IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ERIC BAURLE, M.D., VIRAJ PARIKH, M.D., and DIVISION STREET LAND PARTNERS, LLC,	)	
Plaintiffs,	)	
	)	NF
vs.	)	**NO: 16-0229-BC**
	)	
TRAVIS J. KELTY,	)	
Defendant,	)	
	)	
and	)	
	)	
TODD PRESNELL, and BERTIL WESTIN,	)	
Interested Parties.	)	
	)	
TRAVIS KELTY and DIVISION STREET LAND PARTNERS, LLC,	)	
Counter-Plaintiffs,	)	
	)	
vs.	)	
	)	
ERICK BAURLE, M.D., and VIRAJ PARIKH, M.D.,	)	
Counter-Defendants,	)	
	)	
and	)	
	)	
TODD PRESNELL, and BERTIL WESTIN,	)	
Third-Party Defendants.	)	

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MEMORANDUM AND ORDER: (1) GRANTING IN PART AND DENYING IN PART JOINT MOTION TO DISMISS COUNT I BREACH OF CONTRACT OF DEFENDANT'S RULE 13 COMPLAINT, COUNTERCLAIMS, AND THIRD-PARTY CLAIMS AND (2) SETTING RULE 16 CONFERENCE

This Memorandum and Order completes the ruling on the Plaintiffs' motion to dismiss the Rule 13 Complaint, Counterclaim and Third-Party Claims (referred to

collectively as the "Counterclaim"). The context is that in a June 27, 2016 ruling, the Court granted the Movant's dismissal in part, dismissing Counts II and IV of the Counterclaim. As to dismissal of Count I, additional briefing was needed. That briefing has now been provided and the ruling is as follows.

It is ORDERED that the Court dismisses paragraph 104 of Count I (Breach of Contract) of the Counterclaim asserting that the Escrow Agreement is unconscionable and the corollary allegation in paragraph 82 of economic duress and other references in the Counterclaim to those terms.

It is further ORDERED that, as to paragraphs 101-103 and 105-107 of Count I of the Counterclaim, the motion to dismiss is denied.

Additionally, it is ORDERED that now that the pleadings have been clarified, the Court will conduct a Rule 16 Conference on August 26, 2016, in conjunction with Third-Party Defendant Westin's Motion to Enforce Settlement Agreement. Both matters are specially set for hearing at 10:00 a.m.

The factual allegations in the pleadings and the law on which this decision is based are as follows.

Claims of Unconscionability and Duress Dismissed

As a matter of law, the Court dismisses the claims that the Escrow Agreement is unconscionable or was entered into under economic duress.

The basis for these claims, asserted by Counterplaintiffs/Defendants, is that paragraphs 74-82 of the Counterclaim allege sufficient facts to support a claim that "Mr. Kelty has pled that he was forced to sign the Escrow Agreement because of a conspiracy

amongst Plaintiffs to file an unlawful, frivolous lawsuit to blow up the purchase of the Artemis property." *Counter-Plaintiffs/Defendants Travis Kelty And Division Street Land Partners, LLC's Response In Opposition To Plaintiffs' Supplemental Briefing On Motion To Dismiss*, p. 3 (July 15, 2016).

In studying the elements of unconscionability and economic duress in Tennessee, the Court reviewed the following cases cited by the parties from Tennessee and other jurisdictions: *Carroll v. CMH Homes, Inc.*, No. 3:13-CV-141-JMH, 2013 WL 2431432 (E.D. Tenn. June 4, 2013); *Myers v. Peoples Bank of Ewing*, No. 3:11-CV-380, 2012 WL 3288179 (E.D. Tenn. Aug. 10, 2012); *Cummings Inc. v. Dorgan*, 320 S.W.3d 316 (Tenn. Ct. App. 2009); *Whitmire v. Way-FM Grp., Inc.*, No. 1-08-0050, 2008 WL 5158186 (M.D. Tenn. Dec. 8, 2008); *Vickery Transp., Inc. v. HEPACO, Inc.*, No. W2003-01512-COA-R3CV, 2004 WL 2280421 (Tenn. Ct. App. Oct. 4, 2004); *Flynt Eng'g Co. v. Cox*, 99 S.W.3d 99 (Tenn. Ct. App. 2002); *Windham v. Alexander, Weston & Poehner, P.C.*, 887 S.W.2d 182 (Tex. App. 1994), *writ denied* (Apr. 20, 1995); *Way Rd. Dev. Co. v. Snavely*, No. C.A. 89C-DE-48, 1992 WL 19969 (Del. Super. Jan. 31, 1992).

These cases establish that a claim for unconscionability or economic duress must be something more than just asserting an intention to do what one has a legal right to do, "the economic risk associated with a common business transaction does not rise to the level of duress." *Myers v. Peoples Bank of Ewing*, No. 3:11-CV-380, 2012 WL 3288179, at *6 (E.D. Tenn. Aug. 10, 2012) (citing *Moman v. Walden,* 719 S.W.2d 531, 534 (Tenn.Ct.App.1986). "The pressure of financial circumstances is insufficient to establish economic duress." *Gascho v. Scheurer Hosp.*, 2010 WL 4810222 at * 5 (6th Cir. Nov.17,

2010) (The economic benefits versus risk of economic hardship of an unaccepted offer does not state a claim "because this kind of threat is an accepted part of the bargaining process" (quoting Restatement (Second) of Contracts § 176 cmt. a)).

Applying the foregoing law to the Counterclaim, the Court finds that the allegations in paragraphs 104, 107, 112, and 117 of the Counterclaim that the Escrow Agreement is "unconscionable," assert force and duress based upon the Movants doing what they had a right to do—file a lawsuit. These allegations, under the above law, do not state a claim for unconscionability or economic duress.

Further detracting from the claims is the inconsistency of the Counterplaintiffs/ Defendants' position. In section 4(f) on page 4 of the Escrow Agreement, Counterplaintiff/Defendant Kelty represented and warranted that he had carefully read the agreement, knew the contents thereof and signed his name as a free act for purpose of making a full and final compromise, adjustment and settlement of all claims. As asserted by the Movants and adopted by the Court, the Counterplaintiffs cannot seek to refute the Escrow Agreement as unconscionable while at the same time rely on its terms in their pleadings. As provided in the June 27, 2016 Memorandum and Order, in Tennessee allegations in a pleading are controlled by the actual provisions in the attached agreement. *Summers v. Bond-Chadwell Co.*, 24 Tenn. App. 357, 145 S.W.2d 7, 15, (1939); *Humphries v. West End Terrace,* 1991 WL 244468 (Tenn. Ct. App. 1991). As stated in 71 C.J. S. *Pleadings* § 542, "Generally in case of a variance between the allegations of a pleading and the terms of an instrument annexed or attached as an exhibit, the exhibit will control, as far as its legal effect is concerned, unless it is

expressly impeached or explained by the facts stated in the pleading." Further, in C.J.S., "Moreover, if an exhibit that is attached to a complaint facially negates the cause of action, the document controls and must be considered in determining a motion to dismiss. . . . Any exhibit attached to a pleading is part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control." 61A AM. JUR. 2D *Pleadings,* § 69 (May 2016 update) provides the same, "Generally, when there is a conflict between the provisions of a document attached to and relied upon by a pleading, and the allegations of the pleading, the provisions of the exhibit control. Consequently, the pleader's conclusion as the meaning of the document is not binding on the court, nor can an allegation of the pleading change the character or terms of the exhibit."

Further support for dismissal of the claims of unconscionability and economic duress is that these claims are a reiteration of the Count V – Fraud claim where there are allegations in paragraph 134 "Throughout the course of their involvement in the Company, Defendants have intentionally misrepresented and concealed existing material facts to the Plaintiffs, including misrepresenting their agreement to pursue the stated purpose of the Company, when in fact they were actively – but covertly – seeking to frustrate its purposes, as alleged above."

For all of these reasons, the causes of action in the Counterclaim of economic duress and unconscionability must be dismissed because they do not meet the criteria identified in the caselaw above.

Remainder of Count I Not Dismissed

In addition to dismissal of those portions of Count I pertaining to unconscionability and duress, the Movants assert that the remainder of Count I should be dismissed because the sections of the Operating Agreement, alleged in Count I to have been breached, establish no duty or obligation on the part of the Movants, so there can be no breach. At this preliminary stage of the lawsuit, the Court declines to grant the motion to dismiss but the declination is without prejudice to reassert in support of or in opposition to any future motions concerning: (1) whether all or parts of the Operating Agreement were superceded by the Escrow Agreement; (2) the Court V Fraud claim; and/or (3) Defendant Kelty's factual allegations that the Movants participated in an alleged conspiracy in effect exercising rights of management.

The reasons for this ruling are that the foregoing aspects of the lawsuit will provide more information and context on the Movants' challenge that under Sections 4.1, 5.3, 7.1 and 3.4 of the Operating Agreement they had no duty. At this point, there is not sufficient development of the case to rule on the duty question. At this juncture, there are sufficient facts in the Counterclaim to state a breach of contract claim.

In this regard, the Court's reasoning is, first, that there is a distinction between duty that arises from a contract and performance required by the contract. That a party is not obligated to perform is not necessarily indicative that there is no duty. Taking that rationale and applying it to this case, the Court finds that when the factual allegations of conspiracy and *de facto* exercise of management are viewed alongside Section 4.1 of the Operating Agreement, that shows that in Section 4.1 the Movants agreed to the sole and

exclusive right and authority of the Manager. Under these circumstances, the factual allegations of conspiracy in the Counterclaim state a claim, under Tennessee's liberal notice pleading standard, of breach of this duty. Similarly, Sections 5.3, 7.1 and 3.4, when viewed alongside the factual allegations of conspiracy, fraud and intentional misconduct, at this stage of the lawsuit, state a claim of breach by the Movants. The last reason for denying dismissal at this stage of the proceedings is that the parties have not yet sought rulings on the interplay between the Operating and Escrow Agreements and the extent to which the latter supercedes the former.

For these reasons the motion to dismiss Count I is denied at this stage of the lawsuit as to paragraphs 101-103 and 105-107.

Ellen Hobbs Lyle

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: John Farringer IV
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