SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

NATIONAL AUSTRALIA BANK LIMITED

-v-

J.E. ROBERT COMPANY, INC. et al

INDEX NO. 651146/2012

MOTION DATE

MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion to by defendants to dismiss is GRANTED and plaintiff's claims of tortious interference with contract, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty are dismissed per the attached Decision and Order.

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

Dated: July 1, 2013

MELVIN L. SCHWEITZER, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

NATIONAL AUSTRALIA BANK LIMITED, Plaintiff, -against- J.E. ROBERT COMPANY, INC., ET AL. Defendants.	Index No. 651146/2012 DECISION AND ORDER Motion Sequence No. 004

MELVIN L. SCHWEITZER, J.:

Defendants move to dismiss the Amended Complaint pursuant to CPLR 3016 (b), 3211 (a) (1), (3), (7), and (8) on the grounds that plaintiff, National Australia Bank Limited, cannot obtain personal jurisdiction in New York over 21 of the 23 defendants, lacks capacity to bring certain of the causes of action, and the Amended Complaint fails to state a cause of action. The defendants' motion is granted with respect to all three causes of action.

Background

Plaintiff, National Australia Bank Limited (NAB), is a global banking corporation organized under the laws of Australia. NAB is publicly traded in Australia and has branch offices around the world, including a branch in New York City licensed by the Office of the Comptroller of the Currency.

All corporate defendants are affiliates of J.E. Robert Company, Inc. (J.E. Robert Co.), a corporation organized under the Commonwealth of Virginia. The remaining corporate defendants, all of which were formed in Delaware and have their principal place of business in Virginia, are further detailed in Appendix "A."

Corporate defendant Holdings is the managing member of Blackjack Portfolio I JV, LLC (B1LLC) and Blackjack Portfolio II JV, LLC (B2LLC) (together known as the "Swap Counterparties"). During the relevant time period, B1LLC had no officers, directors, or employees and acted only on the actions of Holdings' officers and directors. B2LLC had no officers, directors, or employees and acted only on the actions of Holdings' officers and directors until April 2008, at which time Holdings appointed certain individuals to be officers and/or directors of B2LLC.

Together, the JER corporate defendants are known as "J.E. Robert Companies," "JER Partners," or "JER" and are the corporate parents, principals, investors, shareholders, general partners, and/or managing members of the Swap Counterparties and each other.

The corporate structure of the JER corporate defendants detailed in Appendix "A" was set forth in the "Topco Mega Resolution" and signed by Joseph E. Robert Jr. (Mr. Robert) in July 2007. Although the structure portrays the entities as separate from one another, NAB alleges that the defendants treated the various JER affiliates as "fungible entities and collapsed any meaningful distinctions among or between them." As a result, NAB asserts that any economic benefit to the JER corporate defendants was also an economic benefit to any JER individual defendant with an equity stake in JER Partners. It also alleges that at all relevant times, defendants treated the obligations of Holdings to the Swap Counterparties under the Operating Agreements as the obligations of JER Fund IV and JER generally. The JER corporate defendants all operated out of the same physical location in McLean, Virginia, but NAB alleges that many of the communications and in-person meetings related to the facts of this case took place in New York.

Each of the JER individual defendants was an employee of JER during the relevant time period. The individual defendants are named either as a "fiduciary defendant" or an "aiding and abetting defendant." The individuals named in each category are detailed in Appendix "A."

This action originates from a transaction that took place in 2007 in which JER Partners agreed to purchase Highland Hospitality Corporation (Highland), a publicly held real estate investment trust that owned and operated more than two dozen hotels in the United States. The transaction was valued at approximately $2 billion and was partially funded by a $1.6 billion mortgage issued by Wachovia Bank, National Association and Barclays Capital Real Estate. The mortgage debt was tied to the London Interbank Offered Rate (LIBOR) and JER Partners entered into a swap with NAB to hedge the interest rate risk related to the mortgage. The agreement provided that if LIBOR increased, NAB would pay JER an amount to cover a portion of JER's increased borrowing cost whereas if LIBOR decreased, JER would similarly pay an amount to NAB. Although JER Fund IV was the initial counterparty to the swap, in December 2007, a novation transaction took place in which the swaps were transferred from JER Fund IV to the Swap Counterparties.

As stipulated in section 2.1(e) of the respective Operating Agreements of the Swap Counterparties, swap payments to NAB were to be paid as operating expenses of the Swap Counterparties out of their available cash flow. If the available cash flow was insufficient to fully satisfy the outstanding payables, the Operating Agreements required members of each Swap Counterparty to make either additional capital contributions or member loans to the Swap Counterparties, which would allow them to meet their financial obligations. The Swap Counterparties' members consisted of the managing member (Holdings), and general members, including REIT and the individual members of the Highland Equity Holders, who were JER's

co-investors in the Highland transaction. Although JER Fund IV was not a direct member of the Swap Counterparties, NAB alleges that JER Fund IV was obligated to satisfy the capital contribution obligations of Holdings by funding portions of capital funds to keep the Swap payments current based on a history of JER Fund IV satisfying Holdings' contribution obligations to the Swap Counterparties as well as a draft of an internal memorandum describing JER Fund IV as a "stockholder" in Highland.

Due to reduced prime lending rates, LIBOR fell during 2007-008. Between November 2007 and March 2009, JER made at least nine wire transfers for Swap payments to NAB's New York Citibank account and by January 2008, JER's liability to NAB from the Swaps was approximately $52 million. In November 2008, JER's internal projections for 2009 showed a cash flow shortfall beginning in November 2009, which would render the Swap Counterparties unable to pay their debts as they became due. Based on those projections, even after exhausting additional capital contributions from its members, the Swap Counterparties would still be unable to meet their financial obligations and JER Fund IV would thereby be obligated to extend a member loan to the Swap Counterparties.

From these facts, NAB alleges that beginning in November 2008, defendants were aware that the Swap Counterparties were insolvent, or soon would be insolvent, and thus the fiduciary duties that the Swap Counterparties' officers, directors, and managing member previously owed to the Highland Equity Holders shifted to the Swap Counterparties' creditors, including NAB.

Beginning in February 2009, the individual defendants began hosting an array of meetings and engaged in various communications to discuss Highland and the interest rate swaps. The topics of these discussions included insufficient funding of the Swap Counterparties, attempts to restructure the Swaps, and future courses of action regarding the Swaps. NAB

alleges that these various communications were the defendants' deliberate attempts to sabotage both it and the Swaps because while JER was aware of its obligations to continue to fund Swap payments and it could have avoided or delayed the default on the Swaps to NAB, it 'elected not to make the April swap payment.' Additionally, NAB alleges that at the end of February 2009, defendants caused the REIT and Swap Counterparties to initiate a capital call for $5 million, which was the final capital call requested for Swap payments.

As of April 2009, over $38 million remained in uncalled capital from the Swap Counterparties' members but the Swap Counterparties remained undercapitalized. As a result, they defaulted on the April 2009 payment to NAB in the amount of $3,092,797 pursuant to the terms of the parties' swap agreements. No further Swap payments were made after that time and, to date, the Swap Counterparties have represented that they still have at least $7 million in uncalled capital available. NAB alleges that defendants improperly favored their own interests by utilizing the capital contributions to pay their own business liabilities as JER Partners rather than paying the outstanding obligations of the Swap Counterparties to NAB.

On April 29, 2009, NAB issued a Notice of Early Termination of the Swaps to the Swap Counterparties requiring the Swap Counterparties to immediately make a termination payment to NAB of $60,521,701. Following this notice (as well as several emails and a Highland stockholder meeting taking place at JER's New York office), the Swap Counterparties initiated two capital calls from their members, one in May for $5 million and one in July for $24.5 million. No funds from either capital call were used to pay NAB despite the outstanding $60 million liability.

After the Swap Counterparties defaulted on the swap agreements in April 2009, NAB commenced an action for breach of contract (Blackjack Litigation) and received a judgment for

$60,478,902, plus interest, in July 2011. With post-judgment interest, the damages currently stand at approximately $66 million. The Swap Counterparties have not made any judgment payments to NAB, but in the course of judgment enforcement discovery, JER represented that $7.3 million remains in uncalled capital.

NAB brings three claims against defendants: (1) tortious interference with contract against the JER corporate defendants, (2) breach of fiduciary duty against the fiduciary defendants, and (3) aiding and abetting the breach of fiduciary duty against the aiding and abetting defendants.

Under its first claim of tortious interference with contract, NAB alleges that the JER corporate defendants intentionally, and by improper means, caused the Swap Counterparties to be undercapitalized and therefore unable to meet their obligations to NAB under the Swaps. It also alleges that while interfering with the Swap Counterparties' performance under the Swaps, the JER corporate defendants acted with malice and ill will towards NAB and ignored and violated NAB's contract rights without legitimate basis. NAB asserts that the JER corporate defendants' interference with the Swap contracts proximately caused its damages of at least $66 million.

Under its second claim of breach of fiduciary duty, NAB contends that the fiduciary defendants breached their fiduciary duties to NAB by engaging in bad faith transactions, self-dealing, and other willful conduct that benefitted themselves and JER at the expense of NAB by (i) refraining from calling sufficient capital to satisfy the Swap Counterparties' obligations to NAB, causing a default on the Swaps, (ii) favoring shareholders and other creditors at NAB's expense, and (iii) failing to preserve the Swap Counterparties' assets. NAB claims that the breaches of fiduciary duty resulted in NAB suffering damages of at least

$66 million, and it also seeks punitive damages due to the willful and wanton disregard of fiduciary and other obligations.

Under its third claim of aiding and abetting the breach of fiduciary duty, NAB alleges that while the fiduciary defendants breached their fiduciary duties to NAB, the aiding and abetting defendants knowingly participated and/or substantially assisted in the fiduciary defendants' breach of their fiduciary duties to NAB by participating in, assisting, and failing to correct the bad faith transactions, self-dealing, and other willful misconduct by the fiduciary defendants. As in the second cause of action, NAB asserts that as a result of the breaches of fiduciary duties, it suffered damages of at least $66 million and it seeks punitive damages for the aiding and abetting defendants' willful and wanton disregard of fiduciary and other obligations.

Discussion

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The

court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

I. Tortious Interference With Contract

NAB's first cause of action against the JER corporate defendants for tortious interference with contract is dismissed for failure to state a claim. The elements of a claim for tortious interference with contract are (1) existence of a contract between a plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to plaintiff. *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 (1993) (citations omitted).

NAB alleges that (1) the Swaps were valid, enforceable contracts between NAB and the Swap Counterparties, (2) the JER corporate defendants had full knowledge of the contractual arrangement between NAB and the Swap Counterparties, (3) the JER corporate defendants intentionally undercapitalized the Swap Counterparties rendering them unable to meet their financial obligations to NAB under the Swaps, and (4) NAB suffered damages of at least $60 million. Taking the allegations in the complaint as true, NAB has pleaded with sufficient detail to allow the court to reach the reasonable conclusion that the elements of a tortious interference with contract claim are met. Despite the sufficient pleadings, the cause of action must be dismissed because defendants put forth a valid economic interest defense.

The JER corporate defendants contend they were privileged to interfere with the Swap Counterparties' contracts based on an economic interest privilege. This privilege does not

recognize an actionable claim of tortious interference with contract where a defendant is merely acting in furtherance of its own interests rather than with malice against the plaintiff. *See e.g. Foster v Churchill*, 87 NY2d 744 (1996); *Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682 (1969). This defense has been successfully raised in a variety of cases where a defendant possesses an economic interest in the contractual obligations of an affiliate, including cases involving a parent company that interferes with the contractual obligations of its subsidiary. *MTI/The Image Group, Inc. v Fox Studios E., Inc.*, 262 AD2d 20, 23 (1st Dept 1999) (holding that because all named corporate defendants were affiliated with plaintiff's contractual counterparty, there existed an economic interest and the defendants' proper use of the economic interest defense was sufficient reason to dismiss the claim of tortious interference with contract).

In this case, since the named corporate defendants are all affiliated with the Swap Counterparties, there is an economic interest that allows defendants to raise the economic interest defense. *Id.* The relevant economic interests consist of the ownership interests and economic benefits created by the various corporate relationships between the various defendants and between the defendants and the Swap Counterparties. Those interests, and the method by which the legitimate economic interests were served (i.e. directing limited assets and reduced cash flow to pay other debts by avoiding payment of a multi-million dollar liability), are sufficient to establish a viable economic interest defense.

There is an exception to the protection provided by the economic interest defense. Under New York law, the presence of malice underlying the defendants' actions would preclude the applicability of the defense. *Foster*, 87 NY2d at 750 (1996) ("economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality"). In support of its allegation of malice, NAB presents three emails that were

transmitted between defendants. The first email was sent on February 16, 2009 from Mr. Gilbert to Mr. Yoon and Mr. Chen, and stated that NAB would be "toast" when the defendants cut off funding to the Swap Counterparties. The second was written by defendant Mr. Nishimura on February 17, 2009 and stated that the defendants decided "[they were] going to jam [NAB] on Highland." The third email was sent on approximately June 11, 2009 and included an attachment of a PowerPoint presentation titled "People Who Should Go F*ck Themselves (as of March 31, 2009)." One of the slides in the PowerPoint was named "List of F'd" and included NAB.

There is a high bar for conduct that constitutes malice. *See e.g. Honeywell Int'l Inc. v Northshore Power Sys., LLC,* 32 Misc 3d 1223(A) (Sup. Ct. N.Y. County 2011) (unpublished table decision), *affd,* 96 AD3d 581 (1st Dept 2012) (stating that mere ill will is generally insufficient to overcome economic interest privilege and a parent company is allowed to refuse continued funding to its subsidiary).[1] As asserted by defendants, these emails are merely "vulgar gallows humor" conveyed at a time where they were at risk of losing a lofty investment. They do not, without more, indicate that malice motivated the defendants' conduct in this transaction. In fact, they do not evidence ill will at all. They merely express, in crude terms, NAB's status in the defendants' legitimate stressed-situations business plans. As a result, defendants' invocation of the economic interest defense is appropriate and the claim for tortious interference with contract is dismissed.

[1] NAB states that its pleadings are sufficient to show that the JER corporate defendants "spitefully acted with ill will." Pl.'s Mem. of Law 6. As stated in *Honeywell*, ill will alone is generally insufficient for a showing of malice. *Honeywell,* 32 Misc. 3d 1223(A).

II. Breach of Fiduciary Duty

NAB's second cause of action against the fiduciary defendants for breach of fiduciary duty is dismissed. To state a claim for breach of fiduciary duty, plaintiff must sufficiently plead (1) the presence of a fiduciary duty, (2) that defendant committed misconduct, and (3) that the misconduct caused plaintiff to suffer damages. *Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 (1st Dept 2011).

NAB brings this cause of action asserting that the fiduciary defendants breached their fiduciary duties to NAB by engaging in bad faith transactions, self-dealing, and other willful misconduct that benefitted themselves and JER at NAB's expense by (1) refraining from calling sufficient capital to satisfy the Swap Counterparties' obligations to NAB which caused a default on the Swaps, (2) favoring shareholders and other creditors at NAB's expense, and (3) failing to preserve the Swap Counterparties' assets.

As the controversy at issue involves a Delaware LLC, the Internal Affairs Doctrine dictates that the governing law is that of the state in which the company was formed. *Finkelstein v Warner Music Group Inc.*, 32 AD3d 344, 345 (1st Dept 2006) ("Since [the company] is a Delaware limited liability company, the question of whether plaintiffs' claims are derivative is governed by Delaware law, not New York law"). This doctrine is also incorporated in Section 801(a) of the New York Limited Liability Company Law, which states "the laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs and the liability of its members and managers." NY Limited Liability Company Law § 801. Additionally, the Operating Agreements of the Swap Counterparties

stipulate that the agreements themselves, in addition to the rights and liabilities of the parties, will be governed by the laws of Delaware.

Defendants contend that NAB does not have standing to bring a breach of fiduciary claim as a creditor of an insolvent Delaware limited liability company. NAB, on the other hand, asserts it has a direct claim of breach of fiduciary duty against the fiduciary defendants because the fiduciary duty was owed to them directly. Under Delaware law, when an entity becomes insolvent, resulting in creditors becoming the parties to whom the fiduciaries' responsibilities run, a creditor could potentially have a derivative claim against the fiduciaries, though not a direct claim. *See Vichi v Koninklijke Philips Electronics N.V.*, CIV.A. 2578-VCP, 2009 WL 4345724 (Del Ch Dec. 1, 2009) (citing *N. Am. Catholic Educ. Programming Found., Inc. v Gheewalla*, 930 A2d 92, 98-103 (Del. 2007)) ("a creditor of an LLC, is barred as a matter of law from bringing such a direct claim for breach of fiduciary duty"). Taking all allegations in the complaint as true, the fiduciary defendants may have owed a fiduciary duty to NAB, in which case a direct claim for breach of that duty could exist. Even if that were that the case, as a matter of Delaware law, creditors of LLCs do not have actionable direct claims against fiduciaries for breach of fiduciary duty and NAB's only remaining option is to pursue a derivative claim. *Id.*

Derivative standing with respect to LLCs is governed by the Delaware LLC Act, which states that the plaintiff of a derivative action must be "a member or an assignee of a limited liability company interest at the time of bringing the action. . . ." 6 Del. Code Ann. § 18-1002. Where a statute is unambiguous, the plain statutory language is controlling and judicial interpretation is unnecessary. *CML V, LLC v Bax*, 28 A3d 1037, 1041 (Del. 2011), as corrected (Sept. 6, 2011). In its reading of § 18-1002, the *CML* court found "[t]he statutory language [to be] clear, unequivocal, and exclusive, and operates to deny derivative standing to creditors who

are not members or assignees of membership interests." *Id.* As a result, unless creditors of LLCs are members or assignees of membership interests, they do not have standing to bring either a direct or derivative claim for breach of fiduciary duty against the LLC fiduciaries. NAB, as neither a member of the Swap Counterparties nor an assignee of a membership interest, lacks derivative standing to bring an actionable claim of breach of fiduciary duty.

NAB next argues that there is an exception to the general rule that creditors of insolvent Delaware LLCs do not have standing to bring either direct or derivative claims against the fiduciaries of the LLC. It cites a recent case where the Court of Chancery of Delaware denied a motion to dismiss direct and derivative claims brought by a judgment creditor against the judgment debtors' directors, controlling shareholder, and three other entities within the same corporate family based on allegations of an "elaborate scheme" to siphon the judgment debtor's assets to avoid its obligations to the judgment creditor. *Hospitalists of Delaware, LLC v Lutz*, No. 6221-VCP, 2012 WL 3679219 at 1 (Del. Ch. Aug. 28, 2012). That case does not address the issue of whether there exists an exception to the general rule for judgment creditors of LLCs. The judgment debtor at issue in *Hospitalists* was a corporation. While creditors of corporations have standing to bring derivative claims against the corporation's fiduciaries, creditors of LLCs do not have standing to bring derivative claims against the LLC's fiduciaries. *Gheewalla*, 930 A2d at 101; *CML*, 28 A3d 1037.

Apart from arguing that the decision in *Hospitalists* provides an exception for judgment creditors, NAB also claims that the decision in *Feeley v NHAOCG, LLC* supports its assertion that it has standing to pursue its claim for breach of fiduciary duty. In *Feeley*, NHAOCG was a member of Oculus LLC, which was managed by AK-Feel, LLC. NHAOCG sued Feeley, the managing member of AK-Feel, claiming that Feeley was the actual manager of Oculus and

therefore owed a fiduciary duty to Oculus' members. The court determined that because Feeley, as the managing member and sole decision-maker of AK-Feel, possessed sufficient control over Oculus, it was possible to find him liable for a breach of fiduciary duty to Oculus. *Feeley v NHAOCG, LLC*, 62 A3d 649, 665 (Del Ch 2012). NAB states that the claimant in *Feeley* was not a member of AK-Feel, yet possessed an actionable claim, and therefore "whether a claimant seeking to assert claims against an LLC is a member of that LLC is irrelevant to the standing analysis." This does not provide an exception to the clear holding of *CML*. Although the *Feeley* court goes through an analysis of whether Feeley had sufficient control over Oculus as to render it the "actual manager," the claimant was a *member* of Oculus, not a creditor. *Id.* Consequently, because Feeley owed, and might have breached, a fiduciary duty to Oculus LLC, the claimant, as a member of that LLC, had standing to bring its claim for breach of fiduciary duty. *Id.*

NAB also argues that pursuant to New York's CPLR 5201 (a), it, as a judgment creditor holding an outstanding New York judgment, has standing to pursue any "debt, which is past due or which is yet to become due, certainly or upon demand[,] of the judgment debtor . . . A debt may consist of a cause of action which could be assigned or transferred." NY CPLR 5201. It claims it has standing to pursue a claim of breach of fiduciary duty because (i) the claims inured to the judgment debtors' benefit, (ii) those claims could be assigned to NAB, and (iii) those claims were assigned to NAB pursuant to CPLR 5201 (a).

CPLR 5201 (a) allows a judgment creditor to enforce a money judgment against an outstanding debt owed to a judgment debtor that is either past due or will become due, certainly or upon demand of the judgment debtor in the form of a special proceeding. NY CPLR 5201; *Port Chester Elec. Const. Co. v Atlas*, 40 NY2d 652, 653 (1976) ("the subcontractor was entitled to enforce its money judgment against the [defendants] . . . through a special proceeding

authorized by CPLR article 52"). As previously discussed, New York courts follow the Internal Affairs Doctrine, which dictates that Delaware law is the governing law in this case. Although Article 52 allows for debts owing to the judgment debtor to be assigned to the judgment creditor, Delaware law does not provide an exception to the general rule regarding derivative standing – only an assignee from an LLC interest has standing, not an assignee of the LLC – with respect to judgment creditors. As a result, because Delaware law is controlling and the requirements of the Delaware statute for standing remain unsatisfied, the CPLR does not offer NAB the requisite standing for this claim.[2]

Plainly put, the Delaware LLC Act only grants derivative standing to members of an LLC or assignees of a *membership interest*. Even if New York law were applicable, under Article 52 of the CPLR, only the claims of the judgment debtor are assignable to the creditor. Since the $66 million judgment from the Blackjack Litigation is against the Swap Counterparties themselves and not against their members, only the debts (including causes of action) owed to the Swap Counterparties can be assigned to NAB. Thus, even if Article 52 assigned the debts owed to the Swap Counterparties to NAB, it would still not have standing to pursue its breach of fiduciary duty claim because it would only be an assignee of the LLC, not the LLC interest. The requirements of the Delaware statute for standing would remain unsatisfied.

CPLR 5201 also requires either that the judgment debtor make a demand for the outstanding debt or that the debt be certain to become due. NY CPLR 5201. Since the judgment debtor has not made a demand for the outstanding debt, the only way for CPLR 5201 to apply is

---

[2] Defendants also cite *Matter of Cnty. Route 20 Post Office, LLC v Cnty. of Greene*, 2008 NY Misc LEXIS 8515 (N.Y. Sup. Ct. Mar. 7, 2008), in which the court applied Section 801 (a) of the New York Limited Liability Company Act and consequently followed Maryland law because the company at issue was a Maryland LLC. After applying Maryland law, the court dismissed the case based on the petitioner's lack of standing based on Maryland law.

to establish that the alleged debt is certain to become due. A greater degree of certainty than alleged here is needed to meet the certainty requirement of CPLR 5201. *See Colonial Press of Miami, Inc. v Bank of Commerce*, 71 Misc 2d 987, 988 (App Term 1972) (holding that an Article 52 proceeding was inappropriate because the underlying cause of action was a tort claim for an unauthorized diversion of corporate funds with factual issues to be resolved at trial and therefore should be asserted in a plenary derivative action). It is unclear whether the causes of action that NAB claims has been assigned to it would have become due and therefore the requisite certainty element is lacking. Accordingly, the elements of CPLR 5201 are not satisfied.

There is a policy rationale behind limiting the extent to which creditors of LLCs have standing to bring suit: "the structure of LLCs affords creditors significant contractual flexibility to protect their unique, distinct interests." *CML*, 28 A3d at 1042 (rejecting the argument that a plain reading of the statutory language would result in absurd consequences because the policy for limiting derivative standing is a logical rationale for the legislature to follow); *Gheewalla*, 930 A2d at 98 (recognizing that creditors have unique layers of protection and thus do not need the additional protections offered by direct claims). There is no distinction between applying this policy to ordinary creditors and judgment creditors. NAB had ample opportunity to make use of the available contractual protections necessary to protect its own interests but did not do so. This court declines to undertake the role to safeguard those interests on NAB's behalf.

NAB argues that the purpose of § 18-1002 is to "protect LLCs from merely frivolous lawsuits brought by frustrated creditors that have exhausted other means of repayment." The court in *CML* makes clear that derivative standing is limited to a strict reading of the plain language of the statute, which prohibits anyone other than members or assignees of membership interests from bringing derivative suits. *CML*, 28 A3d at 1043.

NAB's lack of standing to bring a breach of fiduciary duty claim renders it unable to survive a motion to dismiss and therefore it is unnecessary for the court to continue its analysis to determine whether all the elements of the cause of action are present.

III. Aiding and Abetting Breach of Fiduciary Duty

NAB's third cause of action against the aiding and abetting defendants for aiding and abetting the fiduciary defendants in their breach of fiduciary duty is dismissed. The elements of a claim for aiding and abetting a breach of fiduciary duty are (1) evidence of a fiduciary relationship, (2) a breach of that relationship, (3) knowing participation in the breach by a defendant who is not a fiduciary, and (4) damages proximately caused by the breach. *McGowan v Ferro*, C.A. No. 18672-NC, 2002 Del. Ch. LEXIS 3, at 7 (Del. Ch. Jan. 11, 2012).

NAB alleges that the aiding and abetting defendants knowingly and intentionally participated and encouraged the fiduciary defendants' breaches of their fiduciary obligations by (1) attending and participating in Highland Hospitality shareholder meetings where capital calls, capital contributions, the Swaps, and the eventual default on the Swaps were discussed, (2) participating in communications with lenders regarding the purported priority of the debt to NAB, and (3) in the case of JER Fund IV, directly benefitting from the scheme to divert capital from the Swap Counterparties and avoiding JER's member loans.

Like the claim for breach of fiduciary duty, NAB's claim for aiding and abetting a breach of fiduciary duty is dismissed. Where a plaintiff fails to state a cognizable claim for breach of fiduciary duty, there will not be an actionable claim for aiding and abetting such a breach. *Related Westpac LLC v JER Snowmass LLC*, CIV. A. 5001-VCS, 2010 WL 2929708 (Del Ch July 23, 2010); *Vichi v Koninklijke Philips Electronics N.V.*, CIV. A. 2578-VCP, 2009 WL 4345724 (Del Ch Dec. 1, 2009) (dismissing the claim for aiding and abetting a breach of

fiduciary duty because the underlying breach of fiduciary duty claim was dismissed for lack of standing).

Conclusion

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted and plaintiff's claims of tortious interference with contract, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty are dismissed.

Dated: July 1, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER

Appendix "A"

JER Corporate Defendants

J.E. Robert Co. is the ultimate corporate parent of JER Topco, LLC (Topco), which is a Delaware LLC with its principal place of business in Virginia. Topco is the sole shareholder of JER Real Estate Advisors IV, Inc. (Advisors Inc.), a Delaware corporation with its principal place of business in Virginia. Advisors Inc. is the sole general partner of JER Real Estate Advisors IV, L.P. (Advisors LP), a Delaware LP with its principal place of business in Virginia. Advisors L.P. is the sole general partner of both JER Real Estate Partners IV, L.P. and JER Real Estate Qualified Partners IV, L.P. (together known as "JER Fund IV"), both of which are Delaware LPs and have their principal places of business in Virginia. The two LPs that form JER Fund IV are the outstanding and controlling members of Blackjack Investors, LLC (Investors), a Delaware LLC with its principal place of business in Virginia. Investors is the sole member of Blackjack Holdings, LLC (Holdings), a Delaware LLC with its principal place of business in Virginia.

Aiding and Abetting Defendants

The JER individual defendants are all employees of JER in some capacity. Dwight "Arne" Arnesen was the Managing Director of JER Partners. Bradley T. Berkley was Vice President of JER Partners. Barden Gale was Chief Executive Officer of the J.E. Robert Companies and Chief Executive Officer and President of Holdings. Chad Patterson was Vice President of Holdings and Divisional Controller of J.E. Robert Co. Wrug Ved was a JER Analyst. Tae-Sik Yoon was Director of Highland and Chief Financial Officer of JER Partners. Mr. Robert was Executive Chairman of Holdings, chairman and/or Chief Executive Officer of JER, and sole shareholder of Topco. After his death, Gerald David Fensterheim and Donald

Bean, Jr. were named as co-executors of Roberts' estate. (Collectively known as the "aiding and abetting defendants").

Fiduciary Defendants

Gerald R. Best, Jr. was Vice President, Secretary, Assistant Secretary, Director, and Counsel of Holdings, Vice President and Secretary of Investors, VP-Counsel of Highland, and Vice President and Secretary of the REIT. Devin Chen was the Managing Director of JER Fund IV, Vice President and Chief Operating Officer of each of Holdings and the REIT, Board Member of Holdings, the REIT, and Highland, Executive Vice President of the Swap Counterparties, the REIT, and Highland, and Vice President of Investors. Alex P. Gilbert was President and Principal, Chief Executive Officer, Board Member, and Chairman of Holdings, President and Chief Executive Officer of Investors, Chief Executive Officer and Chairman of the Board of Directors of Highland, and President and Chairman of the Board of Directors of the REIT.

Michael McGillis was Chief Financial Officer of each of Investors and Advisors Inc., Managing Director of JER Fund IV, Chief Financial Officer, Executive Vice President, Assistant Secretary, Treasurer, Board Member, and Managing Director of Holdings, Executive Vice President of Highland, and Executive Vice President, Treasurer and Assistant Secretary of the REIT. Kevin Nishimura was Vice President, Assistant Secretary, and Director of Holdings, Vice President of each of JER Fund IV, Highland, and JER Partners, and Vice President and Assistant Secretary of the REIT. James W. Smith was Managing Director of JER Fund IV, Executive Vice President, President, Chief Executive Officer, Board Member, Chairman, and Managing Director of Holdings, Executive Vice President of the REIT, Vice President and Director of Highland, and Executive Vice President of Investors. Graham Wooten was Senior

Vice President, Chief Financial officer, and Director of Highland, Vice President and Chief Financial Officer of the REIT, and an officer or director of B2LLC. (Collectively, along with Barden Gale, known as the "fiduciary defendants").