

47071 Bayside Parkway, JV LLC v Jadian Mgr. LLC

2025 NY Slip Op 33666(U)

September 25, 2025

Supreme Court, New York County

Docket Number: Index No. 651008/2022

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JUDY H. KIM PART 04

Justice

-----X

47071 BAYSIDE PARKWAY, JV LLC, 47071 BAYSIDE
PARKWAY, LLC,

Plaintiffs,

INDEX NO. 651008/2022

MOTION DATE 05/03/2022

MOTION SEQ. NO. 001

- v -

JADIAN MANAGER LLC, 47071 BAYSIDE LLC, JADIAN
FREMONT AGGREGATOR LP, FREMONT HOLDINGS
LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12,
13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to DISMISS.

Upon the foregoing papers, defendants’ motion to dismiss the complaint is granted in part,
to the extent set forth below.

Plaintiffs 47071 Bayside Parkway, JV LLC and 47071 Bayside Parkway, LLC, two of the
three members of defendant Fremont Holdings LLC (“Fremont”), bring this action against
Fremont’s third member as well as Fremont’s manager and Fremont’s subsidiary, asserting claims
for breach of contract, breach of fiduciary duty, and declaratory relief. Defendants now move to
dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiffs oppose the motion.

FACTUAL BACKGROUND

The following factual recitation is adapted from the allegations in plaintiffs’ complaint,
taken as true for purposes of this motion, and undisputed documentary evidence in the record (i.e.,
the two agreements governing the parties’ relationships).

Plaintiffs 47071 Bayside Parkway, JV LLC¹ (“Bayside”) and 47071 Bayside Parkway LLC (“Bayside Member”), entered into an agreement with defendant Jadian Manager LLC (“Jadian”) to jointly purchase a property located at 47071 Bayside Parkway in Fremont, California (the “Property”) (NYSCEF Doc No. 11, complaint at ¶¶4, 12). Defendant 47071 Bayside LLC (the “Property Owner”) was formed as an entity to acquire title to the Property (*id.* at ¶13). Fremont was formed as a holding company to wholly own the Property Owner (*id.*). Fremont is managed by Jadian and has three members: Bayside, Bayside Member, and Jadian Fremont Aggregator LP (“Jadian Member”) (*id.*).

The parties agreed to purchase the Property for \$34,771,525.68 (*id.* at 15). The parties’ initial plan contemplated that Jadian Member would fund \$11.2 million of the purchase, Bayside Member would fund \$750,000.00, and the Property Owner would fund the remaining \$22.7 million by assuming an existing loan on the Property (*id.*). However, the Property Owner’s assumption of this loan required approval by a rating agency, which approval could not be obtained in time for the scheduled closing (*id.* at ¶¶17-18). As a result, Jadian Member agreed to fund this \$22.7 million shortfall, in addition to its original \$11.2 million contribution (*id.* at ¶18). This \$22.7 million expenditure was allocated to Jadian Member as preferred equity in Fremont (the “Preferred Equity”) (*id.*). The parties agreed that Jadian would “secure a loan promptly after the closing of the Transaction,” to repay Jadian Member’s \$22.7 million additional expenditure (*id.* at ¶19).

The purchase of the Property was completed on or about February 11, 2020. In connection with the purchase, Jadian, Jadian Member, Bayside, and Bayside Member executed a Limited Liability Company Operating Agreement for Fremont (the “Operating Agreement”) while Bayside

¹ Bayside has two principals, Benjamin Kohn and David Manheimer (*id.* at ¶1).

and the Property Owner executed a Management Agreement for the Property. Plaintiffs allege that defendants have breached both agreements.

Breach of Operating Agreement

Pursuant to the Operating Agreement, Jadian Member owned approximately ninety-four percent of the equity membership interest in Fremont while Bayside Member owned approximately six percent of the equity membership interest. Bayside did not own any equity in Fremont but, under the Operating Agreement, was entitled to a fee for having located the Property, secured the purchase of the Property, and provided Jadian with the opportunity to participate in the purchase (the “Promote Fee”) (*id.* at ¶¶20-21). The Promote Fee was calculated pursuant to a formula set out in the Operating Agreement (*id.*).

Section 7.1(d) of the Operating Agreement provides that

... in the event a Prohibited Event occurs which is not cured within the agreed cure period therefor, if any, then, at the option of the Manager, the Promote payable to the Bayside Promote Member under this Agreement shall be forfeited ...

(NYSCEF Doc No. 13 [Operating Agreement at §7.1[d]). The Operating Agreement defines a “Prohibited Event” to include, as pertinent here, any instance in which Bayside, its principals, or Bayside Member

... engages in fraud, negligence, willful misconduct, intentional misappropriation of funds or intentional misrepresentation or any such party is indicted or convicted of a felony (or a guilty plea, plea of no contest or nolo contendere plea in connection therewith).

(*id.* at Schedule B).

Section 7.6(e) of the Operating Agreement provided, in pertinent part, that if Jadian failed to obtain a loan to repay Jadian Member’s \$22.7 million expenditure by June 30, 2020, then Jadian could, upon ten days’ notice to Bayside and Bayside Member, convert the Preferred Equity to capital via a capital call of Fremont’s members (NYSCEF Doc No. 13, Operating Agreement at

§7.6[e][i]-[iii]). If Bayside Member failed to contribute to such a capital call, the resulting shortfall would be paid by Jadian Member and, as a result, Jadian Member's membership interest in Fremont would increase from approximately ninety-four percent to ninety-eight percent and Bayside Member's membership interest would decrease from approximately six percent to approximately two percent. This conversion would also lower Bayside's Promote Fee by at least fifty percent and lower Bayside's management fee under the Management Agreement (NYSCEF Doc No. 1, complaint at ¶¶37-39).

Plaintiffs allege that at the time section 7.6 was incorporated into the Operating Agreement “and again when the Preferred Equity was funded,” Jadian and Jadian Member assured plaintiffs that Jadian would secure a loan to return the Preferred Equity to Jadian Member but that “in the unlikely event that a loan was not obtained, they would not convert the Preferred Equity to capital” (*id.* at ¶26). However, despite multiple opportunities to secure a loan to repay Jadian Member, Jadian failed to do so, and, on April 17, 2021, Jadian notified Bayside and Bayside Member that the Preferred Equity would be converted to capital (*id.* at ¶¶27, 37). Plaintiffs did not make a capital contribution (*id.* at ¶48).

Plaintiffs further allege that upon the closing of the Purchase, the Property Owner became responsible to repay a Property Assessed Clean Energy Loan (the “PACE Loan”)—an \$8.65 million clean energy financing loan, of which it had borrowed approximately \$6.3 million—through annual property assessments but that, on or around August 2021, Jadian decided to pay this PACE Loan in full by making a capital call on Fremont's members (*id.* at ¶¶16, 47). When Bayside Member did not make the requested contribution, Jadian Member contributed the full amount, further diluting Bayside Member's membership interest (*id.* at ¶¶47-48).

Breach of the Management Agreement

The Management Agreement provided that Bayside would serve as the Property Owner's representative and act as an intermediary between the Property Owner and CBRE, the real estate management firm responsible for the day-to-day management of the Property, and would receive a fee for this service (*id.* at ¶¶23, 27).

On March 8, 2021, the insurance company insuring the Property informed Bayside that it had not received a payment for the Property's insurance policy and that, as a result, the insurance policy had been cancelled as of January 29, 2021 (*id.* at ¶33). In response, Bayside secured a \$5 million "stop gap" policy that remained in effect until a new comprehensive policy was obtained (*id.* at ¶34). Plaintiffs and defendants each blame the other for this lapse in coverage.

On June 11, 2021, the Property Owner sent a letter to Bayside purporting to terminate the Management Agreement (the "Termination Letter") based on Bayside's: (i) failure to maintain insurance on the Property; (ii) failure to timely provide accurate budgets and financial reports; and (iii) negligent supervision of various improvements to the Property and evaluation of a prospective tenant for the Property (NYSCEF Doc No. 15, termination letter).

By separate letter of the same date, Jadian informed plaintiffs that the acts set forth in the Termination Letter were incurable Prohibited Events under the Operating Agreement (NYSCEF Doc No. 16) which, pursuant to section 7.1(d) of the Operating Agreement, resulted in the forfeit of Bayside's Promote Fee (NYSCEF Doc No. 1, complaint at ¶42).

On March 3, 2022, plaintiffs commenced this action, asserting claims for: (1) breach of the Management Agreement in improperly terminating same and failing to pay Bayside management fees; (2) a declaratory judgment that no "Prohibited Event" occurred and Bayside is, accordingly, entitled to its Promote Fee under the Operating Agreement; (3) a declaratory judgment that Jadian

and Jadian Member waived their right to, and are now estopped from, converting Jadian Member's Preferred Equity to capital; and (4) breach of fiduciary duty against Jadian based on its: failure to obtain regulatory approval for the Property Owner's assumption of the \$22.7 million loan on the Property; subsequent refusal to close on available loans to repay the Preferred Equity to Jadian Member; and belated conversion of the Preferred Equity to capital in contravention of its oral assurances to plaintiffs.

The Instant Motion

Defendants now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss plaintiffs' complaint. As to plaintiffs' first cause of action, defendants argue that no claim for breach of the Management Agreement lies because Jadian Manager has absolute discretion to terminate it under the terms of that Agreement. Defendants also argue, in the alternative, that they have established the termination was with cause through emails David Manheimer (a principal of Bayside) exchanged with a representative of Bayside's insurance broker and Eddie Chabbott of Jadian Manager (NYSCEF Doc Nos. 17-20). Defendants contend that these emails demonstrate that Bayside caused the lapse in the Property's insurance coverage. In opposition, plaintiffs argue that the Management Agreement does not protect defendants' determination that the termination was with cause from legal challenge and that the emails submitted by defendants are not documentary evidence and do not conclusively establish a defense to this claim. Plaintiffs add that, even if defendants had cause for the termination, the termination would nevertheless be ineffective because the Management Agreement provides that a termination based on Bayside's breach of its obligations under that agreement requires, as a condition precedent, that Bayside be given notice and an opportunity to cure the breach, neither of which Bayside was afforded.

As to plaintiffs' second cause of action—seeking a declaratory judgment that no “Prohibited Event” contemplated in the Operating Agreement occurred—defendants argue that its assessment that a “Prohibited Event” occurred is not subject to Court review, citing section 8.1 of the Operating Agreement. This section provides Jadian Manager with “the sole and exclusive right to manage, control and conduct the affairs” of Fremont, that it “shall be entitled to consider only such interests and factors as it desires, including its own interests, and shall have no duty or obligation to give any consideration to any interest of or factors affecting the Company or any other Person ...” in making management decisions, and, finally, that these decisions made in the exercise of this discretion are “final and conclusive” (NYSCEF Doc No. 13, Operating Agreement at §13.18). In opposition, plaintiffs argue that Jadian’s exclusive right to manage the affairs of Fremont does not protect its interpretation of the Operating Agreement’s terms from judicial review.

As to plaintiffs' third cause of action—seeking a declaratory judgment that defendants waived their right to convert the Preferred Equity to capital—defendants argue that this conversion was permitted under section 7.6 of the Operating Agreement and that the alleged oral assurances from defendants that no conversion would be effected are belied by section 13.3 of the Operating Agreement, in which plaintiffs disclaimed any reliance on prior representations and agreed that any modification of the Operating Agreement would be in writing. In opposition, plaintiffs argue that the Operating Agreement is ambiguous as to whether June 30, 2020 was defendants' deadline to convert the Preferred Equity to capital and that, on this motion to dismiss, the Court must credit plaintiff's interpretation of this provision, that defendants missed the deadline to convert the Preferred Equity to capital. Plaintiffs also reiterate their position that Jadian’s repeated promises not to convert the Preferred Equity were a waiver of its right to do so.

Finally, defendants argue that the fourth cause of action—plaintiffs’ breach of fiduciary duty claim against Jadian—does not lie because section 8.9 of the Operating Agreement expressly waives any fiduciary duties. In opposition, plaintiffs maintain that, pursuant to section 7.6(e) of the Operating Agreement—which provides that Jadian Manager could convert the Preferred Equity upon “the failure of the Company to obtain a Third-Party Loan”—Jadian had a duty to plaintiffs to make a good faith effort to seek out and accept such a loan and that its refusal to accept available loans was a violation of its fiduciary duty to plaintiffs as well as the implied covenant of good faith and fair dealing (the latter of which is not referenced in the complaint).

DISCUSSION

In addressing a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]). In the context of a motion to dismiss under CPLR 3211(a)(7), “[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

On a motion to dismiss pursuant to CPLR 3211(a)(1), “[d]ismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc, Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal citations and quotations omitted]). “To be considered documentary” such evidence “must be unambiguous and of

undisputed authenticity” (*Toribio v 575 Broadway LLC*, 61 Misc 3d 1224(A) [Sup Ct, NY County 2018] [internal citations and quotations omitted]).

First Cause of Action – Breach of Management Agreement

That branch of defendants’ motion to dismiss plaintiffs’ first cause of action is denied. To state a claim for breach of contract, plaintiffs must allege the existence of a contract between plaintiff and defendants, plaintiffs’ performance under the contract, defendants’ breach of the contract, and resulting damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiffs have done so. Defendants’ argument that the Property Owner’s determination that the termination was with cause is incontestable is unavailing.

Section 10.2 of the Management Agreement provides that:

(a) ... at any time after the Effective Date, Owner shall have the right, in Owner’s sole and absolute discretion, to terminate this Agreement with or without Cause.² In order to exercise any termination right under this Agreement, Owner shall deliver a written notice of termination or removal (each, a “Termination Notice”) to Manager stating (x) that Owner has taken such action, (y) whether such termination is with Cause and, if so, the particular Cause at issue, or without Cause and (z) the date upon which such termination shall become effective.

(NYSCEF Doc No. 14, management agreement at §10.2[a] [emphasis added]).

The Management Agreement defines “cause” to include, as relevant here:

(f) any act of fraud, intentional misappropriation of funds, negligence, willful misconduct, intentional misrepresentation or breach of fiduciary duty by Manager, any Manager Principal or any Affiliate of any of the foregoing; or

...

(k) the breach, in any material respect, by Manager of any of the terms of this Agreement, to the extent not otherwise described in the foregoing provisions, which breach is not cured within thirty (30) days after notice of such breach is delivered to Manager

² The distinction between a termination with or without cause is consequential insofar as in the event of a termination without cause, the Property Owner must pay Bayside its management fee for the thirty-day period following Bayside’s receipt of the notice of termination. By contrast, if the termination is with cause, Bayside will not receive payment of any kind for the period between its receipt of the termination notice and the termination date (id. at §10.2[b], [c]).

(*id.* at Ex. B [emphasis added]).

Defendants argue that under section 10.2(a), Jadian’s “sole and absolute discretion” to terminate the Operating Agreement means that its determination that termination was for “cause” is beyond judicial review. This interpretation would give defendants carte blanche to terminate the Operating Agreement “with cause” without reference to the Operating Agreement’s definition of “cause,” rendering the definition of that term effectively meaningless. In other words, crediting defendants’ interpretation would violate a “cardinal rule of [contract] construction,” namely “that a court adopt an interpretation that renders no portion of the contract meaningless” (*Kolmar Americas, Inc. v Bioversal Inc.*, 89 AD3d 493, 494 [1st Dept 2011] [internal citations omitted]).

The cases defendants cite, *Transit Funding Associates, LLC v. Capital One Equipment Finance Corp.* and *Moran v. Erk*, do not support a contrary conclusion. In *Transit*, the Appellate Division, First Department, concluded that a lender’s refusal to make any further loans to plaintiff financing company did not violate the parties’ loan agreement (or the implied duty of good faith and fair dealing) because that agreement gave the lender authority to deny “any” funding requests “in its sole and absolute discretion” and to condition its approval “for any [] reason” (*Tr. Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 25 [1st Dept 2017]). In *Moran*, the parties’ real estate contract contained a clause providing that consummation of the transaction was contingent upon attorney approval and that the agreement could be timely disapproved for any reason or no stated reason and, therefore, the Court of Appeals concluded, defendants’ attorney’s disapproval of the parties’ real estate contract was valid (*Moran v Erk*, 11 NY3d 452 [2008]). These cases stand for the proposition that where a party to a contract has an unconditional, unqualified right to terminate an agreement, their exercise of that right cannot be challenged. Neither of the agreements at issue in these cases included, as here, an option to terminate “with

cause” and therefore have no bearing on the question of whether plaintiffs can challenge Jadian’s determination that the termination was “with cause” under the terms of the Operating Agreement.

Neither have defendants established that their termination of the Management Agreement was “with cause.” The out-of-context emails they submit do not preclude a finding, after discovery, that plaintiffs were not at fault for the cancellation of the insurance coverage (*see Calpo-Rivera v Siroka*, 144 AD3d 568, 568 [1st Dept 2016]) and therefore fail to “conclusively establish a defense to the claims set forth in the complaint” (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]).

Finally, even setting the foregoing aside, plaintiffs have stated a breach of contract claim through allegations that the Property Owner terminated the Management Agreement without providing Bayside with notice of its purported breach of the Management Agreement and an opportunity to cure that breach (*Summit Dev. Corp. v Fownes*, 74 AD3d 563 [1st Dept 2010] [“Where a contract provides that a party must fulfill specific conditions precedent before it can terminate the agreement, those conditions are enforced as written and the party must comply with them”]). Defendants’ argument that Bayside’s failure to maintain insurance coverage was an act of fraud, negligence, or breach of fiduciary duty for which no warning or cure period would be required under the Management Agreement is unavailing. As Bayside’s obligation to procure insurance arose under section 8.2 of the Management Agreement and, therefore, any failure to maintain insurance was a breach of contract rather than a breach of an independent fiduciary duty (*see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc.*, 85 AD3d 680, 682 [1st Dept 2011] [dismissing plaintiffs’ breach of fiduciary duty claim “because it is not based upon the breach of any fiduciary duty independent of the parties’ agreement itself”]).

In short, it remains to be seen whether defendants had cause to terminate the Management Agreement and, if so, whether conditions precedent to that termination were satisfied (*see Summit Dev. Corp. v Fownes*, 74 AD3d 563 [1st Dept 2010] [summary judgment properly denied where “there were factual issues as to whether the contract was properly terminated”]). Accordingly, defendants’ motion to dismiss this claim is denied.

Second Cause of Action – Declaratory Judgment

Defendants’ motion to dismiss the second cause of action—which seeks a declaratory judgment that no Prohibited Event, as defined in the Operating Agreement, occurred—is also denied.

Plaintiffs have sufficiently alleged that Jadian breached the Operating Agreement by improperly declaring a Prohibited Event had occurred and withholding its Promote Fee. The Court is not persuaded by defendants’ argument that Jadian’s declaration of a Prohibited Event is rendered unreviewable by section 13.18 of the Operating Agreement. That section provides that:

whenever in this Agreement ... a Person is permitted or required to make a decision or determination, exercise a right given to it to approve or disapprove a matter, or make an election or judgment (whether in any such instance, such matter, decision, determination, exercise of a right, election, judgment, or approval right is in such Person’s “discretion” or “sole discretion” or under a grant of similar authority or latitude), then the decision, determination, exercise of a right, election, judgment, approval right, or election to withhold an approval, of such Person shall (except as is otherwise specifically herein provided) be in the sole and absolute discretion of such Person, shall be final and conclusive, and such Person shall be entitled to consider only such interests and factors as it desires, including its own interests, and shall have no duty or obligation to give any consideration to any interest of or factors affecting the Company or any other Person and shall not be subject to any other or different standard

(NYSCEF Doc No. 13, operating agreement at §13.18[c]).

As an initial matter, the language of section 7.1(d) does not fall within the intendment of section 13.18 such that Jadian has the discretion to determine whether a Prohibited Event occurred.

It provides, instead, that after a Prohibited Event has occurred, whether the Promote Fee will be forfeited is left to Jadian's discretion. Under Delaware law, which governs the Operating Agreement, the fact that Jadian has exclusive authority to manage Fremont does not make it the ultimate arbiter of whether a Prohibited Event has occurred (*see W.D.C. Holdings, LLC v. IPI Partners, LLC*, 2022 WL 2235005, at 9-10 [Del. Chanc. 6122/22]). Accordingly, defendants' motion to dismiss this cause of action is denied.

*Third Cause of Action – Declaratory Judgment
(Prohibiting Conversion of Preferred Equity)*

Defendants' motion to dismiss is granted as to plaintiffs' third cause of action.³ Plaintiffs' argument that Jadian is prohibited from converting the Preferred Equity to capital by its failure to accept loans to repay the Preferred Equity, its delay in effecting the conversion, and its assurances to plaintiffs that it would not convert the Preferred Equity is undermined by the terms of the Operating Agreement.

Contrary to plaintiffs' position, section 7.6 of the Operating Agreement does not obligate Jadian to procure a loan to repay the Preferred Equity but contemplates that Jadian would not do so. Neither does it set an outside date for defendants to issue a capital call; the June 30, 2020 date is the first date by which a capital call can be issued. The absence of a deadline is not an ambiguity but an indication that no deadline exists.

Finally, plaintiffs' allegations that Jadian and Jadian Member "assured" plaintiffs that they would not convert the Preferred Equity to capital does not support plaintiffs' waiver or equitable estoppel arguments because the integration and non-reliance clauses set forth in sections

³ Defendants argue that Jadian Member, as a member of Fremont Holdings, is not liable for the obligations of Fremont Holdings and must be dismissed from this case. Plaintiffs, in opposition, explain that Jadian Member is named as a party to the third cause of action, because it would be affected if the court grants the declaratory relief sought therein and is therefore a necessary party pursuant to CPLR 1001(a). In light of the dismissal of this cause of action, the Court does not reach this argument.

11.4(b)(vi) and 13.3 of the Operating Agreement preclude any reliance by plaintiffs on defendants' alleged prior oral representations (*see Kokorich v Momentus Inc.*, 2022-0722-MTZ, 2023 WL 3454190, at *11 [Del Ch May 15, 2023], *affd*, 308 A3d 1192 [Del 2023], and *affd*, 308 A3d 1192 [Del 2023]; *St. James Recreation, LLC v Rieger Opportunity Partners, LLC*, CIV.A. 19346, 2003 WL 22659875, at *1 [Del Ch Nov. 5, 2003]).

“While integration clauses ... do nothing to prevent the Court’s consideration of subsequent promises, communications, or modifications to the express agreement and therefore do not bar a finding of waiver, estoppel, or acquiescence” (*In re Coinmint, LLC*, 261 A3d 867, 897 [Del Ch 2021]), the Operating Agreement also provides that

This Agreement may not be waived, changed, modified, or discharged orally, but only by an agreement in writing signed by the party against whom any waiver, change, modification, or discharge is sought ...

(NYSCEF Doc No. 13 [Operating Agreement at §13.3] [emphasis added]).

This provision precludes plaintiffs’ reliance on any oral assurances after the execution of the Operating Agreement (*see Wireless Properties, LLC v CC Fin. LLC*, 10 A3d 613, 618 [Del 2010] [where loan and security agreement unambiguously limited lender’s obligation to an initial loan of \$5.5 million and provided that it could not be changed, modified, amended, waived, supplemented, discharged, cancelled, or terminated other than by an agreement in writing, signed by the party to be charged, lender’s past advances did not amount to a waiver of its discretionary ability to refuse to consent to further loans in the future]).

While Delaware trial courts have, on occasion, concluded that where, on a motion to dismiss for failure to state a claim, “an oral modification was pled, it [is] reasonably conceivable that the parties also waived the no-oral-modification provision” (*CPC Mikaway Holdings, LLC v MyMo Intermediate, Inc.*, CV 2021-0707-MTZ, 2022 WL 2348080, at *13 [Del Ch June 29, 2022])

[internal citations omitted]), no oral modification has been pled here. “Any amendment to a contract, whether written or oral, relies on the presence of mutual assent and consideration” which Delaware courts define “as a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request” (*Estate of Buller v Montague*, CV S18C-11-007 RFS, 2020 WL 996883, at *4 [Del Super Ct Mar. 2, 2020]). Plaintiffs do not allege that it provided any consideration to defendants in return for the purported waiver of their rights under section 7.6(e) of the Operating Agreement (*id.*).

Neither do the complaint's allegations support an equitable estoppel claim. Equitable estoppel requires “(1) a false representation of material fact; (2) the defendant's knowledge of or belief as to the falsity of the representation or the defendant's reckless indifference to the truth of the representation; (3) the defendant's intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance” (*Duffield Assocs., Inc. v Meridian Architects & Eng'rs, LLC*, 2010 WL 2802409, at *4 [Del. Super. July 12, 2010] [emphasis added]). However, a party's reliance on “an oral promise that ‘directly’ or ‘meaningfully’ conflicts with the express terms of the parties’ written agreement” is not reasonable (*Cent. Mortg. Co. v Morgan Stanley Mortg. Capital Holdings LLC*, CIV.A. 5140-CS, 2012 WL 3201139, at *25 [Del Ch Aug. 7, 2012]). Accordingly, plaintiffs' alleged reliance on defendants' promise not to convert the Preferred Equity cannot be said to be reasonable when that alleged promise was in direct conflict with defendants' clear right to convert the Preferred Equity under the Operating Agreement.

Fourth Cause of Action – Breach of Fiduciary Duty

Defendants’ motion to dismiss plaintiffs’ fourth cause of action, alleging that Jadian breached its fiduciary duty to plaintiffs by converting the Preferred Equity, is also granted. Section 8.9 of the Operating Agreement provides that

“Notwithstanding anything to the contrary contained in this Agreement or otherwise applicable provision of law or equity, the Manager and each Member agrees that, to the fullest extent permitted by the Act, neither the Manager nor any Member shall have any duties or obligations (including fiduciary duties) to the Company, any Member, or any other Person except as expressly set forth in this Agreement”

(NYSCEF Doc No 13, Cordero affirm., exhibit 3, Operating Agreement Section 8.9).

This provision waives all fiduciary duties, as the parties are permitted to do under Delaware law (*see Dieckman v Regency GP LP*, 155 A3d 358, 366 [Del 2017]), precluding this claim. To the extent plaintiffs attempt to characterize this fiduciary duty claim into a claim for breach of the implied covenant of good faith and fair dealing, these are two distinct claims (*see Wood v Baum*, 953 A2d 136, 143 [Del 2008] [“The implied covenant of good faith and fair dealing is a creature of contract, distinct from the fiduciary duties that the plaintiff asserts here”]) and plaintiffs cannot now, in opposition, convert the former into the latter. Accordingly, plaintiffs’ fourth cause of action is dismissed.⁴

In light of the foregoing, it is

ORDERED that defendants’ motion to dismiss is granted to the extent that the third cause of action seeking a declaratory judgment and fourth cause of action for breach of fiduciary duty are dismissed, and is otherwise denied; and it is further

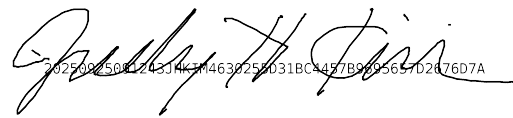
⁴ Plaintiffs’ request, in opposition, for leave to amend their complaint to add further allegations in support of their fourth cause of action is denied, without prejudice, as “[p]laintiffs did not move or cross-move for this relief, nor did they attach a proposed amended complaint pursuant to CPLR 3025(b)” (*Diaz v New York City Dept. of Educ.*, 2020 NY Slip Op 30341[U], 13 [Sup Ct, NY County 2020]).

ORDERED that defendants shall, within fifteen days of the date of this decision and order, serve a copy of same with notice of entry on plaintiffs as well as on the Clerk of the Court; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website); and it is further

ORDERED that the parties are to appear for a preliminary conference in Part 4 on December 11, 2025, at 9:30 am.

This constitutes the decision and order of the Court.



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9/25/2025
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: