

At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19<sup>th</sup> of May 2017.

P R E S E N T:

HON. SYLVIA G. ASH,  
Justice.

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**MENACHEM FARRO, individually and derivatively as a shareholder in the right of LM INTERNATIONAL, INC., SELLER1ON1 INCORPORATED, WML COMMUNICATIONS, INC., and as a member in the right of LMEG WIRELESS, LLC,**

Plaintiff,

Decision / Order

- against -

Index No. 518007/2016

**ZALMAN SCHOCHET a/k/a SCHEUR ZALMAN SCHOCHET, LEVI WILHELM, LM INTERNATIONAL, INC., SELLER1ON1 INCORPORATED, WML COMMUNICATIONS, INC., LMEG WIRELESS, LLC, INTERNATIONAL LLC and LMZT LLC,**

Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

\_\_\_\_\_  
1 - 3  
\_\_\_\_\_  
4  
\_\_\_\_\_

Defendants, Zalman Schochet (“Schochet”), Levi Wilhelm (“Wilhelm”), LM International, Inc. (“LMI”), Seller1on1 Incorporated (“Seller1on1”), WML Communications, Inc. (“WML”), LMEG Wireless, LLC (“LMEG”), Seller Wireless LLC, LM Wireless International LLC and LMZT LLC, move pursuant to CPLR §§3211(a)(1), (a)(3) and (a)(7), to dismiss Plaintiff, Menachem Farro’s amended complaint. Plaintiff opposes and moves for a preliminary injunction and to file a second amended complaint. For the reasons set forth below, Defendants’ motion to

dismiss is DENIED. Plaintiff's cross-motion to file a second amended complaint is GRANTED. Plaintiff's request for a preliminary injunction is DENIED as moot.

### *Background*

Disputes arising out of loan transactions spurred the instant action. In 2003, Plaintiff and Wilhelm formed LMEG, as equal members, to manufacture, sell, and distribute aftermarket accessories for cellular phones. In order to facilitate LMEG's business, Plaintiff and Wilhelm formed three additional companies, LMI, WML and Seller1on1 (together with LMEG the "Businesses"). In the ensuing years, the Businesses are said to have generated millions of dollars in sales. However, the Businesses needed additional capital in 2008 to remain viable. To that end, Plaintiff and Wilhelm approached and obtained loans from Schochet, a licensed attorney. The loans, according to Plaintiff, ranged from \$300,000 to over a million dollars.

Plaintiff and Wilhelm accepted the loans with the knowledge that the loans originated from Schochet's attorney trust account. Plaintiff claims to have been troubled by the loans' origin because he did not want the Businesses to be subjected to potential claims from unknown third parties. In order to allay Plaintiff's concerns, Schochet allegedly represented to Plaintiff that the funds belonged to him personally.

In 2011, Plaintiff and Wilhelm obtained additional loans from Schochet to prop-up the Businesses. In exchange for making the additional loans, Schochet allegedly required that Plaintiff and Wilhelm provide him a one-third interest in the Businesses. Plaintiff, purportedly relying on Schochet's assurances that the loan funds belonged to him personally, acquiesced and along with Wilhelm transferred one-third interest in the Businesses to Schochet.

In May of 2016, Schochet became a director and manager of the Businesses. On October 3, 2016, Schochet sent a notice of a special meeting of shareholders to be held on October 14, 2016. The purpose of the meeting was to obtain shareholder approval to sell the assets of WML, LMI and Seller1on1. Plaintiff objected and commenced this action on October 12, 2016. Plaintiff sought to obtain a temporary restraining order (TRO) to stay the October 14<sup>th</sup> meeting, but the Court denied Plaintiff's application. The meeting was held on November 1, 2016. Plaintiff attended the meeting and registered his objection to the proceedings.

On November 18, 2016, Plaintiff filed an amended complaint seeking, among other reliefs, to rescind Schochet's interest in the Businesses due to Schochet alleged fraud in obtaining same. On November 21, 2016, Schochet and Wilhelm served upon Plaintiff a Notice of Merger and Dissenters' Rights. The Notice of Merger indicated that Schochet and Wilhelm had merged LMEG into LMEG Acquisition (the "Merger") on November 16, 2016. The Notice of Merger informed Plaintiff that he would not receive membership interest in LMEG Acquisition. Further, the Notice of Merger informed Plaintiff that the market value of his interest in LMEG was \$7,225,500 and provided Plaintiff 20 days to dissent to the merger.

On December 5, 2016, Plaintiff filed the instant Order to Show Cause to, among other things, enjoin Defendants from consummating the Merger and interfere with his rights in LMEG. Defendants oppose Plaintiff's request for a TRO as moot, on the ground that the Merger has long since been consummated.

Additionally, Defendants move to dismiss Plaintiff's amended complaint. Defendants maintain that Schochet did not mislead Plaintiff about the ownership and origin of the loan funds. Further, Defendants argue that the origin or ownership of the loan funds is immaterial in this case because the Businesses, and by extension Plaintiff, have benefited from the loans. Further, and in addition to other arguments, Defendants maintain that Plaintiff cannot assert derivative claims on behalf of the Businesses because Plaintiff is no longer an interest holder in the Businesses due to the consummated Merger.

Plaintiff opposes Defendant's motion and cross-moves to file a second amended complaint. Plaintiff's second amended complaint seeks to nullify the Merger on the grounds that: (1) Defendants failed to comply with Limited Liability Company Law §1002 in effectuating the LMEG Merger; (2) the LMEG Merger was undertaken for the sole purpose of depriving Plaintiff standing to assert derivative claims on behalf of LMEG; and (3) the LMEG Merger is a continuation of the fraud perpetuated by Schochet in obtaining equity in LMEG. Defendants oppose, arguing that Plaintiff's second amended complaint lacks merit.

### *Discussion*

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]). Here, the crux of Plaintiff's amended complaint is Plaintiff's allegation that he was defrauded by Schochet into transferring a one-third interest in the Businesses. Thus, in deciding Defendant's motion to dismiss, the Court must determine whether Plaintiff has validly asserted a fraud claim.

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2d Dept 2010]; see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here, Plaintiff alleges material misrepresentation of fact because Plaintiff claims that Schochet informed him that the funds from his attorney trust account belonged to him personally, when in fact they did not.

Further, Plaintiff sufficiently alleges intent on the part of Schochet to induce reliance because Plaintiff claims that he would not have consented to transferring one-third interest to Schochet if he knew that the loan funds did not belong to Schochet personally. Lastly, Plaintiff

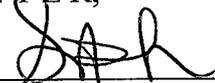
sufficiently allege damages because, upon becoming a director and member of the Businesses, Schochet, along with Wilhelm, initiated transactions in which Plaintiff lost his interest in the Businesses. Therefore, Defendants' motion to dismiss Plaintiff's amended complaint is DENIED.

Turning now to Plaintiff's motion to file a second amended complaint. Applications for leave to amend pleadings should be freely granted except when the delay in seeking leave to amend would directly cause undue prejudice or surprise to the opposing party, or when the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]). Here, Plaintiff's proposed second amended complaint would not cause undue prejudice nor serve as a surprise to Defendants. Plaintiff seeks to add claims based on the Merger, which was initiated after this action's commencement. As such, Plaintiff's motion to file the second amended complaint is GRANTED.

Plaintiff's motion to enjoin Defendants from consummating the Merger and interfere with his rights in the Businesses is DENIED as moot.

This constitutes the Decision and Order of the Court.

ENTER,



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Sylvia G. Ash, J.S.C

HON. SYLVIA G. ASH, JSC