

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

LERNER DEVELOPMENT COMPANY *
LIMITED PARTNERSHIP *

and *

LERNER ENTERPRISES LIMITED *
PARTNERSHIP *

Plaintiffs/Counter Defendants *

vs. *

Case No. 265653
Track V – Judge Mason

LAWRENCE E. LERNER *

Defendant/Counter Plaintiff *

LAWRENCE E. LERNER *

Third Party Plaintiff, *

vs. *

THEODORE N. LERNER *

and *

LERNER CORPORATION, *

Third Party Defendants. *

OPINION AND ORDER

This matter comes before the Court on the motions to dismiss the Counter Claim and Third Party Complaint filed by the Defendant/Counter Plaintiff, Lawrence E. Lerner (“Lawrence”), individually and derivatively on behalf of the Lerner Development Company Limited Partnership (“Development Company”) against the Plaintiffs/Counter Defendants,

Lerner Enterprises Limited Partnership (“Enterprises”) and Lerner Development Company Limited Partnership and Third Party Defendants, Theodore N. Lerner (“Theodore”) and Lerner Corporation. In addition to the motion to dismiss filed by Enterprises and Theodore Lerner, motions to dismiss were filed by counsel for Counter Defendant Development Company and counsel for Lerner Corporation. Upon consideration of the motions, the responses thereto, the supplemental memoranda, and arguments of counsel at the hearing on April 26, 2007, the Court shall, for reasons set forth hereinafter, deny the motions in part and grant them in part.

I. ENTERPRISES’ AND THEODORE LERNER’S MOTION TO DISMISS

Count I – Breach of Contract (Against Theodore Lerner and Enterprises) by Lawrence Lerner, Individually and Derivatively on Behalf of Development Company

Enterprises and Theodore Lerner move to dismiss Count I arguing that the allegations relating to breach of contract are too general and there is no specific allegation of how the Counter Plaintiffs were damaged by virtue of any alleged breach.

For reasons set forth in the Counter Plaintiffs’ Opposition, the Court shall deny the motion as to Count I. The Complaint sets forth sufficient allegations to state a claim for breach of contract.

Count II – Breach of Implied Duties or Good Faith and Fair Dealing and Candor (Against Theodore Lerner and Enterprises) Both Individually and Derivatively

Theodore and Enterprises assert that the claim is duplicitous of Count I, breach of contract, and does not give rise to an independent cause of action. Lawrence responds with citation to the Revised Uniform Partnership Act (“RUPA”) and the Common Law that a duty

arises not only out of the partnership agreement but also by virtue of statute both of which give rise to an independent cause of action. Therefore, the claim involves more than a breach of contract. For reasons set forth in the Counter Defendant's motion, the Court disagrees. To the extent that the duty arises out of contract, it is subsumed in Count I – Breach of Contract. To the extent the duty arises out of statute, it does not give rise to an independent cause of action but is ancillary and dependent upon the breach of a separate independent duty proscribed by statute or otherwise arising under the partnership agreement. Count II shall be dismissed.

**Count III – Breach of Fiduciary Duty
(Against Theodore Lerner and Enterprises) Both Individually and Derivatively**

The parties devote much of their discussion to this claim. With citation to numerous authorities, Enterprises and Theodore argue that, to the extent it ever did, Maryland no longer recognizes a separate cause of action for breach of fiduciary duty. Further, to the extent that any action can be maintained for breach of fiduciary duty involving a partnership, it is limited to a claim for accounting which has been separately pled as Count XVI herein. Accordingly, Count III should be dismissed.

The Counter Plaintiffs respond that while there has been disagreement about what to “label” the claim, Maryland has long recognized and continues to recognize a cause of action for breach of fiduciary duty.

In *Vinogradova v. Sun Trust Bank Inc.*, 875 A.2d 222 (2005), the Court of Special Appeals, with citation to *Int'l Bhd. of Teamsters v. Willis Coroon Corp. of Maryland*, 369 Md. 724, fn. 1 (2002), held that the Court of Appeals has made it clear that there is no independent cause of action for breach of fiduciary duty. *Id.* at 231. It is difficult for this

Court to reconcile that conclusion with other opinions of the Court of Appeals, most notably *Insurance Co. of North America v. Miller*, 362 Md. 361 (2001).

In *Miller*, the plaintiff, Insurance Co., proceeded to trial against the defendant, Miller, on claims of both breach of fiduciary duty and negligence, as well as other claims. *Id.* at 363. The trial court granted judgment in favor of the defendant based in part upon a finding that the defendant was not a fiduciary for purposes of collecting premiums to pay for policies of insurance issued by the plaintiff. *Id.* at 364. The Court of Appeals reversed, holding that Miller was Insurance Co.'s agent and therefore breached a fiduciary duty by not forwarding to them the premiums collected on their policies. *Id.* In discussing the breach of fiduciary duty claim, the Court of Appeals held that the trial court erroneously applied the Court of Appeals' holding in *Kann v. Kann*, 344 Md. 689 (1997):

Contrary to the trial court's ruling, we hold that appellant: (1) identified the particular principal-agent fiduciary relationship created in the case at bar; (2) identified that it was breached by appellee participating in the double financing scheme, not forwarding premiums, and not informing INA that premiums were out-of-trust; (3) considered the remedies available; and (4) selected those remedies appropriate to the client's problem.

Miller, 362 Md. at 379.

It is difficult to read the passage as anything other than an acknowledgement that the complaint for breach of fiduciary duty in that case was a valid and appropriate claim. *Vinogradova* does not discuss *Miller*. Nonetheless, since *Vinogradova* was decided in 2005, four years after *Miller*, the Court feels bound by the decision of the Court of Special Appeals. Accordingly, the Court shall grant the Counter Defendant's motion to dismiss as to Count III.

**Count IV – Aiding and Abetting Breach of Fiduciary Duty
(Against Theodore Lerner and Lerner Corporation)
Both Individually and Derivatively**

In light of the holding of the Court of Special Appeals in *Vinogradova* that there is no independent cause of action for breach of fiduciary duty, the Court shall grant the motion to dismiss Count IV. At the Counter Plaintiff's request (Lawrence Lerner's Opposition to Lerner Enterprises and Theodore Lerner's Motion to Dismiss Amended Counter Claims and Third Party Complaint, fn. 4, p. 18), the dismissal shall be without prejudice.

**Count VII – Negligent and Intentional Misrepresentation
(Against Theodore Lerner, Enterprises, and Lerner Corporation)
Both Individually and Derivatively**

Theodore and Enterprises argue that the claim of intentional misrepresentation is duplicative of Count IX – Fraud. They further allege that the claim of negligent misrepresentation should be dismissed because the allegation as to the duties that were breached is too vague or is a mere conclusion. Finally, they allege that there is no allegation of reliance, a necessary element of both claims. They assert, to the contrary, the facts set forth in the Counter Complaint and Third Party Complaint contradict any suggestion of reliance.

Lawrence responds that the allegations are sufficient. They are not mere conclusions. Specifically, he alleges the Defendants disseminated to the Plaintiffs materially inaccurate and misleading information principally as set forth in various financial statements. Regarding the alleged failure to plead reliance, citing *Crawford v. Mindel*, 57 Md. App. 111 (1984), he asserts that in cases involving a fiduciary relationship, reliance is presumed. Insofar as the derivative action, reliance can be found in the disbursement of funds by Development Company to one or more of the Defendants. Finally, he notes that the Counter Complaint

specifically alleged reliance, at least to the extent that Lawrence failed to take earlier action to redress the wrongs identified therein.

With respect to the intentional misrepresentation claim, Lawrence asserts without explanation that that claim is not duplicative of the claim of fraud under Count IX.

Upon the consideration of the arguments and authorities cited, the Court shall grant the motion as to the claim of intentional misrepresentation. The Court shares the view that that claim is duplicative of Count IX – the claim for fraud.

The Court shall deny the motion as to the claim of negligent misrepresentation. Facts giving rise to such a claim are sufficiently pled. As it relates to the issue of reliance, the Court finds that the facts pled are sufficient to establish reliance on behalf of Development Company. Although the allegations of reliance on behalf of Lawrence individually are generally unsupported, if not contradicted, by other facts set forth in the Counter Complaint, mindful of *Crawford*, at this stage of the proceedings the Court will deny the motion to dismiss as to both Lawrence and Development Corporation.

**Count VIII – Negligence/Gross Negligence
(Against Theodore Lerner, Enterprises, and Lerner Corporation)
Both Individually and Derivatively**

Theodore and Enterprises assert that Count VIII fails to state a cause of action for negligence because paragraph 6(b) of the Partnership Agreement limits partnership liability to claims of gross negligence, dishonesty and fraud. Furthermore, RUPA limits a partner's liability for acts occurring subsequent to January 1, 2003 to similar conduct. Maryland Corporations and Associations Code Ann. § 9A-404(c). They also assert that the Count fails to allege a duty independent of contract and there can be no tort liability for breach of a

contract duty. Finally, they argue that in no event is there a sufficient basis for an award of punitive damages upon the acts alleged.¹

Lawrence responds that the duties alleged in the Counter Complaint arise not only out of contract but also by statute and Common Law. Further, the allegations of negligence and gross negligence in this instance involve breaches of fiduciary duty. Therefore, they cannot be disclaimed under the Uniform Partnership Act for actions occurring prior to January 1, 2003 and under RUPA for actions occurring subsequent thereto.

Following the hearing on the motion, at the invitation of the Court, the parties filed supplemental memoranda on the impact of RUPA upon the ability of a partner to assert a claim for negligence against another partner for acts arising out of the partnership relationship. Therein, the Counter Defendants argue that RUPA by definition substantially narrowed the fiduciary duties owed under Common Law limiting them to duties of “loyalty” and “care.” RUPA expressly states that while a partner owes a duty of “good faith,” it is not a fiduciary duty and is not an independent obligation that one partner owes to another. Theodore and Enterprises argue that it was the intention of the RUPA drafters to limit claims made by one partner against another to those based upon contract and not tort. Robert W. Hillman, et al., *The Revised Uniform Partnership Act*, RUPA § 404, Author’s Comment 2(c) (2006 ed.). Further, citing *Adams v. Coates*, 331 Md. 1 (1993), they assert even at Common Law a partner does not have an independent tort duty to his other partners.

Lawrence responds that RUPA preserves the fiduciary duties of “loyalty” and “care.” These duties are separate and apart from duties that arise under contract. In addition, C.A.

¹ The Court shall address the claim for punitive damages in connection with various counts at the conclusion of this Opinion and Order.

§ 9A-103(b) expressly states that the parties may not by agreement eliminate the duties of “loyalty,” and “good faith and fair dealing.” Further, they may not “unreasonably reduce the duty of care.” *Id.*

They argue that the Court is given wide latitude to fashion the appropriate remedies under C.A. § 9A-405 and the official comments thereto expressly contemplate tort actions. As well, the Court of Appeals Opinion in *Della Ratta v. Larkin*, 382 Md. 553 (2004) makes clear that claims for breach of fiduciary duties survive the enactment of RUPA. Finally, they argue that even if RUPA precluded claims for breach of fiduciary duty, many of the acts alleged occurred prior to January 1, 2003 and that in any event those acts would survive.

The Counter Defendants’ reliance upon *Coates* for the proposition that pre-RUPA actions could be maintained between partners only for an accounting and that no duty in negligence would lie, overstates the Court’s holding therein. *Coates* involved two parties who were engaged in a long-term personal relationship. *Coates*, 331 Md. at 3. As a result of that relationship, they formed a *de facto* partnership sharing equally income and expenses, as well as the profits and losses from various investments. *Id.* When their personal relationship ended after approximately 25 years, one of the parties, Adams, began diverting some of the partnership income and profits to his personal use. *Id.* at 5. When Coates discovered what Adams had done, he filed suit asserting various claims. *Id.*

Among the claims that Coates asserted was a claim for accounting (Count II) and a claim in tort (Count V). On appeal he labeled the tort claim a breach of fiduciary duty. *Id.* at 11. In reaching its decision, the Court of Appeals assumed without deciding that such a tort existed and opined that to recover punitive damages in such an instance, the plaintiff is nevertheless required to prove the existence of actual malice. *Id.* at 13. Accordingly, *Coates*

does not stand for the proposition that pre-RUPA, the only action that would lie between partners was for an accounting.

With respect to the impact of RUPA upon claims for negligence, unquestionably RUPA narrows the fiduciary duties a partner owes to the partnership as well as the other partners. Section 404 of the Act limits those duties to “loyalty” and “care” which terms are expressly defined therein. C.A. § 9A-404(c)-(d). However, Subsection (d) requires that those duties be exercised with “good faith and fair dealing.” C.A. § 9A-404(d). That term is not defined by statute. The official comment to C.A. § 9A-404 notes that the UCC definition of “good faith” was rejected as too narrow. The authors also note “in some situations, the obligation of good faith includes a disclosure component.” C.A. § 9A-404, Comment 4.

While RUPA expressly notes that the duty of “good faith and fair dealing” is not a fiduciary duty, the practical effect of the statement is far from clear. Contrary to the express language of RUPA, in reality neither the duty of “care” nor the duty “loyalty” are fiduciary duties as that term is commonly understood. While the statute refers to them as such, the partners’ allegiance is no longer solely to the partnership. It may also be to himself or herself. The duty is unlike the “fiduciary duty” known to the Common Law.

The principal distinction between the duties of “care” and “loyalty” and the duty of “good faith and fair dealing” is that standing alone the latter cannot give rise to a claim for breach. In that fashion, RUPA does appear to narrow the fiduciary duties recognized by some courts at Common Law. However, the official comment section to § 404 suggests that while limiting the Common Law fiduciary duties in some ways, RUPA may have expanded them in other ways. The comment notes that the drafters added the obligation of “fair dealing...over the objection of the ABA conferees.” Hillman, et al., *supra*, author’s comment (3)(b)(iii).

According to the comment, “good faith” is measured by the subjective intent of the Act whereas “fair dealing” suggests that an objective measure is used. As previously alluded to, C.A. § 9A-103(b) also makes clear that a partnership agreement cannot eliminate the duties of “loyalty,” “care” or the duty of “good faith and fair dealing.” While the statute does allow the parties to prescribe the standards by which the performance of an obligation can be measured, no such effort appears to have been undertaken by the parties here.

In light of the above, the Court shall deny the Counter Defendants’ motion as to Count VIII. The Counter Complaint alleges the existence of duties independent of contract, both statutory and Common Law fiduciary duties for those acts occurring prior to January 1, 2003. While the Court of Special Appeals in *Vinogradova* held that there is no independent cause of action for breach of fiduciary duty, they affirm such actions will lie in contract or tort. *Vinogradova*, 875 A.2d at 231. To the extent that Theodore and Enterprises seek to assert paragraph 6B of the Partnership Agreement bars the claim for negligence asserted in Count VIII, that reading of paragraph 6B runs afoul of C.A. § 9A-103 prohibiting the elimination of fiduciary duties.

While at argument and in their supplemental memorandum, the Counter Defendants assert that the primary purpose of RUPA was to make all duties between partners contractual in nature, the Court’s reading of RUPA and the official comments thereto does not support such a radical interpretation.

Count IX – Fraud
(Against Theodore Lerner, Enterprises, and Lerner Corporation)
Both Individually and Derivatively

In asserting that Count IX should be dismissed for failure to state a cause of action, Theodore and Enterprises principally argue that the allegations giving rise to this claim are conclusory in nature. Further, they argue that Lawrence has failed to plead any reliance on the Counter Defendants' representations.

In response, Lawrence basically restates the arguments made in response to the motion to dismiss the intentional misrepresentation claims asserted in Count VII.

For the reasons stated in denying the motion as to Count VII, the Court shall deny the motion as to Count IX.

Count X – Conversion
(Against Theodore Lerner, Enterprises, and Lerner Corporation)

Theodore and Enterprises argue that the funds described in Count X cannot be the subject of a claim for conversion because they have not been segregated. They have been commingled with other funds belonging to Development Company. They also argue that the funds have not been misappropriated by Theodore and/or Enterprises. They are simply being held in reserve by Development Company.

In response, citing *Food Fair Stores, Inc. vs. Greely*, 246 Md. 105 (1972), Lawrence alleges that the funds are sufficiently segregated. However, the facts of *Greely* are inapposite. In that case, the plaintiff's pension benefits were held in an individual account. *Id.* at 108. The court determined that a conversion occurred when they were removed from that account and commingled with other funds belonging to the company. *Id.* at 119. Here the assets of all

of the partners are commingled in one account. Accordingly, the Court shall grant the Counter Defendants' Motion to Dismiss Count X – Conversion.

**Count XI – Civil Conspiracy
(Against Theodore Lerner, Enterprises, and Lerner Corporation)**

This claim is presumably brought on behalf of both Lawrence and Development Company but the Counter Complaint does not expressly so state.

Theodore and Enterprises move to dismiss alleging that a claim for civil conspiracy cannot stand alone. Since there are no underlying torts, this claim must fail. In light of the Court's earlier denial of the motion to dismiss the claim of fraud, the motion to dismiss Count XI shall be denied.

**Count XII – Unjust Enrichment
(Against Theodore Lerner, Enterprises, and Lerner Corporation)
Both Individually and Derivatively**

Theodore and Enterprises argue that the claim should be dismissed because the allegations are too vague. Further, to the extent that the allegations are predicated on breaches of contractual duties, such breaches cannot support a claim for unjust enrichment. In any event, the claim for punitive damages should be dismissed because the claim is a quasi contract claim.

For reasons discussed earlier herein, the motion shall be denied. The claims are specific enough and are not based strictly on breaches of contract.

**Count XIII – Judicial Disassociation Pursuant to Maryland Code Annotated
Corporations and Associations Article § 9A-601(5)
(Against Enterprises)**

Enterprises seeks to dismiss Count XIII arguing that Lawrence improperly seeks to apply RUPA to conduct occurring prior to January 1, 2003. Enterprises argues that there is no conduct alleged subsequent thereto that would justify the drastic remedy of disassociating it from the partnership.

Lawrence responds that although the conduct complained of began prior to January 1, 2003, it has continued unabated to present.

The Court shall deny the motion to dismiss. The Counter Plaintiffs allege that Enterprises has engaged in conduct willfully and persistently, which, if true, could constitute a material breach of a duty owed to one or more of the other partners to the partnership. A material breach of such a duty would constitute a violation of C.A. § 9A-601(5)(ii).

**Count XIV – Constructive Trust
(Against Development Company, Enterprises, and Lerner Corporation)
Both Individually and Derivatively**

Enterprises argues that because the claim for unjust enrichment must be dismissed, the claim for constructive trust must be dismissed. Further, it alleges that neither Theodore nor Enterprises has “title” to the monies held by Development Company in reserve. Accordingly, the funds have not been misappropriated by Theodore or Enterprises. Finally, it argues that the funds cannot be traced to a specific account and therefore a constructive trust cannot be imposed on those funds.

The Court has previously determined that the claim for unjust enrichment is properly pled. Accordingly, that argument fails. With citation to authority, Lawrence asserts that so

long as the funds can be traced, even though they have been commingled, a constructive trust may be imposed upon the funds.

Lawrence has named Development Company as a Counter-Defendant with respect to the funds held in reserve. Development Company holds title to those funds. Enterprises holds *de facto* title because, as the managing partner, it controls Development Company. With respect to those funds which were paid to the Lerner Corporation as a result of self-dealing, they are titled in the name of the Lerner Corporation. Accordingly, they are properly named as Defendants in Count XIV.

For reasons set forth by the Counter Claimants in their opposition, the motion to dismiss Count XIV shall be denied.

**Count XV – Declaratory Judgment
(Against Theodore Lerner, Enterprises, and Lerner Corporation)
Individually**

Theodore and Enterprises move to dismiss, alleging that Lawrence is seeking an advisory opinion on whether his claims for disassociation and for breach of contract are meritorious. Lawrence argues that his claim is broader than simply requesting an advisory opinion on the breach of contract and dissolution claims.

The Court shall dismiss Count XV for declaratory judgment. The remaining claims in the Counter Complaint present the same issues for resolution. Therefore, in the exercise of its discretion, the Court declines to entertain the claim for Declaratory Judgment.

**Count XVIII – Permanent Injunction
(Against Theodore Lerner, Enterprises, and Lerner Corporation)
Individually and Derivatively**

The Counter Defendant argues that this claim must fail because the disassociation count is not a viable count. In light of the Court’s denial of the motion to dismiss the claim for disassociation, the motion to dismiss the claim for permanent injunctive relief is denied.

**II. LERNER DEVELOPMENT COMPANY’S MOTION TO DISMISS
COUNTS V AND XIV**

**Count V – Violation of the Maryland Limited Partnership Act
and Maryland Revised Uniform Partnership Act
(Against Theodore Lerner, Enterprises, and Development Company) Individually**

Development Company, as Counter Defendant, through separate counsel, argues that in analyzing the Motion to Dismiss, the Court must consider the decades of rancor between the parties. Mindful of this, they argue that the allegations with respect to Count V are overbroad and conclusory.

Lawrence responds that Development Company is a necessary party to this action because they are in possession of the books. He alleges that he has been denied reasonable access to the books in violation of statute.

Because the motion before the Court is a motion to dismiss and the Court must accept as true all facts that are sufficiently pled, at this time the Court shall not consider the decades of rancor between the parties. The Court finds that the allegations are sufficiently detailed to state a cause of action for a violation of the Limited Partnership Act and Revised Uniform Partnership Act. Accordingly, the Court shall deny the motion to dismiss Count V.

**Count XIV – Constructive Trust
(Against Development Company, Enterprises, and Lerner Corporation)**

The Counter Defendant argues that Count XIV should be dismissed because there is no allegation of wrongdoing against Development Company. As the Counter Plaintiff makes clear in response, Development Company has been named as a defendant solely because they are the titled owner of the monies held in reserve. Fully recognizing that Development Company acts at the direction of Enterprises, it is alleged that Development Company has wrongfully withheld the reserves. Accordingly, the Motion to Dismiss Count XIV by Development Company is denied.

**III. LERNER CORPORATION’S MOTION TO DISMISS
COUNTS IV, VI THRU IX AND XIV**

**Count IV – Aiding and Abetting Breach of Fiduciary Duty
(Against Theodore Lerner and Lerner Corporation)**

For reasons previously stated in addressing Theodore Lerner’s Motion to Dismiss, Lerner Corporation’s Motion to Dismiss Count IV is granted with leave to amend.

**Count VI – Tortious Interference with Contractual Relations
(Against Lerner Corporation)**

The Lerner Corporation argues that Count VI must be dismissed because a necessary element of the tort is that the defendant engaged in some type of wrongful conduct such as fraud. They further argue that the allegations of fraud set forth herein are insufficient as a matter of law to state a claim. Finally, they argue that the allegation must demonstrate that the act was engaged in with malice.

While the Court agrees that the conduct must be independently wrongful, the Court has previously held that the claim for fraud is sufficiently pled. With respect to the allegation of malice, Lawrence argues that malice can be inferred from the history of Theodore's dealings with Lawrence as set out in the Counter Complaint. At this stage of the proceedings, viewing the facts pled as true and giving the Counter Claimant the benefit of all reasonable inferences to be drawn from those facts, the Court shall deny the motion to dismiss Count VI.

**Count VIII – Negligence/Gross Negligence
(Against Theodore Lerner, Enterprises, and Lerner Corporation)**

Lerner Corporation argues that the claim should be dismissed because as an entity in a contractual relationship with Development Company, they owe no duty to a minority partner of the latter. Even assuming that Theodore owes a duty to Lawrence, this does not mean that Lerner Corporation does. Further, the facts alleged are insufficient to establish the existence of a confidential relationship or intimate nexus between the Lerner Corporation and Lawrence sufficient to establish a duty for tort liability. Finally, in no event can the Plaintiff recover punitive damages under this claim.

Lawrence responds that an intimate nexus does exist. They point to the fact that Lawrence alleges that Lerner Corporation provided all of the accounting functions for Development Company. As well, they distributed the financial statements for Development Company directly to the partners knowing and intending that the partners would rely on them.

The Court holds that the allegations are sufficient to establish the potential existence of an intimate nexus such as would give rise to a duty owed by the corporation to Lawrence. Accordingly, the motion to dismiss shall be denied.

**Count IX – Fraud
(Against Theodore Lerner, Enterprises, and Lerner Corporation)**

Lerner Corporation alleges the claim should be dismissed because the allegation is general in nature and lacks specifics. Also, with respect to the allegations concerning false representations about the properties Lawrence owned, there could be no reliance because he knew the statement was untrue. With respect to the allegations involving failures to disclose alleged material information, Lerner Corporation alleges that in the absence of a duty, there can be no failure to disclose.

With respect to the allegations concerning properties that it owned, the Court shall grant the motion as to that portion of the claim. With respect to the failure to disclose material information, the Court having previously determined that the allegations are sufficiently definite and the existence of a potential duty to Lawrence is pled, the motion shall be denied.

**Count VII – Negligence and Intentional Misrepresentation
(Against Theodore Lerner, Enterprises, and Lerner Corporation)**

Lerner Corporation argues that the Count should be dismissed because it presupposes a duty to disclose and there is no such duty. Further they allege that the allegations in the Complaint contraindicate any reliance by Lawrence.

The Court having previously determined that based upon the facts pled, a duty could exist between the Corporation and Lawrence, and the Court having previously ruled that reliance has been sufficiently pled, the Court shall deny the motion to dismiss.

PUNITIVE DAMAGES

The Court shall grant the motions to dismiss as to the claim for punitive damages except as it relates to the claims for Tortious Interference with Contractual Relations (VI), Fraud (IX), and Civil Conspiracy (XI).

SEPARATE CLAIMS FOR RELIEF

In response to Theodore's and Enterprises' Motion to Dismiss, the Counter Complainant/Third Party Complainant shall file an Amended Counter Complaint/Third Party Complaint setting out the requested relief at the end of each count within 15 days of the date of this Order.

CONCLUSION

Except as otherwise expressly stated herein, the motion to dismiss shall be denied.

MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD.

DATE: _____