

PSB Indian Cr. LLC v Halpern
2018 NY Slip Op 32209(U)
September 7, 2018
Supreme Court, New York County
Docket Number: 651406/2017
Judge: Saliann Scarpulla
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 39

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PSB INDIAN CREEK LLC, JHPSB INDIAN CREEK VENTURES
LLC, JHPSB INDIAN CREEK VENTURES INVESTORS LLC,
2901 JMH, LLC, PSB COLLINS LLC, JHPSB COLLINS
VENTURES, LLC, JHPSB COLLINS VENTURES INVESTORS,
LLC, JHPSB COLLINS DEVELOPMENT LLC, JHPSB COLLINS
DEVELOPMENT 2 LLC,

INDEX NO. 651406/2017

MOTION DATE 8/4/2017

MOTION SEQ. NO. 008

Plaintiffs,

- v -

DECISION AND ORDER

JASON HALPERN, JMH INDIAN CREEK DEVELOPMENT, LLC,
295 COLLINS LLC, 295 LNP LLC, JMH DEVELOPMENT III LLC,
GERARD LONGO, 29 ICD, LLC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 120, 121, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 141, 142, 144, 145, 148, 168; 81, 82, 83, 84, 85, 86, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 122, 123, 135, 136, 137, 138, 139, 140, 149, 169; 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264

were read on this application to/for Dismiss

Upon the foregoing documents, it is

In this action to recover damages for, inter alia, breach of contract, defendants Jason Halpern (“Halpern”), JMH Indian Creek Development, LLC (“JMH Indian Creek”), JMH Development III, LLC, 295 Collins LLC and 295 LNP LLC (collectively the “Halpern Defendants”) move (in motion sequence number 003) to dismiss the amended complaint pursuant to CPLR § 3211(a)(1) and (a)(7). Defendants Gerard

Longo (“Longo”) and 29 ICD LLC (“29 ICD” and together with Longo, the “Longo Defendants”) move (in motion sequence number 004) to dismiss the complaint’s claims against them pursuant to CPLR § 3211(a)(1), (a)(7), and CPLR § 3016(b). Plaintiff PSB Indian Creek LLC (“PSB Indian Creek”) moves (in motion 008) for an order holding Graham Penn, Esq. in contempt. Motion sequence numbers 003, 004 and 008 are consolidated for disposition.¹

PSB Indian Creek is a New York limited liability company that is beneficially owned by non-party Dhruv Piplani (“Piplani”). JMH Indian Creek is a New York limited liability company that is beneficially owned by Halpern.² On October 21, 2015, PSB Indian Creek and JMH Indian Creek formed JHPSB Indian Creek Ventures LLC (the “JHPSB ICV”) pursuant to the First Amended and Restated Limited Liability Company Agreement (the “Operating Agreement”). JMH Indian Creek is JHPSB ICV’s manager. JHPSB ICV is a Delaware limited liability company and is the sole member of JHPSB Indian Creek Ventures Investors LLC.³

¹ Plaintiff PSB Collins filed a notice of discontinuance on June 13, 2018, discontinuing its claims in this action, both directly and derivatively on behalf of plaintiffs JHPSB Collins Ventures, LLC, JHPSB Collins Ventures Investors, LLC, JHPSB Collins Development LLC and JHPSB Collins Development 2 LLC. I therefore will not include facts pertaining to these parties, or the related claims, in this decision.

² Halpern also beneficially owns defendants 295 Collins LLC and 295 LNP LLC.

³ Derivative plaintiff/nominal defendant JHPSB Indian Creek Ventures Investors LLC is a Delaware company and the sole member of 2901 JMH, LLC. Derivative plaintiff/nominal defendant 2901 JMH, LLC is also a Delaware company. JHPSB Indian Creek Ventures LLC, JHPSB Indian Creek Ventures Investors LLC, and 2901 JMH, LLC are collectively referred to as the “Indian Creek Company.”

The Indian Creek Project was designed to include a condominium building and three townhouses to be constructed on real property that the Indian Creek Company owned at 2901 and 2911 Indian Creek Drive in Miami, Florida (the "Property").

Section 2.1 of the Operating Agreement states that as of the date of the agreement, both PSB Indian Creek and JMH Indian Creek made initial capital contributions. Exhibit A of the Operating Agreement lists JMH Indian Creek's initial capital contribution as \$500,000, noting that \$400,000 was "previously funded." According to PSB Indian Creek's Amended Verified Complaint (the "Amended Complaint"), however, JMH never made its initial capital contribution.⁴

Section 2.2 of the Operating Agreement states that:

(a) (i) The Members agree that PSB Member shall fund additional capital as follows (such payments, the "Mandatory Proceeds"):

1. October 31, 2015 - \$200,000
2. November 30, 2015- \$700,000
3. January 1, 2016 - \$800,000

(ii) Failure of PSB Member to make any contribution of any Mandatory Proceeds on or prior to the date of such funding as set forth in Section 2.2(a), time being of the essence with respect thereto, shall be subject to dilution pursuant to Section 2.2(b) in the event JMH Member opts to fund any such Mandatory Proceeds on behalf of PSB Member; provided, however, that JMH Member shall provide PSB Member written notice (which notice may take the form of an email) of PSB Member's failure to fund pursuant to this Section 2.2 (a) and PSB Member shall have five (5) Business Days from the date of the delivery of such notice to cure such failure before JMH Member may exercise its right to contribute funds on behalf of PSB Member and cause the related dilution of PSB Member's interests as provided herein.

⁴ Halpern disputes this and in his affidavit states that JMH Indian Creek contributed the \$400,000 amount as noted in Exhibit A and then contributed the remaining \$100,000 in November 2015.

The Amended Complaint states that PSB Indian Creek made several capital contributions to the Indian Creek Company as follows: 1) \$3.6 million in fall 2014; 2) \$200,000 in October 2015; and 3) \$700,000 in November 2015.

The parties agreed to extend PSB Indian Creek's deadline for its \$800,000 capital contribution which was due on January 1, 2016. The \$800,000 was not paid by the deadline extension date and an email sent by David Friedman to Piplani, on March 4, 2016 (the "March 4th Email"), requested the money and stated that:

[i]n accordance with Section 2.2(a) of the Indian Creek JV Agreement, PSB Member was to have funded \$800,000 in Mandatory Proceeds by January 1, 2016. While the Indian Creek JV Agreement only permitted five (5) Business Days to cure the default, we understand the parties agreed to extend the cure period for such funding to January 31, 2016. It is now March 4, 2016 (well beyond the cure period), and neither the Company nor JMH Member has received the \$800,000 in Mandatory Proceeds.

A second email was sent by David Friedman to Piplani, on March 7, 2016 (the March 7th Email"), stating that:

...we have not heard back from [] you regarding the required \$800,000 funding of Mandatory Proceeds (as noticed below). As I'm sure you can appreciate, the project continues to move forward. For this reason and as a courtesy, JMH Member is providing you with this additional written notice and extending your cure period through Monday, March 14, 2016. If the \$800,000 of Mandatory Proceeds is not received on or prior to March 14, 2016, JMH Member shall have the right to fund such proceeds on behalf of PSB Member in accordance with Section 2.2(a)(iii) of the Indian Creek JV Agreement and cause the related dilution of PSB Member's interests.

In a letter dated July 15, 2016 (the "July 2016 Letter"), JMH Indian Creek informed PSB Indian Creek that because the latter defaulted on its obligation to make its \$800,000 capital contribution, JMH Indian Creek funded the \$800,000 on PSB Indian

Creek's behalf and that "pursuant to Section 2.6(c) of the [Operating Agreement], the PSB Member's Carried Interest Distributions have been diluted." The July 2016 Letter also stated that due to PSB Indian Creek's default, it forfeited its right to participate in Indian Creek Company's governance. Further, in the July 2016 Letter JMH Indian Creek gave a "Funding Notice pursuant to Section 2.6(a)(i)... in the amount of \$4,150,000" to be paid by PSB Indian Creek.

Section 2.6(a)(i) of the Operating Agreement provides that:

... if JMH Member reasonably believes the Company is in need of additional funding for any bona fide Company reason (other than as already provided in Section 2.2 hereof), then JMH Member shall have the right to deliver (or cause the Manager to deliver) to PSB Member and JMH Member a notice (each, a "Funding Notice") to that effect setting forth the purposes and amounts of such additional requested funding (the "Required Funds")... Within sixty (60) days following the date on which such Funding Notice was given, PSB Member shall contribute to the Company, as an additional Capital Contribution, an amount equal to the total amount of the Required Funds.

PSB Indian Creek alleges that its obligation to contribute additional capital to the Indian Creek Company was excused by JMH Indian Creek's alleged failure to make its initial capital contribution. Moreover, PSB Indian Creek asserts that while Halpern was demanding the \$800,000 from Piplani, JMH Indian Creek was failing to perform and breaching its own funding obligations, improperly distributing company money to itself (*i.e.* it diverted at least \$291,000 from the Project to the Halpern-owned and controlled JMH Development III LLC from 2014 to early 2017) and withholding Piplani's distributions and fees. PSB Indian Creek states that the capital call contained in the July 2016 Letter was invalid because its written consent was required but not received.

In November 2016, following Halpern's alleged refusal to have the Property professionally appraised to then either market it to a third party or allow Piplani to do a buy-out, Piplani allegedly offered to purchase the Property from the Indian Creek Company for \$9 million and the all-cash offer was refused. Then, in January 2017, defendant 29 ICD, LLC ("29 ICD"), a Florida company owned by defendant Gerard Longo ("Longo"), acquired title to the Property from the Indian Creek Company. PSB Indian Creek claims that the sale violated Section 5.3 of the Operating Agreement and that the \$7.75 million purchase price (of which only \$2.5 million was in cash) was below market value.

PSB Indian Creek alleges that the proffered grounds for the Project's delay – first raised in a letter from Halpern to Piplani on December 24, 2015⁵ – were "disingenuous" because when Halpern suggested delaying the Project, he was simultaneously "proceeding with a new investment in a similar real estate development project in the same area." And, PSB Indian Creek further alleges that Halpern sought to delay the Project "to set the stage for the rest of his plan to remove PSB Indian Creek LLC and Piplani from the project so that he could give it to Longo for a secret *quid pro quo*."

⁵ The letter, written to express Halpern's "recent thoughts on [the] project at 2901 Indian Creek Drive," states that: "I feel strongly that the timing is not right for the launch of Abor Miami beach, and that we should pause, endeavor to pay off our debt, and be patient while the construction costs decline, and the Faena District matures. During this time, we can work with the city make sure that the infrastructure issues are properly addressed. We have a spectacular piece of real estate, vested approvals and a beautifully designed product and brand – it would be a shame for it not to reach its full potential because the timing is off."

On June 15, 2017, PSB Indian Creek filed its Amended Complaint seeking declaratory and injunctive relief, an equitable lien, a constructive trust, an accounting and damages for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, conversion, money had and received, fraudulent concealment and tortious interference with contract.

Discussion⁶

Section 11.4 of the Operating Agreement states that the “Agreement and the rights of the parties hereunder shall be interpreted in accordance with the laws of the State of Delaware... and the parties... submit to the jurisdiction of the State and United States District courts located within New York in respect of any suit or other proceeding brought in connection with or arising out of this Agreement.” Thus, procedural matters will be governed by New York law, and for substantive matters, Delaware law applies. *See, e.g., Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48, 53 (1999); *Lerner v. Prince*, 119 A.D.3d 122, 128 (1st Dept. 2014) (stating that “[u]nder New York choice-of-law rules, matters of procedure are governed by the law of the forum”).

Direct or Derivative Analysis

“New York courts look to the law of the state of incorporation in adjudicating a corporation’s internal affairs ... including the question of whether a claim is direct or derivative.” *Amusement Indus., Inc. v. Stern*, No. 07-CV-11586, 2010 WL 2976199, at

⁶ PSB Indian Creek improperly filed three separate sur-replies to the motion to dismiss and was informed by me during a conference call to withdraw the supplemental filings. Thus, the supplemental filings were not considered in this decision.

*4 (S.D.N.Y. July 26, 2010); *see also Finkelstein v. Warner Music Group, Inc.*, 32 A.D.3d 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”). Thus, Delaware law applies to the question of whether PSB Indian Creek’s claims are properly considered as direct or derivative claims.

Under Delaware law, the standard for determining whether a claim is direct or derivative turns “solely on the following questions: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?” *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). Courts should make this determination “by evaluating ‘the nature of the wrong alleged, not merely... the form of words used in the complaint.’” *In re Ebix, Inc. Stockholder Litigation*, 2014 WL 3696655 at *14 (Del. Ch. 2014) (citation omitted).

In only limited circumstances can identical facts support both a direct and derivative claim. *Caspian Select Credit Master Fund, Ltd. v. Gohl*, C.A. No. 10244-VCN, 2015 WL 5718592 at *3 (Del. Ch. 2015). “To maintain a direct cause of action, a ‘stockholder’s claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.’” *Id.*

Here, PSB Indian Creek alleges that it is suing directly in its individual capacity for the following causes of action: first (declaratory judgment); sixth (breach of contract/duty of good faith and fair dealing); eighth (constructive trust); tenth (unjust enrichment); fourteenth (fraudulent concealment); fifteenth (tortious interference with contract); and sixteenth (accounting). PSB Indian Creek's alleged derivative claims are the: second (declaratory judgment); seventh (breach of contract/duty of good faith and fair dealing); ninth (constructive trust); eleventh (unjust enrichment); twelfth (conversion) and thirteenth (money had and received).

As PSB Indian Creek's voluminous Amended Complaint contains some mislabeled direct and derivative claims, where necessary, I apply Delaware law to determine whether the claim is appropriately direct or derivative and then decide if it is sufficiently plead.

Breach of Contract

PSB Indian Creek's breach of contract claim, despite being plead as both a direct and derivative claim, is a direct claim. *See NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175 (Del. 2015) (finding that "[a] suit by a party to a commercial contract to enforce its own contractual rights is not a derivative action under Delaware law."). Accordingly, I dismiss PSB Indian Creek's "derivative" breach of contract claim that utilized the identical language as the "direct" claim and requested the same relief.

To survive a motion to dismiss, a complaint for breach of contract must allege three elements: "(1) the existence of a contractual obligation, (2) an alleged breach of that

obligation, and (3) damages resulting from the alleged breach.” *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542 at *2 (Del. 2001).

PSB Indian Creek alleges that JMH Indian Creek beached the Operating Agreement in several ways. First, PSB Indian Creek contends that JMH Indian Creek failed to make its initial capital contribution in violation of Section 2.1. The Halpern Defendants argue that this claim fails as a matter of law because the Operating Agreement reflects that JMH Indian Creek made its initial contribution. The Operating Agreement notes that the Indian Creek Manager contributed \$400,000 prior to the Agreement’s execution and PSB Indian Creek acknowledged this contribution by signing the Operating Agreement.⁷ Additionally, the Halpern Defendants state that two other documents show that it made its \$400,000 capital contribution: 1) a Merrill Lynch bank statement (the “Merrill Lynch statement”) showing a wire transfer of \$400,000; and 2) an email from Louis Buckworth (“Buckworth”), a partner at PSB Capital, to Piplani, dated 3/10/16, stating that “JMH now holds a \$500K capital account in Indian Creek after funding an additional \$100K” (the “Buckworth email”).

The proffered documentary evidence does not “conclusively establishes a defense” to the breach of contract allegation “as a matter of law.” *Leon*, 84 N.Y.2d at 88. While The parties both executed the Operating Agreement, which states that JMH Indian Creek funded \$400,000 of its capital contribution prior to the execution of the Operating

⁷ The Halpern Defendants also point to a letter and bank statement that they allege show that they fulfilled their obligation to contribute an additional \$100,000 post-execution of the Operating Agreement.

Agreement, PSB's total initial capital contribution was to be \$500,000. The Merrill Lynch statement showing a \$400,00 wire transfer is in the name of 295 LNP LLC, the parent entity of 295 Collins, rather than JMH Indian Creek. Further, the wire transfer doesn't indicate to where the money was transferred. And, although emails can constitute documentary evidence when they meet the "essentially undeniable" test, the Buckworth email fails this test. *Amsterdam Hosp. Grp. v. Marshall-Alan Assocs.*, 120 A.D.3d 431, 433 (1st Dept. 2014) citing *Art & Fashion Group Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436 (1st Dept. 2014). Consequently, I deny dismissal of PSB Indian Creek's breach of contract claim based on the allegation that JMH Indian Creek breached the Operating Agreement by failing to make its initial capital contribution.

Second, PSB Indian Creek contends that JMH Indian Creek breached the Operating Agreement by making an improper capital call for \$4.1 million on July 15, 2016 because: 1) capital calls required PSB Indian Creek's prior written consent and it was not obtained; and 2) Section 2.6(a)(i) limits the purposes for which a capital call can be made and repayment of an acquisition loan – the stated purpose of the disputed capital call – is outside the scope of Section 2.6.

The Halpern Defendants argue that Section 2.6 does not contain a limitation on when a capital call can be made if the funding is required for "any bona fide Company reason" and that repayment of a loan and carrying costs are bona fide reasons. I agree. The language in Section 2.6(a)(i) does not preclude a capital call for repayment of a loan and carrying costs, and PSB Indian Creek's claim on this ground fails based on the plain language of the Operating Agreement.

The Halpern Defendants also argue that PSB Indian Creek's consent to the capital call was not needed because, once PSB Indian Creek failed to pay the \$800,000 in Mandatory Proceeds, it forfeited all its governance rights.

It is true that Section 2.6 (f) of the Operating Agreement states that if PSB Indian Creek has failed to make one or more additional Contributions in accordance with the terms of Section 2.2(a), then "PSB [Indian Creek], as Failing Member, shall forfeit the right to participate in the governance of the [Indian Creek] Company... JMH [Indian Creek] as Funding Member alone shall have the right to govern the Company."

Accepting as true PSB Indian Creek's allegation that JMH Indian Creek breached the Operating Agreement first by failing to make its initial capital contribution, I cannot determine, at this pre-answer motion to dismiss stage whether PSB Indian Creek's further performance under the contract was excused. *See Preferred Investment Svcs., Inc. v. T & H Bail Bonds, Inc.*, C.A. No. 5886VCP, 2013 3934992 at *21 (Del. Ch. Jul. 24, 2013) (stating that "[a] party who first commits a material breach of a contract cannot enforce the contract going forward"). Therefore, PSB Indian Creek's allegation that JMH Indian Creek breached the Operating Agreement by failing to get the former's consent pre-capital call sufficiently pleads a breach of contract claim at this juncture.

Third, PSB Indian Creek contends that JMH Indian Creek breached the Operating Agreement by causing the Indian Creek Company to sell the Indian Creek Property without PSB Indian Creek's consent. Assuming the truth of the allegation (as I must on a motion to dismiss) that PSB Indian Creek was wrongfully diluted because JMH Indian Creek breached the Operating Agreement, then PSB Indian Creek's allegation that JMH

Indian Creek's failed to obtain its consent prior to the sale of the Property sufficiently pleads a breach of contract claim.

Lastly, PSB Indian Creek states that JMH Indian Creek breached the Operating Agreement by failing to timely provide financial documents to PSB Indian Creek as required by Section 6.2. The Halpern Defendants argue that this claim must be dismissed because they provided PSB Indian Creek with monthly status update reports and furnished all the requisite financial documents. In support, the Halpern Defendants provided three sample project status reports and four emails, dated 6/21/16, 7/11/16, 7/14/16, and 10/13/16, which were sent to Piplani with attachments containing financial information.⁸

The documents submitted by the Halpern do not conclusively disprove the claim for breach of contract premised on failure to provide financial records. At this stage of the litigation, PSB Indian Creek has sufficiently plead its claim.

PSB Indian Creek contends that because the Halpern Defendants do not contest the allegation that they failed to provide Piplani with bank statements, the Court should treat the Halpern Defendants' motion to dismiss the claim for breach of Section 6.2 of the Operating Agreement as one for summary judgment pursuant to CPLR 3211(c), and grant summary judgment in favor of PSB Indian Creek. In fact, as noted above, the Halpern Defendants do contest this allegation and I decline to convert the claim to one for summary judgment.

⁸ The Halpern Defendants aver that they provided PSB Indian Creek with 22 reports.

In sum, the breach of contract claim is dismissed only to the extent set forth above.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The cause of action for breach of the duty of good faith and fair dealing is also solely a direct claim as it stems from the contract and the contract is between PSB Indian Creek and JMH Indian Creek.⁹ See *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009). Hence, I will only examine the sufficiency of the direct claim and dismiss PSB Indian Creek's identical "derivative" breach of the duty of good faith and fair dealing claim which used the same language as the "direct" claim and asked for the same relief.

"The implied covenant of good faith and fair dealing inheres in every contract" and requires a party to the contract "to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain." *Id.* at 888 (internal quotations and citations omitted). General allegations of bad faith actions will not suffice to state a claim for breach of the implied covenant but instead a plaintiff needs to allege both a specific implied contractual obligation and how a defendant's violation of that obligation "denied the plaintiff the fruits of the contract." *Id.* As the Delaware courts view implied covenant of good faith and fair dealing claims to have a narrow purpose such claims are infrequently successful. *Id.*

⁹ PSB Indian Creek's complaint conflates two causes of action and names its sixth and seventh causes of action as "Breach of Contract/Duty of Good Faith and Fair Dealing."

Here, PSB Indian Creek alleges that JMH Indian Creek breached the duty of good faith and fair dealing by negotiating with Longo and 29 ICD concerning a sale of the Indian Creek Property and then subsequently selling the property without disclosing either the sale or negotiations to PSB Indian Creek. The express terms of the Operating Agreement address this dispute and therefore the breach of the duty of good faith and fair dealing claim is entirely duplicative of the breach of contract claim. *See Fitzgerald v. Cantor*, No. C.A. 16297-NC, 1998 WL 842316 at *1 (Del. Ch. Nov. 10, 1998) (finding that 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”). The Halpern Defendants’ motion to dismiss is thereby granted as to the breach of the implied covenant of good faith and fair dealing claim.

Declaratory Judgment

In the amended complaint plaintiffs’ first cause of action seeks a declaration that:

(a) PSB Indian Creek LLC’s membership interests in the Indian Creek Company have not been diluted; (b) PSB Collins LLC’s membership interests in the Collins Company have not been diluted; (c) PSB Indian Creek LLC has not forfeited its rights to participate in the management of the Indian Creek Company; (d) the sale and deed of the Indian Creek Property to the Longo Company should be declared, in equity and good conscience, void ab initio and be rescinded because the sale (i) was not validly authorized by, and was performed in violation of, the Indian Creek Operating Agreement, or alternatively, (ii) was executed at a well-below-market price and unfavorable terms, so that a secret side deal would benefit Jason Halpern, or alternatively, (iii) constitutes an ultra vires act; (e) Jason Halpern, JMH Indian Creek Development, LLC, and 295 Collins LLC are not entitled to indemnification of their attorneys’ fees in this litigation from the Collins Company or the Indian Creek Company; and (f) PSB Indian Creek LLC and PSB Collins LLC are entitled to indemnification of their attorneys’ fees in this litigation from the Collins Company and the Indian Creek Company.

The second cause of action for a declaratory judgment, brought derivatively, repeats the declarations in sections (d) and (e) of the first cause of action.

First, I dismiss the portions of the declaratory judgment causes of action that pertain to PSB Collins because of the PSB Collins Discontinuance. Next, irrespective of whether the declaratory judgment claims are either direct or derivative, they are largely duplicative of the Amended Complaint’s other causes of action. As the Halpern Defendants correctly posit, the duplicative nature of PSB Indian Creek’s declaratory judgment causes of action renders them unnecessary. Because the declaratory judgment claims “do not add anything,” to the amended complaint, they are dismissed. *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, No. CV 11053-VCL, 2015 WL 9060982, at *15 (Del. Ch. Dec. 16, 2015). As the Delaware Court of Chancery noted in *ESG Capital Partners*, if it later turns out that “the declaratory judgment claim was not superfluous, it can be reinstated without any prejudice to the defendants.” *Id.*

Injunctive Relief and Equitable Lien

The Amended Complaint’s third, fourth and fifth claims for injunctive relief and an equitable lien were only brought – either derivatively or individually – by PSB Collins. Thus, they are dismissed pursuant to PSB Collins’ Discontinuance.

Constructive Trust

Under Delaware law, a constructive trust is a remedy rather than a substantive cause of action. *VTB Bank v. Navitron Projects Corp.*, 2014 WL 1691250 (Del. Ch.

2014); *See also Hogg v. Walker*, 622 A.2d 648, 652 (Del.1993). As a result, I dismiss both the direct and derivative causes of action for constructive trust.

Unjust Enrichment and Conversion

The direct and derivative unjust enrichment claims and the conversion claim are identical in that they are based on PSB Indian Creek's allegations that Halpern, both pre-dilution and post-dilution, took \$291,000 from the Indian Creek Company and used it for either his own personal expenses or diverted it to JMH Development III LLC, a Halpern-owned and controlled entity. As I stated during the oral argument on these motions, this claim is essentially a breach of fiduciary duty claim that belongs to the corporation and must be plead derivatively.

However, PSB Indian Creek's mislabeling of its causes of action alone doesn't require dismissal because on a motion to dismiss, the court only decides "whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 N.Y.2d at 87-88. Indeed, courts look at the substance rather than the form of the pleaded facts and even if a plaintiff incorrectly labels its claim, if the facts make out another cause of action, then the claim can survive a motion to dismiss. *Oringer v. Rotkin*, 162 A.D.2d 113, 114, 556 N.Y.S.2d 67 (1st Dept. 1990). I therefore review the substance of the claim.

1. Demand

PSB Indian Creek did not make a demand on the Indian Creek Company prior to bringing this action but instead alleges demand futility.¹⁰ The controlling legal standard

¹⁰ Because issues of corporate governance, such as the threshold issue of demand, are substantive matters, Delaware law applies. *Lerner*, 119 A.D.3d at 23.

for whether a claim based on demand futility can withstand dismissal was enunciated in *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). *See also Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). Under Delaware law, “a court will find demand futility where ‘the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.’” *Ishimaru v. Fung*, 2005 WL 2899680 at *12 (Del. Ch. 2005) quoting *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993).

Here, the Operating Agreement designated JMH Member as the Indian Creek Company manager and stated that “Jason Halpern shall maintain the power to control and direct the day-to-day management and policies of JMH Member.” Clearly, PSB Indian Creek’s allegations that Halpern took \$291,000 from the Indian Creek Company and used it for his own personal expenses “create a reasonable doubt” that the Indian Creek Company could have exercised its independent and disinterested business judgment in responding to a demand. Thus, PSB Indian Creek sufficiently pled demand futility.

2. Sufficiency

Under Delaware law, “[t]o state a claim for breach of a fiduciary duty, the factual allegations in a complaint must be such that they reasonably could support a finding that a fiduciary duty existed and the defendant breached that duty.” *Stewart v. Wilmington Trust SP Services, Inc.*, 112 A.3d 271, 297 (Del. Ch. 2015). Moreover, the central principle of a fiduciary duty is that the “one who controls property of another may not, without implied or express agreement, intentionally use that property in a way that

benefits the holder of the control to the detriment of the property or its beneficial owner.”

Id. citing In re USACafes, L.P. Litig., 600 A.2d 43, 48 (Del. Ch.1991).

“The directors of a Delaware corporation owe fiduciary duties to the corporation they serve.” *Quadrant Structured Products Co., Ltd. v. Vertin*, 102 A.3d 155, 171 (Del. Ch. 2014). Parties to an LLC operating agreement may change, limit or eliminate fiduciary duties owed by the LLC manager to the LLC and its members but, “in the absence of a provision explicitly altering such duties, an LLC’s managers and controlling members in a manager-managed LLC owe the traditional fiduciary duties that directors and controlling shareholders in a corporation would.” *Kelly v. Blum*, No. 4516-VCP, 2010 WL 629850, at *1 (Del. Ch. Feb. 24, 2010).

In this case, the Operating Agreement, Section 10.1 states that

No Member, Manager, or any officer... shall be liable, responsible or accountable in damages or otherwise to the Company or the other Members for any act or omission performed or omitted by the Indemnified Party in good faith pursuant to the authority granted to the Indemnified Party under this Agreement and in a manner reasonably believed by the Indemnified Party to be in the scope of the authority granted to the Indemnified Party by this Agreement and in the best interests of the Company, provided that the act or omission is not determined by a court to be due to the Indemnified Party’s fraud, willful misconduct, gross negligence, or misappropriation of funds.

The Operating Agreement does not alter the default fiduciary duties where the alleged actions were due to fraud or misappropriation of funds as has been alleged by PSB Indian Creek. Thus, I find that the Indian Creek Company’s manager (Halpern) and controlling member (JMH Indian Creek) owed the Indian Creek Company the traditional duties of loyalty and care. And, PSB Indian Creek’s allegations that Halpern and JMH Indian

Creek engaged in self-enrichment at the expense of the Indian Creek Company sufficiently state a claim for breach of fiduciary duty against them. Thus, I dismiss the conversion claim and the direct unjust enrichment claim, while the derivative unjust enrichment claim, re-cast as a breach of fiduciary duty claim – survives the Halpern Defendants’ motion to dismiss.

Money Had and Received

A money had and received claim “is an ancient cause of action subsumed by modern law regarding breach of contract.” *Street Search Partners, L.P. v. Ricon Intern., LLC*, No. CIV. A. 04C-09-156PLA, 2005 WL 1953094 at *1 (Del. Super. Ct. Aug. 1, 2005). And, as the Halpern Defendants, note, the claim “is no longer [] legally cognizable” in Delaware. *Id.* at *4.

PSB Indian Creek alleges that Halpern, JMH Indian Creek and JMH Development “received and benefitted from funds and assets obtained” from the Indian Creek Company to the derivative plaintiffs’ detriment. PSB Indian Creek’s opposition to the Halpern Defendants’ motion to dismiss fails to dispute that its cause of action for money had and received is not legally cognizable under Delaware law, nor does PSB Indian Creek cite any case law in support of its contention that the claim is viable. PSB Indian Creek only states that Halpern and JMH Development are not parties to the Operating Agreement and therefore the claim can survive.

Because a claim for money had and received is not legally cognizable under Delaware law, I dismiss this claim. Furthermore, PSB Indian Creek is not without

remedy because I found above that it stated a claim for breach of fiduciary duty (in its re-designated unjust enrichment claim).

Fraudulent Concealment

The elements required to establish a prima facie case of intentional misrepresentation (fraudulent concealment) are: “ (1) [d]eliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak; (2) [t]hat the defendant acted with scienter; (3) [a]n intent to induce plaintiff's reliance upon the concealment; (4) [c]ausation; and (5) [d]amages resulting from the concealment.” *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987). Fraudulent concealment “requires an affirmative act of concealment or ‘actual artifice’ by a defendant that prevents a plaintiff from gaining knowledge of the facts.” *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

PSB Indian Creek alleges that Halpern and JMH Indian Creek had a duty to disclose to it that they were negotiating a sale of the Indian Creek Property with Longo and 29 ICD, that such information was material, and that Halpern and JMH Indian Creek failed to make such disclosure. In addition, PSB Indian Creek alleges that it was damaged by Halpern and JMH Indian Creek's concealment because, had it known of the sale negotiations, it would have taken steps to protect its interests pre-sale and would not have lost the Indian Creek Property.

The Halpern Defendants argue that this claim must be dismissed because PSB Indian Creek failed to plead it with the requisite particularity. I agree. PSB Indian Creek has failed to plead any affirmative actions of concealment on the part of Halpern and

JMH Indian Creek and therefore have not sufficiently pled a claim for fraudulent concealment. *See Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC*, C.A. No. 3658-VCS, 2009 WL 1124451 at *12 (Del. Ch. 2009).

Accounting

“An accounting may be granted whenever a partner alleges the wrongdoing of a fiduciary and ‘asks his co-partners for an account and does not get it, or is not satisfied with it.’” *Nero v. Littleton*, No. CIV. A. 1622, 1998 WL 229526 at *4 (Del. Ch. Apr. 30, 1998) (citation omitted). Further, a fiduciary relationship must exist between the parties. *See Seiden v. Kaneko*, No. 9861-VCN, 2015 WL 7289338 at *15 (Del. Ch. Nov. 3, 2015). A cause of action for an accounting, however, is unavailable where there is an adequate remedy at law. *Schuss v. Penfield Partners, L.P.*, No. 3132-VCP, 2008 WL 2433842 at *11 (Del. Ch. June 13, 2008).

The Halpern Defendants argue that PSB Indian Creek’s claim for an accounting against JMH Indian Creek must be dismissed because there is already an adequate remedy at law, namely, its breach of contract claim. In opposition, PSB Indian Creek states that the claim should not be dismissed because it is permitted to plead alternative inconsistent theories of liability.

Although plaintiffs are generally permitted to plead alternative claims, where, as here, claims “largely duplicate and/or are governed by [a party’s] contract claims” they fail to state a claim and may be dismissed. *See Veloric v. J.G. Wentworth, Inc.*, C.A. No. 9051-CB, 2014 WL 4639217, at *1 (Del. Ch. Sept. 18, 2014). As PSB Indian Creek’s breach of contract claim includes a claim regarding receipt of financial records, I find that

it furnishes an adequate remedy at law and, accordingly, dismiss the accounting claim.

See *Schuss*, 2008 WL 2433842 at *11.¹¹

Tortious Interference with Contract

The tortious interference claim is the only remaining claim asserted against Longo and 29 ICD.¹²

In order to sufficiently plead a claim for tortious interference with a contract, a plaintiff must allege “the existence of: (1) a valid contract (2) about which defendant has knowledge, (3) an intentional act by defendant that is a significant factor in causing the breach of the contract, (4) done without justification, and (5) which causes injury.”

Madison Realty Partners 7, LLC v. Ag ISA, LLC, No. CIV. A. 18094, 2001 WL 406268 at *7 (Del. Ch. Apr. 17, 2001) (internal quotation and citation omitted).

PSB Indian Creek alleges that the Longo Defendants were aware of Operating Agreement and “intentionally and wrongfully interfered” with it “by purchasing the Indian Creek Property at a price that they knew was far below market value (and on inferior terms for the Indian Creek Company) without consent from PSB Indian Creek LLC, which they knew was required.” PSB Indian Creek states that the Longo Defendants’ conduct induced JMH Indian Creek to breach the Operating Agreement and

¹¹ The case cited by PSB Indian Creek, *Lemle v. Lemle*, 92 A.D.3d 494 (1st Dept. 2012) is distinguishable because the plaintiff in that case, unlike here, did not assert a breach of contract claim.

¹² The Amended Complaint also asserted the declaratory judgment claims, which were dismissed above, against Longo and 29 ICD.

that “but for” the Longo Defendants’ conduct, JMH Indian Creek would not have breached the Operating Agreement.

The Longo Defendants argue that the cause of action asserted against Longo individually must be dismissed pursuant to Delaware Lim. Liab. Co. Act § 18-303 (a). PSB Indian Creek counters that they are not seeking to pierce the corporate veil but the cause of action against Longo individually should not be dismissed because “the Amended Complaint alleges that Gerard Longo, personally, intentionally and wrongfully interfered with the Indian Creek Operating Agreement.” The Amended Complaint notes that Halpern co-developed other projects with Longo and alleges that Halpern sought to delay the Indian Creek Project in bad faith so that he could remove PSB Indian Creek from the project and give it to Longo for “a secret quid pro quo.”

Here, the “intentional action” component of the tortious interference with contract claim has not be met with respect to the allegations against Longo individually. The third-party purchaser of the Property was an entity, not an individual. Further, I find the allegations against Longo are entirely speculative and insufficient to sustain a claim for tortious interference with contract. Thus, the claim against Longo individually is dismissed.

The Longo Defendants next argue that this claim must be dismissed against 29 ICD because: 1) as set forth in the Halpern Defendants’ motion to dismiss, the underlying breach of contract claim fails as a matter of law and the tortious interference with contract claim must then also fail; 2) PSB Indian Creek failed to sufficiently plead the knowledge element; 3) PSB Indian Creek failed to sufficiently plead “but for” causation;

and 4) the Authorizing Resolution belies PSB Indian Creek's allegation that at the time of the Property sale, the Longo Defendants acted without consent from PSB Indian Creek.

As I did not dismiss the direct breach of contract cause of action against the Halpern Defendants, the Longo Defendants' first argument in favor of dismissal is moot. Further, at this stage of the litigation, PSB Indian Creek's allegations that 29 ICD was aware of Operating Agreement and purchased the Property at a below market price without consent from PSB Indian are adequate to support the claim for tortious interference.¹³ I therefore decline to dismiss this claim against 29 ICD.

Contempt Motion

On a conference call, the parties informed the Court that the deposition of Graham Penn, Esq. ("Penn") took place on June 29, 2018. Accordingly, PSB Indian Creek's motion for an order holding Penn in contempt for failing to produce documents or appear for a deposition is denied as moot.

In accordance with the foregoing, it is

ORDERED that, in accordance with the Notice of Partial Discontinuance, filed by plaintiff PSB Collins, on June 13, 2018, discontinuing its claims in this action, both directly and derivatively on behalf of JHPSB Collins Ventures, LLC, JHPSB Collins Ventures Investors, LLC, JHPSB Collins Development LLC and JHPSB Collins Development 2 LLC, the claims for injunctive relief and equitable lien are dismissed and

¹³ Contrary to the Longo Defendants' assertion, the Authorizing Resolution alone does not support dismissal of the claim against them because the allegation is that at the time that Halpern executed the sale of the Property, 29 ICD knew that Halpern did not have the ability to do so without PSB Indian Creek's consent.

the claims asserted against 295 Collins LLC and 295 LNP LLC are also dismissed; and it is further

ORDERED that the caption be amended to reflect the discontinuance and dismissal of claims by JHPSB Collins Ventures, LLC, JHPSB Collins Ventures Investors, LLC, JHPSB Collins Development LLC and JHPSB Collins Development 2 LLC against 295 Collins LLC and 295 LNP LLC and that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that the motion by the Halpern Defendants to dismiss PSB Indian Creek's Amended Complaint is granted as to the claims for breach of contract (brought derivatively) and as further set forth in this decision, breach of the implied covenant of good faith and fair dealing, declaratory judgment, constructive trust, conversion, unjust enrichment, money had and received, fraudulent concealment and accounting; and it is further

ORDERED that the motion by the Halpern Defendants to dismiss PSB Indian Creek's Amended Complaint is denied as to the claims for breach of contract (brought directly), and breach of fiduciary duty (previously designated as a derivative claim for unjust enrichment); and it is further

ORDERED that the motion by the Longo Defendants to dismiss PSB Indian Creek's Amended Complaint is denied with respect to the claim of tortious interference with contract asserted against 29 ICD and otherwise granted; and it is further

ORDERED that the motion by the Longo Defendants to dismiss PSB Indian Creek's Amended Complaint is granted as to Gerard Longo and the complaint is

dismissed in its entirety as against him and the Clerk is directed to sever and enter judgment in favor of Gerard Longo dismissing the complaint; and it is further

ORDERED that the caption be amended to reflect the dismissal of Gerard Longo and that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for Gerard Longo, 295 Collins LLC and 295 LNP LLC shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to ~~make the~~ court's records to reflect the changes in the caption herein; and it is further

ORDERED that the balance of the action is severed and continued; and it further;

ORDERED that PSB Indian Creek's motion for a contempt order against Graham Penn, Esq. is denied as moot; and it is further

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, Room 208 on September 26, 2018 at 2:15pm.

This constitutes the decision and order of the Court.

9/7/18
[Redacted]
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE