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Case No. 2017-0449-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MHS CAPITAL LLC, a Delaware limited liability company,

Plaintiff,

v.

KEITH GOGGIN, MICHAEL GOODWIN, and JOHN COLLINS,

C.A. No. 2017-0449-SG

Defendants,

v.

EAST COAST MINER LLC, a Delaware limited liability company,

Nominal Defendant.

BRIEF OF DEFENDANTS KEITH GOGGIN AND MICHAEL GOODWIN IN SUPPORT OF MOTION TO DISMISS

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Defendants Keith Goggin ("Goggin") and Michael Goodwin ("Goodwin") submit this brief in support of their motion, pursuant to Court of Chancery Rules 9(b), 12(b)(1), and 12(b)(6), to dismiss with prejudice the First Amended Verified Complaint in this action (the "Amended Complaint" or "Am. Compl.") in its entirety as against them.[1]

PRELIMINARY STATEMENT

Since plaintiff MHS Capital LLC ("MHS") first commenced suit against Goggin and Goodwin over two years ago in August 2015, MHS – in a quest for "no less than $35 million" in money damages – has filed four separate complaints in three separate courts (New York state court, New York federal court and this Court), each of which has been the subject of an application by Goggin and Goodwin to transfer, to dismiss, or both. MHS has yet to serve a complaint that stood up. The Amended Complaint reflects MHS's latest effort to plead a cognizable claim for money damages; it is without merit and should be dismissed. Goggin and Goodwin have been greatly burdened at enormous cost in successfully defending against MHS. We respectfully submit that the time has come to put an end to what amounts to harassment of them through the courts.

[1] Defendant John Collins ("Collins") is separately represented in this action; he has similarly moved to dismiss the Amended Complaint as against him. Nominal Defendant East Coast Miner LLC ("ECM") has also filed a motion to dismiss and will file a joinder both in this brief and in the brief in support of Collins's motion.

As in MHS's first three complaints, the dominant demand in the Amended Complaint is for money damages. The damage claim is based on Goggin's purported breaches of his contractual and fiduciary duties "as manager of ECM" (in which Goodwin allegedly assisted in ways that are entirely unspecified) that allegedly caused ECM to lose the benefit of certain assets in which it had a security interest. As discussed below, this damage claim is and always has been barred by the Exculpation Clause contained in ECM's Operating Agreement, to which MHS is a party.

In an attempt to get around this bar, MHS now asserts claims in the Amended Complaint for equitable relief in addition to money damages. But these new-found equitable claims cannot avoid the Exculpation Clause because they are barred by MHS's representations to the New York federal court and by binding prior orders of the Bankruptcy Court in Kentucky (the "Bankruptcy Court").

As more fully detailed below, the undisputed facts of record are these. MHS first brought its complaint in New York state court; Collins removed it to federal court in Manhattan for the stated purpose of having it transferred to the Bankruptcy Court, which had already issued orders specifying the precise manner in which the assets at issue here (and their proceeds) were to be disposed. Obviously realizing that such a transfer would mean the end of its claims, MHS sought leave to amend its complaint, asserting in the federal court that its revised claims would *not*

implicate the Bankruptcy Court's orders because (as MHS repeatedly insisted) it sought *only* "monetary damages" and *not* any relief that would affect the assets themselves. The federal court granted MHS leave to amend its complaint and MHS did so, emphatically stating in the preamble to its amended pleading that its claims would not "impact in any way" any orders of the Bankruptcy Court or any rights established by them. The federal court then remanded that amended complaint to the New York state court – which, on Goggin's and Goodwin's motion, promptly dismissed it pursuant to a forum selection clause that required MHS's claims to be brought in this Court.[2]

MHS next brought this action, again seeking "no less than $35 million" in money damages. Goggin and Goodwin again moved to dismiss – this time on the merits, based primarily on the fact that in ECM's Operating Agreement (the "Operating Agreement," a copy of which is attached as Exhibit 1[3]) MHS expressly waived any right to seek "monetary damages" for any breach of the fiduciary and

[2] In May 2017, MHS noticed an appeal from that dismissal in New York; however, it has done nothing whatsoever to pursue that appeal for over five months.

[3] The Operating Agreement is extensively referenced in the Amended Complaint and is the basis for at least three of MHS's claims. Accordingly, it is properly before the Court on this motion. *See R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, at *2 (Del. Ch. Aug. 19, 2008) ("[T]he Court may also consider the unambiguous terms of documents incorporated by reference in the complaint when the documents are integral to the plaintiff's claims. Consequently, because the petition explicitly references and relies on the . . . LLC Agreements, the Court may consider the unambiguous terms of those contracts . . . .") (citations and internal quotations omitted).

contractual duties that form the primary basis for its claims here.[4] Rather than opposing that motion on the merits, MHS served the Amended Complaint; the fundamental change in the Amended Complaint is the addition of claims for equitable relief. Thus, contrary to the representations it made to the federal court in order to obtain a remand and avoid a transfer to the Bankruptcy Court, MHS is now no longer seeking only "monetary damages"; instead, it is affirmatively asking for equitable relief.

The reason for this *volte face* is obvious: the Exculpation Clause clearly bars MHS's damage claims. But MHS cannot so easily escape that contractual provision through the simple expedient of adding claims for equitable relief to its pleading. Having secured a remand and avoided transfer to the Bankruptcy Court based on a representation that it would not seek any relief that could interfere with the dispositions ordered by that court, as a matter of law MHS may not now seek such relief. The equitable relief MHS now purports to seek is *exactly* the kind of relief the Bankruptcy Court's orders preclude – and *exactly* the kind of relief MHS promised the federal court it would not seek. Its requests for such relief should therefore be dismissed, based either on judicial estoppel or on principles of comity. (Point I.A).

[4] Specifically, as permitted under 6 *Del. C.* § 18-1101(e), that Agreement provides in § 5.10 (the "Exculpation Clause") that Goggin "shall not be liable to the Company [*i.e.*, ECM] or any Member [including MHS] for monetary damages for breach of [his] duty as a Manager, except as otherwise required under the Act."

Stripped of those impermissible requests, MHS's claims against Goggin for breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, and misappropriation are barred by the Exculpation Clause – a key part of the bargain embodied in ECM's Operating Agreement signed by MHS, which is fully enforceable here. These claims, and MHS's remaining claims against Goggin, are also defective for additional reasons. All of the claims against Goggin, which MHS has now had four chances to plead, should be dismissed with prejudice. (Point I.B).

The claims against Goodwin are even more egregiously flawed. The allegations against Goodwin in each of the four complaints are virtually identical, and not one of the four sets forth *anything* he is actually alleged to have done or said in relation to any alleged wrong. Instead, MHS pleads only conclusions – even though Goodwin has now *twice* (once in seeking dismissal of the amended complaint remanded from federal court to New York state court, and once in his motion to dismiss the original complaint in this action) laid out chapter and verse the patent pleading deficiencies in the claims against him. MHS has ignored these deficiencies and simply reasserted the same claims with the same allegations, without any effort to meet the well-established standards that were twice explained in Goodwin's prior dismissal motions. The claims against Goodwin should also be dismissed with prejudice. (Point II).

If any claim against Goggin or Goodwin survives despite these flaws, it should be dismissed on *res judicata* grounds. (Point III). And any claim that survives all of these arguments should at a minimum be dismissed to the extent that MHS purports to assert it individually on its own behalf, because the only harm alleged in the Amended Complaint is harm to ECM (for which MHS may sue only derivatively, with any recovery coming to ECM in the first instance). (Point IV).

FACTS[5]

MHS is a Delaware LLC that makes investments in United States-based companies. (Am. Compl. ¶ 16). It owns a 23.75% interest in ECM (*id*. ¶¶ 13, 27, 42), which is also a Delaware LLC (*id*. ¶ 18). Goggin is the sole Manager of ECM (*id*. ¶ 19) and has an 11.88% interest in the company (*id*. ¶ 29). Goodwin is a member of ECM with a 10.69% interest. (*Id*. ¶ 30). ECM's Operating Agreement was signed by all of its members (including MHS, Goggin, and Goodwin); it was

[5] The following description of the facts and procedural history is based on (a) the allegations of the Amended Complaint – which, to the extent they are properly pleaded, are presumed to be true for the purposes of this motion (although many of the alleged facts are actually in sharp dispute and some of MHS's allegations are contradicted by the governing documents); (b) public-record documents reflecting the procedural history of (and prior rulings in) this dispute (which are properly before this Court on this motion because they are within the scope of judicial notice – *see, e.g., In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *9 (Del. Ch. Sept. 28, 2007)); and (c) documents that are relied on and/or quoted in the Amended Complaint (which are also properly before this Court – *see supra*, n.3).

also signed on behalf of ECM itself. (*See* Exh. 1 at 20-25).

The Operating Agreement lays out Goggin's duties as Manager and lists the actions he is permitted to take in that capacity. In particular, § 5.1 of the Operating Agreement states that "the powers of the Company shall be exercised by or under the authority of, and the business and affairs of the Company shall be wholly managed under the direction of, the Manager" (Exh. 1 at 9), and § 5.5 of that Agreement lists the things that the Manager is authorized to do. In relevant part, it provides:

> Except as otherwise expressly provided herein or required by applicable law, the Manager has sole authority to manage the Company and its affairs and, without limiting the foregoing, shall have the sole authority to:
> (a) make any contracts, enter into any transactions, and make and obtain any commitments on behalf of the Company necessary or appropriate to conduct or further the Company's business . . .

(Exh. 1 at 10). Section 5.6(a) of the Operating Agreement, in turn, provides that "[t]he Manager shall discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the Manager reasonably believes to be in the best interests of the Company." (Exh. 1 at 10). Thus, the Operating Agreement obligates Goggin, as Manager, to act in good faith and in ECM's best interest when entering into transactions on behalf of ECM. It also contains a provision entitled "Exculpation" (that is, the Exculpation Clause), which provides that "[t]he

Manager shall not be liable to the Company or any member for monetary damages for breach of such person's duty as a Manager, except as otherwise required under the Act." (Exh. 1 at 11, § 5.10).

ECM was formed by investors of non-party U.S. Coal, Inc. ("USC") to purchase a senior debt note from USC for $21 million. (Am. Compl. ¶ 26). USC operated two divisions: (1) Licking River ("LR"); and (2) JAD. (*Id*. ¶ 25). When ECM initially invested in USC, it obtained a security interest in LR's assets, giving it the right to credit bid for those assets if USC ever went into bankruptcy. (*Id*. ¶ 40). MHS alleges that Goggin represented that he was negotiating a deal pursuant to which ECM would get a majority share in a new entity – the "New LR" – along with the full value of its secured interest in LR's assets. (*Id*. ¶ 41). Instead, according to MHS, Goggin surreptitiously formed a new entity named Licking River Lenders ("LRL"), which consisted of ECM, Goggin, Goodwin, and ECM II (another new entity formed by Goggin). (*Id*. ¶¶ 46-47). MHS claims that when USC went into bankruptcy Goggin permitted LRL to exercise ECM's credit bid rights, forcing ECM to share its interest in LR's assets with ECM II, Goggin, and Goodwin through their interests in LRL even though (according to MHS) none of those other parties held security interests in (or otherwise had a right to credit bid on) those assets. (*Id*. ¶¶ 49-56).

These allegations refer to the results of a sale order entered by the

Bankruptcy Court on April 10, 2015 (the "April 10, 2015 Sale Order"), authorizing the sale of certain assets (the "Credit Bid Assets") to ECM "and/or" ECM II as the "Credit Bid Purchasers." A copy of that order is attached as Exhibit 2. In it, the Bankruptcy Court ruled (among other things) that the Credit Bid Purchasers "shall take title to the Credit Bid Assets with a newly formed special purpose subsidiary (the 'SPV')", which "shall monetize the Credit Bid Assets" and "segregate and account for all proceeds" of those assets and (a) use them first "to pay the reasonable fees, costs, and expenses incurred in connection with" the process of maintaining and monetizing them, and (b) distribute the net proceeds in a manner to be ordered by the Bankruptcy Court following a hearing on notice. (Exh. 2 at 4). The Bankruptcy Court also specified that the Credit Bid Purchasers are vested with title free and clear of any "encumbrance of any kind" (*id.* at 5), and in particular are vested with "all right, title, and interest of . . . [any] claimants or parties in interest in and to the Credit Bid Assets" (*id.* at 6).

MHS also alleges that Goggin misappropriated (unspecified) confidential information of ECM in order to effect an assignment of (unspecified) "separate and additional assets held by LR" to Ember Energy LLC ("Ember"), another entity formed by Goggin. (Am. Compl. ¶¶ 62-63). This, MHS says, "effectively transferred entirely to Ember" ECM's "equity ownership" of the New LR. (*Id.* ¶ 65). According to the Amended Complaint, this left ECM with only a "small

potential future share of lease payments pursuant to a purported Lease Agreement between LRL and Ember." (*Id*. ¶ 66).

These allegations refer to a second sale order entered by the Bankruptcy Court on April 22, 2015 (the "April 22, 2015 Sale Order"), authorizing the sale of certain assets (the "Purchased Assets") to Ember. A copy of that order is attached as Exhibit 3. In it, the Bankruptcy Court ruled (among other things) that Ember would be vested with "good and marketable title to the Purchased Assets" free and clear of any other interest or claim (Exh. 3 at 8-9), and that all other interested parties are "permanently enjoined and precluded from" asserting any claim against "any director, officer, agent, representative, or employee" of Ember (defined collectively in the April 22, 2015 Sale Order as the "Protected Parties") or "creating, perfecting, or enforcing any encumbrance of any kind against the Protected Parties or any properties or assets of the Protected Parties" on account of any claim relating to the Purchased Assets (*id.* at 12).

MHS further asserts that in April 2015 Goggin sent a "Consent Package" to MHS requesting its vote on certain aspects of ECM's exercise of its credit bid rights, but did not seek MHS's approval of these transactions or provide it with any relevant information. (Am. Compl. ¶¶ 81-83). Instead, the Amended Complaint asserts that ECM has denied MHS's requests for information, including "books

and records" demands in March and April of 2015. (*Id*. ¶¶ 75-80).[6]

MHS also alleges that Goggin has indicated that he will "make ECM pay lenders of funds for [his] legal defense costs", thereby improperly "looting ECM's assets" to fund his defense of this litigation. (*Id*. ¶¶ 87-91). As the letter MHS quotes in these allegations makes clear, however, the "lenders" at issue were ECM's own members – who (as further detailed below) freely chose to make the loans at issue and are entitled under ECM's Operating Agreement to be repaid in precisely the manner Goggin has promised. (*See infra* at 30-31).

NATURE AND STAGE OF PROCEEDINGS

On or about August 26, 2015, MHS commenced an action in New York state court against Goggin, Goodwin and Collins, based on essentially the same factual allegations that are at issue here. (*See* Exh. 4 at 1-4). Collins removed the action to the United States District Court for the Southern District of New York (with the stated intention to seek a transfer from there to the Bankruptcy Court) because allegations in MHS's complaint were intertwined with the bankruptcy of USC (which is still pending in the Bankruptcy Court). (*Id.* at 4).

In an effort to avoid federal jurisdiction and a possible transfer to the Bankruptcy Court, MHS argued that none of the relief it was seeking would

[6] MHS also complains about the retention of a certain attorney in 2012, but does not appear to be asserting any claims based on these long-ago events. (*See* Am. Compl. ¶¶ 31-39).

"overturn, reverse or otherwise impact in any way any order of the [Bankruptcy Court], nor . . . interfere with [Ember's] interest in the assets it obtained in the Bankruptcy under the Sale Order" (Exh. 5 at 2), because MHS sought only "*monetary* damages" (*id*. at 1; emphasis added). So adamant was MHS that it was seeking only monetary damages that it emphasized this fact in no fewer than three letters sent to the District Court on the same date. (*See id*. at 1-2; Exh. 6 at 2; Exh. 7 at 1). To put a finer point on this, MHS amended its complaint to specify (among other things) that it did *not* seek (a) "the reversal, overruling, modification, vacatur or otherwise to impact in any way any order issuing from the Bankruptcy Court"; (b) "to enforce or challenge or modify in any way any rights established in a sale order issued by the Bankruptcy Court"; or (c) "to modify any of [the] transactions" approved in the Sale Orders or "any rights that were created thereunder". (Exh. 8 ¶¶ 4, 5, 70, 71). "[I]nstead," MHS reiterated, it sought *only* "damages". (*Id*. ¶ 71).

Accepting this argument, the federal court remanded the case to state court. In so doing, the court reasoned: "The [Amended Complaint] affirmatively state[s] that Plaintiffs do not seek . . . reversal, overruling, or modification of the Bankruptcy Court sale order [and] the allegations in the [Amended Complaint] are not based on rights established in the sale order". (Exh. 9 at 3) (alterations in original).

Thereafter, the New York state court dismissed the action (a) as to Goggin and Goodwin based on the exclusive venue provision contained in the Operating Agreement, and (b) as to Collins for lack of personal jurisdiction. (Exh. 4 at 5-17). MHS then commenced this action with a complaint that was materially identical to its New York pleading.

Goggin and Goodwin moved to dismiss that complaint as against them, based in large part on the Exculpation Clause. In response to that motion, MHS filed its Amended Complaint. Little has changed, with one key exception: in an obvious effort to avoid the Exculpation Clause, MHS now seeks not only damages, but also a constructive trust, disgorgement, restitution, an accounting, and injunctive relief with respect to the assets acquired in the Sale Orders (and/or the proceeds of those assets) – in other words, to effectively garner to itself all benefits flowing from the assets in which all right, title and interest was expressly vested in Ember and in ECM/ECM II pursuant to the Sale Orders.

This motion followed.

ARGUMENT

I. ALL OF THE CLAIMS AGAINST GOGGIN SHOULD BE DISMISSED

MHS asserts nine claims against Goggin: breach of fiduciary duty (First Cause of Action),[7] conspiracy to commit such breach (Third Cause of Action),

[7] We refer to each of MHS's claims as a "cause of action" because MHS uses that

fraud (Fourth Cause of Action), conspiracy to commit fraud (Sixth Cause of Action), breach of the Operating Agreement (Seventh Cause of Action), breach of the implied covenant of good faith and fair dealing (Eighth Cause of Action), unjust enrichment (Tenth Cause of Action), misappropriation (Eleventh Cause of Action), and a demand for books and records (Twelfth Cause of Action). Each of these claims should be dismissed as a matter of law.

A. MHS's Claims Should Be Dismissed To The Extent They Seek Equitable Relief

In amending its complaint to try to escape the Exculpation Clause, MHS has injected a common defect into each of its claims: they now purport to seek equitable relief that (a) is directly at odds with the representations MHS made to the federal court in New York in order to obtain a remand to state court and avoid transfer to the Bankruptcy Court; and (b) is in all events precluded by the terms of the Sale Orders. MHS's requests for such relief should be dismissed as a matter of law.

In particular, in order to get out of federal court MHS amended its complaint and repeatedly emphasized that – *precisely* because it was seeking *only* "monetary damages" – its claims would not "impact in any way" any order of the Bankruptcy Court. (*See supra* at 11-12). The District Court agreed, and on that basis it

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nomenclature in its Amended Complaint.

remanded to state court. (*See supra* at 12). As a result, it is simply not open to MHS to insert claims for equitable relief now.

Nutzz.com, LLC v. Vertrue Inc., 2006 WL 2220971 (Del. Ch. July 25, 2006), is directly on point. There, in order to pursue its claims in this Court, the plaintiff argued that the claims fell within an exception to an arbitration clause. The Court agreed, and allowed those claims to proceed. The plaintiff later attempted to arbitrate "similar" claims, and the defendant objected. Because the plaintiff had successfully argued that claims of that type were not arbitrable, the Court held that the plaintiff was judicially estopped from bringing any such claims in arbitration. 2006 WL 22220971, at *9-10.

Similarly here, in order to obtain a remand to state court MHS adamantly maintained that the relief it sought would not impact any order of the Bankruptcy Court because it was seeking only "monetary damages." It got what it wanted: the District Court remanded the case to state court. Now, apparently realizing that its claims for monetary damages are barred by the Exculpation Clause (*see infra* at 20-21, 24-25, 28-31, 34-35), MHS seeks to re-inject claims for equitable relief. But *all* of that requested relief – "a constructive trust over" and "disgorgement of" the defendants' interests in Ember and in the SPV[8]; "restitution to [MHS] and

[8] The SPV is not called "Licking River Lenders" (*cf.* Am. Compl. ¶ 47); in fact, that is simply a phrase the Bankruptcy Court used to refer to ECM and ECM II. For purposes of this motion, however, we will treat MHS's references to "Licking

ECM" of those interests; and "an injunction requiring [the defendants] to return [those interests] to [MHS] and ECM" and to account to MHS and ECM for "the profits thereof" (Am. Compl. at 36-37) – is directly contrary to what the Sale Orders expressly provide, including: (a) that the proceeds of the assets held by the SPV be distributed in a manner to be ordered by the Bankruptcy Court; and (b) that neither Ember nor any of the "Protected Parties" (including Goggin) may be subject to any claim relating to the assets purchased by Ember. (*See supra* at 8-10).

These are precisely the kinds of claims MHS told the District Court it was *not* asserting. And with good reason. Had the District Court thought that MHS was seeking this kind of relief, it could not possibly have concluded (as it did) that MHS's claims did not seek to upset any of the results dictated by the Sale Orders. The very reason why the District Court was able to reach that conclusion was precisely because MHS insisted it sought only an award of (fungible) "monetary damages" and *not* to assert an equitable interest in any assets that were the subject of those Orders. The claims for equitable relief that MHS has now added in an effort to escape the Exculpation Clause, however, do just that; indeed, the fact that those claims ask this Court to award MHS (and/or ECM) an interest in those assets

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River Lenders" and "LRL" as references to the SPV since – as the April 10, 2015 Sale Order makes clear – the SPV is the entity that took title to the Credit Bid Assets. (*See supra* at 8-9).

is what *makes* them equitable claims in the first place.[9] The principles of judicial estoppel bar MHS from asserting any claim for such relief.[10]

This analysis should end the inquiry over whether MHS should be permitted to seek the equitable remedies it has added to its Amended Complaint. But to the extent that there could be any doubt, MHS's requests for such remedies should be dismissed for the separate reason that those remedies actually *would* undermine the Sale Orders. Those Orders (a) specify precisely what is to happen with the assets held by the SPV *and* their proceeds; and (b) expressly prohibit any claim against Ember *or* any of its principals relating to the assets purchased by Ember. (*See*

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[9] *See, e.g., Steinhardt v. Howard-Anderson*, 2012 WL 29340, at *12-13 (Del. Ch. Jan. 6, 2012) (disgorgement is a remedy that is limited to specifically identifiable assets traceable to the alleged wrong); *Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *14 n.35 (Del. Ch. Nov. 1, 2002) ("The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to plaintiff. Restitution rectifies unjust enrichment by forcing restoration to the plaintiff.") (citation and internal quotations omitted), *aff'd*, 826 A.2d 298 (Del. 2003) (TABLE); *McMahon v. New Castle Assocs.*, 532 A.2d 601, 608 (Del. Ch. 1987) (a constructive trust is "a remedy relating to specific property or identifiable proceeds of specific property" and requires the legal owner "to hold that property as if upon a trust").

[10] *Accord Brown v. T-Ink, LLC*, 2007 WL 4302594, at *15 (Del. Ch. Dec. 4, 2007) (where, in order to avoid an injunction to prevent an arbitration from proceeding, party represented that it amended its arbitration demand to drop certain claims that arguably were not subject to arbitration clause, judicial estoppel precluded party from "pursuing [any such] claims before the arbitrator"); *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 (Del. Ch. June 29, 2004) (party who represented to New Jersey court that dispute could be fully litigated in Delaware Chancery Court was judicially estopped from arguing that Delaware Chancery Court lacked personal jurisdiction over him).

supra at 8-10). The requests for equitable relief that MHS has added to avoid the Exculpation Clause assert interests in those very assets. They are therefore precluded by the Sale Orders as a matter of law. *See, e.g., Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 35684, at *1 (Del. Ch. Mar. 13, 1991) ("Any application seeking to compel disclosure of materials that are subject to the Texas court's Confidentiality Order, or to otherwise modify or interpret the Order, should be made in the first instance to the Texas court."); *Cont'l Illinois Nat'l Bank & Trust Co. v. Hunt Int'l Resources Corp.*, 1987 WL 55826, at *7 (Del. Ch. Feb. 27, 1987) (denying motion for leave to amend complaint to assert claims arguably covered by stay issued by bankruptcy court; directing that plaintiff first seek a ruling from bankruptcy court as to the scope of its stay); *accord Bayard v. Martin*, 101 A.2d 329, 333 (Del. 1953) ("it has been regarded as a rule of universal jurisprudence, based upon principles of comity, that courts must avoid conflicts with each other").[11]

For any or all of these reasons, the Court should dismiss MHS's claims to the extent they seek any relief other than money damages.

[11] As noted below and further detailed in the brief being filed by Collins in support of his separate motion to dismiss, because MHS was a party to and represented in the proceedings that led to the Sale Orders, they bar its claims even more broadly under principles of *res judicata*. (*See infra*, Point III). Even if the Court disagrees, however, at a minimum the Sale Orders bar MHS from asking this Court for relief that would alter or undermine the results of those Orders.

B. Each Of MHS's Individual Claims Against Goggin Should Be Dismissed

1. The Claims for Breach of Fiduciary Duty Should Be Dismissed

The Amended Complaint makes no effort to distinguish the allegations supporting MHS's claims against Goggin for breach of fiduciary duty (the First and Third Causes of Action)[12] from those supporting its claim against him for breach of contract (the Seventh Cause of Action). To the contrary, in the breach of contract claim MHS incorporates by reference all of its allegations in support of its claim for breach of fiduciary duty (*see* Am. Compl. ¶ 158) and then alleges that Goggin breached his obligation under the Operating Agreement to "discharge [his] duties in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner [he] reasonably believes to be in the best interests of [ECM]" (*id.* ¶¶ 161, 164). In the breach of fiduciary duty claims MHS uses slightly different words to allege the same thing: that Goggin failed to act in the best interests of ECM (*id.* ¶¶ 97-101, 115). Moreover, MHS seeks identical relief on all of these claims. (*Id.* ¶¶ 102-103, 124-25, and 165-66). On this basis alone, MHS's claims for breach of fiduciary duty and conspiracy to commit such breach should be dismissed as a matter of law

[12] The Third Cause of Action is a claim that Goodwin and Collins conspired with Goggin to breach his fiduciary duty. That claim – which obviously requires an underlying breach by Goggin (*see infra* at 38-39) – simply incorporates by reference the allegations of the First Cause of Action respecting such a breach. (*See* Am. Compl. ¶ 115).

(*regardless* of the remedy sought) because they are duplicative of the claim for breach of the Operating Agreement.[13]

If the fiduciary duty claims were not duplicative, they would fail as a matter of law for a different reason. Without their improper request for equitable relief that is barred by judicial estoppel and by the Sale Orders (*see supra* at 14-18), these claims are for money damages for alleged breach of the fiduciary duties that Goggin owed "[a]s manager" of ECM. (Am. Compl. ¶¶ 11, 98, 115). But the Exculpation Clause provides that Goggin "shall not be liable to the Company or any Member for monetary damages for breach of [his] duty as a Manager, except as otherwise required under the Act." (Exh. 1 at 11, § 5.10). The "Act" (that is,

[13] *See Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, 2015 WL 394011, at *7-8 (Del. Ch. Jan. 29, 2015) ("To determine whether there is an independent basis for fiduciary claims arising from the same general events, the Court inquires whether the fiduciary duty claims depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy."; fiduciary duty claims dismissed as duplicative of contract claims because "the facts and harms cited in support of the fiduciary duty claims appear to be the same ones that underlie the breach of contract claims") (citations and internal quotations omitted); *CIM Urban Lending GP, LLC v. Cantor Commercial Real Estate Sponsor, L.P.*, 2016 WL 768904, at *3 (Del. Ch. Feb. 26, 2016) (dismissing fiduciary duty claim as duplicative of contract claim "because any relief which [plaintiffs] obtain would be the same under both theories"; "Delaware law does not allow fiduciary duty claims to proceed in parallel with breach of contract claims unless there is an independent basis for the fiduciary duty claims apart from the contractual claims.") (citations and internal quotations omitted); *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001) (dismissing fiduciary duty claims because "the contract and fiduciary claims overlap completely since they are based on the same underlying conduct," noting that "the complaint uses identical conduct as the basis for both legal claims").

the Delaware Limited Liability Company Act – *see* Exh. 1 at 1, § 1.1) provides that an operating agreement can eliminate or limit liability for any breach of duty (specifically "including fiduciary duties") *except* "a bad faith violation of the implied contractual covenant of good faith and fair dealing." 6 *Del. C.* § 18-1101(e). MHS's claims for breach of fiduciary duty do not fall within that exception: a violation of the implied contractual covenant of good faith and fair dealing gives rise only to a *contractual* claim, not one sounding in breach of fiduciary duty.[14]

Apparently recognizing this problem, MHS vaguely asserts that Goggin owed fiduciary duties both as manager "and otherwise." (*See, e.g.*, Am. Compl. ¶¶ 11, 98). But the Amended Complaint does not assert a single fact that could conceivably show that Goggin had any relationship with ECM other than as its manager, and it certainly does not plead any facts showing that he owed the company (or MHS) fiduciary duties for any other reason. It therefore cannot possibly state a claim for breach of any duty other than those he owed as manager of ECM.[15] Any claim seeking money for any alleged breach of that fiduciary duty

[14] *See Wood v. Baum*, 953 A.2d 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.").

[15] *See, e.g.*, *Stewart v. Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 298 (Del. Ch.) (dismissing breach of fiduciary duty claim because a "fiduciary relationship . . . [could not] reasonably be inferred from the well-pled allegations of the Complaint."), *aff'd*, 126 A.3d 1115 (Del. 2015) (TABLE); *Adams v. Gelman*, 2016

in that capacity is plainly barred by the Exculpation Clause.

2. <u>The Fraud Claims Should Be Dismissed</u>

MHS's fraud claims against Goggin (the Fourth and Sixth Causes of Action)[16] should be dismissed because they fail to satisfy the particularly requirements of Rule 9(b). The Amended Complaint nowhere indicates *when* Goggin allegedly made any deceptive statement, *what* exactly he said, *to whom* he said it, *by what means* it was transmitted, or *how* any such statement was misleading. Without such detail, the fraud claims fail as a matter of law.[17]

For example, MHS's only allegations about when any misrepresentations were made are its statement that "*[a]t all times*" Goggin "represented to Plaintiffs that he was working on a deal by which ECM would get a majority share in the

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WL 373738, at *5 (Del. Super. Ct. Jan. 28, 2016) (granting motion to dismiss fiduciary duty claim; "Riddick and Rosenthal have not pled the existence of a fiduciary relationship between them and Dr. Gelman"), *aff'd*, 151 A.3d 449 (Del. 2016) (TABLE).

[16] The Sixth Cause of Action is a claim that Goodwin and Collins conspired in Goggin's alleged fraud. That claim – which obviously requires an underlying fraud by Goggin (*see infra* at 42) – simply incorporates by reference the allegations of the Fourth Cause of Action respecting such a fraud. (*See* Am. Compl. ¶ 148).

[17] *See Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207-08 (Del. Ch. 2006) ("Under Court of Chancery Rule 9(b), a heightened pleading standard applies to fraud claims requiring particularized fact pleading. . . . The factual circumstances that must be stated with particularity refer to the time, place, and contents of the false representations; the facts misrepresented; the identity of the person(s) making the misrepresentation; and what that person(s) gained from making the misrepresentation."), *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007) (TABLE).

'New LR'" (Am. Compl. ¶ 41; emphasis added) and its assertion that he made that representation – and a separate representation "that he was arranging for ECM to use its credit bid right to get the full value of its secured interest in USC's assets" – "[o]ver the course of many months" (*id.* ¶¶ 129, 132). MHS does not identify a *single date* on which Goggin allegedly made any such representation. Similarly, MHS fails to identify a single individual to whom Goggin allegedly made these representations; instead, MHS pleads only that Goggin made them to "Plaintiff"; that is, MHS. (*See id.* ¶ 129; *accord id.* ¶ 41). MHS is an entity that could only receive representations through the person of an individual, but MHS nowhere names any such individual. Nor does MHS set forth *what* Goggin is alleged to have said. These omissions are fatal to MHS's fraud claims.

Airborne Health, Inc. v. Squid Soap, LP, 984 A.2d 126 (Del. Ch. 2009), is directly on point. There, in its counterclaim for fraud the defendant alleged that the plaintiff "intentionally misrepresented, actively concealed, and failed to disclose facts and the truth about the value of its brand image, the impending downfall of its marketing and reputation, and the certain effect on its ability to market [the defendant's] products." 984 A.2d at 142. This Court dismissed the claim, noting: "Nowhere do the counterclaims provide any detail about what was actually said, who said it, where, or when. Generalized allegations of this nature are insufficient under Rule 9(b)." *Id.*

MHS's allegations here are no better. As in *Airborne*, this alone is sufficient reason to dismiss the fraud claims.[18]

MHS's fraud claims are defective for an additional reason: MHS does not allege a single fact that could support the conclusion that it relied on any alleged misrepresentation by Goggin. Although the Amended Complaint asserts that MHS "justifiably acted in reliance" on Goggin (Am. Compl. ¶ 137), it nowhere explains what MHS did in reliance on any alleged misrepresentation. The absence of any such allegation separately warrants dismissal of the fraud claims.[19]

3. The Claim For Breach Of Contract Should Be Dismissed

MHS's claim that Goggin breached the Operating Agreement (the Seventh Cause of Action) cannot survive because – once the improper requests for

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[18] *Accord Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *1 (Del. Ch. Jan. 30, 2015) (dismissing fraud claim for failure to satisfy Rule 9(b)'s particularity requirements in part because "the complaint does not identify the time or place of the false representations"); *Ruffalo v. Transtech Serv. Partners Inc.*, 2010 WL 3307487, at *16 (Del. Ch. Aug. 23, 2010) ("The Complaint lacks any detailed allegations, however, pertaining to the time, place, and contents of the allegedly false representations made by Defendants in relation to the withdrawal of funds from the Trust Fund. Thus, the Complaint fails to satisfy the pleading requirements of Rule 9(b).").

[19] *See Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *4 (Del. Ch. Dec. 19, 2002) (dismissing fraud claim because "[t]he amended complaint fails to allege reliance except in the most conclusory fashion"; "Perhaps plaintiff did rely on defendants' misrepresentations, but so far she has failed to allege any facts to support such an inference."), *aff'd*, 825 A.2d 239 (Del. 2003) (TABLE); *Cont'l Illinois*, *supra*, 1987 WL 55826, at *6 (dismissing fraud claim in part because it "fails to allege circumstances showing specifically how Continental and the Debenture holders relied to their detriment upon the misstatements and/or omissions").

equitable relief are dismissed (*see supra* at 14-18) – what is left is barred by the Exculpation Clause. The claim alleges that Goggin breached his obligation under the Operating Agreement, as "Manager," to "discharge [his] duties in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner the Manager reasonably believes to be in the best interests of [ECM]." (Am. Compl. ¶ 161, quoting § 5.6(a) of the Operating Agreement; *id.* ¶ 164). It then seeks the same monetary relief as the fiduciary duty claim: damages "in an amount to be determined at trial, but no [or 'not'] less than $35 million." (*Compare id.* ¶ 165 *with id.* ¶ 102).

As detailed above, however, pursuant to 6 *Del. C.* § 18-1101(e) the Exculpation Clause expressly exempts Goggin from any monetary liability for breach of his "duty as a Manager." (*See supra* at 7-8, 20-21). MHS does not allege that Goggin had (let alone breached) any duty under the Operating Agreement other than those he owed in his capacity as Manager, and MHS seeks money for breach of those duties (*see* Am. Compl. ¶ 165). The Exculpation Clause bars that claim.

4. The Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing Should Be Dismissed

The claim against Goggin for breach of the implied covenant of good faith and fair dealing (the Eighth Cause of Action) – a doctrine that is "rarely invoked

successfully"[20] – should be dismissed because it fails to plead the elements of such a claim. To do so, MHS would have to allege (a) "a gap" in the Operating Agreement (that is, that the Operating Agreement does not actually cover the conduct at issue)[21]; (b) that this "gap" is not covered by a separate fiduciary duty[22]; (c) that the conduct at issue "could not be anticipated" when the Operating Agreement was negotiated[23]; and (d) that it is "clear from what was expressly agreed upon" that the parties would have agreed to proscribe that conduct "had they thought to negotiate with respect to that matter."[24] MHS does none of this: its

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[20] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009); *accord, e.g., Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010) ("[w]ielding the implied covenant is a cautious enterprise" and is only "an occasional necessity") (citations and internal quotations omitted).

[21] *Fortis, supra,* 2015 WL 401371, at *4.

[22] *See Lonergan*, 5 A.3d at 1017 ("The implied covenant is not a substitute for fiduciary duty analysis."); *Miller v. Am. Real Estate Partners, L.P.*, 2001 WL 1045643, at *11 n.32 (Del. Ch. Sept. 6, 2001) (implied covenant claim dismissed because it was "indistinguishable" from the duty of loyalty and merely attempted to "plead[] the implied covenant as a substitute for fiduciary duties").

[23] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

[24] *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986); *accord Gerber v. EPE Holdings, LLC*, 2013 WL 209658, at *11 (Del. Ch. Jan. 18, 2013) (dismissing implied covenant claim because "Gerber has offered no interpretation of the LPA that would support the inference that its drafters would have anticipated (or provided if they had thought of it) [the implied term] to be read into the [agreement]"); *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *10 (Del. Ch. May 7, 2008) ("In fact, it is clear that a court cannot and should not use the implied covenant of good faith and fair dealing to fill a gap in a contract with an implied term unless it is clear from the contract that the parties would have agreed to that term had they thought to negotiate the matter.") (citations and internal quotations

implied covenant claim is based on the *exact same allegations* underlying its claims for breach of fiduciary duty and breach of contract.

Specifically, while MHS asserts in conclusory fashion that there is a "gap" in the Operating Agreement necessitating an implied covenant claim, it does not offer a single fact to support that assertion or even identify what alleged "gap" exists. To the contrary, MHS insists that the Operating Agreement covers the conduct of which it complains. (*See* Am. Compl. ¶ 164). Nor does MHS allege that Goggin's conduct does not fall within any fiduciary duty; again, MHS alleges exactly the opposite. (*Id.* ¶ 101). MHS similarly does not allege that the circumstances that actually arose could not have been foreseen when the parties negotiated ECM's Operating Agreement. Nor, again, does MHS explain how it could be "clear from what was expressly agreed upon" in the Operating Agreement that the parties would have specifically prohibited the conduct of which MHS now complains if they had considered the matter.[25]

Instead, in support of its implied covenant claim MHS "repeats and re-alleges" its preceding assertions and then refers to the *identical facts* underlying its

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omitted), *aff'd sub nom. Segal v. Fisk Ventures, LLC*, 984 A.2d 124 (Del. 2009) (TABLE); *accord Airborne Health, supra*, 984 A.2d at 146 (the implied covenant "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").

[25] *Accord, e.g.*, *Kuroda*, *supra*, 971 A.2d at 888-89 (dismissing implied covenant claim in part because of "conclusory" supporting allegations).

fiduciary duty and contract claims. (*See* Am. Compl. ¶¶ 167, 170). Although MHS attempts to distinguish this claim by including bullet points allegedly highlighting specific facts, those are the very same facts that had been "set forth in the" paragraphs "preceding" MHS's fiduciary duty and contract claims and that were "repeat[ed] and re-allege[d]" and "fully set forth [t]herein." (*See id*. ¶¶ 31-56, 62-68, 87-91, 97, 101, 158, 164). Those allegations do nothing more than seek to paint a picture of a traditional, duty of loyalty/corporate opportunity claim against an LLC manager. This is fatal to MHS's implied covenant claim.[26]

MHS's claim for breach of the implied covenant should be dismissed on this basis alone, *regardless* of the relief sought. But with the removal of MHS's improper requests for equitable relief (*see supra* at 14-18), the claim is doubly deficient because it is also barred by the Exculpation Clause. As noted above, that provision relieves Goggin from all monetary liability for any breach of his "duty as a Manager" except as expressly provided in 6 *Del. C.* § 18-1101(e). (*See supra* at

[26] *See Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *17 (Del. Ch. Nov. 19, 2013) (dismissing implied covenant claim that "merely incorporates by reference all of the previous allegations in the Amended Complaint and asserts that '[t]hrough its faithless and fraudulent conduct, as alleged above, Sellers breached the covenant of good faith and fair dealing implied in the SPA'") (alteration in *Osram*); *Lonergan*, 5 A.3d at 1019 ("To use the implied covenant to replicate fiduciary review would vitiate the limited reach of the concept of the implied duty of good faith and fair dealing. To the extent the complaint seeks to re-introduce fiduciary review through the backdoor of the implied covenant, it fails to state a colorable claim.") (citation and internal quotations omitted); *see also supra* at 25-27 and nn.20-24.

7-8, 20-21). That statute provides that the parties to a limited liability company agreement may agree to limit or eliminate a manager's liability for all breaches of contractual and fiduciary duties except for "any act or omission that constitutes a *bad faith* violation of the implied contractual covenant of good faith and fair dealing." 6 *Del. C.* § 18-1101(e) (emphasis added). Importantly, in so providing the statute expressly *distinguishes* a "bad faith" violation of that covenant from any other kind of violation: under § 18-1101(c), a limited liability company agreement may expand, restrict or eliminate the duties of any party except that it "may not eliminate the implied contractual covenant of good faith and fair dealing"; under § 18-1101(e), in contrast, such agreements may limit or eliminate liability for any breach of duty except a "*bad faith*" violation of that covenant. Thus, a provision like the Operating Agreement's Exculpation Clause – which expressly incorporates the limits of the statute – must be read to eliminate liability for any breach of the implied covenant that is not committed in bad faith.[27]

The Amended Complaint, however, includes no factual allegation that could

[27] *See Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012) ("the General Assembly is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction"; "every word chosen by the legislature (and often bargained for by interested constituent groups) must have meaning") (citations and internal quotations omitted); *Colonial Ins. Co. of Wisconsin v. Ayers*, 772 A.2d 177, 181 (Del. 2001) ("when different terms are used in various parts of a statute, it is reasonable to assume that a distinction between the terms was intended") (citations and internal quotations omitted); *Alpine Investment Partners v. LJM2 Captial Mgmt., L.P.*, 794 A.2d 1276, 1282-83 (Del. Ch. 2002) (same language).

support the conclusion that Goggin acted in bad faith – that is, with "actual or constructive knowledge that [his] conduct was legally improper."[28] As a result, even if the Amended Complaint did state a cause of action for breach of the implied covenant, MHS's Eighth Cause of Action would have to be dismissed because – once MHS's improper requests for equitable relief are dismissed (*see supra* at 14-18) – the only relief left is barred by the Exculpation Clause.

MHS's addition of a contention that the Operating Agreement included an implied promise by Goggin not to "offer and exchange ECM assets to assist in [his] and Goodwin's personal legal defenses" (Am. Compl. ¶ 170) – which is the only non-conclusory allegation MHS has added that even attempts to show bad faith – does not change this analysis. MHS alleges that Goggin sent a letter to ECM's members in which "he declared that he would make ECM pay lenders of funds for legal defense costs" and that such payments would be paid in full "before any distributions are made with respect to the capital accounts of the members." (*Id*. ¶¶ 88-89). What MHS fails to disclose (but what the letter MHS quotes in paragraphs 89-90 of the Amended Complaint makes clear), however, is that these

[28] *See Wood*, *supra*, 953 A.2d at 141-143 (citations and internal quotations omitted); *accord CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *9 (Del. Ch. Jan. 28, 2011) ("Bad faith generally requires a culpable mind or a conscious objective to do harm. In particular, bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.") (citations and internal quotations omitted).

"lenders" *are ECM's members themselves*. In his letter, Goggin recounts to those members that he "wrote to you seeking additional capital to finance the defense of ongoing litigation" and that "[m]any of ECM's members" agreed to contribute toward that defense.[29] The Operating Agreement (at 10, § 5.8) entitles Goggin to indemnification from ECM for his "reasonable attorneys' fees and expenses . . . to the fullest extent permitted under the Act and any other applicable law," and the Act (in § 18-108) expressly authorizes ECM to indemnify Goggin and hold him harmless "from and against any and all claims and demands whatsoever." The Operating Agreement also expressly permits members to make loans to the company, and provides that repayment of those loans takes priority over distributions to members. (*See* Exh. 1, §§ 8.4, 9.4(b), 9.4(d)). Thus, the letter simply advised ECM's members of what would happen pursuant to the terms of the Operating Agreement. This cannot possibly constitute bad faith.

MHS has, in short, not adequately pled *any* breach of the implied covenant, let alone one that is not covered by the Exculpation Clause. Its claim should accordingly be dismissed.

5. <u>The Unjust Enrichment Claim Should Be Dismissed</u>

MHS's claim against Goggin for unjust enrichment (the Tenth Cause of

[29] A copy of the letter (which is properly before the Court because it is directly referenced and quoted in the Amended Complaint – *see supra*, n.3) is attached as Exhibit 10.

Action) should be dismissed because the parties' relationship is governed by contract – namely, the Operating Agreement. MHS pleads no facts independent of that Agreement that could support a claim of unjust enrichment; to the contrary, MHS simply alleges that it performed its obligations under the Operating Agreement, that "Defendants knowingly accepted and retained the benefits conferred by the performance of such obligations and were enriched thereby," that "it would contravene equity and good conscience" to allow "Defendants" to retain those benefits without affording MHS and ECM "the expected benefits of such performance," and that as a result MHS and ECM are entitled to the exact same relief as that requested on the claim for breach of contract. (Am. Compl. ¶¶ 187-95; *cf. id.* ¶ 165-66). This is nothing more than an assertion that the "Defendants" have been unjustly enriched by MHS's alleged performance under the Operating Agreement because they have not given MHS the "benefit" it should have received in exchange for that performance. As a matter of law, this is a contract claim; it cannot form a basis for a separate claim for unjust enrichment.[30]

[30] *See CIM, supra*, 2016 WL 768904, at *2 (dismissing unjust enrichment claim because it was "based upon the same conduct as the breach of contract claim"; "Delaware courts . . . have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract.") (citations and internal quotations omitted; alteration in *CIM*); *Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *7 (Del. Ch. July 23, 2010) ("Under Delaware law, [w]hen the complaint alleges an express, enforceable contract that controls the parties' relationship . . . a claim for unjust enrichment will be dismissed.") (citations and internal quotations omitted; alterations in

Although the unjust enrichment claim should be dismissed on that basis alone, MHS also has not even attempted to plead all of the elements of such a claim. Those elements are "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Nemec*, 991 A.2d at 1130. Even assuming that the Amended Complaint can be read to plead the first four elements, it nowhere pleads the fifth one: far from alleging that it has no remedy at law, MHS asserts ten other causes of action claiming such a remedy. If MHS were legally entitled to such a remedy, those causes of action would provide it. This failure separately warrants dismissal of the unjust enrichment claim. *Id.* at 1130-31.[31]

MHS's allegation that it is entitled to remedies for unjust enrichment "[t]o the extent it is ultimately determined that there is an absence of a remedy provided by law" does nothing to save the claim. Unjust enrichment claims may be pled in the alternative "only when there is doubt surrounding the enforceability or the

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Related).

[31] Importantly – and as detailed above – the reason why as a matter of law MHS is not entitled to the "remedy" it seeks on its claim for breach of the Operating Agreement (*i.e.*, money damages) is because it *contractually* agreed to forego any claim for monetary relief. (*See supra* at 24-25). MHS cannot use an unjust enrichment claim to circumvent the terms of that contract. *See CIM, supra*, 2016 WL 768904, at *2 (where a contract governs the relationship, "contractual remedies [are] the sole remedies").

existence of the contract." *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *8 (Del. Ch. Aug. 26, 2005). Nowhere does MHS even attempt to plead that the Operating Agreement is unenforceable or that it somehow does not control. Further, pleading claims in the alternative "does not obviate the obligation to provide factual support for each theory." *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *8 (Del. Ch. Feb. 3, 2009).[32] Here, MHS has not pled any facts that support an unjust enrichment claim independent of the Operating Agreement. Its unjust enrichment claim should therefore be dismissed.

6. <u>The Misappropriation Claim Should Be Dismissed</u>

MHS's Eleventh Cause of Action (for "misappropriation") is nothing more than a repackaging of its claim for breach of fiduciary duty: according to MHS, Goggin misappropriated a corporate opportunity (and/or other assets) of ECM to which he had access in his capacity as its Manager. (*See* Am. Compl. ¶¶ 197-202). Goggin's obligation not to do that flows entirely from the fiduciary duties he owed in that capacity. Accordingly, if MHS's allegations were true they

[32] *Accord Doberstein v. G-P Indus., Inc.*, 2015 WL 6606484, at *6 (Del. Ch. Oct. 30, 2015) (dismissing unjust enrichment claim even though it was "pled in the alternative to the breach of contract claim"; plaintiff "ha[d] not identified any factual basis for her unjust enrichment claim independent of the allegations relating to her breach of contract claim . . . . [B]y her own assertions, the unjust enrichment claim relies on the same damages as the breach of contract claim.").

would sound in breach of fiduciary duty[33] – and they would, accordingly, be barred by the Exculpation Clause. (*See supra* at 20-22).

The misappropriation claim should be dismissed for this reason alone. But it also suffers from a separate defect that requires its dismissal independently from the Exculpation Clause (and regardless of the relief sought): MHS has not met the pleading requirements for such a claim. The Amended Complaint circularly tells us that Goggin misappropriated "Information" that "included material *information* regarding the assets acquired by Ember and LRL, including but not limited to *information* regarding the potential returns on such assets and strategies for optimization of the returns of such assets." (Am. Compl. ¶ 198; emphases added). But what exactly *is* that "information"? How did ECM acquire it and what steps did ECM take to maintain its secrecy? When did Goggin take it and how did he use it? These are only a few examples of the many things that MHS does not plead. *See Fitzgerald v. Cantor*, 1999 WL 66526, at *1, 2 (Del. Ch. Jan. 14, 1999) (dismissing misappropriation claim because the complaint "fail[ed] to plead *particularized* facts supporting" allegation that defendant "actually misappropriated confidential information") (emphasis added).[34] These failures

[33] *See, e.g., Grove v. Brown*, 2013 WL 4041495, at *8-9 (Del. Ch. Aug. 8, 2013).

[34] *Accord Kahn v. Icahn*, 1998 WL 832629, at *4 (Del. Ch. Nov. 12, 1998) (dismissing claim for usurpation of corporate opportunity in part because "[p]laintiffs . . . decided not to plead *specific* facts by which I might reasonably infer that there was misappropriation of information, unlawful redirection or

separately warrant dismissal of this claim.[35]

7. The Books And Records Claim Should Be Dismissed

MHS's Twelfth Cause of Action – seeking production of ECM's "books and records" – should be dismissed for two separate reasons. First, as a matter of law such a claim can only be brought as a "distinct proceeding[]"; that is, it cannot be joined with other kinds of claims. *See, e.g.*, *TravelCenters of Am., LLC v. Brog*, 2008 WL 868107, at *1 (Del. Ch. Mar. 31, 2008). The "books and records" claim should be dismissed for this reason alone.

Wholly apart from this defect, however, MHS's "books and records" claim should be dismissed for the separate reason that MHS does not even attempt to show that it has a proper purpose for seeking this information. (*See* 6 *Del. C.* § 18-305 (members of Delaware LLCs may obtain books and records from the company only for a "purpose reasonably related to the member's interest as a member of the [LLC]")).[36] As described in the Amended Complaint (at ¶ 78), MHS demanded to

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personal use of partnership resources or some sort of misappropriation of proprietary investment research") (emphasis added), *aff'd,* 746 A.2d 276 (Del. 2000) (TABLE).

[35] For the same reasons articulated in Point III.B. of Collins' brief in support of his motion to dismiss, and pursuant to 6 *Del. C.* § 2004, Goggin and Goodwin reserve the right to seek attorney's fees in connection with MHS's misappropriation claim.

[36] *Accord* 8 *Del. C.* § 220(b) (corporate stockholders have a right to inspect corporate records only for a "proper purpose").

see every conceivable document relating to ECM's business, including (among other things) complete books and records, financial statements, tax returns, bank statements, contact information for each and every member and manager, information relating "to the cash, property, or services contributed by each member," all minutes of meetings and consents, and other documents. Although the Amended Complaint (¶ 78) notes what "the purpose" of its demand was back in 2015, nowhere does MHS ever explain why – after bringing four separate complaints against Goggin – it *now* needs this information. MHS apparently believed as early as August 2015 that it had enough information to bring a lawsuit based on the exactly same underlying facts as those alleged here, and it began such a lawsuit. (*See supra* at 11). It should not now be permitted to circumvent the usual discovery process through a demand for books and records.[37] The books and records claim should be dismissed for this reason as well.[38]

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[37] *See Cent. Laborers Pension Fund v. News Corp.*, 2011 WL 6224538, at *1 (Del. Ch. Nov. 30, 2011) ("As a general matter, by filing its derivative complaint, Central Laborers acknowledged . . . that it had sufficient information to support its substantive allegations and its allegations of demand futility that would excuse prior demand on the News Corp. board. . . . Section 220 was not adopted as a substitute for litigation discovery; instead, in this context, it serves to enable potential derivative plaintiffs to obtain the necessary information in advance of filing their derivative action. Although there may be special circumstances that would warrant the pursuit of a books and records action at the same time as the related derivative action . . . Central Laborers does not point out any unusual conditions that would support a deviation from the general rule."), *aff'd,* 45 A.3d 139 (Del. 2012).

[38] *See TravelCenters of Am.*, 2008 WL 868107, at *1 and n.1 ("As an initial matter

II. ALL OF THE CLAIMS AGAINST GOODWIN SHOULD BE DISMISSED

MHS asserts *six* claims against Goodwin: for aiding and abetting Goggin's alleged breach of fiduciary duty (the Second Cause of Action), conspiracy to cause Goggin's alleged breach of fiduciary duty (the Third Cause of Action), aiding and abetting Goggin's alleged fraud (the Fifth Cause of Action), conspiracy to commit fraud (the Sixth Cause of Action), intentional interference with Goggin's contractual obligations (the Ninth Cause of Action), and unjust enrichment (the Tenth Cause of Action). But the Amended Complaint does not identify a single action Goodwin took, anything he said, or any other fact that would support any of these claims against him. Accordingly, each of them should be dismissed.[39]

A. The Claims For Aiding And Abetting A Breach Of Fiduciary Duty And Conspiracy To Cause A Breach Of Fiduciary Duty Should Be Dismissed

If the Court dismisses MHS's claim against Goggin for breach of fiduciary

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of proper pleading, counterclaim-plaintiffs have failed to allege facts sufficient to state a proper purpose in their counterclaim"; "Not until their brief in opposition of counterclaimant-defendant's motion to dismiss do counterclaim-plaintiffs even reference the purpose of their demand for inspection."); *accord Cent. Laborers*, 2011 WL 6224538, at *2 (dismissing action brought to inspect books and records pursuant to Section 220 because the complaint was "unable to tender a proper purpose for pursuing its efforts to inspect the books and records").

[39] As noted above, MHS has added requests for equitable relief for the ostensible purpose of avoiding dismissal of its claims against Goggin based on the Exculpation Clause. (*See supra* at 11-18). The Exculpation Clause does not apply to Goodwin; accordingly, the arguments for dismissal of the claims against him are the same whether the claims are legal or equitable. Nevertheless, the principles that preclude MHS's claims for equitable relief against Goggin equally preclude any such relief against Goodwin. (*See supra* at 14-18).

duty because it is duplicative of the contract claim (*see supra* at 19-20), it should also dismiss the related claims that Goodwin aided and abetted Goggin's alleged breach (Second Cause of Action) and conspired to commit that alleged breach (Third Cause of Action). *See Trenwick*, *supra*, 906 A.2d at 215 (dismissing claims for aiding and abetting breach of fiduciary duty and conspiracy to breach fiduciary duty because underlying claim for breach of fiduciary duty failed). But even if the Court finds that the Amended Complaint states a claim for breach of fiduciary duty by Goggin, it should still dismiss the related claims against Goodwin because MHS has not even come close to adequately pleading either of them.

To state an aiding and abetting claim, MHS would have had to plead non-conclusory facts sufficient to show that Goodwin "knowingly participated" in Goggin's alleged breach of fiduciary duty.[40] MHS has pled no such facts; rather, it asserts only in the most conclusory fashion that Goodwin "assisted" Goggin and

[40] *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 734-35 (Del. Ch. 1999) ("knowing participation" is an element of a claim for aiding and abetting a breach of fiduciary duty; claim dismissed because allegations "that Bethlehem 'approved and urged' the Director Defendants to enter into the Merger Agreements" and "knowingly participated in the alleged breaches" were conclusory and insufficient) (citation and internal quotations omitted), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (TABLE); *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *17-19 (Del. Ch. June 30, 2014) ("Even assuming the Complaint states a claim for breach of fiduciary duty in this regard, Dent's aiding and abetting claim still fails because he has not alleged adequately that Cypress knowingly participated in this alleged breach.").

"participated" in his alleged breaches in ways that are entirely unspecified.[41] These allegations are insufficient as a matter of law.

In re Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59 (Del. 1995), is analogous. There, the plaintiffs' aiding and abetting claim rested on "a conclusory statement that 'BNI [Burlington] had knowledge of the Individual Defendants' fiduciary duties and knowingly and substantially participated and assisted in the Individual Defendants' breaches of fiduciary duty, and, therefore, aided and abetted such breaches of fiduciary duties described above.'" 669 A.2d at 72 (alteration in *Santa Fe*). The Supreme Court found that this Court "committed no error in dismissing the aiding and abetting claim" because this statement could not support such a claim and the plaintiffs had alleged no other facts. *Id.*

MHS's allegations here are no better. (*See supra*, n.41). Its aiding and abetting claim should similarly be dismissed.[42]

The claim that Goodwin conspired with Goggin to breach his fiduciary duties is equally deficient. To state such a claim, MHS would have to plead *facts*

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[41] *See, e.g.*, Am. Compl. ¶¶ 47 (alleging that Goggin had "the active assistance of Defendant Goodwin" in secretly forming LRL), 55 (characterizing Goodwin as Goggin's "friend"), 106-07 and 111 (alleging that Goodwin "knowingly and substantially assisted Goggin", "assisted and participated in Goggin's creation and utilization of LRL", and "benefitted" from Goggin's breaches), 117 (alleging that Goodwin "intentionally participated in the plan for Goggin to breach his fiduciary duties"), 119 (alleging that Goodwin "assisted and participated" in unspecified ways "in Goggin's creation and utilization of LRL").

[42] *Accord supra*, n.40 and cases cited therein.

sufficient to show that Goodwin and Goggin had a corrupt agreement with respect to Goggin's alleged breaches and that Goodwin engaged in one or more specific acts "in furtherance" of that agreement.[43] But MHS has alleged no such facts; instead, it has alleged only conclusions.[44] Its conspiracy claim therefore also fails.

Encite, supra, is on point here. In that case, the conspiracy claim alleged that two defendants had "conceived of and executed a plan intended to disrupt the sale of IFCT's assets to [the plaintiff] and the other Series B investors so that [one of the defendants] could purchase the assets for himself at a discount." 2008 WL 2973015, at *11. The Court handily dismissed this claim, emphasizing that it was not based on "*facts*, or facts from which reasonable inferences may be drawn, that an agreement existed between [the defendants]," adding that "[s]imply alleging that [the defendants] acted in concert to prevent the sale of IFCT's assets pursuant

[43] *See, e.g.*, *Encite LLC v. Soni*, 2008 WL 2973015, at *11 (Del. Ch. Aug. 1, 2008) (dismissing conspiracy claim for failure to sufficiently plead these elements); *accord Cliff House Condo. Council v. Capaldi*, 1991 WL 165302, at *6 (Del. Ch. Aug. 26, 1991) (dismissing conspiracy claim because complaint "does not provide any facts suggesting how DG & G knew that Capaldi and Rizzo were breaching their fiduciary duties"; "As this Court recently repeated, '[c]onclusory allegations, unsupported by a single specific detail suggesting knowing participation, will not support a claim that [DG & G] knowingly participated in the wrongs allegedly committed by [Capaldi and Rizzo].'") (citations omitted; alterations in *Cliff House*).

[44] *See, e.g.*, Am. Compl. ¶¶ 116 (alleging that Goodwin had a "corrupt agreement[] with Goggin with a purpose of furthering of [sic] Goggin's breaches of fiduciary duty"), 123 (alleging that Goodwin "benefitted from Goggin's breach of fiduciary duties, in which [he] conspired").

to the Series B Bid does not make it so." *Id.* (emphasis added). As to another defendant, the conspiracy claim alleged that "[o]n information and belief, [he] knew of and encouraged the actions of [the other defendants] to disrupt the sale of IFCT's assets to the series B Investors." *Id.* (first alteration in *Encite*; citation and internal quotations omitted). The Court found this allegation "woefully insufficient to support a claim of civil conspiracy," noting that it "highlights [the plaintiff's] inability to allege any specific conduct by [this defendant]." *Id.*

MHS's conspiracy claim should fare no better: like the aiding and abetting claim, it alleges nothing more than conclusions. (*See supra*, n.44). Accordingly, like the claims in *Encite*, it is "woefully insufficient" and fails as a matter of law.

B. The Claims For Aiding And Abetting Fraud And Conspiracy to Commit Fraud Should Be Dismissed

If the Court agrees that the fraud claim against Goggin should be dismissed (*see supra* at 22-24), it should also dismiss MHS's auxiliary claims that Goodwin aided and abetted Goggin's fraud (the Fifth Cause of Action) and/or conspired with him to commit fraud (the Sixth Cause of Action) on the ground that those claims cannot survive without the underlying fraud claim against Goggin. *See*, *e.g.*, *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *10 (Del. Ch. July 20, 2010) ("Squid Soap has failed to plead a claim for . . . fraud against Airborne. Lacking an underlying wrong, Squid Soap's claims against Weil for aiding and abetting and conspiracy likewise fail."). But those claims are legally deficient in

all events because they are not alleged with anywhere near the particularity required by Rule 9(b).[45]

Rather than setting forth a single fact concerning any action that Goodwin allegedly took in furtherance of any fraud, MHS alleges a parade of conclusions.[46] These allegations do not state a claim for *any* kind of conspiracy because they allege no *facts* that could support the conclusion that a corrupt agreement existed, let alone any *facts* to show that Goodwin took any overt action in furtherance of such an agreement. (*See supra* at 40-42 and n.44). They fall even shorter of the mark when measured against the particularity requirement that applies to a claim for conspiracy to commit fraud.[47] They are similarly insufficient to state a claim

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[45] *See Trenwick, supra*, 906 A.2d at 207 ("a claim of conspiracy to commit fraud must be pleaded with particularity"); *Albert, supra*, 2005 WL 2130607, at *10-11 (analyzing conspiracy and aiding and abetting claims under Rule 9(b)); *accord* Del. Ch. Ct. R. 9(b) ("In *all* averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") (emphasis added).

[46] *See, e.g.*, Am. Compl. ¶¶ 47 (alleging that Goggin had "the active assistance of Defendant Goodwin" in secretly forming LRL, without specifying anything Goodwin did to render such assistance), 67 (referring to Goodwin as one of Goggin's "co-conspirators"), 142-44 (alleging that Goodwin "had knowledge" of Goggin's fraud, "substantially assisted" him in unspecified ways, and "benefitted" in other unspecified ways from the fraud), 150-55 (alleging that Goodwin "intentionally participated [in unspecified ways] in the plan for Goggin to commit fraud", "took [unspecified] overt acts in furtherance of the conspiracy," "assisted and participated" in unspecified ways in Goggin's alleged efforts, and "benefitted [again, in unspecified ways] from Goggin's fraud").

[47] *See Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1066 (Del. Ch. 1989) ("Plaintiff's amended claim is based on a conspiracy theory. A claim of conspiracy to defraud, however, must be pled with particularity. A complaint

for aiding and abetting: they allege no *facts* that could support the conclusion that Goodwin "knowingly" and "substantially" participated in *any* alleged wrong by Goggin (*see supra* at 39-40 and n.41),[48] much less the *particularized* facts that would be necessary given that the alleged wrong at issue is a fraud. The claims for conspiracy and for aiding and abetting should therefore be dismissed as against Goodwin even if the underlying fraud claim survives.

C. The Claim For Intentional Interference With Contract Should Be Dismissed

MHS's claim that Goodwin intentionally interfered with Goggin's performance under the Operating Agreement (the Ninth Cause of Action) should also be dismissed. Most importantly, because Goodwin is a party to the Operating

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alleging conspiracy must allege facts which, if true, show the formation and operation of a conspiracy, the wrongful act or acts done pursuant thereto, and the damage resulting from such acts. Facts, not legal conclusions, must be pled, including facts showing damages."; dismissing claim for failure to meet this standard) (citations omitted); *accord Trenwick*, 906 A.2d at 207-08 (dismissing claims for fraud and conspiracy to commit fraud because they were based on "unspecific, broad-brush" allegations that failed to satisfy Rule 9(b)).

[48] *Accord Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 6703980, at *23 (Del. Ch. Nov. 26, 2014) (noting, in analyzing a claim for aiding and abetting a fraud, that "Delaware courts have set out the elements for aiding and abetting a tort as: (i) underlying tortious conduct, (ii) knowledge, and (iii) substantial assistance"); *id.* at *22 ("civil conspiracy is, in many cases, to borrow a term, a 'lesser-included' claim within an aiding and abetting claim; an 'agreement' and act in furtherance does not necessarily rise to the level of '*substantial* assistance,' while 'substantial assistance,' if shown, normally includes an 'agreement,' even if implicit, and act in furtherance thereof") (emphasis in original).

Agreement, as a matter of law he cannot be liable for interference with it.[49] But even if he could, MHS has not stated a claim for such interference because the Amended Complaint does not plead that Goodwin performed *any* intentional act, let alone that any such act by Goodwin induced or caused a breach of the Operating Agreement by Goggin. Both of these are required elements of a claim for intentional interference; without them, the claim cannot survive.[50] The intentional interference claim fails for this reason as well.

D. The Claim For Unjust Enrichment Should Be Dismissed

MHS's unjust enrichment claim (the Tenth Cause of Action) fares no better against Goodwin than it does against Goggin. For all of the reasons set forth above in Point I.B.5., the Amended Complaint does not adequately state such a claim

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[49] *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1058 (Del. Ch. 1984) ("Because Burlington was a party to the contract representing the first tender offer, the plaintiffs plainly have no cause of action against Burlington for tortious interference with that contract."), *aff'd,* 575 A.2d 1131 (Del. 1990); *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *27 (Del. Ch. Nov. 17, 2014) ("Imposition of liability for tortious interference with contractual relationship requires that the defendant be a stranger to both the contract and the business relationship giving rise to and underpinning the contract."; dismissing claim because defendant "was a party to the [agreement] and so cannot be liable for tortious interference") (citation and internal quotations omitted).

[50] *See Am. Homepatient, Inc. v. Collier*, 2006 WL 1134170, at *4 (Del. Ch. Apr. 19, 2006) (listing elements of an intentional interference claim, which include "intentional interference that induces or causes a breach of the contract"); *accord Kuroda, supra,* 971 A.2d at 885 (dismissing tortious interference claim when complaint "[did] not contain *factual* allegations" to support the claim and "state[d] only conclusory allegations").

against anyone.[51] But MHS's allegations are even more deficient as to Goodwin, who is mentioned only a few times in the Amended Complaint and only in conclusory allegations. (*See supra* at 38-45). Those allegations fall far short of stating an unjust enrichment claim against Goodwin. *See, e.g.*, *MetCap Securities LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *6 n.50 (Del. Ch. May 16, 2007) (dismissing unjust enrichment claim because "[n]o non-conclusory facts" were alleged in support).

III. ANY CLAIM THAT SURVIVES SHOULD BE DISMISSED BASED ON ***RES JUDICATA***

To the extent that any claim against either Goggin or Goodwin survives the foregoing analysis, it should be dismissed on *res judicata* grounds for the reasons detailed in Point II of the brief filed by Collins in support of his motion to dismiss the Amended Complaint as against him (which we understand is being filed on the same day as this brief). The arguments set forth in Point II of that brief are respectfully incorporated herein by reference.

[51] In this regard, we note for the avoidance of doubt that the Operating Agreement – to which Goodwin is a party – precludes any unjust enrichment claim against him even to the extent that the duties allegedly breached under that Agreement were Goggin's. *See CIM, supra*, 2016 WL 768904, at *2 ("when the standard is set by contract, contractual remedies remain the sole remedies even if the claim of unjust enrichment is alleged against a party who is not a party to the contract") (citations and internal quotations omitted).

IV. IF ANY OF THE FIRST ELEVEN CAUSES OF ACTION SURVIVES, IT SHOULD BE DISMISSED TO THE EXTENT THAT IT IS ASSERTED ON BEHALF OF MHS INDIVIDUALLY

Although MHS purports to assert its first eleven claims both derivatively on behalf of ECM and individually on its own behalf, none of those claims actually belongs to MHS individually. Rather, each one is based on allegations that Goggin, as Manager of ECM, wrongfully diverted interests and assets of ECM to himself and/or to other entities in which he held an interest, and that Goodwin (and Collins) aided, abetted and conspired with him to this end. (*See, e.g.*, Am. Compl. ¶¶ 12-13, 41, 46-51, 53-56, 62-69). If any damage occurred as a result of this conduct, it was sustained by *ECM*; any injury to MHS is indirect, resulting from damage to the value of its interest in ECM. Indeed, MHS concedes as much: it describes its claims as based on conduct "which was designed to and did, in fact, cheat Nominal Defendant ECM out of valuable business opportunities" (*id.* ¶ 10), and repeatedly explains that it was damaged *because* of its 23.75% ownership interest in ECM.[52] This is the essence of a derivative claim.[53] As a result, if any of

[52] *See* Am. Compl. ¶¶ 42 (noting that MHS "*by virtue of its 23.75% stake in ECM*, would have a stake of 23.75% in the 'New LR.'"), 45 ("Thus, a 23.75% stake in the 'New LR' is estimated to generate a value of between $15.4 million to $42.8 million."), 53 ("Since LRL exercised the credit bid, *ECM* was forced to share this right . . . with ECM II, Goggin, and Goodwin."), 56 ("*MHS, a quarter owner of ECM,* was particularly disadvantaged by this transaction."); 68 ("*MHS, which was a nearly one-quarter investor in ECM,* is left with a small percentage of the lease payment from Ember to LRL.") (emphases added).

[53] *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del.

the first eleven claims survives the analyses set forth above in Points I and II and incorporated by reference in Point III, it should in all events be dismissed to the extent that it is asserted by MHS on its own behalf. [54]

2004) ("The analysis [to determine whether a claim is direct or derivative] must be based solely on the following questions: Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy?"); *accord*, *e.g.*, *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) ("Delaware courts have long recognized that actions charging mismanagement which depress[ ] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action.") (citations and internal quotations omitted; alterations in *Kramer*); *In re Big Wheel Holding Co., Inc.*, 214 B.R. 945, 951 (D. Del. 1997) ("The vehicle for remedying a violation of the corporate opportunity doctrine is a derivative suit."; applying Delaware law).

[54] *Accord*, *e.g.*, *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1260-61 (Del. 2016) (claim that conflicts committee approved a transaction that it knew was unfavorable to the company could only be brought derivatively because "[t]he core theory of Brinckerhoff's complaint was that 'the Partnership was injured' when the defendants caused [the Partnership] to pay too much"; such alleged acts "though harming the corporation directly, harm[] the stockholders only derivatively so far as their stock loses value") (citations and internal quotations omitted); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818-19 (Del. Ch. 2005) (ruling that plaintiffs' claim – which was based on the assertion that their shares were diluted because the directors paid too much to acquire another bank – was derivative because the challenged conduct "would not have harmed the stockholders of JPMC directly" inasmuch as "[t]he only harm to the stockholders would have been the natural and foreseeable consequence of the harm to JPMC"), *aff'd,* 906 A.2d 766 (Del. 2006).

CONCLUSION

The Amended Complaint should be dismissed in its entirety with prejudice as against Goggin and Goodwin.

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