Oppenheimer Holdings Inc. v Canadian Imperial Bank of Commerce
2018 NY Slip Op 31443(U)
July 2, 2018
Supreme Court, New York County
Docket Number: 650936/2013
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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OPPENHEIMER HOLDINGS INC.,
OPPENHEIMER & CO. INC., and OPY CREDIT CORP.

Plaintiffs,

Index No.: 650936/2013

-against-

Mot. Seq. No. 011

CANADIAN IMPERIAL BANK OF COMMERCE and
CIBC WORLD MARKETS CORP.,

Defendants.

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ANDREA MASLEY, J.S.C.:

Defendants Canadian Imperial Bank of Commerce (CIBC) and CIBC World Markets Corp. (CWM) move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint of plaintiffs Oppenheimer Holdings, Inc. (Oppenheimer), Oppenheimer & Co. Inc. (OpCo), and OPY Credit Corp (OPY). The amended complaint alleges three causes of action: (1) breach of the Warehouse Facility Agreement (WFA); (2) breach of the Amended Asset Purchase Agreement (APA); and (3) tortious interference with the WFA.

Background

In 2007, the parties entered into negotiations for Oppenheimer to acquire CIBC's U.S. capital markets business (Sagalowsky affirmation dated 11/3/17, exhibit 3, attachment to email dated 9/20/07 from A. Lowenthal to Orr, et al. at 2, 4; A. Lowenthal aff dated 12/14/17, ¶ 2). The parties closed the transaction on January 14, 2008 by signing several agreements, the relevant portions of which are summarized below.

Oppenheimer, OpCo, CIBC, and CWM entered into the APA, under which OpCo and Oppenheimer agreed to buy from CWM and CIBC all of CIBC's U.S. equity capital markets business, debt capital markets business, convertible bond and equity options sales and trading

business, and US investment banking business (Sagalowsky affirmation, exhibit 6, APA, §§ 1.01, 2.01). A narrow non-compete provision was included barring solicitation of certain CIBC and CWM employees who transferred to Oppenheimer, or of certain clients of Oppenheimer that predated the closing date, by CIBC, CWM, or their affiliates (*id.*, § 7.12). With the exception of that narrow provision, the parties agreed that nothing in any of the agreements constituting the transaction would limit their business activities (*id.*, § 7.13). Finally, the APA provided that the APA and the other agreements forming the transaction "contain[ed] the entire understanding of the parties [t]hereto with respect to their subject matter" and "supersede[d] all prior agreements and understandings, oral and written, with respect to its subject matter" (*id.*, § 13.06).

OPY and CIBC also entered into the WFA, which governed the terms on which the Oppenheimer clients and customers would be able to access CIBC's warehouse lending facility of $1.5 billion (Sagalowsky affirmation, exhibit 9, WFA, § 1.01). Loans submitted for approval by CIBC had to fall within several parameters. All loans had to fully mature within seven years of the closing date of January 14, 2008, or before January 14, 2015 (*id.*, § 2.01 [a]; Sagalowsky affirmation, exhibit 17, email dated 12/19/08 from Lowenthal to Orr and Venn at 2). All loans were to be senior syndicated loans, with OPY acting as lead syndicator (WFA, §§ 2.04 [a], [b]; Sagalowsky affirmation, exhibit 12, email dated 1/7/10 from A. Lowenthal to McCaughey ["The line was set up for the underwriting of senior syndicated loans"]). "Client loan proposals, 'staple financing' proposals and similar non-binding expressions of interest in financings" were not subject to the terms of the WFA, but instead to CIBC's "general credit policies and practices" (WFA, § 2.01 [d]; Sagalowsky affirmation, exhibit 17, email dated 12/19/08 from Lowenthal to Orr and Venn at 3 ["[I]f we are not acting as the manager in a syndication, or if it is a 'best efforts' deal where we feel a responsibility to participate, we cannot find a provision in the

agreement to allow access to the Warehouse Facility"]). In order to be eligible for the warehouse facility, all loan applications required a formal "Request for Commitment," including, among other things, a written credit presentation, an underwriting opinion from OPY, and a record of OPY's due diligence on the proposed loan (WFA, § 2.02). Lending decisions were subject to the discretion of a special credit committee made up of CIBC and Oppenheimer employees, with CIBC holding a majority of seats and/or votes (*id.*). CIBC was not required to act on any potential loans until it received a Request for Commitment (*id.*, § 5.02 [c]). Finally, as with the APA, the WFA contained a merger clause stating that the WFA was the complete agreement of the parties with respect to its subject matter (*id.*, § 12.06), as well as a clause prohibiting oral modification or waiver of the WFA or its terms (*id.*, § 12.02).

Of the ancillary agreements, Oppenheimer, OpCo, and CWM entered a research sharing agreement (the Research Sharing Agreement) to govern certain equity research produced by the parties (Sagalowsky affirmation, exhibit 13, Research Sharing Agreement, § 2). Specifically, the agreement defined CWM and CIBC research as reports and other documents "produced by the equity research department of [CIBC] for public dissemination to [CIBC's customers]" (*id.*). CWM was to provide its research, as defined, to OpCo during the term of the agreement (*id.*, § 3). OpCo was only allowed to use the research in conjunction with the purchased CIBC businesses and its own U.S. brokerage business (*id.*, § 4). Finally, Oppenheimer signed a service agreement (the Service Agreement) with nonparty CIBC Delaware Holdings, Inc. (CIBC Delaware), regarding shared office space in New York (Sagalowsky affirmation, exhibit 14, Service Agreement dated 1/14/18). The Service Agreement provided, among other things, that Oppenheimer would have the right to signage in the lobby reception area of the building, and for any Oppenheimer space on partial floors of the building (*id.*, § 7).

Over the course of the parties' relationship, CWM approved 25 of a total of 31 Requests for Commitment from OPY (Gewirtz aff dated 10/20/17, ¶ 14). According to Michael Gewirtz, the executive director of CWM's Corporate Credit Products Group (*id.*, ¶ 2), the six declined commitments were for AmeriMark Holdings LLC, Thermadyne Holdings Corp., BakerCorp, GEO Specialty Chemicals, Evergreen Tank Solutions, and Royall & Company (*id.*, ¶ 14). Of those six, four were outside of the scope of the WFA because they were requests for staple financings, and had maturity dates outside of the seven year term of the WFA.[1] Of the remaining two, the AmeriMark request was for a participation deal (A. Lowenthal tr dated 3/10/17 at 56:10-62:5; Sagalowsky affirmation, exhibit 28, AmeriMark credit application at 3), and the GEO Specialty Chemicals request was outside the term of the WFA (A. Lowenthal tr dated 3/10/17 at 73:12-17; Sagalowsky affirmation, exhibit 33). In addition, and contrary to the terms of the WFA, OPY would not have served as lead arranger for the GEO Specialty Chemicals loan (A. Lowenthal tr dated 3/10/17 at 75:15-76:5; Sagalowsky affirmation, exhibit 33). Albert Lowenthal, Oppenheimer's chairman and CEO (Sagalowsky affirmation, exhibit 1, A. Lowenthal tr dated 3/14/16 at 10:6-9), testified that, other than the six deals listed above, he was unaware of any other Requests for Commitment that CWM had declined (A. Lowenthal tr dated 3/10/17 at 50-53).

As time went on, the parties began to grow disenchanted with their business relationship. Lowenthal avers that after closing the Oppenheimer deal, CIBC tightened its underwriting

[1] Thermadyne Holdings: Sagalowsky affirmation, exhibit 2, A. Lowenthal tr dated 3/10/17 at 63:8-66:6; Sagalowsky affirmation, exhibit 30, Thermadyne memorandum at 3, 6.
BakerCorp: A. Lowenthal tr dated 3/10/17 at 66:11-68:5, 69:21-70:18; Sagalowsky affirmation, exhibit 31, BakerCorp credit application at 3, 6.
Evergreen Tank Solutions: A. Lowenthal tr dated 3/10/17 at 77:3-78:6.
Royall & Company: A. Lowenthal tr dated 3/10/17 at 78:18-79:15.

standards for loans brought by Oppenheimer (A. Lowenthal aff dated 12/14/17, ¶ 7). Based on his "understanding of the market," he believes that CIBC denied or required less favorable terms for loans than they would have before selling the business to Oppenheimer (*id.*, ¶ 8). Moreover, he claims that CIBC was presented with creditworthy loan opportunities that it did not evaluate in good faith (*id.*, ¶ 9). Indeed, plaintiffs assert, albeit without support, that CIBC never convened the Special Credit Committee. John Orr, of CIBC, testified that he did not remember being added to either of the Credit or Deals committees, not that such committees never met (Owen affirmation dated 12/15/17, exhibit P, Orr tr dated 11/3/16 excerpt at 2). Moreover, the record reflects at least two meetings of the Deals committee (Sagalowsky reply affirmation dated 1/11/18, exhibit C, Deals committee minutes for Jumers Casino & Hotel; exhibit D, Deals committee minutes for Insight Global).

From CIBC's perspective, Laura Dottori-Attanasio, of CIBC, testified that CIBC was generally more conservative and risk-averse following the 2008 financial crisis in terms of its lending policies (Owen affirmation, exhibit Q, Dottori-Attanasio tr dated 1/8/16 excerpts at 1-4). This attitude is reflected in CIBC's internal correspondence, in which Dottori-Attanasio observed that, in the post-crisis financial world, the Oppenheimer deal was not a great revenue driver for CIBC (Owen affirmation, exhibit J, email dated 5/12/10 from Dottori-Attanasio to Cornett at 1 ["we can discuss but I feel we spend too much time on an account that brings us too little"]; exhibit L, email dated 3/19/20 from Dottori to Cornett ["That's nice...considering all the hell we go through, they should pay more"]; exhibit M, email dated 9/29/10 from Venn to Dottori-Attanasio ["I guess my issue (although a mute[sic] point as we have an agreement to respect with OpCo) is that we continue to have these small undrawn loans . . . (that) never generate sufficient real dollars to cover our costs (compensation and other) – its(sic) a real drag on the business - I

guess we can look forward to the expiry date of the OpCo agreement"]).

Aside from disagreements regarding acceptable terms and underwriting standards, plaintiffs also allege that CIBC acted in several discrete other ways to impede their business. First, they allege that defendants blocked their former employees, who transferred to Oppenheimer, from accessing certain stock research and documents (amended complaint, ¶ 102 [a]; A. Lowenthal tr dated 3/14/16 at 116:23-120:22). John Parks, Oppenheimer's Director of Equity Research (Sagalowsky affirmation, exhibit 43, Parks tr dated 4/11/16 at 9:12-16), testified that there were technical problems regarding client access to the research (*id.* at 24:5-25:9, 55:12-56:25; 59:6-18, 69:23-71:20, 98:2-101:17), but that did not know if those problems were caused by CIBC or by Oppenheimer's own systems (*id.* at 52:25-53:20). Further, he testified that there were extensive meetings regarding data and research access during the negotiations (*id.* at 34:8-35:18), and that the final Research Agreement governed what was and was not available (69:19-70:12). Moreover, he stated that all staff transferred from CIBC to Oppenheimer had saved prior research to personal hard drives (*id.* at 23:7-24:4, 26:11-21), that no one lost access to their hard drives (*id.* at 41:2-10), that he could not recall transferred staff having access problems (*id.* at 101:25-102:6), and that most of the complaints ceased within a year of the deal closing (*id.* at 51:11-52:23).

Second, plaintiffs claim that defendants provided misleading financial information about CIBC's affiliate business CIBC Israel (which Oppenheimer acquired as part of the deal) (amended complaint, ¶ 99), that CIBC had shut down what was referred to as the "Northbound Line," by which CIBC Israel could directly access the Canadian exchanges through CIBC's U.S. business (*id.*, ¶ 102 [b]; A. Lowenthal tr dated 90:24-99:4; Sagalowsky affirmation, exhibit 45, Hellier tr dated 3/29/16 at 55:21-56:3), and that CIBC began competing with the renamed

Oppenheimer Israel for clients (amended complaint, ¶ 102 [b]). Oppenheimer provided two witnesses on this claim; John Hellier, Oppenheimer's head of equities (Hellier tr at 12:3-5), and Peter Feinberg, who handled Oppenheimer's sales and sales force after the deal closed (Sagalowsky affirmation, exhibit 46, Feinberg tr dated 4/12/16 (21:2-9). Hellier, who oversaw Oppenheimer's operations in Israel (Feinberg tr at 21:10-12), testified that Oppenheimer never signed an interconnect agreement, which was required by Canadian regulators, in order to keep the Northbound Line operational (Hellier tr at 74:4-18). CIBC repeatedly pressed Oppenheimer on this issue in the aftermath of the deal closing (Sagalowsky affirmation, exhibit 50; email dated 3/10/08 from Lazzer to Holmes, Hellier, Street at 4; *id.*, email dated 6/18/08 from Lazzer to Harnisch, McNamara, Hellier, and Giordano at 2). Hellier also testified that he was unaware of any competition with CIBC for Israeli clients after the deal closed (Hellier tr at 103:6-9). Feinberg also testified that he was unaware of such competition (Feinberg tr at 98:14-21).

Third, plaintiffs claim that defendants impeded their ability to post signage in the Lobby at 300 Madison Avenue reflecting their presence, and that the only such signage that was posted was abruptly removed two months later (amended complaint, ¶ 102 [c]; A. Lowenthal tr dated 3/14/16 at 110:3-112:17). David Rogers, Oppenheimer's head of facilities (Sagalowsky affirmation, exhibit 52, Rogers tr dated 3/22/16 at 9:25-10:8), testified that Oppenheimer had signs in the reception area of the lobby (*id.* at 23:15-25:10; *see also* Lowenthal tr dated 3/14/16 at 111:3-111:18), and on floors they shared with CIBC (Rogers tr at 25:11-28:9). He further testified that a separate sign in the lobby had been only temporarily put up for a major Oppenheimer meeting (*id.* at 20:20-22:22), and that the building landlord had to approve all signage requests (*id.* at 75:3-24).

Finally, plaintiffs claim that CIBC traders who were not employed by Oppenheimer

identified themselves as Oppenheimer traders, causing confusion and diverting business to CIBC (amended complaint, ¶ 102 [d]; A. Lowenthal tr dated 3/14/16 at 100:13-101:4). Hellier and Feinberg denied knowledge of any CIBC traders doing so (Hellier tr at 103:10-104:16; Feinberg tr at 91:15-19), though Hellier did testify that sometimes traders would leave things vague (Hellier tr at 103:10-104:16). Lowenthal and his son, Robert Lowenthal, Oppenheimer's head of fixed income (Sagalowsky affirmation, exhibit 5, R. Lowenthal tr dated 4/14/16 at 19:12-14), both testified that they had no personal knowledge of this behavior (A. Lowenthal tr dated 3/14/16 at 102:13-19; R. Lowenthal tr at 144:15-20).

Ultimately, in June 2012, the parties terminated the various agreements among them (Gewirtz aff, ¶ 13).

Procedural History

On March 15, 2013, plaintiffs filed a complaint against defendants (NYSCEF Doc. No. 1, complaint dated 3/15/13). The complaint alleged two causes of action: breach of the WFA against CIBC (first cause of action) and breach of the APA's implied covenant of good faith and fair dealing (second cause of action). On May 8, 2013, defendants moved to dismiss the first cause of action against CWM, and the second cause of action in its entirety (NYSCEF Doc. No. 6, notice of motion dated 5/8/13). On November 26, 2013, the court (Oing, J.) granted defendant's motion and dismissed the first cause of action against CWM as they were not a party to the WFA, and the second cause of action in its entirety as duplicative of the first (NYSCEF Doc. No. 20, court tr dated 11/26/13 at 35-37).

On January 31, 2014, plaintiffs filed an amended complaint, which, as stated above, alleges three causes of action. For the first cause of action, plaintiffs asserted that defendants breached the WFA by "failing to exercise CIBC's credit approval discretion in good faith"

(amended complaint, ¶ 129). For the second cause of action, plaintiffs asserted that defendants breached the APA's explicit provisions, as well as the APA's implied covenant of good faith and fair dealing in several ways. Specifically, plaintiffs claimed that defendants had violated the APA by (1) breaching the WFA, (2) "failing to abide by its promises to Oppenheimer to provide credit support and financing, including but not limited to that specified in the [WFA]," (3) "providing materially false and misleading" information about CIBC Israel, (4) preventing transferred employees and others from accessing prior research, (5) shutting down the Northbound Line for CIBC Israel, and (6) refusing to allow the signage change at 300 Madison Avenue (*id.*, ¶ 139 [a]-[f]). For the third cause of action, plaintiffs asserted that, if CWM is not bound by the WFA, then it tortiously interfered with the WFA (amended complaint, ¶¶ 143-151).

On March 13, 2014, defendants moved to dismiss the first cause of action against CWM and the second and third causes of action in their entirety (NYSCEF Doc. No. 25, notice of motion dated 3/13/14). On September 3, 2014, the court (Oing, J.) granted the motion in part and denied it in part. Specifically, the court granted that branch of the motion to dismiss the first cause of action against CWM for the same reason as it had on the prior motion (NYSCEF Doc. No. 39, court tr dated 9/3/14 at 14:9-16:21). The court also dismissed that branch of the second cause of action regarding alleged false financial statements for CIBC Israel as time-barred (*id.* at 29:24-31:12), but otherwise denied the motion with regard to the second and third causes of action (*id.* at 39:16-40:22, 54:21-55:21).

Discussion

Defendants now move for summary judgment dismissing the remainder of the complaint. Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to

warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Breach of the WFA against CIBC (First Cause of Action)

For its first cause of action, plaintiffs allege that CIBC failed to evaluate potential credit applications in good faith. Defendants argue that the six loan applications that CIBC declined all fell outside of the terms of the WFA, and, accordingly, cannot be the basis for a breach thereof. Specifically, they assert that all six either matured outside of the term of the WFA, were a type of loan not governed by the WFA, or otherwise failed to comply with the terms of the WFA. Moreover, they point out that Lowenthal himself admitted that the market for the type of loans intended to make use of the warehouse facility were not popular in the aftermath of the financial crisis. Further, they claim that the WFA is a complete agreement, and any understandings Oppenheimer may claim about the operation of the WFA are barred by the WFA's merger clause and the parol evidence rule.

In opposition, plaintiffs argue that their claim goes beyond the six deals identified in CIBC's moving papers, as other deals were turned down at earlier stages and CIBC allegedly unofficially made it known that certain deals would not be excepted. Further, plaintiffs assert that CIBC misstates the terms of the WFA based on representations made to Oppenheimer during the negotiation process. Finally, they claim that CIBC offered different justifications for turning down the six identified deals at the time they were rejected, and, thus, the court should

not credit the reasons currently being offered.

Breach of contract requires proof of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" *(Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The plaintiff must establish "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing," or to "create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-63 [1990]).

Here, the WFA is clear on its face and its terms are unambiguous. Loans submitted for approval by CIBC under the WFA had to fall within several parameters. All loans had to fully mature within seven years of the closing date of January 14, 2008, or before January 14, 2015 (*id.*, § 2.01 [a]). All loans were to be senior syndicated loans, with OPY acting as lead syndicator (WFA, §§ 2.04 [a], [b]). As even Lowenthal himself confirmed, "[c]lient loan proposals, 'staple financing' proposals and similar non-binding expressions of interest in financings" were not subject to the terms of the WFA, but instead to CIBC's "general credit policies and practices" (WFA, § 2.01 [d]; Sagalowsky affirmation, exhibit 17, email dated 12/19/08 from Lowenthal to Orr and Venn at 3 ["[I]f we are not acting as the manager in a syndication, or if it is a 'best efforts' deal where we feel a responsibility to participate, we cannot find a provision in the agreement to allow access to the Warehouse Facility"]). In order to be eligible for the warehouse facility, all loan applications required a formal "Request for Commitment," including, among other things, a written credit presentation, an underwriting

opinion from OPY, and a record of OPY's due diligence on the proposed loan (WFA, § 2.02). Finally, CIBC was not required to act on any potential loans until it received a Request for Commitment (*id.*, § 5.02 [c]).

Thus, whether other deals may have fallen apart or not been presented to CIBC with a formal Request for Commitment is not a breach of the WFA, as CIBC was not obligated to approve or deny loans at that stage of the process. Moreover, it is essentially undisputed that the small minority of deals that were rejected after a Request for Commitment was made did not fall within the terms of the WFA, and defendants did not, therefore, breach the WFA by turning them down. While plaintiffs argue that they had a different understanding of how the WFA would work in practice based on certain oral representations of the parties that appear to contradict the express terms of the WFA, the parol evidence rule bars such extrinsic evidence to vary the terms of the document (*W.W.W. Assoc.*, 77 NY2d at 162-63). Moreover, the WFA contains a merger clause, which further bars any alleged oral representations (WFA, § 12.06). Plaintiffs cannot rewrite the terms of the WFA just because they are unhappy with how the agreement operated in practice (*see Ambac Assur. Corp. v EMC Mtge. LLC*, 121 AD3d 514, 520 [1st Dept 2014] ["Ambac is not entitled to rewrite the agreements simply because it dislikes, in hindsight, the agreements' terms"]).

Finally, regarding plaintiffs' argument as to CIBC's justification for denying the six loans, plaintiffs essentially argue that defendants are only now proffering the scope of the WFA as a justification to have denied the loans in order to cover their initial bad faith denial at the time. The WFA, however, allowed CIBC to deny loans that fell outside of its scope, and subjected them only to CIBC's regular credit and loan policies. A party cannot act in bad faith when it exercises its rights under a contract (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d

1, 15 [1988] ["Under these circumstances, Chase cannot be held to have acted in bad faith when it took steps to safeguard the fund in which it had an existing security interest and which would, in all likelihood, constitute the only available asset for its reimbursement"]; *Murphy v Am. Home Products Corp.*, 58 NY2d 293, 304–05 [1983] ["In the context of [an at-will] employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination"]). Thus, as CIBC fairly exercised its rights under the WFA, the justification that was offered at the time is irrelevant to the analysis. Plaintiffs' reliance on *Shatkin v Jackson, et al.* (2008 WL 1743481 [WD NY, April 15, 2008, No. 07-CV-332A (RJA/JJM)]) is unavailing, as that case did not involve the exercise of contractual rights.

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

Breach of the APA against CIBC and CWM (Second Cause of Action)

For the second cause of action, plaintiffs assert a variety of violations of both the explicit provisions of the APA and its implied covenant of good faith and fair dealing, the specifics of which are set forth above. As an initial matter, in their moving brief, and based on the record recounted above, defendants established prima facie that no explicit provision of the APA covered any of plaintiffs' allegations with respect to this cause of action, that the Northbound Line regarding CIBC Israel was shut down because Oppenheimer failed to sign the necessary interconnect agreement, that it did not compete with Oppenheimer for clients in Israel, and that CIBC traders did not explicitly hold themselves out as Oppenheimer employees. Oppenheimer makes no arguments in opposition that would raise a triable issue of fact. Moreover, as the court has dismissed the first cause of action for breach of the WFA, plaintiffs may not maintain a claim

for breach of the APA's implied covenant based on a breach of the WFA. Accordingly, to the extent that the second cause of action relies on any of these theories of liability, defendants are entitled to summary judgment dismissing them.

Implicit in every contract is a covenant of good faith and fair dealing (*Dalton v. Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant exists, however, only "in aid and furtherance of other terms of the agreement of the parties" (*Murphy v American Home Prods Corp.*, 58 NY2d 293, 304 [1983]). "The covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (*National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006]; *see also ELBT Realty, LLC v Mineola Garden City Co., Ltd.*, 144 AD3d 1083, 1084 [2d Dept 2016] ["courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]). Moreover, where "there is an express contract addressing the issue in dispute," a claim for breach of the implied covenant must fail (*Cambridge Capital Real Estate Invs., LLC v Archstone Enter. LP*, 137 AD3d 593, 595 [1st Dept 2016]).

Taking plaintiffs' remaining arguments for breach of the APA's implied covenant in turn, and, with regard to plaintiffs' claim that defendants violated the implied covenant by failing to provide lending support pursuant to the WFA or otherwise, defendants argue that a breach of the WFA cannot serve as a breach of the APA. Moreover, as the only lending obligations on CIBC appear in the WFA, further lending obligations may not be implied in another agreement, particularly one that does not contain any provisions regarding lending. In opposition, plaintiffs argue that such claims may exist side by side. Moreover, plaintiffs assert that CWM is not a party to the WFA, and therefore may be held liable for a breach of the APA's implied covenant.

Finally, plaintiffs claim that the APA's implied covenant required that defendants provide "the same level of balance sheet support through non-WFA financing" as part of the overall transaction (Defs' mem of law at 23), and that the fact that the only provisions regarding lending are found in the WFA does not preclude other unwritten lending obligations based on the parties' negotiations.

Here, the WFA contains the entire universe of lending obligations on CIBC and CWM as part of this transaction. The APA is devoid of any provisions referring to lending obligations that do not reference the WFA. Moreover, both agreements contain merger clauses, which provide that they are the complete expression of the parties' agreements when combined with the other agreements that formed the transaction (WFA, § 12.06; APA § 13.05). Thus, this theory of liability is fatally flawed on two grounds. Because there is no provision regarding lending in the APA, plaintiffs may not imply such a provision using the implied covenant (*National Union Fire Ins. Co. of Pittsburgh*, PA, 25 AD3d at 310). Moreover, as the WFA expressly covers the lending obligations that were the basis of the parties' transaction, no claim based on the implied covenant of the APA can succeed (*Cambridge Capital Real Estate Invs., LLC*, 137 AD3d at 595). Plaintiffs reliance to the contrary on *Frydman & Co. v Credit Suisse First Boston Corp.* (272 AD2d 236 [1st Dept 2000]) is unavailing. In *Frydman & Co.*, the Appellate Division, First Department, upheld an express breach of contract claim based on one agreement and an implied covenant claim based on a separate agreement (*id.* at 237-238). The Court, however, upheld the implied covenant claim based on an express provision of that agreement (*id.* at 238), whereas here, plaintiffs wish to imply a new obligation, wholly untethered to any express provision of the APA.

Finally, to the extent that plaintiffs argue this claim may survive against CWM, the

record does not support an assertion of any CWM lending obligations, whether under the WFA or otherwise. Additionally, to the extent that plaintiffs argue that CIBC unfairly altered its loan policies and standards subsequent to closing the transaction, no provision in any of the agreements presented by the plaintiffs prevents CIBC from altering its policies due to changing market conditions. It does not appear that plaintiffs were peculiarly penalized by CIBC's policies such that the record would support a finding of bad faith. That certain CIBC executives disliked the way the Oppenheimer-CIBC relationship functioned is insufficient to raise a material issue of fact as to the application of CIBC's standard policies. To the extent that the second cause of action relies on CIBC's alleged unwillingness to lend, under the WFA or otherwise, defendants are entitled to summary judgment dismissing it.

Regarding the issue of signage at 300 Madison Avenue, defendants argue that plaintiffs received exactly the signage they were entitled to under the Services Agreement, namely a desk sign in the lobby reception area and additional signage on partial floors with in the building. Moreover, the Service Agreement governs this issue, preventing an implied covenant claim under the APA. Moreover, defendants assert that the record does not show that CIBC interfered with signage decisions at the building. In opposition, plaintiffs claim that CIBC purposefully thwarted Oppenheimer's attempts to have proper signage, thus damaging their ability to conduct business.

The Service Agreement provides that Oppenheimer would have the right to signage in the lobby reception area of the building, and for any Oppenheimer space on partial floors of the building (*id.*, § 7). According to the testimony of Rogers, Oppenheimer's head of facilities, Oppenheimer had both types of signage (Rogers tr at 23:15-28:9). Because the express terms of the Service Agreement (which CIBC complied with through its nonparty affiliate CIBC

Delaware) govern Oppenheimer's right to signage, there can be no implied covenant claim based on that issue (*Cambridge Capital Real Estate Invs., LLC*, 137 AD3d at 595). As signage provisions are absent from the APA, an implied covenant claim may not be sued to imply them now (*National Union Fire Ins. Co. of Pittsburgh,* PA, 25 AD3d at 310). In any case, according to the testimony of Rogers, Oppenheimer's head of facilities, Oppenheimer had both types of signage (Rogers tr at 23:15-28:9). Moreover, Rogers testified that an additional sign, which was put up for an annual meeting and then removed, was always intended to be temporary (Rogers tr at 20:20-22:22). Plaintiffs do not raise a material issue of fact in opposition. To the extent that the second cause of action relies on CIBC's alleged interference with signage at 300 Madison Avenue, defendants are entitled to summary judgment dismissing it.

Finally, regarding Oppenheimer employee and client access to prior market research, defendants argue that the Research Sharing Agreement governs what forms of research were shared and with who, barring an implied covenant claim based on an alleged failure to comply thereto. Moreover, the record does not reflect that such research was ever actually withheld, to the extent that it was called for under the Research Sharing Agreement. In opposition, plaintiffs dispute the factual basis for this claim but admit that provisions involving research sharing are absent from the APA.

The Research Sharing Agreement provides that CIBC would provide Oppenheimer and OpCo with certain publicly distributed equity and stock research (Research Sharing Agreement, §§ 2-3). Oppenheimer and OpCo then had the right to distribute such research to their clients (*id.*, § 4), but no provision of the agreement allowed those clients to access such research directly. To the extent plaintiffs' theory of liability with respect to research is contrary to these provisions, it is absent from the APA, governed by the express provision of the Research Sharing

Agreement, and thus cannot serve as a basis for a breach of the APA's implied covenant (*Cambridge Capital Real Estate Invs., LLC*, 137 AD3d at 595; *National Union Fire Ins. Co. of Pittsburgh*, PA, 25 AD3d at 310). Moreover, the record does not support plaintiffs' claims in this regard. Parks, Oppenheimer's Director of Equity Research, testified that there were technical problems regarding client access to the research (Parks tr at 24:5-25:9, 55:12-56:25; 59:6-18, 69:23-71:20, 98:2-101:17), but that he did not know if those problems were caused by CIBC or by Oppenheimer's own systems (*id.* at 52:25-53:20). Further, he testified that there were extensive meetings regarding data and research access during the negotiations (*id.* at 34:8-35:18), and that the final Research Agreement governed what was and was not available (69:19-70:12). Moreover, he stated that all staff transferred from CIBC to Oppenheimer had saved prior research to personal hard drives (*id.* at 23:7-24:4, 26:11-21), that no one lost access to their hard drives (*id.* at 41:2-10), that he could not recall transferred staff having access problems (*id.* at 101:25-102:6), and that most of the complaints ceased within a year of the deal closing (*id.* at 51:11-52:23). Plaintiffs do not raise a material issue of fact in opposition. To the extent that the second cause of action relies on access to research, defendants are entitled to summary judgment dismissing it.

Accordingly, that branch of defendants' motion for summary judgment dismissing the second cause of action for breach of the APA is granted.

Tortious Interference with Contract (Third Cause of Action)

For the third cause of action, plaintiffs assert that CWM tortiously interfered with the WFA. Defendants argue that, as CIBC did not actually breach the WFA, plaintiffs cannot sustain a claim for tortious interference. Plaintiffs respond that CIBC did breach the WFA, and, thus, this claim should survive.

A claim for tortious interference with contract has four elements: "the existence of [the plaintiff's] valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Where there is no breach of the underlying contract, the claim must be dismissed (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 425 [1996] ["There is, however, no allegation ... that Bankers Trust in fact breached its contract to provide financial advice and represent Lama in the disposition of Lama's Smith Barney stock"]). Here, the court has dismissed the first cause of action for breach of the WFA, and, thus, the third cause of action for tortious interference with the WFA must also be dismissed.

Accordingly, that branch of defendants' motion for summary judgment dismissing the third cause of action for tortious interference with the WFA is granted.

The court has reviewed the parties' remaining arguments, and finds them unavailing.

Accordingly, it is hereby,

ORDERED that the motion of defendants Canadian Imperial Bank of Commerce and CIBC World Markets Corp. for summary judgment dismissing the complaint is granted, and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

Dated: 7/2/18

ENTER:

HON. ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY