STRATEGIC MANAGEMENT PARTNERS, INC. *Plaintiff,*	*	**IN THE**
	*	**CIRCUIT COURT**
v.	*	**FOR**
NETWORK TECHNOLOGIES GROUP, INC., et al., *Defendants.*	*	**ANNE ARUNDEL COUNTY**
	*	Case No.: C-2003-087419

* * * * * * * * * * * * *

ORDER

In accordance with the foregoing memorandum opinion, and upon consideration of the arguments of the parties, the testimony taken, and the evidence admitted, it is on this 18 day of January, 2006, by the Circuit Court for Anne Arundel County,

ORDERED, that Defendants Nora Zietz and Robert Stewart are hereby found to be jointly and severally liable to Plaintiff Strategic Management Partners Inc. for negligent misrepresentation in the amount of fifty-nine thousand dollars ($59,500.00); and it is further,

ORDERED, that Plaintiff Strategic Management Partners Inc.'s demand for entry of judgment against Defendants Gwendolyn Iloani and Maritza Alvarez for negligent misrepresentation shall be and hereby is DENIED; and it is further,

ORDERED, that Defendants Nora Zietz and Robert Stewart's cross-claim for contribution from Gwendolyn Iloani and Maritza Alvarez shall be and hereby is DENIED; and it is further,

ORDERED, that Plaintiff Strategic Management Partners Inc.'s demand for entry of judgment against the Abell Foundation for guarantee fees shall be and hereby is DENIED; and it is further,

ORDERED, that Plaintiff Strategic Management Partners Inc.'s demand for entry of judgment against Defendant Nora Zietz for guarantee fees shall be and hereby is DENIED; and it is further,

ORDERED, that Plaintiff Strategic Management Partners Inc.'s demand for attorney's fees and costs shall be and hereby is DENIED.

RONALD A. SILKWORTH, Judge
Circuit Court for Anne Arundel County

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STRATEGIC MANAGEMENT PARTNERS, INC. *Plaintiff,*	*	**IN THE**
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* * * * * * * * * * * * * * * * * *

MEMORANDUM OPINION

This matter came before the Court from September 29, 2004 through October 12, 2004 on Plaintiff Strategic Management Partners, Inc.'s ("SMP") complaint for Breach of Contract and Negligent Misrepresentation against Mrs. Nora Zietz ("Zietz") and Mr. Robert Stewart ("Stewart"), and Demand for Entry of Judgment against The Abell Foundation ("Abell") and Zeitz for Guarantee of SMP's fees, and Defendants' counter-claim for contribution against Mrs. Gwendolyn Iloani ("Iloani") and Mrs. Maritza Alvarez ("Alvarez"). At the conclusion of the proceedings the Court held the matter *sub curia.* Upon consideration of the arguments of the parties, testimony taken, and evidence admitted, the Court presents its conclusions below.

STATEMENT OF FACTS

The Plaintiff, SMP, through its President and sole shareholder, Mr. John M. Collard ("Collard"), provides companies with a variety of management services ranging from basic management consulting to the assumption of upper management positions on an interim basis. In these various capacities, SMP offers its clients extensive experience in the areas of mergers and acquisitions as well as turn-around and crisis management.

Defendant, Network Technologies Group, Inc. ("NTG") was a rapidly expanding, Baltimore-based construction company in search of a Chief Executive Officer ("CEO") to replace its outgoing CEO, Mrs. Michelle Tobin ("Tobin"), who was allegedly leaving the company for health reasons. In May 2002, NTG's Board of Directors determined to search for an

interim CEO while it continued to search for a permanent replacement for Tobin. Several members of the Board began meeting with potential interim CEO candidates during the early part of June 2002.

On June 6, 2002, Stewart, a then member of the Board and a partner at Spring Capital, one of the investors in the company, met with Collard to discuss the possibility of employing his services. During this meeting, the parties discussed the status of NTG and the duties that the successful interim CEO candidate would perform. Collard contends that there was a detailed discussion of NTG's financial status and that a number of financial documents were provided to Collard at that meeting; Stewart denies this allegation.

On June 17, 2002, Zietz, then a member of the Board and an employee of Abell, one of the investors in NTG, met with Collard. At that meeting, Zeitz provided Collard with a number of financial documents and discussed, among other things, the financial position of NTG as well as her expectations of the duties that would befall the interim CEO. At that time, Zietz did not provide any information to Collard regarding any pending or current lawsuits. Neither did she discuss any alleged loans to NTG by the officers of the company. Subsequent to that meeting, Zeitz arranged a June 25, 2002 meeting between Collard and Alvarez, a representative of Smith Wiley who was working with Iloani, then the Bon Secours representative on the Board of NTG. Zeitz also attended this meeting. At some point during the meeting, Zeitz informed Collard that the Board had agreed that Collard would be the interim CEO and asked that he prepare a contract memorializing the terms of their relationship. Collard did so and forwarded the draft "Interim Management Agreement" ("IMA") to Zeitz on or before June 26, 2002. At that point, Collard and Zeitz discussed the language of this proposed draft of the contract for services. At the request of Iloani and Zietz, the portions describing the reasons for Tobin's departure were modified.

Finally, on June 27, 2002, Collard met with Zeitz as well as Giordani, a co-founder, the Chief Operating Officer, and a then member of the Board of NTG. It was at this meeting that Collard executed the IMA on behalf of SMP and Zeitz executed the IMA, purportedly on behalf of NTG and the Board of Directors. Subsequently, at a June 28, 2002, meeting of the Board, the Directors voted to install Collard as the interim CEO and a member of the Board.

The terms of Collard's contract with NTG are the subject of some dispute as the language contained in the minutes from the meeting of the Board[1] on June 28, 2002 differs from that contained in the IMA executed by Zeitz and Collard[2] on June 27, 2002. While both the IMA executed on June 27th and the minutes from the meeting of the Board provided that Collard would be the interim CEO for a term of at least one month, under the June 27th agreement, the term was for "up to six months" and automatically renewed in increments of one month, after the initial term was completed. Conversely, the term memorialized in the minutes from the June 28th

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1 The Minutes for June 28, 2002, in pertinent part provide:

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> The Board next voted unanimously to name John Collard as interim CEO for a period of 1 month, at a salary of $10,000 per week, with the option to extend the contract at the end of the month. The Board also voted unanimously to place John Collard on the Board of Directors on an interim basis, with the express understanding that Mr. Collard will tender his resignation from the Board when his tenure as interim CEO comes to an end.

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2 The IMA executed by Zeitz and Collard on July 27, 2002, in pertinent part provides:

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> **2. Term of Agreement.** [NTG] and [SMP] contemplate that this Agreement will be for a term of up to six months commencing on the date hereof, but agree that it can be extended on a month by month basis if required by the parties under the same terms and conditions. Either party will consider this Agreement extended if six months passes and there is no action to cancel the Agreement. [NTG] agrees to engage [SMP], on an as available basis, for a minimum one-month period following the date of this Agreement.
> After this minimum period and not withstanding the foregoing, this Agreement shall terminate upon 1 weeks notice by either party to the other in writing by certified mail, reputable carrier (i.e. Federal Express, etc.), or personal delivery, or as mutually agreed by the parties.
>
> ***
>
> 5. Payment To [SMP]. [SMP] will be paid at the rate of $10,000.00 per week for its services under this Agreement. [SMP] will submit an invoice for services on a weekly basis. [NTG] will pay [SMP] the amounts due as indicated by invoice upon delivery. All invoices are due and payable upon delivery in person or to the US Mail.
>
> ***

meeting of the Board provided that the IMA would automatically terminate at the conclusion of the initial four-week term unless the parties affirmatively acted to extend the term.

Regardless, Collard began performing his duties as the CEO of NTG on July 1, 2002. According to the evidence, it became immediately apparent to Collard that there were a number of accounting irregularities jeopardizing the viability of the company. Upon further investigation, Collard discovered that the company's senior management had fraudulently manipulated the financial statements to overstate accounts receivable and understate expenses. The company was in dire financial straits. As a result, Collard promptly notified the company's first secured creditor, Mercantile-Safe Deposit and Trust Company ("Mercantile"), of the discovery. During that conversation Collard was told that NTG was overdrawn and Mercantile would not be honoring any more checks issued by the company.

On July 3, 2002 Collard, fearing that NTG would be unable to provide for his compensation, sought a guarantee of payment from Abell. Zietz verbally agreed to guarantee payment for Collard's services.

Subsequently, on July 5, 2002, Mercantile issued a notice of default for its loan to NTG. It was then that Mercantile indicated that it would "call the loan" unless additional monies were invested in the company.

Thereafter, Collard sent Zeitz a letter dated July 9, 2002 that purported to memorialize their conversations about Abell's agreement to guarantee payment of Collard's fees. The July 9 letter read as follows:

> This letter will confirm our conversations wherein The Abell Foundation has agreed to guarantee all professional fees and the contract between Network Technologies Group, Inc. and Strategic Management Partners, Inc. dated June 26, 2002, including in the event that a preference or avoidance action is brought against Strategic Management Partners, Inc. or me with regard to fees received from Network Technologies Group, Inc. in this matter in the future.[3]

[3] *See*, Plaintiff's Exhibit 56.

At the bottom of the letter there was an "Agreed to" line where Zietz signed indicating her assent to the guarantee, thereby binding Abell. There is no dispute that the intent of the parties was to create a guarantee. There is, however, much dispute as to the obligation undertaken by Abell under that guarantee. Abell argues that its intent was to guarantee only the terms of the original IMA entered into between NTG and SMP. Collard disagrees, arguing that the guarantee was intended to cover a much broader scope, including but not limited to the costs associated with winding-up NTG's affairs.

A meeting of the Board had been previously scheduled for the evening of July 11, 2002. Instead, a meeting was held earlier that day during which Collard advised the Board of Directors of Mercantile's position.[4] Nevertheless, the investors that were present, Zietz, Stewart and Iloani, all indicated that they would not invest further sums of money in NTG. As a result, the Board of Directors voted to authorize Collard to shut down the company.

On the same day, Collard drafted and signed the Amendment of Interim Management Agreement ("Amendment") on behalf of both SMP and NTG. The Amendment substantively changed the original IMA in several important respects. First, it changed the nature of the services from consulting to closing down and liquidation.[5] Second, it changed the term of the agreement to provide that "the term of this Agreement has been extended for the purpose of liquidating the Company."[6] Third, it provided that "the time originally anticipated is not changed substantially and increased based upon the desperate situation at the Company."[7] Finally, the Amendment changed the manner in which SMP's fees were assessed from $10,000.00 per week

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4 There is some dispute as to whether this meeting was an official meeting of the Board because of concerns over the adequacy of notice.

5 *See*, Plaintiff's Exhibit 78.

6 *Id.*

7 *Id.*

to an hourly basis, at $250.00 per hour, with no maximum.[8] Additionally, the Amendment provided that NTG would be liable for all amounts not approved by Mercantile under a "Forbearance Budget" it had approved.[9]

On July 12, 2002, NTG ceased operations and all employees were notified of their termination. Thereafter, Collard liquidated NTG's assets pursuant to a Forbearance Agreement entered into on July 16, 2002, between NTG and its first secured creditor, Mercantile. Under the terms of the Forbearance Agreement, Mercantile authorized a budget of loan "Advances" for the "organized withdrawal and liquidation" of NTG. This budget contained an appropriation for Collard's services. The appropriation provided for $10,000.00 per week for the first four weeks of July, 2002, and then decreased to $2,500.00 for the first week of August, and further decreased to $1,000.00 per week for the remaining three weeks of August. Thereafter, the budget for Collard ceased.

In reality, Mercantile made funds available in the amount of $10,000.00 per week for the first four weeks of July and then accepted weekly "Funding Requests" from Collard through October 13, 2002. The total funding approved for the services of SMP under the Forbearance Agreement was $108,500.00 for the services of Collard and SMP staff. These payments purportedly covered the time Collard and SMP staff spent working on liquidating NTG's assets during the time from July 1, 2002, the day Collard started work at NTG, through mid-October of 2002, when Mercantile instructed Collard that it considered withdrawal and liquidation of NTG completed.[10]

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[8] *Id.* Notably, the payment terms of the Amendment were the same as those proposed by Collard in the first draft of the IMA as well as the Forbearance Agreement, later executed by Collard on behalf of NTG.

[9] Interestingly, as of the date of the Amendment, NTG and Mercantile had not executed the Forbearance Agreement despite the fact that the Amendment makes specific reference to an approved Forbearance Budget.

[10] Under the Forbearance Agreement, Mercantile authorized NTG to compensate SMP for Collard's time dating back to July 1, 2002, when the company was still operating as a going concern. Neither side has offered an explanation for this decision.

In addition to the fees authorized under the Forbearance Agreement, Collard negotiated with Mercantile for the payment of a contingency fee for the collection of NTG's insurance claims. Specifically, SMP was paid the sum of $9,392.00 for the collection of approximately $28,000.00 in relation to a claim that NTG had as against Inland Marine. In total, Mercantile authorized payments to SMP in connection with Collard's work at NTG in the amount of $117,892.00.

On March 3, 2003, SMP filed its initial complaint alleging breach of contract by NTG and negligent misrepresentation on the part of the Board of Directors and NTG. That complaint was subsequently amended on September 9, 2003 and again on September 30, 2003. In the Second Amended Complaint, Plaintiff raised the following four causes of action: (1) Negligent Misrepresentation (naming NTG[11], Abell, Zeitz, Stewart, Iloani, and Alvarez[12], jointly and severally); (2) Breach of Contract (naming only NTG); (3) Demand for entry of judgment against Abell for guarantee of fees; and (4) Demand for entry of judgment against Zeitz for a guarantee of fees. Under these causes of action, Plaintiff seeks to recover $357,375.00 in fees for services that SMP claims to have provided beyond those authorized by Mercantile for the withdrawal and liquidation of NTG. These services were allegedly provided pursuant to the Amendment to SMP's original contract with NTG. In addition, Plaintiff seeks to recover attorney's fees and costs.

In response to the Plaintiff's claims, Defendants filed cross claims against Iloani and Alvarez seeking contribution with respect to any liability Defendants may be adjudged to owe Plaintiff.

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[11] On March 3, 2004, Judge North entered a Default Judgment against NTG on the negligent misrepresentation and breach of contract claims.

[12] On February 2, 2004, Judge Jaklitsch dismissed Plaintiff's claim for negligent misrepresentation against Defendants Iloani and Alvarez with prejudice. The Court made no finding or ruling with respect to the pending cross claim brought against Iloani and Alvarez.

ISSUES PRESENTED

I. WHETHER DEFENDANTS ZEITZ AND STEWART ARE JOINTLY OR SEVERALLY LIABLE TO PLAINTIFF FOR NEGLIGENT MISREPRESENTATION?

II. WHETHER CROSS-CLAIM DEFENDANTS ILOANI AND ALVAREZ ARE JOINTLY OR SEVERALLY LIABLE TO DEFENDANTS ZEITZ AND STEWART FOR CONTRIBUTION UNDER THE THEORY OF NEGLIGENT MISREPRESENTATION?

III. WHETHER DEFENDANT ABELL IS LIABLE TO PLAINTIFF SMP UNDER THE GUARANTEE?

IV. WHETHER DEFENDANT ZIETZ IS LIABLE TO PLAINTIFF SMP UNDER THE GUARANTEE?

DISCUSSION

I. WHETHER ZEITZ AND STEWART ARE JOINTLY OR SEVERALLY LIABLE TO PLAINTIFF SMP FOR NEGLIGENT MISREPRESENTATION?

The elements for a claim of negligent misrepresentation have been summarized as follows:

> (1) The defendant, owing a duty of care to the plaintiff, negligently asserts a false statement; (2) the defendant intends that his statement will be acted upon by the plaintiff; (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which if erroneous, will cause loss or injury; (4) the plaintiff, justifiably, takes action in reliance on the statement; and (5) the plaintiff suffers damage proximately caused by the defendant's negligence.[13]

The standard of care required of directors is defined in §2-405.1 of the Corporations and Associations Article of the Annotated Code of Maryland as follows:

> (a) A director shall perform his duties as a director, including his duties as a member of a committee of the board on which he serves:
> (1) In good faith;
> (2) In a manner he reasonably believes to be in the best interests of the corporation; and
> (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.
>
> (b)(1) In performing his duties, a director is entitled to rely on any information, opinion, report, or statement, including any financial statement or other financial data, prepared or presented by:
> (i) An officer or employee of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

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[13] *Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 51, 810 A.2d 1045, 1054 (2002).

(ii) A lawyer, certified public accountant, or other person, as to a matter which the director reasonably believes to be within the person's professional or expert competence; or
(iii) A committee of the board on which the director does not serve, as to a matter within its designated authority, if the director reasonably believes the committee to merit confidence.
(2) A director is not acting in good faith if he has any knowledge concerning the matter in question which would cause such reliance to be unwarranted.

(c) A person who performs his duties in accordance with the standard provided in this section shall have the immunity from liability described under § 5- 417 of the Courts and Judicial Proceedings Article.

* * *

(e) An act of a director of a corporation is presumed to satisfy the standards of subsection (a) of this section.

* * *

(g) Nothing in this section creates a duty of any director of a corporation enforceable otherwise than by the corporation or in the right of the corporation.

A. Duty of Care

To maintain a successful claim of negligent misrepresentation, it is incumbent upon Plaintiff to first establish that Zeitz and Stewart owed Plaintiff a duty of care to avoid negligently asserting false statements.[14] In this case, Plaintiff alleges that the negligent acts or omissions of Zeitz and Stewart caused him an economic loss. A duty of care to avoid causing an economic loss to another requires "an intimate nexus between the parties," which is satisfied by "contractual privity or its equivalent."[15] Merely being a member of the Board of Directors does not, in and of itself, impose personal liability. However, Corporate Directors who, in the exercise of their official duties, take part in the commission of a tort, have knowledge of a tort, or have consented to a tort may be held personally liable for the resultant injury.[16]

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[14] *See Jacques v. First Nat'l Bank*, 307 Md. 527 (1986).
[15] *Id.* at 538.
[16] *Tedrow v. Deskin*, 265 Md. 546, 550-51 (1972).

In *Wiseman v. Connors*[17], the Court of Appeals held that determination of the existence of the requisite privity of contract or its equivalent essential to the establishment of a tort duty of care is an issue to be determined by the trier of fact.[18] There, the Court held that the jury could have found that face-to-face negotiations to induce a prospective employee to accept employment "created a sufficiently close nexus or relationship as to impose a duty on [the employer] not negligently to make statements" regarding the position or the viability of the company.[19]

Here, Zeitz and Stewart argue that they had no contractual relationship, or the equivalent, with Plaintiff. As such, Zeitz and Stewart contend that they did not owe Plaintiff a legally cognizable duty of care. Conversely, Plaintiff contends that Zeitz and Stewart, acting as agents for NTG in the negotiation of Collard's employment as interim CEO, owed Plaintiff a duty to provide accurate financial statements, audits and other representations in order to fairly present NTG's financial condition.

On consideration of the evidence here presented this Court finds that the pre-employment negotiations during the meetings on June 6, 17 and 25, 2002 taking place between the Plaintiff and Zeitz or Stewart were sufficient to establish contractual privity or its equivalent. As such, this Court finds that Zeitz and Stewart owed Plaintiff a duty not to negligently provide information about NTG that was relevant to the proposed employment agreement.

Having determined that Zeitz and Stewart owed Plaintiff a duty of care, this Court must next determine whether Zeitz and Stewart negligently asserted a false statement. Zeitz and Stewart made material misrepresentations during the course of their negotiations. Specifically,

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17 312 Md. 428 (1988).

18 *Wiseman*, 312 Md. 428, 451 (1988) (An employee of a car dealership sued his employer for negligent misrepresentation. The basis of the claim was that the employer had misrepresented the financial condition of the company to induce the employee into an agreement. Thereafter, the employee discovered that the financial status that was presented to him and upon which he relied was substantially different from the actual condition of the company.)

19 *Id* at 448-49.

this Court finds that during their meetings to discuss the possibility that Collard would assume the position of interim CEO at NTG, Stewart and Zeitz each stated "[t]he Company is not aware that it is a party to any litigation," and provided Plaintiff with an Executive Summary indicating the same, despite the fact that both had knowledge of a $883,428.60 claim against the company by Nationwide Trenching, Incorporated.

In addition, this Court finds that both Zeitz and Stewart provided Plaintiff with several documents containing financial information that they knew or should have known to be incomplete and/or inaccurate.[20] While Zeitz and Stewart were directors entitled to rely upon the truth and accuracy of information provided by officers of the company, they were not permitted to rely upon such information if they had any knowledge concerning the matter that would cause such reliance to be unwarranted.

This Court finds that Zeitz and Stewart failed in their duty to exercise reasonable care in providing Plaintiff with information regarding the reason for Ms. Tobin's departure. In addition, this Court finds that Zeitz and Stewart had knowledge that the company was "in danger of collapse" and foreclosure as a result of actions Ms. Tobin took which the Board believed "permanently and irreparably damaged NTG." However, they negligently failed to disclose this knowledge.[21] Finally, this Court finds that Zeitz and Stewart knew or should have known of the existence of alleged employee loans materially impacting the company's financial situation, which they also failed to disclose to Plaintiff. These misrepresentations were material and therefore in violation of Zeitz and Stewart's duty to disclose information relevant to their negotiations.

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[20] *See*, Plaintiff's Exhibits 5-15. This Court finds that Zeitz provided Plaintiff with copies of Plaintiff's Exhibits 5-15 and Stewart provided Plaintiff with copies of Plaintiff's Exhibits 7-11.

[21] *See*, Plaintiff's Exhibit 125.

B. Intent that Plaintiff Act; Knowledge that Plaintiff will Probably Rely; and Plaintiff's Justifiable Action in Reliance Upon the False Statements.

Plaintiff contends that Zeitz and Stewart intentionally provided information that they knew or should have known to be false and/or incomplete with the intention that such information be acted upon by Plaintiff. Further, Plaintiff contends that Zeitz and Stewart had knowledge that Plaintiff would rely upon the aforesaid information, which if erroneous, would cause loss or injury. Finally, Plaintiff contends that it did, in fact, justifiably rely upon the information provided by Zeitz and Stewart in making the decision to enter into the IMA.

On consideration of the testimony and evidence presented, this Court finds that Zeitz and Stewart did intentionally provide Plaintiff with information[22] regarding the condition of NTG with the intention that Plaintiff rely upon that information in evaluating the interim CEO opportunity. Additionally, this Court finds that Zeitz and Stewart had knowledge that Plaintiff would rely upon that information and that it would be detrimental to do so. Finally, this Court finds that Plaintiff did, in fact, justifiably rely upon the information provided by Zeitz and Stewart in conjunction with negotiations.

C. Resultant Injury to Plaintiff

The final element of a claim of negligent misrepresentation is injury that is proximately caused by Defendants' representations. Plaintiff has the burden of proving, by a preponderance of evidence, that the negligent misrepresentations of Zeitz and Stewart were the proximate cause of its injuries. Here, Plaintiff asserts that it was negligently induced to execute the IMA. Plaintiff further contends that, but for the misrepresentations made by Zeitz and Stewart, Plaintiff would have either refused to engage in any relationship with NTG, required a personal guarantee prior

[22] That information, in the form of numerous financial documents and other representations, was more fully discussed in the previous section.

to entering into any agreement for the provision of management services, or provided only consulting services under a retainer arrangement.

Defendants contend that any statements or omissions by Defendants were not the proximate cause of any losses sustained by Plaintiff. Specifically, Defendants contend that any losses incurred by Plaintiff arose after Plaintiff learned of NTG's true financial condition. Further, Defendants assert that many of the damages Plaintiff seeks to recover arose under the Amendment, which was executed after Plaintiff learned NTG's true financial status. As such, Defendants argue that those damages could not have been proximately caused by their actions and that Plaintiff assumed the risk of loss associated therewith. In addition, Defendants cite section 2 of the IMA in support of their contention that, upon discovery of the fraud that ultimately led to the demise of NTG, Plaintiff was within its contractual rights to terminate the IMA with one week's notice.

On review of the evidence, this Court has found that Zeitz and Stewart made material negligent misrepresentations to Plaintiff regarding the condition of NTG prior to the execution of the IMA. In addition, this Court finds that such misrepresentations were the proximate cause of injury to Plaintiff. Despite Defendants' assertions to the contrary, this Court finds that Plaintiff was induced by their statements to enter into the IMA and provide the services of an interim CEO for a minimum term of one month.

Defendants contention that the terms of the IMA provide that Plaintiff was entitled to terminate the IMA upon the discovery of fraud and upon one week's notice is incorrect. Defendants have failed to consider the cited language in proper context. The referenced portion of the IMA specifically provides that "[NTG] agrees to engage [Plaintiff], on an as available basis, for a *minimum one-month period* following the date of this Agreement." It goes further to state "*[a]fter this minimum period* and notwithstanding the foregoing, this Agreement shall

terminate upon 1 weeks notice by either party...."[23] The plain language of the aforesaid section clearly indicates that Plaintiff had an obligation under the IMA to serve a minimum term of one month. Plaintiff may have had other options with regard to avoidance of the contract but, contrary to Defendants' assertions, the IMA did not offer Plaintiff an opportunity to terminate its services upon one week's notice of the start date. In accordance with the terms of the IMA, Plaintiff assumed the role of interim CEO of NTG on July 1, 2002. Plaintiff's resultant injuries were those that naturally and probably flowed from the assumption of that position and the duties carried therewith.

As stated, Plaintiff must establish a causal connection between its claimed injuries and the negligent misrepresentations of Zeitz and Stewart by a preponderance of evidence. To that end, Plaintiff has submitted voluminous evidence regarding its claimed damages.[24] On careful consideration of that evidence in conjunction with all the other evidence presented in this case, this Court finds that Zeitz and Stewart are jointly and severally liable for those damages that are causally connected to the assumption of the role as interim CEO.

The Court has found that Plaintiff has proven by a preponderance of the evidence that Zeitz and Stewart are liable for the following damages: $27,562.50 for time spent in connection with the termination of NTG's 401k Plan; $8,000.00 for time spent in connection with Federal and State investigations associated with the shutdown of NTG; $2,187.50 for time spent filing NTG's tax returns and other government reporting; $13,750.00[25] for time spent in connection

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[23] *See,* Plaintiff's Exhibit 22 (emphasis added).

[24] *See,* Plaintiff's Exhibit 183.

[25] This figure represents all damages from item "G" (totaling $33,375.00) of the time reporting details in Pl.'s Ex. 183 except for those expenses accrued prior to October 13, 2002 and the Inland Marine Claim (totaling $15,375.00 – this claim has already been paid) and the claim for "Lawyer and Participant Discussions" (totaling $1,250.00).

with the pursuit of insurance claims on behalf of NTG; $1,750.00[26] for time spent on NTG's legal matters; and $6,250.00[27] for time spent in connection with local investigations.

With regard to those amounts not specifically included above, the Court has found that Plaintiff has either failed to demonstrate a causal connection between the claimed amount of damages and what this Court has found to be the negligent misrepresentation of Zeitz and Stewart, or has failed to meet the burden of proof by a preponderance of the evidence.

Additionally, of the damages considered to be proven, only those damages that accrued after October 13, 2002, have been awarded. October 13th was the date at which Mercantile stopped accepting Collard's funding requests. Therefore, any work for which Plaintiff presently seeks compensation occurring prior to that date has actually already been paid pursuant to the agreement with Mercantile. Mercantile's Forbearance Agreement authorized a budget containing an appropriation for Collard's services related to the "organized withdrawal and liquidation of the company." The damages claimed in Plaintiff's exhibit relate to the organized withdrawal and liquidation of the company. As such, this Court finds that Zeitz and Stewart are liable to Plaintiff in the amount of $59,500.00 and shall enter the attached judgment in favor of Plaintiff.

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[26] This figure was discerned from item "H" (totaling $171,812.50) of the time reporting details in Pl.'s Ex. 183 calculated by adding the following figures: $125.00 from October 17, 2002; $125.00 from October 28, 2002; $125.00 from November 5, 2002; $125.00 from November 19, 2002; $125.00 from December 3, 2002; $125.00 from December 19, 2002; $125.00 from January 3, 2003; $125.00 from January 23, 2003; $125.00 from February 4, 2003; $125.00 from March 8, 2003; $125.00 from April 7, 2003; $125.00 from May 15, 2003; $125.00 from June 18, 2003; $125.00 and from July 24, 2003.

[27] This figure represents damages from item "I" for the "DLLR Investigations" totaling $6,625.00 minus $500.00 for the following items that will not be awarded because they are duplicate items: $125.00 from August 5, 2003; $125.00 from August 7, 2003 and two entries for $125.00 each from August 8, 2003.

II. Whether Cross-Claim Defendants Iloani and Alvarez are jointly or severally liable to Defendants Zeitz and Stewart for contribution under the theory of negligent misrepresentation?

A. Duty of Care

Because this Court finds that Defendants Zeitz and Stewart are jointly and severally liable to Plaintiff for negligent misrepresentation, the cross-claim for contribution against Iloani and Alvarez by Zeitz and Stewart must be considered.

Zeitz and Stewart maintain that Iloani and Alvarez are equally liable to Plaintiff under the theory of negligent misrepresentation because they participated in Plaintiff's retention to the same extent as Zeitz and Stewart. Specifically, Zeitz and Stewart assert that Iloani and Alverez, as present or former employees or representatives of The Bon Secours Community Investment Fund, L.P. ("Bon Secours"), which was an investor in NTG, participated in the search and selection of Plaintiff for the position of interim CEO of NTG to the same extent as Zeitz and Stewart. As such, Zeitz and Stewart argue that Iloani and Alvarez must be held equally liable for the resultant damages.

This Court shall first consider the claim of contribution as against Alvarez. After consideration of the evidence presented and the testimony taken, this Court finds that Alvarez was never an officer, director or member of the Board of NTG. As such, she had no authority to act on behalf of NTG. Therefore, Alvarez was not an agent authorized to act in connection with the engagement of Plaintiff's services as interim CEO of NTG. Accordingly, this Court finds that Alvarez did not owe Plaintiff a duty of care.

In addition, even if this Court were to find that Alvarez owed Plaintiff a duty of care, it would be the finding of this Court that the evidence presented fails to support the assertion that such duty was breached. There has been no evidence presented indicating that Alvarez provided Plaintiff with any information regarding the financial situation of the company. Additionally, the

record is devoid of any support for the notion that Alvarez knew or should have known that the information provided to Plaintiff was inaccurate or incomplete. As such, Zeitz and Stewart's cross-claim for contribution against Alvarez fails and she cannot be held liable for contribution under the theory of negligent misrepresentation.

With regard to the claim for contribution against Iloani, she was, in fact, a member of the Board. As such, just as Zeitz and Steward owed a duty to Plaintiff not to negligently misrepresent information relevant to the engagement of Plaintiff's services, so too did Iloani. However, this court does not find Iloani liable to Zeitz and Stewart for contribution. Iloani did not meet or communicate with Plaintiff at any point prior to June 28, 2002, the date when the Board voted to hire Plaintiff's interim management services. Additionally, the record contains no evidence that Iloani presented Plaintiff with a shred of information prior to the execution of the IMA. Simply stated, there is no evidence to suggest that Iloani made any material misrepresentations to Plaintiff at all, let alone any that were relied upon to its detriment. As such, Iloani cannot be held liable for contribution under the theory of negligent misrepresentation.

III. WHETHER DEFENDANT ABELL IS LIABLE TO PLAINTIFF SMP UNDER THE GUARANTY?

It is undisputed that on or about July 3, 2002 Zeitz, as representative of Abell, orally agreed to guarantee SMP's fees under the IMA. It is also undisputed that on or about July 9, 2002 Plaintiff presented a letter purporting to reduce the terms of the July 3, 2002 agreement to writing and that Zeitz received and signed that document (the "Guarantee Letter") on behalf of Abell. The parties do, however, disagree as to the scope of the guaranty.

A guaranty may be either continuing or restricted. A continuing guaranty is defined as a guaranty not limited to a single transaction intended to cover or provide security for future

transactions within certain limits.[28] In accord, "a continuing guaranty contemplates a future course of dealings between the creditor and the principal debtor, usually extending over an indefinite period of time."[29]

In Maryland, a guaranty is a contractual agreement and interpretation and construction of a guaranty follows the objective law of contracts.[30] A court "must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated."[31] In addition, a guaranty is to be construed against the drafting party.[32]

Here, Abell contends that its guaranty was a continuing guaranty that was revocable, on due notice, at any time. Plaintiff, however, cites *U.S. ex rel. Wilhelm v. Chain*[33] in support of its contention that the guaranty was supported at the outset by sufficient consideration, making it a binding contract that was irrevocable. On review of the language of the guaranty letter and in light of the aforementioned standards, this Court finds that the parties contemplated that the guaranty was for fees under the June 26, 2002 IMA that were to go on well into the future and that the amount to be guaranteed was unknown.[34] As such, this Court finds that the guaranty was a continuing guaranty. Further, this Court finds that the guaranty was not supported at the outset by sufficient consideration to make it irrevocable. Therefore, this Court finds that the guaranty was merely an offer revocable by Abell on due notice to Plaintiff.

After determining that the guaranty was revocable at will, the question becomes whether Abell effectively revoked. The evidence presented indicates that on July 19, 2002 Zeitz

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28 Guaranty, 38 C.J.S., Section 7.
29 Guaranty, 38 Am. Jur. 2d, Section 63.
30 *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985).
31 *Id.*
32 *MarineMidlandBank v. Kilbanc*, 573 F. Supp. 469 (1983).
33 300 U.S. 31 (1937).
34 Plaintiff's Exhibit 56, *supra* note 3.

personally delivered a letter revoking the guaranty on behalf of Abell.[35] That letter specifically provided that "[Abell] [would] not guarantee any compensation or expenses for [Plaintiff] after the month ending July 31, 2002."[36] While it is true that the guarantor may not revoke the guaranty of services already performed, Plaintiff is not entitled to recover under the guarantee if it has been fully compensated by another source. This is particularly true when the guarantor agreed to make payment only in the event that such payment was not forthcoming from any other source.

In this case, Mercantile and NTG, through Collard, executed a Forbearance Agreement that authorized a budget appropriation for NTG to pay for Collard's services. The appropriation provided for $10,000.00 per week for the first four weeks of July 2002.[37] Plaintiff now argues that it is entitled to additional compensation. Yet, the Mercantile Forbearance Agreement clearly provided another source of funds. After careful review of the evidence, this Court finds that Plaintiff has failed to prove by a preponderance of the evidence that it is entitled to additional fees. Plaintiff was compensated in the exact amount described under the terms of the IMA. This Court is not persuaded that Plaintiff is entitled to additional sums. As such, this Court finds that Abell properly revoked its guaranty and is no longer liable to Plaintiff for any fees associated therewith.[38]

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35. Plaintiff's Exhibit 97.

36 *Id.* In addition to specifically indicating its intention to revoke the guaranty, Abell confirmed that it was its intention to guarantee only those fees provided for in the IMA that were not paid by another source. As such, Abell informed Plaintiff that it would not be paying any of Plaintiff's fees for the month of July 2002 because Plaintiff had secured payment of those fees from Mercantile.

37 The reason for the appropriation for the period of time from July 1, 2002 to July 11, 2002 is inexplicable as NTG was still operating as a going concern up until July 11, 2002 when the Board voted to shutdown. The company was not in forbearance during that time.

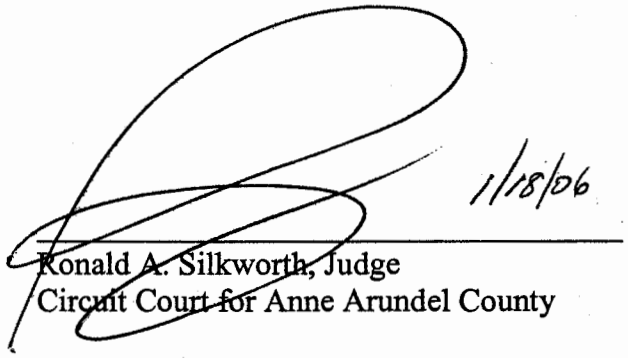
38 Notwithstanding the forgoing, even if this Court were to determine that the guaranty was an irrevocable continuing guaranty, a guarantor is discharged by the material alteration or modification of the underlying contract without the guarantor's consent. In this case, according to its own language, the July 11, 2002 Amendment materially altered the IMA. As such, Abell's liability would have been limited to that which it had agreed to under the June 26, 2002 IMA. That obligation was to provide a guarantee of payment for management services to NTG as a going concern. That obligation terminated upon cessation of operations on July 12, 2002.

IV. WHETHER DEFENDANT ZIETZ IS LIABLE TO PLAINTIFF SMP UNDER THE GUARANTY?

The final cause of action in Plaintiff's Second Amended Complaint stems from an allegation that Zeitz was not authorized by Abell to execute the guaranty of the IMA. As detailed above, this Court has found that Abell is not liable to Plaintiff under the guaranty. As such, Plaintiff's final claim must fail.

CONCLUSION

For the Reasons set forth in this Memorandum Opinion, this Court shall enter the Order attached hereto.



Ronald A. Silkworth, Judge
Circuit Court for Anne Arundel County