STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

HAS TC SOUTH PARTNERS, LLC, a Michigan limited liability company, and derivatively on behalf of **BUFFALO RIDGE CENTER SOUTH, LLC,** a Michigan limited liability company,

Plaintiff,

v

JOSEPH D. SARAFA, both individually and as **TRUSTEE OF JOSEPH D. SARAFA TRUST U/A/D 3/22/2006, AS AMENDED**,

Defendant/Cross-Plaintiff,

v

ANMAR K. SARAFA

Cross-Defendant.

_____/

Case No. 23-204450-CB
Hon. Victoria A. Valentine
Case No. 23-200871-CB
Hon. Victoria A. Valentine
(Consolidated Cases)

OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), (8), AND (10)

At a session of said Court, held in the
County of Oakland, State of Michigan
April 25, 2024

HONORABLE VICTORIA A. VALENTINE

This matter is before the Court on Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(7), (8), and (10). This Court has reviewed the pleadings filed by the parties and the motion, response, and reply briefs. Oral argument was held on the above-entitled motion.

OPINION

I.

Overview

Joseph Sarafa ("Joe") and Anmar Sarafa ("Anmar") are cousins whose business relationship soured and generated the instant lawsuit. Anmar is the president of a registered investment firm that manages, among other things, real estate investments.[1] Anmar also owns an entity called Steward Executive Management ("SEM") to provide services to the entities in his business portfolio.[2] In 2013, Joe, an attorney, began working for SEM to assist in managing some of Anmar's real estate properties, including the Buffalo Ridge Center, an outdoor shopping mall in Traverse City.[3] In 2015, Joe asked Anmar if he could invest with him in certain real estate properties that he was already overseeing as an SEM employee, and Anmar agreed.[4]

Pursuant to this discussion, Joe, though the Joseph D. Sarafa Trust u/a/d 3/22/2006 ("Joe's Trust"), purchased a 25% interest in Buffalo Ridge Center South, LLC (the "Company"). The remaining 75% interest is owned by Plaintiff HAS TC South Partners, LLC.[5] Anmar negotiated a buy-sell provision in the Company's Operating Agreement that he believed would allow HAS TC South Partners to purchase Joe's 25% interest if Joe's employment with SEM ended.[6] Joe and Anmar each serve as co-managers of the Company.[7]

The parties' business relationship became strained in 2022 when Anmar and Joe were negotiating Joe's annual salary for his asset management services. Anmar came to believe that

[1] Complaint § 14.
[2] Complaint § 17.
[3] Complaint § 18.
[4] Complaint §§ 19-20.
[5] Complaint § 23.
[6] Complaint § 26.
[7] Complaint § 6.

Joe's compensation was "grossly disproportionate" to the services he was providing to the Company.[8] Joe and Anmar agreed to go their separate ways, and the Company attempted to exercise its option to purchase Joe's Trust's membership interest in the Company.[9] Joe refused to sell his Trust's interest and litigation ensued.[10]

II.

Standards of Review

Defendant moves for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10).

A. MCR 2.116(C)(7)

A motion for summary disposition may be brought under MCR 2.116(C)(7) on the ground that entry of judgment, dismissal of the action, or other relief is appropriate because of release, payment, prior judgment, immunity granted by law, or statute of limitations, among other reasons. The burden of establishing the bar imposed by a statute of limitations is normally on the party asserting the defense. *Kuebler v Equitable Life Assurance Soc'y of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996). In the absence of disputed facts, whether a cause of action is barred by the statute of limitations is a question of law. *Boyle v General Motors Corp*, 468 Mich 226, 229-230; 661 NW2d 557 (2003). However, summary disposition is inappropriate if application of the statute of limitations involves an underlying factual dispute. See *Huron Tool & Eng'g Co v Precision Consulting Servs*, 209 Mich App 365, 377–378; 532 NW2d 541 (1995).

B. MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood*

[8] Complaint § 42.
[9] Complaint §§ 44, 52.
[10] Complaint § 53.

Healthcare, Inc, 504 Mich 152, 159-160; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763; 453 NW2d 304 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

"All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

C. MCR 2.116(C)(10)

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden,* 461 Mich at 119-120; *Quinto*, 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto*, 451 Mich at 361. If the

moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4). See also *Meyer v City of Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 120-121 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil*, 504 Mich at 160 (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

III.

Analysis

A. Count I – Breach of Operating Agreement (Direct/Derivative)(Joe's Trust)[11]

In the first count of the complaint, Plaintiff alleges that Joe's Trust breached Section 6.7(a) of the Operating Agreement. According to Plaintiff, Section 6.7(a)(i) "gives the Company the right to acquire Joe's Trust's membership interest if Joe's employment with SEM has been terminated."[12] Joe's Trust refused to sell its membership interest, and Plaintiff asserts that this constitutes a breach of the Operating Agreement.

Under Michigan law "[a] party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). A court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Elec Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144; 881 NW2d 95 (2016). "[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). See also *Kendzierski v Macomb County*, 503 Mich 296, 311-312; 931 NW2d 604 (2019) (emphasis in original) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*" and a court "will not create ambiguity where the terms of the contract are clear.").

Under Michigan law, contracts are subject to the parol evidence rule which prohibits the use of extrinsic evidence to interpret unambiguous language within the contract. *Shay v Aldrich*,

[11] Defendant moves for summary disposition of Count I pursuant to MCR 2.116(C)(8).
[12] Complaint ¶ 68.

487 Mich 648, 667; 790 NW2d 629 (2010). See also *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) ("[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.") (citation omitted).

The question of whether contract language is ambiguous is a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). A contract is ambiguous if there is an irreconcilable conflict between provisions in the contract or "when a term is equally susceptible to more than a single meaning." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019). Under such circumstances, the ambiguous contract language presents a question of fact. *Klapp*, 468 Mich at 469. "[I]f a contract is ambiguous, then extrinsic evidence is admissible to determine the actual intent of the parties." *Shay*, 487 Mich at 667 (quotation marks and citation omitted). See also *Klapp*, 468 Mich at 469 ("In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, [trier of fact] is to consider relevant extrinsic evidence").

Here, Joe's Trust correctly points out that Section 6.7(a)(i) gives the Company "the right (but not the obligation)" to purchase Joe's Trust's shares in the event of the termination of Joe's employment with SEM. However, this section is subject to the requirement in Section 4.1 that "any actions taken by the Managers shall require the agreement of all Managers." The Section 4.1 requirement that the managers agree applies to their authority "to manage and control the Company and its business and to make all incidental decisions," including decisions to "make capital expenditures for the acquisition of or addition to… other property."[13] Thus, by terms of the

[13] Operating Agreement § 4.2(c).

Operating Agreement, both Joe and Anmar have agree to expend capital to purchase Joe's Trust's interest in the Company.

Plaintiff argues in its Response that Joe's termination of employment gave the Company the *right* to purchase Joe's Trust's shares, but the Operating Agreement did not give the Company an alternative means for exercising that right (namely unilateral action by Anmar). As such, the Company's right to act found in Section 6.7 is subject to the same requirements for its right to act in any other situation (unanimous agreement from Section 4.1). Accordingly, the Court finds that Plaintiff's claim for Breach of the Operating Agreement is insufficient as a matter of law under MCR 2.116(C)(8).

Defendant's Motion for Summary Disposition is **GRANTED** as to Count I – Breach of Operating Agreement.[14]

B. Count II: Breach of Fiduciary Duty (Direct/Derivative)(Defendant Joe)[15]

a. Direct Claim

At the hearing on April 24, 2024, the parties stipulated to the dismissal of the direct claim for Count II – Breach of Fiduciary Duty. Accordingly, Defendant's Motion for Summary Disposition is **GRANTED** as to the direct claim for Breach of Fiduciary Duty.

b. Derivative Claim

Joe also argues that the derivative claim for breach of fiduciary duty is insufficient as a matter of law because Plaintiff has failed to meet the statutory requirements for bringing a derivative suit, specifically (1) the demand requirement in MCL 450.4510(b), and (2) the fair and adequate representation requirement in MCL 450.4510(e).

[14] Because the Court holds that the claim for Breach of the Operating Agreement is insufficient as a matter of law under MCR 2.116(C)(8), the Court does not need to address the parties' arguments about the direct versus derivative nature of the claim.
[15] Defendant moves for summary disposition of Count II pursuant to MCR 2.116(C)(8).

As to the demand requirement, Joe argues that Plaintiff did not demand that the Company file suit to force Joe to redeem which was required under MCL 450.4510. Instead, Joe characterizes the demand that HAS made as a demand "that BRCS consent to HAS intervening in the prior suit, or the filing of a derivative suit by HAS." Motion at 5. However, this seems to overlook the language of the September 7, 2023 demand letter:

> Demand is hereby made pursuant to MCL §450.4510 of the Limited Liability Act for the State of Michigan on the Co-Managers and/or the Members with authority to cause Buffalo Ridge Center South, LLC (the "Company") to sue in its own right.
>
> Complaint, Exhibit H.

The Court finds that Joe has not demonstrated that the statutorily required demand was deficient under MCL 450.4510 as a matter of law.

Joe also argues that the derivative claim for breach of fiduciary duties is legally insufficient because Plaintiff does not fairly and adequately represent the interests of the Company in bringing the derivative suit. Instead, he argues that HAS and Anmar have brought this suit for their own benefit "just to take the company over and take it away from Joe." Motion at 5. However, reading the Complaint in the light most favorable to Plaintiff, it is clear Plaintiff has met its burden of demonstrating that it fairly and adequately represents the interests of the company. Specifically, Plaintiff believes it is no longer in the best interests of the Company to retain a member and manager who allegedly breached his fiduciary and contractual duties to the Company and refuses to participate in the management of the Company. The pleadings are sufficient to overcome a challenge under MCR 2.116(C)(8).

Defendant's Motion for Summary Disposition is **DENIED** as to the derivative claim in Count II – Breach of Fiduciary Duty.

C. Count IV: Breach of Agency (Direct/Derivative)(Defendant Joe)[16]

Plaintiff includes both a direct and derivative claim for Breach of Agency against Joe. At the hearing on April 24, 2024, the parties stipulated to the dismissal of the direct portion of that claim. For the reasons noted below, however, the Court dismisses the Breach of Agency claim in its entirety.

In describing the claim, Plaintiff states that the faithless servant rule in Michigan recognizes that "by being disloyal to his or her principal—the agent has not properly performed under his or her agreement with the principal and, for that reason, has no right to the compensation contemplated under the agreement." Consequently, Plaintiff demands that Joe "forfeit any compensation, benefits, and ill-gotten profits related to his improper misconduct under the Faithless Servant Doctrine." Indeed, Michigan courts have recognized the faithless servant rule as a defense akin to unclean hands available to employers whose self-dealing employees sue for breach of contract. See e.g., *Tooling Mfg & Technologies Ass'n v Tyler*, an unpublished per curiam opinion of the Court of Appeals, issued Dec. 28, 2010 (Docket No. 293987), pp. 7-8 (holding that the trial court did not err when it barred the employee's claim for additional compensation on the basis of his misconduct). However, none of the cases cited by Plaintiff demonstrate that the faithless servant rule provides an independent cause of action under Michigan law.

Further, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v. Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Upon review of the Complaint, it is clear that Plaintiff's breach of agency claim is merely a misstatement of its breach of fiduciary duty claim.

[16] The Complaint contains two "Count IV" sections. This addresses the first Count IV – Breach of Agency. Defendant moves for summary disposition of Count IV (Breach of Agency) pursuant to MCR 2.116(C)(8).

Accordingly, Defendant's Motion for Summary Disposition of Count IV – Breach of Agency is **GRANTED**.

D. Count IV: Member Oppression (Direct)(All Defendants) [17]

A claim for member oppression under MCL 450.4515 allows a circuit court to grant relief when the "acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." The statute defines willfully unfair and oppressive conduct as a continuing course of conduct or significant action or series of actions that substantially interfere with the member's interests as a member. MCL 450.4515(2).

Defendants argue that this count must be dismissed because there is no genuine issue of fact that Joe is not in control of the LLC. While it is true that he is not a "*member* in control of the limited liability company," he is a manager which is an alternative prerequisite for recovery under MCL 450.4515. Indeed, the Operating Agreement gives the managers (Joe and Anmar) "full and complete power, authority and discretion to manage and control the Company and its business and to make all incidental decisions."[18] Because of his status as a manager in a manager-managed LLC, Joe is potentially liable under MCL 450.4515 for any "willfully unfair and oppressive conduct" as defined in that statute. Thus, there are genuine issues of material fact as to whether Defendants are liable for member oppression under MCL 450.4515, and summary disposition of this claim under MCR 2.116(C)(10) is not warranted.

Consequently, Defendant's Motion for Summary Disposition of Count IV – Oppression is **DENIED**.

---

[17] Defendants move for summary disposition of Count IV (Oppression) pursuant to MCR 2.116(C)(10).

[18] Operating Agreement § 4.2.

E. Count V: Fraud (Direct)(All Defendants)[19]

The statute of limitations for a fraud claim is six years under MCL 600.5813. *Kuebler*, 219 Mich App at 6. The cause of action is accrued when the wrong was done, not when the fraud was discovered. *Boyle*, 468 Mich at 231-232.

In this case, the factual basis for Plaintiff's fraud claim involves Joe's conduct in negotiating the Operating Agreement in 2015. Specifically, Plaintiff alleges that Joe sent a version of the draft Operating Agreement that purported to take away Anmar's right to purchase Joe's interest in the Company without Joe's approval and bypassed Anmar's attorney.[20] Any fraud claim should have been brought within 6 years of the allegedly fraudulent conduct, whereas this action was filed approximately 8 years later. Consequently, summary disposition is appropriate under MCR 2.116(C)(7).

Defendant's Motion for Summary Disposition is **GRANTED** as to Count V – Fraud.

F. Sanctions

Joe requests that this Court sanction Plaintiff for including the fraud claim which, for the reasons discussed above, is barred by the statute of limitations. In the end, Joe has failed to show that sanctions are warranted. Indeed, the higher courts have established an exceedingly high threshold for granting sanctions and have reversed trial courts for awarding them under similar circumstances. See, e.g., *Kozma v Scott Law,* unpublished per curiam decision of the Court of Appeals, issued March 14, 2024 (Docket Nos. 363508 and 364450), p 9 (dedicating nine pages of analysis to reverse the granting of sanctions, finding that "plaintiff's claim was not frivolous because it was sufficiently grounded in law and fact"); *Davis v Wayne County Commission*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2023 (Docket No.

[19] Defendant moves for summary disposition of Count V pursuant to MCR 2.116(C)(7).
[20] Complaint ¶¶ 111-115.

362547), p 1 ("The trial court clearly erred in concluding that Davis's complaint was devoid of arguable legal merit and intended to harass"); *Thayer v Dipple*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2023 (Docket No. 362213), p 1 ("The circuit court granted the Thayers' motion to impose sanctions against Siudara based on 'deliberate misrepresentations to the Court.' We vacate the court's order and remand for further proceedings consistent with this opinion"); *Mass2Media, LLC v Cimini,* unpublished per curiam opinion of the Court of Appeals, issued March 30, 2023 (Docket Nos. 357973, 360357) (finding that sanctioning a party who was found to have based his entire case on lies was erroneous when the dispute boils down to a contract dispute). Accordingly, the Court declines to grant Joe's request for sanctions.

G. Request to Amend

Should the Court grant summary disposition, Plaintiff is seeking an opportunity to file an amended complaint to add fraudulent concealment. If a court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5). Here the Plaintiff requests leave to amend the complaint to more specifically plead fraudulent concealment under MCL 600.5855, which allows a two year tolling period to bring the claim after the claim is or should have been discovered. The Plaintiff claims that Joe's fraudulent actions in drafting/amending the Operating Agreement were not discovered until August/September 2023 because he unilaterally made changes to the Agreement and did not send those changes to Scott Lites, Anmar's attorney. However, the August 21, 2015 email attached as Tab 7 to Anmar's affidavit makes clear that Mr. Lites did receive the final version of the Operating Agreement, and Anmar invited him to discuss "any further changes you recommend." Thus, by Plaintiff's own admission, Anmar's attorney did receive Joe's changes as of August 21, 2015 and any fraud should

have been discovered in 2015. Consequently, it would be futile to allow Plaintiff to amend the complaint to add fraudulent concealment, and the Court denies Plaintiff's request to do so.

ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Defendant's Motion for Summary Disposition is **GRANTED** as to Count I – Breach of Operating Agreement;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition is **GRANTED** as to the direct claim in Count II – Breach of Fiduciary Duty and **DENIED** as to the derivative claim in Count II – Breach of Fiduciary Duty;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition of **GRANTED** as to Count IV – Breach of Agency;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition is **DENIED** as to Count IV – Oppression;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition is **GRANTED** as to Count V – Fraud;

IT IS FURTHER ORDERED that Defendant's Request for Sanctions is **DENIED**;

IT IS FURTHER ORDERED that Plaintiff's Request for Leave to Amend is **DENIED**.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 4/25/24