moving party.[34] The Court "accords the party opposing a [Rule] 12(c) motion the same benefits as a party defending" a motion to dismiss under Rule 12(b)(6).[35] Accordingly, this Court will grant a motion for judgment on the pleadings only if, after drawing all reasonable inferences in favor of the non-moving party, there is no material fact in dispute and the moving party is entitled to judgment as a matter of law.[36]

A. Baldwin must repay the amounts advanced to him but is not required to repay previous indemnification payments.

10. Baldwin must repay the $541,664.99 that New Wood advanced to him, as expressly required by the LLC Agreement and his written promise to repay. "In interpreting contract language, clear and unambiguous terms are interpreted according to their ordinary and usual meaning."[37] The parties agreed in Section 8.2 of the LLC Agreement that Baldwin would not be entitled to indemnification unless

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[34] *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993); *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *6 (Del. Super. Ct. Feb. 2, 2021) (citing *Indian Harbor Ins. Co. v. SharkNinja Operating LLC*, 2020 WL 6795965, at *2 (Del. Super. Ct. Nov. 19, 2020)).

[35] *Catlin Specialty Ins. Co. v. CBL & Assocs. Props., Inc.*, 2017 WL 4784432, at *6 (Del. Super. Sept. 20, 2017) (citing *Desert Equities*, 624 A.2d ay 1205); *see SharkNinja*, 2020 WL 6795965, at *2 ("[T]he standard for motion for judgment on the pleadings is almost identical to the standard for a motion to dismiss under Rule 12(b)(6)." (internal quotation marks omitted)); *see also Incyte Corp. v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *1-2 (Del. Super. Nov. 1, 2017) (importing the same liberal construction into review of motion for "partial" judgment on the pleadings).

[36] *V&M Areospace LLC v. V&M Co.*, 2019 WL 3238920, at *3 (Del. Super. July 18, 2019) (citations omitted).

[37] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006); *Rhone–Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992); *accord Allied Capital Corp. v. GC–Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

a majority of New Woods' unitholders determined that, "with respect to the matter for which such Person seeks indemnification, such Person acted in good faith and in a manner that he or she reasonably believed to be in or not opposed to the best interests of the Company."[38] Further, under Section 8.3 of the LLC Agreement, Baldwin signed a written undertaking promising to repay all amounts advanced to him if it ultimately was determined that he was not entitled to indemnification.

11. Section 8.2's good faith prerequisite to managers' indemnification rights may be unusual, but Baldwin has not cited any authority suggesting it is unenforceable. To the contrary, Delaware's Limited Liability Company Act gives maximum effect to the principles of freedom of contract and contractual enforceability.[39] In fact, one of the advantages to selecting a limited liability company as a form of entity is the parties' freedom to shape their relationship through contract.[40] Baldwin does not dispute that he signed the written undertaking to repay or that a majority of New Woods' unitholders ultimately made a determination that he was not entitled to indemnification in the Delaware Plenary Action. Neither party disputes that Section 8.2's language is clear and unambiguous, and the parties agree on the precise amounts advanced to Baldwin. Even drawing all reasonable inferences in Baldwin's favor, there is no material dispute that

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[38] Pl.'s Mot. at 4.
[39] 6 *Del. C.* § 18-110(b).
[40] *Haley v. Talcott*, 864 A.2d 86, 88 (Del. Ch. 2004).

Baldwin contractually was required to repay the advanced amounts if it later was determined he was not entitled to indemnification.[41] Baldwin therefore must reimburse New Wood the $541,664.99 advanced to him.

12. For two reasons, however, the same conclusion does not apply to amounts New Wood previously paid as indemnification for the fees Baldwin incurred in the Advancement Action. First, the written undertaking only applies to the funds advanced in the Delaware Plenary Action.[42] Accordingly, the undertaking does not obligate Baldwin to repay "fees on fees," since such sums constitute indemnification, rather than advancement. Second, Sections 8.2 and 8.3 do not authorize claw-back of amounts paid out for indemnification, even if New Wood paid these amounts before any "good faith or best interests" determination. Rather, Sections 8.2 and 8.3 establish the standard that governs when indemnification must be paid. In short, Baldwin is not contractually obliged to reimburse New Wood the $325,546.04 paid as indemnification for the Advancement Action.[43]

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[41] As explained below, Baldwin's affirmative defenses and counterclaim do not create disputed issues of material fact.

[42] Pl.'s Am. Compl. at ¶ 16.

[43] New Wood correctly points out that Baldwin did not raise this distinction between advancement and indemnification in his opposition to New Wood's motion. The Court raised the point *sua sponte* at oral argument. Baldwin, however, cannot truly be said to have waived the argument, since he never implicitly or expressly conceded the indemnified funds should be repaid. In my view, the Court was compelled by principles of comity to raise the issue of whether the "fees on fees" the Court of Chancery ordered New Wood to pay should be considered differently from the advancement ordered by the Court and governed by the undertaking. For the reasons explained above, I believe the amounts must be treated differently.

B. Baldwin's affirmative defenses and Counterclaim do not raise disputed issues of material fact that preclude entry of judgment on the pleadings.

13. Baldwin's Counterclaim and affirmative defenses do not preclude judgment on the pleadings because Baldwin has not pleaded a cognizable counterclaim. Baldwin's argument fails at the outset because it is undisputed that New Wood did not make the indemnity decision; rather, the majority of New Woods' unitholders made the decision, as provided for in the LLC Agreement. New Wood cannot be said to have breached the implied covenant of good faith and fair dealing when the challenged decision was made by a non-party to this action.

14. Moreover, even if Baldwin could avoid the fact that New Wood did not make the indemnity decision, the Counterclaim fails for other reasons as well. The implied covenant of good faith and fair dealing attaches to all contracts and exists to fill unanticipated contractual gaps.[44] To state a claim for breach of the implied covenant, a claimant must allege: (1) a specific implied contractual obligation; (2) a breach of that obligation; and (3) resulting damage.[45] The implied covenant "involves a cautious enterprise" in which a court infers contractual terms to fill gaps or developments that neither party anticipated.[46] A contracting party may not use

[44] *See Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017).
[45] *Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917, at *11 (Del. Super. Aug. 7, 2019) (quotation marks and citations omitted).
[46] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (quotation marks omitted).

the implied covenant to alter a contract's express terms.[47] Put differently, Delaware courts will use the implied covenant to fill gaps only when a contract truly is silent on the disputed issue.[48] As a result, where the express terms of an agreement govern a particular matter, an implied covenant claim regarding that matter is not viable and must be dismissed.[49]

15. Baldwin argues New Wood breached the implied covenant of good faith and fair dealing because New Wood acted in bad faith when it determined he was not entitled to indemnification.[50] Alternatively, Baldwin asserts this Court should invoke the doctrine of necessary implication to imply into the LLC Agreement a term that required New Wood to make an indemnification determination in good faith.[51] Baldwin's implied covenant claim fails because it would create a free-floating obligation of good faith that is not tethered to any unanticipated gap in the LLC Agreement.[52] Instead, the implied covenant Baldwin advances directly would contradict the express language in the LLC Agreement, which conditions indemnification on a determination that a manager acted in good

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[47] *See Brightstar Corp.*, 2019 WL 3714917, at *11 (When reviewing an implied covenant claim, "the express terms of a contract must always control.") (citing *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)).
[48] *See Brightstar Corp.*, 2019 WL 3714917, at *11; *accord Dunlap*, 878 at 441; *see also E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443-44 (Del. 1996).
[49] *Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, 2018 WL 2727542, at *9 (Del. Ch. June 8, 2018).
[50] Def.'s Resp. at 16,19-21.
[51] Def.'s Supp. Br. at 2-5.
[52] *Dunlap*, 878 A.2d at 441.

faith and in a manner he believed to be in the company's best interests. Baldwin asks this Court to override express contractual language to impose a free-floating duty that any indemnification determination be made in good faith; the implied covenant cannot be used in this way.

16. Baldwin's reliance on *Dieckman v. Regency GP LP*[53] is misplaced and unsupported by the pleaded facts. In *Dieckman*, a unitholder in a master limited partnership alleged the general partner made false and misleading statements in a proxy statement the general partner issued to induce unitholders to approve a conflicted transaction. The unitholder's approval of the transaction triggered the limited partnership agreement's safe harbor provision and thereby shielded the general partner from further scrutiny. The Delaware Supreme Court determined that, once the general partner elected to issue a proxy statement to take advantage of the safe harbor protection, there was an implied obligation in the agreement not to mislead the unitholders.[54] But *Dieckman* does not rescue Baldwin's bid to avoid the LLC Agreement's plain terms because the case is distinct factually and legally. First, *Dieckman* was decided in the context of a publicly traded master limited partnership in which the investors could not competitively negotiate the partnership agreement's terms and necessarily relied on the public documents and public disclosures about

[53] 155 A.3d 358 (Del. 2017).
[54] *Id.* at 368.

the entity.[55] Second, the safe harbor provision at issue was a voluntary protection the general partner attempted to utilize to immunize the merger from judicial review.[56] The Delaware Supreme Court held that, having voluntarily sought the safe harbor's protections, the implied covenant precluded the general partner from misleading the unitholders in the proxy statement or appointing conflicted members to the ostensibly independent conflicts committee.[57]

17. Here, in contrast to *Dieckman*, the LLC Agreement was a negotiated agreement of a private entity, not a publicly traded master limited partnership. And, the LLC Agreement mandates a determination that an indemnitee acted in good faith or in the company's best interests before the indemnification may be paid. Imposing an additional free-floating good faith obligation would subject every express and mandatory provision in the LLC Agreement to fact-intensive and unyielding judicial review. This is not consistent with either Delaware law or the "narrow" purposes of the implied covenant.[58] Accordingly, the Counterclaim does not create a genuine factual issue that precludes judgment on the pleadings.

18. Baldwin's argument that this Court should invoke the doctrine of necessary implication to imply a good faith term into the LLC Agreement likewise

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[55] *Id.* at 366-67.
[56] *Id.* at 367-68.
[57] *Id.* at 367-69.
[58] *See Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 888 (Del. Ch. 2009).

fails because the implied term would contradict the LLC Agreement's express language.[59] The doctrine of necessary implication permits a court to read an implied promise into a contract in order to carry out the purpose for which the promise was made or prevent one party from frustrating the other's right to receive the fruits of the contract.[60] Terms are implied not because they are reasonable but because they necessarily are involved in the contractual relationship such that the parties only failed to express them because they are too obvious to need expression. In other words, the doctrine appears to be no broader than, and arguably is synonymous with, the implied covenant. The doctrine does not apply, however, where the implied term sought would destroy, rather than carry out, the agreement's express purpose.[61]

19. In this case, for the same reasons discussed above, implying the term Baldwin's seeks would undermine Section 8.2's express and unambiguous language. It is far from "obvious" that the LLC Agreement's parties intended any process to govern the indemnification decision other than the one expressly set forth in Section 8.2. Implying some free-floating obligation of good faith into the LLC Agreement

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[59] Although the Counterclaim does not refer to the doctrine of necessary implication, Baldwin asserted during his oral argument that the Counterclaim was both a claim for breach of the implied covenant and a claim to imply a term in the LLC Agreement. Baldwin's supplemental briefing on May 19, 2021 argues this Court should invoke the doctrine of necessary implication to imply a contractual term requiring any indemnification determination to be made in good faith. Def.'s Suppl. Br. At 4.

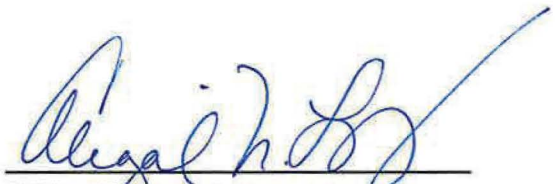
[60] *In re IT Group, Inc.*, 448 F.3d 661, 671 (3d Cir. 2006) (citing *Killian v. McCulloch*. 850 F.Supp. 1239, 1250-51 (E.D.Pa. 1994)).

[61] *In re IT Group, Inc.*, 448 F.3d 661, 671 (3d Cir. 2006).

would undermine, rather than carry out, the parties' intentions. The doctrine of necessary implication therefore is not applicable to this case.

CONCLUSION

For the reasons set forth above, Plaintiff/Counterclaim-Defendant New Wood's Motion for Judgment on the Pleadings is **GRANTED** and Baldwin shall repay the $541,664.99 advanced to him.



Abigail M. LeGrow, Judge

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NEW WOOD RESOURCES LLC,	)	
	)	
Plaintiff/Counterclaim-Defendant,	)	C.A. No. N20C-10-231 AML [CCLD]
	)	
v.	)	
	)	
RICHARD BALDWIN,	)	
	)	
Defendant/Counterclaim-Plaintiff.	)	

[PROPOSED] FINAL ORDER AND JUDGMENT

WHEREAS, on August 23, 2021, this Court issued an Order (Trans. ID 66872009) granting Plaintiff/Counterclaim-Defendant New Wood Resources LLC's Motion for Judgment on the Pleadings (Trans. ID 66427718);

IT IS HEREBY ORDERED, ADJUDGED, and DECREED, this _____ day of _____2021, as follows:

1. For the reasons stated in the Court's August 23, 2021 Order, judgment is entered in favor of Plaintiff/Counterclaim-Defendant New Wood Resources LLC ("New Wood").

2. Defendant/Counterclaim-Plaintiff Richard Baldwin ("Baldwin") shall repay New Wood the $541,664.99 advanced to him plus $9,505.12 in pre-judgment interest.[1]

[1] Pre-judgment interest is calculated by applying April 23, 2020 as the date of breach.

3. Post-judgment interest shall begin to accrue from the date of the judgment.

4. All parties shall bear their own fees.

_____

The Honorable Abigail M. LeGrow

Dated: _____

This document constitutes a ruling of the court and should be treated as such.

/s/ Judge Abigail M LeGrow