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

SOLUS ALTERNATIVE ASSET MANAGEMENT LP, Plaintiff/ Counterclaim Defendant,	Index No. 652341/2012
-against-	Hon. Saliann Scarpulla
PERRY CORP. d/b/a PERRY CAPITAL, Defendant/ Counterclaim Plaintiff.	Motion Seq. No. 4

MEMORANDUM OF LAW IN SUPPORT OF
PERRY CAPITAL'S MOTION FOR SUMMARY JUDGMENT

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Perry Corp. d/b/a Perry Capital ("Perry") moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint filed by Solus Alternative Asset Management LP ("Solus") and granting Perry declaratory relief as requested in its Counterclaim.

PRELIMINARY STATEMENT

Solus unsuccessfully negotiated with Perry and Deutsche Bank over a potential transaction in which Solus would take over Perry's side of a contingent $130 million trade with Deutsche Bank. In June 2012, after months of discussions and numerous draft contracts, Perry told Deutsche Bank and Solus that it would no longer pursue the proposed deal. Solus responded by claiming that Perry had orally agreed to a binding, two-party "trade" two months earlier, on April 10, 2012. Before Perry ended the three-party negotiations and Solus decided to sue, however, Solus's books showed no record of any such "trade."

That is not surprising. There was no "April 10 trade." The evidence is conclusive that on, before, and after April 10, Perry and Solus discussed a transaction that required Deutsche Bank's agreement to material and unresolved terms. It is undisputed, moreover, that on April 10 Perry's representative told his Solus counterpart that any potential deal was "subject to documentation" by the parties. It is further undisputed that, on April 10, Perry and Solus discussed material terms on which they did not reach an agreement. As a matter of law, therefore, Solus cannot establish a meeting of the minds on any "April 10 trade."

In any event, Solus has no injury. The measure of damages for the breach of a contract to sell a financial asset is the difference between the alleged contract price and the asset's market value on the date of the alleged breach. [redacted], and Solus's own books, establish that the market value of the relevant asset was *lower* than the alleged "contract price" when Perry ended its negotiations with Deutsche Bank and Solus.

With no actual damages to speak of, Solus asks this Court to order specific performance of its purported trade with Perry. It wants a court-ordered transfer of the asset so that it can capture any market appreciation that occurred *after the alleged breach*. But Solus cannot use litigation as a free option on a financial asset's future upside. Rather, specific performance is available only when an asset cannot be reliably valued. Solus *did* value the asset, however, and admits that comparable, "benchmark" assets trade in the market. When the parties' negotiations ended, Solus could have invested (and did invest) in those available substitutes.

STATEMENT OF FACTS

A. Participation Interests In The Kingate Claims Against The Madoff Estate

Since Bernard L. Madoff Investment Securities ("BLMIS") was revealed to be a massive Ponzi scheme in late 2008, thousands of its investors have been clamoring to recover their investments. Meanwhile, a liquidation trustee and the Department of Justice have been collecting funds for distribution to jilted BLMIS investors.

Kingate Global Fund Ltd. and Kingate Euro Fund Ltd. ("Kingate") were "feeder funds" that invested billions of dollars in BLMIS. SMF ¶¶ 1, 2. By early 2011, Kingate wanted to cash out its BLMIS claims. It was hardly alone. Investment banks and hedge funds had created "a multibillion-dollar market" for Madoff claims like Kingate's. Michael Rothfeld, *Madoff Claims Lure Banks*, WALL STREET JOURNAL (June 17, 2011). In August 2011, Kingate agreed to sell its \$1.624 billion BLMIS claims (the "Kingate Claims") to Deutsche Bank. SMF ¶ 3. At the same time, Deutsche Bank agreed to sell slices of that transaction—called "participations"—to other entities. Perry-managed funds agreed to purchase \$195 million in participations for 66.5% (SMF ¶ 6); Solus-managed funds agreed to purchase \$25 million at the same price (SMF ¶ 10).

Perry's and Solus's transactions with Deutsche Bank were promptly evidenced by written trade confirmations signed by both parties. SMF ¶¶ 6–12. The trade confirmations stated that

Perry's and Solus's purchases were subject to Deutsche Bank's successful acquisition of the Kingate Claims from Kingate. SMF ¶¶ 9, 12. As of the date of this brief, Deutsche Bank still has not acquired the Kingate Claims. SMF ¶ 16. Indeed, for most of the last two-and-a-half years, that end result has been doubtful. *See* Dan Strumpf & Matt Wirz, *Deal Over Madoff Funds Collapses*, WALL STREET JOURNAL (Nov. 21, 2013).

B. Perry's And Solus's Initial Discussions About A Potential Transaction

In March 2012, two Deutsche Bank traders responsible for the Kingate transactions—Scott Martin and C.J. Lanktree—left to become hedge-fund managers at Solus. Martin and Lanktree had signed Deutsche Bank's trade confirmation with Perry (SMF ¶ 7), and Martin had signed Deutsche Bank's confirmation letter with Kingate (SMF ¶ 4). Before they left for Solus, however, Kingate sued Deutsche Bank. Kingate claimed that Deutsche Bank was reneging on Martin's confirmation letter by not executing final documentation. SMF ¶ 18. Deutsche Bank counterclaimed that Martin's confirmation letter was "not a firm, binding, irrevocable agreement" because, "consistent with longstanding industry practice," it was expressly "subject to the negotiation and execution" of additional documentation. SMF ¶¶ 21, 23.

With months or years of litigation on the horizon, Perry told Deutsche Bank it wanted to exit its participation interests in the Kingate Claims (SMF ¶ 28), but Deutsche Bank responded that it still considered Perry to be on the hook under its trade confirmations (SMF ¶ 27). Martin and Lanktree were privy to those confidential communications while still at Deutsche Bank (SMF ¶¶ 28, 29) and shortly after he started at Solus, Lanktree called Perry trader Robert Carroll to propose that Solus take over Perry's participation interests. SMF ¶ 31. Lanktree recalls Carroll reiterating to him that Perry needed to "exit" its participation interests with Deutsche Bank. SMF ¶ 35. Carroll remembers, more specifically, explaining to Lanktree that Perry "needed a full release from Deutsche Bank" and "needed [Solus] to step in to [Perry's] shoes" to "face Deutsche Bank" so that Perry could "rip up [its] ticket" with Deutsche Bank. Aff. of Kathryn S. Zecca Ex. ("Zecca Ex.") 13 (Carroll Tr.) 115–17.

On March 29, 2012, Lanktree confirmed to Carroll that Solus was willing to work towards a potential transaction in which Solus would "take on litigation risk"—not just the inherent investment risk—that Perry had on the Kingate Claims. SMF ¶ 39. The structure of such a transaction would be unusual, and so Lanktree reassured Carroll that Solus was willing to negotiate "a couple of different structures as [Perry] see[s] fit." *Id.*

Before crossing those bridges, however, Solus wanted to settle on the price it would have to pay Deutsche Bank if it took over Perry's participation interests. Solus initially said it was willing to step into Perry's participation interests at least 4 cents below the price Perry had agreed to pay Deutsche Bank. SMF ¶ 36. Then, on March 29, Solus said it was willing to take over the participation interests at "1.5 pts below original purchase." SMF ¶ 39. Carroll's marching orders, however, were to get Perry out of its participation interests *completely*—it had to be as if Perry "were never there." SMF ¶ 34. Carroll thus rejected any transaction in which Perry would still be responsible to Deutsche Bank for any part of the original price.

On April 10, Solus acceded to that demand. Lanktree told Carroll that Solus would be willing to obtain Perry's participation interests at the original price: 66.5%. SMF ¶ 41. Lanktree also said that Solus would offer to pay Deutsche Bank an extra 1/8% so that Deutsche Bank would earn a profit from participating in the transfer. SMF ¶ 43. In a Bloomberg message, Carroll told Lanktree that Perry was willing to work towards putting together such a transaction. SMF ¶ 42. It is undisputed that Carroll told Lanktree, on April 10, that the potential transaction was still "subject to documentation" among the parties. SMF ¶ 44. They agreed to get their lawyers to work on negotiating that documentation. SMF ¶ 50.

At that point, the parties still needed to resolve material terms. Deutsche Bank would have to agree that Perry could "exit" its participation interests, and that Solus could step in and "take on [Perry's] litigation risk." As Lanktree testified, Solus could not stand in Perry's shoes and face Deutsche Bank without Deutsche Bank's agreement. SMF ¶ 45. When Lanktree and Carroll talked on April 10, however, neither of them had even *approached* Deutsche Bank yet. SMF ¶ 55. Lanktree also proposed material terms to Carroll on April 10 to which Carroll expressly declined to agree. In particular, Lanktree asked Carroll whether Perry would agree to "pay its portion" of the Kingate litigation fees that Deutsche Bank had already incurred. SMF ¶ 46. He also asked Carroll whether Perry would agree to make a representation leaving it liable for any "bad acts" while it had held the participation interests. SMF ¶ 47. It is undisputed that Carroll said he would have to get back to Solus on each of those proposed terms. SMF ¶¶ 46, 48.

C. Potential Transaction Proposed To Deutsche Bank

Once Solus had agreed to obtain Perry's participation interests at 1/8% over their original price, Lanktree and Carroll proceeded to pitch the proposed transaction to Deutsche Bank in separate, recorded phone calls. "The purpose of these calls," according to Lanktree, was "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*." SMF ¶ 52; Zecca Ex. 20 (Lanktree Aff.) ¶ 16 (emphasis added).

Lanktree told Carroll that he and Martin would take the first crack at approaching their former Deutsche Bank colleagues. SMF ¶¶ 53, 54. Accordingly, minutes after Lanktree and Carroll got off the phone on April 10, Martin called a Deutsche Bank trader. On that call, Martin reminded his former colleagues that Perry had "a commitment to Deutsche Bank to purchase 195 million Kingate at 66½," and told them that Solus was proposing "to take that commitment off [Perry's] hands" so that Solus would "have [Perry's] obligation." SMF ¶ 57. Martin proposed that Deutsche Bank agree to "just let [Perry] out" by "tear[ing] up the [August 2011 trade] ticket" it had "with them." SMF ¶ 58. In place of the terminated trade, Deutsche Bank would "then write the [trade] ticket with [Solus]." *Id.*

Those dual agreements by Deutsche Bank—to terminate its trade with Perry and to enter into a new trade with Solus—were, Martin said, how Solus proposed to "just step in [Perry's] shoes." *Id*. Martin emphasized that Solus wanted Deutsche Bank's "approval" of the proposed deal "because we want to get Perry out of the middle." SMF ¶ 60. He said that he hoped Deutsche Bank wanted the same thing. SMF ¶¶ 56, 60.

[redacted] SMF ¶ 61. Without sharing that [redacted] response, Lanktree told Carroll that Perry should alert its Deutsche Bank salesperson to the proposal. Carroll did so, and told 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." SMF ¶ 64. Carroll believed Deutsche Bank's agreement to such a transaction would come quickly, and so after he got off the phone with Deutsche Bank he asked his back office to "[r]ip up Madoff ticket [with Deutsche Bank] and take off sheets." SMF ¶ 68. Upon that news, others at Perry reported internally that Carroll had "[f]ound a buyer to step into our place and face [Deutsche Bank]." SMF ¶ 71. But that deal was not done—far from it—and accordingly Solus did not book any purchase from Perry on April 10. SMF ¶¶ 72, 157.

D. Two Months Of Negotiations Do Not Result In A Deal

As it turned out, Deutsche Bank's agreement to the potential transaction did not come quickly—indeed, it never came at all. On April 11, Carroll asked his Deutsche Bank salesperson whether she thought the proposed transaction was "all set," and she said "[n]o," it was not. SMF ¶ 73. Deutsche Bank was still "looking through the docs" to determine whether it could "do whatever needs to be done" to agree to the proposed deal. *Id*. By April 16, Lanktree was complaining to Carroll that he had "called DB 4 times" and still not received a draft trade confirm that it sought from Deutsche Bank for the new trade between them. SMF ¶ 75. At Lanktree's urging, Carroll put in another call into his Deutsche Bank salesperson, and she told him, once again, that Deutsche Bank was still "looking at the documentation" and trying to figure out if it had "any issues" with the proposed deal. SMF ¶ 76.

Two days later, Perry attempted to move negotiations along by sending Deutsche Bank "a draft of a proposed Termination and Release Agreement" between Perry and Deutsche Bank. SMF ¶ 77. In it, Deutsche Bank would have agreed to "terminate" and "cancel" its trade with Perry, while "releas[ing] and forever discharg[ing] Perry" for "any and all" liabilities associated with that trade. *Id*. Solus would not have been a party to that proposed agreement. *Id.*

[redacted] SMF ¶ 78. A week later, Perry's salesperson at Deutsche Bank explained to Perry that the proposed deal [redacted] SMF ¶ 80. Later that day, Deutsche Bank's salesperson explained to Perry that Deutsche Bank had already told Solus the terms on which it would be comfortable agreeing to a transaction. She told Perry to discuss Deutsche Bank's proposed terms with Solus, and to "figure out if that works for you." SMF ¶ 82.

As a result of those conversations, Perry, Solus, and Deutsche Bank began negotiating a three-party agreement. Perry sent Solus a draft of the new proposed agreement on April 30 so that those two parties could "be on the same page before the draft goes to [Deutsche Bank]." SMF ¶ 86. They exchanged four more drafts over the next ten days. SMF ¶¶ 87–102. Those drafts, and the others still to come, reflected the careful negotiation of numerous, material terms:

the scope of releases, the scope of warranties, and even the date as of which Solus would be agreeing to step into Perry's participation interests. *Id.* A redline of the parties' rounds of edits is a veritable rainbow of their back-and-forth. Zecca Ex. 105. Yet every draft agreement kept some critical things constant: *Every* draft agreement required Deutsche Bank's agreement; *every* draft agreement required Deutsche Bank to agree to release Perry from claims and liabilities relating to its participation interests in the Kingate Claims; and *every* draft agreement provided that Solus would step into Perry's participation interests only "[u]pon execution and delivery" of a final written contract among Perry, Solus, and Deutsche Bank. *See* SMF ¶¶ 133, 134, 140.

On May 10, Perry sent the fifth draft agreement to Deutsche Bank. At Deutsche Bank, the new proposal was elevated to the trading desk's general counsel [redacted] SMF ¶ 103. A week later, Deutsche Bank again refused to agree to Solus's and Perry's proposal. Solus's lawyer reported to Perry's lawyer that Deutsche Bank simply did not want to "stand in the middle" of the potential deal. SMF ¶ 104.

At that point, having been twice thwarted by Deutsche Bank, the negotiations toward a proposed deal stalled. SMF ¶ 106. On May 30, representatives from Perry and Deutsche Bank convened a conference call to assess the status of their August 2011 trade confirmations and the proposal from Perry and Solus. Perry's general counsel reiterated what Martin and Carroll had each explained to Deutsche Bank on April 10: The proposed transaction was one in which "the original trade between Perry and Deutsche would be torn up, and Solus steps into Perry's shoes" so that Solus would "be on the other side of that trade." SMF ¶ 111. He explained to Deutsche Bank that a two-party deal between Perry and Solus was a nonstarter. SMF ¶ 113. That would "make[] no sense" for Perry, he explained, because of the "ongoing litigation potential." *Id.* Under the circumstances, trading away the upside while retaining litigation risk would "make no sense" for Perry as a fiduciary of its investors. *Id.* [redacted] SMF ¶ 112. [redacted] SMF ¶¶ 112, 114.

The next day, May 31, Solus's counsel told Perry that Solus had spoken to Deutsche Bank and wanted to "mark up" yet another draft of the proposed agreement. SMF ¶ 115. Perry suggested a change to that mark-up, and told Solus's counsel it could send the draft to Deutsche Bank if it wanted to. SMF ¶ 119. Without copying Perry, Solus did so on June 1. SMF ¶ 121.

There had been no further negotiations when Perry decided it had had enough. Having never heard from Deutsche Bank since the May 30 call that it had changed its mind, Perry's portfolio manager took a fresh look at his portfolio. He decided that the participation interests could have an upside that made the economics of retaining those interests a compelling reason to end the unsuccessful negotiations. SMF ¶ 123. The current market value of Madoff claims had not improved, however. Indeed, Solus had just *marked down* its own Kingate claims to 66.25%—a price *lower* than the one it had discussed with Perry on April 10. SMF ¶ 181.

On June 5, Perry's counsel called Deutsche Bank, and then Solus's counsel, and told them that Perry was putting "pens down" on the proposed transaction. SMF ¶ 124. After Perry withdrew from the negotiations, Deutsche Bank sent Solus (but not Perry) "initial comments" on the June 1 draft, and said it was "still being reviewed by general counsel internally." SMF ¶ 126. It is undisputed that no party ever signed any of the draft agreements.

E. Solus Demands That Perry Perform The "April 10 Trade," Backdates An April 10 "Trade Ticket," And Sues Perry

After Perry ended its negotiations with Solus and Deutsche Bank, Solus insisted that it had a binding, two-party "trade" with Perry all along. It demanded that Perry proceed with that purported "trade," and Perry disputed Solus's mischaracterization of their negotiations. SMF ¶¶ 147–48. Solus decided to sue Perry, but at that point it confronted an inconvenient obstacle to its newly minted position: It had never booked *any* "trade" with Perry. SMF ¶¶ 72, 157. If Solus *had* entered into a binding trade with Perry on April 10, federal law [redacted] would have required it to create and maintain a "memorandum" of that trade in its books and records—a document colloquially called a "trade ticket." *See* 17 C.F.R. § 275.204-2(a)(3); SMF ¶ 158. Solus had no such trade ticket for any "April 10 trade" with Perry. For the months ending April 30 and May 31, accordingly, Solus had calculated its funds' net asset value (NAV) without accounting for the $130 million obligation that Solus was now planning to claim it had purchased from Perry back on April 10. SMF ¶ 157. By contrast, Solus *had* recorded its August 2011 purchase of the Kingate Claims from Deutsche Bank the day it happened, and *had* ever since calculated its funds' NAV by accounting for that booked trade. SMF ¶ 14.

On June 27, therefore—with litigation against Perry on the horizon—C.J. Lanktree created a trade ticket purporting to evidence Solus's purchase of Perry's participation interests *two-and-a-half months earlier*. SMF ¶¶ 153–56. For good measure, Lanktree backdated the new trade ticket for entry into Solus's books and records by handwriting a "[t]ime [e]xecuted" of April 10, 2012. SMF ¶ 155. At Lanktree's direction, [redacted] entered his June 27 trade ticket into Solus's books effective as of April 10, 2012. SMF ¶¶ 156, 157.

Just six days later, Solus filed this lawsuit. Doc. 1 ("Cplt."). Perry counterclaimed for a declaration that there was no "April 10 Trade." Doc. 6. Before disclosure had commenced, Perry moved for summary judgment on the ground that even just the pleadings and primary documents conclusively demonstrated that the parties had not entered into a binding agreement on April 10. Docs. 19 & 20. Solus cross-moved for summary judgment, and in the alternative asked that it be permitted to obtain disclosure before any ruling on the merits of its claims. Docs. 42 & 43. On April 10, 2013, Justice Kapnick granted Solus's request to obtain disclosure, and denied both motions for summary judgment. Doc. 93. Since disclosure is now complete, Perry moves for summary judgment on the full record.

ARGUMENT

Perry can "establish its defense [and counterclaims] sufficiently to warrant a court's directing judgment in its favor as a matter of law." *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 967 (1988). "In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, *i.e.*, whether there was a 'meeting of the minds' regarding the material terms of the transaction. The issue is generally one of law, properly determined on a motion for summary judgment." *Cent. Fed. Sav., F.S.B. v. Nat'l Westminster Bank, U.S.A.*, 574 N.Y.S.2d 18, 19 (1st Dep't 1991) (citation omitted). Moreover, breach-of-contract claims are properly dismissed where the plaintiff cannot prove "damages resulting from defendant's breach," *Haber v. Gutmann*, 882 N.Y.S.2d 780, 782–83 (3d Dep't 2009), and where it is not entitled, as a matter of law, to the equitable remedy of specific performance, *Sansol Indus., Inc. v. 345 E. 56th St. Owners, Inc.*, 714 N.Y.S.2d 472, 472–73 (1st Dep't 2000).

I. PERRY IS ENTITLED TO SUMMARY JUDGMENT ON ALL COUNTS BECAUSE IT HAD NO APRIL 10 TRADE WITH SOLUS

Solus cannot establish that it had a two-party trade with Perry on April 10, 2012. "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." *Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp.*, 93 N.Y.2d 584, 589 (1999). Solus's undisputed admissions and communications show that, from late March through early June 2012, it unsuccessfully negotiated a bespoke transaction with Perry and Deutsche Bank. For nearly two months *after* the alleged trade, those three parties discussed a potential deal, and at all times made such a deal subject to their final, written agreement. They exchanged numerous draft contracts and negotiated over material terms in almost every paragraph. Some of those terms, Solus admits, were ones that Perry refused to agree to when Solus proposed them on April 10. Most importantly, there is no dispute that Solus, Perry, and Deutsche Bank had never executed any agreement among them when the negotiations ended in early June.[1]

A. Deutsche Bank's Agreement Was Essential To The Proposed Transaction And Was Not Secured At The Time Of The Purported "Trade"

The only potential transaction on the table when Solus talked with Perry during March through June 2012 was one that required Deutsche Bank's participation and agreement. From the very start, Perry told Solus that its goal was to "exit[]" an existing trade with Deutsche Bank. SMF ¶ 35. And two of Solus's portfolio managers had been privy to Perry's confidential communications with Deutsche Bank on that score. Accordingly, Solus told Perry it would be willing to step into that trade and "take on [Perry's] litigation risk" from Kingate's lawsuit against Deutsche Bank. SMF ¶ 39. Perry, Solus, *and Deutsche Bank* then spent nearly two months negotiating the terms on which Perry would exit its Deutsche Bank trade and Solus would step into it. The three parties had not reached any agreement, however, when Perry withdrew from the negotiations on June 5, 2012. That should have been the end of the matter.

In its Complaint, however, Solus manufactures an "April 10 trade" with Perry out of their consensus on the price for the potential transaction they would each propose to Deutsche Bank

[1] In addition to defeating Solus' contract claims (Counts I & II), the lack of any enforceable agreement between Perry and Solus also defeats Solus's claims (Counts III and IV) for breach of a purported duty to negotiate in good faith. The duty to negotiate in good faith arises only from a binding contract that contemplates the need to further negotiate immaterial terms. The claims "arise from the same facts" and "seek identical damages," and so they are duplicative of Solus's breach-of-contract claims and are "properly dismissed." *See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 894 N.Y.S.2d 47, 49–50 (1st Dep't 2010).

later that day. For a couple of weeks leading up to April 10, Solus and Perry had haggled over whether Solus would be willing to take over Perry's trade with Deutsche Bank at its original cost, or whether it would do so only at a discount (leaving Perry obligated to Deutsche Bank for the difference). On April 10, Solus confirmed that it was willing to take over Perry's trade with Deutsche Bank at its original cost (66.5%), and that it would offer to pay Deutsche Bank an extra eighth of a point as compensation for participating in the transaction.

That was not a "trade" between Solus and Perry. The work of proposing the potential transaction to Deutsche Bank, and negotiating with it over terms, still lay ahead. Just minutes after their April 10 discussions, in fact, Solus and Perry placed separate, recorded phone calls to Deutsche Bank about the proposed deal. Those call recordings could hardly be clearer evidence that Solus and Perry had in mind a potential transaction that was still very much unfinished and that required Deutsche Bank's agreement. Solus asked Deutsche Bank to agree to "tear up" its trade with Perry, and to agree to "write" a new trade with Solus. SMF ¶ 58. Solus told Deutsche Bank that it needed Deutsche Bank's agreement because that was the only way "to get Perry out of the middle." SMF ¶ 60. If Deutsche Bank agreed to let Perry out, Solus explained, Solus would agree to take on an obligation *to pay Deutsche Bank* a new "purchase price" of 66 and 5/8. SMF ¶ 59. Perry likewise called Deutsche Bank to alert it to the same potential transaction. Until these calls—which came after the purported "trade"—Deutsche Bank was not even *aware* of this proposal. SMF ¶ 55. [2] It is undisputed that Deutsche Bank declined to agree to the proposed transaction on April 10 (SMF ¶ 61)—and that it repeated that message to Solus and Perry at every turn in the days and weeks to come (*see* SMF ¶¶ 73, 76, 80, 82, 104, 112–14).

[2] Later on the call, Lanktree told a salesperson that "[Solus] booked the trade date as of a little bit [ago]." Zecca Ex. 23 at 10–11. That was untrue when he said it; Solus did not book any transaction until eleven weeks later, after it had decided to sue Perry. SMF ¶¶ 147, 153.

Every draft agreement circulated among Perry, Solus, and Deutsche Bank reflected a transaction to which Deutsche Bank was a necessary party. Tellingly, Solus was *not even a party* to the first draft agreement—a "Termination and Release Agreement" between only Perry and Deutsche Bank. SMF ¶ 77. Solus, for its part, had been haranguing *Deutsche Bank* to send it a draft "confirm" for the "new participation" it had requested on April 10. SMF ¶¶ 52, 74–75. In late April, the three parties restructured the proposed transaction to put Perry, Solus, and Deutsche Bank on the same draft contract. Each one of the eight drafts thereafter required Deutsche Bank's execution, provision of releases, and agreement to other provisions. SMF ¶¶ 133, 134, 135, 138, 141, 144. And none of these numerous draft agreements referred back to any "April 10 trade" between Solus and Perry that they supposedly "memorialized." SMF ¶ 145.

During their unsuccessful negotiations with Deutsche Bank, neither Solus nor Perry ever booked any April 10 "trade" between them. SMF ¶¶ 70, 72, 157. Solus booked such a "trade" only on June 27, and then backdated it *eleven weeks* to be effective "as of" an April 10 "trade date." By then, however, Perry had already withdrawn from the three-party negotiations, and Solus had already sent a demand letter and decided to bring this lawsuit (which it filed six days later). By contrast, Perry's books after April 10 reflected—albeit prematurely—that it was ripping up its existing conditional trade with Deutsche Bank. After negotiations ended and Solus sued, Perry reinstated that unfunded commitment to its books.

Notwithstanding the overwhelming evidence of an unsuccessful, three-party negotiation, Solus claims it had a "trade" with Perry all along—to which Deutsche Bank's agreement was neither material nor necessary. As Solus now sees it, nothing mattered to any potential "trade" but its price; everything else would be dictated to the parties by what Solus calls "industry standard" terms. The most that can be said for that litigating position, however, is that it might not have mattered *to Solus* whether Deutsche Bank agreed to let Perry to "exit" their existing trade. It also might not have mattered *to Solus* whether Perry obtained a release of its "litigation risk" on the existing trade. To be sure, *Solus* might have been happy if Perry simply transferred the economics of its Deutsche Bank trade to Solus and otherwise stayed in the middle of it.

The evidence shows, however, that that is not the transaction Perry discussed with Solus, or the one they both proposed to Deutsche Bank on April 10. There is uncontroverted evidence, moreover, that Perry's exit and release from its Deutsche Bank trade was its primary goal. *See* SMF ¶¶ 34, 35, 39, 44, 45, 52, 56–60, 64, 67, 77, 81, 111–14. Even if Solus truly misunderstood this merely to be Perry's "preferred structure" for a potential transaction (Zecca Ex. 20 (Lanktree Aff.) ¶ 16), that mistaken impression cannot serve as the basis of a binding contract. *Cf. Gessin Elec. Contractors, Inc. v. 95 Wall Assocs., LLC*, 903 N.Y.S.2d 26, 28 (1st Dep't 2010) (no contract where "parties understand the contract's material terms differently").

B. The Potential Transaction Was Subject To Its Three Parties' Written Agreement To All Terms

Solus's "April 10 trade" claim fails for another reason. Every indication in the record is that Perry did not intend to be bound until it reached a written agreement to all material terms with all three parties. Perry expressed that intention to Solus on April 10, and it was reflected in every one of the draft contracts that circulated among the three parties. "When parties do not intend to be bound until their agreement is reduced to writing and signed, there is no contract in the interim." *Chatterjee Fund Mgmt., L.P. v. Dimensional Media Assocs.*, 687 N.Y.S.2d 364, 365 (1st Dep't 1999); *see also Scheck v. Francis*, 26 N.Y.2d 466, 469–70 (1970); *Jordan Panel Sys. Corp. v. Turner Const. Co.*, 841 N.Y.S.2d 561, 562, 565 (1st Dep't 2007).

1. Solus admits that Perry told it—on April 10—that any potential transaction was "subject to documentation." SMF ¶ 44. Courts regularly hold that such an "express reservation"

is a clear manifestation that a party does not intend a binding oral agreement. *Ciaramella v. Reader's Digest Ass'n, Inc.*, 131 F.3d 320, 324 (2d Cir. 1997); *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir. 1985). In *Chatterjee*, for example, the parties had reached a "written summary of intention" to complete a transaction, but stated that their deal was still subject to the "negotiation of a definitive agreement and documentation." 687 N.Y.S.2d at 365. The First Department affirmed summary judgment against a breach-of-contract claim because that "clear language" proved the parties "d[id] not intend to be bound until their agreement [was] reduced to writing and signed." *Id.* There was "no contract in the interim," the court explained, "even if the parties ha[d] orally agreed upon all the terms." *Id.*; *see also Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 894 N.Y.S.2d 47, 50 (1st Dep't 2010) ("extensive" term summary not binding where parties' "references to future definitive documentation" had "clearly expressed an intent not to be bound until those documents were actually executed").

That is settled New York law. In its pleadings, Solus denied that Perry told it that any transaction was "subject to documentation." Zecca Ex. 31 ¶ 22. But Lanktree has since testified that Carroll said exactly that during the April 10 call that Solus now claims was a "trade." SMF ¶ 44. Lanktree asserts, however, that he understood Carroll merely to be observing that nearly *all* transactions, including oral trades, are eventually written down. Zecca Ex. 9 (Lanktree Tr.) 189. Carroll testified, however, that when he told Lanktree their discussions were "subject to documentation," he meant that "there was no transaction" until Deutsche Bank had signed an agreement to release Perry from their existing trade. Zecca Ex. 13 (Carroll Tr.) 57.

Perry's "subject to documentation" reservation was entirely reasonable in these circumstances. Perry had never traded with Solus, a competing hedge fund with which Perry had no established relationship. SMF ¶ 32. It is understandable, therefore, that the parties would not intend to bind themselves to a $130 million transaction until they had executed a final agreement on *all* material terms. *See, e.g.*, *Shearson Lehman CMO, Inc. v. TCF Banking & Sav., F.A.*, 710 F. Supp. 67, 73 (S.D.N.Y. 1989) ("With close to $21 million to change hands . . . 'a requirement that the agreement be in writing cannot be a surprise to anyone.'") (quoting *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984) (applying New York law)).

In any event, Solus's mischaracterization of Perry's words was decisively rejected in *Angelo, Gordon & Co. v. Dycom Industries., Inc.*, No. 04 Civ. 1570 (RMB), 2006 WL 870453 (S.D.N.Y. Mar. 31, 2006). In that case, the parties had agreed on a price of 75% for the sale of $39.5 million in trade claims. They specified, however, that any transaction was "subject to execution of customary documentation for the sale of trade claims of debtors in bankruptcy." *Id.* at *8. Like Solus here, the plaintiff in *Angelo, Gordon* called that language "boilerplate," and asked the court to ignore it and enforce a "trade." *Id.* at *7. The court refused, however, and held that the statement reflected the parties' "express reservation" of their intent not to be bound until they reached a final written agreement. *Id.* Refusing to give the same effect to Carroll's similar statement here "would deny a party the ability to define the intended legal effect of its . . . pre-contractual business dealings" with other parties. *Jordan Panel*, 841 N.Y.S.2d at 567.[3]

2. The draft agreements circulated by Perry, Solus, and Deutsche Bank likewise provide "numerous indications . . . that the parties did not intend to bind themselves until the [agreement]

[3] In *Deephaven Distressed Opportunities Tradings, Ltd. v. 3V Capital Master Fund Ltd.*, 954 N.Y.S.2d 46 (1st Dep't 2012), the defendant executed three written trade confirmations "that contained all the material terms of the trade." The confirmations stated, however, that the transaction was subject to final documentation. *Id.* at 47. Such final documentation was never executed, but the court nevertheless enforced a trade. Significantly, the defendant had attempted to *re-sell* the asset without waiting for final documentation. *Id.* at 47–48. Under those circumstances, the First Department distinguished the many "cases in which [it had] held that agreements contemplating the execution of further agreements were non-binding" because the defendant had "so blatantly take[n] ownership of the subject matter underlying the initial agreement before the execution of the contemplated agreements" by assigning it to a third party "and expecting to be paid a profit." *Id.*

had been signed." *Ciaramella*, 131 F.3d at 324. Those indications are entitled to "considerable weight" so as to "avoid frustrating the clearly-expressed intentions of the parties." *Id.*; *see also R.G. Group*, 751 F.2d at 75 (similar).

Each of the three parties' numerous draft agreements before negotiations ended in June 2012 provided that a transaction would happen only "[u]pon the execution and delivery *hereof* by the Parties *hereto*." SMF ¶ 140 (emphasis added). Each draft likewise provided that "the Parties *hereto* agree," that Solus "*hereby* accepts" the transaction, that Deutsche Bank "*hereby* does release" Perry, and that Perry "*hereby* assigns" to Solus all of Perry's rights under its trade confirmations with Deutsche Bank. SMF ¶¶ 134, 135, 136 (same). Applying New York law, the Second Circuit concluded that such phrasing "indicate[s] that the parties contemplated the moment of signing as the point when the [agreement] would become binding." *Ciaramella*, 131 F.3d at 324. It "demonstrates that only the terms of the [draft] agreement, and not any preexisting pact, would legally bind the parties." *Id.*; *see also CAC Group Inc. v. Maxim Group LLC*, 523 F. App'x 802, 805 (2d Cir. 2013) (such language "indicates that the parties understood that the written agreement would effectuate a binding contract and not merely memorialize a contract that had already been entered into"); *Angelo, Gordon*, 2006 WL 870453, at *8 (similar). Each draft agreement also contained a merger clause providing that the executed agreement would "supersede[] all prior negotiations, representations, or agreements, whether written or oral." SMF ¶ 142. "The presence of such a merger clause is persuasive evidence that the parties did not intend to be bound prior to the execution of a written agreement." *Ciaramella*, 131 F.3d at 324. Moreover, "[t]here is no evidence that [Solus] took exception" to any of these clauses in the draft agreements, which "conclusively establishe[s]" it shared "[a] mutual intent not to be bound by anything other than a writing." *Shearson Lehman*, 710 F. Supp. at 70.

What is more, it is not the case that Perry and Solus had "'literally nothing left to negotiate'" on April 10, 2012. *Winston*, 777 F.2d at 82. Quite the contrary: Key terms of the potential transaction were in play throughout the two months of three-party negotiations *after* April 10. The fundamental structure of the transaction changed from Perry and Solus each engaging Deutsche Bank in separate agreements, to a very different arrangement that put all three parties on the same document. SMF ¶¶ 77, 84. Then, the parties engaged in considerable back and forth over material terms of that draft agreement. A collective redline of their edits to its *eight* drafts reveals changes—often multiple changes—to nearly every paragraph. *See* Zecca Ex. 105. Among the terms in dispute were the date as of which Solus would step into Perry's trade, the scope of releases among the parties, and the indemnities they each would provide.

Parties generally do not devote significant time and attention to the careful negotiation of *immaterial* terms. Rather, the parties' negotiations speak for themselves:

> [W]ell after [April 10, 2012], terms that [all] sides understood were crucial to the agreement were still being negotiated. Under these conditions, there is no ambiguity about whether there has been a meeting of the minds. *That agreement may have been reached as to quantity of securities, price, interest and the like does not change the result*. Agreement on terms does not become binding until there is agreement on all terms as to which agreement was anticipated.

Shearson Lehman, 710 F. Supp. at 72 (emphasis added); *see also Angelo, Gordon*, 2006 WL 870453, at *9–10 (holding there was no contract where subsequent negotiations showed there had been "no[] meeting of the minds"). The parties' continuing negotiations over material terms of the potential transaction provide conclusive evidence that they had not manifested their assent to all the material terms of any "trade" on April 10.

Solus has contended, by contrast, that all of these various drafts were "simple and boilerplate . . . containing standard provisions." Cplt. ¶ 27. That cannot be squared with the two months of push-and-pull over the drafts' various terms. In any event, "[i]t is not for the court to determine retrospectively that at some point in the evolution of a formal document that the changes being discussed became so 'minor' or 'technical' that the contract was binding despite the parties' unwillingness to have it executed and delivered." *Winston*, 777 F.2d at 83. What is significant is that Solus, Perry, and Deutsche Bank unfailingly manifested that the resolution of all these terms mattered *to them*.

3. Finally, the communications among Perry, Solus, and Deutsche Bank in April and May 2012 confirmed the tentative nature of their potential deal. They routinely referred to the circulating document as a "draft agreement" or "proposed draft." SMF ¶¶ 77, 86, 88, 92, 99, 119. In a communication with Deutsche Bank, for example, Perry's counsel called the deal under discussion the "*proposed* Perry/Solus transaction." SMF ¶ 109 (emphasis added). Solus's counsel, likewise, emphasized to Perry—more than once—that the proposed agreement was "subject to further review [by Solus] *in all respects*." SMF ¶¶ 88, 94 (emphasis added). Courts have repeatedly held that statements like these made during negotiations are clear evidence that the parties did not intend themselves to be bound until they had finalized their "proposed," "draft" agreement. *See, e.g., Winston*, 777 F.2d at 81 (party's reference to "the proposed agreement" showed that the parties did not yet have a "final binding agreement[]").

C. The Potential Transaction Had Unresolved Material Terms On April 10

Solus's contract claims face another insurmountable hurdle: Solus admits it asked Perry to agree to certain terms for the proposed transaction on April 10, *and that Perry declined to agree*. "It is axiomatic that a party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms." *Silber v. N.Y. Life Ins. Co.*, 938 N.Y.S.2d 46, 50 (1st Dep't 2012).

Specifically, Solus's representative, C.J. Lanktree, asked Perry to agree to a so-called "bad acts carveout" as part of the potential transaction. SMF ¶ 47. Such a carevout would have left Perry at risk to defend even unfounded claims that it had done something wrongful during the time it was a party to the trade confirmations with Deutsche Bank. Lanktree also asked Perry to agree to pay a portion of Deutsche Bank's legal expenses from defending against Kingate's lawsuit. SMF ¶ 46. Solus concedes that Perry declined to agree to either proposed term on April 10. SMF ¶¶ 46, 48. There is no doubt, moreover, that Solus's proposed terms were material: they would cost Perry money and increase its potential litigation exposure.

Remarkably, Solus nevertheless contends that Perry's April 10 refusal to agree to Solus's proposed terms has no bearing on whether Perry and Solus had an April 10 contract. First, Solus calls its proposals "industry standard," and asserts that Perry bound itself to a contract despite expressly declining to agree to them. That is a frivolous argument. Even assuming that Solus's proposed terms were "standard" (which the parties dispute), that parties' failure to agree on otherwise "standard" terms is no less of a bar to contract formation than their inability to agree on non-standard ones. Second, Solus claims that its April 10 disagreement with Perry on these terms came shortly after their April 10 agreement on price. An agreement on price established a "binding trade," Solus says, notwithstanding the disagreements on other terms. But the law does not support Solus's "gotcha" theory of contract formation. Solus must be able to prove that it and Perry were "truly in agreement with respect to *all* material terms" on April 10, no matter the order in which they addressed the various open and material issues. *Express Indus. & Terminal Corp.*, 93 N.Y.2d at 589 (emphasis added). On the undisputed facts, it cannot.

D. Solus Premised Its Unjust-Enrichment Claim On The Purported "Contract" And So That Claim, Too, Fails

Solus's fifth cause of action, for unjust enrichment, is premised entirely on its alleged contract with Perry. Cplt. ¶¶ 65–70 ("Perry Capital has refused to . . . honor its binding Contract."). That is not a cognizable unjust-enrichment claim. As the Court of Appeals held in

Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 790 (2012), "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." It "is not a catchall cause of action to be used when others fail." *Id.*

II. SOLUS WAS NOT INJURED BY THE PURPORTED BREACH AND IS NOT ENTITLED TO SPECIFIC PERFORMANCE OF ANY "TRADE"

Solus's breach-of-contract causes of action, Counts I through IV, fail for another, independent reason: Solus suffered no damages from Perry's purported breach, and cannot reap any *subsequent* market-value appreciation of the Kingate Claims through specific performance.

1. Solus cannot establish that Perry's June 5, 2012 withdrawal from the three-party negotiations breached any April 10, 2012 contract it purportedly had with Solus. Even if it could, however, Solus suffered no damages. Solus's second and fourth causes of action claim money damages of not less than $20 million resulting from Perry's purported June 5 "breach." Cplt. ¶¶ 53, 64. Disclosure has conclusively disproved those claims.

"Where, as here, 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." *Credit Suisse First Boston v. Utrecht-America Fin. Co.*, 923 N.Y.S.2d 482, 483 (1st Dep't 2011). In this case, neither side of that equation is in dispute: Solus alleges Perry agreed to a "contract price" of 66.5% for a "sale" of its participation interests in the Kingate Claims. Cplt. ¶ 22. Perry withdrew from the negotiations with Solus and Deutsche Bank on June 5, 2012. On that date, Solus held its own participation interests in the Kingate Claims that it had agreed to purchase from Deutsche Bank in August 2011, and it was booking those participation interests at a "price" of 66.25%. SMF ¶ 181; *see also* SMF ¶¶ 179, 182 (same "price" booked as of May 31 and June 29). Solus admits that this "price" reflected [redacted] SMF

¶ 161. Moreover, Solus premised that [redacted] determination on price quotes (*i.e.*, "dealer marks") it received from Deutsche Bank—[redacted] SMF ¶ 180. On these undisputed facts, Solus cannot establish any damages as a matter of law.

2. Lacking cognizable damages, Solus demands specific performance of the alleged trade. Forcing Perry to "transfer[] the Participation to Solus" (Cplt. ¶ 46) would allow Solus to reap any *post-"breach"* increase in the market value of Perry's participation interests. Solus's portfolio manager believes their market value has [redacted] *since Solus filed its Complaint.* Zecca Ex. 9 (Lanktree Tr.) 295. Solus's specific-performance claims are thus acting as "free options" on nearly two years of perceived market-price appreciation. If market prices fell, Solus would undoubtedly drop its demand.

The specific-performance remedy is not meant to be a hedge-fund investment strategy. *See Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 146 (1971) (a breach-of-contract "cause of action should not and may not be converted into carrying a market 'call' or 'warrant' to acquire the [asset] on demand if the price rose above its value as reflected in [the] cause of action"). In particular, "specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party.'" *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 (2001). By Solus's own admission the participation interests' [redacted] 66.25% was *lower* than the alleged "contract price" when Perry ended negotiations. Solus's "expectation interest" on the purported date of breach was zero.

Specific performance, by contrast, is "a proper remedy" only where "'the subject matter of the particular contract is unique and has no established market value.'" *Id.* (quoting *Van Wagner Adver. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 193 (1986)). There must be a "difficulty of proving damages with reasonable certainty." *Id.* According to the Court of Appeals, these are "exceptional instances" (*Simon*, 28 N.Y.2d at 145) in which a court lacks sufficient information "to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee" (*Van Wagner*, 67 N.Y.2d at 193). There is no such "risk" here. Solus's books, [redacted], establish the June 5 [redacted] of participation interests in the Kingate Claims to two decimal places. Solus's damages are not uncertain, they are zero. Courts regularly measure damages to a reasonable certainty using far less information on market value in cases involving relatively illiquid financial assets. *See, e.g.*, *Credit Suisse*, 923 N.Y.S.2d at 483 (distressed debt); *Kaminsky v. Herrick, Feinstein LLP*, 870 N.Y.S.2d 1, 7–12 (1st Dep't 2008) (pre-IPO stock).

Solus nevertheless claims it is entitled to specific performance because participation interests in the Kingate Claims are a "unique" financial asset. Cplt ¶ 45. "The word 'uniqueness' is not, however, a magic door to specific performance." *Van Wagner*, 67 N.Y.2d at 192. Rather, "uniqueness" is just a proxy for "the uncertainty of valuing" an asset, and there is no such uncertainty here. *Id.* at 193. In *Van Wagner*, for example, the Court of Appeals denied specific performance of the lease of a billboard facing the Midtown Tunnel. The billboard was not "unique," the court explained, even though there was no other billboard in its prime location. The "value of the 'unique qualities'" of that particular billboard "could be fixed with reasonable certainty" by comparison to similar (though not identical) billboard leases. *Id.* at 194.

The same is true here. The Kingate Claims are among thousands of investor claims against the BLMIS estate (SMF ¶ 185), and there is an active secondary market for "similar" BLMIS claims (SMF ¶ 186). One of Solus's portfolio managers testified that [redacted] SMF ¶ 187; *see also* SMF ¶ 188 [redacted]

[redacted] According to another Solus portfolio manager, putting a price on any BLMIS claim is a "simple value proposition." SMF ¶ 189. For that reason, throughout this litigation, Solus has calculated the value of the Kingate Claims' price appreciation by reference to the "trading prices" of other BLMIS claims. *See* Zecca Ex. 20 (Lanktree Aff) ¶ 18; Cplt. ¶ 33 (referencing "the current trading price of claims similar to the Participation").[4]

In short, Solus's specific-performance claims are not about seeking an equitable remedy where money damages are too uncertain. They are Solus's demand for an after-the-fact windfall, premised on the purported breach of a backdated "trade," where there are no money damages. "It has long been settled," however, "that specific performance will not be granted where it would cause unreasonable hardship or injustice to the party, even if it was the one who breached the contract." *Concert Radio, Inc. v. GAF Corp.*, 488 N.Y.S.2d 696, 699 (1st Dep't 1985). Courts squarely reject specific-performance claims, like Solus's, where a plaintiff has not "suffered no damages of consequence" and "will lose nothing but an uncontemplated opportunity to gather in a windfall" if specific performance is denied. *Id.* at 700. This is such a case, and Perry is entitled to judgment on Solus's first and third causes of action.

CONCLUSION

For the foregoing reasons, the Court should enter judgment for Perry Capital on plaintiff's complaint and Perry's counterclaim for declaratory relief.

[4] Valuation expert Espen Robak, CFA, has reviewed the relevant market information and has testified that a fair value of the participation interests on June 5, 2012 is 66.25%, and that BLMIS claims are "highly comparable" from a valuation and investment perspective. *See generally* Affidavit of Espen Robak.

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Respectfully submitted,

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