SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650841/2013
GEM HOLDCO, LLC
vs
CHANGING WORLD TECHNOLOGIES,
Sequence Number : 002
DISMISS ACTION

INDEX NO. ______
MOTION DATE 10/11/13
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 75-82
Answering Affidavits — Exhibits | No(s). 83-104
Replying Affidavits | No(s). 105-109

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 12/24/13

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE
☒ Cross-Motion Granted

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GEM HOLDCO, LLC,

Index No: 650841/2013

Plaintiff,

DECISION & ORDER

-against-

CHANGING WORLD TECHNOLOGIES, L.P,
CWT CANADA II LIMITED PARTNERSHIP,
RESOURCE RECOVERY CORPORATION, JEAN
NOELTING, RIDGELINE ENERGY SERVICES, INC.,
and DENNIS DANZIK,

Defendants.

---X

SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 002 & 003 are consolidated for disposition.

Defendants Changing World Technologies, L.P. (CWT), CWT Canada II Limited Partnership (CWT Canada), Resource Recovery Corporation (RRC), Jean Noelting, Ridgeline Energy Services, Inc. (Ridgeline), and Dennis Danzik move to dismiss the Amended Complaint (the AC) pursuant to CPLR 3211. Seq. 002. Plaintiff GEM Holdco, LLC (GEM) cross-moves for leave to file a second amended complaint pursuant to CPLR 3025(b). After the dismissal motion was argued, GEM changed counsel and immediately moved for leave to file a sur-reply. Seq. 003. Defendants opposed and cross-moved to strike GEM's proposed brief. For the reasons that follow, defendants' motion to dismiss is granted in part and denied in part, plaintiff's cross-motion to amend is granted, and all post-argument submissions are stricken from the record.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC.

CWT is a Delaware limited partnership. AC ¶ 2. Its subsidiaries manufacture and sell renewable diesel fuel oil. *Id.* In 2010, GEM's parent company provided financing to CWT's predecessor in a Chapter 11 proceeding. ¶ 2. In late 2012, CWT came out of that bankruptcy proceeding in dire financial shape. ¶ 15. CWT's investors, CWT Canada and Noelting, declined to provide further financing to CWT. ¶¶ 14-15.

In November 2012, GEM offered to loan $4 million to CWT in exchange for an 80% equity interest in CWT. ¶ 16. In December 2012, CWT agreed to accept a $4 million loan from GEM, but only for a 60% equity stake. ¶ 17. The final terms of the loan were memorialized on December 5, 2012, in a Term Sheet which provided that GEM would invest a minimum of $2.5 million and a maximum of $4 million into CWT's subsidiaries in exchange for a note carrying 12% annual interest and up to a 60% ownership stake in CWT with "commensurate management control." ¶ 18. Before the contracts were finalized, however, GEM made a bridge loan of $250,000 to CWT so it could meet payroll. ¶ 19. Also, before the closing, GEM introduced Ridgeline to manage CWT. ¶ 21. Ridgeline was thought to be "an excellent synergistic fit" for CWT. That is, GEM though Ridgeline would help turn CWT around so GEM could see its investment pay off. *Id.* The plan was that once Ridgeline improved CWT, Ridgeline would purchase the 60% stake in CWT which GEM intended to acquire. ¶ 22.

In fact, Ridgeline, and its principal, Danzik, had actually contemplated purchasing a stake in CWT back in November 2012. ¶ 46. On November 19, 2012, Danzik and GEM's affiliate, GEM Ventures, Ltd. (GEM Ventures), executed a Non-Disclosure and Non-Circumvention Agreement (the NDA), which prohibits Danzik and his affiliates from investing

in CWT with anyone other than GEM. ¶ 47. Moreover, Danzik pledged his 2,945,436 shares of Ridgeline stock to secure CWT's obligations under the Note, discussed below. ¶ 48.

One day before closing, on December 20, 2012, defendants formed RES Management Inc. (RESM) for the purpose of becoming CWT's general partner. ¶ 24. The deal closed the next day, on December 21, 2012, when GEM and CWT entered into a Securities Purchase Agreement (the SPA). The SPA defines the term "General Partner" as "[RESM], a Delaware corporation in which a majority of the board of directors consists of designees of [GEM] and/or assignees of [GEM]." Section 3.2(a) of the SPA provides:

> [GEM] hereby agrees to subscribe for a minimum Subscription Amount [defined to mean GEM's investment of up to $4 million] of [$2.5 million] (the "Minimum Subscription Amount") and a maximum Subscription Amount of [$4 million] (the "Maximum Subscription Amount") [between December 21, 2012] and April 30 2013. Until the Minimum Subscription Amount has been achieved, [GEM] shall promptly make payment of all Subscription Amounts it is requested to make by [CWT] (each a "Subscription Request") subject to customary force majeure limitations or [GEM's] reasonable determination that [CWT] has no reasonable prospects of achieving net revenues and positive cash flow. To the extent [GEM] declines to meet a Subscription Request, subsequent to the achievement of the Minimum Subscription Amount, [GEM] agrees that [CWT] may seek investment from alternative sources, following written notice to [GEM] thereof and all limited partners of [CWT] will be allowed to participate in any such investment in proportion to their holdings in [CWT]. At its discretion, [GEM] may make payment of Subscription Amounts to [CWT] which have not been requested by [CWT] via a Subscription Request or otherwise.

AC ¶ 26. (parenthesis, quotes, and emphasis in original; brackets added). By the end of December 2012, control of CWT shifted from Noelting and his management team to Danzik, who was named CEO pursuant to Section 2.3(b)(v) of the SPA. ¶ 27. Danzik and Ridgeline were given complete control of CWT and its bank accounts. ¶ 28.

In conjunction with the SPA's execution, GEM, CWT Canada, and RRC entered into a Stockholders Agreement, which memorialized their rights with respect to RESM's role as CWT's general partner. ¶ 29. Section 1.1 of the Stockholders Agreement provides that GEM shall elect three of RESM's five directors. ¶ 30. Section 1.3 provides that, if after April 30, 2013 (the deadline for GEM to make its full $4 million investment), GEM holds less than 60% equity in CWT (because it invested less than $4 million), the parties' representation on the board shall be adjusted to reflect their actual equity in CWT. Section 1.4 then sets forth the procedure for removing board members:

> No stockholder shall vote to remove any member of the Board ... other than, (i) for cause, (ii) upon the affirmative vote of [holders of at least 80% of the shares] or (iii) upon the request of the partner entitled to designate such member of the Board.

GEM, CWT Canada, and RRC also entered into a Waiver Agreement to allow GEM to transfer its equity in CWT to Ridgeline without shareholder approval. ¶ 31. CWT's Limited Partnership Agreement was also amended (the ALPA) to make RESM the general partner with the authority to manage the company. ¶ 32. The ALPA defines "General Partner" as "[RESM] or such other Person appointed in accordance with Article IV, Section 1." Article IV, Section 1 states:

> The General Partner shall serve as the General Partner until the earlier of its resignation and designation of a successor General Partner designated by [1] vote or written consent of the Majority of the Partners [defined as more than 80% of the equity holders] or [2] [when the partnership is cancelled] ... The initial General Partner shall be [RESM]. The General Partner shall be selected and may be removed and replaced by the vote or written consent of the Majority of the Partners.

AC ¶ 56. Once all of the aforementioned agreements were executed, on December 21, 2012, GEM invested a further $213,945.48, which, along with its prior $250,000 bridge loan, brought its total investment to $463,945.48. ¶ 33.

According to the AC, it only took approximately 1.5 months (mid December 2012 to the end of January 2013) for GEM's management team "to turn CWT's dire financial situation around." ¶ 34. The AC paints the following picture:

> Under GEM's management, by the end of January 2013, CWT became cash flow positive and the value of the company drastically increased. Whereas in late December 2012 CWT essentially sold 60% of its limited partnership interest to GEM for $4 Million, by February, GEM, through its efforts and the new management it introduced to CWT, had at least quadrupled CWT's worth.

¶ 35.

The AC states that "[b]y January 14, 2013, in response to GEM's request for a cash flow projection statement from CWT, Danzik reported to GEM that CWT's cash exceeded $1 Million and stated that CWT foresaw a strong upcoming sales week." ¶ 36. "By January 29, 2013, Danzik reported to GEM that a full audit of CWT was completed, payroll and insurance costs were reduced by over $70,000 per week, raw material costs were reduced by 50%, the value of Renewable Identification Numbers ("RINS") was increased by 45%, losses greater than $300,000 per month were stopped, and a vendor payback plan that stretched debt on the books for up to eight more months was developed." ¶ 37. Based on this described progress, GEM determined that CWT did not need further investment beyond the $463,945.48 that GEM had invested so far. ¶ 38. Up to that point, GEM had not received any Subscription Requests. *Id.*

On January 29, 2013, GEM wrote an email to Danzik stating, "GEM has a $4m

commitment to CWT/RES, which we stand by. So far, we have not received any request from you for additional capital, but are prepared to fund its capital needs as you request in your role as Manager." ¶ 39. Danzik sent the following response:

> Your statement is fair, and correct. I am detailing today. However, since you are gaining equity for your share of CWT/RES in the RTO with RGP, your funding should be just based on a lump $ 4MM as agreed contractually. I will however, detail what I think cash should be spent on. CWT/RES is at a point where very little CapEx is needed. The need is only for raw material (nice position to be in!).

¶ 40. In other words, although CWT did not make any Subscription Requests to GEM before January 29, 2013, Danzik reminded GEM that, to ultimately obtain its full 60% equity, GEM still had to invest the balance of the $4 million ($3,536,054.52) by April 30, 2013.

In early February 2013, Danzik made a Subscription Request to GEM for $300,000. ¶ 41. GEM requested and received certain financial information from CWT, after which GEM paid $340,000 to CWT, bringing its aggregate investment to $763,945.48. *Id.* On March 4, 2013, GEM allegedly fulfilled another Subscription Request by investing $206,185.56.[1] ¶¶ 43-44. Thus, as of March 4, 2013, GEM had invested approximately $1 million (including the $206,185.56 that it never sent to CWT). ¶ 44. This corresponds to a pro-rated equity interest of 15.32% (which still left over 80% owned by the other investors, which is sufficient to remove board members under Section 1.4 of the Stockholders Agreement and Article IV, Section 1 of the ALPA). *Id.*

[1] The documentary evidence shows that GEM never sent this money to CWT. Instead, it sent the money to its own attorney's escrow account, but did not forward the money to CWT. While all payments from GEM to CWT were made via this escrow account, the other payments were sent to CWT. For some reason, GEM did not forward this payment to CWT. The reason is not clear, as the breakdown in the parties' relationship, discussed below, does not appear to have occurred until after March 4, 2013.

Meantime, on February 27, 2013, GEM's affiliate companies (Global Merging Market Group and GEM Global Yield Fund Limited) entered into a Letter of Intent (the LOI) with Ridgeline, under which it was contemplated that GEM would sell its equity in CWT to Ridgeline "in exchange for $15 Million payable in Ridgeline's stock issued at a certain discount which had a value far in excess of $15 Million." ¶ 50. GEM's affiliates subsequently assigned their rights under the LOI to GEM. ¶ 51. The LOI provides for a breakup fee of $950,000 "in the event such party refuses to honor the terms agreed to herein." ¶ 52.

According to GEM, once CWT's other investors found out that GEM would be selling its equity in CWT for an amount far exceeding its contemplated $4 million investment, they conspired to cut GEM out by preventing it from making the rest of its investment so they could reap the higher sale price from Ridgeline. ¶¶ 53-54. In other words, they wanted to sell their equity to Ridgeline for $15 million instead of to GEM for $4 million. *Id.*

On March 6, 2013, RRC and CWT Canada executed a Written Consent "purporting to remove [RESM] as the General Partner of CWT and replacing it with an entity they control, [non-party] CWT Enterprises (Canada) Inc. [CWT II]." ¶ 55. On March 7, 2013, CWT sought to raise $1 million in capital. ¶ 59. Pursuant to the operative agreements, GEM exercised its right to participate, invested in proportion with its 15.32% equity, such that its equity was not diluted by the offering. ¶¶ 60-62. GEM maintains, however, that this offering contravened the SPA because it had not yet invested $2.5 million. *Id.*

On March 11, 2013, Ridgeline, CWT Canada, RRC, and CWT II entered into a Unit Purchase Agreement (the UPI). ¶ 66. The UPI presumes that the SPA was repudiated because it

provides for the sale of CWT to Ridgeline and states in Section 3.3 that "[t]here are no Contracts relating to the issuance, sale or transfer of any equity … of [CWT]." ¶¶ 68-69.

That same day, GEM commenced this action. Its original complaint alleged breach of the discussed contracts and fraud. GEM also moved by order to show cause for a preliminary injunction to void the March transactions and to reinstate GEM as General Partner. After a hearing was held on March 13, 2013, the court denied the injunction motion. *See* Dkt. 55 (transcript). On March 18, 2013, the UPI was amended to remove GEM as a direct party. Ridgeline completed its purchase of CWT on April 15, 2013. ¶ 71. GEM did not make any further investments in CWT. Ergo, as of the April 30, 2013 deadline, GEM invested less than the $2.5 million Minimum Subscription Amount.

GEM filed the AC on April 29, 2013. The AC lists 10 causes of action: (1) breach of the SPA against CWT; (2) breach of the ALPA against CWT Canada, RRC, and Noelting; (3) breach of the implied covenant of good faith and fair dealing in the ALPA against CWT Canada, RRC, and Noelting; (4) breach of the implied covenant of good faith and fair dealing in the Stockholders Agreement against CWT Canada, RRC, and Noelting; (5) tortious interference with business relations against CWT, CWT Canada, RRC, and Noelting; (6) tortious interference with contract (the SPA) against all defendants except CWT; (7) breach of the NDA against Danzik and Ridgeline; (8) tortious interference with contract (the NDA) against CWT, CWT Canada, RRC, and Noelting; (9) conspiracy to commit torts against all defendants; and (10) breach of the LOI against Ridgeline.

Defendants filed the instant motion to dismiss the AC on June 10, 2013.[2] On July 12, 2013, GEM cross-moved to file a second amended complaint to add GEM Ventures as a plaintiff for the NDA claim. Oral arguments were held on October 8, 2013, after which the court reserved judgment on the motions. On October 31, 2013, GEM substituted in new counsel. On November 5, 2013, GEM moved for leave to file a sur-reply. Defendants then cross-moved to oppose and to strike GEM's proposed sur-reply from the record.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary

[2] On June 27, 2013, defendants amended their motion papers to comply with this court's page limit requirements. The court has only considered defendants' amended moving papers.

evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Breach of Contract Claims

GEM alleges breaches of the SPA, the ALPA, the NDA, and the LOI, none of which are governed by New York law.

1. The SPA

The SPA is governed by Delaware law. GEM alleges that CWT breached the SPA by preventing GEM from making its full $4 million investment so that it could not acquire a 60% equity stake in CWT. To be sure, GEM had no obligation to invest the full $4 million. But, GEM was obligated to make a minimum investment of $2.5 million by April 30, 2013. It is undisputed that, at most, GEM invested approximately $1 million. Therefore, CWT argues, GEM cannot sue CWT for breach of the SPA because GEM committed a material breach. *See Frunzi v Paoli Servs., Inc.*, 2012 WL 2691164, at *7 (Del Ch 2012) ("in order to recover damages for a breach of contract, the plaintiff must demonstrate substantial compliance with all of the provisions of the contract. If the plaintiff commits a material breach, plaintiff cannot complain if the non-breaching party subsequently refuses to perform").

GEM claims that its performance was excused due to CWT's repudiation of the SPA. "A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions. Repudiation may be accomplished through words or conduct. A party may repudiate an obligation through statements when its language, reasonably interpreted, indicates that it will not or cannot perform; alternatively, a party may repudiate through a voluntary and affirmative act

rendering performance apparently or actually impossible. In any event, repudiation must be 'positive and unconditional.'" *W. Willow-Bay Court, LLC v Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *5 (Del Ch 2009) (citations and quotation marks omitted). "A party confronted with repudiation may respond by (i) electing to treat the contract as terminated by breach, (ii) by lobbying the repudiating party to perform, or (iii) by ignoring the repudiation." *Id.*

Here, there is no question that CWT repudiated the SPA. CWT cut out the middleman (GEM) by contracting directly with Ridgeline to sell the very equity designated for GEM. This is undisputed. The issue, however, is whether CWT was entitled to do so. CWT claims that it was entitled to repudiate the SPA due to GEM's own breach -- failure to meet Subscription Requests. In other words, each side claims its breach was excused by the other breaching first. The court must determine whose actions were contractually justified.

First, the court disregards the dispute over Danzik's authority to make Subscription Requests and whether such requests were made in the proper form. Clearly Danzik, who GEM itself selected to manage CWT, had this authority. Moreover, GEM's admissions in the original complaint and the AC that Danzik's emails were Subscription Requests precludes GEM from later claiming that the form of the request excuses GEM's breach. In any event, GEM never objected to the form of the requests when they were made.

Nonetheless, the briefs and the documentary evidence are not entirely clear about exactly what requests were made and how much GEM actually paid. To be sure, it certainly appears that GEM failed to cause funds related to a least one Subscription Request (the March 4, 2013 request) to be transferred to CWT. The circumstances of GEM failing to release the funds from

its attorney's escrow account and GEM's former counsel's inexcusable lack of candor about this issue (which, as this court noted on the record, borders on perjury) strongly suggests that GEM breached the SPA by failing to promptly remit payment. Moreover, GEM has not proffered an excuse for failing to do so, since, regardless of CWT's week-to-week cash flow, CWT clearly needed more operating funds to meet expenses. Profitability does not magically solve all liquidity problems. The need for such liquidity was the very reason for GEM's obligation to meet CWT's Subscription Requests.

That being said, the timeline of the events is somewhat troubling. Even if CWT did not get its cash on March 4, by March 6,[3] rather than seeking to resolve this issue (which apparently could have been dealt with had the parties better communicated, since some of the requested funds were in escrow and could have been released), CWT's other investors immediately pounced on the opportunity to sell to Ridgeline for more money. These events occurred almost two months before GEM's deadline to complete its investment. Even if CWT needed to raise capital from another source and issue some of GEM's equity to that investor, cutting GEM entirely out in the expedited manner that occurred is suspect.

This is not to say that CWT did not have an immediate need for capital and the sale to Ridgeline was not in the best interest of the company. It appears that defendants' actions were more of a savvy (albeit ethically questionable) response to GEM's breach rather than an obvious

[3] Not that it is legally relevant, but RESM did not need to be removed as General Partner to sell to Ridgeline instead of GEM, since Danzik, who was running CWT though RESM, could have continued to operate CWT via RESM while buying CWT though Ridgeline. RESM's removal did not resolve CWT's funding problem. Getting funds from Ridgeline did. The immediate removal of RESM speaks more to CWT's intention of getting rid of GEM rather than merely dealing with a short term funding problem.

violation of the SPA. The question is whether defendants' actions were a good faith response to GEM's failure to timely provide capital or an improper attempt to cut out GEM.

Consequently, the court cannot dismiss this claim on the ground of repudiation since there are questions about whether the immediate repudiation of the SPA was justified under the circumstances. There simply needs to be more factual clarity about the exact timing and payment (or lack thereof) of the Subscription Request before the court can dismiss the case. Although, it should be noted that even if there was a technical breach of the SPA, cutting out one's business partner to profit off an investor that very partner brought to you may very well be a breach of the duty of good faith and fair dealing under these facts.

In light of these issues, GEM's failure to invest the full \$4 million (or even \$2.5 million) by April 30, 2013 is not dispositive. CWT repudiated the SPA before such investment was due, obviating the need for further performance by GEM. The relevant inquiry is whether CWT's repudiation was justified by GEM's failure to meet its Subscription Requests. If the repudiation was justified, GEM has no claim; if it was not, GEM may seek specific performance – which would entail GEM making the balance of its \$4 million investment to CWT and receiving the purchase price of approximately \$15 million from Ridgeline. Specific performance is warranted since, under the NDA, Ridgeline was not allowed to invest in CWT except by transacting with GEM. Thus, if GEM prevails, the court will put the parties in the position they originally bargained for – that is, Ridgeline paying GEM for its equity in CWT.

2. The ALPA

The ALPA also is governed by Delaware law. GEM contends that CWT Canada, RRC, and Noelting breached the ALPA by improperly removing RESM as General Partner. Noelting

signed the ALPA on behalf of CWT II, the general partner of CWT Canada. Though a general partner of a contract's signatory can be held liable (*see Sandvik AB v Advent Int'l Corp.*, 83 FSupp2d 442, 448 (D Del 1999)), Noelting is not a general partner of CWT Canada or CWT II. He is merely an employee. Noelting, therefore, cannot be sued for breaching the ALPA.

In any event, the ALPA was not breached. Regardless if the SPA was breached, the removal of RESM as General Partner was permitted under the ALPA. Under Article IV, Section 1 of the ALPA, 80% of CWT's equity holders could remove CWT's General Partner. There is no dispute that RESM was removed by over 80% of the equity holders since GEM owned less than 20% of the equity at the time of RESM's removal in March 2013. GEM's only argument is that the removal procedure does not apply to RESM since, as the first General Partner designated by GEM, the parties did not intend to allow for RESM's removal. GEM maintains that RESM was supposed to be in control of CWT during GEM's investment period. This understanding, according to GEM, is reflected in the first half of Article IV, Section 1 of the ALPA, which only allows for the removal of the General Partner upon its resignation or the cancellation of CWT, neither of which occurred. However, as defendants aver, the last sentence Article IV, Section 1 (and Section 1.4 of the Stockholders Agreement) also allows for the removal of the General Partner upon the consent of 80% of the equity holders, which is what happened.

GEM's response is unconvincing. GEM argues that the first use of the defined term "General Partner" should read be to mean the "initial General Partner", RESM. However, if the parties wished to preclude the removal of RESM by majority vote, the first reference to the General Partner instead could have read "the initial General Partner" or "RESM". In fact, later in that same paragraph, it says that "The initial General Partner shall be [RESM]." The very next

sentence states that such a General Partner can be removed by majority vote. It is clear that the parties understood how to differentiate between RESM and subsequent General Partners. If they wished to limit the removal of RESM in some special way, they would have done so explicitly. They did not. The lack of an ambiguity in the removal provision precludes the court from considering GEM's extrinsic evidence about the parties' intent. *See Cooper Tire & Rubber Co. v Apollo (Mauritius) Holdings Pvt. Ltd.*, 2013 WL 5787958, at *4 (Del Ch 2013). Hence, as the removal of RESM complied with the express terms of the ALPA, GEM cannot maintain that such removal was a breach of the duty of good faith and fair dealing. *See Fitzgerald v Cantor*, 1998 WL 842316, at *1 (Del Ch 1998) ("The express terms of a contract and not an implied covenant of good faith and fair dealing, however, will govern the parties' relations when the terms expressly address the dispute").[4]

3. *The NDA*

The NDA also is governed by Delaware law. GEM contends that Danzik and Ridgeline breached the NDA. However, GEM is not a party to the NDA; GEM Ventures is the contracting party. GEM argues, nonetheless, that it can enforce the NDA as a third-party beneficiary. The court declines to address GEM's third-party beneficiary standing since GEM is granted leave to amend to add GEM Ventures as a plaintiff to assert this claim. As GEM Ventures is the real party in interest, the court will not reach the merits of this claim in its absence. That being said, it should be noted that GEM Ventures and Danzik (not Ridgeline) are the only contracting

[4] Likewise, the court also dismisses GEM's good faith claim under the Stockholders Agreement (GEM does not allege an express breach of this contract). As discussed above, the Stockholders Agreement, like the ALPA, expressly permits the removal of the General Partner with the consent of 80% of the equity holders. Thus, GEM cannot maintain a good faith claim for such conduct. Also, as with the ALPA, Noelting cannot be sued since he is neither a contracting party nor a general partner of a contracting party.

parties. As a result, though the court declines to dismiss the NDA claim in the absence of GEM Ventures, it is unlikely that this claim can be maintained against Ridgeline.[5]

4. The LOI

The LOI is governed by Canadian law. Ridgeline argues that GEM cannot sue for the LOI's breakup fee because: (1) under Canadian law, contracts for personal services cannot be assigned; and (2) GEM's breach of the SPA was the reason its sale to Ridgeline did not occur, not Ridgeline's own refusal to transact with GEM. Both arguments are unconvincing.

First, the transaction contemplated by the LOI was merely the sale of stock owned by GEM. Ergo, it was not a personal services contract. Ridgeline's services to GEM are governed by other contracts. Second, the question of whether GEM breached the SPA survives this dismissal motion. As such, dismissal of GEM's LOI claim cannot be granted based on GEM's alleged breach of the SPA. Indeed, if GEM did not breach the SPA, Ridgeline's participation in cutting out GEM would be a violation of the LOI. If this is the case, Danzik would have effectuated breaches on behalf of both CWT and Ridgeline.

B. Tortious Interference With Contract

GEM alleges tortious interference with the SPA and the NDA. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996).[6]

[5] GEM's argument that Ridgeline is liable because Danzik was its agent is uncompelling. If the parties wanted to bind Ridgeline, they would have expressly done so.

[6] All parties argue only New York law on the tort claims.

Defendants argue that this claim fails because: (1) they did not breach the SPA and the NDA; and (2) the economic justification defense precludes the claim. As mentioned earlier, the first argument is insufficient to warrant dismissal because the court is not dismissing GEM's claims for breach of the SPA and the NDA.

As for defendants' second argument, when a defendant has an economic interest in the contract with which he allegedly interfered, it is not liable "absent allegations of malice or fraudulent or illegal means." *Hirsch v Food Resources, Inc.*, 24 AD3d 293, 297 (1st Dept 2005). In other words, "[a] defendant may assert ... 'that it acted to protect its own legal or financial stake in the breaching party's business.'" *Savage v Galaxy Media & Marketing Corp.*, 2012 WL 2681423, at *8 (SDNY 2012), quoting *White Plains Coat & Apron Co., v Cintas Corp.*, 8 NY3d 422, 426 (2007).

Here, however, there are allegations of malice and contract breach. GEM's fundamental allegation is that GEM's business partners – including its handpicked managers (Danzik and Ridgeline) and the other investors in CWT – conspired to cheat GEM out of its investment by having CWT's investors sell directly to Ridgeline. Obviously, if the subject contracts were not breached, this claim will fail. But, for now, these claims survive.

It should be noted that these tortious interference with contract claims can be maintained against the individual defendants (Danzik and Noelting). The rule barring claims against corporate officers does not apply where, as here, these individuals allegedly "personally benefitted from these actions and that such was their motivating intent" because they stood to benefit financially from their actions. *See Petkanas v Kooyman*, 303 AD2d 303, 305 (1st Dept

2003). The AC indicates that Danzik and Noelting had personal stakes (aside from their jobs) in their respective companies and stood to benefit from their alleged scheme.[7]

C. Tortious Interference With Business Relations

"To prevail on a claim for tortious interference with business relations in New York, a party must prove: (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009). Here, the only business relations that were interfered with are the subject contracts. The claim is duplicative of the tortious interference with contract claims. This claim is dismissed.

D. Conspiracy To Commit Torts

This claim is dismissed because "New York does not recognize civil conspiracy to commit a tort as an independent cause of action." *Steier v Schreiber*, 25 AD3d 519, 522 (1st Dept 2006). Accordingly, it is

ORDERED that the motion by defendants Changing World Technologies, L.P., CWT Canada II Limited Partnership, Resource Recovery Corporation, Jean Noelting, Ridgeline Energy Services, Inc., and Dennis Danzik to dismiss the Amended Complaint is granted in part as follows: the second (breach of the ALPA), third (good faith breach of the ALPA), fourth (good faith breach of the Stockholders Agreement), fifth (tortious interference with business relations), and ninth (conspiracy to commit torts) causes of action are dismissed; and it is further

[7] If this is not the case, discovery can refute this contention.

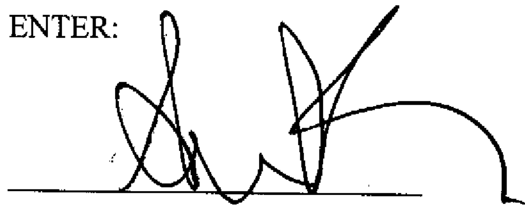
ORDERED that the cross-motion by plaintiff GEM Holdco, LLC to amend is granted, and within 14 days of the entry of this order on the NYSCEF system, said plaintiff shall file a second amended complaint, adding a new plaintiff, GEM Ventures, Ltd., to assert a claim under the NDA (the seventh cause of action); and it is further

ORDERED that plaintiff's motion to file a sur-reply is denied, and defendants' cross-motion is granted such that all briefing under Motion Sequence 003 (Dkt. 113-14 & 116-19) are stricken from the record; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on January 21, 2014 at 10:30 in the forenoon.

Dated: December 24, 2013

ENTER:



J.S.C.