STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
GASTON COUNTY	21 CVS 725

LORAY MILL DEVELOPERS, LLC, LORAY MILL MANAGER, LLC, LORAY COMMERCIAL TENANT, LLC, LORAY MILL REDEVELOPMENT PHASE II, LLC, JBS VENTURES, LLC, and JOSEPH LENIHAN, Plaintiffs, v. CAMDEN LORAY MILL PHASE 1, LLC and JOHN GUMPERT, Defendants.	**AMENDED ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**[1]

1. **THIS MATTER** is before the Court upon (i) Defendants' Motion for Summary Judgment as to Plaintiffs' Claims and as to Defendants' Counterclaim for Declaratory Judgment ("Defendants' Motion"), (ECF No. 30), and (ii) Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion"), (ECF No. 32), (together with Defendants' Motion, the "Motions"), each filed 15 March 2022 in the above-captioned case.

[1] The Court enters this amended order and opinion to amend its Order and Opinion on Cross-Motions for Summary Judgment entered on 7 February 2023 [hereinafter "February Order"], (ECF No. 91), primarily to amend and clarify certain of the Court's rulings on Plaintiffs' Motion on Defendants' counterclaim for declaratory judgment, (*see* February Order ¶¶ 2, 78, 79, 102(b), n.58 (n.59 *infra*), n.82 (n.84 *infra*) and newly added footnotes 107, 108, 110, 111, and 115 *infra*), to correct the summary of its ruling in paragraph two, and to clarify the entities to which certain rulings apply, (*see* February Order ¶¶ 27, 31, 36, 38, 57–59, 69, 78, 79, 84, 102(b), n.56 (n.57 *infra*), 123 (n.130 *infra*)). *See also, e.g.*, *Vizant Techs., LLC v. YRC Worldwide, Inc.*, 2018 NCBC LEXIS 155, at *9 (N.C. Super. Ct. Nov. 15, 2018) (recognizing that "a trial court judge has the authority to reconsider his or her own summary judgment ruling" and citing cases), *aff'd per curiam*, 373 N.C. 549, 554 (2020).

2. Having considered the Motions, the briefs and related materials in support of and in opposition to the Motions, the arguments of counsel at the hearing on the Motions, and other appropriate matters of record, the Court hereby **DENIES** Defendants' Motion and **GRANTS in part** and **DENIES in part** Plaintiffs' Motion as set forth below.

Rosenwood, Rose & Litwak, PLLC, by Erik M. Rosenwood, for Plaintiffs-Counterclaim Defendants Loray Mill Developers, LLC, Loray Mill Manager, LLC, Loray Commercial Tenant, LLC, Loray Mill Redevelopment Phase II, LLC, JBS Ventures, LLC, and Joseph Lenihan.

Berman Fink Van Horn P.C., by William J. Piercy and Daniel H. Park, and McGuire Wood & Bissette, P.A., by Matthew S. Roberson, for Defendants-Counterclaim Plaintiffs Camden Loray Mill Phase I, LLC and John Gumpert.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact in ruling on motions for summary judgment. The following background, drawn from the evidence submitted in support of and in opposition to the Motions, is intended only to provide context for the Court's analysis and ruling.

4. This case involves a dispute between the two principal owners of the Loray Mill (the "Mill") project, a large-scale, mixed-use urban revitalization and historic preservation project located at a 120-year-old, six-story brick building in Gastonia, North Carolina. The Mill formerly contained a textile mill known as Loray Mill (the "Property") and was owned by Firestone Textile and Fibers ("Firestone") from the

1930s to the 1990s.[2] In 1998, Firestone donated the Property to The Historic Preservation Foundation of North Carolina, Inc. ("PNC"), and PNC then sought to find a developer to preserve and develop the Property (the "Project").

5. In 2003, Defendant John Gumpert ("Gumpert"), through his company, Camden Management Partners, Inc., put the Property under contract and attempted to develop the Project. The Project failed to close, however, due to a lack of financing during the recession of the late 2000s.[3]

6. At some point in the late 2000s, Gumpert met Plaintiff Joseph Lenihan ("Lenihan").[4] Lenihan, through his company, Plaintiff JBS Ventures, LLC ("JBS"), agreed to invest capital in the Project and guarantee Project loans, and thereafter the Project secured financing and closed in 2012 or 2013.[5] By this time, Lenihan, JBS, Gumpert, and Gumpert's company, Defendant Camden Loray Mill Phase I, LLC ("Camden"), had begun working together to develop the Project and each had incurred hundreds of thousands of dollars in pre-construction costs.[6]

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[2] (Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. Ex. 1, Aff. John Gumpert, dated 14 Mar. 2022, ¶ 6 [hereinafter "Gumpert Aff."], ECF No. 31.2; Verified Compl. ¶¶ 13–14 [hereinafter "Compl."], ECF No. 3; Defs.' Answer and Verified Countercls. ¶¶ 13–14, ECF No. 4.) Defendants' Answer and Verified Counterclaims contain separately numbered sections for affirmative defenses and counterclaims. The Court will refer to the former section as "Answer" and to the latter as "Countercls."

[3] (Gumpert Aff. ¶ 8; Compl. ¶ 18.)

[4] (Gumpert Aff. ¶ 9 (stating the introduction was in 2009); Compl. ¶ 17 (placing the introduction in 2007).)

[5] (Gumpert Aff. ¶ 9; Compl. ¶ 18.)

[6] (Answer ¶ 18; Compl. ¶ 19.) According to Lenihan JBS had made contributions of $747,500 and a loan of $395,393.69, and Camden had contributed $402,500 to cover construction costs as of 1 November 2012. (Compl. ¶ 19.) Gumpert avers that Camden had incurred hundreds

7. The Project ultimately cost well over $40,000,000 and generated more than $16,000,000 in federal and state tax credits.[7]

8. The Project was divided into two phases. Phase I has been completed; Phase II has not yet begun.

9. The owner of Phase I of the Project was Loray Mill Redevelopment, LLC ("LMR"). The manager of LMR was Plaintiff Loray Mill Manager, LLC ("LMM"), and LMM owned 90% of LMR. The remaining 10% of LMR was owned by Loray Master Tenant, LLC ("LMT").[8] LMM's manager is JBS, and JBS's manager is Lenihan. LMM was initially owned 64.995% by JBS, 34.995% by Camden, and .01% by Centurion Construction Company, Inc.

10. The owner of Phase II was Plaintiff Loray Mill Redevelopment Phase II, LLC ("LMR2").[9] LMR2's manager is LMM, and LMR2 was initially owned 50% by JBS and 50% by Camden.

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of thousands of dollars more in additional pre-construction costs as of this date. (Answer ¶ 19.)

[7] (Compl. ¶ 22; Answer ¶ 22.)

[8] LMT is the entity through which the Project was leased. LMM was the manager of LMT, and LMT was owned .01% by LMM and 99.99% owned by the Project's tax credit investors. Chevron TCI, Inc., the Project's federal tax credit investor, owned 98.99%, and Foss N.C. Mill Credit 2011 Fund I, LLC and Foss N.C. Mill Credit 2014 Fund I, LLC, the Project's North Carolina state tax credit investors, each owned .5%. (Gumpert Aff. ¶ 14(e); Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. Ex. A, ECF No. 31.3; Compl. ¶¶ 23, 24.)

[9] (Gumpert Aff. ¶¶ 14(c), (d); Compl. ¶ 24.)

11. The developer of the Project was Plaintiff Loray Mill Developers, LLC ("LMD"). LMD was owned 65% by JBS and 35% by Camden, and JBS was LMD's manager.[10]

12. Plaintiff Loray Commercial Tenant, LLC ("LCT") leases out the commercial and retail portions of the Project.[11] LCT was initially owned 65% by JBS and 35% by Camden, and JBS served as LCT's manager.

13. Finally, former defendant HPP, LLC,[12] a Gumpert and Camden-affiliated entity, served as the construction manager for the Project.[13] Gumpert acted as on-site representative during construction between 2013 and 2016[14] and worked with Centurion and other subcontractors on the Project.[15]

14. JBS and Camden entered into substantially identical operating agreements for LMD, LMM, LCT, LMR, and LMR2 (collectively, the "Loray Entities"), each of

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[10] (Gumpert Aff. ¶ 14(a); Compl. ¶ 24.)

[11] (Gumpert Aff. ¶ 14(f); Compl. ¶ 24.)

[12] HPP, LLC was voluntarily dismissed from this action on 29 April 2021. (ECF No. 11.)

[13] (Countercls. ¶ 35; Pls.' Resp. Defs.' Verified Countercls. ¶ 35, ECF No. 12.) Gumpert also testified that Camden was the construction manager for the Project from 2013 to 2016. (Gumpert Aff. ¶ 11.)

[14] (*See* Gumpert Aff. ¶ 11; Countercls. ¶ 35; Compl. ¶ 26.)

[15] (Compl. ¶¶ 27–28.)

which, except for LMR,[16] was governed by Georgia law.[17] Among other provisions, the operating agreements for the Loray Entities (the "Operating Agreements") permitted JBS, as the LLC's manager (or as manager of the LLCs' manager), to issue a capital call in writing to JBS and Camden in the following circumstances:

> **Additional Contributions**. If at any time, and from time to time, the Manager in good faith believes that the Company is, or at any time within the following ninety (90) days will be, in the position of having payment obligations in excess of cash including reserves or equivalent resources with which to fund such obligations, including available borrowed funds from third party sources (although the Manager is not obligated to cause the Company, or to attempt to cause the Company, to borrow such funds), the Manager shall make such situation, and in particular the amount of the excess of obligations over resources so determined (the "cash need amount") known to the Members in writing (a "Capital Call"). If the Manager issues a Capital Call to the Members, each Member shall make an Additional Contribution to the Company within thirty (30) days following receipt of the Capital Call from the

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[16] The LMR Operating Agreement provided that LMR was organized under the laws of the State of North Carolina. (Compl. Ex. E, Operating Agreement Loray Mill Redevelopment, LLC 1 [hereinafter "LMR Agreement"].)

[17] (Gumpert Aff. ¶ 15; Aff. Erik M. Rosenwood, dated 15 Mar. 2022, Ex. 2, Operating Agreement Loray Mill Developer, LLC Art. 2.1 [hereinafter "LMD Agreement"], ECF No. 33.2; Aff. Erik M. Rosenwood, dated 15 Mar. 2022, Ex. 1, Operating Agreement Loray Mill Manager, LLC Art. 2.1 [hereinafter "LMM Agreement"], ECF No. 33.1; Aff. Erik M. Rosenwood, dated 15 Mar. 2022, Ex. 3, Operating Agreement Loray Commercial Tenant, LLC Art. 2.1 [hereinafter "LCT Agreement"], ECF. No. 33.3; Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. Ex. D, Operating Agreement Loray Mill Redevelopment Phase II, LLC Art. 2.1 [hereinafter "LMR2 Agreement"], ECF No. 31.6.) Collectively, the LMR, LMD, LMM, LCT, and LMR2 Agreements will be referred to as the "Operating Agreements." The Operating Agreements have been filed in multiple locations on the docket. The LMD Agreement also appears at Complaint Exhibit B and Defendants' Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment Exhibit A. The LMM Agreement also appears at Complaint Exhibit A and Defendants' Index of Materials accompanying their Brief in Support of their Motion for Summary Judgment Exhibit 1. The LCT Agreement also appears at Complaint Exhibit C and Defendants' Index Materials Supporting Motion for Summary Judgment Exhibit 3. For ease of reference, when citing an Article included in all Operating Agreements, the citation will reference "Operating Agreements."

> Manager in an amount equal to such Member's Residual Percentage multiplied by the cash need amount.[18]

15. The Operating Agreements further provided that if a member failed to make an Additional Contribution consistent with the Capital Call within 60 days (and thereby became a "Shortfall Member"), any other member (a "Non-Shortfall Member") was permitted, but not required, to "loan or contribute to the Company the amount of the entire Additional Contribution for such Member and the Shortfall Member."[19] The Non-Shortfall Member could then treat the loan or contribution:

> as either a debt owing by the Company to the Non-Shortfall Member (a "Shortfall Loan"), or as a capital contribution to the Company by the Non-Shortfall Member, in either case pursuant to the terms and conditions of Section 4.3(b); provided, however, that prior to the time that Chevron reserve is released at the Project Entity level, the Non-Shortfall Member may only make a Shortfall Loan to the Company and may not make a capital contribution to the Company.[20]

16. If the Non-Shortfall Member elected to treat the Additional Contribution as a capital contribution, the Operating Agreements provided that the members' ownership interests would be adjusted in accordance with the contributions each had made.[21]

17. The Operating Agreements gave JBS, as manager of each entity, broad authority to manage the entity:

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[18] (Operating Agreements Art. 4.2.)

[19] (Operating Agreements Art. 4.3(a).)

[20] (Operating Agreements Art. 4.3(a).)

[21] (Operating Agreements Art. 4.3(b).)

> **3.1 Authority of Manager**. Subject to provisions hereof limiting its authority; the Manager shall have full charge at its sole discretion of the management, conduct and operation of the Company's business, within the confines of such business, and its decisions shall be binding on the Company, and in particular, without limitation upon the generality of the foregoing, the Manager shall have authority to cause the Company: to employ or engage the services of such agents, employees, independent contractors, attorneys, and accountants, as it deems reasonably necessary; to create, by grant or otherwise, easements and servitudes; to alter, improve, repair, raze, replace, and rebuild Company property; to effect insurance for the Company and the Members; to pay, collect, compromise, arbitrate, or otherwise adjust any and all claims or demands of or against the Company; to enter into any and all other transactions involving the Company's property, real or personal, or business affairs; and to abandon any unconsummated transaction, even if consent thereto by other Members has been obtained (whether or not any such consent was required). Without limiting the generality of the foregoing, the Manager shall have full, complete and exclusive authority, power, and discretion to act as a Member and Manager of the Project Entity and in such capacities and subject to the Operating Agreement for the Project Entity to manage and control the business, property and affairs of the Project Entity, to make all decisions regarding those matters and to perform or cause to be performed any and all other acts or activities customary or incident to the management of the Project Entity's business, property and affairs.[22]

18. The Operating Agreements restricted JBS, as manager, in certain ways as well, including by requiring JBS to "use reasonable, good faith efforts to consult with Camden on all material management issues"[23] and prohibiting JBS from taking "any action which ha[d] the effect of altering, modifying, changing or amending [the Operating Agreements]"; "commingl[ing] the funds of the Company with funds of the

[22] (Operating Agreements, Art. 3.1.)

[23] (Operating Agreements Art. 3.1.)

Manager or any other person"; or "materially chang[ing] or add[ing] to the approved construction scope of the Project."[24]

19. Although the Operating Agreements also required the preparation and submission of operating budgets for each Loray Entity, it is undisputed that the parties subsequently agreed that such budgets were only necessary for LMT and LCT since the operations of the other Loray Entities were included within the budgets of those entities.[25] The Operating Agreements required JBS to prepare and submit the proposed operating budgets to the respective LLC's members for their approval not later than 45 days before the end of each entity's fiscal year.[26] The members agreed to "consider the proposed Operating Budget in good faith and consult with each other as necessary in an effort to resolve any differences" and to "not . . . unreasonably with[o]ld, condition[ ] or delay[ ]" their approval.

20. Approval under the Operating Agreements required the consent of those "Members, including the Manager, holding Residual Percentages which taken together exceed fifty percent (50%) of the aggregate of all Residual Percentages owned by all of the Members, including the Manager."[27] Once approved, JBS, as manager, had "the right, power and authority to expend funds on behalf of the Company (with Company funds) for any of the items set forth in, and with respect to, the Accounting

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[24] (Operating Agreements Art. 3.2.)

[25] (Gumpert Aff. ¶¶ 44–45; Aff. Joseph Lenihan ¶ 9 [hereinafter Lenihan Aff.], ECF No. 38.)

[26] Only the LMR Operating Agreement omitted this 45-day period.

[27] (Operating Agreement Art. 11.8.)

Period covered by an approved Operating Budget, without the further consent [of] the Members."[28] In addition, the parties agreed that the manager was "entitled to incur *de minimus* [sic] expenditures not provided in the Operating Budget which [did] not exceed (i) the sum of $25,000 as to any single expenditure, and (ii) the sum of $100,000 as to any such expenditures in the aggregate for any fiscal year."[29]

21. Construction of Phase I of the Project began on 27 March 2013.[30] Disagreements between Gumpert and Lenihan began to emerge not long after and persisted throughout the course of construction. In particular, Lenihan initiated a number of design changes to the Project that Gumpert did not support.[31] Gumpert documented his opposition to these changes as early as 4 February 2014.[32] When the Project began to run over budget, Gumpert blamed Lenihan's redesigns. For his part, Lenihan contended that Gumpert grossly mismanaged the Project's construction and blamed Gumpert for causing the Project to incur vast cost overruns.[33]

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[28] (Operating Agreement Art. 3.3(c).) In the event that the members did not approve an operating budget, the Operating Agreement gave JBS, as manager, and without the consent of any other member, the authority to spend up to 110% of the line items in the last approved operating budget as well as the authority to incur emergency expenditures to "prevent imminent damage to persons or property on or about the Project." (Operating Agreement Art. 3.3(b), (d).)

[29] (Operating Agreement Art. 3.3(e).)

[30] (Countercls. ¶ 44.)

[31] (Countercls. ¶ 47.)

[32] (Aff. Erik M. Rosenwood, dated 15 Mar. 2022, Ex. 5, ECF No. 33.5.)

[33] (Compl. ¶ 32; Countercls. ¶ 54.)

22. In response to these increased costs, Lenihan and Gumpert took various actions to keep the Project afloat. During 2014, Lenihan made loans and guarantees,[34] and Camden deferred a portion of its construction management fee.[35] As a result of these actions, Lenihan and Gumpert agreed in early 2015 to increase JBS's LMR2 ownership interest from 50% to 65% and to reduce Camden's LMR2 ownership interest from 50% to 35%.[36]

23. Over time, matters worsened, and the Project struggled to stay afloat. It is undisputed that by 2016, the Project was behind schedule and over budget by $8,000,000.[37] JBS, as manager of the Loray Entities and pursuant to Article 4.2 of the Operating Agreements, issued a series of capital calls to raise funds to save the Project and to reimburse itself for funds it advanced to the Project. Camden did not participate in these calls, contending variously that the calls were procedurally improper, issued for unbudgeted items, and otherwise invalid. These capital calls, their validity, and their effect on JBS's and Camden's respective ownership of each of the Loray Entities lie at the heart of Plaintiffs' claims and Defendants' counterclaims.

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[34] For example, in March 2014, JBS loaned LMR2 $100,000, (Aff. Erik Rosenwood, dated 15 Mar. 2022, Ex. 16, ECF No. 33.16), and on 8 December 2014, Lenihan guaranteed a bridge loan and agreed to put $1,000,000 in escrow as collateral. (Compl. ¶ 33.)

[35] (Countercls. ¶ 55; Aff. Erik M. Rosenwood, dated 15 Mar. 2022, Ex. 17, Dep. Camden Loray Mill Phase I 30(b)(6), dated 15 Dec. 2021, 249:19–24 [hereinafter "Camden Dep."], ECF No. 33.17.)

[36] (Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. Ex. E, [hereinafter "February 2015 Call"], ECF No. 31.7.) The February 2015 Call can also be found at Aff. Erik M. Rosenwood, Ex. 6, ECF No. 33.6 and Compl. Ex. F.

[37] (Compl. ¶ 30, Countercls. ¶ 48.)

24. The capital calls at issue in this litigation include those made by JBS: (i) in December 2015 for $855,166.63 (the "December 2015 Call")[38]; (ii) in June 2017 for $150,000 (the "June 2017 Call"),[39] (iii) in February 2019 for $2,304,934[40] and $130,500[41] (the "2019 Calls"), and (iv) in July 2020 for $478,000 (the "July 2020 Call") (collectively, the "Capital Calls" or the "Calls"). Camden did not participate in any of these Calls.[42]

25. Plaintiffs assert that as a result of Camden's failure to participate in these Capital Calls, and consistent with JBS's election under Article 4.3 of the Operating Agreements, Camden's ownership interests in LMM, LCT, and LMR2 have been lawfully reduced to less than 1% in each.[43] Defendants contend that Camden's failure

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[38] (Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. Ex. I [hereinafter "December 2015 Call"], ECF No. 31.11; Compl. ¶ 48; Countercls. ¶¶ 83–84.) The December 2015 Call can also be found at Compl. Ex. G and Aff. Erik M. Rosenwood, dated 15 Mar. 2022, Ex. 7, ECF No. 33.7.

[39] (Compl. ¶ 53.)

[40] (Compl. ¶ 56; Countercls. ¶ 98; Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. Ex. K, ECF No. 31.13.)

[41] (Compl. ¶ 58; Countercls. ¶ 99; Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. Ex. L, ECF No. 31.14.)

[42] (Compl. ¶¶ 53, 57, 60; Countercls. ¶¶ 101, 109.)

[43] (Compl. ¶ 63.) In particular, Plaintiffs assert that for LMM, JBS contributed $2,957,066 and Camden contributed $35; for LCT, JBS contributed $681,100 and Camden contributed $35; for LMR2, JBS contributed $281,000 and Camden contributed $35; and for LMD, JBS contributed $747,500 and Camden contributed $402,500. (Compl. ¶ 63.) Lenihan bases his ownership calculations on the parties' relative contributions to each entity. (Compl. Ex. M [hereinafter "July 2020 Ownership Letter"]). The July 2020 Ownership Letter is also found at Exhibit F to Defendants' Brief in Support of Their Motion for Summary Judgment as to Plaintiffs' Claims and as to Defendants' Counterclaim for Declaratory Judgment. (ECF No. 31.8.)

to participate in the Capital Calls did not impair its 30% interest in these three entities.[44] Plaintiffs and Defendants agree that Camden retains a 30% interest in LMD.

26. In addition to their contention that the Capital Calls were invalid, Defendants also seek to recover funds they contend JBS and Lenihan spent without Camden's approval and which were in excess of the Project's approved budgets. Plaintiffs contend that the challenged expenditures were for Project improvements, payroll expenses, and management and consulting ("oversight") fees that benefited the Project and were permitted under the Operating Agreements and applicable law.[45]

27. On 23 February 2021, Plaintiffs initiated this action, asserting claims (i) for declaratory judgment determining JBS's and Camden's respective ownership interests and rights in the Loray Entities and (ii) for breach of contract.[46] On 5 April 2021, Defendants answered the Complaint and asserted counterclaims against Plaintiffs for (i) declaratory judgment, (ii) breach of contract, (iii) derivative and direct claims for breach of fiduciary duty, (iv) unjust enrichment, (v) derivative and direct claims for constructive fraud, (vi) conversion, and (vii) civil conspiracy.[47]

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[44] (Countercls. ¶ 112.)

[45] (Gumpert Aff. ¶ 43.)

[46] (Compl.)

[47] (Countercls.)

28. After the completion of discovery, the parties filed their respective Motions on 15 March 2022. After full briefing, the Court held a hearing on the Motions on 11 May 2022 (the "Hearing"), at which all parties were represented by counsel.

29. On or about 26 August 2022, the Loray Mill was sold for $44,750,000 (the "Sale"). Plaintiffs informed Defendants of the Sale by letter dated 8 September 2022 (the "Letter"). While Defendants did not oppose the Sale, they objected to Plaintiffs' plan for distribution of the proceeds of the Sale (the "Sale Proceeds") and therefore filed a Motion for Preliminary Injunction[48] ("PI Motion") on 19 September 2022. On 1 November 2022, after full briefing and hearing, and with Plaintiffs' consent, the Court granted the PI Motion and ordered Plaintiffs to escrow $6,245,810.36 of the Sale Proceeds in Plaintiffs' counsel's trust account pending further order of the Court.[49]

30. Thereafter, on 11 November 2022, Defendants filed a Supplemental Reply in Support of Defendants' Motion to Reopen Discovery,[50] to which Plaintiffs filed a response on 29 November 2022.[51] Defendants filed a surreply in response[52] which stated, in part, that Plaintiffs produced to Defendants on 2 December 2022 LCT's

[48] (ECF No. 47.)

[49] (Order on Defs.' Mot. Prelim. Inj., ECF No. 64.)

[50] (ECF No. 65.)

[51] (Pls.' Reply Defs.' Suppl. Reply Supp. Defs' Mot. Reopen Disc., ECF No. 68.)

[52] (Suppl. Surreply Supp. Defs' Mot. Reopen Disc., ECF No. 70.)

2021 K-1 tax form (the "K-1")[53] reflecting that Camden owns 35% of LCT.[54] Because no party had advanced summary judgment arguments based on Camden's reported ownership in LCT's K-1 tax form, the Court, acting *sua sponte*, ordered supplemental briefing on 9 December 2022 concerning the K-1's relevance to the Motions.[55]

31. In addition, on 6 December 2022, the Court, also acting *sua sponte*, ordered supplemental briefing to address whether, under Georgia and North Carolina law, the economic loss rule bars Defendants' counterclaims for breach of fiduciary duty and constructive fraud based on Plaintiffs' alleged payment of unbudgeted payroll expenses, oversight fees, and commercial tenant improvements.[56]

32. After full supplemental briefing as described above, the Court held a further hearing on the Motions on 18 January 2023, at which all parties were represented by counsel.

33. The Motions are now ripe for resolution.

II.

LEGAL STANDARD

34. Under Rule 56, "[s]ummary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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[53] (ECF No. 72.)

[54] The Court subsequently learned that similar representations are made in LMM's 2017 K-1, (ECF No. 31.29), LCT's 2019 K-1, (ECF No. 31.30), and LMD's 2020 K-1, (ECF No. 79).

[55] (Second Order Suppl. Briefing Mots. Summ. J., ECF No. 74.)

[56] (Order Suppl. Briefing Mots. Summ. J., ECF No. 73.)

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Da Silva v. WakeMed*, 375 N.C. 1, 10 (2020) (quoting N.C. R. Civ. P. 56(c)). "An issue is genuine if it can be proven by substantial evidence and a fact is material if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Curlee v. Johnson*, 377 N.C. 97, 101 (2021) (cleaned up). "The summary judgment standard requires the trial court to construe evidence in the light most favorable to the nonmoving party." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482 (2020).

35. "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The movant may meet this burden either (1) "by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense" or (2) "by showing through discovery that the opposing party cannot produce evidence to support an essential element of [its] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000). If the movant meets this burden, "the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Pennington*, 356 N.C. at 579; *see* N.C. R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

III.

ANALYSIS

A. Defendants' Motion

36. Each side seeks a declaratory judgment determining the ownership interests and rights JBS and Camden have in the Loray Entities.[57] Defendants seek summary judgment on both sides' declaratory judgment claims, contending that the undisputed evidence establishes as a matter of law that Camden has a 30% ownership interest in the Loray Entities.[58] Plaintiffs argue that Defendants' Motion should be denied because the undisputed evidence shows that Camden's failure to participate in JBS's various Capital Calls has reduced Camden's ownership interests in LMM, LCT, and LMR2 to less than 1% in each.[59] Defendants also seek summary judgment on Plaintiffs' claim that Defendants breached the various Operating Agreements by disputing the legitimacy of JBS's Capital Calls and by interfering with Plaintiffs'

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[57] The parties' pleadings are somewhat imprecise, but it is clear that Plaintiffs seek a declaratory judgment at least as to LMM, LCT, LMR2, and LMD, (*see* Compl. ¶¶ 63, 74, 77), and that Defendants seek a declaratory judgment at least as to LMM, LCT, and LMD, (*see* Countercls. ¶ 190, 193–94). In addition, Plaintiffs initially sought a declaration regarding JBS's "authority to move ahead with refinancing or other restructuring of the Project's finances," (Compl. ¶ 75), but Plaintiffs' counsel conceded at the hearing on the PI Motion that the sale mooted this aspect of Plaintiffs' declaratory judgment claim.

[58] (Defs.' Br. Supp. Mot. Summ. J. Pls.' Claims and Defs.' Countercl. Declaratory J. 14–15 [hereinafter "Defs.' Supp. Br."], ECF No. 31.)

[59] (Pls.' Mem. Law Opp'n Defs.' Mot. Summ. J. Pls.' Claims and Summ. J. Their Countercls. 5 [hereinafter "Pls.' Opp'n Br."], ECF No. 37; Compl. ¶ 63.) Unlike Defendants, Plaintiffs do not seek summary judgment on their affirmative claim for relief.

operations, refinancing efforts, and negotiations with the Project's tax credit investors.[60]

1. Declaratory Judgment Claims

37. As noted above, the Operating Agreements provide JBS with the power and authority to make capital calls on behalf of a Loray Entity and allow a member of the entity to cover a non-contributing member's portion of the capital call, which the member may convert into equity and thereby reduce the non-contributing member's equity interest in the entity.[61] Plaintiffs allege that they properly exercised these powers, resulting in the dilution of Defendants' ownership interests in LMM, LCT, and LMR2 to less than 1% in each.

38. Defendants argue, however, that the undisputed evidence shows that Camden's ownership interests in LMM, LCT, and LMR2 were not diluted by JBS's Capital Calls because (i) the Calls were made before the "Chevron reserve" had been released and only *after* JBS made contributions to the Project, not *before*, which were required for a valid capital call under the Operating Agreements;[62] (ii) JBS did not issue a capital call for LCT;[63] and (iii) the Capital Calls to LMM and LMR2 were

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[60] (Pls.' Opp'n Br. 3.) Plaintiffs have abandoned their breach of contract claim to the extent it is based on Gumpert's work as the Project's construction manager or on Defendants' alleged interference with the "operations of the general contractor and various subcontractors," except to the extent that they may serve as offsets or as estoppel against Defendants' claims. (Pls.' Opp'n Br. 3.)

[61] (Defs.' Supp. Br. 6; Pls. Opp'n Br. 3–4; Operating Agreements Arts. 4.2 and 4.3.)

[62] (Defs.' Supp. Br. 9–12, 16–19.)

[63] (Defs.' Supp. Br. 15–16.)

made to recoup Plaintiffs' improper and unapproved expenses.[64] Defendants therefore argue that they are entitled to summary judgment against Plaintiffs' claims.

39. For their part, Plaintiffs contend that they have offered evidence showing that the Capital Calls were consistent with the Operating Agreements and, to the extent they were not, were consistent with the course of dealing between the parties.[65]

40. After a careful review of the record, the Court concludes that genuine issues of material fact preclude summary judgment for Defendants on Plaintiffs' declaratory judgment claim.

a. Choice of Law

41. The Court first turns to choice of law. The Operating Agreements for LMM and LMR2 each provide that the Agreements "shall be construed in accordance with and governed by the law of Georgia, and particularly by the [Georgia Limited Liability Company] Act."[66] The LCT Operating Agreement likewise provides that it "shall be construed in accordance with and governed by the law of Georgia," but, in apparent conflict, goes on to state "and particularly by the [North Carolina Limited Liability Company] Act." Because our courts recognize that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the

[64] (Defs.' Supp. Br. 19–21.)

[65] (Pls.' Opp'n Br. 5, 10, 12.)

[66] (LMM Agreement Art. 2.1; LMR2 Agreement Art. 2.1.)

interpretation of the contract, such a contractual provision will be given effect," *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262 (1980), the Court will apply Georgia law to the LMM and LMR2 Operating Agreements and both Georgia and North Carolina law to the LCT Operating Agreement.

b. The "Chevron Reserve"

42. The parties dispute the meaning of the term "Chevron reserve" in Article 4.3 of the Operating Agreement. The term is not defined or otherwise referenced in the Agreement, and its meaning cannot be discerned from the four corners of the document. Accordingly, the Court finds that the term is ambiguous. *See, e.g.*, *Unified Gov't of Athens-Clarke Cnty. v. Stiles Apartments, Inc.*, 295 Ga. 829, 832 (2014) ("When the terms of a contract are clear and unambiguous, the reviewing court looks only to the contract itself to determine the parties' intent."); *Richard Haney Ford, Inc. v. Ford Dealer Comput. Servs.*, 218 Ga. App. 315, 316 (1995) ("[T]he existence or nonexistence of an ambiguity is [ ] a question of law for the court."); *see also, e.g.*, *Jones v. Casstevens*, 222 N.C. 411, 413 (1942) ("If there be no dispute as to the terms, and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written."); *Myers v. Myers*, 213 N.C. App. 171, 175 (2011) ("[W]hether . . . the language of a contract is ambiguous or unambiguous is a question for the court to determine.").

43. The Court further concludes that the pertinent rules of contract construction do not supply the term's meaning as a matter of either Georgia or North Carolina law given the single use of the term in the Operating Agreements. *See, e.g.*, *City of*

Baldwin v. Woodard & Curran, Inc., 293 Ga. 19, 30 (2013) ("[I]f the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity."); *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 94 (1992) ("[I]t is a fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so.").

44. Finally, the Court concludes that the parties' proffered extrinsic evidence is in conflict and is not susceptible to a single interpretation. *See, e.g.*, *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 334 (1989) ("Extrinsic evidence to explain ambiguity in a contract becomes admissible only when a contract remains ambiguous after the pertinent rules of construction have been applied."); *Cogdill v. Sylva Supply Co.*, 265 N.C. App. 129, 142 (2019) ("Where the language of a contract is ambiguous, courts consider other relevant and material extrinsic evidence to ascertain the parties' intent[.]"). In particular, Gumpert avers that the "Chevron reserve" is the funding Chevron provided to the Project, which was finally exhausted on 24 December 2020.[67] In contrast, Lenihan has testified that the term "refers to 'Tenant Reserve' as outlined in the [LMT] Operating Agreement" and was an account that had been exhausted by 2016.[68]

45. The parties' competing contentions about their pattern and practice and course of dealing regarding the "Chevron reserve" is similarly in conflict. In the face

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[67] (Defs.' Supp. Br. 17 n.18; Gumpert Aff. ¶ 12.)

[68] (Lenihan Aff. ¶ 5; Pls.' Opp'n Br. 8–9; Compl. Ex. H.)

of this disputed evidence, the Court concludes that the meaning of the term "Chevron reserve" must be resolved by the factfinder[69] at trial. Accordingly, Defendants' Motion must be denied to the extent it is based on Defendants' contention that the Operating Agreements required that the "Chevron reserve" be released before a valid Capital Call could issue.

c. Capital Calls for Reimbursement of Advanced Funds

46. The Court next considers Defendants' contention that the Operating Agreements required JBS to make capital calls before it made contributions to the Project and thereby prohibited JBS from making a capital call to obtain reimbursement for advanced funds. Defendants rely on Article 4.2 of the Operating Agreements for support, which provides that JBS may make capital calls when it "in good faith believes that the Company is, or at any time within the following ninety (90) days will be, in the position of having payment obligations in excess of cash[.]"

47. Plaintiffs, however, point to section 3.1 of the Operating Agreements, which broadly grants JBS "full charge at its sole discretion of the management, conduct and operation of the Company's business," and argue that the Agreements do not restrict JBS from loaning money to any of the Loray Entities, calling the loan due at a date in the future, and then seeking reimbursement through a capital call. Plaintiffs argue that this construction describes a process that fully complied with Article 4.2,

[69] In the February Order, the Court referenced that certain issues would be resolved by a jury. However, in e-mail correspondence with the Court, the parties requested a bench trial of this matter, which the Court subsequently noticed on 17 February 2023. (ECF No. 95.) The Court therefore has replaced the references to a "jury" in the February Order with "factfinder" in this amended order and opinion.

was well established by the parties' regular course of conduct, and occurred with respect to each Capital Call.

48. Based on the above, the Court concludes that, at a minimum, both sides have proffered reasonable interpretations of the Operating Agreement, thereby requiring the denial of Defendants' Motion to this extent under Rule 56. *See, e.g.*, *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 275 (2008) (concluding summary judgment was inappropriate where contract was "susceptible to differing yet reasonable interpretations"); *see also, e.g.*, *Bowers v. Today's Bank*, 347 Ga. App. 615, 618 (2018) ("A contract is ambiguous if the words used therein leave the intent of the parties in question—i.e., that intent is uncertain, unclear, or is open to various interpretations.").

d. Capital Calls on LCT

49. Defendants next contend that JBS never issued a capital call to LCT and thus that Camden continues to own 30% of that entity. For their support, Defendants rely upon Gumpert's affidavit averments to that effect[70] and point to a letter dated 6 July 2020 in which Lenihan stated that "Loray Mill Developer [sic] and Loray Commercial Tenant have not received capital calls and I am working on those now."[71]

50. Plaintiffs respond in opposition that Defendants "ignore [ ] the course of conduct between the parties, whereunder from the beginning capital calls would be

[70] (Gumpert Aff. ¶ 19.)

[71] (July 2020 Ownership Letter.)

issued through [LMM] and the funds disbursed to the various entities."[72] Plaintiffs acknowledge, however, that "beginning in 2017, various capital calls were made on behalf of specific companies," limiting Plaintiffs' alleged course of conduct to the first two capital calls at issue: the February 2015 Call, which Defendants admit was valid, and the December 2015 Call, through which Plaintiffs offer evidence suggesting that LCT received $681,175 of the $885,000 raised in the Call.[73]

51. In considering these competing contentions, the Court first notes that Defendants mischaracterize the quoted passage from Lenihan's 6 July 2020 letter to Gumpert to imply that Lenihan recognized that company-specific capital calls were required under the Operating Agreements. Lenihan, however, began his letter by stating the following:

> It has come to my attention that you now are stating that all the Loray entities are to be treated individually and not as a group of companies. This is not what you and I agreed too [sic] and has not been the way we have been treating these entities since inception of the project. When capital was needed, with your approval and actual request, I did not identify each individual company we were putting money into as we agreed that all capital was for the entire group of companies and we used the money that came into the group to pay invoices for which ever company needed the cash at that time to keep from having to call capital for the entities that had no income like Loray Mill Manager, Loray Mill Developer and Loray Mill Manager.[74]

52. He then stated:

> Now that it appears you are calling this into question and are asserting that each individual company should be treated as a stand-alone entity,

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[72] (Pls. Opp'n Br. 12.)

[73] (Pls. Opp'n Br. 12–13; July 2020 Ownership Letter.)

[74] (July 2020 Ownership Letter.)

> therefore I would need to establish percentage ownership of each entity based on the capital calls that were made.
>
> If this were in fact the way we had agreed, the facts would look like this:[75]

It was in this context—in framing a scenario with which Lenihan did not agree—that Lenihan stated that LCT had not received a capital call. As such, while the evidence is undisputed that Plaintiffs did not make a capital call specifically on behalf of LCT, Lenihan's testimony is not fairly characterized to suggest that he admitted that such a company-specific capital call was a requirement of the Operating Agreements.

53. Shorn of this implication, the evidence before the Court is in sharp dispute with respect to the December 2015 Call. Defendants point to the requirement of a capital call on LCT for an equity conversion under section 4.3 of the LCT Operating Agreement and the undisputed fact that no capital call was specifically made on behalf of LCT. Plaintiffs rely on the above-stated course of conduct, which is supported by Lenihan's testimony, contemporaneous writings, and JBS's conduct in making the unchallenged February 2015 Call on behalf of LMM for all Loray Entities, to have effected a modification of the Operating Agreements' specific terms concerning capital calls.

54. Both North Carolina and Georgia law recognize that "[a] contract may be modified or waived . . . by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived . . . even where the instrument provides for any modification of the contract to be in writing." *Childress*

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[75] (July 2020 Ownership Letter.)

v. C.W. Myers Trading Post, Inc., 247 N.C. 150, 154 (1957); *see, e.g.*, *Glimcher Props., L.P. v. Bi-Lo, LLC*, 271 Ga. App. 322, 324 (2005) ("parties may modify a written agreement through their conduct, even when the contract itself contains a merger clause or a 'No Waiver' provision"). As a result, the Court concludes that the parties' conflicting evidence creates a genuine issue of material fact as to whether the December 2015 Call was made on behalf of LCT, precluding summary judgment for Defendants on this ground.[76]

e. Capital Calls for Allegedly Improper and Unapproved Expenses

55. Defendants' next contention is that JBS initiated capital calls to raise funds to pay for unbudgeted payroll expenses, oversight fees, and commercial tenant improvements, as well as to recoup funds that benefited Plaintiffs rather than the Loray Entities.[77]

56. Plaintiffs offer testimony from Lenihan, however, that many of the payroll expenses and oversight fees that Defendants challenge as unbudgeted were included in the budget for LMT, which is not a party to the lawsuit, and that the payments Defendants allege to be improper self-dealing were approved by Defendants and made for proper business purposes.[78] In particular, Lenihan addresses each of the

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[76] According to Lenihan, Camden's failure to participate in the December 2015 Capital Call resulted in ownership adjustments leaving JBS with 99.98532% and Camden with .005138% of LCT. (July 2020 Ownership Letter.)

[77] (Defs.' Supp. Br. 13.) These contentions allege improper expenditures from 2013 to 2021. (Gumpert Aff. ¶¶ 46–48.)

[78] (Second Aff. Joseph Lenihan, dated 21 Apr. 2022, Ex. B, ECF No. 41.2.)

expenses Defendants challenge and attests to specific facts rebutting each of Defendants' claims. Accordingly, viewing this evidence in the light most favorable to Plaintiffs, the Court concludes that Plaintiffs have offered sufficient evidence to preclude summary judgment for Defendants on this ground.[79]

f. Quasi-Estoppel Based on the K-1 Tax Forms

57. Finally, Defendants invoke the doctrine of quasi-estoppel to contend that the K-1 representations of LCT, LMR2, LMD, and LMM should preclude Plaintiffs from contending in this litigation that Camden has less than a 35% interest in these entities.

> Under quasi-estoppel doctrine one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct. Likewise, under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument. The essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent positions.

Snow Enter., LLC v. Bankers Ins. Co., 282 N.C. App. 132, 142 (2022) (cleaned up). "Quasi-estoppel is thus directly grounded upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Id.* at 142–43 (cleaned up).

58. Defendants argue that the doctrine should apply because Plaintiffs "have accepted tax benefits" from the representations of Camden's ownership in the K-1s.[80]

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[79] As discussed below, the Court concludes on Plaintiffs' Motion that Defendants' counterclaims for breach of fiduciary duty and constructive fraud based on Plaintiffs' alleged self-dealing must be dismissed.

[80] (Defs.' Suppl. Br. Mots. Summ. J. Addressing Impact LCT K-1 4, ECF No. 83.)

Plaintiffs argue in opposition that JBS and Lenihan were not responsible for the K-1 representations because they were prepared by an independent accounting firm without their input, and, in any event, the percentage ownership figures reflected in the K-1s neither harm nor benefit the Loray Entities.[81] JBS and Lenihan also argue that the representations were made to reflect Defendants' position in light of the parties' current dispute and are subject to amendment upon a judicial determination of Lenihan's and Gumpert's respective ownership shares in the course of this litigation. In the face of these conflicting positions and evidence, the Court concludes that the facts necessary to determine the potential application of quasi-estoppel are in dispute and must await a factfinder's determination at trial.

59. For each of these reasons, therefore, the Court concludes that Defendants' Motion seeking summary judgment on the parties' declaratory judgment claims must be denied.

2. Plaintiffs' Breach of Contract Claim

60. Plaintiffs allege that Defendants breached the various Operating Agreements by improperly interfering with the Loray Entities' operations after Plaintiffs made, and Defendants failed to respond to, valid capital calls that diluted Camden's investment. Defendants respond that their conduct was consistent with their rights as 30% owners of these various entities. So framed, the parties appear to agree that Plaintiffs' claim for breach of contract thus depends upon the resolution

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[81] (Pls.' Reply Defs.' Suppl. Br. Mots. Summ. J. Addressing Impact 2021 LCT K-1 3, ECF No. 86; Pls.' Reply Defs.' Suppl. Br. Mots. Summ. J. Addressing Impact 2021 LCT K-1 Ex. A, ECF No. 86.1.)

of the parties' competing claims for declaratory judgment. Since the Court has concluded that the claims for declaratory relief must be resolved at trial, the Court reaches the same conclusion concerning Plaintiffs' claim for breach of contract. Accordingly, Defendants' Motion as to this claim must also be denied.

B. Plaintiffs' Motion

61. Apart from its request for declaratory judgment, Camden has asserted counterclaims directly against (i) JBS for breach of the Operating Agreements and for breach of fiduciary duty, (ii) LMM for breach of the LMM Operating Agreement,[82] and (iii) JBS and Lenihan for constructive fraud and unjust enrichment. Camden has also asserted counterclaims derivatively (i) on behalf of LMM, LMD, and LCT against JBS for breach of fiduciary duty and (ii) on behalf of LMR against Lenihan for conversion.[83] Finally, Defendants together have asserted a direct counterclaim against Plaintiffs for civil conspiracy.

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[82] Defendants base this claim on LMM's alleged breach of Article 5.4(d) of the LMM Operating Agreement by failing to pay Camden a "construction management fee associated with the project." (Countercls. ¶ 187.) The LMM Operating Agreement, however, does not contain an Article 5.4(d), and no other provision requires a "construction management fee" be paid to Camden. In any event, Defendants have not offered any evidence or argument in opposition to Plaintiffs' motion seeking summary judgment on this claim. The Court therefore will grant Plaintiffs' Motion and enter summary judgment for Plaintiffs on this counterclaim as pleaded.

[83] The Court notes that LMR does not appear in the caption and is not identified as a party in Defendants' counterclaims. Plaintiffs have not challenged Defendants' purported derivative claim for LMR on this ground, however, and the Court will therefore consider Plaintiffs' Motion against this claim solely on the grounds asserted in the Motion and supporting briefs.

62. Plaintiffs move to dismiss all counterclaims,[84] contending that Defendants' counterclaims for breach of contract and breach of fiduciary duty are time-barred by the applicable statute of limitations and further that all of Defendants' counterclaims must be dismissed in light of the undisputed evidence of record.

1. Defendants' Breach of Contract and Breach of Fiduciary Duty Counterclaims

a. Statutes of Limitations[85]

63. As an initial matter, the Court notes that North Carolina's "traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335 (1988). "Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover." *Id.* at 340. Accordingly, although the Operating Agreements provide that they will be governed by Georgia law, North Carolina's statutes of limitations will be applied to Defendants' counterclaims.

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[84] Plaintiffs do not advance arguments specific to Defendants' declaratory judgment claim (Count IX), despite stating in their supporting briefs that they seek dismissal of all claims. (*See* Defs.' Resp. Opp'n Pls.' Mot. Summ. J. 2 [hereinafter "Defs.' Opp'n Br."], ECF No. 39.) Because the declaratory judgment counterclaim is based on the same facts and allegations as certain of Defendants' breach of contract counterclaims, however, the Court will consider Plaintiffs' Motion to seek dismissal of Defendants' declaratory judgment counterclaim based on the same arguments Plaintiffs advance to dismiss the relevant portions of Defendants' breach of contract counterclaims.

[85] As discussed in further detail, *infra* Sec. 3.a., the Court concludes that Defendants' derivative counterclaims for breach of fiduciary duty should be dismissed for lack of standing. Accordingly, the discussion that follows only addresses the applicable statutes of limitations for Defendants' direct claims for breach of contract and breach of fiduciary duty.

64. Under North Carolina law, Defendants' claims for breach of contract and breach of fiduciary duty each have a three-year statute of limitations. *See, e.g.*, *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 n.5 (2015) (recognizing three-year statute of limitations for breach of contract and breach of fiduciary duty claims) (citing N.C.G.S. § 1-52(1), (5), (9) (2017)).[86] For both claims, "the statute [of limitations] begins to run when the claim accrues." *Miller v. Randolph*, 124 N.C. App. 779, 781 (1996). A "cause of action generally accrues when the right to institute and maintain a suit arises." *Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Nat. Res.*, 333 N.C. 318, 323 (1993) (cleaned up). The right to sue for both breach of contract and breach of fiduciary duty arises when the plaintiff knew or should have known of the alleged breach. *See, e.g.*, *Chisum v. Campagna* (*Chisum I*), 376 N.C. 680, 702 (2021) (for breach of contract claims); *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 69 (2005) (for breach of fiduciary duty claims). In short, "as soon as the injury becomes apparent to the claimant or should reasonably become

[86] In deciding which statute of limitations should be applied to a declaratory judgment claim, the Court is "guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs." *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 414 (2002). Since Defendants' declaratory judgment counterclaim seeks a determination of contract rights, the three-year statute of limitations for breach of contract applies. *See, e.g.*, *Penley v. Penley*, 65 N.C. App. 711, 723 (1984) ("Although in form the complaint asked for relief through a declaratory judgment, in substance, as represented by the evidence produced and the issue submitted to the jury, the action is based on contract."), *rev'd on other grounds*, 314 N.C. 1 (1985); *see also, e.g.*, *Ludlum v. State*, 227 N.C. App. 92, 95 (2013) (holding that "[b]ecause plaintiff waited too long to file his claim [based on contract], he is barred from a determination that he is owed any benefits at all [pursuant to that contract]" under his declaratory judgment claim).

apparent, the cause of action is complete and the limitation period begins to run." *Chisum I*, 376 N.C. at 701.

65. Plaintiffs argue that the actions upon which Defendants base their breach-based counterclaims—Plaintiffs' alleged unbudgeted commercial tenant upfits, improper capital calls, failure to accept an offer for purchase of a tax credit, unpaid development fee, and Camden's loss of investment partners and financing—were all known to Defendants more than three years before Defendants filed their counterclaims for breach of fiduciary duty and breach of contract on 5 April 2021.[87]

66. In particular, Plaintiffs contend, and the undisputed evidence shows, that Defendants were on notice of Plaintiffs' alleged breaches of fiduciary duty and contract (i) no later than the end of construction in 2016 as to JBS's design changes in 2013 and 2014[88] that led to the unbudgeted commercial tenant upfit expenditures in 2015 and 2016 about which Defendants complain;[89] (ii) in 2015 as to JBS's failure to pay the development fee when it became due at that time;[90] (iii) in 2016 as to LMM's failure to pay the construction management fee when it became due at construction completion;[91] (iv) in 2016 as to JBS's failure to reach an agreement with

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[87] (Pls.' Supp. Br. 9–12.)

[88] (Aff. Erik M. Rosenwood Ex. 5.)

[89] (Aff. Erik M. Rosenwood Ex. 10, ECF No. 33.10.)

[90] (Camden Dep. 68:17–74:9.)

[91] (Camden Dep. 249:19–24.)

Foss regarding tax credits;[92] (v) in 2016 as to Gumpert's lost financing;[93] (vi) in 2015 as to Lenihan's alleged self-dealing;[94] and (vi) on 8 December 2015 and 6 June 2017 as to the Capital Calls initiated and communicated to Defendants on those dates.[95]

67. Rather than challenge this undisputed evidence, Defendants rely upon the continuing wrong doctrine, the discovery rule, and equitable estoppel principles to argue that their counterclaims should survive dismissal.[96] The Court examines each contention in turn.

b. Continuing Wrong Doctrine

68. Defendants first contend that Plaintiffs' alleged breaches "remain a constant and continuing theme" and therefore that the statute of limitations has not yet expired by operation of the continuing wrong doctrine.[97] "When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases." *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 179 (2003). To determine whether Defendants have suffered from a "continuing wrong," the Court considers "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged." *Id.* In particular, the Court "must examine

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[92] (Camden Dep. 242:13–246:11.)

[93] (Camden Dep. 247:19–248:9.)

[94] (Countercls. ¶¶ 119–21.)

[95] (Defs.' Supp. Br. Exs. I–J, ECF Nos. 31.11–.12.)

[96] (Defs.' Opp'n Br. 2.)

[97] (Defs.' Opp'n Br. 2, 8–9.)

the wrong alleged by the plaintiff to determine if the purported violation is the result of continual unlawful acts, each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the continual ill effects from an original violation." *Quality Built Homes, Inc. v. Town of Carthage*, 371 N.C. 60, 70 (2018) (cleaned up). As a result, "the 'continuing wrong' doctrine does nothing more than provide that the applicable limitations period starts anew in the event that an allegedly unlawful act is repeated." *Id.*

69. Here, the conduct on which Defendants base their claims for breach involved separate discrete acts rather than continual ill effects from an original breach of contract or an original breach of fiduciary duty. The undisputed evidence shows that the payment of unbudgeted commercial tenant upfit expenditures, the failure to pay a development or construction management fee, the failure to reach an agreement with Foss, Gumpert's loss of financing, and the pre-5-April-2018 capital calls were (i) non-repetitive and occurred at a specific, identified time well before 5 April 2018, (ii) the alleged injuries to Defendants resulting from these actions occurred at the time of the events, and (iii) the events and Defendants' injuries were known by Defendants prior to 5 April 2018. Accordingly, the Court concludes that Defendants' breach of contract and breach of fiduciary duty claims are untimely and that the continuing wrong doctrine does not apply to save Defendants' late-filed claims.

c. <u>"Discovery Rule"</u>

70. Under the "discovery rule," "a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim."

Christenbury Eye Ctr., P.A. v. Medflow, Inc., 370 N.C. 1, 5 (2017). As noted above, the rule applies to both breach of contract and breach of fiduciary duty claims and states that the statute of limitations begins to run only when the injured party discovers, or should have discovered, the injury. *See, e.g.*, *Chisum I*, 376 N.C. at 699–702; *Toomer*, 171 N.C. App. at 68–69.

71. Plaintiffs argue that the same evidence that defeats Defendants' continuing wrong argument requires the rejection of Defendants' defense based on the discovery rule. Defendants disagree, contending that, despite having pleaded claims based on Plaintiffs' alleged financial misconduct, they were not on notice of Plaintiffs' specific financial misconduct until Plaintiffs produced the Loray Entities' financial records as QuickBooks files ("QuickBooks") in discovery in this action on 11 January 2022.[98] They argue that the QuickBooks production revealed, for the first time, the specific self-dealing transactions on which their claims are based, specific unbudgeted expenditures on tenant improvements, payroll expenses, oversight fees, and the amount of cash available to pay the development fee,[99] and, as a result, their claims should be saved by the discovery rule.

72. Plaintiffs assert that the QuickBooks production provided Defendants with additional information that only supplemented the information already available to

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[98] (Defs.' Opp'n Br. 3.)

[99] (Defs.' Opp'n Br. 3–4.)

Defendants.[100] The Court agrees with Plaintiffs. Defendants were sufficiently aware of Plaintiffs' alleged financial misconduct to assert their counterclaims in 2021, and they based those claims on the very misconduct Defendants contend they only recently discovered. At most, the QuickBooks production provides further evidence to support Defendants' counterclaims and the extent of Defendants' alleged injuries,[101] not evidence of new claims that may be asserted with a new statute of limitations. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 494 (1985) ("The fact that further damage which plaintiff did not expect was discovered does not bring about a new cause of action, it merely aggravates the original injury."). Indeed, Defendants have not sought to amend their counterclaims or file a separate action based on the QuickBooks production, a confirmation that Defendants' counterclaims, as originally pleaded, embrace the information gleaned from the QuickBooks production.

73. Accordingly, the Court concludes that the discovery rule does not salvage Defendants' contract and breach of fiduciary duty claims to the extent they are based on Plaintiffs' alleged conduct before 5 April 2018.

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[100] (Pls.' Reply Defs.' Resp. Opp'n Pls.' Mot. Summ. J. 9 [hereinafter "Pls.' Reply Br."], ECF No. 40.) Citations to the page numbers in Pls.' Reply Br. are to the electronic filing's PDF page numbers as the brief itself is not paginated.

[101] Indeed, Defendants asserted in their Opposition Brief that "it was not until this Court forced JBS to make the Loray Entities QuickBooks available in January 2022 that Defendants became aware of the *details and extent* of JBS'[s] self-dealing and the unbudgeted expenditure of Loray Entity money." (Defs.' Opp'n Br. 13 (emphasis added).)

d. Estoppel

74. Finally, Defendants contend that Plaintiffs should be estopped from advancing a statute of limitations defense because Plaintiffs did not provide the QuickBooks production until ordered by the Court in January 2022.[102]

75. "Equitable estoppel may be invoked, in a proper case, to bar a defendant from relying upon the statute of limitations." *Duke Univ. v. Stainback*, 320 N.C. 337, 341 (1987). The party seeking the application of equitable estoppel must demonstrate the following:

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially[.]

Gore v. Myrtle/Mueller, 362 N.C. 27, 33–34 (2007) (first alteration in original) (quoting *Hawkins v. M. & J. Fin. Corp.*, 238 N.C. 174, 177–178 (1953)).

76. "The party asserting the claim must plead the necessary facts with particularity and demonstrate that the [opposing party's] representations delayed it from filing suit." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 2015 NCBC LEXIS 64, at *8 (N.C. Super. Ct. June 19, 2015). "The court need not find bad faith, fraud nor

[102] (Defs.' Opp'n Br. 11–12.)

intent to deceive to apply the doctrine of equitable estoppel." *Blythe v. Bell*, 2013 NCBC LEXIS 7, at *47 (N.C. Super. Ct. Feb. 4, 2013). However, "[a] party cannot rely on equitable estoppel if it was put on inquiry as to the truth and had available the means for ascertaining it." *Christenbury Eye Ctr., P.A.*, 2015 NCBC LEXIS 64, at *8 (cleaned up).

77. Defendants contend that Plaintiffs withheld important financial information from Camden despite Gumpert's requests, which began in 2013.[103] The undisputed evidence demonstrates, however, that the Project's property manager regularly provided annual budgets and monthly financial statements to Defendants beginning in 2015.[104] Defendants have not challenged this fact, and it is undisputed that Defendants did not seek additional information from the project manager prior to June 2020.[105] Moreover, there is no evidence that Plaintiffs sought to limit the information the property manager provided to Defendants,[106] and Defendants have not offered evidence that Camden relied in any way on any alleged

[103] (Defs.' Opp'n Br. 2; Defs.' Opp'n Br. Ex. 1, Second Aff. John Gumpert, dated 12 Apr. 2022 ¶¶ 8, 11.)

[104] (Camden Dep. 143:25–144:13; Aff. Stephanie Harrison, dated 25 Apr. 2022 ¶ 5 [hereinafter "Harrison Aff."], ECF No. 42.)

[105] (Harrison Aff. ¶ 7; Second Aff. Joseph Lenihan, dated 21 Apr. 2022, ¶ 13 [hereinafter "2d Lenihan Aff"], ECF No. 41.)

[106] (2d Lenihan Aff. ¶ 11.)

misrepresentations made by JBS. The Court concludes, in these circumstances, that equitable estoppel does not apply.[107]

78. Accordingly, based on the above, the Court concludes that the applicable statutes of limitations bar Defendants' claims for breach of contract and breach of fiduciary duty related to (i) JBS's alleged failure to pay the development fee,[108] (ii) LMM's alleged failure to pay the construction management fee,[109] (iii) unbudgeted commercial tenant upfit expenditures flowing from JBS's design changes in 2013 and 2014,[110] (iv) JBS's failure to reach an agreement with Foss regarding tax credits, (v) Gumpert's lost financing,[111] (vi) Lenihan's alleged self-dealing prior to 5 April 2018, and (vii) the Capital Calls on 8 December 2015 and 6 June 2017. The Court further concludes that the applicable statute of limitations likewise bars Defendants' declaratory judgment claim concerning Camden's alleged right to payment of the development fee given that claim's close correlation to Defendants' breach of contract claim based on the same conduct and seeking essentially the same relief.

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[107] For these same reasons, the Court concludes, separate and apart from its statute of limitations rulings, that Camden's breach of fiduciary duty claim based on JBS's alleged withholding of information, (*see* Countercls. ¶179), necessarily fails.

[108] (Countercls. ¶¶ 151–52.)

[109] (Countercls. ¶¶ 186–188.)

[110] (*See* Countercls. ¶¶ 157–61.)

[111] (Countercls. ¶ 177.)

Accordingly, Plaintiffs' Motion will be granted to this extent and the foregoing claims will be dismissed with prejudice.[112]

2. Defendants' Breach of Contract Counterclaims – Post-5 April 2018

79. The Court next turns to Plaintiffs' Motion to the extent it seeks dismissal of Defendants' counterclaims for Plaintiffs' alleged breach of contract after 5 April 2018.[113] To support those claims, Defendants allege that JBS breached multiple provisions of the Operating Agreements, including (i) Article 3.1, by "failing to use reasonable, good faith efforts to consult with Camden on all material management issues of the entity"; (ii) Article 3.2, by "acting on multiple occasions in excess of the limitations on its powers as Manager"; (iii) Article 3.5, by "obtaining reimbursement of other than out-of-pocket expenses incurred by JBS"; (iv) Articles 4.2 and 4.3, by "purporting to dilute Camden's ownership interest therein through improper capital calls"; and (v) Article 4.5, by "failing to apply the capital of each of [LMD, LMM, and LCT] . . . in accordance with the applicable operating budget."[114] The Court has already concluded that issues of fact remain concerning the alleged breaches of

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[112] In light of the Court's ruling, the Court need not address Plaintiffs' further contention that Defendants have failed to offer sufficient evidence to sustain their breach of contract and breach of fiduciary duty claims based on Plaintiffs' alleged conduct prior to 5 April 2018, although that evidence is discussed in connection with Defendants' counterclaim for constructive fraud below.

[113] The elements of a claim for breach of contract are similar in North Carolina and Georgia. *See, e.g.*, *Harper v. Vohra Wound Physicians of N.Y., PLLC*, 270 N.C. App. 396, 400 (2020) (requiring "(1) existence of a valid contract and (2) breach of the terms of that contract"); *McAlister v. Clifton*, 313 Ga. 737, 742 (2022) (requiring "(1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken" (quoting *Norton v. Budget Rent a Car Sys., Inc.*, 307 Ga. App. 501, 502 (2010))).

[114] (Countercls ¶¶ 129–41; Defs.' Opp'n Br. 14.)

Articles 3.5, 4.2, 4.3, and 4.5 relating to whether Plaintiffs' Capital Calls were properly issued, whether Camden's ownership interest was improperly diluted, and whether Plaintiffs made unauthorized reimbursements and improperly incurred unbudgeted expenses after 5 April 2018. Defendants have also offered evidence that JBS commingled funds during this period in violation of Articles 3.2(e) and (f). As a result, summary judgment on these issues is not proper, and the Court will therefore deny Plaintiffs' Motion as to Defendants' breach of contract counterclaims based on conduct occurring after 5 April 2018.[115]

3. Defendants' Counterclaims for Breach of Fiduciary Duty and Constructive Fraud Against JBS

80. Next, Plaintiffs seek to dismiss all derivative and direct counterclaims against JBS for breach of fiduciary duty and constructive fraud. Defendants premise their constructive fraud claims on the same conduct as the breach of fiduciary duty claims, so where appropriate, the Court will consider these claims together.

81. North Carolina and Georgia law both require that a plaintiff claiming breach of fiduciary duty must show (1) a fiduciary duty, (2) a breach of that duty, and (3) injury proximately caused by the alleged breach. *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 339 (2019); *Niloy & Rohan, LLC v. Sechler*, 335 Ga. App. 507, 510 n.5 (2016).[116]

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[115] As noted in Section III.A.1 above, issues of fact preclude summary judgment for Plaintiffs dismissing Defendants' declaratory judgment counterclaim for the period prior to 5 April 2018.

[116] The choice of law for Defendants' breach of fiduciary duty and constructive fraud claims differs by entity and by claim. Because LMM and LRM2 are Georgia LLCs, Defendants' derivative claims on behalf of these entities shall be governed by Georgia law. *See* N.C.G.S.

82. Under both North Carolina and Georgia law, a claim for constructive fraud requires a fiduciary or confidential relationship between the parties. *See, e.g.*, *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620 (2012); *Thunderbolt Harbour Phase II Condo. Ass'n v. Ryan*, 326 Ga. App. 580, 581–82 (2014); *see also* OCGA § 23-2-58.

a. Defendants' Derivative Counterclaims Based on the Capital Calls

83. Plaintiffs first challenge Defendants' standing to assert derivative claims based on the Capital Calls, contending that any injury caused by Plaintiffs' conduct was suffered by Defendants, individually, and not by any of the Loray Entities. As a result, Plaintiffs argue that Defendants lack standing to assert their breach of fiduciary duty and constructive fraud claims derivatively. *See, e.g.*, *Aubin v. Susi*, 149 N.C. App. 320, 324 (2002) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction."); *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 44 (2022) ("Standing is a jurisdictional prerequisite to a plaintiff's right to sue."). The Court agrees.

84. Defendants allege that the sole injury arising from Plaintiffs' unlawful Capital Calls was the reduction in Camden's ownership interests in LMM, LMR2,

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§ 57D-8-06 ("In any derivative proceeding in the right of a foreign LLC, the matters covered by this Article will be governed by the laws of the jurisdiction of the foreign LLC's organization except for the matters governed by G.S. 57D-8-02, 57D-8-04, and 57D-8-05."). In contrast, Defendants' derivative claim on behalf of LCT, a North Carolina LLC, and Defendants' direct claims for breach of fiduciary duty and constructive fraud are governed by North Carolina law since our courts have held that tort claims are generally governed by the law of the state where the alleged injury occurred. *See Boudreau*, 322 N.C. at 335 ("For actions sounding in tort, the state where the injury occurred is considered the situs of the claim."); *Camacho v. McCallum*, 2016 NCBC LEXIS 81, at *17 (N.C. Super. Ct. Oct. 25, 2016) (considering breach of fiduciary duty claim to sound in tort).

LMD, and LCT under the Operating Agreements. These injuries to Camden's ownership interests, however, are specific to Camden, not shared by Plaintiffs, and do not include injury to any of the affected LLCs. Since Defendants' counterclaims seek only to remedy Defendants' own injuries, the counterclaims are necessarily direct, not derivative. *See, e.g.*, *759 Ventures, LLC v. GCP Apartment Invs., LLC*, 2018 NCBC LEXIS 82, at *8 (N.C. Super. Ct. Aug. 13, 2018) (noting that whether a claim is direct or derivative " 'turns on whether the alleged injuries were caused directly to [the member/manager] or instead are a consequence of breaches of fiduciary duty that harmed' [the LLCs]") (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 34.04[5], (7th ed. 2017)).

85. As a result, the Court concludes that Defendants' derivative counterclaims for breach of fiduciary duty and constructive fraud arising from the Capital Calls must be dismissed for lack of standing. *See, e.g.*, *Chisum v. Campagna* (*Chisum II*), 2017 NCBC LEXIS 102, at *17, *19 (N.C. Super. Ct. Nov. 7, 2017) (dismissing a derivative breach of fiduciary duty claim where capital calls for additional capital contributions and "freezing" out the plaintiff were not alleged by plaintiff to have harmed the LLC); *N. Walhalla Props., LLC v. Kennestone Gates Condo. Ass'n, Inc.*, 358 Ga. App. 272, 274 (2021) ("The purpose of a derivative action is to protect the corporation and its assets.").

b. Defendants' Derivative Counterclaims Based on Unbudgeted Expenses

86. The Court next turns to Defendants' derivative counterclaims for breach of fiduciary duty and constructive fraud based on JBS's alleged payment of unbudgeted

payroll expenses, oversight fees, and commercial tenant improvements.[117] At the Court's request, the parties submitted briefing on 15 December 2022 addressing whether these claims are barred by the economic loss rule under Georgia and North Carolina law. *See, e.g.*, *Gen. Elec., Co. v. Lowe's Home Ctrs., Inc.*, 279 Ga. 77, 78 (2005) ("The 'economic loss rule' generally provides that a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort."); *Perry v. Frigi-Temp Frigeration, Inc.*, 2020 NCBC LEXIS 100, at *18 (N.C. Super. Ct. Sept. 3, 2020) (concluding economic loss rule barred breach of fiduciary duty claim where plaintiff sought enforcement of a right existing only in contract).

87. Here, the injury Defendants claim to have suffered was caused by Plaintiffs' alleged failure to abide by the Operating Agreements. The right Defendants seek to vindicate is created by contract, and the remedy Defendants seek to impose is defined by that same contract. Under North Carolina law, such a claim is barred by the economic loss rule. *See, e.g., Wilkins v. Wachovia Corp.*, No. 5:10-CV-249, 2011 U.S. Dist. LEXIS 30896, at *6 (E.D.N.C. Mar. 24, 2011) (applying North Carolina's economic loss rule to bar breach of fiduciary duty claims which arose "out of the duties in the . . . agreement and relate to contract performance"); *Haigh v. Superior Ins. Mgmt. Grp., Inc.*, 2017 NCBC LEXIS 100, at *19 (N.C. Super. Ct. Oct. 24, 2017) (dismissing breach of fiduciary duty claim where alleged wrongdoing was "a result of the parties' *contractual* relationship, not as a result of a *fiduciary* relationship" and

[117] (*See* Defs.' Supp. Br. Exs. T, U.)

would be "better resolved through contract principles, rather than general principles of fiduciary relationships" (emphasis in original)).

88. The outcome is the same under Georgia law. As under North Carolina law, Georgia law provides that "if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to [the contract], except in cases where the party would have a right of action . . . independently of the contract[.]" O.C.G.A. § 51-1-11(a). As discussed above, the alleged breaches of fiduciary duty here are based on Plaintiffs' alleged breaches of the Operating Agreements—specific, identified duties which arise under those contracts and not from any fiduciary relationship between the parties. As a result, Defendants' counterclaims for breach of fiduciary duty and constructive fraud must be dismissed under both North Carolina and Georgia law to the extent they seek recovery for JBS's alleged payment for unbudgeted items. [118]

89. Camden's direct claim against JBS for breach of fiduciary duty based on this same alleged conduct[119] is premised on the same allegations and conduct as its derivative claims. Thus, to the extent that Defendants' direct counterclaims are based on JBS's alleged payment of unbudgeted payroll expenses, oversight fees, and commercial tenant improvements, those direct claims are dismissed for the same reasons set forth above.

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[118] The Court notes that its ruling provides a separate ground, in addition to statute of limitations, for the dismissal of Defendants' breach of fiduciary duty counterclaim based on Plaintiffs' alleged payment of unbudgeted items before 5 April 2018.

[119] (*See* Countercls. ¶¶ 176, 182.)

c. Defendants' Direct Counterclaims Based on the Capital Calls

90. Defendants' direct breach of fiduciary duty and constructive fraud counterclaims based on Plaintiffs' Capital Calls require that Defendants establish that Plaintiffs owed Camden a fiduciary duty. But even if the Court were to conclude that JBS owed a fiduciary duty to Camden as a matter of law on the present record, Defendants have failed to offer evidence showing that Plaintiffs have breached that fiduciary duty by issuing the Capital Calls. In particular, while the Court has concluded that there are disputed issues of material fact as to whether the Capital Calls were properly issued under the Operating Agreements, Defendants have not offered competent evidence that Plaintiffs sought to harm Defendants, acted in bad faith, or acted without due regard to Camden's interests in issuing the Calls. *See, e.g.*, *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014); O.C.G.A. § 14-11-35.

91. To the contrary, it is undisputed that Plaintiffs announced each Capital Call, identified its purpose, explained the consequences of failing to participate, and otherwise provided necessary information to Camden to permit Camden to evaluate its participation in the Call. While Camden vigorously disagrees with Plaintiffs' reasons for the Capital Calls and the uses of the proceeds of those Calls, it has not offered evidence showing that Plaintiffs breached a fiduciary duty in deciding to issue the Calls or to use the proceeds of the Calls as it did. JBS, as manager, had the right to initiate the Calls under the Operating Agreements, and there is no evidence that Plaintiffs knowingly issued the Calls for unlawful purposes or through improper means. At its core, Defendants complain that the Calls were used to pay for expenses

other than the development fee. But Defendants have not shown that Plaintiffs' use of the Call proceeds in this fashion was in breach of a fiduciary duty. At most, Defendants' complaint, and resulting remedy, are grounded in contract—in Camden's bargained for rights under the Operating Agreements—and not through any fiduciary duty that JBS may have owed to Camden. As such, Defendants' direct breach of fiduciary duty and constructive fraud claims based on the Calls must be dismissed.[120]

d. Defendants' Derivative Counterclaims Based on Alleged Self-Dealing

92. Defendants also assert derivative counterclaims for breach of fiduciary duty and constructive fraud based on JBS's alleged self-dealing.[121] Plaintiffs seek summary judgment, contending that the undisputed evidence shows that JBS's challenged payments were for proper corporate purposes and further that JBS's decision to pay oversight fees and payroll expenses of various LLCs was protected conduct under the business judgment rule.

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[120] As with Defendants' counterclaim for breach of fiduciary duty based on Plaintiffs' alleged payment of unbudgeted items above, and as a result of the Court's dismissal of the fiduciary duty counterclaim on statute of limitations grounds, the foregoing provides an additional basis for the dismissal of Defendants' fiduciary duty counterclaim to the extent it is based on Plaintiffs' Capital Calls prior to 5 April 2018.

[121] (Countercls. ¶¶ 173, 182.) *See* N.C.G.S § 57D-3-21(b) ("Each manager shall discharge that person's duties (i) in good faith, (ii) with the care an ordinary prudent person in a like position would exercise under similar circumstances, and (iii) subject to the operating agreement, in a manner the manager believes to be in the best interests of the LLC."); Ga. Code Ann. § 14-11-305(1) ("[A managing member of an LLC] shall act in a manner he or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.").

93. Because the Court's statute of limitations ruling limits Defendants' breach of fiduciary duty counterclaim to Plaintiffs' alleged conduct after 5 April 2018,[122] the Court examines that conduct first.

94. It appears to the Court that the only specific transactions occurring after 5 April 2018 that Defendants challenge as improper self-dealing are identified in Exhibits S and X to Defendants' supplemental brief.[123] In response to Plaintiffs' Motion, Defendants make conclusory arguments without record citations but appear to rely upon Gumpert's affidavit testimony to show that issues of fact preclude summary judgment. But while Gumpert offers evidence that JBS and Lenihan caused LCT and LMM to pay various sums to JBS, Lenihan, and JBS-related entities,[124] Defendants offer no response to Plaintiffs' evidence showing that the payments at issue were made for proper purposes and in the best interest of the Loray Entities.[125]

95. The same is true for JBS's alleged self-dealing prior to 5 April 2018. Defendants contend that JBS made distributions to itself and related entities during this period "for its own personal benefit, and to the detriment of [LMM, LCT, LMD,]

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[122] Defendants' counterclaim for constructive fraud is subject to a ten-year statute of limitations, *see Chisum I*, 376 N.C. at 707 (citing N.C.G.S. § 1-56(a)), and thus is unaffected by the Court's statute of limitations rulings above.

[123] (ECF Nos. 31.21, .26.)

[124] (Gumpert Aff. ¶¶ 40–43; Defs.' Supp. Br. Exs. N–S [hereinafter "Cash Accounts Ledgers"], ECF Nos. 31.15–.21; Defs.' Supp. Br. Ex. G, ECF No. 31.9.)

[125] (Lenihan Aff. Ex. B, ECF No. 38.2; Pls.' Reply Br. 11.)

and Camden."[126] In particular, Defendants offer evidence showing that JBS and Lenihan caused the Loray Entities to pay over $1.1 million to Lenihan, JBS, and JBS-related entities.[127] Relying upon these payments, Defendants assert that "there is more than sufficient evidence of JBS's willful misconduct, knowing violations of the law, and conflict-of-interest transactions for which JBS received benefits in violation of the Operating Agreements."[128]

96. For their part, Plaintiffs do not deny that these payments were made but instead offer substantial evidence showing that Lenihan and JBS made the payments to repay loans and advances to the various Loray Entities consistent with the terms of each loan or advance.[129] As with the post-5-April-2018 payments, Defendants do not grapple with this evidence and fail to point to any evidence from which a reasonable factfinder could conclude that Plaintiffs made the challenged payments in bad faith, in knowing violation of the law, or without an honest belief that they were acting in the best interests of the Loray Entities.

97. Absent such evidence, Plaintiffs' conduct is protected by the business judgment rule, requiring dismissal of Defendants' counterclaim for constructive fraud based on Plaintiffs' alleged self-dealing.[130] *See, e.g.*, *Fed. Deposit Ins. Corp. v.*

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[126] (Defs.' Opp'n Br. 16.)

[127] (Gumpert Aff. ¶ 41; Defs.' Supp. Br. Ex. N, ECF No. 31.16.)

[128] (Defs.' Opp'n Br. 20.)

[129] (Pls.' Reply Br. 11; Defs.' Br. Supp. Exs. E, I–M, ECF Nos. 31.7, .11–.15.)

[130] Defendants assert their constructive fraud claims not only against JBS, but also against Lenihan. (Countercls. ¶¶ 181–85.) Yet Lenihan was neither a manager nor a majority

Loudermilk, 295 Ga. 579, 585 (2014) ([T]he business judgment rule . . . generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been made without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith."); *State v. Custard*, 2010 NCBC LEXIS 9, at *58 (N.C. Super. Ct. Mar. 19, 2010) ("Absent proof of bad faith, conflict of interest, or disloyalty, the business decisions of officers and directors will not be second-guessed if they are the product of a rational process, and the officers and directors availed themselves of all material and reasonably available information and honestly believed they were acting in the best interest of the corporation." (cleaned up)).

4. Defendants' Conversion Counterclaim

98. Defendants base their derivative counterclaim for conversion on Lenihan's alleged use of LMR's tax credits. Under North Carolina law,[131] however, "only goods and personal property are properly the subjects of a claim for conversion." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 414 (2000). "[A]n intangible

member of LCT, LMM, or LMD, and Defendants have not shown that he otherwise owed either Defendant a fiduciary duty. Accordingly, Plaintiffs are entitled to summary judgment on Defendants' constructive fraud claims against Lenihan on this separate, additional ground.

[131] North Carolina "favors the use of the *lex loci* test in cases involving tort or tort-like claims." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 420 (2020). "According to the *lex loci* test, the substantive law of the state where the injury or harm was sustained or suffered [applies], which is, ordinarily, the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place." *Id.* (cleaned up). Since Defendants assert that Lenihan "moved from California to North Carolina and then claimed the tax credits for himself," (Countercls. ¶ 121), North Carolina is the place of Defendants' alleged injury. North Carolina law shall therefore apply to Defendants' conversion claim.

interest cannot provide the basis for a conversion claim." *Window World of N. Atlanta, Inc. v. Window World, Inc.*, 2018 NCBC LEXIS 111, at *8–9 (N.C. Super. Ct. Oct. 22, 2018). Because Defendants allege that the converted property interests here are tax credits—intangible interests—Defendants' conversion claim necessarily fails. The Court will therefore grant Plaintiffs' Motion seeking dismissal of this counterclaim.

5. Defendants' Unjust Enrichment Counterclaim

99. Because all parties agree that the parties are bound by the Operating Agreements and that those Agreements govern the parties' contract claims, Defendants' counterclaim for unjust enrichment necessarily fails under either North Carolina or Georgia law. *See, e.g.*, *Booe v. Shadrick*, 322 N.C. 567, 570 (1988) ("If there is a contract between the parties the contract governs the claim and the law will not imply a contract."); *Tuvim v. United Jewish Cmtys., Inc.*, 285 Ga. 632, 635 (2009) ("Unjust enrichment applies when as a matter of fact there is no legal contract[.]"). Accordingly, the Court will grant Plaintiffs' Motion seeking summary judgment on this counterclaim.

6. Defendants' Civil Conspiracy Counterclaim

100. Neither North Carolina nor Georgia recognizes an independent cause of action for civil conspiracy. *See, e.g.*, *Toomer v. Garrett*, 155 N.C. App. 462, 483 (2002) ("There is no independent cause of action for civil conspiracy."); *O'Neal v. Home Town Bank of Villa Rica*, 237 Ga. App. 325, 330 (1999) ("Absent the underlying tort, there can be no liability for civil conspiracy."). Rather, each state requires that a civil

conspiracy claim be based on the conspiring parties' agreement to carry out alleged misconduct that supports a separate, underlying claim. *See, e.g., Toomer*, 155 N.C. App. at 483 ("Only where there is an underlying claim for unlawful conduct can a plaintiff state a claim for civil conspiracy by also alleging the agreement of two or more parties to carry out the conduct and injury resulting from that agreement"); *Elliott v. Savannah Int'l Motors, Inc.*, 360 Ga. App. 281, 285 (2021) ("To recover damages for a civil conspiracy claim, a plaintiff must show that two or more persons, acting in concert, engaged in conduct that constitutes a tort.").

101. Defendants allege that LMD, LMM, and LCT, joined by JBS and Lenihan, conspired to engage in the alleged misconduct that forms the basis for their counterclaims for breach of fiduciary duty and constructive fraud.[132] Because the Court has concluded that those counterclaims must be dismissed in their entirety, so too must Defendants' counterclaim for civil conspiracy.

IV.

CONCLUSION

102. **WHEREFORE**, for the reasons set forth above, the Court hereby **ORDERS** as follows:

a. Defendants' Motion is hereby **DENIED**;

b. Plaintiffs' Motion is **DENIED** as to (i) Defendants' breach of contract counterclaims to the extent those claims are based on Plaintiffs' conduct after 5 April 2018; and (ii) Defendants' declaratory judgment

[132] (Defs. Opp'n Br. 18.)

counterclaim to the extent that claim seeks to establish the parties' respective ownership rights in LMM, LCT, and LMD; and

c. Plaintiffs' Motion is hereby **GRANTED** as to Defendants' remaining counterclaims, and those counterclaims are hereby **DISMISSED with prejudice**.

SO ORDERED, this the 27th day of March, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge