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

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GMX TECHNOLOGIES, LLC, f/k/a KGS AGRO GROUP, LLC,

Plaintiff,

-against-

PEGASUS CAPITAL ADVISORS, L.P., a foreign entity, and THE LEIBER GROUP, INC., a foreign corporation,

Defendants.

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Index No. 654056/2019

Justice A. Masley

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT

DAVIDOFF HUTCHER & CITRON LLP
Attorneys for Defendants
605 Third Avenue
34th Floor
New York, New York 10158
(212) 557-7200

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Defendants Pegasus Capital Advisors, L.P. and The Leiber Group, Inc., by their undersigned attorneys, Davidoff Hutcher & Citron LLP, respectfully submit this Memorandum of Law in support of their motion, pursuant to CPLR 3211(a)(7) to dismiss the Verified Complaint for failure to state a claim.

This Complaint, in its best light, should be recognized as nothing more than a misguided litigation ploy intended to delay the inevitable entry of an $8 million judgment against the Plaintiff and its controlling shareholder. As demonstrated below, each and every cause of action asserted herein lacks merit, and there is nothing that should preclude this Court from dismissing the Complaint.

PRELIMINARY STATEMENT

In 2016, Defendant The Leiber Group ("Leiber")[1] took a sizable position (12.5%) in a new agricultural technology business called GMX Technologies, LLC ("GMX" or the "Company").[2] GMX was presented to Leiber as a developer and distributor of a proprietary agricultural treatment designed to enhance the yield of various crops. As a startup company seeking to market a new product based on emerging technology, the investment in GMX carried substantial risks. GMX's Chairman, Arnold Simon, posed one of the more significant of these risks. Simon had virtually no experience in the agricultural business sector, having spent his entire career up to that point in the retail fashion and apparel space.

Recognizing Simon's inexperience and the inherent uncertainty associated with startup businesses, Leiber insisted on strong exit rights to minimize the risks of its investment. The centerpiece to this risk-mitigation strategy was the inclusion of a heavily negotiated put option in

[1] Leiber is a portfolio company of Defendant Pegasus Capital Advisors, L.P. ("Pegasus").

[2] At the time of the investment, GMX was known as KGS Agro Group, LLC ("KGS"). Throughout this Memorandum, references to GMX are meant to encompass KGS.

the Company's operating agreement, permitting Leiber, in its sole discretion and without any qualification as to available funds, to sell its 12.5% stake back to GMX (the "Put Option") for a specified price of $8 million (the "Put Price"). Leiber could exercise the option on either the 2½ or 3½-year anniversary of the investment.

Leiber anticipated a variety of circumstances under which it may want to exercise its Put Option, including the failure of GMX to show an acceptable level of growth during the first few years. Of course, if GMX was struggling to perform at expected levels, Leiber understood that the Company might not have $8 million in cash on hand to satisfy its obligation under the option. Thus, to ensure the viability of the Put Option, Leiber insisted that the operating agreement provide that ***Simon*** would also be personally responsible for payment of the full $8 million Put Price. GMX and Simon were thus jointly and severally liable for paying the $8 million Put Price to Leiber upon its exercise of the Put Option.

Leiber's concerns proved to be well-founded. In the ensuing years, GMX's business failed to meet Leiber's expectations, despite Leiber's efforts to secure additional financing for the Company. Accordingly, at the 3½-year anniversary of its investment, Leiber exercised the Put Option within the time limits afforded under the operating agreement.

GMX now claims that it lacks the money to pay. It urges – in a convoluted and repetitive series of allegations – that the Put is prohibited because an inapposite clause in the operating agreement bars "distributions" to members that would render the company insolvent.

Yet, and certainly not surprisingly, the Complaint totally ignores the fact that GMX is not the sole obligor of the Put Option. The operating agreement is clear: Arnold Simon personally agreed to make payment of the Put Price as a primary obligor. He is, thus, responsible for the full $8 million owed to Leiber. He is fully aware of both his debt, having signed the operating

agreement in his individual capacity, as well as the fact that GMX is resisting the Put, as he controls the Company and verified the complaint here. GMX has articulated no reason why Simon's payment obligation is invalid, and thus it is not entitled to the declaration[3] it seeks.

Even absent Mr. Simon's personal obligation for the debt, GMX is still obligated to satisfy the Put Option. Contrary to the Complaint's mischaracterization of this clause, the Put Option is not a "distribution" under applicable law or any rational reading of the contract. A "distribution" is a payment made to a member "in his or her capacity as a member." This is meant to encompass a dividend payment, a distribution of profits, and the like. Here, however, satisfaction of the Put Option is a bargained-for commercial transaction: GMX is to purchase a 12.5% stake in the Company from Leiber, the seller. Payment is entirely permissible, and indeed required.

As demonstrated in full below, GMX is not entitled to the declarations it seeks, and has utterly failed to state a claim upon which it can recover. Accordingly, the Verified Complaint should be dismissed in full, with costs.

STATEMENT OF PERTINENT FACTS

For purposes of a motion to dismiss, the allegations of the Verified Complaint must be accepted as true. Here, despite the tortured and inaccurate "factual" recitation proffered by GMX, the four corners of the Complaint demonstrate that Plaintiffs have failed to state a claim for relief.[4]

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[3] GMX seeks a declaratory judgment that, *inter alia*, Leiber is not entitled to exercise the Put Option. Compl. ¶ 56(a).

[4] Annexed to the Complaint is a contract, entitled Second Operating Agreement ("SOA") between the parties. Pursuant to CPLR 3014, this document forms part of the Complaint. The provisions of this contract prevail over Plaintiff's allegations describing them. *See 805 Third Avenue Co. v. M.W. Realty Assocs.*, 58 N.Y.2d 447, 451 (1983).

The Simon / Pegasus Relationship

Prior to forming GMX, Arnold Simon was an executive in the retail apparel industry for many years. Compl. ¶ 13. Simon's first dealings with Pegasus occurred in or around 2005, when he was seeking a substantial capital investment in one of his apparel companies. Compl. ¶ 14. As part of the various transactions that resulted between Pegasus and Simon, Simon personally guaranteed certain debts to Pegasus totaling $8 million. Compl. ¶ 18.

Thereafter, the Simon/Pegasus relationship deteriorated, and Simon filed suit against Leiber and a Pegasus fund. Compl. ¶ 19. That lawsuit was ultimately resolved (the "Prior Settlement").

Leiber's Investment in GMX and the Put Option

As part of that Prior Settlement, Leiber and Pegasus released Simon from his $8 million guarantee of the previous loans. Compl. ¶ 21. In return, Leiber received a 12.5% stake in GMX, the agricultural products company that Simon was now running. Compl. ¶¶ 22, 25.

To effectuate this ownership interest, GMX and Leiber entered into the Second Amended and Restated Operating Agreement ("SOA") dated February 24, 2016. Significantly, Section 5.06 of the SOA contained a put option, carrying important exit rights for Leiber. Under the Put Option, Leiber was entitled to sell its 12.5% interest in GMX back to the Company for $8 million cash – an amount identical to Simon's personally-guaranteed debts released in the Prior Settlement. Compl. ¶¶ 21, 27.

Leiber had the right to exercise the Put Option on either the 2½ or 3½-year anniversaries of its investment (February 26, 2016). Compl. ¶ 27; SOA § 5.06. It could do so "in its sole and absolute discretion" and was entitled "to ***resell*** to [GMX] all or a pro-rated portion of [its] Membership Interest." SOA § 5.06(a) (emphasis added).

In order to exercise the Put Option, Leiber was required to give notice, in writing (the "Put Notice"), "within sixty (60) days of" either the 30-month or 42-month anniversary of the SOA's effective date (the "Put Option Period"). *Id.* Because the SOA was executed on February 24, 2016 (SOA Recitals), the first Put Option Period concluded on August 24, 2018, and the second Put Option Period concluded on August 24, 2019. *Id.* at § 5.06(b). Accordingly, the two Put Option Notice periods ran as follows: (i) June 24, 2018 to August 24, 2018; and (ii) June 24, 2019 to August 24, 2019.

Under the SOA, payment under the Put Option shall be made on the "Put Closing Date," which is "a date reasonably designated by [Leiber] but no later than thirty (30) days after the Put Notice. Compl. ¶ 28; SOA § 5.06(b). On the Put Closing Date, Leiber is required to tender to GMX "certificates or instruments ... evidencing the Put Interests, duly endorsed ... and otherwise in good form for delivery and free and clear of all liens...." SOA § 5.06(b). In return, "the Company ***or Simon*** shall pay the Put Price [$8 million] in cash." *Id.* (emphasis added). The SOA does not limit or restrict the enforceability of the Put Option, nor is the Put Option conditioned on a certain amount of funds being available to GMX at the time of its exercise. The SOA was executed by Arnold Simon both individually, and on behalf of GMX.

GMX Struggles and Executes the Third Operating Agreement

In the months following the Leiber investment, GMX did not flourish. Rather, the Company's financial position became admittedly "dire" and "precarious." Compl. ¶¶ 36–37. As a result, Simon turned to Leiber and Pegasus, yet again, for help. In November 2016, the GMX

Members – including Pegasus and Simon – executed another agreement (the "Third Operating Agreement" or "TOA").[5]

The TOA evidences Simon's latest attempt to obtain additional capital to keep his failing business afloat. The relevant Pegasus fund, however, was outside its investment period. Accordingly, Pegasus agreed only to "commercially reasonable efforts" to help Simon raise outside funds. TOA, Recitals. This would be accomplished "through a newly-created special purpose vehicle (together with its designees, the 'Pegasus SPV') to allow the Pegasus SPV together with its designees to provide a loan or other financing (the 'Loan') to the Company in the amount of up to $5 million." TOA, Recitals.

If, and only if, the Loan was funded, the Pegasus SPV would receive additional Class A shares in GMX, but that would not occur until two years after the $5 million Loan was funded. TOA § 2.06(c). The TOA afforded the Pegasus SPV the option, but not the obligation, to "acquire up to that number of Class A Units that ... would not exceed 50.1% of the aggregate Membership Percentage after giving effect to such acquisition at a pre-money valuation of the Company of $75 million." *Id.* Thus, any potential "control" of this struggling Company by Pegasus would only come about at significant capital expense, and only after the Loan was funded.

Significantly, the TOA never became a binding agreement. By its terms, the TOA only became "effective from and after the closing of the Loan." TOA, Recitals. That never occurred. Despite Pegasus' efforts, outside investors were not willing to commit $5 million to the failing

[5] While the Verified Complaint seeks to cherry-pick quotes from the TOA, it curiously neglects to attach the document. As such, it is provided in full as Exhibit A to the accompanying Affirmation of William H. Mack, Esq.

GMX enterprise. The parties reasonably anticipated that sourcing funding for GMX would be a challenge. To wit, they included the following provision in the TOA:

> [f]or the avoidance of doubt, neither Pegasus, Pegasus SPV, not [sic] any of their respective Affiliates shall have any liability to the Company or its officers, directors, employees or agents to the extent Pegasus SPV fails to fund the Loan.

TOA § 11.12.

Exercise of the Put Option

On June 26, 2019, Leiber provided written notice that it was exercising its Put Option rights in full. Compl. ¶ 48. The Put Closing Date was designated as July 15, 2019, 19 days after the Put Notice was given and well within the confines set forth in the SOA. Compl. ¶ 49. Rather than pay the $8 million Put Price on the Put Closing Date, GMX – acting on the old cliché that the best defense is a good offense – filed its Verified Complaint, which makes no mention of Mr. Simon's primary obligation for payment of the Put Option.

Because the Loan contemplated by the TOA was never funded, any suggestion in the Complaint that Leiber sought to "leverage their slim minority stake to effectively take over GMX" (Compl. ¶ 2) is not only false, but deliberately misleading. Nor has Leiber taken any action toward GMX, apart from demanding the money it is owed under the Put Option. Defendants' only goal is to exit Simon's failing enterprise and be done with both GMX and Simon once and for all.

ARGUMENT

I. GMX FAILS TO STATE A CLAIM FOR A DECLARATORY JUDGMENT

Rather than pay the money owed to Leiber under the SOA, GMX improperly seeks a declaration that: (i) Leiber is not entitled to exercise the Put Option; (ii) Leiber's exercise of the Put Option constitutes a breach of the SOA; (iii) GMX is not in material breach of the SOA

because Leiber's exercise of the Put Option was improper; (iv) Leiber cannot hold GMX in material breach of the SOA; and (v) Leiber's Put Option Notice was "untimely" and the Put Closing Date designated by Leiber is not "reasonable."

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) a court may reach the merits of a cause of action for a declaratory judgment where "'no questions of fact are presented'" by the controversy. *Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1150 (2d Dep't 2011) (quoting *Hoffman v. City of Syracuse*, 2 N.Y.2d 484, 487 (1957). Here, GMX has raised no factual issues concerning the parties' rights under the SOA. As such, the Court can and should enter a judgment declaring that Leiber did not breach its obligations under the SOA, and that its exercise of the Put Option is valid and enforceable. *Minovici v. Belkin BV*, 109 A.D.3d 520, 524 (2d Dep't 2013).

A. Leiber's Exercise Of The Put Option Was Proper

The gravamen of GMX's complaint is a manufactured notion that the Put Option is barred under the terms of the SOA and the Delaware LLC law. It alleges, erroneously, that "after giving effect to the $8 million Distribution, GMX's liabilities would exceed the fair market value of GMX's assets." Compl. ¶ 50. GMX claims that this renders the Put Option invalid under certain terms of the SOA and Delaware LLC law which bar "distributions" that would render the company insolvent. This argument fails for two reasons.

First, payment under the Put Option does not render GMX insolvent because Arnold Simon is personally liable for payment of the $8 million. In other words, the Put Option can be satisfied without any funds flowing from GMX to Leiber. Second, even absent Simon's primary obligation, payment under the Put Option is not a distribution. Instead, it is a distinct commercial transaction whereby the Company is repurchasing its shares. GMX is not making

payment to Leiber "in its capacity as a member," but rather in its capacity as a party selling shares in a corporation.

i. Satisfaction of the Put Option Would Not Render GMX Insolvent Because Arnold Simon Personally Obligated Himself For Payment of the Put Price

GMX's entire claim rests on the false notion that satisfaction of the Put Option is improper because it would render the Company insolvent, in violation of Section 18-607 of Delaware's LLC Act and Section 6.07 of the SOA.[6] The Complaint states that "after giving effect to the $8 million [d]istribution, GMX's liabilities would exceed the fair market of GMX's assets." Compl. ¶ 50. This claim fails on its face.

Far from rendering the Company insolvent, satisfaction of the Put Option does not require payment from GMX. This is because ***Mr. Simon accepted personal liability for payment*** of the Put Price. Specifically, the SOA states that – upon exercise of the Put Option – "the Company or ***Simon*** shall pay the Put Price in cash." SOA § 5.06(b) (emphasis added). And indeed, Simon bound himself *personally* to the governing document by specifically executing the SOA on his own behalf, on a separate signature page from where he executed the SOA for GMX. *See* SOA Signature Pages.

Plaintiff does not and cannot allege that Simon's personal liability for the Put Option is somehow unenforceable. Delaware law expressly permits a member of an LLC (Simon) to

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[6] Section 18-607 of the Delaware Limited Liability Company Act provides, in pertinent part (and SOA § 6.07 is substantially similar):

> Limitations on distribution. (a) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their limited liability company interests ... exceed the fair market value of the assets of the limited liability company.

include a provision in the articles or organization or limited liability company agreement whereby a member may be personally liable for the debts of the corporation. *See* 6 Del. C. § 18-303(b) ("a member [of an LLC] may agree to be obligated personally for any or all of the debts, obligations, and liabilities of the limited liability company"). Such contractual provisions are enforceable, and are frequently used "in lieu of or to supplement personal guarantees for a particular debt." *CML V LLC v. Bax*, 6 A.3d 238, 251 (Del. Ch. 2010).

Confined to the four corners of the Second Operating Agreement, which is annexed to the Complaint, it is evident that satisfaction of the Put Option would *not* render GMX insolvent because Simon is jointly and severally liable for the entire debt.[7] GMX's entire claim rests on this false premise and, as it is easily discarded by the terms of the SOA, the Complaint has raised no material issues of fact and must be dismissed.

ii. Satisfaction of the Put Option Is Not a "Distribution"

Even absent Simon's personal liability for the Put Price, Leiber's exercise of its Put Option is nevertheless enforceable because Section 18-607 of the Delaware LLC Act and Section 6.07 of the SOA (which are relied upon by GMX) only apply where the contemplated payment is a "Distribution." Here, however, payment of the Put Price does not constitute a "Distribution" under the terms of the SOA.

It has been observed that "[t]here are relatively few cases interpreting [Section 18-607 of] the Delaware [LLC] statute." *Royal Equip. Leasing LLC v. Willis*, No. 15-P-56, 2016 WL 538331 (Mass. App. Feb. 11, 2016). Nevertheless, *In re 3702 Plaza LLC*, 387 B.R. 413

[7] Concurrently with the filing of the accompanying Motion to Dismiss GMX's Complaint, Defendants are filing a plenary action against Arnold Simon, individually, for payment of the Put Price. That Complaint will be styled as a "Related Case" to the instant action under applicable Court rules.

(E.D.N.Y. 2008) is instructive, as it considers the New York analogue to this provision, LLC Law Section 508, which is substantially the same. In that case, an LLC agreed to purchase from two members their combined 70% interest in the LLC. The LLC manager executed two promissory notes on behalf of the LLC, which guaranteed payment by the LLC. The LLC later sought to avoid the payments it owed by arguing that those payments would render the LLC insolvent and were thus prohibited.

The court disagreed. It found that because the members had tendered their stock in the LLC, they were not being paid as members of the LLC. The payments, thus, were not "distributions" and did not implicate Section 508.

The same rationale applies here. The SOA contemplates that, at the closing, Leiber "shall deliver to the Company certificates or instruments ... evidencing the Put Interests." SOA § 5.06(c). The "Put Interests" are defined as the "12.5% Membership Interests held by" Leiber. *Id.* § 5.06(b). By the time payment is made under the Put Option, Leiber will already have tendered its ownership interest in GMX and will no longer be a member. The payment of the Put Price, therefore, would not be made to Leiber in its capacity as a member, and is not a Distribution. *See also In re 45 John Lofts LLC*, 2017 WL 1379359 (Br. S.D.N.Y. Apr. 14, 2017) (payment to members was not a "distribution" where payment was made pursuant to a contractual obligation).

Instead, the SOA styles the Leiber Put Option as a "purchase and sale" of stock. SOA § 5.06(b). Leiber therefore became a creditor of GMX at the moment that it exercised the Put Option and tendered its shares. GMX could have bargained for specific language in Section 5.06 of the SOA limiting the Put Option's enforceability to certain liquidity levels, or expressly subjecting the Put Option to SOA Section 6.07. It did not do so, and cannot now invent or re-

write contract terms that were not bargained for at the time of contracting. GMX must instead live with the SOA's clear and unambiguous terms. *Willie Gary LLC v. James & Jackson LLC*, No. Civ. A. 1781, 2006 WL 75309, at *5 (Del. Ch. Jan 10, 2006), *aff'd* 906 A.2d 76 (Del. 2006).

B. Leiber's Put Option Notice Was Timely And Reasonable

GMX also seeks a declaration that Leiber's Put Option Notice was somehow procedurally invalid. It urges, without explanation, that that Leiber's notice was "untimely," and that the Put Closing Date designated in the Put Notice was not "reasonable." Compl. ¶ 56(e). Neither contention finds support in the terms of the SOA.

The SOA is dated February 24, 2016. SOA, Recitals. It expressly permits Leiber, in its discretion, to exercise the Put Option "on the 42nd-month anniversary" of the SOA. SOA § 5.06(a). That anniversary date occurred on August 24, 2019. Leiber was entitled to give notice of its intention to sell the Put Interests "within sixty (60) days of the applicable anniversary date." SOA § 5.06(b). This permitted Leiber to provide notice of its intention to exercise the Put Option as early as June 25, 2019. Leiber provided written notice of its election to exercise the Put Option on June 26, 2019, within 60 days of the 42-month anniversary of the SOA. Compl. ¶ 49. Thus, the Put Notice was timely.

As to the Put Closing Date, GMX baselessly asserts that the date selected by Leiber is not "reasonable." Compl. ¶ 56(e). The SOA requires that the Put Closing Date occur "on a date reasonably designated by [Leiber] but no later than thirty (30) days after the Put Notice." SOA § 5.06(b). Thus, the closing *had to occur* sometime between June 25, 2019 and July 25, 2019. Leiber selected July 15 as the Put Closing Date, which is well past the halfway point in the Put Option Period. In fact, the closing date was only ten days prior to the last possible date under the terms of the SOA. Any suggestion that this date was not facially reasonable is meritless.

For the foregoing reasons, GMX is not entitled to any of the declarations that it seeks in Count I of its Complaint. To the contrary, because Plaintiff has raised no factual issues, Defendants respectfully request that this Court enter a declaration that: (i) Leiber's exercise of the Put Option was proper; (ii) GMX is required to honor Leiber's exercise of the Put Option; (iii) Leiber is entitled to enforce its rights under the SOA through any available remedies, including those self-help remedies specifically enumerated in the SOA; and (iv) Leiber's notice triggering the Put Option was valid, including the Put Closing Date.

II. THE SECOND CAUSE OF ACTION, FOR PRIOR BREACH OF CONTRACT, INCLUDING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, SHOULD BE DISMISSED BOTH BECAUSE IT IS REDUNDANT AND BECAUSE IT SEEKS TO IMPOSE ADDITIONAL OBLIGATIONS NOT IMPOSED BY THE PARTIES' CONTRACTS

GMX next seeks recovery for "prior breach of contract, including the implied covenant of good faith and fair dealing." Compl., Count II. The only stated basis for this claim is the recycled assertion that "Leiber's attempt to exercise its Put Option in violation of Section 6.07 of the parties' SOA and Section 18-607 of the Act, constitutes a material breach of the parties' SOA." Compl. ¶ 58. GMX's breach of contract claim amounts to no more than an impermissible restatement of that which was already alleged, and refuted, in Count I. Compl. ¶¶ 50–56. Because Leiber's exercise of its Put Option was valid and does not implicate the cited contractual provisions (*see supra* pp. 7-13), GMX's breach of contract claim must also be dismissed.

Seemingly cognizant that a claim of breach of contract is baseless here, GMX pivots to amorphously assert a breach of the "implied covenant of good faith and fair dealing under Delaware law, concerning the SOA's Put Option (Section 5.06), 'Limitations on Distribution' (Section 6.07), and 'Specific Performance; Breach (Section 10.11) provisions.'" Compl. ¶ 59.

The implied covenant of good faith and fair dealing does not apply here. This doctrine is described as a "cautious enterprise," *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010), that is "'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions.'" *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (quoting *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 463, 443 (Del. 1996).

To be clear, "Delaware's implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, then later adversely affected one party to a contract." *Nemec*, 991 A.2d at 1128. Rather, "the covenant is a limited and extraordinary legal remedy." *Id.* As such, it "does not apply when the contract addresses the conduct at issue." *Nationwide Emerging Managers LLC v. Northpointe Holdings LLC*, 112 A.3d 878, 896 (Del. 2015); s*ee also Dunlap*, 878 A.2d at 441 ("[O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement."). This covenant only applies when the contact is "truly silent" concerning the matter at hand. *Allied Capital Corp. v. GC-Sun Holdings, LP*, 910 A.2d 1020, 1033 (Del. Ch. 2006). Even then, courts "cannot use an implied covenant to re-write the agreement between the parties, and 'should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.'" *Nationwide*, 112 A.3d at 897 (quoting *Allied Capital*, 910 A.2d at 1035).

In other words, a claim for breach of the implied covenant of good faith and fair dealing cannot be predicated on breaches of a contract's express terms. Here, the Complaint nowhere asserts that the SOA or any other agreement between the parties is "silent" on any material term, or that certain unanticipated developments need to be accounted for. GMX merely alleges that

Leiber breached the implied covenant of good faith and fair through its "actions concerning the Put Option." Compl. ¶ 59.[8] GMX cannot assert claims for breach of the covenant of good faith and fair dealing based on claimed breaches of express provisions of the SOA.

As a result, the Second Cause of Action must be dismissed.

III. GMX IS NOT ENTITLED TO AN INJUNCTION CONCERNING THE PUT OPTION

In its Third Cause of Action, GMX impermissibly seeks an order "permanently enjoining [Leiber] from exercising any of the self-help remedies for a Purported Material Breach of the SOA set forth in Section 10.11." Compl., Prayer for Relief & ¶ 66.

For the reasons stated in Section I(a)(i), *supra*, GMX is not entitled to this relief because Leiber was expressly entitled to exercise the Put Option. The Complaint articulates no legal theory which would support the wholesale stripping of the bargained-for contractual rights provided for in the SOA.

Furthermore, "[a] permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." *Parry v. Murphy*, 79 A.D.3d 713, 715 (2d Dep't 2010). Thus, injunctive relief is available only to plaintiffs who allege, with sufficient non-conclusory allegations, that they are without other available remedies, and where the inadequacy of money damages is evident. *See, e.g., City of N.Y. v. State of N.Y.*, 94 N.Y.2d 577, 599 (2000) (adequacy of monetary damages renders injunctive relief inappropriate); *Lemle v. Lemle*, 92 A.D.3d 494, 500 (1st Dep't 2012)

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[8] GMX also complains that Leiber's "actions, including but not limited to, seeking enforcement of the Put Option upon unreasonably short notice, without the Pegasus Defendants having raised or invested capital as they promised to, are not faithful to the scope, terms and purpose of Sections 5.06, 6.07 or 10.11 of the parties' SOA." Compl. ¶ 60. Again, GMX alleges the frustration of three specific sections of the SOA. Thus, the contract is not "silent" on the matter, and the remedy available to GMX is a claim for breach of contract (which, as discussed *supra*, fails).

(dismissing claim for injunctive relief because "there is no showing that plaintiff does not have an adequate remedy at law"). Where it appears that the plaintiff has an adequate remedy at law, such as monetary damages, a claim for equitable relief – including specific performance, preliminary, and permanent injunctive relief – is subject to dismissal. *See Regini v Board of Mgrs. of Loft Space Condominium*, 107 A.D.3d 496, 497 (1st Dep't 2013) ("Plaintiff's claim for injunctive relief against SDS should be dismissed, since, as evidenced by his claims for damages, he has an adequate remedy at law").

Here, as demonstrated in Section I(A)(i), *supra*, Mr. Simon is personally obligated to fund the $8 million Put Option. That obligation runs joint and several with GMX. In the event that GMX cannot fund the $8 million obligation – and in the further event that Mr. Simon is refusing to pay – GMX has a legal remedy in the form of an action for damages against Mr. Simon, individually. GMX cannot, therefore, seek to enjoin Leiber from asserting its rights under the SOA simply because the Company's CEO has decided he does not want to pay.

Finally, GMX's claim for injunctive relief is improper because it seeks to enjoin anticipated future behavior on the basis of mere speculation. To state a claim for a permanent injunction, a plaintiff must allege irreparable harm that is neither remote nor speculative, but actual and imminent. *See Forest City Daly Housing v. Town of North Hempstead*, 175 F.3d 144, 153 (2d Cir. 1999); Siegel, N.Y. PRAC. § 328, at 499 (3d ed.); *see also Elow v. Svenningsen*, 58 A.D.3d 674, 675 (2d Dep't 2009) (permanent injunction requires "a violation of a right presently occurring, or threatened or imminent").

Here, the Complaint acknowledges that Leiber has exercised its rights under the Put Option (Compl. ¶ 49), but then makes an impermissible jump, speculating as to what Leiber might do next. GMX asserts, without basis, that defendants "will try to exercise" certain self-

help remedies that are available under the SOA, that would "allow[] them to effectively take control of the Company." Compl. ¶¶ 64, 66. The Complaint identifies no act by Leiber evidencing an intent to "take control" of this failing company. Leiber's exercise of its Put Option rights demonstrates *only* its intent to extricate itself from Mr. Simon and his business. It does not suggest or imply what rights Leiber may choose to exercise in light of GMX's breach of the terms of the SOA.

Accordingly, GMX's Third Cause of Action must be dismissed.

IV. GMX HAS NOT STATED A CLAIM FOR TORTIOUS INTERFERENCE

Count IV, GMX's claim for tortious interference, must also be dismissed. The crux of this claim is the unfounded notion that Leiber somehow convinced a prospective Chinese investor not to acquire a position in GMX.

To state a cause of action for tortious interference with prospective business relations, a complaint must allege: (i) business relations with a third party; (ii) the defendant's interference with those business relations; (iii) the defendant acting with the *sole purpose* of harming the plaintiff or *using wrongful means*; and (iv) injury to the business relationship. *Guard-Life Corp v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 (1990) (emphasis added); *Carvel v. Noonan*, 3 N.Y.3d 182, 190 (2004).

The Complaint, however, fails to assert that Leiber "acted with the sole purpose of harming" GMX. Nor does the Complaint properly allege the use of "wrongful means" by Leiber. The Court of Appeals has held that "wrongful means" includes "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." *Guard-Life*, 50 N.Y. 2d at 191.

GMX alleges that Leiber "tried to convince [a] Chinese investor to cut GMX and Mr. Simon out of [a] Joint Venture and have the investor deal directly with the Pegasus Defendants." Compl. ¶ 74. GMX claims that, as a result of this pressure, the potential Chinese investor "backed out of the deal and refused to invest in GMX." Compl. ¶ 76.

Even assuming these allegations are true,[9] the simple economic "persuasion" that is alleged does not rise to the level of wrongful means required for a claim of tortious interference. Rather, for economic pressure to be wrongful, it must be "extreme and unfair," *Carvel*, 3 N.Y.3d at 366, and must amount to "a crime or an independent tort." *Guard-Life*, 50 N.Y.2d at 190). No conduct rising to this level is alleged here. The conclusory, unsupported allegation that Leiber acted "intentionally and without justification," Compl. ¶ 15, simply is not enough. *See Advanced Global Tech. LLC v. Sirius Satellite Radio, Inc.*, 15 Misc. 3d 776, 782 (N.Y. Sup. Mar. 8, 2007) (assertion that defendant acted "without justification" insufficient to state a claim for tortious interference).

Because GMX has not alleged anything more than economic persuasion, it has not stated a claim for tortious interference. Accordingly, GMX's Fourth Cause of Action must be dismissed.

V. GMX's FIFTH CAUSE OF ACTION ALLEGING PROMISSORY ESTOPPEL FAILS BECAUSE A VALID CONTRACT COVERING THE SUBJECT MATTER OF THE CLAIM EXISTS

Plaintiff's fifth cause of action, seeking a quasi-contractual remedy for promissory estoppel, also fails. Simply put, promissory estoppel is not available where, as here, the parties' conduct is governed by express contract terms.

[9] While the Court, on a motion to dismiss, accepts the allegations of the Complaint as true, GMX's recitation is factually inaccurate. GMX omits the fact that the Chinese investor was also conducting clinical test results on the efficacy of GMX's product. Pegasus, naturally, was interested in that potential investor's view of the Company and Mr. Simon. What is more, Simon was contemporaneously aware that these discussions were taking place.

Promissory estoppel is a "quasi-contractual" doctrine and thus is inapplicable when a written agreement governs the subject matter of the claim. *See Karmilowicz v. Hartford Financial Services Group, Inc.*, 494 Fed. Appx. 153 (2d Cir. 2012) (affirming dismissal of promissory estoppel claim because "quasi-contractual relief is unavailable where [as here] an express contract covers the subject matter"); *see also Azimut-Benetti S.p.A. v. Magnum Marine Corp.*, 55 A.D.3d 483 (1st Dep't 2008) ("[A] contract cannot be implied where there is an express contract covering the same subject matter"); *Grossman v. New York Life Ins. Co.*, 90 A.D.3d 990 (2d Dep't 2011) (granting summary judgment and dismissing complaint, as "the existence of valid and enforceable written contracts precludes recovery under the causes of action sounding in promissory estoppel and unjust enrichment, which arise out of the same subject matter").

GMX alleges that it relied on Leiber's "numerous promises to both GMX and its owner Mr. Simon, repeated to third parties, that the Pegasus Defendants would invest at least $5 million in GMX." Compl. ¶ 79. Not only is this claim inaccurate (Pegasus only promised to use commercially reasonable efforts to assist GMX in raising financing, *see* p.6, *supra*), this cannot form the basis of a claim for promissory estoppel because there is an express contract governing the alleged investment or funding "promises." In the Third Operating Agreement, Mack Aff. Ex. A, the parties agreed upon the efforts that Pegasus would use to attempt to raise capital for the failing GMX. That agreement provided that Pegasus "will use commercially reasonable efforts to raise sufficient capital through a newly-created special purpose vehicle ... to allow the Pegasus SPV together with its designees to provide a loan or other financing to the Company in the amount of up to $5 million." TOA, Recitals. GMX does not allege that Pegasus failed to use commercially reasonable efforts to seek this capital.

Furthermore, because the parties recognized the difficulty of raising additional funds for Simon's failing business, the parties expressly agreed that Pegasus would have *no liability* should the funding not come through:

> Section 11.12. No Pegasus Liability. For the avoidance of doubt, neither Pegasus, Pegasus SPV, not [sic] any of their respective Affiliates shall have any liability to the Company or its officers, directors, employees or agents to the extent Pegasus SPV fails to fund the Loan.

TOA § 11.12.

Even absent the existence of the Third Operating Agreement, GMX's promissory estoppel claim is also subject to dismissal because Defendants' alleged "representations" are vague and indefinite. A promise must be "clear and unambiguous" to support a claim for promissory estoppel. *See Schroeder v. Pinterest Inc.*, 133 A.D.3d 12 (1st Dep't 2015). Specifically, it must be clear enough for the Court to be able to "reasonably determine what the parties agreed to and whether the terms have been breached." *Rondeau v. Houston*, Nos. 650198/2011, 151202/2012, 2013 WL 1699299 (Sup. Ct. N.Y. Cnty. Apr. 17, 2013) (assessing enforceability of alleged oral contract) (citing *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475 (1989)).

GMX alleges that it relied on Defendants' amorphous and vague "numerous promises to both GMX and its owner Mr. Simon … that the Pegasus Defendants would invest at least $5 million in GMX." Compl. ¶ 79. The Complaint, however, fails to allege any real "promise" made by Defendant. Despite GMX's characterization to the contrary, these alleged "promise[s]" are too indefinite to enforce because they leave open fundamental questions concerning, *inter alia*, what was in fact promised, when such promise was made, and when Plaintiff could expect to receive the benefit of such promise. *See De Madariaga v. Union Bancaire Privee*, 103

A.D.3d 591, 591 (1st Dep't 2013) (promise to compensate terminated employee "consistent with the severance packages paid to other senior executives" was "too indefinite to permit enforcement") (quoting *Glanzer v. Keilin & Bloom*, 281 A.D.2d 371 (1st Dep't 2001)); *Oppman v. IRMC Holdings, Inc.*, 836 N.Y.S.2d 494 (Sup. Ct. N.Y. Cnty. 2007) (alleged promises concerning terms of stock grant were unenforceable because they failed to specify "what Defendants' duties would entail or precisely what Plaintiffs' rights would include"). The alleged promise, which is even more vague and ambiguous than those in the cited case law, cannot support a claim for promissory estoppel.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Verified Complaint be DISMISSED in its entirely, with prejudice, and for such other and further relief as this Court deems just and proper.

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Respectfully submitted,

DAVIDOFF HUTCHER & CITRON LLP

By: _____
Larry Hutcher
William H. Mack

605 Third Avenue – 34th Floor
New York, New York 10158
(212) 557-7200

Attorneys for Defendants