SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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AMBASE CORPORATION, 111 WEST 57TH MANAGER FUNDING LLC,111 WEST 57TH INVESTMENT LLC,ON BEHALF OF ITSELF AND DERIVATIVELY ON BEHALF OF 111 WEST 57TH PARTNERS LLC,111 WEST 57TH MEZZ 1 LLC,

Plaintiffs,

- v -

111 WEST 57TH SPONSOR LLC,111 WEST 57TH CONTROL LLC,111 WEST 57TH DEVELOPER LLC,KEVIN MALONEY, MATTHEW PHILLIPS, MICHAEL STERN, NED WHITE, 111 CONSTRUCTION MANAGER LLC,PROPERTY MARKETS GROUP, INC.,JDS DEVELOPMENT LLC,JDS CONSTRUCTION GROUP, LLC,PMG CONSTRUCTION GROUP LLC,MANAGER MEMBER 111W57 LLC,LIBERTY MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, 111 WEST 57TH PARTNERS LLC (AS A NOMINAL DEFENDANT), 111 WEST 57TH MEZZ 1 LLC,

Defendants.

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INDEX NO. 652301/2016

MOTION DATE 10/12/2021

MOTION SEQ. NO. 017

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 017) 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 531, 532, 533, 537, 538

were read on this motion to DISMISS.

This is a dispute among former partners in a joint venture to develop a luxury residential skyscraper in Manhattan. In 2017, the lender foreclosed on the project's equity through a strict

foreclosure and the Joint Venture lost the project.[1] In a nutshell, Plaintiffs[2] contend that Defendants[3] have engaged in an elaborate and long-running fraudulent scheme aimed at depriving Plaintiffs of their entire $70 million investment by, among other things, mismanaging the project, frustrating Plaintiffs' ability to exercise its equity put right option, accepting third-party funds in contravention of the JVA, and colluding with the project lenders to wipe out Plaintiffs' equity through strict foreclosure.

Defendants now move to dismiss the Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh causes of action in Plaintiffs' Fourth Amended Complaint (NYSCEF 492 ["FAC"]). For the reasons stated below, Defendants' motion is granted in part and denied in part.

RELEVANT PROCEDURAL BACKGROUND

In 2013, a joint venture agreement was entered into by developers Stern and Maloney and AmBase. AmBase contributed $70 million and was the largest equity investor in the real estate project at 111 West 57th Street (the "Project"). The parties' relationship is primarily governed by Company's Amended and Restated LLC Agreement dated December 17, 2013 (the "JVA").

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[1] The Court (Bransten, J.) detailed the background facts of this litigation in its January 23, 2018 Decision and Order (*see* NYSCEF 293). The Court presumes familiarity with those facts here. Additionally, the details of this dispute are discussed in *111 West 57th Street Property Owner v 111 West 57th Partners LLC*, 188 AD3d 590 [1st Dept 2021] and *Ambase Corporation v ACREFI Mortgage Lending, LLC*, 2019 WL 5394498 [Sup Ct, NY County 2019]).

[2] AmBase Corporation ("AmBase"), 111 West 57th Manager Funding LLC ("Manager Funding"), and 111 West 57th Investment LLC ("Investor." and together with AmBase and Manager Funding, "Plaintiffs")

[3] 111 West 57th Sponsor LLC ("Sponsor"), 111 West 57th Control LLC ("Control"), 111 West 57th Developer LLC ("Developer"), Kevin Maloney ("Maloney"), Matthew Phillips ("Phillips"), Michael Stern ("Stern"), Ned White ("White"), JDS Construction Group LLC ("JDS Construction"), PMG Construction Group LLC ("PMG Construction"), Property Markets Group, Inc. ("PMG Inc."), 111 Construction Manager LLC ("Construction Manager"), and Manager Member 111 W57 LLC (collectively, "Defendants")

In April 2016, AmBase and Investment filed this lawsuit against Sponsor, Stern, Maloney, and eight other defendants involved in the Project, alleging, among other things, that Defendants were intentionally precluding Ambase from exercising its Equity Put Right option under the JVA (the "Sponsor Action").

By Order and Decision dated January 23, 2018, this Court (Bransten, J.) dismissed the fraud, misrepresentation, breach of fiduciary duty claims, and certain breach of contract claims in Plaintiffs' Second Amended Complaint ("SAC") (*see Ambase Corp. v 111 W. 57th Sponsor LLC*, 2018 NY Slip Op 30160[U] [Sup Ct, NY County 2018] [the "January 2018 Order"]). Plaintiffs appealed the portion of the January 2018 Order that "granted defendants' motion to dismiss so much of the cause of action for a declaratory judgment and the second cause of action for breach of contract as is based on alleged violations of sections 2.8 (a) (2) and (3)" of the LLC Agreement (*AmBase Corp. v 111 W. 57th Sponsor LLC*, 193 AD3d 627, 628 [1st Dept 2021]).

The First Department affirmed on April 29, 2021. The court found that the Second Amended Complaint "contains no factual allegations that Sponsor 'financed'. . . contributions through any equity arrangements proscribed by section 2.8(a)(2) of the LLC Agreement," and thus failed to state a viable claim for breach of that provision. The court further found that even if Sponsor failed to disclose a change to its investors arising out of such contributions, as required under section 2.8(a)(3), Plaintiff failed to allege that it suffered any damages. As the court noted: "Plaintiff 111 West 57th Investment LLC's equity in the Company was diluted by Sponsor's capital and shortfall contributions to the Company, which the SAC fails to allege adequately were improperly financed by third parties, not by a failure to disclose any change to

investors allegedly resulting from the financing" (*id.* at 628). Finally, the court affirmed dismissal of Plaintiff's claim for declaratory judgment as duplicative of its contract clam (*id.*).[4]

By Order and Decision dated July 22, 2021, this Court granted Plaintiffs' motion to amend its pleadings in light of the First Department's decision (*see* NYSCEF 489).

DISCUSSION

I. Ninth, Tenth, and Eleventh Causes of Action

The Ninth, Tenth, and Eleventh causes of action in the FAC are dismissed. In a related action involving this same project,[5] the First Department determined that section 8.5 of the LLC Agreement waived all fiduciary duties, so Plaintiffs' breach of fiduciary duty and constructive trust claims cannot survive here (*see 111 W. 57th Inv. LLC v 111 W57 Mezz Inv. LLC*, 192 AD3d 618, 621 [1st Dept 2021]). Indeed, Plaintiffs concede in the FAC that "the Court will dismiss their Ninth, Tenth, and Eleventh claims for relief if the Appellate Division adheres to its decision in *111 West 57th Investment LLC*, 192 AD3d 618" (*see* FAC at 71 n 5). The First Department

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[4] While the appeal was pending, Plaintiffs filed a Third Amended Complaint ("TAC") that added federal RICO claims, which in turn triggered removal of the case to federal court (*see* NYSCEF 506; NYSCEF 344). The federal court dismissed the RICO claims and declined supplemental jurisdiction over the remaining state-law claims (NYSCEF 508). On August 30, 2019, the Second Circuit affirmed that dismissal and remanded this action back to this Court (*see AmBase Corp. v 111 W. 57th Sponsor LLC*, 785 F Appx 886, 887 [2d Cir 2019]).

[5] In July 2017, Plaintiff 111 West 57th Investment LLC filed a separate action, *111 West 57th Investment LLC v 111 W57 Investor LLC et al.*, No. 655031/2017 (the "Lender Action"), to challenge a proposed strict foreclosure by lender Spruce Capital Partners ("Spruce"). A temporary restraining order was granted, but the preliminary injunction was later denied, as the Court (Bransten, J.) determined that Plaintiffs did not have standing to challenge the strict foreclosure (*111 West 57th Investment LLC,* No. 655031/2017, NYSCEF 76 [Order and Decision Aug. 29, 2017]). Plaintiff additionally asserted claims for conversion, good faith and fair dealing, breach of fiduciary duty, constructive trust, breach of article 9 of the UCC, and declaratory judgment against Defendants. After appeal of the decision on Defendant's motion to dismiss, Plaintiff's only claims that remained were breach of good faith and fair dealing (*see 111 W. 57th Inv. LLLC v 111w57 Mezz Inv. LLC*, 192 AD3d 618 [1st Dept 2021]). Plaintiffs' motion for reargument was denied on August 26, 2021 (*see* NYSCEF 509).

did so by denying Plaintiffs' motion for reargument on August 26, 2021 (*see* NYSCEF 509). Accordingly, these claims are dismissed with prejudice.

II. Third Cause of Action: Breach of Contract

Defendants seek to dismiss portions of the third cause of action for breach of the parties' Joint Venture Agreement (NYSCEF 493 ("JVA")]). This Court previously dismissed several of these claims in its January 2018 Order. For the reasons outlined below, the claims for breach of the JVA as alleged in paragraphs 321(a), (h), (m), and (r) of Plaintiffs' Third Cause of Action are now also dismissed.

1. Section 2.8(a) and 9.1 of JVA: Undisclosed financing from third parties

Plaintiffs allege that in violation of sections 2.8 and 9.1 of the Joint Venture Agreement, Control and Sponsor relied on undisclosed financing from third parties that encumbered their direct or indirect interests in the Company to fund their portions of the October 2014 Capital Call, December 2014 Capital Call, the December 2014 Shortfall Capital Call, and the February 2015 Shortfall Capital Call (FAC ¶¶ 98, 107). Plaintiffs further allege that Sponsor's refusal to disclose further information breached sections 2.8, 4.2, and 9.1 of the Joint Venture Agreement, all of which entitled Investment to information about changes in direct and indirect investors in Sponsor's holdings, as well as encumbrances upon those holdings (*id.* ¶ 133).

a. Section 2.8(a)

Plaintiffs' previous iteration of its claim under section 2.8 has been dismissed (*Ambase*, 2018 NY Slip Op 30160[U], 15 ["[n]either section 2.8(a)(2), nor any other provision of the JVA, expressly prohibits *financing*"], *affd*, 193 AD3d 627 [1st Dept 2021]).

In reasserting these claims, Plaintiffs added paragraphs 96, 106 and 132 to their FAC, in which Plaintiffs allege that certain documents show that Control received a "loan" or "debt"

from an undisclosed Russian investment that entitled the holders to a percentage of Control's equity in the project. Even taking this as true, the newly alleged third-party "financing" gave the holders a percentage of *Control's* equity in the project, not *Sponsor's*. Accordingly, such loan or debt would not violate section 2.8(a)(2). The FAC does not allege that the third party funds were paid to Sponsor (*see* NYSCEF 520 at 10 [Pl. br. in opp.]). Thus, Plaintiffs still fail to allege "that Sponsor received "capital contributions . . . from third parties or managed funds," rather, they allege "just that defendants wrongfully received third party financing to fund their additional capital calls" (*Ambase*, 2018 NY Slip Op 30160[U], 15).

Further, Plaintiffs claim that they have now adequately alleged damages to support their claim under section 2.8(a)(3) regarding the purported failure to disclose changes to Sponsor's investors. Plaintiffs argue that if they had been given notice of these changes, they could have made a different decision to save at least part of their investment by, for example, not making the April 2015 capital contribution, not approving the construction loan, calling for manager overrun contributions, or exercising their equity put right option (NYSCEF 520 at 14). But these allegations are speculative and conclusory. Nowhere do Plaintiffs allege why, or how, a change in the Sponsor's investors would have led them to make "different decisions" or whether these "different decisions" would have influenced the strict foreclosure. These allegations are insufficient, as "mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based" (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]; *see also Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003] ["The damages for which a party may recover for a breach of contract . . . must be proximate and certain," and "not remote, speculative or contingent"]).

b. Section 9.1 of the JVA and Manager LLC Agreement

Plaintiffs' claim under section 9.1 of both the JVA and the Manager LLC Agreement survives.[6] These are parallel provisions providing that "[t]he Members shall not make, suffer, or permit (i) any Transfer, encumbrance or lien upon such Member's interest in the Company, (ii) any Transfer, encumbrance or lien upon the direct or indirect shares of stock, membership interest, partnership interest or other equity interest in the Members, . . . without, in each instance, obtaining the prior written approval of the Members, which approval may be withheld in such Member's absolute discretion" (JVA § 9.1[a]; Manager LLC Agreement § 9.1[a]).

Contrary to Defendant's arguments, it is not fatal to Plaintiffs' claim that section 9.1 does not mention Capital Calls. Section 9.1 regulates each member's ability to raise funds by transferring or encumbering their interests. The FAC alleges that the "loans" Sponsor used to make capital contributions entitled third parties to a percentage of Control's and Sponsor's equity in the project, and that Sponsor did not disclose, much less obtain approval for, the arrangement (FAC ¶¶ 96, 106). Thus, Plaintiffs have adequately alleged that the loan obtained by Control involved a transfer of Control's indirect interest in the Company.

Further, although Plaintiffs' claim under the Manager LLC Agreement was previously dismissed, it was dismissed only insofar as it was "based on Control allegedly receiving distributions it would not have received if Control had not obtained unlawful third party financing" (*Ambase*, 2018 NY Slip Op 30160[U], 26). Plaintiffs have since revised the

[6] Plaintiffs also assert a breach of contract claim against Defendant Control under the Manager LLC Agreement in its eighth cause of action.

allegations in its eighth cause of action, and this is not the basis of Manager Funding's claim against Control in the FAC.

2. Section 7.2 (Major Decisions)

Plaintiffs allege that Defendants breached the JVA by making "Major Decisions" under the JVA without obtaining Investment's prior written approval in violation of Section 7.2 of the JVA (FAC ¶ 321[h]). Section 7.2 provides that certain enumerated matters "may be proposed by either Manager or Investor but shall be subject to the prior written approval of both Manager and Investor in each instance (each a 'Major Decision')" (JVA § 7.2[a][i–xxvii]). Section 7.2(a) defines "Major Decisions" as those proposed by either Sponsor or Investor.

The Major Decision, as alleged here, was agreeing to the strict foreclosure as proposed by Spruce, which meant handing over all of Borrower's indirect interest in the Property (NYSCEF 520 at 17 [Pl. br. in opp.]). Plaintiffs argue that, per the terms of § 7.2(a) of the JVA, *consenting* to the strict foreclosure required the prior written approval of both Defendant Manager and Plaintiff Investment, but objecting did not. Under Plaintiffs' theory, this meant that Sponsor (or Manager) could cause Borrower to object unilaterally, but could cause Borrower to consent only with Investment's approval (*id.*). This is because "consenting" would cause a transfer of assets under JVA § 7.2(a)(iii), while objecting would not result in such a transfer, and therefore would not have been a Major Decision. Plaintiffs' theory is flawed.

First, neither Sponsors' nor Investments' consent was needed pursuant to section 7.2 of the JVA since the strict foreclosure was proposed by Spruce, not by Sponsor or Investor, nor does strict foreclosure fall within any of the actions requiring approval enumerated in section 7.2(a). Contrary to Plaintiffs' arguments, discharge of Borrower's debt was involuntary and was not a transfer of assets under JVA § 7.2(a)(iii) that could be proposed by Investor or Sponsor.

Objecting to the strict foreclosure would have only changed the form of disposition, not whether the debt would be discharged or the collateral disposed.[7]

Further, Sponsor did not affirmatively consent to the strict foreclosure. Instead, Sponsor did not "cause" Borrower to object within twenty days of receiving notice, which is deemed a consent under the strict foreclosure provisions of the UCC (*see* UCC § 9-620). Plaintiffs' attempt to recharacterize this as a Major Decision by Sponsor is unavailing, as Investment's approval was never sought or necessary. Plaintiffs therefore have failed to state a claim for breach of Section 7.2.

3. Section 7.5 (Refusing to Share Information)

Plaintiffs argue that Defendants breached section 7.5 of the JVA by refusing to cooperate and share information with AmBase's construction consultant, Sterling (FAC ¶ 321 [m]). This claim fails. There are no facts in the FAC to support allegation that Sponsor did not "use commercially reasonable efforts to . . . meet, consult and otherwise cooperate" with Sterling (JVA §7.5) and Plaintiffs cannot rely on allegations made in its TAC that it has not asserted here (*see Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty*, 71 AD3d 533 [1st Dept 2010] ["It is well settled that an amended complaint supersedes the original complaint, thus rendering without legal effect the defective earlier pleading"]). Even if the Court were to consider the allegations made in the TAC, this claim would still fail. Plaintiffs point to paragraph 256 of the TAC as a "detailed account of communications in which Defendants refused Sterling's requests for

[7] Plaintiffs initially informed Defendants that failing to object was a "Major Decision" requiring Plaintiffs' approval. Defendants disagreed, and Plaintiffs served its own objection and sought to enjoin the strict foreclosure. This ultimately failed as the Court determined Plaintiffs did not have standing to seek injunctive relief (*see 111 W. 57 Investor LLC*, NYSCEF 76). Plaintiffs argued at the preliminary injunction hearing they only sought to prevent a strict foreclosure sale, not limit Defendants' rights to a commercially reasonable sale or auction process (*id.*).

information." However, this paragraph alleges that Sterling received "contradictory responses from representatives of JDS" and was pled in support of a fraud claim. This is insufficient to put Defendants on notice of what the claim is against them (*JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Accordingly, Plaintiffs have failed to state a claim for this allegation of breach, and it is therefore dismissed.

4. Section 8.5 (Fraud and Intention Misconduct)

Plaintiffs allege Defendants breached their duty under Section 8.5 of the JVA not to engage in fraud and intentional misconduct with respect to the insurance Loss Fund, payroll and expenses, and the strict foreclosure (FAC ¶ 321[r]). Section 8.5 refers to the scope of the JVA's "Waiver of Fiduciary Duties," and provides that although all common law fiduciary duties have been waived, the provision does not exculpate the Company's members from liability for "acts or omissions that involve fraud, intentional misconduct or a knowing and culpable violation of law" (JVA § 8.5).

The First Department has already found that "[t]he waiver provision, § 8.5, in the LLC Agreement eliminated all fiduciary duties, and all that remained were contractual duties" (*111 W. 57th Inv. LLC*, 192 AD3d at 621). What Plaintiffs allege here is essentially that Defendants violated a *contractual* duty not to commit crimes. This interpretation is not supported by section 8.5. Rather, section 8.5 allows the parties to bring an independent claim for fraud, intentional misconduct, or a knowing and culpable violation of law, *not* a breach of contract claim for fraud, intentional misconduct, or a knowing and culpable violation of law. Therefore, Plaintiffs' claim of breach under section 8.5 is dismissed.

III. Fourth Cause of Action: Derivative Breach of Contract Claim

In Plaintiffs' fourth cause of action, a derivative claim, Plaintiffs argue that Defendant Developer breached its obligations under the Development Agreement (NYSCEF 493 at 81) by, among other things, failing to use "Commercially Reasonable Efforts" to plan, design, develop, construct and obtain permits for the Property in a timely manner and failing to devote sufficient time and attention to its obligations under the Development Agreement. In reviewing the previous version of this claim in the SAC, Justice Bransten dismissed this claim because she found that Plaintiffs did not allege demand would be futile with particularity (*Ambase*, 2018 NY Slip Op 30160[U], 27). However, Justice Bransten noted that even if demand futility were adequately pleaded, the "Complaint's vague allegations that Developer did not use 'commercially reasonable efforts' are insufficient to state a claim for breach of the Developer agreement. At most, plaintiffs allege that Developer did not devote 'sufficient time and attention' to the project, which allegation is not supported by any particularized facts" (*id.*).

On this motion, Plaintiffs argue that in the SAC they were describing an active ongoing business venture, while now they are describing a project that has been driven into the ground, which they assert supports this version of the claim. Plaintiffs further argue that the FAC contains multiple, specific allegations about Developer's failure to use commercially reasonable efforts that were not before Justice Bransten. For example, Plaintiffs contend that it was Developer's responsibility to design the building, that permits were delayed by the need for a redesign (FAC ¶¶ 55–62), that it was Developer's responsibility to direct and supervise the procurement of bids, and that when Defendants concluded the construction loan, they misrepresented their progress on procurement (FAC ¶¶ 141–42). Given these changes in the FAC, Plaintiffs' derivative breach of contract claim survives the motion to dismiss.

IV. Fifth Cause of Action: Fraudulent Misrepresentation or Omission

A fraud claim that is duplicative of a breach of contract claim should be dismissed insofar as it is "based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages" (*Fin. Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]). Justice Bransten previously dismissed Plaintiffs' fraudulent misrepresentation claims on the ground that the "allegations are all duplicative of plaintiffs' breach of contract allegations" (*Ambase*, 2018 NY Slip Op 30160[U], 30, *affd*, 193 AD3d 627 [1st Dept 2021]). The same is true for the most recent iteration of those claims, which again are based on the same underlying facts as the contract claims.

Plaintiffs' reliance on *Deerfield Communications Corp. v Chesebrough–Ponds, Inc.* (68 NY2d 954, 956 [1986]) is misplaced. In that case, an extra-contractual promise was held to have been collateral to the contract and, therefore, the fraud claim did not duplicate the contract claim. The First Department has since explained that "*Deerfield* confirms the rule that a false promise is actionable as fraud only if the promised performance is outside the terms of any contract between the parties" (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 69 [1st Dept 2017]). Here, Plaintiffs' arguments still rely on misrepresentations regarding contractual obligations– they do not allege anything outside the terms of the contract between the parties.

Plaintiffs are correct that Phillips and White are not signatories to the contract, and no contract claims have been alleged against them. But the fraud claims against Phillips and White are intertwined with the claims against the signatories. And while it is true that "a fraud claim may be dismissed as duplicative only as against a defendant against whom the related contract claim is viable" (*Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 305 [1st

Dept 2003]), here, as was the case in *Richbell*, "the fraud claim [is] properly dismissed as to all the defendants, including those who were not parties to the [contract], since in any event their alleged fraud liability was essentially accessorial only, so that once the main fraud claim against the direct actor falls, so does the claim against the remaining defendants" (*id.*).

V. Veil Piercing Allegations

In the third, fourth, fifth, and ninth causes of action, Plaintiffs assert that Stern, Maloney, JDS, and PMG exercised complete dominion and control of Sponsor in connection with the negotiation and execution of the JVA, and the facts and circumstances warrant piercing the veil of Sponsor, thereby rendering Stern, Maloney, JDS, and PMG jointly and severally liable to Plaintiffs for all damages sustained.

"Delaware courts have long understood the valid and useful purpose served by LLCs and recognize they need not be operated with the same level of formality as corporations. LLCs are often run by a single managing member, which quite often, as here, is controlled by a parent or affiliate entity. Consequently, allegations of overlapping control, and even, undercapitalization, do not justify piercing the corporate veil . . . Veil piercing is only warranted where the corporate form is used to perpetrate a fraud or injustice, and '[t]o meet this element, fraud or injustice [must] be found in the defendants' use of the corporate form itself'" (*Capone v Castleton Commodities Intern. LLC*, 2016 NY Slip Op 30521[U], 15 [Sup Ct, NY County 2016], *affd* 2017 NY Slip Op 01956 [1st Dept 2017], quoting *In re Opus E., LLC*, 528 BR 30, 57 [Bankr D Del 2015], *affd* 09-12261, 2016 WL 1298965 [D Del 2016], *affd* 698 Fed Appx 711 [3d Cir 2017]).

Plaintiffs do not adequately allege fraud or injustice in the Defendants' use of the corporate form itself. Rather, Plaintiffs allege that veil piercing is appropriate due to the underlying breaches alleged. This is not enough (*see e.g., Capone*, 2016 NY Slip Op 30521[U],

16 ["As countless Delaware courts have observed, the underlying breach sued upon cannot satisfy the element of fraud or injustice"]). Further, Plaintiff sets "forth conclusory allegations merely reciting typical veil piercing factors" (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016], *affd*, 31 NY3d 1002 [2018] [noting that plaintiff did "not allege any fraud or malfeasance to support its attempt to reach . . . third-party defendants. It alleges breach of contract claims against [defendant], but 'a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil'"] [citation omitted]). Thus, to the extent remaining, Plaintiffs' veil piercing allegations in counts three, four, five, and nine are dismissed.

Accordingly, it is,

ORDERED that Defendants' Motion to Dismiss the Fourth Amended Complaint is granted in part, and the relevant portions of Plaintiffs' Third Cause of Action (FAC ¶ 321(a), (h), (m), and (r)), as well as the Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Causes of Action, are hereby dismissed.

This constitutes the decision and order of the Court.

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5/9/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE