SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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LEONID LEBEDEV,

Plaintiff,

- v -

LEONARD BLAVATNIK and VIKTOR VEKSELBERG,

Defendants.

INDEX NO. 650369/2014

MOTION DATE _____

MOTION SEQ. NO. 009 012

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1168, 1169, 1170, 1171, 1208, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1306, 1311, 1328, 1329, 1330, 1331, 1332, 1333

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 012) 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 969, 1309, 1334

were read on this motion to/for STRIKE JURY DEMAND.

PROCEDURAL HISTORY

Defendant Viktor Vekselberg moved for summary judgment dismissing plaintiff Leonid Lebedev's claims for breach of contract, joint venture, and fiduciary duty arising out of the 2001 Investment Agreement (motion sequence number 010).[1] Defendant

[1] Defendants filed separate motions for summary judgment and addressed separate grounds for dismissal, however, each ground applies equally to both defendants.

Leonard Blavatnik moved for summary judgment on defendants' affirmative defense of settlement, waiver, payment, and release and counterclaim for indemnification (motion sequence number 009). Defendants moved to strike Lebedev's jury demand (motion sequence number 012). Lebedev moved for summary judgment to establish that the 2001 Investment Agreement was a binding contract and to dismiss the affirmative defense and indemnification counterclaim (motion sequence number 011).

Justice Scarpulla granted Vekselberg's motion dismissing the claims arising out of the 2001 Investment Agreement and the indemnification counterclaim, finding that the language of the indemnification clause did not bind Lebedev. (NYSCEF Doc. No. [NYSCEF] 1306, July 9, 2019 decision and order [Scarpulla, J.].) Blavatnik's motion for summary judgment on the affirmative defense was denied consistent with the dismissal of the complaint. Lebedev's motion to dismiss defendants' counterclaim for indemnification was granted and otherwise denied. (*Id*. at 18) Defendants' motion to strike the jury demand was denied as moot. (*Id*. at 19.)

On appeal, the Appellate Division, First Department reinstated the cause of action for breach of contract arising from the 2001 Investment Agreement, holding that an issue of fact existed with respect to contemporaneous consideration and affirmed dismissal of the joint venture claim and the indemnification counterclaim. (*Lebedev v Blavatnik*, 193 AD3d 175, 184-188 [1st Dept 2021].) Accordingly, motion sequence numbers 009 and 012 were restored. (NYSCEF 1333, 1334, restoration orders.)

MOTION SEQUENCE NUMBER 009

The court presumes familiarity with this action and the court will only recount additional facts as necessary.[2] The narrow and remaining question in this motion is whether Lebedev's claim for breach of the 2001 Investment Agreement (2001 IA) is barred by the release provision found in the 2003 Acquisition Agreement (2003 AA).

Legal Standard

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate disputed material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Where this showing is made, the burden shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action. (*Id.*) The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), however, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Discussion

Defendants argue the release provision, found in section 2.3 of the 2003 AA (the Release Provision) bars Lebedev from bringing his claim under the 2001 IA. Lebedev argues to the contrary, that the 2003 AA concerned the purchase of his income rights

[2] For a detailed background, the reader is referred to NYSCEF 1306 (Scarpulla, J.), *Lebedev v Blavatnik*, 144 AD3d 24 [1st Dept 2016]; *Lebedev v Blavatnik*, 193 AD3d 175 [1st Dept 2021].

only, not his equity rights, and in turn, the Release Provision does not bar this action seeking recovery of over $2 billion for the value of his 15% equity stake.

The Release Provision provides:

> "The Seller and its Affiliates hereby waive and release any and all of their rights, claims and other entitlements, emanating from the Underlying Interests and the Underlying Liabilities and/or related to the Underlying Transaction, in consideration for the Acquisition Price. .... The Parties further agree that this Agreement shall provide for the full and final settlement of any and all of the Parties' and their Affiliates' claims related to the Underlying Interests and the Underlying Liabilities and/or the Underlying Transaction and any and all rights and remedies of the Parties and their Affiliates, as related to the Underlying Interests, the Underlying Liabilities and Underlying Transaction and the Note, shall be limited to the enforcement of the rights, duties and obligations of the Parties and their Affiliates under this Agreement."

(NYSCEF 666, 2003 AA at 4.[3])

The 2003 AA defines Coral Petroleum Ltd. (Coral), a company incorporated under the laws of Ireland, as the Seller.[4] (*Id.* at 2 [preamble].) The term affiliate or affiliates is defined as "the beneficial owners of a party to this Agreement or any entity in which such beneficial owner or beneficial owners directly or indirectly own or control at least 10% of the outstanding share capital or participation rights[.]" (*Id.* at 3. [§ 1.4].)

The "Underlying Transaction," a defined term under the 2003 AA, refers to: "[T]he Seller and its Affiliates have provided certain loans to AS Naftaco Industrial Partners Ltd. ('Naftaco') and transferred certain shares in the Russian oil company Tyumen Oil Company ('TNK') to Naftaco and its subsidiaries." (*Id.* at 2 [second whereas clause].)

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[3] Pages refer to NYSCEF generated pagination.
[4] This point is discussed in further detail below.

The "Underlying Interests" and "Underlying Liabilities," are also defined terms under the 2003 AA: "WHEREAS, Oil and Gas Industrial Partners Ltd., . . . ('OGIP'), has taken over Naftaco's certain interests in the oil business and assumed Naftaco's certain liabilities related to such business interests, including any and all business interests (the 'Underlying Interests') and liabilities (the 'Underlying Liabilities') emanating from the Underlying Transaction."[5] (*Id.* [third whereas clause].)

Defendants contend that the Release Provision (a) binds Lebedev and (b) releases all of his claims arising out of the Underlying Transaction, i.e., his breach of contract claim arising out of Lebedev's transfers of TNK/NNG stock and $25 million. It is defendants' burden to establish as a matter of law that the release bars Lebedev's claims. (*Dillon v Peak Environmental, LLC*, 187 AD3d 1517 [4th Dept 2020]; *see Ku v Gu,* 186 AD2d 88, 88-89 [1st Dept 1992] [finding that defendant's submissions do not conclusively demonstrate the action there was barred by the release and reversing granting of summary judgment in favor of defendant].)

Scope of the Release Provision

Defendants specifically argue that "any and all of [Seller and its Affiliates'] rights, claims and other entitlements" unequivocally releases all claims between the parties as a full and final settlement. Not so, according to Lebedev. In Lebedev's view, the 2003 AA only concerned, and therefore only released, his income rights. Defendants counter that the parties entered the written, complete, and fully-executed AA that was intended to resolve all disputes between the parties.

[5] The court will refer to Underlying Liabilities, Underlying Interests, and Underlying Transaction collectively as Underlying Transaction.

"Generally, a valid release constitutes a complete bar to an action on a claim that is the subject of the release." (*Nucci v Nucci*, 118 AD3d 762, 763 [2d Dept 2014] [citations omitted].) "A release is a contract, and its construction is governed by contract law." (*Kaminsky v Gamache*, 298 AD2d 361 [2d Dept 2002] [citation omitted].) "'As with contracts generally, the courts must look to the language of a release—the words used by the parties—to determine their intent, resorting to extrinsic evidence only when the court concludes as a matter of law that the contract is ambiguous.'" (*Broyhill Furniture Industries, Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 555 [1st Dept 2009] [internal quotation marks omitted], quoting *Wells v Shearson Lehman/American Exp., Inc.*, 72 NY2d 11, 19 [1988].) On the face of the Release Provision, it is plainly evident from the language that the parties intended to broadly release any and all of Coral and its Affiliates' rights, claims and other entitlements, limited only to those emanating from the Underlying Transaction. Where the language of the release is plain and unambiguous, the court will not look at extrinsic evidence to determine the intention of the parties. (*Bernard v Sayegh*, 104 AD3d 600, 600 [1st Dept 2013].) Further, the court rejects Lebedev's contention that there were concerns about the purchase price for his equity rights and/or income rights leading up to the 2003 AA, but ultimately the parties came to an oral agreement to sell only his future income rights for $600 million. Based on his concession that there were concerns, Lebedev could have included "appropriate[e] limiting language" in the 2003 AA to preserve his equity rights. (*Broyhill Furniture Industries, Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 555 [1st Dept 2009].) The Release Provision clearly contemplated limiting

language ("emanating from…") yet did not include language anywhere in the 2003 AA about the purported distinction between equity and future income rights.

This is not the end of the inquiry as the Release Provision is immediately narrowed by the inclusion of the portion reading "emanating from the Underlying Liabilities." "If the recitals in the release appear to limit the release to only certain claims, demands, or obligations, the release will operate only as to those matters" (*Rotondi v Drewes*, 31 AD3d 734, 736 [2d Dept 2006].) The Release Provision is expressly limited to claims, rights, and other entitlements emanating the Underlying Transaction. "'The scope of a general release depends on the controversy being settled and the purpose for which the release is actually given.'" (*Id.*, quoting *Commissioners of the State Ins. Fund v Fortune Interior Dismantling Corp.*, 7 AD3d 427, 428-29 [1st Dept 2004].)

Defendants argue that the Underlying Transaction refers to the transactions in 1997-1998 where Lebedev contributed $25 million and transferred shares of TNK and NNG to effectuate the acquisition of TNK (1997 Transaction). There is no dispute over Lebedev's contribution and transfer of shares.[6] (*See* NYSCEF 1168, Lebedev's response to defendants' Rule 19-a statement ¶ 2.) In fact, the record amply demonstrates that the 1997 Transaction was the only transaction where any party transferred shares and made contributions, either in the form of cash or in the form of

[6] Lebedev disputes only "to the extent that Blavatnik claims stock transfers were required under the 1997 Agreement, and disputed to the extent Blavatnik attributes no value to the transfer of shares in TNK and NNG that Lebedev caused and for which he received no payment. Further disputed to the extent Blavatnik claims that anyone other than Lebedev caused these particular stock and cash transfers to occur." (NYSCEF 1168, Lebedev's response to defendants' Rule 19-a statement ¶ 2.)

loans. The court agrees with defendants that the Underlying Transaction must refer to the 1997 Transaction where Lebedev transferred shares of TNK and NNG and contributed $25 million. Even in this lengthy and complex business relationship, there is no doubt that the Underlying Transaction refers to the 1997 Transaction, the transaction where Lebedev admittedly provided funds and transferred shares to obtain a majority stake in TNK and the transaction that incepted the parties' business dealings which spurred the various agreements in this action.

To further demonstrate the point, Lebedev fails to proffer a competing, reasonable interpretation of Underlying Transaction that renders the provision ambiguous. Instead, Lebedev argues that Underlying Transaction is tied to undefined, ambiguous, and inaccurate terms and, thus, in turn, defendants' unsupported assumption that Underlying Transaction must refer to the transfer of TNK/NNG stock and the $25 million cash is wrong. Moreover, Lebedev claims that the defined terms fail to identify the 2001 IA[7] and/or specify value, quantity, or dates of relevant transfers.

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[7] The Release Provision, on its face, does not refer to the 2001 IA, a fact that Lebedev highlights. But the Release Provision does not refer to any specific agreement. That makes sense given that the initial 1997 Transaction spurred various agreements. For example, the 1997 Transaction resulted in the Securities Sale and Purchase Agreement, dated December 26, 1997, between Blusdi Financieringsmaatschappij N.V. and Petrosol Holding, S.A (1997 SSPA). (NYSCEF 661, 1997 SSPA; NYSCEF 1168, Lebedev's amended response to Blavatnik's Rule 19-a Statement ¶ 2.) The 2001 IA is also connected to the 1997 Transaction as indicated by the "Statement of understandings." (NYSCEF 1103, 2001 IA at 3 ["2. The Parties acknowledge that in 1997-98, Party 3 made equity contributions to various companies, made payments to third parties, and rendered services, valued by the Parties in aggregate at 15% of the total value of the Parties' contributions toward the purchase of the Oil Business."].) Thus, given the fact that there were at least two agreements—the 1997 SSPA and 2001 IA—emanating from the 1997 Transaction and the parties' awareness of these two agreements, it makes sense that to effectuate a broad release the parties would draft the Release Clause in such a way to encompass all agreements tracing back to the 1997 Transaction, the transaction that incepted the parties' business dealings.

Merely pointing to undefined terms in the underlying definitions of the Release Provision does not create an ambiguity. Disagreeing with the other side's interpretation without offering a competing reasonable interpretation of what the Underlying Transaction could be is insufficient to create an ambiguity. A contract is ambiguous when it is "susceptible of two reasonable interpretations." (*Georgia Malone & Co., Inc. v E & M Assoc.*, 163 AD3d 176, 185 [1st Dept 2018] [citation omitted].) Lebedev cannot point to another transaction to render the sole limitation ambiguous.

Moreover, Lebedev argues, in a footnote, that the 1997 Transaction did not involve loans and Naftaco was not created yet. Both may be true, but Lebedev still is unable to offer another reasonable interpretation of the Underlying Transaction.

The court addresses Lebedev's remaining arguments which likewise does not save his claim. Lebedev argues that since the Release Provision is ambiguous (which the court finds it is not), the extrinsic evidence will show that the parties reached an oral agreement to buy out his income rights. Even if the court found the Release Provision ambiguous, the terms contained within the four corners of the 2003 would contradict Lebedev's theory. (*See Laskey v Rubel Corp.*, 303 NY 69, 71 (1951) ["If, therefore, the agreement is partly oral and partly written, parol evidence, while admissible to complete the written portion or to resolve some ambiguity therein, may not be used to vary or contradict its contents."].) Written agreements must be read as a whole "to ensure that excessive emphasis is not placed upon particular words or phrases." (*Georgia*

(*Perritano v Town of Mamaroneck*, 126 AD2d 623, 624 [2d Dept 1987]; *see also Commissioners of State Ins. Fund v Fortune Interior Dismantling Corp.*, 7AD3d 427, 428-29 [1st Dept 2004] [finding that release barred claims as the parties were aware of claims pending at the time the settlement agreement was reached in determining scope of release].)

Malone & Co., Inc. v E & M Assoc., 163 AD3d 176, 185 [1st Dept 2018] [citation and internal quotation marks omitted].)

The apparent purpose of the 2003 AA is stated in the seventh whereas clause on the first page of the 2003 AA. It states "WHEREAS, the Buyer wishes to purchase (i) the Note and (ii) any and all rights, claims, business interests and other entitlements of the Seller and its Affiliates, emanating from the Underlying Interests, the Underlying Liabilities and/or the Underlying Transaction, from the Seller[.]" (NYSCEF 666, 2003 AA at 2.) Section 2.1 is also instructive: "The Buyer hereby agrees to pay to the Seller the Acquisition Price, as stipulated hereinafter in Section 3, in consideration for (i) the Note, including any accrued interests thereon, and (ii) any and all rights, claims, business interests and other entitlements of the Seller and its Affiliates emanating from the Underlying Interests and/or the Underlying Transaction." (*Id.* at 3.) The Release Provision is thus part of the 2003 AA that contemplated the purchase of two assets, (i) the Note and "(ii) any and all rights, claims, business interests and other entitlements of the Seller and its Affiliates, emanating from the Underlying Interests, the Underlying Liabilities and/or the Underlying Transaction, from the Seller[.]" Item (ii), which again casts a wide net due to the "any and all" language and the inclusion of "Underlying Transaction", plainly makes clear that what is being purchased—"rights, claims, business interests and other entitlements . . . emanating from" the Underlying Transaction. As explained above, the Underlying Transaction is the 1997 Transaction. The rights, claims, business interests and other entitlements in item (ii) stem from the Underlying Transaction and not from the Note. Thus, reading the entire contract comports with the Release Provision. Additionally, "[a] contract should be read to give

meaning and effect to each of its provisions." (*Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 117 AD3d 551, 553 [1st Dept 2014] [citation omitted].) Under Lebedev's interpretation's (ii) would be rendered superfluous.

Whether Lebedev is Bound by the Release Provision

Defendants assert that Lebedev is the "Seller," or, in the alternative, an "Affiliate," binding him to the Release Provision.

The court begins, as it must, by looking at the language found "within the four corners of the contract" and "giving a practical interpretation to the language employed and reading the contract as a whole." (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014], citing *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002].) The 2003 AA defines "Affiliate" or "Affiliates" as "any of the beneficial owners of a party to this Agreement or any entity in which such beneficial owner or beneficial owners directly or indirectly own or control at least 10% of the outstanding share capital or participation rights[.]" (NYSCEF 666, 2003 AA at 3 [section 1.4].) Here, the Seller is Coral (*id.* at 2 [whereas clause]), and the question is whether Lebedev is Coral's affiliate. Defendants argue that Lebedev is Coral's "affiliate" under the Release Provision and proffers two reasons why: (1) Lebedev controlled Coral, such that Lebedev was a beneficial owner, and (2) as Lebedev qualifies as an "affiliate" in other provisions of the 2003 AA, he falls within the ambit of seller's "affiliate" under the Release Provision.

The court agrees with defendants that the term "affiliate" is unambiguous despite Lebedev's insistence that the term is ambiguous because the underlying term "beneficial owners" is undefined. Lebedev is wrong. Here, the 2003 AA plainly sets forth that a "beneficial owner or beneficial owners directly or indirectly own or control at

least 10% of the outstanding share capital or participation rights." An ambiguity will not be found merely because a party says so. The term must be susceptible to different reasonable meanings to constitute an ambiguity, which Lebedev has not proffered.

Thus, the court turns to whether defendants have, prima facie, demonstrated that Lebedev is a beneficial owner of Coral, a person or entity that directly or indirectly owns or controls at least 10% of the outstanding share capital or participation rights.

To demonstrate that Lebedev controlled Coral, defendants point to the Trust Agreement, which nominates Coral as the trust agent for TCL, a 100% Lebedev owned company. Defendants point to section 3(i) of the Trust Agreement, which states: "3. AGENT'S OBLIGATIONS[.] The Trust Agent undertakes and agrees with the Principal: (i) To accept the Promissory note and dispose of it exclusively in accordance with instructions of the Principal in accordance with instructions of the Principal[.]" (NYSCEF 677, Trust Agreement at 4.) Thus, according to defendants, the Trust Agreement required Coral to follow all of Lebedev's instructions with respect to the Note. Further, defendants contend that the Trust Agreement shows that Coral did not beneficially own the PN or any other trust assets, but rather held these assets in trust for its principal, Lebedev. It is undisputed that Lebedev personally received the $600 million. (NYCSEF 1168, Lebedev's response to defendants' Rule 19-a statement ¶ 40.)

Additionally, defendants rely on the records of Coral's Swiss bank—BNP—to demonstrate that Lebedev was the beneficial owner of Coral's assets (BNP Production). Defendants point to one document, Coral's "Application to Open an Account with Banque Paribas (Suisse) S.A.," wherein Lebedev declared that he was the "beneficial owner of the assets concerned" on page 2 of the application titled "Establishment of the

Beneficial Owner's Identity." (NYSCEF 1249, Application at 2.) Lastly, defendants contend that Deputy Judge of the High Court, Jonathan Hirst QC, found that Lebedev was intended to be treated as an Affiliate of Coral, reasoning that the second whereas clause "only makes sense against the known factual background that Mr Lebedev (and his companies) were the affiliates who made the transfers to an affiliate of Mr Vekselberg and Mr Blavatnik, which the Claimants contend were loans to an entity referred to in [whereas clause] 2 as Naftaco." (NYSCEF 712, Rochester judgment ¶ 44 [Sept. 2014].) Thus, defendants have established, prima facie, that Lebedev is Coral's beneficial owner. Here, defendants have established that Lebedev was the 100% owner of TCL (NYSCEF 662, Lebedev depo tr at 32:3-10), that Lebedev received the $600 million acquisition amount personally, and that Lebedev listed himself as the beneficial owner when applying to open a bank account with BNP.

In opposition, Lebedev proffers deposition testimony from former and current directors and auditors of Coral, who identified nonparty Martin Bartek as the owner of Coral and the individual from whom they took instructions from. For example, Lebedev looks to the deposition of nonparty Liam Grainger, a former Coral director. Grainger testified at his deposition that, regarding Coral, all instructions came from the office of Bartek, the only source of instructions given to him came from Bartek and his employees, that he never received any instructions from Lebedev, and that Bartek was the beneficial owner of the assets in Coral. (NYSCEF 1117, Grainger depo tr at 30:11-29.) Lebedev also contends that the BNP Production shows that Bartek held a broad power of attorney over Coral and that Bartek granted Lebedev his signatory ability. For

this, Lebedev relies on is the affidavit of Daniel Tunik, a Swiss attorney at law firm Lenz & Staehelin in Geneva.[8]

At best, Lebedev demonstrates that there were two beneficial owners of Coral—Lebedev and Bartek. For argument's sake, Lebedev and Bartek are both beneficial owners, and in turn, affiliates of Coral, and are both subject to the Release Provision. Lebedev has not, however, rebutted defendants' prima facie showing Lebedev is a beneficial owner of Coral. Thus, Lebedev has failed to raise a triable issue of fact warranting denial of defendants' summary judgment motion with respect to the Release Provision. The Release Provision bars Lebedev from bringing his remaining breach of contract claim.

The First Department additionally held that defendants' counterclaim for indemnification was properly dismissed because the 2003 Acquisition Agreement only bound the "Seller," i.e., Coral, to indemnify the "Buyer," i.e., Rochester, and "each of [Buyer's] Affiliates] . . . ." It reasoned that since

> "[t]he parties were aware of plaintiff's identity and relationship with Coral, yet specifically drafted this provision to apply only to seller and not to 'seller's affiliates,' a defined term that would have included plaintiff[,] [w]e find no reason to conclude that plaintiff can be substituted as seller and bear the obligation to indemnify, especially because indemnification provisions must be narrowly construed."

(*Lebedev v Blavatnik*, 193 AD3d 175, 187 [1st Dept 2021] [emphasis added].)

"'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court …

[8] It is unclear to the court what Tunik's role is in this litigation is. Further, Tunik does not attest that he has personal knowledge of the facts. (NYSCEF 1136.)

[and] operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law.'" (*Board of Managers of 25 Charles St. Condominium v Seligson*, 106 AD3d 130, 135-36 [1st Dept 2013] [citations omitted] [brackets in original].) In view of the above, and consistent with the First Department's holding as to the indemnification clause, under the Release Provision, the "Seller" is Coral and "its Affiliates" includes Lebedev. Replacing the defined terms with their definitions in the Release Provision, the Release Provision unambiguously applies to, and binds, Lebedev.

In Lebedev's supplemental opposition brief, he argues that the First Department's holding forecloses all agency arguments, and thus, Lebedev is not the Seller under the Release Provision. Lebedev's self-serving position ignores the remainder of what the First Department stated—that the term "seller's affiliates" would have included Lebedev. Lebedev's position further ignores the fact that the Release Provision is unlike the indemnification clause in the 2003 Acquisition Agreement. The indemnification clause obligates only the "Seller," whereas the Release Provision references both "Seller and its Affiliates." Thus, Lebedev's interpretation is unavailing. Additionally, Lebedev's arguments that defendants proffered contradictory arguments, that Lebedev is an "Affiliate" and also "Seller," is without merit.

MOTION SEQUENCE NUMBER 012

In light of the court's finding that the Release Provision bars Lebedev's breach of contract claim, motion sequence number 012 is denied as moot. However, if the Release Provision did not bar Lebedev's claims, this motion to strike would have been denied.

Defendants argue that because Lebedev seeks equitable relief in the form of an accounting, his demand for a jury trial should be stricken. Lebedev concedes that the amended complaint seeks an accounting but contends that he has the right to a jury trial because the essence of his claim is legal in nature as he seeks to recover monetary damages approximating $2 billion.

"[T]he deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial." (*Fakiris v Gusmar Enters., LLC*, 189 AD3d 1543, 1543 [2d Dept 2020] [internal quotation marks and citations omitted].) "However, where a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial." (*Id.* at 1544 [internal quotation marks and citations omitted].)

["T]he mere fact that the complaint demands a money judgment only is not dispositive but that it is the facts pleaded which are controlling in determining whether the relief was 'improperly confined to a money demand merely'." (*Murphy v American Home Products Corp.*, 136 AD2d 229, 232 [1st Dept 1988], *citing O'Brien v Fitzgerald*, 143 NY 377, 381 [1894].)

Therefore, the inclusion of an accounting in a breach of contract claim does not amount to waiver, or deprivation, of a jury trial where the "substance of the action" involves contract issues and "the accounting [is] merely incidental to the contract action." (*Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 317 [1st Dept 1991], *citing Azoulay v Cassin*, 103 AD2d 836 [2d Dept 1984].) Such is the case here. The focus of the amended complaint is clearly centered around the allegations of the

breach of the parties' 2001 IA and recovery of his allegedly owed 15% share, approximating $2 billion, following the sale of the business. (NYSCEF 12, amended compl. ¶¶ 3, 20, 116-117.) Moreover, it appears from the amended complaint that the accounting is being demanded as a result of alleged commingling of dividend payments from OGIP, as well as multiple entities, with similar corporate names, being involved. (NYSCEF 12, amended complaint ¶¶ 106-107.) Based on these allegations, the claim for an accounting is "merely a method to determine the amount of the monetary damages." (*Cadwalader*, 177 AD2d at 316; *Lex Tenants Corp v Gramercy North Associates*, 284 AD2d 278, 278 [1st Dept 2001].) Thus, the overall character and substance of the action is primarily legal and the court denies defendants' motion to strike the jury trial demand. (*Bressler v Kalow*, 13 AD3d 70 [1st Dept 2004].)

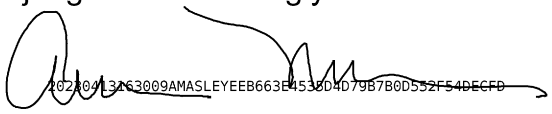
The court has considered defendants' arguments to the contrary and finds their myopic reading of the amended complaint unavailing.

Accordingly, it is

ORDERED that defendant's motion (009) for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that motion 012 is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



4/13/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

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