PMC Aviation 2012-1 LLC v Jet Midwest Group LLC

2017 NY Slip Op 31359(U)

June 21, 2017

Supreme Court, New York County

Docket Number: 654047/2015

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
---X
PMC AVIATION 2012-1 LLC and AMUR FINANCE IV LLC,

Plaintiffs,

-against-

JET MIDWEST GROUP LLC, PAUL KRAUS, and KAREN KRAUS,

Defendants.
---X
JET MIDWEST GROUP LLC, individually and derivatively on behalf of PMC AVIATION 2012-1 LLC, PAUL KRAUS, and KAREN KRAUS

Counterclaim Plaintiffs,

-against-

PMC AVIATION 2012-1 LLC and AMUR FINANCE IV LLC,

Counterclaim Defendants,

-and-

MOSTAFIZ SHAHMOHAMMED,

Additional Counterclaim Defendant.
---X

Index No.: 654047/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

PMC Aviation 2012-1 LLC (PMC), Amur Finance IV LLC (Amur), and Mostafiz ShahMohammed (collectively, the Amur Parties) move, pursuant to CPLR 3211, to dismiss the counterclaims pleaded by Jet Midwest Group LLC (JMG), Paul Kraus, and Karen Kraus (collectively, the JMG Parties) in their amended answer. The JMG Parties oppose the motion. For the reasons that follow, the Amur Parties' motion is granted in part and denied in part.

I. Factual Background & Procedural History

The court assumes familiarity with its decision on the JMG Parties' motions to dismiss plaintiffs' amended complaint, which is set forth in an order dated May 25, 2016. *See* Dkt. 113 (the Prior Decision).[1] The Prior Decision extensively addresses the underlying facts of this case, including the relevant contracts and the parties' relationship. Such detail is not repeated here.[2] The court limits its discussion to the JMG Parties' newly pleaded facts that are germane to this decision, which are drawn from their amended answer (*see* Dkt. 177) and the documentary evidence submitted by the parties.

The JMG Parties' counterclaims first address the refinancing of PMC's debt. They explain:

> On or about April 13, 2012, PMC obtained financing for the acquisition of the PMC Assets [i.e., the Aircraft] by the issuance of promissory notes (the "Promissory Notes") pursuant to [an] Indenture dated as of April 13, 2012 between PMC and Wells Fargo Bank Northwest, National Association, as indenture trustee (the "Indenture Trustee"). The original purchasers of the Promissory Notes were Gerlach & Co., Metropolitan West Total Return Bond Fund, Metropolitan West Strategic Income Fund, Metropolitan West Unconstrained Bond Fund, TCW Securitized Opportunities, L.P., and TCW Strategic Income Fund- SMBS (collectively, the "Note Holders"). **The initial financing was for $10 million at an interest rate of 18% per annum** (the "Initial PMC Loan"). [ShahMohammed] and Amur Investment Company, LLC (an affiliate of [Amur]) ("AIC") touted to Hells [another member of PMC] and JMG that they were well versed and experienced in financing matters and arranged the initial financing for PMC that enabled PMC to acquire the PMC Assets.

Dkt. 177 at 32-33 (emphasis added). The JMG Parties further allege that "[a]t no time during JMG's management of PMC did PMC fail to make any payments due under the Initial PMC

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

[2] Capitalized terms not defined herein have the same meaning as in the Prior Decision.

Loan" and "that within just one year after the Initial PMC Loan was procured, the Initial PMC Loan was paid down to approximately $8.8 million dollars." *Id.* at 33.

The JMG Parties claim that in the summer of 2013, they were fraudulently induced to refinance the Initial PMC Loan. They claim that "[ShahMohammed], non-party Amur Finance Company Inc. (AFC), and Amur approached Paul Kraus and represented that the Note Holders had contacted the Indenture Trustee, [ShahMohammed], AIC or AFC and advised **that, because monthly servicer reports were not timely transmitted, the Note Holders no longer wanted to do business with PMC and the Note Holders insisted on being immediately repaid the entire remaining balance of the Initial PMC Loan**." *Id.* at 35 (emphasis added). They claim to have reasonably relied on these alleged "false representations because of [ShahMohammed], AFC and [Amur's] stated unique, close and favorable relationship with the Note Holders," that "because of that relationship, only [ShahMohammed, AFC, and Amur] dealt with the Note Holders to the exclusion of [the JMG Parties]," and that "[the JMG Parties] relied on [ShahMohammed, AFC, and Amur] for all information regarding the status of the Initial PMC Loan." *Id.* Simply put, the JMG Parties allege that they were lied to about the Note Holders' supposed insistence on being immediately repaid.

Allegedly believing at the time that refinancing was necessary, the JMG Parties accepted Amur's offer to be the new lender. Amur told the JMG Parties that it "would refinance the Initial PMC Loan **and charge PMC the same rate of interest PMC was paying under the Promissory Notes**." *Id.* at 36 (emphasis added). However, ShahMohammed allegedly "falsely represented to Paul Kraus ... that the 18% per annum interest rate [Amur] would charge was just a few points higher than the interest rate which [Amur] was paying to its lender, a hedge fund

named Pine River Capital Management L.P. and or its affiliates ("Pine River")." *Id.*[3] The JMG Parties claim this was a lie and that Amur was actually "paying to Pine River **a rate of interest of only approximately 8% per annum**." *Id.* (emphasis added).

The refinancing was effectuated by PMC and Amur by entering into a Loan and Security Agreement dated August 14, 2013. *See* Dkt. 179 (the LSA). The only two relevant material differences between the terms of the Initial PMC Loan and the LSA are that (1) the principal amount of the loan was increased from $10 million to $12 million under the LSA; and (2) as collateral for the LSA, JMG (and other non-parties) pledged their membership interests in PMC pursuant to a Security Agreement dated August 14, 2013. *See* Dkt. 180 (the Security Agreement). Both the LSA and the Security Agreement are governed by New York law.

As discussed in the Prior Decision, JMG resigned as PMC's managing member on August 15, 2015. Amur immediately replaced JMG as managing member. The JMG Parties allege that the Amur Parties then took various steps to harm PMC to induce a default on the LSA for the purpose of taking over JMG's membership interest in PMC via a foreclosure under the Security Agreement. For instance, the JMG Parties claim that Amur failed to take "any meaningful steps whatsoever to retrieve the PMC Assets and the servicer records or to monetize any of the PMC Assets." Dkt. 177 at 42.[4] They contend that Amur's failure to monetize PMC's assets and its causing PMC's counsel to accumulate nearly $1 million in legal fees in a related action in another court (the Dynamic Litigation) resulted in PMC defaulting on the LSA, thereby allowing Amur to purportedly "unlawfully and [] improperly seize the membership interests of

[3] They similarly allege that "in January, 2015, Eric Dollman [] of the Amur companies ...[also] advised Paul Kraus of JMG that, with respect to the [LSA, Amur] was only making, at most, 1% over and above the amount [Amur] was paying to its lender." *Id.* at 36

[4] While this is a motion to dismiss, the court notes that Amur could not do so because the JMG Parties refused to turn over the Aircraft.

JMG." *Id.* at 43. They also complain that the Amur Parties wrongfully refused to refinance the LSA, which had a maturity date of August 15, 2016.

By letter dated May 16, 2016, Amur notified JMG that PMC was in default under the LSA. *See* Dkt. 181. In a subsequent letter dated June 3, 2016, Amur notified JMG that it was exercising its rights under the Security Agreement to take over JMG's membership interest in PMC. *See* Dkt. 182. JMG objected by letter dated June 7, 2016. *See* Dkt. 184. Amur responded in a June 9, 2016 letter that JMG's objections were baseless. *See* Dkt. 185. On June 21, 2016, the JMG Parties moved by order to show cause (OSC) for a preliminary injunction, *inter alia*, to compel the Amur Parties to return JMG's membership interest in PMC and to restrain the Amur Parties from exercising JMG's rights (e.g., voting) under the Operating Agreement. *See* Dkt. 148. After being served with the OSC, that same day, Amur wrote to JMG:

> While we disagree with your interpretation of applicable law, ... in order to streamline the proceedings, [Amur] hereby (a) **rescinds that portion of the Notice that sought to foreclose on the PMC members' membership interests (the "Membership Interests") in partial satisfaction of the obligations owed to Amur IV under the PMC Loan and Security Agreement, (b) reinstates the Membership Interests**, and (c) cancels Certificate No.1 dated June 8, 2016- representing 100% of the membership interests in PMC -that was issued to Amur IV. The foregoing is without waiver of Amur IV's right to seek to pursue such remedies in the future, all of which, together with Amur IV's other rights and remedies, are expressly reserved.

Dkt. 186 (emphasis added). JMG's order to show cause was resolved by stipulation and order dated June 22, 2016, in which the parties reserved all of their rights and Amur agreed to provide 60-days' notice prior to seeking to foreclose on JMG's membership interest. *See* Dkt. 167. It is undisputed that, at this time, JMG owns and controls its membership interest in PMC and all of its attendant rights under the Operating Agreement.

After the Prior Decision was issued, on June 17, 2016, the JMG Parties filed their original answer with counterclaims. *See* Dkt. 139. After the court denied the JMG Parties' motion to disqualify the Amur Parties' counsel by order dated June 22, 2016 [Dkt. 166 (order); Dkt. 175 (6/22/16 Tr.)], a discovery schedule was set in a June 29, 2016 preliminary conference order. *See* Dkt. 172. That order, among other things, provided for the JMG Parties to file amended counterclaims and set a briefing schedule on the Amur Parties' motion to dismiss. *See id.*

The JMG Parties filed their amended answer on July 14, 2016. *See* Dkt. 177. It contains nine direct and derivative[5] counterclaims, numbered here as in the answer: (1) violation of New York Commercial Code (UCC) § 9-620, asserted by JMG directly against Amur, based on Amur's alleged wrongful taking of JMG's membership interest on June 3, 2016;[6] (2) fraudulent inducement of the LSA and Security Agreement, asserted directly by JMG against Amur and ShahMohammed; (3) violation of UCC § 1-304's good faith obligations, asserted directly by JMG against Amur,[7] based on Amur's alleged wrongful taking of JMG's membership interest; (4) breach of fiduciary duty, asserted derivatively by JMG on behalf of PMC against Amur, regarding Amur's alleged performance as managing member of PMC; (5) aiding and abetting breach of fiduciary duty, asserted derivatively by JMG on behalf of PMC against

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[5] It should be noted that the Amur Parties do not challenge the JMG Parties' demand futility allegations, which are therefore not discussed herein.

[6] As discussed herein, this claim should not have been included in the amended counterclaims because, unlike when the original counterclaims were filed on June 17, 2016, by July 14, 2016, JMG was ensured that it had ownership of its membership interest and all of its rights under the Operating Agreement.

[7] While this cause of action's heading indicates that PMC also is asserting this claim [*see* Dkt. 177 at 53], the supporting factual allegations (and, indeed, the very nature of claim, i.e., the taking of JMG's membership interest) are such that the court assumes that only JMG is asserting the claim (because only it was harmed). Regardless, this claim is dismissed for other reasons addressed herein.

ShahMohammed, for Amur's alleged fiduciary breaches in the prior cause of action; (6) breach of the Operating Agreement, asserted derivatively by JMG on behalf of PMC against Amur; (7) "failing to pay packaging costs" (that were actually incurred by JMI), pursuant to an August 14, 2015 letter agreement (the Side Letter) (Dkt. 192), asserted by JMG directly against PMC;[8] (8) failure "to pay engine rental and C check costs," based on an alleged oral agreement, asserted by JMG directly against PMC; and (9) breach of the implied covenant of good faith and fair dealing, based on myriad, confusingly pleaded breaches of contact (no specific contract is identified) and fraudulent conduct, apparently[9] asserted directly and derivatively by JMG on behalf of PMC against Amur.

The Amur Parties filed the instant motion to dismiss the JMG Parties' amended counterclaims on August 11, 2016, and the court reserved on the motion after oral argument. *See* Dkt. 207 (3/2/17 Tr.).

II. Discussion[10]

A. Fraudulent Inducement

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[8] As discussed herein, the court does not reach the merits of this allegation because the subject packaging costs were incurred by JMI; only JMI (and not JMG) is a party to the Side Letter; and the Side Letter incorporates the terms of a simultaneously executed August 14, 2015 Common Terms Agreement (the CMA) (Dkt. 195), section 5.4.1 of which prohibits JMI from assigning its claims to JMG. *See id.* at 12. JMI, therefore, must assert the packaging costs claim on its own behalf.

[9] The contract under which this implied covenant claim is asserted presumably would dictate the proper plaintiff and the governing law. As discussed herein, that such clarity is lacking is (among other reasons) fatal to this claim being deemed properly pleaded.

[10] The legal standard on a motion to dismiss is set forth in the Prior Decision and is not repeated here. *See id.* at 10-11. That being said, it is unclear why the parties address Delaware's pleading standard in their brief [*see* Dkt. 197 at 27; Dkt. 202 at 11], which is not applicable, even on the claims governed by Delaware law (with the exception of the demand futility pleading standard under Delaware Court of Chancery Rule 23.1 [*see Central Laborers' Pension Fund v Blankfein*, 111 AD3d 40, 45 (1st Dept 2013)], which, as noted, is not at issue on this motion). *See* Prior Decision at 14 n.14.

The elements that must be pleaded with particularity to state a claim for fraudulent inducement, as set forth in the Prior Decision, are "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). JMG claims that it was fraudulently induced to enter into the LSA and Security Agreement. None of the arguments proffered by the Amur Parties warrant complete dismissal of this claim.

JMG has pleaded a material misrepresentation. The alleged representation about the need to refinance PMC's debt – the Note Holders' supposed insistence on being immediately repaid – was allegedly false. On this motion, the Amur Parties did not submit any documentary evidence conclusively refuting this allegation. JMG, moreover, pleaded sufficient allegations about the reasonableness of its reliance to withstand a motion to dismiss. *See ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 (2015) (reasonable reliance is usually not amenable to resolution on motion to dismiss). To be sure, the failure by a sophisticated party to conduct due diligence will ordinarily render a plaintiff's reliance unreasonable as a matter of law. *See Minerals & Metals Corp. v Holme*, 35 AD3d 93, 100 (1st Dept 2006) ("New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations ... by investigating the details of the transactions."). Here, however, given the relationship between the parties as members of a closely held LLC, with Amur being the finance expert, and the nature of the members' relationship with the Note Holders, the question of whether JMG was justified in believing Amur's representation about the Note Holders' intent to call the Initial PMC Loan is better resolved on a full discovery record. Amur cites no case with analogous facts where the type of reliance made by JMG was held unreasonable on a motion to dismiss.

To be sure, as discussed herein, Amur did not have fiduciary duties to PMC at the time because Amur was not yet the managing member. Nonetheless, the court finds the question of whether a managing member can reasonably assume its business partner (whose very role in the deal was to provide financing expertise) was not lying about a matter within the scope of such expertise, inherently, to be a factual inquiry dependent on the particular nature of the parties' relationship. Since the parties do not cite controlling, on-point authority on this issue, the question of reasonable reliance is best resolved with the benefit of a robust discovery record and, indeed, may well prove to be an issue only amenable to resolution by the finder of fact.

Then too, there is no merit in the Amur Parties' contention that JMG has not pleaded *any* damages. While the question of whether the $2 million increased principal amount may constitute recoverable damages under settled loss causation principals is somewhat complicated, there is no need to decide the issue at this juncture.[11] That is because there is no question that JMG securing PMC's debt under the LSA by pledging its membership interest in PMC as collateral amounts to damages directly related to the alleged misrepresentation. But for the alleged fraud, JMG's stake in PMC would be secure.

Additionally, the court rejects, for the purposes of this motion, the Amur Parties' contention that "[i]t would make no sense for [Amur] to put $12 million of its own money at risk, including $2 million directly into Paul Kraus's pocket, in order to make a grab for JMG's equity in PMC when JMG would still control PMC's assets." *See* Dkt. 197 at 12. While the

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[11] JMG does not appear to plead a nexus between the $2 million increase and any misrepresentation made by Amur. The reason for the increase is not clear from the record, nor is it clear why Amur claims it agreed to such increase, especially if the balance on the Initial PMC Loan was under $9 million. Given this uncertainty, and the fact that (as discussed herein) the Security Agreement satisfies the requirement to plead damages, the court will not rule at this juncture on whether the $2 million loan increase also amounts to a proximately caused loss. It also should be noted that since JMG seeks relief only related to the Security Agreement, and not rescission of the LSA, this may prove to be an academic question.

Amur Parties aver that JMG's "fraud claim can[not] stand where [JMG fails to explain why the Amur Parties] would have engaged in such self-defeating behavior" [*see id.*], JMG, in fact, provided such an explanation. As plausibly pleaded in their amended answer and explained in their opposition brief, the JMG Parties allege that the Amur Parties were engaging in a scheme to steal JMG's equity.[12] Of course, the question of whether the Amur Parties were indeed engaging in such a scheme (i.e., the question of Amur's scienter) cannot be resolved without discovery. *See Oster v Kirschner*, 77 AD3d 51, 55-57 (1st Dept 2010) ("[p]articipants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud"; "intent to commit fraud [may] be divined from surrounding circumstances."). To survive this motion to dismiss, JMG need not do more than plead the elements of its fraud claim with the particularity required by CPLR 3016(b). It has done so, with one exception.

That exception is the alleged misrepresentation about the spread Amur was making on the LSA. The court dismisses the fraud claim to the extent it is based on this misrepresentation, which cannot result in any recoverable damages because JMG cannot establish the element of loss causation. *See Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgmt. Co.*, 149 AD3d 146, 149 (1st Dept 2017) ("Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff.") (citation and quotation marks omitted); *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 (1st Dept

[12] As this court has explained, causing a cynical short term harm to a company for the sake of longer term profit can be rational under certain circumstances. *See Age Group, Ltd. v Martha Stewart Living Omnimedia, Inc.*, 2014 WL 1413992, at *4 (Sup Ct, NY County 2014) ("Age Group alleges a theory of scienter that plausibly explains why MSLO would undermine its own Pet Products at the short run expense of Age Group for the purpose of maximizing the value of its brand in the long run. Indeed, this strategy may well be economically rational for MSLO."). It is possible for Amur to risk some of its money and cause PMC short term financial turmoil until PMC defaults, then take over the entire company by foreclosing on JMG's equity, and then find new financing for the company, thereby making itself better off.

2014); *Laub v Faessel*, 297 AD2d 28, 31 (1st Dept 2002). Regardless of the amount Amur was making, PMC paid exactly the same interest rate under the LSA as it did on the Initial PMC Loan. While Amur plausibly pleads transaction causation on this claim (i.e., JMG would not have agreed to Amur as lender if it had known about the spread Amur was really making), JMG suffered no loss caused by the alleged lie. *See Laub*, 297 AD2d at 31 ("To establish causation, plaintiff must show **both** that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) **and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)**.") (emphasis added); *see also Vandashield Ltd. v Isaacson*, 146 AD3d 552, 553 (1st Dept 2017) ("the complaint adequately alleges transaction causation" but "the complaint insufficiently alleges loss causation."); *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 2017 WL 2115841, at *1 (1st Dept May 16, 2017) ("This Court has repeatedly reaffirmed" that "[l]oss causation is the fundamental core of the common-law concept of proximate cause.") (collecting cases). The only harm actually suffered by virtue of the LSA was the exposure of JMG's membership interest in PMC to forfeiture upon PMC's default. That harm had nothing to do with Amur's profit on the LSA; the forfeiture would still have occurred even if Amur was not making any profit on the LSA. In other words, the fact that Amur happened to make more money on the loan than represented did not, in of itself, cause JMG any damages because the interest rate under the LSA was the same as under the Initial PMC Loan.

In contrast, the alleged lie about the imminent need to refinance PMC's debt with the condition that such debt be secured by JMG's membership interest is a misrepresentation with a direct nexus to JMG's damages. This portion of the fraudulent inducement claim survives.

B. Breach of Fiduciary Duty[13]

As an initial matter, there is no question that the scope of Amur's fiduciary duties as PMC's managing member are the same as JMG's duties prior to August 15, 2015. *See* Dkt. 197 at 18 ("[Amur] acknowledges that, as set forth in [*Feeley v NHAOCG LLC*, 62 A3d 649 (Del Ch 2012)], [Amur] has a fiduciary duty arising out of its role as managing member [of PMC].").[14] That being said, based on the authority and reasoning set forth in the Prior Decision, the court dismisses the JMG Parties' fiduciary breach claims as duplicative of their claims for breach of the Operating Agreement. *See id.* at 16-17; *see also AM General Holdings LLC v Renco Group, Inc.*, 2013 WL 5863010, at *10 (Del Ch 2013). Simply put, to the extent JMG takes issue with the way in which Amur managed PMC, it must demonstrate that its conduct was violative of the Operating Agreement. This is particularly true where, as here, the Operating Agreement contains rather broad fiduciary duty waivers, which are enforceable under settled Delaware law. Prior Decision at 18; *see Capone v Castelton Commodities Int'l LLC*, 148 AD3d 506 (1st Dept 2017) (noting enforceability of Delaware LLC Act's allowance of fiduciary duty waivers).

The JMG Parties' claim that ShahMohammed aided and abetted Amur's fiduciary duty breaches also is dismissed. This claim, essentially, is that ShahMohammed should be held personally liable for what are essentially alleged breaches by Amur of the Operating Agreement. The claim is nothing more than an end run around Delaware's strict veil piercing rules which,

[13] This claim, as discussed in the Prior Decision, is governed by Delaware law because it involves the duties of a managing member of a Delaware LLC.

[14] While the counterclaims are somewhat unclear, to the extent JMG asserts claims for breach of fiduciary duty prior to Amur becoming managing member on August 15, 2015, such claims are dismissed. The Delaware authority accurately cited in the Amur Parties' moving brief provides that a non-managing member who merely serves as a lender to the LLC does not have default fiduciary duties to the LLC. *See* Dkt. 197 at 18. Thus, the claim that Amur was not truthful about the spread it was making on the LSA cannot be a fiduciary duty breach.

given this court's discussion of the Amur Parties' veil piercing claims (which were dismissed), the JMG Parties likely recognized could not be properly pleaded. *See* Prior Decision at 20-22. Unlike the Krauses, ShahMohammed is not alleged to have committed gross negligence. *See id.* at 22-23. To the extent the JMG Parties can plead a basis for ShahMohammed being held liable that is consistent with the Operating Agreement, they may seek leave to amend.

C. Breach of the Operating Agreement

The JMG Parties have stated a claim for breach of the Operating Agreement. The bases on which the Amur Parties seek dismissal are factual in nature and, therefore, are not properly raised on a motion to dismiss. For instance, the Amur Parties contend that the amount of legal fees billed in the Dynamic Litigation was reasonable. While the Amur Parties may seek summary judgment on this issue with the benefit of a discovery record, they cannot simply point to the amount in controversy in the Dynamic Litigation and effectively claim that the court should determine their reasonableness arguments to be more persuasive than those proffered by the JMG Parties. Ascertaining the reasons why the legal bills amounted to nearly $1 million requires a far more detailed factual inquiry than is possible on a motion to dismiss.

Likewise, the propriety of how Amur managed PMC and its assets is far too fact-laden of an issue to resolve on a motion to dismiss. Although the court is familiar with the process by which Amur was belatedly given control over the assets during the pendency of this action, it does not believe merely taking judicial notice of JMG's apparat recalcitrance is sufficient to establish the lack of merit in JMG's claim (if that is even permissible; it is certainly not a documentary evidence basis for dismissal). Again, this claim requires a proper discovery record to justify dismissal.

D. The Implied Covenant of Good Faith & Fair Dealing

Despite the Prior Decision explaining the gap-filling nature of an implied covenant claim under Delaware law [*see id.* at 17-18], the JMG Parties have not pleaded a gap filling claim. Instead, there merely recast their other claims as breaches of the implied covenant. Moreover, the counterclaims are unclear as to which contracts' implied covenants were breached. This claim is dismissed without prejudice. The JMG Parties should only seek leave to replead if they can allege wrongful conduct under a specific contract that is not expressly addressed by the contract itself.

E. "Failure to Pay" Breach of Contact Claims

These breach of contract claims, unlike the claims for breach of the Operating Agreement, are governed by New York law. One of them – "failing to pay packaging costs" under the Side Letter – is dismissed because, as noted earlier, only JMI (and not JMG) has standing to assert the claim. The portion of the second claim – failure "to pay engine rental and C check costs," which is based on an alleged oral agreement between JMG and PMC, is dismissed except to the extent that such claim seeks money owed to JMG for the use of its engines. JMG concedes that the actual counterparty was one of its affiliates (either JMT or JMI), and cites no authority for why it, as opposed to those affiliates, may prosecute these claims. *See* Dkt. 202 at 15.

That said, the Amur Parties do not proffer any documentary evidence refuting the existence or breach of the alleged oral agreement between PMC and JMG regarding the engines, nor do the Amur Parties proffer any argument that such an agreement is unenforceable (e.g., the statute of frauds). Consequently, the claim based on PMC's alleged agreement to reimburse JMG for the use of its engines survives dismissal.

F. UCC Claims

These claims are dismissed. At best, any claim that Amur breached its obligations under the UCC in connection with its foreclosure on the collateral for the LSA – JMG's membership interest in PMC – is not ripe. At the present time, JMG still owns its membership interest, and no foreclosure proceedings are pending. To the extent JMG takes issue with how Amur attempted to take over JMG's membership interest in the summer of 2016, PMC has not alleged any damages other than the attorneys' fees spent in connection with its order to show cause. Such fees are not recoverable because, as the Amur Parties explain [*see* Dkt. 205 at 14], the UCC sections under which the JMG Parties sue do not provide for attorneys' fees. *See U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 (2004) ("It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule."), citing *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 (1989).[15] Accordingly, it is

ORDERED that the Amur Parties' motion to dismiss the JMG Parties' counterclaims is granted in part to the following extent: (1) the first (violation of UCC § 9-620), third (violation of UCC § 1-304), fourth (breach of fiduciary duty), fifth (aiding and abetting breach of fiduciary duty), seventh (failure to pay packaging costs), and ninth (breach of the implied covenant of good faith and fair dealing) causes of action, as well as the portions of the eighth cause of action for failure to pay engine rental costs not incurred by JMG, are dismissed without prejudice and

[15] It also should be noted that there is no independently maintainable cause of action under UCC § 1-304. *See* UCC § 1-304, cmt. 1 ("This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, [a remedial] right or power."). While the dismissal of this claim is without prejudice to JMG possibly asserting a claim against Amur for violating its UCC good faith obligations, any such claim should be pleaded as a contract claim, not a statutory claim.

with leave to replead if such claims can be pleaded in a manner consistent with this decision, but only after first filing a motion seeking leave to replead; (2) the second cause of action (fraudulent inducement) is limited to the extent set forth in this decision; and (3) the motion is otherwise denied; and it is further

ORDERED that if any of JMG's affiliates seek to re-assert the claims dismissed in the seventh and eighth counterclaims, they must do so within 20 days of the entry of this order on NYSCEF.[16]

Dated: June 21, 2017

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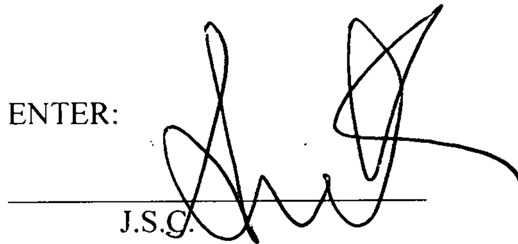

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

[16] If such claims are filed in a new action, instead of in this action, the RJI shall designate the case as related and the new case should be assigned to this part.