STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
BUSINESS COURT

640 TEMPLE INVESTOR, LLC,

Plaintiff,

No. 22-013484-CB

-v-

Hon. Annette J. Berry

CHRISTOS MOISIDES, BYZANTINE HOLDINGS, LLC, DAVID P. SUTHERLAND, and THE DAVID P. SUTHERLAND LIVING TRUST DATED SEPTEMBER 3, 1998,

Defendants.

AND

CHRISTOS MOISIDES AND BYZANTINE HOLDINGS, LLC,

Counter-Plaintiffs,

-v-

640 TEMPLE INVESTOR, LLC,

Counter-Defendant,

AND

CHRISTOS MOISIDES AND BYZANTINE HOLDINGS, LLC,

Cross-Plaintiffs,

-v-

DAVID P. SUTHERLAND and THE DAVID P. SUTHERLAND LIVING TRUST DATED SEPTEMBER 3, 1998,

Cross-Defendants.

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: December 12, 2023

PRESENT: Honorable Annette J. Berry
Circuit Judge

This civil matter is before the Court on two motions for summary disposition filed by Plaintiff/Counter-Defendant 640 Temple Investor, LLC ("640 TI") and Third-Party Defendants Estate of Gretchen C. Valade, the Gretchen C. Valade Irrevocable Trust dated January 15, 2009, and the Gretchen C. Valade Revocable Trust dated May 5, 1982 (collectively "Third-Party Defendants"). For the reasons stated below, the Court grants the motions.

I. BACKGROUND

Plaintiff/Counter-Defendant, 640 TI initially filed a complaint against Defendants/Counter-Plaintiffs Christos Moisides ("Moisides") and Byzantine Holdings, LLC "Byzantine"), to enforce a guaranty provision in the parties' amended operating agreement. Counter-Plaintiffs filed a counter-complaint against 640 Temple Investor, LLC ("640 TI") on March 14, 2023. Moisides and Byzantine also filed a Third-Party Complaint against Third-Party Defendants on March 14, 2023.

The corporate structure in this case is a complicated one. Non-Party Temple Group Holdings, LLC ("TGH") owns real property at 640 Temple Street, Detroit, Michigan. TGH is often referred to in their pleadings by Counter-Plaintiffs as "Property Owner." Counter-Defendant 640 TI is the Investor Member of TGH. Non-party Temple Group Management Company, LLC ("TGM") was the Managing Member of TGH under the Operating Agreement.

Byzantine owns a 50% interest in TGM. Moisides owns a 50% interest in Byzantine. Neither Byzantine nor Moisides directly owns any portion of TGH.

On March 9, 2023, 640 TI exercised its rights under the Operating Agreement and removed TGM as Managing Member of TGH. [640 TI's Exhibit 1, Operating Agreement Sections 8.13(a) and (b), p. 40-42].

Under the TGH Operating Agreement,[1] TGM agreed to repurchase 640 TI's interest in TGH upon the occurrence or non-occurrence of certain events. Those events may be:

> (a) If (i) the conditions precedent to the Placed-in-Service Installment as set forth in Section 5.01(c)(iii)[2] have not been

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[1] The "AMENDED AND RESTATED OPERATING AGREEMENT" is dated as of May 8, 2019 and is attached as 640 TI's Exhibit 1.

[2] Section 5.01(c)(iii) of the Operating Agreement provides:

> (c) Subject to the provisions of this Agreement, including, without limitation, the provisions of Sections 5.01(d), 501(9) and 5.08, the Investor Member shall be obligated to make a Capital Contribution to the Company in the aggregate amount of $9,866,588 in four (4) Installments, which Installments shall be due and payable in cash by the Investor Member, as set forth below.
> ...
>
> (iii) $8,746,612 (the "Placed-in-Service Installment") shall be payable within ten (10) business days after the satisfaction of all of the following conditions: (A) payment by the Managing Member of any amounts then owed by the Managing Member pursuant to Section 501(9); (B) receipt of evidence of the approval by the National Park Service of any amendments t0 the Part 2 Approval satisfying any conditions to the Part 2 Approval; (C) delivery to the Investor Member of certification (acceptable to the Investor Member) by the Architect that the Rehabilitation is one hundred percent (100%) completed and has been done in a manner consistent with the Part 2 Approval, including all tenant improvements and change orders; (D) delivery to the Investor Member of the final certificate of occupancy for the Property; (E) delivery to the Investor Member of the Tax Certificate; (F) receipt of an updated Title Policy which does not contain any exception for construction lien rights; (G) a complete set of as-built drawings for the Property, all in form reasonably satisfactory to the Investor Member; (H) delivery to the Investor Member of a final unconditional lien waiver from the Contractor indicating that all amounts payable to the Contractor have been paid in full and that the Company is not in violation of the Construction Contract; and (I) delivery to the Investor Member of a Lender's Estoppel Certificate.

> satisfied by December 81, 2020, or such later date as may be Consented to by the Investor Member; (ii) the Company has not received Part 8 Approval prior to June 80, 2021, or such later date as may be Consented to by the Investor Member; (iii) the Property will qualify for less than seventy-five percent (75%) of the Projected Credits; or (iv) an event of Bankruptcy has occurred with respect to any Developer Entity (each a "Repurchase Event"), then the Managing Member shall, within fifteen (15) days of the occurrence or notification thereof, as applicable, deliver to the Investor Member notice of such event and of its obligation, at the option of Investor Member, to purchase the Interest of the Investor Member hereunder and return to the Investor Member its Adjusted Capital Contribution, in the event the Investor Member, in its sole discretion requires such purchase of its Interest.
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> [640 TI's Exhibit 1, Operating Agreement, Section 5.04(a), p. 32] [Emphasis added].

Hence, the events are: (1) conditions set forth in Section 5.01(c)(iii) have not been satisfied by December 31, 2020; (2) the Company has not received Part 8 Approval by June 30, 2021; (3) qualification for less than 75% of the Projected Credits; or (4) bankruptcy.

Moisides, Byzantine, Third-Party Defendants, and Defendants David P. Sutherland and the David P. Sutherland Living Trust dated September 3, 1998, entered into an Unconditional Guaranty ("the Guaranty") for the benefit of 640 TI, guaranteeing TGM's repurchase obligation under the Operating Agreement. The Guaranty provides:

UNCONDITIONAL GUARANTY

> THIS UNCONDITIONAL GUARANTY (the "Guaranty"), is made as of May 8, 2019, by Temple Group Management Company LLC, a Michigan limited liability company ("Manager"), Byzantine Holdings, LLC, a Michigan limited liability company ("Developer"), Gretchen Valade, an individual ("Valade"), The Gretchen Valade Irrevocable Trust Dated January 15, 2009 ("Valade Irrevocable Trust"), The Gretchen Valade Revocable Trust dated May 5, 1982

("Valade Revocable Trust"), The David Sutherland Revocable Trust dated September 3, 1998 ("Sutherland Trust"), Christos Moisides, an individual ("Moisides"), and David Sutherland, an individual ("Sutherland", each a "Guarantor" and collectively, the "Guarantors"), for the benefit of 640 Temple Investor, LLC, a Michigan limited liability company (the "Investor").

WHEREAS, as a condition of acquiring an interest in the Company, Investor has required the Guarantors to guarantee unconditionally to Investor the payment in full of all of the payment obligations of Manager under the Operating Agreement and certain other items as herein set forth.

...

1. Guarantors irrevocably and unconditionally fully guarantee the due, prompt and complete performance of each and every one of the following obligations in all material respects (collectively, the "Indebtedness"): (a) the payment and performance by Manager of each and every obligation of Manager due under the Operating Agreement; (b) the payment and performance by Developer under the Development Agreement; (c) the due, prompt and complete payment of all costs and expenses (including, without limitation, reasonable attorneys' fees) incurred by Investor in collection of the enforcement of this Guaranty against the Guarantors; (d) intentionally omitted; (e) the payment and performance under that certain Option Agreement (the "Option Agreement") dated as of even date herewith between Investor and Manager, as "Purchaser") of each and every obligation of the Purchaser thereunder; and (f) intentionally omitted.

2. The Guarantors hereby acknowledge, consent and agree that, Investor has reserved the power and authority to, in its absolute discretion, and without notice to Guarantors deal in any lawful manner with the Indebtedness and the other obligations guaranteed hereby. Without limiting the generality of the foregoing, the liability of the Guarantors hereunder shall not be affected, impaired or reduced in any way by any action taken by Investor involving any of the following powers or authorities or pursuant to any other provision hereof, or by any delay, failure or refusal of Investor to exercise any right or remedy it may have against Manager or any other person, firm or corporation, including other guarantors, if any, liable for all or any part of the Indebtedness or any of the other obligations guaranteed hereby:

(a) to renew, compromise, extend, accelerate or otherwise change the time or place of payment of or to otherwise change the terms of the Indebtedness, subject to the express terms governing the Indebtedness;

(b) to (i) modify any of the terms of the Operating Agreement, the Development Agreement and/or any other obligations guaranteed ... or (ii) waive any of the terms thereof;

...

(e) to grant any indulgence, forbearance or waiver with respect to the Indebtedness or any of the other obligations guaranteed hereby;

(f) to release or waive rights against any person without releasing or waiving any rights against Guarantors; ...

...

3. The Guarantors agree that if any of the Indebtedness is not fully and timely paid or performed according to the tenor thereof, whether by acceleration or otherwise, the Guarantors Shall immediately upon receipt of written demand therefor from Investor pay all of the Indebtedness hereby guaranteed in like manner as if the Indebtedness constituted the direct and primary obligation of the Guarantors. The Guarantors Shall not have any right of subrogation...

4. This Guaranty and the obligations of the Guarantors hereunder shall be continuing and irrevocable until the Indebtedness has been satisfied in full. ...

5. The Guarantors hereby waive notice of acceptance of this Guaranty by Investor and this Guaranty shall immediately be binding upon the Guarantors. Any Guarantor who executes this Guaranty Shall be fully bound hereby regardless of whether or not any other Guarantor subsequently execute this Guaranty.

...

(g) any election by Investor to exercise any right or remedy it may have against the Company or any security, including, without limitation, the right to foreclose upon any such security by judicial or non-judicial sale, without affecting or impairing in any way the liability of any Guarantor hereunder, except to the extent the indebtedness has been paid, and

> Guarantors waive any default arising out of the absence, impairment or loss of any right of reimbursement, contribution or subrogation or any other right or remedy of any Guarantor against the Company or any such security whether resulting from such election by Investor or otherwise. The Guarantors understand that if all or any part of the liability of the Company to Investor for the Indebtedness is secured by real property the Guarantors shall be liable for the full amount of their liability hereunder, notwithstanding foreclosure on such real property by trustee sale or any other reason impairing the Guarantors' right to proceed against the Company; ...
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> ...
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> 7. This Guaranty shall be effective as a waiver of, and the Guarantors hereby expressly waive, any and all rights to which Guarantors may otherwise have been entitled under any suretyship laws in effect from time to time in the State.
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> ...
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> 10. The liability of the Guarantors under this Guaranty shall be an absolute, direct, immediate and unconditional guarantee of payment and not of collectability. The obligations of the Guarantors hereunder are independent of the obligations of Manager or any other party which may be initially or otherwise responsible for performance or payment of the obligations hereunder guaranteed and each other Guarantor and, in the event of any default hereunder, a separate action or actions may be brought and prosecuted against any Guarantor, whether or not Manager is joined therein or a separate action or actions are brought against Manager. Investor may maintain successive actions for other defaults. ...
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> ...
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> 12. The Guarantors hereby agree to pay to Investor, upon demand, reasonable attorneys' fees and all costs and other expenses which Investor expends or incurs in collecting or compromising the Indebtedness or in enforcing this Guaranty against any Guarantor whether or not suit is filed, ...
>
> [640 TI's Exhibit 2].

On November 10, 2022, 640 TI initiated the instant lawsuit seeking to enforce the Guaranty. After 640 TI filed its complaint, Counter-Plaintiffs filed a counter-complaint

alleging breach of fiduciary duty (Count I), oppression (Count II), piercing the corporate veil (Count III), and request for declaratory judgment finding that the Unconditional Guaranty is null and void and unenforceable (Count IV).

Now before the court are the two motions for summary disposition filed by 640 TI and Third-Party Defendants. The motions will be addressed separately below.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Plaintiff/Counter-Defendant 640 TI and Third-Party Defendants base their motions on MCR 2.116(C)(8). MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may consider only the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, *supra* at 130.[3]

III. DISCUSSION

A. 640 TI's Motion

1. Standing and Breach of Fiduciary Duty

In support of its motion, 640 TI first argues that Counter-Plaintiffs lack standing to assert claims for breach of fiduciary duty or oppression against 640 TI. In response,

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[3] Counter-Defendants argue that Counter-Plaintiffs Christos Moisides and Byzantine Holdings, LLC lack standing and that the Court should consider the standing arguments under MCR 2.116(C)(8) relying on *Leite v Dow Chem Co,* 439 Mich 920, 920; 478 NW2d 892 (1992). "640 TI relies solely upon the Counterclaim and the documents incorporated by reference therein..." [640 TI's Brief, p. 4].

Counter-Plaintiffs assert that they have standing to bring their counterclaims because they are "real parties in interest who suffered real individual harm" by 640 TI, which owes fiduciary duties to them. They further assert that they have suffered harm from 640 TI's breach of fiduciary duties and oppressive actions.

"Michigan standing jurisprudence is a limited, prudential doctrine, under which a litigant has standing whenever there is a legal cause of action. Where a cause of action is not provided at law, then a court should determine whether a litigant has standing; a litigant may have standing in this context if the litigant has a special injury or right, or a substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the legislature intended to confer standing on the litigant."1 Mich Pl & Pr § 5:2 (2d ed.) [Footnotes omitted]. See also *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010); *Duncan v Michigan*, 300 Mich App 176, 192; 832 NW2d 761 (2013). If the legislature unambiguously expresses an intent to confer standing through a statute's text, then it would certainly be sufficient to confer standing; *Lansing Sch Ed, supra* at 374-375. If the legislature does not express an intent to confer standing, a court must determine if the litigant has a special injury or right or if the statutory scheme implies that the legislature intended to confer standing on the litigant.

The Court notes the counter-complaint alleges that 640 TI breached its fiduciary duties by:

> a. Instituting the instant lawsuit;
>
> b. Not purs[u]ing Temple Group Management before filing the instant lawsuit;
>
> c. Selectively not purs[u]ing the Valade Owners that are also guarantors under the Guaranty;

> d. Using 640 Temple as a vehicle to force Moisides/Byzantine and non-Valade Owners to bear responsibility for the legal and financial obligations of Property Owner and Temple Group Management with (sic) simultaneously personally benefiting; and
>
> e. Exercising its alleged right to replace Temple Group Management as Managing Member in furtherance of the Valade Owners scheme.

In the Court's view, these allegations are insufficient to satisfy a claim for breach of fiduciary duties under the present circumstances. In reaching this conclusion, this Court must first determine the threshold question of whether Michigan's Limited Liability Company Act ("LLCA") provides in its text an intent to confer statutory standing to pursue a claim for breach of fiduciary duties. *Lansing Sch Ed, supra; Duncan, supra.*

Under Michigan's Limited Liability Act, MCL 450.4101, *et seq,* specifically MCL 450.4404(1), "[a] manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company." The fiduciary duty owed by managers of a limited liability company is owed to the company, not to the individual members. MCL 450.4404; *Frank v Linkner*, 310 Mich App 169, 180; 871 NW2d 363 (2015), aff'd in part, rev'd in part on other grounds. MCL 450.4404 "'requires limited liability company managers to discharge their fiduciary duties 'in the best interests *of the limited liability company.*" MCL 450.4404(1) (emphasis added)." Thus, the duty is owed to the company, not to the individual members." *Id* [Emphasis in original].

"Although a limited liability company is not a corporation under Michigan law, *Alliance Obstetrics & Gynecology, PLC v Treasury Dep't,* 285 Mich App 284, 288; 776 NW2d 160 (2009), it is nonetheless true that the rules regarding corporate form apply

equally to limited liability companies, *Hills & Dales Gen Hosp,* 295 Mich App. at 21, 812 N.W.2d 793. See also *Florence Cement Co. v. Vettraino,* 292 Mich.App. 461, 468–469; 807 NW2d 917 (2011)." *Salem Springs, LLC v Salem Twp.*, 312 Mich App 210, 223; 880 NW2d 793 (2015).

With respect to a limited liability company, a suit to enforce rights or to redress injury to the company is a derivative suit. *Michigan Nat 'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). If a claim is derivative, a shareholder or member has no standing to sue except on behalf of the corporation or company, and after complying with demand requirements. *Murphy v Inman*, 509 Mich 132, 141; 983 NW2d 354 (2022).

To distinguish between direct and derivative actions brought by shareholders, a court must ask (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered; if the answer to both questions is the corporation, the action is derivative, but if the shareholder suffers the harm independent of corporation and receives the remedy rather than the corporation, the action is direct. *Murphy, supra* at 165.

"With regard to principles of standing and 'the real party in interest,' because the law treats a corporation as an entirely separate entity, when a suit is brought to enforce corporate rights or to redress or prevent injury to a corporation, the action ordinarily must be brought in the name of the corporation, not that of a stockholder, officer, or employee." *Salem Springs, LLC, supra* at 222 [Footnote omitted].

Here, Counter-Plaintiffs seek redress for harm done to them and to enforce a personal right belonging to the them independently from the company. *Murphy, supra.* This is a direct action because Counter-Plaintiffs would be receiving the benefit of any remedy recovered. *Id.*

Having determined that this is a direct action, "[t]o establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages caused by the breach of duty. *Highfield Beach at Lake Michigan v Sanderson*, 331 Mich App 636, 666; 954 NW2d 231 (2020) [Citation omitted]. There is no provision in the LLCA for a direct action for breach of fiduciary duties.

Under MCL 450.4404(1), "[a] manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company." Under MCL 450.4510, "[a] member may commence and maintain a civil suit in the right of a limited liability company…" Hence, a member may only maintain a lawsuit in the right of the company, i.e., a derivative lawsuit. Therefore, there is no standing provided at law and there is no implication in the statutory scheme which would confer standing for a direct action for breach of fiduciary duties.

Next, the Court must examine whether Counter-Plaintiffs have a special injury or right, or a substantial interest. *Lansing Sch Ed Ass'n, supra* at 372. Counter-Plaintiffs are not members of TGH. As indicated above, 640 TI exercised its rights under the Operating Agreement to remove TGM as the Managing Member. Only TGM, a non-party, can prosecute a claim, if one exists, against 640 TI. Because neither Moisides nor Byzantine are members, they have no standing to make a claim against 640 TI. No special injury for a breach of fiduciary duty exists whereas here 640 TI has unfettered authority under the Operating Agreement and the Guaranty to alter the management of the company. Sections 8.01(a) and (b) of the Operating Agreement provide in relevant part:

> (a) Except as otherwise set forth in this Agreement, the Managing Member, within the authority granted to it under this Agreement, shall have full, complete and exclusive discretion to manage and control the business of the Company for the purposes stated in Article III, shall make all decisions affecting the business of the Company and shall manage and control the affairs of the Company to the best of its ability and use its best efforts to carry out the purpose of the Company. ...
>
> (b) Except as otherwise set forth in this Agreement and subject to any applicable Lender rules and regulations and the provisions of the Operating Documents, the Managing Member (acting for and on behalf of the Company), in extension and not in limitation of the rights and powers given by law or by the other provisions of this Agreement, shall, in its sole discretion, have the full and entire right, power and authority in the management of the Company business to do any and all acts and things necessary, proper, convenient or advisable to effectuate the purpose of the Company.
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> [640 TI's Exhibit 1, p. 36] [Emphasis added].

Thus, the Managing Member has complete authority to manage the company in any way it believes will benefit the company. In other words, the duty the Managing Member owes is solely to the company and for the stated purpose of the company. No duty is owed to Counter-Plaintiffs under the Operating Agreement.

Even if Counter-Plaintiffs have standing to sue, the first question is whether there is a fiduciary relationship between Counter-Plaintiffs and 640 TI. "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 43–44; 698 NW2d 900 (2005), quoting *Teadt v Lutheran Church Missouri Synod,* 237 Mich.App. 567, 580-581, 603 N.W.2d 816 (1999), citing *Vicencio v Ramirez,* 211 Mich App 501, 508; 536 NW2d 280 (1995). "However, the placement of trust, confidence, and reliance must be reasonable..." *Id* at 44 [Citation omitted].

Counter-Plaintiffs allege that "640 Temple effectively controls Property Owner because it has the ability to divest the Managing Member; it controls what members are admitted; it controls how company assets are disposed; it controls how company liabilities are incurred and paid; and it controls the company's business operations." [Counter-Complaint, p. 19]. They further allege that "640 Temple is owned and otherwise controlled by the Valade Owners" and that "[a]t all relevant times, Moisides/Byzantine were partial owners of and members in Property Owner." [Id].

As indicated above, pursuant to the corporate structure, Byzantine owns a 50% interest in TGM. Moisides owns a 50% interest in Byzantine. Neither Byzantine nor Moisides directly owns any portion of TGH. Under the Operating Agreement, TGH had the right to remove TGM as Managing Member. Both Moisides and Byzantine acquiesced to the agreement. They also acknowledge the powers delineated in the Guaranty, which provides in part:

> 2. The Guarantors hereby acknowledge, consent and agree that Investor has reserved the power and authority to, in its absolute discretion, and without notice to Guarantors, deal in any lawful manner with the Indebtedness and the other obligations guaranteed hereby. Without limiting the generality of the foregoing, the liability of the Guarantors hereunder shall not be affected, impaired or reduced in any way by any action taken by Investor involving any of the following powers or authorities or pursuant to any other provision hereof, or by any delay, failure or refusal of corporation, including other guarantors, if any, liable for all or any part of the Indebtedness or any of the other obligations guaranteed hereby:
> ...
> (b) to (i) modify any of the terms of the Operating Agreement, the Development Agreement and/or any other obligations guaranteed hereby (in the manner provided for in such agreements or as the parties thereto shall otherwise agree) or (ii) waive any of the terms thereof;
>
> [640 TI's Exhibit 2] [Emphasis added].

There is no reason to believe that there is a fiduciary relationship between the Investor, 640 TI, and Counter-Plaintiffs arising from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of" 640 TI. *Prentis Family Found v Barbara Ann Karmanos Cancer Inst, supra.* As 640 TI suggests, Counter-Plaintiffs are merely obligors and strangers to the corporate structure whereby they have agreed and acknowledge in the Guaranty that the "Investor" can modify the terms of the Operating Agreement.

Counter-Plaintiffs argue that, because 640 TI has actual control over the Property Owner, 640 TI owes fiduciary duties to the Counter-Plaintiffs. In support they cite, *Veeser v Robinson Hotel Co*, 275 Mich 133, 138; 266 NW 54 (1936). The *Veeser* court held that "[t]he law requires of the majority the utmost good faith in the control and management of the corporation as to the minority, and it is the essence of this trust that it must be so managed as to produce to each stockholder the best possible return upon his investment."

Although 640 TI, as a majority shareholder must act with "the utmost good faith in the control and management" of the company, Counter-Plaintiffs' placement of trust is unreasonable when they clearly were made aware in the Guaranty of 640 TI's authority to alter management.[4] Hence, Counter-Plaintiffs have no reason to believe that 640 TI owed any fiduciary duties to them. Indeed, under the LLCA, a manager owes fiduciary

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[4] MCL 450.4402(1) provides:

> The articles of organization may provide that the business of the limited liability company shall be managed by or under the authority of 1 or more managers. The delegation of the management of a limited liability company to managers is subject to any provision in the articles of organization or in an operating agreement restricting or enlarging the management rights and duties of any manager or group of managers.
>
> [Emphasis added].

duties he or she believes to be in the best interest of the company. MCL 450.4404(1).[5] Furthermore, an action against the company must be in the "right of the limited liability company," MCL 450.4510, which is a derivative action and not a direct action like the one posed by Counter-Plaintiffs. In addition, to the extent that they claim that instituting the instant lawsuit is a breach of fiduciary, the Court believes that, pursuant to MCL 450.4404(1), a manager should discharge his or her duties in a manner which he or she "reasonably believes to be in the best interests of the limited liability company." Here, the lawsuit to enforce the Guaranty is a right established by the very existence of the Guaranty as a contract obligating Counter-Plaintiffs guarantying TGM's repurchase obligation under the Operating Agreement. Moreover, the Guaranty expressly provides that a "separate action or actions may be brought and prosecuted against any Guarantor" by 640 TI to enforce the Guaranty. [640 TI's Exhibit 2, Guaranty ¶ 10].[6]

Accordingly, the claim for breach of fiduciary duties fails as a matter of law. MCR 2.116(C)(8). Because, the Court has already determined that no fiduciary duties are owed

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[5] "A manager is not liable for an action taken as a manager or the failure to take an action if the manager performs the duties of the manager's office in compliance with this section." MCL 450.4402(4).

[6] The complete text of paragraph 10 provides:

> The liability of the Guarantors under this Guaranty shall be an absolute, direct, immediate and unconditional guarantee of payment and not of collectability. The obligations of the Guarantors hereunder are independent of the obligations of Manager or any other party which may be initially or otherwise responsible for performance or payment of the obligations hereunder guaranteed and each other Guarantor and, in the event of any default hereunder, a separate action or actions may be brought and prosecuted against any Guarantor, whether or not Manager is joined therein or a separate action or actions are brought against Manager. Investor may maintain successive actions for other defaults. Investor's rights hereunder shall not be exhausted by its exercise of any of its rights or remedies or by any such action or by any number of successive actions until and unless the Indebtedness has been paid in full.
>
> [Emphasis added].

to Counter-Plaintiffs, the Court need not address their remaining argument, which is that 640 TI's reliance on MCL 450.4504 is misplaced.

2. Oppression

As to the claim for oppression, Counter-Plaintiffs assert the same allegations as their claim for breach of fiduciary duty. 640 TI argues that another provision of the LLCA expressly bars this claim. It also contends that standing to bring a claim for member oppression depends upon the plaintiff's status as a member: only "[a] member of a limited liability company may bring an action" under MCL 450.4515.

In response, Counter-Plaintiffs contend that the organizational structure indicates that, because 640 TI owns 99% of the Property Owner, it is in control and must be held accountable for its oppressive conduct. The Court disagrees.

First, MCL 450.4515(1) provides in pertinent part:

> A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that 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. . . .

Thus, under this section, to bring a claim for oppressive conduct against managers or members of the company, one must be a member of a limited liability company. As 640 TI claims, Counter-Plaintiffs are not members in 640 TI or in the Property Owner. "Member" is defined as follows:

> "Member" means a person that has been admitted to a limited liability company as provided in section 501, or, in the case of a foreign limited liability company, a person that is a member of the foreign limited liability company in accordance with the laws under which the foreign limited liability company is organized.

MCL 450.4102(p).

Section 501, specifically MCL 450.4501(1), provides,

> A person may be admitted as a member of a limited liability company in connection with the formation of the limited liability company in any of the following ways:
>
> (a) If an operating agreement includes requirements for admission, by complying with those requirements.
> (b) If an operating agreement does not include requirements for admission, if either of the following are met:
> (*i*) The person signs the initial operating agreement.
> (*ii*) The person's status as a member is reflected in the records, tax filings, or other written statements of the limited liability company.
> (c) In any manner established in a written agreement of the members.[7]

Moisides was never a member under the Operating Agreement and, under Section 5.01(a) of the Operating Agreement, Byzantine is a withdrawing member. Thus, Counter-

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[7] MCL 450.4501 also provides:

> (2) A person may be admitted as a member of a limited liability company after the formation of the limited liability company in any of the following ways:
>
> (a) If the person is acquiring a membership interest directly from the limited liability company, by complying with the provisions of an operating agreement prescribing the requirements for admission or, in the absence of provisions prescribing the requirements for admission in an operating agreement, upon the unanimous vote of the members entitled to vote.
> (b) If the person is an assignee of a membership interest, as provided in section 506.
> (c) If the person is becoming a member of a surviving limited liability company as the result of a merger or conversion approved under this act, as provided in the plan of merger or plan of conversion.
>
> (3) A limited liability company may admit a person as a member that does not make a contribution or incur an obligation to make a contribution to the limited liability company.
>
> (4) Unless otherwise provided by law or in an operating agreement, a person that is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company.

None of these conditions exist for Counter-Plaintiffs.

Plaintiffs are not members of the Property Owner. Section 5.01(a) also provides that "Withdrawing Members hereby assign to Managing Member all of their Interests in the Company…" and "Withdrawing Members hereby relinquish any claims they may have against the Company with respect to their previous Interests in the Company." Thus, Byzantine, as a Withdrawing Member, relinquished "any claims" it might have against the company.

Next, MCL 450.4515(2) provides that "'willfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." It further provides that "[t]he term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party…" In other words, under this section of the LLCA, conduct alleged to be oppressive, which is authorized by the Operating Agreement or the Guaranty is not actionable.

Under the terms of the Guaranty, the "Investor" can modify the terms of the Operating Agreement. [640 TI's Exhibit 2, ¶ 2(b)]. Under Sections 8.01(a) and (b) of the Operating Agreement, the Managing Member has complete authority to manage the company in any way it believes will benefit the company. [640 TI's Exhibit 1, p. 36]. Hence, the allegedly oppressive conduct is specifically permitted by the both the Operating Agreement and the Guaranty. Accordingly, under 450.4515(2), Counter-Plaintiffs' oppression claim fails as a matter of law. MCR 2.116(C)(8).

3. Piercing the LLC Veil

The next issue is whether the Court should pierce the corporate veils as Counter-Plaintiffs request. In their counter-complaint, they claim that "640 Temple is a mere

instrumentality of the Valade Owners' scheme to force non-Valade Owners to bear responsibility for the legal and financial responsibility for the obligations of Temple Group Holdings, LLC and Temple Group Management Company, LLC While insulating the Valade Owners from any liability." [Counter-Complaint, ¶ 49].

Preliminarily, it should be noted that "piercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices that would otherwise go unredressed in situations 'where the corporate entity has been used to avoid legal obligations....'" *Gallagher v Persha*, 315 Mich App 647, 654; 891 NW2d 505 (2016), quoting *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 651; 364 NW2d 670 (1984). "It is therefore a remedy, and not a separate cause of action...." *Id.*

The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations. *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004). For the corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity and the corporate entity must have been used to commit a wrong or fraud, and there must have been an unjust injury or loss to plaintiff. *Id* at 293-294. "There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification to determine if the corporate form has been abused." *Id* at 294.

Here, pursuant to the corporate structure, Byzantine owns a 50% interest in TGM. Moisides owns a 50% interest in Byzantine. Neither Byzantine nor Moisides directly owns any portion of TGH. Under the Operating Agreement, TGH had the right to remove TGM as Managing Member. Both Moisides and Byzantine acquiesced to the agreement.

They also acknowledge the powers delineated in the Guaranty. The Operating Agreement clearly sets out the corporate structure and the powers of TGH. There is nothing nefarious or fraudulent about the actions of TGH. Counter-Plaintiffs were made aware of the Operating Agreement as incorporated into the Guaranty. Ultimately, they agreed to their obligations under the Guaranty. Finally, 640 TI has not used the corporate structure in an attempt to avoid legal obligations. *Rymal, supra.* The Guaranty provides that they are obligated for 640 TI's debt, regardless of who is manager. A cause of action for piercing the corporate veil may properly be dismissed for failing to state a claim where there is no underlying liability. *Gallagher, supra* at 654.[8] Counter-Plaintiffs have failed to state claims for breach of fiduciary duty and oppression. Therefore, there is no need to disregard the limited liability company entity and to pierce the LLC veil.

4. <u>Declaratory Judgment</u>

Counter-Plaintiffs have also requested that the Court declare that the Guaranty is null and void and unenforceable. They claim that 640 TI's "improper conduct lays the factual foundation for this Court to exercise its equitable powers and prevent 640 TI from enforcing the debt." 640 TI argues, citing *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002), that courts presume the legality, validity, and enforceability of contracts. It, however, acknowledges that "[c]ovenants that are against 'public policy' are unenforceable." *Terrien v Zwit*, 467 Mich 56, 67, n 1; 648 NW2d 602 (2002).

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[8] The court in *Gallagher v Persha*, 315 Mich App 647, 654; 891 NW2d 505 (2016) stated:

> But this case is not controlled by that principle, for what is at issue here is how a judgment-plaintiff procedurally pursues the piercing remedy once it is established that the corporate entity cannot pay the judgment, and there is some evidence or reason to believe that the corporate form has been abused to avoid legal obligations.

"[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory v Contl Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "In the absence of 'definite indications in the law of some contrary public policy,' contracts generally must be enforced as written." *Gavrilides Mgt Co, LLC v Michigan Ins Co*, 340 Mich App 306, 317; 985 NW2d 919 (2022), app den, quoting *Bronner v Detroit*, 507 Mich 158, 166; 968 NW2d 310 (2021).

Counter-Plaintiffs have failed to specify how and why the Guaranty at issue here should be deemed against public policy, other than its claim that the Court should pierce the veil of the LLC. The Court will not "rebalance the contractual equities struck by the contracting parties" and will not make any "subjective post hoc judicial determinations" whereas here the contract is unambiguous. Accordingly, a declaration that the Guaranty is void and unenforceable is unwarranted.

B. <u>Third-Party Defendants' Motion</u>

Third-Party Plaintiffs, Moisides and Byzantine ("Third-Party Plaintiffs"), have filed a third-party complaint against Third-Party Defendants, Estate of Gretchen C. Valade, the Gretchen C. Valade Irrevocable Trust dated January 15, 2009, and the Gretchen C. Valade Revocable Trust dated May 5, 1982 (collectively "Third-Party Defendants"). The complaint contains only one claim, which is for breach of contract. Moisides and Byzantine allege that Third-Party Defendants are liable under the Guaranty for the claims that 640 TI had asserted in its original lawsuit, but were not named as defendants in 640 TI's original lawsuit.

As indicated above, Moisides, Byzantine, Third-Party Defendants, and Defendants David P. Sutherland and the David P. Sutherland Living Trust dated September 3, 1998 entered into a Guaranty for the benefit of 640 TI, guaranteeing TGM's repurchase obligation under the Operating Agreement.

According to Third-Party Defendants, "[i]nstead of fulfilling their own contractual obligations under the Guaranty, Third-Party Plaintiffs filed a Third-Party Complaint against Third-Party Defendants, claiming the Third-Party Defendants breached the Guaranty and are now somehow liable to Third-Party Plaintiffs." Now before the Court is Third-Party Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8).

In support of their motion, Third-Party Defendants contend that Third-Party Plaintiffs cannot bring a breach of contract claim against their Co-Guarantors for four reasons: (1) 640 TI's decision to enforce the Guaranty against only certain guarantors is authorized by and contemplated in the Guaranty; (2) Third-Party Plaintiffs do not allege any contractual duty owed to them and breached by the Third-Party Defendants; (3) even if properly pled, a claim for contribution must be dismissed because Third-Party Plaintiffs waived a claim for contribution; and (4) even if not waived, any contribution claim is not yet ripe.

Third-Party Defendants first argue that 640 TI's selective enforcement of the Guaranty against certain selective guarantors is authorized by the Guaranty. In response, Third-Party Plaintiffs assert that "the promises and agreements at issue are clearly not bound by the language of the Guaranty." [Third-Party Plaintiffs' Response, p. 8]. They claim that their pleading is sufficient. They base this on certain factual development "that Third-Party Plaintiffs had an agreement and understanding with Valade, Valade Trust 1,

and Valade Trust 2, that Moisides and Byzantine would not be held personally liable for the repurchase obligation under the Guaranty." [Id].

The Court notes that the instant motion is based on MCR 2.116(C)(8). Thus, only the counter-complaint and documents incorporated by reference can be considered. In an action based on a written contract, the contract is considered part of the pleadings for review under MCR 2.116(C)(8). *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). In the case at bar, the Court may only consider the factual allegations and Operating Agreement and the Guaranty. "'All well-pleaded factual allegations are accepted as true and are construed in a light most favorable to the nonmovant.'" *Kazor v Dep't of Licensing & Regulatory Affairs, Bureau of Prof Licensing*, 327 Mich App 420, 422; 934 NW2d 54 (2019), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Dolan, supra.* "The motion may be granted only when the claim is 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Kokx v Bylenga*, 241 Mich App 655, 660; 617 NW2d 368 (2000), quoting *Wade v Dep't of Corrections,* 439 Mich 158, 163; 483 NW2d 26 (1992).

The Court is also mindful that this dispute depends upon the construction of the contracts to which the parties agreed. "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate. In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. [U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. If the language of a contract is ambiguous, testimony may be taken to explain the ambiguity." *Bronson Health Care Group, Inc v USAA Cas Ins Co*, 335 Mich App 25, 32;

966 NW2d 393 (2020) [Internal quotation marks and citations omitted]. "When contractual language is unambiguous reasonable people cannot differ concerning the application of disputed terms to certain material facts, and summary disposition should be awarded to the proper party." *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 393; 837 NW2d 439 (2013) [Citations and quotation marks omitted].

In addition, evidence from outside the four corners of a contract "is limited by the parol-evidence rule." *Coosard v Tarrant*, 342 Mich App 620, 635; 995 NW2d 877 (2022). "The parol evidence rule may be summarized as follows: '[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.'" *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co,* 184 Mich App 574, 580; 458 NW2d 659 (1990). "When... parties include an integration clause in their written contract, it is conclusive, and parol evidence is not admissible to show that the agreement is not integrated, except in cases of fraud that invalidate the integration clause, or where an agreement is obviously incomplete on its face and, therefore, parol evidence is necessary for the filling of gaps." 5A Mich. Civ. Jur. Contracts § 223. "A prerequisite to the application of the parol evidence rule is a finding that the parties intended a written instrument to be a complete expression of their agreement as to the matters covered."4A Mich Pl & Pr § 36:737 (2d ed) [Footnote omitted]. Thus, an integration clause is "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral

agreements relating to the subject matter of the contract." INTEGRATION CLAUSE, Black's Law Dictionary (11th ed 2019).

In this case, both the Operating Agreement and the Guaranty include integration clauses. The Operating Agreement's Section 16.05 provides:

> This Agreement and the documents referred to herein set forth all (and is intended by all parties to be an integration of all) of the representations, promises, agreements and understandings among the parties hereto with respect to the Company, the Company business and the property of the Company, and this Agreement supersedes all prior written or oral agreements regarding the subject matter thereof, including, without limitation, the Original Agreement.
>
> [640 TI's Motion, Exhibit1] [Emphasis added].

Paragraph 19 of the Guaranty also provides in relevant part:

> ...This Guaranty shall constitute the entire agreement of the Guarantors with Investor with respect to the subject matter hereof, and no representation, understanding, promise or condition concerning the subject matter hereof shall be binding upon Investor or the Guarantors unless expressed herein.

Hence, both the Operating Agreement and the Guaranty provide that the contracts represent the parties' complete and final agreements and supersede all informal understandings and oral agreements." Id.

Next, the Court must determine if the Guaranty at issue here is clear and unambiguous. If it is clear and unambiguous, no extrinsic evidence can be considered by this Court with respect to the motion pursuant to MCR 2.116(C)(8) and whether Third-Party Plaintiffs' complaint is legally sufficient.

Notwithstanding the Guaranty's integration clause, in the Court's view, all other provisions in the Guaranty are clear and unambiguous in that it "is made ... for the benefit of 640 Temple Investor, LLC, a Michigan limited liability company (the "Investor")."

[640 TI's Motion, Exhibit 2]. It also provides that, "as a condition of acquiring an interest in the Company, Investor has required the Guarantors to guarantee unconditionally to Investor the payment in full of all of the payment obligations of Manager under the Operating Agreement and certain other items as herein set forth." [Id]. The Guaranty also provides the following:

> 3. The Guarantors agree that if any of the Indebtedness is not fully and timely paid or performed according to the tenor thereof, whether by acceleration or otherwise, the Guarantors shall immediately upon receipt of written demand therefor from Investor pay all of the Indebtedness hereby guaranteed in like manner as if the Indebtedness constituted the direct and primary obligation of the Guarantors.
>
> 4. This Guaranty and the obligations of the Guarantors hereunder shall be continuing and irrevocable until the Indebtedness has been satisfied in full. ...
>
> ...
>
> 7. This Guaranty shall be effective as a waiver of, and the Guarantors hereby expressly waive, any and all rights to which Guarantors may otherwise have been entitled under any suretyship laws in effect from time to time in the State.
>
> ...
>
> [640 TI's Motion, Exhibit 2] [Emphasis added].

It is clear in paragraph 3, that, upon demand from the Investor (640 TI) the Guarantors must pay the unpaid indebtedness. Pursuant to paragraph 4, their obligations are "continuing and irrevocable until the Indebtedness has been satisfied in full." Finally, the Guarantors waive any and all rights they may have had under "suretyship laws." There is nothing ambiguous about the obligations of Third-Party Plaintiffs' obligations as Guarantors as set forth in the Guaranty. Therefore, no extrinsic evidence, including any testimony offered by Third-Party Plaintiffs to support its claim for breach of contract in

which they claim that certain oral representations assured them that they would not be liable for payment. Furthermore, it is clear from the Guaranty that their contractual duties are to the Investor, 640 TI, and not to Third-Party Defendants who are co-guarantors. Therefore, Third-Party Defendants owe no contractual duties to Third-Party Plaintiffs.

As Third-Party Defendants correctly contend, under paragraph 10 of the Guaranty, "a separate action or actions may be brought and prosecuted against any Guarantor…" In addition, the "obligations of the Guarantors … are independent of the obligations of Manager or any other party which may be initially or otherwise responsible for performance or payment of the obligations…" [Emphasis added]. Finally, the "Investor may maintain successive actions for other defaults." There is nothing in the Guaranty that prevents the Investor 640 TI from prosecuting an action against one Guarantor and not against another Guarantor. Therefore, Third-Party Plaintiffs' contention that they were improperly "selectively" named as Defendants in the original lawsuit is without merit.

Third-Party Defendants also argue that Third-Party Plaintiffs do not allege any contractual duty owed to them and breached by the Third-Party Defendants. 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 Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

Here, the contractual duty of Third-Party Defendants is to the Investor, 640 TI. Nothing in the Guaranty provides that Third-Party Defendants have a duty to Third-Party Plaintiffs. Hence, Third-Party Plaintiffs have failed to state a legally sufficient claim for breach of contract against Third-Party Defendants. MCR 2.116(C)(8).

Third-Party Defendants also argue that Third-Party Plaintiffs have not, nor can they, make a claim for contribution against them. In response, Third-Party Plaintiffs argue that "the relationship between the parties here is much more akin to the relationship among partners," citing *Kalamazoo Trust Co v Merrill*, 159 Mich 649; 124 NW 597 (1910).[9] The Court disagrees. Again, nothing in the Guaranty provides that co-guarantors may seek to enforce the obligations against one another.

Their reliance on *Kalamazoo Trust* is misplaced. The *Kalamazoo Trust* court stated: "One joint obligor may not sue another joint obligor, upon their common obligation, until he has paid the debt, or a larger portion thereof than, as between himself and his co-obligor, he would be liable to pay. His action would then be for contribution." *Id* at 655. See also *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 290; 369 NW2d 487 (1985) ("Under the concept of joint and several liability, defendant Byrwa has the right to seek contribution from defendant Geill for approximately $17,000 after he has paid the plaintiff the amount of the judgment."). Hence, in order to sue Third-Party Defendants for contribution, Third-Party Plaintiffs must first satisfy their own obligations. They have not done so. Therefore, this is another reason their claim for breach of contract fails as a matter of law.

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[9] The court in *Kalamazoo Trust Co v Merrill*, 159 Mich 649; 124 NW 597 (1910) held:

> It is not necessary that this defendant should first pay the notes, and then have recourse to a suit for contribution against his co-obligors. Nor is his claim against them one in the nature of a set-off, as claimed by appellee. It is his right to have the equities, as between himself and his co-obligors, adjusted in the action upon the instrument, where such instrument is, in part, the property of those equally liable thereon with himself, and this conclusion does no violence to the rights of the copartnership or of the three members thereof, not themselves liable upon the paper.
>
> *Id* at 655.

This case is distinguishable from the case at bar in which the Guarantors are not partners. Rather, they each are obligated to the Investor.

Third-Party Defendants next argue that there can be no claim for contribution because, under paragraph 7 of the Guaranty, Third-Party Plaintiffs have expressly waived "any and all rights to which Guarantors may otherwise have been entitled under any suretyship laws…"

"[W]hile both the 'surety' and 'guarantor' agree to satisfy the debt in the event of the principal obligor's default, only the surety is obligated with the principal under the primary agreement. The guarantor, on the other hand, enters into an independent, collateral agreement of guaranty, becoming only secondarily liable upon the principal obligor's default." 23 Mich. Civ. Jur. Suretyship § 4 [Footnotes omitted] [Emphasis added]. As noted above, "as a condition of acquiring an interest in the Company, Investor has required the Guarantors to guarantee unconditionally to Investor the payment in full of all of the payment obligations of Manager under the Operating Agreement…" Under paragraph 1 of the Guaranty, they are also obligated for "the payment and performance by Developer under the Development Agreement." Thus, under the Guaranty, the Guarantors are "secondarily liable" upon the Manager's or the Developer's default. Id. Again, nothing in the Guaranty provides that one Guarantor is obligated to another Guarantor. The Guarantors are collectively and individually obligated for the debt of the Manager or the Developer. The Court must construe and apply the unambiguous Guaranty as written. *Bronson Health Care Group, Inc, supra.* Accordingly, Third-Party Plaintiffs' claim for breach of contract fails as a matter of law. MCR 2.116(C)(8).

IV. CONCLUSION

As to 640 TI's motion, both the claims for breach of fiduciary duty and for oppression fail as a matter of law. MCR 2.116(C)(8). It is unnecessary to disregard the limited liability company entity and to pierce the LLC veil. Finally, a declaratory

judgment that the Guaranty is void and unenforceable is not warranted. Therefore, 640 TI's motion is granted.

As to the Third-Party Defendants' motion, Third-Party Plaintiffs have failed to state a legally sufficient claim for breach of contract against Third-Party Defendants. MCR 2.116(C)(8). Moreover, the Court must construe and apply the unambiguous Guaranty as written. *Bronson Health Care Group, Inc, supra.* Nothing in the Guaranty provides that co-guarantors may seek to enforce the obligations against one another. Again, the Third-Party Plaintiffs' claim for breach of contract fails as a matter of law. MCR 2.116(C)(8). Accordingly, the Court grants the Third-Party Defendants' motion.

For the reason stated in the foregoing Opinion,

IT IS ORDERED that the motion for summary disposition filed by Counter-Defendant 640 Temple Investor, LLC is hereby **GRANTED**;

IT IS FURTHER ORDERED that the Counter-Complaint filed by Christos Moisides and Byzantine Holdings, LLC is hereby **DISMISSED;**

IT IS FURTHER ORDERED that the motion for summary disposition filed by Third-Party Defendants Estate of Gretchen C. Valade, the Gretchen C. Valade Irrevocable Trust dated January 15, 2009, and the Gretchen C. Valade Revocable Trust dated May 5, 1982 is hereby **GRANTED**;

IT IS FURTHER ORDERED that the Third-Party Complaint filed by Christos Moisides and Byzantine Holdings, LLC is hereby **DISMISSED;**

IT IS FURTHER ORDERED that this **DOES NOT RESOLVE** the last pending claim and **DOES NOT CLOSE** the case.

IT IS SO ORDERED.

DATED: 12/12/2023

/s/ Annette J. Berry
December 12, 2023

Circuit Judge