**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| CA FUNDS GROUP, Inc.,<br><br>Plaintiff,<br><br>v.<br><br>WALKER & DUNLOP INVESTMENT ADVISORY SERVICES, LLC and WALKER & DUNLOP, LLC,<br><br>Defendants. | No. 13 C 9103<br>Judge James B. Zagel |

**MEMORANDUM OPINION AND ORDER**

Plaintiff CA Funds Group, Inc. ("CAFG") has brought this action for breach of contract against Defendants Walker & Dunlop Investment Advisor Services, LLC ("WDIAS") and Walker & Dunlop, LLC ("W&D," and collectively, "Defendants"). This case is currently before me on cross-motions for summary judgment. For the following reasons, I am denying Plaintiff's motion and granting Defendants' motion.

**FACTS**

CAFG is an Illinois corporation with a principal place of business located in Glen Ellyn, Illinois. CAFG provides assistance in the private placement of real estate debt and equity securities and other real estate-related investment products developed for institutional investors. CAFG has one employee, Dennis Hakeman.

Defendants W&D and WDIAS are both Delaware limited liability companies headquartered in Bethesda, Maryland that provide commercial real estate financial services and specialize in making loans to finance multifamily properties. Defendants are both operating subsidiaries of Walker & Dunlop, Inc., a publicly traded company.

After initially discussing the topic in 2010, WDIAS contacted CAFG at the end of 2011 about retaining CAFG as a placement agent for WDIAS's 2012 capital raising initiative for a possible multi-family debt strategy fund. Specifically, WDIAS contacted CAFG because it was interested in using CAFG's services in connection with the preparation, development, refinement and subsequent marketing of a core-oriented, multifamily bridge to permanent loan debt investment strategy (the "MBPL Debt Strategy").

Institutional investors' real estate portfolios are typically divided into two basic categories of investments, called "core" and "non-core," with core investments having less associated risk, and non-core investments conversely being more risky. Within core investments, there is a subcategory of slightly riskier investments that are referred to as "core-plus" investments.

WDIAS and CAFG entered into an initial agreement on March 7, 2012 (the "Initial Agreement") where CAFG agreed to provide advice to WDIAS with respect to "capital raising for commingled funds, clubs and separate accounts; and/or the formation of strategic and/or programmatic ventures." WDIAS agreed to pay CAFG a monthly fee of $12,500 for its advice but explicitly retained "the right to use any suggestions, feedback or information that CA or CAFG provide[d] to [WDIAS] without any confidentiality or other obligation to CA or CAFG, except as expressly agreed otherwise by the parties." According to the Initial Agreement, "[WDIAS] and W&D reserve[d] the right to enter into agreements with third parties for capital raising services" and the Initial Agreement "in no way establishe[d] a right for CAFG or CA to provide exclusively such services to [WDIAS] or W&D."

Starting on March 8, 2012 and continuing through the next few months, Hakeman advised WDIAS on various equity and debt investment strategies that would have the highest

probability of attracting institutional investor capital, and on the merit not only of an open-ended fund being contemplated to implement the multi-family bridge to permanent loan debt investment strategy, but also other investment vehicles such as separate accounts and closed-ended funds. With input from WDIAS, one of CAFG's assigned roles was to prepare a one-page "teaser" ("Teaser"),[1] a "flipbook" (the "Fund Flipbook"),[2] and inserts into a Private Placement Memorandum (the "Fund PPM")[3] for use in marketing the MBPL Debt Strategy. During the next 30 to 45 days, Hakeman focused on taking the lead role in crafting the "sales pitch" for the MBPL Debt Strategy, *i.e.*, the story to be presented by the parties to potential investors, and preparing the initial drafts of the Teaser, the Fund Flipbook, and inserts to the Fund PPM for this debt investment strategy that could generate expected returns in the "core" and "core plus" range.

Three months later, on or around June 11, 2012, WDIAS and CAFG entered into a supplemental agreement (the "Supplemental Agreement"). The Supplemental Agreement provided that CAFG would assist WDIAS in raising capital for a specific open-ended commingled fund that would be formed in June 2012 (the "Fund"). According to the Supplemental agreement, the Fund would invest primarily in debt secured, directly or indirectly, by multifamily-related real estate properties in the United States.

In addition to CAFG's monthly consulting fee of $12,500, the Supplemental Agreement provided that WDIAS would pay CAFG a "Placement Fee" equal to 140 basis points

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[1] A "teaser" is typically a one-page document that tries to capture the attention of an investor with directed and condensed key elements of the investment strategy opportunity.

[2] A "flipbook" is a key investment marketing piece which is essentially a Power Point Presentation that provides potential investors with two key things: the investment strategy being pursued, and information about the sponsor of the investment strategy and its track record.

[3] A Private Placement Memorandum, or "PPM," is a formal offering document that, *inter alia,* is sent to prospective investors and which, among other things, describe the investment strategy and material provisions of the applicable legal documents and the risks of a particular offering.

of any equity capital contributed to the Fund by investors that were not specifically carved out by WDIAS. The Placement Fee would be net of any monthly consulting fees paid to CAFG.

Although CAFG and WDIAS specifically agreed that CAFG's exclusive rights to Placement Fees would not apply to any other WDIAS-sponsored investment funds, real estate investment trusts, or other investments, the Supplemental Agreement gave CAFG a right to earn its 140 basis point Placement Fee for raising capital for WDIAS and W&D investments besides the Fund under the following conditions:

> It is further understood that in the process of seeking such equity capital commitments for the Fund, [WDIAS] also desires to identify, through Fund-related marketing and capital raising efforts by CAFG and [WDIAS], potential opportunities to obtain equity capital for Alternative Vehicles (as defined below) . . . .
>
> 'Alternative Vehicles' means any alternative debt-focused vehicles that may be sponsored by [WDIAS], including close-ended commingled funds, clubs, separate accounts, and strategic/programmatic ventures, resulting directly from CAFG's marketing and capital raising efforts under this Supplemental Agreement; provided, that, notwithstanding the foregoing, Alternative Vehicles shall not include any vehicle or product being marketed by [WDIAS] independent of the marketing efforts by CAFG under this Supplemental Agreement.

The Supplemental Agreement also included a provision that allowed WDIAS to use the advice and information it received from CAFG "without any confidentiality or other obligation to CAFG, except as expressly agreed otherwise by the parties." The parties had no agreements other than the Initial and Supplemental Agreements.

Under the Supplemental Agreement, CAFG would not be liable if it failed to raise capital for the Fund or other investment vehicle, "except in the event of CAFG's default, willful misconduct, bad faith, fraud, or gross negligence." The Supplemental Agreement also allowed WDIAS to terminate CAFG without cause any time after December 31, 2012 and limited

CAFG's exclusive agency rights to the capital to be contributed to the open-ended Fund that CAFG was working on in June 2012. If WDIAS elected to terminate CAFG without cause, the Supplemental Agreement provided that CAFG's additional compensation would be limited to payment of the monthly retainer fee and a Placement Fee with respect to capital commitments subsequently made to the Fund (not Alternative Vehicles) by Institutional Investors "that CAFG had contacted directly (or indirectly through direct contact with the appropriate Consultant) prior to such termination for purposes relating to CAFG's engagement under this Supplemental Agreement . . . ."

In June 2012, William Walker—the Chairman and Chief Executive Officer of Walker & Dunlop, Inc., the parent company of both WDIAS and W&D—noticed a posting on an internet bulletin board accessed by members of the Young Presidents Organization that described an undisclosed principal's interest in finding real estate investment opportunities. The posting came from a Canadian based broker, and fellow member of the Young Presidents Organization, named Ariel Shlien. In the post, Shlien stated that he was assisting a "large, overcapitalized fund to deploy equity in real estate around the world" that was "seeking local, established partners who have deal flow, integrity and knowledge of the market, and who can also put in a small amount of equity." Shlien did not identify the fund in his post.

Walker contacted Shlien on the same day that he saw his internet post and provided him with background information about Walker & Dunlop, Inc. and its deal flow. Shlien and Walker had subsequent communications from July 16, 2012 to September 21, 2012 along with Aaron Perlis, the Senior Vice President of Business Development of WDIAS. Shlien made it clear that he would not disclose the identity of his prospective investor until Walker & Dunlop, Inc. entered into a Non-Disclosure and Advisory Fee Agreement with his company, which the

parties executed on September 21, 2012 (the "Shlien Agreement"). The Shlien Agreement, in relevant part, required that Walker & Dunlop, Inc. maintain the confidentiality of Walker & Dunlop, Inc.'s communications with the potential investors which Shlien introduced to them. In addition, the Shlien Agreement required Walker & Dunlop, Inc. to pay Shlien Ventures a placement fee of 2% of capital contributed by any investor introduced by Shlien Ventures that subsequently entered into an investment relationship with Walker & Dunlop, Inc.

After the execution of the Shlien Agreement, Shlien disclosed that his principal was PSP Investments ("PSP"), a Canadian pension investment manager. Shlien arranged the first conversation between PSP and representatives from Walker & Dunlop, Inc., which took place on September 25, 2012. Two days later, on September 27, 2012, WDIAS emailed what was determined to be the final Fund Flipbook, along with the Teaser, to Hakeman. Hakeman testified in his deposition that he, individually, had created and/or had significant input in the key pages of this final Fund Flipbook.

On October 9, 2012, Perlis sent an email to a representative of PSP, Raymond Granger, and attached what Perlis referred to as a "confidential presentation" which Perlis testified he prepared using the Fund Flipbook as a "sort of template, if you will." Perlis also testified that he modified the information he found in the Fund Flipbook to emphasize a "core plus" strategy, versus a "core strategy," such that he claimed the returns and the risks were presented in a "slightly different" manner. Perlis was able to obtain the final Fund Flipbook and all other related documents through a network server Perlis had permission to access. On October 10, 2012, Shlien emailed Perlis and responded that the flipbook Perlis had sent the day before to PSP was "an excellent presentation! Nice job!"

From October 15, 2012 through December 5, 2012, Perlis and PSP communicated

directly and exchanged drafts of a finalized term sheet for PSP's investment in a Real Estate Investment Trust agreement (the "REIT") through Walker & Dunlop, Inc.

Meanwhile, Hakeman requested and had a face to face meeting with Jeff Goodman, a high-level executive at Walker & Dunlop, Inc., who was involved in discussions with PSP. This meeting occurred on January 22, 2013 at WDIAS's Bethesda, Maryland office. Goodman told Hakeman that WDIAS had obtained a commitment of $190 million from a large institutional investor for a separate account to execute multi-family bridge to permanent "larger" loans, but would not disclose the investor's identity other than to say it was a pension fund, and that WDIAS was in discussions with a few other investors to obtain similar commitments. Goodman stated he would be happy to entertain Hakeman's referral of investors who may want to join the current $190 million investor, and a fee would be paid if that occurred, but Hakeman said that this would not be appropriate given he was already engaged as a placement agent for the very same investment strategy.

As discussions among Walker & Dunlop, Inc., Shlien Ventures, and PSP proceeded, PSP informed the parties that, based upon regulations applicable to Canadian pension funds, PSP could not own more than 49% of any real estate investment vehicle managed by a U.S. entity. Accordingly, in order for PSP to enter into a REIT, additional investors had to be found. Shlien had a relationship with Colony Capital, LLC ("Colony"), a global real estate and investment management firm headquartered in Los Angeles, California, and arranged the first conversation with Colony and Walker & Dunlop, Inc. with respect to participating in the REIT, which took place on March 21, 2013.

After WDIAS informed Hakeman of its plans regarding the proposed REIT in January 2013, Goodman confirmed and later reiterated via email in February 2013 that WDIAS "would

be pleased to entertain prospects from [CAFG] for our large loan separate account [the REIT] and clearly would be fine paying a commission for any prospect that [CAFG] introduce[d] to us." In another email correspondence later that same month, Goodman stated that "[c]learly we want to retain the potential for launching the fund with [CAFG] taking the leadership role there." After months of communications, however, WDIAS alleges that it terminated the Initial Agreement and Supplemental Agreement because CAFG was threatening to sue. WDIAS terminated the Supplemental Agreement on June 5, 2013.

Roughly two months later, on or around August 3, 2013, Walker & Dunlop, Inc., officially entered into the REIT with affiliates of PSP Investments ("PSP"), a Canadian pension investment manager, and Colony Capital, LLC ("Colony"), a global real estate and investment management firm headquartered in Los Angeles, California.

In total, WDIAS paid CAFG $191,666.67 in monthly consulting fees. Prior to terminating the Supplemental Agreement, WDIAS paid CAFG $150,000 in monthly consulting fees from March 2012 through February 2013. Upon termination of the Supplemental Agreement, WDIAS paid CAFG an additional $41,666.67, reflecting monthly consulting fees for March, April, and May, and a pro rata payment for June 2013.

## LEGAL STANDARD

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of triable fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Pugh v. City of Attica, Ind.*, 259 F.3d 619, 625 (7th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986)).

Once the moving party has set forth the basis for summary judgment, the burden then shifts to the nonmoving party who must go beyond mere allegations and offer specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The nonmoving party must offer more than "[c]onclusory allegations, unsupported by specific facts" in order to establish a genuine issue of material fact. *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). A party will be successful in opposing summary judgment only if it presents "definite, competent evidence to rebut the motion." *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000).

I consider the record in the light most favorable to the non-moving party, and I draw all reasonable inferences in the non-movant's favor. *Lesch v. Crown Cork & Seal Co.*, 282 F.3d 467, 471 (7th Cir. 2002). I will accept the non-moving party's version of any disputed fact, however, only if it is supported by relevant, admissible evidence. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996).

## DISCUSSION

The parties in this case had no agreements other than the Initial and Supplemental Agreements, both of which included a choice of law provision specifying that they are governed by Maryland law. Under Maryland law, disputes concerning contract interpretation are questions of law and frequently regarded as appropriate for summary judgment. *Larocca v. Creig Northrop Team, P.C.*, 94 A.3d 197, 203 (Md. Ct. Spec. App. 2014).

The required elements of a breach of contract claim under Maryland law are: (1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff

of all required conditions, (5) breach, and (6) damages. *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 777 (4th Cir. 2013); *Maslow v. Vanguri*, 896 A.2d 408, 421-423 (Md. 2006).

Maryland common law also recognizes, as most jurisdictions do, an implied duty of good faith and fair dealing in contract performance. *Automatic Laundry Serv., Inc. v. Demas*, 141 A.2d 497, 500 (Md. 1958). The duty of good faith implied in contracts "prohibits one party to a contract from acting in such a manner as to prevent the other party from performing his obligations under the contract." *Parker v. Columbia Bank*, 604 A.2d 521, 531 (Md. 1992). While Maryland law does not recognize an independent cause of action for breach of the implied duty of good faith and fair dealing, parties are obligated to act in good faith even where the contract does not contain a general "good faith" term. *See Clancy v. King*, 954 A.2d 1092, 1107-08 (Md. 2008). Maryland law also recognizes that "the obligation to act in good faith and deal fairly prohibits a party from terminating its contract (or otherwise exercising its discretion) to 'recapture' an opportunity that it lost upon entering the contract." *Questar Builders, Inc. v. CB Flooring, LLC*, 978 A.2d 651, 675 (Md. 2009).

Maryland adheres to the principle of the objective interpretation of contracts. *See Myers v. Kayhoe*, 391 Md. 188, 198 (2006). If the language of a contract is unambiguous, effect is given to its plain meaning, and courts do not contemplate what the parties may have subjectively intended by certain terms at the time of formation. *Cochran v. Norkunas*, 398 Md. 1, 16-17 (2007) (citations omitted). As the Maryland Court of Special Appeals explained, a court "should keep the analysis simple when the language permits: 'Where the instrument includes clear and unambiguous language of the parties' intent, we will not sail into less chartered waters to interpret what the parties thought that the agreement meant or intended it to mean.'" *Newell v. Johns Hopkins University*, 2013 WL 6097561, at *10 (Md. App. Nov. 21, 2013) (citations

omitted).

Here, the language of the Initial and Supplemental Agreements is unambiguous. The Supplemental Agreement makes it clear that CAFG would only be paid a Placement Fee if either (1) WDIAS received a capital contribution for the Fund or (2) CAFG found potential investors in the course of marketing and fundraising for the Fund that were interested in investing in an Alternative Vehicle, not the Fund, and CAFG introduced these investors to WDIAS or one of its affiliates and an alternative investment vehicle was established as a direct result. Because neither PSP nor Colony invested in the Fund, the specific language of the Supplemental Agreement that controls the present dispute addresses the latter scenario:

> It is further understood that in the process of seeking such equity capital commitments for the Fund, [WDIAS] also desires to identify, through Fund-related marketing and capital raising efforts by CAFG and [WDIAS], potential opportunities to obtain equity capital for Alternative Vehicles (as defined below) . . . . 'Alternative Vehicles' means any alternative debt-focused vehicles that may be sponsored by [WDIAS], including close-ended commingled funds, clubs, separate accounts, and strategic/programmatic ventures, ***resulting directly from CAFG's marketing and capital raising efforts*** under this Supplemental Agreement; provided, that, notwithstanding the foregoing, Alternative Vehicles shall not include any vehicle or product being marketed by [WDIAS] independent of the marketing efforts by CAFG under this Supplemental Agreement.

(emphasis added). The Supplemental Agreement therefore recognized that, in looking for investors for the Fund, CAFG might identify and introduce investors that were not interested in investing in the FUND but might be interested in investing in another type of investment vehicle. The question now becomes whether a reasonable juror could conclude that the creation of the REIT and the capital contributions of PSP and Colony in the REIT can be considered *direct results* from CAFG's marketing and capital raising efforts. Because the answer to this question is clearly no, I am awarding summary judgment in favor of the Defendant.

It is undisputed that CAFG neither contacted the investors in the REIT nor introduced them to Walker & Dunlop, Inc. CAFG argues, however, that the Fund Flipbook, only modestly and immaterially revised by Perlis, was clearly the linchpin to securing the commitment from PSP, as was the presentation subsequently sent to Colony, which contained substantially the same information.

After reviewing the materials that were created by CAFG and comparing them to the materials that were provided to PSP and Colony, however, it is abundantly clear that a rational juror could not conclude that the investments made by PSP and Colony *resulted directly* from CAFG's marketing and capital raising efforts under the Supplemental Agreement. Although Perlis testified that he prepared the "confidential presentation" for PSP using the Fund Flipbook that Hakeman as a "sort of template, if you will," the two presentations are clearly presented in a slightly different manner. This similarity in presentations is the only evidence that CAFG can produce that in any way ties PSP's investment to CAFG, and it falls well short of being persuasive.

CAFG is not entitled to a Placement Fee here. Under both the Initial and Supplemental Agreements, WDIAS and its affiliates retained the right to enter into agreements with other placement agents to explore the possibility of establishing investment vehicles, with the sole exception that CAFG had exclusive agency rights with respect to the Fund. Because a reasonable juror could not conclude that the REIT was created as a direct result of CAFG's marketing and capital raising efforts, I am granting summary judgment in favor of Defendant.

**CONCLUSION**

The two investors in this case were brought to the attention of Walker & Dunlop, Inc., through an independent third-party who had nothing to do with CAFG. Because a rational juror could not conclude that these investments directly resulted from CAFG's marketing and capital raising efforts under the Supplemental Agreement, I am denying Plaintiff's motion for summary judgment and granting Defendants' motion.

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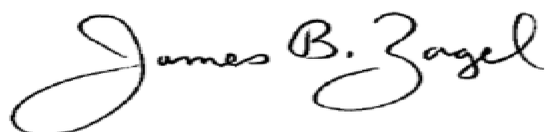

James B. Zagel
United States District Judge

DATE: January 26, 2016