

AT STAMFORD  
123 HOYT STREET  
STAMFORD, CT 06905

DOCKET NO: FST CV 21-6049964 S

: JUDICIAL DISTRICT OF

MALIK, JOHN

2024 MAY 28 P 3:31 STAMFORD/NORWALK

V.

: AT STAMFORD

DECCAN VALUE LLC

: MAY 28, 2024

### MEMORANDUM OF DECISION

Defendants have moved for summary judgment to dismiss all claims alleged by plaintiff John Malik ("Malik"). For the reasons stated below, the motion is granted in part and denied in part.

#### The Standards for Deciding a Motion for Summary Judgment

"The standards . . . [for] review of a . . . motion for summary judgment are well established. Practice Book [§17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . ." *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107,

115-16 (2012), quoting *H.O.R.S.E. of Connecticut, Inc. v. Washington*, 258 Conn. 553, 558-60 (2001). (Citations omitted).

“In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent....” *Zielinski v. Kotsoris*, 279 Conn. 312, 318 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: “it is then ‘incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.’” *Iacurci v. Sax*, 313 Conn. 786, 799 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of “showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact.” *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573 (2016).

### **Breach of Contract (Counts One and Two)**

Malik alleged that Deccan breached the applicable contract by retroactively reducing his earned compensation when it lowered his capital account as of January 1, 2018 to reflect a change in compensation percentages unilaterally imposed by Bodas in July 2018. Deccan quoted provisions of the agreements that granted Bodas, as general partner, the authority to reduce Malik's compensation calculated according to percentages of net Management and Incentive Fees and argued that the allocations are not made until the last day of the accounting period, which Deccan asserts began on January 1 and ended on December 31, 2018. Any changes to the accounting period from those set by the agreement would be on "such other date deemed appropriate by the General Partner." Deccan pointed out that Malik did not have authority to set the date of the accounting period. Under the agreements, Management and Incentive Fees are allocated to Deccan partners' capital accounts only "[a]s of the close of business on the last day of the relevant Accounting Period." The Management and Incentive Fees are calculated based on each partner's Management and Incentive Percentages "as of the last day of the Accounting Period for which such . . . Fees were earned."

The past practice of Deccan for years was to allocate compensation quarterly and to credit earned compensation to the partner's capital account at the end of each quarter at the close of which accounting periods the partners received distributions, not advances, according to Malik. Deccan characterized the mid-year allocations as draws or advances on the year end accounting period estimated allocations. Malik submitted evidence that there were three accounting

periods in 2018 for calculation of the partners' "Management and Incentive Fees." Malik asserts that Bodas was aware of the practice and acquiesced in the practice of setting the accounting periods for partner compensation as set at interim points during the year. If so, these accountings periods in the first two quarters of 2018 could be found to be set by the "General Partner" in accordance with the agreements.

There are genuine and material issues of fact as to whether Deccan breached the agreements by retroactively reducing Malik's earned compensation and reducing his capital account.<sup>1</sup>

#### **Breach of Covenant of Good Faith and Fair Dealing (Retroactive Reduction of Compensation in Counts Three and Four)**

In *Arthurs v. AIG Financial Products Corp.*, 2021 WL 2303051 \*5 (Conn. Super. 2021) (Ozalis, J.), Judge Ozalis refused to strike a claim of breach of good faith and fair dealing for deprivation of discretionary benefits by a defendant that advanced a bad faith interpretation of contract in an attempt "to avoid the spirit of the bargain":

"[I]t is axiomatic that the ... duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship ... In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement ... The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term ... To constitute a breach of [the implied covenant of good

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<sup>1</sup> Whether Malik consented to the retroactive reduction in his compensation raises issues of credibility for the fact finders not susceptible to summary judgment. As the Appellate Court reminded in *Sen v. Tsiongas*, 192 Conn.App. 188, 197 (2019): "[w]hen deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties." *Id.* quoting *Doe v. West Hartford*, 328 Conn. 172, 197, 177 A.3d 1128 (2018).

faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith.' (Internal quotation marks omitted.) *Renaissance Management Co. v. Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007).

'Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive ... Bad faith means more than mere negligence; it involves a dishonest purpose.' (Internal quotation marks omitted.) *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424, 433, 849 A.2d 382 (2004). '[B]ad faith may be overt or may consist of inaction,' and it may include 'evasion of the spirit of the bargain.' (Internal quotation marks omitted.) *Elm Street Builders, Inc. v. Enterprise Park Condominium Assn., Inc.*, 63 Conn.App. 657, 667, 778 A.2d 237 (2001), quoting 2 Restatement (Second), Contracts § 205, comment (d) (1981)."

In *LPP Mortgage Ltd. v. Underwood*, 205 Conn.App. 763, 829 (2021), the Appellate Court emphasized the breadth of conduct covered by the duty of good faith and fair dealing:

"Under our law, 'every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. ... The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. ... To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith.' ... '[T]he notion of bad faith encompasses a wide range of dishonest behavior, including evasion of the spirit of the bargain. [W]hen one party performs the contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied,

there is a breach of the covenant of good faith and fair dealing, and hence, a breach of contract, for which damages may be recovered ....”<sup>2</sup>

Delaware law also implies covenants of good faith and fair dealing into all contracts. See *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441-42 (2005) (“the implied covenant attaches to every contract....”):

“Stated in its most general terms, the implied covenant requires ‘a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits’ of the bargain. Thus, parties are liable for breaching the covenant when their conduct frustrates the ‘overarching purpose’ of the contract by taking advantage of their position to control implementation of the agreement’s terms. This Court has recognized ‘the occasional necessity’ of implying contract terms to ensure the parties’ ‘reasonable expectations’ are fulfilled. This quasi-reformation, however, ‘should be [a] rare and fact-intensive’ exercise, governed solely by ‘issues of compelling fairness.’ Only when it is clear from the writing that the contracting parties ‘would have agreed to proscribe the act later complained of ... had they thought to negotiate with respect to that matter’ may a party invoke the covenant’s protections.” (Footnotes omitted).

There are genuine and material issues of fact as to whether Bodas acted in good faith when he retroactively adjusted Malik’s compensation and reduced his capital account. The motion for summary judgment to dismiss the retroactive compensation reduction claims in Counts Three and Four are denied.

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<sup>2</sup> Accord, *Trani v. Johnson*, 2022 WL 1773599 \*2-3 (Conn. Super. 2022) (Krumeich, J.T.R.) (“[t]he allegation that [defendant] is seeking to avoid coverage under the umbrella policy by failing to honor its obligations under the UM policy provides a factual basis for the claim that defendant is acting in bad faith”); *Norlin v. Ram Affiliates, LLC*, 2021 WL 6335266 \*2-3 (Conn. Super. 2021) (Krumeich, J.T.R.); *Ghei v. State Farm Fire and Casualty Insurance Company*, . 2023 WL 8594716 \*2 (Conn. Super. 2023) (Krumeich, J.T.R.).

## Breach of Covenant of Good Faith and Fair Dealing (Constructive Discharge in Counts Three and Four)

Plaintiff asserts a claim that Deccan breached duties of good faith and fair dealing owed to him by Bodas engaging in “improper managerial activities” in connection with redemptions for two clients, which caused him to resign as a partner<sup>3</sup> and member<sup>4</sup> and thereby forfeit future compensation. Malik’s theory that Deccan breached duties owed to him of good faith and fair dealing by reason of the alleged “improper managerial activities” of Bodas in connection with the customer redemptions that forced him to withdraw from the partnership and LLC, therefore Deccan owes him millions of dollars in lost compensation, stretched the law of implied covenants to its breaking point.

As the Delaware Supreme Court cautioned in *Dunlap*, 878 A.2d at 442:  
“[o]nly when it is clear from the writing that the contracting parties ‘would have agreed to proscribe the act later complained of ... had they thought to negotiate

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<sup>3</sup> In the Third Count Malik alleged the same claim of managerial misconduct that he asserts compelled his resignation as a partner from Deccan: “Defendants Deccan GP, Deccan LP and Bodas (individually and in his capacity as Managing Member of Deccan GP) also breached the implied covenant of good faith and fair dealing by virtue of Bodas exercising his broad managerial discretion to knowingly and intentionally engage in improper, immoral, unprofessional and unethical acts that, inter alia, breached Deccan LP’s fiduciary duties to University A and University B, as well as violated numerous Deccan LP internal compliance policies, exposing Malik to sweeping liabilities, severe sanctions and grave reputational harm, all so as to completely frustrate, hinder and thwart the purpose of the Deccan LP Agreement, which improper managerial activities by Bodas necessitated Malik resigning and withdrawing from the Deccan Entities in February 2020, resulting in Malik suffering lost future income and profits under the Deccan LP Agreement and Supplementary LP Agreement.”

<sup>4</sup> In the Fourth Counts Malik alleged the same claim of managerial misconduct that he asserts compelled his resignation as a member from Deccan: “Defendants Funds GP and Bodas (individually and in his capacity as Managing Member of Funds GP) also breached the implied covenant of good faith and fair dealing by virtue of Bodas exercising his broad managerial discretion to knowingly and intentionally engage in improper, immoral, unprofessional and unethical acts that, inter alia, breached Funds GP’s fiduciary duties to University A and Deccan LP’s fiduciary duties to both University A and University B, as well as violated numerous Deccan LP internal compliance policies, exposing Malik to sweeping liabilities, severe sanctions and grave reputational harm, all so as to completely frustrate, hinder and thwart the purpose of the Funds GP Agreement, which improper managerial activities by Bodas necessitated Malik resigning and withdrawing from the Deccan Entities in February 2020, resulting in Malik suffering lost future income and profits under the Funds GP Agreement and Supplementary GP Agreement.”

with respect to that matter' may a party invoke the covenant's protections."<sup>5</sup>

Delaware law would not imply a covenant that would permit a partner to assert constructive discharge for "improper managerial activities" under the circumstances alleged or shown by the evidence submitted. The Delaware law is clear "a court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue." *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 842316 \*1 Del.Ch.Ct. 1998).<sup>6</sup> A plaintiff "must advance provisions of the [Agreements] that support" the implied contractual obligation that he contends were breached.

*Optical Air Data Systems, LLC v. L-3 Communications Corporation*, 2019 WL 328429 \*6 (Del.Super.Ct.. 2019).<sup>7</sup>

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<sup>5</sup> This requirement under Delaware law is similar to the requirement under Connecticut law that requires identification of the contractual benefit affected by bad faith conduct. "The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed [on] by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. ... To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." *M&T Bank v. Lewis*, 349 Conn. 9, 34 (2024) (citation omitted).

<sup>6</sup> "All contracts are subject to an implied covenant of good faith and fair dealing. This doctrine, however, does not provide a Delaware court with the authority to rewrite or supply omitted provisions to a written contract. Rather, a court should be cautious when implying a contractual obligation and do so only where obligations which can be understood from the text of the written agreement have nevertheless been omitted from the agreement in the literal sense. In this instance, "a court's inquiry should focus on 'what the parties likely would have done if they had considered the issue involved.'" The express terms of a contract and not an implied covenant of good faith and fair dealing, however, will govern the parties' relations when the terms expressly address the dispute. In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff. Since a court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue,<sup>11</sup> the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation." 1998 WL 842316 \*1 (footnotes omitted).

<sup>7</sup> "Every contract contains an implied covenant of good faith and fair dealing. The implied covenant requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain.' The implied covenant allows a court to infer contractual obligations 'that neither party anticipated.' A plaintiff must allege three elements to state a claim for breach of the implied covenant: 1) 'a specific obligation implied in the contract, [2] a breach of that obligation, and [3] resulting damages.'

Courts will not infer that an obligation exists, which 'contradicts a clear exercise of an express contractual right.' Express contractual language is more persuasive than a party's actions implementing a contract. Courts will infer



There is nothing in the agreements to suggest a partner or member could withdraw over managerial differences and continue to be paid future compensation. The only contractual provision cited by Malik in support of his implied covenant of good faith and fair dealing claim is the provision that requires individual partners to comply with Deccan's Code of Ethics and Compliance Manual and applicable law.<sup>8</sup> There is nothing cited from the agreements' provisions that would suggest an implied covenant for future compensation to a partner or member "forced" to withdraw because another member violated that provision.<sup>9</sup> It is also inconsistent with the provision that would have allowed Deccan to terminate Malik at any time, for any reason or for no reason at all, with Malik no longer being eligible for income. Malik was not terminated by Deccan, but an implied provision that would allow Malik to withdraw and still be paid in the future is inconsistent with the termination provision and would not "indicate that the parties would have agreed to the obligation had they negotiated the issue." *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 842316 \*1. The motion for summary judgment to dismiss the constructive discharge claims in Counts Three and Four are granted.

### **Statutory Theft (Count Five)**

Malik had a property interest in his capital accounts from which transfers were made and distributions were drawn by Bodas sufficient to state a claim of

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an obligation 'when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue, [so] the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation.'" 2019 WL 328429 \*6 (footnotes omitted).

<sup>8</sup> "(d) Each Individual Partner shall observe the provisions contained in any code relating to dealings in securities or other codes, policies, guidelines, or statements which have been adopted by the Partnership (including, without imitation, the Partnership's Compliance Manual and Code of Ethics) or which Partners are required to observe by law, any recognized stock exchange, self-regulatory body or any other regulatory body or authority."

<sup>9</sup> The circumstances of Malik's withdrawal and his conduct prior to withdrawal are subject to dispute.

statutory theft under C.G.S. § 52-564. The capital accounts constituted identifiable property in the form of earned capital in which Malik had an identified interest that could be converted by transfer into another capital account and cashed out by improper distributions to Bodas, which is what Malik alleged was done here. See e.g., *Schepis v. Canales*, 2020 WL 5995127, \*\* 6-7 (S.D.N.Y. 2020) (Liman, J.) (Conn. Law). There are genuine and material issues of fact whether Deccan violated C.G.S. § 52-564.

### **Statutory Wage Claim (Count Six)**

The motion to grant summary judgment on Malik's claim under the wage claim statute, C.G.S. § 31-72,<sup>10</sup> turns on whether he was an "employee" of Deccan and whether the compensation he claims would constitute "wages" within the definitions of C.G.S. § 31-71a (2) (3). Deccan argued Malik was a partner, not an employee, and that his compensation was based on percentages of Deccan's net income from the Management and Incentive Fees that it earned from its clients.<sup>11</sup>

Section 31-31-71a provides:

"(2) 'Employee' includes any person suffered or permitted to work by an employer;

(3) 'Wages' means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation...."

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<sup>10</sup> C.G.S. § 31-72 provides, in pertinent part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive, ... such employee or labor organization shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between an employee and his or her employer for payment of wages other than as specified in said sections shall be no defense to such action."

<sup>11</sup> In addition to being a partner in Deccan LP and a member in Funds GP, Malik served as the Chief Operating Officer, Chief Financial Officer, and Chief Compliance Officer of Deccan LP and the Treasurer of Deccan GP and Funds GP. Am.

Malik argued that partners and owners of business have been permitted to pursue lost wage claims under C.G.S. § 31-72 citing *Ferentini v. Gheorghe-Youssefi*, 2023 WL 2986705 \*2 (Conn.Super. 2023) (Bellis, J.), in which Judge Bellis rejected a similar argument and denied a motion for summary judgment:

“Although the term ‘employee’ is not defined in § 31–72, the statute specifically references § 31–71a, which also is contained in part II of chapter 558 and defines ‘employee’ as ‘any person suffered or permitted to work by an employer.’ ...” *Saunders v. Firtel*, 293 Conn. 515, 526, 978 A.2d 487 (2009). Accordingly, our Supreme Court has ‘conclude[d] that § 31–72 unambiguously indicates that the definitions contained in § 31–71a should be applied when construing § 31–72.’ *Id.* In making this determination, the Supreme Court expressly rejected a defendant's argument that because ‘the plaintiff was an officer ... and was ‘running the company,’ the plaintiff was ‘an individual employed in a bona fide executive, administrative or professional capacity,’ and, therefore, he is excluded from the definition of ‘employee’ under § 31–72. *Id.*, 524. Rather, the relatively broad language of § 31–71a (2) controls this determination.”

In *Ferentini* Judge Bellis observed that there was an issue of fact relating to his status as partner, plaintiff was entitled to seek recovery as a partner and employee: “while the defendants are correct that the plaintiff would be precluded from recovering as both a partner and an employee, it is well accepted in Connecticut that ‘as a general rule, [u]nder our pleading practice, a plaintiff is permitted to advance alternative and even inconsistent theories of liability against one or more defendants in a single complaint.’” 2023 WL 2986705 \*2.

In the *Saunders* case, relied on by Judge Bellis, the Supreme Court held an officer running the company who was a fifty per cent owner of the defendant limited liability company could be awarded relief under the wage statute: “under the broad definition of ‘employee’ set forth in § 31–71a, the plaintiff was an

employee of [defendant]. Accordingly, the trial court properly invoked § 31-72 in awarding wages to the plaintiff." 293 Conn. at 527.

If Malik is found to be an "employee" subject to the wage claim statute his compensation could be found to be "wages" as "compensation for labor or services rendered by an employee" within the meaning of C.G.S. § 31-71a (2) (3) even though the amount was calculated as a percentage of net income rather than by salary, commission or per diem. Compare, *Bennett v. Shaheer*, 2013 WL 2383604 \*6 (Conn.Super. 2013) (Gilardi, J.) (49% owner could be an "employee").

There are genuine issues of fact concerning Malik's status as "employee" so the motion for summary judgment to dismiss the statutory wage claim is denied.

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Krumeich, J.T.R.

DECISION ENTERED IN  
ACCORDANCE WITH THE  
FOREGONING 5/28/24.  
JDMS SENT 5/28/24.  
By: [Signature] DEC