STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

KATHLEEN KARCZEWSKI, an individual; and TANYA CRAIG, an individual,

Plaintiffs/Counter-Defendants,

vs.

MARKET CENTER TITLE COMPANY, LLC, a Michigan limited liability company,

Defendant/Counter-Plaintiff,

and

JON A. JACKSON, an individual; KAROL COOLEY, an individual; MICHELE T. BROWN, an individual; and CHARLES FAST, an individual,

Defendants.
_______________________________________/

Case No. 13-04651-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING SUMMARY DISPOSITION TO THE DEFENDANTS ON COUNTS ONE AND TWO OF PLAINTIFFS' COMPLAINT

Manus manum lavat. That Latin phrase, which means one hand washes the other, captures the essence of the real-estate business. Here, two successful real-estate agents – Plaintiffs Kathleen Karczewski and Tanya Craig – seek to continue to reap the benefits of a lucrative affiliated business called Market Center Title Company, LLC ("Market Center") despite the plaintiffs' move from the entity that devised Market Center, *i.e.*, Grand Rapids Market Center East, Inc. d/b/a Keller Williams of Grand Rapids, East ("Keller Williams East"). Because the plaintiffs' voluntary exit from Keller Williams East justified the repurchase of their membership units in Market Center, the Court must award summary disposition to the defendants on the bulk of the plaintiffs' claims.

I. Factual Background

The defendants have moved for the entry of summary disposition under MCR 2.116(C)(8) and (10). When addressing the defendants' request for relief under MCR 2.116(C)(8), the Court may consider "only the pleadings." See Maiden v Rozwood, 461 Mich 109, 120 (1999). In contrast, the Court "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in weighing the defendants' summary-disposition request pursuant to MCR 2.116(C)(10). See id. Accordingly, the Court shall limn the facts by referring to the complaint in the first instance and then augmenting those allegations with evidence presented "in the light most favorable to the part[ies] opposing the motion." See id. But the Court must preface its discussion of the facts with a brief history of congressional legislation that puts the current dispute in its proper context.

In 1974, Congress enacted the Real Estate Settlement Procedures Act ("RESPA"), 12 USC 2601, *et seq*, to reform a real-estate industry rife with kickbacks and referral fees that unnecessarily drove up the cost of real-estate transactions. Freeman v Quicken Loans, Inc, 132 S Ct 2034, 2037-2038 (2012). But in broadly prohibiting kickbacks and referral fees, see 12 USC 2607(a), Congress recognized one specific relationship – an affiliated business arrangement – that passes muster under RESPA. See Carter v Welles-Bowen Realty, Inc, 736 F3d 722, 724 (6th Cir 2013). That is, in 1983, Congress "added a safe harbor for 'affiliated business arrangements'" in 12 USC 2607(c)(4), which requires that: "(1) The person making the referral must disclose the arrangement to the client; (2) the client must remain free to reject the referral; and (3) the person making the referral cannot receive any 'thing of value from the arrangement' other than 'a return on the ownership interest or franchise relationship.'" Carter, 736 F3d at 725. Predictably, real-estate agencies like Keller Williams East flocked to this safe harbor.

In June 2000, Plaintiffs Karczewski and Craig began working as real-estate agents under the broker's license of Keller Williams East. Shortly thereafter, in 2001, Keller Williams East's agents and managers formed Defendant Market Center as a Michigan limited liability company that owns a controlling financial stake in Grand Rapids Title Company ("GR Title"). See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit A (Affidavit of Jon A. Jackson, ¶¶ 1-2, 6). By all accounts, Market Center qualifies as an affiliated business arrangement under RESPA, so its members can receive funds as returns on their ownership interests even though the funds are derived from GR Title. Indeed, one benefit of a successful career with Keller Williams East is an invitation to invest in Market Center, and thereby qualify for distributions of funds from that affiliated business arrangement. See id. (Affidavit of Jon A. Jackson, ¶¶ 7-9). Plaintiffs Karczewski and Craig were both afforded the opportunity to become "Series B Members" in Market Center, and they both chose to do so for a modest per-unit purchase price.[1] See id., Exhibit C. Consequently, they both received substantial pay-outs in the form of Market Center net profits during their tenure as real-estate agents with Keller Williams East.

On October 23, 2012, Plaintiffs Karczewski and Craig voluntarily left Keller Williams East, but they expressed the desire to retain their membership interests in Defendant Market Center. See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit A (Affidavit of Jon A. Jackson, ¶¶ 17-20). Then, on March 29, 2013, Defendant Jon Jackson, acting in his capacity as the manager of Market Center, executed assignments of the plaintiffs' Series B units to Market Center

[1] Plaintiff Karczewski bought a total of 12 Series B units for $18,500. See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit C. She purchased her first seven units for $500 per unit, and she paid $3,000 for each of her last five units. See id. Plaintiff Craig bought three Series B units for the sum of $1,500, which amounted to $500 per unit. See id. Both sides seem to agree that the purchase prices bore no relationship to the actual value of the units.

"pursuant to a power of attorney contained in Plaintiffs' subscription agreements."[2] Id. (Affidavit of Jon Jackson, ¶ 22); see also id., Exhibit F (assignments of membership interests). The plaintiffs responded by filing this action on May 20, 2013, alleging breach of fiduciary duties, willfully unfair and oppressive conduct, and denial of access to books, records, and financial information. Market Center, in turn, lodged two counterclaims for breach of contract against the plaintiffs. Ultimately, on April 28, 2014, all of the defendants sought summary disposition pursuant to MCR 2.116(C)(8) and (10).

II. Legal Analysis

The defendants' summary-disposition request pursuant to MCR 2.116(C)(8) "tests the legal sufficiency of the complaint." Maiden, 461 Mich at 119. Such relief may be awarded "only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" Id. In contrast, the defendants' demand for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." Id. at 120. Thus, the Court may grant relief under that provision if "the proffered evidence fails to establish a genuine issue regarding any material fact[.]" Id. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003). Applying these well-established standards, the Court shall consider the plaintiffs' claims *seriatim*.

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[2] Defendant Market Center apparently tried to return to the plaintiffs the full amounts of their respective contributions for all of their Series B units. See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit A (Affidavit of Jon A. Jackson, ¶ 23). Market Center's operating agreement calls for such reimbursement – and nothing more – upon repurchase of Series B units. See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit B (2007 Operating Agreement, § 6.5(A)) & Exhibit E (2012 Operating Agreement, § 6.6(F)).

A. Breach of Fiduciary Duties.

Defendant Market Center operates as a limited liability company ("LLC"), which Michigan law recognizes as "a form of 'hybrid business entity that offers all of its members limited liability as if they were shareholders of a corporation but treats the entity and its members as a partnership for tax purposes.'" Dawson v DeLisle, No 283195, slip op at 3-4 (Mich App July 21, 2009). Under the Michigan Limited Liability Company Act, MCL 450.4101, *et seq*, an LLC can install a manager or managers to run the entity, see MCL 450.4403(1), and the manager or managers are obligated to operate the LLC "in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company." See MCL 450.4404(1). Therefore, LLCs "involve fiduciary relationships." Dawson, No 283195, slip op at 4. Here, the plaintiffs contend that all of the "Series A" members of Market Center, including Defendant Jackson as the manager of Market Center and Defendants Karol Cooley, Michele Brown, and Charles Fast as mere Series A members, breached their fiduciary duties by improperly dealing with the Series B members, including both of the plaintiffs. The Court finds at least two fundamental flaws in this claim.

First, although "a fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship," The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute, 266 Mich App 39, 43 (2005), the language of the Michigan Limited Liability Company Act expressly requiring "that a manager discharge duties 'in the best interests of the limited liability company,' MCL 450.4404(1), indicates that a manager's fiduciary duties are owed to the company, not the individual members." Dawson, No 283195, slip op at 4. Thus, the plaintiffs cannot assert a claim for breach of fiduciary duties in their capacity as individual members of Defendant Market Center. See id. Second, even if the manager of Market Center and all of the Series A members owed fiduciary duties to the plaintiffs as individual members, Defendant Jackson clearly discharged his responsibilities as the manager of Market Center in a manner consistent with his fiduciary duties. Specifically, every iteration of the Market Center operating agreement permits the manager of Market Center "in his sole discretion" to repurchase Series B units when a "Series B Member's affiliation with [Keller Williams East] is voluntarily or involuntarily terminated."[3] See Brief in Support of Defendant's Motion for Summary Disposition, Exhibit B (Amended and Restated Operating Agreement of August 1, 2007, § 6.2(g)(ii)) & Exhibit E (Amended and Restated Operating Agreement of December 1, 2012, § 6.3(b)). Therefore, the Court concludes that neither Defendant Jackson nor Market Center itself nor any of the Series A members of Market Center breached any fiduciary duties to the plaintiffs when Jackson repurchased the plaintiffs' Series B units based upon their voluntary departure from Keller Williams East. Accordingly, the Court must award summary disposition under MCR 2.116(C)(10) to the defendants on the claim for breach of fiduciary duties.

B. Unfair and Oppressive Conduct.

The plaintiffs' most promising claim involves an assertion of unfair or oppressive conduct under MCL 450.4515. As our Supreme Court has observed, MCL 450.4515(1)(b) "provides that if a member of a limited liability company establishes that the acts of managers or members in control

[3] To be sure, the 2007 version of the operating agreement includes a typewritten reference to "[t]he Series B Member's affiliation with Keller Williams Realty," amended by a hand-written reference to Keller Williams "of Grand Rapids East" in the place of Keller Williams "Realty." See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit B (Amended and Restated Operating Agreement of August 1, 2007, § 6.2(g)(ii)). But the fact remains that each version of the operating agreement allows the manager to repurchase the Series B units of any member who leaves Keller Williams East. Moreover, even the initial reference to "Keller Williams Realty" in context must be regarded as synonymous with "Keller Williams East."

of a limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company ***or the member***, 'the circuit court may issue an order or grant relief as it considers appropriate, including . . . the cancellation or alteration of a provision in the articles of organization.'" Ewie Co, Inc v Mahar Tool Supply, Inc, 483 Mich 905, 906 (2009) (emphasis added). In this case, the plaintiffs seek to nullify the Market Center manager's authority to repurchase their Series B units upon their departure from Keller Williams East based upon their argument that either the authorization itself or the manager's exercise of that authority constitutes a willfully unfair and oppressive act.

Under MCL 450.4515(2), willfully unfair and oppressive conduct "means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." But that "term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure." See MCL 450.4515(2). In this case, Defendant Jackson – as the manager of Market Center – repurchased the Series B units of the plaintiffs pursuant to unambiguous language in the Market Center operating agreement allowing him to take such action based upon the plaintiffs' departure from Keller Williams East. See Brief in Support of Defendant's Motion for Summary Disposition, Exhibit B (Amended and Restated Operating Agreement of August 1, 2007, § 6.2(g)(ii)) & Exhibit E (Amended and Restated Operating Agreement of December 1, 2012, § 6.3(b)). Given the fact that Market Center devised the Series B units as an incentive and benefit for real-estate agents affiliated with Keller Williams East, the Court must conclude that the plaintiffs were not subjected to willfully unfair and oppressive conduct when their Series B units were repurchased because of their departure from Keller Williams East. Indeed, permitting the plaintiffs to retain their Series B units merely because they remain within the Keller Williams family, as opposed to the specific broker's license of Keller Williams East,[4] would at least dilute, and at most defeat, the entire Market Center concept of Series B units as an incentive to join and remain with Keller Williams East.[5] Had the plaintiffs been dispossessed of their Series B units while operating under the broker's license of Keller Williams East, they might have a viable claim. But given the plaintiffs' departure from Keller Williams East, the Court concludes that the plaintiffs cannot succeed on their claim for unfair and oppressive conduct under MCL 450.4515. Accordingly, the Court shall grant summary disposition to the defendants on that claim.

C. Denial of Access to Books and Records.

The plaintiffs' final claim rests upon the allegation that the defendants denied them access to the books and records of Defendant Market Center. Under Michigan law, a member of an LLC is entitled, upon written request, to the LLC's "most recent annual financial statement and its most recent federal, state, and local income tax returns," see MCL 450.4503(1), as well as "true and full information regarding the current state of a limited liability company's financial condition." See id., 450.4503(2). The plaintiffs made a proper demand in a letter dated January 10, 2013, see Complaint, Exhibit H, and the record does not conclusively establish that the defendants ever complied with that

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[4] Keller Williams East is a franchisee of Keller Williams International. Both sides agree that the plaintiffs are now affiliated with a different franchisee of Keller Williams International.

[5] In an ironic twist, the plaintiffs fault Defendant Jackson for, *inter alia*, failing to repurchase the units "of favored Series B members who did not meet their threshold real estate sales volumes[,]" and thereby "diluting Plaintiffs' interests in Market Center . . . ." See Complaint, ¶ 58(b). But the plaintiffs simultaneously fault Jackson for repurchasing their Series B units based on their departure from Keller Williams East, even though their departure meant that they would no longer be required to assist Keller Williams East or Market Center in any way, which would almost certainly dilute the interests of Market Center Series B members who remained with Keller Williams East.

demand. At this point, and in light of the Court's rulings on the plaintiffs' other claims, the demand for information under MCL 450.4503 may no longer matter to the parties. Nevertheless, the Court cannot award summary disposition simply by surmising that the parties no longer wish to contest the plaintiffs' right to the information demanded in the letter they sent on January 10, 2013. Thus, the Court must deny summary disposition to the defendants on the plaintiffs' claim alleging deprivation of access to the books and records of Defendant Market Center.[6]

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall grant summary disposition to all of the defendants pursuant to MCR 2.116(C)(10) on the claims set forth in Counts One and Two of the plaintiffs' complaint. Consequently, the plaintiffs can no longer seek redress for any alleged breach of fiduciary duties or unfair and oppressive conduct. But the plaintiffs may persist in their claim for deprivation of access to the books and records for Defendant Market Center. Moreover, the Court still must resolve Market Center's counterclaims for breach of contract. Those remaining matters shall discussed at a status conference at 4:15 P.M. on Wednesday, August 27, 2014.

IT IS SO ORDERED.

Dated: August 25, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

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[6] To be fair to the record, the Court must acknowledge that the defendants' brief begins with a request for "summary disposition of Counts I and II of Plaintiffs' Complaint," so the Court does not yet have a formal request for summary disposition on Count Three of the complaint.