

<b>Unique Goals Intl. Ltd. v Finskiy</b>
2020 NY Slip Op 31933(U)
June 18, 2020
Supreme Court, New York County
Docket Number: 655692/2017
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**UNIQUE GOALS INTERNATIONAL LTD.,  
FAITH UNION INDUSTRIES, LTD., and  
MANGAZEYA MINING LTD.,**

**Plaintiffs,**

**DECISION AND ORDER  
Index No.: 655692/2017**

**-against-**

**Mot. Seq. Nos.: 006-007**

**MAXIM FINSKIY, KIRKLAND INTERTRADE  
CORPORATION, DZM GOLD MINING LTD.,  
WTG HOLDINGS S.A.R.L., and INGER  
INDUSTRIES,**

**Defendants.**

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**MAXIM FINSKIY, KIRKLAND INTERTRADE,  
CORPORATION, DZM GOLD MINING LTD.,  
WTG HOLDINGS S.A.R.L.,**

**Third Party Plaintiffs,**

**-against-**

**SERGEY YANCHUKOV, VTB CAPITAL PLC,  
and XTELLUS CAPITAL PARTNERS  
f/k/a VTB CAPITAL INC.,**

**Third Party Defendants.**

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**O. PETER SHERWOOD, J.:**

In this commercial action, plaintiffs Unique Goals International, Ltd. (Unique), Faith Union Industries, Ltd. (Faith), and Mangazeya Mining Ltd. (Mangazeya) move, pursuant to CPLR 3211 (a) (7), to dismiss the counterclaims of defendant Maxim Finskiy (Finskiy) (Motion Sequence Number 006). Third-party defendant Sergey Yanchukov (Yanchukov) moves separately to dismiss the third-party complaint as against him (Motion Sequence Number 007).

## BACKGROUND

As these are motions to dismiss the counterclaims set forth in Finskiy's answer to the amended complaint and counterclaims (counterclaims) (NYSCEF Doc. No. 93) and the third-party complaint (Finskiy Compl.) (Doc. No. 97), the following facts are taken from the counterclaims and third-party complaint and assumed true for the purposes of these motions. The third-party complaint and counterclaims contain essentially the same allegations and are referenced interchangeably.

This action concerns a series of investments made by plaintiffs, all foreign entities, in a publicly traded Canadian gold-mining company, White Tiger Gold, Ltd. (White Tiger), now known as Mangazeya Mining, Ltd. Finskiy is a Russian businessman with substantial experience in the mining and extractive industries around the world. During the time period at issue, Finskiy was the Executive Chairman of White Tiger and owned a controlling interest in that company through Kirkland Intertrade Corporation (Kirkland), DZM Gold Mining Ltd. (DZM), and WTG Holdings S.A.R.L (WTG).

Finskiy also had ownership interests in other mining enterprises, including non-parties MMC Norilsk Nickel Mining and Metals Co. (Norilsk Nickel) and Intergeo MMC Ltd. (Intergeo). He was the President of Intergeo and a member of its board until February 22, 2015. White Tiger was a mining company that owned and operated gold mines in various locations worldwide, including in Peru, Canada, and eastern Russia. Century Mining Corporation (Century) was a mining company organized under the laws of Canada, and whose shares were traded on the Toronto Stock Exchange (TSX). White Tiger, through a wholly owned subsidiary, acquired 100% of the share capital of Century on October 20, 2011.

Yanchukov is an experienced businessman who met and became friendly with Finskiy in 2005. At all times material to the events in this action, Yanchukov was the owner of the plaintiff corporations, Unique and Faith. Defendant alleges that in 2009 when Finskiy and Yanchukov first discussed doing business together, Roman Zolotov (R. Zolotov) and Yanchukov told Finskiy that Yanchukov represented the Zolotov family (the Zolotovs), that he acted as their investment advisor and managed family businesses, and that they were looking for global investment opportunities in the gold mining sector (counterclaim ¶ 22). From July 2011 through at least March 2013, Yanchukov invested in White Tiger by purchasing shares in and making

loans to White Tiger, through Unique and Faith, and purportedly for the benefit of the Zolotovs (*id.* ¶ 23).

During this time, there were numerous meetings and telephone conferences wherein Yanchukov and Finskiy discussed the financing of and investment in White Tiger. Yanchukov agreed to the loans and investments suggested by Finskiy.<sup>1</sup> Over the course of 2011 and 2012, production at White Tiger's mines fell below expectations and the company struggled financially. On or about November 8, 2011, Yanchukov, through Unique and Faith, entered into two loan agreements with White Tiger, getting a \$15 million loan from Unique and a \$3 million loan from Faith.

On August 22, 2012, the Unique and Faith loans, which then totaled \$20,401,001.30, were consolidated into a single loan (Unique Loan), following White Tiger's April 4, 2012, repayment of \$3 million of the November 2011 Faith loan.<sup>2</sup> The Unique Loan had a maturity date of January 31, 2015, along with the issuance of 204,010,013 common share purchase warrants in favor of Unique.

In or about late 2011, White Tiger and Century needed additional funding, despite loans from Finskiy, Yanchukov, and their respective companies. Yanchukov offered to broker an additional loan facility for White Tiger from VTB Capital plc (VTB), a prominent Russian financial institution known for servicing the business needs of powerful and important businesses and individuals in Russia. Yanchukov sought help in getting this loan from Viktor Zolotov (V. Zolotov), in the Ministry of Internal Affairs of the Russian Federation, who had strong connections with Andrey Kostin, the President and Chairman of the Management Board and Member of the Supervisory Council.

On December 5, 2011, White Tiger announced the approval of a senior term loan facility from VTB of up to \$150 million secured by pledges of shares of Diascia, the White Tiger subsidiary that owned White Tiger's mining assets in Russia, and other securities (VTB Loan). The VTB Loan contained production covenants that required White Tiger to produce certain specific volumes of gold (in ounces) on a quarterly, semi-annual and annual basis (*id.* ¶ 64).

In October 2012, White Tiger notified VTB of a production shortfall in the third quarter. During the fourth quarter, White Tiger's gold production failed to make up enough of

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<sup>1</sup> Plaintiffs' version of the events that occurred during this period are set forth in the court's decision and order dated 10/29/18 dismissing the complaint (Doc. No. 52).

<sup>2</sup> It appears that the referenced sums are in Canadian dollars (see Doc. No. 148, EX. B).

the third quarter shortfall to meet the annual production requirements of the VTB Loan. Without Finskiy's knowledge, Yanchukov had approached VTB to further a conspiracy between Yanchukov, Unique, Faith, and V. Zolotov to acquire Finskiy's stake in White Tiger at a deeply discounted price. Specifically, Yanchukov asked VTB to declare a default of the VTB Loan based on White Tiger missing its production covenants, which would depress the price of White Tiger's shares so that, through economic and physical threats, Yanchukov could purchase Finskiy's shares at a lower price. VTB agreed to cooperate with Yanchukov either because of pressure applied with directly by V. Zolotov or because of VTB's perception that any failure to cooperate Yanchukov would have negative financial consequences for V. Zolotov and lead to him seeking retribution against VTB (*id.* ¶67). The Counterclaim adds:

"Yanchukov went so far as to encourage VTB to foreclose its collateral and sell the Russian mining assets that secured the VTB Loan directly to Yanchukov, as an alternative form of corporate raid, if Yanchukov could not extort an acquisition of Kirkland's, DZM's, and WHS's shares at a price that Yanchukov considerably discounted"

(*id.* ¶ 68). On February 21, 2013, VTB sent White Tiger subsidiary Diascia a reservation of rights letter threatening to declare a covenant default. VTB acted at the behest of Yanchukov and with the knowledge and consent of Dmitry Snesar. VTB's designee on the White Tiger board of directors.

During the following three or four months, Yanchukov continued to harass and threaten Finskiy about the value of his investment in White Tiger, pressuring Finskiy to sell White Tiger to him at a discount and/or otherwise compensate him. The two discussed various potential structures to resolve Yanchukov's concerns, but none were agreeable to Yanchukov. Yanchukov reminded Finskiy that money belonging to the Zolotovs was behind Yanchukov's investments in White Tiger, and he repeatedly referenced that VTB declared White Tiger to be in default under the VTB Loan and that White Tiger's market share price was dropping. Because Finskiy knew of V. Zolotov's position with the Ministry of Internal Affairs, he began to worry about his financial security and personal safety (*id.* ¶ 77).

White Tiger had missed its production covenants on previous occasions, but until Yanchukov's intervention, VTB had not considered it necessary or prudent to declare a default. In February 2013, Yanchukov called a meeting with Finskiy. Yanchukov took the firm position that the only way to resolve the issue was for Finskiy to sell his entire interest in White Tiger to

Yanchukov at the current depressed price and to turn over management and control of the company to Yanchukov (*id.* ¶ 82). Finally,

“[g]iven that Yanchukov had influence over VTB and could persuade it to maintain White Tiger’s default status, forcing down White Tiger’s share price, or could foreclose on its collateral against White Tiger’s mining assets, and given the threat made by [Sergei] Tchetvertnykh [Yanchukov’s associate], and knowing Zolotov’s influence behind the threats, Finskiy felt he had no choice but to sell his shares in White Tiger to Yanchukov”

(*id.* ¶ 85).

In February 2013, Finskiy agreed to sell his controlling interest in White Tiger to Yanchukov at a severely depressed price.

“By three separate written sales and purchase agreements each dated March 11, 2013 (the “SPAs”), Finskiy caused Kirkland, DZM and WHS to sell their respective shareholdings of 75,680,522, 85,000,000 and 78,019,849, which equaled a combined total of slightly over 40% of White Tiger’s outstanding shares, to Unique in exchange for a payment equal to the U.S. dollar equivalent of CDN \$11,935,018”

(*id.* ¶ 87). Finskiy alleges the real value of the shares was substantially higher than the contract price and that Yanchukov paid no premium to reflect he was acquiring the controlling interest. The sale fully and finally resolved any and all disputes between the parties concerning Yanchukov’s, Unique’s, and Faith’s investment in White Tiger (*id.*). Yanchukov became the controlling shareholder in White Tiger, and Finskiy no longer had any interest or role in that entity. Despite Finskiy’s assertion that the sale of stock was to resolve all claims against him, the SPAs did not contain any form of release. As part of the transaction, Finskiy resigned from the Board of Directors of White Tiger and Yanchukov took his place as Executive Chairman.

In the fall of 2013, Yanchukov again accused Finskiy of misrepresenting White Tiger’s financial prospects to him. Yanchukov threatened to have Finskiy killed or thrown in jail in Russia unless Finskiy agreed to pay him \$150 million (*id.* ¶ 108). When Finskiy refused, Yanchukov filed a “baseless” criminal complaint to the Ministry of Internal Affairs that Yanchukov had been “swindled” by Finskiy. V. Zolotov had “influence and control” over the Ministry of Internal Affairs, so was able to ensure that the complaint was treated as a genuine financial crime (*id.* ¶ 112).

Finskiy was arrested in Moscow in March 2015. He was interrogated and a hearing was held, at which Yanchukov and Finskiy both presented their allegations and

evidence. Finskiy was then placed under house arrest pending completion of the formal investigation by the Ministry of Internal Affairs (*id.* ¶ 120). While under house arrest, Finskiy fled from Russia, allegedly on advice from his unidentified Russian counsel. Finskiy now resides in Florida.

The SPAs left Unique with slightly over 70% of the shares in White Tiger. The SPAs are all nearly identical. Each contains two and a half pages of substantive provisions and contains the following under the heading “Vendor’s Representations and Warranties”:

“2.1 In order to induce the Purchaser to enter into and consummate this agreement, the Vendor represents and warrants in favor of the Purchaser as follows: (a) the Vendor is the beneficial owner of the Purchased Shares, with good and marketable title thereto, free and clear of any Encumbrances; (b) this agreement has been duly executed and delivered by the Vendor and is a legal, valid and binding obligation of the Vendor, enforceable against it by the Purchaser in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction; and (c) the execution, delivery and performance of this agreement by the Vendor does not conflict with any law applicable to the lender, the constating [sic] documents, memorandum of association or by-laws of the Vendor”

(*id.* ¶ 93).

Each also has an “entire agreement” clause as follows: “4.7 The terms and provisions herein contained constitute the entire agreement between the parties and shall supersede all previous oral or written communications” (*id.* ¶ 95).

Finskiy asserts counterclaims as follows:

(1) Fraud against Unique, Faith, Yanchukov and VTB Bank (together, the Fraud Enterprise) based on various misrepresentations intended to obtain Finskiy’s assets at a depressed price (*id.* ¶¶ 126-142);

(2) Tortious interference with business relations against Unique, Faith and Yanchukov for interfering with Finskiy’s relationship with his company, Intergeo (*id.* ¶¶ 143-149);

(3) Breach of contract and breach of the implied covenant of good faith and fair dealing against Unique arising from Yanchukov’s decision to make a formal complaint against Finskiy to the Russian authorities (*id.* ¶¶ 150-160);

(4) Conspiracy to commit fraud against Unique, Faith, VTB, VTB, Inc. Kirkland, DZM, and WHS (*id.* ¶¶ 161-168);

(5) Declaratory judgment that Finskiy, Kirkland, DZM, and WHS made no misrepresentations to induce Yanchukov, Unique, and Faith to purchase shares in, or loan money to, Century or White Tiger other than those set out in the SPAs and that they complied with the SPAs (*id.* ¶¶ 169-173);

(6) Issuance of an anti-suit injunction for both the Russian criminal action and a civil case pending in Russia (*id.* ¶¶ 174-181); and

(7) Indemnification as against Mangazeya (*id.* ¶¶ 182-189).

In the October 29, 2018. Decision and Order, this court dismissed the complaint against defendants DZM, Kirkland, and Inger, and dismissed all claims, except the claim for breach of fiduciary duty, against Finskiy (Doc. No. 52). That ruling was affirmed (*see* Doc. No. 146). On April 4, 2019, this court granted plaintiffs' motion to file an amended complaint against defendant Finskiy only (Doc. No. 78).

On March 8, 2019, Finskiy, Kirkland Intertrade Corporation, DZM Gold Mining Ltd., and WTG Holdings S.A.R.L. commenced this third-party complaint against Yanchukov, VTB Capital PLC, and Xtellus Capital Partners f/k/a VTB Capital Inc. alleging five causes of action: (1) fraud, (2) tortious interference with business relations, (3) conspiracy to commit fraud, (4) declaratory judgment, and (5) anti-suit injunction (Doc. No. 73).

Plaintiffs now move, pursuant to CPLR 3211 (a) (7), to dismiss the counterclaims (Doc. No. 91). Yanchukov, a third-party defendant, moves to dismiss the third-party complaint as against him (Doc. No. 95).

## DISCUSSION

It is well settled that on a motion pursuant to CPLR 3211 (a) (7), to dismiss for failure to state a cause of action, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference" (*EBCL, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005][citation omitted]). Determining "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*id.*). "In this procedural posture, the allegations of the complaint . . . must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). The Court need only determine whether the allegations taken

from the “four corners” of the complaint “together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

### Fraud

Plaintiffs argue the first counterclaim, sounding in fraud, should be dismissed as it does not allege an actual misstatement, much less a material misstatement which is a predicate for a claim of fraud. Further, they contend defendants do not identify any actual statement made to them. The crux of this fraud claim is that Finskiy, Kirkland, DZM, and WHS relinquished their interest in White Tiger for an artificially depressed price in justifiable reliance on false representations made by the “Fraud Enterprise” that all of their issues and/or disputes with Finskiy regarding their investment in White Tiger would be resolved upon completion of the sale and execution of the SPAs. Finskiy seeks damages as follows:

“The damages include, but are not limited to the diminution in values of Kirkland, DZM, and WHS as a result of the sale of the White Tiger shares, lost income from White Tiger, loss of stock options and salary, and other losses resulting from the Counterclaim-Defendants’ false allegations to the Russian authorities to advance the fraud plan”

(*id.* ¶ 42).

Plaintiffs further argue that even if a statement could be discerned from defendants’ pleadings, allegations of plaintiffs’ “threats” of bodily and economic harm do not constitute misrepresentations of fact, but instead would constitute alleged acts of extortion, which is not grounds for a private right of action, but a criminal prosecution. Plaintiffs also argue there is nothing in this claim, apart from a conclusory statement that defendants made their representations “purposefully, knowing them to be false,” which indicates that, at the time Unique and Faith purportedly made the promise to release Finskiy, they had a present intention to file a criminal complaint against Finskiy or otherwise initiate claims against him. There are no facts through which scienter could be inferred.

In his opposition, Finskiy argues the fraud counterclaim asserts a number of misrepresentations. For example, Yanchukov, on behalf of his companies, falsely represented the financial condition of White Tiger in late 2012 and demanded Finskiy refund Unique’s and Faith’s entire investment due to alleged misrepresentations despite knowing that no such misrepresentations were made. Yanchukov told Finskiy he “had misrepresented the company’s financial prospects” at a meeting between Finskiy and Yanchukov (*id.* at ¶¶ 74-77).

Finskiy further alleges that, in 2013, Yanchukov falsely represented White Tiger failed to perform as represented by Finskiy. claimed he was not satisfied with White Tiger's performance, and demanded Finskiy pay \$150 million to resolve the dispute. Yanchukov knew White Tiger was performing very well (in fact better than was projected) and never intended to resolve the dispute (*id.* at ¶¶ 25, 32, 108). The representation was also made at a meeting between Yanchukov and Finskiy.

The parties agreed in February 2013 that sale of White Tiger's shares would fully and finally resolve any and all disputes between the parties concerning White Tiger (counterclaim at ¶ 85). Finskiy also alleges Yanchukov made false representations of material fact to Finskiy that if Finskiy sold his interest to Yanchukov and his companies, the threats of physical violence would cease and the parties would walk away from any respective obligations to each other (*id.* at ¶¶ 127-132).

Finskiy argues Yanchukov attempted to engineer a default for fraudulent purposes, so as to depress the price of White Tiger's shares (*id.* at ¶¶ 133-135). Finskiy also alleges Yanchukov represented "VTB was declaring White Tiger to be in default" and used this to pressure Finskiy to sell at a discount, knowing there was never a real intention to actually default White Tiger (*id.* at ¶¶ 77; 134). Finskiy was also induced into entering into the buyout by statements of Sergei Tchetvertnykh, one of Yanchukov's associates, to Fran Scola, in February 2013 (*id.* at ¶¶ 82-85).

The elements of a claim for fraud are an intentional misrepresentation of material fact, falsity, scienter, justifiable reliance and damages (*see Pasternak v Laboratory Corp. of Am., Holdings*, 27 NY3d 817, 827 [2016]; *Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352, 352 [1<sup>st</sup> Dept 2005] ["plaintiff could not show requisite reasonable reliance to support its fraud claim" where plaintiff failed to seek necessary information to ensure against the possibility of misrepresentation]). Claims of fraud must meet a heightened pleading standard, requiring the "circumstances constituting the wrong" be "stated in detail" (CPLR 3016 [b]; *El Entertainment U.S. LP v Real Talk Entertainment Inc.*, 85 AD3d 561 [1<sup>st</sup> Dept 2011]). However, "[t]his provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be

impossible to state in detail the circumstances constituting a fraud” (*Selechnik v Law Office of Howard R. Birnbach*, 82 AD3d 1077, 1078-1079 [2d Dept 2011] [internal citations omitted]).

The court finds Finskiy has not alleged plaintiffs made a misrepresentation on which he justifiably relied and was damaged. The actionable misrepresentations include, first, that Yanchukov falsely represented the value of White Tiger and told Finskiy that Finskiy himself was misrepresenting the value of White Tiger, his own company, and demanded the return of his investments. Second, Finskiy alleges Yanchukov told him there was going to be a default declared on the VTB loan to pressure Finskiy to sell White Tiger to him at a discount, even though there was never a real intention to default White Tiger or to initiate foreclosure proceedings by VTB. Third, Finskiy alleges Yanchukov told him the SPAs would resolve all of the disputes between them and end the threats of physical harm. Finally, he alleges that after the parties entered into the SPAs, Yanchukov demanded \$150 million more from Finskiy.

A claim for fraud must include proof of justifiable reliance made by the plaintiff on a misrepresentation. With respect to Yanchukov’s statements about the value of White Tiger and the VTB default, Finskiy, a sophisticated businessman, had ample opportunity to determine the veracity of statements concerning the value of his own company and whether VTB would declare a default on the loan to White Tiger (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-95 [1<sup>st</sup> Dept 2012] [“as a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm’s length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it” quotation marks and citations omitted]). Allegations that Finskiy turned his company over to Yanchukov based on statements about the condition of Finskiy’s company without inquiring into the truth of those statements cannot support a claim of justifiable reliance. Finskiy would have known, or had ready access to the information at the time of the sale, that he was selling his shares at a loss, the financial condition of White Tiger, and the truth of VTB’s intentions with respect to the loan.

Further, Yanchukov’s representations that the agreement would resolve all the parties’ disputes concerning Yanchukov’s investments in White Tiger likewise cannot support a claim for fraud. According to Finskiy, Yanchukov made these statements in order to entice him to sell his shares at a loss, and later, in violation of these promises, demanded \$150 million more and filed a false criminal complaint against him. The purpose of the SPAs was the sale of Finskiy’s

shares in White Tiger to Yanchukov. This sale was completed and the monies were paid. If Finskiy is now claiming he intended for the SPAs to resolve other unidentified disputes between the parties, that intention appears nowhere in the parties' agreements. This claim is simply too vague to sustain a fraud claim (*see Hart v Windjammer Barefoot Cruises Ltd.*, 220 AD2d 252, 253 [1st Dept 1995] ["plaintiff's vague allegations are devoid of the details necessary to support a claim of fraud"]). Furthermore, if Finskiy is claiming fraud because he entered into the SPAs in reliance on alleged promises by Yanchukov that he would stop threatening him with physical harm and false reports to the police, these are "criminal offenses" and cannot form the basis for a civil claim (*see Minelli v Soumayah*, 41 AD3d 388, 389 [1<sup>st</sup> Dept 2007]). The fraud claim shall be dismissed.

#### **Tortious Interference Claim**

The counterclaim for tortious interference alleges that plaintiffs tortiously interfered in Finskiy's relationship with his company, Intergeo. The basis for this claim is that plaintiffs damaged Finskiy's reputation by causing the Russian authorities to prosecute him and thereby resulting in harm to his relationship with Intergeo (*id.* at ¶¶ 146-147). Plaintiffs argue these facts cannot form the basis for a claim of tortious interference because the alleged conduct was not directed at Intergeo (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]) ["conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship"].

"The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procurement of the third party's breach of that contract without justification; and (4) damages" (*Tri-Star Light. Corp. v Goldstein*, 151 AD3d 1102, 1105 [2d Dept 2017] [internal quotation marks and citations omitted]; *Rockwell Glob. Capital. Li C v Soreide Law Grp., PLLC*, 100 AD3d 448, 449 [1st Dept 2012] [dismissing counterclaim for tortious interference with business relations, finding "defendants have not alleged that plaintiffs conduct was directed at the clients with whom defendants have or sought to have a relationship"]).

Finskiy has not stated a prima facie claim for tortious interference. That his arrest interfered with his relationship with Intergeo does not support a claim for tortious interference. This counterclaim does not allege Yanchukov made statements directed

Intergeo for the specific purpose of interfering with Finskiy's contractual relationship with that company. This claim shall be dismissed.

**Breach of Contract—Implied Covenant of Good Faith and Fair Dealing**

Plaintiffs argue this claim fails as a matter of law. Plaintiffs note that in setting forth the claim, Finsky explicitly acknowledged he received the benefit of the bargain as set forth in the SPAs. In exchange for their shares in White Tiger, Finskiy and his companies received payment "equal to the U.S. dollar equivalent of CDN \$11,935,018, with payment and completion occurring the same day" (Counterclaims, ¶ 151). Thus, this claim fails to allege the defendants were denied the "fruits of the contract." Plaintiffs add that the claim that Finskiy suffered damages by virtue of being removed as executive chairman of Intergeo and losing stock options and a salary must be rejected because Intergeo is a completely separate entity with no connection to the claims at issue. Accordingly, those damages cannot be said to have been benefits contemplated by terms of the SPAs and "cannot serve as the basis for such a breach of contract claim" (plaintiffs' memorandum of law in support at 21-22). Plaintiffs further argue it is simply absurd to argue that the reporting of a crime could be deemed to be a breach of contract.

In opposition, Finskiy argues he entered into the SPAs in part to put an end to plaintiffs' threats and false accusations, and that this intention was memorialized in the SPAs, as they represented the parties' "entire agreement." Nevertheless, after the SPAs were entered into, Yanchukov and his affiliates initiated the baseless criminal proceedings in an attempt to fraudulently extort substantial additional sums from Finskiy. Specifically, at ¶ 82 of the counterclaim Finskiy alleges:

"In February 2013, Yanchukov called a meeting with Finskiy. He took the firm position that the only way to resolve the issue of his investment in White Tiger was for Finskiy to sell his entire interest in White Tiger to Yanchukov at the current depressed price and to turn over management and control of the company to Yanchukov. It was against this background that, in March 2013, Finskiy contracted to sell his shares in White Tiger, held through Kirkland, DZM and WHS, to Unique, and to cede executive and management control to Yanchukov."

Several months after the parties entered into the SPAs, Yanchukov charged that his total investment in White Tiger was \$150 million and demanded Finskiy pay him that sum immediately, or he would see Finskiy either dead at the hands of Chechen thugs or in a Russian jail cell. In 2015, Yanchukov filed a criminal complaint in Russia stating that Finskiy defrauded \$18 million dollars from him. Finskiy alleges that, as a result of the criminal charges, the board

of directors of Intergeo removed him as executive chairman and refused to honor his stock options with the company valued at no less than \$130 million Canadian. He adds that he sold his stock in White Tiger to the plaintiffs at a loss.

Implied in every contract is “a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks and citations omitted]). The covenant of good faith and fair dealing cannot be used to create terms that do not exist in the writing (*see Vanlex Stores, Inc. v BFP 300 Madison II LLC*, 66 AD3d 580, 581 [1<sup>st</sup> Dept 2009]). “The implied covenant includes any promises which a reasonable person would be justified in understanding were included” (*1357 Tarrytown Rd. Auto, LLC v Granite Props., LLC*, 142 AD3d 976, 977 [2d Dept 2016]).

In *1-10 Indus. Assoc. v Trim Corp. of Am.*, (297 AD2d 630 [2d Dept 2002]), the Second Department found merit in the plaintiff’s claim for breach of the covenant of good faith and fair dealing. The issue for the court is set forth in the following excerpt:

“In exchange for [plaintiff] extending the [defendant’s] leases, the letter agreement gave the plaintiff the right to completely relocate all of [defendant’s] operations from buildings 9 and 10 to a “comparable ‘reasonably contiguous’ facility subject to [defendant’s] approval ... within [defendant’s] existing lease term or within their new lease term.” After [defendant] rejected four proposed relocation sites, the plaintiff commenced this action alleging, inter alia, that [defendant] breached the letter agreement by failing to exercise good faith in its refusal to relocate to any of the alternate sites it was offered”

(*id.* at 631). The Second Department sustained the claim and found that, although the letter agreement did not contain language that defendant had to act reasonably, the defendant’s alleged repeated rejections of proposed relocation sites could be construed as bad faith, in violation of the implied contractual covenant.

Here, Finskiy has not alleged a breach of contract. The crux of this cause of action is whether the parties carried out their contractual duties in good faith to the extent that each party benefits from the “fruits” of the contract. Finskiy alleges that, as a result of plaintiff’s breach of this covenant, he was arrested and subjected to Russian criminal proceedings, and was damaged thereby because the board of directors of Intergeo removed him as executive chairman and refused to honor his stock options. However, the parties entered into the SPAs for sale of stock in White Tiger, and, therefore, Finskiy’s alleged losses are not “fruits” of those contracts.

Accordingly, Finskiy cannot support a claim that plaintiffs breached the covenant under the SPAs.

As to the claim that he sold his stock in White Tiger to plaintiffs at a loss, it likewise cannot serve as a basis for breach of the covenant. The three contracts set forth the terms of the sale. Finskiy's dissatisfaction with the explicit terms of the sale does not satisfy the elements of this claim. The third counterclaim shall be dismissed.

#### **Conspiracy to Commit Fraud**

Plaintiffs argue that, as Finskiy's fraud claim must be dismissed, resulting in the absence of any underlying tort, the conspiracy claim fails as well (plaintiffs' memorandum in support at 16, citing e.g., *Linden v Lloyd's Planning Serv. Inc.*, 299 AD2d 217, 218 [1st Dept 2002]). Finskiy's civil conspiracy claim is based on the purported conspiracy by Unique Goals, Faith Union, Yanchukov, VTB and Xtellus Capital Partners to defraud Finskiy. However, "a civil conspiracy cause of action cannot stand alone, but stands or falls with the underlying tort" (*Romano v Romano*, 2 AD3d 430, 432 [2d Dept 2003]). Since the fraud claim is dismissed, the civil conspiracy claim must also be dismissed for failure to state a claim (*see Linden*, 299 AD2d at 218).

#### **Declaratory Judgment**

In his fifth counterclaim, Finskiy seeks a declaration that: (a) Finskiy, Kirkland, DZM and WHS made no representations to induce Yanchukov, Unique, and Faith to purchase shares in, or loan money to, Century or White Tiger, other than the representations set out in the SPAs; and (b) Finskiy, Kirkland, DZM, and WHS have complied with the SPAs. Plaintiffs argue that this claim lacks any legal basis, and should be dismissed.

A declaratory judgment is intended "to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact" (*Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679 [1st Dept 2017] [internal quotation marks and citations omitted]). The general purpose of a "declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*id.* [internal quotation marks and citations omitted]). "Thus, a declaratory judgment requires a 'justiciable controversy,' in which not only does the plaintiff 'have an interest sufficient to constitute standing to maintain the action, but also that the controversy involves present, rather than hypothetical, contingent or remote, prejudice to plaintiffs'" (*id.* at 680 [internal citations

omitted]). A court “should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties” (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530 [1977]). Declaratory judgment “is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action... Where there is no necessity for resorting to the declaratory judgment it should not be employed” (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]).

In its Decision and Order dated October 29, 2018, this court dismissed plaintiffs' claim for fraud. There is currently no claim for fraud asserted in the amended complaint. Moreover, Finskiy's argument that plaintiffs' amended complaint contains claims of misrepresentation throughout does not support the granting of a declaratory judgment. Finskiy's claims as to third-party plaintiffs' misrepresentations will be resolved in the context of the pending claims and counterclaims in this litigation, and, therefore, a declaratory judgment is not necessary.

With respect to Finskiy's application that this court declare Finskiy complied with the SPAs, there is no justiciable controversy between the parties on the issue. Plaintiffs have not attacked Finskiy's compliance with the SPAs. It is undisputed that in accordance with the SPAs, the White Tiger shares were sold to the plaintiffs and Finskiy received the agreed upon purchase price. The fourth counterclaim shall be dismissed.

#### **Request for Issuance of Anti-Suit Injunction**

In the sixth counterclaim, Finskiy seeks an injunction to stay the Russian criminal case. He alleges: “Unique has agreed to litigate its claims in New York. Unique, along with Yanchukov has refused to withdraw the politically motivated Russian criminal case complaint (sic), or to otherwise cause it to be dismissed, despite repeated requests from Finskiy that they do so” (*id.* ¶ 179). Finskiy seeks an anti-suit injunction a) requiring plaintiffs Yanchukov, Unique and Faith to cease and abandon the criminal proceedings against Finskiy; and b) prohibiting Yanchukov, Unique, and Faith from initiating any civil or criminal legal proceedings in any other forum, including, but not limited to, Russia. Plaintiffs argue the request is without basis. The determination of whether a violation of Russian criminal law has occurred is one for the Russian courts to make. No determinations rendered by this or any other American court will resolve the issues of Russian law and this court cannot issue an injunction which will impede the Russian court's ability to act. Plaintiffs argue “it would be particularly inappropriate to issue an

Order compelling a Russian citizen, Mr. Yanchukov, to refuse to cooperate in a Russian criminal proceeding” (plaintiffs’ memorandum of law in support at 19).

Finskiy responds by arguing that: “Counterclaim-Plaintiffs have stated a claim for anti-suit injunction, and Counterclaim-Defendants should be enjoined from continuing to pursue criminal and civil litigation in Russia arising from and relating to the same facts, transactions, occurrences, and parties that are being litigated here” (memorandum in opposition at 19).

New York courts recognize the importance of anti-suit injunctions where a parallel action in a foreign court is being prosecuted in contravention of a New York forum selection clause and where a parallel action would undermine the integrity of the New York court’s judgments (*see Indosuez Intl. Fin. v National Reserve Bank*, 304 AD2d 429, 431 [1<sup>st</sup> Dept 2003]). “The rule of comity forbids our courts from enjoining an action in a sister state unless it is clearly shown that the suit sought to be enjoined was brought in bad faith, motivated by fraud or an intent to harass the party seeking an injunction, or if its purpose was to evade the law of the domicile of the parties” (*Chayes v Chayes*, 180 AD2d 566, 566 [1<sup>st</sup> Dept 1992]) [internal citations omitted]. An anti-suit injunction may also be appropriate where there is “clear evidence of defendant’s harassing and bad faith foreign litigation” (*Indosuez Intl. Fin.*, 304 AD2d at 431).

There is no forum selection clause at issue here, no facts alleged supporting the argument that an outcome of the actions in Russia would undermine the integrity of this action, and no “clear evidence” of harassment that could support the extreme remedy being sought in this court. With respect to Finskiy’s application for an anti-suit injunction regarding a criminal proceeding in Russia, the concerns that would mandate an injunction against that action are not present. The sixth counterclaim shall be dismissed.

#### **Indemnification**

The Amended and Restated Memorandum of Association and Articles of Association of Mangazeya (Articles of Association), Section 15.1, provides coverage to people who are or were directors of the company. Finskiy has been the subject of complaints and demands regarding alleged misrepresentations about Mangazeya, formerly known as White Tiger Gold Ltd. during the time Finskiy was Executive Chairman and a Director of White Tiger. Finskiy asserts that, as a result of his lawful and appropriate activities while a director at White Tiger, he has been forced to defend and prosecute claims to protect his name and freedom, and so can recover damages.

Article 15.1 of the Articles of Association states, in part:

“INDEMNIFICATION 15.1 Subject to the limitations hereinafter provided the Company shall indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings against any person who (a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director or officer of the Company; or (b) is or was, at the request of the company, serving as a director of, or in any other capacity is or was acting for, another body corporate or a partnership, joint venture, trust or other enterprise.

15.2. The indemnity in Sub-Regulation 15.1 only applies if the person acted honestly and in good faith with a view to the best interests of the Company and, in the case of criminal proceedings, the person had no real cause to believe that their conduct was unlawful”

(Counterclaims, exhibit C). Article 15.3 provides that:

“[t]he decision of the directors as to whether the person acted honestly and in good faith and with a view to the best interests of the Company and as to whether the person had no reasonable cause to believe that his conduct was unlawful is, in the absence of fraud, sufficient for the purposes of the Articles, unless a question of law is involved.” (*id.*).

Plaintiffs argue that Article 15.1 only applies if the officer or director acted honestly and in good faith as determined by the Board of Directors (Pl. Opp at 20, Doc. No. 94). Plaintiffs further argue this is a condition precedent to indemnification, and Finskiy does not dispute that the Board, in its discretion, found that he did not act in good faith and is not entitled to indemnification (*id.*). However, plaintiffs present no evidence in support of that decision. Plaintiffs maintain that simply claiming that a “question of law” is involved, without explanation, does not strip the Board of its discretion, nor render its determination a nullity.

In opposition, Finskiy argues that because the Federal Litigation was dismissed in its entirety, he is entitled to indemnification for his expenses therein. This is so, argues Finskiy, because that dismissal presented a question of law only. Finskiy also argues that the claims against him in this court, for fraud, conspiracy to commit fraud, and unjust enrichment, have likewise been dismissed on a motion to dismiss.

In support of the argument that Mangazeya is required to indemnify Finskiy for claims that have been dismissed, Finskiy also cites Article 15.5 of the Articles of Association. He argues this provision mandates indemnification as he has been successful in his defense of the Federal Litigation and the claims against him that were dismissed in this action.

Article 15.5 states:

“If a person referred to in Sub-Regulation 15.1 has been successful in defense of any proceedings referred to in Sub-Regulation 15.1, the person is entitled to be indemnified against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred by the person in connection with the proceedings”

(Counterclaims, exhibit C, Article 15.5). Based upon this provision, Finskiy asserts he is entitled to be fully indemnified as to the entirety of the Federal Litigation and as to the dismissed causes of action in the State Court Litigation.

At this stage in the litigation, the allegations in this counterclaim are sufficient to state a claim. The seventh cause of action survives.

#### **Motion to Dismiss Finskiy’s Third-Party Complaint**

In motion sequence seven, Yanchukov moves to dismiss Finskiy’s third-party complaint against him. This complaint contains five of the causes of action set forth in Finskiy’s counterclaims. His claims for fraud, tortious interference with contract, conspiracy to commit fraud, declaratory judgment, and anti-suit injunction are set forth in the same manner and are based on the same facts. Third-party defendants’ motion to dismiss Finskiy’s complaint seeks to dismiss these claims on the same grounds as set forth above. These claims shall be dismissed for the same reasons discussed above.

In accordance with the foregoing, it is

**ORDERED** that the motion of plaintiffs Unique Goals International, Ltd., Faith Union Industries, Ltd., and Mangazeya Mining Ltd., pursuant to CPLR 3211 (a) (7) (motion sequence 006) to dismiss the counterclaims of defendant Maxim Finskiy is granted to the extent that the first through sixth counterclaims are dismissed, and as for the seventh counterclaim, it is denied; and it is further

**ORDERED** that third-party defendant Yanchukov’s motion to dismiss the third-party complaint as against him (motion sequence 007) is granted with costs and disbursements to third-party defendant Yanchukov as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

**ORDERED** that the remainder of the action is severed and shall continue; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that counsel for the remaining parties shall appear for a status conference on September 15, 2020 at 9:30am if in person appearances have been authorized as of August 28, 2020. Otherwise counsel for plaintiffs shall contact the court for instructions regarding an appearance.

This constitutes the decision and order of the court.

**DATED: June 18, 2020**

**E N T E R,**

  
O. PETER SHERWOOD, J.S.C.