

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

PRESENT: Kapnick
Justice

PART 30m

Invesco Institutional

INDEX NO. 650154/07

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

Deutsche Investment

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
Sep 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

Settle Order.

E-FILE

Scanned to New York EF on 9/29/09

Dated: 9/29/09

[Signature]
BARBARA R. KAPNICK
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):

E-FILE

Scanned to New York EF on 9/29/09

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

-----X
INVESCO INSTITUTIONAL (N.A.), INC.,

Plaintiff,

-against-

DECISION

Index No. 650154/07

Motion Seq. No. 003

DEUTSCHE INVESTMENT MANAGEMENT
AMERICAS, INC., RANDY G. PAAS,
STEPHEN M. JOHNSON, JAMES F. GUENTHER,
KENNETH R. BOWLING, AUSTIN C. MAYBERRY,
and J. RICHARD ROBBEN,

Defendant.

-----X
BARBARA R. KAPNICK, J.S.C.:

This case arises out of a purported scheme by defendant Deutsche Investment Management Americas Inc. ("Deutsche"), a competitor of plaintiff Invesco Institutional (N.A.), Inc. ("Invesco"), to effect a surprise mass defection of senior personnel from Invesco's Worldwide Fixed Income Group ("WFI") located in Louisville, Kentucky and London, England. Plaintiff claims that the alleged scheme was designed to coerce it into transferring its entire institutional fixed income business to Deutsche on terms dictated by Deutsche.

According to plaintiff, Deutsche convinced approximately 20 professionals to resign from Invesco and move to Deutsche, including four senior executives who were Invesco "Global Partners" and were responsible for leading the WFI Group in Kentucky. Defendant Steven M. Johnson, formerly WFI's Global Chief Investment

Officer, was considered the most senior of the group. Defendant James F. Guenther held the title of Director of Global Research. Defendant Kenneth R. Bowling was in charge of US Fixed Income. Defendant Randy G. Paas was an Account Manager with overall responsibility for one of three sales regions within WFI. All four former Global Partners are currently Deutsche Managing Directors and each holds a senior executive position in Deutsche's institutional fixed income business.

Plaintiff claims that Deutsche also hired nine investment professionals who simultaneously resigned on March 26, 2007 and began work with Deutsche the following day, including defendant J. Richard Robben, who served as Invesco's Director of Information Technology ("IT") from 1996 through 2002. In 2002, Robben became a Portfolio Manager at Invesco, but continued to be actively involved in IT development by serving as a liaison between the WFI investment management team and the technical development group. Upon joining Deutsche in March 2007, Robben became a Portfolio Manager and Vice President of Deutsche Asset Management.

Deutsche hired defendant Austin C. Mayberry in May 2007 as Vice President and Head of Institutional Fixed Income Technology. Mayberry previously worked at Invesco as a Senior Applications Developer from January 2004 through March 2007.

To assist in its software development efforts, Deutsche - at the purported urging of Mayberry - retained two consultants, Paul King and Neil Martin. King and Martin, who are principals of VNP Software, Inc. ("VNP"), allegedly devoted 100% of their consulting time to the development of Invesco's Q-Tech system over a five year period from 2001 through 2006.¹

Plaintiff contends that King and Martin knew that they were retained by Deutsche to develop a software system that would provide the same functionality as Invesco's Q-Tech system.

Plaintiff further contends that the Q-Tech system, including the Alpha Sources and Portfolio Implementation Tool ("PIT") Passport modules, are proprietary to Invesco.²

Plaintiff now moves by Order to Show Cause for a preliminary injunction pursuant to CPLR § 6301 and 22 NYCRR § 216.1:

(1) enjoining and restraining defendant Deutsche and all persons and entities in privity with it or acting in concert with

¹ Invesco claims to have spent \$21 million developing the Q-Tech system between 2001 and the end of 2007, over \$2 million of which was paid to these outside consultants.

² Alpha Sources is where Invesco's investment decision-makers store their thoughts and opinions on sources of alpha. (Tr. at 93) PIT is the tool that Invesco's portfolio constructors use to implement investment decisions that impact the products that the portfolio constructors are managing. (Tr. at 96)

it, from any further development, use or development of that certain software program, tool or module known, or previously known, as "Alpha Workbench" or any other iteration, modification or enhancement of the same;

(2) enjoining and restraining Deutsche, and all persons and entities in privity with it or acting in concert with it, from any further development, use or deployment of any software program, tool or module designed to recreate, replicate or mimic the design or functionality of those certain software tools contained within Invesco's Q-Tech system and known as i) "Alpha Sources", ii) "Product Passport", and iii) "Portfolio Implementation Tool"; and

(3) enjoining and restraining Deutsche, and all persons and entities in privity with it or acting in concert with it, from disclosing, implementing or using Invesco's unique investment process insofar as the same is facilitated and carried out by Invesco's proprietary Q-Tech system.³

It is well settled that

[a] preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of

³ The Order to Show Cause also seeks to have the County Clerk seal some of the documents submitted with the motion. Several documents were sealed pursuant to various Stipulations and Sealing Orders signed during the course of the proceedings. If there are any issues remaining relating to documents to be sealed, counsel are directed to notify the Court of their positions by letter.

equities tipping in the moving party's favor (*Grant Co. v. Srogi*, 52 NY2d 496, 517).

Doe v Axelrod, 73 NY2d 748, 750 (1988).

Defendants argue that plaintiff cannot demonstrate that it has a likelihood of success on the merits in this case. In this regard, defendants deny that they misappropriated any of Invesco's trade secrets and contend that plaintiff cannot demonstrate that Invesco's investment process, software functionality and/or its database structure are confidential and unique. Moreover, defendants contend that Deutsche uses a different investment process than Invesco, that its portfolio managers have much more discretion than Invesco's portfolio managers and that it does not use the rigid assembly-line approach used by Invesco.

Specifically, defendant refers to the Affidavit of Bart Grenier, a managing director and global head of Institutional Active and Passive Investments at Deutsche, who stated that

DB's institutional fixed-income investment process is nearly identical to the way [their] fixed-income business operated before the arrival of the Louisville hires. ... DB does not employ a rigid investment process of the sort Invesco describes. Analysts at DB make investment *recommendations* regarding the markets or securities that they follow. ... Ours is a team approach - on open forum ... DB does not use software programs to automatically allocate alpha sources to portfolios without portfolio manager input.

Defendants further argue that plaintiff cannot demonstrate that it will suffer irreparable harm if the preliminary injunctive relief sought is not granted,⁴ or that the balance of equities weighs in Invesco's favor.

A plaintiff claiming misappropriation of a trade secret must prove: "(1) it possessed a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means." *Rapco Foam, Inc. v Scientific Applications, Inc.*, 479 F.Supp. 1027, 1029 (SDNY 1979). See also, *Integrated Cash Management Services, Inc. v Digital*, 920 F2d 171 (2nd Cir 1990).

The Court of Appeals has held that

[t]here is no generally accepted definition of a trade secret but that found in section 757 of Restatement of Torts, comment b has been cited with approval by this and other courts (citations omitted). It defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (*Id.*) The

⁴ Defendants cite to the recent decision of the Second Circuit in *Faiveley Transport Malmo AB v Wabtec Corp.*, 559 F.3d 110 (2nd Cir. 2009) in which the Court held that a presumption of irreparable harm does not automatically arise upon the determination that a trade secret has been misappropriated, and that no presumption is warranted in those cases where an award of damages will provide a complete remedy for injury.

Restatement suggests that in deciding a trade secret claim several factors should be considered:

"(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others" (Restatement of Torts § 757, comment b).

As these considerations demonstrate, a trade secret must first of all be secret: whether it is is generally a question of fact (citations omitted).

Ashland Mgt. v Janien, 82 NY2d 395, 407 (1993). See also, *Integrated Cash Management Services, Inc. v Digital*, *supra* at 173.

A hearing on this preliminary injunction motion was conducted over five separate days, i.e. - December 18 and 23, 2008, and January 12, 15 and 26, 2009. Counsel presented closing arguments on February 23, 2009, and made additional letter submissions in March of 2009.

During the course of the hearing, plaintiff presented testimony from the following witnesses: (a) Randolph Jay Boyd, a senior director and head of fixed income and money market application development at Invesco; (b) Dr. Brendan D. Dixon, an associate professor of computer science at the University of

Alabama; and (c) Dr. Steven R. Kursh, an executive professor in the College of Business at Northeastern University and the founder and sole employee of Software Analysis Group, a consulting firm.

Defendant presented testimony from its own expert, Frank A. Filippis, and from defendant Austin Mayberry. Plaintiff then offered rebuttal testimony from Drs. Dixon and Kursh and Mr. Boyd.⁵

Mr. Boyd explained that Q-Tech is used by Invesco's investment professionals to support the investment process that they use to manage assets. He testified that "it was called the rock that we built our church on. That's how it was often described, the technology platform." (Tr. at 91).

Plaintiff contends that there is unrebutted evidence in the record as to the value of this proprietary information to its business and to its competitors.

Specifically, Mark Matthews, the Head of Research and Development at Invesco for WFI, submitted an Affidavit in support of the motion in which he represents that Stephen Johnson, while still employed at Invesco, (i) "always emphasized that Q-

⁵ Extensive testimony was presented with respect to the academic background and professional credentials of each of the expert witnesses.

Tech should be included in the client and consultation presentations, particularly screenshots of Q-Tech, to demonstrate Invesco's competitive edge", (ii) "described Invesco's fixed income investment process and the Q-Tech platform as 'unique', 'best in industry', and 'different'", and (iii) "pointed to the differentiation in approach and technology as the primary reason why a client should do business with Invesco versus its competitions."

In an e-mail dated October 1, 2004, which was sent to Johnson among others, another Invesco employee, Kim McCarrel, reported that she had just returned from four back-to-back meetings with Invesco's clients in Louisville. The meetings included one hour demonstrations of the Q-Tech system. Ms. McCarrel described Q-Tech as "a big hit with the clients", and concluded that

[o]bviously, not every client who comes to visit will be interested in seeing a demo, but the clients who do a lot of manager visits really ate it up. In each case they said they were very impressed, and several commented that QTech stacked up very well against our competitors in the fixed income world.

Plaintiff further contends that Invesco always took steps to keep the information secret. Chris Utz, Invesco's Managing Director, Head of Product Strategy, represents in an Affidavit that

[b]ecause Invesco's unique investment process and the proprietary Q-Tech system are extremely sensitive confidential information, my team was always careful not to include in the presentations any technical specifications or anything that would allow a viewer to recreate the software source code or the investment process. Furthermore, each of the presentations was equipped with a clear confidentiality designation and was circulated only on a need-to-know basis outside of Invesco.

Plaintiff contends that Deutsche has essentially recreated Invesco's proprietary software tools, and adapted and developed them to suit its own needs, as evidenced by, *inter alia*, comparative tables presented at the hearing.

Deutsche, on the other hand, argues that plaintiff has failed to establish that it misappropriated a trade secret from Invesco, and contends that Invesco has failed to point to a single economic advantage that it has obtained by the use of the technologies at issue.

As more fully discussed below, Deutsche does not dispute that the two systems contain similar data and features, but contends that the bulk of the data constitutes generic market data which comes from public feeds and has certain common attributes which dictate what is found in the tables.

Plaintiff concedes that certain software used in its system is publicly available,⁶ but argues that there is abundant evidence in the record that the 'combination' of its investment process and the software system designed to implement it constitutes a trade secret which was wrongfully misappropriated by Deutsche.

"[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret." *Imperial Chem. Indus. Ltd. v National Distillers and Chem. Corp.*, 342 F2d 737, 742 (2d Cir 1965). See also, *Integrated Cash Management Services, Inc. v Digital*, *supra* at 174.

Thus, "[e]ven if all of the information is publicly available, a unique compilation of that information, which adds value to the information, also may qualify as a trade secret [citations omitted]." *Capital Asset Research Corp. v Finnegan*, 160 F3d 683,

⁶ Dr. Kursh testified upon cross-examination that "there may be elements in the Invesco investment process that are not confidential and proprietary, that companies in the financial services industry would [not] consider to be trade secrets." (Tr. at 354) He also acknowledged that the collection of AlphaSource is generally "not confidential and proprietary" and "[a]t a broad level of generalization it is not a trade secret." (Tr. at 355).

686 (11th Cir 1998). See also, *Computer Associates International, Inc. v Bryan*, 784 FSupp 982 (EDNY 1992).

Development Process

In an Affidavit submitted in opposition to the motion, Robben denies taking "any Invesco technology or materials with [him] in any form, electronic or otherwise, when [he] left Invesco,"⁷ but acknowledges that "[i]n order to try to be helpful" when he joined Deutsche in March 2007, before the Louisville office was up and running, he

decided to try to help assess what software tools were available within Deutsche Bank that could support a fixed-income team, and to determine what additional capabilities were necessary ... To that end, I drafted a document called "Quick Qtech Overview," where I described in very broad terms the functionality of software that I believed our fixed-income team would need to conduct its business.

⁷ Robben stated in his Affidavit sworn to on December 4, 2008 that,

[t]here was Invesco-related information on one or more of my home computers, which I had used when I worked from home in the routine course of business prior to my resignation. Upon joining [Deutsche Bank], I searched my computers for any Invesco material, copied that information onto a zip drive, deleted the same from my computers, and, at the direction of [Deutsche Bank], delivered the zip drive to independent counsel.

In an e-mail dated March 28, 2007 in preparation for a conference call regarding technology development, Robben explained as follows:

I put together a brief overview of the Investment system we built with our previous employer called Qtech. This is really just a sketch of the functions that the system provided, but I think it will be helpful to us to get the ball rolling so to speak [emphasis supplied].

By way of background, I am a portfolio manager now, but for the first 6 years I was with my previous firm I was Director of Technology. In fact, I worked in IT for about 15 years before getting my CFA charter and jumping to the business side of the house. Anyway, The document you have here is not a technical spec by any stretch of the imagination, but whenever you are ready to really go down into the guts of how this thing needs to work I can help out [emphasis supplied].

Robben also acknowledges that he prepared an 18-page specification document called the "IDC Overview" shortly after joining Deutsche "to describe a hypothetical tool the Louisville team could use to support its investment process."

The document provides an overview of the Investment Decision Center ("IDC"), and a primer on the investment process, including different types of investment decisions. The document also outlines three types of comments to be available in the IDC, provides sample charts to be displayed on the Decision Quality Screen, and contains a glossary of relevant terms.

Plaintiff contends that this 18-page specification was the launching pad for the development of the Alpha Workbench tool at Deutsche. Mr. Mayberry conceded that he received the document before he started work at Deutsche. He further testified that he "may have talked about it" with Paul King, although he was "not sure" if he talked about it with Neil Martin. (Tr. at 803).

Mr. Filippis acknowledged on cross-examination that he considered it relevant that Mayberry looked to the 18-page specification upon commencing his development work (Tr. at 618). However, in a significant omission which undermined his credibility in the eyes of this Court, he made no mention of the specification in the 14-page Affidavit he submitted in opposition to the motion.

Plaintiff has also submitted an Affidavit from Matt Cameron, an employee of Invesco, Ltd., the parent company of plaintiff Invesco, who played a supervisory and support role in the application of development efforts of Invesco's Fixed Income investment group. He represents after reviewing the IDC Overview, that the investment process described therein, and "the software design that would be required to support that process, are substantially identical to Invesco's investment process and the Alpha Sources and Product Passport tools embedded in the Q-Tech software system."

Mr. Filippis also testified that he considered it significant that Robben testified at his deposition in 2008 (prior to the motion for a preliminary injunction) that he tended to agree with the statement that since he arrived at Deutsche Bank and developed their investment tools, the investment process for the fixed income platform at Deutsche Bank was a lot closer to the investment process at Invesco than it was before. (Tr. at 655-656).

Robben, however, denies accessing any of Invesco's material, confidential or otherwise, in drafting this document, and contends that "[t]he investment process, and tools to support this process, that were ultimately implemented in [Deutsche Bank]'s Louisville office differ from what is described in the IDC Overview in several material respects."

Dr. Dixon disagreed. He testified that in his opinion, the developers and investment professionals that provided specifications for and did the actual development of Deutsche's Alpha Workbench had prior knowledge of and experience with Invesco's Alpha Sources and that "that prior knowledge and experience was extremely valuable and that Alpha Workbench is a derivative of Alpha Sources." (Tr. at 148). He further noted that

Alpha Workbench was developed in approximately nine months, whereas the -- the Alpha Sources system was

developed over a period of -- of multiple years, was refined, evolved, based on input from the investment professionals that were using -- involved in the use of -- of that Alpha Sources tool; and that without the prior knowledge of the Invesco Alpha Sources system and the clear and concise specifications that could be provided to those developers because of that prior knowledge and experience, that those developers could not have constructed Alpha Workbench in only nine months.

(Tr. at 157-158).

Mr. Filippis also testified on cross-examination that he reviewed a document called the Louisville Technology Overview prepared by Mayberry on or about May 25, 2007 in which he indicated that the Investment Decision Center, Product Passport and Product Calculator systems are "unique to the investment process of the Louisville investment professional. They will need to be recreated to match their investment process because Deutsche Bank has no equivalent system." (Tr. at 628-630). Plaintiff contends that it is relevant that in the next draft prepared four days later on May 27, 2007, the second sentence was changed to state that "[t]hey will need to be created from the ground up to match their investment process because Deutsche Bank has no equivalent systems," although Mr. Filippis did not find that to be relevant. (Tr. at 630-631).

There is no dispute that the development of Deutsche's system was not conducted in a "clean room" environment,⁸ but Mr. Filippis testified that he had never seen a clean room development environment used in the investment management industry. (Tr. at 515).⁹

On cross-examination Mr. Filippis acknowledged that hiring people with domain knowledge was an important part of being able to develop the required tools, and that Deutsche's development effort involved the hiring of people with the appropriate domain knowledge. (Tr. at 572). Mr. Filippis also acknowledged that the Q-Tech domain knowledge of Mr. Mayberry was a factor in his development of Alpha Workbench (Tr. at 642-643), and that Robben's Q-Tech domain knowledge factored into his work and specifications of the Alpha Workbench tool at Deutsche (Tr. at 643).

⁸ Dr. Kursh explained that in a clean room, "you do not have people working on the software who have knowledge of the prior product, who have any recollection of the prior product, even inadvertently." (Tr. at 338).

⁹ According to Mr. Filippis, it is common in the investment management industry to use rapid application development where "you discuss the requirements with the business and you quickly develop a prototype which you can demonstrate to the business so they can look and use the application and then give you additional feedback as to the features that exist, any new features they want incorporated and literally you start to cycle over again." (Tr. at 523-524).

In addition, Mr. Filippis agreed that King and Martin's Invesco domain knowledge - in this case, knowledge about investment management - factored into their work on the Deutsche tools (Tr. at 643). He also testified that Invesco domain knowledge factored into the development work that Mr. Mayberry and others did for Deutsche, explaining as follows:

when you work at an organization and you get to understand how the business to that organization is performed, you have that knowledge and you obtain knowledge about the processes within that business, and you bring that knowledge to other organizations that you join.

* * *

That's, in fact, why you're hired to go to those organizations and frequently why I would hire one individual over another individual, is the domain knowledge that they acquired while they worked at another firm.

(Tr. at 710-711)

Dr. Kursh testified as to the lack of development artifacts regarding Deutsche's system, stating that "[i]f there were appropriate design documents that would describe their goal was with the use of linear optimization tools, I'd be able to answer that question. But, again, there's the lack of development artifacts." (Tr. at 392-393).

Mr. Mayberry, however, testified that they

developed a number of plans and you know, informal -- nothing as formalized as IEEE [Institute of Electrical and Electronics Engineers], but we did develop plans, ER

diagrams [entity relationship diagrams], design documents along the way, that we would e-mail around.

We did a lot of white boarding sessions where we do a lot of designs on the white board. So those wouldn't necessarily be artifacts in [the] record, but there are thousands of e-mails documenting the back and forth between us, the business professionals and the other developers.

(Tr. at 747).

He further testified that he modeled the database structure that he built for Deutsche (Tr. at 747) and that he created ER diagrams of that database structure in the course of the development process (Tr. at 748), using a tool called a Sybase PowerDesigner "which was a \$3,000 piece of software made specifically for designing everything from the database layout to what we call a conceptual diagram which lays out all the concepts involved in the software." (Tr. at 771).

Mayberry admitted that the diagrams he spoke about at the hearing were not created until in or about July 2008, but claimed that "in the Alpha Workbench folder there's another diagram we used earlier on." (Tr. at 783). He explained that the initial design, which was "much simpler", continued to evolve. (Tr. at 785).

Mayberry also testified as to the steps taken during the development process, including the normalization process which he

explained "is done across the board to extract the unique pieces of information and relate them to each other". (Tr. at 777). According to Mayberry, the normalization process is not unique to Invesco; rather, normalization is "used in every database I've ever designed as well as taught to me in college in introductory database design classes and even in high school I was aware of this process." (Tr. at 777).¹⁰

According to Mayberry, normalization determined the relationships between the data tables reflected on the ER diagrams for Alpha Workbench. (Tr. at 778). Defendant contends that its database structure is normalized and is functionally dictated, i.e., the structure is dictated by the data that is used and it is essentially generic.

Mayberry further denied using any information he learned at Invesco in his database development work at Deutsche, and claimed that the portfolio work database that he developed for Deutsche was more complex than the Alpha Sources database "in the sense there's many more entities and many more relationships." (Tr. at 788-789). He also denied that the choices made during the normalization process at Deutsche were the result of choices made at Invesco. (Tr. at 796).

¹⁰ Defendant contends that this testimony is consistent with Mr. Boyd's admission at his deposition that many of the functions found in the Q-Tech system were not unique to Invesco.

Comparison of Alpha Sources and Alpha Workbench

Dr. Dixon testified that he performed an analysis of the tables in Invesco's Alpha Sources and Deutsche's Alpha Workbench, and compared the contents and structures of the two modules. In making those comparisons, Dr. Dixon found 27 matched tables and another four partial-matched tables. (Tr. at 146).

It was Dr. Dixon's opinion, based on the extent of the matched tables, that "the two databases are substantially similar, that their structure and organization is substantially similar * * * -- that this database is significantly complex and not merely generic; that these two applications are very much data-centric. This database plays a core and vital role in how these applications work." (Tr. at 147-148).

He explained that "[t]he foundation upon which [his] opinions are based are the structure, complexity and similarity of the two databases in question; and the manner in which the source code, the programs, interact with that database."¹¹ (Tr. at 151).

Dr. Dixon found both the Alpha Sources and Alpha Workbench applications to be "complex", "based on a combination of things",

¹¹ Mr. Filippis agreed on cross-examination that the physical source code and the underlying physical documentation are proprietary to Invesco (Tr. at 582, 593).

including "the number of tables that are involved in this database and the relative complexity of the structure" (as illustrated in his prepared diagram), "the number of links and . . . , oftentimes, the number of steps that you have to take to get from one table to another to relate a piece of information across the database." (Tr. at 152).

Dr. Dixon did, however, concede on cross-examination that the two systems use different database management systems. (Tr. at 192). He also acknowledged that "there is no claim that there was a line of source code or multiple lines of source code that were directly copied." (Tr. at 194).

Mr. Filippis acknowledged that both systems use "relational database technologies, which is pretty common in the industry", and that "they both use an object oriented design approach in that they create classes to model the problem and ultimately solve the problem." (Tr. at 466). However, he testified that "[t]he technology used by Invesco is radically different than the technology used by Deutsche Bank. The tools and the languages with the exception of one case in the languages, are different." (Tr. at 466).

Mr. Filippis denied that the databases were structured in the same way (Tr. at 467), and disputed Dr. Dixon's finding of certain

matches (Tr. at 485). According to Mr. Filippis, "Alpha Sources is the most important table within the Alpha Sources product and the IDC Decision is the most important table within the Alpha Workbench product." (Tr. at 685). He found that there are business data elements and business concepts that are included within the Alpha Sources table that are not included in the IDC Decision table. (Tr. at 688). Mr. Mayberry likewise testified that the Deutsche Bank Alpha Workbench tool did not include a bank loans component of the sort he did for Invesco. (Tr. at 786).

However, after pointing to six comparison tables for illustration purposes on re-direct, Dr. Dixon reiterated that "[i]f you look at the entire structure overall, my conclusion is that the databases are substantially similar, that the databases are complex enough that this similarity is no coincidence." (Tr. at 245).¹²

Dr. Kursh concurred as to the similarity of corresponding fields in the Alpha Sources and Alpha Workbench tables. (Tr. at 311), and concluded that "the similarities are too great and too frequent, that this cannot be a coincidence." (Tr. at 313).

¹² On rebuttal, Dr. Dixon gave the example of a class assignment where he asked the students to build databases for these products based on a given specification and instructed them not to collaborate. He said that "if I received two assignments that were as closely related as Alpha Sources database and Alpha Workbench database, I would conclude that those students [had] disobeyed my orders and collaborated." (Tr. at 831).

Comparison of PIT and Portfolio Workbench

Similarly, Dr. Kursh testified that, in his opinion, "the Deutsche Portfolio Workbench database is derivative from the Invesco PIT software database."¹³ (Tr. at 301; 313). He pointed to examples of "many to many" ("MTM") matches in the Deutsche Portfolio Workbench database and Invesco PIT software database, and noted numerous connections of tables found in both which he concluded were "too close to be coincidental." (Tr. at 305).

Dr. Kursh conceded on cross-examination that certain tables found in both systems, for example, currency blocks which were related to countries, had a logical relationship (Tr. at 378), but maintained that other tables paralleled "each other because the people who developed the Deutsche Bank tables -- that database chose to develop it in that way. They didn't have to develop it that way." (Tr. at 376).

¹³ Dr. Kursh testified that in order to arrive at this opinion, he traced user needs and requirements "all the way through" the whole software development process, "following an IEEE standard from user requirements to design to coding to testing". (Tr. at 330) He found the lack of a clean room environment to be significant, along with other factors, including the relatively short development period for the Deutsche software. (Tr. at 339)

Dr. Kursh also testified on cross-examination, that Robben, Mayberry, King, Martin and perhaps Johnson, who were involved in the development of PIT, knew about "the secret sauce" of linear optimization that was used. He noted that while "linear optimization is well known, it's not confidential and proprietary, it is what you do with it. It is how you do, that is confidential and proprietary." (Tr. at 390-391).

Mr. Filippis denied that Deutsche's Portfolio Workbench was derivative of Invesco's PIT Program. (Tr. at 491). Mr. Filippis further testified that the connections were "very natural relationships which you would expect to see in financial services and especially investment management in that a security here at the table is related to a sector that that security belongs to." (Tr. at 493).

Testifying with respect to the relationships between certain tables in the diagrams relating to currencies and countries, Mr. Filippis stated that he had "probably seen very similar, if not exact depictions of this relationship, literally tens if not hundreds of times and probably design databases, which mimic the exact design here." (Tr. at 495.)

Mr. Filippis acknowledged that the relationship between organization to securities ratings were done in a similar fashion in the database structure, but did not find that factor to be

unusual, claiming that "it models the business, it models the way the information is related within the business, when you talk to the business professionals, this is the way that they would normally express how they do business." (Transcript at 498).

Mr. Filippis testified that he did not find "drastic similarities in the source code", as would be expected if the Invesco database or application software design had been copied or stolen. He also concluded that there was functionality in the Deutsche software that was not in the Invesco software (Tr. at 511-512), and described the differences in functionality as a significant factor (Tr. at 697-698).

Mr. Filippis further testified that the Invesco database structure and the content of the PIT software do not include functions or features that would be considered a unique or confidential software approach in the investment management industry, because "the functionality expressed in those three modules are available in a variety of different commercial products that could be purchased off the shelf and integrated into an environment to replicate the same process that exists within Invesco." (Tr. at 532). He further represented that he "found no evidence of copying in the sense that similarities between software, the languages used, the actual instructions that are used to execute the business process." (Tr. at 533).

Mr. Filippis also testified on re-direct as to the significance of certain differences between the functionality of PIT and Portfolio Workbench, concluding that "[t]hose being present within Invesco's environment and not being present within the Deutsche Bank product leads me to believe that the processes for both of them are substantially different." (Tr. at 717-718).¹⁴

However, Dr. Kursh testified on rebuttal that

[w]hat you have in developing databases is both an art and a science. And as Dr. Dixon testified today, and as I testified earlier, two programmers, or two groups of programmers working independently are ... unlikely to produce near identical schemas.

The relationships among these tables, that information is going to be generally common in an industry, but how you tie it together is unique to the development team. There is no one place where this information is published. There is no template in the industry. This is unique to the development team.

(Tr. at 888-889).

Conclusion

After reviewing all of the papers submitted and after considering the extensive testimony and demonstrative evidence offered into evidence at the hearing, this Court finds that

¹⁴ According to Filippis, "the Deutsche Bank product is not implemented to follow through with taking the opinions and translating them into the actions. (Tr. at 718).

plaintiff has met its burden of showing a likelihood of success on the merits on its claims that: (i) the Q-Tech system, and, specifically, the Alpha Sources and PIT modules, constituted a unique compilation of software tools which, as developed by plaintiff, gave rise to a trade secret which was of value to the competitive companies; and (ii) Deutsche misappropriated that trade secret in the development of the Alpha Workbench and Portfolio Workbench databases.

In addition, this Court finds that plaintiff has met its burden of showing that it will suffer irreparable harm if a preliminary injunction barring defendant from the continued use of its trade secrets is not granted, as this Court finds that in the absence of such relief, plaintiff "would likely sustain a loss of business impossible, or very difficult, to quantify (citations omitted)" *Willis of New York, Inc. v. DeFelice*, 299 AD2d 240, 242 (1st Dep't 2002). See also, *Gundermann & Gundermann Ins. v Brassill*, 46 AD3d 615 (2nd Dep't 2007).

Moreover, unlike the situation present in *Faiveley Transport Malmo AB v Wabtech Corp.*, *supra*, plaintiff has shown that, unless enjoined, defendant may disseminate plaintiff's trade "secrets to a wider audience" including potential client and other third

parties, or will "otherwise irreparably impair the value of those secrets." *Faiveley Transport Malmo AB v Wabtec Corp.* at 118.

Finally, this Court finds that the balance of equities weighs in plaintiff's favor.

Accordingly, plaintiff's motion for a preliminary injunction is granted.

Settle Order.



Dated: September 29, 2009


BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.