Oppenheimer Inv. (Jersey) Ltd. v Standard Chartered Bank
2011 NY Slip Op 33875(U)
September 7, 2011
Sup Ct, New York County
Docket Number: 651780/2010
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

OPPENHEIMER INVESTMENTS (JERSEY) LTD.

- v -

STANDARD CHARTERED BANK and STANDARD CHARTERED BANK (HONG KONG) LTD.

INDEX NO. 651780/2010

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss pursuant to CPLR 327(a), 3211(a)(1), (7) and (8) and 3016(b), including the motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 301 and 302 is DENIED, except for the claim for unjust enrichment and imposition of a constructive trust which is GRANTED per the attached Decision and Order.

Dated: September 7, 2011

MELVIN L. SCHWEITZER, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

OPPENHEIMER INVESTMENTS (JERSEY) LTD.,	:	
Plaintiff,	:	Index No. 651780/2010
-against-	:	DECISION AND ORDER
STANDARD CHARTERED BANK and STANDARD CHARTERED BANK (HONG KONG) LTD.,	:	Motion Sequence Nos. 001, 002
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This matter arises out of a set of "bookrunner agreements" between the plaintiff, Oppenheimer Investments (Jersey) Ltd. and defendants, Standard Chartered Bank and Standard Chartered Bank (Hong Kong) Ltd. It involves, *inter alia*, issues which are raised in three separate defense motions to dismiss involving lack of personal jurisdiction, *forum non-conveniens*, and defenses based on documentary evidence and failure to state a cause of action.

Background

Plaintiff, Oppenheimer Investments (Jersey) Ltd. ("OIJ") is a financial institution which provides advice and capital markets services with respect to capital formation and other investment activities. OIJ is organized under the laws of the Channel Islands, and has its principal place of business in Jersey. OIJ is part of a global group, including an affiliate, OIAG, Inc. ("OIAG"), which is organized under the laws of the State of New York and has its principal place of business in New York City. The group is collectively referred to as Oppenheimer ("Oppenheimer"). Both defendants, Standard Chartered Bank ("SCB"), and Standard Chartered Bank Hong Kong ("SCHK"), are financial services institutions and also members of a global

group. SCB is incorporated and maintains its principal place of business in the United Kingdom. SCBK is incorporated and maintains its principal place of business in Hong Kong. It is an affiliate of, and controlled by, SCB. SCB has a substantial business presence in New York.

In September 2007, OIJ was retained as exclusive financial advisor by Goral Holdings Co. Ltd. and Goral Asset Management Co. Ltd. (collectively, "Goral"), Chinese corporations, pursuant to a financial advisory agreement ("Advisor Agreement"). Goral intended to raise $600 million through the issuance of securities in order to invest in a joint venture project for the construction and financing of a polyvinyl chloride manufacturing facility in Tianchen, China ("Project"). As the exclusive financial advisor, OIJ was responsible for finding and securing investors to purchase securities required to finance the Project. Oppenheimer's senior management assigned responsibility for executing the Advisor Agreement to OIAG. Under the Advisor Agreement, OIJ retained the right to contract with sub-agents to assist in finding and placing financing for the Project. Goral was obligated to pay OIJ a fee equal to 8% of the aggregate principal amount of securities placed by OIJ and its sub-agents and to reimburse OIJ at closing for expenses incurred in the offering and sale of such securities.

As the capital markets deteriorated in 2008, OIJ contacted various investment banks, hoping to secure sub-agents to assist in raising the project finance capital. In April 2008, OIJ entered into a sub-agent agreement (Offshore Agreement) with SCB and Royal Bank of Canada (RBC). The agreement provided that SCB and RBC would be sole lead arrangers, bookrunners (Bookrunners) and placement agents for the capital market transactions necessary to raise the capital required to finance the Project. The Offshore Agreement provided that Oppenheimer was

mandated as exclusive financial advisor to Goral and that Goral intended to raise $600 million for the Project. Furthermore, the Offshore Agreement also provided that:

> Each of the Bookrunners are authorized by Oppenheimer, to the extent such Bookrunner deems appropriate, to delegate any of their functions or responsibilities hereunder to any other of their respective Affiliates... provided that any such delegation shall not affect the obligation of such Bookrunner hereunder for which it shall remain primarily liable....

The Offshore Agreement defines an "Affiliate" with respect to any company as "any subsidiary undertaking or holding company and any subsidiary undertaking of any such holding company".

The Offshore Agreement provides that funds were expected to be raised by the issuance of securities within the United States. Oppenheimer agreed to cooperate with the Bookrunners and provide information and data regarding the Project to prospective investors. In exchange for the Bookrunner's services, Oppenheimer was to pay a 3% commission on the proceeds of the financing in addition to any expenses incurred while securing investors. Following the execution of the Offshore Agreement, Oppenheimer advanced $250,000 to the Bookrunners as a retainer for their services. The $250,000 advance was to be offset against the Bookrunners' commission.

In regards to Oppenheimer's reimbursement, the Bookrunner's Agreement states:

> When the Financing is closed, the $250,000 advanced to the Bookrunners, and other third party expenses which are related to the Financing which may have been advanced by Oppenheimer shall be paid to the Bookrunners out of the relevant Closing proceeds by the *Company* [Goral] and *the Bookrunners shall reimburse Oppenheimer* for such advance and expenses from such Closing proceeds equal to or in excess of such amounts....Any such reimbursement shall not affect the Bookrunners' rights under paragraph 4.

This provision makes clear that following the closing of the financing, the Bookrunners, in this case SCB, were to reimburse Oppenheimer out of the proceeds remitted to SCB by Goral.

The Offshore Agreement is governed by New York Law. Also, it contains a unilateral forum selection clause, in which Oppenheimer consents to the non-exclusive jurisdiction of any court in Manhattan, New York. In this respect, it provides:

> Oppenheimer irrevocably (a) submits to the non-exclusive jurisdiction of any New York State or U.S. federal court sitting in the Borough of Manhattan, The City of New York, New York, for the purposes of any suit, action or other proceeding arising out of this Agreement or any of the agreements or transactions contemplated hereby. . . . Oppenheimer hereby irrevocably designates Oppenheimer Investments AG, 1 Rockefeller Plaza, New York, NY 10020 as agent upon whom process against Oppenheimer may be served.

In October 2009, SCBHK and Standard Chartered Bank (China) Ltd. (SCBC), affiliates of SCB, entered into an agreement with Goral and OIJ (Onshore Agreement) pursuant to which SCHK and SCBC agreed to arrange financing for the Project on a best efforts basis. The financing was to be raised in China.

The agreement provided that SCB was to be paid a fee of 3% of the principal amount of the financing raised through the Onshore Agreement. In addition, if the interest expense of the financing was less than 12.5% per year, Goral, SCB and OIJ would share the additional savings on a percentage basis. It was also agreed that the amount arranged through these efforts would cover all fees and expenses incurred in connection with the financing, including those incurred in connection with the Offshore Agreement.

Finally, the Onshore Agreement provided that all the terms of the engagement would be the same as set forth in the Offshore Agreement, except as expressly set forth in the Onshore Agreement.

OIJ alleges that despite the terms of the Advisory Agreement, the Offshore Agreement and the Onshore Agreement, SCB and SCHK entered into an undisclosed agreement with Goral

pursuant to which they raised capital for Goral and were compensated for such services. This arrangement allegedly was in violation of the three previously executed agreements and prevented OIJ from being paid fees and expenses that had been contractually agreed to. It also allegedly interfered with OIJ's ongoing relationship with Goral.

SCB, not surprisingly, views the matter differently, asserting that its conduct was not in violation of contractual arrangements but was independent capital raising activity. SCB claims that Oppenheimer had no involvement in the transactions that would transpire after the Onshore Agreement was executed, given that that financing was to take place solely in China. Oppenheimer, on the other hand, emphasizes that the Onshore Agreement was part of the much larger financing scheme formalized in the Offshore Agreement. It asserts that the Onshore Agreement obligated SCB to reimburse it the fees and expenses it advanced under the Offshore Agreement by expressly incorporating the Offshore Agreement's rights and obligations into the Onshore Agreement.

Discussion

Oppenheimer initiated this action by filing a complaint alleging that the defendants' conduct constituted breach of contract, breach of the implied covenant of good faith and fair dealing, tortuous interference with contract, fraud, and unjust enrichment. In addition, Oppenheimer sought an order for the imposition of a constructive trust in the amount totaling their injury. The defendants, SCB and SCHK filed two separate motions to dismiss. They moved to dismiss pursuant to CPLR § 327 (a), CPLR § 3211 (a) (1), (7) and (8), and CPLR § 3016 (b) and on grounds of *forum non-conveniens*. In addition, SCHK filed a separate

motion to dismiss on the same grounds and also for lack of personal jurisdiction pursuant to CPLR §§ 301 and 302.

There are two critical provisions in the Offshore Agreement relating to this case. First, under paragraph 6 of the Offshore Agreement, SCB had reimbursement obligations to Oppenheimer at the closing of the financing. Second, paragraph 12 of the Offshore Agreement, contained a New York governing law provision and submitted OIJ and its affiliates to the non-exclusive jurisdiction of the New York courts. While the Onshore Agreement differed from the Offshore Agreement in that it targeted mainland Chinese investors, and obligated Goral to compensate SCB and its affiliates directly with a 3% commission, the two critical provisions of the Offshore Agreement referred to above were incorporated into the Onshore Agreement. The Onshore Agreement provided specifically with respect to fees and expenses:

> We also confirm our understanding that the amount raised in the Onshore Financing will cover all fees and expenses incurred in connection with the financing, including all fees and expenses incurred in connection with the engagement letter between Oppenheimer Investments (Jersey) Ltd ("Oppenheimer") and SCB dated 14th April 2008 (Offshore Engagement Letter). . . .

Additionally, it included the following incorporation by reference language:

> Except as expressly set forth herein, all other terms and conditions of this engagement shall be the same as are set forth in the Offshore Engagement Letter, but without the involvement of or any participation by RBC Capital Markets Corporation. . . .

Accordingly, paragraph 12 of the Offshore Agreement governing the choice of law and incorporating OIJ's unilateral forum selection clause, applied to the Onshore Agreement, as well.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026)." *Leon v Martinez*, 84 NY2d 83, 87 (1994). "We accept the facts

as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit with any cognizable legal theory." *Id.* at 87-88. "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 88. "In assessing a motion under CPLR 3211 (a) (7), however,... the criterion is whether the proponents of the pleading has a cause of action, not whether he has stated one." Id. (citation and internal quotation marks omitted).

Forum Non-Conveniens

SCB and SCHK first move to dismiss on grounds of forum non conveniens pursuant to CPLR 327. They argue that New York is an inconvenient forum given that much of the activity governed by the relevant agreements took place in China, the dispute involves Chinese parties and the documentary evidence and witnesses are in China. CPLR 327(a) authorizes dismissal where the court "finds that in the interest of substantial justice the action should be heard in another forum. . . ."

The doctrine of *forum non-conveniens* is a flexible one based on the circumstances of each case, the application of which is a matter of discretion to be exercised by the trial judge. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 483 (1984); *Piper Aircraft Co. v Reyno,* 454 U.S. 235 (1981). The defendant challenging the forum bears the heavy burden of demonstrating that the relevant private and public interest factors weigh in favor of dismissal. *Bank Hapoalim Ltd. v Banca Intesa SPA*, 810 NYS2d 172, 174 (2006). The court must consider and balance various competing factors in deciding whether jurisdiction is appropriate – the burden on the New York courts, the potential hardship to the defendant and the availability of an alternative

forum in which plaintiff may bring suit. *Islamic Republic* at 479. In addition to balancing these factors, the courts may consider whether the parties are nonresidents and whether the transaction arose in a foreign jurisdiction. *Id.* Finally, "it is well-established law that unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 (1st Dept.1991); *JPS Capital Partners, LLC v Silo Point Holding LLC*, 24 Misc 3d 1234(A), 899 NYS2d 60 (NY Sup Ct 2009).

The defendants have not met their burden of demonstrating that the forum non-conveniens factors weigh in favor of dismissal – that exercising jurisdiction in this forum would result in undue hardship and that there is a suitable alternative forum. The defendants rely on the fact that plaintiff and defendants are nonresidents and the placement of securities pursuant to the Onshore Agreement took place in China. However, it is the underlying transaction and subsequent breach that form the issues relevant to the *forum non-conveniens* analysis. The defendants fail to take into account that (1) the transaction has a substantial nexus with New York in that plaintiff's New York affiliate, OIAG, played a material role in the overall transaction, (2) the Offshore Agreement provides that New York substantive law applies and the Onshore Agreement incorporates the New York choice of law provision, (3) similarly, the Offshore Agreement contains a unilateral forum selection clause which is incorporated into the Onshore Agreement, and (4) both plaintiff and defendants are multi-national corporations with substantial contacts to New York.

More specifically, while OIJ was the signatory to the Offshore Agreement, it provided that it extended to OIJ's and SCB's affiliates and the personnel most involved in the financing of

the Project were senior officers at OIAG who worked in New York. In addition, a unilateral forum selection clause serves as relevant evidence weighing against dismissal on *forum non-conveniens* grounds. By agreeing to SCB's request for a unilateral New York forum selection clause, OIJ waived any claim that any proceeding brought in New York was brought in an inconvenient forum. This provision, although included for SCB's benefit, was intended to ensure a reliable forum in which to litigate, should a dispute arise. Consequently, to now seek dismissal on the ground that the forum is inconvenient puts SCB in the position of acting inconsistently and opportunistically. New York courts disfavor such conduct. *Concesionaria DHM S.A. v Int'l Fin. Corp.*, 307 F Supp 2d 553 (SDNY 2004); *Am. Steamship Owners, Mut. Protection and Indem. Ass'n, Inc. v LaFarge N.A., Inc.*, 474 F Supp 2d 474 (SDNY 2007).

Finally, SCB argues that Hong Kong is an available and suitable alternative forum. However, the mere existence of a viable alternative forum is not enough to dismiss on the ground of *forum non-conveniens*. *JPS Capital Partners* at 899. Moreover, because the Agreements contain a New York choice of law provision, OIJ may be burdened and prejudiced if the case were moved to a Hong Kong forum where a foreign judge would have to interpret New York law. Additionally, there will be no right to a jury trial in Hong Kong. For the reasons set forth above, the defendants' motion to dismiss on grounds of *forum non-conveniens* is denied.

Personal Jurisdiction

SCHK moves to dismiss the complaint for lack of personal jurisdiction.

CPLR 302 (a) (1) provides for jurisdiction over a foreign corporation which "transacts any business within the state or contracts anywhere to supply goods or services in the state," but

only where the cause of action arises out of the aforesaid transaction. *Holness v Mar. Overseas Corp.*, 251 AD2d 220 at 224 (1st Dept 1998). Moreover,

> "[t]he courts look to the "totality of circumstances" to determine whether a party has "transacted business" in this state, within the meaning of CPLR 302(a)(1), considering factors including: "(1) whether the defendant has an ongoing contractual relationship with a New York corporation; (2) whether the contract was negotiated or executed in New York; (3) what the choice of law clause is in the contract; and (4) whether the contract requires notices and payments to be sent into the forum state or requires supervision by the corporation in the forum state."

Bluman v Labock Technologies, Inc., 13 Misc 3d 1244 (A), (NY Sup Ct 2006) quoting *Roper Starch Worldwide, Inc. v Reymer & Assocs., Inc.*, 2 F Supp 2d 470, 474 (SDNY 1998). The plaintiff, OIJ, responding to the motion to dismiss, has shown that jurisdiction does indeed exist in New York, and thus SCHK's motion is denied. *See Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 466, (1974); *Fed. Ins. Co. v Specialty Paper Box Co., Inc.*, 222 AD2d 254, 254 (1st Dept 1995). More specifically, OIJ correctly states that,

> SCHK's activities on the Goral transaction were not limited to its efforts on the Onshore Agreement in Asia. First, SCHK is a party to the Offshore Agreement, as the agreement was entered into by OIJ 'together with its Affiliates' on the one hand and RBC and *Standard Chartered Bank 'together with their affiliates' on the other hand serving as Oppenheimer's placement agents.* (emphasis added)

SCHK had direct contacts with New York given its participation in the Offshore Agreement. Moreover, at least two SCHK employees worked on the Offshore financing proposal. Through its close operational relationship with SCB, SCHK played a significant role in a global financing project, with roots in New York. In addition, given the New York choice of law provision and the unilateral forum selection clause contained in the Offshore Agreement, both of which are explicitly extended to the Onshore Agreement, SCHK also appears to be acting inconsistently and opportunistically in order to avoid jurisdiction in New York.

Furthermore, this court has jurisdiction over SCHK under CLPR 301, through application of the "agency" and "mere department" analysis, by virtue of SCB's business activities in New York and SCHK and SCB's common ownership by the corporate parent, Standard Chartered PLC. SCHK argues that it is a Hong Kong bank with no New York presence, as it is incorporated in Hong Kong, has its principal place of business in Hong Kong and all of its branches and employees are within Hong Kong. However, while SCHK argues that it is an entirely distinct corporate entity from SCB, SCHK ignores New York law, which recognizes that SCHK may be subject to jurisdiction in New York by virtue of activities of its corporate affiliates or parent company. More specifically, under New York law, jurisdiction may be established over a foreign company if it is a "mere department" of an entity that is present in New York, or if the relationship between the foreign corporation and the local one gives rise to an inference of an "agency" relationship.

> In determining whether the subsidiary is a "mere department" of the parent . . . the court must consider four factors, which in *Beech Aircraft* we summarized as follows: first, "common ownership"-which is "essential"-; second, "financial dependency of the subsidiary on the parent corporation;" third, "the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities;" and fourth, "the degree of control over the marketing and operational policies of the subsidiary exercised by the parent.

Jazini v Nissan Motor Co., Ltd., 148 F.3d 181, 184-85 (2d Cir 1998) (quoting *Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d at 120, 121, 122.) *See also Frummer v Hilton Hotels Int'l, Inc.*, 19 NY2d 533, 538, (1967); *Taca Int'l Airlines, S. A. v Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97 (1965). Such a relationship is present in this case.

SCB owns 85% of SCHK, with the remaining 15% owned by their common corporate parent Standard Chartered PLC. In addition, SCB publicly associated itself with SCHK as part of their "global network" and refers to SCHK as a "branch" of SCB. Moreover, the foreign affiliate in Hong Kong was established to do business that SCB, an affiliate with a substantial New York presence, normally had done itself for 135 years. Up until 2004, business was carried out in Hong Kong by SCB employees in the SCB Hong Kong branch office. Thus, the plaintiff correctly argues that the SCHK, a foreign corporation, may be found to be doing business in New York based on its relationship with SCB and Standard Chartered PLC, its parent entity, each of which is present in New York.

In reaching this conclusion, it is most persuasive that all of Standard Chartered PLC's affiliates perform much of the same functions, promote a public association of all the affiliates, coordinate in the selection of executive personnel and are financially interdependent. Also, all Standard Chartered PLC's affiliates have common training programs, marketing protocols, and accounting and banking standards. *See Dorfman v Marriott Int'l Hotels, Inc.*, 2002 WL 14363 (SDNY Jan 3, 2002); *Jayne v Royal Jordanian Airlines Corp.*, 502 F Supp 848, 860 (SDNY 1980) ("[I]t is the public association of the two companies, together with their other points of interrelatedness, that overcomes their corporate and operational separateness and tips the balance in favor of their constituting a single enterprise for jurisdictional purposes."). Therefore, the defendants' motion to dismiss on grounds of lack of personal jurisdiction is also denied.

Failure to State a Cause of Action

In the alternative, SCB and SCHK, move to dismiss the action for failure to state a cause of action, on the basis of documentary evidence and for failure to allege fraud with specificity.

Both defendants rely on a single assertion, counter to the language of the Offshore Agreement, in an attempt to dismiss OIJ's claim on the merits. They claim that only the Goral Companies were contractually obligated to reimburse OIJ for its expenses and that neither SCB nor SCHK ever had any such obligation. However, the defendants had a contractual obligation to reimburse OIJ its fees and incurred expenses from financing proceeds under paragraph 6 of the Offshore Agreement.

First, the defendants argue that the documentary evidence – the Offshore and Onshore Agreements, disprove an essential allegation of the complaint, and therefore dismissal pursuant to CLPR 3211 (a) (1) is warranted. More specifically, defendants argue that OIJ is suing for Goral's breach of the Advisor Agreement, and that all damages are thus indirect, and barred by the limitation of liability clause agreed to by OIJ in the Offshore Agreement. This is not the case. Rather, OIJ seeks to enforce SCB's payment obligations under the Offshore Agreement. Failure to meet this obligation constitutes a "direct injury" and is not precluded by the Offshore Agreement's limitation of liability clause.

Second, the defendants contend that the breach of contract cause of action should be dismissed because it is refuted by the terms of the relevant Agreements. Again, this argument stems from the defendants incorrect interpretation of these Agreements. The contractual obligation that the defendants allegedly failed to honor does in fact exist and the plaintiff correctly identified the portion of the contract that was breached in its complaint. Thus, OIJ has sufficiently pled the material terms of the agreement sufficient to put the defendants on notice of their breach.

Implied Covenant of Good Faith

Third, the defendants' motion to dismiss OIJ's second cause of action for breach of implied covenant of good faith and fair dealing is denied. OIJ has sufficiently pled this cause of action in its complaint as the claim is based on separate allegations than the breach of contract claim. OIJ alleged that the defendants acted in bad faith by conspiring with Goral in order to prevent OIJ from receiving commissions and reimbursements under the three Agreements referred to above, depriving OIJ of an intended benefit of such Agreements. *See Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886 (1st Dep't 2010) ("The complaint also states a cause of action for breach of the implied covenant of good faith and fair dealing. It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995) quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87, (1933)). Because the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations are to be taken as true, OIJ's allegations are sufficient to maintain this claim here.

Tortious Interference with Contract

Fourth, the defendants seek to dismiss the causes of action for tortious interference with contract. "In order to succeed on such a cause of action, the plaintiff must establish: (1) the existence of a valid contract between it and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of the third party's breach of that contract

without justification, and (4) damages." *R.U.M.C. Realty Corp. v. JCF Associates, LLC,* 51 A.D.3d 993, 994-95, (2d Dept 2008). *See also Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 424 (1996); *Foster v Churchill*, 87 N.Y.2d 744, 749–750 (1996). OIJ sufficiently plead its claims because the complaint alleges that the defendant's knew of OIJ's contractual relationship with Goral given the Advisor Agreement and Onshore Agreement under which OIJ was to receive a fee at closing of the financings. Moreover, paragraphs 28-32 of the complaint allege that the defendant's directly raised capital on behalf of Goral in exchange for a commission paid directly by Goral, thus enabling Goral to avoid paying Oppenheimer its fees and expenses under the Advisor and Onshore Agreements,. This is the "but for" cause of OIJ's financial injury, and, as such, these allegations are sufficient to defeat a motion to dismiss.

Fraud

Fifth, the defendant argues that the fraud cause of action should be dismissed because OIJ fails to plead fraud with the requisite specificity. "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." CPLR 3016. Again, the defendant's motion is denied as OIJ's complaint pleads sufficient facts to establish a claim for fraud. The complaint alleges that the defendants made representations in their ordinary course of dealing with OIJ regarding their commitment to honor their contractual obligation, misleading OIJ. Given the alleged events that transpired in 2010, the complaint clearly asserts that the defendants did not intend to honor their contractual obligations. OIJ is alleged to have reasonably relied to its detriment on the information communicated by the defendants regarding their contractual obligations, and the defendants allegedly knew or were reckless in not knowing

that the representations were false and misleading. Moreover, CPLR 3016 "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'. *Lanzi v Brooks,* 43 NY2d 778, 780 (1977). Further proof or detail of fraud are often unavailable prior to discovery. *See Pludeman v N. Leasing Sys., Inc.,* 10 NY3d 486 ("Although plaintiffs did not allege specific details of each individual defendant's conduct, the requirement under CPLR 3016 (b) that the complaint must sufficiently detail the allegedly fraudulent conduct should not be confused with unassailable proof of fraud. It may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct").

Unjust Enrichment

Sixth, the defendants argue that plaintiff's cause of action for unjust enrichment should be dismissed as the subject matter of the dispute is the interpretation of a set of contracts which are affirmed by plaintiff. Defendants' assertion here is correct. Under New York law, no such cause of action can be sustained where the matter is controlled by a valid, enforceable contract. *See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 (1987).

Constructive Trust

Seventh, defendant asserts that plaintiff's claim for a constructive trust should be dismissed as it has not plead the essential elements of such a cause of action. In particular, defendants point out that plaintiff has failed to allege facts sufficient to establish the necessary presence of a fiduciary relationship. *See In re Gupta*, 38 AD3d 445, 446 (1st Dept 2007). This is clearly so. This case presents facts related to an arm's-length, commercial arrangement among

sophisticated financial institutions. In the rough and tumble, competitive world of international finance, sophisticated parties competing for financial service advisory fees rarely form fiduciary relationships. There is nothing to suggest that they did so here. Consequently, this cause of action is dismissed.

Accordingly, it is

ORDERED that the motions to dismiss of Standard Chartered Bank and Standard Chartered Bank (Hong Kong) Ltd. are denied except for their motion to dismiss the claim for unjust enrichment and imposition of a constructive trust, which are granted.

Dated: September 7, 2011

ENTER:

J.S.C.