SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0085-19

JAMES G. ROBERTSON, KATHLEEN J. ROBERTSON, STEVEN M. SFUGARUS, SUZANNE C. SFUGARUS, KENNETH AVIA, SMITH/STINNEFORD, LLC, JEFFREY A. MONACHINO, ANNETTE C. MONACHINO, ELLEN MULLER, ARNOLD KAPLEAU, JILL KAPLEAU, ANN M. FAGAN, and JON BIRGÉ,

Plaintiffs-Respondents/
Cross-Appellants,

v.

HYDE PARK MALL, a general partnership, JOHN M. AZARIAN, JR., individually and as Executor of the Estate of BARBARA AZARIAN MCCULLOUGH, and d/b/a AZARIAN MANAGEMENT & DEVELOPMENT CO., and JOHN M. AZARIAN REALTY CO.,

Defendants-Appellants/
Cross-Respondents.

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Submitted March 21, 2022 – Decided May 19, 2022

Before Judges Rothstadt and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-000091-18.

Kilstein & Kilstein, LLC, attorneys for appellants/cross-respondents (Richard J. Kilstein, on the briefs).

Leopold Law, LLC, attorney for respondents/cross-appellants (Howard B. Leopold, on the briefs).

PER CURIAM

In this partnership dispute, we address the parties' challenges to a final judgment entered following a bench trial. The court concluded that plaintiffs, a group of partners with ownership interests in the Hyde Park Mall (Mall) in Hyde Park, New York, rightfully dissociated from the partnership in accordance with the Uniform Partnership Act, N.J.S.A. 42:1A-1 to -56 (Act). The court also determined their buyout interests and ordered the partnership to pay the buyout price as specified in the judgment.

On appeal, defendants contend that the court erred by failing to: (1) find that plaintiffs' dissociation was wrongful; (2) assess damages against the wrongfully dissociating partners; (3) discount the partnership's fair value for lack of control and marketability; (4) reduce the partnership's fair value to account for numerous outstanding partnership debts and other amounts, including (a) management fees along with brokerage commissions and accounting fees, inclusive of alleged interest; (b) unpaid loans made by the Managing General Partner; (c) the dissociated partners' negative capital accounts; and (d) tenant security deposits.

In their cross-appeal, plaintiffs maintain that the court erred by: (1) relying upon defendants' expert's appraisal of the partnership's fair value instead of the value as testified by their expert; (2) refusing to increase the partnership's fair value to account for personal loans taken by defendant John M. Azarian, Jr., and his mother, Barbara Azarian McCullough,[1] that were improperly repaid using partnership funds; and (3) failing to find that the partnership overpaid management and accounting fees to defendant Azarian Management & Development Co. (AM&DC), and other Azarian-owned entities.

With one exception, we affirm the final judgment based on the court's attendant factual findings which we conclude are amply supported by substantial credible evidence. We are also satisfied that the court's legal conclusions are

[1] For ease of reference, we refer to John, and his wife Donna, as well as Barbara by their first names, intending no disrespect.

consistent with applicable law. On the issue of whether plaintiffs rightfully or wrongfully dissociated, we also affirm, but do so after invoking our original jurisdiction to address an issue not resolved by the court – whether the parties' General Partnership Agreement (Agreement) and the Act prevented plaintiffs from rightfully dissociating until completion of a "definite term or particular undertaking," N.J.S.A. 42:1A-32(b)(2), here the sale of the Mall. Based on the undisputed record on this point, and relevant case law interpreting a similar provision of the Act, we conclude it did not. We accordingly reject defendants' primary point on appeal and conclude that plaintiffs' dissociation was not wrongful.

I.

To provide context for our opinion, we provide a detailed summary of the proofs adduced at the bench trial.

A. The August 1987 Partnership Agreement

The Mall is a 130,000 square-foot, one-story shopping center located in Hyde Park on approximately fifteen acres of land. Also included on the property is a two-story, freestanding building and gasoline station. The Mall's current anchor tenant is Stop & Shop supermarket. Other tenants include Radio Shack, Advanced Auto Parts, Dollar Tree, and Liquorama. Although built in the 1970s, the Mall underwent a major renovation in the late 1990s.

On August 24, 1987, Barbara and John executed the Agreement to form a partnership whose stated purpose was "to acquire the land and premises" of the Mall "and thereafter to hold, lease, manage and operate the same as a shopping center." The partnership conducted its business under the name "Hyde Park Mall" and maintained its principal office in Hawthorne, New Jersey.

We next briefly discuss those provisions of the Agreement relevant to the issues on appeal. Similar to most partnership agreements, the Agreement here contained provisions establishing the admission and creation of Class A partners and Class B partners, "each of whom shall have a percentage interest in the partnership and shall share in the income, gains, deductions, losses and credits of, and distributions . . . from the partnership in proportion to their percentage interest in the partnership." At the time the Agreement was first executed, Barbara and John were Class A partners, with Barbara holding a 30% partnership interest and John holding a 3 1/3% partnership interest. Barbara was also a Class B partner with a 66 2/3% partnership interest. The Agreement also permitted the admission of additional Class A and Class B partners upon the agreement of the existing general partners.

Section 4 of the Agreement appointed Barbara as the Managing General Partner, with a successor to be appointed by a majority of the general partners upon her death. John was later appointed her successor and became the Managing General Partner after Barbara died in 2012.

Pursuant to Section 5, each partner's capital account was to include the "cash and fair market value of the property originally contributed by such partner to the partnership, increased by additional contributions and share profits transferred to capital and decreased by the share of the partnership losses and distributions." Section 6 required "[d]istributions to the partners shall be made at such times as determined by the Managing General Partner and shall be charged against the capital account of each partner."

The Agreement also addressed the duration of the partnership, a critical issue on appeal, in Section 12, which provided that the partnership "shall continue until the sale, exchange or other disposition of [t]he Mall or until terminated by the Managing General Partner or by a vote of a majority in interest of all of the general partners." It further stated that "[u]pon termination or other dissolution of the partnership, each general partner shall receive an amount equal to the positive balance in his capital account and shall contribute an amount equal to the negative balance in his capital account."

Section 4 granted the Managing General Partner broad authority "to do any act or execute any document or enter into any contract or any agreement of any nature necessary or desirable, in the sole opinion of the Managing General Partner, in pursuance of the purposes of the partnership" without consent of the other general partners. That provision expressly authorized the Managing General Partner to, among other things:

> (a) acquire The Mall or any other assets deemed necessary or desirable in furtherance of the partnership business;
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> (b) enter into a management agreement with Azarian Management & Development Company[2] (the "Property Manager"), which is owned and controlled by the Managing General Partner, pursuant to which the Property Manager for a fee of 10% of base rent including percentage rent shall manage the property in accordance with such management agreement under the general direction and supervision of the Managing General Partner;
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> (c) enter into an exclusive real estate brokerage agreement with John M. Azarian Realty Co.,[3] or any other real estate broker, for the leasing of premises in The Mall;
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> (d) borrow monies from time to time and from any source, including one or more of the general partners, upon such terms and conditions as the Managing

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[2] This entity is now known as The Azarian Group, LLC.

[3] This entity is now known as Azarian Realty Co.

> General Partner may deem advisable and secure such borrowings with partnership property or any part thereof, and refinance, recast, modify or extend any of the obligations of the partnership;
>
> (e) execute any and all instruments, and pay out of partnership funds such expenses as are necessary, to carry out the intentions and purposes of this Agreement;
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> (f) employ, retain or otherwise secure or enter into contracts with persons or firms to assist in the management of the partnership property, including but not limited to arrangements with property agents, construction companies, general contractors, other contractors, sales companies, attorneys, accountants, insurance companies, brokers and advertising companies (any of which may be general partners of the partnership or affiliates thereof) and any other person or firm, all on such terms and for such consideration as the Managing General Partner may deem advisable[.]

Section 9 also permitted the Property Manager "to receive the fee set forth in Section 4(b) hereof" and for the Managing General Partner and Property Manager to "be reimbursed for all out-of-pocket expenses in connection with the operation of the property."

Section 7 expressed that the partnership's intention was "to obtain financing for the acquisition of The Mall and all other funds required for the operation of the partnership from unrelated third parties." It also provided, however, "[i]n the event that the partnership has insufficient funds in the sole opinion of the Managing General Partner, each partner shall be requested to loan to the partnership that portion of the amount being sought corresponding to the partner's interest in the partnership."

That provision also provided that if "any partner does not loan its portion of such loan, any of the other partners may, but are not obligated to, loan such amount to the partnership." "All loans to the partnership shall bear interest at a floating rate equal to the prime rate charged by Citibank, N.A. or comparable financial institution selected by the Managing General Partner" and "[s]uch loans may be repaid from time to time by the partnership as determined by the Managing General Partner and shall be repaid prior to the distribution to partners of their capital accounts on dissolution of the partnership."

B. The September 1987 Addition of Class B Partners

Consistent with the Agreement, and with John's approval, in September 1987, Barbara transferred portions of her Class B partnership interests to the following individuals, who were subsequently admitted as Class B partners in the corresponding percentages:

Class B Partner	Date of Transfer	Partnership Interest
Joyce Avedisian	9/6/1987	2.77%
Kenneth J. Avia	9/19/1987	2.77%

Jon Birgé	9/10/1987	5.56%
Ann M. Fagan	9/3/1987	2.77%
Arnold & Jill Kapleau	9/14/1987	5.56%
Barbara McCullough	9/2/1987	22.23%
Jeffrey A. & Annette C. Monachino	9/16/1987	5.56%
James G. & Kathleen J. Robertson	9/19/1987	5.56%
Steven M. & Suzanne C. Sfugarus	9/8/1987	5.56%
Paul R. & Anita L. Smith	9/1/1987	5.56%
William C. Swatek	9/16/1987	2.77%

C. The May 2000 Property Management Agreement

On May 16, 2000, Barbara, on behalf of the partnership, entered into a Management Agreement with AM&DC resulting in it becoming the "sole and exclusive managing agent and the exclusive leasing broker to manage, operate and lease the Hyde Park Mall," along with Azarian Realty Company, which became "the exclusive leasing agent" for the property. The initial term of the Management Agreement was ten years, to continue thereafter until terminated by either party upon sixty days written notice.

Pursuant to the Management Agreement's terms, AM&DC agreed to keep the property rented and to negotiate leases; collect all rent and other income from the property; employ, discharge and pay any necessary contractors including those for utilities; make repairs and improvements; and maintain full books, including monthly detailed statements of receipts and disbursements.

In exchange, the partnership agreed to pay AM&DC: (1) "an annual compensation equal to ten (10%) percent of the 'Gross Rent Receipts'" payable on or before the first day of each month; (2) a "Supervision Fee" in one lump sum equaling "five percent of the cost of constructing tenant improvements and other construction activities from time to time on the property"; and (3) an "Administrative Fee" equaling the "percent of the gross salary or salaries paid to on site maintenance, personnel and janitors" to "cover the administrative payroll costs and expenses for such onsite maintenance and personnel." The partnership also agreed to reimburse AM&DC monthly for administrative, out of pocket, and overhead expenses specifically attributable to the property.

As for Azarian Realty Company, the partnership agreed to pay it "a commission equal to six (6%) percent of the gross aggregate base rent payable for the entire lease term" upon the lease signing or signing of subsequent options, renewals, extensions, additions, or expansions. The Management Agreement required that Azarian Realty Company refer all property inquiries to AM&DC to be negotiated either solely by AM&DC or under its direction.

John testified at trial that the other partners were not notified about the execution of the Management Agreement, or provided with a copy prior to the filing of this action. He claimed that the Management Agreement "was prepared because a bank [he was] dealing with wanted it," that he and Barbara "never" followed it, nor was he seeking "to enforce any of [its] terms."

D. The Partnership's Financial Difficulties

John also testified that the Mall experienced financial problems "almost from the very beginning" caused primarily by high vacancy. Although the initial larger anchor tenants included a 33,000-square-foot Shop-Rite supermarket and a 65,000-square-foot Jamesway store, in the early 1990s, Shop-Rite moved to a shopping center across the street. John tried to recruit a replacement tenant for the vacant Shop-Rite space but described those efforts as "quite a challenge."

Shortly after Shop-Rite vacated the property, Jamesway filed for bankruptcy and left their space. By that point, 100,000 square feet of the 135,000-square-foot shopping center were empty. According to John, the remaining smaller stores suffered as a result, and "excessive vacancy" ensued.

Despite the Mall's challenging financial outlook, according to a letter from John to the partners in 1998, the property underwent "major renovation" funded by Barbara. John testified that during the 1990s, Barbara loaned a substantial amount of money to the partnership each month, usually between $25,000 and $50,000, due to "cash flow shortage." In addition, the partnership's lender reduced the partnership's monthly mortgage payment for several months because it could no longer afford the payments. John also stated he deferred collection of duly owed management fees and brokerage commissions and, according to a letter from Barbara, was owed $578,420.02 as of May 27, 1998.

In 1999, an Ames department store opened in the space previously occupied by Jamesway. That good news was shortlived, however, as it, too, filed for bankruptcy and closed its store two or three years later. To keep the property afloat in the interim, John stated he requested capital calls from the partners during in-person meetings. Some partners participated; others did not. For her part, Barbara asked the partners to make individual loans to the partnership and certain partners agreed to do so. But, according to John, none of the partners other than he and Barbara made any capital calls or loans to the partnership after 2002 or 2003.

John also testified that the partners had periodic discussions about selling the property, but that "the consensus was to stabilize the property and then consider putting it up for sale" so that "it could be sold at hopefully a profit" instead of a loss. For instance, in 2002, according to one appraisal, the Mall had a negative value of $733,538.

E. <u>Barbara & John's 2006 Loans from Provident Bank</u>

John testified that once Barbara "was pretty much tapped out," she and John went back to the partnership's primary lender, Provident Bank, and asked for additional financial assistance. The bank, however, refused to loan them "any more money against Hyde Park [Mall] because of regulations" and "because the property was underwater" by about $200,000 or $300,000 annually. According to John, the bank alternatively offered to set up credit lines for him and Barbara "of a million dollars each that we could use to fund the property further."

In April 2006, Barbara and John accepted the bank's offer and obtained $1,000,000 lines of credit, referred to in the record as loans. John testified that although the lines of credit were reflected as personal loans, they were "absolutely" used for the partnership purposes "until they were exhausted" in around 2009 or 2010. He also testified that the lines of credit were set up as "commercial line[s] of credit." Consistent with John's testimony, certain documents in the record refer to those obligations as commercial loans.

Although the credit lines were intended to be "very short term," the bank ultimately agreed to extend the terms in June 2009, with Barbara and John agreeing to a modification agreement of the related note that extended the maturity date of the loans to May 15, 2010, and which further secured the loans by third and fourth mortgages. A Provident Bank Loan Committee Memorandum stated that the credit line proceeds were utilized for the Mall's "development costs."

John testified that the bank would not extend the maturity date of the loan "unless there was something taken against the property," that the bank "recognized the funds were going into the property," and the other partners were not informed about the mortgages. In July 2012, he entered into a further Mortgage Loan Modification and Extension Agreement in connection with the $1,000,000 loans.

F. <u>The 2013 Columbia Bank Refinancing</u>

On March 13, 2013, the partnership negotiated a new mortgage and note with Columbia Bank for $10,875,000. Most of the loan proceeds were used to pay off existing partnership mortgages and loans, for construction expenses, and to repay partners (including Barbara, John, and some plaintiffs) who loaned money to the partnership. Barbara and John's $1,000,000 lines of credit from Provident Bank were also repaid as part of this transaction.

John intended for the remaining balance of $1,675,000 on the $10,875,000 loan to be advanced for construction expenses and "to pay down a substantial part of what [was] still due [him] and [Barbara's estate]." He testified, however, that he and Barbara did not receive "close to . . . 100 percent of what was due" to them as they "paid off the partners first." He did not know how much was owed to Barbara's estate, which he inherited, but said that the outstanding balance was only for interest and not principal.

John also stated he received $1,671,089 that had been due to Barbara as part of the refinance but claimed that he did not know how much money he got toward repayment of his own loans to the partnership. Overall, he claimed that the partnership still owed him six or seven million dollars, inclusive of money owed to his mother's estate.

G. The December 2016 Notices of Dissociation and Withdrawal

As of December 2016, according to the partnership's 2016 federal income tax return, the following individuals maintained an interest in the partnership[4]:

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[4] For reasons not explained in the record, plaintiffs Jill Kapleau, Annette Monachino, and Suzanne Sfugarus were not listed on the 2016 tax return as

Class A/B Partner	Partnership Interest
John M. Azarian	44.44%
Class B Partners	Partnership Interest
Joyce Avedisian	2.77%
Kenneth J. Avia	2.77%
Jon Birgé	5.56%
Ann M. Fagan	2.77%
Arnold Kapleau	5.56%
Jeffrey Monachino	5.56%
James Robertson	2.78%
Steven Sfugaras	5.56%
Smith/Stinneford Family, LLC	11.12%
Ellen Muller	5.56%
Roslyn Swatek	2.77%
Kathy Robertson	2.78%

having partnership interests although it is uncontested that they are plaintiffs in this matter who continued to hold partnership interests in December 2016. As best we can discern, it appears their spouses were listed as holding both their own, and their wives', partnership interests.

On December 9, 2016, each plaintiff in this action sent a "Notice of Dissociation and Withdrawal" to the partnership via certified mail. The Notices stated that each plaintiff intended to dissociate from the partnership effective January 1, 2017. They advised the partnership that it was required to purchase each plaintiff's partnership interest for a buyout price pursuant to N.J.S.A. 42:1A-34(a), and requested that the partnership provide them "with [its] tender, an explanation of [its] estimate of the buyout price," no later than the 120-day period allowed by law, to include:

> a) a statement of the partnership's assets and liabilities as of 12:01 a.m. on January 1, 2017;
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> b) an up-to-date partnership balance sheet and income statement; and
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> c) an explanation of how the estimated amount of the proposed buyout price has been calculated.

According to James Robertson, a plaintiff and former partner, neither he nor any of the other non-Azarian partners ever received distributions from the partnership despite assurances from John on several occasions that they were forthcoming. John confirmed Robertson's testimony, in part, by admitting the partners never received distributions although he had notified them via letter that he had anticipated providing distributions in 2014.

Robertson also stated he was one of the few minority partners who personally responded to seven or eight capital calls and provided approximately $100,000 to the partnership that was never reimbursed. He did acknowledge, however, that he received a loan repayment following the 2013 refinancing and stated that he signed a release. Although the record reveals that some other plaintiffs also signed releases after the 2013 refinance, none of those documents are included in the record on appeal.

Jon Birgé, another plaintiff and former partner, also contributed to capital calls and provided approximately $160,000 to $170,000 in unreimbursed funds. He explained that at some point in 2015, he "saw items in the financial statements that did not seem to make sense," which led to plaintiffs' dissociation. When he "started asking questions [of John] about the money that was owed by the partnership . . . [he] couldn't get a sense of how much was actually owed. And it occurred to [him] that [plaintiffs] would never see [their] money."

According to Birgé, plaintiffs collectively contributed $2 million to the partnership, and two lists in the record prepared by defendants' accountant corroborated his testimony. John testified that the list of partner loans was prepared at the end of March 2013 at his direction by Joel Weinberg, an accountant who worked for John, Barbara, and various Azarian entities.

H. Plaintiffs' Expert's Appraisal of the Mall

Plaintiffs retained Michael J. Bernholz, owner of the Hudson Valley Appraisal Corporation in Port Ewen, New York, to appraise the market value of the Mall as of January 1, 2017. Bernholz, who the court admitted as an expert in commercial real estate appraisals, prepared a July 18, 2018 report, which the court admitted in evidence. He opined in his report that the market value of the leased fee interest in the property was $14,300,000, but later reduced that figure at trial to $13,800,000.

As part of his appraisal, Bernholz visited the property for approximately thirty minutes, entered some of the stores, inspected relevant public records, and reviewed various documents provided by plaintiffs, including income summaries for 2016 and 2017, profit and loss statements for 2016, statements of revenues and expenses for 2015 and 2016, and rent rolls as of May 15, 2015. He also "inspected the subject market area" and collected "information on sales of properties similar to the subject throughout Dutchess County."

Bernholz relied primarily upon the income capitalization approach in conducting the valuation, which "value[d] the property based on an investor's anticipated future returns."[5] Using this approach, he applied the direct capitalization method, as opposed to the discounted cash flow method, "to convert a single year's estimate of income into a value indication." He used the direct capitalization method because "the property has been operating for many years" and was assumed to be "at or near stabilized occupancy." He declined to use the discounted cash flow method utilized by defendants' expert because it relied upon too many projections and assumptions, although he admitted that "[i]t could work as well" as the direct capitalization method if "all the right assumptions" were made.[6]

Bernholz also considered the rent rolls, evaluated whether they were "in line with the market," and evaluated the Mall's expenses to arrive at a net operating income (NOI). He acknowledged that the property had a vacancy rate of 17.7% as of May 2015, but instead used a vacancy rate of 10% in his analysis and admitted that this was an "assumption." He testified further that he did not

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[5] Bernholz performed a secondary analysis using the sales comparison approach but relied primarily upon the income capitalization approach.

[6] Bernholz's report explained that the discounted cash flow method "is a detailed analysis used when the future income is expected to fluctuate, usually as a result of numerous lease obligations and/or anticipated changes in income and expenses."

use the actual vacancy rate because it was "overinflated and it would devalue the property."

Bernholz further explained it was his opinion that the "higher [vacancy] rate which currently exists is probably not really representative of the mall's potential" given its proximity to Marist College and the Culinary Institute of America "and the general lack of competition in the immediate area." He explained that the area was growing and that the Mall was "positioned now . . . very well in the market" but admitted that he did not have any data to support his opinion. He instead based his opinion on this point by driving through the area, looking at other properties and how they were faring, speaking to other real estate brokers, and considering "the vibrance of the area."

Bernholz also added back "base rent" of $16 per square foot, "expense pass throughs" for common area maintenance (CAM) of $11,877 to adjust for the 10% vacancy rate, and real estate taxes of $28,115. His report reflects that he utilized a reduced management fee of 4% of effective gross income in his analysis (although he testified that he used 5%), upon determining that defendants' management fee was "excessive based on industry standards."

To conclude his analysis, Bernholz divided the stabilized annual NOI of $1,028,417 by the composite capitalization rate of 7.2% to arrive at an appraised value of $14,283,569, rounded up to $14,300,000. He explained he used 7.2% because it fell between the rate he calculated based upon the property's mortgage and equity of 7.3% and the published capitalization rate of 7.1%.

At trial, Bernholz reduced the appraised value to $13,800,000. He testified that after he wrote his report, he obtained additional information pertaining to property taxes paid by Stop & Shop for 2016 that differed from what was shown on the 2016 profit and loss statements, which caused him to reduce the appraised value. He also admitted that had he utilized the actual 17.7% vacancy rate in his analysis, the appraised value would have been further reduced to $11,666,125.

Bernholz conceded that defendants' expert's appraisal report was a "good report." He explained that the defense expert's appraised value differed from his because the defense expert used the income approach with the discounted cash flow method and a sliding vacancy rate instead of a stabilized vacancy rate of 10%. In addition, the defense expert valued the vacant space at between $6 and $8 per square foot, while he valued it at $16 per square foot. He disagreed with the defense expert's choice of properties used to estimate the vacancy rate as some of them were not located near the Mall.

I. Defendants' Expert's Appraisal of the Mall

Defendants retained Gerald M. Carey of McGrath & Company, Inc., who, over plaintiffs' objection, was qualified by the court as an expert as to the value of the Mall. Carey issued an appraisal report on or about September 7, 2018, which the court also admitted in evidence. He appraised the property previously in 2012 or 2013 for $8,670,000 in connection with Barbara's estate. As of January 2017, however, he stated that the property increased in value to $11,835,000.

As part of his most recent appraisal, Carey inspected the property for about forty-five minutes. He too reviewed pertinent background information including deeds, real estate and tax assessments, county, town, and neighborhood data. He investigated comparable shopping centers in the area. He considered the rent roll as of January 1, 2017; the tenant leases; and the property's 2015 and 2016 financial statements.

As noted, Carey utilized the income approach with the discounted cash flow method. He admitted that the discounted cash flow method involved "making assumptions" about the property's income and expenses "over the next few years." For instance, he projected that Mall's vacancy rate would decrease from 21% to 15% over time. When considering expenses, he used a management fee of 5% in keeping with industry standards.

Carey applied a discount rate of 9% even though it was above the national average of 7.39% because the property had "a significant amount of vacancy" of 21% overall, had "never . . . reached stabilized occupancy," and required upgrades to the vacant spaces which lacked ceilings, utilities, bathrooms, and HVAC systems. He admitted, however, that he did not know whether the landlord or tenant would be responsible for payment of the fit-out or build-out expenses.

Carey further testified that, historically, the Mall's vacancy rate has "been very high." He opined that approximately 8,000 square feet of the vacant space "will probably never be leased due to the depth of the original grocery store that was on the site." He explained that "when someone rents satellite space [meaning non-anchor store space], they don't want the depth that is available there." He added that there is a 46,000 square foot shopping center nearby undergoing a renovation that will "become direct competition" with the Mall for tenants. He also considered the "lack of growth in the local retail market" and the area population.

Carey's report indicated that, under the income approach with the discounted cash flow method, the market value of the property as of January 1, 2017, was $12,350,000. That calculation, however, assumed that the property was "complete." Because "there were extensive fit-up and upgrades to be made to the unoccupied space to provide rentable floor area for subsequent or potential tenants," Carey deducted "actual or estimated" fit-up costs which resulted in a final appraised value of the property "as improved" of $11,835,000.

When asked about plaintiffs' expert's appraisal, Carey questioned Bernholz's use of the direct capitalization method and testified that Bernholz's calculations involved "double-dipping" of about $40,000 because he added on CAM and real estate pass-through expenses that were already included in the tenant gross rents. He believed Bernholz erred by including "another $70,000 worth of income that was not real" when calculating Stop & Shop's property taxes.

Carey also testified that he and Bernholz valued the vacant space differently. While Bernholz looked at average rents at the subject property, Carey studied the "more recent" current market conditions for current leases in the area. He arrived at $13 per square foot for the "prime retail space" and $8 per square foot "for the rear space" that was undesirable due to its depth and "probably . . . not rentable." He conceded, however, that an antique store had previously rented the rear space.

J. Defendants' Marketability & Minority Discounts Expert

Henry L. Fuentes, CPA, ABV, CFE, of Fuentes Forensics, LLC, also testified. He was retained "to appraise the fair market value of a 1% nonmarketable minority partnership interest in Hyde Park Mall." After the court qualified him as an expert in business valuation, he testified regarding a valuation report he prepared in which he concluded "that the fair market value of a 1% nonmarketable minority interest in Hyde Park Mall as of January 1, 2017, [was] $7,900." Fuentes explained that he conducted the valuation "under the fair market value standard" which "assum[es] a hypothetical willing buyer and a hypothetical willing seller."

As for the methodology he employed to support his opinion, Fuentes stated he relied upon Carey's appraisal of the property as a "starting point," but subtracted the value of the mortgage and other liabilities to arrive at a net asset fair market value of a controlling interest equal to $1,034,000. He did not undertake any independent research to confirm the validity of Carey's valuation and was not provided a copy of Bernholz's appraisal. Nor did he consider "any of the unpaid fees, commissions and interest on loans which have been claimed to be owed" since those amounts are disputed or "the fact that the partnership was losing money."

Fuentes did discount the net asset fair market value of a controlling interest for lack of control and lack of marketability. He testified that the discount for lack of control "was appropriate" because a "one percent ownership interest is not control" and the managing partner had "most of the decision-making authority." As for the lack of marketability discount, he testified that he "took a small discount" because Carey's appraisal "already took some of that into consideration by using a higher cap rate" and that it was appropriate because the property "was privately held."

More specifically, Fuentes deducted $155,100 (15%) for lack of control based upon "published research data," arriving at $878,900 as the fair market value of a marketable, non-controlling interest. He then applied a 10% discount of $87,890 for lack of marketability, though he testified that "[e]ffectively, it was eight and a half percent." Ultimately, he concluded that the fair market value of a 1% partnership interest in the Mall as of January 1, 2017, was $7,910, rounded to $7,900. Had he used a 10% management fee instead of the 5% management fee utilized by Carey's appraisal upon which he relied, "the resultant value of a 1% interest . . . would have been approximately $4,000."

K. Potential Adjustments to the Fair Value

At trial, defendants asserted that the partnership's fair value should be reduced by: (1) amounts owed by the partnership to various Azarian entities for management fees plus interest, accounting fees plus interest, and brokerage commissions plus interest; and (2) loans made by Barbara and John to the partnership plus interest. For their part, plaintiffs asserted that the partnership's fair value should be increased by $2 million to account for Barbara and John's $1 million personal lines of credit from Provident Bank that were repaid after the refinance because the money was not used for partnership business. We address each issue separately.

1. Management Fees, Accounting Fees, and Brokerage Commissions Plus Interest

In support of this category of discounts, defendants relied upon largely illegible lists prepared by the partnership's accountants, Lota & Bernard, LLC, to contend that millions of dollars in management fees, accounting fees, and brokerage commissions plus interest incurred between 1987 and 2018 and owed by the partnership to other Azarian entities should be deducted from the partnership's fair value.

For the management fees plus interest component, defendants supplied a list indicating that the partnership owed $980,926 in fees plus interest of

$1,750,501 for a total of $2,731,427. The list stated that the management fees were "estimated" for years 1987 through 1991 and that the partnership made at least partial payments in 2000, 2002 through 2005, and 2012 through 2017.

As for purported accounting fees and interest deductions, defendants supplied a separate list which stated the partnership owed $569,724 in fees plus $846,427 in interest for a total of $1,416,151. It further provided that the partnership made at least partial payments between 2000 and 2006, and between 2012 and 2017. With respect to brokerage commissions, defendants introduced into evidence a list indicating that the partnership owed $1,452,134.52 plus $954,599.61 in interest, and certain payments were made.

Kathleen Bernard, a certified public accountant at Lota & Bernard, testified that she had done the accounting for the partnership since "year end 2013." John asked her to prepare the aforementioned lists and she did so "based upon what John told [her] the numbers were." She and John testified that the lists were accurate.

Bernard admitted that she "didn't see any bills" for any fees incurred prior to when she began doing the accounting in 2013. She claimed that the outstanding management fees, accounting fees, and brokerage commissions were not shown on the partnership's financial statements "[b]ecause they're cash basis financial statements, which reflect expenses when actually paid."

Additionally, Bernard testified that, as of December 31, 2013, the partnership did not owe any accounting, management, or brokerage fees as they had been repaid in connection with the 2013 refinancing. In April 2014, however, John sent the partners a letter claiming that he was only "paid for a portion of deferred fees" and there was "still a balance of fees due" to him. In a March 12, 2015, letter, John wrote to the partners and advised them that he would begin "taking monthly management fees as well as professional fees" as he was "still due a considerable balance for deferred fees which have accrued over the years."

With respect to the accounting fees specifically, Azarian & Company, owned by Barbara, initially did the bookkeeping, accounting and tax work for the partnership. Joel Weinberg worked for Barbara at Azarian & Company from 1987 until around 1998. Between 2000 and 2009, he worked directly for John doing accounting and tax work for various Azarian entities, including the partnership. He prepared tax returns, K-1s, and financial statements for the partnership, which took him approximately twelve hours per quarter, but could not recall what his hourly rate was at that time.

In or around 2009, John's wife Donna's company, Azarian & Associates, began handling the accounting and tax work for the partnership. Weinberg worked for Azarian & Associates until December 2013 performing the same functions as he did previously. According to Donna, although she owned Azarian & Associates, Barbara ran the company until around 2009 when she got ill and Donna has only worked there full-time since December 2013.

Donna also testified concerning the accounting fees owed to both Azarian & Company and Azarian & Associates by the partnership. She said that no invoices or bills were sent to the partnership for the accounting work performed by either entity "because the property could not pay the bills." Bernard's list of the accounting fees owed, however, reflected partial payments made between 2000 and 2006 and between 2012 and 2018. Regardless, Donna believed that the partnership owed Azarian & Associates "well over $500,000."

In terms of how the fees were calculated, Donna initially testified that Azarian & Associates charged a $650 per month retainer to the partnership for accounting services that was "receive[d]." She later testified that the retainer was not paid "every time," that she did not recall if it was paid at all prior to the refinance, but that it was paid since then. She said that the retainer was "based upon a certain amount of hours . . . anticipated" for accounting work each month, billed at "about $150 an hour." Donna claimed that she kept a list of hours worked but could not produce the list at the time of trial.

Additionally, Donna testified that she had not "trued up" the accounts since December 2013 to determine whether the retainer charge accurately reflected the actual number of hours worked. At any rate, she was charging eight percent compound interest on the overdue balance and did not know whether there was a written agreement in place between her company and the partners regarding the interest charge. John's testimony confirmed that the partners were not aware of this interest rate.

Donna claimed "extra time" of, at a minimum, ten to fifteen hours spent doing the "year-end stuff" related to taxes. She could not explain why the list prepared by Lota & Bernard reflected that the partnership was charged a flat fee of $24,000 per year for accounting fees since 1987 and how that related to the monthly retainer fee, other than to say that the $24,000 "amount has never changed throughout the years" and was put in place by Barbara. John also testified that Barbara established the $2,000 monthly charge for the accounting fees "30 years ago" and that it "never changed over the years."

John confirmed that the entities owned by Barbara and Donna never sought to collect the outstanding accounting fees in writing or via the filing of a lawsuit, and that he never advised the partners how much the partnership owed for accounting fees. Donna said that she never demanded payment via letter or legal action because "why would [she] sue [her] husband to get the money that he would just have to put in to pay the lawsuit." She acknowledged that her company received approximately $58,000 after the refinance toward unpaid fees.

2. Barbara & John's Loans to the Partnership Plus Interest

Weinberg testified that Barbara was owed $4,012,587 in loans made to the partnership plus interest. John testified that Barbara's estate was still owed close to $2.5 million of that amount, primarily in interest. Bernard testified that the interest owed to Barbara was $2,275,051, but admitted that John had provided that number to her.

John stated that in 2015, he made a personal loan to the Mall in the amount of $291,000, to pay the real estate taxes and did not inform the partners about it. He also stated that he "issued a promissory note for the amount." The record contains a check from The Azarian Group, LLC to Hyde Park Mall for $291,000 dated April 28, 2015, consistent with John's testimony and a list that Donna prepared. Donna testified that she wrote the check, and Bernard testified that the $291,000 loan was reflected on the partnership's 2015 financial statement.

A document prepared by Bernard states that John is owed $17,101 in interest on the loan. John continued to loan the partnership hundreds of thousands of dollars in 2018, after plaintiffs dissociated, to cover real estate taxes and mortgage payments.

3. Barbara & John's 2006 Provident Bank Loans

Plaintiffs sought to establish at trial that Barbara and John did not use the loan proceeds from Provident Bank for the benefit of the partnership. On this point, plaintiffs challenged John at trial regarding various transactions shown on his Provident Bank (later known as Sterling National Bank) individual account statements. John testified that this account was an "intermediary" account in that he transferred money into it that was then automatically debited for monthly payments due on the $1,000,000 loan. His account statements showed that beginning in January 2007, the account routinely received deposits from "Azarian Mgmt" and that said money was then used for monthly payments due on the loan. He said that he did not use partnership money to pay down the loan because "[t]here weren't any funds to pay it with."

John's account also received numerous deposits from Barbara's line of credit. A July 20, 2007, account statement showed a $100,000 deposit from Barbara's line of credit into the account along with a $6,758.34 deposit from

"Azarian Mgmt." Thereafter, the statement reflected a $100,000 transfer to "Azarian Mgmt" and a payment of $6,758.34 toward John's line of credit. John did not know why the $100,000 transfer was made to "Azarian Mgmt."

A similar series of transactions appeared on the September 20, 2007, account statement, with $275,000 deposited from Barbara's line of credit into the account followed by a $275,000 outgoing wire transfer to "Azarian Mgmt." John testified that his "educated guess" was that the wire transaction was "to pay real estate taxes" for the Mall, but that he did not have any documentation to demonstrate same. He conceded that the $275,000 was not reflected on the partnership's 2007 financial statements as a loan.

Another account statement dated January 22, 2008, showed a $300,000 deposit from Barbara's line of credit into John's account made on January 16, 2008. The statement also showed a $272,000 outgoing wire transfer made to the Knee Law Firm two days later. John testified that he did not believe the $272,000 was used "for Hyde Park Mall business" but that the transaction "was something between [his] mother and the Knee Law Firm."

Peggy Knee, an attorney at the Knee Law Firm, testified that she represented John and Barbara in matters concerning Barbara's estate. She denied ever representing the partnership. She confirmed that she received a $272,000 wire transfer from John in 2008 into her attorney trust account that was then "disbursed to one of the partners of another partnership."

L. The Court's Determination of the Buyout Price of Plaintiffs' Interests

The court determined that the value of the Mall was $11,835,000. To determine its fair value, the court reduced that figure by: (1) $10,457,527, the mortgage balances owed to Columbia Bank as of January 1, 2017;[7] and (2) $352,837.50, the balance owed to John in connection with the April 28, 2015, promissory note for $291,000 plus interest of $61,837.50. Thus, it concluded that the fair value of the Mall was $1,024,635.50, and each 1% partnership interest had a value of $10,246.36.

In its amended final judgment, the court concluded that plaintiffs dissociated from the partnership effective January 1, 2017, "and [they] shall have no further liability with regard to the partnership after such date." It ordered the partnership to pay each plaintiff the buyout price in accordance with N.J.S.A. 42:1A-34(i) on or before August 23, 2019, as follows:

Partner	Partnership Interest	Fair Value
James Robertson	2.78%	$28,484.88

[7] In the court's attendant July 24, 2019, opinion, it stated that the parties "agreed that the outstanding mortgages against the Mall should be deducted from the Mall value," in the amounts of $9,882,527 and $575,000. The parties do not contest that reduction.

Kathleen Robertson	2.78%	$28,484.88
Steven Sfugarus	2.78%	$28,484.88
Suzanne Sfugarus	2.78%	$28,484.88
Kenneth Avia	2.77%	$28,382.42
Smith/Stinneford, LLC	11.12%	$113,939.52
Jeffrey & Annette Monachino	5.56%	$56,969.76
Arnold & Jill Kapleau	5.56%	$56,969.76
Ann M. Fagan	2.77%	$28,382.42
John Birgé	5.56%	$56,969.76
Ellen Muller	5.56%	$56,969.76

II.

In their first two points on appeal, defendants contend that the court erred by failing to find that plaintiffs' dissociation was wrongful and that they were liable to the partnership for damages. We disagree.

We first address the standard of review that guides our analysis. In a non-jury case, "[f]indings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974). We do "not disturb the factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid.; accord Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (holding that deference is owed to the trial court "that heard the witnesses, sifted the competing evidence, and made reasoned conclusions"). A "trial court's interpretation of the law and the legal consequences that flow from established facts[, however,] are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The Act contemplates two types of partnerships: a partnership at will, or a partnership for a definite term or completion of a particular undertaking. See N.J.S.A. 42:1A-2 (defining "partnership at will" as "a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking"); see also 68th St. Apartments, Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law Div. 1976) (distinguishing "at will" partnership relationship with one "for a fixed term or until the accomplishment of a particular undertaking"), aff'd, 150 N.J. Super. 47 (App. Div. 1997).

Under the Act, "[a] partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to subsection a. of section 31."

N.J.S.A. 42:1A-32(a). That subsection provides, in relevant part, that "[a] partner is dissociated from a partnership upon the occurrence of . . . [t]he partnership's having notice of the partner's express will to withdraw as a partner or on a later date specified by the partner." N.J.S.A. 42:1A-31(a).

> A partner's dissociation is wrongful only if:
>
> (1) it is in breach of an express provision of the partnership agreement; or
>
> (2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:
>
> > (a) the partner withdraws by express will, unless the withdrawal follows within 90 days after another partner's dissociation by death or otherwise under subsections f. through j. of section 31 of this act or wrongful dissociation under this subsection;
> >
> > (b) the partner is expelled by judicial determination under subsection e. of section 31 of this act;
> >
> > (c) the partner is dissociated by becoming a debtor in bankruptcy; or
> >
> > (d) in the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.
>
> [N.J.S.A. 42:1A-32(b).]

Regardless of whether a partner's dissociation is wrongful, he or she is entitled to a buyout. If the partnership continues after the dissociation, as occurred in this case, "except as otherwise provided in the partnership agreement, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price as determined pursuant to subsection b. of this section." N.J.S.A. 42:1A-34(a). "'[B]uyout price' means the fair value as of the date of withdrawal based upon the right to share in distributions from the partnership unless the partnership agreement provides for another fair value formula." N.J.S.A. 42:1A-34(b).

That said, wrongful dissociation will affect the buyout price of the wrongfully dissociated partner's interest because "[a] partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation" plus "any other obligation of the partner to the partnership or to the other partners." N.J.S.A. 42:1A-32(c). "Damages for wrongful dissociation . . . and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, shall be offset against the buyout price." N.J.S.A. 42:1A-34(c).

In addition, wrongful dissociation affects the timing of the buyout:

> A partner who wrongfully dissociates before the expiration of a definite term or the completion of a

> particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment shall be adequately secured and bear interest.
>
> [N.J.S.A. 42:1A-34(h).]

The interpretation of partnership agreements, like other contracts, is governed by the longstanding rules of contract interpretation. See Chance v. McCann, 405 N.J. Super. 547, 565 (App. Div. 2009); Brook Valley Ltd. P'ship v. Mut. of Omaha Bank, 797 N.W.2d 748, 753 (Neb. 2011); Casey Ranch Ltd. P'ship (CRLP) v. Casey, 773 N.W.2d 816, 821 (S.D. 2009). "The plain language of the contract is the cornerstone of the interpretive inquiry; 'when the intent of the parties is plain and the language is clear and ambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Barila v. Bd. of Educ., 241 N.J. 595, 616 (2020) (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)). "The judicial task is simply interpretative; it is not to rewrite a contract for the parties better than or different from the one they wrote for themselves." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

In interpreting the Agreement, the court held that because there was "no express provision in the . . . Agreement which prohibits a partner from dissociating," plaintiffs' dissociation was not wrongful. It rejected defendants' reliance on language from Section 12 of the Agreement which provided that "[t]he partnership shall continue until the sale, exchange or other disposition of The Mall or until terminated by the Managing General Partner or until a vote of the majority of the partners." In that regard, the court reasoned that "nothing in [Section 12] . . . prohibits a partner from seeking to dissociate from the [p]artnership" and noted that "the remaining partners, notwithstanding dissociation by [p]laintiffs, elected to continue the [p]artnership."

The court's opinion, unfortunately, did not explicitly address the second potential scenario under the Act which could establish wrongful dissociation, i.e., "in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking: (a) the partner withdraws by express will" absent certain extenuating circumstances that are not applicable here. N.J.S.A. 42:1A-32(b)(2). Defendants assert that the court erred in this regard, as Section 12 establishes that the partnership was to continue for a definite term or particular undertaking, i.e., until the Mall was sold or until terminated by the Managing General Partner or majority vote, and that plaintiffs' dissociation prior to those events having occurred was wrongful.

In evaluating defendants' contention, the threshold inquiry is whether the partnership was an at-will partnership, or a partnership established for a definite term or particular undertaking. It is necessary to resolve this issue because plaintiffs' dissociation can only be considered wrongful under the circumstances if the record shows that the partnership was established for a definite term or particular undertaking. "Whether the [partnership] relationship is at will or for a fixed term or until the accomplishment of a particular undertaking is a question of fact." 68th St., 142 N.J. Super. at 561; see also Scholastic, Inc. v. Harris, 259 F.3d 73, 85 (2d Cir. 2001).

Here, the trial court failed to make any explicit findings of fact concerning whether the partnership was an at-will partnership or a partnership established for a definite term or particular undertaking which hampers our appellate review of this critical issue. Rule 1:7-4(a) requires the court to "by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury." "Implied in the judge's fact-finding responsibilities is the judge's obligation to decide all critical issues." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:7-4 (2022).

However, "[w]hen the trial judge fails to make the required findings of fact . . . the appellate court may avoid the necessity of a remand in an appropriate case by itself making findings of fact pursuant to the constitutional grant of necessary original jurisdiction and R. 2:10-5." Ibid. Rule 2:10-5 provides that "[t]he appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." But "that power should be invoked 'sparingly,' and is generally used when the record is adequately developed and no further fact-finding is needed." Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 146 (2022) (quoting State v. Jarbath, 114 N.J. 394, 412 (1989)).

Because defendants are relying primarily on Section 12 of the Agreement to support their position that the partnership was established for a definite term or particular undertaking and the contents of the Agreement are undisputed, we conclude it is appropriate to exercise our original jurisdiction pursuant to Rule 2:10-5 to resolve this factual issue and avoid a remand. See, e.g., Farmingdale Realty Co. v. Borough of Farmingdale, 55 N.J. 103, 106 (1969) (exercising original jurisdiction after trial judge failed to make requisite factual findings where "[t]he basic facts [were] undisputed"); accord Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 310 (App. Div. 1999).

It is uncontested that the Agreement does not contain a minimum or maximum durational term and is thus not limited to a specific timeframe. See, e.g., Fischer v. Fischer, 197 S.W.3d 98, 102 (Ky. 2006) (holding that "[i]t is undisputed that the partnership was not for a definite term, as no time length was included in the amended partnership agreement"). The real dispute centers around whether the partnership was formed for a particular undertaking. The Act does not define "particular undertaking," but the Official Comments on the Uniform Partnership Act, coupled with case law from New Jersey and other jurisdictions that have adopted the Act, shed some light on the phrase's scope.

"Although in the absence of some contrary showing a partnership is deemed to be at will and any partner may withdraw at any time without incurring liability, such a withdrawal is wrongful if it is in violation of an express or implied agreement that the relationship would continue for a definite term or until a particular undertaking is completed." 68th St., 142 N.J. Super. at 561 (citations omitted). "[W]here a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished." Id. at 562 (quoting Hardin v. Robinson, 162 N.Y.S. 531, 534-35 (N.Y. App. Div. 1916), aff'd, 119 N.E. 1047 (N.Y. 1918)).

The Official Comment to the Uniform Partnership Act of 1997 explains that "[t]o constitute a partnership for a term or a particular undertaking, the partners must agree (i) that the partnership will continue for a definite term or until a particular undertaking is completed and (ii) that they will remain partners until the expiration of the term or the completion of the undertaking." Official Comment, Unif. P'Ship Act § 101 (1997).[8] "To find that the partnership is formed for a definite term or a particular undertaking, there must be clear evidence of an agreement among the partners that the partnership (i) has a minimum or maximum duration or (ii) terminates at the conclusion of a particular venture whose time is indefinite but certain to occur." Ibid.

Although Section 12 of the Agreement provides that "[t]he partnership shall continue until the sale, exchange or other disposition of The Mall or until terminated by the Managing General Partner or until a vote of the majority of the partners," none of those particular undertakings are "certain to occur" because nothing in the Agreement requires them to. Ibid. And Section 2 of the Agreement titled "Purpose of the Partnership," not Section 12, expressly defines the partnership's purpose.

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[8] New Jersey adopted the revised Uniform Partnership Act of 1997 in 2000. See N.J.S.A. 42:1A-1 to -56; Zavodnick v. Leven, 340 N.J. Super. 94, 99-100 n.1 (App. Div. 2001).

Section 2 provides that "[t]he purpose of the partnership is to acquire the land and premises in the Town of Hyde Park, County of Dutchess, and State of New York, commonly known and referred to as 'The Mall at Hyde Park' ('The Mall'), and thereafter to hold, lease, manage and operate the same as a shopping center." There is no mention of any purpose, intent, or requirement to sell the Mall. See also Chandler Med. Bldg. Partners v. Chandler Dental Grp., 855 P.2d 787, 794 (Ariz. Ct. App. 1993) (holding that a partnership agreement stating that the partnership's purpose was "to own, hold for investment, improve, lease manage, operate or sell" a medical office building was not a partnership for a particular undertaking because "the agreement does not require that the building ever be sold").

In addition, the United States Court of Appeals for the First Circuit held that "[b]usiness activities which may continue indefinitely are not 'particular' in nature and do not constitute particular undertakings" under the Act. Tropeano v. Dorman, 441 F.3d 69, 77-78 (1st Cir. 2006). Similarly, the Pennsylvania Supreme Court held that "[l]easing property, like many other trades or businesses, involves entering into a business relationship which may continue indefinitely; there is nothing 'particular' about it." Girard Bank v. Haley, 332 A.2d 443, 447 (Pa. 1975); accord Fischer, 197 S.W.3d at 104; Canter's

Pharmacy, Inc. v. Elizabeth Assocs., 578 A.2d 1326, 1330 (Pa. Super. Ct. 1990) (holding that "[o]perating a personal care facility, like leasing property, may continue indefinitely").

Here we are satisfied that the partnership did not exist for a definite term or to accomplish a particular undertaking. Indeed, Section 2 of the Agreement clearly and unambiguously establishes that the partnership's purpose was to "hold, lease, manage and operate" the Mall without specifying any durational limitation. Further, John testified at trial that "the purpose of the partnership was to own . . . and operate" the Mall.

We are unpersuaded by defendants' position that Section 12 of the Agreement established a "particular undertaking." First, while that section enumerates conditions that could result in the termination of the partnership, none of the conditions are certain or required to occur. Second, defendant's interpretation ignores Section 2, which expressly defines the partnership's purpose. See Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009) ("A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner."). As such, we are satisfied based on the record before us that the partnership did not agree to continue their relationship for a defined term or particular undertaking, and plaintiffs' decision to dissociate was therefore consistent with the Agreement and Act and not wrongful.

III.

In their third point, defendants contend that the court erred by not applying discounts for the dissociated partners' lack of control and marketability as recommended by their expert, Fuentes, when valuing plaintiffs' partnership interests. Again, we disagree.

When valuing a dissociated partner's interest in a partnership, the court may decide to apply "a marketability or other discount." Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 375 (1999). "A minority discount adjusts for lack of control over the business entity, while a marketability discount adjusts for a lack of liquidity in one's interest in an entity." Id. at 373. During this process, courts "must take into account what is fair and equitable." Id. at 377. In other words, "the 'equities of the case' must be considered when ascertaining 'fair value' in appraisal . . . actions." Id. at 381.

"Whether marketability or minority discounts are appropriate to the valuation of a less than controlling interest in [an] entity are questions of law which [courts] review de novo, giving no special deference to the trial judge's determination." Brown v. Brown, 348 N.J. Super. 466, 483 (App. Div. 2002).

Here, the court appropriately considered the equities of the case when it decided not to apply discounts for lack of control and marketability, and its findings and conclusions are supported by the record and applicable law.

Relying on Balsamides, the court explained that marketability and minority discounts "should not be applied in determining 'fair value' unless the equities of a particular case so dictate." It determined that "[d]efendants have not shown justification to apply either . . . discount" and reiterated its conclusion that plaintiffs' dissociation was not wrongful. It also cited the undisputed fact "that from the time of their acquisition of their [p]artnership interest, Plaintiffs received no distributions from the [p]artnership totally dominated by the Managing General Partner."

Defendants' contention is premised upon their mistaken belief that plaintiffs wrongfully dissociated, a point which we have already addressed and rejected. Further, they rely upon Fuentes's expert opinion that discounts should be applied. An "expert's opinion on a question of law, [however], is neither appropriate nor probative." Kamienski v. State, 451 N.J. Super. 499, 518 (App. Div. 2017). Furthermore, Fuentes admitted at trial that had he been asked to perform a valuation of a 1% partnership interest in the Mall under the fair value standard applicable here (and not the fair market value standard), it "would have been without discounts." Accordingly, we conclude the court's decision to reject Fuentes's opinion, and instead credit plaintiffs' expert, is fully supported by the record.

IV.

In their fourth argument, defendants contend the court erred by failing to reduce the fair value of the partnership by certain amounts the partnership owes to other Azarian-related entities for management fees plus interest, accounting fees plus interest, and brokerage commissions plus interest, as well as money that John and Barbara loaned to the partnership. Additionally, they contend that the court should have further reduced the fair value of the partnership and plaintiffs' interests therein to account for tenant security deposits and plaintiffs' negative capital accounts. We are not persuaded by any of these arguments.

"'Fair value' . . . is not synonymous with fair market value." Balsamides, 160 N.J. at 374. It "is a flexible standard dependent on the circumstances and context of a transaction." Lawson Mardon Wheaton, Inc. v. Smith, 160 N.J. 383, 393 (1999). "[T]here is no inflexible test for determining fair value" and its assessment "requires consideration of 'proof of value by any techniques or methods which are generally acceptable in the financial community and otherwise admissible in court.'" Balsamides, 160 N.J. at 374-75 (quoting Lawson, 160 N.J. at 397).

The trial court's findings in valuation disputes "are critical" as valuation "is inherently fact-based." Id. at 368. "[V]aluation disputes . . . frequently become battles between experts." Ibid. "[V]aluation . . . is not an exact science" and "[t]here is no right answer." Ibid. "Experts exercise judgment at many stages in the valuation process. As a result, their credibility and reliability are critical." Ibid. "Only the trial court has the opportunity to see, hear, and question the expert witnesses." Ibid.

A. Management Fees, Accounting Fees, and Brokerage Commissions Plus Interest

Citing defendants' reliance upon the lists created by their accountants, the court concluded that the record overall lacked credible evidence to support their contention that the partnership's fair value should be reduced due to monies owed to Azarian-owned entities by the partnership for management fees plus interest, accounting fees plus interest, and brokerage commissions plus interest. We find no basis to disturb the court's findings on these points.

As to the management fees plus interest, the court concluded that "[w]hile the . . . Agreement contemplates that management fees may be paid, the assertions made by the [d]efendants on this issue are not credible" because: (1)

"nothing in the Management Agreement . . . support[ed] [d]efendants' claim for the imposition of interest on any outstanding amounts"; (2) "[d]efendants' claims for management fees go back to the inception of the [p]artnership"; and (3) the "claims for management fees were never pursued prior to the commencement of this action and were not reflected in the financial statements of the [p]artnership."

Concerning the accounting fees plus interest, the court determined that: (1) "[n]o documents were offered . . . reflecting any agreement by the [p]artnership to pay accounting fees other than the Partnership Agreement, which allowed the Managing General Partner to incur accounting fees"; (2) John "testified that until the commencement of this action the [p]artnership never received any invoice for accounting services"; (3) "there was conflicting testimony as to the number of hours that the accountants spent on a monthly basis for the [p]artnership which calls into question the bona fides of such claim"; (4) defendants "presented . . . no evidence to support the alleged claim for accounting fees, other than exhibits listing those fees"; (5) "nothing in the trial record supports [d]efendants' claim for the imposition of interest on the accounting fees claimed"; (6) "the financial statements of the [p]artnership do not list any outstanding balance for accounting fees"; (7) "the alleged accounting fees date back to the inception of the [p]artnership (1987) and thereafter"; and (8) "[n]o claims for accounting fees were ever pursued prior to the commencement of th[is] action."

With respect to the brokerage fees plus interest, the court found that: (1) defendants "presented no documentary evidence to support the specific amounts except for the list of brokerage commissions allegedly owed"; (2) "no agreement [for brokerage fees] was introduced into evidence" despite the Agreement's contemplation of "entry into an exclusive real estate brokerage agreement with John M. Azarian Realty Co."; (3) "nothing in the record supports [d]efendants' claim for the imposition of interest on the brokerage commissions"; (4) "[s]ome of the alleged brokerage commissions date back to the 1990s and were not reflected on the [p]artnership's financial statements"; and (5) "no one, prior to the commencement of the action, pursued any such commissions."

As noted, the court determined that the record lacks credible evidence to support defendants' claims. Before us, defendants continue to rely primarily upon the lists of overdue management fees plus interest, accounting fees plus interest, and brokerage commissions plus interest created by their accountant at John's direction with John supplying the numbers included therein. The record contains no bills or invoices to substantiate any of the alleged overdue fees or interest payments, however. In addition, the record is devoid of any contracts or agreements pertaining to payment of accounting fees plus interest, notwithstanding Section 4(f) of the Agreement contemplated entry into such contracts or agreements.

Although the record does contain a Management Agreement pertaining to management fees, its terms conflict with the Agreement. The Agreement contemplated entry into a Management Agreement with AM&DC and a management fee to be paid to that entity of 10% of base rent including percentage rent, but the Management Agreement stated that the partnership agreed to pay AM&DC "an annual compensation equal to ten (10%) percent of the Gross Rent Receipts."

Apart from the fact that the Management Agreement's terms are inconsistent with the Agreement, John admitted that the other partners were never made aware of the Management Agreement or given a copy, and AM&DC no longer exists as an entity. Furthermore, he testified that he was not seeking "to enforce any of [the Management Agreement's] terms" and would instead rely solely on the Agreement in this action.

Although defendants take issue with the court's findings that the outstanding fees were never pursued prior to the litigation, there is no evidence in the record that the various Azarian-related entities demanded fees from the partnership or initiated lawsuits to recover those fees. Defendants rely upon lists that showed partial payments were made over the years. But again, defendants offer no corroborating proof of partial payments having been made in the form of checks or bank statements. Even assuming partial payments were made, we are satisfied that the court did not err when it declined to adjust the fair value to account for alleged outstanding fees, given the lack of corroborating evidence in the record.

B. <u>Barbara & John's Loans to the Partnership Plus Interest</u>

The court also rejected defendants' contention that the partnership's fair value should be reduced to account for interest owed to Barbara's estate on loans she made to the partnership. It determined that: (1) the 8% interest sought "was not pursued by or on behalf of [Barbara] prior to the commencement of this litigation"; (2) "no promissory notes were presented to this court evidencing any interest amount to be charged"; and (3) the [p]artnership's balance sheet "does not reflect any amounts owed to [Barbara]."

First, we are satisfied the court did not mistakenly exercise its discretion by declining to reduce the partnership's fair value to account for said interest, as defendants failed to offer any evidence, such as a promissory note, to support their claim that Barbara's estate was owed 8% interest on monies she loaned to the partnership. Second, as for John's loans to the partnership, the court found that he made five "advances" to the partnership but only one occurred prior to the date of dissociation (on April 28, 2015), while the others occurred in 2018. With respect to the April 28, 2015, advance, the court determined the partnership "executed a promissory note in favor of Mr. Azarian in the amount of $291,000" with interest to accrue "at the rate of 5% per year." It also found that "such amount is reflected on the balance sheet of the partnership as [of] June 30, 2016."

The court concluded "that the $291,000 advance by Mr. Azarian to the [p]artnership, plus interest, would reduce the Mall Value for the purpose of determining the fair value of [p]laintiffs' [p]artnership Interests" but that "the additional amounts" advanced after the date of dissociation "are not proper reductions since those advances were made in 2018." This determination is both factually supported and in accordance with the applicable law, see N.J.S.A. 42:1A-36 ("A dissociated partner is not liable for a partnership obligation incurred after dissociation . . . ."), and is therefore unassailable.

C. Tenant Security Deposits and Negative Capital Accounts

We also reject defendants' claim that the court erred in failing to: (1) reduce the fair value of the partnership to account for tenant security deposits; and (2) offset the buyout price owed to plaintiffs to account for their negative capital accounts.

With respect to the tenant security deposits, defendants address the issue by including but two sentences in their merits brief in which they assert that the court erred by not taking these discounts into account when entering final judgment. Because defendants offered neither a legal argument nor cited to any legal authority, we could decline to consider the issue. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) ("An issue that is not briefed is deemed waived upon appeal."). Likewise, as to the negative capital accounts, defendants provided neither legal argument nor citations to legal authority to support their position, instead asserting that Section 12 of the Agreement required the court to make a deduction for the negative capital accounts.[9]

[9] We cannot discern from the record if these issues were ever raised before the trial court. Nevertheless, we decided to address these issues on the merits.

Despite these procedural infirmities, we address the issues on the merits. As for the tenant security deposits, the record does not contain sufficient evidence to establish the amounts actually paid as defendants did not provide copies of cancelled checks or relevant bank account statements. Furthermore, Section 12 does not support defendants' arguments concerning the negative capital accounts, as that provision provides that "[u]pon termination or other dissolution of the partnership, each general partner shall receive an amount equal to the positive balance in his capital account and shall contribute an amount equal to the negative balance in his capital account." The court found, and defendants do not dispute, that "the remaining partners had determined to continue the [p]artnership" following plaintiffs' dissociation. Because the partnership was not terminated or dissolved, Section 12 is inapplicable. See generally N.J.S.A. 42:1A-34 (Dissociation not resulting in dissolution; buyout; damages).

In sum, we are satisfied that the court did not mistakenly exercise its discretion by failing to reduce the fair value of the partnership to account for tenant security deposits, or by failing to offset the buyout price owed to plaintiffs to account for their negative capital accounts.

V.

In their cross-appeal, plaintiffs primarily contend that the court erred by declining to rely upon their expert's appraisal and instead crediting defendants' expert's appraisal when determining the fair value of the Mall. They also claim that defendants' appraisal is "not credible" because the appraiser: (1) used a methodology that generated "a lower than market valuation"; and (2) valued the Mall "for estate tax reporting purposes at a ridiculously low $8,670,000.00 through manipulation of discount rates and vacancy rates" in 2013. We are unpersuaded by these arguments.

As discussed supra, fair value "is a flexible standard dependent on the circumstances and context of a transaction," Lawson Mardon Wheaton, Inc., 160 N.J. at 393, and the court's fair value determination "must be supported by substantial credible evidence." 160 W. Broadway Assocs., LP v. 1 Mem'l Drive, LLC, 466 N.J. Super. 600, 615 (App. Div.), cert. denied, 248 N.J. 232 (2021). Because fair value is a factual determination, it is "given a high level of deference" and "will be overturned only if . . . the judge mistakenly exercised that discretion." Casey v. Brennan, 344 N.J. Super. 83, 110-11 (App. Div. 2001), aff'd, 173 N.J. 177 (2002).

"A factfinder is not required to accept an expert's opinion. In the same manner as a jury, a judge sitting as factfinder may accept some parts of a witness's testimony and reject other parts." E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 29 (App. Div. 2018). The judge, as factfinder, "must weigh and evaluate the experts' opinions, including their credibility, to fulfill the judge's responsibility in reaching a reasoned, just and factually supported conclusion." Pansini Custom Design Assocs., LLC v. City of Ocean City, 407 N.J. Super. 137, 144 (App. Div. 2009).

Further, appellate courts "generally defer to a trial court's credibility findings about the testimony of expert witnesses." State v. J.L.G., 234 N.J. 265, 301 (2018). See State v. Locurto, 157 N.J. 463, 474 (1999) ("Appellate courts should defer to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.").

In the end, "the court's determination of value must be supported by substantial credible evidence." 160 W. Broadway Assocs., 466 N.J. Super. at 615. Because it is a factual determination, it is "given a high level of deference" and "will be overturned only if . . . the judge mistakenly exercised that discretion." Casey, 344 N.J. Super. at 110-11.

After thoroughly weighing the appraisals by Bernholz and Carey, comparing their methodologies and testimony, and making detailed factual findings as to both, the court found that the McGrath & Company appraisal performed by Carey was "more credible" and accepted the fair value of the Mall as of January 1, 2017, to be $11,835,000. We have no basis to question the court's findings as they are all supported by substantial credible evidence.

Indeed, in its opinion, the court cited the specific reasons why it credited the McGrath & Company appraisal over the Bernholz appraisal. It explained that the McGrath & Company appraisal considered "the difficulty in leasing certain space at the Mall and the cost of fit-up expenses," while Bernholz did not. It also cited the fact that Bernholz "assumed a 10% vacancy factor, which has never been achieved by the Mall" as part of his analysis. Notably, during trial, Bernholz conceded that had he used the actual vacancy rate as part of his analysis, his appraisal of the property would have been $11,666,125.

As to plaintiffs' claim that the McGrath & Company valuation is not credible because its methodology "generat[es] a lower than market valuation," the record reflects that both experts utilized the same methodology: the income approach. Furthermore, plaintiff's own expert Bernholz testified that the McGrath & Company appraisal was "[a] good report" and admitted that the discounted cash flow method used by Carey could be used under the circumstances.

With respect to plaintiffs' contention that Carey's 2013 appraisal of the property was "ridiculously low" and derived from "manipulation of discount rates and vacancy rates," we note that these assertions are neither supported by citations to the record, nor legal authority. And because the valuations in this case are made as of January 1, 2017, we are satisfied that any valuations completed prior to that date were not controlling on the court when addressing the appraisals.

In sum, we are satisfied that the court's determination of fair value is supported by substantial, credible evidence and its findings which credited the Carey appraisal over plaintiffs' appraisal are entitled to deference.

VI.

Plaintiffs also contend that the court erred by failing to increase the fair value of the partnership by adding back the value of personal loans taken by John and Barbara from Provident Bank that were repaid by the partnership in 2013. Plaintiffs further argue that the court erred by failing to determine that defendants overpaid management and accounting fees to various Azarian-owned entities.

We would be remiss if we did not observe that plaintiffs raise many of these arguments in the body of their merits brief, and do not identify them in proper point headings. See R. 2:6-2(a)(6) (requiring briefs to include "[t]he legal argument . . . which shall be divided, under appropriate point headings, distinctively printed or typed, into as many parts as there are points to be argued" and stating "in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or . . . a statement indicating that the issue was not raised below"); Almog v. Israel Travel Advisory Serv., Inc., 298 N.J. Super. 145, 155 (App. Div. 1997) ("[W]e confine our address of issues to those arguments properly made under appropriate point headings."). Further, the record fails to contain certain exhibits that the court referenced in its decision on the partnership loan issue. See Pressler & Verniero, cmt. 1 on R. 2:6-1 (We "may decline to address issues requiring review of those parts of the trial record not included in the appendix.").

Although we could refuse to address these arguments due to the aforementioned procedural deficiencies, we have nevertheless considered the arguments on the merits and reject them. The court found that in April 2006, Barbara and John "each obtained a $1 million line of credit from Provident Bank," and relied upon a December 12, 2008, Loan Committee Memorandum of

Provident Bank which stated "that the lines of credit obtained in 2006 were utilized for 'development costs' of the Mall." It further found that in June 2009, Barbara and John "each executed a modification agreement which, among other things, extended the maturity date of the 2006 loans to May 15, 2010[,] and secured the amounts owed thereunder by giving Provident Bank third and fourth mortgages against the Mall."

Next, it determined that in March 2013, the partnership obtained a $10,875,000 loan from Columbia Bank secured by the Mall. At the closing of that transaction, Provident Bank was paid over $6,000,000, "of which a total sum of $2,051,474.32 was paid for the $1 million loans previously provided to" Barbara and John.

In rejecting plaintiffs' contention, the court credited John's testimony "that these lines of credit were obtained . . . for the benefit of the [p]artnership, which was unable to meet its financial obligations because Ames Department Stores, its anchor tenant, had filed for bankruptcy." It found that "Provident Bank lent the monies to him and [Barbara] personally because any further loans to the [p]artnership would violate banking regulations," that the partnership "was operating in the red by at least $200[,000]-$300,000 per year and that the lines of credit were utilized to fund Mall operations." It found "no dispute that during this time frame, the [p]artnership was suffering financially" and that while "[t]he [p]artnership sought to obtain monies from the other partners, most . . . were unwilling to make any additional advances."

Although the court found that in January 2008, Barbara transferred $272,000 to the Knee Law Firm and that Knee "testified at trial that she never did any work for the Hyde Park Mall," it was unpersuaded by plaintiffs' reliance on this single transaction. It ultimately determined that "[w]hile the testimony of Ms. Knee raised some issues as to the use of funds from Provident Bank," John's testimony established that the lines of credit were used "for the business of the Hyde Park Mall."

The court also found that after the 2013 refinancing, some plaintiffs released any claims they had against the partnership, John, Barbara, or her entities after their loans to the partnership were repaid and that the releases in the record "encompass any claims that these partners had with respect to the Provident Bank loans and the refinance of same via Columbia Bank."

We are satisfied that the court's refusal to increase the fair value of the partnership based on the Provident Bank personal loans was supported by substantial credible evidence, as the record established that those loans were used for the partnership. Further, we are satisfied the court did not err by refusing to issue a credit with regard to the funds transferred to the Knee Law Firm. While the court acknowledged the evidence regarding that transaction, it appears not to have been persuaded by the proofs supporting that expense. See McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 531 (2003) (discussing the factfinder's responsibility "to ascribe the weight to be given to th[e] evidence").

For example, at the time of trial, Barbara was deceased, and the court had very limited information about the transaction. "[I]t is a well-established and salutary rule in this State that the testimony of a witness need not be believed when the only person who could have contradicted the witness is dead." D'Amato v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). "Consequently, our courts are especially reluctant to deprive a trier of fact of the opportunity to pass upon the credibility of an alleged transaction with a person who is now deceased." Ibid.

In sum, we are further satisfied the court did not abuse its discretion in failing to credit plaintiffs based on their claims of overpayment of management and accounting fees as the record was devoid of any bills, invoices, checks, or bank statements specifically related to such payments.

Finally, because we affirm the court's decision declining to reduce the partnership's fair value for alleged outstanding management fees plus interest, accounting fees plus interest, and brokerage fees plus interest owed by the partnership to various Azarian-owned entities based upon a lack of substantial, credible evidence to support them, we need not consider plaintiffs' arguments that defendants' attempts to collect those amounts from the partnership were barred under the doctrine of laches, the statute of limitations, or the statute of frauds.

To the extent we have not specifically addressed any of the parties' arguments it is because we have concluded they are of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION