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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Bradley D. Wine, Esq., Natalie A. Fleming Nolen, Esq., Eileen M. Brogan, Esq., Arvid S. Miriyala, Esq., Morrison & Foerster LLP, and Stephen B. Stern, Esq., Jonathan P. Kagan, Patrick W. Daley, Esq., Kagen Stern Marinello & Beard LLC, counsel for defendants Eli Kimel, Barclay Booth, Travis Booth, and EM Group, LLC.

Memorandum and Order

On August 27, 2020, the parties appeared, through counsel, for a hearing on the defendants' motion for preliminary injunction. The court concludes that the motion should be denied for the reasons set out below.

Procedural Background

The plaintiffs, Sachs Capital Fund, I, LLC, Sachs Capital-Empire, LLC, and Sachs Capital-Empire B, LLC (the "Sachs Entities"), and Sachs Capital, LLC, are limited liability companies organized under the laws of Delaware, with their principal place of business in

Potomac, Maryland. Sachs Capital, LLC, is the managing member of each of the plaintiff 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. 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]

Defendant Eli Kimel ("Kimel") is a representative of EM Group, is the chief executive officer of EMSG, and is a member of EMSG's Board of Managers. Under EMSG's operating agreement, Kimel is responsible for the management of the operations of EMSG, subject to oversight by the Board of Managers. Defendant Barclay Booth is a representative of EM Group and a member of EMSG's Board of Managers. Andrew Sachs is also a member of the Board of Managers. Travis Booth is the outside general counsel and the son of Barclay Booth.

After a hearing on May 22, 2020, the Court entered a Temporary Restraining Order ("TRO") against defendants EM Group and Kimel, requiring them to deposit the proceeds of the sale of Empire Petroleum Partners, LLC into the Registry of the Clerk of the Circuit Court for Montgomery County, Maryland. The court also appointed a special fiscal agent to represent the interests of EMSG, which is not represented by counsel.

On June 1, 2020, the plaintiff Sachs Entities, intervenor plaintiff TZG-Sachs, and defendants EM Group, LLC and Kimel agreed to convert the Court's May 22, 2020 TRO into a Preliminary Injunction that will remain in effect until final judgment is entered in this action. In

[1] Defendants' Exhibit 3 at Exhibit B

the Consent Preliminary Injunction Order, the Court authorized immediate payment of the amounts due and owing to Intervenor Plaintiff TZG-Sachs.

On August 14, 2020, EM Group, Kimel, Barclay Booth and Travis Booth, collectively, filed a motion for preliminary injunction seeking to prevent the distribution of any of the funds deposited into the Registry of the Court from the sale of Empire Petroleum Partners, LLC, to TZG-Sachs. The motion seeks to change what they consented to on June 1, 2020.

Arguments of the Defendants

According to the movants' motion for preliminary injunction, Andrew Sachs and TZG-Sachs Empire, LLC ("TZG-Sachs") failed to disclose material facts related to conflicts of interest to the EMSG board when TZG-Sachs loaned EMSG $17 million on November 21, 2011. The defendants allege that, when the loan was made, Andrew Sachs owned 46% of TZG-Sachs, served as one of its two managing members, and that The Zitelman Group, Inc. ("TZG") owned 46% of TZG-Sachs and was an investor in the Sachs entities and in Sachs Capital, LLC. The defendants contend that, as a consequence of these conflicts of interest, the loan was not properly authorized and should be rescinded. According to the defendants, it was not until June 26, 2020, after this court entered a TRO (May 22, 2020) against EM Group and Kimel and after EM Group and Kimel agreed to convert that May 22, 2020 TRO into a Preliminary Injunction (June 1, 2020), that they say they first became aware of Mr. Sachs's interest in TZG-Sachs. In fact, as shown at the preliminary injunction hearing, Sachs Capital, LLC owns a 9.2% interest in TZG-Sachs. TZG-Sachs does not own any interest in the Sachs Entities.

Discussion

In considering a movant's motion for preliminary injunction, the court considers four factors: (1) the likelihood that the plaintiff will succeed on the merits; (2) the "balance of convenience" determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest. *LeJeune v. Coin Acceptors*, Inc., 381 Md. 288, 300-301 (2004). "The burden of proving the facts necessary to satisfy these factors rests on the party seeking the interlocutory injunction." *Fogle v. H&G Restaurant*, 337 Md. 441, 456 (1995). "It is well-accepted that if a party cannot establish that it has a likelihood of success on the merits, then no interlocutory injunction should be granted." *Id.* The movants have not carried their burden of proof with respect to any of the four factors. The court has determined that the following issues are dispositive as to all claims advanced in the motion for preliminary injunction. Therefore, there is no need to, and the court does not, rule on the plaintiffs' other contentions at this time.

I. Likelihood of Success

First, it is unlikely that the movants will succeed on the merits. In their effort to rescind the loan, the defendants, the parties seeking a preliminary injunction, are seeking to enforce the rights of EMSG, the borrower, not their own rights. EMSG has a court-appointed special fiscal agent, who has not asked for this or any other sort of relief in connection with the TZG-Sachs loan. Nor have the moving parties introduced any evidence showing, or even suggesting, that the terms of the loan were commercially unreasonable or in any way unfair. Further, the moving defendants do not say, really, what is wrong with the loan, when, and how, in fact, they

discovered the allegedly non-disclosed information, when they sought rescission (if they did so), or why they have not ratified the transaction by continuing to accept its benefits.

Standing

The borrower was EMSG, a limited liability company. The members of EMSG are the EM Group, of which Kimel is a representative, and the Sachs Entities, of which Andrew Sachs is the representative. There is a three-member Board of Managers, only one of which is a Sachs affiliate. 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 stockholder 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 corporations 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 pled, much less shown, in this case. In any event, it is not altogether clear that pre-suit demand would be futile in this case, at least since May 29, 2020, the date of the court appointment of a special fiscal agent. At the very least, the special fiscal agent could review a demand and recommend to the court; (1) that the defendants should be allowed to pursue the derivative claim on behalf of the LLC; (2) that further investigation by the special fiscal agent was necessary; or (3) that a demand-review committee be established. The defendants, to date, have not asked the special fiscal agent to do so.

Standard of Review

The defendants contend that, at this juncture, the court should look to Delaware law and apply the "entire fairness" standard of review to the TZG-Sachs loan, thereby shifting the burden of proof to the Sachs Entities to show that the loan transaction, made initially in 2011, and re-stated on November 21, 2016, was entirely fair to EMSG. The defendants do not cite any Maryland authority for this proposition.

This court is aware that Delaware, for some time, has applied the entire fairness standard of review to corporate transactions involving a controlling or dominating stockholder who stood on both sides of a business or financial transaction.[2] *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1115-17; (Del. 1994) *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (1983). This standard subsequently has been applied by the Delaware courts to self-dealing transactions between a limited liability company and its managers. *William Penn Partnership v. Saliba*, 13 A.3d 749, 756-57 (Del. 2011); *see Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212-16 (Del. 2012). Here, Kimel and Barclay Booth control the Board of Managers of EMSG.

EMSG's operating agreement states:

> This limited liability company agreement of EMSG, LLC is entered into and made effective as of July [6], 2011 (the "Effective Date"), by Sachs Capital, Fund I, LLC, a Delaware limited liability company, and Sachs Capital-Empire, LLC, a Delaware limited liability company (collectively, "Sachs"), and EM Group, LLC, a Maryland limited liability company ("EMG"), on the following terms and conditions:...

[2] In *Bender v. Schwartz*, 172 Md. App. 648, 670-71 (2007), the Court of Special Appeals discussed, but had no occasion to adopt or apply, the entire fairness standard, as derived from Delaware precedents.

5. Management and Operation of Business

5.1 Board of Managers.

(d) The Board shall consist of three (3) members. Two (2) members of the Board shall be designated, and may be removed and replaced, solely by EMG (the "EMG Designated Managers"), and the initial Persons to serve as such are Eli Kimel and Barclay Booth. One (1) member of the Board shall be designated, and may be removed and replaced, solely by Sachs (the "Sachs Designated Manager"), and the initial Person to serve as such is Andrew Sachs. Each EMG Designated Manager will hold office until such Board member's death, disability, resignation, or removal by written direction of EMG. The Sachs Designated Manager will hold office until such Board member's death, disability, resignation, or removal by written direction of Sachs. Upon a vacancy occurring on the Board, Sachs or EMG, as applicable, shall promptly designate a Person to fill such vacancy, and deliver written notice thereof to the other Member."[3]

Under Delaware law, with sole control of only one (1) of three (3) seats on the Board of Managers, Andrew Sachs does not control EMSG's Board of Managers. For that reason alone, entire fairness is not the appropriate standard of review for this transaction.

It is not entirely clear that the entire fairness standard, even were it to be adopted in Maryland, would (1) apply to the loan transaction at issue and (2), if it applied, would alter the burden of proof for purposes of a preliminary injunction on a transaction that was entered into in 2011, some nine (9) years ago. The moving parties have cited the court to no authority on these questions.

Rescission

Under Maryland common law, a conflicted transaction (even one not induced by fraud), or an arm's-length transaction induced by fraud, may be avoided. *Sommers v. Dukes*, 208 Md. 386, 392 (1955). However, "[r]egardless 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

[3] Defendants' Exhibit 3 at p. 1, 6.

promptly upon discovery of the fraud or misrepresentation." *Cutler v. Sugarman Organization, Ltd.*, 88 Md. App. 567, 578 (1991). At a minimum, "the party exercising a right to rescind [must] notify the other party and demonstrate an unconditional willingness to return to the other party both the consideration that was given and any benefits received." *Id.* If a party fails to do so, he may have waived the right to rescind by "continuing to treat the contract as a subsisting obligation." *Michael v. Towers*, 253 Md. 114, 117 (1969). In other words, absent a few well-recognized exceptions which do not apply in this case, if a party fails to act with alacrity, or does any act that recognizes the validity of the contract and retains its benefits, he will be held to have affirmed the contract and waived the right to rescind. *Lazorcak v. Feuerstein*, 273 Md. 69, 76-78 (1974); *Kemp v. Weber*, 180 Md. 362, 365-66 (1942); *Bagel Enterprises, Inc. v. Baskin & Sears*, 56 Md. App. 184, 200-01 (1983). In short, no specific reasons have been given as to why the loan would be voided ab initio, essentially giving EMSG a "free," no interest loan for some nine (9) or so years.

II. Balancing Test

Second, the balancing test tilts heavily against the defendants in this case. "Under Maryland law there is a prima facie presumption that an attorney has the authority to bind his client by his actions relating to the conduct of litigation." *Beck v. Beck*, 112 Md. App. 197, 204-205 (1996); *Secor v. Brown*, 221 Md. 119, 123 (1959). The defendants' lawyers did so when they consented to the preliminary injunction. This is "particularly the case where admissions were made in the course of trial." *Beck*, 112 Md. App. at 205. Furthermore, "the rule is properly extended to admissions made on behalf of a client in documents drafted and filed in the ordinary course of litigation." *Id.* An admission is defined broadly to include "the words or acts of a party

opponent…offered as evidence against him" and "admissions are considered to be substantive evidence of the facts admitted." *Id.*

In Maryland, in civil cases, "where a party fails to take the stand to testify as to facts peculiarly within his knowledge, or fails to provide evidence (e.g., testimony by certain witnesses) the fact finder may infer that the testimony not produced would have been unfavorable to that party." *Hayes v. State*, 57 Md. App. 489, 495 (1984); *DiLeo v. Nugent*, 88 Md. App. 59, 69 (1991); *Brooks v. Daley*, 242 Md. 185, 194 (1966). "The unfavorable inference applies where it would be most natural under the circumstances for a party to speak, or present evidence." *DiLeo*, 88 Md. App. at 69. Importantly, "it would be generally agreed, to be sure, that the mere fact of the party's failure to testify is not itself open to inference; it is his failure when he could be a useful and natural witness…that is significant." *Hayes*, 57 Md. App. at 495-496 (citing 2 WIGMORE ON EVIDENCE (3d ed.) 289, p. 173)). Neither Kimel nor Barclay Booth disavowed their lawyer's actual authority to bind them.

In a very carefully worded affidavit, dated August 14, 2020, at ¶ 12, Kimel says that during the "negotiations" for the loan, he did not know that Sachs owned any interest in TZG-Sachs. Curiously, Kimel's affidavit does not say when he learned of Sachs's interest in TZG-Sachs. Kimel does not say who negotiated on behalf of EMSG, the borrower, and who negotiated on behalf of TZG-Sachs, the lender. Kimel does not say whether he and Barclay Booth, who constituted a majority of the Board of Managers, reviewed or approved the loan, and if so, why and under what circumstances. He also does not say what financing alternatives were reasonably available to EMSG in lieu of the TZG-Sachs loan, whether in 2011, or at any time since inception.

As stated above, in their motion for preliminary injunction, defendants EM Group, Kimel, Barclay Booth, and Travis Booth claim that "on or about June 26, 2020, after the Court entered the Consent Preliminary Injunction Order on June 11, 2020, Defendants learned that Mr. Sachs was both a manager of TZG-Sachs and a 46% owner of TZG-Sachs" when "it received the Confidential Private Placement Memorandum as an exhibit attached to Plaintiffs' Motion to Dismiss or in the alternative Motion for Summary Judgment." However, in the Answer and Counterclaims defendants EM Group, and Kimel submitted to this Court on May 27, 2020, in response to the Sachs Complaint, defendants stated that:

> In December 2019, Mr. Kimel and the EMSG Board learned for the first time that the Sachs Entities were major lenders in the TZG Loan, and therefore Mr. Sachs would gain from a default on the TZG Loan while Mr. Kimel and all other EMSG investors would lose their security interest in EPH.[4]

This statement serves as a judicial admission to this Court, through a pleading, that Mr. Kimel and the EMSG Board learned about the loan for the first time in December 2019. This prior judicial admission tilts the balancing test heavily against the defendants because it means that 1) EM Group and Kimel knew of the involvement of Andrew Sachs in December 2019 and have since failed to even attempt to rescind the loan and that 2) EM Group and Kimel knew of the involvement of Andrew Sachs on June 1, 2020, when EM Group and Kimel agreed to this Court's conversion of the Mary 22, TRO into a preliminary injunction in which this Court authorized immediate payment of amounts due and owing to TZG-Sachs from the sale proceeds deposited into the registry of the Court.

[4] Intervenor Plaintiff TZG-Sachs Exhibit 1 at ¶ 159

At the Preliminary Injunction hearing, both Barclay Booth and Kimel took the stand. Neither of them denied that they gave their legal team actual authority in these matters. As people in positions where it would have been natural to speak up when presented with information that went directly against their specific knowledge, this Court draws a negative inference against Kimel and Barclay Booth that their attorneys did, in fact, have actual authority.

III. – IV. Irreparable Injury and Public Policy

Movants will not suffer irreparable harm in this case because they knew about the relative position of the parties, at the latest, in December 2019 and, on June 1, 2020, agreed that the Court should authorize immediate payment of amounts due and owing to TZG-Sachs from the sale proceeds deposited into the registry of the court.

That the movants have to pay what they owe is not against public policy. Instead, allowing these highly sophisticated movants to borrow, for free, $17 million from TZG-Sachs for nine (9) years, would be heavily against public policy.

Conclusion

For the foregoing reasons, the defendants' motion for a preliminary injunction is denied. It is so ordered this 10th day of September, 2020.

Ronald B. Rubin, Judge