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

PRESENT: O. PETER SHERWOOD PART 49
Justice

PAUL HETH,

Plaintiff,

-against-

CHRISTOPHER VAN RIET, *et al.*,

Defendants.

INDEX NO. 651437/2011

MOTION DATE Jan. 16, 2014

MOTION SEQ. NO. 012

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

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

Cross-Motion: ☐ Yes [ ] No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: January 27, 2014

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

PAUL HETH,

Plaintiff,

-against-

CHRISTOPHER VAN RIET and VAN RIET CAPITAL LIMITED,

Defendants.

----------X

VAN RIET CAPITAL LIMITED,

Counterclaim-Plaintiff,

-against-

PAUL HETH,

Counterclaim-Defendant.

----------X

DECISION AND ORDER

Index No.: 651437/2011
Mot. Seq. Nos. 012 -and- 013

O. PETER SHERWOOD, J.:

In motion sequence number 012, plaintiff/counterclaim-defendant Paul Heth ("Heth") moves, pursuant to CPLR 3212, for summary judgment. In motion sequence number 013, defendants/counterclaim-plaintiffs Christopher Van Riet ("Van Riet") and Van Riet Capital Limited ("VRCL") also move for summary judgment.

I. Background

A. Rising Star Media

Heth was the General Director and Chief Executive Officer of OOO Rising Star Media ("OOO RSM"), which leased and operated six multiplex movie theaters in Russia ("RSM"). National Amusements Inc. ("NAI") was the majority owner of OOO RSM through an its majority membership in Rising Star Media LLC ("RSM LLC"). In 2008, Heth began exploring of a management buyout of NAI's stake with Charles Ryan of UFG Asset Management ("UFG") and NAI's president, Shari Redstone. Heth, Ryan, and Redstone agreed on the outline of a deal structure where Ryan would provide most of the funding and Heth and Redstone would become minority shareholders.

B. The March Agreement

Heth engaged his friend, Van Riet, to provide financial assistance in connection with potential acquisition by RMS LLC of other companies or the potential sale of the cinema assets of RSM LLC. The initial plan was to raise capital to fund the acquisition of cinemas in Russia (the "Program"). Heth sought to secure an agreement that would be a "poison pill" to any third party that would attempt to get in between Heth and Van Riet. Heth and Van Riet both stated that the contemplated agreement would align their interests. After a period of negotiations, Heth and VRCL entered into a contract on March 27, 2009 (the "March Agreement" e-filed as NYSCEF Doc. No 319).

In the March Agreement, VRCL agreed to provide financial assistance in connection with the Program or any other transaction involving the sale or transfer of the cinema assets (a "Transaction"). If the Program or a Transaction was consummated within twelve (12) months of the March Agreement, VRCL was entitled to "the greater of (I) between 28.57% . . . and 50%[1] of the Sponsor Interest . . . or (ii) $2,000,000" (Doc. No. 319, p. 2). A "Sponsor Interest" is defined as "all consideration (including cash, securities or other property) paid to or received by [Heth], directly or indirectly, in connection with the Program or any Transaction" *(id)*. If the Sponsor Interest took the form of non-public securities, Heth and VRCL were required to agree in good faith on the value of the securities prior to the closing date of the Transaction. Any Sponsor Interest paid to VRCL would be "credited to VRCL's share of [Heth's] and VRCL's aggregate Sponsor Interest" (*id*, p. 3). However, "any investment by VRCL into the Transaction or Program does not constitute a Sponsor Interest" *(id)*.

The March Agreement contemplated termination on the date of the closing of a Transaction. However, it also included a "tail provision." The tail provision specified that the Compensation provision would survive for a period of 12 (twelve) months after the termination of March Agreement "if the Program is implemented or Transaction is consummated or an agreement is

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[1]The value was set to 28.57% in the case of a "Transaction." The potential for up to 50% applies only in the case of the "Program."

entered into that subsequently results in the implementation of the Program or the consummation of a Transaction" (*id*, p.2). The March Agreement included a provision that it "may not be amended or modified except in writing signed by you and VRCL, supersedes all prior understandings and agreements between us with respect to the subject matter hereof . . . " (*id*, p. 5).

C. Negotiations for the Sale of RSM

The Program never came to fruition (*see* Decision and Order dated March 15, 2013, NYSCEF Doc. No. 279). On April 6, 2009, Van Reit and UFG entered into a non-circumvent agreement which prevented UFG from acquiring RSM without VRCL for a period of two years (NYSCEF Doc. No. 556 ¶ 7). On April 27, 2009, Ryan sent an email to Van Riet in response to a draft proposal explaining that he considered "applying a private equity paradigm to the management's role [was] confusing." Heth, Van Reit, and Redstone met in New York on July 13, 2009 to discuss how the management of RSM would allocate ownership of the new company after the acquisition of RSM by a group of investors led by Ryan. Thereafter, the negotiations proceeded as described below.

On July 18, 2009, Van Riet emailed Heth expressing dissatisfaction with a 8-8-4 percent split among Redstone, Heth and Van Riet. On July 28, 2009, Van Riet and Ryan spoke. Ryan suggested a 9-9-2% split, with Van Riet receiving fees for merger and acquisition deals post-closing. On November 11, 2009, Heth, Van Riet and Ryan met in Moscow. Ryan told Van Riet to "back down" on his contractual entitlement with Heth. Van Riet made an offer which was rejected by Ryan. By late November, it was understood that the total "Management Promote" among Redstone, Heth, and Van Riet would be increased from 20% to 30%.

On December 15, 2009, Van Riet proposed via email that he receive 2% of the sponsors carried interest, $350,000 for the transaction, board membership, executive responsibility for strategic financial matters, $180,000 annual compensation, and an exclusive M&A advisory relationship with a 2.5% acquisitions value. Van Riet also stated that Heth supported the proposed arrangement provided that it concluded the March Agreement. Van Riet also sought to invest between $1 million and $2 million, depending on final governance if he received a board seat. Through late December, Van Riet and Ryan exchanged additional emails negotiating the terms of

the arrangement. Van Riet deferred discussion of a release of the March Agreement until after consummation of the acquisition of RSM.

D. The December Agreement

On December 29, 2009, Van Riet, RSM Holdco, and UFG signed a "summary of principal agreed terms and conditions related to the acquisition of RSM" (the "December Agreement" e-filed as NYSCEF Doc. No. 336). Ryan signed in his capacity as Chairman of UFG and controlling shareholder of RSM Holdco. Heth signed in his capacity as CEO of RSM Holdco.

In consideration for Van Riet's facilitation of the acquisition transaction and a $1,000,000 cash investment, the December Agreement provided him with 2% of the management ownership interest vesting within three years; a $350,000 fee; a board seat, contingent on availability (otherwise an ex-officio board position);a one-year exclusive M&A advisor engagement with a 2.5% advisory fee; and $115,000 in annual compensation comprising $57,500 as M&A advisor and $57,500 for board participation. The December Agreement was not an integrated document, and it stated that it could be "further clarified by further documentation" (*id*, p. 1). It is undisputed that Heth intended the December Agreement terminate the March Agreement. Although disputed by Van Riet, it appears that Ryan intended the December Agreement to terminate the March Agreement (Ryan Tr. I, p. 80-86).

E. The Sale of RSM

Following execution of the December Agreement, the UFM-led acquisition of RSM closed on December 31, 2009. The sale of RSM was a "Transaction" as defined by the March Agreement (Plaintiff's Statement of Undisputed Facts ¶ 166; Defendant's Statement of Undisputed Facts ¶ 72). Heth received 13% of the "B-Shares," or profit interest in the new company, Redstone received 15%, and Van Riet received 2%.

F. The Aftermath of the Sale

Following the closing, Heth, through his attorney, Chase Mellen, emailed Van Riet and his attorney on December 31, 2009 seeking to work out a satisfaction of the March Agreement. Van Riet replied that "we should wait until the last details of [his compensation] had been worked out." On February 15, 2010, Mellen again e-mailed Van Riet, stating that since the compensation details had been worked out, it was now time to execute the release, attaching a draft Termination and Mutual

Release. Van Riet replied seeking information on the status of the issuance of the B-shares and the implementation of the new corporate structure. Heth e-mailed Van Riet on February 21, 2010 seeking to "speed this up." Van Riet replied stating that there was much to finalize and that "link[ing] the two [i.e. the March Agreement and the December Agreement] . . . is not appropriate."

On March 1, 2010, Heth e-mailed Van Riet stating that he was advised by Ryan and Mellen that "there was enough documentation for you to release me from our letter." Van Riet replied that he "did not understand [that] email." Heth explained that Van Riet and UFG have not concluded their agreement, but he would release the 2% , but he did not want to then be held liable under the March Agreement. Van Riet replied asking: "What does the $350k have to do with the 2%?" Heth sought to have Mellen draft a release of his obligations to reimburse expenses and cash obligations, leaving outstanding the disbursement of the 2%. Heth explained in a further email that neither he nor Van Riet wanted to release each other from the March Agreement until they had received what they need from RSM.

On March 5, 2010, Heth again e-mailed Van Riet stating that he was prepared to send the M&A funds and Van Riet's expenses, but wanted a release of the March Agreement pending receipt of the B-Shares. Heth explained that he wanted to "ensure that I am not put in a situation where I am liable for another claim from you as this is how I read the [March Agreement] letter we signed" (Plaintiff's Statement of Undisputed Facts ¶ 107).

On March 11, 2010, Van Riet, through his counsel Markham, sent a "side letter" to Mellen stating that the $350,000 transaction fee "shall be credited against any amounts that may be due to me pursuant to the [March Agreement]." Mellen replied that he "didn't understand" the side letter and thought that the compensation under the December Agreement would satisfy the March Agreement. On March 18, 2010, Heth forwarded an email to Van Riet containing an account of a conversation between their attorneys where Markham had allegedly stated that Van Riet was "specifically withholding" confirmation that "performance of [Van Riet's] deal with [RSM] will constitute satisfaction of the [March Agreement]."

On May 28, 2010, Mellen again raised the issue of the release. Markham replied that Van Riet was "still awaiting documents to reflect [his] deal with RSM" and they could "address the release once we have finalized those documents."

In June, 2010, UFG, Heth, and, Van Riet circulated a draft shareholder agreement. Van Riet objected to the extent that it did not reflect the December Agreement. In July, UFG sought to include a clause that incorporated language that there existed no other agreements with anyone else. On August 18, 2010, UFG asked Van Riet whether he had reviewed the draft agreement. Van Riet replied that he preferred "to just stick with the existing agreements." UFG responded that "there remains the issue that you have not formally torn up the original agreement with [Heth]." On August 24, Markham circulated a revised draft that made several changes, including deletion of the section involving existing agreements.

On September 1, 2010, Heth e-mailed Van Riet stating that he recalled Van Riet stating that he would release Heth from the March Agreement once he had his documents from UFG. While Van Riet did not contradict this email, he testified that the statement was "totally inconsistent" with his recollection of that conversation. Heth was concerned that UFG had told him that Van Riet had a claim of half of his deal based on the March Agreement. On September 6, 2010, UFG emailed a revised draft of the shareholder agreement which reinserted the "no other agreements language." Van Riet did not sign the proposed shareholder agreement.

G. ProfMedia's Purchase of UFG

During the negotiations regarding termination of the March Agreement, UFG decided not to acquire additional cinemas but instead to explore selling RSM to ProfMedia. Realizing that this would preclude compensation for M&A services, Ryan told Van Riet that he would instead receive a sales fee in connection with the sale to ProfMedia. On August 6, 2010 Van Riet requested a meeting with Ryan to discuss the sales fee. Ryan replied expressing the view that because Van Riet would receive nearly $7,000,000 from the sale to more than half of that would be considered Van Riet's "fee" and no additional payment was necessary.

On September 14, 2010, the RSM board authorized Heth to negotiate the final terms of the sale to ProfMedia. The next day, an "Indicative Term Sheet," a summary of principal terms and conditions proposed for the sale for a price of $179,950,000 was signed by representatives from ProfMedia. On November 6, 2010, RSM and ProfMedia signed an amendment to the term sheet. On February 18, 2011, Heth (on behalf of RSM) and ProfMedia signed a Share Purchase Agreement agreeing to the sale of RSM. The Share Purchase Agreement "supersede[d] any previous agreement" relating to the sale. The sale closed in June 2011.

Van Riet received $2,608,073.00 for his 2% of the B-Shares, $2,826,307.00 in return on his $1,000,000 investment, the $350,000 transaction fee, $57,500 annual compensation through June 2, 2011 and $57,500 for board participation.

Heth, as CEO of RSM received a $250,000 bonus in 2010 and a housing allowance of $90,000. Based on RSM's financial numbers in 2010, Heth received an additional bonus of $1,100,000. For his 13% of the B-Shares Heth received $16,796,000. Heth also received a $800,000 discretionary bonus upon the sale of RSM to ProfMedia. On September 11, 2012, Heth was paid a "change-of-ownership bonus" of $1,300,000.

H. Procedural History

On May 25, 2011, Heth filed this action seeking a declaratory judgment that any obligations under the March Agreement were satisfied, discharged, or otherwise extinguished. Van Riet and VRCL answered, with VRCL filing a five counterclaims seeking, *inter alia*, damages for breach of the March Agreement. On November 29, 2011, this court issued a Decision and Order dismissing all the counterclaims except the breach of contract claim (NYSCEF Doc. No. 116).

Heth then amended his complaint adding causes of action for fraudulent inducement of (2) the March Agreement and (3) the December Agreement, (4) breach of March Agreement, and (5) unjust enrichment. Discovery having been completed, Heth moves in motion sequence number 012 for summary judgment as to his First Cause of Action for a declaration that if any obligation was owed under the terms of the March Agreement, it has been fully satisfied and dismissing the remaining counterclaim for breach of the March Agreement. In motion sequence No. 013, VRCL moves for summary judgment on the counterclaim and Van Riet and VRCL move for summary judgment dismissing Heth's complaint.

II. Discussion

A. Summary Judgment Standard

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as

a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.,* 26 NY2d 255, 259 [1970]).

B. Fraudulent Inducement

To state a claim for fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). The plaintiff must set forth the circumstances of the fraud with particularity (CPLR 3016 [b]). To plead scienter, a plaintiff must offer more than conclusory allegations of intent. (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495. 495-496 [1st Dept 2006]). Further, a plaintiff may not claim justifiable reliance if he could have discovered the truth "by ordinary intelligence or with reasonable investigation" (*id.* at 496). Furthermore, the fraudulent statement must be more than a concealed lack of intent to perform the contract. "To say that a contracting party intends when he enters into an agreement not to be bound by it is not to state 'fraud' in an actionable area, but to state a willingness to risk paying damages for breach of contract" (*Briefstein v P.J. Rotondo Constr. Co.*, 8 AD2d 349, 351 [1st Dept 1959]).The "fraud" must therefore "allege fraud extraneous and collateral to the contract" (*International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 527 [1st Dept 2009]).

Heth argues that Van Riet's statements leading up to the signing of the March Agreement that agreement would be a "poison pill" constituted a promise that Van Riet would cancel the March Agreement if he received a suitable appointment at RSM. This argument must be rejected. The March Agreement is a fully integrated agreement negotiated at arms-length by sophisticated parties represented by counsel. The March Agreement specifically contemplates the circumstances under which it terminates. The plain language of the agreement states that the provisions relating to compensation will "survive any such termination." Heth's argument that Van Riet agreed to terminate the compensation provisions is external to the integrated contract and belied by its express terms. Summary judgment on the Second Cause of Action must be denied.

Heth's Third Cause of Action asserts that Van Riet promised that the December Agreement would novate the March Agreement. When the December Agreement did not novate the March Agreement, Van Riet allegedly breached this "promise." This argument must also be rejected. Van Riet's email expressing an intention to release Heth from his obligations under the March Agreement occurred in the course of sophisticated parties negotiating an agreement with counsel. To find that an offer made in the course of negotiations constitutes a binding promise and that non-inclusion of the offered term in the final agreement constitutes a breach of that promise or a fraudulent inducement to enter into the final contract is inconsistent with the fundamental principles of contract. RSM and Van Riet did not include a release provision in the December Agreement. If Heth, who signed the agreement on RSM's behalf, felt a release was an indispensable element of the Agreement, he could have included it in the contract. The non-inclusion of such language indicates only that ultimately Van Riet did not agree to release the March Agreement. Van Riet may not be held liable for terms that Heth desired, but ultimately were not included in the December Agreement.

C. Whether the March Agreement Was Novated

"[T]he requisite elements of a novation, each of which must be present include a previous valid obligation, agreement of all parties to the new obligation, extinguishment of the old contract, and a valid new contract" *(Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952, 954 [2nd Dept 1985] [citations omitted]). Any agreement purporting to novate a prior obligation must show a "clear and definite intention" to do so (*Beck v Manufacturers Hanover Trust Co.*, 125 Misc 2d 771, 779 [Sup Ct NY County 1984]). "Not only must the intention to effect a novation be clearly shown, but

a novation [must] never . . . be presumed" (*id.* [internal citations omitted]). If a contract is ambiguous, parol evidence may be used to establish the intent of the parties (*see, Raleigh Associates v Henry*, 302 NY 467 [1951]; *Tullet & Tokyo Forex, Inc. v Sandomeno,* 258 AD2d 427 [1st Dept 1999]; *see also Greenfield v Phillies Records, Inc.*, 98 NY 2d 562, 569 [2002]).

As discussed *supra*, there was no fraudulent inducement of the March Agreement or December Agreement and those contracts are valid. The December Agreement makes no mention of the March Agreement. The December Agreement was among RSM, UFG and Van Riet. The March Agreement was between Heth and VRCL. The December Agreement is not ambiguous.

Mallad Contruction Corp. v County Federal Savings & Loan Ass'n (32 NY2d 285), cited by plaintiff, does not hold otherwise. That case involved a contract that was ambiguous and allowed the introduction of parol evidence. The December Agreement has no ambiguity. Therefore parol evidence may not be used to establish a novation. Even if parol evidence were admissible, the submitted evidence would not establish an intent by Van Riet to novate the March Agreement. On the contrary, the evidence shows that Van Riet consistently and systematically avoided Heth's repeated efforts to be released from his obligations under the March Agreement.

Although novation was discussed, by the time the December Agreement was executed, Van Riet had successfully deferred agreement to release Heth from the March Agreement. Throughout 2010, Heth continued to seek to obtain the release. These efforts show that Heth considered himself still bound by the March Agreement and that he understood the importance of terminating it. This is illustrated by Heth's own email on March 10, 2010, where he admitted that he read the March Agreement as holding him liable. Van Riet consistently refused to sign any document purporting to release Heth from his obligations. The Third Cause of Action alleging fraud in the inducement as to Heth's relinquishment of 2% of the equity in RSM in return for release of the March Agreement must be dismissed.

D. Breach of the March Agreement/Unjust Enrichment

Each party argues that the other is in breach of the March Agreement. VCRL claims that it was not paid in accordance with the compensation provisions of the March Agreement. Heth claims that because of the compensation Van Riet received pursuant to the December Agreement, Van Riet was actually overpaid and therefore owes Heth for the amounts Van Riet received in excess of the compensation due under the March Agreement.

VRCL was entitled to be compensated under the March Agreement. However, the parties did not negotiate the value of the B-Shares they received, as required by the March Agreement. The market valuation of the B-Shares as of the closing of the RSM Acquisition is not in dispute. They had no liquidation value. Van Riet's expert argues that the B-Shares were worth "up to $60 million." However, this valuation reflects the option value of the shares, which is not applicable here.

Under the terms of the March Agreement, VCRL was entitled to be compensated the greater of $2,000,000 or 28.57% of the aggregate Sponsor Interest paid to Heth and VCRL. The potential of 50% does not apply because portions greater than 28.57% apply only if VCRL does more than assist in implementing the Program, which this court has already found did not occur. Because, according to Heth's theory, the B-Shares had zero value, the parties did not receive sufficient Sponsor Interest in conjunction with the RSM Acquisition to meet the $2,000,000 threshold, VCRL is entitled to the $2,000,000 minimum less any transaction fees already received in connection with the RCM Acquisition. Conversely, Heth's Fourth and Fifth Causes of Action, seeking to recover based on a theory that Van Riet was *overpaid* must be rejected.

The amount that Heth received when ProfMedia acquired RSM is irrelevant to this calculation. The RSM Acquisition on December 30, 2009 was a "Transaction" under the March Agreement. The RSM Acquisition terminated the March Agreement and began the running of the tail provision. Accordingly, the tail provision expired December 29, 2010. The Share Purchase Agreement which was signed on February 18, 2011, was an "agreement that resulted in a Transaction" but is was outside the 12-month tail period. The deal closed on June 2, 2011. Earlier Term Sheets were preliminary, non-binding, agreements to enter a to be negotiated Share Purchase Agreement. The Share Purchase Agreement in turn led to the closing of the "Transaction" which occurred on June 2.

Further, the money Heth (and Van Riet) ultimately received for their B-Shares in the ProfMedia did not constitute "Sponsor Interest" as defined in the March Agreement. The B-Shares should have been valued prior to the closing of the RSM Acquisition. Profits made by Heth (or Van Riet) on their B-Shares in the subsequent sale to ProfMedia was not Sponsor Interest. They are proceeds from the sale of the Sponsor Interest that should have been settled prior to the RSM Acquisition. The value of those B-Shares at the time they should have been priced in December 2009

was zero. Their value over a year later has no bearing on their value at the relevant time for purposes of the March Agreement. The tail provision contemplated Heth sharing additional Sponsor Interest he earned after the termination of the agreement, *not* profits made on Sponsor Interest earned on an earlier Transaction.

The Fourth Cause of Action for unjust enrichment must be dismissed because there exists a valid and enforceable written contract governing the subject matter. Recovery on the quasi-contract theory of unjust enrichment for events arising out of the subject matter of the contract is ordinarily precluded (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

Accordingly, it is hereby

ORDERED that Heth's motion for summary judgment seeking a declaration that any obligation under the March Agreement has been satisfied (First Cause of Action) and dismissing the VAN RIET CAPITAL LIMITED counterclaim for breach of the March Agreement (motion sequence number 012) is DENIED; and it is further

ORDERED that VAN RIET CAPITAL LIMITED's motion for summary judgment as to the First Counterclaim for breach of the March Agreement (motion sequence number 013) is GRANTED to the extent that VAN RIET CAPITAL LIMITED shall recover $2,000,000 less any transaction fees ($350,000) already received in connection with the December 2009 transaction; and it is further

ORDERED that Van Riet and VAN RIET CAPITAL LIMITED's motion for summary judgment dismissing the Second Amended Complaint is GRANTED in its entirety except the Fourth Cause of Action as to which the motion is DENIED; and it is further

ORDERED that defendant-counterclaim plaintiff VAN RIET CAPITAL LIMITED shall settle judgment within fourteen (14) days of service of this Decision and Order with notice of entry.

This constitutes the decision and order of the court.

DATED: January 27, 2014

ENTER,

O. PETER SHERWOOD
J.S.C.