SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
- X
UNIQUE GOALS INTERNATIONAL, LTD.,
FAITH UNION INDUSTRIES, LTD., and
MANGAZEYA MINING LTD.,

Plaintiffs,

- against -

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

Defendants.
- X

DECISION AND ORDER
Index No.: 655692/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Defendants Maxim Finskiy, Kirkland Intertrade Group (Kirkland), DZM Gold Mining Ltd. (DZM), and Inger Industries (Inger) move to dismiss the complaint against them pursuant to CPLR 3013, 3016, and 3211(a)(3), (7) and (10).

BACKGROUND

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 plaintiff Mangazeya Mining Ltd. (Mangazeya or White Tiger). The following facts are taken from the complaint and assumed as true for purposes of this motion to dismiss.

Plaintiffs Unique Goals International, Ltd. (Unique Goals) and Faith Union Industries, Ltd. (Faith Union) are private investment companies whose controlling shareholder and beneficial owner is non-party Sergey Yanchukov, a Russian citizen and businessman. Defendant Finskiy, another Russian citizen and businessman, currently residing in Florida, is White Tiger's former owner. Defendants Kirkland, DZM and WTG Holdings S.A.R.L. (WTG Holdings) are foreign entities beneficially owned, directly and indirectly, by Finskiy (Complaint, ¶¶ 9-11). Defendant Inger Industries is a foreign entity beneficially owned, directly and indirectly, by Finskiy's close friend and business partner, Oleg Baibakov (*id.*, ¶ 12). Baibakov is not personally named in this action.

White Tiger, a British Virgin Islands company, owned gold mining properties in Russia, Canada and Peru (*id.*, ¶ 14). According to the complaint, sometime in 2009, Finskiy invested "tens of millions of dollars" in White Tiger and its subsidiary, Century Mining Corporation (Century) (*id.*, ¶ 19). By the end of 2010, Finskiy had taken control of both companies and, beginning in 2011, he arranged for a series of "substantial intra-company and third-party financing" (*id.*, ¶¶ 21-31). Among the financial transactions executed was a $33,000,000 Deutsche Bank Gold Forwarding Facility pursuant to which Century agreed to deliver 61,183 ounces of gold to Deutsche Bank over five years in exchange for a $33,000,000 loan, secured by virtually all of Century's mining assets (the Deutsche Bank Loan Agreement) (*id.*, ¶¶ 33-34). The Deutsche Bank Loan Agreement was amended twice over the course of 2011 as Century amended its estimates of resources available and its mines produced significantly less output than anticipated (*id.*, ¶¶ 35-39). Notwithstanding these amendments, Century defaulted on its obligations under the agreement in late 2011 and again in March of 2012 (*id.*, ¶¶ 39-40). In May of 2012, "White Tiger announced that Deutsche Bank would be taking control of Century's mines in Peru and Quebec" due to Century's continuous default and the mines were seized by a receiver on behalf of Deutsche Bank and shut down (*id.*, ¶¶ 43-44). Following this seizure, White Tiger was left with only one operational mine in Russia: the Savkino mine (*id.*, ¶ 45).

In 2011, Finskiy also arranged for White Tiger and/or its subsidiaries to make and receive several other loans from various entities, including those owned by his friends and business associates (*id.*, ¶¶ 21-31). The complaint alleges, "upon information and belief," that Finskiy, "[k]nowing that White Tiger was in financial distress, [] acting in concert with White Tiger's management and defendants Kirkland, DMZ, WTG Holdings, [and] Inger, ... orchestrated a new funding facility with VTB Capital PLC (VTB) by misrepresenting the future prospects of the company" (the VTB Facility) (*id.*, ¶ 46). Plaintiffs allege defendants never actually intended to use the VTB Facility to benefit White Tiger and, instead, misappropriated the VTB funding for their own purposes (*id.*). White Tiger obtained a commitment from VTB in July of 2011 to secure a senior structured loan for up to $150 million, available in three tranches, to fund its exploration, development, and production activities in Russia (*id.*, ¶¶ 47-48). However, pursuant to VTB's conditions on the loan, White Tiger had to obtain feasibility studies on its Savkino and

Nasedkino mines before receiving any funding (*id.*, ¶ 49).

Plaintiffs allege Finskiy was aware a feasibility study would be a problem because a November 2010 technical report issued by Micon indicated that, as of September 2010, the Savkino mine had 113 thousand ounces of proved and probable gold reserves, which was insufficient to secure the VTB loan (the Micon report) (*id.*, ¶ 50). Plaintiffs allege, again only "on information and belief," that "Finskiy knew that if Micon was commissioned to provide the updated feasibility study, White Tiger would lose the VTB funding" (*id.*, ¶ 50).

As a result, Finskiy, "acting in concert with the White Tiger Board of Directors," retained a different entity, J.S.C TOMS International (TOMS), a local Russian geological consulting company, to prepare an updated mineral resource and reserve study on the Savkino mine (*id.*, ¶ 51). Since White Tiger was a publicly reporting company trading on the Toronto stock exchange, the report was required to be prepared in accordance with Canadian National Instrument 43-101 Standards of Disclosure for Mineral Projects (*id.*, ¶ 51). TOMS, however, was not retained to prepare a so-called "43–101 report," and was, instead, given little more than three weeks to prepare its entire study, which plaintiffs claim was an insufficient amount of time to conduct an independent investigation of a mine's feasibility. As a result, TOMS was allegedly forced to rely on data provided by White Tiger and other third-party sources to reach its conclusions (*id.*, ¶ 52). The TOMS report dated December 13, 2011 (the TOMS Report), found that the amount of reserves was 380% higher than what was reported by Micon a year earlier and estimated the Savkino mine gold reserves as 438.9 thousand ounces (*id.*, ¶ 57). Plaintiffs claim the TOMS Report was falsely presented as a technical report based on a thorough investigation and independent analysis when, in fact, it was a "Preliminary Economic Assessment" (ESA) or "Scoping Study," which is generally much less accurate. Plaintiffs also contend that the report was misleading in its calculation of reserves because it failed to differentiate between oxide mineralization, which is economically feasible to extract or refine, and sulfide mineralization, which is not economically feasible to extract or refine (*id.*, ¶¶ 58-59).

Ultimately, White Tiger was able to enter into a $150 million loan facility with VTB on or about February 2, 2012 (*id.*, ¶ 64). This loan facility, as noted, was divided into three tranches: $40 million to fund exploration, $40 million for development, and $70 million for

production activities (*id.*, ¶ 64). However, the complaint alleges, defendants never intended to utilize the funds as required by the terms of that loan (*id.*, ¶ 68). Rather, as mentioned above, the money was utilized to prop up other entities and repay loans on behalf of other Finskiy affiliated companies, including loans that were not yet due and had lower interest rates (*id.*, ¶¶ 68-69). About $25 million of that money ended up being returned to defendant Kirkland (*id.*, ¶ 71). The second tranche of the Deutsche Bank loan was drawn down in October of 2012 and used to "make payments to sham corporations and pay improper bonuses to White Tiger executives" (*id.*, ¶ 72).

Simultaneously, in 2012, Finskiy started selling his White Tiger shares and Kirkland began turning its loan to White Tiger into equity, allowing it to divest (*id.*, ¶¶ 74-76, 79). Plaintiffs claim that Finskiy began to target Yanchukov to take White Tiger off of his hands (*id.*, ¶¶ 79-82). The two men had been friends since 2006, their families vacationed together, and in 2012 Yanchukov even became godfather to Finskiy's child (*id.*, ¶¶ 80-81). Although Yanchukov had a background in energy and the financial sector, he claims to have known little about the mining industry (*id.*, ¶ 82). The complaint alleges that by "[r]elying on the relationship of trust and confidence that he had cultivated, Finskiy convinced Yanchukov to invest in his companies, touting his experience and success in the mining industry" and relying on the fact that "Yanchukov, in making his investments, would defer to Finskiy's knowledge and expertise about the mining industry" (*id.*, ¶ 82).

Finskiy first encouraged Yanchukov to invest in Century in the Fall of 2010 (*id.*, ¶ 83). To that end, "[d]espite possessing insider information about Century's financial troubles," Finskiy represented to Yanchukov that the company was poised to become highly profitable (*id.*). "Relying on his friend's false statements" in September of 2010, "Yanchukov caused Faith Union to enter into the first of three subscription agreements to purchase shares of Century" for a total of Cdn $5 million (*id.*, ¶ 84). Between November of 2010 and November of 2011, Faith Union spent an additional $3.8 million on Century shares (*id.*, ¶ 85). In March of 2011, while the two men were on a joint vacation with their families, Finskiy again said that Century was a good investment, spoke highly of its then-operating position and encouraged Yanchukov to make further investment (*id.*, ¶ 86). Plaintiffs allege Finskiy knew these statements to be false and

misleading when he made them (*id.*). As a result, in April of 2011, Yanchukov caused Faith Union to purchase an addition 10.3 million shares of Century stock (*id.*, ¶ 87).

Thereafter, through a combination of rosy predictions about Century's prospects and pretextual "short term liquidity cris[e]s," Finskiy asked Yanchukov to provide additional financial support for Century and White Tiger, make them millions in loans, and buy more stock (*id.*, ¶¶ 90-107). Specifically, on July 25, 2011, the same day Deutsche Bank agreed to amend Century's gold delivery obligations in light of the low production at the Lamaque mine, Finskiy asked Yanchukov to provide Century with additional financial support due to the aforementioned "liquidity crisis," all the while assuring him that Century was "poised to expand its gold mining operations" (*id.*, ¶ 90). At the time he made these statements, Finskiy was aware of Micon's Lamaque report and had "knowledge that this influx of capital" would only delay but "not prevent an eventual default by Century under the Deutsche Bank facility" (*id.*). Despite multiple multi-million-dollar investments throughout 2011, in January 2012, Finskiy implored Yanchukov, as the beneficial owner of Faith Union and Unique Goals, to further support White Tiger by investing additional funds and organizing a large credit facility so the company could expand (*id.*, ¶ 98). To this end, by e-mail dated January 19, 2012, Finskiy sent Yanchukov several monthly reports of White Tiger's mining operations (*id.*). These reports "contained the artificially inflated TOMS Report numbers for the Savkino mine," and painted an overall "rosy picture of White Tiger's future," suggesting that "the TOMS Report findings with respect to Savkino could be grounds for increasing reserves numbers at another gold mine in Eastern Europe" (*id.*). Plaintiffs allege that "Finskiy knew this information was false and misleading" (*id.*).

Likewise, plaintiffs allege they were provided with various misleading materials regarding White Tiger's February 2012 Board Meeting. Specifically, the complaint alleges these materials contained "inflated reserve amounts for the Savkino mine" and indicated the mine "met all of its 2011 key targets for mining and processing," even though production was less than anticipated (*id.*, ¶ 99). Plaintiffs allege Finksiy also knew this information to be false (*id.*).

At a meeting between Finskiy and Yankchukov in New York in March of 2012, Finskiy again made a number of purportedly false statements and asked Yanchukov for a $1.2 million

short term loan (*id.*, ¶¶ 101-102). As a result, in reliance on Finskiy's" fraudulent statements" at this meeting, Faith Union signed a bridge loan to Kirkland for $1.2 million (*id.*, ¶ 103). However, the money was transferred to White Tiger's bank account, not Kirkland's (*id.*). Kirkland, however, repaid this loan from its own account in April 2012 (*id.*). Plaintiffs allege this repayment was part of Finksiy's scheme seeking "to perpetuate the fiction of White Tiger's financial soundness and viability" (*id.*, ¶ 103), which resulted in several more multimillion dollar loans and the extension of the maturity date on prior White Tiger loans (*id.*, ¶ 104). In May 2012, when the Faith Union and Unique Goals loans to White Tiger were about to mature, Finskiy again convinced Yanchukov to extend the time for repayment. To obtain this extension, Finskiy provided Yanchukov with the weekly report and summary of the Lamaque mine as of May 13, 2012 and a valuation of the Russian portion of White Tiger's holdings, which "indicated that from 2012 through 2014, White Tiger's level of gold extraction would increase" (*id.*, ¶ 105). Plaintiffs claim Finskiy knew at this time that the collapse of the mines was inevitable (*id.*).

In June of 2012, Yanchukov and Finskiy met in Moscow to discuss plaintiffs' investment in the company. Finskiy again assured him that plaintiffs' investments were "sound, and provided him with documentation indicating that the companies were able to repay the VTB loan and would provide plaintiffs with a return on their investments" (*id.*, ¶ 106). The following month, Unique Goals entered into a subscription agreement, purchasing over 25 million shares of White Tiger for $2,537,750 (*id.*, ¶ 107). Simultaneously, Unique Goals' loans to White Tiger were consolidated into a single loan of approximately $20.4 million and extended to January 31, 2015 (*id.*, ¶ 107). Plaintiffs maintain that they entered into these transactions based on the false information provided by Finskiy and White Tiger's management.

That same month, Yanchukov sent a representative to the Lamaque and Savkino mines as there had been a decrease in production. He discovered Lamaque was not operating and Savkino's scale was set to overestimate weights by about 20 percent, causing misrepresentations in reports about that mine (*id.*, ¶¶ 109-111). In August 2012, Yanchukov found out the contracts of several White Tiger executives had been renegotiated without his or his entities' knowledge or participation (*id.*, ¶ 112). However, when the White Tiger board met that September, Finskiy reiterated his prior false statements about White Tiger's prospects, including that it had sufficient

reserves and was only experiencing a temporary liquidity problem (*id.*, ¶ 113).

In January 2013, White Tiger announced it had not produced enough gold to satisfy the gold sales covenant of the VTB Facility (*id.*, ¶ 115). Nonetheless, Finskiy reassured Yanchukov that White Tiger had sufficient gold reserves, and the still-functioning mine would provide enough gold to fulfill the company's obligations and provide a return on investment (*id.*, ¶ 116). That same month, Unique Goals commissioned SRK Consulting (SRK) to prepare a report on the mines, including the open mine, Savkino (*id.*, ¶ 118). Based on the limited data provided by defendants, SRK reached "a preliminary conclusion that it was possible to turn the economic situation at White Tiger around" (*id.*). This conclusion, however, was based on the false and/or inflated data provided by defendants and the true state of the mines was, therefore, not revealed to plaintiffs by SRK's report (*id.*).

In March 2013, Yanchukov became a director of White Tiger (*id.*, ¶ 120). At the same time, Unique Goals put over $12 million in escrow for the potential purchase of White Tiger shares from Kirkland, DZM, WTG, and Inger (*id.*, ¶ 120). In April 2013, plaintiffs purchased defendants' share in White Tiger, Finskiy left his position on the White Tiger Board of Directors, and Yanchukov became the company's CEO (*id.*, ¶¶ 123-124).

After plaintiffs purchased defendants' interest in White Tiger, they commissioned a financial audit of the company as well as a new geological study from Micon (*id.*, ¶¶ 125-126). The audit revealed that $30 million was misappropriated from the company rather than being used for drilling work and that the company's management team had received "unreasonable and unwarranted bonuses" despite the dire economic situation facing White Tiger (*id.*, 126). Plaintiffs also discovered that White Tiger's interest in another mine, Kalarsvetmet, which it had purchased from DZM, was "worthless because Kalarsvetmet had little or no reserves" (*id.*, ¶ 127). In August of 2013, White Tiger, now known as Mangazeya, attempted to renegotiate the terms of the VTB Facility, but was unable to do so in a way that would allow it to become profitable and was forced buy out the VTB debt at market value (*i.e.*, for $59 million) (*id.*, ¶ 128). White Tiger also performed an inventory of the Savkino mine, which revealed that the ore on the site was only half of what the company had previously reported, and the mine itself would only produce for four more years, not enough to satisfy the VTB loan and not enough for

plaintiffs to make a profit (*id.*, ¶ 131). At this point, plaintiffs attempted to revise the terms of their purchase of defendants' interest in White Tiger, but defendants refused to negotiate (*id.*, ¶ 132). Mangazeya lacked the funds to repay the loans previously extended to it by Faith Union and Unique Goals (*id.*, ¶ 133). Faith Union and Unique Goals settled their debt by purchasing shares in Mangazeya at a premium to its then current stock price in order to enhance the company's liquidity and improve its prospects for raising additional capital (*id.*, ¶ 133). Yanchukov filed a criminal complaint with Russian law enforcement alleging large scale fraud. A criminal investigation was commenced pursuant to Russian law, and in March 2015, a Moscow court placed Finskiy under house arrest, placing an electronic tracking device on him (*id.*, ¶¶ 134-35). In April of 2015, however, Finskiy cut his electronic bracelet and fled Russia (*id.*, ¶ 136). He currently has an Interpol warrant out for his arrest (*id.*, ¶ 137). He appears to be residing in Florida (*id.*, ¶ 138). Defendants Finskiy, Kirkland, DZM and WTG Holdings filed an action against Mangazeya, Faith Union and Yanchukov in the Eastern Caribbean Court in the British Virgin Islands, "seeking a worldwide anti-suit injunction and termination of criminal charges in Russia" (*id.*, ¶ 139). Plaintiffs previously filed an action against defendants in the Southern District of New York. Both actions were discontinued without prejudice pursuant to a jurisdiction agreement entered into by the parties in order to more efficiently resolve their disputes.

In this complaint, plaintiffs now assert four causes of action for:

1. Fraud – by Unique Goals and Faith Union against all defendants, for various misrepresentations about the state of Century and White Tiger;

2. Conspiracy to Commit Fraud – by Unique Goals and Faith Union against all defendants.

3. Unjust Enrichment – by Mangazeya against Finskiy and Kirkland, for diverting White Tiger assets, including $25 million for the VTB Facility and tens of millions from White Tiger which Finskiy allegedly used to purchase assets in the U.S.; and

4. Breach of Fiduciary Duty – by Faith Union and Unique Goals against Finskiy for breaching his duties to shareholders by mismanaging White Tiger, diverting money, and giving board members bonuses.

DISCUSSION

Defendants move to dismiss the complaint against them on the following grounds: (1) group pleading; (2) lack of standing for Faith Union and Unique Goals; (3) failure to state a claim and lack of specificity; and (4) failure to add a necessary party, *i.e.*, Yanchukov. Defendants' arguments will be addressed in turn.

1. Group Pleading

Defendants argue that plaintiffs' allegations in the complaint improperly lump together the conduct of all of the defendants, thereby failing to provide defendants with sufficient notice of their purported wrongdoing (Memo, NYSCEF Doc. No. 13, at 9). CPLR 3013 requires that:

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

The complaint here sufficiently meets this standard. The entity defendants are all closely related to the individual defendant, Finskiy, and are alleged to have participated in the same wrongful acts. In grouping all of the defendants together, the complaint merely seeks to attribute Finskiy's actions to that of business entities held and/or controlled by him. This is not prohibited by CPLR 3013 (*see Stewart Title Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532, 533 [1st Dept 2011]). The 40-page complaint provides defendants ample "notice of the transactions and occurrence alleged to give rise to liability" on their part (*id.*).

2. Standing

Defendants argue plaintiffs Faith Union and Unique Goals, as shareholders of Mangazeya, lack standing to sue for economic injuries to Mangazeya (Memo at 11; Reply, NYSCEF Doc. No. 48, at 5). Defendants further argue that, to the extent Faith Union and Unique Goals bring claims for fraudulent misappropriation of funds from White Tiger, any such cause of action belongs to the company and not to its shareholders (*citing Lamberti v 30 Real Estate Corp.*, 8 AD3d 211, 212 [1st Dept 2004]). In opposition, plaintiffs maintain Faith Union and Unique Goals were each "victims of the defendants' fraud" and were "induced to loan and invest enormous sums of money in White Tiger and Century by virtue of the pattern of fraudulent conduct engaged in by the defendants" (Opp, NYSCEF Doc. No. 40, at 13-14).

Faith Union and Unique Goals have sufficient standing to bring the claims asserted for purposes of this motion to dismiss. The complaint is replete with allegations of loans and investments made by both entities to White Tiger and Century, and, therefore, plaintiffs have standing to assert fraud claims for themselves relating to those loans. "On a pre-answer motion to dismiss for lack of standing, the burden lies with the defendant to establish *prima facie* that plaintiff has no standing to sue" (*Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510 [1st Dept 2016] [citations omitted]). Here, defendants have failed to meet this burden.

3. Statute of Limitations

The parties dispute whether New York or Russian law applies to plaintiffs' claims. In their moving brief, defendants argue the claims are untimely under Russia's one-year statute of limitations (Memo at 12, 17). Plaintiffs counter with an affidavit from Paul B. Stephan, a law professor, who attests that under Russian law a three-year limitations period applies to plaintiffs' claims, which begins to run "at the time that the victim knew or should have known of the fraudulent nature of the conduct causing injury and the identity of the person legally responsible for that conduct" (Stephan aff., NTSCEF Doc. No. 41, ¶¶ 2[a], 2[b]). Professor Stephan concludes that, assuming "the allegations in the complaint regarding the timing of plaintiffs' discovery of the facts that would provide a basis for this claim are correct, this claim was timely filed as a matter of Russian law" (*id.*, ¶ 2[d]). On reply, defendants decline to engage "in a battle-of-the-experts," and simply argue that the fraud claim is untimely even under a three-year statute of limitation (Reply at 11). The Court will treat defendants' statement as a concession that a one year statute of limitations does not apply to plaintiffs' claims.

A jurisdiction agreement between Yanchukov and Finskiy dated March 15, 2016 (Jurisdiction Agreement, NYSCEF Doc. No. 49), pursuant to which all claims between the parties may be brought in New York courts, states that, "[t]his Agreement shall be governed by, and construed in accordance with the laws of the State of New York (without giving effect to principles of conflict of laws)" (Jurisdiction Agreement, § 10). Although the jurisdiction agreement does not directly address the issue, read as a whole, it appears to contemplate the application of New York law to the parties' claims (*see id.*, §§ 1, 6-8). This action would be timely under New York's six-year statute of limitations applicable to fraud claims. To the extent

the agreement is ambiguous, however, this action is still timely, under Russian law.

Based on the allegations in the complaint, plaintiffs discovered the alleged fraud after the delivery of the audit report, on or about June 25, 2013. Plaintiffs filed their federal action in the Southern District of New York on April 20, 2016, thus tolling the applicable limitations period, within three years of that discovery. Accordingly, the action is timely even under a three-year limitations period.

4. Failure to State a Claim/Particularity

It is well settled that on a CPLR 3211(a) (7) motion 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" (*EBC I 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]) and 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]). On these standards, a motion to dismiss must fail.

5. Fraud

The first cause of action for fraud is asserted by Faith Union and Unique Goals against all defendants. This claim is based upon misrepresentations by Finskiy upon which plaintiffs relied in making their investments. Essentially, plaintiffs contend Finskiy's various misrepresentations fraudulently induced them to purchase stock in White Tiger.

The elements of a claim for fraud are an intentional misrepresentation of material fact, falsity, scienter, justifiable reliance and damages (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract … and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]. In addition, claims of fraud must meet a heightened pleading

standards requiring that "the circumstances constituting the wrong" be "stated in detail" (CPLR 3016).

Critically, "[r]eliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud" (*VisionChina Media, Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 57 [1st Dept 2013] [internal quotation marks and citation omitted]). "Sophisticated investors," like plaintiffs, "must show they used due diligence and took affirmative steps to protect themselves from misrepresentations by employing what means of verification were available at the time" (*id.* [citation omitted]). Although the complaint here attempts to cast Yanchukov as a newcomer to the mining business who relied on his close, personal friend Finskiy to guide him, Yanchukov, plainly, is a sophisticated businessperson with access to plentiful resources to protect himself and his investments, to obtain the requisite inspections and perform the necessary due diligence. While he may have lacked experience in the mining industry, he clearly had the resources necessary to obtain expert advice or, indeed, do an investigation. Moreover, to the extent that plaintiffs argue they were forced to rely on Finskiy's representations about, *e.g.*, the amount of gold reserves because an independent study would have been time and cost prohibitive, they could have required warranties that these facts are true be included in their purchase documents (*see DDJ Mgt., LLC v Rhone Group LLC*, 15 NY3d 147, 154 [2010] [holding that in contract negotiations between sophisticated parties, justifiable reliance element sufficiently alleged where plaintiff "has gone to the trouble" of insisting written agreement includes warranties that certain facts are true]). Further, where a sophisticated plaintiff conducts no due diligence, he cannot demonstrate reasonable reliance as a matter of law (*MAFG Art Fund, LLC v Gagosian*, 123 AD3d 458, 459 [1st Dept 2014]). Such is the case here. Accordingly, the fraud claim is dismissed.

6. Conspiracy to Commit Fraud

To establish a claim for civil conspiracy under New York law, a "plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in furtherance of a plan or purpose; and (4) resulting damage or injury" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). 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 plaintiffs have failed to state a claim for fraud, as discussed above, plaintiffs fail to state a claim for conspiracy to commit fraud. Even if the claim for fraud survived, the conspiracy claim would still fail, as plaintiffs pled no facts showing an agreement to commit fraud existed and do not plead any overt acts by any defendant other than Finskiy. Accordingly, this claim is dismissed.

7. Unjust Enrichment

The unjust enrichment claim is asserted by Mangazeya against Finskiy and Kirkland. The parties agree there is no substantive difference between claims for unjust enrichment under New York and Russian law (Memo at 18, citing *Norex Petroleum Ltd v Blavatnik*, 48 Misc 3d 1226[A], *9 [Sup Ct, NY County 2015] [*affd* 151 AD3d 642 [1st Dept 2017]). To plead a claim for unjust enrichment, a plaintiff must allege that "the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011]), *affd* 19 NY3d 511 [2012], quoting *Mandarin Trading Ltd. v Wildenstein*, 6 NY3d 173, 182 [2011]). "Unjust enrichment is a quasi-contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, the absence of an actual agreement between the parties concerned" (*id.*, quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.,* 12 NY3d 132, 142 [2009]).

Defendants argue that Mangazeya fails to identify how Finksiy was unjustly enriched, particularly in light of the complaint's allegation that the $25 million was used to repay the mining company's loans to MFK (Complaint, ¶ 71). Defendants also contend the allegations in the complaint are not pled with the requisite particularity, in violation of CPLR 3016. As concerns the latter, CPLR 3016 does not impose a heightened pleading standard upon unjust enrichment claims. To the extent defendants rely on *Woods v 126 Riverside Dr. Corp.*, in which the court dismissed the unjust enrichment claim because plaintiffs did not identify "what benefit was conferred on defendants" nor provide "an equitable basis for the court to compel defendants to return it," that case is distinguishable (64 AD3d 422, 424 [1st Dept 2009]). Here, Mangazeya

alleges Finskiy and Kirkland improperly diverted $25 million from White Tiger for their own benefit when Finskiy caused White Tiger to use the VTB loan proceeds to pay off other loans rather than develop White Tiger's mines, as intended (Complaint, ¶¶ 68, 161). The next paragraph of the complaint, however, alleges Finksiy "used the proceeds of the first tranche of the VTB credit facility to repay the loans made by [other entities] … to protect his relationship with those key Russian financial institutions" (*id.*, ¶ 69). Thus, plaintiffs complain the "VTB loans were used improperly to repay third-party financial institutions" and only "$4.5 million of the original $40 million of Tranche A financing remained for capital investment in White Tiger's mining properties" (*id.*, ¶ 70). Although defendants' actions may not have been taken in the best interests of White Tiger's long term financial management, as currently alleged, they do not make out the necessary elements of unjust enrichment. Defendants caused certain of White Tiger's debts to be paid off, albeit prematurely. White Tiger received value for its money and Finskiy and Kirkland were not enriched at White Tiger's expense. This claim is dismissed.

8. Breach of Fiduciary Duty

The breach of fiduciary duty claim is alleged on behalf of Faith Union and Unique Goals against Finskiy. Plaintiffs argue that Finskiy, as an officer and director of Mangazeya, had a fiduciary duty to its shareholders and he breached that duty by mismanaging the company, diverting money from the company, and overpaying Mangazeya's management team (Complaint, ¶¶ 166-67). Defendants contend that, because Mangazeya is incorporated in the British Virgin Islands, BVI law applies to this claim (Memo at 20). Plaintiffs contend, however, that New York law applies, citing the Jurisdiction Agreement (Opp at 23). The difference is critical as "[u]nder British Virgin Islands law … a director … does not owe a fiduciary duty to shareholders (plaintiffs) unless there is a special factual relationship between them" (*Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 404 [1st Dept 2008] [citation omitted]).

Under New York choice of law rules, the internal affairs doctrine requires that claims concerning the relationship between a corporation, its directors and shareholders be governed by the substantive law of the state or country of incorporation (*New Greenwich Litigation Trustee, LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 21 [1st Dept 2016]). The internal affairs doctrine, however, only applies to choice of law determinations "concerning the relationships

inter se of the corporation, its directors, officers and shareholders" (*id.*, at 22 [internal quotation marks and citation omitted]). The internal affairs doctrine does not apply to defendants like Finskiy, who are not *current* officers, directors, and shareholders of the plaintiff corporation (*id.*; *Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 AD3d 422, 422 [1st Dept 2014]). Accordingly, BVI law does not apply to the fiduciary duty claims asserted against him.

Under New York law, to state a claim for breach of fiduciary duty, a "plaintiff must allege that the defendant owed him a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct" (*NRT New York, LLC v Morin*, 147 AD3d 589, 589 [1st Dept 2017]). A fiduciary relationship exists where one party is "under a duty to act or give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal quotations and citation omitted]). Similarly, it may be found "when confidence is reposed on one side and there is resulting superiority and influence on the other" (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). The inquiry is usually fact specific and generally requires a relationship that is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions (*EBC I, Inc.*, 5 NY3d at 19, citing *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158 [1993]).

Board members of a corporation owe a fiduciary responsibility to shareholders to treat all shareholders fairly and evenly (*Armentano v Paraco Gas Corp.*, 90 AD3d 683, 685 [2d Dept 2011] [citation omitted]). "Because the power to manage the affairs of a corporation is vested in the directors and majority shareholders, they are cast in a fiduciary role of guardians of corporate welfare (*Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 568 [1984] [internal quotation marks and citations omitted]). As a result of "this position of trust, they have an obligation to all shareholders to adhere to fiduciary standards of conduct and to exercise their responsibilities in good faith when undertaking any corporate action" (*id.*).

Plaintiffs' breach of fiduciary duty claim is based on allegations that Finskiy: (1) redirected White Tiger loan proceeds for the benefit of Kirkland, and (2) used inside information about White Tiger's business to facilitate the sale of White Tiger shares from his entities to plaintiff entities at an inflated price. The complaint alleges the loan proceeds were transferred in

March of 2012 (Complaint, ¶¶ 71-72). However, per the complaint, while plaintiffs made loans to White Tiger and purchased stock in Century, Faith Union did not purchase shares in White Tiger until October 2011 and Unique Goals did not purchase stock in White Tiger until July 2012 (*id.*, ¶¶ 93, 107). As such, Finskiy had a fiduciary duty only to Faith Union at the time the alleged transfers were made, as Unique Goals was not a shareholder at that time. As concerns the stock purchase basis for the fiduciary duty claim, as discussed above, those transactions were conducted at arms' length between sophisticated parties and cannot form the basis of a breach of fiduciary duty claim as alleged in the complaint. Accordingly, this cause of action survives only with respect to Faith Union's claim for misuse of White Tiger funds.

9. Failure to Join a Necessary Party

Defendants also argue that this action must be dismissed for failure to include Yanchukov as a party to this action. Yanchukov was personally involved in all the events at issue and was a party to the Russian and SDNY actions between the parties. Defendants claim he is a necessary party and that, as owner of all three plaintiff entities, he has an interest in this litigation.

CPLR 1001(a) provides that:

> "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Although Yanchukov, as principal of three plaintiffs and a participant in the underlying events, plainly has an interest in this litigation, there is no reason that complete relief cannot be provided to the parties without him. Nor is there any indication that he would be inequitably affected by a judgment in this matter. The fact that he will almost certainly be an important witness does not, without more, make him an indispensable party.

10. Leave to Replead

Plaintiffs seek leave to replead in the event the court dismisses any of the claims set forth in the complaint. Pursuant to CPLR 3025 (b), leave to amend "shall be freely given" absent prejudice of surprise resulting from the delay (*McCaskey, Davies and Assocs., Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Defendants articulate no opposition to an amended pleading. However, some of the dismissed claims cannot be received by artful

pleading. Leave shall be granted for plaintiffs to move to file an amended complaint.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint herein is granted in part and the complaint is dismissed in its entirety as against defendants Kirkland Intertrade Corporation, DZM Gold Mining Ltd., and Inger Industries, and dismissed with respect to the first through third causes of action only as against defendant Maxim Finskiy, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against defendants Finskiy and WTG Holdings S.A.R.L.; and it is further

ORDERED that plaintiffs shall have leave to move to amend the complaint within 30 days of service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants Finskiy's and WTG Holdings S.A.R.L.'s time to serve an answer to the complaint is stayed during the time that plaintiffs have to file their amended pleading, and, in the event that no amended pleading is filed, their time to file will expire twenty (20) days from the expiration of that time period; and it is further

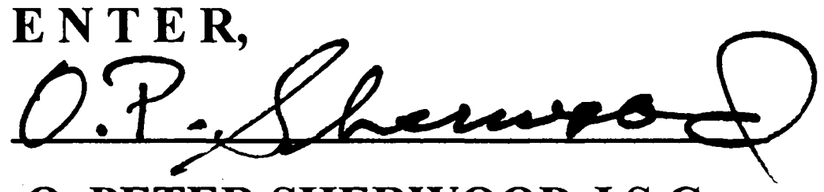
ORDERED that counsel for moving defendants shall serve a copy of this order with notice of entry upon plaintiffs' counsel and upon non-moving defendant WTG Holdings S.A.R.L.; and it is further

ORDERED that counsel shall appear at a preliminary conference at Part 49, Room 252, 60 Centre Street, New York, New York 10007 on Tuesday, December 4, 2018 at 9:30 AM.

This constitutes the decision and order of the court.

DATED: October 29, 2018

E N T E R,



O. PETER SHERWOOD J.S.C.