could be a defense to the tortious interference claim. Plaintiffs also appear to have conceded that the viability of such claim is predicated on the independent tort of

defamation. Because Plaintiffs' defamation claim asserts that the Fund had suffered reputational injury (though they also allege that the Fund had suffered economic losses as a result), the tortious interference claim is not viable because the predicate claim of defamation is subject to the one year limitations period, which had already expired when this action was commenced. Therefore, the Fund's tortious interference claim should be dismissed.

With respect to Advisors' tortious interference claim, although the alleged defamatory statement referred to the solvency of "Amaranth," it is undisputed that such statement was meant to question only "the Fund's solvency and its honesty" (Plaintiffs' Opposition Brief, p. 11). Under New York law, it is essential in making out a prima facie case in defamation that the alleged defamatory statement be "of and concerning" plaintiff. (*Kirch v Liberty Media Corp.*, 449 F3d 388, 398 [2d Cir. 2006]).

Here, the alleged defamatory statement was obviously not of and concerning Advisors. Plaintiffs also assert that Advisors was the agent of the Fund (Plaintiffs' Opposition Brief, p. 1, 17).

However, under New York law, agents "cannot recover on the basis of interference with the transactions or business relationships for which they are serving as an agent" (*Kirch*, 449 F3d at 400; *Maruki, Inc. v Lefrak Fifth Ave. Corp.*, 161 AD2d 264, 268 [1st Dept 199][same]).

Because Advisors' tortious interference claim is derivative and duplicative of the Fund's claim, it is "too attenuated" as asserted against Defendants (*Kirch*, 449 F3d at 401). In addition, because the contemplated trade was between the Fund (not Advisors) and Citadel, and because Advisors has not alleged how the defamatory statement had actually interfered its own business

[* 17]

relation with Citadel, if any,⁷ Advisors' tortious interference with prospective economic advantage claim against JPMC should be dismissed.

Claims Under Connecticut Unfair Trade Practices Act

Plaintiffs argue that JPMC's conduct, as alleged in the complaint, "constituted a pattern and practice of unfair and deceptive acts or practices" (Complaint, ¶ 77, 89). Plaintiffs argue that JPMC's alleged conduct violated the Connecticut Unfair Trade Practices Act (CUTPA), C.G.S. § 42-110a *et seq.*

To prevail in a CUTPA action, a plaintiff must establish that the "defendant engaged in a prohibited act" (i.e. acted unfairly or deceptively) and plaintiff "suffered an injury" as a result thereof (*Stevenson Lumber Co.-Suffield, Inc. v Chase Assoc., Inc.*, 284 Conn 205, 214 [Conn 2007]). Notably, a CUPTA violation need not necessarily occur in Connecticut, but the violation must either be "tied to a form of trade or commerce *intimately associated* with Connecticut" (*Titan Sports, Inc. v Turner Broadcasting Systems, Inc.* 981 F Supp 65, 71 [D. Conn 1997]), or, where Connecticut's choice of law rules apply, the rules dictate that Connecticut law apply (*Uniroyal Chem. Co. v Drexel Chem. Co.* 931 F Supp 132, 140 [D. Conn 1996]).⁸ Further, a

⁷ Indeed, the complaint states, without mentioning or including Advisors, that "the Fund had an existing business relationship with Citadel." Complaint, ¶ 85. Also, the allegation in paragraph 2 of the complaint that "Defendants each understood that Advisors derived a substantial majority of its revenues and profits from its advisory relationship with the Fund" does not allege Advisors' own business relationship with Citadel, a required element for a tortious interference claim.

⁸ The first rationale, as expressed in *H&D Wireless Limited Partnership v Sunspot* (No. H-80-1026, 13 Conn L Trib No. 17, p. 22 [D Conn 1987]), is that CUTPA does not necessarily require that the violation occurred in Connecticut, as long as it is tied to trade or commerce intimately associated with Connecticut. The second rationale, based on *Bailey Employment System, Inc. v Hahn* (655 F2d 473 [2d Cir 1981]), is that CUTPA applies to conduct occurring outside of Connecticut where the choice of law rules require that Connecticut law apply.

plaintiff is not required to establish a consumer relationship as a predicate to maintain a CUTPA claim. *Macomber v Travelers Property and Casualty Corp.*, 261 Conn 620, 643 (Conn 2007).

In this case, Defendants argue that because all of JPMC's alleged unfair or deceptive acts (such as tortious interference of business and defamation) occurred outside Connecticut, and the only nexus with Connecticut is that Plaintiffs are residents of Connecticut (where their economic loss was felt), the CUPTA claim must be dismissed (*Victor G. Reiling Associates and Design Innovation, Inc. v Fisher-Price, Inc.*, 406 F Supp 2d 175, 199-201 (D Conn 2005)(after reviewing the "intimately associated" test and "choice of law" rules, court dismissed plaintiffs' CUTPA claim because all purportedly tortious acts of defendant were tied to its New York situs, and the relationship between the parties was centered in New York); *Excelsior Advertising, Inc. v Abbott*, 2007 WL 1875655 (D Conn June 27, 2007)(granting summary judgment dismissing CUTPA claim in favor of defendants who were residents of Connecticut, but tortious act occurred entirely outside of Connecticut and plaintiff was a New York corporation).

Plaintiffs contend that "CUTPA may apply even if some or all of Defendants' deceptive trade practices occurred outside of Connecticut" (Plaintiffs' Opposition Brief, p. 15). Plaintiffs rely on *Titan Sports, supra*, for support. Plaintiffs reliance on *Titan Sports* is misplaced. In that case, despite the defendants' claim that the unfair trade practices occurred at their principal place of business in Georgia, the court found that the defendants unfairly competed against the plaintiff, which has its principal place of business in Connecticut, by broadcasting defendants' television and pay-per-view programs in Connecticut, and that residents of Connecticut had called the defendants' 900-number hotline. Because of the defendants' conduct and other contacts in Connecticut, the court ruled that such nexus with Connecticut was sufficient to deny

defendants' motion to dismiss the CUTPA claim. *Titan Sports*, 981 F Supp at 72.⁹

In this case, Plaintiffs do not dispute Defendants' averment that JPMC's alleged misrepresentation or defamation of the Fund's solvency was not made in or from Connecticut, but was from JPMC's office in New York and directed towards Citadel which is located in Illinois. Plaintiffs also do not dispute Defendants' averment that any breach of contract or leak of trade information occurred in New York, because the Fund's commerce as well as the parties' relationship was centered in New York, and the Fund's portfolio derivative trades were made and cleared on various exchanges outside of Connecticut. Yet, Plaintiffs argue that because Defendants' executives and lawyers were in Plaintiffs' offices in Connecticut during the weekend of September 16-17, 2006, working on the Goldman deal, Defendants had access to Plaintiffs' business information, which "provided weight" to the false statement made by Defendants' executives (Messrs. Black and Winters) to Citadel's executive (Griffin) about the Fund's solvency (Plaintiffs' Opposition Brief, p. 19). In such regard, Plaintiffs argue that the alleged wrongful conduct of Defendants is "highly connected to Connecticut" (*Id.*).

Plaintiffs arguments are unpersuasive. First, the complaint does not allege that the presence of Defendants' executives in Plaintiffs' offices in Connecticut "provided weight" to the defamatory statement allegedly made by Defendants' executives to Citadel. Instead, a fair reading of the complaint alleges that Defendants' executives were in Connecticut to do due

⁹ The court noted that there was authority for the proposition that so long as the complaint alleges that the economic impact occurred in Connecticut, the plaintiff has stated a CUTPA claim. 981 F Supp at 72, fn. 5 (citations omitted). However, the same court subsequently observed that the cited cases in *Sports Titan* similarly involved other nexus with Connecticut, beyond the fact that a Connecticut plaintiff had suffered economic injury in Connecticut. See *Victor G. Reiling*, 406 F Supp 2d at 200-201, fn. 38 (collecting cases).

diligence in connection with the Goldman deal, and when the Goldman deal failed, causing Citadel to come in, Defendants allegedly derailed the Citadel deal by making the defamatory statement that damaged the Fund's reputation and caused economic loss. Moreover, the allegation that Mr. Griffin of Citadel "had reason to believe the aspersion cast by Defendant J.P. Morgan on the Fund's solvency precisely [sic] because he would have known that Defendants had been on the ground in Connecticut" and therefore "would have known that Mr. Black and Mr. Winters spoke with the benefit of the knowledge that their employees and lawyers had gained in Plaintiffs' offices" is speculative and conclusory (Pl Opp Brief p 19). In any event, Plaintiffs do not refute that the defamatory statement, i.e. the "unfair or deceptive" act or conduct, was made by Defendants in New York and communicated to Citadel in Illinois. At best, the fact that Defendants' executives were in Plaintiffs' Connecticut office implicates both New York and Connecticut, but does not satisfy Plaintiffs' claim that the "most significant relationship" choice of law rules mandate the application of CUTPA.¹⁰ (*Otis Elevator Co. v Factory Mutual Ins. Co.*, 353 F Supp 2d 274, 285-286 [D Conn 2005][most significant relationship test mandated application of Minnesota law even though plaintiff was located in Connecticut and injury occurred in Connecticut, but defendant was located in Minnesota and parties' relationship was centered in Minnesota]). Moreover, because Defendants' allegedly unfair and deceptive defamatory statement cannot be fairly characterized as tied to a form of trade of commerce

¹⁰ The "choice of law" rules in Connecticut and New York are similar. See *Stewart v World Wrestling Fed'n Entm't, Inc.*, 2005 WL 66890, at *1 (SD NY Jan. 11, 2005). In fact, both Connecticut and New York courts apply the "most significant relationship" test of Restatement (Second) of Conflicts of Laws, § 145. The test factors include: place where injury occurred; place where conduct causing injury occurred; residence or place of business of parties; and place where parties' relation is centered (*Id.*).

22]

“intimately associated” with Connecticut, CUTPA is inapplicable to this case.

Despite the foregoing, Plaintiffs contend that in this case, “it is New York choice of law principles that apply, and New York choice of law dictates application of substantive Connecticut law including CUTPA.” (Plaintiffs’ Opposition Brief, p. 16, citing to *Ackerman v Price Waterhouse* (252 AD2d 179, 192-193 [1st Dept 1998]), Plaintiffs contend that New York’s “interest analysis” test requires the “locus of the tort be determinative” (i.e. where plaintiff suffered the injury), and because Plaintiffs suffered the economic injury in Connecticut, CUPTA applies (*Id.*). This contention is without merit. As discussed above, the choice of law rules in New York and Connecticut are similar in that both jurisdictions apply the “most significant relationship” test. In addition, the court in *Titan Sports*, 981 F Supp 65, *supra*, has indicated that a plaintiff who asserts a CUPTA claim must plead and show that the defendant’s unfair and deceptive act has a “sufficient nexus” with Connecticut in order to survive a motion to dismiss. Here, Plaintiffs failed to plead or show that the defamatory statement, the primary basis of their claim that Defendants had acted unfairly and deceptively, has a “sufficient nexus” or was otherwise “intimately associated” with Connecticut. In light of the foregoing, Count Three and Count Five of the complaint alleging CUTPA violation, which are asserted by the Fund and Advisors¹¹ respectively, should be dismissed.

Unjust Enrichment Claim

In the complaint, Plaintiffs allege that JPMB was unjustly enriched from its transaction with the Fund, because the Fund allegedly received “overwhelmingly less than the value what

¹¹ As noted above, Advisors is admittedly the agent of the Fund. Thus, Advisors’ CUTPA claim can also be dismissed because such claim is duplicative or derivative of the Fund’s claim.

Defendant JPMB extracted from the Fund” (Complaint, ¶ 97-99). More specifically, the complaint alleges that the Fund paid JPMB more than \$2.2 billion to execute the trades with JPMB, as compared with the \$1.85 billion concession fee that the Fund would have been required to pay under the Goldman or Citadel deals, had the deals not been tortiously derailed by Defendants.

Defendants argue that the unjust enrichment claim is without merit because paragraph 4 of the Transfer Agreement stated that the purchase price paid by the Fund to JPMB was “fair and reasonable consideration for the Transfer.” Hence, Defendants argue that this claim should be dismissed because the Fund is foreclosed from challenging the fairness of consideration paid and received. In opposition, Plaintiffs contend that the \$2.2 billion price paid by the Fund under the Transfer Agreement could have been achievable at a price of \$1.85 billion days earlier, had Defendants not tortiously derailed the Fund’s deals with Goldman and Citadel. In sum, Plaintiffs contend that, despite the acknowledgment of “fair and reasonable consideration for the Transfer” under the Transfer Agreement, they should be “entitled to prove that Defendant [JPMB] used wrongful means to unjustly enriched itself” (Plaintiffs’ Opposition Brief, p. 21).

To prevail on a claim of unjust enrichment in New York, a plaintiff must establish that the defendant benefitted at the plaintiff’s expense, and that equity and good conscience require restitution (*Kaye v Grossman*, 202 F3d 611, 616 [2d Cir 2000]). The law in Connecticut is similar (*Vertex, Inc. v City of Waterbury*, 278 Conn 557, 573 [Conn 2006][plaintiff must prove that defendant unjustly did not pay plaintiff for the benefit, and defendant’s failure of payment was to plaintiff’s detriment]). Further, unjust enrichment is a quasi-contractual remedy, and such a claim is usually unavailable when a valid written contract governs the subject matter exists

[* 24]

(*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]).

Here, Plaintiffs allege that Defendants had tortiously derailed the Goldman and Citadel deals. Yet, they do not allege that the Transfer Agreement, which reflected the parties' mutual consent as to the purchase price paid by the Fund to JMPB for its assumption of the risk associated with the Fund's entire energy portfolio, was not negotiated in good faith and at arms-length. Also, they do not dispute Defendants' assertion that comparing the prices paid under the defunct Goldman deal and the Transfer Agreement would be specious, because the former only involved the sale of most (but not all) of the Fund's remaining gas positions, while the latter involved the sale of the Fund's entire energy portfolio, not just natural gas, but also power, oil and coal, and as such, the price comparison is not entirely meaningful. Further, Plaintiffs do not allege that Defendants had somehow manipulated the energy trading market during the relevant time period, such that the price paid by the Fund under the Transfer Agreement could have been paid at a lower price days earlier.

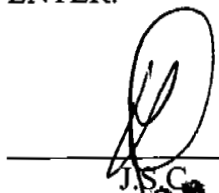
Based on the foregoing, particularly in light of the fact that the parties acknowledged that the price paid by the Fund under the bargained-for Transfer Agreement was "fair and reasonable consideration for the Transfer," dismissal of the unjust enrichment claim is appropriate under the facts of this case (*See Granite Partners, L.P. v. Bear, Stearns & Co., Inc.*, 17 F Supp 2d 275, 312 [SD NY 1998]["[t]he law is clear that the payments made pursuant to the express terms of a contract cannot be recovered via unjust enrichment theory"]; *Harris Trust & Savings Bank v John Hancock Mutual Life Insurance Co.*, 767 F Supp 1269, 1284 [SD NY 1991]["[b]argained-for benefits cannot be deemed to unjustly enrich a contracting party"], *affd in part and revd in part* 970 F2d 1138 [2d Cir. 1993]).

Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted with respect to the Second, Third, Fourth, Fifth and Sixth causes of action of Plaintiffs' complaint, and is otherwise denied.

Dated: October 28, 2008

ENTER:



J.S.C.
HON. RICHARD B. LOWE, JR.

FILED

NOV 10 2008

NEW YORK
COUNTY CLERK'S OFFICE