IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| BAY CENTER APARTMENTS OWNER, LLC, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. 3658-VCS |
| EMERY BAY PKI, LLC, EMERY BAY ETI, LLC, ALFRED E. NEVIS, and EMERY BAY MEMBER, LLC, | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

Date Submitted: February 2, 2009
Date Decided: April 20, 2009

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**STRINE, Vice Chancellor.**

## I. Introduction

This action arises out of a failed condominium development project based in Emeryville, California (the "Project"). The Project was a venture of two entities, plaintiff Bay Center LLC, and defendant Emery Bay PKI, LLC ("PKI"). PKI is owned and managed by defendant Alfred E. Nevis. In November 2005, Bay Center and PKI formed defendant Emery Bay Member, LLC ("Emery Bay") and designated PKI as the managing member.

The Emery Bay "LLC Agreement" gave PKI considerable power and authority to manage the affairs of Emery Bay. The LLC Agreement also contemplated that PKI would be responsible for managing the Project, but the parties defined those responsibilities through a separate agreement, the "Development Management Agreement." PKI was not required to sign the Development Management Agreement; instead, PKI designated one of its affiliates, defendant Emery Bay ETI, LLC ("ETI"), to be the entity bound by the terms of the Development Management Agreement. ETI's only counterparty in the Development Management Agreement was a wholly owned subsidiary of Emery Bay.

Soon after the Project began, it encountered problems stemming from mismanagement and poor financial performance. Emery Bay defaulted on a construction loan it had obtained from a third-party bank (the "A&D Loan") and which Nevis had personally guaranteed (the "Personal Guarantee"). Bay Center alleges that the defendants secretly renegotiated this Loan on several occasions, resulting in the diversion of cash flow from the Project that was earmarked to repay an unsecured note from Emery Bay

held by Bay Center (the "Bay Center Note"). By renegotiating the Loan in this way, Nevis avoided triggering his Personal Guarantee, and PKI avoided capital calls.

The Project experienced a host of other problems, all supposedly resulting from mismanagement of the Project by PKI's affiliates, including budget overruns in excess of $10 million, vendor complaints, poor sales, and squatters and vandalism. The Project eventually failed under the weight of these troubles, and entered into receivership in December 2007.

In its Verified Amended Complaint (the "Complaint"), Bay Center seeks monetary damages from Nevis and the entities he controlled: PKI, ETI, and Emery Bay. Bay Center's most direct route to recovery is through a breach of contract claim under the LLC Agreement. But, this approach is limited because, among other things, PKI is the only defendant who was a party to that Agreement. Bay Center therefore seeks to expand its remedial options by bringing claims for breach of the contractually implied covenant of good faith and fair dealing, breach of fiduciary duty, common law fraud, and aiding and abetting.

The defendants move to dismiss all of Bay Center's claims except those based on breach of contract. In this opinion, I deny the defendants' motion in its entirety. I find that Bay Center has stated a claim for breach of the implied covenant of good faith and fair dealing against PKI because Bay Center has alleged that PKI had an implied duty to exercise its authority to enforce performance of the Development Management Agreement and the Bay Center Note in good faith, and that PKI failed to do so. Bay Center has also sufficiently pled that PKI breached its fiduciary duties. And Nevis, as the

human who directly managed Emery Bay for PKI, had a fiduciary duty not to use his control over Emery Bay's assets to benefit himself at Emery Bay's expense. Bay Center has sufficiently pled that Nevis breached this duty by renegotiating the A&D Loan to advantage himself personally at the expense of Emery Bay. Bay Center has also alleged viable common law fraud claims against both PKI and Nevis for their failure to disclose the renegotiation of the A&D Loan when they had a duty to do so. Additionally, I find that Bay Center has sufficiently pled the elements of its various aiding and abetting claims.

## II. Factual Background[1]

### A. The Parties And Their Agreements

In the fall of 2005, Bay Center joined with PKI to renovate and remodel certain apartment buildings owned by Bay Center and located in Emeryville, CA (the "Property") into condominiums. In order to carry out their plans for the Property, Bay Center and PKI formed Emery Bay, a limited liability company organized under Delaware law. Bay Center and PKI are the sole members of Emery Bay, and PKI is the managing member.

Bay Center and PKI executed the LLC Agreement forming Emery Bay on November 1, 2005. The LLC Agreement contemplated that the Project would be conducted through a number of affiliated entities, and that the duties and obligations of those entities would be defined through separate agreements, which are discussed in more

[1] The facts are drawn from the Complaint ("Compl.") and the documents attached to it, including the LLC Agreement, the Development Management Agreement, the Bay Center Note, and the report prepared by the Project's receiver. *See* Ct. Ch. R. 10.

detail below. At the center of this multilayered arrangement was PKI, and more accurately, PKI's sole equity holder, Nevis.[2] The LLC Agreement entrusted PKI with considerable authority to manage Emery Bay's affairs, and the Agreement contemplated that Nevis (who is not a member or officer of Emery Bay) would play a major role in PKI's exercise of this authority.[3] But, the Agreement did carve out certain "major decisions" that required Bay Center's consent.[4] Of relevance to this litigation, these major decisions included the refinancing or restructuring of any loan.[5]

The LLC Agreement also set forth the financial obligations of PKI and Bay Center. PKI made an initial capital contribution of $3,215,200, and Bay Center contributed $1,000,000. In addition, Bay Center, through a separate purchase agreement referenced in the LLC Agreement, sold the Property to Emery Bay North, LLC ("EB North"), an LLC solely owned by Emery Bay. In exchange for the Property, Emery Bay executed the Bay Center Note, an unsecured installment note for the principal amount of $28 million, in favor of Bay Center. Under the terms of the Note, Emery Bay was required to pay Bay Center, on a monthly basis, all "Available Cash" or "Net Capital Transaction Proceeds."[6] These terms were defined in the LLC Agreement as, essentially,

[2] LLC Agreement § 9.2(a) ("Alfred E. Nevis owns, directly or indirectly, all of the equity interests in PKI and has the power to direct the management and policies of PKI.").
[3] *See* LLC Agreement § 5.1(a) (stating that "[PKI] shall manage and conduct the operations and affairs of [Emery Bay] and make all of the decisions regarding [Emery Bay] and its business and assets"); LLC Agreement § 5.1(i)(iv) (making "the non-involvement of Alfred E. Nevis in the day-to-day management and operation of [Emery Bay Member]" grounds for removing PKI as the managing member).
[4] LLC Agreement § 5.2.
[5] LLC Agreement § 5.2(c)(i).
[6] Bay Center Note at 1.

any cash or sale proceeds available after appropriate provision for current and future expenses.[7]

To further seed the Project, PKI was required by the LLC Agreement to cause EB North to obtain the A&D Loan.[8] PKI applied for and obtained the A&D Loan for $110 million from Fremont Investment & Loan ("Fremont") on behalf of EB North.[9] In connection with EB North's receipt of the A&D Loan, Nevis executed a Personal Guarantee of PKI's performance under the Loan.[10]

If these initial financial contributions proved inadequate to meet Emery Bay's financial needs, the LLC Agreement required PKI to make up the shortfall. Under § 3.3, if Emery Bay needed any future capital contributions, as determined in the reasonable discretion of Bay Center or PKI, then PKI was to make an additional contribution.[11] If PKI failed to make the additional contribution, Bay Center could advance the funds and then elect to either adjust the percentage interests of each member accordingly, or receive a 25% return on the advanced funds.[12]

One important aspect of the Project that the LLC Agreement did not detail, however, was the day-to-day management of the Project itself. Instead, the LLC Agreement referred to a separate Development Management Agreement, which was an exhibit to the LLC Agreement. The Development Management Agreement set forth in

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[7] LLC Agreement § 1.1.
[8] LLC Agreement § 3.5. The form of the A&D Loan is attached as an exhibit to the LLC Agreement.
[9] Compl. ¶ 16.
[10] Compl. ¶ 16.
[11] LLC Agreement § 3.3.
[12] LLC Agreement § 3.4(a).

detail the responsibilities of the "Development Manager." These responsibilities included all aspects of planning and managing the Project, such as budgeting; scheduling; overseeing architectural and engineering plan development; obtaining necessary permits and approvals; overseeing subcontractors; accounting and record keeping; making payments to vendors; collecting rents; performing repairs; managing tenant relationships; and assisting with sales broker selection.[13] In short, the vast majority of activities that would ultimately determine the Project's success were the responsibility of the Development Manager.

PKI was required under the LLC Agreement to cause EB North to enter into the Development Management Agreement with the Development Manager, which was defined as "PKI or an Affiliate of PKI, in its capacity as development manager of the Real Property pursuant to the Development Management agreement, or such other Person engaged to provide such services as may be specified in the Development Management Agreement or as selected by the Managing Member."[14] Thus, the LLC Agreement contemplated a situation where the entity with primary responsibility for the success of the Project, the Development Manager, was an entity that was not a contractual partner of Bay Center.

And, this was the situation that arose. PKI selected another Nevis-controlled entity, ETI, rather than PKI itself, to be the Development Manager. Accordingly, EB North and ETI executed the Development Management Agreement, with Nevis signing

[13] Development Management Agreement Ex. A.
[14] LLC Agreement § 1.1.

on behalf of both companies. Bay Center, Emery Bay, and PKI were not parties to the Development Management Agreement.

But, the LLC Agreement did anticipate that PKI and Emery Bay might play a role in the performance of the Development Management Agreement. Section 5.1 of the LLC Agreement, detailing PKI's role as managing member, states:

> [T]he power and authority of Managing Member under this Agreement shall expressly include *the power and authority* to:
> …
> (ix) *Cause the Development Manager to perform its obligations under the Development Management Agreement*, including, without limitation, the timely performance of such obligations within the schedules required for such performance, or, if the Development Manager fails to perform such obligations, performing or causing such services to be performed, at no additional cost, for [Emery Bay]'s benefit;
> . . .
> (x) Subject to the availability of funds therefor, *take all proper and necessary actions reasonably required to cause [Emery Bay], [EB North] and all third parties at all times to perform* and comply with the provisions . . . of any loan commitment . . ., agreement, mortgage, lease, *or other contract . . . to which [Emery Bay] is a party or which affects the Property or the operation thereof . . . .*[15]

It is clear from these provisions that the Development Management Agreement was important to the Project's success, and, at the very least, PKI had the power and authority to make sure that contract was performed, regardless of what entity served as the Development Manager.

## B. The Project

According to Bay Center, the various defendants, who are all PKI affiliates, began failing to fulfill their obligations under the various agreements within months of the

[15] LLC Agreement § 5.1(a) (emphasis added).

Project's formation. Bay Center alleges that by August 2006, Fremont stopped funding the A&D Loan because interest payments were several months past due, and the defendants had improperly diverted rental income to construction expenses.[16] ETI and PKI were also allegedly failing to pay vendors on time and had understaffed the construction team, jeopardizing marketing efforts. The defendants also failed to notify Bay Center of any of these events.

Bay Center first learned of the problems at the Project in November 2006, but had difficulty getting details about the issues because the defendants had failed to comply with the regular reporting requirements in the LLC Agreement and the Development Management Agreement, and the defendants also initially declined to respond to direct requests from Bay Center.[17]

In February 2007, with budget overruns mounting, Bay Center demanded that PKI make an additional capital contribution of approximately $11 million in accordance with the LLC Agreement. PKI refused to make the additional contribution.

Eventually PKI did, however, respond to Bay Center's requests for information. In March 2007, PKI provided Bay Center with copies of the default notice issued by Fremont in August 2006 as well as certain agreements between EB North and Fremont that modified the A&D Loan. In particular, the renegotiated A&D Loan provided for the cash proceeds of unit sales to go to funding the interest reserves on the Loan. As a result, cash held by Emery Bay that had been earmarked for payment on the Bay Center Note

[16] Compl. ¶ 34.
[17] I use the blanket term "defendants" because the Complaint itself is no more specific.

was diverted to funding the Loan reserves. In Bay Center's view, the funding for the interest reserves should have been provided by PKI through additional capital contributions. The loan agreements that the defendants disclosed to Bay Center had been entered into between December 2005 and November 2006. Bay Center had only been informed of one of them before its execution, and in that case PKI allegedly executed the agreement without incorporating Bay Center's requested changes or getting Bay Center's final approval.

Over the next several months, the Project continued to deteriorate. By early summer 2007, the A&D Loan was in default, cost overruns were over $10 million, sales were far below projections, construction was behind schedule, and the Property had become victimized by squatters and vandalism. Finding the defendants unresponsive to its demands for improvements, Bay Center brought suit against the defendants in the Superior Court of California for breach of contract and other claims, but that Court determined that the forum selection clause of the LLC Agreement required Bay Center to bring its claims in Delaware.

In the meantime, Fremont sold the A&D Loan in July 2007 to iStar Financial Inc., which filed suit in the Superior Court of California for breach of contract, judicial foreclosure, and specific performance against EB North, Nevis, and one of Nevis' investment vehicles (the "iStar Action"). During the iStar Action, the Superior Court appointed a receiver for the Project. The receiver prepared a report, a copy of which is attached to the Complaint, revealing extensive mismanagement of the Project by the defendants (the "Receiver's Report"). The Receiver's Report documents a diverse array

of problems suggestive of both a lack of oversight of the Project — including use of unlicensed subcontractors and failure to secure the Property, leading to theft and vandalism — and of more intentional misuse of the Project's funds and property — including payment of management fees of $11,000 a month, which the receiver concluded to be above-market, to another Nevis-controlled entity acting as the property manager, and allowing construction personnel to live on the Property rent-free.

C. The Complaint

Bay Center brought suit in this court against PKI, ETI, Emery Bay, and Nevis in March 2008 asserting a variety of theories of relief for the defendants' alleged mismanagement of the Project and failure to fulfill their contractual, fiduciary, and legal obligations. As amended, the Complaint brings eight counts.

Counts I and II bring breach of contract claims against PKI and Emery Bay, respectively. Count I alleges that PKI directly breached the LLC Agreement by failing to make additional capital contributions, failing to obtain Bay Center's approval to renegotiate the A&D Loan, and failing to meet its reporting obligations. Count I also alleges that PKI is liable under the LLC Agreement for failing to cause ETI to perform its obligations under the Development Management Agreement and for failing to cause Emery Bay to perform its obligations under the Bay Center Note because those two agreements were incorporated by reference into the LLC Agreement and because the LLC Agreement charged PKI with ensuring that those two agreements are performed. Count II alleges that Emery Bay breached the Bay Center Note by failing to make

payments in accordance with the terms of the Note and by renegotiating the A&D Loan, which impaired Emery Bay's ability to repay the Note.

Count III is offered in the alternative to Count I, and alleges that even if PKI was not obligated by the explicit terms of the LLC Agreement to ensure performance of the Development Management Agreement and the Bay Center Note, the implied duty of good faith and fair dealing required it to do so.

Counts IV, V, and VI bring fiduciary duty claims. Count IV alleges that both Emery Bay and Nevis had fiduciary duties to Bay Center that they breached in the course of their mismanagement of the Project. Counts V and VI allege that ETI and Nevis, to the extent Nevis does not have primary liability, aided and abetted the breaches alleged in Count IV.

Finally, Count VII alleges that both PKI and Nevis committed fraud by failing to inform Bay Center of material developments at the Project. In case Count VII fails to state a claim against Nevis, Count VIII alleges that Nevis aided and abetted PKI's fraud.

PKI and Emery Bay agree that Counts I and II of the Complaint state breach of contract claims against them, and accordingly have not moved for dismissal of those two counts. The remaining six counts of the Complaint are subject to this motion to dismiss for failure to state a claim under Rule 12(b)(6) brought by all of the defendants.

## III. Legal Analysis

In deciding this motion to dismiss, I apply the familiar standard under Court of Chancery Rule 12(b)(6). To state a claim, "a complaint must plead enough facts to

plausibly suggest the plaintiff will ultimately be entitled to the relief she seeks."[18] In determining whether the Complaint states a claim, I must accept all well-pled facts as true and draw all reasonable inferences in the light most favorable to the plaintiff.[19] In order to dismiss a claim, I "must determine with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiffs would not be entitled to relief."[20]

With these principles in mind, I turn to the six counts of the Complaint that the defendants argue fail to state a claim. I start with Bay Center's allegations under the implied covenant of good faith and fair dealing, and then turn to the breach of fiduciary duty counts, and finally I address the fraud counts.

A. The Implied Covenant Of Good Faith And Fair Dealing

Bay Center's claim under the implied covenant of good faith and fair dealing is part of Bay Center's efforts to, in essence, hold PKI secondarily liable for the alleged breaches of the Development Management Agreement and Bay Center Note (collectively, the "Supporting Agreements") despite the fact that PKI was not a signatory to either of the Supporting Agreements. Bay Center's primary argument is contained in Count I, which the defendants have not moved to dismiss, and rests on the theory that PKI agreed in the LLC Agreement to ensure that the Supporting Agreements would be

[18] *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007).
[19] *In re Lukens, Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd* 757 A.2d 1278 (Del. 2000).
[20] *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broad. Corp.*, 906 A.2d 218, 223 (Del. Ch. 2006) (quoting *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988)).

performed. Bay Center brings Count III in the alternative in case the court does not share Bay Center's interpretation of the LLC Agreement.

Bay Center's claim in Count I is helpful in understanding the argument Bay Center makes under Count III. In Count I, Bay Center argues that PKI was required to cause ETI to perform its obligations competently under the Development Management Agreement and to cause Emery Bay to perform its obligations under the Bay Center Note. In making this argument, Bay Center relies on the detailed terms of Article 5 of the LLC Agreement, entitled "Powers, Rights and Duties of Members." Under this article, PKI had broad authority to run Emery Bay: "[PKI] *shall manage* and conduct the operations and affairs of [Emery Bay] and make all decisions regarding [Emery Bay] and its business and assets."[21] The LLC Agreement, "without limiting the generality" of this provision, also granted PKI the express "power and authority" to undertake a number of actions.[22] This included the "power and authority" to: 1) "[c]ause the Development Manager to perform its obligations under the Development Management Agreement . . . or, if the Development Manager fails to perform such obligations, performing or causing such services to be performed, at no additional cost"; 2) "[p]erform, or cause to be performed, all of [Emery Bay's] obligations under any agreement to which [Emery Bay] is a party; and relatedly 3) "take all proper and necessary actions *reasonably required* to cause [Emery Bay] . . . to perform and comply with the provisions . . . of any loan

[21] LLC Agreement § 5.1(a) (emphasis added).
[22] LLC Agreement § 5.1(a).

commitment . . . or other contract, instrument or agreement to which [Emery Bay] is a party . . . ."[23]

Bay Center's argument in Count I is that the fact that PKI unambiguously had the power and authority to cause performance of the Supporting Agreements meant PKI also had the obligation to do so. This argument is supported by the language surrounding the grant of express authority to perform the Supporting Agreements, such as the statement that PKI "shall manage" the affairs of Emery Bay, which can reasonably read to mean that PKI had the obligation to exercise its authority on behalf of all the members, and the language cited above regarding Emery Bay's loan commitments, which tempers the efforts required to those "reasonably required" to meet the loan obligation. Likewise, the language stating that if the Development Manager fails to perform its obligations, PKI has the power and authority to "perform[] or caus[e] such services to be performed, *at no additional cost*, for [Emery Bay]'s benefit" supports such a reading.[24] In other words, Bay Center reads the items listed in § 5.1(a) as spelling out the core functions that PKI had to perform as part of its obligation to manage Emery Bay and attempt to make the Project a success. PKI takes a different view of the purpose of § 5.1(a)'s enumeration of PKI's express powers, arguing that § 5.1(a) did "not require PKI to do anything with respect to the Development Management Agreement, it simply empower[ed] it to do so if it so decide[d]."[25]

[23] LLC Agreement § 5.1(a)(v), (ix), (x) (emphasis added).
[24] LLC Agreement § 5.1(a)(ix) (emphasis added).
[25] Defs.' Op. Br. at 23.

These arguments are, of course, not before the court at this time because the defendants have not moved to dismiss Count I, but they illustrate the ambiguity that exists in the LLC Agreement as to who was responsible for the bulk of the conduct alleged in Bay Center's Complaint. The pertinent question at this stage is, if this ambiguity regarding PKI's express obligation or lack thereof to cause performance of the Supporting Agreements is resolved against Bay Center, as I assume it would be for purposes of this alternatively pled count, whether that obligation can be implied in the LLC Agreement.

This is a close question. Delaware courts rightly employ the implied covenant sparingly when parties have crafted detailed, complex agreements, lest parties be stuck by judicial error with duties they never voluntarily accepted.[26] Nevertheless, Delaware courts have "recognized the occasional necessity of implying contract terms to ensure the parties' reasonable expectations are fulfilled."[27] In the context of corporate entities, "[t]he implied covenant functions to protect stockholders' expectations that the company and its board will properly perform the contractual obligations they have under the operative organizational agreements."[28] Part of corporate managers' proper performance

[26] *See, e.g.*, *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) ("This quasi-reformation, however, should be a rare and fact-intensive exercise, governed solely by issues of compelling fairness." (internal quotations omitted)); *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) ("Delaware Supreme Court jurisprudence is developing along the general approach that implying obligations based on the covenant of good faith and fair dealing is a cautious enterprise."); *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("[C]ourts should be most chary about implying a contractual protection when the contract easily could have been drafted to expressly provide for it.").

[27] *Dunlap*, 878 A.2d at 442 (internal quotations omitted).

[28] *Wood v. Baum*, 953 A.2d 136, 143 (Del. 2008) (interpreting an LLC agreement).

of their contractual obligations is to use the discretion granted to them in the company's organizational documents in good faith.[29]

Here, PKI had the obligation to manage Emery Bay and the discretion to cause the Supporting Agreements to be performed. PKI was required to carry out these functions in good faith, meaning PKI could not engage in "arbitrary or unreasonable conduct" that had the effect of preventing Bay Center from "receiving the fruits of the bargain."[30] This bargain was, essentially, that in exchange for contributing the real estate to be developed, Bay Center would reap the rewards of PKI's project management skills and efforts.

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[29] *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1206 (Del. 1993) ("[T]he General Partner is obliged to exercise that discretion [to exclude a limited partner from an investment opportunity] in a *reasonable* manner." (emphasis in original)); *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 922 (Del. Ch. 1999) (finding indemnitor breached the implied covenant of good faith and fair dealing by exercising its "broad discretion" to choose indemnitee's counsel unreasonably), *aff'd* 748 A.2d 407 (Del. 2000); *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch.1984) ("[I]f one party is given discretion in determining whether the condition in fact has occurred that party must use good faith in making that determination."), *aff'd* 575 A.2d 1131 (Del. 1990). Thus some commentators have noted:

> One context in which application of the Implied Covenant is particularly noteworthy is in the instances where a party is allowed discretion under the agreement to take certain actions. . . . Delaware cases generally support the proposition that the Implied Covenant requires that such discretion must be exercised in good faith and consistent with the reasonable expectations of the parties.

Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469, 1480-81 (2005). This is in keeping with the definition of good faith crafted by Professor Steven Burton in a well-known article:

> Good faith limits the exercise of discretion in performance conferred on one party by the contract. When a discretion-exercising party may determine aspects of the contract . . . it controls the other's anticipated benefits. Such a party may deprive the other of these anticipated benefits for a legitimate (or good faith) reason. The same act will be a breach of the contract if undertaken for an illegitimate (or bad faith) reason.

Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 372-73 (1980).

[30] *Dunlap*, 878 A.2d at 442 (internal quotations omitted); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a.

PKI's conduct allegedly frustrated the parties' intent to develop a profitable condominium complex because PKI in bad faith failed to force the entities that were contractually obligated to perform tasks that were crucial to the Project's success to fulfill their obligations, even though PKI had the express authority to do so.[31] And Bay Center has pled facts from which it can reasonably be inferred that PKI's decision not to cause performance of the Supporting Agreements was not in good faith. For starters, Emery Bay's alleged breaches of the Bay Center Note benefited PKI by diverting cash that Emery Bay was supposed to use to repay the Note to fund the depleted A&D Loan reserves, which PKI would have otherwise had to fund through capital calls. And, the decision not to pursue claims against ETI under the Development Management Agreement was a conflicted one because Nevis, as the controller of both Emery Bay and ETI, stood on both sides of it.

Thus, Bay Center has sufficiently pled that PKI had an implied duty to cause performance of the Supporting Agreements and that Bay Center breached this duty, and I deny the defendants' motion to dismiss Count III.

### B. Breach Of Fiduciary Duty

#### 1. The LLC Agreement's Treatment Of Fiduciary Duties

As a threshold matter, I address the disagreement between the parties as to what fiduciary duties existed under the LLC Agreement. The Delaware LLC Act gives

[31] *Dunlap*, 878 A.2d at 442 ("[P]arties are liable for breaching the covenant when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms." (internal quotations omitted)); *see also* 17A AM. JUR. 2D CONTRACTS § 370 ("When one undertakes to accomplish a certain result, he or she agrees by implication to do everything to accomplish the result intended by the parties.").

members of an LLC wide latitude to order their relationships, including the flexibility to limit or eliminate fiduciary duties.[32] But, in the absence of a contrary provision in the LLC agreement, the manager of an LLC owes the traditional fiduciary duties of loyalty and care to the members of the LLC.[33]

The defendants claim that the parties took full advantage of this flexibility by eliminating all fiduciary duties in the LLC Agreement. Bay Center, in contrast, claims that the LLC Agreement specifically preserves the traditional fiduciary duties. To support these starkly opposite positions, the parties point to two separate and seemingly contradictory provisions of the LLC Agreement:

> Section 6.1 Relationship of Members. Each Member agrees that, to the fullest extent permitted by the Delaware Act and except as otherwise expressly provided in this Agreement or any other agreement to which the Member is a party: . . . (b) *The Members shall have the same duties and*

[32] 6 *Del. C.* § 18-1101(e); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) ("The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement.").

[33] The Delaware LLC Act is silent on what fiduciary duties members of an LLC owe each other, leaving the matter to be developed by the common law. *See* 6 *Del. C.* § 18-1104; ROBERT L. SYMONDS, JR. & MATTHEW J. O'TOOLE, DELAWARE LIMITED LIABILITY COMPANIES § 9.04[B][3] (2007). The LLC cases have generally, in the absence of provisions in the LLC agreement explicitly disclaiming the applicability of default principles of fiduciary duty, treated LLC members as owing each other the traditional fiduciary duties that directors owe a corporation. *See Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149-50 (Del. Ch. 2006); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 153 (Del. Ch. 2004); *VGS, Inc. v. Castiel*, 2000 WL 1277372, at **4-5 (Del. Ch. Aug. 31, 2000), *aff'd* 781 A.2d 696 (Del. 2001). Moreover, when addressing an LLC case and lacking authority interpreting the LLC Act, this court often looks for help by analogy to the law of limited partnerships. *See, e.g.*, *In re Seneca Invs. LLC*, -- A.2d --, 2008 WL 5704773, at *2 (Del. Ch. Sept. 23, 2008); *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005). In the limited partnership context, it has been established that "[a]bsent a contrary provision in the partnership agreement, the general partner of a Delaware limited partnership owes the traditional fiduciary duties of loyalty and care to the Partnership and its partners." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 2000 WL 1476663, at *10 (Del. Ch. Sept. 27, 2000); *see also* MARTIN I. LUBAROFF & PAUL M. ALTMAN, DELAWARE LIMITED PARTNERSHIPS § 11.2.2 at 11-5 to 11-7 (2003) (hereinafter LUBAROFF & ALTMAN).

> *obligations to each other that members of a limited liability company formed under the Delaware Act have to each other*.
>
> Section 6.2 Liability of Members. . . . *Except for any duties imposed by this Agreement . . . each Member shall owe no duty of any kind* towards the Company or the other Members in performing its duties and exercising its rights hereunder or otherwise.[34]

Thus, the LLC Agreement states, on a single page, that the members of Emery Bay both owe each other the default fiduciary duties that exist between members of an LLC absent alteration in an LLC agreement, and at the same time owe each other no duty of any kind not imposed by the LLC Agreement itself.

In resolving this apparent paradox for purposes of this motion, I look to the pleading standards under Rule 12(b)(6). On a motion to dismiss, the court cannot choose between reasonable interpretations of ambiguous contract provisions.[35] Instead, defendants are only entitled to dismissal if "the interpretation of the contract on which their theory of the case rests is the '*only* reasonable construction as a matter of law.'"[36] The determinative question is therefore whether the defendants' position that the LLC Agreement eliminates their fiduciary duties is the only reasonable one. I find that it is not.

The defendants argue that under § 6.2, a duty must be expressly imposed by the LLC Agreement in order for PKI to be bound to it. According to the defendants, no

[34] LLC Agreement §§ 6.1, 6.2 (emphasis added).
[35] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003); *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *see also Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1292 (Del. 2007) (holding that the court cannot choose the "more reasonable" of competing contract interpretations as legally controlling on a Rule 12(b)(6) motion).
[36] *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008) (quoting *VLIW Tech.*, 840 A.2d at 615) (emphasis in original).

fiduciary duty is expressly imposed on PKI in the LLC Agreement. But, it is reasonable to read § 6.1(b) as doing precisely that. Section 6.1(b) expressly imposes the default fiduciary duties on PKI, so the default fiduciary duties are carved out of § 6.2's elimination of duties by the "except for any duties imposed by this Agreement" language in that provision. The duties eliminated by § 6.2 are those that are not traditional fiduciary duties or are otherwise not expressly contemplated in the LLC Agreement.

Because the existence of fiduciary duties under § 6.1(b) can be reconciled with § 6.2's apparent elimination of them in this way, Bay Center's reading of the LLC Agreement is more reasonable than the defendants' reading. It is a maxim of contract interpretation that, "given ambiguity between potentially conflicting terms, a contract should be read so as not to render any term meaningless."[37] The defendants have not offered a coherent argument for how the LLC Agreement can be read to eliminate fiduciary duties without rendering § 6.1(b) meaningless. And, the interpretive scales also tip in favor of preserving fiduciary duties under the rule that the drafters of chartering documents must make their intent to eliminate fiduciary duties plain and unambiguous.[38] As a result, the defendants' interpretation of the fiduciary duty provisions of the LLC Agreement is not the most reasonable interpretation, let alone the only reasonable interpretation. Thus, I construe the LLC Agreement in favor of Bay Center and assume,

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[37] *Hexion Specialty Chems. v. Huntsman Corp.*, 965 A.2d 715, 741 (Del. Ch. 2008).

[38] *See Miller v. Am. Real Estate Partners, L.P.*, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001) ("[D]efault principles of fiduciary duty will apply unless a partnership agreement plainly provides otherwise."); *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 322 (Del. Ch. 1998); *cf. Kahn v. Icahn*, 1998 WL 832629, at *3 (Del. Ch. Nov. 12, 1998) (holding that limited partners could not bring a duty of loyalty claim where the partnership agreement contained "clear and unambiguous modifications of fiduciary duties"), *aff'd* 746 A.2d 267 (Del. 2000).

for the purposes of this motion to dismiss, that the LLC Agreement requires Emery Bay's members to act in accordance with traditional fiduciary duties.

2. Breach Of Fiduciary Duty By PKI And Nevis

In Count IV, Bay Center alleges that PKI and Nevis breached their fiduciary duties to Bay Center by, among other things, improperly diverting rental income from the Project to avoid capital calls, modifying the A&D Loan without Bay Center's consent, and allowing construction employees to occupy units on the Property for free.[39]

The defendants' only challenge to this Count with regard to PKI is the argument discussed above that the LLC Agreement eliminates fiduciary duties. Because I must assume at this stage that the LLC Agreement does impose fiduciary obligations on PKI, and because Bay Center has alleged a number of facts from which it can be inferred that PKI breached its duties, I deny the motion to dismiss Count IV as to PKI.

The analysis regarding Nevis is less straightforward. Nevis himself is not a member or officer of Emery Bay, and is thus beyond the normal scope of those who owe fiduciary duties in the corporate context.[40] Bay Center's theory of liability rests on a line of cases, beginning with *In re USACafes, L.P. Litigation*,[41] holding that "those affiliates of a general partner who exercise control over the partnership's property may find

[39] Compl. ¶ 92.
[40] *See Metro Ambulance, Inc. v. E. Med. Billing*, 1995 WL 409015, at *3 (Del. Ch. July 5, 1995) (noting that those who traditionally have been recognized to owe fiduciary duties to a corporate entity are directors, officers, and general partners); 3 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 846 (2008) (hereinafter FLETCHER).
[41] 600 A.2d 43 (Del. Ch. 1991). The cases following *USACafes* include: *Wallace v. Wood*, 752 A.2d 1175 (Del. Ch. 1999); *Bigelow/Diversified Secondary P'ship Fund 1990 v. Damson/Birtcher Partners*, 2001 WL 1641239 (Del. Ch. Dec. 4, 2001); *In re Primedia Inc. Deriv. Litig.*, 910 A.2d 248 (Del. Ch. 2006); and *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096 (Del. Ch. 2008).

themselves owing fiduciary duties to both the partnership and its limited partners."[42] Importantly, the defendants do not challenge the general applicability of this doctrine in the LLC context.[43] Instead, the defendants argue that *USACafes*-type liability can only be imposed in limited circumstances that are not present here.[44]

It is true that *USACafes* does not apply to all affiliates in all circumstances. First, to have any fiduciary duties to an entity, the affiliate must exert control over the assets of that entity.[45] Here, the defendants concede that Bay Center has sufficiently pled that Nevis himself exerted direct control over Emery Bay's property.[46] Second, *USACafes* suggests that controlling affiliates do not have the full range of traditional fiduciary

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[42] *Bigelow/Diversified*, 2001 WL 1641239, at *8.

[43] This court, to my knowledge, has not been presented with the question of whether the principles enunciated in *USACafes* and its progeny are applicable to the affiliates of an LLC's managing member. But, in the absence of developed LLC case law, this court has often decided LLC cases by looking to analogous provisions in limited partnership law. *See, e.g.*, *Silver Leaf*, 2005 WL 2045641, at *11 (looking to the law of limited partnership dissolution in an LLC dissolution case). And, the general applicability of this principle has been recognized by this court in other contexts. *See Cargill*, 959 A.2d at 1120 (opining that the *USACafes* line of cases extends to the parents of a managing owner of a statutory trust); *Primedia*, 910 A.2d at 258 n. 26 (Del. Ch. 2006) (holding that a private equity group, although not a controlling shareholder itself, could have fiduciary duties based on its control of intermediate parent entities).

[44] I have noted in the past that the imposition of fiduciary duties on individuals who work for a corporate fiduciary charged with managing an alternative entity raises some difficult policy issues and disregards corporate formalities in a manner unusual for Delaware law. *See Gelfman v. Weeden Investors, L.P.*, 792 A.2d 977, 992 n.24 (Del. Ch. 2001); *Gotham Partners*, 2000 WL 1476663, at *20. Some commentators have also raised concerns about the effect of *USACafes*. *See* LUBAROFF & ALTMAN § 11.2.11 at 11-32.3 ("[*USACafes* puts] directors in the situation of having potentially conflicting and irreconcilable fiduciary duties to stockholders of the [corporate general partner] and to limited partners of the limited partnership."). But, given the defendants' acceptance of the *USACafes* line of cases, I simply apply that line.

[45] *See Cargill*, 959 A.2d at 1121; *Bigelow/Diversified*, 2001 WL 1641239, at *8; *Wallace*, 752 A.2d at 1181-82.

[46] Transcript of 2/2/09 ("Tr.") at 17. It is also apparent from the face of the documents attached to the Complaint that the parties intended for Nevis personally to have a position of control at Emery Bay. *See* LLC Agreement § 5.1(i)(iv) (making "the non-involvement of Alfred E. Nevis in the day-to-day management and operation of [Emery Bay]" grounds for removing PKI as the managing member).

duties, although that case specifically disclaims any effort to fully delineate the scope of controlling affiliate duties:

> While these authorities extend the fiduciary duty of the general partner to a controlling shareholder, they support as well, the recognition of such duty in directors of the General Partner who, more directly than a controlling shareholder, are in control of the partnership's property. It is not necessary here to attempt to delineate the full scope of that duty. It may well not be so broad as the duty of the director of a corporate trustee. But it surely entails the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership.[47]

Later cases have similarly declined to expound on the full scope of *USACafes* duties.[48] In practice, the cases applying *USACafes* have not ventured beyond the clear application stated in *USACafes*: "the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership."[49] Limiting the application of *USACafes* to this duty provides, in my view, a rational and disciplined way of protecting investors in alternative entities with managing members who are themselves entities, while not subjecting all the individuals who work for managing members to

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[47] *USACafes*, 600 A.2d at 49 (footnote omitted).

[48] *See, e.g.*, *Cargill*, 959 A.2d at 1121 n.103 ("At this preliminary stage, the parties have not provided sufficiently thorough arguments as to the exact scope of the applicable duties owed by the Cargill Plaintiffs to permit me to delineate those duties conclusively beyond the duty of loyalty. Consequently, for purposes of the pending motions, I rely solely on the duty of loyalty without prejudice to the possibility of additional duties, as well.").

[49] *USACafes*, 600 A.2d at 49 (footnote omitted); *see, e.g.*, *In re Boston Celtics Ltd. P'ship S'holders Litig.*, 1999 WL 641902 (Del. Ch. Aug. 6, 1999) (directors of general partner personally received preferential treatment in a reorganization); *Bigelow/Diversified*, 2001 WL 1641239 (individual control persons structured transactions in order to personally receive unearned fees and other benefits); *Wallace*, 752 A.2d 1175 (controllers of general partner diverted partnership assets for purpose of generating fees directly benefitting themselves); *USACafes*, 600 A.2d 43 (directors of general partner received side payments in sale of partnership).

wide-ranging causes of action. Bay Center must therefore plead that Nevis benefited himself at the expense of Emery Bay in order to withstand this motion to dismiss.

Bay Center has met this pleading burden in at least one important respect. Bay Center alleges that Nevis caused Emery Bay to make cash sweeps to satisfy the renegotiated A&D Loan, which avoided a default on the Loan, and in turn, the triggering of Nevis' substantial Personal Guarantee. Stated differently, Nevis used his control over Emery Bay's assets to stave off personal liability. The defendants respond with a number of weak factual arguments about why these circumstances are not actually benefits to Nevis or detriments to Bay Center. For instance, the defendants argue that Nevis' Personal Guarantee might not have been triggered in any event, or that the renegotiated A&D Loan might have been in Emery Bay's best interests. These arguments might be borne out on an evidentiary record, but at this stage Bay Center has created a reasonable inference that Nevis used his control over Emery Bay's property to shield himself from monetary liability at the expense of Bay Center. Under *USACafes* and its progeny, that suffices to state a claim. Thus, I deny the defendants' motion to dismiss Count IV as to Nevis.

3. Aiding And Abetting A Breach Of Fiduciary Duty

In Counts V and VI, Bay Center brings aiding and abetting claims against ETI and Nevis, respectively, for aiding and abetting the breaches of fiduciary duty alleged in

Count IV, discussed above.[50] To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must demonstrate: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary."[51]

The defendants' only challenge to Counts V and VI rests on the first prong of this standard. The defendants argue that neither PKI nor Nevis had fiduciary duties, for the reasons discussed with regard to Count IV, so there was no breach of fiduciary duty to aid and abet. Because I find that Bay Center has adequately alleged that PKI and Nevis committed breaches of fiduciary duty, and because I find that the other requirements for stating an aiding and abetting claim have been met, this argument fails, and the motion to dismiss Counts V and VI is denied.

### C. The Fraud Claims

In Count VII, Bay Center alleges that both PKI and Nevis committed fraud against Bay Center by failing to disclose the severe problems that were developing at the Project. Common law fraud can be demonstrated in three ways: 1) overt mispresentation; 2) silence in the face of a duty to speak; or 3) deliberate concealment of material facts.[52] Bay Center disclaims any attempt to use the first route, and relies on the arguments that:

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[50] Count VI, bringing aiding and abetting claims against Nevis, is pled in the alternative in the event Count IV is dismissed against Nevis. Although I find that Count IV states a claim against Nevis, I address Count VI for completeness.

[51] *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007).

[52] *See Stephenson v. Capano Devel., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Metro Commc'n Corp. BVI v. Advanced Mobilcomm Techs. Inc.*, 854 A.2d 121, 143 (Del. Ch. 2004).

1) PKI and Nevis had a duty to speak and failed to do so; and 2) PKI and Nevis actively concealed material information from Bay Center. I discuss each argument in turn.

1. Silence In The Face Of A Duty To Disclose

In order for a party to commit common law fraud through silence, she must have a duty to speak that arises by operation of law, rather than purely by contract.[53] This so-called independent tort doctrine is satisfied if, in addition to a contractual duty, a party was subject to an independent duty, such as a fiduciary duty.[54]

As discussed above, for purposes of this motion, I consider PKI to be subject to the traditional fiduciary duties of a director of a Delaware corporation. The defendants have conceded that if this court finds a breach of fiduciary of duty, there are grounds for Bay Center's fraud claims.[55] And, the defendants have not argued that Bay Center failed to plead facts from which it can be reasonably inferred that PKI breached its fiduciary duty of disclosure. Indeed, it would be hard to do so in this case.

As a general matter, the board of directors of a corporation has a "fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks

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[53] *See Pinkert v. John J. Olivieri, P.A.*, 2001 WL 641737, at *5 (D. Del. May 24, 2001) ("As a general rule under Delaware law, where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort."); *Data Management Internationale, Inc. v. Saraga*, 2007 WL 2142848, at *3 (Del. Super. Jul. 25, 2007) (citing *Pinkert* and other cases); *Tristate Courier and Carriage, Inc. v. Berryman*, 2004 WL 835886, at *11 (Del. Ch. Apr. 15, 2004) (quoting *Pinkert*); *Diver v. Miller*, 148 A. 291, 293 (Del. Super. 1929) ("In order to constitute a tort there must always be a violation of some duty owed to the plaintiff; but generally speaking such a duty must arise by operation of law and not by the mere agreement of the parties.").

[54] *See, e.g.*, *Data Management*, 2007 WL 2142848, at *3 ("[T]he same circumstances may give rise to both breach of contract and tort claims if the plaintiff asserts that the alleged contractual breach was accompanied by the breach of an independent duty imposed by law.").

[55] Tr. at 35-36.

shareholder action."[56] The principle applies by analogy to the fiduciaries of an LLC when they seek members' consent. Here, the LLC Agreement requires Bay Center's consent, which necessarily requires disclosure to Bay Center, of any refinancing or restructuring of the A&D Loan.[57] Bay Center alleges that the A&D Loan was modified on seven separate occasions, but that PKI only informed Bay Center of one of the modifications.[58] The fiduciary duty of directors to disclose material facts when shareholders are required (or have the right) to make a decision is precisely implicated here. Emery Bay had a right to make a decision regarding the renegotiations of the A&D Loan, and PKI therefore had a fiduciary duty to inform Bay Center of all material facts concerning the renegotiations. The alleged fact that PKI failed to inform Bay Center that most of the renegotiations were taking place illustrates PKI's failure to make Bay Center aware of even the most basic facts that Bay Center was entitled to know. Thus, Bay Center has sufficiently pled a fraud claim against PKI based on PKI's failure to disclose material facts in the face of its fiduciary duty to do so.[59]

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[56] *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992).
[57] LLC Agreement § 5.1(c)(i).
[58] Compl. ¶¶ 43-44.
[59] The defendants make no argument that the other elements of fraud — i.e. justifiable reliance and damage, *Stephenson*, 462 A.2d at 1074 — have not been met, nor does it seem likely that such an argument would succeed given the defendants' superior informational position and the length of time over which the Project deteriorated without Bay Center knowing it should be protecting its investment and its rights under the various agreements.

Of course, I recognize that allowing a fraud claim to proceed because of a fiduciary duty to disclose generates redundancy. *See Metro Commc'n*, 854 A.2d at 153, 154. Nonetheless, this sort of redundancy has been permitted in our jurisprudence. *See, e.g.*, *Zirn v. VLI Corp.*, 621 A.2d 773 (Del. 1993) (allowing a disclosure-based fiduciary claim to proceed alongside an equitable fraud claim); *Shamrock Holdings of Cal., Inc. v. Iger*, 2005 WL 1377490 (Del. Ch. June 6, 2005) (same).

And, because Bay Center has pled that Nevis personally participated in this fraud by PKI, Bay Center has also stated a claim against Nevis individually. Under settled Delaware law, "[a] corporate officer can be held personally liable for the torts he commits and cannot shield himself behind a corporation when he is a participant."[60] This includes situations where a corporate agent participates in corporate fraud.[61] Nevis does not argue that he cannot be held individually liable for his participation in fraud committed by PKI, or that he did not participate in the activities that Bay Center alleges were fraudulent. Instead, Nevis argues that PKI's actions were not fraudulent because PKI had no duty to speak, so there was no fraud for Nevis to participate in. But, as discussed above, I find that Bay Center has stated a claim that PKI's conduct constituted fraud. Bay Center may therefore also move forward on its claim against Nevis individually for his participation in the alleged fraud.

2. Active Concealment

Although Bay Center's allegations under the theory of silence in the face of a duty to speak are sufficient to state claims of fraud against both PKI and Nevis, I also address

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[60] *Stonington Partners, Inc. v. Lernout & Houspie Speech Prods., N.V.*, 2002 WL 31439767, at *8 n.27 (Del. Ch. Oct. 23, 2002) (citing *Brandywine Mushroom Co. v. Hockessin Mushroom Prods., Inc.*, 682 F.Supp. 1307, 1314 (D. Del. 1988); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978)); *see also T.V. Spano Bldg. Corp. v. Dep't of Natural Res. & Envtl. Control*, 628 A.2d 53, 61 (Del.1993); *St. James Recreation, LLC v. Rieger Opportunity Partners*, 2003 WL 22659875, at *6 (Del. Ch. Nov. 5, 2003); *Brady v. Preferred Florist Network, Inc.*, 791 A.2d 8, 21-22 (Del. Ch. 2001); 3A FLETCHER § 1135 ("Under the responsible corporate officer doctrine, if a corporate officer participates in the wrongful conduct, or knowingly approves the conduct, the officer, as well as the corporation, is liable for the penalties.").

[61] *See, e.g.*, *Marino v. Cross Country Bank*, 2003 WL 503257, at *7 (D. Del. Feb. 14, 2003); *Stonington Partners*, 2002 WL 31439767, at *8; *see also* 3A FLETCHER § 1143 ("A corporate officer or agent who commits fraud is personally liable to a person injured by the fraud. An officer actively participating in the fraud cannot escape personal liability on the ground that the officer was acting for the corporation.").

Bay Center's claims under the third type of fraud theory, active concealment, for the sake of completeness. A critical distinction between the active concealment and silence theories of fraud is that active concealment does not require a preexisting duty to speak.[62] But, this distinction does not aid Bay Center in this case because I find that Bay Center has not sufficiently pled active concealment.

Both sides rely on the standard for active concealment set forth in *Corporate Property Associates 14, Inc. v. CHR Holding Corp.*[63]:

> To plead active concealment, a plaintiff must allege facts supporting an inference that the defendant took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.[64]

This standard requires affirmative action on the part of defendant. Bay Center has not pled such affirmative efforts on the part of either PKI or Nevis. The gist of the Complaint is that the defendants failed to share with Bay Center important information that the defendants knew by virtue of their positions as the day-to-day managers of the Project. But it cannot be reasonably inferred from the Complaint that the defendants made any effort to hide this information from Bay Center through subterfuge or other artifice. Bay Center's strongest allegation — that the defendants "misleadingly sought Bay Center's consent and approval for one [of the amended loan documents] and then

[62] *See Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).
[63] 2008 WL 963048 (Del. Ch. Apr. 10, 2008).
[64] *Id.* at *7 (internal quotation omitted).

failed to make Bay Center's required changes to it"[65] — falls short. These alleged actions, while perhaps wrongful for other reasons, do not indicate that the defendants did anything to conceal information from Bay Center, as opposed to remaining silent about material information.

In sum, despite the infirmity of Bay Center's pleadings regarding active concealment, Bay Center has pled a claim of fraud against PKI and Nevis based on their failure to disclose the A&D Loan modifications when they had a duty to do so, and I deny the defendants' motion to dismiss Count VII.

### 3. Aiding And Abetting Fraud

Count VIII is pled in the alternative in the event Nevis is found not to have committed fraud, and alleges that Nevis aided and abetted PKI in its commission of fraud. The defendants' only challenge to this claim is that PKI did not commit fraud, and therefore Nevis could not aid and abet it. As discussed above, Bay Center has adequately pled that PKI engaged in fraud. Bay Center has also pled that Nevis, by being the person through which PKI acted, was a knowing participant in the fraud. I therefore deny the defendants' motion to dismiss Count VIII.

## IV. Conclusion

For the foregoing reasons, I deny the defendants' motion to dismiss in its entirety. IT IS SO ORDERED.

[65] Pl.'s Ans. Br. at 25.