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THE APPROVAL OF THE COMMITTEE ON OPINIONS

DAVID M. NAMEROW, M.D. *Plaintiff,* v. PEDIATRICARE ASSOCIATES, LLC; SCOTT W. ZUCKER, M.D.; JEFFREY M. BIENSTOCK, M.D.; and MELISSA CHISM, M.D. *Defendant.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART BERGEN COUNTY DOCKET No. BER-C-273-17 CIVIL ACTION DECISION

Argued: January 19, 2018
Decided: January 22, 2018

Honorable Robert P. Contillo, P.J.Ch.

Robert Novack, Esq. appearing on behalf of the plaintiff, David M. Namerow. (Bressler, Amery & Ross, P.C.).

Steven D. Gorelick, Esq. appearing on behalf of the defendants, PediatriCare Associates, Scott W. Zucker, M.D., Jeffrey M. Bienstock, M.D., and Melissa Chism, M.D. (Garfunkel Wild, P.C.)

OPINION

I. Statement of the Case

This matter is before the Court by way of Motion filed by defendants PediatriCare Associates, L.L.C. ("PediatriCare" or the "Practice"); Scott W. Zucker, M.D.; Jeffrey M. Bienstock, M.D.; and Melissa Chism, M.D. (collectively, "Defendants") on December 22, 2017. On December 26, 2017, the Court received an amended certification of Steven D. Gorelick, Esq. from Defendants. On January 5, 2018, plaintiff David M. Namerow ("Plaintiff") filed

Opposition. On January 16, 2018, Defendants filed a Reply. On January 18, 2018, the Court heard oral argument and reserved decision.

Defendants seek the entry of an Order dismissing Plaintiff's Amended Complaint with prejudice as to Counts I, II, and III and without prejudice as to Count IV.

The original Verified Complaint in this matter was filed on October 11, 2017. Defendants filed a motion to dismiss same on November 20, 2017. On December 1, 2017, Plaintiff filed an Amended Verified Complaint, prompting the withdrawal of the Defendants' initial motion to dismiss and then the December 22, 2017, revised motion to dismiss.

a. The Operating Agreement

This being a motion to dismiss, the Court accepts as true the facts pled in the Amended Verified Complaint.

Over the course of thirty-eight (38) years, Plaintiff built a medical practice in the field of pediatrics. Ex. A-2 to Corrected Certification of Steven D. Gorelick, Esq. ("Amended Complaint"), ¶ 12. On or about January 1, 2000, Plaintiff and Defendants entered into an Operating Agreement ("Original Operating Agreement") to form a limited liability company known as PediatriCare (the "Practice") with the purpose of operating a medical practice. Id. at ¶ 13. On or about March 12, 2001, Plaintiff and Defendants (the "Members") entered into an Amended Operating Agreement (the "Operating Agreement"). Id. at ¶ 14.

Pursuant to the terms of the Operating Agreement, a Member has a right to retire with a buy-out once the Member has reached the age of sixty (60) years and has provided twenty-five (25) years of membership or employment service to the Practice. Id. at ¶ 15; Ex. B to Certification of Steven D. Gorelick, Esq. ("Gorelick Cert.") at § 9.9. The Operating Agreement further provides that upon retirement, the remaining Members and the Practice:

> shall be obligated to purchase said Member's Interest, at a purchase price equal to the Value of such Interest, which Value shall be determined pursuant to Section 10 hereof (the "Retirement Purchase Price"), upon the terms and conditions set forth herein.

Ex. B to id. at § 9.9. Section 10 states:

> The total value of the Company ("Company Value") shall be the last dated amount set forth on the Certificate of Agreed Value, attached hereto as Exhibit G and made a part hereof, executed by the Members. The Members shall exercise their best efforts to meet not less than once per year for the purpose of considering a new Value but their failure to meet or to determine a Value shall not invalidate the most recently executed Certificate of Agreed Value . . . If the Parties fail to agree on a revaluation as described above for more than two (2) years, the Company Value shall be equal to the last agreed upon Value, adjusted to reflect the increase or decrease in the net worth of the Company, including collectible accounts receivable, since the last agreed upon Value. The value of a Member's Interest ("Value)" shall mean the Company Value multiplied by the Percentage Interest held by said Member and being purchased hereunder, less any indebtedness that the Selling or Disabled Member, the Decedent, or a Member departing for any other reason contemplated hereunder may have to the Company or to the other Members, whichever the case may be.

Ex. B to id. at § 10.

Exhibit G to the Operating Agreement places a value of the Company at $2,400,000.00 dated January 1, 2000. Id. at Ex. G.

Section 25 of the Operating Agreement states that a vote of at least eighty (80) percent of the percentage interests of the members of the Company is required to effectuate an amendment to the Operating Agreement. Ex. B to Gorelick Cert at § 25. Since there are only four Members, such an amendment would effectively require unanimous consent in the absence of a change to the configuration of membership interests.

b. Prior Valuations

In or around January of 2016, Plaintiff announced his intention to retire. Amended Complaint at ¶ 21. It was represented to Plaintiff that the valuation method used to calculate his Value would be a fair market valuation. Id. at ¶ 22. Prior to the dispute, the Members have

never questioned the use of the fair market appraisal methodology in valuing the Practice and on all prior occasions, the Members have employed the fair market valuation methodology. Id. at ¶ 23. The January 1, 2000 Certificate of Agreed Value, fixing the value at $2,400,000.00, was not specifically amended.

i. 2009 BKCT Appraisal

In or about 2009, the Members of the Practice engaged Butzel, Karadimas, Carrabba, Testin, LLC ("BKCT"), a New Jersey CPA firm, to perform a valuation using the fair market valuation methodology for the purpose of assisting the Members in their business and financial planning (the "2009 BKCT Appraisal"). Id. at ¶¶ 24-25. It was not specifically tethered to the retirement pay out of any member of the Practice. BKCT issued a report dated October 28, 2010 (the "2009 Valuation Report"), valuing the Practice at $4,250,000.00. Id. at ¶ 26. Defendants approved the fair market methodology used in the report and accepted the conclusion that the value of the Practice at that time was $4,250,000.00. Id. at ¶¶ 28-29. The January 1, 2000 Certificate of Agree Value, fixing the value at $2,400,000.00, was not amended.

ii. 2016 BKCT Appraisal

In or about March of 2016, the Members of the Practice engaged BKCT to perform another valuation using the fair market valuation methodology for the purpose of assisting in the matter of business and succession planning (the "2016 BKCT Appraisal"). Amended Complaint at ¶ 30. Again, it is not alleged that this valuation was specifically tethered to the retirement pay out of any particular member of the Practice. BKCT issued a report dated October 25, 2016 (the "2016 Valuation Report"), valuing the business at a range from $3,400,000.00 to $5,500,000.00, with a midpoint being $4,450,000.00. Id. at ¶ 32. Defendants approved the fair market valuation

methodology an accepted the 2016 Valuation Report that the value of the Practice was worth $4,450,000.00. Id. at ¶¶ 33-34.

iii. Coker Group's Appraisal

Consistent with prior practice, in or about October of 2016, Defendants engaged the Coker Group ("Coker"), a healthcare consulting firm, to provide a fair market valuation of the Practice for the purpose of determining the retirement purchase price for Plaintiff's retirement. Id. at ¶ 35. In or around December of 2016, Coker issued a final report dated March of 2017 (the "Coker Valuation Report"), which concluded that the Practice's fair market value was $3,412,000.00. Id. at ¶ 37.

Plaintiff questioned how the value of the Practice could be appraised at $3,412,000.00 in December of 2016 when it was appraised at $4,450,000.00 in October 2016 in the 2016 Valuation Report. Id. at ¶ 44. Prior to the Coker Appraisal, there had been a steady increase in the value of the Practice. Amended Complaint at ¶¶ 39-42. Plaintiff believed that since the 2016 BKCT Appraisal, the financial performance of the Practice continued to improve. Id. at ¶ 43. Thereafter, Plaintiff raised questions regarding Coker's reliance upon national survey data and other valuation techniques in light of the steady increase in value of the Practice over the years. Ibid. As a result of his skepticism, Plaintiff subsequently engaged the accounting firm of Gramkow, Carnvale, Seifert & Co., L.L.C. ("GCS") to critique Coker's fair market valuation of the Practice (the "GCS Critique"). Id. at ¶ 48.

iv. Net Worth Valuation Appraisal

Defendants instructed Coker to respond to the GCS Critique. Id. at ¶ 49. In response to the GCS Critique, the Coker Group conducted an additional appraisal, employing a "net worth valuation" appraisal methodology, resulting in a valuation of $3,223,116.00, i.e., less than the

$3,412,000.00 valuation in the earlier (October 2016) Coker valuation. ("Coker Net Worth Valuation Report"). Id. at ¶ 50.

By letter dated July 10, 2017 (the "July 10, 2017 Letter"), Defendants threatened that if Plaintiff did not accept the Coker Group fair market valuation of $3,412,000.00 Defendants would, alternatively, seek to utilize the net worth valuation methodology set forth in the Operating Agreement ($2,400,000.00), even though such methodology had never been previously employed in the sixteen (16) years the Operating Agreement had been in existence. Amended Complaint at ¶ 51. In the July 10, 2017 Letter, Defendants also threatened to reduce the amount to which Plaintiff was entitled as his Retirement Purchase Price by $172,327.00, based upon alleged improper actions taken by Plaintiff while sill practicing. Id. at ¶¶ 52, 54-55.

In response to the July 10, 2017 Letter, Plaintiff proposed that the Members select a neutral, recognized medical practice appraisal firm familiar with the local market which would conduct a fair market value appraisal that would bind the parties. Id. at ¶ 56. Defendants refused. Ibid.

Thereafter, Plaintiff subsequently engaged Mark Dietrich, CPA/ABV ("Dietrich") to critique the fair market valuation of the Practice conducted by the Coker Group. Id. at ¶ 57. In a report dated September 1, 2017 (the "Dietrich Report"), Dietrich placed the value of the Practice in the range of $5,205,000.00 and $6,110,000.00, utilizing Coker's discounted cash flow analysis but substituting reasonable compensation of local physicians in the place of the national survey data relied upon by Coker. Ibid. Defendants refused to permit Dietrich access to relevant financial records of the Practice to allow Dietrich to perform a full, fair market value analysis. Amended Complaint at ¶ 58.

v. Amended Complaint

Count I of the Amended Complaint seeks specific performance of the Operating Agreement "as modified by the parties' course of conduct" to buy-out Plaintiff's membership at a fair market value. Id. at ¶¶ 64-70.

Count II of the Amended Complaint seeks a finding that Defendants have oppressed a minority member of a limited liability company under N.J.S.A. 42:2C-48(a)(5). Id. at ¶¶ 71-77. Count II asserts that Defendants have acted in bad faith by refusing to permit Plaintiff access to relevant financial records of the Practice to permit a fair value appraisal, refused to employ the fair market valuation methodology, and now seek to enforce a net worth valuation methodology to punish Plaintiff for challenging the valuation first presented by Defendants. Id. at ¶ 75.

Count III of the Amended Complaint alleges that Defendants have breached their fiduciary duties owed to Plaintiff. Id. at ¶ 78-80.

Count IV of the Amended Complaint seeks a declaration that the amount to which Plaintiff is entitled as his Retirement Purchase Price should not be reduced by the amounts alleged by Defendants. Id. at ¶¶ 81-87. Also Count IV seeks a declaration that in the event a net worth valuation methodology is employed as Defendants urge, the net worth value is to be a minimum of $6,311,136.00 as reflected in the GCS Net Worth Analysis. Amended Complaint at ¶ 87.

II. Argument

a. Defendants' Argument

i. Count I: Specific Performance

Defendants argue that Count I of the Amended Complaint should be dismissed because Section 10 of the Operating Agreement clearly states the manner in which the Value is to be determined. Brief at 11-12. In particular, the Operating Agreement makes no provision for the

fair market valuation that Plaintiff seeks. Id. at 12. Defendants state that where the terms of a contract are clear and unambiguous, the court must enforce the terms as written. Id. at 11 (citing Risikatv Olajide v. One Main Financial, 2017 WL 2705413 (App. Div. June 23, 2017) (quoting Kutzin v. Pirnie, 124 N.J. 500, 507 (1991)). Defendants highlight that because Plaintiff does not argue that the Operating Agreement is ambiguous, the Operating Agreement must be enforced according to its terms. Id. at 12. Defendants argue that because Plaintiff asks the Court to impose a fair market valuation while the Operating Agreement provides for a valuation by a net worth methodology, Count I should be dismissed. Id. at 12-13.

Defendants argue that Plaintiffs suggest that Operating Agreement has been modified by the parties' course of conduct. Id. at 13. Such a modification, according to Defendants, likewise runs contrary to the Operating Agreement, which specifically provides that the Operating Agreement may be modified or amended only through a vote of eighty (80) percent of the Membership interests, not through the parties' course of conduct. Brief at 13 (citing Associated Bus. Brokers, Inc. v. Calderone, 2010 WL 5420161, at *1 (App. Div. June 28, 2010)).

ii. Count II: Oppression and Count III: Breach of Fiduciary Duty

Defendants argue that the Revised Uniform Limited Liability Company Act ("RULLCA") enumerates specific types of conduct which violate the duties of loyalty and care, none of which are present here. Id. at 14. Moreover, Defendants contend that there can be no valid claim for breach of fiduciary duty or for oppression of minority member's rights based on members in a member-managed company simply acting in conformity with the provisions agreed to by the parties and set forth in an operating agreement. Ibid. More broadly, however, Defendants contend that conclusory claims that Defendants breach some fiduciary duty or violated or oppressed Plaintiff's rights fail to state a claim. Id. at 17.

Defendants contend that the economic loss doctrine bars Plaintiff's non-contractual claims, which are Counts II and III. Id. at 15. Defendants explain that the "economic loss doctrine 'prohibits plaintiffs from recovering in tort economic losses to which their entitlement only flows from a contract." Ibid. (quoting Coleman v. Deutsche Bank Nat. Trust Co., 2015 WL 2226022 at *4 (D.N.J. May 12, 2015) (quoting Duquesne Light Co. v. Westinghouse Elec. Co., 66 F.3d 604, 618 (3d Cir. 1995)). Defendants argue that Plaintiff's allegations are contractual in nature and flow from the Operating Agreement. Brief at 15. As such, Defendants argue that Plaintiff's claims for oppression and fiduciary duties fail. Ibid.

iii. Count IV: Declaratory Relief

Defendants contend that Count IV should be dismissed for lack of ripeness. Id. at 18-19. Defendants highlight that the Amended Complaint was filed on December 1, 2017 and references and attached a new GCS Net Worth Analysis. Id. at 19. However, this Analysis has never been previously provided to Defendants for review. Ibid. Defendants argue that it is impossible to Count IV to reflect a ripe controversy when the subject of that controversy was not even known to Defendants when it was served with the Amended Complaint. Id. at 19-20.

b. Plaintiff's Argument

i. Count I: Specific Performance

Plaintiff argues that the Operating Agreement should be interpreted in light of the course of conduct that occurred over a sixteen (16) year period, which has modified the terms of the Operating Agreement to require a fair market valuation. Opposition at 12. Over a sixteen (16) year period, Plaintiff and Defendants have repeatedly ignored the express terms of Section 10 of the Operating Agreement. Ibid. Rather, on all prior occasions, where a valuation of the Practice was performed, the Members employed the fair market valuation methodology. Id. at 13.

Plaintiff states that it is well-established under New Jersey law that "parties to an existing contract, by mutual assent, may modify their contract, and modification can be proved by an explicit agreement to modify, or … by the actions and conduct of the parties, so long as the intention to modify is mutual and clear." Id. at 12 (quoting Elliott & Franz, Inc. v. Ingersoll-Rand Co., 457 F.3d 312, 322 (3d Cir. 2006)). Plaintiff cites to the 2009 BKCT Appraisal and the 2016 BKCT Appraisal for establishing this course of conduct. Id. at 13.

Plaintiff contends that Defendants mistakenly argue that a modification under the Operating Agreement was never approved by the requisite eighty (80) percent of the Membership interests. Id. at 13. Plaintiff highlights that all Members, constituting one hundred (100) percent Membership interests, approved the use of a fair market valuation methodology on every occasion where valuation of the Practice was performed. Opposition at 14. Plaintiff contends that an oral modification through the parties' course of conduct was expressly contemplated under the Operating Agreement's integration and amendment clauses, which do not require that a modification or amendment be in writing. Ibid. (citing Ex. A-2 to Corrected Gorelick Cert. at § 25, 26.9).

ii. Count II: Oppression

Plaintiff argues that Count II is a credible claim for oppression because Plaintiff had a reasonable expectation that his membership interest would be purchased using a fair market valuation methodology. Id. at 16. Plaintiff cites to the fair market valuations requested by the Members in 2009, March of 2016, and October of 2016. Ibid. Despite Section 10 of the Operating Agreement, a net worth valuation was never previously used. Ibid. Moreover, Plaintiff argues that because in October of 2016, the fair market valuation of the Practice was calculated to $4,450,000.00, and that the Practice had continued improvement in financial

performance, that Plaintiff's expectation that the fair market value has increased was reasonable. Id. at 17. Plaintiff contends just two months prior in December 2016, the fair market value of the practice was listed at $3,412,000.00. Opposition at 18. The GCS Critique placed a fair market value of the Practice in excess of $5,500,000.00. Ibid. Plaintiff argues that by threatening to employ a net worth valuation methodology that results in a substantially lower value, this frustrated Plaintiff's reasonable expectations. Id. at 18-19. When Dietrich was hired by Plaintiff, Plaintiff requested access to certain financial records to complete the valuation but Defendants refused. Id. at 19. Plaintiff contends that Defendants have not acted in good faith. Ibid.

iii. Count III: Fiduciary Duty

Plaintiff contends that as Member-Managers of the Practice who each have a twenty-five (25) percent ownership interest, each owe each other fiduciary duties of loyalty and care at law and under the RULLCA. Id. at 19 (citing N.J.S.A. 42:2c-39(a)). Moreover, a member of a limited liability company owes a fiduciary duty of loyalty and care to the company and other members that arises by virtue of the members' trust relationship. Opposition at 19-20. Plaintiff contends that Defendants breached the fiduciary duties of care and loyalty owed to Plaintiff when they engaged in questioning the validity of Coker's fair market valuation, threatening to employ the net worth valuation methodology if Plaintiff did not accept Coker's fair market valuation at $3,412,000.00. Id. at 20. Plaintiff argues that Defendants likewise engaged in bad faith conduct when it withheld financial records of the Practice in precluding Dietrich from performing his fair market value analysis. Ibid.

Plaintiff moreover argues that the economic loss doctrine is not applicable to Plaintiff's claims for fiduciary duty and minority oppression. Id. at 21-23. Plaintiff argues that the

economic loss doctrine does not bar Plaintiff's claims where Defendants owed Plaintiff fiduciary duties at law and under the RULLCA, which are independent from any contractual obligations under the Operating Agreement. Id. at 21. Finally, Plaintiff contends that Defendants cannot use the business judgment rule to shield them from liability for their bad faith conduct. Id. at 22 (citing Anklowitz v. Greenbriar, 2014 N.J. Super. Unpub. LEXIS 2123, at *9 (App. Div. Aug. 29, 2014)).

iv. Count IV: Declaratory Relief

Plaintiff argues that his claim is ripe because Defendants, even if they were not aware previously, are now aware that Plaintiff contests their net worth valuation. Opposition at 23. Nonetheless, at all relevant times, Plaintiff claims to have contested the amount of the net worth valuation and expressed such contention in his response to the July 10, 2017 Letter. Ibid. Plaintiff never agreed to Defendants' proposed net worth value. Ibid.

c. Defendants' Reply

In Reply, Defendants largely reiterate their arguments. However, Defendants point out that Plaintiff never contends that a vote occurred, which is required under the Operating Agreement to effectuate a modification or amendment. Reply at 2. Defendants contend that Plaintiff's attempts to distinguish the economic loss doctrine from the facts of this case is incorrect. Id. at 3. In particular, to Defendant, Plaintiff's argument is that a breach of duty arose from the application of net worth methodology in Section 10 of the Operating Agreement. Ibid. Defendants contend that there is no independent duty, distinct from the Operating Agreement. Ibid. Defendants argue that Plaintiff's repeated allegations that Defendants acted in "bad faith" or were "punishing" Plaintiff, simply by applying the plain terms of Section 10 of Operating Agreement. Ibid.

III. Analysis

a. Legal Standard

A defendant may move to dismiss a plaintiff's complaint for failure to state a cause of action under R. 4:6-2(e). R. 4:6-2(e). On a motion under R. 4:6-2(e), the court must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. See Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). The Court will accept Plaintiff's well-pleaded facts as true for purposes of assessing the viability of Plaintiff's pleading. The court must afford the plaintiff every reasonable inference of fact. Ibid. If the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). But, if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997). A motion to dismiss for failure to state a claim may be addressed to specific counts of the complaint, and the court, on a motion to dismiss the entire complaint, has the discretion to dismiss only some of the counts. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), certif. den. 153 N.J. 405 (1998) (dismissing contract and fraud claims, but sustaining intentional interference and promissory estoppel theories).

If the court relies on any materials outside of the pleadings, a motion to dismiss for failure to state a cause of action automatically converts to a summary judgment motion. R. 4:6-2(e); Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 337 (App. Div.), certif. den. 188 N.J. 353 (2006). However, a motion to dismiss on the pleadings does not convert into a summary judgment motion when a party files, and the court relies on, documents referred to in the pleadings. See N.J. Sports Prods., Inc. v. Bostick, 405 N.J. Super. 173, 178 (Ch. Div. 2007); see

also Dickerson &Sons, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n.1 (App. Div. 2003) (reasoning that the courts may consider "a document integral to or explicitly relied upon in the complaint" without converting a motion to dismiss into a summary judgment motion), aff'd, 179 N.J. 500 (2004). Courts will also consider exhibits attached the complaint and matters of public record in consideration of a motion to dismiss. See Banco, supra, 184 N.J. at 183.

b. Count I: Specific Performance

Count I of the Amended Complaint seeks specific performance of the Operating Agreement as modified by the parties' course of conduct to buy-out Plaintiff's membership at a fair market value. Under New Jersey law, "where the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the courts must enforce those terms as written." Levison v. Weintraub, 215 N.J. Super. 273, 276 (App. Div. 1987). However, New Jersey has long recognized the ability to modify one's contract. DeAngelis v. Rose, 320 N.J. Super. 263, 280 (App. Div. 1999). "A modification can be proved by 'an explicit agreement to modify or by the actions and conduct of the parties as long as the intention to modify is mutual and clear.'" Wells Reit II-80 Park Plaza, LLC v. Dir., Div. of Taxation, 414 N.J. Super. 453, 466 (App. Div. 2010) (quoting DeAngelis, supra, 320 N.J. Super. at 280).

Count I of the Amended Complaint suggests a cause of action for specific performance. This Court's inquiry with respect to specific performance of an Operating Agreement must naturally start with the text of the Operating Agreement. While Section 10 of the Operating Agreement describes the methodology for a valuation, Section 25 states that upon a vote of at least eighty (80) percent of the percentage interests of the members of the Company, a modification of the Operating Agreement will come into effect. Ex. A-2 to Corrected Gorelick Cert. at § 25. Section 25 of the Operating Agreement is ambiguous with respect to whether a

modification must be in writing. It does so not state explicitly. Moreover, the integration clause found in Section 26.9 of the Operating Agreement is silent on the issue of whether a writing is required for a modification to be effective as well. Id. at § 26.9. The Court does not decide that the Operating Agreement was modified, but determines that Plaintiff has plead with sufficient particularity to suggest a cause of action for specific performance based upon a prior course of conduct. Plaintiff pleads in his Amended Complaint that fair market valuation methods used in the 2009 BKCT Appraisal, the 2016 BCT Appraisal, and the 2016 Coker Report were approved by Defendants and Plaintiffs at the time. Moreover, Plaintiff contends that Defendants in particular accepted the conclusions found therein as true. Although Plaintiff is ambiguous as to who exactly told him, he states in his Amended Complaint that he was told that a fair market valuation would be used to calculate his Value upon retirement. Amended Complaint at ¶ 22. This is sufficient to plead a cause of action for specific performance of an agreement modified by course of conduct reflecting "mutual and clear" intent of all the parties, sufficient to withstand a motion to dismiss.[1]

Defendants' citation to the holding in Associated Bus. Brokers, Inc. v. Calderone, 2010 N.J. Super. Unpub. LEXIS 1418 (App. Div. June 28, 2010) leads to no different result. Calderone involved a brokerage agreement that required an amendment to be in writing whereas here, the Operating Agreement does not require a modification or amendment to be in writing. However, even if the Operating Agreement's integration clause required that a modification be in

[1] It appears that only the initial Coker fair market value is said to be tethered to the retirement of a member; specifically the retirement of Plaintiff. The Court acknowledges that parties may undertake Practice valuations for reasons having nothing to do with the retirement of a Member. The Court also acknowledges that the only valuation said to be undertaken with respect to a Member's retirement was the initial Coker fair market value appraisal said to have been undertaken in connection with Plaintiff's contemplated retirement. It remains to be seen whether that single retirement-tethered valuation, whether alone or considered in conjunction with the two (2) preceding valuations, can amount to a course of conduct reflecting a "mutual and clear" intent of all parties to abandon the value stated in the Certificate of Agreed Value. This is a decision on a motion to dismiss, not a decision on the merits of the underlying dispute.

writing, New Jersey law states that a court may still conclude that the parties to a contract may modify its terms by subsequent agreement. See McGrath v. Poppleton, 550 F. Supp. 2d 564, 571 (D.N.J. 2008) ("At common law, an oral agreement is sufficient to modify or rescind a written contract, notwithstanding a provision in the written contract purporting to require that subsequent modifications be evidenced by a writing."); Estate of Connelly v. United States, 398 F. Supp. 815, 827 (D.N.J. 1975) ("Even a formal agreement which expressly states that it cannot be modified except in writing, is subject to modification by oral agreement since the requirement for a writing it itself subject to modification."). Accordingly, Count I of the Amended Complaint suggests a cause of action. For that reason, Defendants' Motion to Dismiss Count I of the Amended Complaint with prejudice is denied.

c. Count II: Oppression

Count II of the Amended Complaint seeks a finding that Defendants have oppressed a minority member of a limited liability company. Count II points to Defendants' conduct in refusing to permit Plaintiff access to relevant financial records of the Practice to permit a fair value appraisal, refusal to employ the fair market valuation methodology, and their insistence on enforcing a net worth valuation methodology to punish Plaintiff for challenging the valuation first presented by Defendants.

RULLCA permits a member of a limited liability company to apply to the Court for an "order dissolving the company on the grounds that the managers or those members in control of the company . . . have acted . . . in a manner that is oppressive and was, is, or will be directly harmful to the applicant." N.J.S.A. 42:2C-48(a)(5). Oppression has been defined as "frustrating a [member's] reasonable expectations" and "is usually directed at a minority [member]

personally . . . ." Brenner v. Berkowitz, 134 N.J. 488, 506 (1993). The Court is moreover, authorized to:

> order the sale of all interests held by a member who is a party to the proceeding to either the limited liability company or any other member who is a party to the proceeding, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case.

N.J.S.A. 42:2C-48(b).

Count II of the Amended Complaint suggests a cause of action for oppression. Plaintiff contends that he had a reasonable expectation that a fair market valuation would be used. Plaintiff cites to the several valuations conducted with a fair market value, including the 2009 BKCT Appraisal, the 2016 BCT Appraisal, and the 2016 Coker Report that, he says, gave him an expectation that a fair market valuation would be conducted in connection with Plaintiff's retirement. Plaintiff moreover pleads that Defendants and Plaintiff not only requested the fair market valuations but Defendants also approved the conclusions of the valuations. Plaintiff contends that he was told that a fair market valuation would be used when calculating his Value upon retirement. Amended Complaint at ¶ 22. The Court finds that Count II therefore suggests a cause of action as Plaintiff arguably had a reasonable expectation that the sole valuation methodology employed during sixteen (16) years since the creation of the Operating Agreement —fair market value as opposed to stated value — would likewise be utilized in connection with Plaintiff's imminent retirement. Threatening Plaintiff with a valuation that would baselessly reduce his payout on retirement, along with Defendants' alleged refusal to permit Plaintiff access to financial records, suggests a claim for oppression sufficient to survive a motion to dismiss.

Defendants' insistence that the doctrine of economic loss prevents either Count II or Count III is unsupported by case law. A tort remedy may arise from a contractual relationship where the breaching party owes an independent duty imposed by law. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 311 (2002). Defendants cannot successfully claim that under RULLCA Defendants owe no fiduciary duties to one another. Even assuming the Operating Agreement sought to limit fiduciary duties of Members, the law creates an outer bound for such contracting. While the RULLCA "is to be liberally construed to give the maximum effect to the principle of freedom of contract," an operating agreement may not "eliminate the duty of loyalty, the duty of care, or any other fiduciary duty." N.J.S.A. 42:2C-11(c)(4). Moreover, an operating agreement may not "eliminate the contractual obligation of good faith and fair dealing." N.J.S.A. 42:2C-11(c)(5). Because a contracting party who enters into an Operating Agreement may allege both violations in connection with the Operating Agreement and, at the same time, allege violations of a fiduciary duty or oppression, Defendants' argument is rejected, for purposes of this motion. Accordingly, for the foregoing reasons, Defendants' Motion to Dismiss Count II with prejudice is denied.

d. Count III: Breach of Fiduciary Duty[2]

Count III of the Amended Complaint alleges that Defendants have breached their fiduciary duties owed to Plaintiff. Plaintiff contends that the duties alleged to have been violated are the duties of loyalty and care.

In a member-managed limited liability company, each member owes the company and other members a duty of loyalty and duty of care. N.J.S.A. 42:2C-39(a)-(c). A breach of the duty of loyalty requires a fact-specific analysis. Cameco, Inc. v. Gedicke, 157 N.J. 504, 516

[2] The Court rejects Defendants' argument that the doctrine of economic loss prohibits Count III of the Amended Complaint for the reasons set forth in the Court's analysis of Count II.

(1999). "The contexts giving rise to claims of employee disloyalty are so varied that they preclude the mechanical application of abstract rules of law." Ibid. Notwithstanding the need for flexibility when evaluating claims of disloyalty, certain principles emerge. The scope of the duty of loyalty that an employee owes to an employer may vary with the nature of their relationship. Traditionally, the duty of loyalty prohibits the accumulation of secret profits, conflicts of interest, usurping business opportunities, unfair competition. Lamorte Burns & Co. v. Walters, 167 N.J. 285 (2000). While the duty of loyalty may be cabined under an Operating Agreement, it may not be eliminated. N.J.S.A. 42:2C-11(c)(4). Plaintiff does not plead facts that suggest a cause of action for the breach of the duty of loyalty. There are no facts suggesting a claim of usurping business opportunities, unfair competition, or conflicts of interests. For that reason, Defendant's Motion to Dismiss as to Count III insofar as Count III seeks a claim based upon the breach of the duty of loyalty is granted, without prejudice.

In a member-managed limited liability company, each member owes the company and other members a duty of care. N.J.S.A. 42:2C-39(a)-(c). However, "if not manifestly unreasonable," an operating agreement may: (i) identify types or categories of activities that do not violate the duty of loyalty; (ii) alter the duty of care, except that the operating agreement may not authorize intentional misconduct or a knowing violation of law; (iii) alter any other fiduciary duty, including eliminating the particular aspects of that duty; and (iv) prescribe the standards to measure the performance of good faith and fair dealing. N.J.S.A. 42:2C-11(d).

Section 8.4 of the Operating Agreement states:

> Each Manager and the President shall exercise his or her business judgment in participating in the management of the Company's business, operations and affairs. Unless fraud, gross negligence, willful misconduct or a wrongful taking shall be proved by a nonappealable court order, judgment, decree or decision, each Manager and the President shall not be responsible, liable or obligated to the

> Members or the Company for any mistake of fact or judgment or for the doing of any act or the failure to do any act by the Managers . . ."[3]

Ex. B to Gorelick Cert. at § 8.4. Moreover, Section 26.5 of the Operating Agreement states:

> Manager shall not be personally liable for failure to perform in accordance with, or to comply with the terms and conditions of [the Operating] Agreement or for any other reason unless such failure to perform or comply or such other reason constitutes fraud, gross negligence or willful misconduct by the Manager.

Id. at § 26.5.

Viewing the facts alleged by Plaintiff in the light most favorable to Plaintiff, Count III suggests a cause of action for the violation of the duty of care. If Plaintiff's factual theory is true, Defendants may arguably have committed "willful misconduct" or committed a "wrongful taking" of Plaintiff's property. While the factual record would need development, the Court cannot foreclose that opportunity to Plaintiff at such an early stage in litigation.

e. Count IV: Declaratory Relief

Count IV of the Amended Complaint seeks a declaration that the amount to which Plaintiff is entitled as his Retirement Purchase Price should not be reduced by the amounts alleged by Defendants. Also Count IV seeks a declaration that in the event a net worth valuation methodology is employed as Defendants urge, the net worth value is to be a minimum of $6,311,136.00 as reflected in the GCS Net Worth Analysis. Defendants argument that Plaintiff "effectively concedes that the [Operating] Agreement requires use of the Net Worth Methodology" is not true. Reply at 4. Plaintiff is pleading in the alternative, which is permitted by R. 4:5-2.

Moreover, Defendants argument that Plaintiff's claim for declaratory relief is not ripe because Defendants had not seen the GSC Net Worth Analysis until the filing of an Amended

[3] Defendants fail to provide to the Court pages 17 and 18 of the Operating Agreement.

Complaint lacks support in the law. A declaratory judgment claim is ripe for adjudication when there is an actual controversy, meaning that "the facts present concrete contested issues conclusively affecting the parties' adverse interests." Carter v. Doe, 230 N.J. 258, 275 (2017). In contrast, a declaratory judgment claim is not ripe for judicial determination if (1) review of the issue would require additional factual development; or (2) the facts illustrate that the rights or status of the parties are "future, contingent, and uncertain." Garden State Equal v. Dow, 434 N.J. Super. 163, 189 (Law Div. 2013). Here, neither of those instances are present. Hence, Defendant's Motion to Dismiss with respect to Count IV is denied.

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss is granted in part and denied in part. The Motion is denied in all respects except that Plaintiff's allegation of breach of the duty of loyalty is dismissed, without prejudice. A responsive pleading shall be filed within ten (10) days. A Case Management Conference is hereby scheduled for February 8, 2018 at 11:00 AM. An Order accompanies this Decision.

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ROBERT P. CONTILLO, P.J.CH.