Capone v Castleton Commoditites Intl. LLC
2016 NY Slip Op 30521(U)
March 29, 2016
Supreme Court, New York County
Docket Number: 651794/2015
Judge: Shirley Werner Kornreich
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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KEVIN CAPONE and STEVEN SCHEINMAN,

Plaintiffs,

-against-

CASTLETON COMMODITITES INTERNATIONAL LLC (f/k/a/ LOUIS DREYFUS HIGHBRIDGE ENERGY LLC), LDH MANAGEMENT HOLDINGS LLC, LDHMH MM, LLC, TODD BUILIONE, GLENN DUBIN, GEORGE FERRIS, WILLIAM C. REED II, JACQUES VEYRAT, and JOHN DOES 1-10,

Defendants.

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Index No.: 651794/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendants Castleton Commodities International LLC (LDH),[1] Todd Builione, Glenn Dubin, George Ferris, and William C. Reed II move, pursuant to CPLR 3211, to dismiss the Amended Complaint (the AC). Plaintiffs, Kevin Capone and Steven Scheinman, oppose the motion. The motion is granted in part and denied in part for the reasons that follow.

I. Background

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 40)[2] and the documentary evidence submitted by the parties.

LDH, a Delaware LLC, is an energy trading company based in Stamford, Connecticut. Plaintiffs are former employees of LDH. Capone, a Connecticut resident, was LDH's Head of Trading. Scheinman, a New York resident, was LDH's Executive Vice President, General

[1] As discussed herein, LDH, which stood for "Louis Dreyfus Highbridge", was renamed "Castleton" after new investors became involved at the end of 2012.

[2] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Counsel, Chief Compliance Officer, and Corporate Secretary. Part of plaintiffs' lucrative compensation package was a Management Equity Participation Plan established on December 1, 2009, pursuant to which senior employees, such as plaintiffs, would receive a portion of LDH's profits. The plan was implemented by creating another Delaware LLC, defendant LDH Management Holdings LLC (Holdings), whose only material asset was a 15% profit interest in LDH. Holdings' managing member was LDHMH MM, LLC (LDH Manager), a Delaware LLC that is a wholly owned subsidiary of LDH. Holdings was run by a board of directors composed of defendants Builione and Reed, and also non-moving defendant Jacques Veyrat (a resident of France who, according to the moving defendants, has not been served). LDH's board was composed of these three individuals and defendants Dubin and Ferris (collectively, the Individual Defendants).

The equity in Holdings was composed of 150 Units, which could be distributed to senior LDH employees. So, for instance, if an employee was granted 75 Units, he would have an effective 7.5% profit interest in LDH (50% x 15%). Capone was awarded 15 Units (i.e., 10% of Holdings, 1.5% of LDH's profits) and Scheinman was awarded 7 Units (i.e., 4.67% of Holdings, 0.7% of LDH's profits). Plaintiffs' rights in the Units are governed by contracts referred to as "the Unit Award Agreements" and "the LDH Management Holdings Agreement" (the Holdings Agreement),[3] the terms of which are largely irrelevant to this action. The meaning and applicability of the provision at issue – § 7.4(b) of the Holdings Agreement – is not disputed by the parties. § 7.4(b), as applicable here, provides that upon termination of plaintiffs' employment from LDH, plaintiffs' were subject to a Separation Call Right, pursuant to which

[3] The Holdings Agreement, dated December 1, 2009, was Holdings' operating agreement. *See* Dkt. 70. It is governed by Delaware law and provides for jurisdiction in this court. *See id.* at 60-61.

Holdings was obligated to pay plaintiffs the fair market value of their Units as of the last day of the year preceding their termination. *See* Dkt. 70 at 49.

Plaintiffs' employment with LDH was terminated in early 2011. It is undisputed that LDH had the right to terminate plaintiffs without cause, and plaintiffs do not assert any claims in this action based on alleged wrongful termination. This case is only about the valuation of the Units. The option for those Units was exercised on April 12, 2011, and the parties agree that the valuation date is December 31, 2010. Plaintiffs were paid for their Units based on a $1.744 billion fair market valuation of LDH. Scheinman was paid an additional sum based on a Separation Agreement he executed on January 13, 2011. *See* Dkt. 71. The Separation Agreement, as relevant here, entitled Scheinman to a portion of an increase in LDH's value between December 31, 2010 and a sale of LDH's assets (the Assets)[4] occurring on or before June 30, 2012.[5]

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[4] Prior to the sale, LDH's value was composed of the Assets (pipelines and storage facilities) and its trading platform. While the precise value of each is disputed and cannot be determined on this record, it is undisputed that the Assets had more value than the trading platform. Plaintiffs allege in the AC that, as of December 31, 2010, the Assets were worth $1.925 billion while the trading platform was worth $569 million, resulting, they argue, in LDH being worth $2.494 billion minus its long term debt of approximately $250 million.

[5] Paragraph 3(d) of the Separation Agreement provides:

> In the event that, on or before June 30, 2012, both (x) the Company has exercised the Separation Call Right (as defined in the Equity Plan) with respect to your Series 1 Units under the Equity Plan and (y) the Company has effected the Assets Business (as defined above) sale (or effects such sale or sales after such date pursuant to a binding contract entered into before such date), you will receive, within thirty (30) days after the closing of such sale, as a lump sum payment (less tax withholdings and other deductions required by law), an additional transaction bonus payment equal to thirty-five one hundredths of one percent (0.35%) of the portion of the net income or net gain recognized by the Company upon the Assets Business sale to the extent that such net income or net gain results from an aggregate enterprise value in the Assets Business sale in excess of the fair market

On March 22, 2011, LDH announced that it had agreed to sell the Assets to a third-party for $1.925 billion. According to plaintiffs, LDH received a bid for approximately this amount in December 2010. Plaintiffs, thus, argue that the bid and sale amount prove, or at least raise a reasonable inference on a motion to dismiss, that the $1.744 billion valuation used to buy out plaintiffs' Units was less than the true fair market value of LDH.[6]

Plaintiffs initially expressed their concern to some of the Individual Defendants about the $1.744 billion valuation. The latest complaint cited in the AC was made on June 7, 2011. At oral argument on the instant motion, plaintiffs' counsel explained that the reason no lawsuit was filed until now – more than four years after plaintiffs' option was exercised – was because

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> value of such Assets Business as of (x) December 31, 2010 (as determined by LDHE's Board of Directors for purposes of establishing the Gross Asset Value of LDHE's assets in connection with the issuance of Series 2 Units under the Equity Plan) if the Separation Call Right is exercised on or before December 31, 2011 or (y) December 31, 2011 (as determined by LDHE's Board of Directors for purposes of establishing the Gross Asset Value of LDHE's assets) if the Separation Call Right is exercised after December 31, 2011 and on or before June 30, 2012.
>
> If the Assets Business sale is for less than all of the assets of the Assets Business (but constitutes substantially all of the Assets Business) then the foregoing enterprise value and fair market value determinations shall be made on the basis of the assets that are sold.
>
> It is the Company's and your mutual understanding that the rights set forth in this Paragraph 3(d) are intended to provide you the same protections as those contemplated in the Equity Plan if the Separation Call Right were not exercised and the Assets Business sale occurred prior to June 30, 2012. In addition, it is agreed that no Supplemental Call Payments pursuant to Section 7.6(a) of the Equity Plan will be payable to you on the exercise of a Separation Call Right, and in the event any Supplemental Call Payments are made to you pursuant to Section 7.6(a) of the Equity Plan, then any amounts payable under this paragraph 3(d) shall be reduced by an amount equal to such Supplemental Call Payments.

See Dkt. 71 at 3-4.

[6] The fair market value of LDH is a question of fact that requires discovery and cannot be determined on this motion to dismiss.

plaintiffs received other lucrative severance compensation and did not want to sue over the valuation until 2015, when they received all of that money. *See* Dkt. 77 (2/9/16 Tr. at 46). In the interim – that is, between plaintiffs' last complaint about the valuation and the filing of this action – the corporate defendants underwent a restructuring due to the involvement of new investors. On December 31, 2012, after LDH was acquired by those investors, LDH was renamed "Castleton Commodities International LLC", and Holdings and LDH Manager were canceled. Plaintiffs do not allege that the restructuring was motivated by an intent to defraud plaintiffs.

The cancellation of Holdings and LDH Manager is especially important because, as discussed below, plaintiffs' surviving breach of contract claim may only proceed if and when a Delaware court revives those LLCs. To explain, section 9.9(a) of the Holdings Agreement provides, in relevant part:

> Any claim by a Participating Member [i.e., plaintiffs], or any beneficiary of a Participating Member or any other person having or claiming a right under this Agreement or a Unit Award Agreement, **may be asserted solely against the Company [Holdings] or the Managing Member [i.e., LDH Manager]**, as applicable, **and no such individual may assert any claim against LDH, any other LDH Entity, any other Covered Person or any other Person [i.e., the other defendants]** with respect to any matter arising under this Agreement, any Unit Award Agreement, or otherwise in connection with the Units.

See Dkt. 70 at 59-60 (emphasis added). Defendants contend, and plaintiffs do not dispute, that this provision, if enforceable, bars plaintiffs' claims against all defendants other than Holdings and LDH Manager. Plaintiffs, however, aver that section 9.9(a) is unenforceable under Delaware law. They are wrong.

Moreover, since Holdings and LDH Manager were canceled, it is undisputed that pursuant 6 *Del C* §§ 18-803(b) & 18-805, they are not subject to suit unless first revived by a

Delaware court. *See Matthew v Laudamiel*, 2012 WL 605589, at *21 (Del Ch 2012) ("After the certificate of cancellation has been filed, suits generally may not be brought by or against an LLC"), citing *Metro Commc'n Corp. v Advanced Mobilecomm Techs. Inc.*, 854 A2d 121, 138 (Del Ch 2004).[7] Plaintiffs now seek, as discussed below, to nullify the cancellation of Holdings and LDH Manager in the Delaware Court of Chancery. That is where such claims belong. *See Otto v Otto*, 110 AD3d 620 (1st Dept 2013). This court, therefore, will not reach plaintiffs' claims regarding the cancellation of Holdings and LDH Manager (i.e., the eighth, ninth, and the tenth causes of action in the AC). A New York court should not rule on the existence or cancellation of a Delaware corporate entity. *See Otto*, 110 AD3d at 620, ("plaintiff failed to file a petition in the Delaware Chancery Court in order to have the certificates of cancellation of the Delaware entities annulled, and instead, improperly filed a cross motion in this action seeking nullification of the certificates.") (citation omitted); *see also Raharney Capital, LLC v Capital Stack LLC*, 25 NYS2d 217, 217-20 (1st Dept Feb. 25, 2016) (New York courts lack subject matter jurisdiction to dissolve foreign business entities). As noted, since the only claims surviving this motion are those asserted against Holdings and LDH Manager, this action may not proceed unless and until Holdings and LDH Manager are revived.

Defendants also contend that Scheinman's claims are barred by the Separation Agreement. Paragraph 3(d) of the Separation Agreement states that "Except as provided in paragraphs 2 and 3 above,[8] no additional amounts will be payable by the Company or its

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[7] There are exceptions to this rule, but none apply here. *See* Dkt. 51 at 15 n.4. Plaintiffs do not contend otherwise.

[8] Paragraphs 2 and 3 provide Scheinman with certain employment compensation, benefits, a bonus and severance upon fulfilling specific duties, by certain dates. *See* Dkt. 71 at 2-4.

affiliates to you in respect of salary, bonus, severance pay, benefits or otherwise." *See* Dkt. 71 at 4. Additionally, paragraph 4, titled "General Release", states that Scheinman:

> hereby forever WAIVE[s], RELEASE[s] AND DISCHARGE[s] the Company [defined on page 1 to mean LDH and its subsidiaries and affiliates], its affiliates, predecessors and successors, and their respective officers, directors, employees, and agents (the "Released Parties") from any and all liability for claims, in law or equity, whether known or unknown or suspected to exist by you, which at any time from the beginning of the world until today you have had or may now have against the Company or any of the Released Parties, including without limitation such claims arising out of or relating to your employment or the termination of that employment, **excepting only the Excluded Claims** (as defined below).

See id. (capitalization in original; bold added). Paragraph 4 further provides that Scheinman agrees "that this release extends to all claims you have had or may now have against the Company or any of the Released Parties of any nature and kind whatsoever, known or unknown, past or present, which existed prior to your execution of this Agreement, **excepting only the Excluded Claims**." *See id.* at 5 (bold added). The Excluded Claims are addressed in the last portion of paragraph 4:

> Notwithstanding the foregoing or anything else herein to the contrary, this waiver, release and discharge does not and shall not include any claims that may be asserted by you or your heirs, representatives or assigns **for any payments or benefits described in paragraphs 2 or 3 of this Agreement**, any Indemnification Rights, or to enforce any provision of this Agreement (the "Excluded Claims").

See id. (bold added). The parties dispute whether the claims Scheinman asserts in this action are Excluded Claims.[9]

II. Procedural History

Plaintiffs commenced this action on May 21, 2015 by filing a complaint with causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and unjust

[9] As required by the Separation Agreement, on April 4, 2011, Scheinman also executed a Second General Release in which the Excluded Claims (i.e., those claims not released) are defined identically to those set forth in paragraph 4 of the Separation Agreement. *See* Dkt. 71 at 11.

enrichment. *See* Dkt. 2. Plaintiffs filed the AC on July 15, 2015, which contains 10 causes of action numbered here as in the complaint: (1) breach of contract: (2) breach of the covenant of good faith and fair dealing; (3); piercing the corporate veil of LDH Manager; (4) piercing the corporate veil of Holdings; (5) tortious interference with contract; (6) unjust enrichment; (7) fraud; (8) nullification of the certificates of cancellation of LDH Manager and Holdings; and (9 & 10) violations of 6 *Del C* § 18-404. *See* Dkt. 40. The causes of action, for the most part, do not clearly indicate the defendants against whom they are asserted.

On August 20, 2015, five (out of eight) of the defendants – LDH, Builione, Dubin, Ferris, and Reed – filed the instant motion to dismiss. *See* Dkt. 50. They explain that LDH Manager and Holdings did not move because they have been canceled and that Veyrat has not been served. Plaintiffs filed opposition to the motion on September 21, 2015, and the moving defendants filed a reply on October 12, 2015. On November 6, 2015, plaintiffs filed a five count complaint in the Delaware Court of Chancery against the same defendants named in this action, asserting claims for: (1) nullification of the certificates of cancellation of LDH Manager and Holdings (the eighth cause of action in the AC); (2 & 3) violations of § 18-804 of the Delaware LLC Act (the ninth and tenth causes of action in the AC); (4) fraudulent transfer; and (5) appointment of a trustee or receiver for LDH Manager and Holdings. *See* Dkt. 69.

This court held oral argument on the instant motion on February 9, 2016 [*see* Dkt. 77 (2/9/16 Tr.)], after which the parties, at the court's request, filed complete and unredacted copies of the contracts.

III. *Discussion*

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Section 9.9(a) of the Holdings Agreement

To begin, the court will not address many of the parties' arguments (e.g., the statute of limitations) regarding the claims asserted against all of the defendants other than Holdings and

LDH Manager because section 9.9(a) of the Holdings Agreement provides that plaintiffs' claims regarding the buyout:

> may be asserted solely against [Holdings] or [LDH Manager] ..., and no such individual may assert any claim against LDH, any other LDH Entity, any other Covered Person or any other Person [i.e., the other defendants] with respect to any matter arising under this Agreement, any Unit Award Agreement, or otherwise in connection with the Units.

See Dkt. 70 at 59-60. This provision, on its face, bars all of plaintiffs' claim except breach of contract against Holdings and LDH Manager.

Plaintiffs proffer two arguments in an attempt to evade this reality: (1) section 9.9(a) is unenforceable; and (2) regardless if section 9.9(a) is enforceable, the court should pierce the corporate veils of Holdings and LDH Manager to hold the other defendants liable. Neither argument has merit.

Delaware law governs both issues. *See* Dkt. 70 at 60 (Delaware choice of law clause); *MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 530 (1st Dept 2015) (law of state of incorporation governs veil piercing claims), citing *Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 (1st Dept 2008).[10] As plaintiffs themselves concede, under Delaware law, limitations of liability clauses are ordinarily enforceable. This is particularly true in the LLC context, where Delaware law permits the parties to contract away almost all forms of liability – even breach of fiduciary duty. *See Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 291 (Del 1999); *Achaian, Inc. v Leemon Family LLC*, 25 A3d 800, 803 (Del Ch 2011), accord 6 *Del C* § 18-1101. The Holdings Agreement is an LLC Agreement. It is well settled under Delaware law that "[s]ophisticated parties entering unambiguous LLC agreements are presumed to understand the consequences of the language they have chosen, and are bound thereby, lest contract rights

[10] The court disregards the parties' citations to New York and Connecticut law, which clearly do not apply to the claims arising under the Holdings Agreement.

be subject to endless second-guessing and opportunistic revision." *Huatuco v Satellite Healthcare*, 2013 WL 6460898, at *5 (Del Ch 2013), *aff'd* 93 A3d 654 (Del 2014). An exception to this rule is that parties may not disclaim the implied covenant of good faith and fair dealing. *See Auriga Capital Corp. v Gatz Props.*, 40 A3d 839, 851 (Del Ch 2012), *aff'd* 59 A3d 1206 (Del 2012), accord 6 *Del C* § 18-1101(e).

Here, contrary to plaintiffs' contentions, the implied covenant does not apply. Under Delaware law, when a contract expressly addresses a subject matter, the implied covenant is inapplicable. *See Nationwide Emerging Managers, LLC v Northpointe Holdings, LLC*, 112 A3d 878, 896 (Del 2015) ("The implied covenant of good faith and fair dealing involves ... inferring contractual terms to handle developments or contractual gaps that ... neither party anticipated. It does not apply when the contract addresses the conduct at issue.") (quotation marks omitted), citing *Nemec v Shrader*, 991 A2d 1120, 1125 (Del 2010); *see also Haney v Blackhawk Network Holdings, Inc.*, 2016 WL 769595, at *8 (Del Ch 2016) ("The implied covenant, however, only applies where a contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not contradict, the purposes reflected in the express language of the contract.") (citation and quotation marks omitted). The Holdings Agreement not only expressly requires LDH's fair market valuation to be conducted in good faith, the good faith obligation appears in the very definition of "Fair Market Value". *See* Dkt. 70 at 11. Hence, as defendants themselves admit [*see* Dkt. 51 at 22], a claim that LDH's fair market value was not computed in good faith states a valid claim for an express breach of contract, but not a breach of the implied covenant. *See Stewart v BF Bolthouse Holdco, LLC*, 2013 WL 5210220, at *17 (Del Ch 2013) ("Here, there was never a 'gap' that the implied covenant could have filled. Plaintiffs' claim is based on a single clause of the [contract] that required [defendant] to act in good faith.

Plaintiffs essentially contend that [defendant] had an implied duty to act in good faith in complying with its contractual duty to act in good faith. That contention is not accurate, as [defendant] was expressly required to act in good faith, and does not provide a basis for a valid claim for breach of the implied covenant.").

Nor is there merit in plaintiffs' argument that section 9.9(a) is unenforceable due to defendants' alleged tortious conduct. Putting aside the fact that plaintiffs ignore that 6 *Del C* § 18-1101 permits the disclaimer of non-contractual claims and the fact that plaintiffs cite no on-point Delaware Chancery or Supreme Court case to support their contention that their claims are not barred by section 9.9(a), plaintiffs have not actually pleaded a viable claim based on tortious conduct. This suit concerns plaintiffs' claim that the money they were paid for their Units was based on a below fair market valuation of LDH. This is a breach of contract claim, not a fraud claim.[11] The fair market valuation obligation arises under the Holdings Agreement, not from any extra-contractual duty.

Moreover, under any applicable law,[12] an essential element of fraud is reasonable reliance on a material misrepresentation. *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Curtis v Bouley*, 127 AD3d 584 (1st Dept 2015), citing *Meyercord v Curry*, 38 AD3d 315, 316 (1st Dept 2007) (plaintiff must have changed his position based on the misrepresentation). No such detrimental reliance is alleged. Plaintiffs not only fail to plead

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[11] If the fraud claim was not otherwise clearly without merit, the confusing group pleading of the claim would have necessitated dismissal for failure to plead with the specificity required by CPLR 3016(b).

[12] Unlike the contract claims, Delaware law does not necessarily govern. That said, a review of the law cited by the parties indicates that all of the potentially applicable law is substantially similar. Under First Department precedent, there is no need to conduct a choice of law analysis, and the court may rely exclusively on New York case law, where differences in another jurisdiction's law would not significantly alter the outcome. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014).

detrimental reliance, they actually claim to have immediately complained about the valuation of LDH. This is not a case where plaintiffs were lied to about a material fact used to compute the fair market value of the company. On the contrary, plaintiffs knew about the asset sale they claim evidences the (alleged) true value of LDH. Plaintiffs do not allege that they acted to their detriment based on the fair market value used. Instead, plaintiffs merely complain that the fair market valuation was wrong, i.e., that Holdings breached the Holdings Agreement. Liability for such a claim, even in the absence of section 9.9(a), is restricted to the counterparty who breached. *See LNR Partners, LLC v C-III Asset Mgmt. LLC*, 2014 WL 1312033, at *9 (Del Ch 2014) (breach of contract liability, under both New York and Delaware law, requires privity).

Unjust enrichment, moreover, is not a viable theory of recovery because the claim is expressly governed by a written contract. *See CIM Urban Lending GP, LLC v Cantor Commercial Real Estate Sponsor, L.P.*, 2016 WL 768904, at *2 (Del Ch 2016) (unjust enrichment claim cannot coexist with contract claim where contract claim engulfs very foundation of unjust enrichment claim); *see also Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 (2005), citing *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987). This is true even if, as here, the Individual Defendants are not parties to the Holdings Agreement. *See AM Gen. Holdings, LLC v Renco Group, Inc.*, 2013 WL 5863010, at *15 (Del Ch 2013); *see also Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 (1st Dept 2014), citing *Randall's Island Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 (1st Dept 2012) ("there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim"). Further, a tortious interference claim fares no better, as it is precluded by section 9.9(a).

Section 9.9(a) could not be clearer. Plaintiffs can only sue Holdings or LDH Manager "with respect to any matter arising under this Agreement, any Unit Award Agreement, or otherwise in connection with the Units." This action only seeks redress for the valuation of the Units. Accordingly, the claims in this action are all subject to section 9.9(a). All defendants other than Holdings and LDH Manager, therefore, are dismissed from this action.

Plaintiffs' veil piercing claims do not alter this result. "To state a 'veil-piercing claim' [under Delaware law], the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors." *Crosse v BCBSD, Inc.*, 836 A2d 492, 497 (Del 2003). "Delaware takes corporate formalities seriously." *Base Optics Inc. v Liu*, 2015 WL 3491495, at *23 (Del Ch 2015), citing *Wallace v Wood*, 752 A2d 1175, 1183 (Del Ch 1999). "[P]ersuading a Delaware court to pierce the corporate veil is a difficult task. Absent compelling cause, a court will not disregard the corporate form or otherwise disturb the legal attributes, such as limited liability, of a corporation." *Midland Interiors, Inc. v Burleigh*, 2006 WL 4782237, at *3 (Del Ch 2003) (quotation marks omitted). Delaware "courts have only been persuaded to pierce the corporate veil after substantial consideration of the shareholder-owner's disregard of the separate corporate fiction and the degree of injustice impressed on the litigants by recognition of the corporate entity." *Crosse*, 836 A2d at 497. "Determining whether to [pierce the corporate veil] requires a fact intensive inquiry, which may consider the following factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; or (5) whether, in general, the company simply

functioned as a facade for the controlling shareholder." *Winner Acceptance Corp. v Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del Ch 2008).

Simply put, veil piercing is only warranted when corporate formalities are disregarded to defraud plaintiff. That is not the case here, nor do plaintiffs allege this. Rather, all plaintiffs allege is that Holdings and LDH Manager were controlled by the very same people who controlled LDH, i.e., its board. This is permissible and cannot justify veil piercing. *See generally In re Opus E., LLC*, 528 BR 30, 57-66 (Bankr D Del 2015) (collecting cases). LLCs, such as Holdings and LDH Manager, must be treated as distinct legal entities unless they are used for an improper purpose to defraud creditors. *See id.* at 60. Delaware courts have long understood the valid and useful purpose served by LLCs and recognize they need not be operated with the same level of formality as corporations. *See id.* at 62-63. LLCs are often run by a single managing member, which quite often, as here, is controlled by a parent or affiliate entity. Consequently, allegations of overlapping control, and even undercapitalization, do not justify piercing the corporate veil. *See id.* at 64-65 ("Merely presenting evidence of dominion or control of the parent over the subsidiary, without evidence of fraud or similar injustice, will not support alter ego liability.") (citations omitted); *see also* Dkt. 51 at 23-27 (collecting cases). Veil piercing is only warranted where the corporate form is used to perpetrate a fraud or injustice, and "[t]o meet this element, fraud or injustice [must] be found in the defendants' use of the corporate form itself." *Id.* at 65 (citations and quotation marks omitted); *see Crosse*, 836 A2d at 497.

Here, there is no dispute that Holdings was set up as an SPV to issue senior LDH employees a profit interest in LDH. LDH Manager was formed to manage Holdings. Plaintiffs do not explain why this was inappropriate and cite no case where a similar use of a Delaware LLC was considered improper. Rather, all plaintiffs really complain about is that Holdings and

LDH Manager no longer have funds to pay a possible judgment. But that, it should be noted, may well be a function of plaintiffs' delay in bringing this action. Plaintiffs could have filed suit in 2011 after their fair market value complaints fell upon defendants' deaf ears. Holdings was not canceled until the end of 2012. Plaintiffs, however, now conflate the propriety of the cancellation of Holdings and LDH Manager with the question of whether Holdings and LDH Manager operated as legitimate LLCs during their existence. To the extent cancellation of Holdings and LDH Manager was improper under Delaware law, that will be determined by the Delaware court.

Nonetheless, regardless of whether grounds exist to revive Holdings and LDH Manager, everything plaintiffs allege about the operation of Holdings and LDH Manager is indicative of nothing more than ordinary and proper use of the corporate form. In essence, plaintiffs complain that a parent company cannot issue an economic interest in itself through a membership interest in a wholly owned and controlled LLC, as opposed to directly issuing equity in the parent itself. There are myriad reasons why a company would want to do so, one of which being the avoidance of liability by the parent to the investor.[13] Doing so is permissible; plaintiffs cite no case holding otherwise. *See Trevino v Merscorp, Inc.*, 583 FSupp2d 521, 530 (D Del 2008) ("[l]imiting one's personal liability is a traditional reason for a corporation.") (citation omitted). It is not an injustice.

As countless Delaware courts have observed, the underlying breach sued upon cannot satisfy the element of fraud or injustice. *See Medi-Tec of Egypt Corp. v Bausch & Lomb Surgical*, 2004 WL 415251, at *4 (Del Ch 2004), citing *Mobil Oil Corp. v Linear Films, Inc.*, 718 FSupp260, 268 (D Del 1989). Otherwise, every parent and subsidiary could be held liable

[13] There are other tax and regulatory reasons for doing so.

for each other's breaches. *See id.*; *see also EBG Holdings LLC v Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *12 (Del Ch 2008) ("the requisite element of fraud under the alter ego theory must come from an inequitable use of the corporate form itself as a sham, and not from the underlying claim"). That is especially the case where, as here, plaintiffs are only in privity with Holdings with respect to their claims for underpayment on the Units and, as discussed, they expressly agreed in section 9.9(a) that they would not seek to hold LDH or its board members liable for Holdings' obligations.

Plaintiffs, to be sure, are highly sophisticated. Capone was LDH's head of trading. Scheinman is a lawyer, and was the very lawyer responsible for setting up Holdings' corporate structure. It was clearly foreseeable to both of them that Holdings, which served no purpose but to pay its Unitholders a share of LDH's profits, would not be a deep pocketed defendant. The essence of a bargain not to sue a more solvent parent entity is an agreement to take counterparty credit risk. That such risk came to fruition, without a showing of misuse of the corporate form, does not justify the extreme relief of veil piercing. The AC, therefore, is dismissed against all defendants except Holdings and LDH Manager.[14]

C. Scheinman's Separation Agreement

Scheinman's claims are not barred by paragraph 4 of the Separation Agreement. Scheinman's claims regarding his Separation Call Right are referenced in paragraph 3 and, thus, fall within the definition of Excluded Claims. While Scheinman's Separation Call Right is governed by the Holdings Agreement, and not the Separation Agreement, paragraph 4 of the

[14] While § 9.9(a) does not preclude a suit against LDH Manager, it is not clear why it, as opposed to just Holdings, is a proper defendant on a claim for breach of § 7.4(b) of the Holdings Agreement. However, since neither Holdings nor LDH Manager have appeared in this action, the court will not determine which is a proper defendant, only that § 9.9(a) does not preclude them from being sued.

Separation Agreement makes clear that Excluded Claims are not limited to those rights governed by paragraphs 2 and 3, but also those that are "described" therein. Excluded Claims are defined to include both claims "described in paragraphs 2 or 3 of [the Separation Agreement]" and claims to enforce the Separation Agreement itself. As a result, Scheinman did not release his claims to enforce his rights under § 7.4(b) of the Holdings Agreement.

That said, defendants contend that the increased fair market value of the Units sought by Scheinman in this action is nothing more than an attempt at "double dipping", that is, to recover twice for the same increase in the value of the Assets. They observe that Scheinman seeks entitlement to his pro rata share of the alleged difference between the $1.744 billion valuation assigned by LDH and the greater amount plaintiffs claim LDH was worth based on the December 2010 bid and the $1.925 billion sale of the Assets in March 2011. According to defendants, the whole point of the Separation Agreement was to compensate Scheinman for an increase in the value of LDH based on a sale of the Assets occurring after the required valuation date of December 31, 2010. This is true, but only to a certain extent. Paragraph 3(d) of the Separation Agreement, as applicable, entitles Scheinman to:

> an additional transaction bonus payment equal to **[0.35%]** of the portion of the net income or net gain recognized by the Company upon the Assets Business sale to the extent that such net income or net gain results from an aggregate enterprise value in the Assets Business sale in excess of the fair market value of such Assets Business as of ... December 31, 2010.

See Dkt. 71 at 3-4 (emphasis added).

Scheinman's profit interest in LDH, however, was 0.7%, not 0.35%. Hence, the portion of the Assets' increased value provided for in paragraph 3(d) does not appear to strictly align with Scheinman's profit interest in LDH. Moreover, plaintiffs do not claim that § 7.4(b) of the Holdings Agreement entitles them to an increase in the value of the Assets after December 31,

2010. Paragraph 3(d), apparently, was meant to compensate Scheinman for something more than he was entitled to under § 7.4(b). Ergo, it would appear that defendants' double dipping claim is without merit.[15]

The reality is more complicated. Scheinman was paid for his Units based on a fair market valuation founded on the assumption that the March 2011 sale of the Assets did not reflect the fair market of LDH as of December 31, 2010. In other words, defendants implicitly concede that the value of LDH *did indeed increase* between December 31, 2010 and March 2011. In fact, Scheinman was paid additional money under paragraph 3(d) based on the assumption that the fair market value of LDH as of December 31, 2010 *was actually less* than the fair market value in March 2011 based on the sale price of the Assets. To wit, if value of the Assets did not increase between December 2010 and March 2011, then Scheinman would not have been entitled to any payment under paragraph 3(d). So, if Scheinman prevails on his claim that the fair market value of LDH used to compute the amount paid for his Units was too low, *he then must concede he was paid too much under paragraph 3(d).* That, however, is more properly a predicate for a set-off defense or counterclaim, not a basis to dismiss Scheinman's claims outright.

That said, permitting Scheinman a double recovery on the very same increase in the value of the Assets would require an impermissibly absurd interpretation of the Holdings Agreement and the Separation Agreement. *See Hampton v Turner*, 2015 WL 1947067, at *3 (Del Ch 2015) (courts must avoid "interpretations that produce absurd results to which the parties would not have agreed"). No reasonable, objective interpreter of the parties' agreements could conclude

[15] The parties also dispute whether and how the value of Scheinman's Series 2 Units affects the value of his Series 1 Units. The parties' terse treatment of this issue precludes the court from determining who is correct. The court will not, on its own, parse the extremely extensive and complex contracts to resolve this issue at this juncture.

they intended such a result. *See Rexam Inc. v Berry Plastics Corp.*, 2015 WL 7958533, at *3 (Del Ch 2015).

Nonetheless, since there are questions of fact about LDH's fair market value as of December 31, 2010 and as of the March 2011 sale of the Assets, Scheinman's claims survive, subject to appropriate set-offs that may be pleaded in defendants' answer. However, given the uncertainty over whether this action may proceed at all, no responsive pleading need be filed until the Delaware Court makes the appropriate threshold rulings regarding whether this action may procced against Holdings and LDH Manager. Accordingly, it is

ORDERED that the motion by defendants Castleton Commodities International LLC, Todd Builione, Glenn Dubin, George Ferris, and William C. Reed II to dismiss the Amended Complaint is granted to the following extent: (1) the second (breach of the covenant of good faith and fair dealing), third (piercing the corporate veil of LDH Manager), fourth (piercing the corporate veil of Holdings), fifth (tortious interference with contract), sixth (unjust enrichment), and seventh (fraud) causes of action are dismissed with prejudice; (2) the first cause of action (breach of contract) is dismissed with prejudice against all defendants except for defendants LDH Management Holdings LLC and LDHMH MM, LLC; (3) the remainder of this action, including the time for filing responsive pleadings, is stayed pending a ruling by the Delaware Court of Chancery on whether the remaining defendants (Holdings and LDH Manager) are subject to suit on the first cause of action; and (4) the ninth and tenth causes of action (violations of 6 *Del C* § 18-804) are dismissed without prejudice in favor the identical claims which are pending in the Delaware Court of Chancery; and it is further

ORDERED that the parties are to promptly contact the court upon a ruling by the Delaware Court of Chancery and, prior to doing so, a copy of the Delaware Court's decision

shall be e-filed on the docket in this action and a brief joint letter notifying the court of such decision shall also be e-filed and faxed to Chambers.

Dated: March 29, 2016

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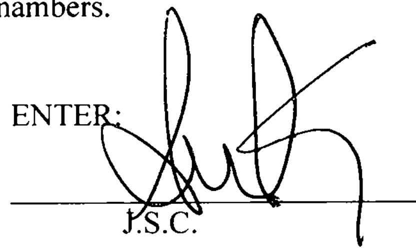

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C