STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

SARGENT DOCKS AND TERMINAL, INC,
SARGENT SAND COMPANY, LLC, and
WILLIAM WEBBER,

Plaintiffs,

v

THOMAS WEBBER,
AVANT LOGISITCS, LLC,
f/k/a SARGENT LOGISTICS, LLC,
MARCELLUS ENERGY SERVICES, LLC,
and ERIC STRANG,

Defendants.
_____/

Case No. 11-014229-CB

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION No. 1
(Duties / Disclosure / Consent)

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This case arises out of a failed business venture involving the sale of sand utilized in hydraulic fracturing[1] operations by the oil and gas industry.

[1] Hydraulic fracturing (also known as hydrofracturing, hydrofracking, fracking, or fraccing) is a well-stimulation technique in which rock is fractured by pressurized liquid (primarily water, containing sand and other proppants

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The plaintiffs' complaint asserts, in part, that defendants Webber and Strang violated statutory and common law fiduciary duties by usurping business opportunities and misappropriating business assets.

In the present motion, the defendants seek dismissal of Count 1, *Breach of Fiduciary Duty*, on the basis that defendant Strang is not subject to statutory fiduciary duties and, in any event, the plaintiffs consented to the defendants activities following full disclosure.

For the reasons stated in this opinion, the court concludes the defendants' motion should be granted to the extent the plaintiffs assert defendant Strang is subject to statutory fiduciary duties, but the balance of the motion should be denied due to lingering questions of fact.

Factual Background

The Sargent family, through a variety of business entities ("Sargent Family Companies"), has long engaged in the mining, processing, and supply of sand and other aggregate products. In recent years, active participants in the Sargent Family Companies have included Fran Sargent ("Fran") and her two sons, William ("Bill") and Thomas ("Tom") Webber.

On June 2, 2008, Articles of Organization for Sargent Sand Company, LLC ("LLC") were filed with the State of Michigan, specifically enumerating its purpose as "mineral extraction / land development" (supplementing the statutory boilerplate purpose, "to engage in any activity within the purposes for which a limited liability company may be formed", *MCL 450.4203(1)(b)*) (Defendants' MSD No. 1, Exhibit 1). Importantly, the Articles did not state that the business of the LLC was to be managed by one or more managers, *MCL 450.4401*.

On June 4, 2008, an Agreement was executed by Tom, Bill, Cherie Webber, and Barbara Sargent ("Family Members"), individually and on behalf of all closely-held business entities in which they had an ownership interest ("Business Entities"), Fran, individually and on behalf of all closely-held business entities in which she had an ownership interest, Sargent Sand Co, a Michigan corporation (the "Corporation"), and the LLC. The agreement detailed Fran's plan to sell 280,000 tons of sand from lands located in Hamlin Township, Mason County, Michigan (the "Property"), to the LLC by June 3, 2009, but otherwise, no Family Member had any rights to the Property or its sand; and that the provisions of the Agreement were to apply to any subsequent purchase agreement, purchase order or other contract for the purchase of sand from the Property (Defendants' MSD No. 1, Ex 3; Defendants' MSD No. 2, Ex 3).

On June 16, 2008, Tom and Bill signed an Operating Agreement for the LLC (Defendants' MSD 1, Exhibit 2), stating its purpose was "to engage in any lawful act or activity for which a limited liability company may be organized under the laws of the state of Michigan including, but not limited to, mining and processing proppant sand for the oil and gas industry" (Sec 2.3), and that the two members, Sargent Docks and Terminal, Inc. and Thomas Webber, enjoyed equal, 50%,

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suspended with the aid of gelling agents) into a wellbore to create cracks in the deep-rock formation through which natural gas, petroleum, and brine will flow more freely. When the hydraulic pressure is removed from the well, small grains of hydraulic fracturing proppants (either sand or aluminum oxide) hold the fractures open. https://en.wikipedia.org/wiki/Hydraulic_fracturing (accessed July 21, 2015).

interests (Sec 3.1). Importantly, the Operating Agreement did not provide any mechanism for resolving deadlocks.

The interest of Sargent Docks and Terminal, Inc. in the LLC was assigned to Bill (Amended Complaint, ¶ 2)[2].

In 2008, Eric Strang ("Eric") began his association with the Sargent Family Companies, initially with Michigan Gypsum (Strang 07-12-13 dep, vol 1, pp 8-9).

In July 2008, Eric contacted Universal Well Services ("Universal") on behalf of the LLC and inquired if it was interested in purchasing frac sand (MSD No. 1, Ex 7, T Watkins dep, p 8).

In July 2008, Bill, Tom, and Eric traveled to Wisconsin to investigate potential sites for mining proppant sand, which included a meeting with landowner Kevin Griffin who, as a cranberry farmer, required pond reservoirs for irrigation (K Griffin dep, p 7-13, 41). Although there were a "handful" of meetings in Wisconsin with Tom (and Eric) and "less" with Bill (K Griffin dep, p 43) , a couple of trips by Griffin to Michigan because "Tom and Bill wanted to show [him] that they were legit" (K Griffin dep, pp 44-45), and having Griffin's sand tested, no sand was actually purchased (Wm Webber dep, p 174), and "nothing developed" until Eric approached Griffin on his own in Spring 2011 (K Griffin dep, pp 15, 20-26, 32, 43-48, 51, 57)].

On August 15, 2008, Eric, on behalf of the LLC, enters into a 5-year Sand Purchasing Agreement with Cudd Energy Services ("Cudd"). The agreement specified that "[a]ll sand shipped via rail will include freight and fuel surcharges; "[the LLC] and Cudd will enter into a Railcar Sublease Agreement"; "[a]ll transportation rates to be agreed upon annually"; prices were established for both Ludington and Wisconsin sand; prices to be "adjusted annually according to Midwest CPI", with prices "adjusted quarterly for transportation and drying fuel increases". (Plaintiffs' Response, Ex 7, with signature page supplied at March 23, 2015 oral argument).

On September 14, 2008, Eric emailed both Tom and Bill asking whether they were interested in shipping sand via barge from Wisconsin to Little Rock, Arkansas, to be warehoused for loading rail cars to ship out west as well as loading local trucks (Defendants' MSD No. 1, Ex 10; Wm Webber dep, Ex 3).

On September 21, 2008, Bill emailed Eric regarding how to develop the Wisconsin market (Plaintiffs' Ex 8).

On November 7, 2008, Eric emailed Tom lamenting the lack of action (Plaintiffs' Exhibit 9).

On November 11, 2008, a meeting was held regarding Wisconsin Frac Sand, attended by Bill, Tom and Eric (and others). The agenda included market, mining locations, state requirements, equipment/operation, personnel, and financial issues (Plaintiffs' Exhibit 10).

[2] Although it may have been overlooked, the court is not aware of a document, testimony, or other evidence corroborating this allegation but, for purposes of the pending motions, will assume the truth of the allegation; although, even then, the timing of the assignment is unclear.

On December 8, 2008, Bill emailed Eric (and others) indicating his dissatisfaction with the way rail cars were being managed: "With the public cars, this equates to lost revenue. For the private cars, this equates to lost revenue in the face of high costs", and also expressed a desire "to take immediate action to resolve the situation" (Defendants' MSD No. 1, Ex 9; Wm Webber dep, Ex 21).

Although the time sequence is not clear, at some point before commencing warehouse operations in North Little Rock, Arkansas, Eric contacted Cudd indicating the LLC was interested in selling sand to the oil and gas industry (MSD No. 1, Ex 8, T Matthews dep, p 12). Subsequently (presumably), Bill and Tom had a meeting with Tim Matthews, executive vice president of Cudd, during which Bill indicated he did not want to be involved in logistics/warehousing/transloading because he believed that end of the business was too volatile (T Matthews dep, pp 20, 26, and 30)

On January 10, 2009, Bill emailed Eric to express his disapproval of Schlumberger contractor requirements, and indicated his expectation of "regular terms", including "[a]cceptance of the material upon release of the rail car" and "[p]ayment based on our terms" (Wm Webber dep, Ex 22).

In 2009 or 2010 (no more specific date available), Wisconsin cranberry farmer Claude Riglemon was introduced by fellow farmer Kevin Griffin to Tom and Eric (MSD No. 1, Ex 15, C Riglemon dep, pp 10-11, 68). They made an offer to purchase sand from him, but Riglemon declined because he was unable to perform excavation requirements (C Riglemon dep, p 90). Although there was subsequent contact, including Tom's return the next Spring (C Riglemon dep, p 70), and the LLC had his sand tested, no sand was purchased (Wm Webber dep, vol 2, pp 173-174), and they "vanished" (C Riglemon dep, pp 12, 22, 67-68, 86-87) [until Eric approached him in Fall 2010 (C Riglemon dep, p 29)].

In February 2009, already purchasing frac sand from the LLC, Cudd contacted Eric and expressed interest in warehousing and transloading frac sand (Marcellus Energy's Answers to Plaintiffs' Supplemental Interrogatories, Nos. 5(a) and (c)); Sargent Logistics' Answers to Plaintiffs' Supplemental Interrogatories, Nos. 5(a) and (c)).

On February 16, 2009, Eric emailed Bill regarding a North Little Rock warehouse lease proposal. Bill replied February 23, 2009 indicating it was premature until various details were considered (Defendants' MSD No. 1, Ex 10; Plaintiffs' Ex 11; Wm Webber dep, Ex 4-5).

In late February/early March, 2009, already purchasing frac sand from the LLC, Universal Well contacted Eric and expressed interest in warehousing and transloading frac sand (Marcellus Energy's Answers to Plaintiffs' Supplemental Interrogatories, No. 5(a) and (c)).

On March 2, 2009, an all-day LLC meeting was held with the agenda reflecting discussions [to be] held regarding "Ongoing Operations" and "New Operations" (including Pennsylvania warehouse and transload and Arkansas Warehouse and transload) (Defendants' MSD No. 1, Ex 10; Plaintiffs' Ex 12; Wm Webber dep, Ex 6).

On March 6, 2009, Eric emailed Tom regarding Mississippi, Wisconsin, Cudd, and Arkansas operations (Plaintiffs' Ex 14).

On March 11, 2009, Eric forwarded Tom and Bill an email with attached photographs of the proposed Arkansas warehouse (Wm Webber dep, Ex 7).

On March 12, 2009, in response to an email from Fran questioning "what the costs are to the company LLC vs any future profit that could be made", Bill emailed Eric stating his desire "to discuss . . . [m]aking it a policy to no longer handle rail for customers" (Defendants' MSD No. 1, Ex 9; Wm Webber dep, Ex 23).

On April 21, 2009, Eric emailed Tom imploring faster action on the Marcellus (Plaintiffs' Ex 15).

On April 21, 2009, Tom emailed Bill reporting on a trip he and Eric took to Pennsylvania and meetings with representatives of Universal (Tom Watkins), Williamsport terminal (Don Lundy), and North Shore Rail, and conveyed several key points, including: "Universal is warehousing sand in several facilities [and] they want ONE logistical side to manage this and they are very positive about Sargent doing so for them" (Defendants' MSD No. 1, Exhibit 10; Wm Webber dep, Ex 14; Wm Webber dep, Ex 18).

On April 25, 2009 Tom emailed Bill (as well as Eric and Fran) detailing meetings he and Eric had in Little Rock with Cudd (Tim Matthews), and reported Cudd's needs for warehousing and logistics, and identified a potential warehouse in North Little Rock (Defendants' MSD No. 1, Exhibit 10; Wm Webber dep, pp 93Ex 8).

In April 2009, at Tom's suggestion (having already executed a lease and hoping to obtain Bill's approval), Bill visited the North Little Rock warehouse facility (Wm Webber dep, pp 95-104, 197).

In April 2009, Sargent/Avant Logistics began providing warehousing and transloading services to Cudd (Sargent Logistics' Answers to Plaintiffs' Supplemental Interrogatories, No. 5(b); Wm Webber dep, p 96). Ultimately, the warehouse lease was terminated early and Sargent Logistics lost approximately $200,000 (E Strang dep, vol 2, pp 30-31)

On May 5, 2009, Strang emailed Tom requesting that he review a rough draft of a Storage and Handling Agreement to be entered into between "N Little Rock Logistics LLC" and Cudd (Plaintiffs' Ex 16).

On May 21, 2009, Eric was copied on an email from Universal's Tom Watkins confirming the cost to transload sand (T Watkins dep, Ex 7).

On June 4, 2009, Tom emailed Bill with marketing updates regarding Wisconsin, Cudd, Universal, and North Little Rock; concluding with "I really want to get [North Little Rock] done hopefully this week. Let me know your thoughts. If you are uncomfortable, I am still willing to jump in and you can always come in later. Tim Matthews is getting frustrated with us on the

warehouse. He has total faith in Sargent. * * * North Little Rock: Timing is of the essence. Please let me know your thoughts". Bill replied later the same day expressing his "interest[] in these projects", but also expressed concerns. In particular, Bill wrote, "I don't know much about this one" (referring to Universal's desire for warehousing in Williamsport, Pennsylvania), and requested to meet (Defendants' MSD No. 1, Ex 10; Wm Webber dep, Ex 9).

On June 8, 2009, Eric emailed Tom a narrative regarding his Pennsylvania trip (06-01-09 through 06-03-09) (Plaintiffs' Exhibit 17).

On July 8, 2009, Articles of Organization for Sargent Logistics LLC were filed with the State of Arkansas, with Tom as the only member (T Webber dep, p 48). Subsequently, Tom forwarded Bill the Articles and a proposed Operating Agreement identifying both of them as 50% members but with Tom as the sole manager (Defendants' MSD No. 1, Ex 10; Wm Webber dep, Ex 11). Bill promptly registered his objections with Tom (Wm. Webber dep, pp 113-120). Subsequently, "Sargent Logistics" was renamed "Avant Logistics LLC".

Eric's time expended for Sargent/Avant Logistics was recorded on Employee Breakdown Worksheets he submitted to Sargent Leasing to enable his cost as a shared employee to be allocated among the several Sargent Family Companies (Wm Webber dep, Ex 16; E Strang dep, vol 1, pp 23-26; E Strang dep, vol 1, pp 24-25, and vol 2, p 21).

On [undetermined date], Articles of Organization for Marcellus Energy Services LLC ("Marcellus Energy") were filed with the State of [undetermined], with Avant Logistics LLC (formerly Sargent Logistics LLC) as the only member (Marcellus Energy's Answers to Plaintiffs' Supplemental Interrogatories, No. 10)

On July 14, 2009, Mike Moncrief of FracSand.com LLC, of North Little Rock, Arkansas, forwarded a narrative of his company to Tom that referenced a joint venture being formed with "Sargent Companies" "to completely serve the end users with frac sand supply, manufacturing, and distribution services" (Plaintiffs' Ex 18).

On August 4, 2009, Bill and Tom met with Mike Hnatiuk in anticipation of his employment as manager of the Arkansas warehouse (MSD No. 1, Ex 10; Wm Webber dep, pp 108-112, and Ex 10).

On August 7, 2009, Tom emailed Bill (Defendants' MSD No. 1, Exhibit 10):

> I have Sargent Logistics LLC set up as an Arkasas (sic) LLC.
>
> Should I have Mike H as an employee of Sargent Logistics LLC, or Sargent Companies and then bill Sargent Logistics LLC
>
> My gut is telling me that Mike will only be down there 6-12 months and will be moving up in our company.

On August 18, 2009, Tom emailed Bill relating a conversation he had with Tim Matthews (Cudd) regarding the need for action in Wisconsin, including possible financing for a plant, either on a straight cash basis or a 5-10 year contract (Plaintiffs' Exhibit 19).

On September 4, 2009, Eric forwarded Tom an email sent to "Scott", outlining the LLC's product, cost, and services (Plaintiffs' Exhibit 20).

On October 10, 2009, replying to his mother's inquiry about the LLC's costs, Bill sent an email to Tom and Eric (and others, including Fran) indicating, among other things, concern over the risk of leased railcars (Defendants' MSD No. 1, Ex 9; Wm Webber dep, Ex 24).

On October 25, 2009, Bill emailed Eric complaining "I haven't seen a sales report in two months. As discussed before, we need to know what is going on – who you are speaking with, where you are, what you are doing. We need this weekly." (Defendants' MSD No. 1, Exhibit 9; Wm Webber dep, Ex 27).

On November 10, 2009, Eric emailed Tom and Bill (and Fran) a report regarding "Frac Sand Markets" (Wm Webber dep, Ex 13).

On November 1, 2009, Marcellus Energy Services entered into a Storage and Handling agreement with Universal (T Watkins dep, p 26, and Ex 6).

In November 2009, Cudd requested Sargent/Avant Logistics (and later Marcellus) to broker ground transportation from Williamsport, Pennsylvania (Marcellus Energy's Answers to Plaintiffs' Supplemental Interrogatories, No. 6(a)).

On December 11, 2009, Bill emailed Eric expressing his "understanding we would not handle any rail to the Marcellus[3]. I was informed we are now carrying Cudd rail shipments to the Marcellus. This, again, will require Tom and I to sign off." (Defendants' MSD No. 1, Ex 9; Wm Webber dep, Ex 25)

On December 12, 2009, Bill set forth his review of several aspects of previously prepared spreadsheets, including his thoughts on transportation:

> This is a transportation business. I have asked Eric for a full breakdown of the rail, and can't get him to give me a report. We are covering rail for CUDD to the Marcellus without receiving any compensation for doing so. This is especially dangerous in that the cost of sand is a minute portion in the cost of a well. If there is a problem, and CUDD blames the sand, the risk of us eating the transportation

[3] The court understands that "the Marcellus" refers to the Marcellus shale formation, a unit of marine sedimentary rock found in eastern North America, named for a distinctive outcrop near the village of Marcellus, New York, and extending throughout much of Pennsylvania, Ohio, and West Virginia. The shale contains largely untapped natural gas reserves, and its proximity to the high-demand markets along the East Coast makes it an attractive target for energy development (https://en.wikipedia.org/wiki/Maracellus_Formation (accessed July 21, 2015); Wm Webber dep, vol 1 p 125).

is enormous. WE DO NOT WANT TO HANDLE RAIL." (Defendants' MSD No. 1, Exhibit 9; Wm Webber dep, Ex 26)

On December 14, 2009, Bill emailed Tom and, among things, confirmed "We also agreed that we would not handle rail to the Marcellus. Eric has agreed on our behalf to change the pricing and handle rail for no profit." (Defendants' MSD No. 1, Ex 9; Wm Webber dep, Ex 27)

On January 1, 2010, Eric became a member of Sargent Logistics LLC (Sargent Logistics' Answers to Plaintiffs' Supplemental Interrogatories, No. 10; E Strang dep, vol 1, p 22, and vol 2, p 71).

In January 2010, Marcellus Energy began providing transloading and brokering services to Cudd, as well as subsequent periodic warehousing services (Marcellus Energy's Answers to Plaintiffs' Supplemental Interrogatories, Nos. 5(b) and 6(b)).

On January 8, 2010, Eric emailed Bill and Tom a frac sand report, including a narrative on both Universal Well Service and Cudd Energy Services (Plaintiffs' Exhibit 22).

On January 12. 2010, Eric emailed Universal's Tom Watkins thanking him for helping getting Marcellus Energy Services up and running in Williamsport, Pennsylvania (T Watkins dep, Ex 1).

In February 2010, rail car sub-leasing was first discussed by Cudd and Sargent/Avant Logistics (Sargent Logistics' Answers to Plaintiffs' Supplemental Interrogatories, No. 7(a)).

In March 2010, Marcellus began providing transloading services to Universal Well (Marcellus Energy's Answers to Plaintiffs' Supplemental Interrogatories, No. 5(b)).

On March 19-25, 2010, a string of emails between Eric, Jason Kerkezl, and Mark Nunley (and Tom Webber) discussed the creation of a "new division of our company last fall, Sargent Logistics" and the need to "switch over the account name we have with CSXT from Sargent Sand to Sargent Logistics". This required "documentation for a person in the company having sufficient authority to make those decisions for the company", with a "need [for Tom's] signature for Sand" to "make everyone happy" (Plaintiffs' Ex 6).

In April 2010, Sargent/Avant Logistics began providing private rail car sub-leasing to Cudd (Sargent Logistics' Answers to Plaintiffs' Supplemental Interrogatories, No. 7(b)).

On April 28, 2010, Bill emailed Tom and recommended that "we contact Cudd and let them know we will continue to sell them sand, but rail freight will become their responsibility if it is over [illegible] days form shipment. Tom please let me know if you agree with this." (Defendants' MSD No. 2, Exhibit 1)

On May 17, 2010, in response to an email from Lundy Warehousing to Eric and copied to Bill, regarding a lease agreement apparently being contemplated by Marcellus Energy, Bill emailed Eric inquiring "What is this about – I didn't know we leased a warehouse in Williamsport. What is Marcellus Energy Services?". Eric replied that the lease was for an office, not a warehouse

(but without addressing Bill's inquiry regarding Marcellus Energy) (Plaintiffs' Ex 24; Wm Webber dep, Ex 17)

On May 25, 2010, Bill emailed Tom announcing discovery of "fundamental conflict's (sic) of interest with our fiduciary interest and Duty of Loyalty to Sargent Sand LLC", and demanded Tom and Eric have no further contact with Universal Well Services. Tom replied with an explanation for establishing Sargent Logistics LLC and Marcellus Energy LLC (Plaintiffs' Exhibit 25; Wm Webber dep, Ex 20).

On July 6, 2010, Bill emailed Eric: "As of July 1, 2010, you are terminated as an employee of Sargent Sand, LLC or Sargent Companies, LLC" (Defendants' MSD No. 1, Ex 16).

On July 29, 2010 (3:14:15 pm), Bill copied Tom on an email to Ken Cunningham:

> Following is my stance, and the legal stance to make:
>
> Sargent Sand llc will not rebill Sargent Logistics or any of Erics/Toms paper companies. SSllc will bill Cudd, with a reasonable charge for tvm, risk and administration. (we received a margin in AK, but eric purposely did not add a margin for PA).
>
> If any of Erics/Toms paper companies wish to hand this in conjunction with Cudd, they will need to get an account with CSX and deal with Cudd directly – or have Cudd do so.
>
> I am 100 percent against any further subsidization of logistics or any other paper companies by sargent sand llc and am committed to resist this, even if it means losing the customer – which none of us want to do.
>
> If strange (sic) wants to get in the rail business with Cudd, that is their business – but our relationship with Cudd is separate from logistics/webber/strange companies. [(Defendants' MSD No. 2, Exs 9, 11; Wm Webber dep, Ex 29)]

On July 29, 2010 (6:15 pm), Cudd (Tim Mathews) emailed Ken Cunningham confirming a prior meeting and telephone conversation in which Cudd requested Eric be allowed to handle all freight and transloading concerns regarding sand purchased from Sargent. (Defendants' MSD No. 1, Ex 11).

On July 29, 2010 (10:40:04 pm), Bill emailed Tom (and Fran), in part (Defendants' MSD No. 1, Ex 11):

> I have no problems if eric/tom sets up and (sic) account with csx.
> * * *
> I will cooperate with the customer and stranges (sic) paper companies, but handing over published rates is not possible for me after the deception and lies.

On September 21, 2010, Sargent Logistics changed its name to Avant Logistics (Sargent Logistics' Answers to Plaintiffs' Supplemental Interrogatories, No. 12).

On September 27, 2010, Eric filed Articles of Organization for Chippewa Sand Company LLC with the State of Wisconsin (Defendants' MSD No. 2, Ex 2).

On September 30, 2010, Chippewa Sand executed Nonmetallic Mining Reclamation Permit Application for sand stone mining at Cooks Valley, Chippewa County, Wisconsin (Plaintiffs' Exhibit 26).

In Fall 2010, Eric contacted Wisconsin cranberry farmer Claude Riglemon, indicating he had left Sargent and wanted to purchase sand through Marcellus Energy (C Riglemon dep, pp 26-30). This resulted in excavation and hauling operations from late April 2011 until abruptly shut down in late September 2011 (C Riglemon dep, pp 75-76), although Riglemon was never paid (C Riglemon dep, pp 80-81, 89).

In Fall 2010, Eric's relationship with Universal ended (E Strang dep, vol 1, p 70, and 97).

On December 30, 2010, the Corporation and the LLC entered into a Transition Agreement to reflect the Corporation's election to take over and assume on its own the processing and sale of sand mined at its property. The agreement included a covenant that the LLC (and its owners/members) would not claim an association with the Corporation, and not directly interfere with the Corporation's business with Cudd and Universal. The LLC was left to receive proceeds of sale of its inventory and equipment, and to otherwise wind down its affairs (Defendants' MSD No. 2, Ex 4).

The LLC ceased doing business as of December 31, 2010 (Plaintiffs' Answer to Defendants' Requests for Admission 1).

In Spring 2011, Eric contacted Wisconsin cranberry farmer Kevin Griffin and entered into the first of two contracts for the purchase of sand by Chippewa Sand (K Griffin dep, pp 20-26; E Strang dep, vol 2, p 115).

On October 1, 2012, Eric bought Tom out of Sargent/Avant Logistics (E Strang dep, vol 1, p 27, and vol 2, pp 106 and 120).

On December 31, 2012, Eric's relationship with Cudd ended (E Strang dep, pp 70 and 98).

Procedural Background

On October 17, 2011, the present action was filed, with an Amended Complaint filed April 3, 2012 by leave granted, and a Second Amended Complaint for Damages and Equitable Relief[4] filed April 27, 2015 by leave granted April 24, 2015, stating the following claims:

[4] The Second Amended Complaint was filed April 27, 2015, by leave granted in an Order entered April 24, 2015.

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Count	*Claim*	*Plaintiff(s)*	*Defendant(s)*
1	breach of fiduciary duty	all	Thomas Webber and Eric Strang
2	member oppression	Sargent Docks/Terminal Inc and William Webber	Thomas Webber
3	conversion	Sargent Sand Company LLC	all
4	conspiracy	Sargent Sand Company LLC	all
5	tortious interference with economic business relationship	Sargent Sand Company LLC	all
6	fraud	all	all
7	unjust enrichment	all	all

On February 9, 2015, the defendants filed five separate motions for summary disposition, focusing variously on:

Motion No. 1 -- duties/disclosure/consent (Count I)
Motion No. 2 -- actions and damages post-Strang employment and post-Transition Agreement
Motion No. 3 -- member oppression (Count II)
Motion No. 4 -- conspiracy (Count IV), and tortious interference with economic business relationship (Count V)
Motion No. 5 -- conversion (Count III), and fraud (Count VI)

Oral arguments were held March 23 and 25, 2015, and the matters were taken under advisement.

On May 19, 2015, the defendants filed a motion to disqualify then-assigned Judge Fred L. Borchard, resulting in a June 26, 2015 Order of Disqualification, and subsequent assignment of the case to the business court docket by virtue of a June 29, 2015 Order Determining Business Court Eligibility.

Summary Disposition Standards

The defendants' motions for summary disposition are brought under MCR 2.116(C)(8) and/or (10).

Motions brought pursuant to MCR 2.116(C)(8) test the *legal* sufficiency of a claim. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). Such motions are determined on the pleadings alone, *MCR 2.116(G)(5)*, assuming all well-pleaded factual allegations in support

Although post-dating the several pending dispositive motions, the new complaint does not differ from the First Amended Complaint except by adding a claim for unjust enrichment (Count 7) which is not presently at issue. Therefore, references in the pending motions and briefs to the First Amended Complaint remain unaffected.

of the claim are true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and are construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). The motion should be granted only when the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Clohset v No Name Corp*, 302 Mich App 550, 558; 840 NW2d 375 (2013) (internal quotation marks omitted).

Motions brought under MCR 2.116(C)(10) test the *factual* sufficiency of a claim or defense. In determining such a motion, the court (a) must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties (although only to the extent that the content or substance would be admissible evidence), (b) must not assess credibility or determine facts, and (c) must view the admissible evidence (including reasonable inferences) in the light most favorable to the nonmoving party. MCR 2.116(G)(3)(5)(6); *Quinto v Cross & Peters Co*, 451 Mich 358, 361-363; 547 NW2d 314 (1996); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition under MCR 2.116(C)(10) is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group,* 466 Mich 453, 461, 646 NW2d 455 (2002). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Quinto, supra*, at 362. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto, supra* at 363.

Analysis

In Count I of their amended complaint, *Breach of Fiduciary Duty*, the plaintiffs allege Tom and Eric "were Members and/or employees of the [LLC]" (Amended Complaint, ¶ 36) and, as such, owed fiduciary duties to the LLC under the common law as well as MCL 450.4404 (i.e. discharge of managerial duties, good faith, and ordinary prudent person standard) (Amended Complaint, ¶¶ 37-38). The plaintiffs allege the defendants breached these fiduciary duties by usurping business opportunities and by diverting business assets to their own personal use (Amended Complaint, ¶¶ 39-53).

With discovery now complete, the defendants' present motion requests dismissal of Count I, *Breach of Fiduciary Duty*, asserting there is no genuine issue of material fact that --

- Eric was never a member or manager of the LLC (a critical element of the claim against him under MCL 450.4404), and
- Eric and Tom made full disclosure of business opportunities and the LLC consented to/ratified their independent pursuit.

Strang's Lack of Member/Manager Status

The creation and operation of domestic limited liability companies is governed by the Michigan Limited Liability Company Act, *MCL 450.4101 et seq*. ("MLLCA").

The MLLCA provides that management of a limited liability company may either be delegated to one or more managers (i.e. centralized management), *MCL 450.4402*, or shared by all of the members (i.e. decentralized management), *MCL 450.4401*. Unless the articles of organization state that the business is to be "manager-managed", a limited liability company will, by default, be deemed "member-managed", *MCL 450.4401*.

Although the MLLCA does not expressly define (or even mention) duties of members, per se, it does specifically assign duties to managers, *MCL 450.4404*, including:

> (1) A manager shall discharge the duties of manager 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.

In turn, if no manager is designated and management of a limited liability company is left in the hands of the members (i.e. "member-managed"), both of the following apply, MCL 450.4401:

> (a) The members are considered managers for purposes of applying this act, including [MCL 450.4406] regarding the agency authority of managers, unless the context clearly requires otherwise.
> (b) The members have and are subject to, all duties and liabilities of managers and to all limitations on liability and indemnification rights of managers.

Here, although the plaintiffs' Amended Complaint (¶¶ 36-37) alleges "Defendants were Members . . . of the [LLC]" and "owed a fiduciary duty . . . under MCL 450.4404", there is no dispute that the LLC's Articles of Organization do not designate a manager (Defendants' MSD No. 1, Exhibit 1)[5] and there is evidence Eric was ever even offered a membership interest in the LLC (E Strang dep, vol 1, p 20).

Indeed, the plaintiffs do not dispute that Eric was not a member or manager of the LLC (tacitly conceding he was not subject to duties imposed by MCL 450.4404), but, rather, argue he nevertheless owed fiduciary duties under the common law (Plaintiffs' Response, p 18).

[5] Consistent with operation of the default rule that assumes a member-managed entity unless otherwise stated in the Articles of Organization, the Operating Agreement affirmatively states the LLC "shall be managed by its members" (Article IV, Management) (Defendants' MSD 1, Exhibit 2).

Accordingly, pursuant to MCR 2.116(C)(10)[6], the court concludes that Eric is entitled to dismissal of the claim that he owed any duty under MCL 450.4404.

Disclosure / Consent / Ratification

In addition to Tom's duties as member/manager under MCL 450.4404, both Tom and Eric arguably owed fiduciary duties to the LLC under the common law.

As observed in *Production Finishing Corp v Shields*, 158 Mich App 479, 485-486; 405 NW2d 171 (1987)[7], quoting 18B Am Jur 2d, Corporations, §1770, pp 623-624):

> A corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain. The rule is that if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake which is, from its nature, in the line of the corporation's business and is of practical advantage to it, and which is one in which the corporation has an interest or a reasonable expectancy, and if, by embracing the opportunity, the self interest of the officer or director will be brought into conflict with that of this corporation, the law will not permit him to seize the opportunity for himself. If he does, the corporation may claim the benefit of the transaction.[8]

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[6] The defendants argue Eric is alternatively entitled to summary disposition under MCR 2.116(C)(8), i.e. "the opposing party has failed to state a claim on which relief can be granted" (Defendants' Brief in Support, p 17). However, as noted, the plaintiffs' Amended Complaint (¶¶ 36-37) alleges "Defendants were Members . . . of the [LLC]" and "owed a fiduciary duty . . . under MCL 450.4404". Accordingly, although it turns out to be factually untrue, Eric's membership in the LLC, as an element of a statutory fiduciary duty violation claim, appears to have been sufficiently pled, thus precluding summary disposition under MCR 2.116(C)(8). *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012).

[7] In *Production Finishing*, the defendant was the president and board member of the plaintiff corporation that dominated the Detroit-area steel polishing industry and had long sought to acquire Ford Motor Company's steel polishing business. Upon learning that Ford was considering ceasing its internal polishing operations, the defendant notified his Board of Directors and, with their blessing, pursued the opportunity on behalf of his principal. Ford was against the proposal because, with the Ford business, the defendant's principal would have a monopoly in the area. The defendant offered to provide the services himself and eventually submitted a confidential proposal to independently buy Ford's equipment and provide polishing services to Ford. In the following months, the defendant met with Ford representative several times to finalize his personal plan, had Ford's equipment appraised, sought a bank loan, and organized a corporation, but never informed his principal's board that Ford refused their business overture or that he was pursuing the opportunity on his own account. Only after resigning did the defendant inform his principal that he was pursing the Ford business himself. The court held that the defendant breached his fiduciary duties by diverting a business opportunity of the principal and, importantly, that Ford's refusal to deal with the principal (which had never wavered in its desire to obtain Ford's business) did not relieve the defendant fiduciary from liability when he failed to disclose the refusal to his principal.

[8] Given the relatively recent development of limited liability companies, courts commonly take guidance from interpretations and analyses of analogous issues available in the context of corporations (and/or partnerships). *Duray Dev, LLC v Perrin*, 228 Mich App 143, 159; 792 NW2d 749 (2010); *International Flavors & Textures, LLC v Gardner*, 966 F Supp 522, 553 (WD Mich 1997); Cambridge and Christopoulos, *Michigan Limited Liability Companies*, 2d ed, § 6.10, pp 279-280; and Cambridge, *Fiduciary Duties and Standards of Conduct of Members of a Michigan Limited Liability Company*, MI Bus LJ, Fall 2004.

On the other hand, a corollary rule was recognized in *Rapistan Corp v Michaels*, 203 Mich App 301, 307; 511 NW2d 918 (1994)[9], quoting *Guth v Loft, Inc*, 23 Del Ch 255; 5 A2d 503 (1939):

> It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it if, of course, the officer or director has not wrongfully embarked the corporation's resources therein.

And, in any event, if the corporation is fully informed of the opportunity and decides not to pursue it, an agent of the corporation may pursue the opportunity after his/her affiliation with the corporation has ended, as long as there is no agreement preventing the agent's pursuit of the opportunity. *Central Cartage Co v Fewless*, 232 Mich App 517, 526-527; 591 NW2d 422 (1998)[10].

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[9] In *Rapistan*, the plaintiff was engaged in the warehouse-distribution market. After its president/chief executive officer resigned and acquired a manufacturer of conveyors and pallitizers. Rapistan sued on theories of breach of fiduciary duties, usurpation of business opportunity, and misappropriate of confidential information. The Court of Appeals affirmed a judgment of no cause of action entered by the trial court because the defendant learned of the manufacturing opportunity in his individual capacity (not in his Rapistan capacity), the manufacturing opportunity was not essential to Rapistan, there was no credible evidence that Rapistan had an expectation in the manufacturing opportunity, and the defendant had not embarked sufficient Rapistan corporate assets to justify judicial intervention.

[10] In *Central Cartage*, the defendant was vice president of sales of a transport company, hauling parts inbound from surrounding states to Michigan's automotive plants. To produce outbound business, defendant secured Wyeth-Ayerst Laboratories as a customer to transport baby formula from its Mason plant to points out of state. But because federal regulations required infant formula to stay within a certain temperature range, Wyeth permitted Central to transport freight only within a relatively small area because Central only had "dry vans", rather than more costly steel-lined temperature-controlled trailers. The defendant advised Central's owner/chief executive officer of the potential for large revenues from Wyeth if Central obtained temperature-controlled trucks for more lengthy trips, but was advised "That's not our type of business". The defendant subsequently referred Wyeth to his employer's affiliated company that had a fleet of temperature-controlled trailers, and, without advising his employer, the defendant's wife began receiving commissions on the transportation of Wyeth's freight. Eventually, the defendant established his own company, but did not actually solicit any business while he was an employee of Central. Once confronted, the defendant admitted his wife had formed a company that was receiving revenues for Wyeth freight transport, tendered his resignation, and was fired. Following a directed verdict regarding plaintiff's motion for commissions paid to the defendant's wife while he remained employed by Central, and jury verdict of no cause of action on remaining claims, the trial court denied plaintiffs' motion for JNOV:

> Without question, [the defendant] breached his fiduciary duties to Central by failing to advise that Navajo was paying SKAN commissions for Wyeth freight. However, we disagree with plaintiffs' assertion that, even after [the defendant] was terminated from his employment and had advised Central of the situation involving SKAN and Navajo, all future commissions also rightly belonged to Central ad infinitum. We find that, particularly in light of the fact that an agreement not to compete did not exist between Central and [the defendant], reasonable minds could differ regarding the question whether, after [the defendant] was terminated and Central was armed with

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Here, the defendants assert –

- it was "clear that Bill [] did not view "logistics"[11] as a corporate opportunity of the [LLC]" (Defendants' Brief in Support, p 22)
- there were "repeated disclosures and urgings" regarding "opportunities in Arkansas and Pennsylvania in warehousing and transloading" (Defendants' Brief in Support, p 21)
- "Bill adamantly refused to extend the Company's business beyond the sale of processed sand, FOB Muskegon", "[a]s evidenced by [Bill's] repeated emails . . . [and] his sentiments [] as directly expressed to [Tim] Matthews [(Cudd)] [that] neither the [LLC] (though (sic) Bill the disinterested member) or Bill individually wanted to be involved" (Defendants' Brief in Support, p 22)
- in a July 29, 2010 email, Bill expressly consented to/ratified Eric and Tom independently engaging in logistics (Defendants' Brief in Support, p 24)

However, as the plaintiffs argue, there are two sides to the story.

First, although Tom understood that the LLC, at least as originally designed, would "just sell sand and not try to speculate on providing other services" (T Webber dep, vol 1, p 26), Bill envisioned that the LLC would provide "hole to hole" services (Wm Webber dep, pp 24, 26-29, 45-47, 60-63, 122, 147, 149-150, 171-172, 177, 180, 188, 192-193, 241-242, 245, and 251), including procuring silica sand, getting it mined, getting the sand transported to where it could be processed, processing it to specification, hiring railcars so it could be shipped, loading the sand into cars, shipping it to customers' business sites, etc. (Wm Webber dep, vol 1, pp 6-8).

Second, while there is significant evidence that Eric and Tom disclosed to Bill material information about LLC business opportunities (e.g. E. Strang dep, vol 1, p 23, 72-73), the court cannot wholly ignore direct and circumstantial evidence that Bill was not always kept "in the loop". For example, in April 2009, even though the concept of providing warehousing services in Arkansas was under consideration by the LLC, Tom entered into a lease without Bill's knowledge (Wm Webber dep, pp 95-104, and 197); in June 2009, Eric having communicated with Tom, not Bill, regarding Universal's "push[ ] to get the Williamsport [(Pennsylvania)] warehousing deal done asap", Bill was left wondering, "I don't know much about this one" (Defendants' MSD No. 1, Ex 10; Wm Webber dep, Ex 9; E Strang dep, vol 1, p 89, and Ex 1); and, although on January 12, 2010 Eric thanked Tom Watkins (Universal) for helping him set up

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all relevant facts surrounding [Wyeth's payment of commission to the defendant's wife while he was still employed, the defendant was] free to pursue these revenues."

Observing that reasonable minds could find that Central's owner/chief executive officer "flatly rejected" the opportunity of obtaining more Wyeth business by purchasing refrigerated trailers in order to obtain longer routes, the court distinguished the case from *Production Finishing*, where the employer never wavered in its desire to obtain the business opportunity usurped by the employee, and concluded that, under the facts, "absent an agreement not to compete, [the defendant] was free, upon the termination of his employment, to use his skill, experience, and general knowledge to compete against Central".

[11] The court understands that the term "logistics" describes various functions beyond the mere sale of goods, including (at least in this case) the providing or coordination of rail cars, rail service, warehousing, transloading (i.e. "vessel to vessel"), and trucking.

Marcellus Energy in Williamsport, Pennsylvania (T Watkins dep, Ex 1), Bill is emailing Eric on May 17, 2010 (in response to a lease agreement he received regarding Lundy Warehousing), asking "What is this about . . . What is Marcellus Energy Services?" (Plaintiff's Ex 24; Wm Webber dep, Ex 17).

Third, although Bill told Tim Matthews (Cudd) he was not interested in providing logistics/warehousing/transloading (because that end of the business was "too volatile") (T Matthews dep, pp 20, 26, and 30), and although Bill repeatedly expressed concerns/questions regarding specific business opportunities presented by Eric and Tom, and although Tom and Eric subjectively interpreted Bill's failure to unconditionally embrace the initial opportunity to expand into logistics (warehousing in Arkansas)[12] as a universal and absolute rejection of all things "logistics" (T Webber dep, vol. 1, p 96, and vol 2, p 48; E Strang dep, vol 1, 76-78, and vol 2, pp 80 and 85), the defendants' contention that "Bill adamantly refused to extend the LLC's business beyond the sale of processed sand" is an overstatement. At least arguably, Bill envisioned "hole to hole" services; rather than flatly rejecting the Arkansas warehouse opportunity, considered it only "premature" pending resolution of details (Defendants' MSD No. 1, Ex 10; Plaintiffs' Ex 11; Wm Webber dep, Ex 4-5); chose to not participate in the Arkansas warehouse operation because a [undesirable] lease was already signed and packaged with a limited liability company in which, unlike the LLC, Tom was the sole manager (Wm Webber dep, pp 116-119); [begrudgingly] allowed the LLC to provide rail[car] service (if it could be financially justified) (Wm Webber dep, pp 42-43, and 149); attributes the ultimate demise of the LLC's rail service to Eric's manipulation of price/profit to advantage his independent ventures (Wm Webber dep, pp 61-62, 159, 162-163, 166, 210-211, 258, and 262-276); requested additional information regarding opportunities in the Marcellus (Defendants' MSD No. 1, Ex 10; Wm Webber dep, Ex 9); and never formally said "No" to all "logistics" (T Webber dep, vol 1, p 95; E Strang dep, vol 1, pp 94 and 96).

Fourth, rather than manifest his universal ratification of Eric and Tom's independent logistics operations, the July 29, 2010 email chain the defendants cite (Defendants' MSD No. 1, Ex 11; Defendants' MSD No. 2, Exs 9, 11; Wm Webber dep, Ex 29) post-dates Eric's July 1, 2010 termination from the LLC, and, as the court understands, merely manifests Bill's effort to maintain an LLC sand customer (Cudd) unsettled by Eric's departure.[13]

Having reviewed the voluminous documentary evidence submitted by both the plaintiffs and the defendants, as well as having considered the parties' respective oral and written arguments, the court concludes that, while significant evidence of disclosure/consent/ratification does exist, reasonable minds could, viewing the record in the light most favorable to the plaintiffs, still differ on whether the plaintiffs made a sufficiently informed, final decision to decline pursuing otherwise available business opportunities, *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

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[12] This opportunity appears to have been offered to Bill, after the fact, without the benefit of due diligence and protections he preferred, and packaged in a limited liability company in which Tom was sole manager.

[13] By comparison, upon previous "discovery" of their independent activities, rather than acquiesce, on May 25, 2010 Bill demanded that Tom and Eric have no further contact with another LLC customer (Universal) (Plaintiffs' Exhibit 25; Wm Webber dep, Ex 20).

Accordingly, the aspect of defendants' Motion for Summary Disposition No. 1 involving the related issues of disclosure/consent/ratification, brought under MCR 2.116(C)(10), is being denied.

Conclusion

The plaintiffs accuse defendants Webber and Strang of breaching statutory and common law duties by misappropriating the LLC's business opportunities. Defendant Strang responds that he is not subject to statutory duties at all, and, in any event, both defendant Strang and Webber argue that the plaintiffs consented to their activities following full disclosure.

While it is undisputed that defendant Strang is not subject to the duties imposed by MCL 450.4404, the court concludes that legitimate factual issues preclude summary dismissal of the plaintiffs' claim that the defendants otherwise violated their applicable fiduciary duties.

Accordingly, Defendants' Motion for Summary Disposition No. 1 is being granted in part and denied it in part:

- the motion to dismiss any claim against Eric Strang based on breach of duties imposed by MCL 450.4404 is **GRANTED** pursuant to MCR 2.116(C)(10), and
- the balance of the motion (i.e. seeking dismissal of claims of breach of common law fiduciary duties against both Eric Strang and Tom Webber, and breach of duties under MCL 450.4404 against Tom Webber) is **DENIED**.

IT IS SO ORDERED.

Date: August 7, 2015 /s/ (P27637)
M. Randall Jurrens, Circuit Judge