IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AM GENERAL HOLDINGS LLC, directly and derivatively on behalf of ILSHAR CAPITAL LLC,	:	
Plaintiff,	:	
v.	:	**C.A. No. 7639-VCN**
THE RENCO GROUP, INC., IRA L. RENNERT, and ILR CAPITAL LLC,	:	
Defendants,	:	
and	:	
ILSHAR CAPITAL LLC,	:	
Nominal Defendant.	:	

MEMORANDUM OPINION

Date Submitted: June 20, 2013
Date Decided: October 31, 2013

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NOBLE, Vice Chancellor

This is yet another opinion[1] in the ongoing conflict between AM General Holdings LLC ("Holdco") and The Renco Group, Inc. ("Renco"). In this action, Holdco is the Plaintiff bringing suit directly and derivatively on behalf of Nominal Defendant Ilshar Capital LLC ("Ilshar" or the "Company"), and the Defendants are Renco, ILR Capital LLC ("ILR Capital"), and Ira L. Rennert ("Rennert") (collectively, the "Renco Parties" or the "Defendants"). Holdco asserts a variety of claims against the Renco Parties, but it has moved for partial summary judgment only on its breach of contract claim alleging that Ilshar engaged in certain transactions prohibited under the Amended and Restated Limited Liability Company Agreement of Ilshar Capital LLC (the "Ilshar Agreement").[2] The Renco Parties have moved to dismiss seven of Holdco's thirteen claims.[3]

[1] For related proceedings between the parties, see *Renco Gp. Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 3369318 (Del. Ch. June 25, 2013); *AM Gen. Hldgs. LLC v. Renco Gp., Inc*., 2013 WL 1668627 (Del. Ch. Apr. 18, 2013); *Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 209124 (Del. Ch. Jan. 18, 2013); *AM Gen. Hldgs. LLC v. Renco Gp., Inc*., 2012 WL 6681994 (Del. Ch. Dec. 21, 2012).

[2] Aff. of Edward P. Taibi in Supp. of Pl.'s Mot. for Partial Summ. J. ("Taibi Aff."), Ex. A.

[3] Defendants move for dismissal of Plaintiff's first claim against ILR Capital and Rennert for breach of fiduciary duty, second claim against Renco for aiding and abetting ILR Capital and Rennert in breaching their fiduciary duties, seventh claim against Renco and Rennert for tortious interference with the Ilshar Agreement, eighth claim against Renco and Rennert for unjust enrichment, ninth claim against Renco for conversion, eleventh claim against ILR Capital and Ilshar for distribution of a preferred return under the Ilshar Agreement, and thirteenth claim against Renco and ILR Capital for indemnification for breach of the Contribution Agreement by and among Renco, ILR Capital, Rennert, the Company and Holdco and its related entities. Defs.' Op. Br. in Supp. of their Mot. to Dismiss at 11 ("OB MTD").

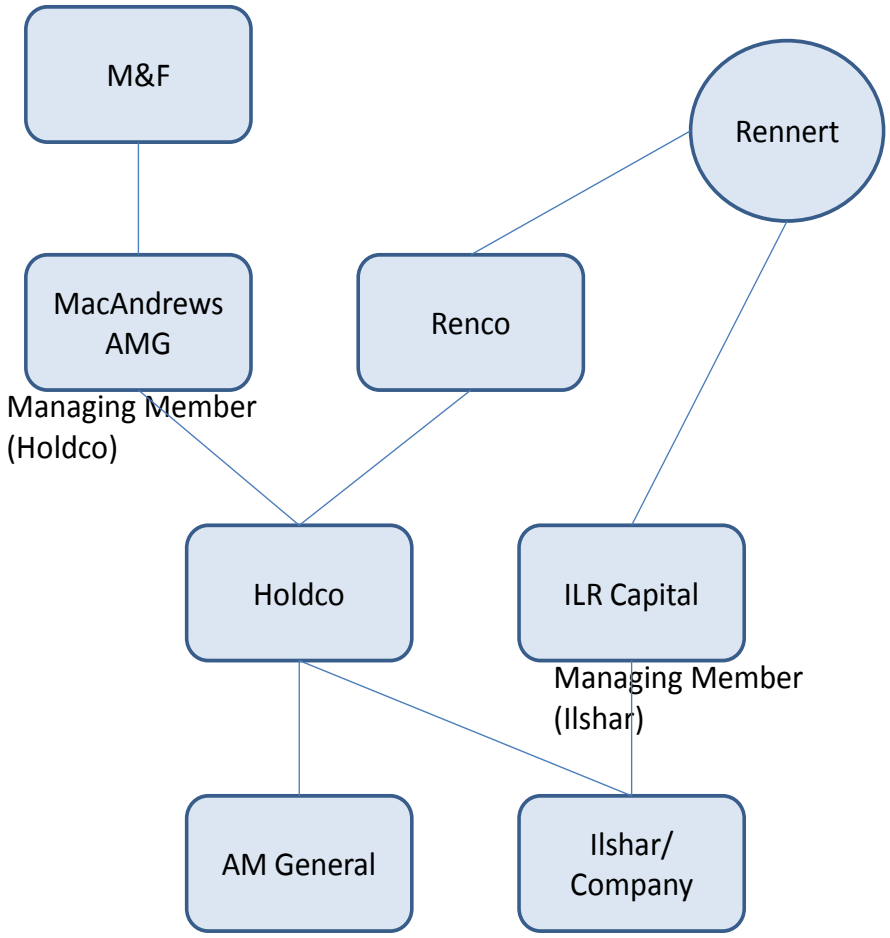
I. BACKGROUND

In 2004, Renco restructured its ownership interest in AM General LLC ("AM General"), which manufactures and sells trucks and related parts, including the military vehicle commonly known as the Humvee. MacAndrews & Forbes Holdings Inc. ("M&F") wished to become a majority-interest holder in AM General and thereafter Renco and M&F entered into negotiations. Upon concluding negotiations, the parties reached an agreement which involved the creation of several entities in order to realize their various goals, including an allocation of ownership and control between M&F and Renco.

The parties formed Holdco as a limited liability company into which they would contribute various assets. Pursuant to the Contribution Agreement by and among Renco, ILR Capital, Rennert, M&F, MacAndrews AMG Holdings LLC ("MacAndrews AMG"), the Company, and Holdco (the "Contribution Agreement"),[4] Renco placed its entire ownership interest in AM General, and M&F paid cash, into Holdco. Holdco has two members, Renco and MacAndrews AMG, a wholly-owned subsidiary of M&F. MacAndrews AMG is Holdco's managing member. Profits and losses of Holdco are generally allocated 70% to MacAndrews AMG and 30% to Renco with certain exceptions.

[4] Taibi Aff., Ex. L.

The parties also created another entity, the Company, which Renco's affiliate, ILR Capital, manages. The Company has two members: Holdco and ILR Capital. Rennert is the sole owner and controller of both ILR Capital and Renco. The parties thus established a structure in which both Renco and M&F held an interest in the entity managed by the other party.



Also pursuant to the 2004 transaction, Holdco was to be paid a preferred return, called the Cumulative Holdco Preferred Return (the "Preferred Holdco Return"), of 8.25% on the capital contribution it made to the Company, compounded annually. The Defendants have calculated this amount to be $324,706,840.[5] The first installment of the preferred return was to have been paid on January 31, 2013.[6] Upon distribution to Holdco, Holdco's operating agreement (the "Holdco Agreement")[7] provides that approximately 80% of the return would be paid to Renco and approximately 20% would be paid to MacAndrews AMG.[8]

The Holdco Agreement permits Renco to elect to receive all of the distributions by Holdco if the Revalued Capital Account—the measure of the parties' relative capital interests in Holdco—of MacAndrews AMG is less than 20% of the aggregate Revalued Capital Accounts of the members of Holdco.[9] On

[5] Prior tax distributions of $18,134,238 were deducted from this amount.
[6] Section 9.1(b) of the Ilshar Agreement provides:

> The Company shall distribute cash to Holdco (i) on January 31, 2013 and on January 31st of each year thereafter an amount equal to the Cumulative Holdco Preferred Return accrued and unpaid through such date less all Tax Distributions to Holdco in respect of taxable income allocated to Holdco as a result of the preferred allocation of Profits pursuant to Section 8.1(a).

Pl.'s Second Verified Am. and Supplemented Compl. ¶ 20 ("Compl.").
[7] Aff. of Edward P. Taibi in Supp. of Pl.'s Mem. of Law in Supp. of Mot. for a Prelim. Inj., Ex. A.
[8] Compl. ¶ 4.
[9] This topic is the subject of another suit before this Court. *Renco Gp. Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 3369318 (Del. Ch. June 25, 2013) ("These specific limitations . . . were agreed upon by the parties to ensure that neither Renco nor Holdco would become exposed to the pension liabilities of the other.").

October 12, 2012, Renco notified MacAndrews AMG that Renco elected to receive the distribution from Holdco and, pursuant to that election allegedly caused the Company, through ILR Capital, to pay the Preferred Holdco Return amount directly to Renco, rather than to Holdco. The Company held back $48,658,515 of that amount (the "MacAndrews Preferred Amount"), which Holdco alleges is the amount MacAndrews AMG is entitled to receive under the Holdco Agreement.

Renco purportedly paid all but $49,033,826 of the approximately $350 million it received back to the Company to satisfy certain loans made by the Company to Renco. Holdco alleges this approximately $49 million was retained in cash by Renco (the "Renco Retained Amount"). Holdco maintains that the loans which Renco satisfied with the Preferred Holdco Return were improper loans made in violation of the Ilshar Agreement and were made on terms that were unfair and disadvantageous to the Company (the "Challenged Loans").[10] Holdco further alleges that ILR Capital caused the Company to guarantee a $70 million loan for a

[10] Holdco alleges that at least seven loans were made to a Rennert affiliate between July 2009 and June 2012. It also alleges partial disclosures made between April 2010 and March 2011 revealed a $40 million loan to Renco in July 2009, a $59 million loan in March 2011, and a $20 million loan in July 2011 (all purportedly unsecured, providing for no payment of interest or principal until the loan's maturity, and at a below-market interest rate). Further disclosure in October 2012 revealed an additional $61.5 million in loans (made in amounts of $20 million, $17 million, $2.5 million, and $22 million–allegedly on the same unfair terms as above). Compl. ¶¶ 26-29.

Renco affiliate (the "Challenged Guarantee") and is now liquidating investments to cover that guarantee.[11]

Holdco claims that its information rights under the Ilshar Agreement have been violated, because the Challenged Loans, the Challenged Guarantee, and the Challenged Investments (as defined in the following paragraph) were not disclosed until October 12, 2012, and because certain rights to quarterly compliance certificates under the Ilshar Agreement (the "Compliance Certificates") have also been violated for a period of five years.[12] Holdco asserts that it made numerous requests for such materials which have been ignored and is therefore entitled to full access to the Company's books and records.

The Ilshar Agreement permits the Company "to make Investments (other than Prohibited Investments), . . . provided, however that any transaction between the Company and Rennert (or any Affiliate thereof) shall be on terms no less

[11] Holdco contends Ilshar initially guaranteed a repayment amount of $50 million in favor of a Renco affiliate in January 2012 and in March 2012 raised the guarantee amount to $70 million. Compl. ¶ 6.

[12] Section 10.1(b) of the Ilshar Agreement requires Ilshar and ILR Capital, as Ilshar's managing member, to certify that:

> (i) the Company and the Managing Member are and have been in full compliance with the provisions of this Agreement during such Fiscal Quarter, including the provisions set forth in Section 6.3 [prohibiting certain actions without the consent of Holdco] and the provisions herein relating to Prohibited Investments, including the provisions set forth in Section 12.8 and Schedule B.

Id. ¶ 37 (alterations in original).

favorable to the Company than those of an arm's-length transaction."[13] The Prohibited Investments are set forth in Schedule B to the Ilshar Agreement and largely concern activities that (i) may make the Company or any of its Affiliates an "operator" of a facility for the purposes of environmental laws, or (ii) may make Holdco or AM General actually or contingently liable to fund an employee pension or defined benefit plan under the Employee Retirement Income Security Act ("ERISA").[14] When the Company eventually delivered its Compliance Certificates, it reported that "the Company and the Managing Member have been in full compliance with the provisions of the Agreement, with the following exceptions" and then listed a series of hedge fund investments that were "possible violation[s]" of the agreement because the Company and Renco "each have or had separate investments" (the "Challenged Investments") in these funds.[15] Holdco alleges that these statements in the Compliance Certificates are proof that the Company has breached the contractual provision requiring it to refrain from making Prohibited Investments.[16]

[13] *Id.* ¶ 22 (emphasis omitted) (citing Section 3.2(a)(iv) of the Ilshar Agreement).
[14] ERISA is codified in part at 29 U.S.C. ch. 18.
[15] Taibi Aff., Exs. B-H.
[16] Holdco further alleges that two of the Prohibited Investments were in hedge funds managed by Ezra Merkin, whose funds were used as "feeder funds" to Bernard Madoff's "Ponzi scheme," and that such funds resulted in large losses for the Company. Compl. ¶ 43.

On January 28, 2013, Renco was sued by the Pension Benefit Guaranty Corporation (the "PBGC") in the United States District Court for the Southern District of New York (the "PBGC Lawsuit"). The Complaint alleges that Renco and an affiliate of Cerberus Capital Management L.P. ("Cerberus") engaged in a transaction in January 2012 to reduce Renco's ownership of its subsidiary RG Steel LLC ("RG Steel"), which was bankrupt and had unfunded pension liabilities of approximately $97 million.[17] The PBGC has the authority not only to recover the unfunded benefit liabilities from the plan sponsor, but also to recover from other entities within the plan sponsor's "controlled group."[18] Renco, as the 80% owner of RG Steel, the plan sponsor, could be jointly and severally liable with RG Steel for the underfunded plan, as could any entity owned 80% or more by Renco or Rennert (thereby potentially making the Company part of the controlled group as well).

The PBGC alleges that it began implementing a plan in January 2012 to terminate RG Steel's pension plans while Renco was still an 80% owner and would have had joint and several liability for the unfunded plans. The PBGC alleges Renco represented to the government that no transaction involving Renco's equity interest in RG Steel was imminent and that it would sign a standstill agreement. The PBGC apparently suspended the termination process based on Renco's

[17] *Id.* ¶ 54.
[18] *See* 29 U.S.C. § 1362.

representations and sent it a standstill agreement, which Renco ultimately would not sign. On January 17, 2012, Renco announced it had closed a deal with Cerberus which reduced Renco's ownership in RG Steel to 75.5%. The PBGC alleges that a principal purpose of the transaction was to dilute Renco's ownership below the ERISA controlled group threshold and thereby avoid responsibility for RG Steel's pension plan liabilities and that the PBGC relied on Renco's false assurances in suspending its termination proceedings.

Holdco claims that the pending PBGC Lawsuit has triggered the indemnification clause of the Contribution Agreement.

II. CONTENTIONS

Although Holdco has asserted many claims against the Renco Parties, it has moved for partial summary judgment only on its fourth claim which alleges that ILR Capital breached its obligations under the Ilshar Agreement by making Prohibited Investments.[19] Holdco contends that the Ilshar Agreement contains no ambiguity and expressly prevents any overlapping investments in any entity in which Renco or its affiliates hold an interest.[20] Holdco argues that ILR Capital admitted to breaches when it delivered its quarterly Compliance Certificates to Holdco[21] and thus Holdco is entitled to remedies directing ILR Capital to cause

[19] Compl. ¶ 72.
[20] Pl.'s Mem. of Law in Supp. of its Mot. for Partial Summ. J. at 5-7 ("OB PSJ").
[21] *Id.* at 7-10.

Ilshar to divest the Challenged Investments, to specifically perform by refraining from making additional Challenged Investments, to provide an immediate accounting of the Challenged Investments, and to indemnify Holdco for losses resulting from the Challenged Investments.[22]

The Renco Parties have also moved to dismiss seven of Holdco's thirteen claims.[23] They argue that Holdco's thirteenth claim for indemnification under the Contribution Agreement should be dismissed because Holdco has not incurred any injury and because the claim is not ripe. They argue that Holdco's first claim for breach of fiduciary duty is based entirely on conduct that arises from activity expressly governed by the Ilshar Agreement and the claim is therefore duplicative of its breach of contract claims and must be dismissed. The Renco Parties argue that Holdco's second claim against Renco for aiding and abetting the breach of fiduciary duty must be dismissed for failure to state a claim of primary liability by way of the fiduciary duty claims. Defendants argue Holdco's seventh claim for tortious interference with contract should be dismissed because Renco and Rennert are not strangers to the Ilshar Agreement and are entitled to the qualified affiliate privilege. The Renco Parties argue Holdco's eighth claim for unjust enrichment is duplicative of Holdco's breach of contract claims and should therefore be dismissed. The Renco Parties argue that Holdco's ninth claim does not state a

[22] *Id.* at 3.
[23] *See supra* note 3.

claim for conversion under Delaware law and its eleventh claim seeking distribution of the Preferred Holdco Return should be dismissed because Ilshar has already made the distribution and thereby rendered such claims for relief moot.[24]

III. ANALYSIS

A. *Holdco's Motion for Partial Summary Judgment*

Holdco has moved for partial summary judgment on its contractual claim that ILR Capital breached the Ilshar Agreement by making Prohibited Investments in violation of Sections 3.2(a)(iv) and 6.3(h) of that agreement.

A motion for summary judgment may be granted under Court of Chancery Rule 56(c) if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[25] The moving party bears the initial burden, and the Court must view the evidence in the light most favorable to the nonmoving party. A fact is material if it "might affect the outcome of the suit under the governing law."[26] A genuine issue of material fact is present "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[27]

Summary judgment is "frequently appropriate" in resolving contract disputes because, "under Delaware law, the interpretation of a contract is a

[24] OB MTD at 11.
[25] Ct. Ch. R. 56(c).
[26] *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009) (quotation omitted).
[27] *Id.*

question of law."[28] Where contract language is unambiguous, "the Court should give binding effect to its ordinary and usual meaning."[29] Nevertheless, material issues of fact regarding the conduct of the contracting parties may still be present, which would prevent the Court from granting partial summary judgment. The Court may look to parol evidence "[o]nly where the contract's language is susceptible of more than one reasonable interpretation . . . ; otherwise, only the language of the contract itself is considered in determining the intentions of the parties."[30]

1. The Meaning of Prohibited Investments

The Court is asked to consider whether the definition of Prohibited Investments in Schedule B of the Ilshar Agreement is susceptible to more than one reasonable interpretation; if so, parol evidence may be introduced to explain further the intent of the parties in drafting the provision. If the Court may not consider any additional evidence of intent from the parties, the Court is asked whether Ilshar engaged in a transaction prohibited by the agreement.

Section 3.2(a)(iv) of the Ilshar Agreement grants Ilshar the power "to make investments (other than Prohibited Investments)."[31] Section 6.3 provides that certain actions may not be taken without first obtaining the mutual agreement of

[28] *Id.* at *5.
[29] *Id.*
[30] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).
[31] Compl. ¶ 22.

the parties and Section 6.3(h) requires such agreement before "the making of any Prohibited Investment."[32] Schedule B defines Prohibited Investments.[33] The Renco Parties vehemently protest that to read Section 2(a)(ii) of Schedule B as a strict prohibition preventing Ilshar from investing in companies in which Renco or Renco affiliates hold an interest renders the paragraph introducing the Restrictions (the "Express Intent Language") surplusage. They insist that Delaware law would prevent such a result.[34]

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[32] Taibi Aff., Ex. A § 6.3(h).

[33] Schedule B, in pertinent part, provides:

> **2. ERISA Restrictions.**
> The parties intend that neither the Company nor Rennert will make or maintain any investment that would, by contract, statute or otherwise, make Holdco or AMG (i) actually or contingently liable for any "employee pension benefit plan" that is subject to Title IV of ERISA or "defined benefit plan" that is subject to section 302 of ERISA or (ii) an ERISA affiliate of any other business, such affiliation to be determined under Code sections 414(b), 414(c), 414(m), 414(n) or 414(o). These restrictions shall be interpreted in accordance with such intention:
>
> **(a) Restrictions.**
>
> (i) Subject to Section 2(e) below, the Company may not acquire or hold an 80% or more Interest in any Entity.
> (ii) The Company may not acquire or hold an Interest in (1) any Entity in which either Renco or any shareholder or affiliate (or equity holder of any affiliate) thereof has an Interest, or (2) any M&F Newco Entity.
> (iii) Rennert may not acquire or hold an Interest in any M&F Newco Entity.
> (iv) The Company shall not sponsor or maintain a Prohibited Pension Plan.

Taibi Aff., Ex. A at Schedule B § 2.

[34] *Maloney-Refaie v. Bridge at Sch., Inc.*, 958 A.2d 871, 884 n.35 (Del. Ch. 2008) (noting that it is an "age-old principle that contracts must not be interpreted so as to render clauses superfluous or meaningless" (quotations omitted)).

The Renco Parties argue that if Section 2(a)(ii) were read as a blanket prohibition, then the intent expressed in the Express Intent Language clause would be violated as the clause would prohibit Ilshar investments that could not possibly result in actual or contingent ERISA-related liability (preventing investment in any Renco affiliate even where no risk of ERISA-related liability would be present). The Renco Parties also argue that the second sentence of the Express Intent Language would be rendered surplusage as would the language preventing investments that "would . . . make Holdco or AMG . . . actually or contingently liable" for ERISA-based liability or make the entities "an ERISA affiliate of any other business" because without some power by Ilshar to exercise investment discretion under Section 2(a)(ii), then such a risk of ERISA liability would be an impossibility.[35] The Renco Parties advance a variety of cases demonstrating how Delaware courts engage in contractual interpretation when confronted with terms that are ambiguous and argue that those cases must be used to resolve this dispute.[36] Finally, the Renco Parties argue that the Ilshar Agreement grants ILR Capital the discretion to determine whether or not a given investment decision

[35] Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Partial Summ. J. at 21 ("AB PSJ").
[36] *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818 (Del. 1992); *Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2010 WL 1838608 (Del. Ch. Apr. 28, 2010); *In re IAC/Interactive Corp.*, 948 A.2d 471 (Del. Ch. 2008).

could incur actual or contingent ERISA liability or make Holdco or AMG an ERISA affiliate of any other business.[37]

The Renco Parties' arguments fall short of overcoming the unambiguous prohibition found in Section 2(a)(ii) of Schedule B (which reads "[t]he Company may not acquire or hold an Interest in (1) any Entity in which either Renco or any shareholder or affiliate (or equity holder of any affiliate) thereof has an Interest . . . ."). This straightforward prohibition is entirely consistent with the Express Intent Language. The fact that the Express Intent Language is not referenced when interpreting an unambiguous Restriction such as Section 2(a)(ii) does not render such language surplusage as the Renco Parties argue. Rather, the Express Intent Language has meaning in that it would be used to guide a court in the task of contractual interpretation when and if a Restriction is found to be ambiguous.[38] Such language simply is not necessary in interpreting Section 2(a)(ii) because Section 2(a)(ii) was unambiguously written. However, the Court's conclusion that the provision is unambiguous does not mean the Express Intent Language is rendered meaningless.

[37] AB PSJ at 33.

[38] The Renco Parties also argue that the Express Intent Language is not a recital and thus certain cases articulating how Delaware law interprets recitals are not relevant. The Court agrees with their conclusion. The Court understands the Express Intent Language to be a statement explaining how to properly construe the contract if ambiguity is present and does not rely on Delaware law explaining the proper method of interpreting recitals in interpreting the contract at issue.

Additionally, the wording in Section 2(a)(i) which refers to additional exceptions in Section 2(e) indicates that the drafters of the Ilshar Agreement knew how to create carve-outs and modify a given Restriction to grant Ilshar discretion in its investment activities, subject to certain specified criteria which would then require divestment.[39] Furthermore, a clear prohibition on certain investments is again consistent with the intent expressed in the Express Intent Language: by entirely prohibiting certain categories of investment, the parties were reflecting their desire to avoid unforeseen ERISA liability. Although in Section 2(a)(i) the parties agreed that Ilshar could exercise discretion in its investment activities, in Section 2(a)(ii), by contrast, the drafters indicated their clear intent to place a blanket prohibition on certain other investment activities to prevent the risks of unintentionally triggering ERISA liability, precisely as set forth in the Express Intent Language. They did this in Section 2(a)(ii) by declining to grant Ilshar the same powers they mutually agreed to in Section 2(a)(i) of Schedule B. For this reason, the Court is not convinced that ILR Capital had discretion to determine

[39] Section 2(e) reads:

> (e) Notwithstanding Section 2(a)(i) above, the Company may acquire an 80% or more Interest, or continue to hold such an Interest, in any Entity if and for so long as (i) such Entity does not maintain, contribute to or establish, and is not liable for, a Prohibited Pension Plan or (ii) in the event such Entity is required to maintain, contribute to or establish, or become liable for a Prohibited Pension Plan, the Company shall reduce its Interest in such Entity below 80% prior to such maintenance, contribution, establishment or becoming liable for such Prohibited Pension Plan.

Taibi Aff., Ex. A at Schedule B § 2.

whether ERISA liability might be incurred by the Company, and instead concludes that the agreement unambiguously denies the Renco Parties the authority they claim to possess.

Finally, the cases to which Defendants direct the Court are inapposite because in each of these cases, the courts were engaged in the task of using tools of contractual interpretation to resolve ambiguity.[40] Here, where the provisions are unambiguous, the Court need not inquire further beyond the ordinary and usual meaning of the Prohibited Investments provision.

Because Section (2)(a)(ii) is unambiguous, the Court need not further consider the parol evidence offered by the parties. The intent to prohibit investments in Renco affiliates is expressed without qualification in Section (2)(a)(ii).

2. Ilshar's Investments

According to Holdco, the Company's reporting of certain exceptions to Prohibited Investments in its Compliance Certificates is an admission by the

[40] *See Citadel Hldg. Corp.*, 603 A.2d at 822-24 ("Because the intent of the parties cannot be gleaned from the language of the [provision at issue], we look elsewhere for that intent." The Court was then willing to consider the recitals and the broader statutory scheme into which the provision fit to resolve the ambiguity.); *Ross Hldg. & Mgmt. Co.*, 2010 WL 1838608, at *8 (where ambiguity was present in contractual language and the Court "rel[ied] upon the surrounding language to interpret its scope"); *In re IAC/Interactive Corp.*, 948 A.2d at 495-96 ("The dispute centers on the uncertain scope of that clause, which makes the application of *ejusdem generis* permissible."). Although *IAC* also states the use of *ejusdem generis* "does not depend on a finding of ambiguity," *ejusdem generis* on these facts would not clarify the already unambiguous language of Section 2(a)(ii) or compel a finding that a statement of intent functions to narrow the clear prohibition set forth in Section 2(a)(ii).

Company that its Challenged Investments were Prohibited Investments in violation of Sections 3.2(a)(iv) and 6.3(h) of the Ilshar Agreement. The Compliance Certificates report that "in possible violation of Section 2(a)(ii) of Schedule B of the Agreement, from time to time and in [a specified number of] cases at the present time, . . . the Company and Renco each have or had separate investments in the following hedge funds."[41] The Compliance Certificates then list the names of certain hedge funds in which the Company and Renco "have or had separate investments." This is the only evidence to which Holdco directs the Court in support of its claim that the Renco Parties violated the Ilshar Agreement. The Renco Parties offered no specific evidence in response.

[41] Taibi Aff., Exs. B-H. The pertinent sections of the Compliance Certificates read:

> (1) Since [the date of the Compliance Certificate], the Company and the Managing Member have been in full compliance with the provisions of [the Ilshar] Agreement, with the following exceptions:
>
> . . .
>
> (v) in a possible violation of Section 2(a)(ii) of Schedule B of the Agreement, from time to time and in [a specified number of] cases at the present time, the Company and Renco each have or had separate investments in the following hedge funds:
> [list of between seven and thirteen hedge funds]
>
> Section 2(a)(ii) of Schedule B provides that the Company may not acquire or hold an Interest in any entity in which Renco or a Renco affiliate has an Interest; Section 2 further provides, however, that these restrictions are to be interpreted in accordance with the intention that investments do not create certain actual or contingent liabilities under ERISA. We do not believe that these investments have any ERISA or pension-related implications.

Id.

However, because the Court must take the evidence in the light most favorable to the nonmoving party, the Court does not conclude that the moving party has borne its burden and that no material factual issue remains with respect to Ilshar's conduct. Although the Renco Parties admitted to "possible violations," that statement is not an unqualified admission that its Challenged Investments violated the Prohibited Investments clause of the Ilshar Agreement.[42] Holdco asks the Court to take a statement that clearly admits its own ambiguity at a time when all presumptions must be drawn in favor of the nonmoving party and to convert such a statement, without any additional evidence, into an unambiguous admission.

The Court recognizes that several statements within the Compliance Certificates create an inference that the Company may have held an interest in an entity in which Renco also held an interest.[43] Nonetheless, because all evidence

[42] The parties did not argue the point, but the Compliance Certificates' statement that the Company and Renco "each have or had separate investments" is not a clear admission that Ilshar invested in an entity in which Renco had an interest at the same moment in time in which Renco held such interest, which would be necessary to violate the language of Section 2(a)(ii). No evidence was presented to the Court to demonstrate that the Challenged Investments were made in an entity at the same time that Renco or a Renco affiliate held an interest in such entity which may have proved definitive on the issue.

[43] Although the Compliance Certificates state among their "exceptions" to full compliance with the Ilshar Agreement that "in [a certain number of] cases at the present time" there could have been non-compliant investments, the ambiguity of the phrase "each have or had" remains and does not dispose of the factual question sufficiently to meet the standard necessary to grant a motion for partial summary judgment. Similarly, the paragraph following the list of hedge funds in which Ilshar had an interest seems to indicate that the Renco Parties are relying on a favorable interpretation of Schedule B of the Ilshar Agreement to defeat claims of having made prohibited investments. However, without additional proof from Holdco of such overlapping investments, such inferences do not resolve all genuine issues of material fact as necessary to allow the Court to grant partial summary judgment.

must be taken in the light most favorable to the Renco Parties, their incomplete admission of "possible violations" does not resolve all genuine issues of material fact. A "possible violation" is not necessarily the same as an admitted violation. Holdco's inability to direct the Court to evidence that a Prohibited Investment was made that is more conclusive than the ambiguous statements by the Renco Parties on which Holdco relies does not persuade the Court that no reasonable fact-finder could find that the Challenged Investments did not violate the Ilshar Agreement. The Court therefore denies Holdco's motion for partial summary judgment.[44]

B. *The Renco Parties' Motion to Dismiss*

The Renco Parties have moved to dismiss seven of the Complaint's thirteen claims. In assessing a Rule 12(b)(6) motion, the Court:

> should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[45]

The reasonable conceivability standard asks whether there is a "possibility" of recovery.[46] However, the Court need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the

[44] Because the Court does not grant summary judgment with respect to the making of Prohibited Investments, the Court need not now resolve the parties' contentions about the proper remedy.
[45] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).
[46] *Id.* at 537 n.13.

non-moving party."[47] Failure to plead facts supporting an element of a claim precludes entitlement to recovery and constitutes grounds to dismiss that claim.[48]

1. The Indemnification Claim

Holdco seeks enforcement of its indemnification rights under the Contribution Agreement "for all losses incurred as a result of the conduct alleged by the PBGC."[49] Defendants contend that such claims are not ripe while the PBGC Lawsuit is pending and that Holdco has failed to state a claim because it has not alleged a breach of the indemnification obligation or damages as a result of such breach.

Delaware law provides that "indemnification claims do not typically ripen until after the merits of an action have been decided,"[50] but also permits parties to

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[47] *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[48] *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000).
[49] Compl. at 32 ¶ 3[sic]. The relevant language of Section 9.2(a) of the Contribution Agreement under which Holdco asserts its indemnification right is as follows:

> Renco shall defend, indemnify and hold harmless M&F and its Affiliates (which for the purposes of this Section 9.2(a) shall include Holdco and AMG and its Subsidiaries) . . . from and against any Losses that are imposed on or incurred by the M&F Indemnified Parties (whether originally asserted against or imposed on any M&F Indemnified Parties or originally suffered or incurred by any M&F Indemnified Party) which result from or arise out of . . . (iv) any actions, omissions or liabilities of, or arising from or in connection with, any business or Person controlled or owned in whole or in part, directly or indirectly, by Rennert or Renco . . . .

Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 26 ("AB MTD").
[50] *Huff v. Longview Energy Co.*, 2013 WL 4084077, at *2 (Del. Ch. Aug. 12, 2013).

contract around this general rule through an indemnity clause.[51] Nonetheless, even where contractual indemnification clauses were present, Delaware courts have dismissed claims without prejudice where a party's "entitle[ment] to indemnification depends on specific facts" and the "underlying facts are currently being litigated [elsewhere]."[52] Additionally, such a breach of a contract claim would require the usual showing of (1) a contractual obligation; (2) breach of that obligation by the defendant; and (3) resulting damage to the plaintiff.[53]

Although Holdco directs the Court to a seemingly broad indemnification provision under the Contribution Agreement, it has not and cannot allege other facts underlying the adjudication in the PBGC Lawsuit to demonstrate a breach and resulting damages. Thus, Holdco's claims that it has suffered losses because its distributions from Ilshar will inevitably be reduced and because it is incurring costs from monitoring the PBGC Lawsuit are unavailing. The Court, should it ultimately hear Holdco's indemnification claims, would rely on the Southern District of New York's determination of liability and other underlying facts in the PBGC Lawsuit in evaluating liability and in awarding damages under the indemnification provision at issue here. The Court therefore dismisses Holdco's

[51] *Quereguan v. New Castle Cnty.*, 2006 WL 2522214, at *5 (Del. Ch. Aug. 18, 2006).
[52] *Breakaway Solutions, Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, at *16 (Del. Ch. Aug. 27, 2004) *amended*, 2005 WL 3488497 (Del. Ch. Dec. 8, 2005); *see also LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 195 (Del. 2009) ("[O]bligation [to honor contractual indemnification provision] did not ripen until a final adjudication of [defendant's] breach . . . .").
[53] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003).

indemnification claim without prejudice until the underlying facts which are being litigated elsewhere are adjudicated.

Should Holdco wish to re-file such a claim once the PBGC Lawsuit is resolved or the Court is directed to more specific harms that it has suffered, then the Court can properly adjudicate the respective liabilities of the parties under the Contribution Agreement. However, until the resolution of the PBGC Lawsuit, Holdco will lack the ability to demonstrate whether any losses were "imposed on or incurred by" it as would be necessary under the indemnification provision.[54]

2. The Breach of Fiduciary Duty Claim and the Aiding and Abetting Claim

Holdco alleges that ILR Capital and Rennert breached the duties of loyalty and care that they owed to Holdco and to the Company when the Company engaged in certain activities such as making the Challenged Loans and the Challenged Guarantee, refusing to distribute the Preferred Holdco Return to Holdco, exposing Holdco to liability under the PBGC Lawsuit, and refusing to honor the information rights under the Ilshar Agreement.[55] Holdco further alleges

[54] Because the Court finds that the claim itself is not ripe, it declines to address Holdco's argument that addressing the indemnification claim in this suit is in the best interests of judicial economy.

[55] The Complaint reads:

> In breach of those duties, Defendants ILR Capital and Rennert engaged in self-dealing transactions, including the making of at least $180.5 million in loans on terms unfair to the Company and for the improper benefit of Defendants, guaranteed debts of a failing affiliate on improper and unfair terms, caused the Company to repudiate its obligations to distribute the Preferred Holdco Return to

that Renco knowingly participated in these breaches of fiduciary duty and aided and abetted such breaches.[56]

"[W]here a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim" and thus "any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."[57] Delaware does recognize a "narrow exception" to this general rule where the breach of fiduciary duty claim "may be maintained independently of the breach of contract claim."[58] Thus, fiduciary duty claims can survive, despite sharing "a common nucleus of operative facts" with the underlying contractual claims, if the fiduciary duty claims "depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy."[59] As articulated in *Schuss*, to maintain both claims, a plaintiff

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> Holdco, caused the Company to retain the MacAndrews Preferred Amount, improperly paid $49 million in cash to Renco, caused the Company to make "Prohibited Investments" that caused losses for the Company and put the Company and Holdco, among others, at risk, caused the Company to be exposed to nearly $100 million in fraud damages and improperly refused Holdco's requests for information about the Company and access to the Company's books and records.

Compl. ¶ 63.

[56] *Id.* ¶ 65.

[57] *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010); *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 832-33 (Del. Ch. Aug. 22, 2006).

[58] *Grunstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) ("Courts will dismiss the breach of fiduciary duty claim where the two claims overlap completely and arise from the same underlying conduct or nucleus of operative facts.").

[59] *Schuss v. Penfield P'rs, L.P.*, 2008 WL 2433842, at *10 (Del. Ch. June 13, 2008).

must properly plead "distinct harms caused by the defendants that fell outside the scope of their contractual relationship."[60]

Here, Holdco has asserted a variety of claims arising out of underlying contractual breaches. That it has failed to allege distinct harms that fall outside of the scope of the parties' contractual relationship precludes it from relying upon *Schuss* to pursue the claims under a fiduciary theory. First, the claims alleged arise out of the obligations contemplated by the contractual agreements that the parties reached:

- Holdco's allegations of self-dealing loans arise out of Section 3.2(a)(iv) of the Ilshar Agreement permitting Ilshar to engage in transactions with Rennert or his affiliates if the transaction is "on terms no less favorable to [Ilshar] than those of an arm's-length transaction."[61]
- Holdco's allegations seeking distribution of the Preferred Holdco Return also arise out of the Ilshar Agreement as indicated by Holdco's third claim for relief, which seeks distribution of the Preferred Holdco Return and the $49 million in cash retained by Renco.[62]

[60] *Grunstein*, 2009 WL 4698541, at *7 (citing *Schuss*, 2008 WL 2433842, at *10).
[61] Compl. ¶¶ 22, 24, 68 (alleging violations of Section 3.2(a)(iv) of the Ilshar Agreement).
[62] *Id.* ¶¶ 4-5, 69-70 (alleging violation of the Ilshar Agreement without specifying the section number).

- Holdco's allegations that fiduciary duties were breached as a result of making "Prohibited Investments" arise from the contractual definition of Prohibited Investments within the Ilshar Agreement.[63]
- Holdco's allegation that Ilshar has been exposed to fraud liability fails to state a claim because the PBGC Lawsuit does not allege that Ilshar committed fraud, and, though Ilshar may have to indemnify Renco as a result of the PBGC Lawsuit, those rights to indemnification arise out of the indemnification provision of the Contribution Agreement.[64]
- Finally, Holdco's allegations that Ilshar refused Holdco's requests for access to books and records also arise from Holdco's rights under Section 10.1 of the Ilshar Agreement which defines the information rights to which the members of Ilshar are entitled.[65]

The factual circumstances underlying these claims arise not from Defendants' fiduciary duties, but from their contractual obligations. No fiduciary duty exists to make distributions, to avoid certain agreed-upon Prohibited Transactions, or to grant information rights between co-members of a limited liability company. Although self-dealing transactions may implicate fiduciary duties, here, the parties agreed that loans, even self-dealing loans, could occur

[63] *Id.* ¶¶ 7, 22-23, 35, 72 (alleging violations of Sections 3.2(a)(iv) and 6.3(h) and Schedule B Section 2(a)(ii) of the Ilshar Agreement).
[64] *Id.* ¶¶ 60, 3 [sic] (alleging violations of Section 9.2(a) of the Contribution Agreement).
[65] *Id.* ¶¶ 46-47, 52, 74 (alleging violations of Section 10.1 of the Ilshar Agreement).

under the Ilshar Agreement and thus modified whatever fiduciary duties may otherwise be present in such a context. Holdco can properly litigate over whether the modified duty the parties agreed to has been violated, but cannot impose additional duties on Defendants when the parties agreed to specific terms and rights surrounding the making of loans.

Holdco particularly emphasizes that its claims relating to the PBGC Lawsuit do not involve a contractual claim and that in this context its fiduciary duty claims are different and broader. Holdco argues that because Renco purportedly made deliberate misrepresentations to the PBGC which have resulted in the possibility of a judgment, ILR Capital, Renco, and Rennert breached their fiduciary duties to the Company in a manner that is not duplicative of Holdco's breach of contract claims. Holdco argues that *Brincat*, in which the Supreme Court held that "[d]issemination of false information could violate [fiduciary] duties,"[66] enables Holdco to state a fiduciary duty claim because Renco made deliberate misrepresentations to the PBGC and thus potentially exposed the Company to liability.

The Court is not persuaded by Holdco's arguments that unique fiduciary duties are owed to the Company in this context. Any liability to which the Company may be exposed is a result of the 2004 transaction in which the Company became a member of Renco's ERISA controlled group and thus the

[66] *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998).

indemnification provisions under those contracts provide Holdco with its proper remedy (a conclusion supported by Holdco's allegation seeking indemnification under those very contractual provisions).[67] Citing *Brincat* does not change this result. Although the fiduciary duties of directors who disseminated false information to shareholders were considered in *Brincat*, the factual circumstances are quite different from those presented here, where allegedly false statements were made to a governmental agency and the joint and several liability to which the Company may be exposed was a function of knowingly joining Renco's controlled group. Holdco's claim and proper remedies arise from its contractual relationship. It has not alleged any distinct fiduciary duties owed to it in this circumstance.

Holdco also argues that because its breach of contract claim is asserted only against ILR Capital and is not asserted against Rennert that the breach of fiduciary duty claim cannot be duplicative. This sort of argument was rejected in *Nemec*, where the Supreme Court declined to allow fiduciary duty claims against the directors of a company in a dispute related to the exercise of a contractual right between the company and the plaintiffs. The defendant directors were not signatories to the contract and the dispute arose from the contract; thus, the Supreme Court determined that "[a]ny separate fiduciary duty claims that might

[67] *See supra* note 64.

arise out of the Company's exercise of its contract right . . . were foreclosed."[68] For the same reasons, this Court rejects Holdco's fiduciary duty claims based upon this theory.

Second, although Holdco argues that it seeks remedies sounding in equity for its breach of fiduciary duty claims and aiding and abetting claim, it has failed to allege distinct harms properly which could entitle it to substantially broader relief. A party does not satisfy the *Schuss* standard simply by praying for broader relief than the contract permits.[69] Thus, the breach of fiduciary duty claims must be dismissed as duplicative of contractual claims alleged against ILR Capital.

In the absence of any properly pleaded fiduciary duty claims, Holdco's claim alleging Renco aided and abetted such breaches must be dismissed as well.

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[68] *Nemec*, 991 A.2d at 1129 ("[T]he nature and scope of the Directors' duties when causing the Company to exercise its right to redeem shares covered by the Stock Plan were intended to be defined solely by reference to that contract."). Where, as here, relief can be provided under the contractual provisions as contemplated (*i.e.*, where Defendants are not bankrupt and can be located and more serious misdeeds have not been alleged), Holdco has not pleaded an adequate reason to provide additional fiduciary duty remedies beyond those to which the parties agreed. *Schuss* properly provides plaintiffs the opportunity to allege distinct harms when and if facts are present that may implicate the fiduciary duties of managers who could not be sued through breach of contract claims.

[69] *Grayson v. Imagination Station, Inc.*, 2010 WL 3221951, at *9 (Del. Ch. Aug. 16, 2010) (where "the sole remedy" was identified within the contract, plaintiff's prayer for additional remedies was "insufficient to transform a breach of contract claim into a breach of fiduciary duty claim").

3. The Tortious Interference Claim

Holdco asserts that Renco and Rennert tortiously interfered with the Ilshar Agreement and the contractual obligations of ILR Capital.[70] Defendants move to dismiss because "neither Rennert nor Renco are strangers to the Ilshar Agreement" or "to the business relationship underpinning the Ilshar Agreement" and because Holdco has failed to allege a breach of the Ilshar Agreement in connection with the PBGC Lawsuit.[71]

To establish a claim for tortious interference under Delaware law, a plaintiff must show that there was: "(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."[72]

Delaware law, under the so-called affiliate exception, also requires that the defendant "be a stranger to both the contract and the business relationship giving

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[70] Compl. ¶ 78. Specifically, Holdco alleges tortious interference occurred when Renco and Rennert:

> [E]ngaged in a scheme to cause the Company to make loans to Renco, make Renco and Rennert the beneficiaries of at least $180.5 million of improper loans from the Company, make the improper $70 million guarantee and conceal its existence, improperly retain the Preferred Holdco Return that is due and owing to Holdco, cause the Company to retain the MacAndrews Preferred Amount, cause the Company to improperly pay $49 million in cash to Renco, cause the Company to be exposed to nearly $100 million in fraud damages and prevent Holdco from receiving the information necessary to uncover these improper activities.

Id.

[71] OB MTD at 22.

[72] *Grunstein*, 2009 WL 4698541, at *16 (citing Restatement (Second) of Torts § 766 (1979)).

rise to and underpinning the contract."[73] The affiliate exception recognizes that "where an entity under the control of a contracting party is used by that party as an instrument to breach the contract, it is improper to accord it separate status as a tortfeasor."[74] However, because the affiliate exception is based upon the shared economic interests of affiliated entities, a plaintiff may allege facts to demonstrate that an interference by an affiliated entity was "motivated by some malicious or other bad faith purpose" and by making such a showing could thereby overcome the limited privilege granted by the affiliate exception.[75] Such an allegation must meet a "stringent bad faith standard"[76] and state that the "interfering party was not pursuing in good faith the legitimate profit seeking activities of the affiliated enterprises."[77]

Holdco asserts that Renco may not benefit from the affiliate privilege because it was not a signatory to the Ilshar Agreement and is a stranger to the transaction.[78] However, the alleged interfering party, Renco, is an entity under the control of Rennert, a contracting party to the Ilshar Agreement. Furthermore, Renco and ILR Capital are affiliated through joint ownership by a common parent and thus share "the commonality of economic interests which underlay the creation

[73] *Tenneco Auto. Inc. v. El Paso Corp.*, 2007 WL 92621, at *5 (Del. Ch. Jan. 8, 2007).
[74] *Grunstein*, 2009 WL 4698541, at *16.
[75] *Shearin v. E.F. Hutton Gp., Inc.*, 652 A.2d 578, 591 (Del. Ch. 1994).
[76] *Allied Capital Corp. v. GC-Sun Hldgs., LP*, 910 A.2d 1020, 1039 (Del. Ch. Nov. 22, 2006).
[77] *Shearin*, 652 A.2d at 591 (quotations omitted).
[78] AB MTD at 22 ("Renco is not a party to the Ilshar Agreement, is independent of Ilshar and ILR Capital, and has no direct ownership in ILR Capital.").

of an interference privilege."[79] Additionally, Renco and M&F were the parties which initiated the 2004 transaction in order to share an interest in AM General. The entire complex structure of the Company, Holdco, MacAndrews AMG, AM General, ILR Capital and Renco flowed directly from the Contribution Agreement and those initial negotiations.[80]

Renco can hardly be described as an outsider to the business relationship when it was one of the two parties responsible for the transaction and resulting organizational structure. Holdco's characterization of Renco as a mere creditor as in *WaveDivision Holdings*[81] is therefore not compelling. On these facts, both Renco and Rennert are entitled to the limited affiliate privilege because of the commonality of economic interest and common control that they share, and also because they were both parties to the 2004 transaction responsible for the agreements giving rise to the allegations in the present dispute and thus are not strangers to the transaction. Because Renco and Rennert qualify for the limited

[79] *Shearin*, 652 A.2d at 590 n.14 ("[T]he relationship among wholly owned affiliates with a common parent is no different, insofar as is relevant here, than that between a parent and a subsidiary.").

[80] Holdco concedes these facts in its Complaint. "The 2004 Transactions were realized through a complex structure designed to achieve the parties' various goals, including an agreeable allocation of ownership and control between [M&F] and Renco. The structure used three Delaware limited liabilities companies . . . ." Compl. ¶ 19. The Complaint then goes on to describe the creation of Holdco and the Company and the ownership allocations discussed above.

[81] *WaveDivision Hldgs., LLC v. Highland Capital Mgmt. L.P.*, 2010 WL 1267126, at *8 (Del. Super. Mar. 31, 2010) (where the Superior Court declined to extend affiliate status to creditors alleged to have tortiously interfered with a contract).

affiliate privilege, the Court must next evaluate whether Holdco alleged acts of bad faith sufficient to overcome the privilege.

Holdco asserts that even if Renco and Rennert are affiliates of the Company, they improperly interfered with the Ilshar Agreement by engaging in a variety of transactions in bad faith.[82] Holdco alleges that Renco and Rennert improperly caused Ilshar to loan over $180.5 million to Renco, to guarantee repayment of a $70 million loan for a Renco affiliate, and to distribute the Preferred Holdco Return to Renco rather than to Holdco.[83]

However, the Ilshar Agreement expressly permits Ilshar to make loans and guarantees and even contemplates transactions between the Company and Rennert and his affiliates.[84] Holdco argues that the Renco Parties "us[ed] the Company as a convenient drive-thru teller to which they pull up and ask themselves for as much money as they like,"[85] "hatched a scheme to extract almost $50 million from the Company,"[86] and that the terms of the Challenged Loan and Challenged Guarantee

[82] AB MTD at 20-21 ("[T]he Renco Parties acted in bad faith, purposefully engaging in self-dealing and misappropriation, violating corporate rules, and then concealing these acts from Holdco.").
[83] *Id.* at 21.
[84] Section 3.2(a)(iv) provides that Ilshar has the power "to make Investments" as defined as "any . . . loan . . . or other extension of credit (including by means of any guarantee or similar arrangement)." Section 3.2(a)(iv) permits Ilshar to engage in transactions with Rennert or his affiliates as long as those transactions are on arm's-length terms. Defs.' Reply Br. in Further Supp. of their Mot. to Dismiss at 22 n.11.
[85] Compl. ¶ 34.
[86] *Id.* ¶ 30.

were unfair to the Company.[87] Holdco alleges that the $180.5 million in improper loans represents "at least nearly 30% of the Company's assets."[88]

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. In those cases where Delaware courts found that an alleged tortfeasor acted in bad faith after it was found to qualify for the limited affiliate exception, plaintiffs pleaded facts alleging that the tortfeasor had shifted the debtor entity's assets such that the entity was insolvent and could not satisfy its obligations to the creditor plaintiff.[89]

Holdco has failed to plead facts with respect to the Challenged Loans, the Challenged Guarantee, or the Preferred Holdco Return that meet the bad faith standard. Although Holdco has used colorful language to describe the alleged breaches of the Ilshar Agreement, Holdco has not alleged facts demonstrating that

[87] Holdco alleges the loans were unsecured, provided for no payment of either interest or principal until the loan matures, and were not made on arm's-length terms. Compl. ¶ 27. Holdco alleges that the guarantee is improper on its face, was not made on arm's-length terms, and that the Company is being forced to liquidate assets as a result of the obligation. Compl. ¶ 6.
[88] Compl. ¶ 34.
[89] *See WP Devon Assocs. v. Hartstrings, LLC*, 2012 WL 3060513, at *1 (Del. Super. July 26, 2012) (where alleged tortfeasor purportedly liquidated investments such that there were no assets with which to satisfy lease payments owed to creditor plaintiff); *Allied Capital Corp.*, 910 A.2d at 1024 (where alleged tortfeasor purportedly embarked on a scheme that resulted in the insolvency of the debtor and creditor plaintiff sued). Allegations of insolvency or inability to locate assets are not the only manner of successfully pleading bad faith; however a plaintiff must allege behavior beyond a failure to comply with the terms of a contract to seek remedies beyond those contemplated by the contractual terms governing its breach. An escalated showing of bad faith is particularly necessary when the entities are so closely intertwined, as they are here, where despite the somewhat complicated organizational structure, the real dispute is between Rennert and M&F and its controller.

Defendants were motivated by some malicious or bad faith purpose. There have been no allegations of egregious conduct necessary to sustain a bad faith claim that can overcome the affiliate privilege that Renco and Rennert qualify for, given their close relationships to the Company.

The Challenged Loans in this dispute, which allegedly are worth approximately 30% of the Company's assets, do not subject the Company to the same serious financial risk as alleged in *WP Devon* and *Allied Capital*.[90] Even when the total amounts due under the Challenged Loans, the Challenged Guarantee, and the Preferred Holdco Return are considered cumulatively, the potential liability would total approximately 50% of the Company's total assets, assuming the accuracy of the allegation that $180.5 million is 30% of the enterprise value of the Company. Although no bright-line rule exists for evaluating bad faith in this context, Holdco's various allegations do not individually or cumulatively rise to the risk of insolvency akin to *WP Devon* and *Allied Capital* and allege no other serious misdeed which might sustain its bad faith claim. Holdco's validly stated objections concern whether the terms the Ilshar Agreement have been violated; any improprieties that occurred can be

[90] The Court further notes that Holdco has stated that Renco has paid back the debts it owed to the Company which weakens claims of bad faith that Holdco might have if Defendants had shifted assets away from creditors in bad faith. *Id.* ¶ 34 ("Renco apparently used most [of the Preferred Holdco Return] to pay back loans that Defendants had improperly caused the Company to make to Renco . . . .").

remedied by the Company and other signatories to the agreement and on such terms as the agreement prescribes as the case proceeds.

In addition, Holdco alleges Renco tortiously interfered with its "right to receive distributions under the Ilshar Agreement by exposing Ilshar to potential liability in the PBGC Lawsuit."[91] However, Holdco has conceded that the PBGC is not pursuing Ilshar on a claim of fraud.[92] Thus, the only potential PBGC liability to which the Company could be exposed of which the Court is aware as a result of the PBGC Lawsuit is the risk to which the Company became exposed by consummating the 2004 transaction and becoming a part of Renco's controlled group. Becoming party to a lawsuit is not inherently the result of an act of bad faith by Renco. Thus, Holdco has not alleged facts demonstrating malicious motive or bad faith necessary to sustain Holdco's bad faith claim.

Finally, Holdco alleges that Renco and Rennert prevented "Holdco from receiving the information necessary to uncover these improper activities."[93] However, Holdco's pleadings on this claim are quite general and do not allege facts demonstrating bad faith committed by Renco and Rennert capable of overcoming the limited affiliate privilege. Although Holdco explains in its

[91] AB MTD at 21.
[92] *Id.* at 11 n.2. Holdco, in its answering brief, states that "Holdco does not base its tortious interference claim on the facts relating to the PBGC Lawsuit," but then ends the paragraph and does not explain upon what grounds Holdco is basing its tortious interference claim based upon the PBGC Lawsuit. *Id.* at 22.
[93] Compl. ¶ 78.

Complaint that the Compliance Certificates were not provided for a period of five years, it has not pleaded specific facts akin to those found in *WP Devon* or *Allied Capital* which could support its allegations of bad faith and overcome the qualified affiliate privilege.[94] Therefore, the claims for tortious interference by Renco and Rennert for exposing Ilshar to the PBGC Lawsuit and for preventing Holdco from receiving information are dismissed.

4. The Unjust Enrichment Claim

Holdco alleges that Renco and Rennert have been unjustly enriched by the loans of $180.5 million, the $49 million cash payment to Renco, and the $70 million guarantee for the Renco affiliate. The Renco Parties argue that because each of these violations is a violation of the Ilshar Agreement, Holdco's remedy is limited to the terms of the agreement and cannot sound in unjust enrichment. Holdco argues that because Renco was not a party to the Ilshar Agreement, unjust enrichment is a proper cause of action and argues as well that the unjust enrichment claim is simply a measure of the damages resulting from the tortious interference claim.[95]

[94] Compl. ¶¶ 44-52. Furthermore, Holdco declined to advance an argument concerning Renco and Rennert's failure to provide information in its answering brief. AB MTD at 18-22.
[95] AB MTD at 23; Tr. of Oral Arg. at 64 ("The unjust enrichment claim . . . is there principally as a source of remedy for the other violations.").

If unjust enrichment[96] arises from a relationship governed by contract, then that contract "alone must provide the measure of the plaintiff's rights."[97] Furthermore, the contractual remedies remain the sole remedies even if the claim of unjust enrichment is alleged against a party who is not a party to the contract.[98] Although Delaware law has recognized unjust enrichment as a measure for damages resulting from tortious interference with a contract,[99] such a measure of damages does not controvert the general principle that the contract provides the measure of a plaintiff's rights if a breach of contract occurs.

Holdco has alleged that Renco and Rennert have unjustly enriched themselves by making the Challenged Loans and the Challenged Guarantee, and by paying the Renco Retained Amount.[100] The conduct at issue in the unjust enrichment claim is the same as that alleged in Holdco's third claim that ILR

[96] "Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Nemec*, 991 A.2d at 1130 (internal quotations omitted).

[97] *Id.* at 1131 (quoting *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009)).

[98] "[U]njust enrichment cannot be used to circumvent basic contract principles [recognizing] that a person not a party to [a] contract cannot be held liable to it." *Kuroda v. SPJS Hldgs., LLC*, 971 A.2d 827, 891 (Del. Ch. 2009) (alterations in original) (citation omitted) (granting motion to dismiss unjust enrichment claim against individuals not party to the contract).

[99] *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *27 (Del. Ch. Jan. 29, 2010). The opinion only considers unjust enrichment as a measure of damages; the opinion does not consider any unjust enrichment cause of action and such a count is not among the plaintiff's claims. *Id.* at *8.

[100] Compl. ¶¶ 80-82.

Capital materially breached its obligations under the Ilshar Agreement by making the Challenged Loans, making the Challenged Guarantee, and paying the Renco Retained Amount.[101] Therefore, because the conduct at issue arises from the contract, Holdco's remedy is limited to the remedies agreed to in the contract and it cannot avail itself of unjust enrichment as a cause of action. It is also irrelevant that Renco is not a signatory to the Ilshar Agreement because the alleged unjust enrichment arises from a relationship governed by contract and thus the contract alone provides Holdco its sole remedy. Holdco could not recover under any reasonably conceivable set of circumstances on its unjust enrichment claim, and the Court therefore grants the Renco Parties' motion to dismiss this claim.[102]

5. The Conversion Claim

Holdco alleges that Renco has converted or caused Ilshar to convert the Preferred Holdco Return distribution.[103] The Renco Parties argue in their motion to dismiss that Delaware law does not recognize a cause of action for conversion of money and that even if such a cause of action existed, the claim would be mooted by the Court's previous ruling on a preliminary injunction motion to pay the Preferred Holdco Return to Holdco.[104]

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[101] *Id.* ¶¶ 68-70.
[102] Such a dismissal would not have limited Holdco's possible recovery through a measure of unjust enrichment if its claims for tortious interference had survived.
[103] Compl. ¶¶ 84-85; *see also AM Gen. Hldgs. LLC v. Renco Gp., Inc.*, 2012 WL 6681994, at *1-2 (Del. Ch. Dec. 21, 2012).
[104] OB MTD at 25-27.

Under Delaware law, an "action in conversion will not lie to enforce a claim for the payment of money."[105] Several cases[106] recognize that other jurisdictions may recognize a limited exception where there is an "obligation to return the identical money delivered by the plaintiff to the defendant."[107] However, in none of these cases did the Court hold that such a limited exception existed in Delaware. Even if the limited exception were applicable in Delaware, the claim for conversion would succeed "only when it can be described or identified as a specific chattel, but not where an indebtedness may be discharged by the payment of money generally."[108]

Although Holdco alleges that the Preferred Holdco Return distribution is a specifically identified chattel, it has not explained why such distribution cannot be discharged by the payment of money generally. This argument fails to allege anything beyond the allegations of "specific" or "segregated funds" that were rejected in *Kuroda* and therefore is dismissed here for the same reason.[109]

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[105] *Xu Hong Bin v. Heckmann Corp.*, 2009 WL 3440004, at *13 (Del. Ch. Oct. 26, 2009).
[106] *Id.* at *13 ("While some jurisdictions recognize a narrow exception to this general rule . . . that is not this case."); *Kuroda*, 971 A.2d at 890 ("Although other jurisdictions have recognized a narrow exception to this general rule, plaintiff points to no Delaware cases that recognize an exception that would encompass plaintiff's claim."); *Goodrich v. E.F. Hutton Gp., Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988).
[107] *Kuroda*, 971 A.2d at 890 (citing *Goodrich*, 542 A.2d at 1203).
[108] *Id.* (citing *Goodrich*, 542 A.2d at 1203).
[109] *Id.* ("Although Kuroda argues that he seeks 'specific' or 'segregated' funds . . . what plaintiff is seeking is still satisfaction of a contractual obligation that could be satisfied 'by the payment of money generally.' Accordingly, the conversion claim must be dismissed." (citing *Goodrich*, 542 A.2d at 1203)). Because the claim may be dismissed on other grounds, there is no need to

6. The Distribution Claim

Holdco alleges that it is entitled to the Preferred Holdco Return as a creditor of the Company.[110] The Renco Parties argue that the distribution claim is moot because of the entry by this Court of a preliminary injunction against Defendants in December of 2012.[111]

A claim should be dismissed under the doctrine of mootness "if the substance of the dispute disappears due to the occurrence of certain events following the filing of an action."[112] Certain actions, such as settlements, commonly moot disputes.[113] However, a preliminary injunction does not typically moot an underlying claim.

The Renco Parties argue this point half-heartedly as they fail to advance any cases supporting their assertion that the entry of a preliminary injunction moots the underlying claim. Their inability to direct the Court to such a case likely stems from the novelty of their argument. Preliminary injunctive relief precedes the disposition of the underlying claims and is based, in part, on grounds separate from the merits of the underlying claim: namely, the risk that irreparable harm may

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consider the Renco Parties' argument that the claim is mooted by the preliminary injunction previously granted by this Court.

[110] Compl. ¶¶ 90-91.

[111] OB MTD at 26-27.

[112] *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 435 (Del. Ch. 2007).

[113] *Crescent/Mach I P'rs, L.P. v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 209 (Del. 2008) ("With limited exceptions [s]ettlement of a dispute between the parties . . . render[s] the case moot, making any remaining disagreements nonjusticiable." (alterations in original) (internal quotations omitted)).

befall one of the parties without the preliminary injunction. On the present facts, the alleged injury was not permanently remedied by the Court's preliminary injunction.[114] The motion to dismiss the claim for distribution on mootness grounds must be denied because Holdco's relief is not yet permanent. Certainly, its claim for distribution was not extinguished by the earlier grant of a preliminary injunction.

IV. CONCLUSION

As set forth above, the Court denies Holdco's motion for partial summary judgment on its claim that ILR Capital breached the Ilshar Agreement by making Prohibited Investments because Holdco has not met its burden of establishing that no material issue of fact remains. The Court grants the Renco Parties' motion to dismiss Holdco's indemnification claim, breach of fiduciary duty claims and aiding and abetting claim, tortious interference claims, unjust enrichment claim, and conversion claim. Holdco's distribution claim may proceed.

An implementing order will be entered.

[114] *AM Gen. Hldgs. LLC v. Renco Gp., Inc.*, 2012 WL 6681994 (Del. Ch. Dec. 21, 2012).