IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

SACHS CAPITAL FUND I LLC, et al.,	:	
Plaintiffs,	:	
	:	Case No. 480195-V
v.	:	
	:	
EM GROUP LLC, et al.,	:	
Defendants.	:	

Attorneys and Law Firms:

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Memorandum and Order

On September 14, 2020, the parties appeared, through counsel, for a hearing on the plaintiffs' motion to dismiss or, in the alternative, for summary judgment as to the first amended counterclaims of defendants. For the reasons set out below, the court concludes that the motion for summary judgment should be granted as to Counts I and III-X and denied as to Count II.

Procedural Background

The plaintiffs, Sachs Capital Fund, I, LLC, Sachs Capital-Empire, LLC, Sachs Capital-Empire B, LLC (collectively, the "Sachs Empire Entities"), and Sachs Capital, LLC, are limited liability companies organized under the laws of Delaware, with their principal places of business in Potomac, Maryland. Sachs Capital, LLC, is the managing member of each of the Sachs Empire Entities. Plaintiff Andrew Sachs is the sole member of Sachs Capital, LLC.

Defendant, EM Group, LLC ("EM Group"), is a limited liability company organized under the laws of Maryland, with its principal place of business in Gaithersburg, Maryland. Eli Kimel ("Kimel") owns 50% of EM Group. Barclay Booth, his son Travis Booth, and another one of Barclay Booth's sons together own the other 50% of EM Group.

EMSG, LLC ("EMSG"), is a limited liability company organized in November 2010 under the laws of Maryland, with its principal place of business in Gaithersburg, Maryland. EM Group owns a 67% common interest in EMSG. The Sachs Entities own a 33% common interest in EMSG.[1] EMSG's Board of Managers consists of members Kimel, Barclay Booth, and Andrew Sachs.[2] According to EMSG's Operating Agreement, EM Group has the sole ability to remove and replace two of the three members of EMSG's Board of Managers.[3] EMSG also has two

[1] Plaintiffs' Motion to Dismiss or, in the alternative, for Summary Judgment as to First Amended Counterclaims of EM Group, LLC ("Plaintiffs' Motion for Summary Judgment") Exhibit A, Third Amended and Restated Limited Liability Company Agreement of EMSG, LLC (a Maryland limited liability company), at Exhibit B.

[2] Plaintiffs' Motion for Summary Judgment Exhibit A at p. 7-8.

[3] Plaintiffs' Motion for Summary Judgment Exhibit A at p. 8.

officers.[4] Kimel is the Chief Executive Officer ("CEO")/President.[5] Travis Booth is the Vice President.[6] According to EMSG's Operating Agreement, notice to either of EMSG's officers constitutes notice to EMSG.[7] In addition to what the Operating Agreement states, Barclay Booth testified at an earlier evidentiary hearing that if Kimel or Travis Booth had learned information related to the role of Andrew Sachs and the loan "they would have told me instantly"[8] and that "they would definitely have told me since I was the largest shareholder of EM Group."[9] Notably, Travis Booth has "been employed as General Counsel by Empire Petroleum Partners, LLC ("Empire Petroleum"), and its predecessor Empire Petroleum Holdings, LLC, in Dallas, Texas since 2007."[10]

EM Group was formed to manage, invest in, and operate EPH.[11] As EM Group explains "nearly thirteen years ago, Kimel established an innovative business that would fill a void in the traditional fuel distribution supply chain. His company, Empire Petroleum Holdings ("EPH"),

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[4] Plaintiffs' Motion for Summary Judgment Exhibit A at Exhibit D.

[5] Plaintiffs' Motion for Summary Judgment Exhibit A at Exhibit D.

[6] Plaintiffs' Motion for Summary Judgment Exhibit A at Exhibit D.

[7] Plaintiffs' Motion for Summary Judgment Exhibit A at p. 28.

[8] Defendant EM Group, LLC's Opposition to Intervenor Plaintiff/Counter-Defendant TZG-Sachs Empire, LLC's Motion for Summary Judgment as to the First Amended Counterclaims, ("Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment") Exhibit 1, August 27, 2020 Preliminary Injunction Hearing Transcript, at p. 31-32. The loan referred to is the loan TZG-Sachs made to EMSG in 2011.

[9] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 1 at p. 31-32.

[10] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 3, Affidavit of Travis Booth dated September 8, 2020, at p. 1, ¶ 2.

[11] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 1 at p. 57.

provided operational, real estate, and capital services for fuel stations nationwide."[12] When EM Group was formed, it owned 50% of EPH and an outside entity, Kaman Holdings, owned the other 50% of EPH.[13] According to Kimel:

> Because of the slow, the economic slowdown of 2008 that same partner got into, got itself into difficulties. The owner wasn't able to raise money or finance our goal to acquisitions and as the CEO I had no choice but to inform them that I am going to be looking for a different partner that is capable to fuel our expansion.[14]

After the departure of Kaman Holdings, EPH gave way to EPP. EM Group and the Sachs Entities created EMSG, with EM Group owning 67% and the Sachs Entities owning 33%.

The record shows[15] that, to fund its expansion, EMSG agreed upon debt financing and, in November 2011, EMSG executed a Secured Promissory Note (the "Note") to borrow a Principal Loan Amount of $17 million from TZG-Sachs. The Note required EMSG to make quarterly interest payments of $573,750. Prior to the November 21, 2016 maturity date, EMSG made the interest payments in full. On November 21, 2016, TZG-Sachs and EMSG executed the First Amended and Restated Secured Promissory Note (the "Amended Note") which amended and restated the Note and operated as a continuation, modification, and extension of the Note. The new maturity date for the repayment of the Principal Loan Amount was November 21, 2019. The quarterly interest payments remained due and owing for the same amount as under the Note. EMSG paid the quarterly interest payments in full through January 1, 2019. Beginning with the

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[12] First Amended Counterclaims of EM Group, LLC ("First Amended Counterclaims") at p. 2.

[13] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 1 at p. 57.

[14] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 1 at p. 58.

[15] Intervenor Plaintiff's Opposition to Motion for Preliminary Injunction by Defendants EM Group, LLC, Eli Kimel, Barclay Booth and Travis Booth, Affidavit of P. Richard Zitelman dated August 25, 2020 at p. 1-3.

quarterly interest payment due on April 1, 2019, EMSG began to materially and repeatedly breach the payment terms of the Amended Note by not paying the amounts owed when due. EMSG also failed to pay back the Principal Loan Amount on November 21, 2019. No reason for these non-payments has been provided. The three members of the Board of Managers of EMSG, Kimel, Barclay Booth, and Andrew Sachs, all independently confirmed the terms of the Amended Note, TZG-Sachs's payoff calculation, and that the Amended Note was in default and that it had matured on November 21, 2019. The EM Group has not controverted or contradicted these statements. *Educ. Testing Serv. v. Hildebrant*, 399 Md. 128, 139 (2007).

The record also shows how the Sachs Entities and Andrew Sachs are related to TZG-Sachs. In an affidavit filed with the court, TZG-Sachs member Rick Zitelman ("Zitelman") stated:

> The Sachs Entities and Andrew Sachs do not own a forty-six percent (46%) interest in TZG-Sachs. Sachs Capital, LLC owns forty-six percent (46%) of the Class B Member interests in TZG-Sachs. The Class B Members of TZG-Sachs own twenty percent (20%) interest in TZG-Sachs. As such, Sachs Capital, LLC effectively owns 9.2% of TZG-Sachs, after investors have been paid their priorities and preferences.[16]

The EM Group has also not controverted or contradicted these statements. *Hildebrant*, 399 Md. at 139. In its counterclaims, EM Group claims that TZG-Sachs had an undisclosed interest in the Sachs Entities that wholly negates the enforceability of the loan. But no reasons have been provided by Kimel or any other defendant as to why EMSG was in default.

[16] Intervenor Plaintiff's Opposition to Motion for Preliminary Injunction by Defendants EM Group, LLC, Eli Kimel, Barclay Booth and Travis Booth, Affidavit of P. Richard Zitelman dated August 25, 2020 at p. 3, ¶ 20.

As a preliminary matter, it is important to understand why Kimel and Andrew Sachs made the deal they made. Adding a portion of debt to the original equity structure prevented Kimel's equity stake from being diluted by the new investors. While EM Group now claims that "Mr. Kimel was not aware, however, that Mr. Sachs joined the company with a detailed plan to defraud the EM Defendants," as the innovative creator of a nationwide fuel distributor, Kimel surely knew that, in business, there are risks to every investment. Here, to avoid having his own equity share diluted by a new investor, he made a deal with Andrew Sachs and related parties to fund his company in part with debt instead of solely with equity. In return, Andrew Sachs protected his investors' interests against the always present possibility that a business he invested in might not live up to the hopes of its founders. The claim that this was some arcane scheme to bring about a future default ignores the inherent risks of doing business, lets extremely sophisticated parties off the hook inappropriately, and completely ignores the rules of contract that govern limited liability companies. The record shows that the effort to avoid dilution motivated Kimel in making the deal. In an affidavit filed with the court, Andrew Sachs stated:

> Had TZG-Sachs Empire not provided the loan, EMSG's interest in Empire would have been significantly diluted. Without the loan, and subsequent Preferred B financing provided by the Sachs Empire Entities, EMSG would own approximately 5.85 percent of Empire, rather than the approximately 26.27 percent it owns today. Furthermore, without the loan and subsequent Preferred B financing, EM Group would not have received the approximately $5.8 million in distributions it has received from EMSG (from Empire).

The EM Group has also not controverted or contradicted this statement. *Hildebrant*, 399 Md. at 139.

After a hearing on May 22, 2020, the court entered a Temporary Restraining Order ("TRO") against EM Group and Kimel, requiring them to deposit the proceeds of the sale of Empire Petroleum Partners, LLC into the court registry. The court also appointed a special fiscal

agent for EMSG, which is not represented by counsel, to make recommendations with regard to the distribution of the sale proceeds.

On June 1, 2020, the Sachs Entities, Intervenor Plaintiff TZG-Sachs, EM Group, and Kimel agreed to convert the court's May 22, 2020 TRO into a Preliminary Injunction to remain in effect until final judgment is entered in this action. In the Consent Preliminary Injunction Order, the court authorized immediate payment of the amounts due and owing, under the 2011 loan, to Intervenor Plaintiff TZG-Sachs.

After a hearing on August 14, 2020, the court, on September 10, 2020, denied defendants EM Group, Kimel, Barclay Booth, and Travis Booth's motion for preliminary injunction seeking to prevent the distribution of the funds deposited into the court registry to TZG-Sachs.

On July 20, 2020, EM Group filed counterclaims.[17] On August 7, 2020, Plaintiffs filed a motion for summary judgment as to EM Group's counterclaims.[18] On August 20, 2020, Intervenor Plaintiff TZG-Sachs filed a motion for summary judgment as to EM Group's counterclaims.[19]

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[17] First Amended Counterclaims at p. 1.

[18] Plaintiffs' Motion for Summary Judgment at p. 1.

[19] Intervenor Plaintiff's Motion for Summary Judgment at p. 1.

Discussion

Summary Judgment

In accordance with Md. Rule 2-322(c), the court is applying Md. Rule 2-501 to the plaintiffs' motion. Summary judgment is appropriate only if the moving party shows two things. First, that there are no genuine issues of material fact. Second, that it is entitled to judgment as a matter of law. Md. Rule 2-501(f). This standard is well-settled.

Discovery

EM Group claims that it needs discovery, and that the court should deny summary judgment pending the conclusion of discovery. The court is not persuaded to do so in this case.

Maryland courts have emphasized that "in order to defeat a motion for summary judgment, the party opposing the motion must identify with particularity each material fact in genuine dispute and provide support for its contentions 'by an affidavit or other written statement under oath.'" *Hildebrant*, 399 Md. at 139 (quoting Md. Rule 2-501(b)). Md. Rule 2-501(d) gives the court the discretion to deny or continue a summary judgment motion if the court is satisfied that the "facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit" submitted under the Rule. EM Group argues that, from Kimel's affidavit, "it should be abundantly clear that there are many disputes of material fact, as discovery has not even begun and such discovery is needed to put the entirety of the parties' relationships in context."[20] In fact, Kimel's affidavit falls far short of showing the need for discovery to put the relationship of these parties in context, or to avoid summary judgment. The affidavit does not, in this court's view, state with clarity why the information sought to be discovered is necessary to the court's consideration of the pending summary judgment motion, why the information sought would raise

[20] Defendant EM Group, LLC's Opposition to Plaintiffs' Motion to Dismiss or, in the alternative, for Summary Judgment ("Defendant's Opposition to Plaintiffs' Motion for Summary Judgment") at p. 3.

a genuine factual issue regarding any of the defendant's counterclaims, or specify the reasons for the non-moving party's failure, to date, to obtain such information from the entities EM Group, EMSG, or Kimel, Barclay Booth, or Travis Booth. Counsel for EM Group admitted to the court, in a hearing, that it has not even looked for, much less completely reviewed, the files of these entities or individuals. *See Brown v. Suburban Cadillac, Inc.*, 260 Md. 251, 256-257 (1971); *Channel Master Satellite, Sys., Inc., v. JFD Electronics Corp.*, 748 F. Supp. 373, 395 (E.D.N.C. 1990). The court has sufficient information to rule on the legal issues that have been presented and the discovery sought would unduly delay the resolution of the pertinent issues. *See Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 87-89 (2000). The defendants have had ample time and opportunity to raise a genuine issue of material fact. Any factual disputes that do exist are simply not material to the outcome, must less to the counterclaims at issue in this case.

Derivative Claims vs. Direct Claims

EM Group totally fails to explain how a) any of its claims in counts IV-X are direct (as opposed to derivative) and would therefore be its claims to bring instead of EMSG's claims to bring and b) why demand on the Board of Managers of EMSG would be futile or why demand was wrongfully refused. All center upon and seek to undo the loan made by TZG-Sachs to EMSG. Although these claims contain a myriad of disparate allegations, all seek to undo the loan. At least to that extent, counts IV-X are derivative in nature.

Maryland law requires a complaint in a derivative action to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort." *Danielewicz v. Arnold*, 137 Md. App. 601, 628 (2001); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95-97 (1991). In

Kamen v. Kemper, involving a Maryland corporation, "the [Supreme] Court made clear that pre-suit demand was not merely a pleading requirement, but, through incorporation of State law, a substantive one." *Danielewicz*, 137 Md. App. at 628.

Under 4A-801(a) of the Corporations Article, a member may bring a derivative action on behalf of the LLC "to the same extent that a shareholder may bring an action for a derivative suit under the corporation law of Maryland." Subsection (b) has been read, in conjunction with (a), to mean that the derivative pleading rules that apply to limited liability companies are the same as those that have been developed by the Court of Appeals for a regular corporation. *Wasserman v. Kay*, 197 Md. App. 586, 628 (2011). As a consequence, even in the limited liability company context, demand-futility or demand-refused must be pled and shown. *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 343-344 (2009); *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004). Neither has been properly pled, much less shown, in this case.

In this case, all of EM Group's claims in counts IV-X are largely derivative claims as they turn on the propriety of the 2011 loan to EMSG. Whether a claim is derivative or direct turns, largely, on the following questions: (1) who suffered the alleged harm (the entity or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the entity or the stockholders, individually)?" *Tooley*, 845 A.2d at 1033. Where "it is plain under the limited partnership agreement that the limited partnership itself was entitled in the first instance to sue and obtain recovery against the general partner and its co-defendants for any claim that the transaction was economically unfair to the limited partnership," "that individual limited partners might press the limited partnership's rights as derivative plaintiffs does not make the claims ones belonging to them individually." *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1251 (Del. 2016). Instead, to prove that a claim is direct, a

plaintiff "must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Brinckerhoff*, 152 A.3d at 1260 (footnotes omitted). If a party must recover according to his interests in a company, "the necessity of a pro rata recovery to remedy the alleged harm indicates that his claim is derivative." *Brinckerhoff*, 152 A.3d at 1264. In short, to have a direct claim there must be separate harm distinct from that suffered by, or that which may have been suffered by, the company. *Oliveira v. Sugarman*, 451 Md. 208, 245 (2017); *Shenker*, 411 Md. at 345. Neither EM Group, nor Kimel, nor Booth have pled that they have suffered any injury distinct from that suffered by EMSG, the borrower.

The first prong of the *Tooley* test asks "who suffered the alleged harm (the entity or the suing stockholders, individually)?" In counts IV-X, EMSG, LLC suffered the alleged harm by reason of the loan. Through its First Amended Complaint, EM Group recognizes this by repeatedly claiming that it should recover through EMSG.[21] Kimel also testified to this effect at an evidentiary hearing, as follows:

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[21] See the following counterclaims:

> Counterclaim VII, p. 36, ¶ 183, "EMSG owes substantial penalties and penalty interest to TZG-Sachs, which in turn will deprive EM Group of substantial funds;"
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> Counterclaim VIII, p. 37, ¶ 192, "...any such benefits that have accrued to TZG-Sachs Empire, the Sachs Entities, and Mr. Sachs as a result should be returned to EM Group through EMSG;"
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> Counterclaim X – Civil Conspiracy, on p. 38, ¶ 199, "...perpetrated in furtherance of a conspiracy between Mr. Sachs and TZG-Sachs Empire to have EMSG enter into the TZG-Sachs Empire Loan that was highly lucrative for TZG-Sachs Empire and Mr. Sachs, to EMSG's and, thus, EM Group's detriment, when the loan went into default;" and
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> Counterclaim X – Breach of Fiduciary Duty, on p. 39, ¶ 207, "...overruled the objections of the EMSG Board and agreed to a sale of Empire that would, in the view of Mr. Sachs, profit his investors while leaving all other EMSG investors, including EM Group, with nothing."

Q: Rather than going through line by line, what was the effect of these security documents, security agreement, with respect to the TZG Sachs loan?

A: What do you mean? You know, if we default, we lose the company. That's my understanding.

Q: And whose interests were being secured with these documents? Was it only-

A: EMSG

Q: EMSG's interests?

A: EMSG's interests, yes. And all its members.[22]

The second prong of the *Tooley* test requires proof that the individual stockholders, not the entity, would receive any recovery. In this case, the party receiving any recovery would be EMSG, not the defendants that brought the counterclaims.

The final *Tooley* element requires proof that the plaintiffs "can prevail without showing an injury to the corporation." In counts IV-X, EM Group repeatedly recognizes, in its own counterclaims, that it can recover only through EMSG.[23]

The *Tooley* test is met for counts IV-X in this lawsuit and those counts are derivative claims. [24] The record shows that EM Group has not made demand on the Board of Managers of EMSG regarding the loan. In an affidavit filed with the court, Andrew Sachs stated:

EM Group also has not made a demand that EMSG file suit regarding the loan made by TZG-Sachs Empire.[25]

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[22] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 1 at p. 77-78.

[23] See counterclaims in which EM Group seeks to recover through EMSG, *supra* note 21.

[24] This court is aware of the Court of Appeal's decision in *Oliveira v. Sugarman*, 451 Md. 208, 241-242 (2017). Critically, *Sugarman* was not cited by the defendants. This case is factually distinguishable from *Sugarman*. In addition, *Sugarman*'s discussion of *Gentile v. Rossette*, 906 A.2d 91, 93, 99 (Del. 2006) is dicta that failed to take into account what the Delaware Supreme Court said about *Gentile*, both in the majority opinion and in Chief Justice Strine's concurring opinion, in *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1262-1264, 1265-1266 (2016). As a consequence, interpreted through the lens of *Brinckerhoff*, the holding of *Gentile* has no application to the facts of this case.

[25] Plaintiffs' Motion for Summary Judgment Affidavit of Andrew Sachs dated August 7, 2020, p. 5, ¶ 23.

The EM Group has also not controverted this statement. *Hildebrant*, 399 Md. at 139.

<u>Count I – Declaratory Judgment – Unenforceable Contract</u>

(Against Andrew Sachs and the Sachs Entities)

Regarding the contents of the Operating Agreement, EM Group claims that the terms disproportionately and unfairly favor the Sachs Entities and disadvantage EM Group, are substantially one-sided, and were agreed to under circumstances that were procedurally unconscionable. EM Group further argues that the Operating Agreement was not entered into by competent, informed parties such that a "meeting of the minds" occurred sufficient to form a valid contract under Maryland law and that it lacks mutuality. Next, EM Group contends that it was entered into only because of the omission of substantial material facts and is therefore not a conscionable, enforceable contract under Maryland law, including with respect to any division of proceeds from its underlying assets. Finally, EM Group claims that the terms of the Operating Agreement were agreed to under a fraud that concealed the role and interests of the law firm drafting the agreement.[26]

"Maryland adheres to the principle of the objective interpretation of contracts." *Cochran v. Norkunas*, 398 Md. 1, 16 (2007). "If the language of a contract is unambiguous, we give effect to its plain meaning and do not contemplate what the parties may have subjectively intended by certain terms at the time of formation." *Norkunas*, 398 Md. at 16. "Under the objective theory of

[26] In the First Amended Counterclaims, EM Group alleges or mentions fraud as part of Counterclaim I, p. 28, ¶ 123, Counterclaim III, p. 30, ¶ 137, and as the entire claim of Counterclaim IV, p.31-33, ¶ 144-159. All of these claims fail, and are dismissed, with prejudice, as they relate to Andrew Sachs, TZG-Sachs, and the named law firm, due to the reasons stated in section IV of this memorandum. None of the fraud claims in the First Amended Counterclaims meet the requisite materiality requirement or the requisite pleading requirement.

contracts, we look at what a reasonably prudent person in the same position would have understood as to the meaning of the agreement." *Norkunas*, 398 Md. at 17.

Here, the court concludes that reasonably prudent people in the same position as EM Group's representatives, that is, members of the Board of Managers of an entity worth tens of millions of dollars, would have absolutely no trouble understanding the meaning of the Operating Agreement or discerning the relative roles of the parties to the loan. This type of Operating Agreement is commonplace and is not a difficult read. Consequently, the court concludes that the Operating Agreement and the loan are fully enforceable. Count I will be dismissed, with prejudice.

Count II – In the Alternative to Count I – Declaratory Judgment

EM Group argues that, in the event the court finds the Operating Agreement enforceable, a controversy exists between the parties as to classification and distribution of proceeds in connection with the sale of Empire, specifically, what proceeds classify as a "EPP Liquidity Event" in the Operating Agreement.[27] EM Group seeks a declaratory judgment interpreting "EPP Liquidity Event" to exclude anticipated payments including real estate income and contingent earn out payments. As a mirror image to the plaintiffs' request for a declaratory judgment, this count survives summary judgment. The special fiscal agent in this case will make recommendations as to the distribution of the funds from the Empire sale.

[27] First Amended Counterclaims at p. 29.

Count III – Anticipatory Breach of Contract

(Against Andrew Sachs and the Sachs Entities)

EM Group contends that "Plaintiffs have indicated that Mr. Sachs plans to use his fraudulently obtained[28] veto rights to prevent Mr. Kimel and EM Group from being indemnified for the expenses each will incur while defending against the suit that Sachs brought," and asserts that this statement constitutes a definite, specific, positive, and unconditional repudiation of Section 9.2 of the EMSG LLC Agreement. [29]

Where one party has clearly and unequivocally refused to do something that he, she, or it is required to do under the contract and it is clearly a refusal to proceed, it may be treated as an anticipatory breach, also called anticipatory repudiation. Rosalyn B. Bell, *Maryland Civil Jury Instructions and Commentary*, 362-363 (1993) (citing *String v. Steven Dev. Corp.*, 269 Md. 569, 578-581 (1972)). "Ordinarily, in order to constitute anticipatory repudiation, there must be a definite, specific, positive, and unconditional repudiation of the contract by one of the parties to the contract." *C.W. Blomquist & Co. v. Capital Area Realty Investors Corp.*, 270 Md. 486, 494 (1973).

While the Operating Agreement makes Andrew Sachs a member of the Board of Managers of EMSG, he was not a party to the Operating Agreement. Consequently, he is not an Indemnitor and cannot have breached this section of the Operating Agreement. Likewise, the Sachs Entities are not the Indemnitor under the Operating Agreement. Instead, EMSG is the Indemnitor. The Operating Agreement specifically says that the obligor is EMSG and not any of its members. Specifically, Section 9.2 states:

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[28] See counterclaims featuring fraud, *supra* note 26.

[29] First Amended Counterclaims at p. 30-31.

> **9.2 Indemnification**
>
> (f) The indemnification obligations created by this Section 9.2 are obligations of the Company, and no Member (in its capacity as a Member) will have any obligation to indemnify any Indemnitee by reason of this Section 9.2.[30]

Section 9.2 of the Operating Agreement also establishes two preconditions an Indemnitee must meet in order to be indemnified. First, the Indemnitee must make formal demand for indemnification on EMSG. Second, the Indemnitee must undertake "in writing to repay such amounts if it is ultimately determined that the Indemnitee is not entitled to indemnification..."[31] Here, EM Group has failed to make formal demand for indemnification to EMSG. EM Group also has failed to make the required written certification. While EM Group has written numerous letters to the special fiscal agent, as the court has explained many times, the special fiscal agent is not running EMSG, is not a member of the Board of Managers of EMSG, and is not authorized to grant or withhold indemnification; only EMSG can do that. Thus, no letter sent to the special fiscal agent accomplishes anything related to the two preconditions to indemnification laid out in Section 9.2 of the Operating Agreement.

Given that Andrew Sachs is not the Indemnitor and that EM Group has failed to allege or show compliance with both preconditions to indemnification under the Operating Agreement, summary judgment as to this claim is warranted.

[30] Plaintiffs' Motion for Summary Judgment Exhibit A at p. 24.

[31] Plaintiffs' Motion for Summary Judgment Exhibit A at p. 23-24.

Count IV – Fraud in the Inducement

(Against Andrew Sachs and TZG-Sachs Empire)

EM Group claims that Mr. Sachs and TZG-Sachs Empire fraudulently induced EM Group to enter into the EMSG operating agreements by making false representations regarding the Operating Agreements' treatment of EM Group, by failing to disclose that the law firm that wrote the Operating Agreements had equity interests in the Sachs Entities and who, in fact, that law firm represented, by failing to disclose the involvement of Mr. Sachs in the TZG-Sachs Empire Loan Agreement on the side of the lender, and by failing to disclose that TZG-Sachs was an investor in the Sachs Entities. EM Group claims that it "would not have entered into the Agreements as written but for the misrepresentations of Mr. Sachs." EM Group also claims that it "did not learn of these various fraudulent statements and omissions until 2018 and 2019."

Under Maryland law, the elements of a cause of action for fraud are (1) that defendant made a misrepresentation of a material fact which was false; (2) that its falsity was known to him; (3) that defendant made the misrepresentation for the purpose of defrauding plaintiff; (4) that plaintiff not only relied upon the misrepresentation but had the right to do so and would not have done the thing from which the damage resulted if it had not been made; and (5) that plaintiff suffered damage from defendant's misrepresentation. *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 334 (2013); *James v. Weisheit*, 279 Md. 41, 44 (1997). Fraud must be shown by clear and convincing evidence. If not, summary judgment is warranted. *Hoffman v. Stamper*, 385 Md. 1, 41 (2005).

Md. Rule 2-305 generally requires that a complaint contain only "a clear statement of the facts necessary to constitute a cause of action." *McCormick v. Medtronic, Inc.*, 219 Md. App.

485, 527 (2014). Nonetheless, Maryland courts have long required parties to plead fraud with particularity. *McCormick*, 219 Md. App. at 527. Specifically,

> the requirement of particularity ordinarily means that a plaintiff must identify who made what false statement, when, and in what manner (i.e., orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (i.e., that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement.

McCormick, 219 Md. App. at 528.

Here, defendants have failed both a) to allege that Andrew Sachs and TZG-Sachs made material misstatements and b) to plead fraud with the requisite particularity. "The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Industries v. Northway*, 426 U.S. 438, 445 (1976). "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries*, 426 U.S. at 449. If a fact is material, a party must state how it would have acted differently had it had notice of the material fact. *Santa Fe Indus. v. Green*, 430 U.S. 462, 474 n.14 (1977).

First, regarding the materiality of the alleged failures to disclose relative conflicts of interest, the record shows that Andrew Sachs had, at most, a 9.2% interest in TZG-Sachs.[32] Critically, the EM Group also has not cited any case law suggesting that the rights to a 9.2% interest in a loan is material. If a conflict of interest is not material, a failure to disclose that conflict cannot support a fraud claim.

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[32] See Zitelman Affidavit, *supra* note 16.

The record also shows that the law firm had, at most, a slightly more than 1% interest in the Empire transaction. The law firm that wrote the Operating Agreement invested approximately $35,146.[33] The Sachs Empire Entities had invested more than $31 million in the Empire deal. At a little more than 1%, this interest by the law firm is also not material.

Second, regarding the requirement to plead fraud with particularity, the EM Group has failed to plead any of its fraud claims with the requisite particularity. In its papers filed with the court, EM Group has changed its position on when it claims it discovered Sachs's involvement with, or interest in, the loan innumerable times. EM Group has also failed to specify what it would have done differently if it had known what it claims was kept hidden from it. Only saying that it would not have entered the deal, without more, is not sufficient to meet the pleading requirement for fraud claims.

In addition to the potential conflicts of interest being immaterial and improperly pled, the officers of EMSG also had notice, beginning in 2011, of any potential conflicts related to Andrew Sachs's involvement on the side of the lender in the TZG-Sachs loan. In Maryland, litigants have three years from the date their action accrues to file a civil action. Maryland Code. Md. Code Ann., Cts. & Jud. Proc. 5-101. Maryland applies the "discovery rule" in determining when an action accrues. *Bank of New York v. Sheff*, 382 Md. 235, 244 (2004). Under the discovery rule, "the statute of limitations begins to run when the plaintiff has knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged cause of action." *Id*. (quotation marks omitted). If there is any genuine dispute of

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[33] Plaintiffs' Motion for Summary Judgment Affidavit of Andrew Sachs dated August 24, 2020, at p. 3, ¶ 12-14.

material fact regarding when the movants possessed that knowledge, the issue is one for the trier of fact to resolve. *Id.* If there is no such genuine dispute of material fact, summary judgment is appropriate. *Id.*

The July 2011 EMSG Operating Agreement stated that the Board of Managers has the power to appoint officers to run EMSG. Specifically, the Operating Agreements stated:

> **5. Management and Operations of Business**
>
> ***5.9. Officers***
>
> (a) General.
>
> ***
>
> Such Officers may be appointed for such terms determined by resolution of the Board with such authority as proscribed by such resolution, including the authority to enter into, accept and perform or cause to be performed, agreements, instruments, certificates or other documents necessary or desirable in connection with the conduct of the day to day operations of the business and transactions contemplated hereby, in each case without any further act, vote or approval of any Member.

The July 2011 EMSG Operating Agreement also stated that providing notice to the officers equates to providing notice to EMSG. Specifically, it stated:

> **12. Miscellaneous**
>
> ***12.1 Notices***
>
> Any notice, payment, demand or communication required or permitted to be given by any provision of this Agreement will be in writing (which may be facsimile, e-mail in PDF format, or other electronic means) and will be deemed to have been delivered, given and received for all purposes (i) if delivered personally to the Person or to an officer of the Person to whom the same is directed, or (ii) when the same is actually received, if sent either by registered or certified mail or overnight courier, postage and charges prepaid, or to such other address as such Person may from time to time specify by notice to the other Members and the Company.

Exhibit A

Defined Terms

"Person" means any individual, partnership (whether general or limited), joint venture, limited liability company, corporation, trust, estate, association, government, nominee, or other entity.

The July 2011 EMSG Operating Agreement named Kimel and Travis Booth as the only two officers of EMSG. Specifically, it named Kimel the Chief Executive Officer ("CEO")/President and it named Travis Booth the Vice President.[34]

In this case, EMSG's only two officers, Kimel and Travis Booth, both possessed documents in 2011 that, had they not already known about the potential conflicts of interest, would, at a minimum, have caused reasonable people in their positions to investigate Andrew Sachs's involvement with the TZG-Sachs loan. In addition to their role as officers, Barclay Booth testified that it was understood that, since he was the largest shareholder of EM Group, any information Kimel or Travis Booth learned about the role of Andrew Sachs in the TZG-Sachs Loan agreement would be conveyed to Barclay Booth "instantly."

The record shows that on September 3, 2011, EMSG CEO and President Kimel received and signed the Term Sheet for the $17 million loan between "Lender" TZG-Sachs – Empire, LLC, and "Borrower" EMSG, LLC.[35] Andrew Sachs signed the Term Sheet on behalf of TZG Sachs – Empire, LLC on September 3, 2011. Kimel signed the Term Sheet on behalf of EMSG, LLC, in his capacity as president, on September 3, 2011. EM Group argues that the Term Sheet did not provide Kimel with notice of any potential conflicts because it was on Sachs Capital

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[34] Plaintiffs' Motion for Summary Judgment Exhibit B, Amended and Restated Limited Liability Company Agreement of EMSG, LLC (a Maryland limited liability company), as of July 7, 2011, at Exhibit D.

[35] Plaintiffs' Motion for Summary Judgment Exhibit E, Term Sheet for the loan of up to $17 million from "Lender" TZG Sachs-Empire, LLC, or an affiliate ("Lender") to EMSG, LLC (the "Company"), at p. 1.

letterhead, Sachs was not identified as the Co-Manager of TZG-Sachs, and that it was not altogether clear that the signature in the TZG Sachs – Empire, LLC space belonged to Andrew Sachs.

The record also shows that on September 27, 2011, EMSG CEO and President Kimel received a letter from Andrew Sachs confirming the addition of an exhibit to the September 3, 2020 letter.[36] Andrew Sachs signed that letter on behalf of TZG Sachs – Empire, LLC, in his capacity as Co-Manager, on September 27, 2011. Kimel signed that letter on behalf of EMSG, LLC, once again in his capacity as president, on September 28, 2011. Here, EM Group argues that, while this time Sachs is clearly identified as the Co-Manager of TZG-Sachs Empire, LLC, and even though his signature is clearly the same as that on the September 3, 2011 letter, this still represented an effort by Sachs to "sneak one by" Kimel by providing "a signature on behalf of a different company, TZG-Sachs, not Sachs Capital." EM Group goes on to say "it defies logic to expect Mr. Kimel would scrutinize this letter looking to make sure Mr. Sachs in fact signed it on behalf of Sachs Capital (EM Group's business partner) instead of some other company."[37]

This court disagrees with EM Group on the effect of both letters. As the CEO/President of EMSG and as the founder of a national oil distribution company worth tens of millions of dollars, Kimel would have easily been able to recognize the signature of Andrews Sachs, on both documents, and would have known that TZG-Sachs was a different company than Sachs Capital,

[36] Plaintiffs' Motion for Summary Judgment Exhibit F, September 27, 2011 letter from Andrew Sachs to Kimel, at p. 1.

[37] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment at p. 4.

LLC. At a minimum, a reasonable person in his position would have made a diligent inquiry into both of these questions.

Further, EMSG Vice President Travis Booth received a draft of the Confidential Private Placement Memorandum (the "PPM") from Zitelman on October 11, 2011. This document contained a Summary of the Offering section with a concise description of the "Company" and its "Purpose." The "Company" subheading stated:

> **Summary of the Offering**
> Company:
> TZG-Sachs Empire LLC, a Delaware limited liability company (the "Company"). The Managers of the Company are The Zitelman Group, Inc., a Maryland corporation ("TZG") and Sachs Capital LLC ("Sachs"). The Class A Members of the Company (the "Class A Members") will be the purchasers of the Units in this Offering and will own the Class A Membership interests in the Company. The Class B Members of the Company (the "Class B Members") are TZG, Sachs, Leading Edge Capital LLC or their respective designees. [38]

The "Purpose" heading stated that TZG-Sachs was being formed to loan EMSG up to $17 million and described, in detail, the relative positions of TZG-Sachs Empire LLC. Specifically, in its third paragraph, it stated:

> **Summary of the Offering**
> Purpose:
> EMSG is a Delaware limited liability company that was formed in 2010 to invest in EPP. The Managers of EMSG are Andrew Sachs, Eli Kimel, and Barclay Booth. Mr. Sachs is Managing Member of Sachs Capital LLC. Mr. Kimel is President of EPP and Mr. Booth is Senior Vice President, Acquisitions of EPP. As of the date of this Memorandum, 67% of the equity in EMSG is held by EM Group, LLC (whose membership is comprised of EPP management personnel), and 33% of the equity in EMSG is held by investment funds affiliated with Sachs. In addition, affiliates of Sachs hold $3,500,000 of preferred equity (the "Sachs Preferred Equity") in EMSG. Affiliates of TZG own an interest in the EMSG equity held by Sachs and in the Sachs Preferred Equity. The Loan will rank senior to the EMSG equity and Sachs Preferred Equity.

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[38] Intervenor Plaintiff's Motion for Summary Judgment Exhibit 6, Confidential Private Placement Memorandum dated October 12, 2011, at p. 3.

The document also contained a "Conflicts of Interest" page that revealed further information about the relative position of these parties.[39]

In sending the draft to Travis Booth, Zitelman said "take a close look at the Risk Factors and let us know if there are any modifications or other risk factors you think we should add. Also, feel free to let us know if there are any other documents you would like to review relevant to the PPM."[40] In his affidavit, Travis Booth stated that "when I was asked to review the draft PPM, I was asked to do so in my capacity as General Counsel for Empire Petroleum and confirm the accuracy of the description of the Empire Petroleum transaction (in that Empire Petroleum ultimately was the party that received the funds from the loan being made by TZG-Sachs to EMSG). This task did not require my review of the entire document."[41] EM Group argues that, by calling Travis Booth's attention to the Risk Factors, Zitelman allowed a "very busy" Travis Booth to ignore the rest of the document. Consequently, they argue, EMSG was not on notice of the contents of the "PPM" even though it was sent to its Vice President.

First, this argument completely fails to recognize that, as the Vice President of EMSG, when Travis Booth received a document, EMSG was on notice about the contents of that document. That Zitelman asked Travis Booth to look at a particular section immediately before asking him if he would like to review any other documents relevant to the PPM does not vitiate Travis Booth's duty as an officer of EMSG to read what he was sent. Second, this argument

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[39] Intervenor Plaintiff's Motion for Summary Judgment Exhibit 6 at p. 28.

[40] Intervenor Plaintiff's Motion for Summary Judgment Exhibit 5, email from Rick Zitelman to Travis Booth on October 11, 2011.

[41] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 3, Affidavit of Travis Booth dated September 8, 2020, at p. 2, ¶ 5.

ignores the reality of the family ties to this business relationship, as revealed by Barclay Booth's testimony that he would have expected Travis Booth to "instantly" convey any information that he learned about Andrew Sachs's role in the TZG-Sachs loan because Barclay Booth was the largest shareholder of EM Group, the company that controlled EMSG through its control of the members of the Board of Managers of EMSG. Third, it ignores the fact that, as general counsel for EPP and its predecessor EPH, Travis Booth had been an attorney for a nationwide oil distribution company for over a decade.[42] Zitelman sent this document to perhaps the most sophisticated party he possibly could have sent it to in order to make sure that EMSG was satisfied with the relative positions of all parties to the loan. It was not Zitelman's responsibility to provide Travis Booth a crash course on the importance of reading loan documents or on the obligations of LLC officers. Travis Booth could not have been more aware of the importance of such a document and could not have been more aware of his obligation to read it.

Due to its failure to raise material misstatements, its failure to plead with the requisite particularity, and its failure to bring claims within three years of having inquiry notice that a conflict of interest might exist, count four is dismissed, with prejudice.

<u>Count V – Negligent Misrepresentation</u>

(Against Andrew Sachs)

EM Group repeats its conflicts of interest claims related to Andrew Sachs, TZG-Sachs, and the law firm in its claim for negligent misrepresentation against Andrew Sachs.

The principal elements of the tort of negligent misrepresentation may be outlined as follows: (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false

[42] Defendant's Opposition to Intervenor Plaintiff's Motion for Summary Judgment Exhibit 3, Affidavit of Travis Booth dated September 8, 2020, at p. 1, ¶ 2.

statement; (2) the defendant intends that his statement will be acted upon the by plaintiff; (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury; (4) the plaintiff, justifiably, takes action in reliance on the statement; and (5) the plaintiff suffers damages proximately caused by the defendant's negligence. *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 336-337 (1982).

Here, since the underlying tort of fraud falls, so too does negligent misrepresentation based on those same allegations.

Count VI – Unjust Enrichment

(Against the Sachs Entities)

EM Group repeats its conflicts of interest claims related to Andrew Sachs, TZG-Sachs, and the law firm in its claim for negligent misrepresentation against the Sachs Entities.[43]

"Parties entering into a contract assume certain risks with the expectation of a beneficial return; however, when such expectations are not realized, they may not turn to a quasi-contract theory for recovery." *County Comm'rs of Caroline Cty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 101 (2000). Generally, quasi-contract claims such as quantum meruit and unjust enrichment cannot be asserted when an express contract defining the rights and remedies of the parties exists. *Id.* Here, both the Operating Agreement and the loan are valid contracts, and unjust enrichment is not a usable theory. Therefore, count six is dismissed, with prejudice.

[43] First Amended Counterclaims at p. 35.

Count VII – Declaratory Judgment

(Against TZG-Sachs Empire)

EM Group repeats its claims that Andrew Sachs failed to disclose material facts regarding his interest in the TZG-Sachs Empire Loan and TZG's interest in the Sachs Entities. Further, it claims that these respective interests resulted in conflicts of interest that needed to be disclosed, but were not disclosed, to EMSG and EM Group. It also claims that, due to the nondisclosure, EMSG entered into a loan agreement that would result in substantial benefits to Andrew Sachs and TZG-Sachs Empire if the loan went into default. It further claims that Andrew Sachs made numerous decisions that resulted in EMSG defaulting on the TZG-Sachs Empire Loan. EM Group points out that, by being in default on the loan, EMSG owes substantial penalties and penalty interest to TZG-Sachs, which in turn will deprive EM Group of substantial funds. EM Group asks the court to declare the TZG-Sachs Empire Loan void and unenforceable, including, but not limited to, those provisions which provide for penalties and penalty interest, and those provisions which provide for a potential transfer of securities.

The Loan and Security Agreement, signed by Zitelman on behalf of TZG-Sachs, Kimel on behalf of EMSG, EM Group, and EPH, and Andrew Sachs on behalf of the Sachs Entities, states, in relevant part:

> **LOAN AND SECURITY AGREEMENT**
>
> This Loan and Security Agreement is effective as of the 21st day of November, 2011, by and among (i) EMSG, LLC, a Maryland limited liability company ("Borrower"), (ii) TZG Sachs-Empire, LLC, a Delaware limited liability company ("Lender")...
>
> ***
>
> **Representations and Warranties:** To induce Lender to enter into this Agreement, Borrower hereby represents and warrants to Lender:
>
> (a) Organization; Offices. Borrower is duly organized, validly existing and in good standing as a limited liability company under the Laws of the State of

> Maryland, and there is no other state in which the present conduct of its business requires that it be qualified to do business. Borrower represents and warrants that its chief executive office is located at 9055 Comprint Court, Suite 200, Gaithersburg, MD 20877, and that the Collateral at all times shall be located at that address or somewhere else in Maryland.
>
> (b) *Authority*. Borrower has the right, power, and capacity to execute and deliver the Loan Documents and to perform its obligations under the Loan Documents. The execution and delivery of the Loan Document by Borrower and the performance by Borrower of its obligations under the Loan Documents have been duly and validly authorized and approved by all necessary limited liability company action. The Loan Documents have been duly executed and delivered by Borrower and constitute valid and binding agreements of Borrower, enforceable against Borrower in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and other similar Laws affecting the enforceability of creditors' rights generally, general equitable principles and the discretion of courts in granting equitable remedies.

In the absence of fraud, it is well established that "one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature." *Merit Music Service, Inc. v. Sonneborn*, 245 Md. 213, 220 (1967). EMSG had notice of the relative positions of the parties to the loan.[44] Kimel signed the loan documents as EMSG's CEO.[45] Given his capacity, EMSG is bound by his signature. The loan is valid and enforceable.

"Regardless of the action giving rise to the right to rescind a contract, whether it be fraud or misrepresentation, the remedy of rescission must be exercised promptly upon discovery of the fraud of misrepresentation." *Cutler v. Sugarman Organization, Ltd.*, 88 Md. App. 567, 578 (1991). "The right to rescind may be waived by not acting promptly on discovery of the facts from which it arises." *Id.* "Rescission requires at a minimum that the party exercising a right to rescind notify the other party and demonstrate an unconditional willingness to return to the other

[44] See section IV.

[45] See section IV.

party both the consideration that was given and any benefits received." *Id.* This loan is no longer eligible for rescission.

In addition, as discussed above, counsel for EM Group admitted at a hearing that it has not searched through the documents of the entities or individuals it represents to figure out what caused the default of the loan. Their failure does not win them discovery to avoid summary judgment. For these reasons, count seven is dismissed, with prejudice.

Count VIII – Unjust Enrichment

(Against the Sachs Entities and TZG-Sachs)

EM Group repeats its claim that it didn't know about the relative positions of TZG-Sachs and the Sachs Entities on its way to claim that accepting and retaining the benefit of penalty interest and additional penalties paid on the loan make it inequitable for the Sachs Entities and TZG-Sachs Empire to be unjustly enriched by such payments.

As cited in section VI above, unjust enrichment claims fail where there is a valid contract. As stated above in section VII, this court finds that the loan was a valid contract. Therefore, count eight is dismissed, with prejudice.

Count IX-X – Civil Conspiracy

(Against Andrew Sachs and the Sachs Entities; and
Against Andrew Sachs and TZG-Sachs Empire)

EM Group claims that the alleged misrepresentations of Mr. Sachs were all perpetrated in furtherance of a conspiracy between Mr. Sachs and the Sachs Entities to gain control of EMSG and Empire to the benefit of the Sachs Entities and its investors to the detriment of EMP.

EM Group also claims that the alleged misrepresentations of Mr. Sachs were also perpetrated in furtherance of a conspiracy between Mr. Sachs and TZG-Sachs Empire to have

EMSG enter into the TZG-Sachs Empire Loan that was highly lucrative for TZG-Sachs Empire and Mr. Sachs, to EMSG's and, thus, EM Group's detriment, when the loan went into default. EM Group further claims that, in furtherance of the conspiracy, Mr. Sachs orchestrated a series of events to take over the decision-making at EMSG such that he was able to and did in fact make decisions that resulted in EMSG going into default on the TZG-Sachs Empire Loan.

It is well established that a conspirator can be liable for the conduct of a co-conspirator. A civil conspiracy has been defined in Maryland as "a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff." *Mackey v. Compass Mktg.*, 391 Md. 117, 128-129 (2006). The plaintiff must prove an unlawful agreement, the commission of an overt act in furtherance of the agreement, and that as a result, the plaintiff suffered actual injury. *Mackey*, 391 Md. at 128-129. The unlawful agreement is not actionable by itself; rather, the "tort actually lies in the act causing the harm" to the plaintiff. *Mackey,* 391 Md. at 129. Thus, civil conspiracy is not capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff. *Mackey*, 391 Md. at 128-129. Here, because the underlying torts fail, so too do the claims of civil conspiracy.

EM Group also requests punitive damages for the civil conspiracy in its Prayer For Relief. "In order to properly plead a claim for punitive damages, a plaintiff must make a specific demand for that relief in addition to a claim for damages generally, as well as allege, in detail, facts that, if proven true, would support the conclusion that the act complained of was done with 'actual malice.' Nothing less will suffice." *Scott v. Jenkins*, 345 Md. 21, 37 (1997).

EM Group claims that Andrew Sachs's misstatements, misrepresentations, omissions, and outright falsehoods were intentionally made for the purpose of defrauding EM Group. However, yet again, EM Group failed to plead with the required particularity, this time failing to plead, among other things, the "actual malice" required in order to properly plead a claim for punitive damages. *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460 (1992). Further, the summary judgment record does not show the requisite elements by clear and convincing evidence. *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 270 (2004).

The counts for civil conspiracy are dismissed, with prejudice.

Count X – Breach of Fiduciary Duty

(Against Andrew Sachs)

EM Group repeats its claims that the relative position of Andrew Sachs, TZG-Sachs, and the law firm were undisclosed and claims that Andrew Sachs "owed EMSG and the investors in EMSG including EM Group a duty, both as a Board member and as a financial advisor" and through this lack of disclosure violated this duty.

Under Maryland Corporations Article 9A-404(d), "a partner shall discharge the duties to the partnership and the other partners under this title or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing."

Under Maryland Corporations Article 9A-103(b)(5), the partnership agreement may not "eliminate the obligation of good faith and fair dealing under 9A-404(d) of this title, but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable."

Under Maryland Corporations Article 4A-405, "unless otherwise agreed, a member may lend money to and transact other business with the limited liability company and has the same rights and obligations with respect to the transaction as a person who is not a member."

Thus, in Maryland, members of the LLC are free to alter, without eliminating, the scope of the duty of loyalty. Members of the LLC also are free to lend money to the LLC and be treated just like any other lender. "The members' relationship with one another, the affairs of the LLC, and the conduct of the LLC's business are governed by contract, defined as an 'operating agreement.'" *Plank v. Cherneski*, 469 Md. 548, 570 (2020). "The operating agreement adopted by the members addresses, *inter alia*, how the LLC 'shall be managed, controlled, and operated'; the manner in which members share profits and losses; the manner in which new members may be admitted; procedures for assignment of membership interests; and meeting and voting procedures." *Plank*, 469 Md. at 570-571.

Specifically, the Operating Agreement states:

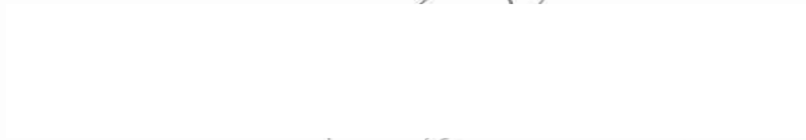
> ***6.5 Other Business Ventures***
>
> ***
>
> Sachs' status as a Member of the Company shall be without prejudice to Sachs's rights (or the rights of its member or Affiliates) to maintain, expand, or diversify such other interests and activities and to receive and enjoy profits or compensation therefrom...Sachs shall not be liable to the Company or any Member for any claim arising out of, or based upon (i) the investment by Sachs or its members or Affiliates (other than Sachs Capital Fund I, LLC) in any entity competitive to the Company or (ii) actions taken by any partner, officer or other representative of Sachs to assist any such competitive company, whether or not such action was taken as a board member of such competitive company or otherwise, and whether or not such action has a detrimental effect on the Company.[46]

[46] Plaintiffs' Motion for Summary Judgment Exhibit A at p.14.

The Operating Agreement allowed Andrew Sachs, or his affiliates, to lend EMSG money and to compete with it.

Conclusion

For the foregoing reasons, plaintiffs' motion for summary judgment is granted on Counts I and III-X and is denied on Count II. It is so ordered this 28th day of September, 2020.



Ronald B. Rubin, Judge