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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-76-22

HARRY JAY LEVIN, individually
And derivatively on behalf of
BAJA UNLIMITED, LLC,

Plaintiff,

v.

MICHAEL SWEIGART,

Defendant.

OPINION

Decided February 18, 2025.

Levin & Associates (Harry Jay Levin, Esq., appearing) and Giordano, Halleran & Ciesla (Matthew N. Fiorvanti, Esq., appearing), attorneys for plaintiff.

LeVan Stapleton Segal Cochran LLC (John S. Stapleton, Esq., and Jonathan L. Cochran, Esq., appearing), attorneys for defendant.

FISHER, P.J.A.D. (t/a, retired on recall).

This action was commenced by a minority member of a limited liability company who alleges he was oppressed in various ways by the majority member. In the following findings of fact – derived from the evidence presented at trial over the course of three days in October 2024 and a few more hours on December 6, 2024 – the court concludes that the minority member was oppressed and that the matter should now proceed to a second phase designed to ascertain the most appropriate remedy.

I

Plaintiff Harry Jay Levin, a 30% member and an employee of Baja Unlimited, LLC, a Delaware limited liability company, claims he was oppressed in various ways by defendant Michael Sweigart, the owner of the other 70% of the company. Baja was formed in 2017 for the purpose of manufacturing and selling an item known as "FurZapper," which Sweigart thought of and later patented when he realized animal fur would adhere to a silicon-based item when placed in a laundry washer or dryer, leaving clothing free of fur.

Levin, a practicing attorney with offices in Toms River, was approached by Sweigart for legal assistance. Levin provided advice and, among other things, secured for Sweigart the services of a patent attorney and, in January 2017,

incorporated Baja in Delaware, as was Sweigart's wish.[1] At the beginning, Sweigart had little or no money to take the steps necessary to start up the company – Levin testified and it was not contradicted that Sweigart was then unemployed – and, after a while, asked Levin if he wished to invest.

In late 2016, Sweigart, without solicitation from Levin, sought Levin's investment in the company. Levin was interested but cognizant of the ethical rules that govern lawyers who seek to enter into business with a client. He informed Sweigart of this circumstance and advised he would first have to send Sweigart something in writing that would, among other things, notify Sweigart that he should seek out and consult with independent counsel. See RPC 1.8(a). On December 13, 2016, Levin emailed Sweigart (P-1) in which he "advise[d] you to seek legal counsel on the propriety of going into business with me" so as "to ensure that I am not taking advantage of you due to my position as a lawyer and to ensure that the overall venture is fair and transparent." Levin also

[1] The law applicable to Levin's oppression claim and Sweigart's responding position has been much in dispute throughout this litigation. The court heard testimony that Sweigart asked Levin whether it was better to incorporate in Delaware or Nevada, and Levin advised that, between the two, Delaware was preferable. See D-78. For reasons not clear, Sweigart did not seek advice about whether the company should have been formed under the laws of New Jersey and so, Levin confined his exploration to the question posed and never gave advice about a New Jersey incorporation even though, as he testified, incorporating in New Jersey would have been what he ordinarily would have done absent a client's specific direction.

explained his particular thoughts about his personal involvement in the business. He explained to Sweigart that he wasn't interested in being just a passive investor; Levin stated that he would "join[] you in onsite marketing activities at international marketing shows, at in person pitch presentations to national distributors, Walmart, PetCo, etc. and to assist in the deal making." Ibid. Months later, on April 3, 2017, Sweigart emailed Levin, advising that Levin "obviously bring[s] a lot to the table" and acknowledging that if Levin were to purchase of part of the company's equity it "will give you great rewards for your participation and involvement" (P-2). Sweigart asserted that "the power of 2 can be so much greater" and offered to sell Levin a 30% interest for $30,000. Ibid. Levin accepted[2] and credibly testified he would not have agreed to become involved absent Sweigart's agreement that he (Levin) would have an active role in the company's management because his involvement meant reducing his law practice and because he was otherwise leery of entrusting his monetary investment to Sweigart, who apparently had no experience in such an undertaking.

[2] Sweigart has continued to push his argument that Levin failed to comply with RPC 1.8(a). Another judge presiding over this matter at its early stages held, however, that Levin acted entirely appropriately and ethically in purchasing an interest in Baja, and, having heard testimony about these events, this court finds Levin credible and agrees with that earlier holding to the extent Sweigart continues to argue otherwise and to the extent Sweigart has sought reconsideration of the earlier ruling.

The parties agreed that Levin's $30,000 contribution would be conveyed through his taking on various Baja accruing expenses. P-3 is a list of those expenditures, which includes Levin's payment of the bill of the attorney who secured a patent for FurZapper, and other costs associated with Baja's use of Levin's Toms River office, its copier, and other expenses. The court heard credible testimony that there were disagreements about some of the amounts, and P-3 in fact reveals that while initially including in his expenses the cost of using the law firm's copier, Levin later withdrew that item. In any event, there is no question and apparently no dispute that Levin contributed more than the $30,000 agreed upon in this fashion.[3]

It is readily apparent from these circumstances and the parties' communications at the time that there was an understanding – despite the absence of an operating agreement or employment agreement – that Levin accepted into Baja as more than a passive investor. First, there is no dispute that he was a 30% member of Baja. Second, he became a Baja employee and not just an employee at-will but an employee involved at the highest levels of management and a true (albeit minority) partner in the joint decision-making for the company. The absence of an agreement at the outset that would more clearly

[3] Levin seeks reimbursement of that alleged overpayment, slightly in excess of $10,028.64. See Levin Written Summation, ¶4 at p. 74.

define the parties' interests has certainly rendered difficult a resolution of their present difficulties. But it is clear from the testimony and their communications at the time Levin became a member, and thereafter, that Levin was more than just an investor and employee at-will. This is clear from one of Sweigart's earliest communications to Levin about the latter's investment; in his April 3, 2017 email (P-2), Sweigart observed that Levin would "obviously bring a lot to the table." For that reason, Sweigart offered Levin an interest in the company to obtain Levin's "participation and involvement" and expressed his recognition that "the power of 2 can be so much greater" in terms of the management of Baja. From these and similar communications, as amplified by Levin's credible testimony, the court is satisfied that Levin was not only obtaining an interest in Baja but the right to jointly participate in management and business decisions of substance. Sweigart might have had the ultimate say, as he was the majority member, but Levin was entitled to be informed and participate in all significant decisions. So, it is important to recognize that their implicit, albeit unwritten operating agreement at the time was based on that framework and on the understanding that Levin was not just any employee but one that could only be disciplined or terminated for cause.

Indeed, Levin was given the title vice-president (P-93), which further suggested an understanding that Levin was entitled to participate in Baja's

management. And, in fact, that is exactly how the parties' proceeded. Consequently, and from the outset, Levin reduced the time he spent in his law practice so he could devote approximately twenty to twenty-five hours per week on Baja business. Among other things, Levin was immediately engaged in and indeed responsible for identifying and hiring appropriate company employees. Space in his law office was devoted to Baja business. And from that his participation – with Sweigart's approval and consent – grew even further.

For example, in 2017, Levin brought to the company the idea of obtaining Walmart's involvement through Walmart's "Made in America" program. While Sweigart found Levin's pursuit of this to be "laughable," Levin's persistence brought he and Sweigart to Arkansas to meet with and make an in-person presentation to Walmart. Sweigart's leading of the presentation wasn't well met by Walmart but, at Levin's urging, Levin made the next presentation which proved successful, and Baja was invited by Walmart to participate in the "Made in America" program, resulting in FurZapper being sold in every Walmart store in the United States.

Most telling on the question of whether Levin was more than a mere minority owner and more than an employee at-will is his involvement in the

parties' appearance on a television program known as Shark Tank.[4] The evidence revealed that it was Levin's idea to pursue this – Sweigart thought it a pipedream – and Levin spearheaded the efforts that actually landed the two of them on Shark Tank, where they pitched FurZapper and gained for the company a significant amount of publicity for its product. Watching their part of the episode, which was played in open court, suggested Levin's considerable involvement in the company; indeed, anyone watching the episode would have assumed Levin was the senior partner; at least, that is this court's impression from this evidence.

As part of Baja's application to Shark Tank, Levin proposed and sent to Sweigart a simple, two-page agreement.[5] In disputing that the parties eventually agreed to the operating agreement's terms, Sweigart points out that the Shark Tank application did not require that Baja's members have an operating agreement only that, if there was one, it was to be included in the application.

[4] Shark Tank first aired on ABC in 2009. The basic premise consists of a handful of entrepreneurs (the "sharks" referred to in the show's title) listening to pitches from start-up companies and then deciding whether or to what extent to invest.

[5] Levin had previously attempted to gain Sweigart's consent to an operating agreement. A very rough draft had been circulated much earlier but no finer point was ever put to it.

Sweigart's position about what Shark Tank required was certainly accurate[6] but that Levin mistakenly thought an agreement was required does not move the needle much in determining whether Levin and Sweigart actually then agreed to written terms that would govern their relationship.

The operating agreement in question (P-15) has had a most unusual involvement in this case. Considering that it could be viewed as being determinative about whether New Jersey or Delaware law provides the substantive law applicable to the present disputes, and considering that that choice-of-law issue has been viewed by both sides as playing a large and pivotal role in how this case should be decided,[7] it is truly peculiar that the document did not make an appearance in this litigation until the night before the return date of Levin's summary judgment motion. See Yannacone Certification (Feb.

[6] That is, the application asked for the inclusion of "any existing shareholder or operating agreements" (P-9), which would suggest that if there were no such agreements there was nothing to include, not that one should be created so that it could be included.

[7] Until P-15's appearance in these proceedings, the parties had engaged in a dispute about whether the court should, as Levin argued, apply New Jersey law to their dispute – because the company operated in New Jersey and both its members were New Jerseyans – or whether, as Sweigart argued, Delaware law should apply because, notwithstanding the otherwise the New Jersey flavor of all that had or would occur, Baja was incorporated in Delaware. Resolving this dispute seemed critical because the parties disagree – and not frivolously – that a different outcome might attach if Delaware law governed instead of New Jersey law.

5, 2024), ¶ 2. At that last minute, Levin supplied to the court a certification which appended a copy of what is now in evidence as P-15; it was as if Hamlet did not first step on stage until the second act. The motion was adjourned as a result, and Sweigart allowed time to respond. Despite the suspicious late appearance, however, Sweigart didn't contend the document was fictional; he only stated he never physically signed it and didn't recall authorizing the placing of his e-signature on it. See Sweigart Certification (Feb. 14, 2024), ¶s 4-6.

Adding to the uncertainty about whether Sweigart ever agreed to P-15's terms is the fact that it does not contain pen-and-ink signatures. The document contains only electronic signatures, and the record lacks a clear, written statement from Sweigart at the time he consented to the agreement or its content. Notwithstanding, there is credible evidence that Levin provided Sweigart with a draft of what eventually became P-15. Indeed, that seems undisputed. Levin emailed Sweigart on July 30, 2020, expressing his position that Shark Tank required proof of an agreement between them, perhaps an incorrect interpretation of what Shark Tank required, see n.6, above, and "attach[ing] . . . a short and to the point Agreement which reflects the basic terms of our relationship" (P-11A). Sweigart did not dispute in his testimony that he received this email; his testimony was largely that he did not remember what transpired, that he did not discuss the document with Levin, or that he otherwise ultimately

never expressed his agreement with its terms. But the court finds more credible Levin's testimony that he went through the document paragraph-by-paragraph with Sweigart and that Sweigart agreed to its substance[8]; this is buttressed by the fact that Levin emailed his assistant on July 31, 2020, stating that he "[d]iscussed [the document] with [Sweigart]," that Sweigart is "fine with it," and that she should "place /s/ for both of us on the signature line" (P-12). And that all this isn't a recent fabrication is further buttressed by the fact that a year later, on October 21, 2021, Sweigart emailed Levin's assistant and requested "a copy . . . of all documents and or contracts/agreements that you have on file that have been signed by me, for my records" (P-14), and the next day Levin's assistant emailed a copy of the operating agreement (P-15) to Sweigart. Despite the inclusion of the operating agreement in the Shark Tank application and the forwarding of the agreement to Sweigart in October 2021, he never once questioned its existence or its effectiveness in defining the parties' relationship until it suddenly appeared in this lawsuit and, even then, only claims a lack of recollection rather than an outright claim that the document was a recent fabrication.

[8] The few differences between the draft sent to Sweigart and the final version are just corrections of typos or mistakes in the former that have no bearing on the substance of the document.

While hardly an ideal way of confirming their understandings, the court is satisfied from the handful of relevant emails and from Levin's more credible testimony[9] that he and Sweigart agreed on the material terms of their manner of operating Baja as set forth in P-15.[10] That finding militates in favor of the

[9] Indeed, this is probably a propitious time to expand on the court's view of the credibility of Levin and Sweigart not just on this particular point but as an overall matter. To be sure, their personalities are quite different. Levin is an experienced attorney, used to speaking to groups, and very adept at persuasively making a point; Sweigart is not as loquacious, probably not used to speaking to groups, and indeed may not be comfortable expressing himself via the spoken word as he likely is in expressing himself through emails. It is also interesting that Levin testified not only on direct but during cross-examination at great length, whereas Sweigart sought to avoid testifying at all. The record will reveal that after Levin rested his case, Sweigart's counsel offered and the court admitted certain deposition excerpts and some other exhibits, following which he too rested without putting Sweigart on the stand. This prompted Levin, who anticipated that Sweigart would be called, to seek to reopen his case for the purpose of calling Sweigart to the stand. After argument and considerable thought on the point, the court permitted Levin to reopen and call Sweigart as a witness. While the court does not draw from this unusual circumstance an adverse inference against Sweigart, see, e.g., Torres v. Pabon, 225 N.J. 167, 181-83 (2016), the court has – after carefully watching both parties testify – that Levin was the more credible witness. Although combative on cross-examination, the court finds that his combativeness wasn't because of an unwillingness to answer but an impatience with some of the questions. The court, that is, finds Levin the witness most interested in subjecting himself to questioning and in providing all the information sought by the questioner, whereas Sweigart was very guarded and at times sought to avoid providing the information sought by the questioner. From this – and the general sense the court derives from the content of their answers – the court finds Levin the more credible witness.

[10] There is no significance in P-15 being labeled "Shareholder/Partnership Agreement" and not "Operating Agreement." Courts of equity concern

application of New Jersey law to what Levin was required to show to sustain his claim of oppression. As the parties' stipulated in P-15, "[t]his [a]greement shall be interpreted and construed by applying the laws, judicial decisions and commercial standards, of New Jersey."[11] Courts should enforce those types of choices expressly made by the parties unless the choice conflicts with New Jersey public policy. See Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324, 341 (1992). The agreement to apply New Jersey law governed the interpretation and construction of P-15, which generally defined the parties' relationships to each other and to Baja. This operating agreement clearly applies to Levin's claims of oppression.[12]

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themselves with substance, not labels. See Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 348 (Ch. Div.), aff'd o.b., 33 N.J. 72 (1960).

[11] The court should add that, in enforcing this operating agreement, there is no significance to the fact that there are no pen-and-ink signatures, only e-signatures that were placed on the document by Levin's assistant at his direction. See Caspi v. Microsoft Network, LLC, 323 N.J. Super. 118, 125 (App. Div. 1999); N.J.S.A. 12A:12-7(a). A court must not be so much concerned with the form of the matter but whether there has been mutual assent, Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 538 (1953), and the court is satisfied, for the reasons already expressed, that Sweigart gave to Levin his assent to be bound to P-15's terms, Leitner v. Braen, 51 N.J. Super. 31, 38 (App. Div. 1958).

[12] In the final analysis, it may be that there is nothing but a semantical difference between New Jersey law and Delaware law on the duties owed by one LLC member to another. Under Delaware law, a minority member should be entitled when wronged to a remedy befitting the equities and the circumstances. In 2012, the Supreme Court of Delaware questioned whether there exist "default fiduciary duties," i.e., obligations implied in the absence of expressed

II

That being the case, the court must determine what constitutes a viable cause of action when it is alleged that a majority member acted wrongfully toward a minority member. Because the parties' consented in their operating agreement to New Jersey as the provider of the legal framework for such a determination, the court looks to N.J.S.A. 42:2C-48,[13] which, in its subsection

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contractual duties, Auriga Capital Corp. v. Gatz Props., LLC, 59 A.3d 1206, 1218 (Del. 2012), and Delaware's Legislature responded by enacting 6 Del. C. § 18-1104, which declares that "[i]n any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern." This broad grant of equitable power, as held in CSH Theatres, LLC v. Nederlander of San Francisco Assocs., 2015 Del. Ch. LEXIS 115 at *34 (Del. Ch. 2015), recognizes that "[i]n the absence of language in an LLC agreement to the contrary, the managers of an LLC owe traditional fiduciary duties of care and loyalty." See Feeley v. NHAOCG, LLC, 62 A.3d 649, 660 (Del. Ch. 2012). So, although the court has held that the parties did, in fact, have an operating agreement that called for the application of New Jersey law to their disputes, the court is further satisfied that Delaware also allows for rights similar to those our Legislature and courts allow to oppressed members.

[13] Sweigart argues that this statute applies only to disputes between members of a New Jersey limited liability company and not a limited liability company formed – like here – under another state's laws. The court rejects the argument that the relationship of a Delaware LLC's two New Jersey members to each other is excluded from the provisions of N.J.S.A. 42:2C-48. Sweigart's support for his contrary argument lies mostly with N.J.S.A. 42:2C-57, which declares that, in an action in New Jersey, Delaware law applies to "the internal affairs of the company" and the "liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of the company." Neither of those circumstances, however, is presently involved here. Beyond the statutory limits suggested by N.J.S.A. 42:2C-57, New Jersey law should apply – as the parties expressly agreed (P-15) – to allow an oppressed member a

(a), first describes when such conduct compels dissolution of the limited liability company, and then to subsection (b), which allows for relief either on the oppressed member's application or on the court's own, other than dissolution. That is, this statute allows for dissolution in six instances, N.J.S.A. 42:2C-48(a)(1) through (6), but also allows for less drastic relief, in proceedings brought under either N.J.S.A. 42:2C-48(a)(4) or (5). It is here that the court places its focus, since dissolution: is not sought; may not be an appropriate remedy here; and may be a claim over which the court lacks subject matter jurisdiction.[14]

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remedy. Moreover, it is quite possible, as noted above, that there is only a semantical difference between how Delaware and New Jersey law apply to the claim of an oppressed member. To plainly state the court's holding on this legal dispute, there is nothing in the statutes or in this State's policies to suggest that two New Jersey residents, who operate in New Jersey a limited liability company that happened to be formed under the laws of Delaware, and who agreed that their relationship would be governed by New Jersey law, should somehow have their relationship regulated by Delaware law.

[14] Dissolution as a remedy provides other choice-of-law concerns because it may be that only a Delaware court may dissolve a Delaware entity. See In re Coinmint, LLC, 261 A.3d 867, 910 n.276 (Del. Ch. 2021); Michael V. Caracappa, "'Exclusive' Jurisdiction in Delaware's General Corporation Law: Why States Lack the Power to Strip Jurisdiction from Their Sister States and the Federal Courts," 49 Seton Hall L. Rev. 1091, 1191-20 (2019). Levin, however, doesn't seek Baja's dissolution, only an order compelling Sweigart to purchase his interest in Baja – an issue that would seem to avoid the impact of this jurisdictional or choice-of-law problem, see id., 49 Seton Hall. L. Rev. at 1119 n.232. So, the court need not presently concern itself with whether this court may or can dissolve Baja.

Under N.J.S.A. 42:2C-48(a)(4)(b), a court may, among other things, intervene when finding "it is not reasonably practicable to carry on the company's activities in conformity with one or both of the certificate of formation and the operating agreement." N.J.S.A. 42:2C-48(a)(5) also allows for court intervention when "the manager or those members in control of the company," like Sweigert here, has "acted or [is] acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant," N.J.S.A. 42:2C-48(a)(5)(b).

These concepts are no different than those used to combat oppression in other business organizations, such as traditional corporations. Thus, the approach announced in Brenner v. Berkowitz, 134 N.J. 488, 508 (1993) – that available protections should be "interpreted broadly to provide remedies" for oppressed shareholders – should have equal application here. This doesn't limit the court's search to illegality or fraud; it is enough that the acts or omissions of the controlling member have "frustrat[ed] a shareholder's reasonable expectations." Id. at 506; see also Sipko v. Koger, Inc., 214 N.J. 364, 382-83 2013); Namerow v. PediatriCare Assoc., LLC, 461 N.J. Super. 133, 144-45 (Ch. Div. 2018).

There were at least pillars of Levin's agreement to purchase a 30% interest in Baja and their corresponding two chief stipulations in the operating agreement

relevant to Levin's claim. The first concerns his employment status and the other concerns his right to "jointly manage" Baja. The court concludes that Sweigart's actions were intended to deprive, and had the effect of depriving, Levin of both these things.

The precise reason for Sweigart's actions is not entirely clear. It may have been, at least in part, jealousy over the fact that it appeared to others in the company, to the outside world, and no doubt to Sweigart himself that Levin – as revealed by the Shark Tank appearance – had become the face of the company and that Sweigart's importance had thereby been diminished. But the reason is not terribly important. What is relevant, and the court so finds, that, as Levin puts it, Sweigart became "resentful . . . and began to marginalize Levin." Levin Proposed Finding of Fact 78. Sweigart's de-minimizing Levin may also have resulted from their disagreement about Sweigart's pushing the company into uncertain relationships with Chinese manufacturers and Levin's resistance to that course.

Levin didn't feel that Baja should be involved with Chinese manufacturers because the relationship he developed with Walmart – an important component of Baja's sales efforts – was founded on FurZapper being an American-made product. Levin voiced those concerns, as well as his concerns that being involved with a Chinese manufacturer: might somehow violate American law;

could possibly lead to the production of FurZapper through child labor; and risked a loss or diminishment of Baja's intellectual property because Chinese entities are, according to Levin, known not to honor American law in that regard. Levin voiced all these concerns to Sweigart.

Levin was concerned as well by Baja's inability to learn of the identity of the actual manufacturer. What the evidence reveals is that Sweigart came in contact with someone named "Jackie," who served as a "middleman" between Baja and the Chinese manufacturer. Wanting to pin down and identify its relationship with the unknown manufacturer, Levin prepared in July 2020 an agreement to be executed by Baja and the manufacturer (P-18). That Levin was in the dark about the manufacturer's identity is demonstrated by the agreement's lack of the name of the manufacturer. Instead, what happened was revealed by Levin's October 8, 2021 email to Jackie in which he memorialized Jackie's unwillingness to reveal the manufacturer's identity; Levin attempted to resolve these problems while insisting that Jackie provide "the full contact information of all of the manufacturers or companies involved with our products" (P-19). Jackie never complied; instead, Jackie sought a multi-year contract with the unidentified manufacturer "before we open all info." Ibid. Sweigart expressed his willingness without first discussing the issue with Levin, responding to Jackie with "[h]ow is 3 years that is renewable?" Ibid. Levin again expressed

his concerns (P-20), but Sweigart ignored him and proceeded forward with this China-based arrangement.

Sweigart's oppressive conduct began not only with the parties' disagreement about the unknown Chinese manufacturer but also with Levin's suggestion in August 2020 that Baja should begin paying rent for the space Baja was using in Levin's law office (P-17). Levin hadn't sought compensation previously because the use of his offices rent free at the company's inception and in its early days gave Baja "an opportunity to establish itself." Ibid. Levin asserted that this arrangement wasn't intended to be perpetual, and he claimed he was entitled to be compensated, although he also stated a willingness to provide a substantial discount and requested $25,000 per year. Ibid. Sweigart's response was to both refuse and then move – without discussion – Baja's operations to a warehouse in Manahawkin, further away from Levin.

There is also evidence the court finds credible that besides the move to Manahawkin, Sweigart would schedule meetings at early hours, knowing Levin's physical limitations made the hour, the distance, and the company's location a burden. Notwithstanding, Levin expressed a willingness to put these squabbles aside for the company's betterment, writing in one email: "I swear on everything that is holy I don't want to fight, I want peace, have some fun and

make a lot of money" (D-181; see also D-187). Levin later offered to engage in mediation as an "olive branch"; Sweigart rejected that proposal (D-236).

Sweigart's oppressive conduct also had a monetary aspect. While they both received a $49,200 annual salary in 2018 (P-60), Sweigart increased his own salary to $101,600 in 2019, while allowing Levin only $93,600 (P-63); Levin received the same salary in 2020, while Sweigart gave himself a ten percent raise to $112,980 (P-66). None of this was discussed with Levin. In 2021, Sweigart reduced Levin's salary from $93,600 to $58,240, prompting Levin to complain and seek "an explanation" (P-21). In response, Sweigart promised to "reinstate" Levin's former salary once "cash flow got better," but when cash flow got better, he didn't make good on his promise. There was no response to Levin's objecting email, further revealing Sweigart's attempts to simply take complete control contrary to the understanding that they would jointly manage the business. Levin continued to object via similar emails (P-22, P-23 and P-25), all of which Sweigart ignored. When Levin's annual salary of $93,000 was later reinstated, Sweigart unilaterally increased his own to $146,401 (P-74) and gave himself a car allowance to boot without providing Levin with such an allowance, all, again, without explanation.

Not long after these events, on February 15, 2022, Sweigart sent Levin an email offering to buy out his interest; he "conclu[ded]" that, having "considered

the events that have transpired since the time you became an owner of [Baja]," "we can no longer work together" (P-26). The email listed Sweigart's claims as to why he had come to this conclusion.

One of the reasons Sweigart alleged in concluding they could no longer work together was his claim that when Levin acquired his interest in Baja, "I was not advised by you in writing of the desirability of seeking the advice of independent counsel nor was I given a reasonable opportunity to seek advice of independent legal counsel concerning your acquisition of your equity interest," adding that Levin claimed that "any other attorney was not needed since you represented both me as a client, and also represent the company" (P-26). This assertion simply wasn't true. As already observed – and as memorialized in an earlier partial summary judgment, see n.2, above – Levin acted in accord with RPC 1.8(a) in that he advised Sweigart in writing he should seek out independent counsel and Sweigart was given considerable time within which to do so. Levin's advice about independent counsel was given in writing on December 13, 2016 (P-1), shortly after Sweigart first suggested that Levin get involved as a member, and the ultimate transaction occurred in April 2017, starting with Sweigart's specific offer in his April 3, 2017 email (P-2). Sweigart's false assertion that Levin failed to comply with RPC 1.8(a) – no doubt wielded because of the sensitivity any attorney would have when accused of unethical

conduct – in his offer of a buy-out was an obvious and inappropriate attempt to gain leverage and hardly consistent with the fiduciary duties LLC members owe each other.

Sweigart gave other false reasons for seeking a buy-out agreement on the most favorable terms to him. He claimed that Levin reneged on an agreement to allow Baja to use Levin's law office free of charge indefinitely when, as Levin credibly testified, the agreement about the use of his office was only until Baja was functioning well. He claimed that Levin asserted there was a "legal requirement" that they have equal salaries; again, Levin credibly denied that and a December 23, 2021 email from Levin to Sweigart plainly asserted Levin's view that "in fairness, [Sweigart] should be getting paid more" (P-25). In the concluding portion of his buy-out email, Sweigart again attempted to use his false claim that Levin acted "improperly and unethically" when he acquired his interest in Baja (P-26). With that Sweigart made an offer to purchase Levin's interest that Levin viewed as not only unacceptable but grossly less than what they both thought about Baja's value.[15]

[15] The offer was $300,000 paid out over time. Eighteen months earlier Baja, in applying to Shark Tank, expressed a willingness to sell a 10% interest to one of the sharks for $650,000 and, later, a shark offered $600,000 in exchange for a 15% interest, which would suggest a company value of $4,000,000 (P-8; P-16).

In his March 24, 2022 response, Levin proposed to Sweigart's counsel that they agree to retain someone to value the business so as to determine a fair buy-out amount (P-27). He also asserted that he thought "neither one of us should use corporate funds relating to the [anticipated] litigation." Ibid. A few days later, Sweigart's counsel rejected the proposal to appoint a joint appraiser and asserted Sweigart would be "seeking to declare" Levin's acquisition of a 30% interest in Baja "to have been unethical, unenforceable and rescindable" (P-28); again, Sweigart pushed the false narrative that Levin had gained his interest in Baja in an unethical manner. Minutes after Sweigart's attorney sent that email – that is, on March 25, 2022, at 4:00 p.m. – Sweigart emailed Levin, advising him that he was being placed on "paid leave of absence" as of 5:00 p.m. that same day, i.e., an hour later. He claimed in that email that Levin had been unproductive even though no prior email or other writing suggested Sweigart had previously felt that way. In support, Sweigart provided a list of "responsibilities and tasks going back to 2019" that he claimed Levin left "unfinished or simply ignored" (P-29). Nearly all of these – if not all – concerned aged events of more than a year old and, in this court's view, constituted a rather unpersuasive attempt to build a case to support the otherwise oppressive step of putting Levin on leave of absence.

The conditions imposed on Levin's leave of absence precluded Levin from communicating with Baja employees; Levin was also shut out of access to Baja email. In short, Levin was completely frozen out, receiving only his reduced income, and without any ability to learn of – let alone participate in – the managing of the company.

III

All this prompted Levin's commencement of this suit in June 2022. Early on, the parties agreed on the terms of a consent order entered on August 1, 2022. One of the order's stipulations (paragraph E) was Sweigart's agreement that he would, "on behalf of the company," provide Levin "on a timely basis, but in no event later than seven days after written request, [Baja's] financial, management and operational records . . ., including but not limited to all bank account information, employee information, and marketing materials."

On the same day the order was entered and on numerous occasions after, Levin sought information about Baja with little or no success for many months.[16]

[16] At this opinion's outset, the court noted that the case was tried over three days in October 2024 and for a few more hours on December 6, 2024. The court heard testimony on that fourth day was because it had granted Sweigart's motion to reopen the record after the parties' written summations were submitted. Sweigart sought an order that would allow the record to be supplemented with a series of exhibits, or to hear testimony from one of Sweigart's former attorneys about those exhibits, or both. And the reason for that was to respond to Levin's testimony that Sweigart had provided nothing in response to the requests he made pursuant to the August 1, 2022 consent order. The court granted that relief

In particular, Levin asked for information about whether Sweigart had borrowed money from the company or whether he was using Baja funds to pay his legal fees in this matter. He asked for information about that, and on other subjects, on November 4, 15, 21, 22, and 30, December 9, 11, 21, and 24, 2022, and January 15 and 18, 2023 (P-31 through P-42). Not until seven months after entry of the consent order that required production within seven days of a request, did Levin receive a response but only from Baja's counsel in response to discovery requests. Within the 26,000 pages provided in that one response, was a note signed by Sweigart in which he promised to repay Baja $100,000 (P-82). The promissory note, turned over on March 3, 2023, was not supported by any collateral; repayment of this uncollateralized debt included interest at the rate of only 3.15% (P-82). Baja balance sheets later provided did not list the $100,000 loan as a company asset (D-260), potentially suggesting the loan had already been forgiven; there certainly was no evidence or testimony that the loan had been repaid.

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for reasons explained in a written decision and order entered on November 22, 2024. After hearing the testimony of Mark H. Williams, Esq., about whether or to what extent Sweigart provided Baja information as required by the August 1, 2022 consent order, Levin was permitted to give rebuttal testimony. With that, the record was closed, and the parties were permitted the right to submit written reply summations. Timely reply summations were provided by December 13, 2024. See also n.16, below.

There are also other suggestions in the company documents provided to Levin over the course of time that raised additional questions about whether Sweigart had inappropriately helped himself to other funds from the company. For example, one balance sheet listed what were then current Baja liabilities and included a reference to $30,660,18 "due to Sweigart" (P-260). And other Baja records refer to payments to Sweigart of $9,672.75 "for legal fees-non lawsuit," and $5,000 for "reimbursable expenses" (P-83), none of which was explained.

Along these same lines, two days before trial in this matter, Sweigart's counsel provided to Levin a copy of an indemnification agreement (P-90) executed two months earlier by which Baja agreed to indemnify Sweigart in connection with any claims asserted by anyone against Sweigart; this agreement lists the three law firms that sequentially represented Sweigart in this litigation. On October 18, 2024, well into the trial of this matter, Sweigart's counsel also advised that months earlier Sweigart arranged for the transfer of $110,000 of Baja funds "as an advancement/reimbursement of a fraction of his legal fees" in this matter, estimated to be greater than $600,000 (P-94). Levin was never previously advised of these events and circumstances.

Levin also complains of the fact that a K-1 for 2022 was provided to him revealing his share of company profits was $284,752; that required Levin to pay taxes on that amount despite never actually receiving it from Baja. Levin

inquired about why he only actually received $120,000 in distributions from the company's profits for that year (D-34) and asked why there was not a more substantial distribution to offset this "phantom income" situation (P-44). Sweigart didn't respond, even as of now. This was all repeated, albeit in different amounts for the following calendar year (P-73), and again hasn't been explained.

IV

Turning back to the general legal principles from these specific factual findings, the court has no hesitation in concluding that Sweigart has acted in derogation of his obligations to his fellow LLC member and has "frustrat[ed]" Levin's "reasonable expectations" as a minority LLC member. Brenner, 134 N.J. at 506. When considering that there is little or no question that Levin's expectations – as expressed at the time he agreed to invest, as expressed in the operating agreement, and as revealed by other communications and actions at the time – were that despite his minority position he would be a paid employee jointly involved in Baja's management. Sweigart, by wielding his majority position, dashed those reasonable expectations by excluding, without just cause, Levin from having any say in the management of Baja, he has frustrated Levin's attempts to learn of and understand the manufacturing, production and financial activities of Baja, and he has suspended Levin from his status as an employee

without any just or good cause. In short, despite the fact that Levin had bargained for and obtained an ownership interest, albeit a minority interest, and that he had also obtained employment rights and a right to participate in Baja's management, Sweigart wielded his majority interest to frustrate all Levin's reasonable expectations and turned Levin from an active participant to a silent investor.

The court concludes that Levin has demonstrated clearly and convincingly that Sweigart put Levin on a leave of absence for no legitimate reasons, that Sweigart improperly excluded Levin from participating in the management of Baja and that Sweigart kept Levin substantially (and at times completely) in the dark about whatever would thereafter occur with Baja for no reason except to force out Levin. Sweigart very clearly reduced Levin's salary while increasing his own, reduced the distribution to Levin of his share of Baja profits in 2022 and then made no distribution in 2023 – all without explanation – borrowed money from Baja without informing Levin, and had Baja indemnify him for attorneys' fees that he has incurred and the borrowings he took without notice to Levin until, and only in some cases, well after taking the action.[17] Without a

[17] The court does not agree with Levin's contention that Sweigart grossly violated the terms of the August 1, 2022 consent order that required Sweigart to provide, on request, financial information about Baja. To be sure, Sweigart unreasonably delayed in responding to many of the requests, but a large amount of information – albeit not all – was provided on March 3, 2023, and it revealed

doubt, Sweigart's intent was to squeeze Levin out or to extract from Levin an agreement to be bought out at what Levin believes to be an unconscionably low price by continually asserting – falsely – that Levin violated RPC 1.8(a) when Levin purchased his interest in Baja. All these things demonstrate to the court that Sweigart has oppressed Levin and has unreasonably frustrated Levin's quite reasonable expectations about his relationship to Baja and, therefore, warrants relief under New Jersey law.

V

As noted at the trial's outset, this first phase was to determine whether there was any cause for action on Levin's claims of oppression, and that questions about the appropriate remedy should await further proceedings. Although the parties have argued in their summations about the appropriate

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some of the transactions between Sweigart and Baja that demonstrate Sweigart has engaged in potentially prejudicial transactions with Baja without prior notice to Levin. In other words, the court rejects the argument that Sweigart provided none of the information required by the consent order – and it seems Levin has acknowledged in his rebutting December 6, 2024 testimony – that his sweeping claim of a complete blackout of information from Sweigart was hyperbolic, but it also appears to the court that Sweigart did not take seriously his obligation to comply with the consent order and did not fully or timely respond as the order required. This circumstance, however, standing alone would not result in the court granting relief to Levin because Levin certainly had other avenues, including seeking enforcement of the order under Rule 1:10 or by seeking the appointment of a special fiscal agent, custodian, or provisional manager to protect Baja, or his interest in Baja, during the pendency of this lawsuit, but did not do so.

remedy being a compelled buy-out, the court will stay consistent with the ground rules established earlier and impose no remedy and draw no conclusion about the best way to proceed at this time. The court will, however, offer some thoughts for the parties' consideration as we move forward to the remedy phase.

To start, a compelled dissolution of Baja seems at present a highly unlikely remedy. The fact that dissolution is a truly drastic remedy led to the recognition of courts and legislatures that there should be available lesser remedies that would still fairly and equitably compensate the oppressed while allowing the business entity to survive. Indeed, as noted earlier, an order of dissolution would be further problematic because it may be that this court lacks jurisdiction to take that step. See n.14, above. But the fact that it may only be a Delaware court that may dissolve a Delaware limited liability company doesn't mean that a court with personal jurisdiction over the company or its members may not impose lesser relief.

The Legislature has clearly provided alternatives for less drastic remedies than dissolution. Under N.J.S.A. 42:2C-48(b), a court may – in the circumstances referred to in subsections (4) or (5) of N.J.S.A. 42:2C-48(a) – grant "a remedy other than dissolution," including but not limited to ordering a "sale of all interests held by a member who is a party to the proceeding to either the limited liability company or any other member who is a party to the

proceeding" if the court is able to determine in its discretion "that such an order would be fair and equitable to all parties under all of the circumstances of the case." See Musto v. Vidas, 281 N.J. Super. 548, 562 (App. Div. 1995) (recognizing that "a court of equity . . . has the power of devising the remedy and shaping it in order to fit the circumstances of the case and the complexities involved therein").

As noted earlier in this opinion, the court is satisfied that the circumstances described in N.J.S.A. 42:4C-48(a)(4)(b)[18] and in N.J.S.A. 42:4C-48(a)(5)(b),[19] which allow for a remedy less than dissolution, have been demonstrated. These statutes provide for a compelled sale of one of the parties' interests in Baja. This remedy will certainly be explored in the next phase.

It should be further noted that a compelled buy-out is the primary relief Levin seeks, and Sweigart seems to agree it is the most appropriate remedy if the court were to find a reason to intervene, Sweigart Summation, ¶s 54-55 (arguing that "if the [c]ourt elects to move to a second phase of trial related to the sale or dissolution of Baja . . . Levin should be ordered to sell his interests

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[18] This subsection refers to circumstances in which "it is not reasonably practicable to carry on the company's activities in conformity with . . . the operating agreement."

[19] This subsection permits relief if "the . . . member[] in control of the company . . . ha[s] acted or [is] acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant."

at fair market value to Sweigart"[20]). But the court may also consider other relief instead of or in addition to a compelled buy-out. Most noteworthy is the court's power to appoint a special fiscal agent or provisional manager; through the involvement of such an individual, the court could ensure the active participation of both Sweigart and Levin – as was their original intent – and allow this appointed individual to resolve conflicts and provide a means forward in the face of any impasses.

Although neither party has asked the court to make such an appointment, the court does not rule it out as possibly the most appropriate and least intrusive way of moving forward. After all, when intervening in corporate affairs, a court's approach ought to be similar to the central provision of the Hippocratic oath: primum non nocere ("first, do no harm"). It may be, as both parties seem to acknowledge, they can no longer work together and that even the inclusion of a provisional manager may be more burdensome – and costly too[21] – than the

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[20] Both parties seem to assume that it would be Sweigart buying out Levin, but the court is not necessarily so limited. See, e.g., Balsamides v. Protameen Chems., 160 N.J. 352, 354 (1999) (where the oppressing shareholder was ordered to sell his shares in the corporation to the oppressed).

[21] N.J.S.A. 42:2C-48(b) allows for such a course of action and further authorizes the court to "allow reasonable compensation to any custodian or provisional manager for his or her services and reimbursement or direct payment of all his or her reasonable costs and expenses, which amounts shall be paid by the limited liability company."

corporate divorce they both seek, but the court sees no reason to take other measures off the table as the case moves to the next phase.

The court also has the discretion to allow an award of counsel fees "incurred in connection with the action . . . to the injured party," N.J.S.A. 42:2C-48(c), and Levin has sought such an award. The claim, however, must be based on a finding that Sweigart "has acted vexatiously, or otherwise not in good faith." Ibid. In offering a few comments, but without drawing any conclusions at this time, the court would observe that the Legislature undoubtedly envisioned circumstances where not every oppressive step , and not every instance that has led to a conclusion that it is not "reasonably practicable" for two or more members to carry on, may be labeled "vexatious" or found to have been taken without "good faith." So, to be sure, the court is empowered to make a fee award under N.J.S.A. 42:2C-48(c), but the finding of oppression alone doesn't mean the oppressed member is entitled to an award of fees. The question will be considered further at the next phase. In short, whether or to what extent a fee award or, for that matter, Levin's claim for the reimbursement of Baja expenses he paid above his $30,000 buy-in, see Levin's Summation, ¶4 at page 4, may be allowed here – because the question of remedies was segregated from the claims

of oppression – will have to await the future proceedings designed to deal with the remedy or remedies that should be awarded.[22]

VI

The court lastly must consider Levin's claim that actions taken by Sweigart violated the Law Against Discrimination, N.J.S.A. 10:5-1 to -42. The court rejects this claim because the court found no persuasive evidence that Sweigart – in moving the office a distance away from Levin's Toms River office and in scheduling meetings at times difficult for Levin due to his medical problems, and the other events alleged – did so for discriminatory reasons. Sweigart took those steps and the others discussed earlier because he was trying to rid himself of Levin's involvement in Baja, but he didn't take those actions because he was motivated by a desire to unlawfully discriminate. See N.J.S.A. 10:5-12(a); Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005) (recognizing that "[w]hat makes an employer's personnel action unlawful is the employer's intent"). The LAD's "overarching goal of . . . eradicat[ing] . . . 'the cancer of discrimination,'" Fuchilla v. Layman, 109 N.J. 319, 334 (1988) (quoting

[22] The court is mindful that Sweigart has moved to dissolve the August 1, 2022 consent order that obligated Baja to continue to pay Levin's salary during the pendency of the action. That motion was largely dependent on Sweigart's claim that there was no merit in Levin's claim of oppression. Because the court has found there was oppression, the motion to vacate the earlier consent order insofar as it required the continued payment of Levin's salary as an employee, or otherwise, is denied.

Jackson v. Concord Co., 54 N.J. 113, 124 (1969)), not the eradication of oppressive conduct by one LLC member attempting to eliminate another. Sweigart is certainly liable for the latter, but there is no evidence of the former.

* * *

In short, the court concludes that Sweigart did oppress Levin, and that Levin is entitled to relief. But, as was determined prior to the start of trial, the submission of evidence on the remedy or remedies sought would abide whether Levin sustained any of his claims. Now that he has, the matter must now go into a second phase to determine what is the most appropriate remedy or remedies that will fairly and equitably cure the oppression and compensate Levin.

The court will conduct a case management conference in the immediate future to consider and determine the way forward. An appropriate partial judgment has been entered.