SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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PIPER SANDLER & CO.

Plaintiff,

- v -

ACER THERAPEUTICS INC.,

Defendant.

INDEX NO. 656055/2017

MOTION DATE 02/28/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 170, 172, 173, 174, 175, 176, 177

were read on this motion for SUMMARY JUDGMENT.

This case is about the soured relationship between an investment banking firm and its former client, which began as a fee dispute before escalating into a fight over the firm's alleged conflicts of interest. Plaintiff Piper Jaffray & Co. ("Piper Jaffray")[1], an investment banking firm, demands payment from its former client, Defendant Acer Therapeutics, Inc. ("Acer"), following the successful completion of a reverse merger that Piper Jaffray helped to orchestrate. Acer, however, believes Piper Jaffray is not entitled to payment because, among other things, the firm was simultaneously working on behalf of Acer's competitor to pursue the same target. Although Acer ultimately closed the deal, it alleges that Piper Jaffray's skullduggery – which Acer

[1] Effective January 6, 2020, Piper Jaffray was renamed Piper Sandler & Co., and the caption of this case was modified accordingly. *See* NYSCEF Doc. No. 203. Because Plaintiff operated as Piper Jaffray at all times relevant to this motion, however, the former name is used throughout this opinion.

purportedly learned about afterwards, from another source – delayed the deal and drove down its value.

Now, Piper Jaffray seeks summary judgment on its breach of contract claim, and to dismiss Acer's four counterclaims. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

Piper Jaffray is an investment banking and securities brokerage firm headquartered in Minneapolis, Minnesota, with offices located in various other cities, including New York City and San Francisco. Piper Jaffray's Statement of Undisputed Material Facts ("Piper Jaffray SUMF") ¶¶1-2. Acer is a pharmaceutical company, based in Massachusetts, focused on the acquisition, development and commercialization of therapies for serious rare and ultra-rare diseases. *Id.* ¶¶3-4.

The 2015 Private Placement

On June 30, 2015, Piper Jaffray and Acer entered into a letter agreement (the "2015 Engagement Letter"), under which Piper Jaffray agreed to assist Acer in its effort to raise capital through a private placement of equity and other securities. *Id.* ¶¶13-14; *see* Acer Resp. to Piper Jaffray SUMF ¶14. The 2015 Engagement Letter provided that if Acer successfully completed a private placement, Piper Jaffray would be entitled to a fee equal to 7.0% of the capital raised. *Id.* ¶15. Piper Jaffray states that its New York-based Equity Capital Markets team worked with Acer on the 2015 private placement. *Id.* ¶17.

But the private placement fell flat. Acer received only one term sheet from a potential new investor, which Acer rejected. *Id.* ¶¶19-20. In the end, the only investment Acer received from a new investor during the term of the 2015 Engagement Letter was a $100,000 personal

investment from Acer's new Chairman of the Board, Steve Aselage. *Id.* ¶21. Although Acer acknowledged that Piper Jaffray was contractually entitled to a fee under the 2015 Engagement Letter for Aselage's investment, Piper Jaffray agreed, at Acer's request, to waive its fee for that investment. *Id.* ¶¶22-23. Because there was no private placement during the 2015 Engagement Letter's term, Piper Jaffray was not entitled to a fee for its efforts on Acer's behalf. *Id.* ¶24.

The 2016 Engagement

The next year, Piper Jaffray and Acer continued to look for new equity investors, and also investigated potential merger-and-acquisition ("M&A") transactions. *Id.* ¶25. Despite the 2015 private placement's lackluster results, Acer continued to work with Piper Jaffray because, among other things, it "trusted" Piper Jaffray and "wanted to give them the shot at [an] M&A transaction." *Id.* ¶26. Piper Jaffray's work on the M&A effort would be handled by a New York/Boston-based team from Piper Jaffray's Investment Banking division. *Id.* ¶27.

The parties agreed to terminate the 2015 Engagement Letter and enter into a new agreement (the "2016 Engagement Letter") that would cover not only a private placement, but also a potential M&A process. *Id.* ¶28. The parties entered into the 2016 Engagement Letter on August 30, 2016. *Id.* ¶29. The Letter would "be governed by and construed in accordance with the laws of New York, without regard to it conflict of laws principles." *Id.* ¶36.

Several other provisions in the Letter are also relevant to the dispute here. *First*, Piper Jaffray agreed to act as "(i) a financial advisor for a potential Transaction, and (ii) a placement agent in connection with a potential private placement of equity securities ("***Securities***") issued by [Acer] (a "***Private Placement***")." *Id.* ¶30 (emphasis in original). As part of the 2016 engagement, Piper Jaffray agreed to, *inter alia*, review and analyze Acer's business and financial condition, and prepare materials describing Acer's operations and projected growth. *Id.* ¶¶44-45.

Second, the 2016 Engagement Letter provided that if Acer "consummate[d] a Private Placement," it would pay Piper Jaffray "a cash fee, payable at each closing of such Private Placement equal to seven percent (7.0%) of the gross proceeds of all Securities sold at such closing to Approved Contacts in the Private Placement." *Id.* ¶32.

Third, the 2016 Engagement Letter included a conflict-of-interest disclaimer that allowed Piper Jaffray, "from time to time, [to] perform various investment banking and financial advisory services for other clients and customers who may have conflicting interests with respect to [Acer]":

> [W]e and our affiliates may from time to time perform various investment banking and financial advisory services for other clients and customers who may have conflicting interests with respect to you or the Transaction or the Private Placement. Except as otherwise provided herein or by separate agreement with you, we and our affiliates will not use your confidential information in connection with the performance by us and our affiliates of services for other companies, and we and our affiliates will not furnish any such information to any third party. . . . Notwithstanding anything herein to the contrary, during the Term and the Tail Period, neither Piper Jaffray nor any of its affiliates shall provide advisory services or serve as investment banker to any entity or person that attempts to acquire all, or a substantial part of, the Company in a transaction that would constitute a Transaction in connection with such acquisition

Piper Jaffray Ex. 5 at 10.

Fourth, Piper Jaffray was to employ "best efforts" in securing the Private Placement:

> You [*i.e.*, Acer] acknowledge and agree that our engagement pursuant to this Agreement does not constitute an agreement or a commitment, express or implied, by us [*i.e.*, Piper Jaffray] or any of our affiliates to underwrite, purchase or place any Securities or otherwise provide any financing, nor an agreement by you to issue and sell any Securities. The Private Placement will be made by Piper Jaffray, if at all, on a "best efforts" basis.

Piper Jaffray Ex. 5 at 5; *see* Acer Counterstatement of Additional Material Facts ("CSMF"), ¶25.

Fifth, Piper Jaffray disclaimed the existence of any fiduciary duties on either party arising from the work Piper Jaffray was contracting to perform:

> You [*i.e.*, Acer] acknowledge that you have retained us [*i.e.*, Piper Jaffray] solely to provide the services set forth in this Agreement. In rendering such services, we will act as an independent contractor. You acknowledge that nothing in this Agreement is intended to create duties to you beyond those expressly provided for in this Agreement, and we and you specifically disclaim the creation of any fiduciary or agent relationship between, or the imposition of any fiduciary or agency duties on, either party. Further, you acknowledge that Piper Jaffray has been engaged only by you, and that your engagement of Piper Jaffray is not deemed to be on behalf of and is not intended to confer rights upon any shareholder, creditor or optionee of Company capital stock or any other person not a party hereto as against Piper Jaffray or any of its affiliates or any of their respective directors, officers, agents, employees or representatives.

Piper Jaffray Ex. 5 at 10.

Acer Pursues a Reverse Merger with Opexa

In early January 2017, Acer began discussing a potential M&A transaction with Opexa Therapeutics, Inc. ("Opexa"). *Id.* ¶61. The form of the transaction was to be a reverse merger, meaning that Acer would merge into an Opexa subsidiary but then Acer's shareholders would exchange their stock for Opexa shares and end up controlling the merged entity, which would be renamed "Acer." *Id.* ¶62. Acer submitted a reverse merger proposal to Opexa on January 11, 2017. *Id.* ¶64. Two days later, the parties executed a mutual confidentiality agreement, which gave access to each other's respective data rooms to facilitate the due diligence process. Acer CSUF ¶¶32-33.

Around this time, Acer alerted Piper Jaffray of its discussions with Opexa, and asked Piper Jaffray for assistance in raising capital through a private placement that it planned to conduct in conjunction with the reverse merger. *Id.* ¶35; Piper Jaffray SUMF ¶65. Acer forwarded Opexa's comments on the Acer proposal to the Piper Jaffray team, and all parties held a conference call in mid-January to introduce Opexa to Acer's bankers and to foster confidence in Acer's "finance-ability." Acer CSUF ¶¶37-39.

Acer and Piper Jaffray discussed entering into a new engagement letter, more specifically tailored to the potential Opexa transaction than the 2016 Engagement Letter was. *Id.* ¶66. In January, Piper Jaffray sent Acer a draft revised engagement letter that contained a conflict of interest disclaimer identical to the one in the 2016 Agreement. But in early February, Piper Jaffray circulated a newly revised draft, which sought to change that disclaimer:

> More specifically, **the Company acknowledges that Piper Jaffray, through a separate Investment Banking team may be currently advising another company (the "Competitor") in connection with a potential acquisition of [Opexa]. The Company understands that the Competitor, with the benefit of Piper Jaffray's advice as a financial advisor, could bid for and ultimately acquire [Opexa] and even if the Competitor does not ultimately acquire [Opexa], the Competitor could cause the price to be paid by the Company for [Opexa] to be greater than it would have been absent the involvement of the Competitor.** The Company hereby irrevocably i) consents to Piper Jaffray's acting as financial advisor to the Competitor and ii) holds Piper Jaffray harmless, and waives any and all claims (including but not limited to any claim against Piper Jaffray based on conflict of interest or breach of duty), as a result of Piper Jaffray's acting as a financial advisor to the Competitor.

Acer CSUF ¶64 (emphasis added). After reviewing the draft engagement letter, Acer conveyed that it would not accept the expanded scope of the revised disclaimer. *Id.* ¶66. The parties also disagreed over other provisions in the draft letter relating to Piper Jaffray's fee structure. *Id.* ¶69. Ultimately, the draft engagement letter was never signed. *Id.* ¶68.

On February 7, Opexa informed Acer that it was not ready to move forward with Acer because Opexa was exploring a reverse merger with another candidate – later identified as a company called Innovate. *Id.* ¶56.

Piper Jaffray's Alleged Conflict of Interest

Meanwhile, in January 2017, Piper Jaffray's Global Head of Healthcare Investment Banking, J.P. Peltier, wrote to the group about "accelerating" reverse merger activity and warned that Piper's "ad hoc method" of "track[ing] potential conflicts" was "no longer effective." Acer

CSUF ¶44. According to Peltier, Piper Jaffray "need[ed] to get coordinated on the reverse merger projects to ensure [they were] navigating conflicts of interest," and to "incorporate[ ] appropriate language into [their] engagement letter to protect the firm." *Id.*

According to Acer, Peltier's directive went unheeded, as the firm simultaneously represented both Acer and Innovate in pursuing a merger with Opexa. Piper admits that it "did, in fact, end up representing another client interested in Opexa." Piper Jaffray Mot. for S.J. at 9. But Piper maintains that neither of the San Francisco-based bankers who represented Innovate – Rita Wang and Chris Collins – ever performed any work for Acer, and that nobody on the Piper Jaffray/Acer team was aware that Piper was also representing Innovate or that Innovate was interested in a transaction with Opexa. Piper Jaffray SMUF ¶¶81-84. Acer disputes these assertions. Acer Resp. to Piper Jaffray SMUF ¶¶81-84.

Innovate – working with Piper Jaffray – submitted a term sheet to Opexa on February 1, 2017. *See* Piper Jaffray SMUF ¶85. A few weeks later, on February 27, Opexa and Innovate entered into an exclusivity agreement preventing Opexa from speaking with any other potential transaction partners, including Acer. *Id.* ¶86. From February to March 2017, Opexa and Innovate unsuccessfully negotiated merger terms. *Id.* ¶87. By early April, Opexa had stopped responding to Innovate's emails and phone calls. *Id.* ¶88. Finally, on April 16, Opexa told Innovate that it was no longer interested in pursuing a transaction with Innovate. *Id.* ¶89.

While Piper Jaffray insists that at no point during this period did it attempt to raise money for Innovate in connection with a potential Opexa transaction, Acer disputes this claim. *Id.* ¶90; *see* Acer Resp. to Piper Jaffray SMUF ¶90. Acer asserts, instead, that Piper's bankers working on behalf of Innovate "participated in many calls with Opexa about Innovate's potential investors and with Innovate's potential investors," Acer CSUF ¶84, that Piper Jaffray "played an

integral role in boosting Opexa's confidence in Innovate's ability to raise funds," *id.* ¶86, and that Piper Jaffray's Innovate group was "working with Innovate to help raise financing to facilitate the Innovate/Opexa reverse merger," *id.* ¶87.

Acer and Opexa Resume Negotiations and Complete Reverse Merger

In April 2017, as Opexa cut off negotiations with Innovate, Opexa resumed merger discussions with Acer. *Id.* ¶91. Acer then contacted Piper Jaffray and requested that Piper Jaffray assist Acer in raising capital through a private placement in connection with the Opexa transaction. *Id.* ¶92. On April 28, Acer and Piper executed an addendum to the 2016 Agreement (the "Addendum"), which entitled Piper to receive a 7% fee on the proceeds of the securities sold in the private placement that would close in conjunction with the reverse merger. *Id.* ¶98.

From Acer's perspective, the private placement was a disappointment. Acer states that when Acer and Piper started marketing the private placement, Acer's pre-money valuation was between $65-70 million, but that it fell to $40 million when the transaction closed. *Id.* ¶¶106, 108. Acer believes the "deal had essentially grown stale to many investors as a result of the delay that occurred when Opexa started to negotiate with Innovate," and that Piper Jaffray compounded the difficulties by failing to "go broader with their investor outreach." *Id.* ¶110. In addition, Acer says it learned during this period that Piper had been speaking negatively to potential investors about Acer and its ability to find financing, and that Piper was interfering with Acer's investors by giving them instructions that conflicted with Acer's. *Id.* ¶¶112, 114-118. As the closing date grew near, Acer's management and its Board of Directors decided that after the deal closed, Acer would try to renegotiate Piper's fee. *Id.* ¶111.

The merger closed on September 19, 2017. Piper Jaffray SUMF ¶113. Shortly thereafter, Acer learned from Opexa's counsel that the reason the negotiations between Acer and

Opexa had broken off in February 2017 was because Opexa had been negotiating a potential transaction with Innovate, also represented by Piper Jaffray. Acer CSUF ¶118. Piper Jaffray had never told Acer about representing Innovate. *Id.* ¶119. According to Acer, had it known about Piper Jaffray's conflict of interest earlier, the company could have terminated its relationship with Piper Jaffray for cause, meaning Piper Jaffray would receive no fee, or not signed the Addendum, or negotiated different economic terms. *Id.* ¶123.

Acer did not pay Piper any fee at the closing. Piper Jaffray SUMF ¶¶119. In Acer's view, no such fee is justified in light of Piper's conflicted representation surrounding the Opexa merger, and other alleged breaches of Piper's contractual obligations. Acer CSUF ¶¶126-133.

The Instant Action

Piper Jaffray initiated this action by filing a Summons and Complaint on September 27, 2017. *See* NYSCEF Doc. Nos. 1-2. In the Complaint, Piper Jaffray asserted a claim for breach of contract against Acer, alleging that Acer breached the terms of the 2016 Engagement Letter, and the Addendum thereto, by failing to pay Piper Jaffray the Offering Fee, along with accrued expenses, following the Acer-Opexa merger. Compl., ¶¶25-33.

Acer filed an Answer on November 10, 2017 and asserted four counterclaims against Piper Jaffray: (1) breach of contract, (2) breach of duty of good faith and fair dealing, (3) breach of fiduciary duty, and (4) aiding and abetting the breach of fiduciary duty. *See* NYSCEF Doc. No. 12. In addition, as its fourth affirmative defense, Acer maintained that "[t]his Court lacks jurisdiction over Acer." *Id.*, ¶37.

DISCUSSION

A party moving for summary judgment pursuant to CPLR 3212 must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once a prima facie showing has been made, the burden then shifts to the opposing party to produce admissible evidence "sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 N.Y.2d at 324

A. Piper Jaffray's Breach of Contract Claim

1. Personal Jurisdiction

As a threshold matter, Piper Jaffray has made the necessary showing that Acer is subject to personal jurisdiction in New York. Under CPLR § 302(a)(1), this Court "may exercise personal jurisdiction over a non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." Section 302(a)(1) is a "single act statute," which means that "proof of one transaction in New York is sufficient to invoke jurisdiction." *Deutsche Bank Sec., Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 71 (2006).[2] In addition, to exercise jurisdiction, "some articulable nexus" must exist "between the business transacted and the cause of action sued upon." *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981).

The record here indicates that Acer transacted relevant business in New York, for purposes of CPLR § 302(a)(1), by working extensively with Piper Jaffray's New York-based team and projecting itself into this jurisdiction. Acer engaged in a two-year relationship with Piper Jaffray's New York-based Equity Capital Markets and Investment Banking teams, which

[2] Acer does not move for summary judgment on grounds of lack of personal jurisdiction. Instead, Acer argues that "there are factual issues regarding Acer's personal jurisdiction defense" that preclude granting summary judgment in Piper Jaffray's favor on any of its claims. Acer Opp. to S.J. at 3.

culminated in the Private Placement. Even though this business relationship was conducted mainly through electronic communication, it still falls within the long-arm jurisdiction of CPLR 302(a)(1). *See Deutsche Bank*, 7 N.Y. 3d at 71 ("recogniz[ing] CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions"); *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 577 (1980) (exercising long-arm jurisdiction over Texas defendant where most of the securities transactions at issue "arose out of telephone calls made to the plaintiff's New York office," with only a few occasional in-person visits); *C. Mahendra (N.Y.), LLC v. Nat'l Gold & Diamond Center, Inc.*, 125 A.D.3d 454, 456 (1st Dep't 2015) (holding that "parties' telephone dealings over several years and in the two transactions at issue" were sufficient under 302(a)(1)).

Moreover, Acer and Piper Jaffray sought investment from New York-based sources as part of the Opexa transaction. Even before the Private Placement, Acer CEO Chris Schelling testified that Acer came to New York to meet with both Piper Jaffray and potential investors and strategic partners. Piper Jaffray Ex. 10 at 144:8-145:5. In addition, Acer held multiple meetings in New York with both Piper Jaffray and "at least five to ten, perhaps more than ten," potential investors in connection with the Private Placement to try to raise funds; plus, other New York investors were contacted on Acer's behalf. And Acer met personally with one particular New York-based investor, Jim Gale, in New York to coax necessary capital for the Opexa merger. Although some of these meetings proved unsuccessful, the fact remains that Acer purposefully projected itself into New York in an attempt to raise critical funds for the transaction at the crux of the current dispute.

The parties' relationship was also governed by contracts – including the 2016 Engagement Letter and Addendum – which contained New York choice-of-law provisions. To be sure, such provisions, "absent more, [are] insufficient to warrant a finding of long-arm jurisdiction pursuant to CPLR 302(a)(1)," but they "might be considered relevant in determining whether a nondomiciliary transacted business in this state." *Peter Lisec Glastechnische Industrie GmbH v. Lenhardt Maschinenbau GmbH*, 173 A.D.2d 70, 72 (1st Dep't 1991); *see also Sunward Electronics, Inc. v. McDonald*, 362 F.3d 17, 23 (2d Cir. 2004) ("A choice of law clause is a significant factor in a personal jurisdiction analysis because the parties, by so choosing, invoke the benefits and protections of New York law."); *accord Davis v. Scottish Re Group Ltd.*, No. 654027/2013, 2016 WL 3688466, at *3 (Sup. Ct. N.Y. Cty. July 11, 2016). Viewing these factors together, the Court finds that Acer is subject to long-arm personal jurisdiction under CPLR 302(a)(1).

Exercising specific personal jurisdiction over Acer in this case also comports with constitutional due process requirements. To satisfy those requirements, the defendant must have "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *accord LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216 (2000) ("Under the Due Process Clause, the standards of 'minimum contacts' and 'fair play and substantial justice' are implicated in the decisional law governing personal jurisdiction.").

That test is met here. Acer had sufficient contacts with New York, interacting with Piper Jaffray's New York-based team in pursuing possible transactions, to warrant the exercise of personal jurisdiction. *See LaMarca*, 95 N.Y.2d at 216-19 (finding non-domiciliary tortfeasor had

minimum contacts with New York because the company "itself forged the ties with New York" through "purposeful action"); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."). In addition, the exercise of personal jurisdiction over Acer is reasonable in these circumstances. "[A] defendant who purposefully has directed [its] activities at forum residents . . . must present a compelling case that the presence of some other considerations would render jurisdiction *unreasonable*." *LaMarca*, 95 N.Y.2d at 217–18 (emphasis added). Acer has failed to make such a showing. The evidence indicates, rather, that New York played an important role in the relevant business dealings here, as the site of Piper Jaffray's (now disputed) work on behalf of Acer.

Therefore, the Court finds that it has personal jurisdiction over Acer for purposes of this case.

2. Issues of Fact Preclude Summary Judgment on Piper Jaffray's Contract Claim

Turning to the merits of Piper Jaffray's contract claim, the Court finds that genuine issues of material fact exist as to whether Piper Jaffray breached the 2016 Engagement Letter and Addendum, or performed its obligations thereunder, by simultaneously advising Innovate during the run-up to the Opexa merger.

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Markov v. Katt*, 176 A.D.3d 401, 401-02 (1st Dep't 2019) (quoting *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 [1st Dep't 2010]); *see Frydman & Co. v. Credit Suisse First Bos. Corp.*, 272 A.D.2d 236, 237 (1st Dep't 2000) (denying motion to dismiss breach of contract claim premised,

in part, on allegations of a banker's conflicting positions). "If a contract is ambiguous, it cannot be construed as a matter of law." *Rubin v. Baumann*, 148 A.D.3d 556, 556 (1st Dep't 2017) (denying summary judgment); *Funk v. Seligson, Rothman & Rothman, Esqs.*, 165 A.D.3d 429, 430 (1st Dep't 2018) (same).

Although the 2016 Engagement Letter contains a broad conflict-of-interest waiver, it is not clear that it permitted Piper Jaffray to advise Innovate at the same time it was advising Acer with respect to the same transaction in a way that directly undermined Acer's interests. The Letter provided that Piper Jaffray "may from time to time perform various investment banking and financial advisory services for other clients and customers who may have conflicting interests with respect to you or the Transaction or the Private Placement." Piper Jaffray Ex. 5 at 10. While that provision clearly would have permitted Piper Jaffray to represent Innovate (or others who might have had a conflicting interest with respect to the Opexa transaction) in *other* matters, it does not state plainly that Piper Jaffray may *itself* operate at cross-purposes with its own customer, which obviously could present a much more significant and direct conflict of interest.[3]

Since the key phrase "who may have conflicting interests" follows immediately after "other clients and customers," the provision could be read to mean those other "other clients and customers," but *not* Piper Jaffray itself, were permitted to conflict with Acer's interests in the Opexa deal. In that case, Piper Jaffray's representation of Innovate may have constituted either a breach or a failure to perform under the 2016 Engagement Letter. What's more, this

[3] Further, the parties dispute the scope of Piper Jaffray's role in the Innovate negotiations, and whether Piper Jaffray was aware of its conflicted representations. *Compare* Piper Jaffray SMUF ¶¶81-84, 90, *with* Acer Resp. to Piper Jaffray SMUF ¶¶81-84, 90. These material factual disputes underscore the need for a trial on the issue.

construction may be buttressed by Piper Jaffray's later attempt to revise the conflict disclaimer to cover exactly the conflict that occurred here. *See Blum v. Spaha Capital Mgmt., LLC*, 44 F. Supp. 3d 482, 491 (S.D.N.Y. 2014) ("Once an ambiguity in the agreement is found, a court may consider evidence such as exchanges between the contracting parties during the course of negotiations[.]"); *Carter v. Broadway 48th-49th St. Assocs.*, 19 Misc. 3d 1120(A), 862 N.Y.S.2d 813 (Sup. Ct. N.Y. Cty. 2008) (denying summary judgment because "subject provisions are susceptible to more than one meaning" and "parol evidence, including prior drafts of the agreement" should be admitted to discern intent of the parties).

In the other direction, Piper Jaffray may argue that the last sentence in the conflict-waiver paragraph (prohibiting Piper Jaffray from providing "advisory services or serv[ing] as investment banker to any entity or person that attempts to acquire all, or a substantial part of, the Company in a transaction that would constitute a Transaction in connection with such acquisition") shows that the parties knew how to carve out exceptions from the conflict waiver when it was their intention to do so. The bottom line is that the scope of the conflict waiver is unclear, as applied to the facts of this case. The parties should be permitted to seek and introduce extrinsic evidence regarding the parties' intent and understanding behind the 2016 Engagement Letter – and the February 2017 draft conflict waiver –to resolve the ambiguity. *See Steckler v. Steckler*, 78 A.D.2d 818, 819 (1st Dep't 1980) ("[W]hen there is ambiguity or the language is equivocal, and its interpretation depends upon the sense in which the words were used, in view of the subject to which they relate, the relation of the parties and the surrounding circumstances, the issue is one of law and fact requiring a trial.").

Therefore, the branch of Piper Jaffray's motion seeking summary judgment on its breach of contract claim is Denied.

B. Acer's Counterclaims

1. Breach of Contract

Acer's counterclaim for breach of contract is, as Piper Jaffray notes, largely identical to Acer's defenses to Piper Jaffray's breach of contract claim. *See* Piper Jaffray Reply at 2. Therefore, for the reasons stated in denying summary judgment in Part A.2, *supra*, the Court denies summary judgment on this counterclaim.

2. Breach of the Duty of Good Faith and Fair Dealing

Acer's next counterclaim, for breach of the duty of good faith and fair dealing, is duplicative of its breach of contract claim and therefore is dismissed. *Liberman v. Cayre Synergy 73rd LLC*, 108 A.D.3d 426, 428 (1st Dep't 2013) (dismissing implied covenant claim as "duplicative of the contract claim" on motion for summary judgment); *Logan Advisors, LLC v. Patriarch Partners, LLC*, 63 A.D.3d 440, 443 (1st Dep't 2009) ("The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach of contract claim because both claims arise from the same facts."); *compare with Frydman & Co. v. Credit Suisse First Bos. Corp.*, 272 A.D.2d 236 (1st Dep't 2000) (sustaining cause of action for breach of contract and cause of action for breach of the implied covenant where the two claims related to different agreements).

Here, the allegations underlying Acer's implied-covenant claim against Piper Jaffray are identical to the allegations underlying its breach-of-contract claim. Both claims incorporate by reference and rely on the same factual allegations. And the damages Acer seeks on its implied-covenant claim are the same as those it seeks for the alleged contract breach. *See* Acer Answer with Counterclaims ¶¶67, 70; *id.* ¶¶63, 68. Therefore, this counterclaim is dismissed.

3. Breach of Fiduciary Duty

Acer's counterclaim for breach of fiduciary duty fails, like its implied covenant counterclaim, because it merely restates Acer's contract-based claims. "The only duty owed by [Piper Jaffray] to [Acer] was a contractual one," so "[t]he claim is duplicative of the breach of contract claim since it fails to allege breach of any fiduciary duty independent of the contract itself." *Morgenroth v. Toll Bros.*, 60 A.D.3d 596, 597 (1st Dep't 2009) (dismissing fiduciary-duty claim). Where a claim for breach of fiduciary duty is "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract, the claim is barred as redundant." *Metro. W. Asset Mgmt., LLC v. Magnus Funding, Ltd.*, No. 03 CIV. 5539 (NRB), 2004 WL 1444868, at *8 (S.D.N.Y. June 25, 2004).

Acer's counterclaim also fails because no fiduciary duty existed between Acer and Piper Jaffray with respect to the actions at issue here. In New York, a claim for breach of fiduciary duty requires "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005) ("*EBC I*"), citing Restatement (Second) of Torts § 874, Comment *a*.

"Generally, where parties have entered into a contract, courts look to that agreement to discover . . . the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency." *Id.* at 19-20. Where an "agreement contains no cognizable fiduciary terms or relationship," *Ne. Gen. Corp. v. Wellington Advert., Inc.*, 82 N.Y.2d 158, 162 (1993), "courts should not ordinarily transport them to the higher realm of

relationship and fashion the stricter duty for them," *EBC I*, 5 N.Y.3d at 20. To that end, contractual disclaimers of fiduciary duties are regularly enforced under New York law. *See, e.g, CIBC Bank & Tr. Co. (Cayman) v. Credit Lyonnais*, 270 A.D.2d 138, 139 (1st Dep't 2000) (dismissing "breach of fiduciary duty claim . . . [as] flatly contradicted by the parties' contracts" containing disclaimer of fiduciary duty); *Merrill Lynch Capital Mkts. Ag v. Controladora Comercial Mexicana SAB DE C.V.*, No. 603214/08, 2010 WL 5827550, at *11 (Sup. Ct. N.Y. Cty. Mar. 16, 2010) ("[W]here the parties' agreement specifically disclaims a fiduciary relationship, no defense of, or claim for, breach of fiduciary duty will lie."); *Valentini v. Citigroup, Inc.*, 837 F. Supp. 2d 304, 326 (S.D.N.Y. 2011) ("Under New York law, contractual disclaimers of fiduciary duty are enforceable when sufficiently explicit.") (collecting cases).

At the same time, "fiduciary liability is not dependent *solely* upon an agreement or contractual relation between the fiduciary and the beneficiary *but results from the relation*." 5 N.Y.3d at 20 (emphasis added). In *EBC I*, the Court of Appeals denied Goldman Sachs' motion to dismiss the plaintiff's claim for breach of fiduciary duty, even though "[i]t may well be true that the underwriting contract, in which Goldman Sachs agreed to buy shares and resell them, did not in itself create any fiduciary duty." *Id.* That was because the plaintiff's allegations "allege[d] an advisory relationship that was independent of the underwriting agreement," such that the parties "created a relationship of higher trust than would arise from the underwriting agreement alone." *Id. See Frydman & Co. v. Credit Suisse First Bos. Corp.*, 272 A.D.2d 236, 237 (1st Dep't 2000) (denying motion to dismiss breach of fiduciary duty claim against investment bank "on the ground that the allegations of the complaint that [defendant] provided [plaintiff] with investment banking advice and other services . . . raise[d] an issue of fact as to whether [defendant] owed [plaintiff] a fiduciary duty"); *Veleron Holding, B.V. v. Morgan*

Stanley, 117 F. Supp. 3d 404 (S.D.N.Y. 2015) (citing *EBC I*, 5 N.Y.3d at 20) (denying motion for summary judgment, finding that an issue of fact existed as to whether Morgan Stanley owed a fiduciary duty notwithstanding an explicit disclaimer of fiduciary duties).

The broad, unambiguous disclaimer of fiduciary duties in the 2016 Engagement Letter bars Acer's counterclaim for a breach of fiduciary duty, as a matter of law, because that counterclaim is tied solely to Piper Jaffray's performance under the contract. Under the undisputed terms of the 2016 Engagement Letter, Acer "acknowledge[s]" that Piper Jaffray would "act as an independent contractor" and that "nothing in this Agreement is intended to create duties to [Acer] beyond those expressly provided for in this Agreement, and [Piper Jaffray and Acer] specifically disclaim the creation of any fiduciary or agent relationship between, or the imposition of any fiduciary or agency duties on, either party." Piper Jaffray SUMF ¶41 (citing Piper Jaffray Ex. 5 at 9-10). The Piper Jaffray activities that Acer claims give rise to a fiduciary duty are all services that Acer specifically contracted for Piper Jaffray to provide. *See* Acer Opp. to S.J. at 23-24. And the contract under which Piper Jaffray agreed to provide those services expressly disclaimed the creation of any fiduciary relationship or the imposition of any fiduciary duty. The disclaimer, on its face, forecloses Acer's fiduciary-duty claim.

Acer does not allege that a fiduciary relationship existed apart from its contractual arrangement with Piper. Rather, Acer insists that the services Piper performed under the contract "are inherently fiduciary in nature." Acer Opp. to S.J. at 23. But that reading disregards – or at least dilutes – the plain language of the contractual disclaimer. And neither *EBC I* nor *Frydman* hold that such disclaimers can be ignored at one side's urging. In those cases, the allegations of breach of fiduciary duty stemmed from services that were provided outside the scope of the parties' written agreements. *EBC I*, 5 N.Y.3d at 20 (describing "an advisory relationship that

was independent of the underwriting agreement"); *Frydman*, 272 A.D.2d at 237 (noting "the parties did not enter into a written agreement for the provision of investment banking services" but finding possibility of fiduciary relationship based on "the ongoing conduct between the parties") (citing *Wiener v. Lazard Frieres & Co.*, 241 A.D.2d 114, 122 [1st Dep't 1998]).

Moreover, the advisory relationship that Acer alleges – in which "Acer retained Piper to provide its expertise and guidance in connection with facilitating an M&A transaction and raisin financing," *see* Acer Opp. to S.J. at 22-23 – does not necessarily create fiduciary duties outside the strictures of the parties' contractual agreement. In the postscript to *EBC I*, six years later at the summary judgment stage, the First Department dismissed the plaintiff's claim for breach of fiduciary duty against Goldman Sachs. The court "first examine[d] the scope of the underwriting agreement in order to determine whether [the parties] had a principal-fiduciary relationship that transcended it." *EBC I, Inc. v. Goldman Sachs & Co.*, 91 A.D.3d 211, 214 (1st Dep't 2011). In concluding that no fiduciary relationship existed, the court noted that "a mere expression of confidence in [an investment banker's] expertise" is "wholly insufficient to create a relationship of higher trust than would arise from the underwriting agreement alone." *Id.* at 216. Although "an advisory relationship independent of an underwriting agreement may give rise to a fiduciary duty . . . [a]dvice alone . . . is not enough to impose a fiduciary duty." *Id.* at 217. The same reasoning applies here. While Acer may have expressed confidence in Piper Jaffray's expertise, and relied on Piper Jaffray's advice, that alone is insufficient to create the requisite fiduciary relationship.

Therefore, for both of those independent reasons, Acer's counterclaim for breach of fiduciary duty is dismissed.

4. Aiding and Abetting Breach of Fiduciary Duty

Lastly, Acer's counterclaim for aiding and abetting breach of fiduciary duty is also dismissed. This counterclaim takes as its premise that *Acer's* officers and directors breached their fiduciary duties to Acer by engaging a conflicted Piper Jaffray as its financial advisor for the transaction. And, "[b]y virtue of concealing and not disclosing its conflict of interest to Acer, its Officers and its Board of Directors," Piper Jaffray aided and abetted that breach. Acer Answer with Counterclaims ¶¶77-81.

This counterclaim fails as a matter of law for multiple reasons. *First*, in opposition to Piper Jaffray's motion for summary judgment, Acer makes an insufficient showing as to the threshold requirement for an aiding-and-abetting claim – that Acer's officers and directors in fact breached their fiduciary duties to the company by hiring Piper Jaffray. For this claim to survive summary judgment, Acer "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests," and "[m]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose." *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *see Kramer v. Harris*, 9 A.D.2d 282, 283 (1st Dep't 1959) (noting that opponent of summary judgment must present "a contradictory factual version [of events] which would support [its] contentions," and that "[b]ald conclusory assertions, even if believable, are not enough"); *Kornfeld v. NRX Tech., Inc.*, 93 A.D.2d 772, 773 (1st Dep't 1983) ("To defeat a motion for summary judgment . . . the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist."), *aff'd*, 62 N.Y.2d 686 (1984).

Acer fails to "lay bare its affirmative proof" and provide admissible evidence of its officers' and directors' alleged breach of fiduciary duty; Acer simply repeats the refrain that

"[i]ssues of fact exist" as to the breach. *See* Acer Opp. to S.J. at 26-28. Indeed, Acer appears to equivocate about the culpability of its officers and directors, alternately depicting them as wrongdoers and unwitting victims. Acer reiterates, for example, that "[i]ssues of fact exist regarding whether Acer's officers and directors acted in a fully informed manner because they were not aware of Piper's conflict of interest." *Id.* at 27; *see id.* at 28-29 ("[H]ad Acer's officers and directors learned of the conflict when it arose, they would have had alternatives including discharging Piper for cause and refusing to authorize the Addendum."). Because Acer fails to advance "affirmative proof to demonstrate that genuine triable issues of fact exist" on the aiding-and-abetting claim, Piper Jaffray is entitled to summary judgment dismissing the claim.

Second, and in addition, even if Acer's officers and directors did in fact breach their fiduciary duties to Acer by retaining Piper Jaffray, then the doctrine of *in pari delicto* bars Acer's claim. This doctrine "mandates that the courts will not intercede to resolve a dispute between two wrongdoers," *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010), and it would apply here (again, presuming that a breach did occur) because any wrongdoing by Acer's officers and directors must be imputed to Acer itself, "even if the particular acts were unauthorized," *New Greenwich Litigation Trustee, LLC v. Citco Fund Services (Europe) B.V., et al.*, 145 A.D.3d 16, 23 (1st Dep't 2016) (dismissing aiding-and-abetting claim under *in pari delicto* doctrine). Moreover, the doctrine's "adverse interest" exception would not apply. There is no evidence in the record that Acer's officers and directors had "totally abandoned" Acer's interests and were "acting entirely" for their own (or someone else's) purposes – for instance, by hiring Piper Jaffray to further some personal financial interest. *Kirschner*, 15 N.Y.2d at 266.

Therefore, Acer's aiding-and abetting claim is dismissed.

* * * *

Accordingly, it is

ORDERED that Piper Jaffray's motion for summary judgment is Granted as to Acer's counterclaims for breach of fiduciary duty and aiding abetting such breach, and the motion is otherwise Denied; and it is further

ORDERED that the parties are directed to contact the Court at sfc-part3@nycourts.gov thirty days following the date of this Decision and Order to seek a date for a pre-trial conference.

This constitutes the Decision and Order of the Court.

3/25/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE