IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MOODY NATIONAL CI GRAPEVINE S., L.P., *et al.*, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-19-0711
TIC TEXAS TWO 23, L.L.C., *et al.*, Defendants.	§	

MEMORANDUM AND ORDER

This case is before the Court on Defendants'[1] Traditional Motion for Summary Judgment on Plaintiffs' Fiduciary Duty [Doc. # 69], to which Plaintiffs[2] filed a Response [Doc. # 102], and Defendants filed a Reply [Doc. # 112]. Also pending is Plaintiffs' corresponding Motion to Dismiss or, in the Alternative, for Summary Judgment on Defendants' Counterclaims [Doc. # 110], counterclaims which are each

[1] Defendants are TIC Texas Two 21, L.L.C. ("TIC 21"); TIC Texas Two 22, L.L.C. ("TIC 22"); James D. Vigue; Carol Chua-Vigue; TIC Texas Two 23, L.L.C. ("TIC 23"); David A. Hardenbrook; TIC Texas Two 27 L.L.C. ("TIC 27"); and Pamela J. Maas.

[2] Plaintiffs are Moody National CI Grapevine S, L.P.; Moody National Medical Center S, L.P.; Moody National Medical Center MT, L.P.; Moody National Realty Company, L.P.; Moody National Mortgage Corporation; Moody National Texas Two Hotel DST Management, LLC; Brett C. Moody; Moody Management Corporation; Moody National Management, L.P.; MNGP Medical Center MT, LLC; MNGP CI Grapevine MT, LLC; Moody National CI Grapevine MT, L.P.; MNGP CI Grapevine S, LLC; Moody Realty Corporation; and MNGP Medical Center S, LLC.

based on the existence of a fiduciary duty Plaintiffs allegedly owed to Defendants. Defendants filed a Response [Doc. # 113], and Plaintiffs filed a Reply [Doc. # 114].

Also pending is Plaintiffs' Motion to Strike and for Summary Judgment on Defendants' Affirmative Defenses [Doc. # 79], to which Defendants filed a Response [Doc. # 91], and Plaintiffs filed a Reply [Doc. # 107]. Also pending is Plaintiffs' Motion for Summary Judgment [Doc. # 77], seeking summary judgment on Plaintiffs' breach of contract claims, including summary judgment that the Mutual Release is valid and enforceable. Defendants filed a Response [Doc. # 94], and Plaintiffs filed a Reply [Doc. # 104].

The Court has carefully reviewed the full record, including the Court's prior Memorandum and Order [Doc. # 111], entered March 6, 2020. Based on that review, and the application of governing and persuasive legal authorities, the Court **denies** Defendants' Traditional Motion for Summary Judgment on Plaintiffs' Fiduciary Duty, and **grants** Plaintiffs' Motions regarding Defendants' counterclaims, Defendants' affirmative defenses, and Plaintiffs' breach of contract claims.

I. BACKGROUND

Plaintiffs allege that in the Fall of 2006, Plaintiff Moody National CI Grapevine S, L.P. ("Moody S") issued a confidential private placement memorandum ("PPM") regarding two hotel properties -- a Residence Inn in Houston ("RI Houston") and a

Comfort Suites in Grapevine, Texas ("CI Grapevine") (collectively, the "Project"). The PPM disclosed that "conflicts of interest between the Tenants in Common [Defendants herein] and the other activities of Moody and its Affiliates may occur from time to time." PPM [Doc. # 102-1], ECF p. 60. The PPM also stated that "[n]either Moody, the Master Tenant nor the other Tenants in Common will have a fiduciary duty to a Purchaser[3] as would be applicable to a limited liability company or partnership." *Id*. In connection with the PPM and the resulting Tenants in Common relationship, Plaintiffs Moody S, Moody National Medical Center S, L.P., Moody National Medical Center MT, L.P., Moody National Texas Two H, L.P., and Moody National CI Grapevine MT, L.P., signed contracts containing broad arbitration provisions.

In August 2010, the Project's original tenants-in-common structure was converted to a Delaware Statutory Trust ("DST"), specifically the Moody National Texas Two Hotel Trust (the "Trust"). *See* Trust Agreement [Doc. # 77-11]. Defendants, who were investors in the original tenants-in-common structure, became beneficiaries of the Trust ("Trust Beneficiaries"). The Trustee of the Trust was CSC Trust Company of Delaware ("CSC"). *See id.*, § 2.1(a). CSC is neither a Plaintiff nor

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[3] A "Purchaser" under the PPM is an entity purchasing an interest in the Project. *See* PPM [Doc. # 102-1], ECF p. 3.

a Counterclaim Defendant. Brett Moody was named "Designated Trustee" and, in that capacity, his only duty was to sign documents that required the signature of more than one trustee. *See id.*, § 4.5. Plaintiff Moody National Texas Two Hotel DST Management, LLC ("Manager"), was appointed Manager of the Trust. *See id.*, § 1.1. The Manager had exclusive management responsibility for the Project. *See id.*, § 5.1. By signing the Trust Agreement, the Trust Beneficiaries, including Defendants, agreed to be bound by the terms of the Trust Agreement. *See id.*, § 10.10.

Plaintiffs allege that there were continuing revenue problems with the Project. During an Investor Conference Call on November 19, 2015, the investors were informed that Marriott had advised that it was discontinuing the "Generation 1" Residence Inn design and, therefore, would not renew the franchise for the Residence Inn when it expired on December 16, 2015. *See* Investor Conference Call Summary [Doc. # 77-9], § 2. Based on a Moody affiliate's agreement to build a new Residence Inn in the Houston Medical Center area, however, Marriott agreed to extend the franchise for a year until the loan maturity date in December 2016. *See id.* This permitted the RI Houston to continue operation under the Marriott Residence Inn brand through loan maturity. *See id.*

In connection with discussions during the November 2015 conference call about marketing the Residence Inn, Moody and his affiliates expressed that they "would not

purchase the portfolio as there could be potential conflicts of interest." *See id.*, § 4. Nonetheless, approximately six months later, when the highest combined offer for the two hotel properties was only $13.57 million, Moody offered to purchase the Project for $14 million, but required a release from all parties. *See* June 2016 Email from Investor Services [Doc. # 77-18]. A "Sentiment Ballot" was sent to the Trust Beneficiaries seeking their "preference" regarding how to proceed. *See id.* Option 1 was to sell to the non-related party for $13.57 million, Option 2 was to sell to the Moody-related party for $14 million, and Option 3 was to wait until closer to the loan maturity date in December 2016. *See id.* Defendants TIC 22, TIC 23, and TIC 27 each selected Option 2 - the sale of the Project to the Moody-related party. *See* Sentiment Ballots [Doc. # 77-19]. Eventually, the Project was sold to MN TX II, LLC ("MN TX"), a Moody affiliate.

In connection with the potential sale, certain Plaintiffs and certain Defendants[4] signed a Mutual Release by which they released all claims and actions relating to the Project. *See* Mutual Release [Doc. # 28], Exh. A to Second Amended Complaint, § 1.1. In the Mutual Release, each "Releasing Party and each of its Affiliates" agrees that it will never institute a lawsuit or arbitration proceeding "against any of the Released Parties . . .." *See id.*, § 1.6. Additionally, the Mutual Release provides that

[4] Plaintiffs allege that all Defendants except TIC 21 signed the Mutual Release.

it "may be used as the basis for enjoining any action, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of this Agreement, except for an action based on a breach of this Agreement." *Id.*, § 9. The Mutual Release states that it "contains the entire agreement and understanding with respect to the compromise of the Released Matters and the Claims." *Id.*, § 4.

On February 1, 2019, Defendants instituted an arbitration proceeding ("Arbitration") against Plaintiffs with the American Arbitration Association. Defendants allege in the Arbitration that Brett C. Moody, through his affiliated companies, misrepresented the Project and used it for his personal benefit. *See* First Amended Original Demand for Arbitration and Statement of Claims in Arbitration [Doc. # 29], Exh. B to Second Amended Complaint. Although it is undisputed that one of the parties that filed the Arbitration did not sign the Mutual Release, the arbitrator stayed the arbitration proceeding.

On February 27, 2019, Plaintiffs filed this lawsuit, asserting the Mutual Release as a basis to enjoin the Arbitration.[5] Plaintiffs also assert breach of contract claims based on the Mutual Release. The Court determined that the validity of the Mutual

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[5] The Plaintiffs in this case are the Respondents in the Arbitration. Defendants in this lawsuit are the Claimants in the Arbitration and their representatives. All Arbitration Claimants and Respondents are named as parties in this case for purposes of the request to enjoin the Arbitration, but it is undisputed that not all named Plaintiffs and not all named Defendants are signatories to the Mutual Release at issue in this case.

Release is a threshold issue. Defendants challenge the validity and the enforceability of the Mutual Release on a variety of grounds.

Following discovery on the validity of the Mutual Release, Defendants filed five motions for summary judgment and Plaintiffs filed three motions. In the prior Memorandum and Order [Doc. # 111], the Court denied four of Defendants' Motions. The remaining four motions, three by Plaintiffs and one by Defendants, have been fully briefed and are now ripe for decision.

II. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides for the entry of summary judgment against a party who fails to make a sufficient showing of the existence of an element essential to its case and on which it will bear the burden at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Celotex*, 477 U.S. at 322-23; *Curtis*, 710 F.3d at 594.

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc.*, 699 F.3d 832, 839 (5th Cir. 2012). The moving party, however, "need not negate the elements of the nonmovant's case." *Coastal Agric. Supply, Inc. v. JP Morgan Chase Bank, N.A.*, 759 F.3d 498, 505 (5th Cir. 2014) (quoting *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)). The moving party may meet its burden by pointing out "the absence of evidence supporting the nonmoving party's case." *Malacara v. Garber*, 353 F.3d 393, 404 (5th Cir. 2003) (citing *Celotex*, 477 U.S. at 323; *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996)). Where the movant bears the burden of proof at trial on the issues at hand, it "bears the initial responsibility of demonstrating the absence of a genuine issue of material fact with respect to those issues." *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718 (5th Cir. 1995); *see also Brandon v. Sage Corp.*, 808 F.3d 266, 269-70 (5th Cir. 2015); *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005).

If the moving party meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 141 (5th Cir. 2004); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (internal

citation omitted). "An issue is material if its resolution could affect the outcome of the action." *Spring Street Partners-IV, L.P. v. Lam*, 730 F.3d 427, 435 (5th Cir. 2013). "A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *DIRECT TV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2006) (internal citations omitted).

In deciding whether a genuine and material fact issue has been created, the court reviews the facts and inferences to be drawn from them in the light most favorable to the nonmoving party. *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Tamez v. Manthey*, 589 F.3d 764, 769 (5th Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "'Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial.'" *Pioneer Exploration, L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503, 511 (5th Cir. 2014) (quoting *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002); *accord Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008). Instead, the nonmoving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case."

Firman v. Life Ins. Co. of N. Am., 684 F.3d 533, 538 (5th Cir. 2012) (citation and internal quotation marks omitted). In the absence of any proof, the court will not assume that the non-movant could or would prove the necessary facts. *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

The Court may make no credibility determinations or weigh any evidence. *See Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 229 (5th Cir. 2010) (citing *Reaves Brokerage Co.*, 336 F.3d at 412-13). Nonetheless, the Court is not required to accept the nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence. *Id*. (citing *Reaves Brokerage*, 336 F.3d at 413); *accord, Little*, 37 F.3d at 1075. Affidavits cannot preclude summary judgment unless they contain competent and otherwise admissible evidence. *See* FED. R. CIV. P. 56(c)(4); *Love v. Nat'l Med. Enters.*, 230 F.3d 765, 776 (5th Cir. 2000).

III. MOTIONS REGARDING FIDUCIARY DUTY

Defendants assert three counterclaims alleging that Plaintiffs violated their fiduciary duty to Defendants, and seeking a declaratory judgment that the Mutual Release is "void and unenforceable." *See* Counterclaims [Doc. # 95]. In Count 1, entitled "Declaratory Relief for Violation of Fiduciary Duty," Defendants discuss the duty of good faith and fair dealing under Delaware law, and argue that the Trust

Manager breached this duty by withholding from the Trust Beneficiaries the existence of an October 2015 offer to purchase RI Houston. *See id.*, ¶ 51. In Count 2, also entitled "Declaratory Relief for Violation of Fiduciary Duty," Defendants state that Trust Beneficiaries are entitled by Delaware statute to information "as is just and reasonable," that the Trust Agreement requires the Manager to maintain "customary and appropriate books and records," and that the Manager denied the Trust Beneficiaries information regarding the "effects" of the "Sentiment Ballot" and the Mutual Release. *See id.*, ¶ 54. In Count 3 of the Counterclaims, entitled "Declaratory Relief for Trustee's Self-Dealing," Defendants argue that Moody breached his fiduciary duty by purchasing the Project and refusing "to explore alternatives suggested by the Trust beneficiaries." *See id.*, ¶¶ 56-57. Defendants seek a declaration that the Mutual Release is "void and unenforceable" because it was obtained "by self-dealing and violating the Manager's fiduciary duties" to the Trust Beneficiaries. *See id.*, ¶ 58. The parties have each filed a motion seeking summary judgment on the fiduciary-duty-based Counterclaims.

A. Construction of Trust Agreement

The Trust Agreement is a contract governing the DST Trust. When interpreting a contract, the Court's "primary concern is to ascertain and give effect to the written expression of the parties' intent." *NuStar Energy, L.P. v. Diamond Offshore Co.*, 402

S.W.3d 461, 465 (Tex. App. -- Houston [14th Dist.] 2013, no pet.) (emphasis added) (citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011); *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006)). The Court's responsibility is "to honor the parties' agreement," not to remake it. *Id*. The parties' intent is governed by what is actually written in the contract, not by what one party claims it intended -- but failed -- to include. *See id*. The Court gives the contract language its plain and ordinary meaning unless the contract indicates that the parties intended a different meaning. *See id*. at 466 (citing *Dynegy Midstream Servs., Ltd. P'ship. v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009)).

A contract is unambiguous "if it can be given a certain or definite meaning as a matter of law." *Id*. (citing *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012); *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003)). Importantly, a "contract is not ambiguous simply because the parties advance conflicting interpretations." *Id*. (citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)).

B. Trust Agreement Parties and Duties

***Trustee*.--** In the Trust Agreement, CSC Trust Company of Delaware ("CSC") is appointed as Trustee. *See* Trust Agreement [Doc. # 77-11], § 2.1(a). CSC is not a party to this lawsuit.

Brett Moody*.--** In the Trust Agreement, Brett Moody is appointed "Designated Trustee," a defined term under the Trust document.[6] *See id.*, § 4.5. The Designated Trustee is appointed "for the limited purpose of executing any documentation that may require the signature of more than one trustee of the Trust." *Id*. Plaintiffs argue that Moody's isolated, shorthand references to himself as a trustee did not create a fiduciary relationship. Defendants agree that Moody's reference to himself as a trustee did not create the fiduciary relationship, but argue that Moody owed them a fiduciary duty because the Trust Agreement gave the Designated Trustee the "power to act and sign documents on behalf of the Trust." *See* Response [Doc. # 113], p. 6. Defendants fail to include the full sentence in their quoted language. Under the Trust Agreement, the Trust granted "the Designated Trustee the power to act and sign documents on behalf of the Trust ***pursuant to the terms of this Section 4.5." Trust Agreement, § 4.5 (emphasis added). The Trust Agreement clearly limits the

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[6] Brett Moody is a Counter-Defendant in his individual capacity, not in his capacity as Designated Trustee. *See* Counterclaims, ¶ 9. Indeed, the term "Designated Trustee" does not appear in the Counterclaims.

Designated Trustee's "power to act" to the terms of § 4.5, which states that the Designated Trustee is appointed for the "***limited purpose*** of executing any documentation that may require the signature of more than one trustee of the Trust." *See id.* (emphasis added). The Trust Agreement does not impose fiduciary duties on the Designated Trustee and, more importantly, does not impose such duties on Moody individually.[7]

Defendants argue that they placed special trust and reliance in Moody and, therefore, he owed them a fiduciary duty. *See* Response [Doc. # 113], p. 6. Defendants cite no legal authority to support the argument that their unilateral reliance on Moody creates a fiduciary relationship and imposes fiduciary duties on Moody. The argument is particularly unpersuasive here where the authority of the Designated Trustee is specifically limited in the Trust Agreement.

Manager.-- The Manager, Moody National Texas Two Hotel DST Management, LLC ("Manager"), has the exclusive responsibility under the Trust Agreement for managing the "activities and affairs of the Trust." *See* Trust Agreement, § 5.1. The Manager has the primary duty to handle the administrative

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[7] Defendants note that Delaware law requires that every statutory trust have at least one trustee. *See* Response [Doc. # 113], p. 9. Defendants argue that the Trust can comply with this requirement only if Moody is a trustee. *See id.* This argument is refuted by the record. CSC is the Trustee of the Trust, satisfying the requirement for at least one trustee.

matters involving the Trust, including the potential sale of Trust assets. *See id.*, § 5.3(a). Defendants correctly note that the Manager's exclusive responsibility to manage the Trust's business affairs could give rise to a fiduciary duty under Delaware law. *See* Response [Doc. # 113], p. 5.

The Delaware Statutory Trust Act (the "Act"), however, expressly authorizes the restriction or elimination of fiduciary duties that would otherwise exist. *See* DEL. CODE tit. 12, § 3806(c); *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1111-12 (Del. Ch. 2008). Here, the Trust Agreement provides specifically that:

> The Manager shall not have any duty or obligation under or in connection with this Agreement or the Trust, or any transaction or document contemplated hereby, except as expressly provided by the terms of this Agreement, and ***no implied duties or obligations shall be read into this Agreement against the Manager***. The right of the Manager to perform any discretionary act enumerated herein shall not be construed as a duty. ***To the fullest extent permitted by law, including without limitation Section 3806 of the Act, the Manager's duties (including fiduciary duties) and liabilities relating thereto to the Trust and the Owners shall be restricted to those duties (including fiduciary duties) expressly set forth in this Agreement and liabilities relating thereto.*** The Manager expressly reserves the right to invest in, pursue, develop, own, manage, operate or otherwise participate in all business opportunities of any nature for its own account, including opportunities that may directly or indirectly compete with the Trust or the Project.

Trust Agreement, § 5.3(a) (emphasis added). The "fullest extent" permitted by § 3806 is the complete elimination of fiduciary duties. *See* DEL. CODE tit. 12, § 3806(c). In the Trust Agreement, the Manager's fiduciary duties are restricted to those fiduciary

duties expressly set forth in the Trust Agreement. There are no fiduciary duties expressly set forth in the Trust Agreement. Indeed, many terms expressly set forth in the Trust Agreement are inconsistent with, and support the elimination of, the Manager's fiduciary duty. For example, in § 5.3, the Manager reserves the right to participate in business opportunities for its own benefit, even those that "may directly or indirectly compete with the Trust or the Project." *See id.* Similarly, the Trust Agreement contemplates the Manager exercising its sole discretion to sell the Project to a related party, provided it is not "at a price below the appraised value of the Project." *See id.*, § 9.3(c). These provisions are inconsistent with the traditional duty of loyalty, and support the Trust Agreement's elimination of the Manager's fiduciary duty pursuant to § 3806(c).

Defendants argue that if Moody and the Manager do not owe fiduciary duties, the Trust Agreement would be illegal under Delaware law because no party would be responsible for actions that violate the Trust Agreement. *See* Response [Doc. # 113], p. 9. Any alleged violation of the Trust Agreement was subject to a breach of contract claim against the breaching party.[8] Defendants have cited no legal authority that the existence of a breach of contract claim is dependent on the existence of a fiduciary

[8] To the extent there were any breaches of the Trust Agreement, and there is no evidence that there were, those breaches were released by those who signed the Mutual Release.

relationship, or that the absence of fiduciary duties renders the Trust Agreement illegal.

Based on the foregoing, neither Brett Moody nor the Trust Manager owed fiduciary duties to Defendants. On this basis, Plaintiffs are entitled to summary judgment on the Counterclaims. Nonetheless, for purposes of a complete record, the Court will address each of the three counterclaims.

C. Count One

In October 2015, there was an offer to purchase RI Houston for $16,715,100.00. The Manager exercised his discretion not to accept the offer. In Count One, Defendants allege that the Mutual Release is void and unenforceable because the Manager violated its fiduciary duty when it failed to disclose the October 2015 offer to the Trust Beneficiaries.

The Court notes as an initial matter that, although the title of Count One indicates it is based on an alleged violation of fiduciary duty, the text of the counterclaim discusses a breach of the duty of good faith and fair dealing. Under Delaware law, the duty of good faith and fair dealing is not a fiduciary duty. *See Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 418-19 (Del. 2013), overruled on unrelated grounds, *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 n.13 (Del.

2013); *see also Blaustein v. Lord Baltimore Cap. Corp.*, 84 A.3d 954, 959 (Del. 2014).

Moreover, the "implied covenant of good faith and fair dealing cannot be employed to impose new contract terms that could have been bargained for but were not." *Id*. Under the terms of the Trust Agreement, if the Manager is considering a sale of the Project, the Manager "***may*** provide written notice" to the Trust Beneficiaries. *See* Trust Agreement, § 9.3(a) (emphasis added). The Court cannot, based on an implied duty of good faith and fair dealing, rewrite the parties' agreement to require the Manager to provide notice of offers to buy the property. *See*, *e.g.*, *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010); *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("Existing contract terms control, however, such that implied good faith cannot be used to circumvent the parties' bargain").

Defendants argue that the Trust Agreement is silent as to when the sale of the Project is "appropriate," so the Manager had a duty of good faith and fair dealing to sell the Project for as much revenue as possible.[9] *See* Defendants' Motion [Doc. # 69], pp. 15-17. The Trust Agreement is not silent, however, that the Trust

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[9] Count One of Defendants' Counterclaims alleges that Plaintiffs breached either their fiduciary duty or the duty of good faith and fair dealing by failing to *disclose* the October 2015 offer. There is no allegation that the failure to *accept* the offer constituted a breach of either duty.

Beneficiaries are not entitled to input into whether a sale is "appropriate." The Trust Agreement clearly and unambiguously limits the rights of the Trust Beneficiaries as follows:

> The sole right of the Owners shall be to receive distributions from the Trust as a result of the Trust's ownership or sale of the Project. The Owners shall not have the right or power to direct in any manner the actions of the Trust, the Master Tenant, the Depositor or the Manager in connection with the management or operation of the Trust or the Project. The Owners shall have no voting rights, including as to whether or not the Project are sold pursuant to this Agreement.

Trust Agreement, § 6.2. The Manager has sole discretion under the Trust Agreement to determine whether a sale of the Project is appropriate. *See id.*, § 9.3(a). As noted above, the Trust Agreement provides that, if the Manager is considering a sale of the Project, the Manager "may provide written notice" to the Trust Beneficiaries. *Id.* The Trust Agreement, signed by Defendants, provides clearly and unequivocally that "the Manager will have no obligation whatsoever to proceed in accordance with any suggestions of the [Trust Beneficiaries] and will retain the authority to determine in its sole discretion whether or not to sell the Project and the terms of any such sale." *Id*. Defendants have failed to present evidence of the breach of the duty of good faith and fair dealing based on the failure to disclose the October 2015 offer.

Based on the clear terms of the Trust Agreement allowing, but not requiring, the Manager to give written notice of potential sales of the Project if those sales are

being considered, Plaintiffs are entitled to summary judgment on Count One of the Counterclaims.

D. Count Two

When Moody offered to purchase the Project for $14 million, but required a release from all parties, a "Sentiment Ballot" was sent to the Trust Beneficiaries seeking their "preference" regarding how to proceed. *See* June 2016 Email from Investor Services [Doc. # 77-18]. Option 1 was to sell to a non-related party for $13.57 million, Option 2 was to sell to the Moody-related party for $14 million, and Option 3 was to wait until closer to the loan maturity date in December 2016. *See id.*

In Count Two, Defendants allege that Plaintiffs breached their fiduciary duty by failing to provide the Trust Beneficiaries with information explaining the effects of the "Sentiment Ballot" and the Mutual Release. The section of the Trust Agreement on which Defendants rely states:

> The Manager shall keep customary and appropriate books and records relating to the Trust and the Trust Estate and shall certify such reports to the Lender if required by the Loan Documents. The Manager shall keep customary and appropriate books and records of account for the Trust at the Manager's principal place of business. The Owners may inspect, examine and copy the Trust's books and records at any time during normal business hours. The Manager shall maintain appropriate books and records in order to provide reports of income and expenses with respect to the Trust Estate to each Owner as necessary for such Owner to prepare such Owner's income tax returns.

Trust Agreement, § 5.3(c). Although this provision requires the Manager to maintain books and records, and to have them available for the Trust Beneficiaries' inspection and copying, the Trust Agreement imposes no duty on the Manager to explain any of the books and records to anyone, including the Trust Beneficiaries.

With specific reference to the Sentiment Ballot, the Manager had sole discretion under the Trust Agreement to determine whether a sale of the Project is appropriate. *See id.*, § 9.3(a). The Trust Agreement provides that, if the Manager is considering a sale of the Project, the Manager may provide written notice to, and seek suggestions from, the Trust Beneficiaries. *See id.* The Sentiment Ballot was, at most, such a solicitation of input from the Trust Beneficiaries. The Trust Agreement, signed by Defendants, provides clearly and unequivocally that "the Manager will have no obligation whatsoever to proceed in accordance with any suggestions of the [Trust Beneficiaries] and will retain the authority to determine in its sole discretion whether or not to sell the Project and the terms of any such sale." *Id.* Therefore, the Trust Agreement itself explains that suggestions, such as the Sentiment Ballot, from the Trust Beneficiaries are not binding on the Trust Manager. It was not a breach of any fiduciary duty not to explain to the Trust Beneficiaries the effect of the Sentiment Ballot.

With reference to the Mutual Release, it is uncontroverted that Defendants had a copy of the Mutual Release for several days during which they were free to review the document thoroughly and, if they chose, to discuss it with an attorney. There is no evidence that Defendants lacked full knowledge of the character or essential terms of the Mutual Release, or that they lacked an opportunity to learn and understand those essential terms. Given their full opportunity to consult with counsel if they chose, and given the absence of any obligation on the Manager to explain the Mutual Release to the Trust Beneficiaries, the failure to explain the effect of the Mutual Release did not breach any fiduciary duty.

E. Count Three

In Count Three, Defendants assert that Plaintiffs breached their fiduciary duty by engaging in "self-dealing." Defendants allege that "the Moody Parties engaged in and benefitted from self-dealing by purchasing assets from the beneficiaries of the very Trust that a Moody Party (the Manager) managed." Counterclaim, ¶ 57. As noted above, the PPM clearly disclosed the existence of potential conflicts of interest. *See* PPM [Doc. # 102-1], p. 60. Moreover, the Trust Agreement allowed the Manager to sell the Project to an affiliated entity. *See* Trust Agreement, § 9.3(c).

Defendants complain that Plaintiffs "withheld superior offers" for RI Houston (presumably the October 2015 offer). *See* Counterclaim, ¶ 57. As discussed above,

it was not a breach of fiduciary duty not to disclose the October 2015 offer to the Trust Beneficiaries.

Defendants complain also that the Manager "refused to explore alternatives suggested by the Trust beneficiaries." *Id*. As noted above, however, the Trust Agreement provides specifically that the Manager has "no obligation whatsoever to proceed in accordance with any suggestions of the [Trust Beneficiaries] and will retain the authority to determine in its sole discretion whether or not to sell the Project and the terms of any such sale." Trust Agreement, § 9.3(a).

Defendants argue that the purchase of the Project by a Moody-affiliate is a breach of fiduciary duty and, therefore, presumed unfair. As discussed in Section III.B. above, Defendants have failed to present evidence of a fiduciary duty owed by Brett Moody or his affiliated companies, including the Trust Manager. Therefore, there is no presumption that the sale was unfair, and Defendants have also failed to present evidence that the purchase of the Project for $14 million was in fact unfair. Indeed, the evidence in the record suggests strongly that the purchase -- which netted $4,664,767.59 in proceeds, was in the best interest of the Trust and its beneficiaries. *See* Exh. 28 to Motion [Doc. # 79].

F. Conclusion on Counterclaims

Defendants have failed to present evidence that raises a genuine issue of material fact regarding the existence of, or a breach of, a fiduciary duty as alleged in the Counterclaims.[10] As a result, Plaintiffs are entitled to summary judgment on Defendants' Counterclaims.

IV. MOTION REGARDING AFFIRMATIVE DEFENSES

In their First Amended Answer ("Answer") [Doc. # 56], filed November 8, 2019, Defendants asserted the affirmative defenses of (1) fraudulent inducement; (2) fraud in the factum; (3) duress; (4) failure of consideration; (5) unclean hands; (6) material breach; (7) illegality; (8) arbitration; and (9) no liability for Plaintiffs' attorneys' fees. After Plaintiffs filed a Third Amended Complaint [Doc. # 85] on January 24, 2020, Defendants filed a First Amended Counterclaim [Doc. # 95] on February 7, 2020. Defendants did not, however, file an Answer or any affirmative defenses in response to the Third Amended Complaint. Nonetheless, the Court will address Plaintiffs' Motion for Summary Judgment on the affirmative defenses as if they were asserted in response to the Third Amended Complaint.

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[10] Defendants argue that alleged breaches of fiduciary duty and the duty of good faith and fair dealing "constituted improper threats." *See* Defendants' Motion [Doc. # 69], p. 24. In addition to failing to present evidence to raise a genuine issue of material fact regarding the alleged breaches of these duties, there is absolutely no evidence to support the assertion that Plaintiffs engaged in improper threats.

A. Fraudulent Inducement

Plaintiffs assert that they were fraudulently induced to sign the Mutual Release by Plaintiffs' "fraudulent nondisclosure," breach of fiduciary duty, and fraudulent misrepresentations. Fraudulent inducement shares the same basic elements as fraud: "(1) a material misrepresentation, (2) made with knowledge of its falsity or asserted without knowledge of its truth, (3) made with the intention that it should be acted on by the other party, (4) which the other party relied on and (5) which caused injury." *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018).

As discussed above, Defendants have failed to present evidence that raises a genuine issue of material fact in support of their position that any Plaintiff owed them a fiduciary duty.

Fraudulent Nondisclosure.-- Regarding the "fraudulent nondisclosure" prong of the fraudulent inducement affirmative defense, Defendants allege that Plaintiffs failed to disclose information regarding third party offers for the Project, and failed to disclose the reason for Marriott's decision to terminate the franchise relationship. *See* Answer, ¶ 41. Defendants have failed to present evidence that would support the existence of a contractual or other legal duty for Plaintiffs to disclose this information to the Trust Beneficiaries.

Defendants allege also that the Sentiment Ballot was "not a good faith straw poll" and was, instead, designed to "create the pretense of approval for Moody purchasing the Trust assets from the beneficiaries." *See id.* Defendants assert that:

> On June 15, 2016, Plaintiffs sent via email to Defendants a purported summary of a conference call held June 3, 2016. In this summary, Plaintiffs stated that "as the Trustee of the Trust, Mr. Moody would like to determine the course the super majority of the Trust members would like to pursue." By using the term "pursue," Plaintiffs indicated that Defendants' votes would determine which course of action the Trust would follow.

Id. As noted in Section III.D. above, the Trust Agreement granted to the Manager the ability, but not the obligation, to provide written notice to, and seek suggestions from, the Trust Beneficiaries regarding options for selling the Project. *See* Trust Agreement, § 9.3(b). The Manager had no duty to solicit suggestions from the Trust Beneficiaries. Moreover, the Trust Agreement provided that "the Manager will have no obligation whatsoever to proceed in accordance with any suggestions [from the Trust Beneficiaries] and will retain the authority to determine in its sole discretion whether or not to sell the Project and the terms of any such sale." *Id*. The Trust Agreement itself explains that the Trust Beneficiaries' suggestions are not binding or determinative. Failure to disclose more detailed information in the Sentiment Ballot, and failure to explain more clearly to the Trust Beneficiaries that the Sentiment Ballot

was not binding on the Trust Manager, does not support a fraudulent inducement affirmative defense based on fraudulent nondisclosure.

In the final allegation of the "fraudulent nondisclosure" section, Defendants assert that "Moody was seeking to have the Defendants release their rights to enforce their fiduciary duty while fraudulently withholding from them the ongoing competing transactions in which he was engaged." Answer, ¶ 41. As explained above, Moody did not owe Defendants a fiduciary duty, and it is uncontested that he disclosed the related transactions in which he was engaged, and did so before Defendants signed the Mutual Release. Defendants have failed to present evidence that raises a genuine fact dispute regarding their fraudulent nondisclosure allegations as they relate to the fraudulent inducement affirmative defense.

Fraudulent Misrepresentation.-- Defendants assert that they were fraudulently induced into signing the Mutual Release by Plaintiffs' fraudulent misrepresentations. Many of the allegedly fraudulent misrepresentations involve statements of future intent. Defendants allege that Plaintiffs misrepresented that the Trust Beneficiaries would ultimately recover 50% of their original equity from the sale of the Project,[11] that 100% of the Trust Beneficiaries would have to agree to Moody's purchase of the

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[11] The Trust Beneficiaries together received $4,664,767.59 in sales proceeds, or approximately 50.18% of their combined original investment of $9,295,000.00. *See* Exhibits 28 and 29 to Motion [Doc. # 79].

Project and that Moody would require all Trust Beneficiaries to sign the Mutual Release, and that the Trust Beneficiaries would be refunded their cash calls before any distributions were made from the sales proceeds.[12] *See* Answer, ¶ 51. Fraudulent inducement based on a false promise of future performance is a viable affirmative defense only when the false promise was made "with a present intent not to perform." *See Anderson*, 550 S.W.3d at 614. For each of these allegedly false statements of future conduct, there is no evidence that Plaintiffs made the statements with a present intent not to perform.

Defendants also assert that Plaintiffs fraudulently misrepresented that under Texas law, "a lender can foreclose on a property in ***as little as*** 21 days." *See* Answer, ¶ 51(a) (emphasis added). The statement is not a misrepresentation; it is an accurate statement of Texas law. *See* TEX. PROP. CODE § 51.002(b) (allowing foreclosure sale after 21 days notice).[13]

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[12] The calculation of each Trust beneficiary's distribution was based on first accounting for the repayment of cash call contributions by those Trust Beneficiaries who had made those contributions, then making a *pro rata* distribution of the remaining sales proceeds. *See* Brett Moody Deposition, Exh. 14 to Motion [Doc. # 79], p. 164.

[13] The Texas statute provides that foreclosure sales take place on the first Tuesday of each month. *See* TEX. PROP. CODE § 51.002(a). The statutory notice is required 21 days before that foreclosure sale date. *See id.*, § 51.002(b).

Defendants have failed to present evidence or legal authority to support their fraudulent inducement affirmative defense. Plaintiffs are entitled to summary judgment on the defense.

B. Fraud in the Factum

In the second affirmative defense, Defendants argue that the Mutual Release is void under the doctrine of fraud in the factum because Plaintiffs sent them a different version of the Mutual Release and because the Mutual Release contained misrepresentations. Specifically, Defendants allege that Plaintiffs substituted a different Schedule I -- listing only those entities that actually signed the Mutual Release -- for the original Schedule I that listed all potential signatories (¶ 53), that the Mutual Release falsely represented that it "was the result of arms-length negotiations between sophisticated parties who were represented by counsel" (¶ 54), and that the Mutual Release contained the false representation that each Trust beneficiary "was supplied with a copy" of the Mutual Release because the copy the Trust Beneficiaries received included the original Schedule I.

"Fraud in the factum exists 'when a party signs a document without full knowledge of the character or essential terms of the instrument.'" *Resolution Tr. Corp. v. Leon*, 988 F.2d 1213 (5th Cir. 1993) (quoting *McLemore v. Landry*, 898 F.2d 996, 1002 (5th Cir. 1990)). "The party must not only have been in ignorance, but

must also have had no reasonable opportunity to obtain knowledge." *Hidalgo v. Sur. Sav. & Loan Ass'n*, 502 S.W.2d 220, 224 (Tex. App. -- El Paso 1973, no pet.).

The Mutual Release on which Plaintiffs rely is the Mutual Release signed by Defendants and to which the original Schedule I was attached.[14] The record is uncontroverted that Defendants had a copy of this Mutual Release for several days during which they were free to review the document thoroughly and, if they chose, to discuss it with an attorney. There is no evidence that Defendants lacked full knowledge of the character or essential terms of the Mutual Release, or lacked an opportunity to learn and understand those essential terms. Plaintiffs, therefore, are entitled to summary judgment on the fraud in the factum affirmative defense.

C. Duress

Defendants' duress affirmative defense is based on the allegation that "Plaintiffs threatened to withhold any return of the trust assets and to dissolve and seize the Trust assets if the beneficiaries did not sign a purported release" and to withhold the Trust Beneficiaries' share of the sales proceeds. Answer, ¶ 56. The affirmative defense of duress requires the party claiming the defense to establish: (1) "a threat to do some act which the party threatening has no legal right to do;" (2) "some illegal exaction or

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[14] For a more detailed discussion of the two different versions of Schedule I, *see* Section V below.

some fraud or deception;" and (3) "the restraint must be imminent and such as to destroy free agency without present means of protection." *Lee v. Hunt*, 631 F.2d 1171, 1178 (5th Cir. 1980); *Lockwood Int'l, Inc. v. Wells Fargo Bank, N.A.*, 2020 WL 1650907, *4 (S.D. Tex. Mar. 25, 2020). The "pressure of business circumstances or economic necessity does not, without more, constitute economic duress invalidating a contract." *Id*. (citing *Berry v. Encore Bank*, 2015 WL 3485970, *13 (Tex. App. -- Houston [1st Dist.] 2015, pet. denied)).

As an initial matter, there is no evidence in the record to support Defendants' allegation that Plaintiffs "threatened to withhold any return of the trust assets and to dissolve and seize the Trust assets if the beneficiaries did not sign a purported release" or to withhold the sales proceeds from the Trust Beneficiaries. Indeed, Defendants in their Response make it clear that the allegation is based on "implied" threats. *See* Response [Doc. # 91], p. 20. The uncontroverted evidence in the record establishes that the better of two options for selling the Project would require the Trust Beneficiaries, or at least a vast majority of them, to sign the Mutual Release. The Trust Beneficiaries had the opportunity to consult with an attorney, and had the choice not to sign the Mutual Release. There is no evidence that the result of their declining to sign the Mutual Release would be that Plaintiffs would dissolve the Trust and seize

its assets. Although the Trust Beneficiaries may have viewed all their options as unfavorable,[15] their precarious economic position does not constitute duress. *See id.*

Additionally, under Texas law, any alleged threats must render persons "incapable of exercising their free agency" and must overcome their power to withhold consent. *See Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006); *McCord v. Goode*, 308 S.W.3d 409, 413 (Tex. App. -- Dallas 2010, reh'g denied). In this case, it is uncontroverted that some Trust Beneficiaries, including one of the Defendants in this case, considered their options and elected not to sign the Mutual Release. As a result, Plaintiffs' Motion for Summary Judgment on the duress affirmative defense is granted.

D. Failure of Consideration

Defendants argue that the Mutual Release is unenforceable for failure of consideration because not all the Trust Beneficiaries signed it. *See* Answer, ¶ 58. Defendants have provided no evidence that the signature of all Trust Beneficiaries was consideration for the Mutual Release. Instead, the Trust Agreement establishes, and the parties acknowledge in § 1.1, that the Mutual Release is supported by sufficient consideration including the parties' mutual covenants. "Although a release must be

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15 For example, Defendant James Vigue testified in his deposition that he had "three bad choices" and believed that selling to the Moody-affiliate was the best. *See* Vigue Depo., Exh. 2 to Motion [Doc. # 79], pp. 82-83.

supported by valid consideration, any consideration, however slight in amount, is sufficient if accepted by the person giving the release. Mere inadequacy of consideration is not a sufficient ground to set aside a release." *McCorkle v. Cobra Enters. of Utah, Inc.*, 2015 WL 9942873, *3 (N.D. Tex. Nov. 17, 2015) (quoting *Torchia v. Aetna Cas. & Sur. Co.*, 804 S.W.2d 219, 223 (Tex. App. -- El Paso 1991, writ denied), report and recommendation adopted, 2016 WL 302326 (N.D. Tex. Jan. 25, 2016). A partial failure of consideration does not entitle the party asserting the affirmative defense to rescission of a release. *See Rodriguez v. Ginsburg*, 2019 WL 4010770, *8 (Tex. App. -- Dallas Aug. 26, 2019, no pet.).

Moreover, the language in the Mutual Release does not support Defendants' argument that all signatures were required. Defendants argue that language in § 17 of the Mutual Release requires the signatures of all Trust Beneficiaries in order for the Mutual Release to be effective. Section 17 reads, in its entirety:

> IN WITNESS WHEREOF, each of the Parties has executed (or caused to be executed, by a duly authorized signatory) this Agreement, dated as of the date first set forth above and to be effective as of the Effective Date, which shall be a date on which *all signatures hereto have been confirmed received*, the Termination Agreement is effective and the Restructuring is completed.

Mutual Release, § 17 (emphasis added). Section 17 requires only that all actual signatures to the Mutual Release have been confirmed received; it does not state that the Effective Date is when all Trust beneficiaries have signed the Mutual Release.

Additional language in the Mutual Release refutes Defendants' argument that the signature of every Trust beneficiary was required. For example, the opening paragraph states that the Mutual Release is between Plaintiffs and "each of the *parties and signatories* listed on Schedule I . . .." *See* Mutual Release, p. 1. This language indicates that the Mutual Release is between Plaintiffs and those listed on Schedule I who are signatories to the document.

The clearest indication of the parties' intent that signatures of all Trust Beneficiaries were not required is § 16. That provision states:

> Each Party hereby represents and warrants that such Party has full power and authority to execute this Agreement and to perform its obligations hereunder, and that this Agreement has been duly authorized, *executed* and delivered by such Party and *is a valid and binding agreement with respect to such Party*.

Mutual Release, § 16 (emphasis added). Pursuant to § 16, each party that executed the Mutual Release is bound by its terms regardless of whether other parties executed the release.

The Mutual Release did not require that all Trust Beneficiaries sign it in order for it to be valid and enforceable as to those who chose to sign. The decision by some Trust Beneficiaries not to sign the Mutual Release is not a failure of consideration that invalidates the Mutual Release. Plaintiffs are entitled to summary judgment on this affirmative defense.

E. Unclean Hands

Defendants assert the affirmative defense of unclean hands. *See* Answer, ¶ 59. The affirmative defense may, if proven, bar a party with unclean hands from obtaining equitable relief. *See Davis v. Grammar*, 750 S.W.2d 766, 768 (Tex. 1988); *Cantu v. Guerra & Moore, LLP*, 448 S.W.3d 485, 496 (Tex. App. -- San Antonio 2014, review denied).

Defendants base this affirmative defense on the allegations that Plaintiffs breached their fiduciary duty to Defendants, fraudulently withheld material information, fraudulently induced Defendants to sign the Mutual Release, made fraudulent misrepresentations, and committed fraud in the factum. *See id.* Each of these allegations has been addressed above. *See* Section III.B. (fiduciary duty); Section IV.A. (fraudulently withheld information, fraudulently inducement, fraudulent misrepresentations); Section IV.B. (fraud in the factum). For the same reasons discussed above, Plaintiffs are entitled to summary judgment on the affirmative defense of unclean hands.

F. Material Breach

Defendants assert "material breach" as an affirmative defense to the enforceability of the Mutual Release. *See* Answer, ¶ 60. Defendants allege that the Mutual Release required that all Trust Beneficiaries sign, and that the failure of all

parties to sign constituted a material breach. *See id.* For the reasons discussed in Section IV.D. above, the Mutual Release does not require that all Trust Beneficiaries sign it before it becomes enforceable. Therefore, failure to obtain those signatures is not a material breach of the Mutual Release. Summary judgment in Plaintiffs' favor is granted on this affirmative defense.

G. Illegality

Although the affirmative defense is entitled "Illegality," Defendants assert only that "even if the [Mutual Release] were a valid and enforceable agreement, it could not – as a matter of law – extend to *all* claims arising from the Project." Answer, ¶ 61 (emphasis in original). Defendants assert that the Mutual Release is limited to claims relating to the sale of the Project. *See id.* Defendants' assertion is refuted by the terms of the Mutual Release.

In the Mutual Release, the parties agree to a mutual release of all matters "with regard to the Released Matters or the facts underlying the Released Matters." *See* Mutual Release, § 1.1. "Released Matters" is defined in the Mutual Release as "any and all claims, disputes, causes of action or controversies, arising under or in connection with the Project, including, ***without limitation***, any and all claims related to the acquisition of all or a portion of the Project by MN TX." *Id.*, RECITALS ¶ 8 (emphasis added). The "Project" is defined in the Mutual Release as "the Residence

Inn Houston, located in Houston, Texas ('RI Houston') and the Comfort Suites Grapevine, located in Grapevine, Texas ("CI Grapevine")." *Id.*, RECITALS ¶ 1. Therefore, the term "Released Matters" in the Mutual Release includes any claims "arising under or in connection with" the two hotels. The Mutual Release is not limited to claims relating to the actual sale of the Project.

H. Arbitration and Attorneys' Fees

Defendants state that "Plaintiffs' action is subject to arbitration." Answer, ¶ 62. In the Mutual Release, however, the parties agreed never to institute an arbitration proceeding against any of the Released Parties. *See* Mutual Release, § 1.6. Therefore, Plaintiffs' action to enforce the agreement not to institute an arbitration proceeding is not subject to arbitration.

Defendants state also that they are not liable for Plaintiffs' attorneys' fees. *See* Answer, ¶¶ 63-66. To the extent Defendants argue they are not liable because Plaintiffs breached their fiduciary duties to Defendants, that argument has been decided in Plaintiffs' favor. To the extent Defendants argue that they are not liable for fees that are "(a) not reasonable or necessary; (b) not usual or customary; and (c) to the extent those fees are not segregated with respect to specific claims and/or specific Defendants," *id.*, ¶ 63, this is not an affirmative defense. Instead, this is a potential challenge to Plaintiffs' request for attorneys' fees pursuant to the Mutual

Release's Indemnification provision. These issues, which relate to the amount of fees for which Defendants are liable, will be addressed after Plaintiffs file a separate Motion for Fees with full accounting, and there is legal briefing on the issue by both sides.

V. MOTION ON BREACH OF CONTRACT CLAIM

Plaintiffs seek summary judgment on their breach of contract claim, including summary judgment that the Mutual Release is valid and enforceable. Under Texas law, a breach of contract claim requires proof that "(1) a valid contract exists; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages due to the breach." *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 418 (5th Cir. 2009).

Plaintiffs seek summary judgment that the Mutual Release is a valid contract,[16] enforceable against those entities who signed it. Defendants argue that there is no

[16] The Court notes that in prior sections of this Memorandum and Order, it has granted summary judgment to Plaintiffs on Defendants' affirmative defenses and counterclaims. Therefore, these arguments by Defendants do not provide a basis for finding the Mutual Release invalid or unenforceable.

valid contract because the Mutual Release executed by Defendants[17] and the document executed by the Moody Parties[18] was not the same document. *See* Response [Doc. # 94], pp. 4-11. Defendants note correctly that Investor Services sent the Trust Beneficiaries an unexecuted copy of the Mutual Release, to which was attached a Schedule I that listed all investor entities to whom the unexecuted Mutual Release had been sent for signature. Defendants also note correctly that some, but not all, investor entities executed a copy of the Mutual Release and returned it to Investor Services. By signing and returning the copy of the Mutual Release, the signing Defendants agreed to be bound by its terms. Defendants base their "different document" argument on their assertion that later, after the signatory Defendants signed the Mutual Release but *before* the Moody Parties signed it, Investor Services replaced the original Schedule I (listing all investors) with a modified Schedule I that listed only those investor entities that actually had signed the Mutual Release.[19] Defendants argue that this allegedly material alteration of Schedule I -- to delete from the original Schedule

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17 As noted previously, all Defendants except TIC 21 signed the Mutual Release.

18 The Moody Parties who signed the Mutual Release were Brett Moody, Moody National CI Grapevine S, L.P., Moody National Texas Two H, L.P., Moody National CI Grapevine MT, L.P., Moody National Medical Center MT, L.P., Moody National Texas Two Hotel DST Management, LLC, and MN TX II, LLC. *See* Mutual Release [Doc. # 28], pp. 9-10.

19 Defendants do not allege that the provisions of the Mutual Release itself -- the provisions that constitute the actual contract terms -- ever changed.

I the names of those investors who elected not to sign the Mutual Release -- occurred before the Moody Parties signed the agreement and, therefore, prevents the formation of a valid Mutual Release.[20]

Defendants' factual position is refuted by the record. The uncontroverted evidence in the record is that Investor Services, Plaintiffs' representative, received the executed signature page from those investor individuals and entities who chose to sign the Mutual Release. *See* Plaintiffs' Response to Interrogatory No. 4 [Doc. # 76-1], p. 7. "Following that, those executed signature pages would have been compiled into one document with the body and the schedule of the Unexecuted Mutual Release *along with the signatures of the 'Moody Parties*.'" *Id*. (emphasis added). At that point, the Mutual Release had been signed by all the signing Plaintiffs and all the signing Defendants, creating a valid contract between the signatories. "*Following that*, the representative who worked with Investor Services also updated the Schedule I that was attached to the Unexecuted Mutual Release to reflect those individuals and entities who executed the Unexecuted Mutual Release." *Id*. (emphasis added). This uncontroverted evidence establishes that the Moody Parties and the signing Defendants had already signed the Mutual Release before Schedule I was

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[20] Defendants fail to offer evidence that supports their conclusory assertion that the modification of Schedule I to delete the names of non-signing investors was a material alteration to the Mutual Release.

modified. At that point, the Mutual Release became a valid contract. It is this unaltered Mutual Release, to which the original Schedule I was attached, that Plaintiffs seek to enforce, but seek to enforce only against those Trust Beneficiaries who signed it.

Based on the foregoing, Defendants have failed to present evidence that raises a genuine issue of material fact regarding their myriad challenges to the validity of the Mutual Release. Defendants' repeated, and unsupported, accusations of breach of fiduciary duty, fraud, and illegality are not evidence. As a result, Plaintiffs are entitled to summary judgment that the Mutual Release is valid and enforceable against those entities who signed it.

Plaintiffs performed under the Mutual Release. Specifically, Plaintiffs released and indemnified Defendants from relevant claims, both known and unknown. Defendants argue that Plaintiffs' "performance" is illusory because they "have failed to identify a single actual or potential claim against Defendants that could be 'released' or 'indemnified.'" *See* Response [Doc. # 94], p. 15. Plaintiffs' failure to identify an unknown claim against Defendants that it released in the Mutual Release does not render the performance "illusory."

Regarding the existence of a breach of the valid Mutual Release, it is clear from the undisputed evidence in the record that Defendants filed the Arbitration in which

they asserted claims "arising under or in connection with the Project." This is a violation of § 1.6 of the Mutual Release. Defendants argue that Plaintiffs are not entitled to summary judgment that all the Defendants breached the Mutual Release because some of the Defendants, specifically the individual Defendants, are not named parties in the Arbitration, and they did not "necessarily" authorize its filing. *See* Response [Doc. # 94], p. 16. The term "Claimants" in the Arbitration is defined to include "the principals and/or owners" of the TIC entities. *See* Claimants' Original Demand for Arbitration [Doc. # 23], p. 1. Additionally, Plaintiffs are clear that they seek, and this Court is granting, summary judgment on the breach of contract claim only as to those Defendants who signed the Mutual Release. It is those Defendants that breached the Mutual Release in connection with the filing of the Arbitration.

Plaintiffs have presented evidence that they suffered damages as a result of Defendants' breach of the Mutual Release, specifically attorneys' fees and other expenses incurred in seeking to enjoin the Arbitration and to obtain indemnity from Defendants. As of January 2020, Plaintiffs had incurred over $450,000.00 in attorneys' fees and expenses. The final amount Plaintiffs are entitled to recover, and from which Defendants, will be determined at a later time if not resolved by the parties.

The unambiguous terms of the Mutual Release, and the uncontroverted evidence, establish that the Mutual Release is a valid and enforceable release against the parties who signed it, that Plaintiffs performed under the Mutual Release, and that Defendants who signed the Mutual Release breached it by participating as "Claimants" filing the Arbitration and asserting claims they had previously released. Plaintiffs, as a result of Defendants' breach, have suffered damages in the form of attorneys' fees and expenses. Plaintiffs are entitled to summary judgment on the breach of contract claim.

VI. CONCLUSION AND ORDER

Based on the foregoing, it is hereby

ORDERED that Defendants' Traditional Motion for Summary Judgment on Plaintiffs' Fiduciary Duty [Doc. # 69] is **DENIED**, and Plaintiffs' Motion for Summary Judgment on Defendants' Counterclaims [Doc. # 110] is **GRANTED**. It is further

ORDERED that Plaintiffs' Motion for Summary Judgment on Defendants' Affirmative Defenses [Doc. # 79] and Plaintiffs' Motion for Summary Judgment [Doc. # 77] are **GRANTED**. It is further

ORDERED that counsel shall appear before the Court on **May 27, 2020, at 2:30 p.m.** to discuss Plaintiffs' requests for injunctive relief and for indemnity (including attorneys' fees), unless those issues are amicably resolved prior to that date.

SIGNED at Houston, Texas, this 27th day of **April, 2020**.

NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE