1-22-2019

PREMIER PORFOLIO 2, LLC Order on Motion to Dismiss

Elizabeth E. Long
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

PREMIER PORFOLIO 2, LLC, Plaintiff, v. ABS INVESTOR, LLC, ABS PREFERRED EQUITY MEMBER, LLC, and ACADIA REALTY LIMITED PARTNERSHIP, Defendants.	CIVIL ACTION NO. 2018CV310460 Bus. Case Div. 2

ORDER ON MOTION TO DISMISS

The above styled action is before the Court on Defendants ABS Investor, LLC ("ABS Investor"), ABS Preferred Equity Member, LLC ("ABS Preferred"), and Acadia Realty Limited Partnership's ("Acadia Accountant") Motion to Dismiss. Having considered the pleadings and argument of counsel at a January 16, 2019 hearing in this matter, the Court finds as follows[1]:

SUMMARY OF PLEADINGS

According to the Verified Complaint and Petition ("Complaint") of Plaintiff Premier Portfolio 2, LLC ("Plaintiff"), in 2015 Plaintiff and ABS Investor formed Broughton Street Partners Company II, LLC, a Delaware limited liability company ("BSP II"), as owners and Co-Managing Members.[2] BSP II was established "for the purpose of acquiring, owning, developing, redeveloping, financing, operating, leasing, managing, and disposing of unique real-estate assets

[1] In briefs and oral argument to the Court regarding Defendants' Motion to Dismiss, the parties referred to allegations and documents not contained in the pleading. However, when considering the motion the Court has limited its review strictly to the pleadings.

[2] Complaint, ¶11.

in Savannah, Georgia."[3]

On April 20, 2015, Plaintiff and ABS Investor executed an operating agreement for BSP II that was amended June 20, 2016.[4] On November 4, 2016, the operating agreement was again amended (as last amended, the "Operating Agreement") when ABS Preferred was admitted as its third member. Under the Operating Agreement, Plaintiff and ABS Investor remain Co-Managing Members of BSP II and each owns a 50% common membership interest in BSP II while ABS Preferred owns a 100% preferred membership in BSP II.[5]

The Operating Agreement includes a Buy-Sell provision ("Buy-Sell Option") under which either Co-Managing Member can buy or sell its membership interests from or to the other Co-Managing Member under a procedure that contemplates a hypothetical sale of BSP II's assets and a calculation of the resulting distribution each member would receive on account of their respective percentage interest in accordance with the terms of the Operating Agreement. Specifically, the Buy-Sell Option provides in part:

> 14.03 Buy-Sell.
>
> (a) In the event of a Deadlock between [Plaintiff] and [ABS Investor] as to a dispute or at any time after the second anniversary hereof, either Co-Managing Member may put its Membership Interest (and in the case where [ABS Investor] shall include the Membership Interest of [ABS Preferred]) to the other Member (an "Offer")...
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> (b) **The Offer shall (i) be in writing and signed by Offeror and (ii) specify a cash purchase price (the "Offer Price") at which the Offeror would purchase all of the Company assets if such Company assets were free and clear of all liens, claims, and encumbrances.** A copy of the Offer shall be delivered to the Company Accountant or, if none, a certified public accounting firm, **who shall, within 10 days, determine and notify the Members of the amount that the Offeree would receive (the**

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3 Complaint, ¶11.

4 Complaint, ¶12, Ex. A (Operating Agreement), p. 1, Recitals at ¶¶ 1-2.

5 Complaint, ¶13; Operating Agreement, Art. 1, Definitions at p. 4. The Operating Agreement is to be governed under the laws of Delaware and specifically the Delaware Limited Liability Company Act. *See* Operating Agreement, §19.01.

> **"Offeree Value"**; which in the case where [ABS Investor] is the Offeree shall include [ABS Preferred]) **and the amount that Offeror would receive (the "Offeror Value"), on account of their respective Percentage Interests in the Company** and any loans made by them to the Company, if (1) all Company assets were sold for the Offer Price, (2) all tax allocations were made as required in the Operating Agreement, (3) all liabilities of the Company (including any loans made by any Member or its Affiliates to the Company), were paid in full and (4) the remaining proceeds were distributed to and by the Members in accordance with this Agreement. Each Member shall cooperate fully with the Company's auditor or certified public accounting firm, as applicable, in connection with its effort to determine the Offeree Value and the Offeror Value.
>
> (c) **Offeree shall have the right, exercisable by delivery of written notice (the "Buy Election") to Offeror within 60 days, after the receipt of the Offer, to elect to purchase all of Offeror's Membership Interest** in the Company, and in any loans made to the Company by Offeror and its Affiliates, **for a cash purchase price equal to the Offeror Value**.
>
> **If Offeree fails to give Offeror notice of Offeree's Election within such time period, Offeree shall be deemed to have made an election to sell (the "Sell Election") all Offeree's Membership Interest and interests in any loans made to the Company** (which in the case where [ABS Investor] is the Offeree shall include the Membership Interest and interests in any loans made to the Company of [ABS Preferred]) **for a cash price equal to the Offeree Value.**[6]

On July 30, 2018, ABS Investor invoked the Buy-Sell Option by sending Plaintiff an offer letter with an "Offer Price" of $16.25 million ("Offer" or "Offer Letter" as appropriate).[7] That same day Acadia Accountant, acting as BSP II's "Company Accountant",[8] sent Plaintiff a letter stating in part: "Pursuant to Section 14.03(b) of the Operating Agreement, and in connection with the Offer Letter, the undersigned, as the Company Accountant, hereby determines that the Offeree Value is $0.00 and the Offer Value is $6,216,952.00" ("Acadia Accountant Calculation").[9]

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6 Operating Agreement, §14.03(a)-(c) (emphasis added).

7 Complaint, ¶35.

8 Section 9.03 of the Operating Agreement provides: "[ABS Investor's] affiliate shall handle the accounting, tax returns and reporting for which it shall receive a fee of 1% of the gross revenue collected at the Properties, payable monthly in arrears."

9 Complaint, ¶36.

Plaintiff alleges the Acadia Accountant Calculation is incorrect and that—under a "Waterfall" provision in the Operating Agreement which governs the distribution of Net Capital Proceeds[10]—given an offer of $16.25 million the correct Offeror Value is $4,876,508 and the correct Offeree Value is $1,325,317. Plaintiff further asserts that despite repeated requests, Defendants have "refused to explain" the Acadia Accountant Calculation (specifically the Offeror Value and Offeree Value under the Waterfall provision) or to provide documents and other information necessary to understand the calculations.[11] According to Plaintiff, the parties exchanged various communications regarding the disputed calculations and, in a September 10, 2018 letter, ABS Investor took the position that it "invoked the [Buy-Sell Option] with the justified intention of offering [Plaintiff] no monetary consideration for its interest in BSP II."[12]

Plaintiff alleges Defendants intentionally manipulated the Buy-Sell Option in an attempt to deprive Plaintiff of its rights to receive any value for its membership interests in BSP II. Based on these allegations, Plaintiff seeks a declaratory judgment declaring that: "[G]iven the Offer Price of $16.25 million, Plaintiff has the right to sell its membership interests in BSP II for an Offeree Value of $1,325,317 under a correct interpretation of the Operating Agreement's Waterfall and to be paid that amount in accordance with the Operating Agreement's terms." (Count I asserted against all Defendants). Additionally, Plaintiff asserts claims for: breach of contract (Count II asserted against ABS Investor and ABS Preferred); breach of implied covenant of good faith and fair dealing (Count III asserted against ABS Investor and ABS Preferred); breach of fiduciary duty (Count IV asserted against ABS Investor); and aiding and abetting breach of fiduciary duty (Count V asserted against Acadia Accountant).

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10 *See* Operating Agreement, §12.01(b).
11 Complaint, ¶39.
12 Complaint, ¶45

ANALYSIS

A. Standard on a Motion to Dismiss

> [A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied.

Abramyan v. State, 301 Ga. 308, 309, 800 S.E.2d 366, 368 (2017) (citing Anderson v. Flake, 267 Ga. 498, 501, 480 S.E.2d 10, 12–13 (1997)). Further, "[w]hen the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the rules require that it be construed in the light most favorable to the plaintiff with all doubts resolved in his favor even though unfavorable constructions are possible." Cobb Cty. v. Jones Grp. P.L.C., 218 Ga. App. 149, 152, 460 S.E.2d 516, 520 (1995) (citation omitted).

Under the notice pleading procedure of the Georgia Civil Practice Act, only "[a] short and plain statement of the claims" is required. O.C.G.A. § 9-11-8(a)(2)(A). *See* Wright v. Waterberg Big Game Hunting Lodge Otjahewita (PTY), Ltd., 330 Ga. App. 508, 510, 767 S.E.2d 513, 516 (2014) ("[T]he Georgia Civil Practice Act requires only notice pleading and, under the Act, pleadings are to be construed liberally and reasonably to achieve substantial justice consistent with the statutory requirement of the Act. Pleadings serve only the purpose of giving notice to the opposing party of the general nature of the contentions of the pleader, and thus general allegations are sufficient to support a plaintiff's claim for relief") (citing Racette v. Bank of Am., N.A., 318 Ga. App. 171, 180, 733 S.E.2d 457, 465 (2012)).

Nevertheless, "a complaint must give a defendant notice of the claim in terms sufficiently clear to enable him to frame a responsive pleading thereto." Patrick v. Verizon Directories Corp., 284 Ga. App. 123, 124, 643 S.E.2d 251, 252 (2007) (citing Allen v. Bergman, 201 Ga. App. 781, 783(3)(b) (1991)). *See* Cleveland v. MidFirst Bank, 335 Ga. App. 465, 465, 781 S.E.2d 577, 578 (2016) ("[A] plaintiff is not required to plead in the complaint facts sufficient to set out each element of a cause of action so long as it puts the opposing party on reasonable notice of the issues that must be defended against").

B. Conclusions of Law

In their Motion to Dismiss, Defendants argue the Complaint should be dismissed in its entirety for three reasons: (1) Plaintiff's request for declaratory relief is contrary to Delaware law, is not supported by the Operating Agreement, and is moot, (2) Plaintiff's claims for monetary relief against ABS Investor and ABS Preferred are precluded by an "exculpatory" provision in the Operating Agreement, and (3) the Complaint fails to state a claim under O.C.G.A. §9-11-12(b)(6) for Counts II through V. The Court addresses each argument in turn.

a. Request for Declaratory Relief

Defendants argue that Plaintiff's response to ABS Investor's $16.25 million Offer was a rejection of the Offer and that it constitutes a counteroffer. Specifically, Defendants contend Plaintiff materially varied the terms of the Offer by proposing a new Offeror Value of $4,876,508 and a new Offeree Value of $1,325,317 rather than accepting the Acadia Accountant Calculation. The Court disagrees.

> It is an elementary principle of contract law that an acceptance of an offer, in order to be effectual, must be identical with the offer and unconditional... 'It is, of course, elementary that where a contract is sought to be made in the form of an offer and an acceptance, there is no meeting of minds unless the acceptance is of the identical thing offered. If the acceptance be not co-extensive with the offer, then before the offerer [sic] can be said to have

> become bound, he must have indicated in turn his assent to the modified acceptance.'

Friel v. Jones, 42 Del. Ch. 148, 151, 206 A.2d 232, 233–34 (1964), *aff'd*, 42 Del. Ch. 371, 212 A.2d 609 (1965) (citing Foreman's Sys. v. Milk Dealers' Crate Corp., 13 Del. Ch. 351, 120 A. 358, 360 (1923)). *See* Ramone v. Lang, No. CIV.A. 1592-N, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006) ("Delaware, which has adopted the mirror-image rule, requires that an acceptance be identical to the offer") (citations omitted).

Here, an offer made under the Operating Agreement's Buy-Sell Option must expressly "specify a cash purchase price (the "Offer Price") at which the Offeror would purchase all of the Company assets if such Company assets were free and clear of all liens, claims and encumbrances."[13] Thus, ABS Investor's Offer was to purchase BSP II's assets for $16.25 million.[14] The Offeree Value and Offeror Value are not an offer *per se* but rather are calculations flowing from the Offer Price which are to be determined by the "Company Accountant" pursuant to the express terms of the Operating Agreement.

Although Plaintiff took the position that the Acadia Accountant Calculation is incorrect, stated what it believes to be the correct calculation, and requested additional documents and information to understand the Acadia Accountant Calculation, such does not constitute a rejection of Defendants' Offer Price. *See* Eikon King St. Manager, L.L.C. v. LSF King St. Manager, L.L.C., 109 S.W.3d 762, 767 (Tex. App. 2003) (under LLC agreement's buy-sell procedure which invoking-offeror member initiates by delivering notice to offeree member with a "Stated Amount" representing price at which it would purchase all assets of the company as if it were a hypothetical sale, and agreement then sets a formula for calculating the value of each member's interest based on the hypothetical sale, finding offeree member's acceptance of Stated

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13 Operating Agreement, §14.03(b).

14 Complaint, ¶35.

Amount but challenge to methodology and accuracy of offeror member's calculations of the value of each member's interest was authorized under the agreement). Indeed, to the extent Plaintiff sought a "correct" calculation of the Offeree Value and Offeror Value flowing from the $16.25 million Offer under the terms of the Operating Agreement, it sought to enforce the parties' agreed-upon formula for determining such values. *Compare* PAMI-LEMB I Inc. v. EMB-NHC, L.L.C., 857 A.2d 998, 1013-15 (Del. Ch. 2004) ("The court finds that the totality of [the general partner's] response to the Buy/Sell Notices was so inconsistent with the clear terms of the partnership agreements it constitutes either a repudiation of those contracts or an improper counteroffer"; holding the general partner repudiated those agreements by stating it would perform only on terms different therefrom and finding its "responses" to limited partner's offer under a buy-sell clause, when considered in the context of the general partner's contemporaneous statements that it would not agree to perform waterfall calculations under the agreements, constituted a counteroffer).

It follows that when faced with Defendants' Offer Price and the Acadia Accountant Calculation which Plaintiff believed to be incorrect under the Operating Agreement's Waterfall distribution formula and in light of Defendants' alleged refusal to provide additional information and the parties' inability to resolve the dispute, Plaintiff's only apparent recourse was to seek assistance from the courts to declare the parties' rights. *See* O.C.G.A. §9-4-1 ("The purpose of [the Declaratory Judgment Act] is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and this chapter is to be liberally construed and administered"); Mariner Healthcare, Inc. v. Foster, 280 Ga. App. 406, 410, 634 S.E.2d 162, 167 (2006) ("Georgia's declaratory judgment act is to be construed liberally, and all that is required to state a claim for declaratory judgment is 'the presence in the declaratory action of a party with

an interest in the controversy adverse to that of the petitioner'") (citing RTS Landfill v. Appalachian Waste Systems, 267 Ga. App. 56, 63(3), 598 S.E.2d 798 (2004)).[15]

Defendants also assert that by withdrawing or revoking the Offer Defendants have rendered moot Plaintiffs' claims.[16] Plaintiff, in turn, alleges the Buy-Sell Option is in the nature of a firm offer that must be held open to the Offeree for 60 days.[17]

> Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party. We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage. We will not read a contract to render a provision or term "meaningless or illusory. A contract must contain all material terms in order to be enforceable, and specific performance will only be granted when an agreement is clear and definite and a court does not need to supply essential contract terms. When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions.

Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1159–60 (Del. 2010) (citations, footnotes, and internal punctuation omitted)

Here, the Buy-Sell Option provides: "Offeree shall have the **right**, **exercisable** by delivery of written notice (the "Buy Election") to Offeror **within 60 days, after the receipt of the Offer**, to elect to purchase all of Offeror's Membership Interest…for a purchase price equal to the Offeror Value" but "[i]f Offeree fails to give Offeror notice of Offeree's Election within such time period, Offeree shall be deemed to have made an election to sell (the "Sell Election") all Offeree's Membership Interest…for a cash price equal to the Offeree Value." Reading the Operating Agreement as a whole and under an objective reading of the Buy-Sell Option, if an

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[15] *See* Newstrom v. Auto-Owners Ins. Co., 343 Ga. App. 576, 578-79, 807 S.E.2d 501, 503 (2017) ("When a choice-of-law question arises in a contract action brought in Georgia, substantive matters such as the validity and construction of the contract are governed by the substantive law of the state where the contract was made (or is to be performed, if that is a different state); but procedural and remedial matters are governed by the law of Georgia, the forum state"; holding declaratory judgment action concerning a dispute over the effect of a general release and the method of resolving that dispute "involve[d] procedural and remedial matters governed by Georgia law").

[16] Defendants' Verified Answer to Complaint and Petition ("Answer"), Fourth Defense and ¶53.

[17] Complaint, ¶26.

Offeree has the "right" to make a Buy Election and such right is "exercisable…within 60 days, after the receipt of the Offer", it logically follows that the offer must remain open during that period. Defendants' construction of the Buy-Sell Option would not give effect to an Offeree's express "right" thereunder and would, in fact, render an Offeree's right to make an election during the 60-day period illusory. *See* O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions "illusory or meaningless") (citations omitted). Insofar as ABS Investor's Offer had to remain open for a period of 60 days, the purported withdrawal of the Offer would be ineffective and would not render Plaintiff's claims moot.

Additionally, Defendants assert that to the extent Plaintiff seeks a declaration that it is entitled to "be paid [$1,325,317]", the declaratory judgment claim fails because §14.03(d) of the Operating Agreement expressly limits a seller's damages to two percent of the purchase price in the event the buyer fails to close on the purchase. Section §14.03(d) provides in pertinent part:

> Immediately after the Buy Election or Sell Election, as applicable, the purchaser under this Section shall deposit in escrow with a title company…a deposit in cash in an amount equal to two percent (2%) of the purchase price to be paid. The undersigned expressly acknowledges that if the purchaser fails to close such purchase as provided herein, the seller will suffer damages that, although substantial, will be difficult if not impossible to quantify. Accordingly, in such event the seller **may retain** the earnest money deposit as liquidated damages and not as a penalty.[18]

The Court finds the above language clear and unambiguous. Upon a buyer's failure to close a purchase per the Buy-Sell Option, a seller "may" but is not required to retain the earnest money deposit as liquidated damages. *See* Oracle Partners, L.P. v. Biolase, Inc., No. CIV.A. 9438-VCN, 2014 WL 2120348, at *16 (Del. Ch. May 21, 2014), *aff'd*, 97 A.3d 1029 (Del. 2014) (interpreting language in corporation's bylaws, finding use of the word "may" in the context

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[18] Operating Agreement, §14.03(d) (emphasis added).

used could only be interpreted as permissive rather than mandatory). Moreover, the Operating Agreement contains a provision that expressly makes the parties' rights and remedies cumulative:

> The rights and remedies provided by this Operating Agreement are **cumulative and the use of any one right or remedy by any party shall not preclude or waive the right to use any or all other remedies**. Such rights and remedies are **given in addition to any other rights** the parties may have by law, statute, ordinance or otherwise.[19]

Thus, §14.03(d) does not ultimately preclude or limit the declaratory relief sought in the Complaint or Plaintiff's other claims.

Given all of the above, Defendants' motion to dismiss Plaintiff's declaratory judgment claim is hereby DENIED.

b. Exculpatory Provision

Defendants assert Plaintiff's claims for monetary damages against ABS Investor and ABS Preferred are barred by an exculpatory provision contained in §5.03(b) of the Operating Agreement. As noted by Defendants, Delaware law allows members of a limited liability company to limit their potential liability to the company or other members:

> A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; **provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing**.

Del. Code Ann. Title 6, § 18-1101(e).

Here, §5.03(b) of the Operating Agreement provides:

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[19] Operating Agreement, §19.07 (emphasis added).

> No Member shall be liable to the Company or to the other Member for any loss or damage sustained by the Company or any of its Members **unless such loss or damage shall have been caused by intentional misconduct, fraud, a material misrepresentation or a knowing violation of law or a transaction for which such Member received a personal benefit in violation or breach of the provisions of this Operating Agreement.** [20]

In its Complaint, Plaintiff expressly alleges:

> [ABS Investor's] conduct and [ABS Preferred's] participation in manipulating the Buy-Sell Option involves intentional misconduct, fraud, a material misrepresentation, or a knowing violation of law in connection with a transaction for which [ABS Investor] and [ABS Preferred] expect to receive a personal benefit in violation or breach of the provisions of the Operating Agreement, within the meaning of section 5.03(b) of the Operating Agreement.[21]

Indeed, throughout its pleadings, Plaintiff alleges Defendants have acted in bad faith and in concert to intentionally manipulate the Buy-Sell Option to deprive Plaintiff from receiving any value for its membership interest in BSP II.[22] Under Georgia's notice pleading procedure, the Court finds Plaintiff has at least stated a claim for monetary damages against ABS Investor and ABS Preferred notwithstanding the exculpatory provision.

c. Counts II through V

i. Breach of contract (Count II)

"Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages." Interim Healthcare, Inc. v. Spherion Corp., 884 A.2d 513, 548 (Del. Super. Ct.), *aff'd*, 886 A.2d 1278 (Del. 2005) (citing H–M Wexford, LLC v. Encorp, Inc., 832 A.2d 129, 144 (Del.Ch.2003).

Here, Plaintiff alleges Defendants ABS Investor and ABS Preferred breached the Operating Agreement: "by failing to cooperate with Plaintiff in purporting to exercise the Buy-

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20 Operating Agreement, §5.03(b) (emphasis added).
21 Complaint, ¶48.
22 Complaint, ¶¶ 1, 48, 71

Sell Option, preventing Plaintiff from cooperating with the Acadia Accountant in determining the Offeree Value for Plaintiff's interest in BSP II, and interfering with the calculation of the Offeree Value for Plaintiff's interest in BSP II; and "by encouraging, adopting, and approving the Acadia Accountant's improper calculation of the Offeror Value and Offeree Value."[23]

Defendants argue that the breach of contract claim fails because the Operating Agreement expressly limits ABS Investor's and ABS Preferred's duties to certain enumerated acts, none of which Plaintiff alleges they breached. Further, they assert that, in the case of ABS Preferred, the Operating Agreement expressly provides that it owes "no fiduciary duty of disclosure or other duty to any other member or to the Company" and that it is entitled to act in its sole discretion even if such actions conflict with the interests of BSP II or Plaintiff. The Court is not persuaded.

Although §5.02(a) of the Operating Agreement limits ABS Investor's "powers, duties, and obligations" to certain enumerated acts and, with respect to ABS Preferred, §5.05 eliminates any fiduciary duty of disclosure or other duties to the other members or to BSP II to the fullest extent permitted by law, both provisions are subject to the other express terms of the Operating Agreement. *See* Operating Agreement at §5.02(a) ("[ABS Investor's] powers, duties and obligations shall be limited to the following **and to the powers, duties and obligations otherwise specifically granted to or imposed upon [ABS Investor] in this Operating Agreement**") (emphasis added); id. at §5.05 ("To the fullest extent permitted by law, **and except as otherwise specifically provided herein**, [ABS Preferred] shall have no fiduciary duty of disclosure or other duty to any other Member or to the Company…" (emphasis added).

With respect to the Buy-Sell Option, the Operating Agreement expressly states: "Each Member shall cooperate fully with the Company's auditor or certified public accounting firm, as

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[23] Complaint, ¶60.

applicable, in connection with its effort to determine the Offeree Value and the Offeror Value."[24]

Further, the Operating Agreement has a "Cooperation" clause that provides:

> The Members agree that they shall provide all cooperation reasonably requested by the other party in connection with the activities contemplated by this Operating Agreement, including (i) making available appropriate officers and employees, on reasonable advance notice, and (ii) executing and delivering any certificates or documents."[25]

Having considered the pleadings and given the above, the Court finds Plaintiff has at least stated a claim for breach of contract. Defendants' motion to dismiss the contract claim is DENIED.

ii. Breach of the implied covenant of good faith and fair dealing (Count III)

Under Delaware law,

> [t]he implied covenant of good faith and fair dealing inheres in every contract and requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain. The implied covenant cannot be invoked to override the express terms of the contract. Moreover, rather than constituting a free floating duty imposed on a contracting party, the implied covenant can only be used conservatively to ensure the parties' reasonable expectations are fulfilled. Thus, to state a claim for breach of the implied covenant, [a plaintiff] must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff. General allegations of bad faith conduct are not sufficient. Rather, the plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract.

Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 888 (Del. Ch. 2009) (citations, footnotes, and internal punctuation omitted).

Here, with respect to its claim for breach of the implied covenant of good faith and fair dealing, Plaintiff adopts and incorporates its previous allegations and further alleges that the Operating Agreement "impose[s] a duty of good faith and fair dealing on [ABS Investor] and

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[24] Operating Agreement, §14.03(b).

[25] Operating Agreement, §5.10.

[ABS Preferred] in the performance of their contractual obligations", and that they "have breached and will continue to breach this duty…by violating their contractual obligations to Plaintiff."[26] Defendants contend Plaintiff's allegations are too vague and conclusory to state a claim for breach of the implied covenant of good faith and fair dealing. However, when considered in the context of Plaintiff's breach of contract claim and, in particular, in light of Plaintiff's allegations that Defendants acted together to manipulate the Buy-Sell Option and impeded Plaintiff's attempts to obtain a proper calculation of the Offeree Value and Offeror Value under the terms of the Operating Agreement, the Court finds Plaintiff has at least stated a claim for breach of the implied covenant of good faith and fair dealing. *See* Wright, 330 Ga. App. at 510 (Under the Georgia Civil Practice Act, "[p]leadings serve only the purpose of giving notice to the opposing party of the general nature of the contentions of the pleader, and thus general allegations are sufficient to support a plaintiff's claim for relief") (citing Racette, 318 Ga. App. at 180(4)). Defendants' motion to dismiss this claim is DENIED.

iii. Breach of fiduciary duty (Count IV) and aiding and abetting breach of fiduciary duty (Count V)

Under Delaware law, "[a] claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty." Beard Research, Inc. v. Kates, 8 A.3d 573, 601 (Del. Ch.), *aff'd sub nom.* ASDI, Inc. v. Beard Research, Inc., 11 A.3d 749 (Del. 2010). A claim for aiding and abetting a breach of fiduciary duty has four elements: "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in the breach by the non-fiduciary defendants, and (iv) damages proximately caused by the breach." In re Rural Metro Corp., 88 A.3d 54, 80 (Del. Ch.), *decision clarified on denial of reargument sub nom.* In re Rural Metro Corp. Stockholders

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[26] Operating

Litig. (Del. Ch. 2014). Further, Delaware law permits a limited liability company to restrict the fiduciary duties owed by members and managers to the company or to other members. *See* Del. Code Ann. Title 6, § 18-1101(c) ("[T]he member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement"). *See also* Kagan v. HMC-New York, Inc., 94 A.D.3d 67, 72, 939 N.Y.S.2d 384 (2012) ("[W]ith these provisions the agreement imposes only specific limited contractual obligations on the managers, thus eliminating the traditional fiduciary duties imposed under Delaware law; *expressio unius est exclusio alterius*").

Here, Plaintiff asserts "[ABS Investor], as one of BSP II's Co-Managing Members, owes fiduciary duties of loyalty, care, and disclosure to the other Members, including Plaintiff" and that such duties "extend to its responsibilities with respect to BSP II's accounting matters."[27] Further, Plaintiff alleges ABS Investor "breached its fiduciary duties to Plaintiff, intentionally and in bad faith, by manipulating the Buy-Sell Option in a calculated effort to reduce the Offeree Value, to enrich itself at Plaintiff's expense, and to deprive Plaintiff of its membership interests in BSP II at an improperly calculated Offeree Value of $0", allegedly causing it to suffer damages.[28] With respect to its aiding and abetting claim, Plaintiff adopts and incorporates its prior allegations and further alleges Acadia Accountant "knowingly participated in [ABS Investor's] breaches of its fiduciary duties to Plaintiff", allegedly causing it to suffer damages.[29]

Although, as noted above, §5.02(a) of the Operating Agreement limits ABS Investor's "powers, duties, and obligations" to certain enumerated acts, given that such includes acts related to BSP II's accounting functions and it light of Plaintiff's assertions regarding the allegedly coordinated efforts of Defendants to intentionally and improperly manipulate the Buy-Sell Offer

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27 Complaint, ¶¶ 69-70.
28 Complaint, ¶¶ 71-72.
29 Complaint, ¶¶ 73-75.

to their benefit, the Court does not find that the breach of fiduciary claim is duplicative of the contract claim or that the pleadings disclose with certainty that Plaintiff would not be entitled to relief under any state of provable facts asserted in support thereof. *See* Schuss v. Penfield Partners, L.P., No. CIV.A. 3132-VCP, 2008 WL 2433842, at *10 (Del. Ch. June 13, 2008) (Although these fiduciary duty claims share a common nucleus of operative facts with [p]laintiffs' breach of contract claim, they depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy"). The motion to dismiss the breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims is DENIED.

CONCLUSION

Having considered the pleadings and given all of the above, the Court hereby DENIES Defendants' Motion to Dismiss.

SO ORDERED this 22nd day of January, 2019.

ELIZABETH E. LONG, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

Served upon registered service contacts through eFileGA

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