STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
DOCKET NO. BCD-CV-2019-042
(cons. w/ BCD-CV-2019-041)

TUCKER J. CIANCHETTE

Plaintiff,

v.

ERIC L. CIANCHETTE, PEGGY A. CIANCHETTE and PET, LLC,

Defendants.

COMBINED ORDER ON DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS OR FOR A MORE DEFINITE STATEMENT

Before the Court are two motions: Defendants' motion for partial judgment on the pleadings according to M. R. Civ. P. 12(c), and Defendants' motion to dismiss the complaint, or in the alternative, for a more definite statement. The Court grants Defendants' motion for a partial judgment on the pleadings. The Court denies Defendants' motion to dismiss or for a more definite statement, except with regard to Plaintiff's request for attorney fees, for which Defendants' motion is granted.

BACKGROUND

PET is a Maine limited liability company which owns and operates the Casco Bay Ford dealership located in Yarmouth, Maine. Plaintiff Tucker Cianchette, and Defendants Eric and Peggy Cianchette are members of PET LLC each owning a 33%, 34%, and 33% interest respectively. The operation of PET and the rights and responsibilities of members and managers of PET are governed by the LLC Agreement of PET ("LLC Agreement").

In June of 2016, Plaintiff Tucker filed a lawsuit against Eric and Peggy for, among other things fraud, breach of contract, and breach of fiduciary duty with regard to the operation of PET, as well as Eric and Peggy's conduct in relation to a proposed sale of their PET membership interests. Significantly, the breach of fiduciary duty verdict against Peggy was founded in large part on Peggy's actions as manager of PET. Peggy was found to have artificially inflated rent paid by PET to another LLC of which Eric and Peggy were members, and made loans to other commonly owned LLCs while acting as manager of PET. As a result of the 2016 lawsuit, Tucker was awarded $5,900,000 in damages on March 5, 2018. The Law Court affirmed the judgment on June 4, 2019.

Tucker now brings this current lawsuit under the belief that Peggy, still acting as manager of PET LLC, has conspired with Eric to continue engaging in the wrongful conduct for which they were already held liable in the 2016 lawsuit. In particular, Tucker asserts Defendants have continued to charge PET exorbitant rent to occupy property owned by another of Defendants' commonly owned LLCs. Likewise, Tucker alleges Defendants have continued to loan PET's money to their own entities. Both actions were already found in violation of the PET LLC Agreement, as well as the LLC Act. Additionally, Tucker asserts Defendants have engaged in additional wrongful conduct not previously the subject of litigation in the 2016 lawsuit. These claims involve Peggy refusing to make distributions of PET cash flow as provided for in the LLC Agreement, Defendants payment of interest on their capital contributions to PET, as well as Tucker's suspicion that other wrongful acts are occurring out of his sight.[1] Tucker believes Defendants Eric and Peggy Cianchette intentionally seek to reduce or eliminate any financial benefit to him from PET despite his 33% membership interest. In response to Tucker's

[1] Tucker asserts he has made formal requests for access to the financial books and records of PET but had not been provided those documents prior to the filing of his complaint, or oral argument which occurred on 12/2/19.

complaint, Defendants have filed two motions, one seeking a declaratory judgment, and the other a motion to dismiss the complaint, or in the alternative for a more definite statement.

STANDARD OF REVIEW

In this matter, Defendants have filed both a motion for partial judgment on the pleadings, as well as a motion to dismiss the complaint. When a motion for a judgment on the pleadings is filed by the defendants pursuant to M.R. Civ. P. 12(c), only the legal sufficiency of the complaint is tested. *Wawenock, LLC v. Department of Transporation*, 2018 ME 83, ¶ 4, 187 A.3d 609 (citing *Cunningham v. Haza*, 538 A.2d 265, 267 (Me. 1998) (quotation marks omitted). A defendants' motion for judgment on the pleadings is treated identically to a motion under M. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted. *Id.*

In reviewing a motion to dismiss under Rule 12(b)(6), the Court "consider[s] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id*. (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id*. "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law" and thus subject to de novo appellate review. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141.

DISCUSSION

I. Defendants' Motion for a Partial Judgment on the Pleadings

Defendants seek partial judgment on the pleadings to resolve this legal question: does the PET LLC Agreement create a mechanism to accomplish a business dissolution? In practical terms, Defendants seek to hire an independent, third party certified public accountant to determine the fair market value of Casco Bay Ford, transfer PET's assets to another LLC in which Peggy and Eric have membership interests, and distribute cash payment to all three members of PET in accordance with Section 4.4 of the LLC Agreement. Defendants assert this process qualifies as a "Capital Transaction" as defined in the LLC Agreement, and thus with majority support, can be used to effectuate the proposed business dissolution.

Conversely, Tucker asserts that his answer and affirmative defenses are sufficient to establish facts that when viewed in the light most favorable to him, prevent the Court from making this decision as a matter of law. Likewise, Tucker insists granting the motion at issue would require the Court to ignore questions of fact regarding Defendants' fiduciary duties, as well as their duty of good faith and fair dealing. However, Defendants do not ask for (and the Court would not grant), a waiver of liability for breaches of any of their duties as part of this motion.

Tucker also points to the LLC Agreement which provides: any "dealings and undertakings" with affiliates of members of PET are permissible, so long as they are on terms which are at "arm's length and commercially reasonable." (Pl.'s Ex. A §5.4.3.) Tucker insists whether the transaction would be at arm's length and commercially reasonable is a question of fact. The Court is not asked at this time whether the *execution* of the proposed capital transaction will be at arm's length and is commercially reasonable. The transaction has not yet occurred, and multiple procedural and substantive safeguards can be implemented to ensure that the process is

fair, and that it results in an arm's length and commercially reasonable transaction. Rather, the Court is asked at this junction to decide only whether the procedure described by Defendants qualifies as a capital transaction under the LLC Agreement and is thus an acceptable method of achieving a business dissolution. LLC Agreements are contracts, and it is black letter law that the interpretation of a contract is a question of law. *QAD Investors v. Kelly*, 2001 ME 116, ¶ 13, 776 A.2d 1244. Thus, this inquiry is purely legal and Tucker's arguments to the contrary are unpersuasive.

Limited liability companies in Maine are governed by the Maine Limited Liability Company Act ("the LLC Act"). The LLC Act provides: "the limited liability company agreement governs relations among members as members and between the members and the limited lability company." 31 M.R.S. § 151(1). When an LLC agreement speaks to an issue, it controls. 31 M.R.S. § 1521(1), 1522. Otherwise, the LLC Act controls, or fills in the gaps of the agreement. 31 M.R.S. § 1521(2).

Defendants assert the PET LLC Agreement speaks directly to how a business dissolution may be achieved. Specifically, Defendants contend a Capital Transaction as defined in Section 4.4 of the LLC Agreement allows them, with majority approval, to sell PET's assets to another of their LLCs, or to merge with one. According to Section 4.4 of the LLC Agreement, a Capital Transaction is:

> any transaction not in the ordinary course of business which results in the Company's receipt of cash or other consideration other than Capital Contributions, including, without limitation, proceeds of sales or exchanges or other dispositions of property not in the ordinary course of business, financings, refinancing, condemnations, recoveries of damage awards, and insurance proceeds.

(Pl.'s Ex. A § 4.4). Accordingly, a capital transaction may include the sale of PET's assets, or another transaction so long as it is outside the ordinary course of business and results in PET's receipt of cash or other consideration. In effect, the business of PET would be sold, or merged with another LLC, and PET's members would receive payment for their interests based on PET's fair market value, and the distribution rules found in the LLC Agreement. Defendants' general plan to value the business, transfer its assets, and distribute payment to PET's members qualifies as a Capital Transaction.

Plaintiff Tucker contends a merger does not qualify as a capital transaction, as it is not explicitly listed as one of the examples of such a transaction in its LLC Act definition. Additionally, Tucker asserts that plans of merger are not directly spoken to elsewhere in the LLC Agreement, and thus, the provisions of the LLC Act control. Section 1642 of the LLC Act provides that "[a] plan of merger must be consented to by all members of the constituent limited liability company." 31 M.R.S. 1642(a).

Despite PET's failure to explicitly include a cash-out merger as an example of a capital transaction, the definition makes clear that the definition includes specific examples "without limitation." A capital transaction as described in the LLC Agreement must be a transaction, not in the ordinary course of business, that results in PET receiving cash or other consideration. A cash-out merger satisfies this definition and thus, Tucker's argument is unpersuasive.

Likewise, Tucker's argument that the capital transaction described by Defendants would violate Section 1554 of the LLC Act is unpersuasive. Section 1554 provides: "[a] person does not have a right to demand and receive a distribution from a limited liability company in any form other than money. Except as otherwise provided. . . a limited liability company may distribute an asset in kind if each person receives a percentage of the asset equal in value to the

member's share of distributions." Section 1544 does not apply to Defendants' proposed transaction. Defendants are not requesting distributions of PET assets in kind to them personally. Instead, Defendants aim to participate in an arm's length transaction, resulting in the sale or merger of PET's assets with another LLC. The fact that Defendants are members of the other LLC does not transform the capital transaction into a distribution of assets directly to members.

In addition to Defendants' argument that a capital transaction as defined in the LLC Agreement provides a mechanism for a business dissolution, Defendants assert a capital transaction can be initiated with or without Tucker's approval. The PET LLC Agreement provides the manager (Defendant Peggy Cianchette) substantial authority to make decisions on behalf of the company. It establishes the manager's powers as follows:

> The Manager shall have full, exclusive and complete discretion, power, and authority, subject in all cases to the other provisions of this Agreement and the requirements of applicable law, to manage, control, administer and operate the business and affairs of the Company for the purposes herein stated, and to make all decisions affecting such business and affairs [. . .]

(Pl.'s Ex. A § 5.1.2.) Nevertheless, the LLC Agreement also specifies particular transactions, such as capital transactions, that must receive member approval. These transactions are labeled "Extraordinary Transactions". (Pl.'s Ex. A § 5.1.3.1.) The LLC Agreement also provides a process for achieving approval of the members; either an affirmative vote by a 51% majority of Members, or by a written instrument indicating "consent of Members holding a majority of the Percentages then held by members." (Pl.'s Ex. §§ 5.2.2, 5.2.3.) Accordingly, the approval of Peggy and Eric Cianchette, amounting to 67% of Percentages held by members, would satisfy the LLC Agreement's required member approval.

In conclusion, the Court holds that Defendants' proposed valuation of PET, transfer of its assets (via sale or cash-out merger), and provision of cash distributions to its members qualifies as a capital transaction as defined by Section 4.4 of the PET LLC Agreement. Thus, the parties may achieve a business dissolution in accordance with this procedure. The Court does not herein express any opinion about the *execution* of this procedure, nor as to any breach of duty by either party that could arise as part of the process.

II. Defendants' Motion to Dismiss or for a More Definite Statement

In addition to their motion requesting partial judgment on the pleadings, Defendants seek dismissal of Plaintiff's claims against them, or in the alternative a more definite statement. Defendants assert that all of the Counts included in Plaintiff Tucker's complaint: 1) are barred by the doctrine of *res judicata,* 2) fail to state a claim upon which relief can be granted, or 3) are remedies and not independent claims that stand alone as causes of action.

a. Res Judicata Does Not Bar Tucker's Claims

The doctrine of *res judicata* consists of two concepts: issue preclusion and claim preclusion. *Pearson v. Wendell,* 2015 ME 136, ¶ 23, 125 A.3d 1149. While issue preclusion prevents the re-litigation of factual issues already decided in a prior case, claim preclusion prevents the litigation of claims that were, or could have been litigated in a prior case. *Town of Mt. Vernon v. Landherr,* 2018 ME 105, ¶ 15, 190 A.3d 249; *Portland Water Dist. v. Town of Standish,* 2008 ME 23, ¶ 8, 940 A.2d 1097. Defendants argue Counts I, II, IV, V, VI, VIII, and IX of Tucker's complaint were based, "in whole or in part, on matters which were, or could have been, litigated in the 2016 Lawsuit and are, therefore, barred." (Mot. Dismiss 5.)

Count I of Tucker's complaint is a claim for breach of contract against Defendants alleging they breached the LLC Agreement as well as the covenant of good faith and fair dealing. Specifically, Tucker contends Defendants have:

> (i) continu[ed] a no interest loan to the Cianchette Family, LLC; (ii) establish[ed] the rent amount to be paid by PET to Cianchette Family, LLC at an above market rent for their own benefit and to the detriment to Tucker; (iii) refus[ed] to provide Tucker access to the financial and operating information of PET and Casco Bay Ford; (iv) fail[ed] to make distributions of PET cash flow when and as required; (v) conduct[ed] the business of PET in a manner designed to create expenses benefitting only Eric and Peggy or their other family members while decreasing net profits available to distribute to the members of PET (including Tucker) and (vi) intentionally or through acts of gross negligence, reduc[ed] the value of PET; all causing Tucker damage.

(Pl.'s Compl. ¶ 38.) Tucker also repeats and realleges all preceding paragraphs of his Complaint. Importantly, in paragraph 15, Tucker explains that even after the verdict rendered in the 2016 Lawsuit, Defendants have continued many of the same practices. Tucker asserts Defendants have actually increased PET's rent, and have continued to loan PET's money to their own entities, both in violation of the jury's findings in the 2016 lawsuit. Further, Tucker specifies that Defendants' refusal to distribute Cash Flow of PET in accordance with section 4.1.2. of the LLC Agreement is one of multiple wrongful acts that were not, and could not, have been dealt with in the 2016 Lawsuit. (Pl.'s Compl. ¶¶ 19, 22, 24.) Accordingly, the Court will not dismiss Tucker's claims raised in Count I. Tucker has alleged some of Defendants' wrongful actions, initially litigated in the 2016 lawsuit, have continued. Further, Tucker alleges additional wrongful actions that were not litigated at all in the 2016 Lawsuit. To the extent these claims are unclearly

articulated, Tucker's receipt of PET LLC's financial and operating information, as well as discovery, may or may not provide support for his allegations.

Counts II, IV, and V of Tucker's complaint, alleging breach of fiduciary duty against Defendant Peggy, civil conspiracy against both Defendants, and for a declaratory judgment, are based primarily on the same allegations as Count I. In addition, Count IV alleges both Defendants have conspired to deprive Tucker of the benefits of his ownership interest in PET. Likewise, Defendants justification for dismissal is the same; *res judicata* bars relitigating claims that were, or could have been litigated in the 2016 Lawsuit. This justification is similarly unpersuasive with regard to these claims. Accordingly, Tucker may proceed on Counts II, IV, and V.

Counts VI, VIII, and IX of Tucker's complaint all seek specific remedies: dissociation, injunctive relief/ specific performance, and punitive damages respectively. Defendants argue that in each case, Tucker cannot take a second bite at the apple for relief he should have requested in the 2016 Lawsuit. However, as acknowledged above, Tucker has adequately pleaded claims for both new, and continued wrongful conduct. The Court will not bar Tucker from requesting relief in the current lawsuit as a result of him not requesting the same type of relief in the 2016 Lawsuit.

b. Plaintiff Does Not Fail to State a Claim

In addition to arguing Tucker's claims are barred by *res judicata,* Defendants contend Counts I and II relate to damages suffered by PET as opposed to damages suffered by Tucker individually and are therefore derivative claims. Only if Tucker's claims involved actual or threatened injuries *not* solely the result of an injury suffered or threatened to be suffered by the limited liability company, Defendants assert, would Tucker's claims be valid.

Defendants raised this very issue in the 2016 Lawsuit. *Cianchette v Cianchette*, CV-16-249, 2018 WL 1138457, at *12 (Me. Super. Jan. 12, 2018). Derivative actions may be treated as direct actions "if justice requires." To determine if justice requires a derivative action be treated as a direct action, Courts consider whether claims involve oppressive action by majority shareholders against the interests of minority shareholders or alleged breaches of fiduciary duty owed to minority shareholders. *Id.* In this case, like the 2016 Lawsuit, Tuckers allegations, if proven, would constitute the oppression of a minority shareholder by two majority shareholders. Thus, Tucker's claims may be treated as direct actions under 31 M.R.S. § 1637(3)(A), as they were in the 2016 Lawsuit. *See Id.*

In Count IV, Tucker asserts Defendants engaged in a civil conspiracy against him. Defendants argue that even if the Court found the claim not barred by *res judicata*, it would still fail. Particularly, Defendants point to the perceived lack of tort claim against Eric, and argue without such a claim, a claim for conspiracy fails. Maine recognizes civil conspiracy where a tort is committed by one defendant, and other defendants are proven to have acted in concert with the commission of the tort. *See Cohen v. Bowdoin*, 288 A.2d 106, 112 (Me. 1972). Tucker states a tort claim for breach of fiduciary duty against Defendant Peggy, pertaining to her role as manager of PET. Therefore, Tucker can proceed with his civil conspiracy claim at this stage.

Finally, with respect to Count VI, Defendants assert Tucker lacks standing to bring his dissociation claim. In support, Defendants point to Section 1582 of the LLC Act. Specifically, Defendants cite language in Section 1582(5) that provides: "*On application by the limited liability company*, the person is expelled as a member by judicial order […]", to establish that the only avenue to such a judicial order is when requested by the LLC itself. 31 M.R.S. § 1582(5) (emphasis added). Despite Section 1582 discussing dissociation only when requested by the LLC

itself, an individual member may still apply for such relief in limited scenarios. The right of a member to maintain an action to enforce a right of an LLC is acknowledged in the LLC Act. 31 M.R.S. § 1632. As stated previously, an action which might otherwise be derivative may be brought directly by a minority member "if justice requires." 31 M.R.S. § 1637(3)(A). Courts will consider the possibility of minority member oppression when considering if justice requires. Tucker alleges facts that, if proven, establish his oppression as a minority member. Accordingly, the Court will not dismiss Tucker's claim for dissociation at this stage.

c. Plaintiff is Not Entitled to Seek Attorney's Fees

As part of his complaint, Tucker requests attorney fees as part of his potential damage award. Defendants seek dismissal of this request. In the absence of contractual or statutory liability, counsel fees are not recoverable either in tort or contract actions.[2] *Soley v. Karll,* 2004 ME 89, ¶ 10, 853 A.2d 755, 758 (Me. 2004); *Gagnon v. Turgeon*, 271 A.2d 634 (Me. 1970). Neither the LLC Agreement, nor the LLC Act include a provision granting attorney fees in potential litigation. Accordingly, Tucker's claim for counsel fees is dismissed.

d. Counts III, VII, VIII and IX of the Complaint May Proceed Despite Not Existing as Independent Claims

Defendants contend Counts III, VII, VIII, and IX of the Complaint must be dismissed as they seek a specific remedy but do not set for the underlying claim upon which relief can be granted. This argument is unpersuasive.

Maine is a notice pleading state. Notice pleading requires that a complaint give "fair notice of the cause of action" by providing a short and plain statement of the claim showing that

[2] Plaintiff cites *Samsara Memorial Trust v. Kelly, Remmel & Zimmerman,* 2014 ME 107, ¶ 48, 102 A.3d 757 for the proposition that the Court has inherent power to award attorney fees if it deems necessary to fully compensate a plaintiff for their loss or injury suffered. In *Samsara,* the Court authorized the award of attorney fees after concluding the Maine Fraudulent Transfer Act authorized such an award.

the pleader is entitled to relief. *Burns v. Architectural Doors and Windows,* 2011 ME 61, ¶ 16, 19 A.3d 823 (citing M.R. Civ. P. 8(a)(1)). A complaint need not identify the particular legal theories that will be relied upon, but it must describe "the essence of the claim and allege facts sufficient to demonstrate that the complaining party has been injured in a way that entitles him or her to relief." *Id.* at ¶ 17 (citing *Johnston v. ME. Energy Recovery Co.,* 2010 ME 52, ¶ 16, 997 A.2d 741). Neither Maine's notice pleading standard, nor the Maine Rules of Civil Procedure require Plaintiffs to plead their claims and relief sought in single counts. Additionally, Maine Courts have previously rejected arguments that damage claims should be denied because they were pled as a separate count, noting that separate counts merely put the Court on notice of the damage claims. *See Murray v. Murray*, No. CV-05-161, 2006 WL 5255496, at *3 (Me. Super. Dec. 13, 2006). Thus, Plaintiff may proceed on Counts III, VII, VIII, and IX at this stage.

e. Defendants' Motion for a More Definite Statement is Denied

Finally, in the alternative to their motion to dismiss, Defendants request the court order Tucker to provide a more definite statement of claims asserted against them. Generally, a motion for a more definite statement is available only where a defendant could not reasonably be required to frame their answer to a pleading because of its vagueness or ambiguity. *Nadeau v. Fogg*, 145 Me. 10, 70 A.2d 730 (1950); *Brown v. Rouillard,* 117 Me. 55, 102 A. 701 (1917). A motion for a more definite statement under Rule 12(e) is not designed to act as a substitute for discovery, or to merely insure a defendant is better prepared for trial.

In his complaint, Tucker asserts Defendants have continued certain behaviors deemed wrongful in the 2016 Lawsuit. Particularly, Tucker alleges Defendants have continued to artificially inflate the rent paid from PET to another company owned by Defendants, and that they have continued to loan PET's money to their own entities in violation of the jury's findings

in the 2016 Lawsuit and their duties under the LLC Agreement, and LLC Act. (Pl.'s Compl. ¶ 15.) Tucker also alleges Defendants have engaged in additional wrongful acts and acts of oppression, specifically: withholding year-end cash flow distributions from Tucker, refusing to provide Tucker with PET's financial documents, and using PET's financial resources for their own personal use. (Pl.'s Compl. ¶¶ 19, 22, 24.) These facts, as alleged, are sufficient to put Defendants on notice of the claims asserted against them. Defendants can be reasonably expected to frame an adequate answer to the pleadings. Thus, Defendants' motion for a more definite statement under Rule 12(e) is denied.

CONCLUSION

In summary, Defendants' motion for a partial judgment on the pleadings is granted. The Court agrees with Defendants that the PET LLC Agreement allows Defendants to initiate a "Capital Transaction", a process by which a business dissolution may be achieved. The Court expresses no opinion here about the *execution* of the process, as it has not yet begun. The Defendant's motion to dismiss or for a more definite statement is GRANTED only with respect to attorney fees, but is otherwise DENIED for the remainder of Plaintiff's claims.

The Clerk of the Business and Consumer Court will schedule a telephonic conference between the Court and counsel for the parties to implement a Case Management Scheduling Order. The teleconference will also address a possible stay of the business dissolution process until discovery has been completed.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: December 16, 2019

____/s_____
Justice M. Michaela Murphy
Business and Consumer Court