NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X

DANIEL Z. CHEN, NANCY KLINE, BLAIR ROTHMAN, FRANK SCALLON, EDWARD SIROTA,

Plaintiff,

- against -

FOX REHABILITATION SERVICES, P.C., FOX REHABILITATION PHYSICAL, OCCUPATIONAL AND SPEECH THERAPY SERVICES, L.L.C., TIMOTHY FOX, ROBYN KJAR, NEIL WEISSHAAR,

Defendant.

----------X

Index No. **800365/22E**

Hon. **FIDEL E. GOMEZ** Justice

The following papers numbered 1 to 4, Read on this motion noticed on 6/9/22, and duly submitted as no. 2 on the Motion Calendar of 8/2/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Judgment of Foreclosure and Sale		
Memorandum of Law	2-4	
Administrative Order 5.25.2022 and Amended Bronx Auction Plan 2021		

Defendants motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 10/11/2022

Hon. **FIDEL E. GOMEZ, AJSC**

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION/CROSS-MOTION IS ☐ GRANTED (MOTION) ☐ DENIED (CROSS-MOTION)

3. CHECK IF APPROPRIATE. X GRANTED IN PART ☐ OTHER ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT ☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

DANIEL Z. CHEN, NANCY KLINE, BLAIR ROTHMAN, FRANK SCALLON, EDWARD SIROTA,

Plaintiff(s),

- against -

FOX REHABILITATION SERVICES, P.C., FOX REHABILITATION PHYSICAL, OCCUPATIONAL AND SPEECH THERAPY SERVICES, L.L.C., TIMOTHY FOX, ROBYN KJAR, NEIL WEISSHAAR,

Defendant(s).

----------x

DECISION AND ORDER

Index No: 800365/22E

In this action for, *inter alia*, breach of contract, defendants move seeking an order pursuant to CPLR § 3211(a)(8) dismissing all claims asserted by plaintiff BLAIR ROTHMAN (Rothman) in the amended complaint against all defendants except defendant FOX REHABILITATION PHYSICAL OCCUPATIONAL AND SPEECH THERAPY SERVICES, L.L.C. (FTS). All defendants except FTS aver that this Court has no personal jurisdiction over them with regard to Rothman's claims because neither Rothman nor the individual defendants reside in New York, defendant FOX REHABILITATION SERVICES, P.C. (Fox) is not incorporated in New York, and because none of the wrongs alleged in the complaint arise from the remaining defendants' business in New York or that any of the wrongs alleged occurred in New York.

Defendants also move for an order dismissing the amended

complaint against all defendants pursuant to, *inter alia*, CPLR § 3211(a)(7). Defendants, *inter alia*, aver that the allegations in the amended complaint, when read against the contents of the documents referenced therein, fail to state a cause of action for breach of contract and implied covenant under New Jersey law, that the breach of contract cause of action bars the quasi-contract unjust enrichment claim, and that the independent duty doctrine bars all tort claims sounding in fraud since the duties alleged to have been breached by defendants all arose from, and are the same as those imposed by agreement between the parties, upon which the breach of contract claim is premised.

Plaintiffs oppose the instant motion asserting that the amended complaint does, in fact, state a cause of action for breach of contract inasmuch as the contract alleged to have been breached is the employer/employee relationship and not the agreement between the parties. As a result, plaintiffs oppose dismissal of the remaining causes of action in the amended complaint, asserting, *inter alia*, that the agreement submitted by defendants, governing the deferred compensation at issue, does not bar the causes of action for fraud and unjust enrichment. Plaintiffs oppose dismissal of Rothman's claims for want of personal jurisdiction over the defendants, asserting that Rothman's claims, even if arising outside of New York, are nevertheless related to the claims made by the remaining plaintiffs, over which this Court has

personal jurisdiction.

For the reasons that follow hereinafter, defendants' motion is granted, in part.

The instant action is for fraud, fraud by omission, fraudulent concealment, negligent misrepresentation, unjust enrichment, breach of contract, breach of the covenant of good faith and fair dealing, and violations of the New York Labor Law and the New Jersey wage and Hour Law.

According to the amended complaint, on January 1, 2007, Fox, a provider of physical therapy services in the tri-state area and headquartered in New Jersey, and FTS, Fox's corporate vehicle for purposes of payment to plaintiffs, incorporated in New York and headquartered in New Jersey (hereinafter at times collectively referred to as "the company") created an Employee Equity Appreciation Rights Plan (the Plan). In connection therewith, Fox and FTS' employees were provided with a Notice of Plan Participation (the Notice) and an Amended and Restated Fox Rehabilitation Services PC Employee Equity Appreciation Rights Plan Summary Plan Description (the SPD). Per the SPD, the Plan was intended to provide Fox and FTS' employees with a share of appreciation in the company's value, earned by the employees during their tenure. The SPD stated that it was intended to induce employees to remain with the company by providing employees with supplemental deferred payment - a cash payout upon a change in

control, namely an acquisition of the company - all based on the company's increased value. Per the SPD, a change in control constituted a payment event, defined as when more than 50% of the company's stock or assets were acquired and when the eligible employee continued employment for twelve months thereafter. Per the SPD, employees of the company became eligible to participate in the Plan after two years of employment and on the anniversary of an employee's second year, the company would issue the Notice, informing the employee that he/she was a participant in the Plan. The Notice listed the base value of the company as of the date of participation and the amount an employee would be paid under the Plan. Pursuant to the Plan an employee's cash benefit would be determined by, *inter alia*, the difference between the company's base value upon an employee's entry into the program and the company's value upon a change in control. In 2009, when one of the plaintiffs became a participant on the Plan, the company's base value was $10 million.

In 2019, when all plaintiffs were fully vested in the Plan, the company was acquired by Blue Wolf capital Partners, LLC (Blue Wolf), and at the time of acquisition the company's value was between $120-300 million. Twelve months after the acquisition, plaintiffs requested payment under the Plan and the company and the individual defendants declined to pay, asserting that the Plan, which was never provided to plaintiffs, defined a change in control

as the acquisition by another of 75% or more of the company's stocks or assets, and such acquisition had not occurred. Denial of payment was further premised on the assertion that in December 2015, the Plan had been abolished in its entirety. Plaintiffs appealed the decision to deny them payment and the appeal was decided against them on grounds identical to the initial determination.

In December 2015, defendant TIMOTHY FOX (TF), director of Fox, and the sole member of the company, executed a document, simultaneously in New York and in New Jersey, which purported to terminate the Plan, premised upon the company's claimed right to effectuate the termination and on the basis that the company's value at the time was less than the value at the time that each of the company's employees became participants in the Plan. It is alleged that TF and the company knew that the company's value at the time the Plan was terminated was higher than the value when plaintiffs and other employees became participants in the Plan, that the value of the company had increased between the time that the company's employees became participants in the date the Plan was terminated, that termination of the Plan required a decision by a majority of the company's board, such that the basis for the Plan's termination was false and its termination ineffective. It is alleged that because the company's base value in 2009 was $10 million and that in 2019, the company sold for between $120-300

million, the company, which in 2010 had 400 clinicians, operated in seven states, and had doubled in size by 2015, falsely represented that it was worth less in 2015 than in 2010. It is also alleged that because at the time the Plan was terminated, all plaintiffs were fully vested and the SPD stated that any plan termination could not adversely affect a participant's vested rights under the Plan, the termination of the Plan adversely affected plaintiffs' rights under the Plan.

The amended complaint asserts that the company and the individual defendants represented to plaintiffs, in writing, that a payment event would occur when more than 50% of the company's stock or assets were acquired, that these statements were made to induce plaintiffs' reliance upon them so that they would continue to be employed by defendants, while never intending to pay plaintiffs upon the foregoing occurrence. In addition, it is alleged that plaintiffs did not learn that the Plan had been terminated until more than five years after the Plan had been terminated, such that defendants fraudulently and intentionally induced plaintiffs into believing that they would receive a payment under the Plan when the company was acquired, which prompted plaintiffs' reliance thereon and their continued employment with the company. Based on the foregoing representation, and reliance upon the same, plaintiffs continued to work for the company, and were injured when they were denied payment under the Plan. It is

further alleged that in order to avoid misleading plaintiffs, defendants had a duty, based on their superior knowledge, to disclose the materials, which were kept secret and which defined a change in control in a way, which was at variance with the SPD. The foregoing is true with regard to the disclosure that the Plan had been terminated.

Because plaintiffs were never provided with the Plan until after they were denied payment thereunder, and were initially only provided with the SPD, whose terms upon which plaintiffs relied, it is alleged that the Plan's and terms therein are in dispute, such that the SPD is controlling. The SPD was accompanied by a cover letter from TF, which stated that the SPD and the Notice constituted the details of the Plan, that the participants in the Plan would be granted an interest in the company, such that plaintiffs relied on the same and believed that they were being given ownership in the company. Based on the foregoing and because the SPD never provided contact information for the person bearing the title Director of Communications, from whom the Plan could be obtained, it is alleged that there was never the requisite assent binding plaintiffs to the terms of the Plan, such that only the SPD is controlling as to the terms of the Plan. To that end, it is alleged that insofar as the SPD provided plaintiffs with a tangible monetary stake in the company, any term in the Plan which would eliminate that term in its entirety is unenforceable.

Plaintiffs allege that TF, a resident of New Jersey, who was the company's owner, director, and ultimate decision maker, defendant ROBYN KJAR (Kjar), the company's Chief Executive Officer, the Plan's administrator, and a resident of New Jersey, and defendant NEIL WEISSHAAR (Weishaar), the company's Chief of Staff, and a resident of New Jersey, each bear individual liability. TF represented that a change in control would occur when more than 50% of the company's stock or assets were acquired with knowledge that such representation was false, that TF terminated the Plan, falsely representing that the company's value at the time was less than its base value when plaintiffs became participants in the Plan, and concealed the termination, which induced plaintiffs' reliance, prompting them to continue working for the company. Kjar, who controlled the company's pay practices and the terms and conditions of employment therein, deprived plaintiffs of compensation under the Plan by designating Weisshaar to adjudicate plaintiffs' application for compensation under the Plan, knowing that the basis for denial of the same was false, and by directing Weisshaar to deny plaintiffs' claims. Weisshaar, who possessed the ability to make compensation decisions with regard to plaintiffs' compensation deprived plaintiffs of compensation by relying on facts he knew to be false.

It is alleged that plaintiff DANIEL Z. CHEN (Chen) resides in New York, and has been employed by Fox as a Physical Therapist

since 2008. Plaintiff NANCY KLINE (Kline) resides in New York and has been employed by Fox as an Occupational Therapist since 2007. Rothman is a resident of New Jersey and has been employed by Fox as a Physical Therapist since 2007. Plaintiff FRANK SCALLON (Scallon) is a resident of New York and has been employed by Fox as a Physical Therapist since 2009. Plaintiff EDWARD SIROTA (Sirota) is a resident of New York and was employed by Fox as a Physical Therapist from 2010 through 2021. It is alleged that FTS is a shell corporation used by the all the defendants for their operations in New York and that although FTS paid plaintiffs' wages, Fox and FTS have consolidated operations, are operated from Fox's headquarters in New Jersey, are managed by the same staff and are registered at the same address.

Based on the foregoing, plaintiffs interpose 10 causes of action. The first is for fraud, the second is for fraud by omission, the third is for fraudulent inducement, the fourth is for fraudulent concealment, the fifth is for negligent misrepresentation, the sixth is for breach of contract, the seventh is for fraudulent inducement, the eighth is for failure to pay compensation under New York Labor Law § 190, the ninth is for failure to pay compensation under Labor and Workmen's Compensation Law[1] §§ 34:11-4.1 and 12:55, and the tenth is for unjust

[1] The complaint erroneously denominates the Workmen's Compensation Law as New Jersey Wage and Hour Law.

enrichment. With regard to each cause of action, plaintiffs allege that they suffered economic and pain and suffering damages.

STANDARD OF REVIEW

Pursuant to CPLR § 3211(a)(1), a pre-answer motion for dismissal based upon documentary evidence should only be granted when "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *IMO Industries, Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 10 [1st Dept 1999]). Much like on a motion pursuant to CPLR § 3211(a)(7), on a motion to dismiss pursuant to CPLR § 3211(a)(1), the allegations in plaintiff's complaint are accepted as true, constructed liberally and given every favorable inference (*Arnav Industries, Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001], *overruled on other grounds by Oakes v Patel*, 20 NY3d 633 [2013]; *Hopkinson III v Redwing Construction Company*, 301 AD2d 837, 837-838 [3d Dept 2003]; *Fern v International Business Machines Corporation*, 204 AD2d 907, 908-909 [3d Dept 1994]).

Affidavits are not documentary evidence for pirposes of establishing relief under CPLR § 3211(a)(1) (*Fleming v Kamden Properties*, LLC, 41 AD3d 781, 781 [2d Dept 2007][Here, the appellants' submissions in support of their motion included an affidavit and a verified Surrogate's Court petition which the

Supreme Court properly declined to consider on a motion to dismiss pursuant to CPLR 3211 (a) (1) because the submissions did not constitute documentary evidence."]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]).

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), on grounds that the complaint fails to state a cause of action, all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366). In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*). The court's role when analyzing the complaint in the context of a motion to dismiss is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not

whether he has stated one."]). However, "when evidentiary material [in support of dismissal] is considered the criterion is whether the proponent of the pleading *has* a cause of action not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [emphasis added).

Significantly, documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages and "a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground upon which the motion is based" (*Webster Estate of Webster v State of New York*, 2003 WL 728780, at *1 [Ct Cl Jan. 30, 2003]). Accordingly, much like on a motion seeking dismissal pursuant to CPLR § 3211(a)(1), where affidavits and deposition transcripts are not documentary evidence sufficient to establish a right to dismissal (*Fleming* at 781; *Berger* at 347) "affidavits submitted by a defendant [in support of a motion pursuant to CPLR § 3211(a)(7)] will almost never warrant dismissal under CPLR 3211 unless they *establish conclusively that the plaintiff has no cause of action*" (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] [internal quotation marks omitted and emphasis added]; *see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976] ["affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action."]; *Matter of*

Lawrence v Miller, 11 NY3d 588, 595 [2008]).

CPLR § 3013 states that

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688 [2d Dept 2006]; *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]). While generally, on a motion to dismiss the complaint for its failure to state a cause of action, the facts in the complaint are deemed true, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2d Dept 2007]; *Meyer v Guinta*, 262 AD2d 463, 464 [2d Dept 1999]).

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(8), on grounds that the court lacks personal jurisdiction over one or more defendants, the allegations in the complaint must be accepted as true and plaintiff must be accorded every favorable inference (*Whitcraft v Runyon*, 123 AD3d 811, 812 [2d Dept 2014]; *Weitz v Weitz*, 85 AD3d 1153, 1153 [2d Dept 2011]). Significantly, on such a motion, it is the generally the plaintiff or the proponent of jurisdiction who bears the burden of establishing jurisdiction (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003] ["In either event, the burden rests on plaintiff as the party asserting jurisdiction."]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 407 [2d Dept 2005]; *Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]). The law, however, does not generally mandate that plaintiff make a prima facie showing of personal jurisdiction, but only that there has a sufficient start on the issue of jurisdiction to warrant further discovery on the issue (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]; *James v iFinex Inc.*, 185 AD3d 22, 30 [1st Dept 2020] ["Rather, she need only make a "sufficient start" in demonstrating, prima facie, the existence of personal jurisdiction, since facts relevant to this determination are frequently in the exclusive control of the opposing party and will only be uncovered during discovery."]; *James v iFinex Inc.*, 185 AD3d 22, 30 [1st Dept 2020]; *Bunkoff Gen. Contractors Inc. v State Auto. Mut. Ins. Co.*, 296 AD2d 699, 700 [3d

Dept 2002]). A plaintiff demonstrates a sufficient start by establishing that there is an issue as to jurisdiction that cannot be resolved absent further discovery on that issue (*Peterson* at 467; *James* at 30; *Bunkoff Gen. Contractors Inc.* at 700). If questions of fact as to the issue of jurisdiction exist, the court can order a hearing to resolve any factual issues (*Juron and Minzner v Dranoff and Patrizio*, 180 AD2d 439, 439 [1st Dept 1992]; *EAC Sys., Inc. v Chevie*, 154 AD2d 813 [3d Dept 1989]).

DISCUSSION

I

Dismissal of Rothman's Claims for Want of Personal Jurisdiction

Defendants' motion pursuant to CPLR § 3211(a)(8) seeking dismissal of Rothman's claims against all defendants but FTS on grounds that the Court has no personal jurisdiction over said defendants is granted. Here, the amended complaint fails to plead sufficient facts to establish that this Court has either general or specific jurisdiction over Rothman's claims against all defendants except FTS.

CPLR § 301 prescribes the power of New York courts to exercise general jurisdiction over defendants in actions brought before its courts. CPLR § 301 states that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." In order to exercise general jurisdiction over a defendant under CPLR § 301, a defendant must either be

domiciled or have its principal place of business in New York (*IMAX Corp. v The Essel Group*, 154 AD3d 464, 466 [1st Dept 2017]; *Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]), or its contacts with New York must be "so extensive as to support general jurisdiction notwithstanding domicile elsewhere" (*IMAX Corp. v The Essel Group*, 154 AD3d 464, 466 [1st Dept 2017] [internal quotation marks omitted]; *see Aybar v Aybar,* 169 AD3d 137, 144 [2d Dept 2019], *affd*, 37 NY3d 274 [2021] ["Neither Ford nor Goodyear is incorporated in New York or has its principal place of business here. Thus, New York courts can exercise general jurisdiction over each defendant only if the plaintiffs have established that its affiliations with New York are so continuous and systematic as to render it essentially 'at home' here"]). Thus, generally, general jurisdiction over a corporation does not exist if it is neither incorporated in New York or has its principle place of business therein (*Magdalena* at 601). Instead, under CPLR § 301 and New York's exercise of general personal jurisdiction "a foreign corporation is amenable to suit in our courts if it is engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction" (*Frummer v Hilton Hotels Intern., Inc.*, 19 NY2d 533, 536 [1967] [internal quotation marks omitted]). The relevant inquiry is whether the exercise of personal jurisdiction satisfies due process in that a foreign corporation has minimum contacts with the forum state such

that suing the corporation in the forum state does not run afoul of notions of fair play and substantial justice (*id.* at 536). In *Frummer*, the court, while noting that the mere solicitation of business in New York was not doing business in New York for purposes of general jurisdiction, nevertheless held that it had general jurisdiction over defendant, a British corporation (*id.* at 536). In *Frummer*, the British corporation, with a hotel in London, moved to dismiss the claims brought against it by plaintiff, who fell and was injured in a room at the hotel (*id.* at 535). In denying the defendant's motion, the Court noted that the defendant, the British corporation, was doing business in New York because its affiliate, who had an office, telephone number, and a bank account in New York advertised that it could make reservations at defendant's hotel, such that it generated business for defendant in New York (*id.* at 537). In other words, the court held defendant was, in fact, doing business in New York because through its affiliate in New York, it did "all the business which [defendant, the foreign corporation] could do were it here by its own officials" (*id.* at 537). Notably, for purposes of general jurisdiction, merely operating an office in New York, does not, by itself, confer general jurisdiction over a foreign corporation (*Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.*, 131 AD3d 259, 265 [1st Dept 2015] [Court held that it had no general jurisdiction over defendant, a foreign corporation with a

branch office in New York.]).

Similarly, general jurisdiction over a natural person does not exist unless he/she is domiciled in New York (*Magdalena* at 601 ["Similarly, no jurisdiction lies pursuant to CPLR 301 over Glendun's founder, defendant Eduardo Lins. While Lins, a Brazilian national, owns an apartment in New York, he is not domiciled there. His daughters regularly reside there. Lins resides and is domiciled in Uruguay; New York is not his domicile."]), or if his/her contacts with New York are extensive so as "to support general jurisdiction notwithstanding domicile elsewhere" (*Reich v Lopez*, 858 F3d 55, 63 [2d Cir 2017]).

Here, the amended complaint alleges that TF, Kjar, and Weisshaar reside in New Jersey and that Fox is headquartered and incorporated in New Jersey. Moreover, beyond pleading that Fox provides physical therapy services in the tri-state area, the complaint is bereft of facts indicating that the defendants' contacts with New York were or are extensive, so as to confer general jurisdiction over them. Thus, this Court does not have general personal jurisdiction pursuant to CPLR § 301 over Rothman's claims against all but FTS, a New York limited liability company.

CPLR § 302 prescribes the ability of New York courts to exercise personal long-arm or specific jurisdiction over non-domiciliaries. Generally, a court can 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[,] . . . commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act[, or if he/she] . . . commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he . . . regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce

(CPLR § 302[a]).

Pursuant to CPLR § 302(a)(1), the courts of this state can exercise personal jurisdiction over any non-domiciliary who in person or through his agent "transacts any business within the state or contracts anywhere to supply goods or services in the state." However, specific personal jurisdiction can only be exercised thereunder if the cause of action asserted arise from the very transactions upon which jurisdiction is based (*Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 [2006]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 458 [1965] ["Not only did the contract upon which the suit is

based have 'substantial connection' with New York but the appellant's 'contacts' with this State were such 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"]; *Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 246 [2d Dept 2005]). Provided that a defendant's activities in New York were purposeful, a defendant is deemed to have transacted business in New York, even if the contact with New York involves a single transaction conducted without actual entry into New York (*Kreutter* at 467 [CPLR 302(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."]). In *Opticare Acquisition Corp.*, the defendants, nondomiciliaries, were deemed to have transacted business in New York "by entering into agreements which, in each case, gave rise to substantial relationships, both substantively and temporally, with a New York employer . . . [because they] had systematic, ongoing relationships with a New York company, with which they were in daily contact. " (*id.* at 244-245). The court then noted that the requisite nexus between the business defendants transacted and the claims alleged in the complaint existed since the breach of the confidentiality agreement arose therefrom (*id.* at 226-247 ["We

have little difficulty concluding that there is such a nexus here. If the appellants' transaction of business is viewed as the execution of their respective employment agreements, then the cause of action sued upon in each case—breach of those agreements—clearly arose from the relevant transaction. On the other hand, if the transaction of business is viewed as the appellants' post agreement business activities on behalf of Wise, then the causes of action clearly arose therefrom once again. Simply put, the appellants could not conduct any business for Wise, in New York or elsewhere, without the confidential information they allegedly misappropriated. The contractual breaches that are alleged here consist, inter alia, in the misappropriation of the very confidential information that allowed the appellants to transact business in the first place" [internal quotation marks omitted]).

The execution of a contract outside New York, by itself, does not preclude the exercise of specific jurisdiction, if there exist substantial pre and post-execution activities in New York (*Longines-Wittnauer Watch Co.* at 458), and the fact that a contract was executed in New York, without more, does not constitute the transaction of business in New York sufficient to allow the exercise of specific jurisdiction (*Libra Glob. Tech. Services (UK) Ltd. v Telemedia Intern., Ltd.*, 279 AD2d 326, 327 [1st Dept 2001]).

Here, as noted above, beyond one assertion that Fox provides therapy services in the tri-state area and that TF simultaneously terminated the Plan in both New York and New Jersey, the amended complaint is bereft of any allegations that defendants specifically transact or transacted business in New York, let alone that the claims in the amended complaint arose from defendants' business in New York. Indeed, to the extent that the claims asserted by all plaintiffs, including Rothman, arise from the creation and subsequent termination of the Plan, with the exception of the claim that the Plan was simultaneously terminated in both New York and New Jersey, there is no other assertion that the claims made arise from defendants' business in New York. Assuming that the amended complaint sufficiently pleaded that defendants transacted business in New York, it is the execution of the document terminating the Plan, which as if by magic, is alleged to have been done in two states at same time. This latter vague and confusing assertion would nevertheless be insufficient to establish the nexus between the claims in the amended complaint and New York.

Under CPLR § 302(a)(2), which premises specific personal jurisdiction upon the commission of "a tortious act within the state," jurisdiction can only be exercised when a nondomiciliary defendant commits a tortious act within New York (*Longines-Wittnauer Watch Co.* at 460 ["The mere occurrence of the

injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording. Any possible doubt on this score is dispelled by the fact that the draftsmen of section 302 pointedly announced that their purpose was to confer on the court 'personal jurisdiction over a non-domiciliary whose act in the state gives rise to a cause of action' or, stated somewhat differently, 'to subject non-residents to personal jurisdiction when they commit acts within the state'" [internal citations omitted]). This means that in order to have a court exercise jurisdiction pursuant to CPLR § 302(a)(2), the nondomiciliary defendant has to be physically present in New York when he/she commits the tort upon which jurisdiction is premised or the factual equivalent thereof (*Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182, 188 [Sup Ct 1996], *affd sub nom. Banco Nacional Ultramarino, S.A. v Moneycenter Tr. Co. Ltd.*, 240 AD2d 253 [1st Dept 1997]; *Bensusan Rest. Corp. v King*, 126 F3d 25, 28 [2d Cir 1997]; *Pilates, Inc. v Pilates Inst., Inc.*, 891 F Supp 175, 182 [SDNY 1995]; *Paul v Premier Elec. Const. Co.*, 576 F Supp 384, 389 [SDNY 1983]; *Dept. of Economic Dev. v Arthur Andersen & Co. (U.S.A.)*, 747 F Supp 922, 929 [SDNY 1990]).

Here, as just discussed, the amended complaint is bereft of any allegation that any of the claims asserted were perpetrated by the nondomiciliary defendants while they were in New York. Thus,

this Court has no specific jurisdiction over Rothman's claims pursuant to CPLR § 302(a)(2).

Under CPLR § 302(a)(3), a court can exercise primary personal jurisdiction over a nondomiciliary when the nondomiciliary commits a tortious act outside of New York which causes injury to person or property in New York if the nondomiciliary

> regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce

(*id.* at § 302[a][3][i)]and [ii]). As the court in *LaMarca v Pak-Mor Mfg. Co.* (95 NY2d 210 [2000]) discussed, jurisdiction under the foregoing statute rests on five elements

> [f]irst, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce

(*id.* at 214; *see Ingraham v Carroll*, 90 NY2d 592, 596 [1997]).

The fourth element - that a defendant expects or should reasonably expect the act to have consequences in the State - an element designed to make it reasonable to require a defendant to

come to New York and answer for tortious conduct committed elsewhere - is established when defendant knows that its goods are likely to be sold in New York, such that he/she should reasonably expect that an out of state tortious act will have direct consequences in New York (*id.* at 214-215; *see Ingraham* at 598 ["The first prong of CPLR 302 (a)(3)(ii) has been satisfied. Respondent concededly was aware that decedent, a New York resident, was receiving treatment from New York State primary physicians based, at least in part, on his recommendations. He contacted decedent's physicians directly, by mail and via telephone, concerning the treatment she was to receive in New York. Significantly, respondent acknowledged that his expectation, when making recommendations, is that the CHP doctor in New York would follow his advice. Hence, respondent, in essence, has admitted that his allegedly tortious action (a misdiagnosis and improper recommendation) would have consequences within New York, satisfying the fourth prong of CPLR 302(a)(3)(ii)."]).

The fifth element - that a defendant derives substantial revenue from interstate or international commerce - an element designed to narrow the reach of specific jurisdiction so as to preclude jurisdiction over injurious conduct by those whose business is local and outside of New York is established when the defendant derives substantial commerce from interstate commerce (*LaMarca* at 215; *cf Ingraham* at 600 ["Undisputably, all of

respondent's revenue is derived from such local medical services, provided in Vermont. In this respect, respondent's revenue is even less interstate in character than that of a renowned medical specialist, the bulk of whose income may be earned from treating out-of-State patients."]).

Here, for many of the reasons stated above, the amended complaint fails to establish specific jurisdiction over Rothman's claims pursuant to CPLR § 302(a)(3) because the complaint fails to establish the elements required for the exercise of personal jurisdiction thereunder. First, as noted, the complaint is bereft of any allegation that the Plan, the SPD, the document terminating the plan, or the decision to terminate the Plan caused any injury in New York and more specifically to Rothman, a resident of New Jersey. Second, the complaint is utterly bereft of clear allegations establishing that defendants regularly did or solicited business in New York or that defendants derived substantial revenue from goods used or consumed or services rendered in New York.

Contrary to plaintiffs' assertion, while the court in *Ford Motor Co. v Montana Eighth Jud. Dist. Ct.* (141 S Ct 1017 [2021]) stated that "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do" (*id.* at 1026), this does not mean as urged that where as here, Rothman's claims are related to the claims brought by the other plaintiffs, as to whom there are no

issues related to jurisdiction, that this Court is free to exercise specific jurisdiction. Instead, as the court in *Ford Motor Co.* noted, for purposes of primary jurisdiction, "our most common formulation of the rule demands that the suit 'arise out of or relate to the defendant's contacts with the forum'" (*id.* at 1026). Here, this Court has declined to exercise primary jurisdiction over Rothman's claims because as noted, the complaint fails to allege any significant nexus between New York and the defendants, such that it cannot even be inferred that the tortious acts alleged arise from any contact with New York. Thus, the assertion that this Court has jurisdiction over Rothman's claims merely because it has jurisdiction over the remaining plaintiffs and because there is identity of claims is not rooted in any controlling legal principle. Indeed, as the court in *Bristol-Myers Squibb Co. v Superior Ct. of California, San Francisco County* (137 S Ct 1773 [2017]) noted, California had no specific jurisdiction over claims made by nondomiciliaries simply because their claims were related to those made by residents of California over whom that court had jurisdiction (*id.* at 1781 ["The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, a defendant's relationship with a third party, standing alone, is an insufficient

basis for jurisdiction. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents" [internal citations and quotation marks omitted]).

Nor is the Court persuaded that this portion of Rothman's application should be denied so as to allow discovery on the issue of personal jurisdiction over his claims. While it is true that a plaintiff demonstrates a sufficient start on the issue of jurisdiction by establishing that there is an issue as to jurisdiction that cannot be resolved absent further discovery on that issue (*Peterson* at 467; *James* at 30; *Bunkoff Gen. Contractors Inc.* at 700), here the wholesale absence of any allegations sufficient to confer personal jurisdiction over Rothman's claims against defendants precludes any discovery on the issue.

II

Dismissal for Failure to State a Cause of Action

Defendants' motion seeking dismissal of the amended complaint is granted to the extent of dismissing all but the cause of action for breach of contract. Significantly, the amended complaint states a cause of action for breach of contract under New Jersey law. In light of the breach of contract action and the facts which undergird it, plaintiffs' remaining causes action sounding in fraud, negligent misrepresentation and unjust enrichment must be dismissed as duplicative of the breach of contract claim. Lastly,

the causes of action premised on the New York Labor Law and the New Jersey Labor and Workmen's Compensation Law fail to state a cause of action because the compensation provided by the Plan, at issue in this case, is not covered by the foregoing laws.

In support of the instant motion, defendants submit several documents.

First, defendants submit the Plan, which indicates that it is effective January 1, 2007. Section 1.1 states that it is being implemented by Fox

> to encourage and reward employees to remain in the employ of the Corporation for the long term and promote the growth of the Corporation by providing supplemental compensation in an amount based upon the growth in value of the Corporation during their respective periods of participation in the Plan leading to a Change of Control of the Corporation.

Section 1.2 states that the Plan is an "unfunded supplemental compensation program," and not meant to systematically "defer payments until termination of employment or otherwise provide retirement income." Section 3.1 states that an eligible employee, which per section 2.19 is an individual employed by Fox, becomes a participant, which per section 2.22 means an eligible employee who meets the Plan's eligibility requirements after two years of employment. Section 3.2 states that all eligible employees were to be assigned to Tier 4 of the Plan and that once an eligible employee became a participant the Plan's administrator would assign

the person a base value. Base value, as per section 2.7, meant Fox's value as of the Plan year in which an eligible employee was hired. Section 2.14 defined the company value as an amount "equal to five (5) times [Fox's] Average Net Income." Average net income, per Section 2.6, was Fox's value, determined by averaging its income for the three years preceding any determination of Fox's company value under the Plan. Per section 5.1, a participant would become entitled to a payment under the Plan if there was a change in control while the participant was an eligible employee or upon the participant's death. Pursuant to 2.12, a change in control meant when

> [a]ny one person, or more than one person acting as a group (other than the existing shareholders of the Corporation as of the Effective Date) acquires ownership of stock of the Corporation that, together with stock held by such person or group, constitutes more than seventy-five percent (75%) percent of the total fair market value or total voting power of the stock of the Corporation. However, if any one person, or more than one person acting as a group, is considered to own more than 50% of the total fair market value or total voting power of the stock of the Corporation, then the acquisition of additional stock by the same person or persons shall not be a Change of Control. . . . [or when] Any one person, or more than one person acting as a group purchases the Business or acquires assets owned by the Corporation that have a total gross fair market value equal to or more than seventy-five percent (75%) percent of the total gross fair market value of all of the assets of the Corporation immediately

> prior to such acquisition or acquisitions. For this purpose, gross fair market value means the value of the assets of the Corporation (including the value of the Business) or the value of the assets being disposed of, determined without regard to any liabilities associated with such assets. However, there shall not be a Change of Control if there is a transfer to the respective spouse or descendants of shareholders or to an entity that is controlled by the same shareholders of the Corporation immediately after the transfer or to an estate or trust for the primary benefit of such shareholders or the respective spouse or descendants of such shareholder.

Section 5.2 prescribed how an equity appreciation share, meaning per section 2.16, the amount of money a participant was eligible to receive was calculated under the Plan. Per section 5.2, a participant's equity appreciation share equaled "the Net Sale Proceeds in excess of the Participant's Base Value." Section 3.5 states that a a participant "shall only have the rights granted in the Plan as administered by the Administrator," and has "no right to assert claims arising from a challenge to any action by the Corporation pursuant to the plan." Section 6.3 states that with respect to the Plan, there existed no fiduciary relationship between Fox and a participant. Lastly, section 8.2 states that Fox had "the right at any time to amend or terminate, in whole or in part, the Plan, provided, however, that no amendment shall adversely affect the vested rights of any Participant or Beneficiary based on the Company Value as of that Determination

Date." Section 8.6 states that the agreement would be governed by the laws of New Jersey.

Second, defendants submit the SPD. Section 1 states that it is a summary of the Plan and states that

> [t]his Summary Plan Description is only a summary of the Plan. The Plan is formally governed by a "Plan Document," which sets out the terms of the Plan in detail. Any question regarding the terms of the Plan will be determined based on the Plan Document, which will prevail over the terms of this Summary Plan Description. You can obtain a copy of the Plan Document by contacting the Director of Communications of the Corporation.

The SPD defines a change in control in almost the same way as the Plan, except that it defines the percentage of stock required thereunder as 50%, not 75% as defined by the Plan.

Third, defendants submit a document titled Omnibus Written Consent of the Sole Director of Fox Rehabilitation Services, P.C. and Sole Member and Sole Manager of Certain of its Affiliates (termination document). TF is listed as the sole director of the company as well as others. The termination document, dated December 23, 2015, states that the Plan is being terminated and that to the extent that payments under the Plan are calculated as the difference between an employee's base value and Fox's value, none of the participants in the Plan had any value thereunder because as of the date of termination, Fox's value was less than the base value of all the participants in the Plan.

Lastly, defendants provide five letters, one for each plaintiff, dated August 3, 2021. The letters are from Weisshaar, wherein he indicates that each plaintiff's appeal of Fox's decision to terminate the Plan had been affirmed. Within the letters Weisshaar states that Fox had the ability under the terms of the Plan to terminate the same, without notice, where as here, Fox's company value was less than each plaintiff's base value, such that they had no equity share under the Plan.

Breach of Contract(Sixth Cause of Action)

The amended complaint sufficiently pleads a cause of action for breach of contract against the company.[2]

As discussed above, on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), on grounds that the complaint fails to state a cause of action, all allegations in the complaint are deemed to be true (*Sokoloff* at 414; *Cron* at 366), and all reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366). The court's role when analyzing the complaint in the context of a motion to dismiss is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff* at 414 [2001]). While generally, the court's inquiry is

[2] Plaintiffs within their memorandum of law limit their breach of contract claim solely to Fox and FTS, acknowledging that they have no breach of contract claim against the individual defendants.

generally limited to whether the allegations plead the cause of action intended or any other any other cognizable cause of action (*Leon* at 88), "when evidentiary material [in support of dismissal] is considered the criterion is whether the proponent of the pleading *has* a cause of action not whether he has stated one" (*Guggenheimer* at 275 [emphasis added]). This means, that if the evidence submitted controverts the allegations in the complaint, they are not deemed true and dismissal for failure to state a cause of action is warranted.

Documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages and "a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground upon which the motion is based" (*Webster Estate of Webster* at *1 [Ct Cl Jan. 30, 2003]).

Here, with the submission of the SPD, the Plan, the termination document and the letters denying plaintiffs' appeal, this Court must view the allegations in the complaint against the backdrop of these documents and resolve any conflict in favor of the documents. This is no less true despite plaintiffs' assertion that they question the authenticity and validity of the Plan and termination document. First, as defendants contend, here, absent the Plan there is no agreement between plaintiffs and the company, which contrary to some of the language in the complaint, and as

urged by plaintiffs in their memorandum of law, *is the only agreement between the parties*. The SPD on which plaintiffs rely and which they contend is the only agreement, cannot, by its express terms, be the agreement. To be sure, as noted above, section 1 of the SPD expressly states that "it is only a summary of the Plan . . . [and that] [t]he Plan is formally governed by a 'Plan Document,' which sets out the terms of the Plan." Accordingly, despite plaintiffs' repeated assertions to the contrary, the Plan must be treated as the agreement between the parties. Second, the Court must accept the Plan and use it to assess the sufficiency in the amended complaint, because in incorporating the SPD and indeed the Plan by reference, this Court may consider the same (*Lore v NY Racing Assn. Inc.*, 12 Misc 3d 1159[A], *7 [Sup Ct, Nassau County 2006] [On a motion to dismiss the complaint, a court "may consider [not only] those facts alleged in the complaint, [but] documents attached as an exhibit therefor or incorporated by reference and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference."]; *Dragonetti Bros. Landscaping Nursery & Florist v Verizon NY*, 71 Misc 3d 1214[A], *2 [Sup Ct, NY County 2021]).

Notwithstanding the foregoing, and contrary to defendants' assertion, the submission of foregoing documents does not, as urged, establish that the amended complaint fails to plead a cause of action for breach of contract against the company, on grounds,

as urged, that the Plan was properly terminated. Specifically, here the conclusory nature of the assertions in both the termination document and the letters denying plaintiffs' appeal - that in 2015 when the Plan was terminated, Fox's company value was less than each plaintiff's base value - fails to negate the assertions in the amended complaint that at the time the Plan was terminated Fox's value exceeded each plaintiff's base value, such that its termination adversely affected plaintiffs, in violation of section 8.2 of the Plan.

In New Jersey[3], it is well settled that interpretation and construction of a contract is a matter of law for the trial court (*Grand Cent. Properties, L.L.C. v Sudler Tinton Falls, L.P.*, A-4195-11T1, 2013 WL 869595, at *3 [NJ Super Ct App Div Mar. 11, 2013] ["Interpretation and construction of a contract is a matter of law for the trial court, subject to de novo review on

[3] "Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]; *Ministers and Missionaries Ben. Bd. v Snow*, 26 NY3d 466, 470 [2015]). Here, as previously noted, section 8.6 of the Plan states that New Jersey law will govern disputes arising therefrom, which this Court holds limits the application of New Jersey law solely applicable to the interpretation of the agreement. New York law, of course, must govern procedure in this case as well as the other causes of action pleaded by plaintiffs. Curiously, plaintiffs cite no New Jersey law in opposition to the defendants' motion. Nevertheless, here, to the extent that as it relates to contracts and a breach thereof, New Jersey law seems to be identical to New York law, which law the Court applies brings about the same result.

appeal."]). This extends to the determination of whether a contract is ambiguous (*Nester v O'Donnell*, 301 NJ Super 198, 210 [NJ Super Ct App Div 1997]). With regard to enforcing a contract, when its terms are clear, unambiguous, and complete, the contract must be enforced according to its terms and by ascribing to those terms, their plain and ordinary meaning (*Phillips v Cox*, 81 NJL 518, 521 [1911] ["When a written contract is complete, it is to be interpreted and enforced according to the fair import of its terms without reference to other writings, not between the very parties and not referred to in the agreement under consideration."]), ascribing to the contracts terms their plain and ordinary meaning (*Grand Cent. Properties, L.L.C.* at *3 ["When construing a contract, its terms must be given their 'plain and ordinary meaning' and the agreement must be interpreted as a whole.']; *Nester* at 210). A contract's meaning is to be determined by the intent of the parties and to that end, "the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain" (*id.* at 210).

Significantly, a writing should be interpreted as a whole and "all writings forming part of the same transaction are interpreted together" (*id.* at 210; *Barco Urban Renewal Corp. v Hous. Auth. of City of Atl. City*, 674 F2d 1001, 1009 [3d Cir 1982]).

It is well settled that in order

> [t]o prevail on a breach of contract claim, a party must prove a valid

> contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustain damages

(*EnviroFinance Group, LLC v Envtl. Barrier Co., LLC*, 440 NJ Super 325, 345 [NJ Super Ct App Div 2015]; *see Murphy v Implicito*, 392 NJ Super 245, 265 [NJ Super Ct App Div 2007]).

Here, a review of the Plan evinces that by its clear and express terms, a participant's base value, which per section 2.7 meant Fox's value as of the Plan year in which an eligible employee was hired would, per section 5.2, be used to calculate a participant's equity appreciation share, meaning, per section 2.16, the amount of money a participant was eligible to receive. To the extent that per section 5.2, a participant's equity appreciation share was the difference between Fox's net sale proceeds in excess of the participant's base value, an equity appreciation share - meaning the value of plaintiff's equity under the Plan - was directly tied to Fox's value. Pursuant to section 8.2, the Plan could not be cancelled if such cancellation "adversely affected the vested rights" of any participant, based on Fox's value on the date of cancellation.

Accordingly, the express language of the Plan binding the parties proscribed cancellation of the Plan if any participant had earned equity appreciation under the terms of the Plan on the date of cancellation. The amended complaint alleges that in December

2015, TF, director of Fox terminated the Plan on the basis that the company's value at the time was less than the value at the time that each of the company's employees became participants in the Plan. It is further alleged that TF and the company knew that the company's value at the time the Plan was terminated was higher than the value when plaintiffs and other employees became participants in the Plan, that the value of the company had increased between the time the company's employees became participants and the time when the Plan was terminatinated. It is also alleged that because the company's base value in 2009 was $10 million and that in 2019 the company sold for between $120-300 million, the company, which in 2010 had 400 clinicians, operated in seven states, and had doubled in size by 2015, falsely represented that it was worth less in 2015 than in 2010. It is also alleged that because at the time the Plan was terminated, all plaintiffs were fully vested and the SPD stated that any plan termination could not adversely affect a participant's vested rights, the termination of the Plan adversely affected plaintiff's rights under the Plan.

The foregoing must be taken as true and for purposes of stating a cause of action, when read together with the rest of the amended complaint - wherein it is alleged that the parties were bound by the SPD (and as noted above, by the terms therein, the Plan), that the same gave them the right to receive payment, and that the same was breached when defendants improperly terminated

the same - constitutes a breach of contract under New Jersey law (*EnviroFinance Group, LLC* at 345; *Murphy* at 265). Defendants could and should have submitted documents detailing the precise base value of plaintiffs' shares in the Plan and the specific value of the Company in 2015 when the Plan was terminated thereby establishing that the Plan was terminated in accordance with its terms. Instead, they submitted documents which only conclusorily alleged that when the Plan was terminated, as relevant here, that the company's value was less than plaintiffs' base value in the Plan. Thus, defendants fail to establish that when the Plan was terminated, plaintiffs were not entitled to a payment under the Plan's terms. In other words, the record is bereft of specific and detailed information establishing that Fox terminated the Plan in accordance with section 8.2 of the same. As such, dismissal of the breach of contract claim against the company for failure to state a cause of action is denied.

Causes of Action Sounding in Fraud, Negligent Misrepresentation and Unjust Enrichment (First, Second, Third, Fourth, Fifth, Seventh, and Tenth Causes of Action)

Plaintiffs' causes of action sounding in fraud are dismissed insofar as they are all impermissibly premised on the same acts upon which the breach of contract cause of action is premised.

A breach of contract claim may not be concomitantly pleaded as a tort unless duties existing outside the contract exist and have

been violated (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]; *Meyers v Waverly Fabrics, Div. of F. Schumacher & Co.*, 65 NY2d 75, 80, n 2 [1985] ["If in fact plaintiff sold only the right to use the design on fabric, the use of it in other and deceitful ways is no less a tort because it has its genesis in contract, for it is plain that a contracting party may be charged with a separate tort liability arising from a breach of duty distinct from, or in addition to, the breach of contract, as when it springs from extraneous circumstances, not constituting elements of the contract as such although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud" (internal citations and quotation marks omitted)].

Nor can a quasi contract claim survive when "a valid and enforceable written contract governing a particular subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.* at 388) exists. To be sure,

> a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result

(*id.* at 388-389; *Bradkin v Leverton*, 26 NY2d 192, 196 [1970]). Thus, "[a] quasi contract claim may only be brought in the absence

of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc.* at 388; *Parsa v State*, 64 NY2d 143, 148 [1984]; *Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 504 [1983]).

Accordingly, it is well settled that generally a tort cause of action for fraud arising from the same facts as a concomitantly pleaded cause of action for breach of contract must be dismissed as duplicative of the breach of contract claim (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017] ["This Court has held numerous times that a fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as redundant of the contract claim"] [internal quotation marks omitted]; *Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011] ["Similarly, the fraud claim, which arose from the same facts, sought identical damages and did not allege a breach of any duty collateral to or independent of the parties' agreements, was redundant of the contract claim."]; *Fin. Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010] ["The motion court erred, however, in failing to dismiss the fraud cause of action as duplicative of the breach-of-contract cause of action, inasmuch as it is based on the

same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages."]; *Fairway Prime Estate Mgt., LLC v First Am. Intern. Bank*, 99 AD3d 554, 557 [1st Dept 2012]["A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract."]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012] [same]). However, if the alleged promise upon which a claim for fraudulent inducement is premised is collateral to the contract between the parties, then the claim is not duplicative and survives dismissal (*Cronos Group Ltd.* at 62-63; *Havell Capital Enhanced Mun. Income Fund, L.P.* at 589; *Fin. Structures Ltd.* at 419; *Fairway Prime Estate Mgt., LLC* at 557; *HSH Nordbank AG* at 206). Stated differently, where a party sues in tort, solely to enforce a contract, a tort claim is barred (*Encore Lake Grove Homeowners Ass'n, Inc. v Cashin Assoc., P.C.*, 111 AD3d 881, 883 [2d Dept 2013] ["A court enforcing a contractual obligation will ordinarily impose a contractual duty only on the promisor in favor of the promisee and any intended third-party beneficiaries. Thus where a party is merely seeking to enforce its bargain, a tort claim will not lie" [internal citation and

quotation marks omitted].).

The foregoing is also true for action sounding in negligent misrepresentation (*Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC*, 194 AD3d 805, 808 [2d Dept 2021] ["When both [claims for breach of contract and negligent misrepresentation] are alleged, a negligent misrepresentation claim will be found to be duplicative of a breach of contract claim where the pleading fails to allege facts that would give rise to a duty that is independent from the parties' contractual obligations."]; *OP Sols., Inc. v Crowell & Moring, LLP*, 72 AD3d 622 [1st Dept 2010] ["plaintiff's causes of action for fraud and negligent misrepresentation are not separate and apart from its claim for breach of contract. The claims are predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract inasmuch as they all involve defendant's disclosure of plaintiff's purported proprietary and confidential information to a consultant."];

It is also well settled that quasi contract cause of action for "[a]n unjust enrichment [] is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]; *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]; *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]).

All contracts imply a covenant of good faith and fair dealing

in the course of the contract's performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Fairway Prime Estate Mgt., LLC v First Am. Intern. Bank*, 99 AD3d 554, 558 [1st Dept 2012]). The duty imposed by the covenant of good faith and fair dealing does not imply obligations which are at variance with other terms of the contractual relationship. It does however, encompass promises which a reasonable person in the position of the promisee would be justified in understanding were included (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal citations and quotation marks omitted]). The covenant "is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement'" (*Frankini v Landmark Const. of Yonkers*, Inc., 91 AD3d 593, 595 [2d Dept 2012]; *see Howard v Pooler*, 184 AD3d 1160, 1165 [4th Dept 2020], lv to appeal denied, 187 AD3d 1605 [4th Dept 2020]). It is well settled, however, that a claim for breach of the implied covenant of good faith and fair dealing, arising from the facts on which a breach of contract claim is premised, is a duplicative tort and must be dismissed (*Havell Capital Enhanced Mun. Income Fund, L.P.* at 588; *Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]).

Here, all of plaintiffs' causes of action incorporate the

entire complaint by reference, which makes it clear that this entire action is solely premised on the alleged unlawful termination of the Plan in 2015 and the failure to pay sums due under the Plan in 2019 when the company was acquired by Blue Wolf. Thus, contrary to plaintiffs' assertions, the claims sounding in fraud, negligent misrepresentation, and unjust enrichment are all predicated on the very same facts as the breach of contract claim - the purported breach of the SPD, which as noted above is actually and can only be a breach of the Plan. Again, the SPD incorporates the Plan by reference and further indicates that the terms of the Plan control the agreement between the parties. None of the duties facts alleged by plaintiffs to be outside the agreement, which could then support the other causes of action in the amended complaint, actually are.

For example, plaintiffs, in their memorandum in opposition, contend that defendants acted fraudulently by "concealing from their employees that the phantom equity plan had (purportedly) been terminated entirely." This very claim falls squarely with the ambit of the agreement and whether by its terms, plaintiffs were required to be notified of the Plan's termination, which per the terms of the Plan, they were not.

Similarly, plaintiffs contend that their cause of action for breach of the covenant of good faith and fair dealing is not duplicative of the breach of contract cause of action because it is

based on behavior by defendants - the failure to notify plaintiffs that the Plan had been terminated in 2015 - which is not proscribed by the contract. However, here, while it is true that the failure to notify plaintiffs of the Plan's termination was not proscribed by the Plan, it is not the termination of the Plan, which is at the center of plaintiffs' claims, but the termination of the Plan at a time when plaintiffs were, under the terms of the Plan, due a payment because the increase in the company's value exceeded their base value. This act, under section 8.2 of the Plan is prohibited. Thus, plaintiffs' arguments lack merit and do not preclude dismissal of the cause of action for breach of the covenant of good faith and fair dealing.

Accordingly the first, second, third, fourth, fifth, seventh and tenth causes of action are dismissed.

Causes of Action Pursuant to New York Labor Law § 190 and New Jersey Wage and Hour Law § 34:11-4.1 (Eighth and Tenth Causes of Action)

Plaintiffs' causes of action pursuant to New York Labor Law § 190 and New Jersey Labor and Workmen's Compensation § 34:11-4.1 are dismissed since they fail to state a cause of action. Significantly, the law in both New York and New Jersey on which the causes of action are premised exclude claims thereunder for the deferred compensation provided by the Plan.

Pursuant to Labor Law § 190(1), wages, which are governed thereby, are defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Read together, Labor §§ 190(1) and 198-c also include wage supplements, which are defined as "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay" (Labor Law § 198-c[2]). However, it is clear that incentive compensation plans "that are more in the nature of a profit-sharing arrangement and are both contingent and dependent, at least in part, on the financial success of the business enterprise," is excluded from the ambit of Labor Law § 190(1) (*Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 71 [1st Dept 2006] [Court held that unvested and contingent rights to equity compensation are not wages under Labor Law § 190(1).]; *see Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 224 [2000] ["The terms of defendant's bonus compensation plan did not predicate bonus payments upon plaintiff's own personal productivity nor give plaintiff a contractual right to bonus payments based upon his productivity. To the contrary, the declaration of a bonus pool was dependent solely upon his employer's overall financial success. In addition, plaintiff's share in the bonus pool was entirely discretionary and subject to the non-reviewable determination of his employer. These factors, we believe, take plaintiff's bonus payments out of the

statutory definition of wages."] *Intl. Paper Co. v Suwyn*, 978 F Supp 506, 514 [SDNY 1997] ["The Court finds that the 1995 unpaid bonus does not constitute 'wages' within the meaning of section 190(1). Under New York law, "incentive compensation based on factors falling outside the scope of the employee's actual work is precluded from statutory coverage."]).

Pursuant to New Jersey Workmen's Compensation Law (NJ Stat Ann 34:11-4.1[c]), wages

> mean[] the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto.

It is well settled that supplementary income is not considered a wage, to which the New Jersey Workmen's Compensation Law applies (*Van Winkle v STORIS, Inc.* 2017 WL 837066, at *4 [NJ Super Ct App Div Mar. 2, 2017] ["under the plain language of the statute, the payments that plaintiff alleges he is due commissions] are not wages but instead are 'supplementary incentives calculated independently of regular wages and paid in addition thereto."]; *Mahanor v Berkley Life Scis.*, 2022 WL 2541773, at *17 [DNJ July 7, 2022] ["Here, while Plaintiff argues in her Opposition that 'the bonuses to be paid to [her] were to be included as part of her compensation and thus should be deemed as wages under the statute,' she does not set forth facts in the Amended Complaint to support

this assertion. Rather, the Amended Complaint alleges that, Berkley gave Plaintiff her bonus as a result of her 'excellent performance.' The fact that Berkley gave her the bonus for her excellent performance demonstrates that her bonus was a 'supplementary incentive,' and not part of her "base salary" (internal citations omitted).]).

Here, when viewed against the backdrop of the Plan, it is clear that the sums due under the Plan, if any, were equity compensation, excluded from the ambit of wages under Labor Law § 190(1) and a supplementary incentive, excluded from the ambit of wages under NJ Stat Ann 34:11-4.1(c). To be sure, section 1.2 of the Plan states the Plan is an "unfunded supplemental compensation program," and not meant to systematically "defer payments until termination of employment or otherwise provide retirement income." Indeed, even in the absence of the Plan, the pleadings, by themselves establish that the sums provided under the Plan were not wages such that they are not covered by the Labor Law in New York or the Labor and Workmen's Compensation Law in New Jersey. Specifically, here the amended complaint states that per the SPD, the Plan was intended to provide Fox and FTS's employees with a share of appreciation in the company's value, earned by the employees during their tenure and intended to induce employees to remain with the company by providing employees with *supplemental deferred payment* - a cash payout upon a change in control, namely

an acquisition of the company - all based on the company's increased value.

Thus, the eighth and ninth causes of action are dismissed.

III

Dismissal for Failure to State a Cause of Action

Having denied defendants' motion to dismiss the breach of contract action because the SPD and Plan do not negate the allegations in the complaint that the Plan was improperly terminated, it is clear that the documentary evidence submitted by defendants, as it relates to the cause of action for breach of contract, does not "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen* at 326; *Leon* at 88; *IMO Industries, Inc.* at 10). Accordingly, dismissal of the remaining cause of action for breach of contract against the company pursuant to CPLR § 3211(a)(1) is denied and dismissal of the remaining causes of action on that same ground is denied as moot. It is hereby

ORDERED that with the exception of the sixth cause of action, for breach of contract as against FTS, Rothman's portion of the amended complaint be dismissed. It is further

ORDERED that all the causes of action, except the sixth, for breach of contract solely as against Fox and FTS, be dismissed against all defendants. It is further

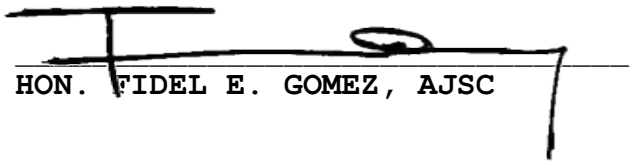
ORDERED that all parties appear for a Preliminary Conference

on December 5, 2022 at 11:30am. It is further

ORDERED that the defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiffs within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated :10/11/22



HON. FIDEL E. GOMEZ, AJSC