Ambase Corp. v 111 W. 57th Sponsor LLC

2018 NY Slip Op 30160(U)

January 23, 2018

Supreme Court, New York County

Docket Number: 652301/2016

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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AMBASE CORPORATION, 111 WEST 57TH MANAGER FUNDING LLC, and 111 WEST 57TH INVESTMENT LLC, on behalf of itself and derivatively on behalf of 111 WEST 57TH PARTNERS LLC,

Plaintiffs,

Index No. 652301/2016

- against -

Mot. Seq. No. 006

111 WEST 57TH SPONSOR LLC, 111 WEST 57TH JDS LLC, PMG WEST 57TH STREET LLC, 111 WEST 57TH CONTROL LLC, 111 WEST 57TH DEVELOPER LLC, ELLIOT JOSEPH, 111 WEST 57TH KM EQUITY LLC, 111 WEST 57TH KM GROUP LLC, KEVIN MALONEY, MATTHEW PHILLIPS, MICHAEL STERN, NED WHITE, and FRANKLIN R. KAIMAN,

Defendants,

- and-

111 WEST 57th PARTNERS LLC,

Nominal Defendant.

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BRANSTEN, EILEEN, J.:

Defendants move, pursuant to CPLR 3211 (a) (1), (a) (7), and 3016 (b), to dismiss, with prejudice, and in their entirety, plaintiffs' third through fourteenth causes of action, and to dismiss, in part, plaintiffs' first, second, and fifteenth causes of action. The parties cannot agree on the exact scope of defendants' dismissal motion (*see* letters dated April 17, 18, and 19, 2017,

NYSCEF Doc. Nos. 238, 239, 243, 244, and 246). The Court will treat the motion as one to dismiss the causes of action denominated in the notice of motion and/or discussed in the supporting papers.

I. BACKGROUND

A. The Parties

The following facts are drawn from the Second Amended Complaint (the Complaint) and assumed as true for purposes of this motion to dismiss. This action involves a joint real estate venture to acquire and develop a luxury condominium project located at 105-111 West 57th Street, New York, New York (the project) (Complaint, ¶ 1). Plaintiff AmBase Corporation (Ambase) is the primary investor in the project (*id.*). Plaintiffs 111 West 57th Manager Funding LLC (Manager Funding) and 111 West 57th Investment LLC (Investment) are AmBase subsidiaries (*id.*, ¶¶ 10-11).

Defendants are the developers of the project (*id.*, ¶ 1). Defendant 111 West 57th Sponsor LLC (Sponsor) is controlled by co-defendants 111 West 57th Street JDS LLC (JDS) and PMG West 57th Street LLC (PMG) (*id.*, ¶¶ 13-15). Plaintiff Manager Funding holds a 3.8% indirect interest in defendant Sponsor through its interest in one of Sponsor's parent entities. Plaintiff AmBase, in turn, holds a 3.2% indirect interest in Sponsor through its majority 83.3% stake in Manager Funding (*id.*, at 5, n 1, 2). Individual defendants Kevin Maloney and Elliot Joseph owned 50% of PMG as of December 2013; at some point, PMG's ownership structure changed and, as of June 2015, defendant 111 West 57th KM Group LLC (KM Group) became a 54.55%

owner of PMG and Joseph the owner of the remaining 45.45% (*id.*, n 3). Defendant Matthew Phillips is JDS's director of finance (*id.*, ¶ 22). JDS is owned by defendant Michael Stern (*id.*, ¶ 23). Defendants Ned White and Franklin R. Kaiman hold indirect equity interests in PMG through their interest in PMG's parent company (*id.*, ¶¶ 24-25). Kaiman is also PMG's general counsel (*id.*, ¶ 25). Defendant 111 West 57th Control LLC (Control) is owned by defendants JDS, PMG and 111 West 57th KM Equity LLC (KM Equity) (*id.*, ¶ 31). Defendant 111 West 57th Street Developer LLC (Developer) is a wholly owned subsidiary of Control (*id.*, ¶ 39). Maloney and Stern are both principals of Sponsor (*id.*, ¶¶ 21, 23).

B. The Joint Venture

In June of 2013, AmBase - through its subsidiaries Investment and Manager Funding - entered into a joint venture (the joint venture) with Stern, Maloney, JDS, PMG and various affiliated entities to acquire and develop the property located at 105-111 West 57th Street (the "property") (*Complaint.*, ¶ 28). The parties planned to redevelop the property into a 346,000 square foot luxury residential tower and retail space (*id.*). To facilitate this project, the parties entered into a series of agreements. Defendant Control joined with plaintiff Manager Funding to form 111 West 57th Manager LLC (Manager LLC) (*id.*, ¶ 31). Control owns 89.3% of the equity in Manager LLC and Manager Funding owns the remaining 10.7% (*id.*, ¶ 32). Control and Manager Funding's rights and obligations with respect to Manager LLC are set forth in an agreement titled 111 West Manager LLC Limited Liability Company Agreement (the Manager LLC Agreement) (Weiss Affirmation, exhibit 4).

Thereafter, Manager LLC and Control formed Sponsor. That relationship is governed by the 111 West 57th Sponsor LLC Limited Liability Company Agreement dated June 28, 2013 (the Sponsor LLC Agreement) (Complaint, ¶ 33). At or about the same time, Sponsor and Investment formed 111 West 57th Partners LLC (the Company) and entered into the 111 West 57th Partners LLC Limited Liability Company Agreement (the Partners LLC Agreement) (*id.*, ¶¶ 10, 34). Under the terms of the Partners LLC Agreement, Investment initially contributed $56 million to the joint venture in exchange for a 59% interest in the Company, and Sponsor contributed $39 million in exchange for a 41% interest (the initial capital contributions) (*id.*, ¶ 35). AmBase invested an additional $1.25 million in the joint venture at the time of the initial capital contributions by virtue of its 83.3% ownership interest in Manager Funding, which holds a 3.8% interest in Sponsor, thereby obtaining an additional 1.3% interest in the joint venture (*id.*, ¶ 36). Accordingly, AmBase held an aggregate 60.3% interest in the joint venture at the time of the initial capital contributions (*id.*). In December of 2013, non-party Atlantic 57 LLC (Atlantic) acquired a 26.3% interest in the Company through a transfer of Sponsor's membership interests, as a result of which Sponsor's interest was adjusted to approximately 14.7% (*id.*, ¶ 37).

The joint venture members' rights and obligations with respect to the company are governed by a restated limited liability company agreement dated December 17, 2013 (the Joint Venture Agreement or JVA) (*id.*, ¶ 38; Weiss Affirmation, exhibit 3). The JVA amends and restates the Partners LLC Agreement in its entirety. Under the JVA, Sponsor serves as the "Manager" of the company and exercises "day to day authority to act for the Company" (JVA, §§ 7.2, 8.1; Complaint, ¶ 43). The only exceptions to Sponsor's broad authority and discretion

concern certain enumerated "Major Decisions," set forth in the JVA, which must be approved by both Sponsor and Investment (JVA, § 7.2 [a]). In addition, in specified circumstances, the JVA allows Sponsor to make additional capital calls, which Sponsor is responsible for answering in proportion to its ownership interest, and to receive 50% of the profits of the joint venture, in addition to a proportional share of the remaining profits, after the participants' capital contributions have been repaid and Investment and Atlantic have received a 20% return on their capital investment (JVA, § 6.1(b)(v); Complaint, ¶ 44). The Sponsor LLC Agreement and the Manager LLC Agreement contain parallel governing provisions (Complaint, ¶ 46). Relevant to the instant motion, as further discussed below, pursuant to section 2.8(a) of the JVA, Sponsor represented and warranted that its capital contributions "have not, and will not, include any capital contributions to Sponsor from third parties or managed funds," and that, "Sponsor shall disclose to [Investment] any changes to the direct and indirect investors in its holdings" (JVA, § 2.8(a); Complaint, ¶ 47).

Defendant Developer and the Company entered into a development agreement dated June 28, 2013 (the Development Agreement) (Complaint, ¶ 39). At or about the same time, the Company obtained a $230 million acquisition loan from Annaly CRE LLC to cover the property acquisition costs and to bridge the company until Sponsor could obtain construction financing for the Company (*id.*, ¶ 41). The loan was for a one-year term with the option of two six-month extensions upon payment of interest and fees (*id.*).

C. The Capital Calls

As noted above, the Joint Venture Agreement authorizes Sponsor to request "Additional Capital Contributions" (the capital calls) from each member of the Company (*Complaint.*, ¶ 46). When a capital call is made, if a "Member tender[s] its entire share of the required Additional Capital Contribution on or before the Tender Date (a 'Contributing Member') and [another] Member has failed to render its entire share of the required Additional Capital Contributions . . . (each, a 'Non-Contributing Member'), a Contributing Member shall have the right to make Additional Capital Contributions to cover the shortfall amount" (JVA, § 3.3[a]). In such case, the Contributing Member may elect to treat the "Shortfall Contribution" as either (1) a "Member Loan" or (2) "dilutive capital" if, "within five (5) days after the funding of the Shortfall Contribution," the Contributing Member provides "written Notice" to the Non-Contributing Member of its election of the "dilution remedy" (JVA, § 3.3[c]).

If the Contributing Member fails to give proper notice, the "Contributing Member shall be deemed to have elected to have the Shortfall Contribution treated as a Member Loan" (Complaint, ¶ 102). If the Shortfall Contribution is treated as dilutive capital, however, then the Contributing Member's percentage interest in the Company increases by a multiple of 1.5 times the Shortfall Contribution and the Non-Contributing Member's Percentage Interest is correspondingly reduced by the same amount (*id.*, ¶ 103).

As outlined in the Complaint, Sponsor made six capital calls. Investment and Manager Funding fully funded the first three capital calls in March, June and July of 2014, in proportion to their percentage interests in the joint venture (*Complaint.*, ¶¶ 50, 55, 58). On or about October

21, 2014, Sponsor made a fourth call to members of the Company for an Additional Capital Contribution of $12,431,236 (the October 2014 Capital Call), purportedly to cover the "hard and soft costs" of construction (*id.*, exhibit G). Plaintiffs allege that some $4.5 million of these purported costs actually related to insurance, and that at least some of these costs were "Manager Overruns," which do not qualify as grounds for Additional Capital Contributions under the JVA (*id.*, ¶¶ 96-97). Investment claims that, due to its concerns about Sponsor's mismanagement of the joint venture's budget and spending, it "elected not to contribute its full share of the October 2014 Capital Call" (*id.*, ¶104).

As a result, in February 2015, Sponsor, who represented that it paid its entire share of that capital call, elected to make a Shortfall Contribution, funding the balance of Investment and Atlantic's shares (*Complaint.*, ¶¶ 106-108). Sponsor notified Investment that it was electing to treat the Shortfall Contribution as dilutive capital. Plaintiffs claim that, in doing so, defendants violated the JVA by relying on third-party financing to fund their portions of the October 2014 Capital Call and subsequent Shortfall Contribution (*id.*, ¶ 109).

In December 2014, Sponsor made a fifth capital call for an Additional Capital Contribution of $17,099,802 (the December 2014 Capital Call), purportedly to cover fees and interest payments associated with a second extension of the Company's acquisition loan (*Complaint.*, ¶ 112). Plaintiffs allege that approximately $2.5 million of these fees improperly related to insurance. Investment, claiming to still be concerned about Sponsor's mismanagement, again decided not to increase its investment in the Company, and declined to pay its share of the December 2014 Capital Call (*id.*, ¶ 115). As with the October 2014 Capital

Call, Atlantic also did not pay its share of the December 2014 Capital Call (*id.*, ¶ 116). Sponsor, in turn, represented that it paid its entire share and, thus, as a Contributing Member elected to make a Shortfall Contribution, to fund the amounts remaining on Investment and Atlantic's Capital Contributions on or about December 31, 2014 (*id.*, ¶¶ 117-118). Plaintiffs claim that as with the October 2014 Capital Call, defendants violated the JVA by relying on third party financing to fund their capital call and shortfall contributions (*id.*, ¶ 119).

Plaintiffs allege that on January 9, 2015, Sponsor delivered to Investment a letter stating that it was electing to treat the December 2014 Shortfall Contribution as dilutive capital (*Complaint.*, ¶ 121). Although the letter is dated January 2, 2015, plaintiffs claim that it was not sent until January 9, 2015, and, therefore, failed to comply with the five-day notice requirement set forth in JVA section 3.3(c); as a result, Sponsor was not entitled to treat the Shortfall Contribution as a dilution (*id.* at 22, n 6; ¶ 122). Investment informed Sponsor, by letter dated January 12, 2015, that because the notice was untimely, the parties were required to treat the December 2014 Shortfall Contribution as a Member Loan rather than dilutive capital (*id.*, ¶ 123). By letter dated January 16, 2015, Sponsor contested Investment's position and asserted that Investment's percentage interest had been decreased from 59% to approximately 48% (*id.*, ¶ 124). After Sponsor made the February 2015 Shortfall Contribution relating to the October 2014 Capital Call, it claimed Investment's Interest Percentage further decreased to 44% (*id.*, ¶ 125).

Sponsor made a sixth Additional Capital Call to members of the Company in April 2015 (the April 2015 Capital Call), purportedly to again cover the "hard and soft costs" of construction, although plaintiffs claim that a portion of these "costs" actually related to insurance

and the construction of a sales center (*Complaint.*, ¶ 126). Allegedly, concerned that defendants would attempt to further dilute Investment's interest in the Company, Investment, along with Manager Funding, paid their full share of the April 2015 Capital Call (*id.*, ¶ 127). Atlantic again did not pay its full share, however Sponsor did not elect to make a Shortfall Contribution to fund the balance due by Atlantic (*id.*, ¶¶ 131-132).

D. Membership Interests

The JVA prohibits "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 . . . obtaining the prior written approval of the Members" (JVA, § 9.1[a]). Similarly, the Manager LLC Agreement, between Control and Manager Funding, provides that Control is generally prohibited from making "any Transfer . . . upon the direct or indirect shares of stock, membership interest, partnership interest or other equity interest" in Control, without Manager Funding's approval (Manager LLC Agreement, § 9.1[a]). Plaintiffs claim that, "[d]efendants have transferred their interests in Control and Sponsor in violation of these provisions" (Complaint, ¶ 135). Plaintiffs allege that, "at some point, Defendants Maloney and Joseph transferred a portion of their interests in PMG to [d]efendant KM Group, which is in turn owned by [d]efendants Maloney, White, and Kaiman" (*id.*, ¶ 136). Plaintiffs also point to a letter dated October 7, 2015, wherein "Stern, JDS, Maloney, and PMG acknowledged that 'one of the principals of PMG' (separately identified as Maloney) 'did not contribute his full portion' of Sponsor's February 2015 Shortfall Contribution," and, instead, JDS "elected to cover" his

portion, thereby changing the ownership percentage of PMG and JDS (*id.*, ¶¶ 137-38; exhibit J). Plaintiffs also claim, upon information and belief, that PMG/KM Equity failed to fund its share of the April 2015 Capital Call and that, instead, its shortfall of approximately $980,000 was funded by JDS and/or Stern (*id.*, ¶ 141).

E. Equity Put Right

Section 8.2 (b) of the Joint Venture Agreement requires Sponsor to propose updates and revisions to the joint venture budget within sixty days of the end of each fiscal year, or quarterly, if necessary (*Complaint.*, ¶ 171; JVA § 8.2[b]). In the event that Investment disapproves or fails to respond within ten days, Sponsor is required to continue to operate under the last approved budget (*id.*). Section 11.5 of the JVA entitles Investment to require Sponsor to purchase its equity interest in the Company, for a purchase price equal to an amount giving Investment a 20% return on its investment, if, after the closing of the construction loan, Investment declines to approve a proposed budget in which the hard costs exceed an amount equal to 110% of the hard costs set forth in the prior approved budget ("equity put right") (Complaint, ¶ 172). In that event, Investment has sixty days to notify Sponsor of its intention to exercise its equity put right, and Sponsor must then set a closing date within 120 days of the date of notice. Sponsor did not submit a proposed budget for Investment's approval between June 2015 and August 2016. Plaintiffs claim that Sponsor's failure to submit a budget was intended to deprive Investment of its rights under this section 11.5 of the JVA (*id.*, ¶ 174).

On or about August 12, 2016, in response to a discovery request, Sponsor did produce a

"Proposed Development Budget" (*id.*, ¶ 175; Doc. Bates Stamp No. JDS-PMG_0000028-29). The hard costs in this "proposed" budget exceeded 110% of the hard costs in the prior approved budget. Investment disapproved of the budget on August 26, 2016 and attempted to exercise its equity put right (*id.*, ¶ 177). By letter dated September 9, 2016, Sponsor rejected Investment's assertion that it was entitled to exercise any right under section 11.5 of the JVA. According to Sponsor, the budget was only a draft proposal and did not trigger the equity put right provision.

F. Major Decisions

As noted above, although the JVA grants Sponsor broad authority and discretion, certain "Major Decisions" set forth in that Agreement must be approved by both Sponsor and Investment (JVA, §7.2 [a]). According to plaintiffs, defendants failed to seek Investment's approval of the following four decisions: (1) Sponsor constructed a sales office with a full-scale model of a sample luxury apartment (Complaint, ¶ 75); (2) in the fall of 2015, Sponsor engaged a sales agent for the property without Investment's approval (*id.*, ¶ 80); (3) Sponsor set condominium prices and filed a Condominium Offering Plan for the Property (*id.*, ¶ 82); and (4) Sponsor made a distribution to the Company, including to Investment, in July 2015, without consulting Investment first (*id.*, ¶¶ 151, 154).

II. THE COMPLAINT

Plaintiffs assert fifteen causes of action against defendants for:

(1) a declaratory judgment on behalf of Investment and AmBase that Sponsor is (i) not entitled to treat shortfalls as dilutive capital because it breached sections 2.8 and 3.2 of the Joint Venture Agreement, (ii) declaring Investment to have a 59% share in the Company, and (iii) declaring that Sponsor must close on the equity put right within 120 days of the notice given;

(2) breach of contract, asserted by Investment and AmBase against Sponsor and Company, based on various provisions of the Joint Venture Agreement;

(3) breach of contract, asserted by Manager Funding against Control, based on sections 9.1(a) and 6.4(a) of the Manager LLC Agreement, which prohibit direct or indirect transfers of interests in Control without prior approval;

(4) breach of contract, asserted derivatively by the Company against Developer, for failure to use "Commercially Reasonably Efforts" as required by the Development Agreement;

(5) breach of fiduciary duty, asserted by Investment against Sponsor;

(6) breach of fiduciary duty, asserted on behalf of Manager Funding against Control;

(7) aiding and abetting breach of fiduciary duty, asserted by Investment and Manager Funding against JDS, PMG, KM Equity, KM Group, Maloney, Phillips, Stern, White and Kaiman;

(8) fraudulent misrepresentation or omission, asserted by all plaintiffs against Sponsor, Control, JDS, PMG, KM Equity, KM Group, Maloney, Phillips, Stern and White;

(9) negligent misrepresentation or omission, asserted by all plaintiffs against Sponsor, Control, JDS, PMG, KM Equity, KM Group, Maloney, Phillips, Stern and White;

(10) demand for books and records, asserted by Investment against Sponsor and the Company;

(11) promissory estoppel, asserted by Investment and AmBase against Sponsor, JDS, PMG, Control, Joseph, Maloney, Stern and White;

(12) unjust enrichment, asserted by Investment and Ambase against Sponsor, JDS, PMG, KM Equity, KM Group, Control, Joseph, Maloney, Phillips, and Stern;

(13) tortious interference with contract, asserted by all plaintiffs against JDS, PMG, KM Equity, KM Group, Maloney, Phillips, Stern, White and Kaiman;

(14) accounting, asserted by Investment and Manager Funding against Sponsor and Control; and

(15) contractual indemnification, asserted by Investment and AmBase against Sponsor, Stern and Maloney.

III. DISCUSSION

A. Motion to Dismiss

As noted, defendants seek to dismiss the third through fourteenth causes of action in full, and to dismiss the first, second and fifteenth causes of action in part. Under section 3211(a) (1) of the CPLR, dismissal of claims is warranted where the claims are precluded by clear documentary evidence such as a contract between the parties (*Leon v Martinez*, 84 NY2d 83, 87-

88 [1994]). Under section 3211 (a) (7), the Court, accepting all the facts alleged as true and according plaintiffs the benefit of every favorable inference, must determine if the allegations fit within any cognizable legal theory (*id.*). CPLR section 3016 (b) provides that where a cause of action or defense is based upon fraud, "the circumstances constituting the wrong shall be stated in detail."

B. Declaratory Judgment and Breach of Contract Against Sponsor *(First and Second Causes of Action)*

Defendants seek to dismiss the first cause of action for declaratory judgement only insofar as it concerns the representations and warranties contained in section 2.8 of the Joint Venture Agreement and the equity put right provision contained in section 11.5 of the JVA (Defendants' April 17, 2017 Letter at 1, NYSCEF Doc. No. 238). Defendants seek to dismiss the second cause of action for breach of contract against Sponsor with respect to these same two provisions, as well as claims based on JVA §§ 2.11 (representations and covenants), 2.13 (cure payments), 9.1 (transfer restrictions), 7.2 (major decisions), and 4.1 and 4.2 (access to books and records); as well as claims concerning distributions to which defendants were allegedly not entitled to except for the portion of those claims based on inadequate notice for treating the December 2014 Shortfall Contribution as dilutive capital; and that portion of the second cause for breach of contract based on the implied covenant of good faith and fair dealing (*id.* at 2). Because the first and second causes of action necessarily overlap, the Court will address the first cause of action for declaratory judgment and the second cause of action for breach of contract together.

Section 2.8 (a) (Third Party Financing)

Section 2.8 (a) of the JVA, entitled "Beneficial Ownership of Members," provides, *inter alia,* that:

> . . . . Sponsor covenants that throughout the term of this Agreement, (1) all Initial Capital Contributions made by Sponsor to the Company have been funded by Sponsor out of personal assets and resources indirectly contributed to Sponsor by Principals, including any such personal assets and resources obtained by a loan that is not secured directly or indirectly by the Property; (2) *all Capital Contributions made by Sponsor to the Company have not, and will not, include any capital contributions to Sponsor from third parties or managed funds*; and (3) Sponsor shall disclose to Investor and Atlantic any changes to the direct and indirect investors in its holdings.

(JVA, § 2.8(a), Weiss Affirmation, exhibit 3) (emphasis added).

Plaintiffs allege that Sponsor breached this section by obtaining so-called "third-party financing" to cover Sponsor's share of the capital calls by the Company (*e.g.*, Complaint, ¶¶ 1, 59, 109, 29, 205[b]). Section 2.8 (a) (2), however, does not actually use the words "third party financing" and is, in fact, silent as to financing. Defendants contend section 2.8(a) does not prohibit third party financing. Defendants also point out that section 2.8 (a) (1) expressly acknowledges that loans are a permissible source of funding for the Initial Capital Contributions, and that nothing in the JVA renders them impermissible for the Additional Contributions.

Nowhere in the 57-page complaint do plaintiffs actually allege that Sponsor received "capital contributions . . . from third parties or managed funds," just that defendants wrongfully received third party financing to fund their additional capital calls. Indeed, the allegations with respect to third party financing are only made only upon information and belief. Section 3.2 of the JVA, which addresses "Additional Capital Contributions," is also silent as to financing; it

does not expressly prohibit financing of additional capital calls. However, section 8.2 (c), "Leverage and Loan Guarantees," which deals with the rights and obligations of the "Manager," *i.e.*, Sponsor, provides that, "[t]he acquisition and *development* of the Property may be partially financed by third-party lenders" as set forth therein. Financing is, therefore, not prohibited under the JVA, at least under some circumstances. To the extent that this section is subject to section 7.2 (a), which requires approval by Investment, plaintiffs do not allege a breach of section 8.2 (c) in their complaint.

As neither section 2.8 (a) (2), nor any other provision of the JVA, expressly prohibits financing, provided other conditions relating to any loans are not violated, this aspect of the breach of contract claim is dismissed.

Section 2.11 (Representations and Warranties)

Section 2.11 deals with additional representations and warranties. Plaintiffs allege that "Sponsor breached its obligations under the [JVA] by: . . . failing to uphold the representations and covenants contained" in this section (*Complaint.*, ¶ 205 [b]). The complaint is unclear as to which portion of this section defendants allegedly violated. In their opposition memorandum, plaintiffs contend that defendants breached the following two covenants: "(1) a representation by Sponsor that its Principals, namely Defendants Maloney, Stern, and White 'shall devote a substantial portion of their time to [the] development, construction management, asset management and operation of the Property, including, without limitation, active oversight of the construction manager and active involvement in all phases of development of the Property,' and

(2) a representation by Sponsor that it and its Principals 'shall comply with any financial net worth and liquidity covenants specifically applicable thereto under any loan'" (Plaintiffs' Opposition Mem. at 18-19, citing JVA § 2.11 [b] [i] and [c]). As concerns the former, the complaint contains no allegations that Sponsor or its Principals actually failed to devote their time to managing the Property; rather, plaintiffs simply take issue with *how* the Property was managed. This is insufficient to maintain a claim for breach of section 2.11 (b) (i).

Turning to the latter, the complaint sufficiently alleges that funding of a construction loan was delayed as a result defendants' inability to meet the necessary net worth and liquidity requirements (*e.g.,* Complaint, ¶¶ 52-53). Although defendants argue that Sponsor itself did not have, and therefore did not violate, any net worth and liquidity covenants under the construction loans, section 2.1 (c) applies to " Sponsor and *Principals, as applicable*" (JVA § 2.11 [c] [emphasis added]). Further, contrary to defendants' argument, plaintiffs have sufficiently alleged damages by alleging that, for instance, Investment was required to contribute to the June 2014 Capital Call, in part, to cover "fees and interest payments associated with extending the Company's acquisition loan," as a result of Sponsor being unable to secure a construction loan on behalf of the Company due to its members' liquidity issues (*id.*, ¶¶ 51-53). Accordingly, that aspect of the second cause of action based on section 2.11 (c) may be maintained.

Section 2.13 (Cure Payments)

Section 2.13, entitled "Cure Payments Not Capital Contributions," provides:

> In the event of a breach of Section 2.8, Section 2.9, Section 2.10, Section 2.11 or Section 2.12 any amounts paid to cure such breach by the breaching party shall not constitute Capital Contributions or loans to the Company, any Subsidiary or any Member and shall not increase the Capital Account of such Member

(JVA, § 2.13).

It is unclear from the Complaint how plaintiffs believe that Sponsor breached this provision. To the extent that the second cause of action alleges a breach of this provision, that aspect of this cause of action is dismissed.

Section 7.2 (Major Decisions)

Section 7.2 (a) identifies the "Major Decision[s]" with respect to which Sponsor must obtain Investment's prior written approval. Plaintiffs claim that defendants breached this section by making the following decisions without obtaining Investment's prior consent: (1) constructing a sales office; (2) setting condominium prices and filing an offering plan; (3) selecting a Corcoran sales agent; and (4) making member distributions. Only one of these four decisions is expressly denominated as a major decision under section 7.2: "the selection of condominium sales agents" (JVA § 7.2 [xviii]). However, pursuant to the construction loan documents, Investment already provided its consent to the selection of either Corcoran or Douglas Elliman as sales agent. To the extent that Investment wished to be consulted on the ultimate choice between Douglas Elliman and Corcoran, Investment does not allege how it was

damaged in any way from being excluded from this decision. Its claim, that it needs additional discovery to ensure that the Corcoran agent was not chosen for any reasons of self dealing such as having a relationship to one of the defendants, is entirely speculative and insufficient to maintain a claim for breach of section 7.2 (xviii).

Turning to the remainder of the alleged major decisions, plaintiffs argue that although not expressly mentioned, decisions concerning the sales office, offering plan, and member distributions are all subsumed in the following categories that are subject to approval:

> (i) the Business Plan, including all quarterly, annual and other updates and modifications thereto . . . including, without limitation, any changes to the scope of the project development;
>
> (ii) subject to Permitted Variance, any Budget, including such amendments to any Budget . . .; [and]
>
> * * *
>
> (iv) expenditures in excess of (i) the Permitted Variance with respect to matters contained in any Budget . . . other than on account of Protective Company Overruns or Manager Overruns;

(JVA, §7.2 [a] [i]; [ii] and [iv]).

As concerns the sales office, the complaint alleges that, "[a]lthough $3 million was initially budgeted for the sales office, and Investment approved a budget that increased that amount to $6 million, Sponsor has now incurred expenses for the sales center in excess of $9 million" (Complaint, ¶ 76). The JVA states that a:

> "Permitted Variance" with respect to the matters contained in any Budget that is then in effect . . . [includes] (c) any expenditure that does not cause the aggregate amount of the expenditures in the line item reflecting the total aggregate costs contained in such Budget to be exceeded by (A) if prior to the closing of the Construction Loan, more than seven and a half percent (7.5 %) of the amount approved for such line item in such Budget, or (B) if after the closing of the

> Construction Loan, more than five percent (5%) of the amount approved for such line item . . . .

(JVA, § 1.100).

Certainly, if Sponsor spent twice the budgeted amount on the sales office, as is alleged, such spending would be "in excess of [] the Permitted Variance with respect to [a] matter[] contained in any Budget" and, therefore, constitute a major decision under section 7.2 (a) (iv). As such, plaintiffs may maintain this aspect of their claim.

To the extent that defendants contend that this allegation is improperly based upon a document that was disclosed for "settlement purposes only," plaintiffs' allegation in the complaint stands alone and may be supported by other information. While the CPLR prohibits evidence of settlement negotiations, it specifically does "not require the exclusion of any evidence, *which is otherwise discoverable*, solely because such evidence was presented during the course of compromise negotiations" (CPLR § 4547 [emphasis added]). Moreover, the exact amount spent on construction of the sales office will be discoverable in litigation. Whether the relied-upon document here is ultimately discoverable and admissible is not an issue that needs to be decided at this juncture.

Turning to the offering plan and condominium prices, section 7.2 (xii) includes "converting the Property to a condominium and *entering into any condominium documents*" (emphasis added). Accordingly, plaintiff may maintain this aspect of their claim.

Finally, as concerns the member distributions, this is not an enumerated major decision anywhere within section 7.2. Plaintiffs' contention that the distribution is somehow a decision

"regarding [a] material tax matter" is a stretch, at best (JVA § 7.2 [xxiv]), and, in any event, is belied by emails from Investment's counsel, requesting a wire of the distribution funds "ASAP" and stating that plaintiff's CEO "would like his share of the refund today" (emails dated June 30, 2015 and July 2, 2015, Weiss Affirmation, exhibits 8-9).

Section 9.1 (Transfer of Interests)

As indicated above, one of the principals of the PMG-affiliated members of defendant Control did not contribute his full share of Sponsor's February 2015 Shortfall Contribution and a JDS-affiliated member of Control covered the difference (Complaint, ¶ 137; Weiss Affirmation, exhibit 7). As a result, the membership interests of the existing members of Control were adjusted from 50/50 to 51.111% for the JDS-affiliated entity and 48.889% for the PMG-affiliated interests (*id.* at 8, n 4, ¶ 138). Plaintiffs claim that this breached the transfer restrictions in section 9.1 of the JVA (*id.*, ¶¶ 133-45; 205 [g]). Defendants argue that this claim fails because, among other things, plaintiffs cannot allege any damage from this alleged "breach," and because section 9.1 only applies to transfers of ownership interest to new members, not reallocations between existing members. In making this argument, defendants point to sections 9.2 and 9.4, which also appear in Article IX regarding Transfers of Interests, and which address the deemed acceptance of the terms of the JVA following a Transfer, and the admission of members to the joint venture following a Transfer. Because these provisions are obviously inapplicable when ownership percentages are shifted among existing members, defendants argue that the proper reading of section 9.1 is that it applies to transfers of ownership interests to new members only.

Defendants also argue that if section 9.1 applied to internal adjustments of ownership percentages among existing members, it would conflict with the dilution provisions of the JVA. That is, defendants argue if the term "Transfer" as used in section 9.1 included adjustments in ownership interests between existing members, a member of the joint venture who failed to fund a capital call would be able to defeat the dilution provisions in the JVA by simply refusing to consent to the "Transfer" of membership interests necessary to accomplish such dilution (*compare* JVA §§ 3.3 and 3.7 *with* § 9.1).

This specific language of section 9.1 restricts:

> (i) any Transfer, encumbrance or lien upon [a] 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, or (iii) any involuntary Transfer of any such direct or indirect shares of interest by reason of merger, death or divorce of, or any other event affecting, a constituent Person of a Member, without in each instance, obtaining the prior written approval of the Members, which approval may be withheld in such Member's absolute discretion.

The term "Transfer" is defined broadly in the agreement as "any transfer, sale, assignment, exchange, charge, pledge, gift, hypothecation, conveyance, encumbrance or other disposition, voluntary or involuntary, by operation of law or otherwise" (JVA, § 1.130). Nothing in section 9.1 creates a distinction or exception for transfers of ownership interests between existing Company members. Indeed, the following section, entitled "Permitted Transfers," clearly specifies categories of transfers that are allowed *without* member approval and transfers between existing members are conspicuously absent from this list of exceptions (JVA, § 9.1 [b]). To the extent that sections 9.2 and 9.4 address issues that arise when Company interests are

transferred to an entity with no prior ownership interest, these sections are not inconsistent with section 9.1 also including transfers between existing direct or indirect members.

As to defendants' argument that a broad reading of section 9.1 nullifies the dilution provisions of sections 3.3 and 3.7, section 9.1 is plainly a general provision, while the dilution provisions of the JVA are specific provisions modifying the general. Accordingly, that portion of plaintiffs' breach of contract claim that rests on a violation of section 9.1 based on the transfer of interest in Control between PMG and JDS may go forward. The same cannot be said of plaintiffs' allegations with respect to defendants White and Kaiman, who plaintiffs complain acquired minority interests in PMG. This transfer is permissible under section 9.1(b) (1), which authorizes "[t]ransfers to employees of [PMG] . . . pursuant to employee incentive arrangements with no voting or control rights." Dismissal of this cause of action in its entirety is not proper. The branch which alleges breach of contract in the transfer between PMG and JDS may continue, however, that portion which alleges breach of contract based on the transfer to White and Kaiman is dismissed.

Section 4.1 and 4.2 (Books and Records)

This aspect of plaintiffs' breach of contract claim is based on sections 4.1 and 4.2 which requires Sponsor to maintain and make available accurate and up-to-date books and records. Defendants fail to state any valid basis to dismiss this aspect of plaintiffs' claim, and therefore it remains.

Section 11.5 (Equity Put Right)

Defendants argue that plaintiffs are not entitled to invoke the equity put right provision contained in section 11.5 because the budget, on which plaintiffs rely, was never "proposed" to Investment for its "Approval," but was simply produced as a draft document in discovery. Section 11.5 of the JVA states that the equity put right can only be invoked if Investment "declines to approve a proposed Budget," and in two other, nonapplicable circumstances. This section is silent as to Investment's options in the event that Sponsor simply refuses to submit a proposed budget in contravention of its responsibilities under the JVA. Since Sponsor never proposed a budget for Investment's approval, plaintiffs cannot invoke the equity put right provision. However, plaintiffs have sufficiently pled that defendants' refusal to timely submit a proposed budget for Investment's approval as required by the JVA has frustrated Investment's rights under section 11.5, and, as such, Investment may maintain this claim as a violation of the implied covenant of good faith and fair dealing.

Based on all the foregoing, the following aspects of plaintiffs' second cause of action for breach of contract are dismissed:

- the claim for breach of section 2.8 (a) based on third party financing;
- the claim for breach of section 2.11 (b) (i) based on the amount of time defendants' spent managing the property;
- the claim based on section 2.13, cure payments;
- the claim based on section 7.2, but only insofar as it concerns the selection of Corcoran as the sales agent or distributions;

- the claim based on section 9.1, transfer of interests, but only insofar as it concerns the transfer of interests to defendants White and Kaiman;
- and the claim based on the equity put right provision, but only insofar as this claim alleges an express violation of section 11.5.

As for the first cause of action for declaratory judgment, an action for a declaratory judgment requires a "justiciable controversy," as "it is intended to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact" (*Touro College v Novus Univ. Corp.*, 146 AD3d 679, 679-680 [1st Dept 2017] [internal quotation and citation omitted]). Because the Court is dismissing the claims relating to section 2.8 and the claims related to the equity put right provision, there is no justiciable controversy with respect to whether Sponsor must close on the equity put right within a contractually-specified time period; therefore, that aspect of the first cause of action for declaratory judgment is dismissed.

C. Breach of Manager LLC Agreement *(Third Cause of Action)*

Manager Funding's claim against Control with respect to the Manager LLC Agreement is based on Control's alleged "direct or indirect transfers of interests in Control without seeking or obtaining Manager Funding's prior written approval;" Control's alleged breach of the covenant of good faith and fair dealing by withholding from Manager Funding the opportunity to use third party financing; and Control's alleged receipt of distributions it would not have received if Control had not obtained unlawful third party financing (Complaint, ¶¶ 212-214).

The Manager LLC Agreement contains a restriction on transfer provision that is parallel

to the provision in the JVA (§ 9.1,Weiss Affirmation, exhibit 4). Defendants' motion to dismiss this aspect of the breach of Manager LLC Agreement claim fails for the same reasons as its motion to dismiss claims relating to the JVA's section 9.1. However, the language of the agreements differs with respect to financing, and there is plainly no restriction on third party financing in the Manager LLC Agreement (*id.*, § 2.8 [a]). Accordingly, insofar as the third cause of action is based on Control allegedly receiving distributions it would not have received if Control had not obtained unlawful third party financing, it is dismissed.

Similarly, nothing in the Manager LLC Agreement requires Control to share opportunities, however lucrative, with Manager Funding. The Court cannot rewrite this lack of obligation by treating it as a claim for breach of the implied covenant of good faith and fair dealing, which, under Delaware law, "operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer" (*Airborne Health, Inc.v Squid Soap, L.P.*, 984 A2d 126, 146 [Del Ch 2009]).

Based on the foregoing, the third cause of action is dismissed but only insofar as it is based on third party financing and breach of the implied covenant of good faith and fair dealing.

D. Derivative Breach of Contract *(Fourth Cause of Action)*

The fourth cause of action is asserted derivatively, on behalf of the Company, against Developer for failure to use "Commercially Reasonable Efforts" as required in the Development Agreement. A member's right to bring a derivative claim on behalf of a Delaware LLC is

governed by 6 Del Code § 18-1001, which states that:

> A member or an assignee of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

Plaintiffs concede that they made no demand on the Company to bring this claim. Thus, to allege a derivative claim, plaintiffs must "set forth with particularity" why such a demand would have been futile (6 Del Code § 18-1003). In their 335-paragraph Complaint, plaintiffs devote exactly two paragraphs to pleading demand futility. Specifically, they allege that:

> 224. . . . such demand would be futile. Developer is an alter-ego of Sponsor. Both Developer and Sponsor are owned and controlled by the same principals, namely Control, JDS, Stern, PMG, and Maloney.
>
> 225. Sponsor cannot properly exercise independent and disinterested business judgment in responding to a demand to sue Developer as such suit is, in essence, a suit against itself.

(Complaint, ¶¶ 224-225).

Such conclusory allegations are insufficient to constitute particularized facts, particularly where plaintiffs were aware of the Developer and Sponsor's ownership structure when they entered into the joint venture. Moreover, even if demand futility was adequately plead, 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.*, ¶¶ 218-22).

Moreover, while defendants argue that "Delaware law clearly holds that a putative derivative plaintiff has a disqualifying conflict if it simultaneously" asserts direct and derivative claims, citing to a 2011 Suffolk County case, *Zutrau v Ice Sys., Inc.*, (33 Misc 3d 1215[A] [Sup Ct, Suffolk County 2011], Emerson, J.), defendants misapprehend the current state of Delaware law on this issue. Addressing this exact question, the Delaware Court of Chancery explained that, while in some instances, the possible conflict inherent in bringing direct and derivative claims may "be strong enough to warrant bifurcating the litigation or dismissing either the direct or derivative claims," this is not necessary where the claims "are not internally inconsistent" (In re Ebix, Inc. Stockholder Litigation, 2014 WL 3696655, *18 [Del Ch 2014]). The fourth cause of action is dismissed for failure to adequately plead demand futility.

E. Fiduciary Duty And Fraud Claims *(Fifth through Ninth Causes of Action)*

As noted, plaintiffs assert claims for breach of fiduciary duty on behalf of Investment against Sponsor, and on behalf of Manager Funding LLC against Control (the fifth and sixth causes of action); a claim for aiding and abetting breach of fiduciary duty on behalf of Investment and Manager Funding against JDS, PMG, JKM Equity, KM Group, Maloney, Phillips, Stern, White and Kaiman (the seventh cause of action); a claim for fraudulent misrepresentation or omission on behalf of all plaintiffs against Sponsor, Control, JDS, PMG, KM Equity, KM Group, Maloney, Phillips, Stern, and White (the eighth cause of action); and, a claim for negligent misrepresentation or omission against the same defendants (the ninth cause of action).

As a threshold matter, a claim for negligent misrepresentation or omission requires a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011]). Plaintiffs claim that, "[a]s fellow members of the Company, Investment and Sponsor . . . owed each other fiduciary duties," and, as "fellow members of Manager LLC, Manager Funding and Control had . . . owed each fiduciary duties" (Complaint, ¶¶ 267-68). Both the JVA and Manager LLC Agreements, however, disclaim any duties, including fiduciary duties, "whether or not, such duties exist in law or in equity" (JVA, § 8.5; Manager LLC Agreement, § 7.6). These identical provisions titled "Waiver of Fiduciary Duties," provide as follows:

> Except as otherwise expressly provided in this Agreement, none of the Members shall have any duties or liabilities to the Company or any other Member (including any fiduciary duties) . . . . [except that this section] shall not eliminate or limit the liability of such parties (i) for acts or omissions that involve fraud, intentional misconduct or a knowing and culpable violation of law, or (ii) for any transaction not permitted or authorized under or pursuant to this Agreement from which such party derived a personal benefit unless all of the Members have approved in writing such transaction; *provided further, however*, that the duty of care of each such parties is to not commit fraud, intentional misconduct or a knowing and culpable violation of law

(JVA, § 8.5; Manager LLC Agreement, § 7.6).

While this provision does not disclaim liability for "fraud, intentional misconduct or a knowing and culpable violation of law," it does make clear that there is no special relationship between members of the Company or Manager LLC sufficient to sustain a negligent misrepresentation cause of action. The ninth cause of action is, therefore, dismissed.

Likewise, the eighth cause of action for fraudulent misrepresentation or omission is also dismissed. A fraudulent misrepresentation cause of action requires the following elements: (1) a knowingly false misrepresentation or omission of relevant fact, (2) made for the purpose of inducing reliance, (3) reasonable reliance, and (4) resulting injury (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 178 [2011]). In support of this claim, plaintiffs allege that under the JVA and the Manager LLC Agreement, defendants had a duty to disclose any capital sourced from third parties, any direct or indirect transfers of interests in Sponsor and Control, and the basis for each Additional Capital Contribution but failed to do so (Complaint, ¶¶ 254-259). Plaintiffs also allege that defendants intentionally misrepresented their net worth and liquidity (*id.*, ¶¶ 260-261). These allegations are all duplicative of plaintiffs' breach of contract allegations. A separate cause for fraud may not be maintained where the alleged "fraud is based on the same facts as underlie the contract claim and is not collateral to the contract and no damages are alleged that would not be recoverable under a contract measure of damages" (*J.E. Morgan Knitting Mills v Reeves Bros.*, 243 AD2d 422, 423 [1st Dept 1997] [citation omitted]).

As the negligent and fraudulent misrepresentation claims are dismissed, the fiduciary duty claims must be dismissed as well. As discussed above, the parties' agreements disclaim all duties between the parties, including fiduciary ones, leaving only claims for fraud, intentional misconduct or a knowing and culpable violation of law. An allegation that defendants should have disclosed financing opportunities does not fall into any of these categories, and without fiduciary duties between the parties, defendants had no such obligation. Plaintiffs do not allege any culpable violation of law or intentional misconduct. Without properly pleaded fraud

allegations, plaintiffs' fiduciary duty claims fail, and by extension the claim for aiding and abetting breach of fiduciary duty fails as well. Accordingly, the fifth through ninth causes of action are dismissed in their entirety.

F. BOOKS AND RECORDS *(Tenth Cause of Action)*

The motion to dismiss this cause of action is denied for the same reasons as that portion of this motion addressing plaintiff's breach of contract claim concerning access to books and records. *See, Supra, III(B).*

G. PROMISSORY ESTOPPEL *(Eleventh Cause of Action)*

To establish a cause of action for promissory estoppel, a plaintiff must allege: (1) a clear and unambiguous promise; (2) reasonable reliance, and (3) damages are a result of that reliance (*Schroeder v Pinterest, Inc.*, 133 AD3d 12, 32 [1st Dept 2015]). Plaintiffs concede that their allegations in support of this cause of action "overlap" with their allegations supporting their contract claims (Plaintiffs' Opposition Mem. at 36). However, plaintiffs argue that the claim is "distinct" because it "relates to promises that predate the contracts," which "induced the [p]laintiffs to enter into them, or promises that were made to induce an exercise of discretion under the contracts" (*id.*). This argument is insufficient to save the promissory estoppel claim. Parallel merger clauses in the JVA and Manager LLC Agreement make plain that those agreements represent the "entire" understanding between the parties (JVA § 12.10; Manager LLC Agreement § 12.9). Moreover, the claim is entirely duplicative of the breach of contract causes

of action.

H. UNJUST ENRICHMENT *(Twelfth Cause of Action)*

The unjust enrichment claim fails for the same reasons as the promissory estoppel claim, namely, that it falls squarely within the same subject matter as the contract claims. Plaintiffs' argument that they should be allowed to maintain this claim in the alternative is unpersuasive. An unjust enrichment claim is not available where it simply duplicates a contract claim and seeks damages for obligations arising from the contract (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-89 [1987]). "It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012]). Such is plainly not the case here. Accordingly, the twelfth cause of action is dismissed.

I. TORTIOUS INTERFERENCE WITH CONTRACT *(Thirteenth Cause of Action)*

The thirteenth cause of action, for tortious interference with contract, is asserted on behalf of all plaintiffs against JDS, PMG, KM Equity, KM Group, Maloney, Phillips, Stern, White and Kaiman. Defendants argue that JDS, PMG, KM Equity and KM Group have a qualified privilege to interfere with the economic relations of their affiliates that bars this claim, and that the individual defendants cannot be held liable because they were acting as corporate officers.

To plead a cause of action for tortious interference with contract, a plaintiff must allege: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) intentional action by the defendant to procure a breach of the contract; (4) without justification, and (5) damages to the plaintiff resulting from the breach (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996] [citation omitted]). "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract" (*Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept 1990]). Throughout their complaint, plaintiffs allege that defendants are all, essentially, alter egos of the Sponsor. Under such circumstances, they cannot be considered "strangers" to the contractual relationships at issue and, thus, there can be no claim for tortious interference with contract (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 477 [1st Dept 2011]). Likewise, a company's directors, officers and shareholder generally cannot be held liable for interfering with their company's contracts (*Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]). To be individually liable, an individual officer or director's actions must constitute independent tortious conduct. Conclusory allegations that an individual profited from the breach are not sufficient (*Petkanas v Kooyman*, 303 AD2d 303, 305 [1st Dept 2003]; *Anametrics Servs. v Clifford A. Botway, Inc.*, 159 AD2d 247 [1st Dept 1990]). The complaint's conclusory allegations of defendants' malice and vague allegations of defendants' self-interest are insufficient to meet this "enhanced pleading standard," nor have plaintiffs alleged "in nonconclusory terms that defendants had not acted in the corporate interests" (*Petkanas*, 303 AD2d at 305-06). Accordingly, plaintiffs have failed to state a claim for tortious interference

with contract against any of the defendants and this cause of action is dismissed.

J. ACCOUNTING *(Fourteenth Cause of Action)*

Defendants maintain that the fourteenth cause of action for an accounting is improper because it seeks the equitable remedy of an accounting. Because Sponsor and Control are organized under Delaware law, this claim is governed by Delaware law. Defendants erroneously claim that because, under Delaware law, an accounting is an equitable remedy, it may not be maintained as a separate cause of action. The cases cited by defendants for this proposition do not support this conclusion. For example, in *Albert v Alex Brown Mgt. Servs., Inc.* (2005 WL 2130607, *11 [Del Ch 2005]), the Delaware Court of Chancery merely notes that, because an accounting is an equitable remedy, it is necessary to look to the underlying claims before granting an accounting. Likewise, in *Rhodes v Silkroad Equity, LLC* (2007 WL 2058736, *11 [Del Ch 2007]), another case cited by defendants, the Court of Chancery declined to dismiss a cause of action for an accounting where it had sustained the underlying claims for which an accounting would be the "form of relief."

Likewise, defendants' contention that a claim for an accounting may not be maintained under Delaware law in the absence of a fiduciary duty is also not supported by the cases cited for that proposition. *Pan Am. Trade & Inv. Corp. v Commercial Metals Co.* (33 Del Ch 425 [Del Ch 1953]), the case upon which defendants base their contention, only states that, for an accounting to be appropriate, there must be either: (1) mutual accounts between the parties; (2) accounts must be "all on one side but there are circumstances of great complication;" or (3) there must be

a fiduciary relationship between the parties that is the basis for defendant to render an account (*id.* at 428).[1] Plainly, as members of a joint venture with defendants, plaintiffs are entitled to an accounting if they establish their underlying claims. Accordingly, the motion to dismiss this claim is dismissed.

K. CONTRACTUAL INDEMNIFICATION *(Fifteenth Cause of Action)*

Plaintiffs' fifteenth cause of action for contractual indemnification is based on section 8.7 (b) of the JVA, which provides for indemnification:

> for any loss, damage or claim incurred by [Investment] by reason of (i) gross negligence, criminal acts, willful misconduct or fraud by Principals, Sponsor or any of their respective Affiliated Persons, and/or (ii) in respect of any loss, damage or claim resulting from a material breach of Sponsor or any of its Affiliated Persons of any provision or representation and warranty contained in this Agreement or any other agreement of the Company or its Subsidiaries with respect to any act or omission performed or omitted by such Person unless such Person cures such material breach within thirty (30) days of receiving written notice of such material breach from [Investment], as the case may be

(JVA, § 8.7 [b]).

Although, plaintiffs' claims in this action are clearly not covered by section 8.7 (b) (i), if it is ultimately established that Sponsor materially breached the terms of the parties' contract, section 8.7 (b) (ii) may require Sponsor to indemnify Investment for any resulting loss. Dismissal of this claim is, therefore, not appropriate at this time.

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[1] To the extent that the Delaware Court uses "and" in listing these three categories rather than "or," the paragraph and decision read as a whole is clear that the list is meant to be disjunctive, not conjunctive (*see also International Bus. Machs. Corp. v Comdisco, Inc.*, 602 A2d 74 [Del Ch 1991]) (recognizing accounting even among non-fiduciaries in special circumstances).

Accordingly, it is

ORDERED that defendants' motion to dismiss is decided as follows; it is further

ORDERED plaintiffs' first cause of action, for declaratory judgment, is dismissed to the extent that it was based on section 2.8 claims concerning third party financing or the equity put right provision; it is further

ORDERED plaintiffs' second cause of action, for breach of contract, is dismissed as to the following claims:

- the claim for breach of section 2.8 (a) based on third party financing;
- the claim for breach of section 2.11 (b) (i) based on the amount of time defendants' spent managing the property;
- the claim based on section 2.13, cure payments;
- the claim based on section 7.2, but only insofar as it concerns the selection of Corcoran as the sales agent or distributions;
- the claim based on section 9.1, transfer of interests, but only insofar as it concerns the transfer of interests to defendants White and Kaiman;
- and the claim based on the equity put right provision, but only insofar as this claim alleges an express violation of section 11.5.

set forth in this decision; it is further

ORDERED plaintiffs' third cause of action, for breach of contract, is dismissed but only insofar as it is based on third party financing and breach of the implied covenant of good faith and fair dealing.

ORDERED plaintiffs' fourth cause of action, for breach of contract, asserted derivatively, is dismissed; it is further

ORDERED plaintiffs' fifth and sixth causes of action, for breach of fiduciary duty, and the seventh cause of action, for aiding and abetting breach of fiduciary duty, are dismissed; it is further

ORDERED plaintiffs' eighth cause of action, for fraudulent misrepresentation or omission, is dismissed; it is further

ORDERED plaintiffs' ninth cause of action, for negligent misrepresentation or omission, is dismissed; it is further

ORDERED plaintiffs' eleventh cause of action, for promissory estoppel, is dismissed; it is further

ORDERED plaintiffs' twelfth cause of action, for unjust enrichment, is dismissed; it is further

ORDERED plaintiffs' thirteenth cause of action, for tortious interference with contract, is dismissed; it is further

ORDERED that defendants are directed to serve an answer to the second amended complaint as to the remaining claims within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a Preliminary Conference in Part 3, Room 442, 60 Centre Street, on February 20, 2018 , at 11:00 AM.

Dated: 1-23-2018

ENTER:

HON. EILEEN BRANSTEN
J.S.C.