IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RELATED WESTPAC LLC, BASE VILLAGE SNOWMASS CENTER ASSOCIATES LLC, SNOWMASS MOUNTAIN VILLAGE ASSOCIATES LLC,	)	
Plaintiffs,	)	
	)	C.A. No. 5001-VCS
v.	)	
JER SNOWMASS LLC, JER REAL ESTATE PARTNERS IV L.P., JER REAL ESTATE QUALIFIED PARTNERS IV L.P.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: April 28, 2010
Date Decided: July 23, 2010

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STRINE, Vice Chancellor.

I. Introduction

In this case, one of the members of two LLCs formed to pursue a land development project in Snowmass, Colorado has sued its fellow member. The plaintiff member says that it was supposed to be the main operator and that the defendant member was to provide most of the funding for the project. But when the funding needs of the project exceeded the agreed upon budget, says the operating member, the defendant member refused to meet capital calls and to give its consent to major decisions of various kinds. The operating member brought this suit seeking to order the defendant member to pay damages and to meet future capital calls on the theory that the defendant member's refusal to give consents and to meet the capital calls was "unreasonable."

In this decision, I dismiss the complaint. Under the operating agreements that govern the LLCs, the defendant member could not unreasonably withhold its consent to certain decisions. But as to the type of decisions at issue in this case — so-called "material actions" — the defendant member was not subject to such a constraint and had contractually bargained to remain free to give or deny its consent if that was in its own commercial self-interest. Here, the plaintiff operating member seeks to have the court impose a contractual reasonableness overlay on a contract that is clearly inconsistent with the parties' bargain. Delaware law respects contractual freedom and requires parties like the operating member to adhere to the contracts they freely enter. The operating agreements here preclude the relief the operating member seeks, including its attempt to end-

run the operating agreements by arguing that the defendant member had a fiduciary duty to act reasonably in granting consent. Under the plain terms of the operating agreements, the defendant member had bargained for the right to give consents to decisions involving material actions or not, as its own commercial interests dictated. Having bargained for that freedom and gained that concession from the operating member, the defendant member is entitled to the benefit of its bargain and the operating member cannot attempt to have the court write in a reasonableness condition that the operating member gave up. The words "not unreasonably withheld" are well known and appear in other sections of the operating agreements. They do not qualify the defendant member's right to deny consent to major decisions involving a material action.

Likewise, the operating agreements clearly state the sole remedy the operating member has if the defendant member fails to meet a capital call. The operating member again seeks to have this court impose a remedy inconsistent with the plain terms of the operating agreements. This court cannot play such a role, and the operating member's claims relating to the capital call are dismissed because they are inconsistent with the operating agreements.

II. Factual Background

The following facts are drawn from the complaint, and the documents that the complaint incorporates.

A. The Snowmass Village Project

In December 2006, plaintiff Related Westpac LLC ("Related"), defendant JER Snowmass LLC ("JER Snowmass"), and a passive, minority investor, Snowmass Investments, LLC, formed two limited liability companies — plaintiffs Base Village Snowmass Center Associates LLC ("Base Village") and Snowmass Mountain Village Associates LLC ("Snowmass Mountain") (collectively, the "LLCs") — in order to redevelop the vacation destination of Snowmass Village, Colorado. According to the complaint, Related and JER Snowmass intended that the LLCs' redevelopment project would include "condominiums, luxury hotels, retail and community recreation facilities, skier services, and office and commercial facilities" that would transform Snowmass Village into a "world-class tourist destination."[1]

B. The Operating Agreements

In March 1, 2007, JER Snowmass, Related, and Snowmass Investments LLC entered into two operating agreements (the "Operating Agreements") to govern the LLCs. Under § 1.1 of the Operating Agreements, Related was designated as the "Operations Manager" of the LLCs, and had the following role:

> The Operations Manager shall, without any requirement of notice to or consultation with Snowmass Investments, have the right, authority and duty to supervise the day to day activities of the LLC[s] consistent with the Business Plan and the Approved Budget then in effect, to consult with the

[1] Compl. ¶ 16.

> Members on a regular basis and to implement the decisions made on behalf of the LLC[s] by the Members . . . . [2]

Under Article VI of the Operating Agreements, the LLCs were to be "exclusively managed by the Members holding Class A Common Interests," which are Related and JER Snowmass.[3] As part of its role as Operating Manager, Related was required to submit an annual budget plan and an annual business plan to JER Snowmass for the "review and unanimous approval" of JER Snowmass and Related.[4]

The Operating Agreements clearly differentiate between situations when JER Snowmass's right to consent is qualified by a duty to act reasonably and when it is not. Under the Operating Agreements, JER Snowmass's consent was required for any of the 23 "Major Decisions" defined in the Operating Agreements that Related made in its capacity as Operations Manager. Major Decisions include actions to:

- "approve or disapprove the annual Business Plan, the annual proposed budget update or . . . any amendment or modification of the Business Plan then in effect or any amendment to the Approved Budget then in effect to the extent that such action would constitute a Material Action;"[5]

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[2] Compl. Ex. A (Limited Liability Company Operating Agreement of Snowmass Mountain Village Associates LLC) at §§ 1.1, 6.2; Compl. Ex. B (Limited Liability Company Operating Agreement of Base Village Snowmass Center Associates LLC) §§ 1.1, 6.2 (collectively, the "Operating Agreements").
[3] *Id.* § 6.1(a).
[4] *Id.* § 6.12.1.
[5] *Id.* § 6.3.1.

- "make expenditures on behalf of the LLC[s] or its subsidiaries to the extent such expenditures would constitute a Material Action;"[6]

- "incur, place, replace, renew, extend, substitute, add to, supplement, amend, modify, increase, restructure or refinance any borrowing by the LLC[s] or [their] subsidiaries . . . or to negotiate or enter into any binding agreement to do any of the foregoing" unless the borrowing is "incurred in the ordinary course of business" and "less than $50,000;"[7]

- "amend, modify, or deviate from, the Business Plan or the Approved Budget of the LLC in a manner which would constitute a Material Action."[8]

The Operating Agreements make plain that JER Snowmass's right to refuse to consent to a Major Decision that constitutes a Material Action was unqualified by any reasonableness condition. They do so by plainly stating that the approval of plans submitted by the Operations Manager was not to be "unreasonably withheld or delayed, *except with respect to JER Snowmass*, to the extent the modification constitutes a Material Action."[9] Material Actions are defined as anything that would "require additional Capital Contributions" or "involve any material change in the budget . . . or any line item therein."[10] Thus, as to Material Actions, JER Snowmass was clearly free to give or withhold its consent in its commercial interest. By contrast, the Operating Agreements make clear that JER Snowmass could not "unreasonably with[o]ld" consent on a range of other matters including

[6] *Id.* § 6.3.2.
[7] *Id.* § 6.3.6.
[8] *Id.* § 6.3.13.
[9] *Id.* §§ 6.12.1-6.12.2 (emphasis added).
[10] *Id.* § 1.1.

taxes, terms of a "co-list" arrangement, and the removal of Westpac Investments LLC as the "Operations Manager" of Related.[11]

The Operating Agreements also provide that the Operations Manager may issue capital calls to members.[12] Under the Operating Agreements, "if any Member is required . . . to provide Additional Funds to the LLC[s] and shall fail to do so, such Failing Member's sole liability, and the Contributing Member's *sole remedy*, shall be expressly set forth in [the Operating Agreements] . . . [and] [n]o Member . . . shall have any personal liability to provide such Additional Funds."[13] That remedy provides that the issuing member can choose to "either notify the other members that such Contributing Member is withdrawing such contribution from the LLC[s] . . . or . . . agree to contribute an amount equal to the Failing Member's Default Amount."[14]

C. JER Snowmass Withholds Its Consent Of Related's Actions

In the complaint, Related goes through at length, if not necessarily with clarity, a series of situations where it, as Operations Manager, sought consent and/or additional capital from JER Snowmass and JER Snowmass refused. Related alleges that the basic division of responsibility between itself and JER Snowmass was that Related was to be the "sweat" and JER Snowmass was to be

[11] *Id.* §§ 3.7.2, 6.11, 10.5.
[12] *Id.* § 9.1.1.
[13] *Id.* § 9.2 (emphasis added).
[14] *Id.*

the "money" and provide most of the capital needed going forward.[15] Related accuses JER Snowmass of breaching the Operating Agreements and its fiduciary duties by, in essence, unreasonably refusing to consent to Related's proposals that required large infusions of cash or other "Material Actions." At bottom, Related senses that JER Snowmass either is not as bullish on the project as it was when the LLCs were formed or does not have the wallet or stomach to go forward as Related claims the parties had initially agreed.

In particular, Related argues that JER Snowmass unreasonably withheld its consent and refused to fund capital calls in violation of the Operating Agreements on three different occasions: (1) the exercise of an option to purchase a property called Sinclair Meadows to provide affordable housing for employees who would work in Snowmass; (2) the extension and refinancing of a $110 million loan; and (3) the sale of a ranch called Bair Chase that was part of the development project. In each instance, Related pleads facts that suggest that it, as Operations Manager, had a good faith, rational basis to ask for consent and for capital to pursue these initiatives on behalf of the LLCs. For example, one of the challenges for mountain communities seeking to draw wealthy tourists and seasonal residents is having an adequate amount of affordable housing available for the workers needed to staff the ski resorts, restaurants, and retail establishments the affluent seasonal residents

[15] Compl. ¶ 22.

and tourists frequent.[16] The LLCs had acquired a purchase option on Sinclair Meadows to help meet that need.[17]

In each of these instances when Related sought JER Snowmass's consent, JER Snowmass refused to do so unconditionally. At times, it offered consent on the condition that Related give JER Snowmass certain commercial benefits it sought, or that Related use its own funds.[18] In this sense, I accept the notion that JER Snowmass viewed the issue of whether to give consent as one entrusted to its own commercial interests. If it viewed giving the consent as being in its best interests as an investor in the LLCs, it would do so. If it did not, it would not give consent unless it reached terms on which giving consent made economic sense to it.

Related claims that JER Snowmass's refusal to consent has caused the LLCs harm because the LLCs ultimately lost the Bair Chase property and took a loss they would not have if the requested consent been given unconditionally,[19] and that the LLCs lost seven properties because they were unable to refinance and extend their $110 million loan which thus went into default.[20] More generally, Related says that the ability of the LLCs to proceed with their development plans has been hindered because of the loss of important properties and JER

[16] *Id.* ¶ 32.
[17] *Id.* ¶¶ 35-36.
[18] *Id.* ¶¶ 41, 52, 67-68.
[19] Specifically, JER Snowmass allegedly withheld its consent to sell the Bair Chaise property for $15 million, but consented to the sale of the note securing the property for the lower price of $12.5 million on the condition that JER Snowmass's subsidiary receive a 1% interest. *Id.* ¶¶ 62, 70, 73.
[20] *Id.* ¶¶ 46, 54, 57.

Snowmass's unwillingness to make large capital infusions. In addition, Related argues that it was unfairly and wrongly forced to make a large number of capital infusions into the LLCs because JER Snowmass did not answer capital calls.[21] As a result, Related says that it is being forced unfairly to become both the "sweat" and the "money." Related seeks monetary damages from JER Snowmass for both the LLCs and itself to remedy this harm.

Although one could dilate more on the specifics of each fact situation, the essence given above is sufficient for addressing the present motion. The reason for this is that it there is no dispute that each of the actions for which Related sought consent from JER Snowmass were are all Major Decisions that required the unanimous consent of Related and JER Snowmass.[22] Indeed, Related treated the transactions as Major Decisions because it sought out JER Snowmass's consent in the first place. Each of the three transactions also clearly fall within the definition of a Material Action, which is defined to include, among other things "any act or omission . . . involv[ing] a material change in the budget . . . or any line item therein."[23] That is, none of the requests for action involve JER Snowmass

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[21] For example, Related contributed $9 million of its own funds to purchase Sinclair Meadows. *Id.* ¶ 44.

[22] *Related Westpac LLC v. JER Snowmass LLC*, C.A. No. 5001-VCS, at 69, 87 (Del. Ch. Apr. 13, 2010) (TRANSCRIPT).

[23] Operating Agreements § 1.1. In the Sinclair Meadows transaction, Related sought JER Snowmass's consent to take out a $7.65 million loan, although the line for Sinclair Meadows in the budget was only $5 million — a clear material change to a line item in the LLCs' budget. The Bank of America Loan is also a clear Material Action, as it would have caused the LLCs to take on an additional $39 million in debt from Bank of America, and contribute millions more in equity to refinance the Loan. Finally, Related nowhere

reneging on a prior agreement to fund a certain project at a certain level, or to commit a certain level of capital in the future. Related is the master of its own complaint, which attached the LLCs' Business Plan. Nothing in that Business Plan or in the complaint alleges that these requests did not involve Material Actions because they were consistent with approved budgets or annual plans.[24] That is, Related admits that these requests were Major Decisions involving Material Actions.

In addressing JER Snowmass's motion to dismiss, I therefore accept the notion that Related has pled facts that would state a claim if JER Snowmass was subject to a contractual duty not to unreasonably withhold consent for Major Decisions involving Material Actions. But, the reality is that under the Operating Agreements, JER Snowmass's right to withhold consent to the requests at issue was unqualified by any such duty.

III. Analysis Of Related's Claims

The importance of this issue to this case becomes clear when one recognizes how Related summarizes its own claims, which it did thusly in its

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contends that the sale of Bair Chase, a property worth over $10 million, is not a Material Action.

[24] For example, the record shows that the price for exercising the Sinclair Meadows purchase option was $2.65 million above the amount set aside for Sinclair Meadows in the approved budget. Compl. ¶ 39; Ex. B (Limited Liability Company Operating Agreement of Base Village Snowmass Center Associates LLC) at Base Village Development Budget.

opening brief: "each of the claims pled in the Complaint rests on a fact intensive inquiry of . . . the reasonableness of JER's conduct."[25]

In its complaint, Related alleges that JER Snowmass: (1) breached the Operating Agreements' express terms by unreasonably failing to give the requested consents and by failing to answer capital calls; (2) breached the implied covenant of good faith and fair dealing by the same refusals; (3) was unjustly enriched, along with two of its members, JER Real Estate Partners IV, L.P. ("JER Partners") and JER Real Estate Qualified Partners IV, L.P. ("JER Qualified Partners"), because Related made capital infusions into the LLCs that JER Snowmass should have made; and (4) breached its fiduciary duty by the same conduct. Related also argues that defendants JER Partners and JER Qualified Partners aided and abetted JER Snowmass's breaches of fiduciary duties.

JER Snowmass and its related entities have moved to dismiss for failure to state a claim. Specifically, JER Snowmass argues that: (1) the breach of contract claim fails because JER Snowmass's right to withhold consent to Major Decisions involving Material Actions was unqualified by a duty to act reasonably; (2) that the contractual freedom for which JER Snowmass bargained precludes both the operation of any implied contractual duty or the imposition of an equitable fiduciary duty requiring it to act in the best interests of the LLCs when deciding whether to consent; (3) that because the Operating Agreements specify the sole remedy for any failure of JER Snowmass not to answer a capital call, the unjust

[25] Plaintiffs' Answering Brief at 4.

enrichment claim that seeks a different remedy fails as well; and (4) given the lack of vitality of the breach of fiduciary duty claims, the aiding and abetting claims against JER Snowmass's affiliates must also be dismissed.

For the following reasons, I find JER Snowmass's position meritorious and dismiss the complaint in its entirety. I begin where a contractual case should, with the breach of contract claim. In doing so, I apply the familiar standard.[26]

A. The Express And Implied Breach Of Contract Claims Fail Because JER Snowmass Was Entitled To Withhold Consent And To Decline To Fund Capital Calls

At the heart of Related's complaint is its claim that JER Snowmass breached its contractual duties by unreasonably withholding consent and refusing to fund capital calls. Specifically, Related claims that JER Snowmass breached the Operating Agreements because it "refus[ed] unreasonably to fund necessary capital calls and unreasonably with[eld] its consent to transactions critical to the Project and agreed to in the parties' Business Plan."[27] Also, Related argues more diffusely that JER Snowmass breached the Operating Agreements because JER Snowmass frustrated the purpose of the LLCs to "develop one of the most unique

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[26] A motion to dismiss for failure to state a claim under Rule 12(b)(6) should not be granted "unless it can be determined with reasonable certainty that the [non-moving party] could not prevail under any set of facts reasonably inferable" from the pleadings. *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (quoting *Superwire.com, Inc., v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)). The truth of all well-pled allegations is assumed, and the non-moving party is given the benefit of all reasonable inferences. *See id.* But, mere conclusory allegations will not be accepted as true in the absence of specific allegations of supporting fact. *See, e.g.*, *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009).

[27] Plaintiffs' Opposition Brief at 32.

opportunities in the United States — a 2.2 million square foot ground-up redevelopment project in Snowmass . . . ."[28]

"To survive a motion to dismiss, a complaint stating a claim for breach of contract must identify a contractual obligation, whether express or implied, a breach of that obligation by the defendant, and resulting damage to the plaintiff."[29] The obligations that JER Snowmass owed to Related and the LLCs are defined by the terms of the LLCs' Operating Agreements.[30] Related's breach of contract counts — both those premised on the express terms of the Operating Agreements and on the implied covenant of good faith and fair dealing — founder for two clear reasons.

First, as to the claim that JER Snowmass unreasonably refused to consent to requests to approve Major Decisions that involved Material Actions, Related's claim fails because it is plainly inconsistent with the Operating Agreements. In the Operating Agreements, JER Snowmass preserved for itself the freedom to withhold consent to Major Decisions involving Material Action if that was in its

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[28] *Id.* (citing the Operating Agreements).
[29] *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *7 (Del. Ch. Nov. 2, 1995).
[30] *Fisk Ventures LLC v. Segal et al.*, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008) ("In the context of limited liability companies, which are creatures . . . of contract, those duties or obligations [among parties] must be found in the LLC Agreement or some other contract."); *see also TravelCenters of Am., LLC v. Brog*, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008) ("Limited Liability Companies are creatures of contract, 'designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved.'" (quoting *In re Grupo Dos Chiles, LLC*, 2006 WL 668443, at *2 (Del. Ch. Mar. 10, 2006))).

self-interest.[31] The fact that its obligation to give consent in other situations was qualified by the commonplace "which shall not be unreasonably withheld"[32] standard demonstrates that JER Snowmass had retained the freedom not to give approval to a request involving Material Actions if it did not view such a request as being in JER Snowmass's own commercial interests.

Related tries to escape this obvious reality by arguing that JER Snowmass was somehow akin to a contractual partner exercising control over joint venture assets by refusing to accede to certain action. That analogy is inapt. Related struck a bargain whereby it realized that JER Snowmass had only made certain contractual obligations to it, and had not made others. That is, Related knew that JER Snowmass was reserving the right whether to agree, by consenting, to future Material Actions that might, for example, require JER Snowmass to invest more into the LLCs than it had previously committed to by agreeing to business plans and budgets. At the bargaining table, Related clearly relinquished any reasonableness condition to JER Snowmass's consent right as to future business plans and budgets. It proceeded knowing that if JER Snowmass did not view a proposal for a Material Action as in JER Snowmass's best interests, JER Snowmass could refuse to give consent.

What Related now wishes is for me to subject all consents under the Operating Agreements to a reasonableness condition. Thus, it seeks for me to

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[31] Operating Agreements §§ 6.3.1-6.3.3, 6.3.13, 6.3.24, 6.12.1, 6.12.2.
[32] *Id.* §§ 3.7.2, 6.11, 10.5.

imply a condition into the consent right JER Snowmass was given as to actions constituting Material Actions that was expressly excluded by the terms of the contract! Delaware law respects the freedom of parties in commerce to strike bargains and honors and enforces those bargains as plainly written.[33] There is no lack of clarity here.

Related's express breach of contract claim as to the consents is clearly contrary to the bargain it made and is therefore dismissed. Its breach of contract claim asking me to imply a reasonableness condition as part of the Operating Agreements' implied covenant of good faith and fair dealing is dismissed for similar reasons. The express bargain of the parties covers this subject and implying such an obligation would override their express bargain.[34] A court

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[33] *See Personnel Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008) ("Delaware is a freedom of contract state, with a policy of enforcing the voluntary agreements of sophisticated parties in commerce." (citing *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006))); *Majkowski v. Am. Imaging Mgmt. Servs.*, 913 A.2d 572, 581 (Del. Ch. 2006) ("When the language of a contract is plain and unambiguous, binding effect should be given to its meaning." (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992))).

[34] *See Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010) (explaining that the implied covenant could not be used to "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal"); *Fisk*, 2008 WL 1961156, at *10 ("[B]ecause the implied covenant is *implied*, and because it protects the *spirit* of the agreement rather than the form, it cannot be invoked where the contract itself expressly covers the subject at issue."); *see also Shenandoah Life Ins. Co. v. Valero Energy Corp.*, 1988 WL 63491, at *8 (Del. Ch. June 21, 1988) (noting that "[t]he mere exercise of one's contractual rights, without more, cannot constitute . . . a breach [of the implied covenant of good faith and fair dealing]"); 23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2002) ("As a general principle, there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract.").

cannot imply an obligation inconsistent with the parties' express agreement,[35] which is what Related improperly seeks here.

Second, JER Snowmass has no contractual responsibility to pay damages for failing to fund Related's capital calls. The Operating Agreements provide that if a member does not fund a capital call, that member shall not "have any personal liability to provide such Additional Funds," and the other members' "*sole remedy*" against the non-contributing member is to either revoke its contribution, or fund the non-contributing member's share.[36] Given this language, it is clear that Related is seeking relief inconsistent with the Operating Agreements by premising a damages theory on the notion that Related is owed damages because it funded capital calls that JER Snowmass failed to answer. The Operating Agreements clearly spell out Related's sole remedy, which it was free to exercise. What Related cannot do is avoid its own express contractual promise about the remedy that would exclusively govern these situations. Its breach of contract counts seek to do just that and are therefore dismissed.

For all these reasons, Related's breach of contract counts (Counts II and III) are dismissed for failure to state a claim.

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[35] *See Williams Natural Gas Co. v. Amoco Prod. Co.*, 1991 WL 58387, at *6 (Del. Ch. Apr. 16, 1991) (explaining that "as a matter of law, no obligation can be implied that is contrary to or inconsistent with [an] express contract provision"); 23 WILLISTON ON CONTRACTS § 63.21 (4th ed. 2002) ("It is elementary that one cannot imply a term or promise in a contract which is inconsistent with an express term of the contract itself." (quoting *U.S. v. Croft-Mullins Elec. Co.*, 333 F.2d 772, 776 (5th Cir. 1964))).

[36] Operating Agreements §§ 9.1.1(b), 9.2.

B. Related's Claims For Unjust Enrichment And Breach Of Fiduciary Duty Cannot Proceed Because The Operating Agreements Govern The Parties' Obligations

For similar reasons, Related's unjust enrichment (Count IV) and breach of fiduciary duty claims (Counts I and V) must be dismissed. First, Related claims that JER Snowmass and its members, JER Partners and JER Qualified Partners, have been unjustly enriched because "JER Snowmass . . . refused in bad faith to fund capital calls necessary for transactions critical to the Project."[37] A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[38] But an unjust enrichment claim cannot stand against either JER Snowmass or against its members because the Operating Agreements govern the parties' rights.

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."[39] Related's allegation that JER Snowmass has been unjustly enriched stems from JER Snowmass's decision not to fund capital calls — an issue that is expressly governed by terms of the Operating Agreements. Under the

[37] Compl. ¶ 97.
[38] *Shock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (citations omitted).
[39] *Kurdo v. SPJS Holdings, LLC*, 971 A.2d 872, 891 (Del. Ch. 2009) (quoting *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006)); *see also Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979) (stating that if "the contract is the measure of a [party's] right, there can be no recovery under an unjust enrichment theory independent of it"); *Sinomab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *21 n.117 (Del. Ch. June 16, 2009) (explaining that a claim for unjust enrichment is "inapposite where there is an operative agreement between the parties").

Operating Agreements, Related's sole remedy for JER Snowmass's failure to fund capital calls was to either obtain the return of its own contribution for the capital call at issue, or fund JER Snowmass's share of the capital call and receive an interest in the LLCs equal to that amount.[40] Having failed to pursue this remedy, Related cannot seek out an equitable avenue to remedy his claim.[41] Thus, Related's unjust enrichment claim is dismissed against JER Snowmass.

Nor can Related's unjust enrichment claim proceed against the members of JER Snowmass. Related argues that no contract governs the relationship between Related and the members of JER Snowmass and, therefore, an unjust enrichment claim is permissible.[42] That is, to be restrained, an argument without logical merit. Under the plain terms of the Operating Agreements, the sole remedy of Related if JER Snowmass, the actual member of the LLCs, to whom capital calls were addressed, was spelled out. Related now seeks to bypass that limitation on its own remedial options by seeking to have JER Snowmass's members pay it money damages because the entity it owned – and who cannot be sued for damges – did not make capital calls. That is absurd. There is no unjust enrichment of JER Snowmass or its members that arises if Related is confined to its contractually-

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[40] Operating Agreements § 9.1.1(b).
[41] *See Ameristar Casinos, Inc. v. Resorts Int'l Holdings, LLC*, 2010 WL 1875631, at *13 (Del. Ch. May 11, 2010) ("If the defendant did not violate the contract governing the subject of the dispute, then the plaintiff cannot attempt to hold the defendant responsible by softer doctrines, and thereby obtain a better bargain than he got during the contract negotiations.").
[42] Plaintiffs' Opposition Brief at 34.

agreed exclusive remedy.[43] The unjust enrichment would be if Related were able to deprive JER Snowmass of the benefit of its express bargain by bypassing the contractual partner against whom any of its claims should lie and seeking a contractually barred remedy from that partner's owners. Related's unjust enrichment claim is clearly inconsistent with the limitation on remedies it agreed to in the Operating Agreements and is therefore dismissed.

Second, Related alleges that JER Snowmass breached its fiduciary duties to Related, its "joint venturer," by "(a) refusing unreasonably to fund necessary capital calls, and (b) unreasonably withholding its consent to, and/or making unreasonable demands as a condition of its consent to, necessary transactions."[44] That is, Related's breach of fiduciary duty claim is essentially identical to the language in Related's breach of contract claim.[45] The Operating Agreements represent an example of the contractual freedom parties can use under our law to craft an approach to operating an entity that fits their own needs.[46] When, as the

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[43] *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 619 (Del. Ch. 2005) ("When the complaint alleges an express, enforceable contract that controls the parties' relationship, . . . a claim for unjust enrichment will be dismissed."), *aff'd in part and rev'd on other grounds*, 901 A.2d 106 (Del. 2006).

[44] Compl. ¶ 81.

[45] *See id*. ¶ 88; *Grunstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. 2009) (stating that "[c]ourts will dismiss [a] breach of fiduciary duty claim where [it and a contract claim] overlap completely and arise from the same nucleus of operative facts").

[46] *See* 6 *Del. C.* § 18-1101(b) (setting forth the policy of the Delaware Limited Liability Company Act to "give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."); *In re Seneca Invs. LLC*, 970 A.2d 259, 261 (Del. Ch. 2008) ("An LLC is primarily a creature of contract, and the parties have wide contractual freedom to structure the company as they see fit."); *see also Fisk*, 2008 WL 1961156, at *8 ("In the context of limited liability companies, which are

parties here did, they cover a particular subject in an express manner, their contractual choice governs and cannot be supplanted by the application of inconsistent fiduciary duty principles that might otherwise apply as a default.[47]

Here, JER Snowmass clearly bargained for the freedom to decide whether to give its consent to Major Decisions involving Material Actions without being restricted by any reasonableness requirement. Related seeks to deprive JER Snowmass of the freedom it preserved by contending that JER Snowmass, as a member of the LLCs, was a fiduciary of the LLCs and was required to act in the reasonable best interests of the LLCs at all times. Related then seeks to have a trial about whether JER Snowmass complied with this supposed fiduciary duty and to hold JER Snowmass liable if its refusal to give consent was adverse to the best interests of the LLCs.

The problem with this theory is as follows. Under the Operating Agreements, JER Snowmass was left free to give consents to Major Decisions involving Major Actions as it chose, in its own commercial interest. That freedom

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creatures . . . of contract, th[e] duties or obligations [of members] must be found in the LLC Agreement or some other contract.").

[47] *See R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, 790 A.2d 478, 497 (Del. Ch. 2001) ("[W]here the use of default fiduciary duties would intrude upon the contractual rights or expectations of the general partner or be insensible in view of the contractual mechanism governing the transaction under consideration, the court will eschew fiduciary concepts and focus on a purely contractual analysis of the dispute."); *Kahn v. Icahn*, 1998 WL 832629, at *3-4 (Del. Ch. Nov. 12, 1998) (holding that the corporate opportunity doctrine could not be applied against a general partner when the partnership agreement gave the partner the right to compete); *cf.* ROBERT L. SYMONDS, JR. & MATTHEW J. O'TOOLE, DELAWARE LIMITED LIABILITY COMPANIES § 11.03[D] (2007) (explaining that the Delaware Limited Liability Company Act provides that limited liability company agreements may eliminate or restrict duties and liabilities of members) (citing 6 *Del. C.* § 18-1101)).

was not qualified by any fiduciary duty of so-called "reasonableness" and to imply such a duty in these circumstances would nullify the parties' express bargain.[48] Under our law dealing with alternative entities such as the LLCs here, this court may not do that. When a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an LLC or other alternative entity agreement, the fiduciary duty claim must fall, otherwise "the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations [would be undermined]."[49] Thus, Related has failed to state a claim for breach of fiduciary duty.

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[48] *See Nemec*, 991 A.2d at 1128 ("A party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party.").

[49] *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001) (quoting *Gale v. Bershad*, 1998 WL 118022, at *5 (Del. Ch. Mar. 3, 1998)); *see also Gelfman v. Weeden Investors, L.P.*, 792 A.2d 977, 987 (Del. Ch. 2001) (holding that the traditional fiduciary entire fairness standard did not apply because it was inconsistent with a contract provision giving a general partner wide discretion subject to a contractually-defined liability standard); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 795 A.2d 1, 24 (Del. Ch. 2001) (refusing to apply traditional fiduciary duties that conflicted with provisions of a partnership agreement, and holding that "the Partnership Agreement supplanted fiduciary law and became the sole source of protection" for the parties to that agreement); *R.S.M.*, 790 A.2d at 497-98 (finding that, where traditional fiduciary duties conflicted with a limited partnership agreement, the language of the contract prevailed, and noting that "the irreconcilability of fiduciary duty principles with the operation of the partnership agreement can itself be evidence of the clear intention of the parties to preempt fiduciary principles"); *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 324-25 (Del. Ch. 1998) (refusing to read the fiduciary default rule of reasonableness into a limited partnership agreement because the agreement had "no requirement that the general partner consider the interests of the limited partners in resolution of a conflict of interest").

Furthermore, because the breach of fiduciary duty claim is dismissed, the aiding and abetting claim must also be dismissed. Because "no cognizable breach of fiduciary duty claim is stated," the aiding and abetting claim also fails.[50]

* * *

In sum, while I am left with little doubt that Related believes that JER Snowmass has acted in a manner that Related did not anticipate, I also have no doubt that JER Snowmass has acted in a manner that Related knew was permitted under the express terms of the Operating Agreements. Although Related may regret the freedom of action it granted to JER Snowmass in the Operating Agreements to refuse consents to Major Decision involving Material Actions, and the limitations on remedial actions those Agreements set forth as to any failure on JER Snowmass's part to fund capital calls, Related cannot alleviate its regret by seeking relief clearly contrary to the LLCs' Operating Agreements. Each of its claims fails on that basis.

IV. Conclusion

For all these reasons, the motion to dismiss filed by defendants JER Snowmass, JER Partners, and JER Qualified Partners is granted and the complaint is dismissed in its entirety. IT IS SO ORDERED.

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[50] *Moore Business Forms*, 1995 WL 662685, at *6 (dismissing a claim for aiding and abetting a breach of fiduciary duty because the underlying breach of fiduciary duty claim had been dismissed as duplicative of a breach of contract claim); *see also Madison Realty Partners 7*, 2001 WL 406268, at *6 n.19 (dismissing an aiding and abetting claim where there was "no legally sufficient underlying claim for breach of fiduciary duty").