SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650841/2013
GEM HOLDCO, LLC
vs.
CHANGING WORLD TECHNOLOGIES,
SEQUENCE NUMBER : 012
DISMISS

INDEX NO. _____
MOTION DATE 11/25/15
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 338-346
Answering Affidavits — Exhibits _____ | No(s). 375-382, 547-552
Replying Affidavits _____ | No(s). 540-546

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 2/1/16

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE
☒ Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GEM HOLDCO, LLC and GEM VENTURES, LTD., Index No: 650841/2013

Plaintiffs, **DECISION & ORDER**

-against-

CHANGING WORLD TECHNOLOGIES, L.P, CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, JEAN NOELTING, RIDGELINE ENERGY SERVICES, INC., DENNIS DANZIK, DOUGLAS JOHNSON, and KELLY SLEDZ,

Defendants.

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CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, and JEAN NOELTING,

Third-Party Plaintiffs,

-against-

CHRISTOPHER BROWN, EDWARD TOBIN, RES MANAGEMENT, INC., ELIZABETH DANZIK, and DEJA II, LLC,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.:

I. Introduction

The court assumes familiarity with this action, which has an extensive procedural history.[1] Most of the relevant facts, including the numerous complex contracts at issue, were discussed in the court's prior decisions and are not repeated here. The court's discussion of the

[1] Unless otherwise indicated, all defined terms have the same meaning as in the court's prior decisions.

facts is limited to matters relevant to the instant motions that are not addressed in prior decisions. It also should be noted that the motions currently before the court include the CWT Parties' motion to hold defendants RDX and Dennis Danzik (Mr. Danzik) in contempt for allegedly violating an order of attachment. Seq. 017. A contempt hearing recently concluded and will be addressed in a separate decision.

This decision addresses motion sequence numbers 012, 013, and 015, which are consolidated for disposition. Motion 12 seeks dismissal of (1) the CWT Parties' cross-claims against the RDX Parties; and (2) the CWT Parties' third-party claims against Mr. Danzik's wife, Elizabeth Danzik (Mrs. Danzik), and their jointly owned LLC, Deja II, LLC (Deja II). The CWT Parties oppose Motion 12 and cross-move for sundry relief discussed further below. Motion 13 seeks dismissal of the CWT Parties' counterclaims and third-party claims against the GEM Parties. Finally, Motion 15 is a motion to supplement the record.

For the reasons that follow, the court: (1) dismisses the CWT Parties' third-party claims against Mrs. Danzik and Deja II for lack of personal jurisdiction; (2) dismisses the CWT Parties' counterclaims and third-party claims against the GEM Parties for failure to state a claim; (3) denies without prejudice and with leave to refile when the automatic stay no longer is in effect, the portions of Motion 12 seeking dismissal of the claims against Mr. Danzik and RDX because such claims are subject to an automatic stay, 11 USC § 362, due to recently commenced bankruptcy proceedings;[2] and (4) denies the CWT Parties' cross-motion and motion to supplement the record.

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[2] RDX and Danzik apparently filed for bankruptcy to avoid pending default, summary judgment, and contempt motions in this case. Another Justice of this court also was about to direct the entry of a monetary judgment against Danzik. *See* Index No. 652883/2015. The contempt decision before this court will address RDX and Danzik and the procedural posture of the

II. The CWT Parties' Claims against Mrs. Danzik and Deja II (Seq. 012)

On September 22, 2014, the CWT Parties filed an answer to the GEM Parties' third amended complaint, which contains eleven causes of action, including counterclaims, cross-claims, and third-party claims. *See* Dkt. 219. Three of the CWT Parties' causes of action are asserted against both Mrs. Danzik and Deja II: (1) the fourth cause of action for fraud; (2) the fifth cause of action for money had and received; and (3) the sixth cause of action for conversion. The seventh cause of action, breach of contract, is asserted against Deja II. These claims arise from a letter agreement dated March 11, 2013 (the Letter Agreement), which was signed by Mr. Danzik as CEO of RDX and Mrs. Danzik as Managing Member of Deja II. *See* Dkt. 345. The Letter Agreement provides:

> This Letter Agreement is by and between DEJA II, LLC holder of common stock of:
>
> RIDGELINE ENERGY SERVICES, Inc. ("RLE")
>
> Whereas;
>
> CWT Enterprises Canada, Inc. ("CWTII") wishes to purchase CDN$ 2,000,000.00 in Ridgeline common stock at CDN$ 0.33 Cents per share ("Shares") for the benefit of the unit holders of Changing World Technologies LP ("CWT"). DEJA II has agreed to sell such Shares to CWTII providing that CWTII executes the definitive agreement for the purchase of 100% of the units of CWT by RLE no later than March 11, 9AM Eastern Daylight Savings Time.
>
> CWTII shall be required to purchase CDN$ 1,000,000.00 of the shares no later than March 15, 2013.
>
> CWTII shall purchase the remaining CDN$ 1,000,000.00 in shares no later than March 29, 2013.
>
> DEJA II will promptly invest the capital paid for Shares into RLE for terms equal for the replacement of such shares in the future by RLE. The proceeds from the

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bankruptcy proceedings. The court only mentions the bankruptcy proceedings here because it is undisputed that this action is automatically stayed as against RDX and Danzik.

> first $ 1,000,000 shall be used to repay the GEM Secured Note. The proceeds from the second CDN$ 1,000,000 shall be promptly invested into RLE.
>
> Failure to repay the GEM Secured Note from the proceeds of these sales or failure to complete the sale of these shares will constitute a breach of the Promissory Note signed between RLE and the unit holders of CWT.
>
> It is understood that DEJA II keeps certificated and not electronic Shares of RLE. DEJA II will have the time necessary to deposit and transfer such shares, approximately ten days from the date of purchase.

See Dkt. 345 at 2 (typographical errors in original).

The CWT Parties paid the first CDN$1 million to Deja II. Deja II, however, allegedly did not invest all of that money in RDX and provided the CWT Parties with restricted stock instead of common stock. The CWT Parties claim this breached the Letter Agreement. The CWT Parties also claim Mrs. Danzik and Deja II fraudulently induced the CWT Parties to enter into the Letter Agreement, and that they are obligated to refund the CDN$1 million under a claim for money had and received. The court, however, will not reach the merits of these claims because the court lacks personal jurisdiction over Mrs. Danzik and Deja II.

The CWT Parties have the burden of establishing personal jurisdiction over Mrs. Danzik and Deja II. *Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009). Since Mrs. Danzik and Deja II are not New York residents, "they cannot be subject to personal jurisdiction in New York unless [the CWT Parties] prove that New York's long-arm statute confers jurisdiction over them by reason of their contacts within the state." *Id.* The CWT Parties must prove that the CPLR confers jurisdiction over Mrs. Danzik and Deja II and that such exercise of jurisdiction comports with due process. *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000); *see generally Daimler AG v Bauman*, 134 SCt 746, 754 (2014) ("The canonical opinion in this area remains *Int'l Shoe* [*Co. v Washington*, 326 US 310 (1945)], in which we held that a State may authorize

its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"').

CPLR 302(a)(1) provides that a New York court may exercise personal jurisdiction over a nondomiciliary who in person or through an agent transacts any business within the state. CPLR 302(a)(1) "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). CPLR 302(a)(3)(ii) also provides jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to a person or property within the state ... if he ... expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." *See LaMarca*, 95 NY2d at 214. "So long as a party avails itself of the benefits of the forum, **has sufficient minimum contacts with it**, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in the State." *Kreutter*, 71 NY2d at 466 (emphasis added); *see Walden v Fiore*, 134 SCt 1115, 1122-23 (2014) (to establish personal jurisdiction, a plaintiff must also demonstrate that defendants have the requisite minimum contacts with New York), accord *Burger King Corp. v Rudzewicz*, 471 US 462 (1985).[3]

Mrs. Danzik lives in Wyoming. Deja II is a Delaware LLC with a principal place of business in Wyoming. Mrs. Danzik and Deja II do not regularly conduct business in New York,

[3] The court only assesses whether specific jurisdiction exists because it is undisputed that Mrs. Danzik and Deja II are not subject to general jurisdiction in New York.

nor is it alleged that they came to New York in connection with the Letter Agreement. As discussed in prior decisions, RDX is a Canadian corporation with a principal place of business in Arizona. The plant at issue is located in Missouri. While the CWT Parties may have a nexus to New York, and though some of the contracts at issue in this action have a New York forum selection clause,[4] the Letter Agreement is not governed by New York law and does not have a New York forum selection clause. The stock sale it governs has no nexus to New York. Tellingly, the CWT Parties do not even bother to contend that Mrs. Danzik and Deja II have the requisite constitutionally required minimum contacts with New York. The only nexus suggested is that Danzik somehow served as their agent in New York. Even if that were true, the wrongdoing allegedly committed by Mrs. Danzik and Deja II is not alleged to have occurred in New York. Wrongdoing may have possibly occurred in Canada, Missouri, Arizona, or Wyoming, but nothing of substance is alleged to have occurred in New York. It is simply alleged that Mrs. Danzik and Deja II breached the Letter Agreement by misusing the sale proceeds and failing to provide the CWT Parties with the stock required by the Letter Agreement. This is not a meaningful nexus to New York, nor is it otherwise alleged that Mrs. Danzik and Deja II sought to avail themselves of the benefits of this jurisdiction in connection with the Letter Agreement. They, therefore, could not reasonably have expected to defend themselves in New York on claims related to the Letter Agreement. The exercise of jurisdiction over them would violate due process. Indeed, not only do Mrs. Danzik and Deja II lack

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[4] The question of whether the Letter Agreement has a connection to the UPA has no bearing on whether there is jurisdiction over Mrs. Danzik and Deja II. Even if the UPA could be said to be so interconnected with the Letter Agreement on the ground that it was part of the same transaction, that fact would not alter the jurisdictional inquiry since the UPA has a permissive Canadian forum selection clause. The court expresses no opinion on whether Mrs. Danzik and Deja II are subject to jurisdiction in Canada under the UPA.

minimum contacts with New York, they do not appear to have any contacts at all. The claims against Mrs. Danzik and Deja II are dismissed for lack of personal jurisdiction.

III. The CWT Parties' Claims against the GEM Parties (Seq. 013)

The CWT Parties' answer asserts four claims against the GEM Parties: (1) the first cause of action, fraud, is asserted against GEM, GEM Ventures, Tobin, and Brown by CWT Canada and RRC; (2) the second cause of action, indemnification and contribution, is asserted against GEM, GEM Ventures, Tobin, Brown, and RES Management by all of the CWT Parties; (3) the tenth cause of action, declaratory judgment, is asserted against GEM and GEM Ventures by Noelting, CWT Canada, and RRC; and (4) the eleventh cause of action, breach of fiduciary duty, is asserted against GEM, GEM Ventures, Tobin, Brown, and RES Management by CWT Canada and RRC.

A. Fraud

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Pursuant to CPLR 3016(b), "the circumstances constituting the wrong shall be stated in detail." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008).[5]

[5] It is unclear what law applies. As previously discussed, the subject contracts are governed by Delaware and Canadian law. *See* Dkt. 120 at 11-17. Yet, the parties assumed the tort claims at issue are governed by New York law. *See id.* at 17 n.6. The CWT Parties now suggest that the fraud claim might be subject to Delaware law, but it is not clear they are correct. Regardless, since the parties do not identify a relevant, dispositive difference between New York and Delaware law, the court applies New York law. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014).

The fraud claim is based on the allegation that Brown and Tobin allegedly promised Noelting and MacFarlane that RRC and CWT Canada would be permitted to make investments in CWT up to $1.5 million if they agreed to sign the contracts at issue in this action, such as the SPA and the ALPA.[6] Specifically, the CWT Parties explain that "[t]he basic structure of the deal was that GEM would invest a minimum of $2.5 million and a maximum of $4 million, in CWT, in exchange for up to 60% ownership of CWT," and that this was reflected in a term sheet dated December 5, 2012. *See* Dkt. 219 at 38-39; *see id.* at 88 (the Term Sheet). The CWT Parties further allege that the Term Sheet granted them two rights:

> **First**, Mr. MacFarlane's and Mr. Noelting's groups were to have the right to contribute up to $1.5 of the $4 million that GEM was to invest through what ultimately became the [SPA]. To fulfill its obligations under the [SPA], GEM was going to raise the $4 million from various sources. In essence, Mr. Noelting and Mr. MacFarlane were promised that their groups would be allowed to contribute, through GEM, at least $1.5 million toward GEM's $4 million investment, thereby minimizing dilution for those investors who still believed in the opportunity. In negotiations with Mr. Noelting, Tobin repeatedly affirmed that the legacy investors' co-investment right reflected in the term sheet would be honored. **Second**, in addition to the co-investment right, CWT Canada and RRC were to receive 100% of any tax credits[7] due to the company for the period prior to the closing. (This was memorialized in the Limited Partnership Agreement. See Article IX, Sec. 3(a)).

See Dkt. 219 at 39 (bold in original).

CWT Canada and RRC claim they were not permitted to make this co-investment. As a result, CWT Canada and RRC claim to have suffered "substantial out-of-pocket damages." Moreover, notwithstanding that the CWT Parties are themselves alleged to have wrongfully

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[6] These contracts were discussed in detail in the court's decision on the original motion to dismiss. *See* Dkt. 120.

[7] These tax credits lie at the heart of the contempt proceedings.

denied the GEM Parties their contractual right to invest the full $4 million in RDX, the CWT Parties claim that:

> even if GEM is held by this Court to be entitled to receive the value of its alleged contemplated transaction with Danzik and/or Ridgeline (pursuant to the LOI and NDA), the economic value of that transaction that GEM was to receive must be offset by the economic benefit that should be awarded to CWT Canada and RRC based on GEM's false promises.

See Dkt. 219 at 62. Putting aside the implausibility of this contention, as the GEM Parties correctly contend, the fraud claim is not viable.

At best, the subject co-investment deal might give rise to a breach of contract claim. Every facet of the highly complex transactions at issue in this case was reduced to writing. Even the transaction with Mrs. Danzik and Deja II was memorialized in a letter agreement. Therefore, a claim for breach of the co-investment right does not sound in fraud; it is merely an allegation that the Term Sheet was breached.[8] A claim based on an alleged breach of the Term Sheet cannot support a fraud claim because false promises of future performance do not constitute actionable fraud. *MP Innovations, Inc. v Atlantic Horizon Int'l, Inc.*, 72 AD3d 571, 573 (1st Dept 2010) ("a fraud claim does not lie where it simply 'alleges that a defendant did not intend to perform a contract with a plaintiff when he made it.'"), quoting *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988); *see Wilshire Westwood Plaza LLC v UBS Real Estate Secs., Inc.*, 94 AD3d 514, 516 (1st Dept 2012) ("The court properly dismissed [the]

[8] Similarly, if the Term Sheet was an agreement to agree, instead of an enforceable contract, then the fraud damages sought would not be recoverable. *See MG West 100 LLC v St. Michael's Protestant Episcopal Church*, 127 AD3d 624, 626 (1st Dept 2015) ("Any profits that plaintiffs may have made under the prospective contracts contemplated by the MOU cannot properly be awarded as damages ... since the MOU was merely a preliminary agreement by which the parties planned to proceed with their initial efforts"). Indeed, if the Term Sheet was merely a preliminary agreement, then the merger clauses discussed herein would override it.

fraudulent inducement claim on the ground that it was essentially a breach of contract claim" because the claim "is essentially that [defendant] never intended to honor its obligation ... under the [contract]."). As the First Department recently reiterated:

> In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim. Moreover, these misrepresentations of present fact must be collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract. Therefore, [a]s a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract.

Wyle Inc. v ITT Corp., 130 AD3d 438, 439 (1st Dept 2015) (citations and quotation marks omitted), accord *N.Y. Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 (1995).

A claim under the Term Sheet, moreover, may be precluded by the SPA's merger clause, which states that:

> the Transaction Documents ... contain the entire understanding of the parties with respect to the subject matter hereof and thereof and supersede all prior agreements and understandings, oral or written, with respect to such matters, which the parties acknowledge have been merged into such documents.

See Dkt. 87 at 19. In addition, CWT's limited partnership agreement contains a similar merger clause. *See* Dkt. 89 at 21. That said, since the CWT Parties' co-investment claim is pleaded as fraud, and not breach of contract, the claim is dismissed without prejudice and with leave to re-plead. The court will not definitively rule on the viability of a contract claim under the Term Sheet because it is not before the court.

The fraud claim, moreover, fails because scienter is not pleaded. The CWT Parties' own allegations regarding the GEM Parties' motives undercuts the fraud claim. The GEM Parties explain:

> The conclusory allegation regarding Tobin and Brown's mental state is also contradicted by the CWT Parties' own allegations. The CWT Parties claim that Tobin and Brown promised a Co-Investment right during "negotiations leading up to" agreements signed on December 21, 2012. Yet according to the CWT Parties, it was only in January 2013 -- weeks after these negotiations had concluded and the agreements were signed -- that GEM decided it would no longer permit Noelting and MacFarlane's groups to make a Co-Investment. GEM allegedly changed its mind because in January 2013 Congress renewed a tax credit that made CWT a more valuable company. These allegations undermine any inference that any of the GEM Parties *knew in December 2013* that representations regarding an opportunity for Co-Investment were false.

See Dkt. 348 at 10 (emphasis in original; citations omitted).

In opposition, the CWT Parties maintain that the alleged circumstances permit a reasonable inference of scienter:

> The CWT Parties have alleged that Brown and Tobin promised to allow them to participate in the investment to be made under the SPA, in order to secure the execution of the SPA. Further, the CWT Parties have alleged that this promise was withdrawn only weeks after the SPA was signed. That timing, together with other behavior the GEM Parties have demonstrated since, provides more than a rational basis to infer that Brown and Tobin had no intention of extending co-investment rights to the CWT Parties, while promising that they would.
>
> The GEM Parties argue that the "allegation regarding Brown and Tobin's mental states is contradicted by the CWT Parties' own allegations," misconstruing the allegations in the Claims. The GEM Parties assert that "according to the CWT Parties, it was only in January 2013 – weeks after these negotiations had concluded and the agreements were signed – that GEM **decided** it would no longer permit Noelting and MacFarlane's group to make a co-investment." In fact, the Claims allege that, "in early January after the agreements had been signed and implemented, Tobin and Brown made clear that contrary to the express promises that induced the CWT Parties and Mr. MacFarlane to approve the transaction, it would not permit the legacy investors to participate in GEM's $4 million investment in CWT." As explained in the Noelting Aff., the GEM Parties' statements were false when made. Specifically, GEM presented the co-investment right as an unconditional offer, when in fact, the timing and circumstances surrounding their reneging on the promise show that they never intended to permit any co-investment if Congress reinstated the renewable fuel tax credit, thus increasing CWT's value. Had the CWT Parties known GEM's true intentions, they would never have agreed to the deal. Thus, the Claims do not contradict the allegation that Tobin and Brown knowingly made untrue statements to induce the CWT Parties into signing the SPA.

See Dkt. 382 at 54-55 (emphasis in original; citations omitted). In short, CWT argues that a brief passage of time between contract and breach, without more, permits a reasonable inference of scienter. The CWT Parties cite no case in support of this proposition. That a breach subsequently occurred does not imply that the decision to breach was made at the outset.

Nor is reasonable reliance pleaded. Sophisticated commercial parties cannot reasonably rely on prior, collateral agreements in the face of a merger clause. If the Term Sheet reflected the parties' definitive agreement, its terms would not have been left out of the final, definitive, written, and integrated agreements. *See Ashwood Capital, Inc. v OTG Mgmt., Inc.*, 99 AD3d 1, 9 (1st Dept 2012) ("the agreement contains both a no-oral-modification clause and a broad merger clause, which as a matter of law bars any claim based on an alleged intent that the parties failed to express in writing"). Indeed, the CWT Parties' tax credit rights mentioned in the Term Sheet are memorialized in the SPA. The co-investment right is not. That said, as noted, the court permits the CWT Parties to re-plead a breach of contact claim regarding the alleged co-investment right since the parties' briefing did not expressly address the viability of such a claim.[9]

B. Indemnification & Contribution

The CWT Parties' claims for indemnification and contribution also are without merit. The CWT Parties argue that "to the extent that the Canadian court may find the CWT Parties Liable on the RDX Parties' fraud claims," the GEM Parties should bear some liability because

[9] It also should be noted that given the history of this case, the CWT Parties may not be able to prove that they were damaged by their inability to make this further investment.

they allegedly "had full awareness of all the facts concerning CWT, the Carthage facility and its fuel and the related process, because they were in charge of managing CWT through their control of RES Management, the General Partner." *See* Dkt. 382 at 59. The court need not weigh the merits of such a claim because, as the GEM Parties correctly contend, common law indemnification may not be sought by a party who participated in the alleged wrongdoing. Hence, if the CWT Parties actually defrauded the RDX Parties, they cannot seek indemnification from the GEM Parties. *See Aiello v Burns Int'l Sec. Servs. Corp.*, 110 AD3d 234, 247 (1st Dept 2013) ("Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine") (citation omitted). Contribution, moreover, would be inappropriate since the gravamen of the RDX Parties' allegations is that the CWT Parties falsified testing records before the GEM Parties' involvement. The CWT Parties fail to allege a non-conclusory basis for contribution since they do not suggest the GEM Parties were themselves involved in the alleged fraud.

C. Declaratory Judgment

The GEM Parties' declaratory judgment claim also is dismissed. CPLR 3001 provides that this court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment requires that an actual controversy exist "and may not be used 'as a vehicle for an advisory opinion.'" *Long Is. Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 (1st Dept 2006), quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3001:3. Accordingly, the court will not make conditional rulings based on hypothetical outcomes in the Canadian lawsuit. *See Ovitz v*

Bloomberg L.P., 18 NY3d 753, 763 (2012) (declaratory judgments should not be issued when the existence of a controversy is predicted on "hypothetical, contingent or remote" events).

The Canadian lawsuit appears dormant and may not continue due to the RDX Parties' failure to prosecute (which seems all the more likely to continue in light of the bankruptcy proceedings). The court will not rule on the implications of the Canadian lawsuit until an actual ruling in that case is issued.

D. Breach of Fiduciary Duty

The CWT Parties' breach of fiduciary duty claims fare no better. Such claims relate to the co-investment agreement, a claim that, at best, sounds in contract. Moreover, the CWT Parties claim the GEM Parties committed malfeasance that devalued the RDX, thereby forcing them to sell to Danzik, "who paid no money for it at all."[10] As the GEM Parties correctly contend, this allegation is nonsensical. The whole point of GEM's lawsuit against the CWT Parties is that the CWT Parties cut out the GEM Parties and sold to Danzik *for a higher price* than they were contractually obligated to sell to the GEM Parties. Hence, the market value of RDX clearly increased.[11] Nor did anyone force the CWT Parties to sell to Danzik. That Danzik

[10] The CWT Parties essentially argue that the GEM Parties have vicarious liability for Danzik's actions. The court will not address the myriad problems with this contention, including those raised in reply and the improper supplemental briefing, since the lack of damages discussed herein precludes the claim.

[11] Of course, if the company really was worth less than the amount (that was supposed to be) paid by Danzik due to the fraud alleged by Danzik, that would mean the CWT Parties committed fraud. In such a case, a claim by the CWT Parties' against the GEM Parties for devaluating the company would be precluded, *inter alia*, by the *in pari delicto* doctrine. Relatedly, even if Danzik misappropriated money from RDX while he was in control, but prior to the sale, the CWT Parties suffered no damages because they sold the company to Danzik and do not allege the purchase price would have been higher but for Danzik's actions. While the GEM Parties aver this also defeats the CWT Parties' standing to assert breach of fiduciary duty claims, the issue of standing need not be reached given the lack of damages.

did not pay the CWT Parties has no bearing on the value of RDX. It is only indicative of what has become the theme of this case – Danzik's refusal to pay any of the parties – as he did not pay the CWT Parties for acquiring RDX nor did he pay the GEM Parties the amounts due under their settlement agreement.

IV. The CWT Parties' Motion to Supplement the Record (Seq. 015) and Cross-Motion (Seq. 012)

The CWT Parties have not identified any grounds warranting further briefing on the motions to dismiss. Dismissal of the CWT Parties' claims discussed herein is supported by the initial briefing and not impacted by subsequent events. The cross-motion also seeks inapposite relief. Simply put, the cross-motion to strike duplicates the jurisdictional arguments; a stay pending a ruling in the Canadian lawsuit is not warranted since that lawsuit appears dormant; and jurisdictional discovery is not warranted. To the extent the cross-motion relates to any relief sought against RDX and Danzik, denial of such relief is without prejudice and may be re-sought if and when RDX and Danzik rejoin this action. That said, the CWT Parties are urged to be more judicious with their motions to supplement the record, as such applications should be the exception, not a routine part of almost every round of motion practice. Accordingly, it is

ORDERED that motion sequence numbers 012, 013, and 015 are decided as follows: (1) the CWT Parties' third-party claims against Mrs. Danzik and Deja II are dismissed for lack of personal jurisdiction, the Clerk is directed to enter judgment dismissing the claims against said third-party defendants, and such judgment shall be severed and this action shall continue against the remaining parties; (2) the CWT Parties' counterclaims and third-party claims against the GEM Parties are dismissed for failure to state a claim, with leave to amend, should they choose, to assert a claim for breach of the Term Sheet if such amended pleading is filed within 21 days of

the entry of this order on the NYSCEF system; (3) the portions of Motion 12 seeking dismissal of the claims against Mr. Danzik and RDX are denied with leave to refile if and when the automatic stay no longer is in effect; and (4) the CWT Parties' cross-motion and motion to supplement the record are denied; and it is further

ORDERED that the parties shall jointly call the court within 10 days of the entry of this order on the NYSCEF system to discuss the status of discovery.

Dated: February 1, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.