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Case No. 7668-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE RENCO GROUP, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 7668-VCN**
	:	
MacANDREWS AMG HOLDINGS LLC, MacANDREWS & FORBES HOLDINGS, INC., RONALD O. PERELMAN,	:	
	:	
Defendants,	:	
	:	
AM GENERAL HOLDINGS LLC,	:	
	:	
Nominal Defendant.	:	

MEMORANDUM OPINION

Date Submitted: July 31, 2014
Date Decided: January 29, 2015

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NOBLE, Vice Chancellor

Plaintiff, a member of a limited liability company (an "LLC"), filed this action directly and derivatively against the company's managing member and its controllers. Plaintiff seeks equitable relief and damages, asserting nine claims arising from Defendants' alleged actions to expropriate money to which Plaintiff is entitled, cause prohibited distributions, cause improper loans, and withhold information about such actions. Defendants have moved to dismiss the breach of contract and declaratory judgment claims in part and Plaintiff's remaining seven claims in full.

I. BACKGROUND[1]

Plaintiff The Renco Group, Inc. ("Renco"), a holding company incorporated under New York law, was the sole owner of AM General LLC ("AM General"), "a Delaware limited liability company that manufactures, among other things, the military vehicle known as the 'Humvee.'"[2] Defendants are MacAndrews AMG Holdings LLC ("MacAndrews AMG"), a Delaware LLC; MacAndrews AMG's

[1] The Court focuses on the facts related to the specific disputes in the pending motion and assumes general familiarity based on related proceedings. *See, e.g.*, *AM Gen. Hldgs. LLC v. Renco Gp., Inc.* ("*AM Gen. II*"), 2013 WL 5863010 (Del. Ch. Oct. 31, 2013); *AM Gen. Hldgs. LLC v. Renco Gp., Inc.* ("*AM Gen. I*"), 2012 WL 6681994 (Del. Ch. Dec. 21, 2012). The Court draws the facts from the well-pleaded complaint and the contested entity agreement. *See, e.g.*, *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) ("In certain circumstances, however, when ruling upon a motion to dismiss, it is proper for the trial judge to consider a document attached to the complaint when the document is integral to a plaintiff's claim.").

[2] Verified Second Am. Compl. ("Compl.") ¶¶ 19, 26.

sole owner, MacAndrews & Forbes Holdings, Inc. ("M&F"), a Delaware corporation; and M&F's sole shareholder, Ronald O. Perelman ("Perelman").[3]

As part of a sophisticated business arrangement, Renco and M&F formed nominal defendant AM General Holdings LLC ("Holdco"), and Holdco and ILR Capital LLC ("ILR Capital"), an affiliate of Renco, formed Ilshar Capital LLC ("Ilshar Capital").[4] In exchange for its interest in Holdco, Renco contributed its membership interests in AM General to Holdco.[5] This contribution included General Engine Products LLC ("GEP"), AM General's wholly-owned subsidiary that "principally manufactures a 6.5-liter diesel engine (the '6.5L Diesel Engine')" for use in Humvees.[6] MacAndrews AMG contributed cash and became managing member of Holdco.[7]

Renco and MacAndrews AMG (the "Holdco Members") memorialized their relationship in the Limited Liability Company Agreement of AM General Holdings LLC, dated August 10, 2004 (the "Holdco Agreement").[8] Under the Holdco Agreement, Renco is entitled (roughly speaking) to $15 million annually if

[3] Compl. ¶¶ 3, 20-22.
[4] Compl. ¶¶ 28, 31. Holdco is a Delaware LLC. ILR Capital and Renco are both owned by Ira L. Rennert ("Rennert"). ILR Capital is the managing member of Ilshar Capital.
[5] Compl. ¶ 3.
[6] Compl. ¶ 4.
[7] Compl. ¶¶ 3, 28.
[8] Renco, M&F, and the other parties to the business arrangement signed a number of agreements, but this dispute centers on the Holdco Agreement. M&F is a signatory to the Holdco Agreement "for purposes of Section 12.8(b) only," as indicated in the preamble and the signature pages. Transmittal Aff. of J. Peter Shindel, Jr., Esquire Ex. A ("Holdco Agreement").

AM General's EBITDA exceeds a certain threshold, 100% of the profits and losses from activities related to the 6.5L Diesel Engine (the "GEP Business"), and 30% of the profits generated by AM General after deducting the above.[9] MacAndrews AMG is entitled to the remaining 70% of AM General's profits.

Because MacAndrews AMG generally has "'full, exclusive and complete discretion to manage and control the business and affairs of [Holdco]'" as the managing member,[10] Renco negotiated for various protections of its interest in profits from AM General and GEP.[11] One such protection is to require that "all transactions between 'AM General or any of its Subsidiaries, on one hand, and a Member or any Affiliates thereof, on the other hand, shall be no less favorable . . . than would be the case in an arms-length transaction.'"[12] Another is to require Renco's approval for certain actions, including "any sale, transfer, distribution or other disposition of any of the assets or Capital stock of GEP, other than . . . in the

[9] Compl. ¶ 30. For the precise definition of the "GEP Business," see Holdco Agreement § 1.1. Renco also has rights to distributions from Ilshar Capital. *See* Compl. ¶¶ 31, 74-75.

[10] Compl. ¶ 28 (quoting Holdco Agreement § 6.1).

[11] Compl. ¶ 37.

[12] Compl. ¶ 89 (quoting Holdco Agreement § 6.2(d)). "Member" appears to include "Capital" and "Profits" members, but the distinction is not material here. The definition of "Affiliate" clarifies that "neither [Holdco] nor any of its Subsidiaries shall be deemed to be an Affiliate of [MacAndrews AMG] or any of its Affiliates or of Renco or any of its Affiliates." Holdco Agreement § 1.1. "Subsidiary" is also defined at Holdco Agreement § 1.1.

Ordinary Course of Business" (one type of "AM General Major Decision").[13] Section 6.4(s) of the Holdco Agreement specifically requires mutual consent for "'the payment of a management fee or similar fee . . . by[] [Holdco], AM General or any of its Subsidiaries,'" to "'an affiliate'" of MacAndrews AMG or M&F.[14] This provision had origins in Renco's rejection of M&F's request, during negotiations for the overall business arrangement, to charge GEP a royalty for its alleged use of AM General's intellectual property.[15]

The Holdco Agreement addresses yet other financial and monitoring concerns. Section 9.4(c) bars distributions to MacAndrews AMG if MacAndrews AMG's Revalued Capital Account would, as a result, become "'equal to or less than 20% of the aggregated Revalued Capital Account of all Members,'"[16] and Section 8.3(b) allows Renco to "cause MacAndrews AMG to distribute cash to Renco" if MacAndrews AMG's Revalued Capital Account falls (or will fall) below

[13] Compl. ¶ 38 (internal quotation marks omitted) (invoking Holdco Agreement §§ 1.1, 6.4(c)). Section 6.2 of the Holdco Agreement sets forth the "[p]owers of the [m]anaging [m]ember," and Section 6.4 specifies "[a]ctions [r]equiring [m]utual [a]greement." "Ordinary Course of Business" and "AM General Major Decision" are defined at Holdco Agreement § 1.1.

[14] Compl. ¶ 41 (quoting Holdco Agreement § 6.4(s)).

[15] Compl. ¶¶ 49-50. Plaintiff contends that Section 6.4(s) "specifically precludes the imposition of a royalty or management fee." Compl. ¶ 50. The provision is at least open to that interpretation, although Plaintiff's discussion in its answering brief appears to focus on Section 6.4(s) in the context of management fees and Section 6.4(c) more generally.

[16] Compl. ¶ 72 (quoting Holdco Agreement § 9.4(c)). "Revalued Capital Account" is defined at Holdco Agreement § 4.4.

that level.[17] Loans from Holdco to the Holdco Members ("Company Loans") are allowed, but under limited circumstances as set forth in Section 9.7.[18] To the extent that company funds are not used to pay expenses or distributed, they are to be held as Company Loans or certain types of investments.[19] Section 10.1 invokes Section 18-305 of the Delaware LLC Act to guarantee that books and records for Holdco's business and the AM General Business "'shall at all times be open to inspection and examination at reasonable times by each Member.'"[20]

Fiduciary duties offer another layer of security. Relevant provisions include Section 12.3(a), which allegedly preserves "'the duties and liabilities of a Covered Person otherwise existing at law or in equity'" unless the Holdco Agreement restricts those duties and liabilities;[21] Section 12.3(b), which allows a Covered Person to resolve its own conflict of interest without breaching the Holdco Agreement or any other duty absent "'fraud, willful misconduct, bad faith or gross negligence'";[22] and Section 12.2, which exculpates a Covered Person for acts and omissions reasonably believed to be within its powers under the Holdco

[17] Compl. ¶ 73.
[18] Compl. ¶¶ 89-90.
[19] Compl. ¶ 94 (summarizing Holdco Agreement § 6.6).
[20] Compl. ¶ 48 (quoting Holdco Agreement § 10.1). "AM General Business," broadly speaking, refers to business activities by AM General and its Subsidiaries. *See* Holdco Agreement § 1.1.
[21] Compl. ¶ 43 (quoting Holdco Agreement § 12.3). Defendants fall within the definition of "Covered Person." Compl. ¶ 44.
[22] Compl. ¶ 45 (quoting Holdco Agreement § 12.3(b)).

Agreement except for those deemed "'to constitute fraud, willful misconduct, bad faith or gross negligence.'"[23]

Despite the above provisions, Defendants found ways to benefit from GEP's business activities. Through an agreement effective as of the closing date of the Holdco Agreement, MacAndrews AMG[24] caused AM General to charge GEP a royalty amounting to 2.5% of GEP's annual gross sales (and later increasing to 8%).[25] In that same agreement, MacAndrews AMG also raised the annual management fee AM General charges GEP from $240,000 to $1.2 million plus an amount based on GEP's performance.[26] And while the profits and losses of the GEP Business relate to the 6.5L Diesel Engine, MacAndrews AMG included in its calculations costs for research and development related to GEP's other engine models.[27] MacAndrews AMG also reduced the prices at which GEP sells engines to AM General.[28]

Defendants found additional ways to benefit from the business arrangement. For example, AM General made a $70 million loan to M&F affiliate MFNY Corp.

[23] Compl. ¶ 45 (quoting Holdco Agreement § 12.2).
[24] The complaint alleges actions taken by MacAndrews AMG, directed by its controllers M&F and Perelman.
[25] Compl. ¶¶ 51-52.
[26] Compl. ¶ 52.
[27] Compl. ¶¶ 61-63.
[28] Compl. ¶¶ 66-67. As Defendants observe, Plaintiff does not provide dates for this alleged price manipulation. MacAndrews AMG Holdings LLC, MacAndrews & Forbes Holdings Inc., and Ronald O. Perelman's Mem. in Supp. of Their Mot. to Dismiss the Renco Group, Inc.'s Second Am. Compl. ("Defs.' Opening Br.") 27.

and provided a revolving credit facility of $50 million to M&F.[29] Although these loans were eventually repaid,[30] they were unsecured, offered at low rates under the circumstances,[31] and made by AM General to affiliates of MacAndrews AMG when the Holdco Agreement restricted loans from Holdco itself to MacAndrews AMG (and self-interested transactions more generally).[32] Renco attempted to assert its rights to a distribution through a letter dated October 12, 2012, because its Revalued Capital Account exceeded (or would exceed) 80% of the aggregate Revalued Capital Accounts of all Members.[33] Yet on December 28, 2012, Holdco made a distribution to MacAndrews AMG,[34] followed by a tax distribution of approximately $19.2 million on February 28, 2013.[35] Renco sought appraisals pursuant to Sections 4.4 and 15.12 of the Holdco Agreement in connection with these two distributions.[36] The appraisal proceedings are ongoing. Plaintiff

[29] Compl. ¶¶ 86-87.
[30] Compl. ¶ 88.
[31] Specifically, the loan to MFNY Corp. bore a 10% annual interest rate, and the revolving credit facility bore a rate of LIBOR plus 2%. Compl. ¶¶ 86-87.
[32] *See* Compl. ¶¶ 89-96. At the time of the disputed loans, Holdco could not have made any loans to MacAndrews AMG: "the Amount of Cash Available for Distribution that was not distributed to MacAndrews AMG pursuant to Section 9.4(c) was $0." Compl. ¶ 93.
[33] Compl. ¶ 73.
[34] Compl. ¶ 78. At least part of the distribution was made pursuant to this Court's decision in *AM Gen. I*. Plaintiff's answering brief states that the distribution exceeded $53 million. Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss the Second Am. Compl. ("Pl.'s Answering Br.") 14-15.
[35] Compl. ¶ 79. This distribution allegedly included amounts "that had already been distributed" and that were calculated too early.
[36] Compl. ¶¶ 83-84.

suggests that as a result of the above actions and transfers of money to controllers M&F and Perelman, MacAndrews AMG was left "with only an illiquid ownership interest in [Holdco]"[37] and "unable to satisfy its obligations as they came due in the ordinary course of business."[38]

II. CONTENTIONS

Plaintiff advances nine claims arising out of the above activities, which essentially fall into the categories of decreasing Renco's interest in profits from the GEP Business, causing Holdco to make improper distributions (which are then moved out of MacAndrews AMG), causing Holdco and AM General to make improper loans, and frustrating Plaintiff's attempts to gather information regarding these activities.[39] For example, Plaintiff contends that Defendants required GEP to pay royalties and higher management fees without Renco's approval (and in contravention to understandings reached during negotiations),[40] manipulated engine pricing, and charged unrelated research and development expenses to decrease profits from the GEP Business (which would be paid wholly to Renco)

[37] Compl. ¶ 101. Plaintiff alleges that Defendants have "jeopardized the viability of" AM General and Renco's investments. Compl. ¶ 12. For example, "AM General had only $7 million in cash and no borrowing ability under its revolving credit facility" as of November 2013, Compl. ¶ 13, and AM General's credit ratings had been downgraded in 2013. Compl. ¶¶ 15-16.
[38] Compl. ¶ 103.
[39] Plaintiff has alleged that demand would be futile because Defendants could not evaluate the claims in a disinterested manner. Compl. ¶ 104. Defendants have not challenged the failure to make demand.
[40] Compl. ¶ 52.

and increase AM General's profits (which would be split roughly seventy-thirty and affect the balances of the Holdco Members' capital accounts). Plaintiff complains that, through Defendants' actions, MacAndrews AMG breached the Holdco Agreement.[41] Alternatively, Plaintiff argues that MacAndrews AMG breached the covenant of good faith and fair dealing implied in the bargain the Holdco Members struck.

The above actions are also alleged to have breached fiduciary duties, owed by MacAndrews AMG as Holdco's managing member, because language in the Holdco Agreement "preserves default duties."[42] Plaintiff reasons that M&F and Perelman, too, breached fiduciary duties as controllers.[43] Alternatively, Plaintiff argues that M&F and Perelman aided and abetted MacAndrews AMG's breach of fiduciary duties[44] or contractual duties.[45] Plaintiff offers the above actions as evidence of bad faith supporting claims of tortious interference with contractual relations against affiliates M&F and Perelman, the recipients of MacAndrews AMG's distributions.[46] Furthermore, Plaintiff alleges that M&F and Perelman took liquid assets from MacAndrews AMG and rendered it unable to fulfill its obligations to Renco in violation of Delaware's Uniform Fraudulent Transfer

[41] This includes allegations of material breach.
[42] Pl.'s Answering Br. 36-37.
[43] *Id.* at 43-46.
[44] *Id.* at 45-46.
[45] *Id.* at 46-47.
[46] *Id.* at 32-33.

Act.[47] Plaintiff's declaratory judgment claims are founded on the aforementioned allegations and claims.[48]

Defendants have moved to dismiss the breach of contract claims (Claim 1) and declaratory judgment claims (Claim 8) in part and the remaining claims in full.[49] With respect to Claim 1, Defendants argue that Plaintiff's allegations about failure to obtain Renco's approval for management fees and royalties do not state a violation of the Holdco Agreement and that allegations about "manipulating the 'transfer prices' charged by GEP to AM General" are too vague to provide notice.[50] Defendants have not moved to dismiss the remaining breach of contract claims. To support dismissal of many of the other claims, Defendants focus on the Holdco Agreement, arguing that it precludes Plaintiff's implied covenant claims (Claim 2),[51] breach of fiduciary duty claims against MacAndrews AMG (Claim 3), and breach of fiduciary duty claims against M&F and Perelman (Claim 6). Defendants further contend that claims for aiding and abetting a breach of fiduciary duties (Claim 4) fail without an underlying breach; claims for aiding and abetting a breach of contract (Claim 5) do not exist absent specific fiduciary obligations created by contract; claims for tortious interference with contractual

[47] *Id.* at 48-51.
[48] *See id.* at 52.
[49] Nominal Defendant Holdco has joined the arguments made in Defendants' briefs.
[50] Defs.' Opening Br. 26.
[51] Defendants also challenge Plaintiff's pleadings with respect to scienter. *Id.* at 14-15.

relations (Claim 7) fail because Plaintiff has not established the bad faith of affiliates M&F and Perelman; and fraudulent transfer claims (Claim 9) cannot stand without factual allegations of fraudulent intent, inadequate exchange, or insolvency. Defendants have moved to dismiss the claims for declaratory judgment (Claim 8) in parallel with the above claims.

III. ANALYSIS

A. *The Motion to Dismiss Standard*

On a motion to dismiss, the Court takes the well-pleaded factual allegations in the complaint as true, draws reasonable inferences in the light most favorable to the plaintiff, and dismisses a claim only when the plaintiff could not "recover under any reasonably conceivable set of circumstances susceptible of proof."[52] Although an allegation might be "vague or lacking in detail, [it] is nevertheless 'well-pleaded' if it puts the opposing party on notice of the claim being brought against it."[53] Yet a plaintiff cannot rest on conclusory allegations.[54]

[52] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-977 (Del. 2002) (internal quotations marks omitted).
[53] *VLIW Tech.*, 840 A.2d at 611.
[54] *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) ("We do not, however, simply accept conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiff's favor.").

B. *Breach of Contract Claims*[55]

Defendants have moved to dismiss two categories of Plaintiff's breach of contract claims: first, claims relating to management fees and royalties because approval was not required and second, claims relating to transfer pricing because Plaintiff fails to provide adequate detail.[56]

With respect to the management fees and royalties, Defendants contend that Plaintiff does not state a claim because Section 6.2 of the Holdco Agreement "expressly authorizes MacAndrews AMG to manage the business of AM General and its subsidiaries."[57] Plaintiff focuses on Section 6.4, which it reads to require mutual agreement for a transfer of an "asset" from GEP to AM General not in "the Ordinary Course of Business" and for the hiring of and payment to an "affiliate" for management services.[58] "Where the provisions in controversy are reasonably susceptible to different interpretations, ambiguity exists and [d]ismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law."[59] This is because when parties present differing—but reasonable—

[55] It should be remembered that the Holdco Members are part of a complicated business arrangement documented in detailed contracts. In this context, going beyond contract claims risks changing what the parties intended and is an exercise to be undertaken with care.
[56] Defs.' Opening Br. 26. The Court need not address the breach of contract claims not challenged by this motion.
[57] *Id.* at 27.
[58] *See* Pl.'s Answering Br. 19-22.
[59] *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1289 (Del. 2007) (alteration in original) (internal quotation marks omitted).

interpretations of a contract term, the Court turns to extrinsic evidence to understand the parties' agreement.[60] Such an inquiry cannot proceed on a motion to dismiss.

The parties' contentions center around the terms "AM General Major Decision," "asset," "Ordinary Course of Business," and "affiliate." Specifically, Plaintiff argues that the fees and royalties are a transfer of GEP's cash (an asset, generally speaking) not "consistent with the past practices of the designated entity or business" (the Ordinary Course of Business)—AM General Major Decisions that cannot be made unilaterally.[61] Furthermore, Plaintiff reads the Holdco Agreement to require mutual agreement for payment of a management (or similar) fee by GEP to AM General (an affiliate of MacAndrews AMG or M&F as a matter of commonsense interpretation).[62] Defendants submit that Plaintiff's broad interpretation of "asset" is inconsistent with the language in the Holdco Agreement[63] and that the Holdco Agreement intends to exclude AM General from the reference to an "affiliate" of MacAndrews AMG or M&F in Section 6.4(s),

[60] *Id.* at 1291.
[61] Pl.'s Answering Br. 19-21.
[62] *Id.* at 21-22.
[63] MacAndrews AMG Holdings LLC, MacAndrews & Forbes Holdings Inc., and Ronald O. Perelman's Reply Br. in Supp. of Their Mot. to Dismiss the Renco Group, Inc.'s Second Am. Compl. ("Defs.' Reply Br.") 26-30 ("The payment of fees or royalties is not identified in the Holdco Agreement as 'assets,' nor are they the type of dispositions of physical property, capital equipment or business operations that are encompassed by the contractual definition of 'AM General Major Decisions.'").

even if the term is not capitalized.[64] These contentions, none of which is patently unreasonable, reflect ambiguity in the Holdco Agreement.

With respect to transfer pricing, Defendants observe that the pleadings leave out a range of information, such as which provision of the Holdco Agreement was violated, the meaning of "transfer prices," and when the alleged charges occurred.[65] Delaware has adopted a notice pleading system. "On a 12(b)(6) motion, particularity in fact pleading is not required."[66] However, a plaintiff must plead facts sufficient to put a defendant on notice of the wrong of which she is accused. Here, Plaintiff alleges that Defendants caused GEP to lower the prices at which it sells engines to AM General, that it did not approve of this change, and that such a decrease shifts money away from the GEP Business and to AM General (and ultimately to Defendants).[67] These are all facts that Plaintiff reasonably might be able to prove. While the allegations are lacking in a number of details, such as "when or how this was done, or in what amount it was done,"[68] they are not so difficult to comprehend that Defendants lack notice.[69] Thus, the Court denies

[64] *Id.* at 31-32. For the definition of "Affiliate," see *supra* footnote 12.
[65] Defs.' Reply Br. 26-27.
[66] *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).
[67] Plaintiff clarifies in its answering brief its theory that the price manipulation violates provisions related to unilateral transfers of GEP assets not in the Ordinary Course of Business. Pl.'s Answering Br. 23.
[68] Defs.' Reply Br. 33.
[69] Defendants complain that the lack of detail prevents them from asserting affirmative defenses, such as laches. First, Defendants have access to financial records, which puts them on some notice of a time bar. Second, under proper circumstances, a motion to

Defendants' motion to dismiss the breach of contract claims (and related declaratory judgment claims[70]).

C. *Implied Covenant of Good Faith and Fair Dealing Claims*

Plaintiff advances its implied covenant of good faith and fair dealing claims in the alternative. The implied covenant of good faith and fair dealing "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[71] The Court is hesitant to imply terms not contained in an explicit agreement drafted by sophisticated and experienced parties and their counsel. Traditionally, the Court resorts to implied covenant analysis only "when the contract is truly silent with respect to the matter at hand, and . . . when . . . the expectations of the parties were so fundamental that it is clear that they did not feel

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amend pursuant to Court of Chancery Rule 15 might be appropriate where a defense was not raised due to lack of notice. *See, e.g.*, *Utz v. Utz*, 1998 WL 670920, at *1-2 (Del. Ch. Aug. 10, 1998) (granting a motion for leave to amend an answer to a counterclaim after "post-answer investigation of documents . . . and post-answer discovery revealed the applicability of [seven affirmative] defenses").

[70] The motion to dismiss Plaintiff's declaratory judgment claims is resolved, here and throughout the balance of this opinion, with the Court's conclusions on the underlying substantive claims. *See Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *6 (Del. Ch. Nov. 19, 2013) ("Sellers appear to argue that this claim . . . should be dismissed because [plaintiff] has failed to state claims for . . . the alleged wrongs underlying its request . . . . My determination as to whether [plaintiff] has stated a claim for a declaratory judgment, therefore, is dependent upon . . . the viability of these other claims.").

[71] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal quotation marks omitted).

a need to negotiate about them."[72] However, more recent authority teaches that a claim for violation of the implied covenant of good faith and fair dealing can survive if, notwithstanding contractual language on point, the defendant failed to uphold the plaintiff's reasonable expectations under that provision.[73]

Defendants correctly observe that the Holdco Agreement (including Schedule B) explicitly addresses the general topics underlying this dispute. The Holdco Members certainly discussed and memorialized an agreement on issues of management, loans, distributions, profits, and self-interested transactions. Yet the Court must also accept Plaintiff's allegations that it intended to protect its interest in returns from AM General and the GEP Business by negotiating provisions to limit MacAndrews AMG's ability to act unilaterally. While it is not clear whether Plaintiff must plead scienter in this context,[74] allegations that MacAndrews AMG

[72] *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1032-33 (Del. Ch. 2006).
[73] *See Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 422 (Del. 2013) (finding that an implied covenant claim was stated because plaintiff "still retained a reasonable contractual expectation that the [d]efendants would properly follow the [contract's] substitute standards"), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013).
[74] Defendants cite a line of authority suggesting that an implied covenant claim requires a plaintiff to "allege 'an aspect of fraud, deceit or misrepresentation.'" *See Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992-93 (Del. 1998) (citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101-02 (Del. 1992)). *Merrill* involved an at-will employment contract, and the Supreme Court in *Cincinnati SMSA* noted that it "should be no less cautious or exacting when asked to imply contractual [non-compete] obligations from the written text of a limited partnership agreement." *Id.* at 993. However, the Supreme Court did not explicitly extend the requirement of a culpable mental state (as opposed to the principle that courts should not readily find implied agreements), and the Court finds persuasive the reasoning in *ASB Allegiance* (relying on

knew what was bargained for in the Holdco Agreement and took action in contravention at Plaintiff's expense could suffice to show some aspect of wrongful conduct within the contractual relationship. Given the early stage of the proceedings, the complexity of the business arrangement, and the breadth of the factual allegations, the Court cannot foreclose the reasonably conceivable claims that MacAndrews AMG's alleged misconduct went to matters so fundamental that Plaintiff's reasonable expectations were frustrated. Although the Court does not readily find breaches of the implied covenant and any success will be meaningless if the contract claims succeed,[75] Defendants' motion to dismiss the implied covenant claims is denied.[76]

D. *Fiduciary Duty Claims*

Defendants next argue that Plaintiff's fiduciary duty claims should be dismissed as duplicative of its breach of contract claims. Plaintiff opposes this

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the Supreme Court's discussion in *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996)). *See ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 444 (Del. Ch. 2012) ("Proving fraud thus offers one way of establishing a breach of the implied covenant, but not the only way. Proving fraud represents a specific application of the general implied covenant test, *viz.*, what would the parties have agreed to when bargaining initially?"), *rev'd on other grounds*, 68 A.3d 665 (Del. 2013).

[75] Plaintiff acknowledges that it cannot recover multiple times for the same harms, but the Court does not have enough information at this stage to resolve all the claims.

[76] Defendants argue that Plaintiff waived its implied covenant claims regarding loans and transfer prices. Defs.' Reply Br. 4 n.2. Plaintiff has responded to the transfer prices argument. *See* Pl.'s Answering Br. 29-30. Plaintiff's general argument and reference to paragraphs 121 to 130 of its complaint, *id.* at 24, suffice to preserve the claims related to the loans.

reasoning because the Holdco Agreement "preserves defendants' default fiduciary duties"[77] and Defendants' "scheme through various artifices to divert GEP Profits and Losses" (among other actions) went beyond a breach of contractual duties.[78] This Court has reasoned that a managing member owes equitable fiduciary duties by default (unless altered by the LLC agreement).[79] Controllers of managing members can also owe duties. *In re USACafes*, although specifically addressing a situation involving a corporate general partner with control over a partnership's property, instructs that an affiliate has a "duty not to use control over [an LLC's] property to advantage the [affiliate] at the expense of the [LLC]."[80] Nonetheless, Delaware respects "the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations" and does not allow fiduciary duty claims to proceed in parallel with breach of contract claims unless "there is an 'independent basis for the fiduciary duty claims apart from the contractual claims.'"[81] To determine whether there is an independent basis for fiduciary

[77] Pl.'s Answering Br. 37.
[78] *Id.* at 42.
[79] *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 660-61 (Del. Ch. 2012). The Court recognizes that the Holdco Agreement addresses fiduciary duties owed by Covered Persons here.
[80] *See In re USACafes, L.P. Litig.*, 600 A.2d 43, 49 (Del. Ch. 1991).
[81] *Grayson v. Imagination Station, Inc.*, 2010 WL 3221951, at *7 (Del. Ch. Aug. 16, 2010) (quoting *PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *7 (Del. Ch. Feb. 26, 2010)); *see also Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010) (affirming this Court's finding that "the Stock Plan created contract duties that superseded and negated any distinct fiduciary duties arising out of the same conduct that constituted the contractual breach").

claims arising from the same general events, the Court inquires whether the fiduciary duty claims "'depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy.'"[82]

Plaintiff alleges "a pattern of self-dealing, willful misconduct and bad faith," and "a serious and immediate threat of further misappropriation of [Holdco's] funds and of ultra vires acts" warranting MacAndrews AMG's removal as managing member.[83] However, the facts and harms cited in support of the fiduciary duty claims appear to be the same ones that underlie the breach of contract claims: MacAndrews AMG reduced the GEP Business profits and caused loans and distributions hurting Renco (and M&F and Perelman used their control to cause this conduct). Furthermore, these purported violations correspond to contractual provisions that Plaintiff cites extensively in its complaint and briefs, whether the definitions in Section 1.1; the mutual agreement language in Section 6.4; the limitations on distributions in Sections 4.4, 6.6, 8.3, and 9.4; arm's-length requirements for interested transactions in Section 6.2; or the loan restrictions in Section 9.7. As it did in a related action, the Court observes that there is no fiduciary duty to avoid particular transactions restricted by contract or

[82] *AM Gen. II*, 2013 WL 5863010, at *10 (quoting *Schuss v. Penfield P'rs, L.P.*, 2008 WL 2433842, at * 10 (Del. Ch. June 13, 2008)).
[83] Compl. ¶¶ 136-37.

to pay distributions.[84] Nor is there a fiduciary duty to calculate and allocate profits in a specific way.

The claims about a scheme to circumvent the Holdco Agreement raise something of a concern about self-dealing, but they ultimately fail to show a reasonably conceivable breach of fiduciary duties independent from Plaintiff's rights under the Holdco Agreement. The Holdco Agreement explicitly (or implicitly through the covenant of good faith and fair dealing[85]) addresses the parties' rights on matters of loans, profits, and other distributions as a matter of contract. Additionally, Section 12.3(a) clarifies that "[t]he provisions of [the Holdco] Agreement, to the extent they restrict the duties and liabilities of a Covered Person . . . replace such other duties and liabilities [otherwise existing at law or in equity]."[86] Under common law precedent (and a plain reading of Section 12.3(a)), the Holdco Agreement provisions supersede the fiduciary duties that otherwise might apply to the conduct challenged here. The Holdco Members chose to govern their relationship with a complex, negotiated agreement. If Defendants have violated any of Plaintiff's rights, the Holdco Members'

[84] *See AM Gen. II*, 2013 WL 5863010, at *10.
[85] *See Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 833 (Del. Ch. 2006) ("[T]he fiduciary claim that the board breached its duty of loyalty . . . is substantially the same as the implied contract claim . . . . Therefore, if the dispute relates to rights and obligations expressly provided by contract, the fiduciary duty claims would be superfluous.") (internal quotation marks omitted)).
[86] Holdco Agreement § 12.3(a).

agreement[87]—not some general duty of loyalty or care—governs the remedy to which Plaintiff is entitled. Thus, the fiduciary duty claims against MacAndrews AMG as managing member, and M&F and Perelman as controllers, are all dismissed.

In light of the above analysis, the aiding and abetting fiduciary duty claims against M&F and Perelman must be dismissed for lack of an underlying fiduciary breach.[88] The claims of aiding and abetting violations of a contractual fiduciary duty must also be dismissed because this dispute properly involves breaches of various provisions of the Holdco Agreement, not a breach of fiduciary duties created by contract.[89]

E. *Tortious Interference with Contractual Relations Claims*

Defendants contend that Plaintiff has not stated a claim for tortious interference with contractual relations because it has not adequately pled facts to demonstrate that M&F and Perelman were acting with bad faith to overcome the

[87] *See AM Gen. II*, 2013 WL 5863010, at *11 (citing *Nemec*, 991 A.2d at 1129, and rejecting the fiduciary duty claim against Rennert as duplicative of the contract claim against ILR Capital).

[88] *See Moore Bus. Forms, Inc. v. Cordant Hldgs. Corp.*, 1995 WL 662685, at *6 (Del. Ch. Nov. 2, 1995) ("Because no cognizable breach of fiduciary duty is stated, [plaintiff's] claim in Count I that [corporate defendant] Cordant aided and abetted the individual defendants' breach of fiduciary duties must be dismissed as well.").

[89] A plaintiff can state a claim for aiding and abetting a breach of contractual duties when there is an entity agreement "with a contractual standard [of fiduciary duty] that supplants traditional fiduciary duties." *Feeley*, 62 A.3d at 659 (alteration in original) (internal quotation marks omitted). For example, *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.* involved breach of a contractually created duty of entire fairness. 817 A.2d 160, 173 (Del. 2002).

presumption of their shared interests with MacAndrews AMG. To succeed on a claim for tortious interference with contractual relations, one must establish the elements of "(1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."[90] In addition, where, as here, a defendant is affiliated with the party accused of breaching a contract, a plaintiff must "adequately plead that the non-party was not pursuing in good faith the legitimate profit seeking activities of the affiliated enterprises, or was motivated by some malicious or other bad faith purpose to injure the plaintiff."[91] This is because a party to a contract cannot tortiously interfere with its own contractual relations, and affiliates can be understood to share in the contractual interest.[92]

Generally speaking, the standard for finding liability for controllers must "be high or every-day consultation or direction between parent corporations and subsidiaries about contractual implementation would lead parents to be always brought into breach of contract cases."[93] For example, plaintiffs have overcome this affiliate privilege when they "pleaded facts alleging that the tortfeasor had shifted the debtor entity's assets such that the entity was insolvent and could not

[90] *Grunstein v. Silva*, 2009 WL 4698541, at *16 (Del. Ch. Dec. 8, 2009).
[91] *Id.* (footnote and internal quotation marks omitted) (citing, for example, *Shearin v. E.F. Hutton Gp., Inc.*, 652 A.2d 578, 591 (Del. Ch. 1994)).
[92] *See Shearin*, 652 A.2d at 590.
[93] *Allied Capital Corp.*, 910 A.2d at 1039 (discussing *Shearin*, 652 A.2d at 591).

satisfy its obligations to the creditor plaintiff."[94] In one instance, the plaintiff (a commercial landlord) adequately pleaded tortious interference by the parent company (and secured creditor) of a tenant (the plaintiff's contractual counterparty) because the parent caused the tenant to liquidate its assets and "ma[k]e a total of $7,266,393 in payments to [the parent] in the two weeks following the sale of [the tenant's] assets."[95] These payments allegedly exceeded the amounts the tenant traditionally paid the parent company to service its debt.[96]

In the well-pleaded complaint, Plaintiff identifies (1) the Holdco Agreement, (2) of which controllers M&F and Perelman must have known through their ownership interests and structuring of the business arrangement. Plaintiff further alleges (3) intentional and bad faith conduct (detailed above) to violate the agreement, (4) not in pursuit of "the legitimate profit seeking activities of MacAndrews AMG," (5) depriving Renco of benefits to which it is entitled.[97] Nonetheless, the affiliate privilege exception requires the Court to determine whether Plaintiff has alleged *facts* to rebut the presumption that M&F and Perelman were acting with the same legitimate economic interests as MacAndrews AMG.

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[94] *See AM Gen. II*, 2013 WL 5863010, at *13 (reviewing Delaware precedent).
[95] *WP Devon Assocs., L.P. v. Hartstrings, LLC*, 2012 WL 3060513, at *4 (Del. Super. July 26, 2012).
[96] *Id.*
[97] Compl. ¶ 159.

Plaintiff has attempted to rebut the presumption by stating that M&F and Perelman demonstrated the requisite bad faith by (1) "directing the manipulation of" profits from the GEP business, (2) causing improper distributions, (3) and "intentionally rendering MacAndrews AMG effectively judgment-proof to frustrate Renco's ability to collect on a potential judgment against MacAndrews AMG in this litigation."[98] Plaintiff makes allegations that MacAndrews AMG is "at risk of insolvency" and retains "only an illiquid ownership interest in [Holdco], the value of which has been substantially diminished."[99] Unfortunately for Plaintiff, however, these allegations do not offer facts permitting the inference of malice or bad faith in the context of the parties' sophisticated business arrangement (as opposed to supporting a breach of contract by wholly-owned MacAndrews AMG). M&F and Renco's joint venture arrangement contemplated that MacAndrews AMG would pass profits on to affiliates.[100] Additionally, Plaintiff has not pled facts supporting its conclusions that the affiliates have rendered MacAndrews AMG unable to meet its obligations as they come due[101] or that they

[98] Pl.'s Answering Br. 33.
[99] Compl. ¶ 101.
[100] *Cf. AM Gen. II*, 2013 WL 5863010, at *13 ("In light of Delaware's bad faith standard, the Court does not conclude that these acts were in bad faith particularly where such behavior is contemplated by the Ilshar Agreement.").
[101] AM General might be suffering from financial problems, and there is a suggestion that Defendants took "at least $247 million that rightfully belongs to Renco." Pl.'s Answering Br. 2. However, the Court does not have facts (such as facts about MacAndrews AMG's financing ability given the assets it does have) permitting a reasonably conceivable inference of insolvency.

have committed a similarly serious tort. Thus, it is not reasonably conceivable that Plaintiff can overcome the affiliate privilege based on its pleadings. Defendants' motion to dismiss the claims for tortious interference with contractual relations is granted.[102]

F. *Fraudulent Transfer Claims*

In its final claim, Plaintiff alleges that M&F and Perelman, as controllers, caused MacAndrews AMG to pay out "all or practically all of MacAndrews AMG's liquid assets" without a fair exchange of value and with at least constructive knowledge that MacAndrews AMG had no way of fulfilling its obligations to creditors (particularly Renco) in due course.[103] Defendants challenge the factual bases for the allegations regarding scienter, MacAndrews AMG's insolvency, and other elements necessary for Plaintiff to prevail.

To establish a fraudulent transfer claim, a plaintiff must show either "actual intent to hinder, delay or defraud any creditor" or inadequate value received for a transfer, combined with either insufficient assets for business or at least constructive belief that the transferor would incur debts exceeding its ability to repay them as they come due.[104] The analysis of actual intent is informed by a number of factors, such as whether the transfer was to an insider, the transfer was

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[102] It bears mention that similar claims were dismissed in related litigation. *See AM Gen. II*, 2013 WL 5863010, at *13-14.
[103] Compl. ¶¶ 164-69.
[104] 6 *Del. C.* § 1304(a).

concealed, and the debtor was or became insolvent after the transfer.[105] Although this is a notice pleading jurisdiction, Chancery Court Rule 9(b) requires a plaintiff to "plead fraud with particularity."[106] Alternatively, a plaintiff can focus on an inadequate exchange, in which fraudulent intent is presumed.[107] It is not enough to make conclusory allegations mirroring the elements in the fraudulent transfer statute.[108] This Court has deemed conclusory a pleading that "'[the defendant] made th[e] transfer without receiving a reasonably equivalent value in exchange . . . and . . . it believed or reasonably should have believed that . . . the transaction would prevent [it] . . . from paying its debts as they became due.'"[109]

Plaintiff's allegations—for example that Holdco made distributions to MacAndrews AMG (and MacAndrews AMG distributed those funds to controllers M&F and Perelman) after Renco had made a Section 8.3(b) election, invoked a Section 15.12 appraisal procedure, and took other actions to challenge the distributions—permit a reasonable inference that Defendants had knowledge that Renco contested the distributions. However, Plaintiff does not plead particular

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[105] *See* 6 *Del. C.* § 1304(b).
[106] *See e.g.*, *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *12 (Del. Ch. Dec. 23, 2008) (analyzing a claim pursuant to 6 *Del. C.* § 1304); *Dodge v. Wilm. Trust Co.*, 1995 WL 106380, at *6 (Del. Ch. Feb. 3, 1995) (analyzing a claim pursuant to 6 *Del. C.* § 1307).
[107] *See Dodge*, 1995 WL 106380, at *4.
[108] *Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at *13 (Del. Ch. Aug. 28, 2012) ("[S]imply reciting the statutory or common law elements of an offense . . . is insufficient to state a claim upon which relief may be granted.").
[109] *Id.* at *13, *15 (quoting the complaint).

facts of intent to defraud. Defendants are not accused of concealing the fact of their distributions,[110] absconding, or leaving MacAndrews AMG with any less cash than the joint venture had intended. Indeed, the parties and other affiliates remain in their complex joint venture arrangement. Perhaps M&F and Perelman caused distributions knowing that Renco opposed them. Nonetheless, fraudulent conduct differs from violating a contract (even intentionally),[111] and Plaintiff has not pled particular facts to support a claim that M&F or Perelman culpably sought to defraud Renco by putting Renco's money out of reach.

Nor has Plaintiff alleged facts of an inadequate exchange. This case involves a distribution of assets that the parties addressed in the Holdco Agreement. The allegations that MacAndrews AMG was left "unable to pay its obligations as they came due in the ordinary course of business"[112] are also not supported by facts of MacAndrews AMG's insolvency beyond pleadings about the structure of the joint venture, distributions made, and the definition of insolvency. Because of the lack of factual allegations supporting a reasonably conceivable

[110] It is alleged that Defendants have prevented access to additional information, however.

[111] *See Eurofins Panlabs, Inc. v. Ricerca Biosciences, LLC*, 2014 WL 2457515, at *7 (Del. Ch. May 30, 2014) (laying out the elements of a basic fraud claim and a breach of contract claim and proceeding to analyze the allegations under each framework); *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P.*, 2011 WL 549163, at *2 (Del. Ch. Feb. 16, 2011) (stating the elements of an intentional breach of contract claim).

[112] Compl. ¶ 169.

finding of unequal exchange and insolvency (or particular facts suggesting fraud), the Court dismisses Plaintiff's fraudulent transfer claims.

IV. CONCLUSION

For the reasons discussed above, Defendants' motion to dismiss is granted with respect to Claims 3, 4, 5, 6, 7, and 9 in whole; granted with respect to Claim 8 in part; and denied with respect to Claims 1 and 2.

Counsel are requested to confer and to submit an implementing form of order.