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NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 25, 2023

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Emailed and mailed 9/25/23

Re: *Johnson, et al.* v. *Bella Gravida, LLC, et al.*, CL 2019-17643

Dear Mr. Altmiller, Mr. Greaves, and Ms. Miles:

Before the court are Plaintiffs' motion for reconsideration of the court's order of March 23, 2023 imposing sanctions on Plaintiffs (filed by Plaintiffs' new counsel) and a similar motion by Plaintiffs' trial (and now former) counsel. For the reasons set forth below, both motions are DENIED.

BACKGROUND

Plaintiffs' case against Defendants Bella Gravida, LLC and Evans upon Plaintiffs' Second Amended Complaint ("SAC") proceeded to trial on January 30, 2023 through February 1, 2023. The SAC asserted claims for

OPINION LETTER

fraud (Count I), common law conspiracy (Count II), violations of the Virginia Limited Liability Company Act (the "LLC Act") (Count III), and breach of contract (Count V).[1]

At trial, the fraud claim was dismissed on Defendants' motion to strike because there was no evidence of a misrepresentation of a pre-existing fact that induced Plaintiffs to sign the MUPA;[2] the conspiracy claim was also dismissed on a motion to strike because it was based upon the fraud claim.

The claim for violation of the LLC Act as to Defendant Evans was dismissed on a motion to strike: i) because the claim was brought as a derivative claim and the claim was not a proper derivative claim as it did not seek a benefit for the LLC, but only for Plaintiffs, and ii) because the SAC indicated that the demands for documents were made on the LLC[3] and, as such, only the LLC has duties under the applicable provision of the statute; the motion to strike the claim for violation of the LLC Act as to the LLC was denied and that claim went forward.

The breach of contract claim was dismissed on a motion to strike as to Defendant Evans because the contract that was allegedly breached was only between Plaintiffs and the LLC; the breach of contract claim as to the LLC was also dismissed on a motion to strike because there was no evidence supporting most of the alleged breaches and, for those provisions that were breached, no damages were proven.

Following the close of all the evidence, the court found in favor of the LLC on the only claim remaining after the motion to strike (violation of the LLC Act as to the LLC).

On March 23, 2023, the court heard argument on the motion of

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[1] Count IV (Breach of Fiduciary Duty) had been dismissed with prejudice on November 12, 2021 on Defendants' demurrer.

[2] Proof of a pre-existing material fact is an element of fraud:

> A litigant who prosecutes a cause of action for actual fraud must prove by clear and convincing evidence: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.

Winn v. Bryant v. Peckinpaugh, 241 Va. 172, 175 (1991). The material fact must be "a present or a pre-existing fact . . . ." *Soble v. Herman,* 175 Va. 489, 500 (1940). If the basis for the misrepresentation is nondisclosure, there must be an allegation, and proof, of "'a knowing and a deliberate decision not to disclose a material fact.' (Citation omitted)." *Lambert* v. *Downtown Garage, Inc.*, 262 Va. 707, 714 (2001).

[3] See SAC, ¶ 77 ("two written demands on Bella Gravida"); ¶ 80 ("written demand on the corporation"); and ¶ 83 ("written demand on the corporation").

Defendants Bella Gravida, LLC and Evans for sanctions pursuant to Code § 8.01-271.1(D) ("the court, upon motion or upon its own initiative, shall impose upon the person who signed" a paper or made a motion, "a represented party, or both, an appropriate sanction," if such paper or motion was not "well grounded in fact" or was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"). By order of April 11, 2023, the court granted Defendants' motion and awarded Defendants attorneys fees and expenses in the amount of $243,101, for which Plaintiffs and Plaintiffs' counsel were jointly and severally liable.[4]

ANALYSIS

PLAINTIFFS' MOTION

A) "Plaintiffs Should Not Be Sanctioned for Their Counsel's Exercise of Her Legal Judgment." In support of this position, Plaintiffs rely upon the following stipulation between Plaintiffs and their former counsel (Ms. Miles):

> Plaintiffs knew that Ms. Miles believed that their legal claims were well-grounded in fact and warranted by existing law, as discussed in the oppositions to the motions for sanctions that she filed on their behalf, which they reviewed. The Plaintiffs as non-lawyers did not doubt that belief. Plaintiffs were also aware that Ms. Miles had consulted with other attorneys and had researched their legal claims to ensure that they were not frivolous before filing their complaints.

Motion 7.[5]

In light of this stipulation, the court will amend its order of April 11, 2023 to remove the imposition of joint and several liability and to impose liability only upon Plaintiffs' former counsel (Ms. Miles).

Although the court now imposes liability for attorney fees only upon Plaintiffs' former counsel, for the sake of completeness, the court will address Plaintiffs' remaining contentions.

B) "Plaintiffs Had a Good Faith Basis for the Allegations in the Second Amended Complaint."

Plaintiffs initially argue that Code § 8.01-271.1 does not:

> place a "duty" on a claimant "to have *all evidence* upon which

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[4] The Order of April 11, 2023 was suspended by Order of April 28, 2023.

[5] In support of the stipulation, Plaintiffs' new counsel provided the court an email dated May 26, 2023 from counsel for Plaintiffs' former counsel in which counsel for Plaintiffs' former counsel proposed the stipulation.

> it planned to rely on before ever filing suit." J.A. at 275 (emphasis added). Nor is it "a per se violation" of the statute to file "a lawsuit without *all evidence in hand.*" *Id.* at 275-76 (emphasis added).

Motion 8 (quoting *Robinson Family, LLC v. Allen,* 295 Va. 130, 139 (2018).

The court agrees that this a correct statement of the law.[6] But, as discussed in more detail, *infra*, this case was not one where Plaintiffs did not have *all* the evidence in hand when they filed suit; it is a case where they had *no* evidence supporting their legal claims, in large part because their legal claims were not warranted by existing law.

The first allegation at issue is: "The Johnsons have also since learned that Mr. Wilson personally guaranteed the equity loan as an owner of the Company. SAC, ¶ 40." *Motion* 9. In analyzing this allegation, the court agrees with Plaintiffs' summary of the law, *i.e.*, that the "question is whether there was at least some factual basis to proceed." *Motion* 9. With respect to this allegation, the problem is not that it was not well-grounded in fact, but that this fact did not support a claim which was "warranted by existing law" in that -- in Plaintiffs' own words -- it did "not relate to any element of the fraud claim (or any other claim) in the SAC, and appears to be entirely gratuitous." *Motion* 9.[7]

The second allegation raised by Plaintiffs is:

> They [the Johnsons] have also since learned that the Company had other debts at the time of the Johnsons' $30,000.00 investment that Ms. Evans and Mr. Wilson did not disclose to them. SAC, ¶ 41.

Motion 10.

This allegation was not well-grounded in fact (*see, infra*). It also does not support a claim which was "warranted by existing law" in that, even if true, it does not allege either that there was a misrepresentation of a pre-existing fact or, alternatively, that the nondisclosure was knowing and deliberate; it alleges only a failure to disclose a fact.

Further, the facts upon which Plaintiffs rely to demonstrate how what they learned was well-grounded in fact include "an email from

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[6] There is nothing in *Robinson Family, LLC* which suggests that a motion to strike cannot be the basis of a finding that a complaint was not well-grounded in fact or was not warranted by existing law.

[7] Plaintiffs do not make any argument that could be construed as contending that such argument was warranted by a "good faith argument for the extension, modification, or reversal of existing law . . . ." Thus, the court will not address that standard.

Defendant Evans in 2019 indicating the existence of multiple debts."[8] *Motion* 10. Even if true, the existence of debts in 2019 does not support the allegation that there were undisclosed debts in 2015. Similarly, the fact that "the Company was in financial trouble in 2015 and had run out of money" (*Motion* 10) does not support the allegation that there were undisclosed debts in 2015. Even taken together, these facts do not "create the reasonable inference" that "the Company had other debts" that were not disclosed when Plaintiffs made their initial investment.

The third allegation Plaintiffs present is:

> The Johnsons have since learned that the additional clothing inventory was never purchased. In other words, Ms. Evans and Mr. Wilson lied to the Johnsons about how their investment money *would be used* in order to lure them into investing in an already failing company. SAC, ¶ 45.

Motion 11 (emphasis added).

As Plaintiffs acknowledge, this allegation "does not support a claim of fraudulent inducement (except possibly a claim of promissory fraud) because it represents a future act . . . ." *Motion* 11. Thus, it was not "warranted by existing law . . . ." Moreover, the facts upon which Plaintiffs rely to support this allegation as well-grounded in fact, *i.e.*, that "the 'Inventory Expense' was $65,586.43" (*Motion* 11), does not provide the necessary support. Indeed, the best that Plaintiffs can argue is only that the facts "suggest[] that Plaintiffs' funds were not used to purchase inventory . . . ." *Id.*

The fourth and final allegation at issue is:

> Contrary to their initial representations, Ms. Evans and Mr. Wilson did not attend trade shows, failed to maintain an online store, and botched an influencer campaign. SAC, ¶ 59.

Motion 12.

Plaintiffs again acknowledge that "this allegation does not appear to support a fraudulent inducement claim . . . ." *Motion* 12. Thus, the claim was not "warranted by existing law . . . ."[9]

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[8] The mail (dated March 20, 2019) states, with regard to debts: "We have agreed that any remaining proceeds, after satisfaction of the business debts, will be returned by equity percentage to its investors."

[9] The facts upon which Plaintiffs rely to support this allegation as well-grounded in fact, *i.e.*, that "Plaintiffs were never informed that Defendant Evans went to a trade show, and there was no indication of that in the investor packet received in 2016" and that "the Company lost their website" (*Motion* 12), support the allegations that Ms. Evans did not attend trade shows and failed to maintain an online store, but do not support the allegation that Mr. Wilson did

C) Plaintiffs are correct that the mere fact of granting a motion to strike does not, in and of itself, justify a finding of a violation of Code § 8.01-271.1. *Motion* 12. Nonetheless, the total absence of evidence supporting a plaintiff's claims at the close of the plaintiff's case-in-chief compels the conclusion that, at the time of filing the complaint, the plaintiff had no evidence to support his/her claims because, if anything, by the time of trial, a plaintiff would have had the opportunity to develop additional evidence beyond what the plaintiff knew at the time of filing the complaint. As the Court noted in *Northern Virginia Real Estate v. Martins,* 283 Va. 86, 108 (2012): "the plaintiffs offered no evidence that could possibly lead the trial court to reasonably conclude that the plaintiffs *ever* had a factual basis for their claim . . . ." (emphasis added).[10] In the instant case, there was a total absence of evidence to support Plaintiffs' claims at the close of their case-in-chief; thus, the court found that, at the time of filing the SAC, Plaintiffs had no evidence to support their claims.

Plaintiffs are also correct that the "threat of sanctions is to deter a wholly baseless case - not a weak case, or a case that is inherently difficult to prove, or a case that simply did not prevail." *Motion* 13. The instant case was a wholly baseless case.

D) Attorney Fees: Plaintiffs contend that, when awarding attorney fees pursuant to Code § 8.01-271.1, "proof of reasonableness is required" and that "no expert testimony was received on the issue of the reasonableness of attorney's fees . . . ." *Motion* 15. While Plaintiffs are correct that "proof of reasonableness is required" (*Motion* 15),[11] they err in concluding that such proof must always come through the testimony of an expert.

In *Tazewell Oil Company v. United Virginia Bank*, 243 Va. 94 (1992), the trial court awarded the plaintiff attorney's fees in the sum of $472,000. The plaintiff submitted to the trial court about 300 pages of contemporary time records detailing the activities for which the fees were sought in support of the motions for costs and attorney's fees. The plaintiff also submitted affidavits of its attorneys on the subjects of the accuracy of the time billed and the reasonableness of the hourly rates charged. The Court concluded that "expert testimony was not

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not attend trade shows.

[10] The Court echoed the circuit court's holding that the plaintiff "never offered anything that could lead the Court to reasonably conclude that she ever had a factual basis for this claim." *Northern Virginia Real Estate, Inc. v. Martins,* 79 Va. Cir. 667 (2009).

[11] See *e.g., Chawla v. BurgerBusters, Inc.,* 255 Va. 616, 623-624 (1998) ("The party claiming the legal fees has the burden of proving *prima facie* that the fees are reasonable and were necessary. . . . [T]he trial court erred in placing upon the Chawlas the burden of proving that the attorneys' fees claimed by BurgerBusters were unreasonable.").

necessary because of the affidavits and detailed time records, which were wholly unrefuted by any evidence offered by [the defendant]." *Id.* at 112.[12]

As in *Tazewell*, Defendants here submitted contemporary time records detailing the activities for which the fees were sought in support of the motions for costs and attorney's fees and they submitted an affidavit of one its attorneys on the subjects of the accuracy of the time billed and the reasonableness of the hourly rates charged. Moreover, Plaintiffs have not submitted an expert affidavit refuting any evidence offered by Defendants. Accordingly, the court's finding concerning the amount of attorney fees awarded to Defendants will not be reconsidered.

MOTION OF PLAINTIFFS' TRIAL COUNSEL

Legal Standard

After citing principles from *Robinson Family, LLC v. Allen*, 295 Va. 130 (2018),[13] Plaintiffs' trial counsel ("Counsel") asserts:

> Claims which are recognized under Virginia law, and as to which Plaintiff pleads the essential elements, are not sanctionable even if Plaintiffs do not prevail on the merits.

Motion 4.

The court does not disagree, assuming that there is truly evidence supporting the essential elements. The difficulty in the case at bar is that Plaintiffs did not have, *at the time they filed suit*, facts which supported claims which are recognized under Virginia law.

I. Plaintiffs' Claims Were Not Well-Grounded In Fact Or Warranted By Existing Law[14]

A) Fraud & Common Law Conspiracy To Commit Fraud:

1) Counsel asserts that "an action for fraudulent inducement need

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[12] *Tazewell* was reiterated in *Seyfarth, Shaw v. Lake Fairfax Seven Ltd. Prtnrshp.*, 253 Va. 93 (1997), holding that a "law firm was not required to present expert testimony to prove the reasonableness of the total fees charged to the defendants." 253 Va. at 97. Twenty years later, *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245 (2017), cited *Tazewell* as a governing authority. 293 Va. at 261, n.7.

[13] As discussed, *supra*, the court agrees that Counsel's statements are correct statements of the principles set forth in *Robinson Family, LLC.*

[14] At no point in Counsel's motion does she make a "good faith argument for the extension, modification, or reversal of existing law . . . ." Thus, the court will not address that standard.

not . . . be limited to formation of the contract. . . . Although formation was free of fraud, *performance* of an executory contract may be fraudulently induced." *Motion* 6. Counsel further asserts that "[t]ort liability for a fraud claim can be imposed on a contractual promise when clear and convincing evidence proves that a contracting party makes a promise that, when made, (*sic*) had no intention of performing." *Id.* The court agrees with both assertions. But, in the case at bar, Counsel points to no evidence that Defendant Evans made a promise that, when made, she had no intention of performing.

Despite Counsel setting forth the law concerning a promise that a defendant had no intention of performing being a species of fraud, Counsel reverts (sort of) in her *Motion* to the argument that there was a misrepresentation of a material fact:

> Defendants provid[ed] Plaintiffs with their Schedule C IRS filings for tax years 2015 and 2016, which negated their *representations* to Plaintiffs in the MUPA [Membership Units Purchase Agreement] that if they signed they would be "members" of the multimember LLC. . . . But they submitted their personal taxes with the 2015 Schedule C in mid-April 2016, classifying the LLC as a sole proprietorship (i.e. without members) instead of as a multimember LLC, which had multiple members.

Motion 6 (emphasis added).[15]

These facts do not concern a promise which Defendant Evans had no intention of performing. Indeed, the word "promise" is not even in the argument, nor is there an allegation that Defendant Evans did not intend to perform that non-existent promise. Rather, these facts seem to suggest (although it is not clear) that Counsel is reverting to the misrepresentation of a pre-existing material fact species of fraud. Assuming that is the case, these facts do not, for several reasons, constitute misrepresentation of a pre-existing material fact to induce another to enter into a contract.

First, the "representations" to which Counsel refers are "representations to Plaintiffs *in the MUPA* that, if they signed they would be 'members' of the multimember LLC." *Motion* 6 (emphasis added). When a fact is set forth in a contract, that is not a misrepresentation of a pre-existing fact to induce another to enter into the contract. Thus, on its face, the above statement does not support an allegation of fraud in the inducement; it is, at most, possible grounds for breach of the contract if Plaintiffs were not treated as "members" of the multimember LLC.

Second, even if the contractual fact could be viewed as a

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[15] A similar disjointed argument occurred at the oral argument on March 23, 2023.

representation of a pre-existing fact to induce another to enter into the contract, a review of the MUPA shows that Plaintiffs *did* become members of the multimember LLC. Thus, there was no misrepresentation.

Third, the 2015 and 2016 Schedule C forms to which Counsel refers in her argument do not even relate to the LLC, let alone "classify" it as a sole proprietorship; they are for Defendant Evans (formerly known as Christa L. Floresca) and nothing suggests that they are for the LLC.

Fourth, with respect to the 2015 and 2016 Schedule K-1 for the LLC -- which Counsel lists as evidence in support of her argument despite only referring to "Schedule C IRS filings for tax years 2015 and 2016" in her argument -- those forms refer to each of the plaintiffs as a "partner" and are the proper method for filing for members of an LLC.[16]

Fifth, the 2015 and 2016 Schedule C forms do not "negate[]" the representation, at the time it was made, that, if Plaintiffs signed, they would be "members" of the multimember LLC as the forms were not in existence on August 18, 2015 (when Plaintiffs entered into the MUPA). The 2015 Schedule C would not have been filed until in or after April, 2016 and the 2016 Schedule C would not have been filed until in or after April, 2017. The same would be true of the 2015 and 2016 Schedule K-1.

In sum, Counsel's argument not only does not demonstrate that the court erred with respect to Plaintiffs having shown that there was evidence of the fraud in the inducement, but affirms what the court stated on March 23, 2023 -- that Counsel does not appear to have a grasp of the law concerning fraud in the inducement and thus subjected Defendants to having to defend against, at great expense, allegations that were wholly unfounded as a matter of fact and law.

2) Non-payment of annual registration fee: Counsel argues that the court:

> erred in discounting the significance of Defendant Evans' own testimony that she had not paid the annual registration fee for the LLC by the time Plaintiffs signed the MUPA and then later paid their investment money in September 2015 (or thereafter), which was a violation of the MUPA.

Motion 7.

For several reasons, the court did not err.

First, if the failure to pay the annual registration fee for the LLC by the time Plaintiffs signed the MUPA "was a violation of the MUPA" as Counsel asserts, then it has no bearing on the fraud claim. At most, therefore, the fact of non-payment could possibly support a claim for

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[16] Owners of an LLC are "members," not "partners." *See* Code § 13.1-1002 (definition of "member").

breach of contract.

Second, Plaintiffs' breach of contract claim (Count V of the SAC) did not allege a failure to pay the annual registration fee for the LLC nor, although it mentioned that the MUPA was breached, did Count V actually allege a breach of the MUPA; Count V alleged only the following breaches:

> The Investor will be notified ten (10) days prior to shareholder meetings and has the right to attend such meetings. In addition, the Company is obligated to send the Investor copies of the minutes or other records of its Shareholder and advisory board meetings and copies of its audited annual financial statements. The Company agrees to submit progress reports every six months for the duration of the investment and annually thereafter.

SAC ¶ 140.[17]

> The Company agrees that during the term of this agreement it will comply with all appropriate laws and regulations; keep full and accurate business records and make these available to The Investor upon reasonable notice . . . .

SAC ¶ 142.

Neither of these agreements is found in the MUPA; both are found in Exhibit C to the MUPA, which is the *Equity Agreement* and which is an agreement between Plaintiffs and the LLC, and to which Defendant Evans is not a party. Further, the *Equity Agreement* is not incorporated into the MUPA; the MUPA simply requires that Plaintiffs "deliver" the *Equity Agreement* to Defendants Evans and Wilson at closing. MUPA ¶ 2. Accordingly, the *Equity Agreement* is not part of the MUPA and any breach of the *Equity Agreement* is not a breach of the MUPA.

Third, the fact that Defendant Evans "later paid [Plaintiffs'] investment money" could not have been a breach of the MUPA because the monies paid to Defendant Evans by Plaintiffs became *her* monies as she had received those monies for the purchase of a part of her interest in the LLC and she was free to spend them any way she wished; those monies were not invested in the LLC.

Fourth, while the allegation in SAC ¶ 142 (Company "will comply with all appropriate laws") might encompass a failure to pay the annual registration fee for the LLC, there was no evidence offered by Plaintiffs that the LLC's failure to pay its annual registration fee caused any

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[17] Owners of an LLC are "members," not "shareholders." *See* Code § 13.1-1002 (definition of "member").

injury to Plaintiffs.[18] Defendant Evans' testimony that she had not paid the annual registration fee for the LLC by the time Plaintiffs signed the MUPA is of no significance and Counsel's argument that it is of significance only serves to demonstrate that Plaintiffs' SAC was not well-grounded in fact or warranted by existing law.

3) Counsel contends that the court:

> erred in ignoring the significance of Defendant Evans' own testimony that she had not accurately represented in the LLC's Membership Units Purchase Agreement ("MUPA") for the membership interest that she and her ex-husband Jason Wilson owned in the LLC.

Motion 7.

Even if it is true that Defendants Evans' and Wilson's membership interests in the LLC were not "accurately represented" in the MUPA, that fact has no bearing on the fraud claim as that fact does not show that there was a misrepresentation of a pre-existing material fact that induced Plaintiffs to enter into the MUPA. At most, that fact could possibly support a claim for breach of contract. But Plaintiffs' breach of contract claim (Count V of the SAC) did not allege such a breach of the MUPA. As discussed, *supra*, the only breaches alleged were breaches of two provisions of the *Equity Agreement*.

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[18] The court notes that, even if the annual registration fee had not been paid prior to the execution of the MUPA, it likely would not have affected the LLC's existence. Code § 13.1-1050.2(A) provides:

> Whether or not the notice described in subsection B of § 13.1-1064 is mailed, if any limited liability company fails to pay its annual registration fee on or before the last day of the third month immediately following its annual registration fee due date each year, the existence of the limited liability company shall be automatically canceled as of that day.

But Code § 13.1-1050.4 offers a reprieve:

> A. A limited liability company that has ceased to exist may apply to the Commission for reinstatement *within five years* thereafter . . . .
>
> C. If the limited liability company complies with the provisions of this section, the Commission shall enter an order of reinstatement of existence. Upon entry of the order, *the existence of the limited liability company shall be deemed to have continued from the date of the cancellation as if cancellation had never occurred,* and any liability incurred by the limited liability company or a member, manager, or other agent after the cancellation and before the reinstatement is determined as if cancellation of the limited liability company's existence had never occurred. (emphasis added).

Defendant Evans' testimony is thus of no significance and Counsel's argument that it is of significance only serves to demonstrate that Plaintiffs' SAC was not well-grounded in fact or warranted by existing law.

4) Counsel argues that the court: "erred in limiting Plaintiffs' action for fraudulent inducement to formation of the contract" because performance of an executory contract "may be fraudulently induced where one party fraudulently leads the other to believe that a condition precedent to the latter's duty to perform has been fulfilled" (citing *Ware v. Scott,* 220 Va. 317 (1979). *Motion* 8. While Counsel correctly sets forth the law, it does not apply here.

In *Ware,* the Court found that "the performance of the contract was fraudulently induced" because of "the Wares' failure to notify [the Scotts] of the May 23 flood [which occurred after the contract was entered into] and its consequences before they went to settlement." 220 Va. at 320.

The facts upon which Counsel relies in attempt to squeeze the principle of *Ware* into support for the SAC is that "Defendant Evans induced the Johnsons to perform by concealing the true financial status of the LLC . . . ." *Motion* 8. This statement does not explain: a) what the supposed condition precedent was; b) what Defendant Evans did to lead Plaintiffs to believe that she had fulfilled the supposed condition precedent when she had not; or c) what duty Plaintiffs had to perform. Rather, these facts appear to suggest that Defendant Evans fraudulently induced Plaintiffs to enter into the MUPA by concealing the true financial status of the LLC. Thus, we come full circle back to Plaintiffs' original argument: that Defendant Evans fraudulently induced Plaintiffs to enter into the MUPA by misrepresenting a pre-existing material fact.[19] As Counsel yet again points to no pre-existing material fact that was misrepresented, Counsel again demonstrates that she had no real grasp of what is required to prove the Plaintiffs' fraud claim.

Further, the "facts" upon which Counsel rely are the following:

> "All necessary actions" described in the MUPA had not been taken to authorize the Company to execute the MUPA and the performance of the LLC's obligations under the MUPA as the annual registration fee had not been paid and the LLC was classified as a sole proprietorship (a non-multimember LLC entity). The Company's performance of the agreement conflicted with the tax laws in that Defendants by giving the Johnsons a MUPA for the LLC asserted that they were members of a multimember LLC when they were not, as evidenced by the Schedule Cs that Defendants filed with the IRS.

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[19] Counsel did not argue that the nondisclosure was knowing and deliberate.

Motion 8.

While the first sentence is not a model of clarity, it appears that Counsel is asserting that the "necessary actions" which were not taken were the payment of the annual registration fee and the classification of the LLC as a multimember LLC. As to the former, Counsel is attempting to rehash the same argument as she did, *supra*, dressed up in a different garb, *i.e.*, that failure to pay the annual registration fee was fraud. As discussed, *supra*, any alleged failure to pay the annual registration fee is, at most, a basis for a breach of contract claim; indeed, Counsel refers to "performance of the agreement . . . ." But Count V of the SAC contains no allegation that Defendant Evans or the LLC failed to pay the annual registration fee; further, there was no evidence offered by Plaintiffs that the LLC's failure to pay its annual registration fee timely caused any injury to Plaintiffs.

As to the purported failure to classify the LLC as a multimember LLC, this assertion again does not support a claim for fraud as it does not assert a misrepresentation of a pre-existing material fact; rather, as with the non-payment of the annual registration fee, this purported failure is, at most, a basis for a breach of contract claim -- a fact which Counsel appears to recognize when she refers in the second sentence to the LLC's "performance of the agreement . . . ." *Motion* 8. But Count V of the SAC contains no allegation that Defendant Evans (or the LLC) failed to classify the LLC as a multimember LLC; further, there was no evidence offered by Plaintiffs that any failure to classify the LLC as a multimember LLC caused any injury to Plaintiffs.

Turning to the second sentence of the "facts" upon which Counsel relies,[20] there is, at a minimum, no support for a fraud claim. As to a breach of contract claim, no such claim is set out in Count V of the SAC. But even it were, the evidence upon which Counsel relies for her contention is the "Schedule Cs that Defendants filed with the IRS." *Motion* 8. As noted, *supra*, the Schedule C forms are not for the LLC; they were part of Defendant Evans' personal return and prove nothing with regard to whether the LLC was a multimember LLC.

Finally, Counsel contends that the LLC "was required to fill out an IRS Form 1065, but never did." *Motion* 8. The court is mystified by this statement since Counsel attached to her motion Exhibits D and E, which are Forms 1065 for 2015 and 2016.[21]

In short, the arguments asserted by Counsel not only do not support

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[20] "The Company's performance of the agreement conflicted with the tax laws in that Defendants by giving the Johnsons a MUPA for the LLC asserted that they were members of a multimember LLC when they were not, as evidenced by the Schedule Cs that Defendants filed with the IRS." *Motion* 8.

[21] The court recognizes that the Forms 1065 may not have been properly completed due to the ignorance of the person who made the entries.

her contention that there was evidence for Plaintiffs' claim for fraud; rather, those arguments further convince the court that the SAC was not well-grounded in fact and was not warranted by existing law.

B) Virginia Limited Liability Company Act Claims: As discussed at the outset, the claim for violation of the LLC Act as to Defendant Evans was dismissed on a motion to strike: i) because the claim was brought as a derivative claim and the claim was not a proper derivative claim as it did not seek a benefit for the LLC, but only for Plaintiffs, and ii) because the SAC indicated that the demands for documents were made on the LLC[22] and, as such, only the LLC has duties under the applicable provision of the statute; the claim for violation of the LLC Act against the LLC went forward after the motion to strike it was denied. Following the close of all the evidence, the court found in favor of the LLC because the requested documents had been provided prior to trial.

In view of the validity of the claim against the LLC, the court did not impose attorney fees based upon that claim not being well-grounded in fact or not being warranted by existing law.[23]

C) Breach of Contract: Counsel asserts that the court "erred in stating that the company had no breach of contract liability." *Motion* 11. In support of this assertion, Counsel refers to:

> Evans and Wilsons' warranty under MUPA 3(d) that no consent of any individual was required in connection with the execution, delivery and performance by them of the Agreement that was in conflict with the consent to add member terms contained in the LLC Agreement (Section III(E)(3)), and the company's failure to abide by their contractual obligations under MUPA 4(a) & (b), as stated above.

Motion 11-12.

The only two claims set forth in Count V of the SAC (Breach of Contract) were that "Defendants breached the terms of making the Johnsons partners in Bella Gravida" (SAC, ¶ 138), referring to an oral contract SAC, ¶ 135), and that Defendants breached three provisions of the *Equity Agreement* (SAC, ¶¶ 139-143). Neither of these two claims encompasses the supposed breaches that Counsel now asserts.

With respect to the first claim in Count V (breach of oral contract), the SAC does not articulate which "terms" Defendants

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[22] See SAC, ¶ 77 ("two written demands on Bella Gravida"); ¶ 80 ("written demand on the corporation"); and ¶ 83 ("written demand on the corporation").

[23] Defendants sought attorney fees in the amount of $289,138; the court awarded $243,101. Part of the denial of the fees claimed by Defendants was based upon the claim against the LLC for denial of documents being well-grounded in fact and being warranted by existing law.

purportedly breached. But even if they did, neither ¶ 3(d) nor ¶ 4(a) and (b) of the MUPA are remotely related to "making the Johnsons partners in Bella Gravida." Moreover, any oral agreement was extinguished by the integration clause of the MUPA (¶ 8). Accordingly, Counsel's present assertion of what terms were breached does not come close to providing support for what was alleged in the SAC.

In addition to not coming even close to providing support for what was alleged in the SAC, the allegation of a breach of an oral contract to "mak[e] the Johnsons partners" in the LLC is directly contradicted by numerous other allegations in the SAC:

> ¶ 4 ("Plaintiffs Stephen and Ann Johnson are shareholders of Bella Gravida")
>
> ¶ 43 ("[Johnsons] were added as Members of of the Company with 4.5% membership interests each (or 9% total)")
>
> ¶ 79 ("Plaintiffs were shareholders of the corporation at the time of the act or omission complained of. Plaintiffs were shareholders at the time they made their written demand on Defendants.")
>
> ¶ 109 ("As Members of Bella Gravida, Plaintiffs asked Defendant Evans – an Officer and Director with access to the financial information - on numerous occasions for an update on the financial condition of the company")
>
> ¶ 114 ("The Johnsons fairly and adequately represent the interests of the limited liability company because they are shareholders")
>
> ¶ 115 ("Here, the Johnsons are proper plaintiffs because they became members in September of 2015")

Thus, the SAC, on its face, does not support the allegation in ¶ 138 ("Defendants breached the terms of making the Johnsons partners in Bella Gravida").

As to Counsel's latter argument, that there was a breach of ¶ 3(d) or ¶ 4(a) and (b) of the MUPA, the SAC alleged only breaches of the *Equity Agreement*, not the MUPA.

In sum, Counsel's argument in no way demonstrates that the court erred in finding that the SAC was not well-grounded in fact or was not warranted by existing law. Indeed, the fact that Counsel set forth an argument that has no basis in the SAC only serves to demonstrate that the SAC was not well-grounded in fact or was not warranted by existing law.

In further support of her argument that there was a factually and legally sufficient breach of contract claim, Counsel refers to page 2 of

the *Equity Agreement*, which Counsel summarizes as stating:

> [T]he Company represents and warrants that it is a legal entity in good standing and authorized by law to enter into this agreement; and that the Company is in compliance with all appropriate laws and tax requirements, and the Company has provided complete, current, and accurate information about its condition.

Motion 12.

While the *Equity Agreement* includes such terms, there is no claim in Count V (Breach of Contract) of the SAC alleging a breach of these terms. Accordingly, Counsel's contention that the SAC was well-grounded in fact and law is not buttressed by this argument. Rather, it serves to magnify the absence of support, factually and legally, for the allegations in Count V of the SAC.

Counsel goes on to state that the *Equity Agreement* "was a contract between the individual investors *and the Sellers* and Company . . . ." *Motion* 13 (emphasis added). Aside from the fact that this point, even if it was true, does not show that the claims in Count V of the SAC were well-grounded in fact or warranted by existing law, Defendants were *not* parties to the *Equity Agreement*; the only parties to the *Equity Agreement* were Plaintiffs and the LLC.

Counsel's next avenue is to argue that:

> a breach of contract claim can be brought directly against a corporation (not derivatively) if the contractual right of a member existed independently of a right *to the corporation*. *Parsch* v. *Massey*, 72 Va. Cir. 121, 128 (2006).

Motion 13 (emphasis added).

Assuming that Counsel mistakenly misstated *Parsch* and meant to refer to a right "*of* the corporation" (emphasis added),[24] Counsel has correctly stated the law regarding direct claims.

To understand what is meant by "direct claims," *Parsch* explained:

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[24] *Parsch* stated in pertinent part:

> For corporate shareholders to have standing when asserting direct claims, they must allege ". . . a wrong involving a contractual right of a shareholder . . . which exists independently of any right *of the corporation*." *Moran v. Household Internat'l*, 490 A.2d 1059, 1070 (Del. Ch. 1985).

72 Va. Cir. at 128 (emphasis added).

> A shareholder ordinarily cannot, as an individual as distinguished from a representative of the corporation, sue directors or other corporate officers for mismanagement, negligence, or the like on a cause of action which belongs to the corporation. The remedial rights of minority shareholders with respect to wrongs committed against the corporation by the officers and directors in the management of corporate affairs are derivative rights and any action taken by the shareholders to redress such wrongs must be for the benefit of the corporation. *Simmons v. Miller*, 261 Va. 561, 574 (2001).

72 Va. Cir. at 128 (emphasis added).[25]

Thus, when *Parsch* refers to "direct claims," it is not referring to claims which are required to be derivative, *i.e.*, those that involve a minority shareholder's claim of mismanagement, negligence, or the like by directors or other corporate officers, or wrongs committed against the corporation by the officers and directors in the management of corporate affairs.

In view of the fact that Count V of the SAC alleges breaches only of the *Equity Agreement* (¶¶ 140 and 142), which was an agreement between only Plaintiffs and the LLC (not Defendant Evans), by Counsel's own argument, Defendant Evans was not a proper defendant in Count V. As to Defendant LLC, even assuming that Defendant LLC breached the *Equity Agreement*, there was no evidence offered which showed any damages arising from those breaches, let alone "their $30,000 investment," which Plaintiffs had paid to Defendants Evans and Wilson.[26] Indeed, the only possible breach of contract claim which Plaintiffs could even possibly have had would have been pursuant to the MUPA, as that is the contract with Defendants Evans and Wilson; yet there is no claim in Count V of the SAC for a breach of any term of the MUPA.

Once again, Counsel's argument serves only to undermine her position that the SAC was well-grounded in fact and warranted by existing law. Rather, her argument makes evident that the SAC was not well-grounded in fact and not warranted by existing law.

Counsel's next contention is that the court:

> continuously refused to admit evidence of what happened after signing the MUPA on the theory that this evidence is unrelated

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[25] The *Parsch* court does not mention that *Simmons* adopted the view of William M. Fletcher, *Cyclopedia of the law of Private Corporations*, 261 Va. at 574 (quoting 12B William M. Fletcher, *Cyclopedia of the law of Private Corporations* § 5924, at 497-99 (perm. ed. 2000 rev. vol.) (citations and footnotes omitted)).

[26] Counsel seems not to recognize that the $30,000 was paid to Defendants Evans and Wilson, not to the LLC.

to the inducement of the contract. However, a party cannot prove a breach of contract without evidence of what happened *after* the contract was signed.

Motion 14.

While it is true, as Counsel contends in the second sentence, that "a party cannot prove a breach of contract without evidence of what happened after the contract was signed," Counsel does not enlighten the court as to the evidence concerning breach of contract to which Counsel adverts. Thus, it is impossible to determine if the evidence was offered in support of the fraud claim or the breach of contract claim. The court would note, however, that the only breach of contract claim in Count V of the SAC related to breaches of the *Equity Agreement* and that there was no evidence demonstrating most of the breaches and, for those provisions that were breached, no damages were proven.

At the end of Counsel's breach of contract arguments, Counsel states: "Evidence found after a contract is signed that supports a finding of misrepresentation in the formation of the contract is directly relevant to an underlying breach of contract claim." *Motion* 16. Counsel cites no authority for this statement as it is a non-sequitur; evidence which "supports a finding of misrepresentation in the formation of the contract" would not concern an "underlying breach of contract claim" because evidence relating to misrepresentation in the formation of a contract would be evidence that existed *prior* to the formation of the contract, whereas evidence relating to breach of a contract would only exist *after* the formation of a contract.

In sum, nothing Counsel argues concerning the breach of contract claim supports her argument that Count V of the SAC was well-grounded in fact or warranted by existing law.

D) Derivative Claims: While Counsel is correct that, for purposes of a derivative action, a corporate entity could be either a nominal plaintiff or a nominal defendant (*Motion* 17), the purported derivative claims in the SAC are not, as a matter of law, derivative claims.

The purported derivative claims in the SAC were set forth in ¶¶ 77-78 and again in Count III.[27] In particular, Plaintiffs alleged that they were not afforded the opportunity to review the records of the LLC

[27] While ¶ 76 of the SAC alleges that Plaintiffs brought their action "derivatively under Va. Code § 13.1-1028(B) on behalf of Bella Gravida" to "redress the damage and injuries to the Company as a result of Defendants' common law conspiracy, violation of the Virginia LLC Act, breach of fiduciary duties, and breach of contract," Counts I (Fraud), II (Common Law Conspiracy), and V (Breach of Contract) only seek money damages for Plaintiffs. Thus, Count III (violations of the LLC Act) is the only count that could even potentially be derivative claim.

pursuant to Code § 13.1-1028(B).[28] These were not derivative claims as derivative claims are "maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder plaintiff," *Mount v. Radford Trust Co.*, 93 Va. 427, 431 (1896), and Plaintiffs were not seeking relief for the LLC, but for themselves.

The fact that Plaintiffs were *eligible* to bring derivative claims pursuant to Code § 13.1-1042(A)[29] and Code § 13.1-1043[30] does not transform their claim pursuant to Code § 13.1-1028(B) into a derivative claim. Their eligibility to bring a derivative claim only arises if a claim is maintained for the benefit of the corporation.

Similarly, the fact that Plaintiffs made a written demand for records pursuant to Code § 13.1-1042(B)[31] also does not transform their

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[28] "B. Each member has the right, upon reasonable request, to:"

1. Inspect and copy any of the limited liability company records required to be maintained by this section; and

2. Obtain from the manager or managers, or if the limited liability company has no manager or managers, from any member or other person with access to such information, from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited liability company, (ii) promptly after becoming available, a copy of the limited liability company's federal, state and local income tax returns for each year, and (iii) other information regarding the affairs of the limited liability company, except to the extent the information demanded is unreasonable or otherwise improper under the circumstances.

[29] "A member shall not commence or maintain a derivative proceeding unless the member fairly and adequately represents the interests of the limited liability company in enforcing the right of the limited liability company and is a proper plaintiff pursuant to § 13.1-1043."

[30] "In a derivative action, the plaintiff shall be a member at the time of bringing the action and (i) shall have been a member at the time of the transaction of which he or it complains or (ii) his or its status as a member shall have devolved upon him or it by operation of law or pursuant to the terms of the articles of organization or an operating agreement from a person who was a member at the time of the transaction."

[31] "B. No member may commence a derivative proceeding until:"

1. A written demand has been made on the limited liability company to take suitable action; and

2. Ninety days have expired from the date delivery of the demand was made unless (i) the member has been notified before the expiration of 90 days that the demand has been rejected by the limited liability

claim pursuant to Code § 13.1-1028(B) into a derivative claim. Again, their right to bring a derivative claim only arises if a claim is maintained for the benefit of the corporation.

Counsel further asserts that Plaintiffs alleged a derivative claim in alleging that the LLC "lost the benefit of the over $200,000 that were invested, including the $30,000 that Plaintiffs invested" and that, "[b]y contrast, Ms. Evans and Mr. Wilson have benefited (*sic*) from their misconduct by potentially misusing the money invested in Bella Gravida to for personal use." *Motion* 18 (quoting SAC, ¶¶ 73-74). None of the counts of the SAC, however, seek the recovery of damages from Defendants Evans and Wilson for the benefit of the LLC: Count I seeks $30,000 for Plaintiffs, Count II seeks $30,000 (plus punitive damages) for Plaintiffs, Count III seeks injunctive relief for Plaintiffs (related to the alleged failure to disclose documents), and Count V seeks $30,000 for Plaintiffs. Consistent with Counts I, II, III, and V, the "Prayer For Relief" does not include a prayer for damages for the benefit of the LLC; rather, it seeks only judgment for Plaintiffs.

Moreover, the "Derivative Allegations" paragraphs of the SAC (¶¶ 75-85) make no mention of damages. Thus, there was no actual derivative claim for damages.

Finally, Counsel argues that "Mr. Johnson stated [at trial] that he was seeking damages on behalf of himself, his wife, and other investors/members of the LLC)." *Motion* 19. Even if Mr. Johnson could invent new theories of recovery at trial which were not articulated in the SAC, seeking damages for himself, his wife, and "other investors/members" would not be a derivative action as damages were not sought for the LLC.

In sum, Counsel's arguments once again only serve to substantiate the court's finding that the SAC was not well-grounded in fact or warranted by existing law.

II. Attorney Fees

Counsel is correct that "the party claiming the legal fees has the burden of proving *prima facie* that the fees were reasonably incurred and necessary." *Motion* 19. *See e.g., Chawla v. BurgerBusters, Inc.,* 255 Va. 616, 623-624 (1998) ("The party claiming the legal fees has the burden of proving *prima facie* that the fees are reasonable and were necessary. . . . [T]he trial court erred in placing upon the Chawlas the burden of proving that the attorneys' fees claimed by BurgerBusters were unreasonable."). Counsel errs, however, in asserting that expert testimony is needed to establish the reasonableness of the fees. While the case cited by Counsel, *Northern Virginia Real Estate v. Martins,* 283 Va. 86 (2012), involved expert testimony concerning fees, it did not *hold*

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company or (ii) irreparable injury to the limited liability company would result by waiting until the end of the 90-day period.

that expert testimony is *required*.

That issue was addressed in *Tazewell Oil Company v. United Virginia Bank*, 243 Va. 94 (1992). In *Tazewell*, the trial court awarded the plaintiff attorney's fees in the sum of $472,000. In support of the request for that award, the plaintiff submitted to the trial court about 300 pages of contemporary time records detailing the activities for which the fees were sought in support of the motions for costs and attorney's fees. The plaintiff also submitted affidavits of its attorneys on the subjects of the accuracy of the time billed and the reasonableness of the hourly rates charged. The Court concluded that "expert testimony was not necessary because of the affidavits and detailed time records, which were wholly unrefuted by any evidence offered by [the defendant]." 243 Va. at 112.[32]

As in *Tazewell*, Defendants here submitted contemporary time records detailing the activities for which the fees were sought in support of the motions for costs and attorney's fees and they submitted an affidavit of one its attorneys on the subjects of the accuracy of the time billed and the reasonableness of the hourly rates charged. Moreover, Counsel has not submitted an expert affidavit refuting any evidence offered by Defendants. Accordingly, the court's finding concerning the amount of attorney fees awarded to Defendants will not be reconsidered.

Counsel's motion for reconsideration is DENIED and an appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

[32] *Tazewell* was later reiterated in *Seyfarth, Shaw v. Lake Fairfax Seven Ltd. Prtnrshp.*, 253 Va. 93 (1997), holding that a "law firm was not required to present expert testimony to prove the reasonableness of the total fees charged to the defendants." 253 Va. at 97. Twenty years later, *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245 (2017), cited *Tazewell* as a governing authority. 293 Va. at 261, n.7.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

STEPHEN JOHNSON, *et ux*	)	
	)	
Plaintiffs	)	
	)	
v.	)	CL 2019-17643
	)	
BELLA GRAVIDA, LLC, *et al.*	)	
	)	
Defendants	)	

ORDER

THIS MATTER came before the court on the motions of Plaintiffs and Plaintiffs' former trial counsel for reconsideration of the sanctions ordered by the court on April 11, 2023, and

THE COURT, having reviewed the written submissions of Plaintiffs and Plaintiffs' former trial counsel, hereby

ORDERS, for the reasons stated in the court's opinion letter of today's date, that the motions of Plaintiffs and Plaintiffs' former trial counsel for reconsideration of the sanctions ordered by the court on April 11, 2023 are DENIED, and further

ORDERS that judgment in the amount of $243,101 is entered against Plaintiffs' former trial counsel, Monique A. Miles, in favor of Defendant Evans, and further

ORDERS that the court's order of February 15, 2023 suspending the execution of the Final Order is VACATED and is of no further force or effect.

ENTERED this 25th day of September, 2023.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

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Counsel for Plaintiffs

Jason C. Greaves
Counsel for Defendants

Monique A. Miles
Former Trial Counsel for Plaintiffs