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

C. KELLY DAMMAN and
GREGORY J. DAMMAN,
Plaintiffs,

v.

Case No. 15-150836-CB
Hon. James M. Alexander

DAMMAN HOLDINGS, LC, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for partial summary disposition. Plaintiffs Kelly and Gregory Damman and Defendant Mike Damman are siblings. Mike is the manager and majority owner of Defendant Damman Holdings, which is a real estate holding company. Kelly and Greg were minority members of the company.[1]

On February 5, 2015, the parties attended an annual meeting, where Kelly and Mike voted that the company would exercise its option to purchase 100% of Greg's common membership interest in Damman Holdings for $1,605,148.[2] While Greg abstained from the vote, he did not object to the company exercising its option at any time.

Following the vote, Greg executed all of the documents required to effectuate the company's redemption, including: (1) an Assignment of Membership Interest, (2) a Closing

[1] Greg Damman held his interest through, and was the trustee of, the Damman Management Trust.
[2] The parties do not dispute that the agenda for said meeting was provided to each member in January 2015 and included notice of the potential exercise of its option to purchase outstanding member interests as an agenda item.

Location Agreement, (3) an Installment Note, and (4) a Representation from Damman Management Trust to Damman Holdings, LC.[3]

The Assignment provides, in relevant part (emphasis added):

> For value received, including the payment of $321,030.00 in cash, and an Installment Note for $1,284,120.00, **the receipt and sufficiency of which is acknowledged**, the Damman Management Trust (the "Member"_ absolutely, unconditionally, and irrevocably transfers, assigns, and sets over to Damman Holdings, LC all of its right, titile, and interest in and to 100% of its Common Interest in Damman Holdings, LC.

Similarly, the Installment Note provides, in relevant part (emphasis added):

> Pursuant to Section 8 of the First Amended and Restated Member Agreement of Damman Holdings, L. C. and its Members . . ., **Damman Holdings . . . exercised its option to purchase all of the Membership Interest . . . of Damman Management Trust . . . for the total sum of** One Million Six Hundred Five Thousand One Hundred Fifty 00/100 Dollars **($1,605,150**).

The Note provides that the first installment of $321,030 would be paid according to the instructions attached to the Note, with the remainder of the purchase price to be paid in four equal, annual installments.

Plaintiffs do not dispute that, on the day it received the executed documents, the company wired Greg the first $321,030 installment payment, and since then, the company has paid Greg a total of $983,793.90 of the $1,605,148 purchase price, inclusive of interest.

Nearly a year after the redemption vote, on December 30, 2015, Plaintiffs then filed the present Complaint on two general claims of wrongdoing. First, Plaintiffs allege that they did not receive distributions in the amount required under the company's Operating Agreement. Second, the company paid less than required under the Operating Agreement to redeem Greg's common

[3] Plaintiffs claim that these and other "closing documents" were executed on April 13 and 14, 2015. (Response Brief, at 10). The Court notes that the Installment Note does not contain date lines near the signature lines, so it is not apparent when Greg signed the Note (but it carries a date of January 1, 2015 on its face).

shares. On these general allegations, Plaintiffs pled breach of operating agreement, declaratory relief, and minority oppression claims.

Defendants now move for partial summary disposition of Plaintiffs' Counts III and IV[4] as they are based almost exclusively on allegations that the Company did not pay enough to redeem Greg's interest.[5] Defendants seek the same under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

I. Redemption Purchase Price Claims

As stated, the majority of allegations supporting Counts III and IV are based on the purchase price to redeem Greg's interest. In support of their motion, Defendants first argue that "neither Kelly nor Greg disputes that Greg's common membership interest was properly redeemed or that Greg knowingly agreed to the purchase price calculated by the Company's independent CPA firm." Rather, Defendants argue, Plaintiffs simply complain that the company paid less than they believe it should have.

Indeed, in response to Defendants' motion, Plaintiffs argue that this lawsuit "is not an attempt to unwind the redemption of Greg's common interest. It is simply to force the Company to Account for its undervaluation of Greg's common interest in violation of the Amended Member Agreement, resulting in a substantial underpayment to Greg."

But, Defendants argue, Greg expressly "agreed to the purchase price for the redemption of his common membership interest knowing full well the purchase price and how it was derived." While the Operating Agreement provided instructions on how to calculate the purchase

[4] Plaintiff's fourth Count is improperly labeled as Count VI (rather than IV).
[5] Plaintiff's Count IV also alleges that the decision to redeem Greg's interest was in retaliation for Greg's questioning about proper distributions under the Member Agreement.

price in the event of a redemption, some discretion was afforded to the company's accounting firm with respect to the capitalization rate to be used to calculate the Aggregate Redemption Value ("ARV").

And, Defendants argue, it is undisputed that "Greg was given the ARV prepared by the Company accountant" each year – including 2015. And, prior to the February 5, 2015 meeting, Defendants claim that Greg "knew exactly what the purchase price would be and how it had been calculated." With this knowledge, Kelly and Mike voted in favor of the company redeeming Greg's shares (while Greg abstained).

Armed with this information, Greg then executed the "closing documents" transferring his interest to the company and acknowledging the sufficiency of the consideration paid, and accepting and agreeing to the $1,605,148 purchase price. And since that time, Greg received the initial, and two subsequent, wire transfers totaling $983,793.90 of said purchase price.

Defendants argue that "[t]here can be no dispute that Greg agreed to the terms of the redemption" – including the purchase price. Accordingly, Defendants claim, "Greg and [the company] entered into an enforceable contract for the purchase of Greg's common membership interest for the agreed-upon purchase price." As a result, Defendants argue that Plaintiffs' Counts III and IV, based on the allegation that Greg was paid too little, fail as a matter of law.

In response, Plaintiffs claim that their lawsuit is proper because a closing provision found in Section 11.d. of the First Amended and Restated Member Agreement provides that "nothing in this Section shall be interpreted as waiving a Member's rights to protest a breach of this Agreement or to bring an action for breach of this Agreement."

But Defendants argue that Plaintiffs' reliance on this section is misplaced because the same only applies to a situation where the member (1) protests the closing, (2) does not attend

the closing, or (3) otherwise does not deliver the appropriate closing documents. And in this case, Plaintiff did none of these things – instead, he voluntarily executed the closing documents and provided written instructions for payment.

Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes*, 291 Mich App at 594.

As often repeated by our Supreme Court, "courts must … give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

As stated Plaintiffs rely on a claimed "non-waiver" provision found at 11.d. of the Member Agreement that provides (in full and emphasis added):

> **If the selling Member protests the Closing, does not attend the Closing, or otherwise does not deliver the appropriate certificates or assignments at the Closing**, each Member irrevocably appoints the Manager(s) individually as the Member's true and lawful attorney in fact, each with the power to execute and deliver in the appointing Member's place all certificates, instruments, and documents necessary or incidental to the sale, transfer, and assignment of the Membership Interests at the Closing. This power is coupled with an interest, shall constitute an irrevocable proxy to vote the Membership Interests solely for purposes of consummating the Closing, shall not expire on the death or incapacity of such appointing Member, and may not be revoked while this Agreement is in effect. **Notwithstanding the above, nothing in this Section shall be interpreted as waiving a Member's rights to protest a breach of this Agreement or to bring an action for breach of this Agreement**.

Defendants argue that this section does not apply for two reasons. First, the last sentence of the above provision only applies when a Member "protests the Closing, does not attend the Closing, or otherwise does not deliver the appropriate certificates or assignments at the Closing." Under such circumstances, Defendants argue, "it makes sense that, if a manager were to execute closing documents pursuant to the power of attorney provided in Section 11(d), it would be inequitable to hold a protesting member bound to offending terms."

Second, Defendants argue, even if the last sentence of Section 11.d. extended beyond said Section and applied to Sections 11.a., 11.b., or 11.c., these Sections only address "the notice to be given, the timing of the closing, the documents to be signed and delivered, and the amount of advance notice before the closing." And Plaintiffs do not complain about any of these "closing protocols." Rather, Plaintiffs only complain that the Purchase Price determined under Sections 9.a., 9.b., and 9.c. was wrong. But this is beyond the reach of the last sentence of Section 11.d.

The Court agrees with Defendants' arguments. First, based on its plain and ordinary meaning, the last sentence of Section 11.d., applies only to a situation where the Member protests or does not attend the Closing, or otherwise does not deliver the appropriate certificates or assignments at the Closing. But in this case, Greg did not object to the Closing and voluntarily agreed to the $1,650,150 purchase price by executing the closing documents. As a result, Section 11.d. does not apply.

Greg also expressly acknowledged the sufficiency of the stated purchase price. When he voluntarily executed the closing documents, his ability to second-guess or object to the purchase price calculation was lost. The closing documents constitute a valid, enforceable agreement as to

the express purchase price provided therein.[6] Once these documents were executed, any argument that the purchase price was improperly calculated became irrelevant.

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiffs, the Court finds that there are no material facts in dispute, and Defendants are entitled to judgment as a matter of law as to Plaintiffs' Count III for breach of the Amended Member Agreement, which is **solely** based on claims relating to the improper calculation of the redemption purchase price.

With respect to Plaintiffs' Count IV[7] for Oppressive Conduct in Violation of MCL 450.4515, however, Plaintiffs base the same on allegations of the following oppressive acts (Complaint, at Paragraph 117):

> a. exercising the Company's option to redeem 100% of Plaintiff DMT's Common Interest in Damman Holdings contemporaneously with and in retaliation for DMT objecting to the Company's breach of the Amended Operating Agreement set forth in Count I and to prevent DMT from exercising its rights to enforce the Amended Operating Agreement;
>
> b. artificially suppressing the value of DMT's Common Shares by using an arbitrarily high and unsupported base capitalization rate of 12.5%, substantially higher than the 10.5% base capitalization rate provided for in Section 9(c)(iv) and in violation of Section 9(b) and (c) of the Amended Member Agreement as set forth in Count III. In applying the arbitrarily high base capitalization rate of 12.5%, Damman Holdings abused its discretion by failing to take into proper consideration all of the facts and circumstances that go into developing a fair capitalization rate, including current market conditions and the recent appraisal of Damman Holdings' properties which applied a base capitalization rate of 9.25%.
>
> c. artificially suppressing the value of DMT's Common Shares in violation of Section 9(b) of the Amended Member Agreement by improperly averaging the percentage of DMT's Common Interest over five years as opposed to simply multiplying DMT's present Common Interest percentage by the ARV as set forth in Count III.

[6] Further, Section 9 of the Member Agreement also provides that the valuation formula may be changed upon the consent of Greg's and Mike's companies. Therefore, even assuming that the purchase price was not strictly calculated according to Section 9, the parties' closing documents could represent an agreed change.
[7] Improperly labeled as "Count VI."

d. artificially suppressing the value of DMT's Common Shares by improperly calculating the Aggregate Redemption Value in violation of Sections 9(b) and 9(c) of the Amended Member Agreement as set forth in Count III.

When read closely, paragraphs b, c, and d are also **solely** based on claims relating to the improper calculation of the redemption purchase price. As a result and for the above reasons, the same cannot be the basis for any minority oppression claim.

The remaining allegation is contained paragraph 117.a. of the Complaint. This paragraph alleges that the redemption decision was made in retaliation for Greg's objecting to the Company's alleged failure to make distributions as required under the Operating Agreement. This allegation is sufficiently removed from the purchase-price argument such that its summary dismissal demands separate analysis.

II. Redemption Decision as Retaliation

With respect to the retaliation allegation, Defendants make a purely factual argument that "there is no dispute that the Company Option was not exercised in retaliation" – citing to the timing of the redemption decision, the date notice of the possibility of the same was provided to members, and some deposition testimony.

And despite Defendants' claim otherwise, Plaintiffs dispute the reason for the redemption decision – alleging the same was retaliatory. In support, Plaintiffs cite to deposition testimony and the timing of the redemption decision as related to Greg's questioning the alleged lack of proper distributions. In other words, the parties present competing evidence that precludes summary disposition.

Because Defendants' motion on this issue solely presents a factual argument, and Plaintiffs respond with sufficient evidence to the contrary, summary disposition is inappropriate and DENIED.

For the foregoing reasons, Plaintiffs' Count IV for minority oppression may be based on the allegation that the redemption decision was made in retaliation for Greg's objections to the Company's distribution decisions as alleged in Paragraph 117.a. of the Complaint.

But, because Greg accepted and expressly agreed to the redemption purchase price as reasoned above, any allegations of minority oppression based thereon (Paragraphs 117.b., c., and d.) fail as a matter of law.

III. Summary

To summarize, Defendants' motion for partial summary disposition is GRANTED IN PART.

Plaintiffs' Count III, based solely on improper purchase-price allegations, is DISMISSED in its entirety. Additionally, to the extent that Plaintiffs' Count IV is based on improper purchase-price allegations, the same is DISMISSED.

But, to the extent that Plaintiffs allege that the redemption decision was made in retaliation for Greg's objecting to distribution decisions, Plaintiffs' Count IV may proceed.

IT IS SO ORDERED.

March 23, 2016_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge