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OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-8-19

THOMAS KIELY; MICHAEL
MARZOVILLA; and 30
JACKSON STREET, LLC,

Plaintiffs,

v.

WILLIAM C. ILER,

Defendant.

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30 JACKSON STREET, LLC;
and WILLIAM C. ILER,

DOCKET NO. MON-C-11-19

v.

THOMAS KIELY, MICHAEL
MARZOVILLA; CHRISTOPHER
MORAN; and MATTHEW
TAETSCH,

Defendants.

OPINION

Decided: April 17, 2025.

Scarinci & Hollenbeck, LLC (Joel N. Kreizman, Esq., appearing), attorneys for plaintiffs in MON-C-8-19 and defendants in MON-C-11-19.

Hughes Hubbard & Reed, LLP (Eric Blumenfeld, Esq., appearing), attorneys for defendant in MON-C-8-19 and plaintiffs in MON-C-11-19.

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

In Dashiell Hammett's Maltese Falcon (1930), Casper Gutman lifts his glass and toasts Sam Spade with: "here's to plain speaking and clear understanding." Many disputes that flow from imperfectly memorialized partnerships and ventures – like the uneasy alliance among Spade, Gutman, Brigid O'Shaughnessy, and Joel Cairo – are often muddled by a frequent lack of "plain speaking" and, worse, the absence of "clear understanding."

The parties to these consolidated suits are the three members of a limited liability company. Their claims – tried to the court without a jury for a second time[1] after a remand from the Appellate Division – include disputes about the percentages they each hold in the LLC, whether two members validly met in the

[1] Testimony was taken during the first trial on June 14, 16, 22, July 8, October 26, 27, and November 30, 2021. The record now also includes testimony taken during a second trial, which took place on January 13, 15, 16 and 21, 2025. The parties testified at both trials; the 2021 trial also included testimony from the parties' jointly-retained accountant to examine and report on their contributions to the project, as well as one of the parties' accounting expert. The court has, as stipulated, considered the testimony and exhibits admitted at both trials.

managing member's absence, and whether the changes they then purported to make to the company's management and the absent member's percentage of ownership should be upheld. All those claims turn on the meaning of their not-entirely-plain-spoken agreements and the impact caused by a failure to clearly understand the agreements' meanings.

After a close examination of the parties' contentions and the evidence adduced, the court concludes, among other things, that the two minority members could not effectively make any changes about their ownership in, or the managing of, the LLC because they didn't give the managing member proper notice of their meeting and because, in his absence, they didn't hold a necessary majority of the LLC.

I

Thomas Kiely, Michael Marzovilla, and William C. Iler are members of 30 Jackson Street, LLC, a limited liability company, which holds title to and operates Highlands' property, which consists of a small two-story house and ten small cottages that make up what is collectively known as SummerHouse. Differences between and among the parties led to these two consolidated lawsuits and a seven-day trial before another judge that started in June 2021 and ended with his decision and judgment in June 2022. The testimony and evidence encompassed a range of contretemps as well as larger disputes about the LLC's

management, Kiely and Marzovilla's unilateral removal of Iler as managing member, and their percentages of ownership in the LLC. Without finding whether any party oppressed any other party within the meaning of the Revised Uniform Limited Liability Company Act (RULLCA), N.J.S.A. 42:2C-1 to -94, or the Oppressed Shareholder Act, N.J.S.A. 14A:12-7(1)(c), the trial judge found the actions of all three were "less than optimal," "subpar," and not "up to standards"; for those reasons, the judge directed one side to buy out the other.

The Appellate Division considered the parties' cross-appeals and concluded the trial judge's findings were inadequate. Kiely v. Iler, No. A-1363-22 (App. Div. Feb. 12, 2024) (slip op. at 2, 28). In reversing and remanding, the court directed the trial judge to make "specific findings and conclusions of law," while allowing reliance on "the evidence adduced at trial" but also without limiting the court to that evidence alone; the court invited the trial judge to "request additional briefing or testimony, if necessary." Id. at 28. The Appellate Division emphasized that it had "take[n] no position regarding the outcome of any of the substantive issues raised in this appeal other than the trial court's failure to make adequate findings." Ibid. (emphasis added).

By that time, the trial judge had retired and was no longer available to make the mandated findings. Rule 1:12-3(a) provides a framework "for a[nother] judge to hear any pending matter" due to a disability, disqualification

or unavailability that seems broad enough to encompass this circumstance. Rule 1:12-3(c) suggests that a "substituted judge" may "continue the trial in any matter" so long as the judge is "satisfied, under the circumstances, that the judicial duties can fairly be discharged." In ascertaining how to "fairly discharge[]" the judicial duties, the court considered whether it was sufficient to simply make the required findings based solely on the exhibits adduced during the 2021 trial and the cold trial transcript, or whether a completely new trial was necessitated, or whether there could be a hybrid. Having heard the suggestions of able counsel, this court concluded that, at the very least, the three parties should testify again, without any particular limitation on the scope of their testimony, so the court might attain its own view of the parties' credibility and gain a better appreciation for the evidence accumulated during the first trial. See Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 488 (App. Div. 2000) (observing the "right of a trial court to manage the orderly progression of cases before it . . . as inherent in its function").

And so, Kiely, Marzovilla, and Iler testified over the course of four days during a second trial in January 2025; new exhibits were offered and admitted into evidence along with those previously admitted during the 2021 trial. The court has now considered and relied on the trial transcript of the first seven-day trial, better understood now that the court has listened to and watched the parties

as they testified during the January 2025[2] virtual[3] trial proceedings. See n.1 above. The court has also considered the legal memoranda filed at the time of the first trial, as well as the written summations submitted after the January 2025 trial and their written rebuttals to the other's submission.[4] All this has fully enabled this court to discharge its obligation, within the intendment of Rule 1:12-3(c), to comply with the Appellate Division's mandate.[5]

II

The LLC's property, as noted above, consists of a two-story house and ten 250 square foot cottages, all originally erected approximately one hundred years ago. The structures are located, as the LLC's name reveals, on Jackson Street in

[2] The parties also provided transcripts of the four-day January 2025 trial, and the court has thoroughly reviewed those transcripts.

[3] All testimony was presented virtually with no less effect than in-person testimony. See Pathri v. Kakarlamath, 462 N.J. Super. 208, 218 n.6 (App. Div. 2020).

[4] The parties' written summations were provided on March 7, 2025, and their replies on March 14, 2025. The court also asked counsel to submit proposed judgments and those were both received by April 14, 2025.

[5] The Appellate Division stated in its opinion that it had "gleaned the following facts from the record," Kiely, slip op. at 2, and then proceeded to provide a factual discussion of the parties' dealings and their disputes, id. 2-8. The court does not conclude, from this statement about "glean[ing]" facts from the record, that the court had found its own facts and that the court's description of the facts would bind this court and prevent this court from making its own findings for which the matter was remanded. Instead, the court assumes that the "glean[ing]" that occurred and was described was only for the purpose of putting the arguments on appeal into context.

Highlands; the property sits in a low-lying area approximately a block-and-a-half from Highlands Reach, a waterway that runs between the southern end of Sandy Hook and the mainland. Because of its low location, the structures were devastated in October 2012 by Superstorm Sandy and remained in that state of disrepair when, in 2015, Iler, an individual involved in purchasing and renovating properties in Monmouth County, and particularly in the Highlands area, took interest.

Iler negotiated with the prior owner but, at some point later in 2015, when he met to finalize the terms of a sale to him, the owner introduced him to Kiely, who was also looking to purchase the property. Rather than compete for the property, Iler and Kiely decided to work together. By the end of 2015, they became the only, and equal, members of 30 Jackson Street, LLC. See Tr. (January 13, 2025) at 47. The LLC's stated purpose was to "purchase, develop, finance, construct, hold, lease, sell or otherwise dispose of, and deal in all manner whatsoever with [the] real property" in question, 30 Jackson Street. See WI-91; Tr. (January 13, 2025) at 120-21. Kiely and Iler reached an agreement with the prior owner to purchase the property for $140,000, which consisted of a $40,000 downpayment and a $100,000 mortgage taken back by the seller; the LLC also agreed to pay $18,000 in property taxes then due.

Realizing early on they both lacked sufficient cash to renovate, Iler and Kiely decided to market the property, but a couple of sales fell through. In November 2016, while the property was still on the market, Marzovilla entered the picture. He was "looking to do a home renovation or buy something" and happened on 30 Jackson Street, which looked to him like an "abandoned property." Tr. (July 8, 2021) at 16. There he ran into Kiely and Iler, who told him about the property's history; Marzovilla, who had the wherewithal to infuse cash into the enterprise, expressed an interest. Tr. (July 8, 2021) at 16-17.

Both Iler and Kiely soon agreed to accept Marzovilla as the LLC's third member. At or around Christmas Day 2016, the three executed a purchase agreement (KM-2) and an amended operating agreement (KM-1), both of which were intended to govern their relationship throughout the renovation and beyond.

The purchase agreement is no model of clarity. Indeed, no self-respecting drafter would claim authorship of it. But there are certain chief terms that are sufficiently clear, when considering all the circumstances and the parties' intended goals, to illuminate the way. A proper understanding of these agreements is acutely important because the disputes that later followed pivot on the parties' understanding or misunderstanding of their agreement.

First, the purchase agreement recognizes that the parties intended "to create an LLC with a net capital value of $420,000.00" (KM-2). Each member's contribution varied. According to the paragraph entitled "Share Value Upon Completed Transaction," with execution of the agreement the percentage of memberships in the LLC would become: Iler 50%, Kiely 25%, and Marzovilla 25%. To achieve those percentages, the parties were required to contribute, in that order, $210,000, $105,000, and $105,000. Because Iler and Kiely were contributing their preexisting halves of the LLC, Kiely was not obligated to provide anything more to obtain his 25%. Iler was likewise obligated to provide his preexisting half membership in the LLC (like Kiely's half, valued at $105,000) as well as $105,000 in cash toward the renovation. And Marzovilla, who was new to the LLC and had contributed nothing up to that moment, was obligated to contribute $105,000.[6]

So, while all of Kiely's obligation and half of Iler's obligation were fully satisfied with the conveyance of their existing interests in the LLC, the other half of Iler's obligation ($105,000) and all Marzovilla's obligation ($105,000)

[6] In a paragraph entitled "Preexisting Debts and Assets" the parties acknowledged and agreed the LLC was burdened by "an outstanding first mortgage obligation" of $100,000 on which Iler and Kiely were personally obligated. The agreement unambiguously expressed that Marzovilla would have no responsibility for the mortgage debt: "No obligation under this note shall in any way transfer to, become an[] obligation of, or be allowed to affect the interest of Buyer Marzovilla in the [LLC]" (KM-2).

were still due and would be provided as the renovation went forward. The parties proceeded from the time of the execution of the purchase agreement (KM-2) as if they were all LLC members and in the agreed on 50/25/25 percentages even though contributions required for the second 25% of Iler's membership and all Marzovilla's 25% ownership were still to come.

The purchase agreement stipulated that Marzovilla's $105,000 obligation was to be viewed as "a line of credit for the benefit of [the] LLC, that has been established by Marzovilla in exchange for an ownership share of the LLC and will be available for draws as needed during the construction process" (KM-2). That is, the parties to the purchase agreement viewed their interests in the LLC as just stated – 50/25/25 – as of that moment, but their percentages of ownership in the LLC would only "fully vest[]," when the "contracted-for contribution[s]" were fully paid.

No deadline for the contracted-for contributions from Iler and Marzovilla was clearly set in either the amended operating agreement (KM-1) or the purchase agreement (KM-2), but it seems clear from the testimony that because these additional contributions from Iler and Marzovilla were for the purpose of completing the renovation of the property, that the date the renovation was completed, or substantially complete – around Labor Day 2017, see, e.g., Tr. (June 14, 2021) at 67; Tr. (June 16, 2021) at 42; Tr. (January 21, 2025) at 156 –

was when the full amount of their two $105,000 cash contributions were expected and the court may so assume despite the agreements' silence. See, e.g., Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 136 (2020); Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 287 (App. Div. 2007). Once fully provided, Iler's second 25% would become vested as would Marzovilla's 25% interest.

There is no question or dispute that Marzovilla made his contribution and, in fact, exceeded it. He didn't pay it all at once or provide a "letter of credit" as the purchase agreement required, but instead, without objection from the other members, he made payments to vendors or for materials as the project went forward. See Tr. (January 13, 2025) at 10, 42-43. According to the Balmuth[7] report (J-1 at page 21), in this way Marzovilla contributed $145,334 during the calendar year 2017.[8]

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[7] Brad Balmuth was an accountant retained jointly by the parties to provide a report on the members' contributions and the expenditures made from those contributions. He testified during the 2021 trial but not the 2025 trial.

[8] Since the renovation was substantially completed and the hotel was operational at or around late August or Labor Day 2017, as observed above, what the parties contributed either before the execution of the purchase agreement and the amended operating agreement (because those monetary contributions and the property itself was what Kiely and Iler contributed to the LLC by that time) and what was contributed after the hotel opened (because by then the contracted-for contributions had been made) are irrelevant in determining the percentages of ownership in the LLC.

A factual issue to be decided – one that is something of a key to providing the answer to other issues – is whether Iler actually paid his contracted-for contribution of $105,000 by the time the hotel opened. According to the Balmuth report, as well as the court's own consideration of the supporting documentation and testimony, Iler contributed at least $105,000 by the time the renovation was complete. This is true even though the Balmuth report, which is in evidence (J-1), states that Iler contributed only $101,353 during the calendar year 2017.[9] As Balmuth testified, his calculation of Iler's contribution was initially reduced in J-1 by $9,600 (bringing it to the $101,353 figure) by mistake or because of a lack of clarity in the underlying records. The addition of that $9,600 back into Iler's overall 2017 contribution meant that Iler had exceeded the $105,000 vesting amount by approximately $5,000. See Tr. (October 26, 2021) at 46, 52-

[9] The court also finds that Iler's 2016 contribution of $31,553 shouldn't be added to the 2017 contribution because that earlier contribution was made prior to the purchase agreement and was subsumed in his 50% in the LLC prior to Marzovilla becoming a member. See n.8, above. To give Iler credit for those earlier contributions would constitute double-counting and would be inconsistent with what the parties intended. By the same token, even though it appears Kiely contributed a few thousand more than Iler in the days leading up to the Christmas 2016 agreements, that difference has no impact on the present disputes since Kiely and Iler apparently rounded off any difference when contributing to the three-member LLC their LLC ownership when the LLC consisted of only two members.

53.[10] Kiely and Marzovilla's contention that Iler's contribution was less than $105,000 seems based solely on their inclusion of 2018 contributions that showed a negative contribution from Iler (because it apparently accounted for the managerial fee to which he was entitled). Their argument is misguided because the purchase agreement and amended operating agreement provide for a different approach once the "contracted-for contributions" were made; in that event, the ownership percentages were fully vested and fixed and wouldn't fluctuate because of later contributions.

To repeat, the significance of this finding is that by the time of substantial completion of the renovation, all three members' ownership interest in the LLC had "vested" within the meaning of the purchase agreement. Even though Kiely and Marzovilla contributed more to the renovation than required – because the renovation costs had overrun what the parties initially expected or hoped – Iler met what he was contractually required to put in to have his 50% interest vest. The court rejects Kiely and Marzovilla's argument to the extent they contend the members' percentages of ownership fluctuated with each contribution or that, for every dollar one of them put into the project, Iler was required to put in two dollars to maintain his 50% interest when the renovation costs exceeded

[10] Kiely and Marzovilla appear not to dispute Balmuth's figures as expressed in J-1. See Tr. (January 13, 2025) at 151 (where Kiely asserted that "the stuff I rely on [is] the Balmuth report"; "I'm relying on Mr. Balmuth").

their Christmas 2016 projections. See KM Br. at 13. Instead, if, once renovation was completed, there was an imbalance in the contributions above and beyond those required by the purchase agreement (KM-2) – that is, to the extent there was an imbalance in the excess above the contributions then made (Kiely's half interest in the LLC, Iler's half interest in the LLC plus $105,000, and Marzovilla's $105,000) – then that imbalance was to be reconciled at a later appropriate time; the excess contributions were to be treated as loans to the LLC. See Tr. (November 30, 2021) at 96. As Iler credibly and correctly explained how things would be evened out if the renovation had required one or more of them to put in more than they were contracted to (i.e., beyond the $210,000, $105,000, and $105,000 split memorialized in the purchase agreement):

> [t]he fact that we all had overpaid doesn't come from one person or the other. It comes out of the hotel and the hotel pays us back.
>
> [Tr. (October 26, 2021) at 121.[11]]

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[11] The court recognizes that Iler was not always consistent about this as things unfolded. At one point an attorney, who represented Kiely (Tr. (January 15, 2025) at 139, 165) and who drafted the purchase agreement, provided a contract interpretation on which Kiely and Marzovilla's arguments are based and, when confronted with that interpretation, Iler expressed his agreement (KM-6). But the agreement is confusing on first or second (or even third) blush and easily lends itself to multiple different interpretations if not carefully and closely read and understood, so the fact that Iler may have maintained some other view about its meaning in the past doesn't forever bind him to that interpretation or that the court should either find he isn't credible or that he must be bound to some earlier mistaken understanding. Indeed, soon after acknowledging Kiely's lawyer was "correct" about how the agreement worked, Iler disavowed that view. In either

This must be what the parties intended. To adopt the contention of Kiely and Marzovilla that the membership percentages would change with every contribution would have been chaotic. It would mean that every time one member paid for a plumber or another paid for a doorknob, the relative ownership in the LLC of all members would fluctuate and any time the members were to meet and act in some way not already identified in the amended operating agreement (KM-1) it would not necessarily be known, among other things, what decisions would have the support of a majority of the LLC.

In so interpreting the agreement, the court is by no means rewriting that to which the parties agreed. Courts don't do that. A court must, instead, "enforce [a contract] as written and not . . . make a better contract for either of the parties." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). But, to the extent the purchase agreement's language may be ambiguous – and the court thinks that it may be ambiguous since Kiely and Marzovilla's suggested interpretation is not entirely implausible – the court must identify which of the plausible interpretations most likely accords with the parties' intentions.

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event, the court's goal is to identify the most likely plausible interpretation from all the circumstances and the parties' intended goals, and that's what the court has endeavored to do in rejecting Kiely and Marzovilla's interpretation.

That is, an ambiguity arises when contractual language is "susceptible to at least two reasonable alternative interpretations." Grow Co. v. Chokshi, 403 N.J. Super. 443, 476 (App. Div. 2008) (quoting Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993)); Nestor v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997). The interpretation the court must adhere to is that which is most consistent with the parties' common intention, and that which is revealed by their relations, the surrounding circumstances, and what it was they were trying to accomplish, Tessmar v. Grosner, 23 N.J. 193, 201 (1957); Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 27 (App. Div. 1985). In other words, the purchase agreement must be construed "in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose." Tessmar, 23 N.J. at 201.

Kiely and Marzovilla contend their view is supported by the third paragraph of the "Overall Contributions" section of the purchase agreement:

> All parties agree that the values stated, reflect the fully funded commitments, and should any funding not be provided as contracted for, an actual share ownership shall be based on the amount of contribution actually provided to date, by each of the three parties at the time at which a funding amount failed to be provided.
>
> [KM-2, top of page 2 (emphasis added).]

This emphasized portion, however, doesn't support the conclusion they would have the court reach.

Their argument conflates the contributions made to vest their ownership interests – Kiely's share of the LLC, Iler's share of the LLC plus $105,000, and Marzovilla's $105,000 – with how the parties would deal with any contributions made by any of them above and beyond those "commitments" or "contracted-for contributions" to finish the renovation. The paragraph quoted above provides for the circumstance – that didn't occur – if either Iler or Marzovilla fell short of their "contracted-for contribution" of $105,000 each. That is, as stated in the quoted paragraph above, "an actual share ownership shall be based on the amount of contribution actually provided to date" means that if – for example – Marzovilla only contributed $90,000 by the time renovation was substantially completed his 25% share would be accordingly reduced. The "actual-share-ownership" phrase does not mean that the degree of ownership would change if – after providing their "contracted-for contribution" – the parties were required to infuse the LLC with additional funds. Because the "contracted-for contributions" or "fully-funded commitments" required by KM-2 were actually made, there is no basis for engaging in what the "actual-share-ownership" provision suggests; it wouldn't apply once all contracted-for contributions were made.

In short, the paragraph quoted at length above has nothing to do with the parties' infusion of funds greater than their "contracted-for contributions" even if those additional funds were required to complete the project and even if the members did not thereafter contribute amounts consistent with their degree of ownership. As for that possibility, which did come to fruition, the parties agreed in the "Management" section of the purchase agreement that they would "be responsible for the funding of that amount" (emphasis added) – i.e., the amount of funds necessary to get the project to reach "the stage where all 10 units are able to be offered for rent" – "in the same ratio to their shares of ownership" (KM-2, page 2). It is here where the contention arises that Iler had to put in two dollars for every dollar any other member put in. See KM Br. at 13. But Kiely and Marzovilla's argument that Iler had to put in twice as much as each of the others had no impact on the degrees of membership; again, to suggest that every contribution above the "commitments" referred to earlier in the purchase agreement would impact the degree of ownership would have thrown the LLC into chaos. It is not plausible – even if one could wring Kiely and Marzovilla's interpretation from the somewhat confusing language of the purchase agreement – that the parties actually intended such a result.

III

With that "clear understanding" about the members' vested interests once renovation was substantially completed – they all vested at 50/25/25 – the court can turn to and describe the significance or sufficiency of the November 3, 2018 meeting that Kiely and Marzovilla attended but Iler did not. It was during this meeting that those members present purported to remove the absent Iler as managing member, reduce Iler's percentage of membership in the LLC to 42%, and amend the operating agreement.[12]

Preliminarily, it seems clear to the court that the actions of Kiely and Marzovilla were prompted by misgivings about a few things that had occurred after the hotel was up and running. For instance, both Kiely and Marzovilla, as their testimony reveals, were troubled by Iler having traveled to Florida for approximately two months[13] in the summer of 2018, a time during which the

[12] Written minutes of that meeting describe the actions they then took (KM-11), but no amended operating agreement and no other document that may have been necessary to cause a transfer of a portion of Iler's membership interest to Marzovilla was created or executed then or later. See Tr. (January 13, 2025) at 199; Tr. (January 16, 2025) at 190.

[13] The competing claims about the length of Iler's Florida vacation during the summer of 2018 vary but the time he was away seems closer to two months than something like two or three weeks, as both Kiely, Tr. (June 14, 2021) at 68, and Iler testified, Tr. (October 26, 2021) at 137, during the first trial. At the second trial, Iler agreed he was in Florida in July and August 2018 but not for the entirety of both months; instead, he claimed he was only in Florida for 25 days.

cottages were expected to produce their greatest amount of activity and income. Kiely and Marzovilla were also bothered by a perceived discrepancy between a system used for the booking of rooms and the separate system by which customers paid the LLC for their rooms, that may have suggested there should have been greater income for the LLC than what the actual income apparently was. And Kiely raised a dispute about whether the property was properly insured. These issues ostensibly prompted Kiely to attempt to schedule a meeting of the LLC's members.

Kiely and Marzovilla were intending to take drastic action while not coming clear to Iler about that in the pre-meeting communications. On October 26, 2018, Kiely emailed to say only that there are "several important issues that need to be addressed" and he "call[ed]" for a meeting on the weekend of November 3-4, asking Iler for his preferences during that time frame. Iler almost immediately responded, asking for "a list of the important issues." A few days later Kiely emailed that he had been "working on an agenda for some time" and that he would have it "completed by the meeting." In the same email, Kiely provided his preference for a meeting on the Saturday of that weekend at 1:00 p.m. and at the property's main structure, but he also stated he was open to other

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Tr. (January 21, 2025) at 102-03, 149. As will be seen, this discrepancy really doesn't matter.

"suggest[ions]." Within the hour, Iler responded that the property was "booked" for the weekend "on both Friday and Saturday nights," that he was busy on other matters "most of Saturday," and that he didn't think – quite rightly – it would be "appropriate to have a meeting in the main house at that time," apparently because the meeting would be observable by patrons; he added that "I'm not 100% certain I can attend." The next morning – October 31 – Kiely acknowledged that the meeting shouldn't occur at the main house and suggested another nearby location; he stated that, if Iler "prefer[red]," the meeting could occur on Sunday instead of Saturday and he also asked Iler to "suggest a . . . time of day that works better" for him, concluding with: "[l]et us know what works best for you." Sixteen minutes later, Iler scoffed at Kiely's suggestion that he should prioritize Kiely's desired meeting over other things Iler felt were more important to him, but he didn't dismiss the request for a meeting and asserted that if Kiely "ha[d] serious concerns" then he should "be open about them and email [Marzovilla] and I so we can prepare for the meeting." With that, Iler closed his email with

> I'm not really ready to commit to anything, until I see an agenda, Tom, and even then, I'm extremely busy – My feeling is that this is something that may be better handled by email first – I've yet to see the agenda you have been working on for quite some time, so of course I want some time to review it once I see it, too –

[WI-93.[14]]

So much for "plain speaking and clear understanding." There were no further messages or discussions about the agenda that never was sent or about the day and time of the meeting that was never agreed on. Kiely never told Iler that, notwithstanding Iler's stated positions about the proposed meeting, there would nevertheless be a meeting, let alone a meeting without him. And Kiely never so much as hinted that the purpose of the meeting was to remove Iler as managing member or to reduce his ownership interest in the LLC.[15] Neither this email chain nor any testimony would contravene Iler's testimony that he did not know what the meeting would entail, let alone that it would include their deposing him as managing member. Tr. (October 26, 2021) at 167. And even if the others – in light of Iler's lack of a commitment to any day or time – had unilaterally set the day and time for the meeting, they never told Iler what that day and time would be. When Iler did not appear for the meeting on the day and at the time they unilaterally set without telling him, Kiely and Marzovilla nevertheless bizarrely waited fifteen minutes for Iler to arrive, as if that would

[14] This one exhibit contains all the emails quoted above.

[15] Kiely's evasiveness in his testimony about this during the January 2025 trial – revealed by his inability to respond to a simple question without a long and unresponsive explanation or diatribe, see Tr. (January 13, 2025) at 187-90; Tr. (January 15, 2025) at 6-11 – convinces the court that he and Marzovilla weren't forthcoming with Iler about the purpose for the meeting.

show they were acting reasonably. And when Iler didn't arrive, they never took the simple step of phoning or texting him to ask about his whereabouts. See Tr. (January 16, 2025) at 187. They clearly were desirous of acting behind Iler's back.

Kiely and Marzovilla have forcefully argued throughout this case that LLC members owe each other a fiduciary duty, N.J.S.A. 42:2C-39(b), and that they all owed each other "duties of loyalty and care," N.J.S.A. 42:2C-39(a). They have referred the court to Judge Pressler's opinion in Silverstein v. Last, 156 N.J. Super. 145, 152 (App. Div. 1978) (emphasis added), in which she acknowledged that this fiduciary duty is "one of trust and confidence, calling for the utmost good faith, permitting of no secret advantages or benefits." In deciding the cross-appeals, the Appellate Division acknowledged as well that "[a] managing member of an LLC owes a fiduciary duty to his co-members," Kiely, slip op. at 19,[16] and some of the fiduciary duties contained in subsection N.J.S.A. 42:2C-39(b) apply to non-managing LLC members as well, including

[16] That holding is contained in an unpublished opinion and unpublished opinions are, for most purposes, not binding or even to be discussed in judicial decisions, R. 1:36-3 (except for the reasons stated in this Rule, "[n]o unpublished opinion shall constitute precedent or be binding upon any court" or "shall be cited by any court"). Nevertheless, this trial court remains bound by the unpublished appellate decision in this case "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law," ibid., and is bound to the appellate mandate whether published or not, see n.24, below.

the obligation of members to "discharge the duties under this act or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing." See N.J.S.A. 42:2C-39(i)(2). Indeed, it doesn't overstate the obligations the members owed each other to invoke Judge Cardozo's famous description in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1978) (quoted with approval and endorsed by Justice O'Hern for our Supreme Court in Muellenberg v. Bikon Corp., 143 N.J. 168, 177 (1996)), of the fiduciary duty owed by business partners; Judge Cardozo said that joint venturers and partners "owe to one another . . . the duty of the finest loyalty," that "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties."

The court is abundantly satisfied from the emails and the testimony at both trials that Kiely and Marzovilla breached the fiduciary duty they owed Iler in conducting a meeting without ever advising Iler of a specific date, time and place for that meeting. They did what Judge Pressler said they shouldn't; they took "secret advantage" of Iler. Silverstein, 156 N.J. Super. at 152. The failure and refusal to provide that information, let alone without clearly explaining why a meeting should occur and without expressing what the meeting was for – in the face of Iler's repeated requests to learn the purpose of and agenda for the meeting – not only violates notions of common courtesy that the court is not

necessasrily here to enforce, but in this court's view constitutes a breach of the covenant of good faith and fair dealing imposed by N.J.S.A. 42:2C-39(d), and general contract principles, see Iladis v. Wal-Mart Stores, Inc., 191 N.J. 88, 109 (2007); Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997), that the court is here to enforce.

Kiely and Marzovilla were staging a coup and in fact took the step of removing Iler as managing member and depriving him of a sizeable portion of his interest in the LLC without telling him of that intention, without giving him adequate notice of their meeting, and in proceeding in his absence.[17] This is not

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[17] It is more than fair to describe what occurred on November 3 as a coup and the emails leading up to it as their preparation for the coup. Kiely bluntly acknowledged as much in his testimony:

> Q. Did you ever tell Mr. Iler before the meeting of November 3rd, tell him that if he didn't properly answer questions at the meeting of November 3rd, you were going to replace him as manager, yes or no?
>
> A. No.
>
> Q. But you and Mr. Marzovilla both knew that, right?
>
> A. Among other things, yes.
>
> [Tr. (June 16, 2021) at 62.]

Marzovilla similarly testified, admitting that he too never informed Iler "that one of the topics of [the November 3] meeting would be to discuss removing him as manager." Tr. (July 8, 2021) at 56.

the way the Legislature, in the above-cited statutes, directed LLC members to act toward one another. Indeed, even if the operating agreement or the quoted statutes do not expressly condemn Kiely's coup – the court remains mindful that N.J.S.A. 42:2C-39(e) does not make a violation of a member's conduct that "furthers the member's own interest" – "principles of law and equity supplement" RULLCA, N.J.S.A. 42:2C-7, and the court finds that Kiely's failure in his emails to be clear about what the meeting was about and his failure to fix a firm date, time and place for the meeting, prohibited he and Marzovilla from acting at the meeting in Iler's absence. The operating agreement was silent about when a meeting may occur or how it might be scheduled, so equity, fairness, and the covenant of good faith and fair dealing firmly apply and, in the final analysis, render invalid all that Kiely and Marzovilla did at that meeting in Iler's absence.

Even if this court were to conclude otherwise about the scheduling, noticing, and conducting of the November 3 meeting, it should be clear from the court's other findings about the meaning of the purchase agreement (KM-2) and amended operating agreement (KM-1) that Kiely and Marzovilla alone could neither replace the managing member nor change the parties' membership percentages. That's because the operating agreement (KM-1) – in effect when the meeting was scheduled – unambiguously declared that it "may be amended

only by written instrument signed with the same formality as this [a]greement, upon a vote of a majority of the ownership interest in the [c]ompany." KM-1, § 6 (emphasis added). As noted above, Iler was the vested owner of 50%, while Kiely and Marzovilla owned 25% each, and so, Kiely and Marzovilla collectively owned only 50%. That is not "a majority of the ownership interest" in the LLC. A majority consists of more than half, see, e.g., Black's Law Dictionary (8th ed. 2004) 974; Arnold v. Eastern Air Lines, 712 F.2d 899, 905-06 (4th Cir. 1983), not just half. Even if the meeting was validly scheduled, no majority of the ownership was present to act.

To be clear, Kiely and Marzovilla's contention that removal required only a majority of the members (two out of three) and not a majority of the ownership (more than 50%), see KM Br. at 18, is erroneous. To be sure, RULLCA might appear to support their contention in that it states an LLC manager "may be removed at any time by the consent of the majority of the members without notice or cause," N.J.S.A. 42:2C-37(c)(5) (emphasis added). But RULLCA provides a standard that may be supplanted or superseded by what members agree to in their operating agreement. As the Legislature declared in N.J.S.A. 42:2C-11(b) (emphasis added), "[t]o the extent the operating agreement does not otherwise provide for a matter described in [N.J.S.A. 42:2C-11(a)], this act governs." Here, the parties' operating agreement does otherwise provide – it

states that the consent of a majority "of the ownership interest" in the LLC is required – and it is that stipulation that governed when Kiely and Marzovilla met on November 3, 2018, not the terms set forth in RULLCA that apply only when the members have not established their own standard.

For these reasons, Iler is entitled to a judgment restoring him to the position of managing member and declaring that Kiely and Marzovilla acted in an ultra vires manner when they made Kiely the managing member, as well as when they declared that eight percent of Iler's interest should be recognized as being owned by Marzovilla.[18] Indeed, everything they purported to do in the minutes of that meeting (KM-11) was a nullity.

IV

It is perhaps appropriate at this stage to consider – and, in so considering, reject – Kiely and Marzovilla's claims that Iler breached the fiduciary duties he either owed them or the LLC.

Kiely and Marzovilla argue that Iler wrongfully: (a) commingled funds, (b) misled them about the financing of the renovation and the use of their funds, (c) went away to Florida during the Summer of 2018, (d) gave a large discount

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[18] More will be said about this eight percent dispute later in this opinion. See Section V below. That Kiely and Marzovilla acted precipitously and without authority when they sought to vindicate the latter's claim to this percentage of membership does not mean the latter must forfeit his claim to the benefit of his bargain.

to a friend of Iler's to the detriment of the LLC, (e) purchased and developed another rental property in the neighborhood, and (f) mishandled bookings. The court finds no merit in any of these contentions.

A

Chief among their complaints is the assertion that funds periodically sent Iler for the renovation were commingled with either Iler's personal funds or funds he held for other projects personal to him or some other entity. To be sure, funds dedicated to the renovation of the LLC's property were mixed or combined with other funds, and the RULLCA imposes on a managing member the duty to "account to the company and to hold as trustee for it any property, profit, or benefit derived by the member . . . in the conduct . . . of the company's activities." N.J.S.A. 42:2C-39(b)(1)(b). But even though money was handled in a way that was not optimal, there is no evidence that Iler ever used money contributed by his fellow members for anything other than the renovation or the LLC's business.[19] Kiely and Marzovilla's new-found insistence on perfection in

[19] One of the examples suggested by Kiely and Marzovilla was a check dated April 4, 2017, written on Iler's personal checking account, payable to a gardener for $350 (KM-9). In the memo portion of the check is written: "91 Washington/30 Jacks[on]" with the fractions ½ written above each address. Iler credibly testified that the gardener to whom he made out the check did something at the one location and the same thing at the property in question at the cost of $175 each and that Iler simply wrote one check to cover both obligations. The check itself reveals this and the spreadsheets designed to reveal what was spent on the renovation do not purport to charge the LLC with the

Iler's accountings is inconsistent with what they willingly participated in as things were then occurring. For example, according to testimony the court finds credible, funds that were being wired to Iler for the project didn't always go into a segregated account and, so that there would be no delay, Iler provided another account into which the funds could be wired even though that other account existed for another project. See, e.g., Tr. (June 16, 2021) at 13. Not according to Hoyle, perhaps, but the funds were accounted for and went into the renovation.

Despite the obvious fact that a lot of the things being done during renovation were somewhat ad hoc or informal, the bottom line is that whatever account or accounts funds were wired into or deposited into, the money designated for the renovation went into the renovation. And no one objected at the time.[20] Similar to the notion that things weren't being done exactly by the book – or in the way most would prefer in such a joint venture – can be seen in

entire $350. Tr. (January 16, 2025) at 86. Again, perhaps imperfect, but nothing dishonest occurred and nothing to suggest Iler used LLC funds for his Washington Street project or for anything else.

[20] For example, Marzovilla's manner of putting in his $105,000 obligation was to pay vendors as obligations became due rather than simply pay in his $105,000 or providing the contracted-for $105,000 line of credit, and having faith that it would be used as promised, as he credibly testified. See Tr. (July 8, 2021) at 20, 44.

the way Marzovilla provided funds, allowing for a while Iler to use Marzovilla's credit card when he was out of the country or unavailable.

Many years ago, our highest court observed that "in the transaction of business, men ordinarily deal with one another in the belief that each is honest." Lloyd v. Hulick, 69 N.J. Eq. 784, 786 (E. & A. 1906). While that sentiment might seem quaint or even naïve in today's business environment, it is fair to say – and the court so finds based on its understanding of the parties' credible testimony – that there was a level of trust between and among these three at the start of their relationship that didn't generate any concern about how Iler was managing the renovation of the property and the handling of their funds and expenses. See, e.g., n.20, above. And Iler regularly provided the others with a spreadsheet of expenditures that generated no concerns and which have not been shown to be erroneous except in the most minor of ways. As these events occurred, no one uttered any concerns. For example, Marzovilla credibly testified that he was periodically comparing the funds he knew he provided with Iler's statements and found no discrepancies. See Tr. (July 8, 2021) at 52-54. Kiely and Marzovilla, therefore, shouldn't be heard to complain that Iler didn't "dot every i or cross every t," or turn square corners, now that other events caused their relationships to sour.

The commingling of which Kiely and Marzovilla now so vociferously complain should be understood in light of the members' general approach to this project at the time, not how it might be viewed in a vacuum or in hindsight after their November 3 coup and the commencement of litigation. More to the point, there is no question that this somewhat loose approach in the handling of the renovation financing and the arguably imperfect but mostly accurate accountings provided by Iler during the course of the renovation may have caused difficulties for Balmuth in his attempt to be precise about or categorize their spending, and may have provided ammunition for the assertions now being flung at Iler when the relationship among the members deteriorated, but the court is satisfied that Iler has sufficiently accounted for all funds provided to him by the other members and his conduct comports with the obligations set forth in N.J.S.A. 42:2C-39(b)(1)(b), and otherwise.[21] Iler was able to answer for

[21] Kiely and Marzovilla correctly observed in their written summation that Iler, who is also an attorney, took great offense at the use of the word "commingling" during cross-examination. To be sure, as noted, funds were commingled but only by a managing member of a hotel construction/operation business. Iler was not acting as an attorney when engaged in the renovation process or in his relationship with Kiely and Marzovilla. And, while Iler asserted that he acted at times as the LLC's attorney f, that would only be with regard to the LLC's relationships with the outside world that had no bearing on the allegations asserted in this case. For example, there seemed to be no dispute that, as Iler testified, he twice acted as the LLC's attorney in drafting papers related to the potential sale of the property to third persons in 2016. But when negotiating and preparing the amended operating agreement and the purchase agreement, Iler advised Kiely and Marzovilla in writing (via email) – as required by RPC 1.8 –

each questionable check or item he was confronted with in a sensible and understandable way. The court was persuaded by his explanation that all Kiely's and Marzovilla's contributions were accounted for and were utilized in the renovation and their project, and those explanations were all found credible. To the extent minor errors may have been made while Iler provided periodic accountings, while simultaneously engaged in the renovation itself, they amounted to something too little or too consequential to support a finding of a breach of Iler's duties to the other members or the LLC itself. Cf., Vierow v. Frommann, 107 N.J. Eq. 230, 232 (Ch. 1930). As revealed during Balmuth's

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that they should seek out their own counsel. To be sure, courts have cautioned about the fine line attorneys walk when engaging in business with others. See In re Urbanick, 117 N.J. 300, 305-06 (1989). But the court's role here is not to determine whether Iler exposed himself to an ethical risk, only whether he breached the duties he owed the LLC and its members. By taking the true facts that (a) Iler is an attorney and (b) Iler, as the LLC's managing member, commingled funds – facts that would have been known at least to Kiely who willingly wired funds into an account obviously dedicated to another project in which he had no interest – presents the false syllogism that Iler acted unethically and has thereby caused injury to Kiely and Marzovilla specifically or the LLC generally. The court does not, as noted above, draw a conclusion that this commingling injured the LLC or its members. So, it's understandable considering the consequences for attorneys who commingle their clients' funds, see, e.g., In re Stern, 92 N.J. 611 (1983), that Iler was offended by the suggestion conveyed by use of the word "commingling." Nevertheless, the court has not drawn the negative inference from those facts that Kiely and Marzovilla suggest. And, to close the loop, these contentions are contained within Kiely and Marzovilla's point heading "Iler Is Objectively Incapable of Telling the Truth," see KM Br. at 1, 5-7, the court concludes that Iler's offense at the allegation does not suggest he was incapable of telling the truth.

testimony, the discrepancies amounted to less than one percent of the expenditures. See Tr. (October 26, 2021) at 46-47 (finding a discrepancy in the aggregate between Iler's spreadsheets and his findings of $3,139 that amounted to "approximately eight-tenths of one percent of the project costs").

B

Kiely and Marzovilla's second assertion of a breach of Iler's fiduciary duties is their claim that he misled them "as to their finances." KM Br. at 12. This is based on their mistaken interpretation of the agreement that was already discussed above. That is, this argument is based on the statement in the purchase agreement that "should any funding not be provided as contracted for, an actual share ownership shall be based upon the amount of contribution actually provided to date by each of the three parties at the time at which a funding amount failed to be provided." KM-2 at page 2; see also KM Br. at 11-12. From this and other provisions, they argue that the purchase agreement and amended operating agreement anticipated that the cost of renovation would be $210,000 – thus, the $105,000 cash contributions from Iler and Marzovilla – but if the cost went beyond that amount "to maintain his 50% share of the LLC, [Iler] was required to pay $2 for every additional dollar paid in by each of his partners." KM Br. at 13. This is simply incorrect, as already stated. To have his 50% interest "vest," Iler was only obligated to put $105,000 into the renovation. Any

contribution beyond those "vesting" amounts constituted loans to the LLC and any imbalance in those loans or the contributions needed to complete the renovation would be reconciled between the LLC members at a later date.

From their faulty understanding about the contract documents, Kiely and Marzovilla contend, for example, based on Balmuth's determination that Kiely put in $173,683 in 2017 and 2018, and, therefore, Iler was obligated to put in twice that amount ($247,066) "to maintain his 50% share." KM Br. at 14. Because, as already explained, their premise is incorrect, so too is their claim of a breach of Iler's fiduciary duty that they have expressed as: Iler "mislead his partners by asserting he had met his investment obligations but, also, he never advised them that while they were meeting their respective investment obligations, he was withdrawing $24,646 from the LLC." KM Br. at 14. In fact, while not necessarily the "punctilio" of accuracy, Iler provided regular financial reports – his spreadsheets – that were substantially if not perfectly accurate, which was all that the members anticipated or expected at the time.

In short, there is nothing about their undertaking that would suggest any of the members would "nickel and dime" the others as they have sought to do in this litigation, so the court finds no breach of a fiduciary duty in regard to this particular contention.

C

The court also rejects Kiely and Marzovilla's third assertion of a fiduciary breach. They contend that Iler breached his fiduciary duties "by going away during the height of the SummerHouse's first season," KM Br. at 15, more specifically arguing that:

> Iler was paid to manage the cottage hotel. While his partners didn't expect him to be onsite 24 hours a day, they did expect him to be available to guests and prospective guests when needed. They also didn't expect him to hire someone in his place, certainly not without the knowledge or consideration of his partners.
>
> Although SummerHouse did not have a front desk or concierge the manager should be available should there be a problem, e.g. broken toilets, floods, fire, accidents, etc., or to show prospective customers around. Relying on someone with no experience put all the partners' investments in jeopardy.
>
> What's worse is, he never even told his partners he was going to be away or that he was hiring someone to essentially run the place. Tom Kiely lived next door. He could have covered if he had known that Iler wasn't going to be around.
>
> [KM Br. at 15.]

The argument almost answers itself. To be sure, in the summer of 2018, Iler left New Jersey for an extended vacation in Florida during the months of July and August. But he remained involved and available by laptop and phone and through other rapid means of communications and that's all that was really

needed. See Tr. (January 16, 2025) at 115-16; see also Tr. (January 13, 2025) (where Kiely acknowledged the manager didn't have to be present at all times). Kiely and Marzovilla recognize that the property did not have a front desk, KM Br. at 15, and that there was no need for someone to greet customers because rooms could be booked and paid for online and a code provided to the customer so they could enter the cottage rented without human interaction, see Tr. (January 15, 2025) at 21, so why should the court conclude that Kiely and Marzovilla had a reasonable expectation that Iler would be permanently stuck in New Jersey? As suggested by Iler in his testimony, there is nothing in the contract documents that would mean that being managing member of the LLC meant that he had to be the 24/7 manager of the LLC's hotel. See Tr. (October 27, 2021) at 91. Any need for someone to go to the premises to take care of some issue could be performed by way of some other employee without expecting that the LLC's managing member be present at all times. Indeed, as noted in the argument, Kiely lived next door, so if "something happened" of a substantial nature, he was presumably available to help.

The real question is not that Kiely or Marzovilla or both were irked over Iler taking a break from the project that he had poured his energy into to get

renovated and open[22] – an investment that has not been mentioned much[23] – but whether the failure to mention he would be in Florida for a while instead of New Jersey constitutes a breach of his fiduciary duties. It clearly does not.

There is no credible evidence in the record to suggest that the property wasn't being run properly or that Iler ignored anything that required his attention while he was out of state in the summer of 2018. Whether in Florida or elsewhere in New Jersey, Iler was equally available to deal with any concerns by phone or other communications. If there was some problem such as those suggested in Kiely and Marzovilla's argument, Iler was fully capable of getting a plumber to

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[22] As Iler credibly testified, and it is totally understandable to the court after hearing the testimony of what it took to transform this wreck of a property into an operating hotel facility, that Iler, having turned this "pile of nothing" into a fully-operational hotel business, was entitled to a break. Tr. (October 26, 2021) at 140. During the renovation and after, he had been the "garbage hauler," the "delivery guy," and "labor[er]." Tr. (January 16, 2025) at 9. There was no evidence that he remained so obligated once the hotel was operational and that the few hands-on matters that might arise couldn't be dealt with by an employee.

[23] It bears mentioning that the $105,000 contribution Iler was required to make did not account for the time and energy – the sweat equity – that Iler in fact contributed and the others did not. See n.22, above. While Kiely and Marzovilla were free to do other things, or sit back and relax, it was Iler who oversaw the renovation, who got his hands dirty bringing the whole operation into fruition, and who added the final touches necessary to make the project a success. See Tr. (January 16, 2025) at 7. To begrudge him a trip to Florida – whether it was two weeks or two months – without a showing that he failed to be available at that distance to continue to manage the property may reveal the extent to which their relationship had sunk. But it doesn't support a finding that Iler abandoned his post as managing member – he didn't – or that he committed a breach of his fiduciary obligations.

the premises or take care of any other event; if something substantial and unexpected occurred, Iler was also aware that Kiely lived next door and could jump into the fray if necessary.

Kiely and Marzovilla also complain of Iler employing someone to do those few things that required being on-site. To be sure, Iler should have – not as a fiduciary duty but as a courtesy or a matter of keeping the other members informed – advised that someone had been hired. The cost to the LLC, however, was relatively minimal. Indeed, the disingenuousness of their contention is revealed by the fact that once Kiely usurped the role of managing member, he ended up hiring the same person to do the same things Iler had hired her for, see Tr. (June 22, 2021) at 58; Tr. (July 8, 2021) at 64; Tr. (January 16, 2025) at 156, and of which Kiely now bitterly complains, even though Kiely, who then and now lives next door, could presumably do himself those things the employee was hired to do, like haul out the garbage.

The court finds these allegations to be wholly lacking in substance.

D

The same can be said for their next claim of a fiduciary breach: that Iler rented to "a real estate colleague" at "an approximate 77% discount." KM Br. at 16. This claim needs to be put in context.

The cabins were summer or warm-weather rentals due to the lack of heating during this time frame and due to the fact that people flock to the shore in the summer, not the fall, winter, or spring. So, there was no great demand on the public's part to rent any part of the property during colder months. As it turns out, Iler had a colleague who was looking for a place to stay following a divorce and sale of her home and at a time when no one was renting because of the time of year. Iler provided accommodations to that individual at a discounted rate. There is little doubt, and the court so finds, that for some of the time this individual was there, the property would have been vacant. Clearly, Iler made a business decision that, while it may have been of benefit to the renter, it also brought in some revenue that would not otherwise have been generated. These facts, absent perhaps the sinister twist suggested by Kiely and Marzovilla – that Iler was causing injury to the business by giving a sweetheart deal to a friend – do not support a claim of a loss of an LLC business opportunity. From the facts presented, the court finds that this was a one-time, albeit long-term rental that was intended to bring some income into the business when, for some part of the individual's stay, none otherwise would have arrived; it does not rise to the level of a fiduciary breach.

That is, maybe it wasn't a good business decision – although it hasn't even been shown to be that – but it seems to have only happened once and the alleged

loss of income if the particular unit or units on the property could have been rented to others during part of the stay – again, not shown – was at best a less than perfect business decision, not a breach of a fiduciary duty to either the other members or the LLC. As Iler credibly asserted, for a large part of this individual's use of a few rooms on the premises, it was expected that those units would otherwise be vacant. Moreover, as he testified, "if we charge [$]110 a night for a weekend room and we don't rent it at all," something highly likely in April or May, "then we don't get anything for it." Tr. (November 30, 2021) at 7. He went on to explain the obvious – "I wanted to make money also" – and for that reason he viewed it better to "fill rooms" at a lesser price than to leave them vacant. Ibid.; see also Tr. (January 21, 2025) at 38.

Reasonable minds might differ about that strategy, but it hasn't been shown that the decision was so poor as to be unreasonable, a breach of the business-judgment rule, or a violation of a managing member's duties, let alone that Iler used the LLC's hotel to get a favor from someone who could or would return the favor to Iler instead of the LLC. None of that was proven.

The court finds no merit in this claim.

E

Although outside the scope of either the pleadings or the proceedings leading up to a final judgment after the first trial, Kiely and Marzovilla also

contend that by purchasing and renovating a nearby property "and not offering that opportunity to his LLC partners," Iler acted disloyally. KM Br at 17. Putting aside the valid question about whether this is even an issue in this case,[24] the authority upon which Kiely and Marzovilla rely does not support their theory. N.J.S.A. 42:2C-39(b)(1)(b), on which they rely, declares that it is a fiduciary breach for a member to make personal use of "the company's property." Neither this other property that Iler purchased in December 2018 nor the opportunity to

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[24] For example, as Iler correctly argues, nowhere in the pleadings was notice given to him that his purchase of the Center Street property constituted a breach of a fiduciary duty or that it gave rise to any other legal or equitable claim. It appears not to be an issue raised during the first trial. Nor was this issue put before the Appellate Division or in any of the proceedings leading up to the second trial in January 2025. And there was no mention throughout the second trial to suggest or even hint that Kiely and Marzovilla were going to pursue a claim until they submitted their written summation last month. The court must remain mindful that the court's role is to do no more than fulfill the Appellate Division's mandate as expressly stated by the upper court. See Flanigan v. McFeely, 20 N.J. 414, 420 (1956) (declaring that "the trial court is under a peremptory duty to obey in the particular case the mandate of the appellate court precisely as it is written"). The Appellate Division remanded this matter "for findings consistent with [its] opinion"; to be sure, the court permitted this court's consideration of not only the existing evidence but also such other evidence as this court might find "necessary" but the appellate court did not state or even suggest this court was free to expand the existing issues. See Kiely, slip op. at 28. Only the appellate court can decide whether the issues may be expanded. See In re Plainfield-Union Water Co., 14 N.J. 296, 303 (1954) (holding that "[r]elief from [the mandate's] directions, even though manifestly erroneous, can be had only in the appellate court whose judgment it is"); Park Crest Cleaners, LLC v. A Plus Cleaners & Alterations Corp., 458 N.J. Super. 465, 472 (App. Div. 2019) (holding that "any disputes still subject to litigation derive only from the [appellate] court's mandate" and "only those matters fairly encompassed by the mandate").

purchase it belonged to the LLC because the LLC's sole purpose – as unambiguously stated in the amended operating agreement (KM-1 at page 1) – was "to purchase, develop, finance, construct, hold, lease, sell or otherwise dispose of, and deal in all manner whatsoever with real property located at 30 Jackson Street, Highlands, New Jersey; and for such other purposes as the [m]embers may, from time to time, determine."[25] There being no evidence that the parties had otherwise "determine[d]" they should acquire and develop other properties, there is no reason to assume or conclude that Iler acted for the other members and therefore holds in trust the nearby Center Street property acquired in December 2018 or that, in obtaining and developing that property Iler was acting disloyally toward the LLC either under the RULLCA or the common law, see Valle v. No. Jersey Auto Club, 141 N.J. Super. 568, 573 (App. Div. 1976), modified, 74 N.J. 109 (1977).

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[25] The record in fact presents very little about this other property – or for that matter about the other Highlands rental properties purchased by Kiely and Marzovilla in the same time frame – as to allow any resolution if this claim were actually considered on its merits. In support of their claim, Kiely and Marzovilla refer only to two pages of Iler's most recent testimony, see Tr. (January 16, 2025) at 68-69, in which he briefly and broadly describes that the Center Street property consisted of five rental apartments which apparently had originally been separate structures but had been strung together in the past into a single structure. No other detail is provided to determine whether this property is in competition with SummerHouse.

Indeed, the record reveals that Kiely also purchased one or more properties in the area, see Tr. (June 16, 2021) at 40-41 (Kiely admitted he owns two rental properties in Highlands, his home next door to SummerHouse that he occasionally rents out, and "another house a few blocks away"), and Marzovilla did as well, see Tr. (January 16, 2025) at 65-68. If the court were to agree with their apparent broad view of the LLC's purpose and the scope of these consolidated cases, shouldn't the court also consider whether Kiely's and Marzovilla's Highlands properties are being held in trust for the LLC's benefit? Or, put another way, should not Kiely and Marzovilla be, in good conscience, estopped from complaining that Iler did the same thing they have done and should not a court of equity require them to now remain silent when conscience required them to previously speak? Cf., In re Estate of Shinn, 394 N.J. Super. 55, 70 (App. Div. 2007); Besson v. Eveland, 26 N.J. Eq. 468, 472 (Ch. 1875).

Even if this issue about Iler's Center Street property is fairly enveloped by the preexisting issues in these suits, the court finds no evidence by which to conclude that Iler's purchase and development of his Center Street property was an act disloyal to the LLC or his fellow members, that it was in derogation of his fiduciary duties to the LLC or its members, or that he holds that property in trust for the LLC. The LLC's purpose for being does not encompass this property.

F

Kiely and Marzovilla have urged other claims, perhaps subsumed by those issues discussed above, of a breach of fiduciary duties. They argue, for instance, that records derived from the electronic websites used for booking and payment suggest that income due the LLC was either taken or lost through Iler's negligence or carelessness.

The testimony and other evidence offered in support of this theory was nothing if not confusing. The claim also labors under the misunderstanding that the bookings (made by patrons through WIX) and the income (taken in via PayPal) should precisely match when, for example, there were other ways of booking rooms and when discounts were at times appropriately provided if there were group bookings or, as already discussed, a patron desirous of renting long term in a way that overlapped the busy season with the non-busy season. The court finds the proofs inadequate to support this theory and any other particular allegation that has not been discussed at any length herein.[26]

[26] One last example that the court views as trivial is the argument that money was expended by the LLC for food or liquor; Kiely and Marzovilla suspect but haven't shown that these small expenditures benefitted Iler personally. In fact, Iler explained in his credible testimony that coffee, tea, a bottle of wine, and other similar items were regularly or on occasion purchased for the use and consumption by patrons in a common area in the main house. See Tr. (January 16, 2025) at 113.

In short, Kiely and Marzovilla have not sustained their burden of persuasion on this or any other aspect of their claims of breaches of Iler's fiduciary duties or his duty of loyalty to either them or the LLC.

V

The court now returns to the arguments about Marzovilla's payment of $56,000[27] to retire the mortgage held by the property's prior owner. As observed earlier, see n.6, above, the purchase agreement's "Preexisting Debts and Assets" provision placed that debt solely on Kiely and Iler, not Marzovilla (KM-1). Kiely paid off his share of the debt, but Iler was unable to do the same and let the other members know of this problem.

While he originally conveyed an offer about this indebtedness to Kiely, there is no dispute that eventually Marzovilla made the payment, causing a termination of the mortgage obligation. See WIBr at 48. And, while Iler may now assert that this merely constituted a loan, see Tr. (January 16, 2025) at 138, the court finds that at the time the transaction occurred Iler viewed this transaction as something different – that he was giving up a percentage of his

[27] The parties continually refer to what Marzovilla paid to rid the LLC of Iler's responsibility for half of the note as $56,000; in fact, the amount owed was $55,920, see Tr. (October 26, 2021) at 56, but to avoid confusion, the court will refer to the rounded-off number the parties have repeatedly used.

membership in exchange for relief from his obligation to pay the mortgagee $56,000. This is all revealed by the parties' communications.

In a June 2, 2017 email (KM-3) to Kiely and Marzovilla, Iler expressed that he was wondering whether he would have "any incoming money" by the end of the month, and stated that otherwise, "at that point I am willing to sell a small %" of the LLC. Nothing then happened but months later, on January 9, 2018, Iler told the other members he was "fine with you making payment of 'my' 56K . . . allocating shares I have to your side of the LLC." KM-7 (emphasis added).

That the offer was for an exchange of eight percent of Iler's interest in the LLC is revealed by all these communications and, in particular, Iler's text message to Marzovilla, advising that if he paid the $56,000 to retire the mortgage it would put Marzovilla's 24.5% interest in the LLC to "around 32-3" (KM-21). As explained earlier, these particular numbers don't constitute an accurate assessment of the parties' ownership interests but are based on Iler's then misconception that ownership may have been tied to the parties' relative contributions. Marzovilla may have been similarly confused about the agreement's meaning and the parties' obligations about payments above the "contracted-for contributions" at this point, as revealed by his testimony in the first trial, when, upon being asked what it was he agreed to receive from Iler for

the $56,000 payment, he could only say, "I think at the time it was eight [percent]. I could be wrong." Tr. (July 8, 2021) at 35. During the second trial more than three years later, however, he was a little surer that he was purchasing eight percent. See Tr. (January 13, 2025) at 12-20. In any event, the court was persuaded by all the testimony about this issue that it was their intent, see Tr. (January 21, 2025) at 27, and Iler so agreed, to transfer eight percent of his interest in the LLC to Marzovilla, in exchange for the lifting of Iler's burden to pay off his share of the mortgage obligation.

But that Iler and Marzovilla so agreed does not end the matter. For the sake of stability about the parties' respective ownership percentages, the amended operating agreement precluded any change in the degree of membership except "by written instrument signed with the same formality as this [a]greement, upon a vote of a majority of the ownership interest in the [c]ompany." KM-1, ¶ 6 (emphasis added). So, while Iler and Marzovilla were free to orally agree about a sale of part of the former's membership in the LLC, only a majority of the members could agree that such a transaction would be binding on the LLC and its membership. While Iler and Marzovilla represented a majority of the membership (collectively holding 75%) and had the ability to make such a change, the transaction still required a writing "signed with the same formality" as the solemnization of the amended operating agreement and

such a writing – indisputably – was, and always remained, lacking. And, as noted earlier, even if the recordation of what Kiely and Marzovilla did at their November 3, 2018 meeting possessed that solemnity, all their acts on that occasion – as held above – were unauthorized without Iler's participation since there could be no majority without Iler. So, while Iler and Marzovilla orally agreed to the exchange, that transaction required further action that never occurred.

Despite all that, the court is satisfied that Iler and Marzovilla had an agreement and that Marzovilla shouldn't be deprived of the benefit of his bargain since he has already fully performed his part of the bargain. Part of the judgment entered will compel the transfer they contemplated.

Equitable principles require that Iler be compelled to perform the agreed-on transaction, for which he obtained the benefit he sought, and that he be compelled to transfer eight percent of his share of the LLC membership to Marzovilla. See Jock v. Zoning Bd. of Adjust., Wall Twp., 184 N.J. 562, 587-88 (2005); Courtney v. Hanson, 3 N.J. 571, 575 (1950); In re Estate of Yates, 368 N.J. Super. 226, 235 (App. Div. 2004). This determination, as the Court said in Jock, "rests on the principle that, as between parties to a contract, equity regards things as done that were agreed to be done." 184 N.J. at 588; see also Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 600-01 (App. Div. 2005);

Seavey v. Long, 303 N.J. Super. 153, 160 (App. Div. 1997); Hadley v. Passaic Nat'l Bank & Trust Co., 113 N.J. Eq. 548, 551 (Ch. 1933).

The court will exercise its equitable discretion and fix the effective date of that transfer as the date of the judgment. While equitable principles compel enforcement of the oral agreement – essentially turning at the time Marzovilla's interest in eight percent of Iler's membership into an equitable lien, Hadley, 113 N.J. Eq. at 551 – those same principles preclude Marzovilla from receiving the benefit of that equitable lien until now because he, in concert with Kiely, acted so inequitably in helping himself to that interest in an ultra vires way that was, as noted earlier, in violation of his fiduciary duty and the duties of loyalty, good faith and fair dealing he owed Iler.

VI

The Appellate Division considered but did not decide Kiely and Marzovilla's claimed entitlement to an award of counsel fees. Kiely, slip op. at 27-28. Kiely and Marzovilla continue to seek this relief. See KM Br. at 20.

Such an award, because of the policies underlying the American Rule, is only available in these circumstances if the parties had a valid and binding agreement authorizing such an award. That is, as explained in Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001), "New Jersey disfavors the shifting of attorneys' fees" and a prevailing party may recover fees

only "if they are expressly provided for by statute, court rule, or contract." No statute or court rule authorizes a fee award here, leaving the parties' agreements as the only founts for such an award.

Because it was never validly amended,[28] the availability of an award of counsel fees turns on what the still-operational amended operating agreement (KM-1) permits. Its fifteenth paragraph discusses the disposition of disputes but stipulates that the members were first to "attempt to mediate . . . and then arbitrate if no resolution can be reached" and likewise imposes pre-mediation and pre-arbitration obligations to "confer and discuss any dispute directly in good faith." The record does not reveal whether the parties actually met and conferred, or whether there was an attempt to mediate, and it is obvious that the disputes asserted in these consolidated actions were never arbitrated.

The basis for any award of fees may only come from the fifteenth paragraph's stipulation that "[t]he parties shall equally divide the cost of the arbitration, and the prevailing party shall be entitled to an award of its attorney and/or filing fees from the non-prevailing party" (KM-1). Kiely and Marzovilla aren't entitled to an award of fees for a number of reasons, the most glaring

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[28] Even if the court had held differently and concluded that Kiely and Marzovilla were authorized to make changes to the amended operating agreement during or as a result of their November 3, 2018 meeting, the record indisputably reveals they never actually took that step.

being that, with the exception of Marzovilla's pursuit of a conveyance from Iler of eight percent of his membership share, they have not prevailed. But the fifteenth paragraph has no application to the fees incurred in these consolidated lawsuits; fees are available only to the party who prevailed at an arbitration and no arbitration ever occurred. The parties certainly intended that limitation – fee shifting only of fees incurred at an arbitration – since the entire fifteenth paragraph envisions arbitration, with the only mention of authorized legal action being an action to enforce an arbitration award. Every one of the six sentences that make up the fifteenth paragraph refers to arbitration. The fee-shifting provision cannot conceivably be interpreted as applying in a situation where the parties eschewed arbitration and brought their disputes to the court for resolution. Stated another way, the agreement cannot be construed as authorizing the shifting of fees contrary to the American Rule in these lawsuits when the parties' agreement never contemplated they would be entitled to or ever seek a resolution of their disputes in the superior court. The right to fees from a losing party is confined to mediation and arbitration only.

The court thus rejects Kiely and Marzovilla's request for an award of counsel fees, as well as Iler's belated request for the same relief,[29] for all these reasons.[30]

* * *

To summarize, the court concludes that Iler, Kiely, and Marzovilla intended – by way of their December 2016 purchase agreement and amended operating agreement – that their stated percentages of ownership (50/25/25, respectively) would "vest" when the contributions stated in those documents were fulfilled, and so remain thereafter, and that all their contracted-for contributions were provided by the time the property's renovation was completed on or shortly before Labor Day 2017. All their subsequent contributions constituted loans to the LLC to be repaid as the LLC began to earn a profit.

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[29] Iler did not set forth such a contention in his initial or reply summation, only raising that claim in his proposed judgment submitted on April 14, 2025. Other than the fact that he may be viewed as the prevailing party, Iler's request for an award of counsel fees must fail for the reason, discussed above, that the fifteenth paragraph of the amended operating agreement does not authorize an award in this situation.

[30] The court heard testimony that suggests the LLC may have paid some or all the counsel fees incurred by either Kiely or Marzovilla or both. To the extent this is true, the court directs that the members who so benefitted disgorge those benefits and reimburse the LLC.

The court also holds that the November 3, 2018 meeting and the steps then taken by Kiely and Marzovilla in Iler's absence were ultra vires and will, therefore, be declared void ab initio. Consequently, Iler was never properly replaced as managing member and the confirmation in the minutes of that meeting concerning his transfer of eight percent of his membership to Marzovilla was ineffectual. The judgment will confirm this but the court will not require Kiely to reimburse the LLC for any management fee he may have been entitled to and that was paid out to him, if any, since regardless of whether he should have been managing member, he was permitted to so act by the court's April 8, 2019 order (KM-14) and he, in fact, did the job since then and until now; he will be required to forthwith turnover to Iler all those things Iler requires to resume his position as managing member.

Iler's and Marzovilla's oral agreement that the former would convey eight percent of his LLC membership to the latter in consideration for the latter's $56,000 payment to the mortgage holder must be enforced and the judgment will require that they and Kiely forthwith execute a writing, within the intendment of paragraph 6 of the LLC's amended operating agreement (KM-1), that will effectuate that transfer.

The court further finds that Iler did not breach the fiduciary duties he owed to either the LLC or the other members in any of the ways asserted by the other members.

The money infused by the parties into the LLC above what the purchase agreement refers to as their contracted-for contributions should be repaid to them from the LLC as contemplated by that agreement and by the amended operating agreement (KM-1), which definitively declares that "[a]ll contributions[,] advances or other infusions of cash by any [m]ember into the [c]ompany, however made, and whether or not made by direct payment of [c]ompany obligations or expenses" – above and beyond the contracted-for contributions – "shall conclusively be deemed loans to the [c]ompany" and "[u]nless otherwise stated in writing, any such loan shall be due and payable in accordance with this [a]greement, together with simple interest at 5% per year" and "shall be repaid by the [c]ompany on a pro rata basis to the [m]embers as cash becomes available after paying all other current obligations of the [c]ompany." KM-1, ¶ 9.

Lastly, all parties' requests for an award of counsel fees are without merit and are denied.

A judgment memorializing these determinations has been entered.