Miscellaneous Recent (Non-Delaware) Partnership and LLC Cases

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Veil Piercing

Blizzard Energy, Inc. v. Schaefers, 71 Cal. App. 5th 832, 286 Cal. Rptr. 3d 658 (2021).

The California appellate court concluded that there was sufficient evidence to support the trial court's finding of unity of interest and ownership between an LLC and a manager/member in a proceeding in which the judgment creditor of the member sought application of reverse veil piercing in order to add the LLC as a judgment debtor on a foreign judgment against the member. The appellate court held that the charging order remedy did not preclude reverse veil piercing, but the court remanded to the trial court for further consideration of competing equities in light of the potential harm that reverse piercing might inflict on the judgment debtor's wife, who owned a 50% membership interest in the LLC and claimed to be an innocent party.

In 2017, Blizzard Energy, Inc. ("Blizzard") obtained a judgment in Kansas in the amount of $3.825 million against appellant Bernd Schaefers for fraud. The Kansas judgment was entered in California under the Sister State Money Judgments Act, and Blizzard moved to have the California trial court amend the judgment to add BKS Cambria, LLC, and BKS Energy, LLC (the "BKS Entities") as judgment debtors under the reverse piercing doctrine. In July 2019, Schaefers filed a voluntary Chapter 11 bankruptcy petition, but the bankruptcy court determined that the California trial court was permitted to hear and decide the motion to amend the judgment to add the BKS Entities as judgment debtors without violating the automatic stay. The trial court found that the BKS Entities were the alter egos of Schaefers and that failing to add them to the judgment would create an unjust result. The trial court thus granted the motion to amend the judgment. BKS Cambria, LLC ("BKS Cambria") and Schaefers appealed.

The appellate court rejected appellants' argument that Blizzard did not have the right to amend the sister state judgment to add a judgment debtor unless it did so in Kansas. The court pointed out that the Sister State Money Judgments Act provides that "a judgment entered pursuant to [the Act] shall have the same effect as an original money judgment of the court...." The court cited authority for the proposition that a California court is authorized to amend a judgment to add a judgment debtor who is found to be an alter ego of a corporate defendant, and the court stated that the alter-ego doctrine was extended to LLCs by Section 17703.04(b) of the LLC statute, which states that "[a] member of a limited liability company shall be subject to liability under the common law governing alter ego liability." Further, the court stated that the trial court did not "amend" the sister state judgment "to add a judgment debtor not named in the original sister state judgment" but merely "'add[ed] a nonparty alter ego as a judgment debtor." The court characterized this as an "'equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant.'"

The court also held that the issuance of a charging order was not the exclusive remedy for Blizzard to enforce its judgment against appellants. The court relied on California precedent holding that a charging order and reverse veil piercing are not mutually exclusive. *Curci Investments, LLC v. Baldwin*, 14 Cal. App. 4th 214, 221 Cal. Rptr. 3d 847 (2017). Distinguishing the LLC context from the corporate context (the *Curci* court having previously held that a creditor of a shareholder may not reverse pierce the corporation's veil), the court in *Curci* stated that the focus should be on the ends of justice and that a trial court should evaluate the same factors employed in a traditional piercing case as well as whether the claimant has any plain, speedy, and adequate remedy at law.

Appellants argued that Blizzard had multiple legal remedies under multiple statutes, including the California Revised Uniform Limited Liability Company Act and Uniform Voidable Transactions Act, but the court stated that appellants failed to explain how these statutes provided an adequate remedy at law. The court noted that, unlike the creditor of a shareholder of a corporation, an LLC member's creditor could not step into the shoes of the debtor but was limited to obtaining a charging order while the debtor remained a member with control over the LLC and the timing of distributions. Furthermore, Schaefers had filed for bankruptcy and had written his accountant a letter indicating that he intended to make it as difficult as possible to collect on the Kansas judgment by remaining as manager of the LLCs, appointing his successor as manager, and withholding distributions from the LLCs.

Next the appellate court addressed the lower court's application of reverse veil piercing. California courts consider two factors before allowing reverse veil piercing via the alter ego doctrine. First, there must be such a unity of interest and ownership between the LLC and its equitable owner that the separate personalities of the LLC and the member do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the LLC alone. The appellate court found substantial evidence of a unity of interest and ownership such that the separate personalities of BKS Cambria and Schaefers did not exist. It was reasonable for the trial court to conclude that Schaefers used BKS Cambria's bank accounts as if they were his own personal accounts. For example, he wrote checks out of BKS Cambria's bank accounts to pay his personal tax deficiencies and to supplement his personal accounts in order to fund a loan, as well as transferring funds to BKS Energy without any explanation. He additionally lived on BKS Cambria's land rent-free and received a monthly loan of $1,200 without specifying the terms of the loan.

The appellate court remanded to the trial court, however, for further proceedings on the issue of whether reverse veil piercing would impose an inequitable result on Schaefers' wife. Schaefers' wife had attempted to intervene in the case before the trial court to argue that she was an innocent party who would be inequitably and adversely affected by reverse veil piercing. She claimed that she was not involved in Schaefers' business dealings and that each spouse owned their respective share of BKS Cambria as separate property. Schaefers and his wife had married in 1981, and the two signed a separation agreement in 1996. In 2001, the two formed the BKS entities, with Schaefers and his wife each owning 50% of the membership interests in each entity. Schaefers was the manager of BKS Cambria. His wife filed a divorce petition in New Jersey in 2019.

The trial court concluded that Schaefer's wife's 50% interest was presumptively community property and that her claim that it was separate property was within the jurisdiction of the bankruptcy court, not the trial court. Thus, the trial court denied her motion to intervene.

The appellate court reversed the trial court's finding for several reasons. First, BKS Cambria's California tax returns, which stated that it was a disregarded entity, did not demonstrate that Schaefers' wife's interest was community property. Although an LLC may only be disregarded when spouses jointly own it if each owns their shares as community property, Schaefers' claim that the LLC was a disregarded entity in California tax returns without his wife's knowledge did not establish the community property status of the membership interests. Additionally, the trial court erred in invoking the presumption of community property because the spouses had acquired their ownership interests after signing the separation agreement. Next, even if the wife's interests were community property, the community's liability does not include a debt incurred by one spouse after the parties' formal separation and before the marriage's dissolution. As Schaefers' actions occurred 15 years after the spouse's separation, it was his separate obligation. Therefore, the appellate court remanded the issue to the trial court to determine if Schaefers' wife was an innocent party and whether she would be harmed by the addition of BKS Cambria as a judgment debtor.

The appellate court rejected the argument that BKS Cambria was denied due process rights due to a lack of support by meaningful analysis with citation to authority.

Additionally, the trial court rejected two choice-of-law arguments that Schaefers advanced. First, no conflict with Kansas law existed because no authority suggested that Kansas did or did not recognize reverse veil piercing of an LLC. In the case of a false conflict of law, the appellate court applied California law. Additionally, the appellate court refused to address appellants' claim that the trial court should have applied New Jersey law in determining the nature of Schaefers' wife's interest in BKS Cambria and application of the alter-ego doctrine. Appellants merely relied on the fact that Schaefers' divorce case was pending in New Jersey, arguing that the wife would be damaged by application of the alter-ego doctrine because New Jersey is not a community property state. The court stated that appellants did not provide meaningful argument and authority supporting their argument that the wife's filing of divorce proceedings in New Jersey required the California trial court to apply New Jersey law even though Schaefers was a California resident and CKS Cambria was a California LLC conducting business and owning property in California rather than New Jersey. Furthermore, the complaint for divorce only requested dissolution of the marriage; it did not request division of the property. Thus, the court found no merit to the argument that New Jersey law on the division of property should apply.

Finally, the court rejected various arguments by Schaefers due to lack of objection at the trial court level, failure to support with meaningful authority, and a refusal to consider the underlying Kansas proceeding.

In re Nilhan Financial, LLC, 627 B.R. 529 (Bankr. M.D. Fla. 2021).

In a reverse veil-piercing case, the bankruptcy court predicted that the Florida Supreme Court would recognize a "familial relationship" exception to the rule that Florida law does not permit veil piercing against non-shareholders.

Good Gateway, LLC (Good Gateway), sought to hold the debtor LLC liable on a judgment against Chittranjan Thakkar based on reverse veil piercing. Thakkar argued that reverse veil piercing is available only against a controlling member of an LLC, and Thakkar was not a controlling member of the debtor. Good Gateway conceded that reverse veil piercing is only available against a company's controlling members as a general rule, but Good Gateway argued that the Eleventh Circuit, in *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330 (11th Cir. 2011), implicitly recognized a "familial" exception to the general rule based on a Florida appellate decision, *Walton v. Tomax Corp.*, 632 So. 2d 178 (5th DCA 1994), which permitted veil piercing to be applied to a non-shareholder corporate officer whose wife was a shareholder. In rejecting the argument that Florida generally permits veil piercing as to non-shareholders, the Eleventh Circuit distinguished *Walton* from the case that was presented to the Eleventh Circuit (which involved an attempt to pierce the veil to reach non-shareholders who were shareholders of an indirect parent corporation), and the Eleventh Circuit predicted that the Florida Supreme Court would likely find dispositive the fact that the officer's wife in *Walton* was a shareholder because the wife's interest likely benefitted the entire family.

The court then discussed a Florida bankruptcy decision in which the Chief Bankruptcy Judge concluded that the *Molinos* familial exception was not limited to husband and wife. The court also emphasized that the Chief Bankruptcy Judge recognized that the policy underlying a familial exception is even more telling when the defendant is alleged to be the true owner of a corporation. The court thus agreed with the Chief Bankruptcy Judge's interpretation of *Molinos* as predicting, albeit in dicta, that the Florida Supreme Court would recognize a "familial-relationship" exception to the "shareholder" rule. Like the Chief Bankruptcy Judge, the court declined to limit the familial

relationship to husband and wife. The court stated that there was evidence in this case that Thakkar and his sons treated the debtor LLC as a family company, and there were allegations that Thakkar was the true owner. Therefore, the court concluded that Good Gateway was not precluded from piercing the veil merely because Thakkar never had a controlling interest in the debtor LLC.

Fiduciary Duties

Bearce v. Yellowstone Energy Development, LLC, 963 N.W.2d 299 (N.D. 2021).

The North Dakota Supreme Court declined to extend the duties owed by directors of a close corporation to minority shareholders to the managing members or board of an LLC under the Uniform Limited Liability Company Act. Because the plaintiff members had not yet been issued their units and were not yet members at the time the board voted to apply a 3:1 multiplier to other seed money investors, no fiduciary duty was owed to the plaintiffs at the time of the vote.

In 2006, representatives of a business entity that would eventually become Yellowstone Energy Development, LLC (Yellowstone) went to the home of Daniel and Debra Bearce seeking to purchase 170 acres of land owned by the Bearces, and Yellowstone obtained an exclusive option to purchase the property. In 2008, Yellowstone exercised its option to purchase the land, and the parties entered into a contract for deed. In 2009, Yellowstone and the Bearces modified the contract for deed to alter some of the payment terms. Both the original contract for deed and the 2009 modified contract for deed included a provision for the payment of a portion of the purchase price with $100,000 worth of "shares" of a contemplated ethanol plant. Yellowstone later abandoned its plan to build an ethanol plant but negotiated a long-term lease with a third party to build an oil train loading facility on the Bearce's land. In 2010, Yellowstone notified the Bearces that $100,000 in "value" would be issued despite Yellowstone's abandonment of the plan to build an ethanol plant. Yellowstone informed the Bearces that ownership units had not yet been issued and explained that the Bearces would receive their ownership interest "at the time shares are issued to all its members." Shortly after receiving this information, the Bearces deeded the property to Yellowstone. In 2011, the Yellowstone board of directors approved a multiplier of three units per $1 invested for individuals who had provided initial cash investment in Yellowstone. The Bearces' interest in Yellowstone was not given the 3:1 multiplier. In 2012, the board approved a second multiplier of three units per $1 invested for individuals who had initially provided cash investment in Yellowstone. The Bearces' interest in Yellowstone was not given the second 3:1 multiplier. Ownership units in Yellowstone were allocated and placed on a ledger sometime after the board approved the second multiplier. After receiving a "unit ledger" indicating their interest in Yellowstone would not receive the 3:1 multiplier, the Bearces objected, but Yellowstone refused to apply the 3:1 multiplier to the Bearces' interest in Yellowstone.

The Bearces sued Yellowstone, asserting claims for breach of fiduciary duty, fraudulent inducement, and breach of contract. The trial court granted summary judgment in favor of Yellowstone on all the claims, but the dismissal of the Bearces' claim for breach of fiduciary duty was reversed in a prior appellate opinion. On remand, a bench trial was held on the claim for breach of fiduciary duty. The district court concluded that Yellowstone did not owe them a fiduciary duty and that, if a duty was owed, the Yellowstone board did not breach its fiduciary duty.

The Bearces argued that those who represented Yellowstone during negotiations for the sale of the property owed them a fiduciary duty as promoters of Yellowstone, but the Bearces did not raise this issue in the court below, and the supreme court held that they could not raise the issue for the first time on appeal.

The Bearces also argued that the board owed them a fiduciary duty to act with good faith because Yellowstone is a closely held company and they were unitholders at the time the board voted on the 3:1 split. The court noted that a "closely held limited liability company" is defined as a company "that does not have more than thirty-five members" (N.D.C.C. § 10-32-02(10), now codified at N.D.C.C. § 10-32.1-02(7)), and the unit ledger showed 23 members of Yellowstone. The court pointed out, however, that the Bearces cited no statutory provision providing for fiduciary or other duties applicable to closely held limited liability companies. The court acknowledged that duties to minority shareholders are imposed on directors of a close corporation, but declined to extend that principle to LLCs:

> "We have recognized that N.D.C.C. ch. 10-19.1 provides significant protection for minority shareholders in a close corporation." *Brandt v. Somerville*, 2005 ND 35, ¶ 7, 692 N.W.2d 144 (citing *Fisher v. Fisher*, 546 N.W.2d 354, 358 (N.D. 1996)). We have "said N.D.C.C. ch. 10-19.1 'imposes a duty upon officers, directors, and those in control of a corporation to act in good faith, and affords remedies to minority shareholders if those in control act fraudulently, illegally, or in a manner unfairly prejudicial toward any shareholder.' " *Id*. (quoting *Lonesome Dove Petroleum, Inc. v. Nelson*, 2000 ND 104, ¶ 30, 611 N.W.2d 154). The Bearces provide no authority, and we can find none, where a court has extended the duties that directors of a corporation owe to minority shareholders in a close corporation to the managing members or board of a limited liability company under the Uniform Limited Liability Company Act. *See Doherty v. Country Faire Conversion, LLC*, 2020 IL App (1st) 192385, ¶¶ 41-47, 446 Ill.Dec. 420, 170 N.E.3d 589 (concluding nonmember may not bring breach of fiduciary claim against a limited liability company or its manager under Uniform Limited Liability Company Act); Revised Unif. Ltd. Liab. Co. Act § 409 cmt. (distinguishing duties owed by members of limited liability company from fiduciary duties that arise in other contexts). In the absence of a statutory directive, we decline to extend the duties under law applicable to close corporations to closely held limited liability companies.

The court next concluded: "Because only a member can sue for the relief sought here, and because the Bearces did not become members until December 2012, Yellowstone did not owe the Bearces a fiduciary duty prior to that time. The Board voted on the 3:1 multiplier for the seed money investors in December 2011 and October 2012, prior to the Bearces being issued their units. The Bearces have failed to show that, at the time the Board voted on the multipliers, the Board owed them a fiduciary duty that was breached by the passage of the multiplier." Because the date the Bearces acquired their interest in Yellowstone and became members was a finding of fact, the court reviewed the finding under the clearly erroneous standard. Under the North Dakota LLC statute, a person becomes a member of an LLC as provided in the operating agreement. The operating agreement (which Debra Bearce testified they never saw and never asked to see) stated that a person did not become a member of Yellowstone until that person was "listed with the appropriate number of Units on the Unit Ledger." The only Unit Ledger in which any member's units, including the units of the Bearces, were listed was the Unit Ledger issued in December of 2012. The 2010 letter sent to the Bearces prior to the conveyance of their property stated that their units would be issued "at the time shares [sic] are issued to all [Yellowstone's] members" and stated that Yellowstone had not yet issued units to its members. The Bearces presented no evidence that any units had been allocated prior to December 2012, and Daniel Bearce testified that they did not receive their units until

December 2012 and did not believe they were members of Yellowstone until that time. Thus, the court concluded that the district court's finding that the Bearces did not acquire their interest in Yellowstone until December 2012 was not clearly erroneous.

Meridian Medical Systems, LLC v. Epix Therapeutics, Inc., 250 A.3d 122 (Me. 2021).

The Maine Supreme Court held, as a matter of first impression, that civil liability can attach for aiding and abetting another's tortious conduct, including breach of fiduciary duty, but the managers' alleged pursuit of an "early exit strategy" and attempt to "steal" patents owned by the LLC's minority member/chairman were not breaches of fiduciary duty to the LLC, and allegations that a licensee of the LLC negotiated consulting agreements with the managers was not alone sufficient to state a claim for aiding and abetting an alleged breach of fiduciary duty by the managers.

The plaintiff, Meridian Medical Systems, LLC (MMS), a Maine LLC, was founded by Carr to develop microwave technologies. Carr was MMS's chairman and CEO until he was removed from those positions by MMS's co-managers. MMS eventually liquidated under Chapter 7 of the Bankruptcy Code, and Carr purchased certain of MMS's claims from the bankruptcy estate. Carr sued Epix Therapeutics, Inc., f/k/a Advanced Cardiac Therapeutics, Inc. (ACT), New Enterprise Associates, Inc. (NEA), and Medtronic Inc. for aiding and abetting breaches of fiduciary duty, tortious interference, and conspiracy. ACT licensed technology from MMS beginning in or before 2013. NEA became a controlling shareholder in ACT in 2014. Medtronic acquired ACT in 2019. The only relationship any defendant had with MMS was the licensing agreement between MMS and ACT. The gist of the complaint was that the value of MMS-owned technology was not maximized due to its co-managers' conduct, which ACT and NEA encouraged. Because Carr claimed that Medtronic was liable only vicariously through ACT, the court referred to Medtronic and ACT collectively as "ACT." The complaint did not allege any claim by Carr personally or by MMS against its co-managers.

Because Maine does not recognize a tort cause of action for conspiracy, the court quickly disposed of that claim. The court then proceeded to analyze the claims for aiding and abetting breach of fiduciary duty and tortious interference.

The court began by explaining that it was unclear whether it had previously recognized an aiding-and-abetting theory, and, if it had, whether the court adopted the elements for imposing aiding and abetting liability set forth in section 876 of the Restatement (Second) of Torts. Section 876(b) requires that the aider and abettor "know[ ] that the other's conduct constitutes a breach of duty and give[ ] substantial assistance or encouragement to the other so to conduct himself," which has been refined by courts to mean that "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." Thus, to state a claim in this case, the complaint needed to contain factual allegations to support inferences that ACT and NEA knew that the co-managers were engaging in a breach of their fiduciary duty toward MMS and that ACT and NEA engaged in conduct amounting to substantial assistance in the commission of the breach.

The court concluded that civil liability can attach for aiding and abetting another's tortious conduct—with two important caveats. First, to avoid casting too wide a net encompassing routine business transactions, the aider and abettor must have actual (not merely constructive) knowledge that the principal tortfeasor is engaged in tortious conduct. Second, the defendant must commit acts constituting substantial assistance in the commission of the underlying tort. The court adopted the factors listed in Restatement section 876 relevant to determining whether this substantial assistance element has been met, i.e., the nature of the act encouraged, the amount of assistance given, the

defendant's absence or presence at the time of the tort, the defendant's relation to the tortious actor, and the defendant's state of mind.

The court saw no reason why breach of fiduciary duty should be excluded from those torts for which liability might be imposed for aiding and abetting another's tortious conduct, but the court concluded that a plaintiff must allege with specificity that the defendant had actual knowledge that the principal tortfeasor was committing a breach of fiduciary duty and that the defendant performed substantial acts in order to assist in the commission of that tort.

The court proceeded to determine whether the complaint alleged, with the required specificity, that the co-managers breached their fiduciary duties to MMS and that ACT and NEA aided and abetted those breaches. The complaint alleged that the co-managers breached their fiduciary duties by "aligning" with ACT and NEA and that ACT and NEA aided and abetted this breach by "corrupting" the co-managers in order to "exploit" MMS's technology. The court stated that these general allegations did not provide substance, and the actual conduct described in the complaint—entering into a licensing agreement with MMS, Carr's removal as manager by the co-managers, differing business philosophies among Carr and the co-managers, attempted theft of Carr's patents, personal consulting agreements between the co-managers and ACT, ACT's conferring value on one of the co-managers, and that co-manager's providing confidential information and trade secrets of MMS to ACT—did not satisfy the plaintiff's burden.

According to the court, the licensing agreement between MMS and ACT could not sustain MMS's claim of a breach of fiduciary duty because the activity was innocent in itself. To the contrary, the existence of the licensing agreement undermined any claim that ACT was attempting to steal MMS's technology.

Allegations that Carr gifted equity in MMS to his son and another individual, Allison, to enable them to gain control of MMS, and that they used that control to remove Carr as chairman and CEO of MMS did not support a claim for breach of fiduciary duty by MMS. The court characterized removal of a manager by majority members as "ordinary governance" that apparently resulted in a personal grievance by Carr against his son and Allison, and the court explained that "[a] plot by majority owners or co-managers to exclude nonmanaging minority members from the rewards of LLC ownership might form the basis of a personal claim by the minority members, but it did not support a claim on behalf of the LLC itself."

The court characterized allegations that the co-managers sought an "early exit strategy" as a disagreement in business strategy between a more risk-averse nonmanaging member of an LLC and its managing members and explained that "[a] differing business philosophy among LLC members is not a breach of fiduciary duty by co-managers against the LLC, even if it turns out that the co-managers' choice was not the optimal one." According to the court, "a breach of fiduciary duty could constitute bad faith sufficient to strip a manager's decision-making of the benefit of the business judgment rule," but the complaint was "devoid of factual allegations indicating why the pursuit of the 'alignment' strategy chosen by the co-managers here was even negligent, and more than conclusory allegations are required."

The court next explained that allegations that the co-managers tried to "steal" patents owned by Carr personally might set forth a claim by Carr individually against the co-managers but did not allege a breach by the co-managers of a duty owed to MMS. Also, the complaint did not allege that the attempt was successful, how it damaged MMS, or specifically how ACT and NEA actively participated in the attempted theft.

Carr argued that the complaint set forth sufficient allegations of wrongful conduct because it described a "quid pro quo" transaction in which the co-managers were enticed to adopt their strategy of alignment with ACT and NEA by "disproportionate" personal consulting agreements

"negotiated" with ACT. The court concluded that these allegations did not sufficiently allege a claim that the co-managers breached their fiduciary duties to MMS for several reasons. First, the court saw nothing nefarious about an LLC's business strategy of aligning with the corporation to which it licensed its technology; therefore, the co-managers' pursuit of consulting agreements, without more, was not a conflict of interest precluding such agreements. Second, ACT and NEA owed no fiduciary duties to MMS, and it was logical that ACT and NEA would want to hire experts familiar with technology that they were licensing. Even if entering into consulting agreements with ACT and NEA would breach the co-managers' fiduciary duties to MMS, entering into such agreements was not in itself sufficient to support a claim for aiding and abetting the co-managers' breach of fiduciary duty by ACT and NEA. Finally, while the consulting agreements were "negotiated," they were never consummated, and the allegations did not indicate how MMS was somehow injured by these negotiations.

The court concluded its examination of the plaintiff's allegations by addressing these two sentences in the complaint: ". . .NEA provided value to Allison to corrupt him and cause him to breach his fiduciary duties to MMS. In return, Allison provided to ACT confidential information, trade secrets and services belonging to MMS in violation of his fiduciary duties owed to MMS." In the context of an LLC's existing licensing agreement with a corporation that owed no fiduciary duty towards that LLC, the court said that there were many innocent explanations for "value" bestowed upon a co-manager of the LLC. Thus, more specificity was required in order to state a claim for knowingly aiding and abetting a breach of fiduciary duty. In the absence of allegations that the transfer of "value" was for technology not authorized by the existing licensing agreement, these sentences failed to demonstrate anything improper. The court pointed to the requirement that the aider and abettor must provide "substantial assistance" in the commission of the breach and noted that the complaint lacked any specific factual allegations regarding most of the factors listed in the Restatement (Second) of Torts § 876.

The court then addressed MMS's claim against ACT and NEA for "tortious interference." The complaint did not assert that ACT and NEA were liable for this tort as accomplices, but that ACT and NEA were directly liable for their own breaches of duties they owed to MMS. The court set forth the requirements for a viable claim for tortious interference with either an existing contractual relation or a prospective economic advantage as follows: (1) the existence of a valid contract or prospective economic advantage, (2) interference with that contract or advantage through fraud or intimidation, and (3) damages proximately caused by the interference. The prospective economic advantage relied on by the plaintiff was a proposed transaction between Abbott Laboratories and ACT in which Abbott would acquire ACT, and, as a part of this acquisition ACT would purchase MMS for between $3 million and $5 million. Assuming the transaction sufficiently identified a nonspeculative prospective economic advantage, ACT was not a viable defendant because it could not interfere with its own contract. The court did not need to answer the question whether NEA, as the controlling shareholder in ACT, shared a unity of interest with ACT preventing it also from being a viable defendant because the court concluded that the complaint lacked any factual allegations sufficient to assert the second element of the tort—fraud or intimidation.

Barkalow v. Clark, 959 N.W.2d 410 (Iowa 2021).

The court addressed the standards for judicial dissolution under the Iowa LLC statute and concluded that the evidence established neither oppression nor a reasonable impracticability to carry on the business of the LLC in conformity with its certificate of organization and operating agreement. The court also held that there was no breach of fiduciary duty on the part of the majority members.

In 2009, Barkalow and three brothers—Bryan Clark, Jeff Clark, and Joe Clark—formed an LLC to purchase a rental property near Kinick Stadium in Iowa City. Bryan and Jeff were married to sisters of Barkalow's wife, and the couples socialized and took vacations together. Joe was less involved in this social circle.

Over the next couple years, the LLC acquired several more properties in Iowa City, most of them near the stadium. Each member played a different role in the LLC. Barkalow provided the day-to-day management, Bryan performed maintenance, Jeff did remodeling, and Joe was more of an investor. Pursuant to oral agreements, the Clark brothers lent Barkalow his initial capital contribution and lent the LLC amounts needed for down payments to purchase additional properties. The brothers also financed or facilitated financing for the additional properties because Barkalow had limited financial resources. Each member initially acquired a 25% interest in the LLC, but the operating agreement was amended in 2010 for estate planning purposes, and the three brothers transferred some of their interests to their children, who became non-voting members.

During 2013 through 2016, the relationship between Barkalow, on the one hand, and Bryan and Jeff, on the other, deteriorated. Joe generally tried to steer a middle ground and attempted to play the role of peacemaker. Barkalow claimed that he had always had an oral agreement to buy the entire LLC at a fee to be set by the Clarks, which the brothers denied. Barkalow began to question the validity of the Clark loans to the LLC in the absence of written loan documents, and the LLC ceased making payments on the Clark loans. Barkalow also stopped efforts by the LLC to obtain bank financing to replace the Clark loans, and he caused the LLC to make payments to his property management companies for management services. Disagreements arose over additional capital contributions that were necessary to cover a balloon payment due on seller-financed properties purchased by the LLC in 2010. In 2015, all members were given the opportunity to make additional capital contributions to enable the LLC to make the balloon payment, but Barkalow refused to contribute. Barkalow also refused an offer by the brothers to buy out his share for undiscounted fair market value at an assumed full 25% share of the company. In 2016, the Clark brothers approved another voluntary capital contribution to enable the LLC to pay off the Clark loans, and Barkalow declined to participate. Bryan and Jeff contributed to cover Barkalow's share. The additional capital contributions in 2015 and 2016 diluted Barkalow's interest to less than 1%. In 2016, Barkalow caused the LLC to pay retroactive management fees to his wholly owned management company as well as withdrawing funds for expenses for a class action settlement to which the LLC was not a party.

In 2017, Barkalow sued Bryan, Jeff, and Joe seeking various types of relief, including judicial dissolution on the basis of majority oppression and that it was not reasonably practicable to carry on the business of the LLC in accordance with its certificate of organization and operating agreement. Barkalow also sought damages for breach of fiduciary duty and breach of contract. After a bench trial, the trial court rejected Barkalow's claim for judicial dissolution based on majority oppression and found no breach of fiduciary duty or breach of contract, specifically finding that the buyout option Barkalow relied upon was too indefinite to be a binding contract. The court also found that there had been an agreement from the outset that each member would provide services to the LLC without charge. Thus, the court found that Barkalow had wrongfully converted assets by paying unapproved management fees and expenses for the unrelated class action settlement. Based on the ongoing and intensely acrimonious relationship among the members, however, the trial court granted judicial dissolution on the basis that it was not reasonably practicable to carry on in accordance with the certificate of organization and operating agreement. Furthermore, the court relied on its equitable powers to fashion a remedy to restore the members to their 25% equity position by recharacterizing the brothers' additional capital contributions as debt of the LLC.

Bryan and Jeff appealed, arguing that the trial court erred in ordering dissolution of the LLC, because the trial court had resolved the disputes, and the LLC was a viable and profitable enterprise. They also urged that even if dissolution was proper, the court exceeded its statutory and equitable authority by recharacterizing the brothers' capital contributions as debt. Barkalow cross-appealed, maintaining that the trial court should have ordered dissolution based on oppression and awarded damages for breach of fiduciary duty.

The Iowa Supreme Court first addressed Barkalow's cross-appeal first because it set the stage for the court's ruling on the appeal by Bryan and Jeff. The Iowa LLC statute authorizes dissolution of an LLC by the court, on application by a member, when "those members in control of the company ... [h]ave acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant," and Barkalow argued that the Clark brothers engaged in oppressive conduct that directly harmed him when they diluted his ownership interest in the LLC in 2015 and 2016. The court cited Iowa case law in the corporate context in which the court said that determining whether the conduct of controlling directors and majority shareholders in a close corporation is oppressive "must focus on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances." *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013). The court then cited and discussed *Manere v. Collins*, 241 A.3d 133, 154 (Conn. App. 2020), in which the Connecticut appellate court applied the reasonable expectations standard to a claim for dissolution of an LLC based on oppression. The court in *Manere* noted that Connecticut (like Iowa) had adopted the Revised Uniform Limited Liability Company Act (RULLCA), the commentary to which "emphasizes that '[i]n many jurisdictions the concept [of oppression] equates to or at least includes the frustration of the plaintiff's reasonable expectations.'" As the *Manere* court pointed out, the RULLCA commentary stated that reasonable expectation factors include:

> whether the expectation: (i) contradicts any term of the operating agreement or any reasonable implication of any term of that agreement; (ii) was central to the plaintiff's decision to become a member of the limited liability company or for a substantial time has been centrally important in the member's continuing membership; (iii) was known to other members, who expressly or impliedly acquiesced in it; (iv) is consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff's conduct; and (v) is otherwise reasonable under the circumstances.

The supreme court agreed with the trial court's implicit determination that Barkalow's expectations were unreasonable. He contributed no money to the LLC, expected the Clark brothers to finance everything, blocked efforts to obtain outside financing, and chose to pledge his own assets as collateral for an expansion of his personal real estate holdings rather than for the use or benefit of the LLC in which he was only a 25% participant. The court also agreed with the trial court that Barkalow misread the LLC's founding documents, which are a major determinant of a member's reasonable expectations. The operating agreement made clear that a member's capital position was subject to change. Although the certificate of organization indicated that members could not be assessed for additional contributions they did not want to make, there was no guarantee that a member's relative ownership position would remain constant if he elected not to make an additional contribution when others did. The certificate of organization contemplated acquisition of other properties by stating a purposes to "to invest in real estate holdings"; therefore, it was unsurprising that additional capital would be needed. Furthermore, Barkalow refused to accept a buyout of his interest for its undiscounted fair market value, which was the very result that the minority

stockholder had been unable to obtain in *Baur* and which supported the oppression claim in that case. Although Barkalow attempted to show that Bryan and Jeff secretly plotted to dilute his interest, he never offered a practical alternative to capital contributions for settling the LLC's outstanding debts. Barkalow wanted the Clarks to continue their outstanding funding of the LLC without repayment. In essence, he wanted something from the Clarks that would function like a capital contribution without actually being a capital contribution, which was not realistic. Thus, the trial court properly rejected Barkalow's oppression claim and his related fiduciary duty claim asserting the same misconduct.

The court next turned to what it regarded as the more difficult issues—those relating to the propriety of the trial court's decree of judicial dissolution on the statutory basis that it was "not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement." Bryan and Jeff implicitly conceded that the LLC was a troubled company in 2015 and 2016, but they argued that the trial court's resolution of the capital contribution controversy and the parties' other claims set a stable path for the future. Indeed, Bryan and Jeff pointed out that the LLC continued to operate and take in rental income during the course of this litigation. Even Barkalow acknowledged the LLC was a financial success.

The court noted that it had not yet had the opportunity to interpret Iowa Code section 489.701(d)(2), but the court cited numerous cases in other jurisdictions that have analyzed the question of whether it is "not reasonably practicable to carry on" an LLC's activities and have concluded that dissolution is warranted when there is actual, unbreakable deadlock. In the absence of deadlock, the court stated that courts have been reluctant to order dissolution so long as it is possible to continue to operate the company in accordance with its certificate of organization and management agreement, i.e., a clear inability to fulfill the contracted purposes of the LLC, usually, but not always, for financial reasons. The court discussed several notable cases in which courts have refused to order dissolution based on member disputes and concluded that the trial court in this case erred in failing to consider the judicial dissolution claim in light of its resolution of the capital contribution controversy and Barkalow's claims that Bryan and Jeff had breached their fiduciary duties to him. Here, there was no deadlock, no showing that the management of the LLC was unable or unwilling to reasonably permit or promote the stated purpose of the LLC to be realized or achieved, and no showing that continuing the LLC was financially unfeasible. In sum, according to the court, "Dissolution under Iowa Code section 489.701(d)(2) is not a wide-ranging mechanism for doing equity, but a drastic remedy to be ordered when an LLC is truly in an unmovable logjam or cannot as a practical matter carry on its contracted purpose. Neither circumstance is present here. Because we reverse the district court's decision to order dissolution of Outside Properties, we also reverse its order recategorizing the Clark capital contributions as debt that was part of the dissolution decree."

Chisum v. Campagna, 855 S.E.2d 680 (N.C. 2021).

The North Carolina Supreme Court held that the statute of limitations on a minority member's claim for declaratory judgment did not begin to run until the member became aware or should have become aware of the defendants' breaches of the operating agreements, liability for nominal damages for breach of fiduciary duty and constructive fraud can support an award of punitive damages, and judicial dissolution was supported by evidence that the majority members unilaterally determined that the minority member's interest had been extinguished and stopped communicating with the minority member.

This dispute involved three LLCs—Judges Road Industrial Park, LLC (Judges Road), Carolina Coast Holdings, LLC (Carolina Coast), and Parkway Business Park, LLC (Parkway)—

formed for the purpose of developing commercial real estate. The majority member of these LLCs was an entity owned by Richard Campagna and Rocco Campagna (The Camp Group), and the minority member was Dennis Chisum. Chisum owned a 35% interest in Judges Group at the time of its formation in 1996, a one-third interest in Carolina Coast at its formation in 2000, and an 8.34% interest in Parkway when he became a member of that LLC in 2007. The operating agreement of each LLC contained provisions on future capital calls and consequences of failure to pay a capital call as well as provisions addressing transfer of membership interests.

Between 2007 and 2012, the Campagnas directed a number of capital calls. By 2010, Chisum's interest in Judges Road and Carolina Coastal had been reduced to 18.884% and 16.667%, respectively. In 2012, the Campagnas called a meeting, and the LLC's attorney sent a letter to Chisum (which Chisum testified he never received) advising Chisum that the accountant had determined that Chisum's interest had been diluted to the point that he had no remaining equity, that another capital call was being made, and that Chisum would be considered diluted in full and would no longer be a member if he did not participate in that capital call. The meeting was held without Chisum, and the minutes reflected that Chisum's membership interest would be "exhausted and extinguished if future capital calls were not timely made," but the Campagnas took control of the LLC at the conclusion of this 2012 meeting and did not communicate with Chisum after that point. Schedule 1 of the operating agreement was not amended to show Chisum's membership interest was extinguished. The Campagnas paid the entire capital call the month following the meeting and believed that they each thereafter owned a 50% interest in Judges Road, but Chisum's 2012 and 2013 K-1s showed that he held an 18.884% interest, although the 2013 K-1 showed that he owned that interest at the beginning of the year and that he held no interest by the end of the year. The 2013 K-1 indicated that it was his "final" K-1 for Judges Road.

The Campagnas took control of Parkway after the 2012 meeting as well. Chisum's 2012 and 2013 K-1s for Parkway showed that he held an 8.34% interest, although the 2013 K-1 showed that he owned that interest at the beginning of the year and that he held no interest by the end of the year. The 2013 K-1 indicted that it was his "final" K-1 for Parkway.

At a 2010 membership meeting of Carolina Coast, the Campagnas assessed a capital call to pay off a loan that Chisum had obtained and that was secured by the LLCs. Chisum did not pay the capital call. After the 2010 meeting, the Campagnas acted as if Chisum's membership interest in Carolina Coast had been extinguished in full. In 2011, Chisum received his 2010 K-1, which stated that Chisum's membership interest in that LLC had been reduced to zero and that this K-1 was his "final" K-1 for Carolina Coast. Although Chisum believed that his 2010 Carolina Coast K-1 was in error and that he continued to have an ownership interest in Carolina Coast, he never received another K-1 from Carolina Coast.

In 2016, Chisum sued the Campagnas, Judges Road, Carolina Coast, and Parkway alleging various claims, including a claim seeking a declaration that he continued to own his interests in the LLCs and a claim for judicial dissolution. In 2017, he amended his complaint to allege numerous additional claims, including individual and derivative claims for breach of fiduciary duty and constructive fraud. Prior to trial, the trial court determined that the operating agreements of Judges Road, Parkway, and Carolina Coast did not permit a member's interest to be extinguished for failure to contribute capital in response to a capital call. The trial court also dismissed Chisum's individual claims for breach of fiduciary duty and constructive fraud.

The case went to trial. The trial court entered a directed verdict in favor of the defendants on the claims related to Carolina Coast on statute of limitations grounds based on the court's view that Chisum should have known that the Campagnas were in breach of the operating agreement more than three years before he filed his lawsuit. The jury found that Chisum filed his lawsuit within three

years of the date that he knew or reasonably should have known that the Campagnas no longer considered him a member of Judges Road and Parkway and found breaches of fiduciary duty on the part of the Campagnas to Judges Road (awarding nominal and punitive damages) and Parkway (awarding actual and punitive damages). The jury also found liability on the part of the Campagnas to Chisum in the amount of distributions that were diverted to The Camp Group and should have been paid to Chisum. The trial court entered judgment for compensatory and punitive damages in the amounts found by the jury and a declaration that Chisum was a 8.34% member of Parkway and an 18.884% member of Judges Road. The court also ordered dissolution of those LLCs on the basis that it was not practicable to conduct their business in conformance with the operating agreements.

On appeal, the supreme court first rejected the defendants' argument that the trial court erred in submitting the issue of when Chisum had notice of the Campagna's breaches of the operating agreements for purposes of Chisum's declaratory judgment claims. The court admitted that "a number of our prior decisions have been somewhat opaque in addressing the issue that is before us in this case," but the court concluded that "the entire principle upon which defendants' argument hinges, which is that the statute of limitations begins to run against a plaintiff who has no way of knowing that the underlying breach has occurred, runs afoul of both our recent decisions ... and basic notions of fairness." The court thus affirmed the trial court's determination that the statute of limitations applicable to Chisum's declaratory judgment claims began running at the time that he became aware or should have become aware of the Campagnas' breaches of the operating agreements. Based on the evidence regarding communications with Chisum and the timing of the receipt of his K-1s, the court held that the record contained sufficient evidence to support the submission of the statute of limitations issue to the jury.

The court next addressed whether the trial court erred by failing to direct a verdict or enter judgment notwithstanding the verdict in their favor with respect to the derivative claims for breach of fiduciary duty and constructive fraud relating to Judges Road. The defendants argued that there was no evidence that Judges Road sustained any actual damages as a result of the Campagnas' conduct and that nominal damages, standing alone, were insufficient to support claims for constructive fraud and breach of fiduciary duty. Although the supreme court stated that it had not previously addressed the issue of whether a plaintiff is required to prove actual damages in support of breach of fiduciary duty and constructive fraud claims, the court discussed cases in which the court of appeals had addressed the issue and had held that nominal damages support an award of punitive damages. The supreme court concluded:

> [W]e adopt the reasoning of the Court of Appeals and hold that potential liability for nominal damages is sufficient to establish the validity of claims for breach of fiduciary duty and constructive fraud and can support an award of punitive damages. Aside from the fact that nothing in the prior decisions of this Court indicates that proof of actual injury is necessary in order to support a claim for breach of fiduciary duty or constructive fraud, we see no basis for treating the incurrence of nominal damages as a second-class legal citizen in this context, particularly given that such damages do reflect the existence of a legal harm and the fact that the policy of North Carolina law is to discourage breaches of fiduciary duty and acts of constructive fraud.

The court also discussed challenges made by the defendants with regard to the consistency of verdicts relating to constructive fraud and breach of fiduciary duty, the propriety of the jury instructions with respect to the Campagnas' duty to deal openly, fairly, and honestly, and the

ambiguity of the identical compensatory damages awards against each of the Campagnas. The court rejected each of these challenges.

The supreme court next addressed the defendants' argument that the trial court erred by ordering dissolution of Judges Road and Parkway and by depriving the defendants of their statutory right to purchase Chisum's interest in lieu of dissolution. The North Carolina LLC statute authorizes a court to dissolve an LLC if a member establishes that (1) it is not practicable to conduct the LLCs business in conformance with the operating agreement and the statute or (2) liquidation of the LLC is necessary to protect the rights and interests of the member. If a court determines that an LLC should be judicially dissolved based on the second ground, the statute states that the court will not order dissolution if the LLC or other members elect to purchase the interest of the complaining member for its fair value in accordance with any procedures the court may provide. The court determined that Chisum's allegations reflected that he sought judicial dissolution pursuant to both grounds. The court reviewed the trial court's fact findings, which included a lack of communications between the Campagnas and Chisum from 2010 (when Chisum walked out of the Carolina Coastal meeting) until the lawsuit; the Campagnas' treatment of Chisum as if his membership interests had been extinguished without communicating to Chisum that they considered his membership interests terminated; Richard Campagna's admission that Chisum did not fail to meet a capital call or take any specific action that would have terminated his interest in Parkway; the Campagnas' filing documents with the North Carolina Secretary of State dissolving Parkway without notifying Chisum, seeking his consent, or making any distribution to him; the Campagnas' ceasing to provide Chisum with required reports and financial information regarding Parkway and Judges Road; and Richard Campagna's ordering Mrs. Chisum to leave in a threatening manner when she visited the Campagnas' offices sometime in 2012 or 2013 to get information regarding the LLCs. The trial court also noted the extraordinary acrimony and distrust among the parties. The supreme court concluded that the evidence provided ample support for the determination that it was not practicable to conduct the LLCs' business in conformance with the operating agreement and the statute, and the trial court properly ordered judicial dissolution pursuant to the first ground without providing the Campagnas the opportunity to purchase Chisum's interests.

The court next addressed Chisum's cross appeal in which Chisum complained of the trial court's determination that his claims relating to Carolina Coast were time-barred, the failure of the judgment to ensure that the Campagnas did not share in the punitive damages award to the LLCs, and the dismissal of Chisum's individual claims for breach of fiduciary duty and constructive fraud.

With regard to Chisum's argument that the trial court erred in determining that his claims relating to Carolina Coastal were time-barred, the court rejected Chisum's argument that statutes of limitations do not apply to declaratory relief, and the court concluded that the three-year statute of limitations applied to his claims because the claims hinged upon the validity of his claim that the defendants breached the operating agreement. The court concluded, however, that there was a triable issue of fact as to when Chisum knew or reasonably should have known that the defendants breached the operating agreement. Although the court stated that there was ample evidence (including receipt of his "final" K-1) tending to show that Chisum knew or should have known of the breach more than three years before he filed the lawsuit, the court pointed to other evidence favoring Chisum on this issue, such as the fact that the schedule of members was never amended to show Chisum's membership had been fully diluted and the fact that Chisum was allowed to use his complimentary storage unit at Judges Road until 2016.

The court concluded that Chisum failed to preserve for appeal his argument that it would be inequitable for the Campagnas to share in distributions that included punitive damages awards they are required to pay the LLCs.

Finally, the court concluded that Chisum's individual breach-of-fiduciary-duty and constructive-fraud claims failed because the record did not show that he sustained a legally cognizable injury. Chisum claimed that the Campagnas attempted to "freeze [him] out of the LLCs," conducted "sham capital calls," acted as if he was no longer a member of the LLCs, and treated him in a manner that was inconsistent with his status as a member of Judges Road and Parkway. The court said that these facts simply described the specific steps that the Campagnas took to deprive Chisum of his ownership interests in Judges Road and Parkway, but did not show the sort of injury that is necessary to support claims for breach of fiduciary duty and constructive fraud. Because Chisum failed to establish that he suffered a legally cognizable injury as the result of the Campagnas' conduct, the court stated that it need not determine whether any injury that Chisum might have suffered was separate and apart from any injury suffered by Judges Road and Parkway, and the trial court did not err in dismissing Chisum's individual claims for breach of fiduciary duty and constructive fraud.

Xereas v. Heiss, 987 F.3d 1124 (D.C. Cir. 2021).

Relying on provisions of the District of Columbia LLC statute regarding fiduciary duties owed by members of a member-managed LLC, the court held that a 1/3 member alleged breach-of-fiduciary-duty claims against the other two members.

John Xereas agreed to go into business with Geoffrey Dawson and Marjorie Heiss to operate the Riot Act Comedy Club in downtown D.C. Xereas had been involved in the D.C. comedy arena for many years and held the trademark on a well-known local comedy brand. The three individuals formed an LLC of which they were each 1/3 managing-members. The court characterized the LLC as a member-managed LLC, which was significant in analyzing Xereas's claims for breach of fiduciary duty in this litigation. (Curiously, in a later part of the opinion addressing Xereas's claims for breach of contract, the court stated that "[t]he operating agreement provides that "[n]o Member, as such, other than the Managing Members shall ... [b]e paid any salary by the Company." This language seems to suggest that the operating agreement contemplated the possibility of non-managing members.) After the relationship among the three individuals deteriorated and they parted ways, Xereas sued Dawson and Heiss. Xereas alleged claims for breach of fiduciary duty, trademark infringement, and breach of contract. The district court dismissed Xereas's claims for breach of the fiduciary duties of loyalty and care before the case went to trial, and this opinion addressed whether dismissal of the claims was proper.

The district court dismissed Xereas's claims for breach of fiduciary duty on the basis that there was no special relationship transcending an ordinary business transaction between the parties. Because some of the defendants' alleged conduct occurred before 2012, when the current D.C. LLC statute became applicable to the defendants' conduct, and Xereas failed to point the court to any statute applicable before 2012 that specified fiduciary duties between members of an LLC, the court analyzed his claim first under the District's common law and second under the statute.

Turning first to the common law, the court stated that District of Columbia courts had addressed the fiduciary duty of loyalty in the corporate and partnership contexts but not in the specific context of an LLC. The court stated that *Calomiris v. Calomiris*, 3 A.3d 1186 (D.C. 2010), suggested that an action for breach of fiduciary duty may lie between members of an LLC based on their status as members alone, but the court in *Calomiris* did not directly consider the question whether members of an LLC owe each other fiduciary duties by virtue of membership alone. Because Maryland is "the source of the District's common law and an especially persuasive authority when the District's common law is silent," the court discussed Maryland case law that considered closely analogous questions and that held "managing members of an LLC owe common law fiduciary duties

to the LLC and to the other members based on principles of agency." Thus, "especially persuasive authority" supported the court's reading that *Calomiris* suggested that Xereas, Dawson, and Heiss—being both members and managers of the LLC—owed fiduciary duties of loyalty and care to each other, the LLC, and any other members. Based on this authority, the court concluded that Xereas's allegations were sufficient under Rule 12(b)(6) to establish the existence of a fiduciary relationship under D.C. common law because Xereas alleged that Dawson and Heiss, by virtue of being managers, were in a fiduciary relationship with Xereas, who was also a manager.

With respect to events that took place in 2012 and were thus also covered by the current D.C. LLC statute, the court stated that Xereas correctly argued that section 29-804.09 provides that members of a member-managed LLC owe each other duties of loyalty and care, which are duties typical of a fiduciary relationship. The defendants argued that the "mere existence of a contract generally does not give rise to a fiduciary duty" and cited case law standing for the proposition that only a relationship founded on trust and confidence that "transcends a normal business transaction" gives rise to a fiduciary relationship. The court was not persuaded to alter its conclusion that the District of Columbia affords special status to the relationship between members of an LLC. The court explained its interpretation of the statute as follows:

> In sum, section 29-804.09 imposes duties characteristic of a special fiduciary relationship and requires members of an LLC to act with the interests of the LLC and other members in mind. *See* D.C. Code § 29-804.09(a) ("A member of a member-managed limited liability company *owes to the company and*, subject to § 29-808.01(b), *the other members the duties of loyalty and care* stated in subsections (b) and (c) of this section." (emphases added)); §§ 29-804.09(b)–(c) (requiring a member to "[a]ccount to the company," to "[r]efrain from dealing with the company ... [with] an interest adverse to the company," and to "[r]efrain from ... grossly negligent or reckless conduct, [and] willful or intentional misconduct"). And while we acknowledge that subsection (a) was amended in 2012 to remove the word "fiduciary" before "duties of loyalty and care," *compare* 58 D.C. Reg. 2065 (Mar. 11, 2011), *with* 59 D.C. Reg. 13244, section 29-804.09(i)(5) instructs that in a *manager-managed* LLC, "[a] member shall not have any fiduciary duty to the company or to any other member solely by reason of being a member." We therefore interpret the deletion of "fiduciary" as part of an effort to omit extraneous text, since a reading in which section 29-804.09(a) does not impose fiduciary duties upon members in a member-managed LLC renders subsection (i)(5) surplusage. That is, we doubt that the drafters would specify that members in a manager-managed LLC do not owe each other fiduciary duties unless members owe each other such duties in another context. *See* Nielsen v. Preap, ––– U.S. ––––, 139 S. Ct. 954, 969, 203 L.Ed.2d 333 (2019) (explaining that "every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." (alteration in original and citations omitted)).

Because Xereas alleged that he, Dawson, and Heiss were members of a member-managed LLC, the court held that Xereas adequately alleged the existence of a fiduciary duty, and the district court erred in dismissing Xereas's fiduciary duty claims at the pleading stage.

McWhinney Centerra Lifestyle Center, LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC, 486 P.3d 439 (Colo. App. 2021).

Applying Delaware law, the court held that the managing member of an LLC owed and breached the fiduciary duties of loyalty and care. Applying Colorado law to the intentional tort claims asserted, the court declined to follow prior Colorado appellate decisions and held that the economic loss rule did not bar the intentional tort claims.

This dispute arose out of a failed joint venture to build and operate an upscale shopping center (the Shops) in Loveland. In 2004, McWhinney Holding Company LLLP (McWhinney) and Poag and McEwen Lifestyle Centers, LLC (PMLC), through their subsidiaries McWhinney Centerra Lifestyle Center LLC (MCLC) and Poag & McEwen Lifestyle Centers-Centerra LLC (P&M), respectively, formed Centerra LLC to develop and operate the Shops. MCLC provided the capital, land, and an established public-private partnership with city and county entities for infrastructure financing. P&M was the managing member of the joint venture.

The operating agreement of Centerra LLC required P&M to obtain a construction loan for Centerra LLC and then a permanent loan before the maturity of the construction loan. In 2005, P&M obtained a construction loan for $116 million in accordance with the terms of the operating agreement, and the Shops opened. In 2006, P&M purchased a $155 million forward swap on behalf of Centerra LLC without obtaining a permanent loan. The forward swap was an agreement between Centerra LLC and a bank to exchange interest in 2008 at a rate of 5.4125 percent. In 2007, P&M entered into a $40 million mezzanine loan agreement. The district court found that P&M used the $40 million mezzanine loan for personal interests—for Dan and Josh Poag to buy out their co-founder— and that P&M intentionally concealed the buyout and its intention to use these self-dealings to fund it. The district court further found that because of the impending cost of the forward swap and P&M's desire to pay off the mezzanine loan, P&M did not seek a permanent loan below $155 million, despite only needing $116 million to refinance the construction loan. Additionally, the court found P&M did not seek permanent financing after 2007. Centerra LLC was forced to pay $7.5 million to settle the forward swap, and P&M never obtained permanent financing.

In mid-2008, the real estate market collapsed, and Centerra LLC defaulted on its construction loan. Ultimately, the lender foreclosed on the Shops.

In 2011, after the joint venture failed, MCLC sued P&M, asserting breach of the operating agreement and numerous tort claims. The district court dismissed all the tort claims under the economic loss rule. In 2014, on interlocutory appeal, a division of the appellate court affirmed the dismissal of four of the claims based on the economic loss rule, and reinstated the other three claims. In 2017, in light of a 2016 Colorado Supreme Court decision, MCLC moved for reconsideration of the dismissal order as to three of its tort claims. The district court denied the motion, and the case was tried in a thirteen-day bench trial, after which the district court concluded P&M breached both fiduciary duties and contractual obligations under the operating agreement. The district court awarded $42 million in damages to MCLC plus interest.

On appeal, P&M contended that the district court improperly (1) imposed fiduciary duties on P&M, (2) found that P&M breached its obligations under the operating agreement, and (3) calculated damages. MCLC cross appealed complaining of the district court's dismissal of its intentional tort claims based on the economic loss rule.

The court of appeals applied Delaware law to the issues raised by P&M because the parties agreed in the operating agreement that Delaware law would apply.

The court started its analysis by deciding whether P&M owed fiduciary duties to MCLC under the operating agreement. The court stated that "Delaware LLC managers owe traditional fiduciary duties of loyalty and care to the LLC and its managers [sic]" unless the LLC agreement

expressly eliminates those duties. P&M argued that the operating agreement was drafted in such a way that it eliminated fiduciary duties, but the court found no such plain and unambiguous intent. In fact, the court stated that the operating agreement contemplated P&M's duties as the manager and a member by providing, in relevant part, that:

> • P&M "will owe a duty in carrying out its duties and responsibilities under this Agreement of good faith, loyalty, and fair dealing to" Centerra LLC;
> • P&M "shall manage or cause the affairs of the Company to be managed in a prudent and businesslike manner" but "shall not be restricted in any manner from participating in any other business activities, notwithstanding the fact that the same might be competitive with the business of [Centerra LLC]";
> • "[i]n carrying out its powers and duties hereunder, [P&M] shall exercise its best efforts, [and] shall owe a duty of good faith and fair dealing to [Centerra LLC] and to [MCLC]"; and
> • P&M "shall not be liable to [Centerra LLC] or [MCLC] for any actions taken on behalf of [Centerra LLC] in good faith and reasonably believed to be in the best interest of [Centerra LLC] or for errors of judgment made in good faith," but shall be liable to Centerra LLC and MCLC for "actions and omissions involving actual fraud, gross negligence, or willful misconduct or from which such Member derived improper personal benefit."

The appellate court agreed with the district court that these provisions meant P&M owed fiduciary duties of care and loyalty to Centerra LLC and MCLC. Rather than eliminating fiduciary duties, the court said the operating agreement itself provided for the fiduciary duties of care and loyalty owed by P&M to Centerra LLC and MCLC.

Additionally, the court pointed out that the operating agreement provided that P&M shall be liable for actions or omissions involving "actual fraud, gross negligence, or willful misconduct or from which [P&M] derived improper personal benefit"; therefore, the agreement assumed that those obligations existed by virtue of fiduciary duties. The court also disagreed with P&M that its duty of loyalty to MCLC was eliminated or significantly reduced by a provision in the operating agreement under which P&M "shall not be restricted in any manner from participating in any other business activities, notwithstanding the fact that the same may be competitive with the business of the company." The court agreed with the district court that this language modified P&M's duty of loyalty but did not displace or eliminate it. Additionally, the agreement provided for relief to MCLC for "actions or omissions involving willful misconduct or from which [P&M] derived improper personal benefit," which the court characterized as liability stemming from an assumed duty of loyalty.

The court next rejected P&M's contention that the district court erred in finding that P&M breached the operating agreement on multiple occasions, including when it (1) purchased the forward swap on behalf of Centerra LLC, (2) entered into the $40 million mezzanine loan, and (3) failed to secure permanent financing.

In finding that P&M breached its obligations under the operating agreement when it purchased the $155 million forward swap on behalf of Centerra LLC, P&M argued that the district court contravened the business judgment rule by improperly substituting its own judgment for P&M's. The court cited corporate case law in describing the Delaware business judgment rule, duty of care, and duty of loyalty, and the court stated that it was unconvinced by P&M that the corporate

fiduciary duties imposed in the cases cited are distinguishable from the "traditional fiduciary duties" imposed on managers of LLCs.

Although the district court found that P&M's breach of the operating agreement when it purchased the forward swap on behalf of Centerra LLC was not a material breach of the operating agreement (because it did not go to the "root or essence" of the agreement), the district court found that P&M was nonetheless liable to MCLC because P&M derived an improper personal benefit from the swap by using it "as a tool to obtain the $40 million mezzanine loan." In this regard, the district court found the business judgment rule did not apply because MCLC demonstrated that P&M's decision to enter the forward swap was a breach of P&M's fiduciary duties of loyalty and care. More specifically, the district court found the swap breached P&M's duties of loyalty and care because the forward swap was for the individual benefit of P&M, the Poags, and PMLC, as it was "an effort by Josh Poag to convince private investors that he had or was close to permanent financing for $155 million so he could obtain $40 million to purchase [the co-founder's] share" of their businesses. The district court additionally found that P&M breached its duty of care to act in a "prudent and businesslike manner" in its management of Centerra LLC based on expert testimony at trial that the swap was a "cart before the horse ... kind of situation" that was "very risky" and "made no sense" and Josh Poag's own testimony that forward swaps generally were "aggressive" and "unnecessarily risky." Based on the district court's findings, supported by the record, the appellate court found no error in the district court's determination that the business judgment rule was rebutted as to the forward swap.

The court next addressed P&M's contention that the district court erred by finding P&M materially breached the operating agreement when it obtained the mezzanine loan. The appellate court concluded that the record supported the district court's finding that "P&M's entry into, and concealment of, the [m]ezzanine [l]oan constituted material breaches of its fiduciary duties to MCLC and Centerra LLC" by improperly giving the lending bank "significant authority over the management of Centerra LLC and the Shops" without MCLC's consent and by acting "solely for the benefit of [P&M] and ... not in the best interest of Centerra LLC."

The district court also found that P&M violated its duties of fair dealing and candor in several respects, which constituted potential "willful misconduct," "improper personal benefit," or "fraud," by purposefully concealing and misrepresenting material facts, including the purpose of the loan (which was to secretly buy out their co-founder's interest) and significant details, including the effect of the loan on Centerra LLC's operations and the loan's negative effect on P&M's ability to obtain permanent financing (all permanent financing offers P&M received after 2007 were insufficient to pay off both the mezzanine loan and the construction loan). The court pointed out that the operating agreement "explicitly provided that P&M owed a duty of fair dealing to MCLC, which necessarily imposed a duty of candor—sometimes referred to as a duty of disclosure. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983)." The appellate court stated that "the district court made detailed findings—all supported by the record—that P&M purposefully withheld, concealed, and misrepresented material facts about the loan and its effect on Centerra LLC's operations in order to get MCLC's consent." Thus, the court affirmed the district court's finding that P&M breached its duty of fair dealing to MCLC in obtaining the mezzanine loan.

The court of appeals next addressed P&M's contention that the district court erred when it concluded that P&M breached its obligations to MCLC by failing to obtain or provide notice of a permanent loan before the construction loan's maturity date. The court discussed the provisions of the operating agreement and the arguments made by P&M and concluded that the district court properly found that P&M breached its contractual obligations in this regard.

Finally, the court analyzed the district court's calculation of damages and rejected P&M's arguments that the district court erred in calculating the damages related to the swap and MCLC's lost equity.

MCLC's cross appeal dealt with the district court's dismissal of MCLC's common law intentional tort claims after applying the economic loss rule. While Delaware law applied to the breach-of-contract claims in this case, the court noted that Colorado law applied to MCLC's tort claims. Based on recent decisions by the Colorado Supreme Court, MCLC argued that the appellate court erred in dismissing its tort claims in the previous interlocutory appeal in this case. Departing from prior decisions of other divisions of the appellate court, including the interlocutory appeal in this case, the court agreed with MCLC and concluded that in most instances the economic loss rule will not bar intentional tort claims. Based on the Colorado Supreme Court's decisions in *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150 (Colo. 2019) (concluding that the economic loss doctrine does not bar statutory tort claims and stating that "the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation") and *Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603 (Colo. 2016) (concluding that the economic loss rule did not necessarily apply where a party's tort claims were related to contractual obligations, but the tort claims flowed from an independent duty under tort law), the court concluded that the district court erred when it applied the economic loss rule to bar MCLC's common-law intentional tort claims of fraudulent concealment, intentional interference with contractual obligations, and intentional inducement of breach of contract because each of these claims stems from a duty based in tort law independent of the operating agreement. The court agreed with the district court, however, that the economic loss rule barred MCLC's civil conspiracy claim because MCLC alleged P&M and PMLC conspired to breach the agreement, and their duty not to conspire to breach the contract that they signed stemmed solely from the agreement itself.

<u>Inspection and Information Rights</u>

Benjamin v. Island Management, LLC, 267 A.3d 19 (Conn. 2021).

The court interpreted and applied Conn. Gen. Stat. § 34-255i, which corresponds with § 410 of the Uniform Limited Liability Company Act of 2006 (ULLCA) and prescribes the conditions for the inspection of books and records of a limited liability company. In the absence of judicial scrutiny of this provision in any jurisdiction adopting ULLCA, the court held that a member seeking information for the stated purpose of ascertaining whether mismanagement has occurred is not required to produce credible proof that mismanagement may have occurred as a precondition for exercising the member's statutory inspection right.

Section 34-255i(b)(2) states in relevant part that: "[A] member may inspect and copy full information regarding the activities, affairs, financial condition and other circumstances of the company as is just and reasonable if: (A) The member seeks the information for a purpose reasonably related to the member's interest as a member; (B) the member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and (C) the information sought is directly connected to the member's purpose."

In 2002, William Ziegler III created trusts for each of his six children, including Helen Ziegler Benjamin, William T. Ziegler, and Cynthia Ziegler Brighton. These trusts owned equal interests in Island Management, LLC ("Island Management"), a manager-managed Connecticut LLC formed to oversee and build the family's assets worth over an estimated $2.8 billion. William and

Cynthia acted as co-managers and co-presidents of Island Management. William and Cynthia had additional, significant roles in other family enterprises that provided income to Island Management.

A disagreement arose between the siblings, such that Helen believed the family businesses should make larger distributions to the present beneficiaries of the trusts. In her capacity as trustee, Helen made four written demands to inspect Island Management's books and records, citing § 34-255i as authority for the demands. Island Management produced many records in response to the demands but refused to produce other records on the grounds that the information was unnecessary or the requests were improper.

The stated purposes of the final demand were (1) to determine the value of Helen's trust's membership interest in Island Management and (2) to ascertain the condition and affairs of such entities so that Helen's trust may exercise its rights as a member of Island Management in an informed manner. Helen's demand letter further identified conflicts of interests and possible excessive manager compensation and management fees as areas of particular concern. Island Management produced reasonable updates to certain previously reported information in response to the final demand but refused to produce any other information.

In her capacity as trustee, Helen brought suit against Island Management to compel the LLC to comply with her inspection demands. Shortly after the complaint was filed, successor trustees were appointed for Helen's trust, and the successor trustees were substituted as plaintiffs. The trial court ruled in favor of the plaintiffs and rejected Island Management's argument that the inspection statute required credible proof of mismanagement when the inspection is sought for the alleged purpose of investigating mismanagement.

On appeal, Island Management made three arguments. First, Island Management argued that the trial court failed to recognize that investigating mismanagement is a proper purpose for inspection only if credible proof exists that mismanagement may have occurred. Second, Island Management contended that the trial court failed to apply the requirement that the information sought must be "directly connected" to a proper purpose stated in the demand. Third, Island Management argued that the trial court failed to apply the requirement of stating the information requested with "reasonable particularity" as to the general ledger and employee compensation because neither was expressly or implicitly referenced in the written demands.

The court considered the statutory terms regarding corporate record inspections because of the similarity between the corporate statutory terms and the relevant LLC statutory terms in this case, and a "well-developed body of law" exists for the corporate statutory terms.

In its first argument, Island Management advanced a "credible proof" requirement. It argued that the court should interpret § 34-255i in accordance with similar corporate statues in jurisdictions such as Delaware, which have held "that a shareholder seeking to inspect corporate records to investigate whether the corporation is being properly managed must come forward with facts that demonstrate a reasonable basis to suspect mismanagement." Three main reasons support this position: (1) the common-law principle that seeking inspection for speculative purposes, to gratify idle curiosity, or to undertake a fishing expedition is not a proper purpose; (2) the necessity to balance the plaintiff's need for information for legitimate purposes against the burden imposed on the entity and other stakeholders; and (3) the necessity to meet a statutorily imposed burden of proof. Other jurisdictions, however, have rejected the credible proof requirement for three reasons: (1) the books of corporations are not the private property of the directors or managers, but are the records of their transactions as trustees for the shareholders; (2) the credible proof requirement practically denies the right to inspect corporate records in the majority of cases; and (3) in the absence of a clear statutory directive placing the burden of proof on the shareholder for proof of purpose, it is sufficient

for the shareholder to allege a proper purpose in general terms to make a prima facie case in support of inspection.

The plaintiffs argued that Connecticut precedent was incompatible with the credible proof requirement, but the court determined that Connecticut precedent had never addressed relevant case law from other jurisdictions and that the Model Business Corporation Act could be read consistently with the Delaware standard. Ultimately, however, the court found the arguments against the Delaware approach more persuasive, especially in the context of LLCs. The court noted that the decisions in other jurisdictions "seem[] to turn on whether the court interprets the legal requirements (1) to include an implied or express condition that the shareholder is seeking the information in good faith and (2) to impose the burden on the shareholder to prove good faith or on the entity resisting inspection to prove bad faith."

A comparison of the Connecticut Business Corporation Act (CBCA) and the Connecticut Uniform Limited Liability Company Act (CULLCA) convinced the court of the inapplicability of the credible proof requirement for LLCs. The CBCA expressly meets the first condition by requiring that a shareholder's demand be "made in good faith and for a proper purpose." However, a good faith requirement is not included in CULLCA except in the context of dissociated members.

The court disagreed with Island Management's argument that there would be no basis for limiting inspection to information "directly connected" to the stated purpose, as is required by § 34-255i(b)(2)(c), in the absence of the credible proof requirement. First, the statute grants trial courts the discretion to require an LLC member to provide greater specificity when justified by the facts and circumstances of the case. Second, a trial court may limit the scope of inspection if the request is too burdensome or inadequately justified. Third, an LLC may persuade the trial court that an improper purpose is the true, primary purpose. Fourth, an LLC may, through its operating agreement, impose reasonable restrictions on the availability and use of information provided under § 34-255i.

After concluding that a trial court's determinations regarding the "direct connection" and "reasonable particularity" requirements should be subject to an abuse of discretion standard, the court proceeded to address Island Management's argument that the trial court failed to determine that a direct connection existed between each of the categories of information at issue and one of the specific purposes asserted in the demands. The court disagreed with Island Management's interpretation that the direct connection requirement constitutes a test of strict necessity such that if the LLC has provided sufficient records from which the plaintiffs can accomplish their purposes, any remaining records lack a direct connection to those purposes. Instead, the court found that the statute's plain meaning was more suggestive of a relevance test. Cumulative information may yield significant corrective value and expose inconsistencies. If information is duplicative and the effort needed to produce it imposes an undue burden on the company, the trial court retains the discretion to determine whether allowing inspection is "just and reasonable ...." The court stated that a trial court is not required to credit a witness's testimony regarding what is or may be revealed by the corporate records at issue, and the court pointed to commentary to the Model Business Corporation Act that suggests the court may examine the records to determine the connection if a corporation disputes the connection of records to a shareholder's purpose. No contested documents were presented to the court for in camera examination in this case.

Without lengthy explanation, the court overruled an argument by Island Management that two types of information sought at trial—the general ledger and employee compensation—were not requested with "reasonable particularity" in any of Helen's demands. With respect to the general ledger, the court concluded that several of the twenty-seven categories referenced in Helen's final demand would be found in the general ledger, and the references were thus sufficiently particular to apprise Island Management about the information needed.

The plaintiffs conceded at oral argument that employee compensation was not requested in any written demand with reasonable particularity, acknowledging that the interest in this information arose after the complaint was filed and that entitlement to this information was contractual only. Thus, the court turned to the judgment rendered on violation of the operating agreement to determine whether the plaintiffs were entitled to employee compensation information under the operating agreement. Island Management's operating agreement provided an expansive right of inspection that supported Helen's request to inspect information related to employee compensation. The operating agreement stated in part: "Upon request, each [m]ember ... shall have the right, during ordinary business hours, to inspect and copy any and all of the books and records of the [c]ompany at the expense of the [m]ember ... making such request." The trial court observed that this provision provided a more expansive right of inspection than the statute and permitted inspection upon an informal request rather than a written demand. Island Management did not contend otherwise, but argued that it did not have notice that Helen or the plaintiffs were invoking the operating agreement as a basis for access to information and that Island Management would have invoked the arbitration clause in the operating agreement if an independent claim under the operating agreement had been asserted.

The court stated that Island Management conflated the issue of whether there was a demand under the operating agreement with the issue of whether it had fair notice of such a claim. Because the operating agreement did not require anything more than an inspection "request,"the court said that the operating agreement did not require the request to expressly invoke the operating agreement. While the express references to the statute in the pre-suit demands for information may not have provided fair notice of Helen's reliance on the operating agreement prior to the lawsuit, the complaint provided the requisite notice that the plaintiffs relied on the operating agreement as well as the statute. The court stated that Island Management was afforded sufficient opportunity to assert its right to arbitrate based on the allegation of an independent violation of the operating agreement in the complaint. Island Management waived its right to arbitration by failing to plead the right or make a formal demand in any other form.

Island Management alternatively argued that the trial court improperly construed the operating agreement to allow unfettered access to all of Island Management's records for any purpose because a proper-purpose requirement (requiring a member to have a proper purpose that is not adverse to the company) is implied in such provisions. The court stated that the case cited by Island Management did not stand for this proposition. The court explained that, "under the so-called 'implied improper purpose' rule, when a proper purpose is not expressly required, the entity can avoid inspection if it proves that disclosure would, in fact, be adverse to the entity." Although Island Management criticized the trial court's rejection of its various improper-purpose defenses, Island Management did not directly challenge the trial court's rulings on appeal. Thus, the alleged violation of the inspection provision of the operating agreement supported the trial court's order to permit inspection of Island Management's employee compensation information.

<u>Interpretation of Operating Agreement or Partnership Agreement</u>

Watkins & Eager, PLLC v. Lawrence, 326 So.3d 988 (Miss. 2021).

The Mississippi Supreme Court held that, under the terms of a PLLC law firm's operating agreement, an attorney member could be terminated for any reason or no reason without an official meeting, and the member was not entitled to legal protections afforded an "employee" because a PLLC member is not an employee.

After Lawrence was expelled by his law firm (with which he had practiced law for more than 40 years), he sued for wrongful termination, alleging more than thirty causes of action in addition to wrongful termination. Lawrence's claims included breach of the firm's operating agreement, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. Lawrence alleged that he had reported acts of discrimination by the firm—which employed two African American attorneys from 2017 to 2019—and that he was expelled without cause, without adequate notice, and without an opportunity to be heard. Lawrence further alleged that his expulsion was based on his reporting of illegal activities within the firm and that he was acting as a whistleblower and thus entitled to the same protections afforded to employees of businesses pursuant to *McArn v. Allied Bruce-Terminix Co., Inc*., 626 So. 2d 603, 607 (Miss. 1993). After the trial court denied the firm's motion to dismiss, the firm filed this interlocutory appeal.

The supreme court began by examining the operating agreement of the firm, which was organized as a professional limited liability company. The operating agreement provided that "[a]ll meetings shall be held at such time and place, within or without the state of Mississippi, as shall be stated in the notice of the meeting or in a duly executed waiver of notice thereof." Article 4.12 defined an action without meeting:

> Any Action required by the act to be taken at the meeting of the Members, or any action which may be taken at the meeting of the members, may be taken without a meeting, without prior notice, and without vote, if a consent or consents in writing, setting forth the actions so taken, shall be signed by sufficient members to approve the action taken and such consent shall have the same force and effect as a vote of the required number of members.

The resolution expelling Lawrence, containing the requisite consent, was attached to his complaint.

Characterizing an LLC operating agreement as a contract that should be interpreted according to contract law, the court held that the amended PLLC agreement was a valid and binding contract. The court agreed with the firm that the provisions of the operating agreement set forth above allowed the firm to terminate Lawrence for any reason or no reason at all without an official meeting and that Article 4.12 was unambiguous on its face as a matter of law. According to the court, Lawrence characterized Section 4.12 of the operating agreement as a "sinister 'dark operations clause,'" but the court said that he failed to provide any legal authority to support his claim that the clause is void or voidable. The court explained:

> Such provisions excepting in-person meetings are commonplace in limited-liability companies and corporations. *See* Miss. Code Ann. § 79-4-7.04 (Rev. 2013). At the corporate level, as provided by state law, directors and shareholders can take action by written consent without notice. ... In the case at bar, it is undisputed that Appellee had been a member of the limited-liability organization and had agreed to be bound by all provisions for years. Appellee has been a practicing attorney since 1979. Clearly, a person with his training, expertise, and reputation and cognizant of the customs, practices, usages, and terminology of limited-liability companies would know that "actions without meeting" provisions are commonplace and actions via written consent occur. There are no other reasonable ways to interpret these provisions.

The court next rejected Lawrence's argument that he was entitled to legal protection as an "employee." The court set forth Section 11.02 of the firm's operating agreement, entitled "Expulsion":

> Upon the vote of a Super Majority of the members and of a required interest, any **Equity Member** may be immediately expelled from the company. Immediately following such expulsion, the Company shall purchase and the expelled Equity Member shall sell his membership interest, effective as of the date of such Equity Member's expulsion, for the purchase price and upon the terms hereinafter set forth in Section 11.05 of the Agreement. (Emphasis added.)

The firm relied on *Bluewater Logistics, LLC, v. Williford*, 55 So. 3d 148, 151 (Miss. 2011) to support its argument that the relationship between the firm and Lawrence was not an employee-employer relationship. In *Williford*, an ousted LLC member sued the remaining members, seeking to remain a member of the LLC. The court noted that every member of an LLC is an agent for the purpose of conducting its business and affairs and concluded that LLC members cannot be fired like employees; members may only be removed pursuant to the operating agreement.

The court further stated that there were no cases permitting the expansion of *McArn v. Allied Bruce-Terminix Co., Inc*. to members of a PLLC, and the court's research did not reveal any prior decisions by the court applying *McArn* to equity members in any limited-liability organization or extending *McArn* to include other types of employment relationships. The court declined to do so in this case, saying that "[t]here are stark differences between an employee-employer relationship and the member-company relationship of a PLLC."

In a footnote, the court noted that Lawrence's remaining contract-related claims largely turned on whether the PLLC operating agreement was breached. The court stated that a party does not breach the implied covenant of good faith and fair dealing when the party's actions are "duly authorized by the contract, " and "[w]hen an express provision of the contract lists the fiduciary duties, Lawrence must establish a breach of the operating agreement to claim a breach of fiduciary duties." Because the court held that the PLLC agreement was not breached, these rules were pertinent. The court also cited case law supporting its conclusion that Lawrence's remaining tort claims failed.

In re Dimas, 14 F.4th 634 (7th Cir. 2021)

The Seventh Circuit Court of Appeals held that the written operating agreement of an LLC was not the complete agreement of the members, and the court relied on extrinsic evidence to conclude that the members impliedly agreed to equalize their capital contributions to the LLC.

In 2006, George Stergiadis, Christos Dimas, and Dean Theo formed 1600 South LLC, an Illinois LLC, to operate a fruit market. 1600 South dissolved in 2009 due to financial difficulties encountered in the 2008 recession. The operating agreement of 1600 South specified that each member held a one-third membership interest and that the members would share profits and losses according to their membership interests (i.e., equally). Additionally, the operating agreement specified that each member would make an initial capital contribution, but the blank lines preceded by a dollar sign beside each member's name in the operating agreement were left blank in the executed agreement.

Stergiadis brought suit against Dimas in 2008 for breach of contract to equalize capital contributions to 1600 South. A stay paused the litigation when Dimas filed for bankruptcy. Dimas finally received a discharge after filing his seventh bankruptcy petition; however, the bankruptcy

court reopened the bankruptcy case on a motion by the United States Trustee to recover the value of an undisclosed property. Stergiadis filed a proof of claim in Dimas's reopened bankruptcy to recover the damages sought by Stergiadis in the state litigation, and the bankruptcy court held a hearing. Notably, the bankruptcy court found that Dimas was not credible because he "may have concealed" sales proceeds from the bankruptcy court during proceedings.

The bankruptcy court heard evidence regarding contributions to 1600 South at the hearing. The evidence showed that 1600 South received a bank loan of $3,690,000 to buy and develop the property for the fruit market. Stergiadis furnished $1,058,000 in cash to 1600 South and pledged an unencumbered property to obtain a $425,000 line of credit, which was completely exhausted, and all the funds went into 1600 South. Dimas (whom the bankruptcy court found had "no credibility") testified as to amounts contributed by him and the other members to 1600 South at the closing of the $3,690,000 bank loan and his pledge of a restaurant property owned by him to secure the loan. Dimas also testified as to construction costs that he claimed he paid on behalf of 1600 South that were not recorded by the LLC's accountant as well as $32,000 in attorney's fees he paid for work related to 1600 South.

1600 South's accountant (whom the bankruptcy court found to be very credible) testified about each member's capital contributions. The ledger reflected that Dimas contributed $200,217, Theo contributed $1,094,687, and Stergiadis contributed $1,058,487. The accountant testified that Stergiadis's balance should increase by $425,000 to reflect the amount drawn on the line of credit. Additionally, the accountant testified that Theo's balance should decrease by $320,000 for unauthorized salary and an unsubstantiated contribution. In sum, the accountant testified that the members' total capital contributions were $1,483,487 for Stergiadis, $774,868 for Theo, and $200,717 for Dimas. Stergiadis's wife (whom the court found to be very credible) testified regarding records she kept of Stergiadis's contributions, her review of bank records of 1600 South, and her meeting with the accountant to discuss the records in her possession before the accountant prepared the ledger. Adding all the contributions together and dividing by three yielded an "equalized" contribution amount for each member of $819,691.

The bankruptcy court found that an implied equalization agreement concerning all capital contributions to 1600 South existed based on Dimas's choice to list in his bankruptcy a "$32,000 equalizing contribution claim as an asset against his former partners" for attorneys' fees that he paid on behalf of 1600 South. Dimas had testified that he sought equal contributions from Stergiadis and Theo for the payment based on an agreement to divide the contribution into equal shares amongst the members.

The bankruptcy court allowed Stergiadis' claim for $618,974. Dimas appealed, and the district court found that the bankruptcy court properly relied on extrinsic evidence to find an equalization agreement.

On appeal, the Seventh Circuit reviewed the bankruptcy court's factual findings for clear error and the lower courts' legal conclusions de novo. First, Dimas argued that the bankruptcy court erred by using extrinsic evidence to find an equalization agreement. Alternatively, Dimas argued that the Illinois Limited Liability Company Act governed and precluded an implied equalization agreement.

First, the Seventh Circuit found that 1600 South's operating agreement was not the complete agreement of the members and that the bankruptcy court properly considered extrinsic evidence. When a party attempts to offer extrinsic evidence to explain the intent of the parties to a written agreement, Illinois courts look to the four-corners rule and the parol evidence rule to decide whether to admit the evidence. The four-corners rule applies where the contract is facially unambiguous and

contains an express integration clause. Because the operating agreement did not contain an integration clause, the court here looked to the parol evidence rule.

To invoke the parol evidence rule, the written agreement must be a "fully integrated writing," i.e., it must be the "complete and unambiguous agreement of the parties." The lack of an integration clause and the agreement's plain language supported the court's conclusion that the agreement was not the complete expression of the members' agreement. First, the agreement stated that loans to the entity would be made "on terms and conditions to be agreed upon by [1600 South] and the Members." This language suggested an intention to reach an arrangement outside the agreement's bounds. Second, the agreement contemplated that each member would contribute a certain amount of capital but left that amount blank. Dimas pointed to a provision in the agreement that "[u]pon dissolution, the Members shall look solely to the assets of the Company for the return of his or her Capital Contribution," but the court stated that this provision did not foreclose the possibility that the members could have also agreed to equalize contributions. Therefore, the use of extrinsic evidence was appropriate.

Next, the Seventh Circuit rejected Dimas's argument that the Illinois Limited Liability Company Act prohibited an implied equalization agreement. The court pointed out that the statute only addresses "debts, obligations, or liabilities *of the company*," not the members. 805 ILL. COMP. STAT. 180/10-10(a) and (d) (emphasis added). As Stergiadis's claim sought to recover from Dimas, a member of the limited liability company, the statute did not pose an obstacle.

Dimas argued that several of the bankruptcy court's factual findings were clearly erroneous. The Seventh Circuit refused to consider Dimas's reformation and admissibility of evidence arguments because he failed to raise these arguments in the case below, but the court did consider two arguments on the bankruptcy court's factual findings. First, Dimas argued that his attempt to recover equalized contributions for attorneys' fees for 1600 South did not support the inference that the members had entered into an equalization agreement. However, testimony by Dimas, Stergiadis, and 1600 South's accountant suggested otherwise. Therefore, the Seventh Circuit rejected this argument. Second, Dimas argued that Illinois law disfavored finding an implied equalization agreement. He claimed that Illinois policy disfavoring implied covenants indicated that Illinois law disfavors implied equalization agreements. The Seventh Circuit rejected this argument because no authority supported expanding the narrow policy disfavoring finding implied covenants in express contracts to broadly disfavor any implied agreement.

Next, Dimas argued that the bankruptcy court was misinformed about the circumstances of his prior bankruptcies and thus erred in finding him not credible. The Seventh Circuit rejected this argument because the bankruptcy court found that he was not credible on the basis that Dimas failed to disclose more than $800,000 in assets in the present bankruptcy.

The court also rejected Dimas's argument that, assuming an implied equalization agreement existed, the bankruptcy court erred in calculating the value of contributions. Dimas claimed that he should have received credit for $1.2 million for pledging his restaurant property on the bank loan to 1600 South. The Seventh Circuit rejected this argument because while a line of credit on Stergiadis's property was drawn and all funds went into 1600 South, Dimas did not contribute any capital drawn from the value of his property. Dimas merely used his property as collateral on the bank loan. At the foreclosure sale, Dimas's property only sold at a value sufficient to cover its first, prior mortgage, and no excess value existed to contribute to 1600 South's bank loan. Additionally, the fact that Dimas's property sold again after the foreclosure sale for a higher value was irrelevant to whether he should receive credit for a capital contribution because none of those proceeds would have been for the benefit of 1600 South.

Finally, the Seventh Circuit also rejected Dimas's argument that the court erred in crediting Stergiadis for contributions that were absent from the accountant's general ledger. There was documentary evidence of the contributions, and Stergiadis's wife testified credibly on the matter. Dimas offered no reason why the bankruptcy court's determination was clearly erroneous; therefore, the Seventh Circuit rejected his argument regarding Stergiadis's capital contribution.

Harris v. Harris, 193 A.D.3d 457, 148 N.Y.S.3d 1 (App. Div. 1st Dept. 2021).

The court held that a provision of a Delaware LLC's operating agreement providing that membership interests may be assigned or bequeathed only to family members was enforceable.

The court described this dispute as "a dispute between the widow and marital child of the deceased (plaintiffs), and the person whom the deceased refers to as his "loving partner" and nonmarital child of the deceased (defendants-respondents) over the ownership of part of nominal defendant TJ."

The court stated that there was no issue of fact as to whether the operating agreement was an unenforceable agreement to agree because it did not leave material terms for future negotiations. According to the court, the fact that the operating agreement referred to a "formal agreement" and "a later time" was not determinative. Although the court acknowledged that the December 1994 operating agreement referred to a limited liability company or partnership to be formed to hold title to a particular property, the court stated that there was no dispute that TJ—a Delaware limited liability company—was formed on December 20, 1994.

The court characterized the operating agreement as enforceable albeit internally inconsistent. The operating agreement stated in three provisions that Steven Harris's wife, Bernice, shall succeed to his membership interest in TJ on Harris's death; however, another provision of the agreement stated that Steven may assign his interest to a family member during his life and elect a family member to be his successor after he dies. In any event, the court held that the plaintiffs were entitled to summary judgment because "Betsy Harris a/k/a Betsy Savage, despite her argument before the motion court, is not—and indeed, in the Respondents' brief does not even claim to be—a family member; although defendant Tamara Harris is a family member, her contingent remainder is not accelerated in this case because the life estate failed (*see Matter of Fischer*, 307 NY 149, 160 [1954]); and the operating agreement, which is not "an attempted testamentary disposition" (*Matter of Hillowitz*, 22 NY2d 107, 110 [1968]), prevails over the will." [The court is apparently referring to an attempt by the deceased member to leave a life estate in his LLC interest to his loving partner and the remainder to his child with the loving partner.]

The court concluded: "The provision of the operating agreement that says that membership interests can be assigned or bequeathed only to family members must be upheld (*see Achaian, Inc. v Leemon Family LLC*, 25 A3d 800, 804 n 14 [Del Ch 2011] ["(O)ne generally is entitled to select his own business associates in a closely held enterprise, like an LLC"]). Lichtenstein "should not be bound to manage and operate an LLC with a co-member with wh[om] [he] never intended or agreed to go into business" (*Eureka VIII LLC v Niagara Falls Holdings LLC*, 899 A2d 95, 115 [Del Ch 2006])."

Potter v. Potter, 252 A.3d 17 (Md. Ct. Spec. App. 2021).

The appellate court held that a member's interest in an LLC is "property" within the meaning of Maryland's testamentary and probate statutes, and a provision of an LLC operating agreement that a successor would automatically and immediately become a successor member upon the death of a member was unenforceable because it was inconsistent with the Maryland statute of wills.

James Potter owned an interest in a Maryland LLC governed by an operating agreement in which the members agreed as to who should receive each individual member's interest upon the death of that member. When James passed away, there was a dispute as to whether his interest passed to the individual designated in the LLC agreement or to his estate. The lower court determined that James's membership interest passed to the designee, and the personal representative of the estate appealed. The court phrased the one issue in this case as follows: "Is a provision in a limited liability company operating agreement that purports to transfer a member's economic interest at death enforceable even though the agreement was not executed with the formalities required in Maryland for the execution of a will?" The court answered this question "no."

Sometime after James Potter married Ruby, he acquired a membership interest in TR Steak Pasadena, LLC, a Maryland LLC. James's rights and obligations as a member of the LLC were defined by various documents that were amended over time. The relevant agreements for this case were the third amended operating agreement (the "operating agreement") and the third amended members' agreement (the "members' agreement"), both of which were executed in 2012. The operating agreement distinguished between a member's "interest," defined as "a person's share of the profits and losses of, and the right to receive distributions" from the LLC, and a member's "rights," which are the rights of a member to participate in the management and control of the company. The operating agreement provided that, on a member's death, his or her "living trust, estate, legatee or other successor in interest" will "automatically and immediately" become a "Successor Member" as long as the successor is a member of the "Permitted Group," as defined in the members' agreement.

According to the members' agreement, James was one of eleven members of the company and owned eight of the 100 outstanding "membership interest units." Although the membership agreement did not contain the referenced definition of "Permitted Group," the court stated that the members' intentions were clear based on the following provision:

> Upon the death of a Member, all of the Membership Interests of the Company owned by him shall be transferred as shown below for each Member with the voting rights attached to their Membership Interests being assigned to the Member shown.

Immediately following this paragraph, Ruby was designated as the "successor" to James's membership interest (i.e., his economic interest). James's membership voting rights were assigned to two other members of the LLC.

James's signature on the operating agreement was not witnessed. His signature on the members' agreement apparently was witnessed by one individual, but the signature was indecipherable, and the witness was not otherwise unidentified.

James and Ruby separated in 2016 and signed a separation agreement with two relevant provisions. The first was a mutual and general assignment and release of the rights of each of them to the other's property. This assignment and release was accompanied by a promise to execute and deliver any documents necessary or convenient to enable them to deal with their property as if unmarried. The second provision related specifically to James's interest in the LLC. Ruby waived "any and all interest" in James's membership interest in the LLC and promised that James "shall maintain his shares/membership interest[ ] ... free and clear of any rights, title or interest" that could be asserted by her. Whether intentionally or by oversight, James never changed his designation of Ruby as the transferee of his interest.

After his divorce from Ruby, James married Denise, and James died intestate. Denise opened a small estate and was appointed personal representative. She listed James's interest in the LLC as

an asset of the estate. Ruby brought a declaratory judgment action seeking a declaration that she was the owner of the interest as the successor named in the members' agreement. Both Denise and Ruby sought summary judgment, and the circuit court entered judgment in favor of Ruby. The circuit court understood the separation agreement to give James "absolute free will" to change the assignee of his membership interest in the event of his death, and the court also decided, based on the undisputed facts and the language of the separation agreement, that Ruby had done nothing to waive or release her right to enforce the agreement. Because Denise did not challenge these aspects of the court's reasoning on appeal, the appellate court stated that it would assume for purposes of its analysis that the circuit court's conclusions were correct.

For statutory context, the appellate court pointed out certain provisions of the Maryland Estates and Trusts Article. As a general rule in Maryland, all "property of a decedent shall be subject to the estates of decedents law." Md. Code, Est. & Trusts § 1-301. "Property" is a defined term in the statute further discussed later in the court's opinion, but the court noted that for the purposes of Maryland's testamentary and probate law, "property" includes any interest that a decedent has in real or personal property "which does not pass, at the time of the decedent's death, to another person by the terms of the instrument under which it is held, or by operation of law." Est. & Trusts § 1-101(r). Maryland's statute of wills, codified as Est. & Trusts § 4-102, states in pertinent part:

> (a) Except as provided in §§ 4-103 and 4-104 of this subtitle, every will shall be:
> (1) In writing;
> (2) Signed by the testator, or by some other person for the testator, in the testator's presence and by the testator's express direction; and
> (3) Attested and signed by two or more credible witnesses in the presence of the testator.

Denise argued that the intended effect of the relevant provisions of the operating agreement and the members' agreement was to transfer ownership of property upon the death of a member and that the members' agreement thus constituted a testamentary instrument that did not comply with Est. & Trusts § 4-102. Ruby argued that the statutory definition of "property" for the purposes of testamentary and probate law excluded James's LLC interest because it passed to her at the time of his death "by the terms of the instrument under which it is held," i.e., the operating and members' agreements. Alternatively, Ruby argued that the Maryland Limited Liability Company Act "expressly permits members of a limited liability company to agree that the membership agreement can control the disposition of a member's interest upon the member's death." Corps & Ass'ns § 4A-606. The court was unpersuaded by Ruby's arguments and stated that her policy arguments were better directed to the General Assembly.

The court organized its analysis around the following three issues: (1) whether the operating agreement and the members' agreement—when read together as they are clearly intended to be—are testamentary in nature, that is, whether they provide for a transfer of an interest in property to be effective at the death of the owner; (2) whether Maryland law permits LLC members to agree that (i) a member's interest can transfer at death to another by means of an agreement that does not satisfy the requirements of the statute of wills, and (ii) the deceased member's interest will not be an asset of the member's probate estate; and (3) whether the relevant provisions of the Estates and Trusts Article and the Corporations and Associations Article can be harmonized so that "neither statute [will] be read so as to render the other, or any portion of it, meaningless, surplusage, superfluous or nugatory."

The court discussed at some length the history of the Estates and Trusts Article (including the *Second Report of Governor's Commission to Review and Revise the Testamentary Law of Maryland, Article 93 Decedents' Estates* (1968) issued by the so-called "Henderson Commission"), the definition of "property" in the Estates and Trusts Article, and case law addressing potential exceptions to Maryland's testamentary laws. The court concluded its analysis of the first question as follows:

> Taken as a whole, the *Milholland* cases, *Jones v. Crisp*, *Collings*, *Cover* and *Carey* all stand for the principle that, absent an effective declaration of trust, a writing that purports to transfer the maker's property at death is testamentary in nature unless it is both irrevocable and based on an otherwise enforceable legal obligation whose performance is deferred during the maker's lifetime. This was the state of Maryland law at the time that Est. & Trusts § 1-102(r) was enacted. And, as the Henderson Commission Report made clear, with one exception, the definition of "property" was "intended to include, and be limited to, those assets which traditionally constituted what is sometimes called in Maryland the probate estate" in 1969. Contrary to the suggestion made by Ruby in her brief, our survey of the relevant caselaw indicates that the Court of Appeals has shown no tendency towards recognizing novel exceptions to the statute of wills.
>
> Returning to the case before us, James's designation of Ruby as his designee did not fit into the narrow confines of the exceptions to the statute of wills established by the Court of Appeals: His designation was certainly not irrevocable, nor was Ruby's status as his designated successor based upon any duty or obligation that he owed her. As long as James was alive, the membership interest was his and he could do with it what he liked without Ruby's permission. As the circuit court observed in its bench opinion, as regards Ruby, James had the "absolute free will" to terminate her expectancy interest at any time.
>
> Ruby also argues that Denise's contentions run counter to "the legal presumption 'that the parties to a contract bind not only themselves but their personal representatives.' " (quoting *United States ex rel. Wilhelm v. Chain*, 300 U.S. 31, 35, 57 S.Ct. 394, 81 L.Ed. 487 (1937)). We can dispose of this quickly. The issue in *Wilhelm* was whether the government could enforce the personal guarantee of a surety against his estate. Unsurprisingly, the Supreme Court held that the government could. *Id*. at 35–36, 57 S.Ct. 394.
>
> Ruby also points to two decisions based applying Maryland law. In *Lanham v. Amoco Oil Company*, 481 F. Supp. 405 (D. Md. 1979), the Court concluded that a franchise agreement that, by its terms, expired at the franchisee's death was not enforceable by the franchisee's estate. *Id*. at 406. In *Burka v. Patrick*, 34 Md. App. 181, 185–86, 366 A.2d 1070 (1976), this Court held that a contract between the decedent and his spouse and a third party to convey land was enforceable against the spouse and the decedent's estate.
>
> *Wilhelm*, *Lanham*, and *Burka* involve routine applications of the well-settled rule that "rights and liabilities under a contract not involving personal confidence or skill pass by operation of law to the executor or administrator of a deceased party." *Burka*, 34 Md. App. at 186, 366 A.2d 1070 (quoting BRANTLEY ON CONTRACTS 124 (2d ed. 1912)). What separates them from the case before us is that Ruby was not a party to the members' agreement and had no right to enforce it.

> This is because, in the words of the circuit court, once the separation agreement was signed, James had the "absolute free will" to designate another successor.
>
> Finally, Ruby relies on *Blechman v. Estate of Blechman*, 160 So. 3d 152 (Fla. Dis. Ct. App. 2015). In that case, the operating agreement at issue provided that a deceased member's interest in the company "shall pass to and immediately vest in [the decedent's] then living children and the issue of any deceased child per stirpes." *Id*. at 153. The issue before the appellate court was whether the membership interest was part of the decedent's estate. Our Florida colleagues held that it was not. *Id*. at 159.
>
> However, *Blechman* is of little assistance to Ruby. The limited liability company in question had been organized under the laws of New Jersey, and our colleagues from the Sunshine State relied on New Jersey law in its analysis. And it has long been the law of the Garden State that:
>
> > In New Jersey, parties may provide by contract that ownership of, or a designated right in, property may pass according to the terms of the contract at the promisor's death. ... Where supported by adequate consideration, such contracts transferring a property interest upon death are neither testamentary nor subject to the Statute of Wills, but are instead evaluated under contract law.
>
> *Id*. at 158 (citing, among other authorities, *Bower v. The Estaugh*, 146 N.J. Super. 116, 369 A.2d 20 (1977) and *Michaels v. Donato*, 4 N.J. Super. 570, 67 A.2d 911 (1949)). We have no quarrel with this interpretation of New Jersey law. However, as we have explained, the law of Maryland is different.
>
> For these reasons, we agree with Denise that James's membership interest in TR Steak was an interest in property that is subject to Maryland's testamentary and probate laws.

[Footnotes omitted.]

Turning to the second question, the court was unpersuaded by Ruby's argument that the General Assembly authorized members of Maryland LLCs to agree among themselves that Maryland's testamentary and probate laws do not apply to membership interests. Ruby relied heavily on Section 4A-102 of the Maryland LLC Act, which states that the "policy of this title is to give the maximum effect to the principles of freedom of contract and to the enforceability of operating agreements," but the court stated that Ruby ignored the Legislature's proviso that freedom of contract can be exercised "[u]nless otherwise provided in this title." The court pointed out that the powers granted to LLCs include to "[m]ake and alter operating agreements, *not inconsistent* with its articles of organization or *with the laws of this State*, for the administration and regulation of the affairs of the limited liability company[.]" Corps & Ass'ns § 4A-203(15) (emphasis added). Based on this restriction on the freedom to contract, the court disagreed with Ruby's assertion that the following provision of Corps & Ass'ns § 4A-606 was dispositive:

> Unless otherwise agreed, a person ceases to be a member of a limited liability company upon the occurrence of any of the following events:
> * * *
> (5) In the case of a member who is an individual, the individual's:
> (i) Death[.]

Ruby contended that § 4A-606 permits LLC members to include provisions in an operating agreement to vary the Act's default provision that a member's interest ceases at death. The court responded that the provision in the LLC operating agreement in this case did more than merely state that a deceased member's interest did not terminate on death; it provided for the automatic succession of the successor as long as the successor was a member of the Permitted Group. Because the Maryland statute of wills has been interpreted to mean that a contract attempting to transfer title to property upon the death of an individual is testamentary in nature unless it is both irrevocable and based on a present legal obligation whose performance is deferred during his or her lifetime, the provision of the operating agreement that stated that a successor member "shall automatically and immediately" become a member of the LLC upon the death of a member, which was not executed in compliance with Est. & Trusts § 4-102, was not authorized to be included in its operating agreement and was unenforceable. For the same reasons, the provisions of the members' agreement that purported to pass title to James's interest at his death were unenforceable.

To validate its reading of the plain language of §§ 4A-203 and -606, the court turned to the legislative history of the Maryland Limited Liability Company Act. After discussing the background of its drafting and enactment, the court concluded that "there is absolutely nothing that even remotely suggests that anyone who drafted or reviewed the legislation thought that it would give limited liability companies the right to transfer member's interest to other persons upon death without complying with the relevant provisions of the Estates and Trusts Article. We decline to equate the pervasive absence of any discussion about the relationship between the proposed Limited Liability Company Act and the Estates and Trusts Article with the notion that the General Assembly intended the Act to carve out exceptions to Est. & Trusts §§ 1-102(r) and 4-102." The court noted that the legislative history revealed that the section relied on by Ruby, Corps & Ass'ns § 4A-606, was derived from Corps & Ass'ns § 10-402, a provision of Maryland's Limited Liability Partnership Act, which has been in effect since 1982. The court stated that "[i]n the intervening thirty-nine years, there has been no reported Maryland decision that suggests that the statute created an exception of Maryland's testamentary and probate law."

Finally, the court addressed how to construe Est. & Trusts § 4-102 and Corps & Ass'ns § 4A-606 together in such a manner as to harmonize the two statutes so that no part of either statute is rendered "meaningless, surplusage, superfluous or nugatory." The court explained that Section 4A-606 permits LLC members to agree among themselves as to what should happen when a member ceases to be a member in order to avoid the difficult and contentious problems that can arise when the default rule under § 4A-606.1 comes into play. The court stated that "[w]hen, as in the present case, the members agree among themselves that they will avoid § 4A-606.1's requirements by designating a successor upon the death of a member, it is incumbent upon each member to take appropriate steps to assure that the succession will be effective. In the context of TR Steak, this means that the members (all of whom were natural persons) should have executed wills whose terms dovetailed with the provisions of the operating and members' agreements." The court stated that this was not an onerous requirement and that this approach gave significance to both § 4A-606 and Est. & Trusts § 4-102.

Ruby pointed to law review articles and commentary to provisions of the Uniform Probate Code to support her contention that there is a "national consensus that transfers at death outside of the probate system are valid without complying with the wills formalities and that a statutory exception is not necessary"; however, the court concluded that her policy arguments should be directed to the Legislature.

In sum, the court held that the membership interest and the proceeds of distributions associated with it were assets of James's estate.

Infinity Emergency Management Group, LLC v. Neighbors Health System, Inc. (In re Neighbors Legacy Holdings, Inc.), 628 B.R. 600 (Bankr. S.D. Tex. 2021).

This case involved a complicated structure (which the court characterized as "convoluted") involving multiple entities, including "series LLCs." The Trustee of the Debtors' Unsecured Creditor Trust challenged the standing of Infinity Emergency Management Group, LLC ("Infinity") to bring derivative claims, asserting that Infinity's claims sought relief for harm to debtor entities and thus belonged to the Unsecured Creditor Trust. Infinity maintained that its claims sought redress only on behalf of two "series LLCs," which were non-debtor entities (although the LLC that apparently created the series was a debtor entity). The bankruptcy court concluded that some of Infinity's claims alleged harm to debtor limited partnerships and that Infinity lacked standing as to those claims. In order to assert the remaining claims, the court concluded that Infinity would need to re-plead to make clear that the alleged harms were suffered by the series LLCs in which Infinity held interests.

The dispute in this case revolved around two of 22 free-standing emergency centers that were operated by debtor Neighbors Legacy Holdings, Inc. and its subsidiaries and affiliates (the "Neighbors Network"). Each emergency center was owned by a separate limited partnership, and each limited partnership had a 1% general partner—Neighbors GP, LLC—and a 99% limited partner—NHS Emergency Centers, LLC ("NHS"). The court stated that "NHS established individual series LLCs to operate (but not to own) each emergency center," and "each series LLC was owned by two classes of shareholders." According to the court, "[t]he Class A owners of each series LLC were to be founding members of the Neighbors Network," and "[t]he Class B owners of each series LLC were physicians that 'purchased interests in [the] profits and losses [of a] specific series LLC[ ]. ... The management and administration of each emergency center, as well as the entities associated with each center, was carried out by five other Neighbors Network affiliates.'"

The court further described the structure of the two emergency centers involved in this dispute as follows:

> Those emergency centers are NEC Eastside Emergency Center, LP and NEC Zaragoza Emergency Center, LP (together, the "Center LPs"). NHS, a Debtor entity, was the sole limited partner of both Center LPs. (ECF Nos. 59-24 at 2, 10; 61-13 at 2, 10). Each Center LP is a Debtor. (ECF No. 80 at 8–9). The series LLCs associated with the Center LPs were Series 114 – Eastside, LLC and Series 115 – Zaragoza, LLC (together, the "Series LLCs"). Neither Series LLC is a Debtor. (ECF No. 80 at 8–9). The Class A shareholder of each Series LLC was Neighbors Investment, which held a 34% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). The Class B shareholder was Infinity, which held a 65% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Investment and Infinity were the sole members of the Series LLCs. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Health provided management and administrative services to the Center LPs, the Series LLCs, and NHS. (ECF Nos. 62-12; 59-29; 59-10; 62-10; 62-24).
>
> In practical terms, the emergency centers were "brick and mortar" stores for the Neighbors Network. The Center LPs were created to own these stores. To that end, the Center LPs provided facilities for Neighbors Network physicians, who provided healthcare services to patients and generated revenue through provision of these services. NHS was created to hold the majority ownership stake in the Center LPs. NHS created the Series LLCs to oversee the day-to-day operations of the Center LPs. While the Series LLCs were created to "operate" the Center LPs, the management and administration of the Center LPs—the "nuts and bolts" of

> day-to-day operations—was entrusted to Neighbors Health (a Debtor entity). Infinity, a member of the Series LLCs, was supposed to provide physicians to staff the emergency centers in exchange for a cut of the revenue generated by the "brick and mortar" centers. Perhaps inevitably, this convoluted structure produced litigation over which entity or successor could sue for the alleged mismanagement of the Center LPs.

The court next described the process by which Infinity invested in this arrangement and highlighted certain provisions of the series agreements executed by Infinity as well as the NHS operating agreement and the Center LP limited partnership agreements.

The court characterized the "6500 Class B shares in the Series LLCs" as "ownership interests" that "were offered by NHS," and the court stated that Infinity acquired a "65% interest in both Series LLCs," each of which was created for the purpose of operating its corresponding free-standing emergency center. Infinity purchased its interests pursuant to two identical "Series Purchase Agreements," each of which reserved the profits and losses of the relevant emergency center for the corresponding series owners. The purchase agreements required Infinity to provide clinical staffing for the emergency centers, but the clinical staff members were to be employed as independent contractors of a specified Neighbors PLLC rather than as employees of the Series LLCs or any other Neighbors Network affiliate.

The "Series Agreements" executed by Infinity described the basic structure of the Series LLCs and identified the property associated with each Series LLC. Under the series agreements, Infinity acknowledged that the Series LLCs were created to operate the "Series Business[es]," which were the Center LPs. The Series LLCs were to receive "profits, losses, distributions, and other benefits received by NHS" from the Center LPs, and these "profits, losses, [etc.]" were identified as "Series Property." Infinity was entitled to receive distributions derived from the Series Property, and Neighbors Health—the manager of the Series LLCs—was responsible for making these distributions.

Along with the series agreements, the NHS Operating Agreement defined the Series Property from which Infinity was to receive distributions. The Series LLCs were established by the NHS Operating Agreement, under which NHS was authorized to acquire interests in Texas limited partnerships. NHS was to "allocate or attribute" the "profits, losses, distributions, and allocations" from the limited partnerships to the Series LLCs. Once received or "determined" by NHS, the "profits, losses, distributions, and allocations" from the limited partnerships were considered Series Property.

Under the Center LP Limited Partnership Agreements, the "income, gain, loss, deduction, and credit of the Partnership[s]" were to be allocated 1% to Neighbors GP (the general partner of each Center LP) and 99% to NHS (the limited partner of each Center LP). Additionally, partnership revenues, which included all gross receipts of the partnership received by the partnership, were to be distributed to Neighbors GP and NHS in accordance with their respective allocations. The Center LPs were the "Series Business[es]" from which NHS was supposed to receive the "profits, losses, distributions, and other benefits," which were to be distributed to the Series LLCs.

Four years after Infinity purchased its interests in the Series LLCs, certain entities in the Neighbors Network filed for Chapter 11 relief. The Center LPs and the general and limited partners of the Center LPs, including NHS, were debtors. Neither Neighbors Investment (the Class A interest owner of the Series LLCs) nor the Series LLCs were debtors. [Interestingly, the court did not address whether the series should be included as debtors by virtue of NHS's status as a debtor (since

the series that were created by NHS would not actually be separate entities from NHS under Texas law).]

At issue in this case was whether Infinity could pursue derivative claims filed against Neighbors Health and Neighbors Health's directors and officers or whether the claims belonged to the Unsecured Creditor Trust. Infinity asserted its claims on behalf of the Series LLCs based on alleged breaches of fiduciary duty, abuses of control, gross mismanagement, and waste of corporate assets by Neighbors Health and its officers and directors. The wrongs of which Infinity complained stemmed from the directors' and officers' alleged failure to "properly oversee the operations and finances of" the Series LLCs. Infinity based the derivative claims on the defendants' actions that caused: (1) the Center LPs to enter into real property leases at above market rates; (2) Series LLC funds to be held in Center LP accounts; (3) limited partner shares of the Center LPs to be wrongly collateralized; (4) fees billed by the Center LPs to be held in Center LP accounts and never "pushed back" to the Series LLCs; (5) physician fees billed by the physicians to be held and distributed to entities other than the Series LLCs; and (6) Series LLC funds to be transferred to other "unprofitable series entities." Infinity asserted that these actions resulted in losses of revenue and profit to the Series LLCs, but the Creditor Trustee argued that the Center LPs, rather than the Series LLCs, suffered the harm alleged. The court stated that the core of the issue was which entity owned the profits that were diminished by the defendants' alleged mismanagement. Infinity claimed that the non-debtor Series LLCs owned the business operations of the emergency centers and that it was thus the Series LLCs' profits that were impaired by the mismanagement, but the Creditor Trustee contended that the Center LPs associated with the emergency centers owned the centers' operations and suffered the loss of profits, thus vesting claims for redress in the debtor Center LPs.

The court discussed at length the "web of agreements" defining what the Series LLCs owned. Although Infinity contended that the agreements clearly established that the Series LLCs owned the emergency centers' business operations, and, by implication, the profits from those business operations, the court agreed with the Creditor Trustee that the Series LLCs only had an interest in distributions from Center LP profits. According to the court, the agreements made clear that certain property identified in Infinity's complaint was, at the time it was damaged, owned by the Center LPs. Because this alleged damage occurred while the property was owned by the Center LPs, the Trustee was vested with the exclusive right to seek redress for this damage. Specifically, Infinity did not have standing to seek redress for the defendants' actions that caused: (1) the Center LPs to enter into real property leases at above market rates; (2) Series LLC funds to be held in Center LP accounts; and (3) fees billed by the Center LPs to be held in Center LP accounts and never "pushed back" to the Series LLCs.

The court concluded that it was unclear whether Infinity had a viable derivative claim based on the three remaining alleged harms, i.e., that the defendants caused: (1) physician fees billed by the physicians to be held and distributed to entities other than the Series LLCs; (2) Series LLC funds to be transferred to other "unprofitable series entities;" and (3) limited partner shares of the Center LPs to be wrongly collateralized. As to the first two of these harms, Infinity's complaint did not make clear whether the Series LLCs owned the physician fees and the funds that were allegedly wrongfully transferred. As to the claim that Center LP shares were wrongfully collateralized, Infinity's failure to specify whether the defendants were acting as managers of the Series LLCs or of NHS was significant in that the series agreement contained a provision by which the members appeared to give NHS the right to encumber the Series Property, including Center LP shares acquired by NHS and allocated to the Series LLCs. Nevertheless, the court stated that Infinity might have a contractual claim based on the defendants' "wrongful collateralization" based on the management agreement between the Series LLC and Neighbors Health, which restricted Neighbors Health's

ability to borrow money or execute promissory notes on the Series LLCs' behalf. Because Infinity's complaint did not make clear its standing to pursue these claims, the court stated that Infinity must re-plead its allegations as to these claims.

McWhinney Centerra Lifestyle Center, LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC, 486 P.3d 439 (Colo. App. 2021).

Applying Delaware law, the court held that the managing member of an LLC owed and breached the fiduciary duties of loyalty and care. Applying Colorado law to the intentional tort claims asserted, the court declined to follow prior Colorado appellate decisions and held that the economic loss rule did not bar the intentional tort claims.

This dispute arose out of a failed joint venture to build and operate an upscale shopping center (the Shops) in Loveland. In 2004, McWhinney Holding Company LLLP (McWhinney) and Poag and McEwen Lifestyle Centers, LLC (PMLC), through their subsidiaries McWhinney Centerra Lifestyle Center LLC (MCLC) and Poag & McEwen Lifestyle Centers-Centerra LLC (P&M), respectively, formed Centerra LLC to develop and operate the Shops. MCLC provided the capital, land, and an established public-private partnership with city and county entities for infrastructure financing. P&M was the managing member of the joint venture.

The operating agreement of Centerra LLC required P&M to obtain a construction loan for Centerra LLC and then a permanent loan before the maturity of the construction loan. In 2005, P&M obtained a construction loan for $116 million in accordance with the terms of the operating agreement, and the Shops opened. In 2006, P&M purchased a $155 million forward swap on behalf of Centerra LLC without obtaining a permanent loan. The forward swap was an agreement between Centerra LLC and a bank to exchange interest in 2008 at a rate of 5.4125 percent. In 2007, P&M entered into a $40 million mezzanine loan agreement. The district court found that P&M used the $40 million mezzanine loan for personal interests—for Dan and Josh Poag to buy out their co-founder— and that P&M intentionally concealed the buyout and its intention to use these self-dealings to fund it. The district court further found that because of the impending cost of the forward swap and P&M's desire to pay off the mezzanine loan, P&M did not seek a permanent loan below $155 million, despite only needing $116 million to refinance the construction loan. Additionally, the court found P&M did not seek permanent financing after 2007. Centerra LLC was forced to pay $7.5 million to settle the forward swap, and P&M never obtained permanent financing.

In mid-2008, the real estate market collapsed, and Centerra LLC defaulted on its construction loan. Ultimately, the lender foreclosed on the Shops.

In 2011, after the joint venture failed, MCLC sued P&M, asserting breach of the operating agreement and numerous tort claims. The district court dismissed all the tort claims under the economic loss rule. In 2014, on interlocutory appeal, a division of the appellate court affirmed the dismissal of four of the claims based on the economic loss rule, and reinstated the other three claims. In 2017, in light of a 2016 Colorado Supreme Court decision, MCLC moved for reconsideration of the dismissal order as to three of its tort claims. The district court denied the motion, and the case was tried in a thirteen-day bench trial, after which the district court concluded P&M breached both fiduciary duties and contractual obligations under the operating agreement. The district court awarded $42 million in damages to MCLC plus interest.

On appeal, P&M contended that the district court improperly (1) imposed fiduciary duties on P&M, (2) found that P&M breached its obligations under the operating agreement, and (3) calculated damages. MCLC cross appealed complaining of the district court's dismissal of its intentional tort claims based on the economic loss rule.

The court of appeals applied Delaware law to the issues raised by P&M because the parties agreed in the operating agreement that Delaware law would apply.

The court started its analysis by deciding whether P&M owed fiduciary duties to MCLC under the operating agreement. The court stated that "Delaware LLC managers owe traditional fiduciary duties of loyalty and care to the LLC and its managers [sic]" unless the LLC agreement expressly eliminates those duties. P&M argued that the operating agreement was drafted in such a way that it eliminated fiduciary duties, but the court found no such plain and unambiguous intent. In fact, the court stated that the operating agreement contemplated P&M's duties as the manager and a member by providing, in relevant part, that:

> • P&M "will owe a duty in carrying out its duties and responsibilities under this Agreement of good faith, loyalty, and fair dealing to" Centerra LLC;
> • P&M "shall manage or cause the affairs of the Company to be managed in a prudent and businesslike manner" but "shall not be restricted in any manner from participating in any other business activities, notwithstanding the fact that the same might be competitive with the business of [Centerra LLC]";
> • "[i]n carrying out its powers and duties hereunder, [P&M] shall exercise its best efforts, [and] shall owe a duty of good faith and fair dealing to [Centerra LLC] and to [MCLC]"; and
> • P&M "shall not be liable to [Centerra LLC] or [MCLC] for any actions taken on behalf of [Centerra LLC] in good faith and reasonably believed to be in the best interest of [Centerra LLC] or for errors of judgment made in good faith," but shall be liable to Centerra LLC and MCLC for "actions and omissions involving actual fraud, gross negligence, or willful misconduct or from which such Member derived improper personal benefit."

The appellate court agreed with the district court that these provisions meant P&M owed fiduciary duties of care and loyalty to Centerra LLC and MCLC. Rather than eliminating fiduciary duties, the court said the operating agreement itself provided for the fiduciary duties of care and loyalty owed by P&M to Centerra LLC and MCLC.

Additionally, the court pointed out that the operating agreement provided that P&M shall be liable for actions or omissions involving "actual fraud, gross negligence, or willful misconduct or from which [P&M] derived improper personal benefit"; therefore, the agreement assumed that those obligations existed by virtue of fiduciary duties. The court also disagreed with P&M that its duty of loyalty to MCLC was eliminated or significantly reduced by a provision in the operating agreement under which P&M "shall not be restricted in any manner from participating in any other business activities, notwithstanding the fact that the same may be competitive with the business of the company." The court agreed with the district court that this language modified P&M's duty of loyalty but did not displace or eliminate it. Additionally, the agreement provided for relief to MCLC for "actions or omissions involving willful misconduct or from which [P&M] derived improper personal benefit," which the court characterized as liability stemming from an assumed duty of loyalty.

The court next rejected P&M's contention that the district court erred in finding that P&M breached the operating agreement on multiple occasions, including when it (1) purchased the forward swap on behalf of Centerra LLC, (2) entered into the $40 million mezzanine loan, and (3) failed to secure permanent financing.

In finding that P&M breached its obligations under the operating agreement when it purchased the $155 million forward swap on behalf of Centerra LLC, P&M argued that the district court contravened the business judgment rule by improperly substituting its own judgment for P&M's. The court cited corporate case law in describing the Delaware business judgment rule, duty of care, and duty of loyalty, and the court stated that it was unconvinced by P&M that the corporate fiduciary duties imposed in the cases cited are distinguishable from the "traditional fiduciary duties" imposed on managers of LLCs.

Although the district court found that P&M's breach of the operating agreement when it purchased the forward swap on behalf of Centerra LLC was not a material breach of the operating agreement (because it did not go to the "root or essence" of the agreement), the district court found that P&M was nonetheless liable to MCLC because P&M derived an improper personal benefit from the swap by using it "as a tool to obtain the $40 million mezzanine loan." In this regard, the district court found the business judgment rule did not apply because MCLC demonstrated that P&M's decision to enter the forward swap was a breach of P&M's fiduciary duties of loyalty and care. More specifically, the district court found the swap breached P&M's duties of loyalty and care because the forward swap was for the individual benefit of P&M, the Poags, and PMLC, as it was "an effort by Josh Poag to convince private investors that he had or was close to permanent financing for $155 million so he could obtain $40 million to purchase [the co-founder's] share" of their businesses. The district court additionally found that P&M breached its duty of care to act in a "prudent and businesslike manner" in its management of Centerra LLC based on expert testimony at trial that the swap was a "cart before the horse ... kind of situation" that was "very risky" and "made no sense" and Josh Poag's own testimony that forward swaps generally were "aggressive" and "unnecessarily risky." Based on the district court's findings, supported by the record, the appellate court found no error in the district court's determination that the business judgment rule was rebutted as to the forward swap.

The court next addressed P&M's contention that the district court erred by finding P&M materially breached the operating agreement when it obtained the mezzanine loan. The appellate court concluded that the record supported the district court's finding that "P&M's entry into, and concealment of, the [m]ezzanine [l]oan constituted material breaches of its fiduciary duties to MCLC and Centerra LLC" by improperly giving the lending bank "significant authority over the management of Centerra LLC and the Shops" without MCLC's consent and by acting "solely for the benefit of [P&M] and ... not in the best interest of Centerra LLC."

The district court also found that P&M violated its duties of fair dealing and candor in several respects, which constituted potential "willful misconduct," "improper personal benefit," or "fraud," by purposefully concealing and misrepresenting material facts, including the purpose of the loan (which was to secretly buy out their co-founder's interest) and significant details, including the effect of the loan on Centerra LLC's operations and the loan's negative effect on P&M's ability to obtain permanent financing (all permanent financing offers P&M received after 2007 were insufficient to pay off both the mezzanine loan and the construction loan). The court pointed out that the operating agreement "explicitly provided that P&M owed a duty of fair dealing to MCLC, which necessarily imposed a duty of candor—sometimes referred to as a duty of disclosure. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983)." The appellate court stated that "the district court made detailed findings—all supported by the record—that P&M purposefully withheld, concealed, and misrepresented material facts about the loan and its effect on Centerra LLC's operations in order to get MCLC's consent." Thus, the court affirmed the district court's finding that P&M breached its duty of fair dealing to MCLC in obtaining the mezzanine loan.

The court of appeals next addressed P&M's contention that the district court erred when it concluded that P&M breached its obligations to MCLC by failing to obtain or provide notice of a permanent loan before the construction loan's maturity date. The court discussed the provisions of the operating agreement and the arguments made by P&M and concluded that the district court properly found that P&M breached its contractual obligations in this regard.

Finally, the court analyzed the district court's calculation of damages and rejected P&M's arguments that the district court erred in calculating the damages related to the swap and MCLC's lost equity.

MCLC's cross appeal dealt with the district court's dismissal of MCLC's common law intentional tort claims after applying the economic loss rule. While Delaware law applied to the breach-of-contract claims in this case, the court noted that Colorado law applied to MCLC's tort claims. Based on recent decisions by the Colorado Supreme Court, MCLC argued that the appellate court erred in dismissing its tort claims in the previous interlocutory appeal in this case. Departing from prior decisions of other divisions of the appellate court, including the interlocutory appeal in this case, the court agreed with MCLC and concluded that in most instances the economic loss rule will not bar intentional tort claims. Based on the Colorado Supreme Court's decisions in *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150 (Colo. 2019) (concluding that the economic loss doctrine does not bar statutory tort claims and stating that "the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation") and *Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603 (Colo. 2016) (concluding that the economic loss rule did not necessarily apply where a party's tort claims were related to contractual obligations, but the tort claims flowed from an independent duty under tort law), the court concluded that the district court erred when it applied the economic loss rule to bar MCLC's common-law intentional tort claims of fraudulent concealment, intentional interference with contractual obligations, and intentional inducement of breach of contract because each of these claims stems from a duty based in tort law independent of the operating agreement. The court agreed with the district court, however, that the economic loss rule barred MCLC's civil conspiracy claim because MCLC alleged P&M and PMLC conspired to breach the agreement, and their duty not to conspire to breach the contract that they signed stemmed solely from the agreement itself.

Bismarck Financial Group, LLC v. Caldwell, 950 N.W.2d 155 (N.D. 2020).

Based on the provisions of an LLC's operating agreement, the court affirmed dismissal of claims for damages against a dissociating member that were premised on the dissociating member's alleged obligation to pay his pro rata share of various company expenses and an alleged increase of the remaining members' obligation to make additional capital contributions. The court reversed dismissal of claims against the dissociating member for other unidentifiable damages allegedly caused by the member's wrongful dissociation.

James Caldwell had been a member of Bismarck Financial Group, LLC ("BFG") and disassociated from the company in 2019. BFG and its members brought suit against Caldwell, requesting a declaration that his disassociation was wrongful and seeking damages.

Caldwell moved to dismiss for failure to state a claim upon which relief can be granted under North Dakota Rule of Civil Procedure 12(b)(6).The district court granted his motion, assuming that Caldwell had wrongfully disassociated, but concluding that BFG had failed to state any cognizable claim for damages.

First, BFG sought to hold Caldwell liable for a share of various expenses (rent, office overhead expenses, and employee salary). BFJ relied on Section 3.03 of BFG's operating agreement, which stated "Net Income and Net Losses shall be allocated annually among the Members based on

their Percentage Interests." The operating agreement defined "Net Income" and "Net Losses" as "the profits and losses of the Company, as the case may be, as determined for federal income tax purposes as of the close of each of the fiscal years of the Company." BFG asserted that company expenditures qualified as "Net Losses." The court concluded that the various expenses sought were factors in determining "Net Income" and "Net Losses" but existed separate and apart from "Net Income" and "Net Losses." Therefore, BFG's first claim failed as a matter of law.

Second, BFG argued that Caldwell's wrongful dissociation injured each remaining member by increasing their proportionate obligation to contribute capital to the company. However, Section 3.08 of BFG's operating agreement stated: "No Member shall have any obligation to make additional capital contributions to the Company or to fund, advance, or loan monies which may be necessary to pay deficits, if any, incurred by the Company during the term hereof." As no member had any obligation to contribute capital, BFG's second claim failed as a matter of law.

Finally, BFG claimed that it was "statutorily entitled" to any damages caused by Caldwell's dissociation. The current North Dakota Uniform Limited Liability Company Act, N.D.C.C. § 10-32.1-47(3), povides: "A person that wrongfully dissociates as a member is liable to the limited liability company and ... to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or other liability of the member to the company or the other members." Under North Dakota's rules of civil procedure, a claim only requires "(1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for the relief sought, which may include relief in the alternative or different types of relief." Thus, the allegation that Caldwell's withdrawal caused additional, currently unidentifiable damages, if proved, was sufficient to support recovery against Caldwell, and the district court erred in dismissing BFG's third claim.

B&S MS Holdings, LLC v. Landrum, 302 So.3d 605 (Miss. 2020).

The Mississippi Supreme Court held that an LLC operating agreement may provide for mandatory arbitration of a claim for judicial dissolution, notwithstanding that the LLC statute states that the operating agreement may not waive the power of a court to decree dissolution, because the Mississippi LLC statute contains a provision that allows members to agree to arbitrate internal affairs matters. The court further found that the 51% member waived its right to seek judicial dissolution in the operating agreement and the member's claim fell within the scope of the arbitration provision in the operating agreement.

The operating agreement of Livingston Holdings, LLC (Livingston), a Mississippi LLC, contained the following arbitration provision in article XIV:

> Except for the injunctive relief provided in Article IX, any dispute, claim, or controversy in connection with or arising under this Operating Agreement, its construction, existence, interpretation, validity, or any breach hereof, which cannot be amicably settled between the parties, shall be finally and exclusively resolved by arbitration under the Rules of Arbitration of the American Arbitration Association then prevailing .... THE PARTIES HEREBY EXPRESSLY WAIVE ANY RIGHT TO TRIAL BY JURY OR CLASS TREATMENT OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE BREACH THEREOF, PROVIDED THAT NOTHING IN THIS AGREEMENT SHALL PRECLUDE A PARTY FROM SEEKING TO COMPEL ARBITRATION IN A STATE OR FEDERAL COURT OF COMPETENT JURISDICTION.

The members of Livingston at the time of this dispute were B&S MS Holdings, LLC (B&S), the 51% member, and Jill Landrum, the 49% member. In 2018, B&S filed a complaint to dissolve Livingston under Mississippi Code Section 79-29-803, alleging that it was not reasonably practicable to carry on the business in conformity with the operating agreement due to irreconcilable differences between the members and the alleged inability of Livingston to continue its business absent recovery for alleged fraudulent transactions that Landrum opposed pursuing.

Landrum filed a motion to dismiss the complaint for dissolution or to compel arbitration. Landrum relied on provisions of the operating agreement specifying that an affirmative "Majority Vote" of the members at a meeting where a quorum was present constituted the act of the members and that Livingston would be dissolved on the date specified in the certificate of formation or the affirmative "Majority Vote" of the members. No meeting or vote was held, and arbitration had not been commenced.

B&S opposed Landrum's motion on the basis of Mississippi Code Sections 79-29-123(3) and 79-29-803(1). Mississippi Code Section 79-29-123(3) states:

> (3) Except as provided in this subsection (3), the provisions of this chapter that relate to the matters described in paragraphs (a) through (d) of subsection (1) of this section may be waived, restricted, limited, eliminated or varied by the certificate of formation or operating agreement. In addition to the restrictions set forth in subsections (4) and (5) of this section, the certificate of formation or the operating agreement may not:
>
> ....
>
> (m) Vary the power of a court to decree dissolution in the circumstances specified in Section 79-29-803(1) ....

Mississippi Code Section 79-29-803(1) states:

> (1) On application by or for a member, the chancery court ... may decree dissolution of a limited liability company:
>
> (a) Whenever it is not reasonably practicable to carry on the business in conformity with the certificate of formation or the operating agreement ....

The chancery court found that under Mississippi Code Section 79-29-1211, LLC members have a right to agree to arbitration, and the court ordered the parties to conduct binding arbitration. Section 79-29-1211 provides in part:

> Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in this state, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of this state with respect to matters relating to the organization or internal affairs of a limited liability company.

The court noted that valid arbitration agreements are favored under Mississippi law and that an LLC's "operating agreement is a contract, subject to contract law."

The court cited prior case law characterizing judicial dissolution as an "extreme" remedy that should be exercised "sparingly" and described Landrum's argument that the relevant statutory criteria had not been met in this case. Landrum alleged that B&S had failed to make any allegations to sufficiently show why arbitration would be impracticable inasmuch as Livingston's operating

agreement defined a "Majority Vote" as "a vote of the Members holding at least fifty one percent (51%) of the Membership Interest then owned by the Members," as well as providing that dissolution of the company shall occur "by the affirmative Majority Vote of the Members." Thus, Landrum argued that B&S, which held a 51% interest, could have unilaterally dissolved Livingston by calling for a vote on dissolution and exercising its vote in favor of dissolution.

The supreme court stated that the trial court correctly found that members of a Mississippi LLC have a right to agree to binding arbitration and that the members of Livingston agreed to an arbitration provision in the operating agreement. The court pointed out that Mississippi Code Section 79-29-1201 specifically states that "[t]he rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter" and that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements." Further, the court relied on Section 79-29-1211 (quoted above),which refers to the ability of members to agree to arbitrate matters relating to internal affairs.

The court summed up its analysis as follows: "In accordance with the operating agreement, dissolution of the company may occur through the majority vote of the members. B&S did not show that it is unable to comply with the operating agreement's terms and that judicial dissolution was required in this case. Further, although Section 79-29-123 states that an operating agreement may not vary the court's power to decree dissolution in certain circumstances, Section 79-29-803(1) clearly states that a trial court may decree dissolution of a limited liability company. Miss. Code Ann. § 79-29-803(1) (Rev. 2013). It does not state that a trial court must decree dissolution of the company. Thus, the trial court correctly found that the arbitration provision contained in the operating agreement prevailed."

The court next addressed Landrum's argument that, regardless of the arbitration agreement, the members each waived their right to seek judicial dissolution under article XVI, section 16.2, of the operating agreement, which provided that "[e]ach Member irrevocably waives during the term of the Company any right that he may have to maintain any action for a decree of dissolution of the Company or for partition with respect to the property of the Company." The court stated that it was obligated to enforce the agreement based on contract case law and Section 79-29-1201, which provides that the policy of the LLC statute is "to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements." Because B&S clearly and unambiguously agreed to waive its right to maintain an action for judicial dissolution, the court held that the trial court correctly ordered the parties to conduct binding arbitration in accordance with the provisions of the operating agreement.

Alternatively, B&S argued that even without the prohibition of Section 79-29-123(3) against an operating agreement's contracting away the right of a party to seek judicial dissolution of an LLC, judicial dissolution was outside the scope of the arbitration agreement. B&S relied on two Georgia cases, but the court distinguished the Georgia cases on the basis that the parties in this case expressly agreed to waive their right to judicial dissolution in the company's operating agreement. The arbitration provision contained in the Livingston operating agreement provided that "any dispute, claim, or controversy in connection with or arising under this Operating Agreement, its construction, existence, interpretation, validity, or any breach hereof, which cannot be amicably settled between the parties, shall be finally and exclusively resolved by arbitration ...." Because the parties agreed to waive their right to judicial dissolution and because dissolution of the company by the majority vote of the members was provided for in the operating agreement, the court concluded that dissolution fell directly under the arbitration provision.

A dissenting justice argued that the plain language of the LLC statute precludes an operating agreement from varying the power of the chancery court to decree dissolution when the chancellor

finds that it is not reasonably practicable to carry on the business in conformity with the operating agreement. The dissenting justice would have held that the parties' waiver of the right to seek judicial dissolution did not include a waiver of their right to judicial dissolution under the specific circumstance identified in Section 79-29-803(1), and would have further held that the provision for arbitration agreements in Section 79-29-1211 does not abrogate the directive in Section 79-29-123(3) that dissolution under 79-29-803(1) is for the chancery court.

Admission of Member

Bearce v. Yellowstone Energy Development, LLC, 963 N.W.2d 299 (N.D. 2021).

The North Dakota Supreme Court declined to extend the duties owed by directors of a close corporation to minority shareholders to the managing members or board of an LLC under the Uniform Limited Liability Company Act. Because the plaintiff members had not yet been issued their units and were not yet members at the time the board voted to apply a 3:1 multiplier to other seed money investors, no fiduciary duty was owed to the plaintiffs at the time of the vote.

In 2006, representatives of a business entity that would eventually become Yellowstone Energy Development, LLC (Yellowstone) went to the home of Daniel and Debra Bearce seeking to purchase 170 acres of land owned by the Bearces, and Yellowstone obtained an exclusive option to purchase the property. In 2008, Yellowstone exercised its option to purchase the land, and the parties entered into a contract for deed. In 2009, Yellowstone and the Bearces modified the contract for deed to alter some of the payment terms. Both the original contract for deed and the 2009 modified contract for deed included a provision for the payment of a portion of the purchase price with $100,000 worth of "shares" of a contemplated ethanol plant. Yellowstone later abandoned its plan to build an ethanol plant but negotiated a long-term lease with a third party to build an oil train loading facility on the Bearce's land. In 2010, Yellowstone notified the Bearces that $100,000 in "value" would be issued despite Yellowstone's abandonment of the plan to build an ethanol plant. Yellowstone informed the Bearces that ownership units had not yet been issued and explained that the Bearces would receive their ownership interest "at the time shares are issued to all its members." Shortly after receiving this information, the Bearces deeded the property to Yellowstone. In 2011, the Yellowstone board of directors approved a multiplier of three units per $1 invested for individuals who had provided initial cash investment in Yellowstone. The Bearces' interest in Yellowstone was not given the 3:1 multiplier. In 2012, the board approved a second multiplier of three units per $1 invested for individuals who had initially provided cash investment in Yellowstone. The Bearces' interest in Yellowstone was not given the second 3:1 multiplier. Ownership units in Yellowstone were allocated and placed on a ledger sometime after the board approved the second multiplier. After receiving a "unit ledger" indicating their interest in Yellowstone would not receive the 3:1 multiplier, the Bearces objected, but Yellowstone refused to apply the 3:1 multiplier to the Bearces' interest in Yellowstone.

The Bearces sued Yellowstone, asserting claims for breach of fiduciary duty, fraudulent inducement, and breach of contract. The trial court granted summary judgment in favor of Yellowstone on all the claims, but the dismissal of the Bearces' claim for breach of fiduciary duty was reversed in a prior appellate opinion. On remand, a bench trial was held on the claim for breach of fiduciary duty. The district court concluded that Yellowstone did not owe them a fiduciary duty and that, if a duty was owed, the Yellowstone board did not breach its fiduciary duty.

The Bearces argued that those who represented Yellowstone during negotiations for the sale of the property owed them a fiduciary duty as promoters of Yellowstone, but the Bearces did not

raise this issue in the court below, and the supreme court held that they could not raise the issue for the first time on appeal.

The Bearces also argued that the board owed them a fiduciary duty to act with good faith because Yellowstone is a closely held company and they were unitholders at the time the board voted on the 3:1 split. The court noted that a "closely held limited liability company" is defined as a company "that does not have more than thirty-five members" (N.D.C.C. § 10-32-02(10), now codified at N.D.C.C. § 10-32.1-02(7)), and the unit ledger showed 23 members of Yellowstone. The court pointed out, however, that the Bearces cited no statutory provision providing for fiduciary or other duties applicable to closely held limited liability companies. The court acknowledged that duties to minority shareholders are imposed on directors of a close corporation, but declined to extend that principle to LLCs:

> "We have recognized that N.D.C.C. ch. 10-19.1 provides significant protection for minority shareholders in a close corporation." *Brandt v. Somerville*, 2005 ND 35, ¶ 7, 692 N.W.2d 144 (citing *Fisher v. Fisher*, 546 N.W.2d 354, 358 (N.D. 1996)). We have "said N.D.C.C. ch. 10-19.1 'imposes a duty upon officers, directors, and those in control of a corporation to act in good faith, and affords remedies to minority shareholders if those in control act fraudulently, illegally, or in a manner unfairly prejudicial toward any shareholder.' " *Id*. (quoting *Lonesome Dove Petroleum, Inc. v. Nelson*, 2000 ND 104, ¶ 30, 611 N.W.2d 154). The Bearces provide no authority, and we can find none, where a court has extended the duties that directors of a corporation owe to minority shareholders in a close corporation to the managing members or board of a limited liability company under the Uniform Limited Liability Company Act. *See Doherty v. Country Faire Conversion, LLC*, 2020 IL App (1st) 192385, ¶¶ 41-47, 446 Ill.Dec. 420, 170 N.E.3d 589 (concluding nonmember may not bring breach of fiduciary claim against a limited liability company or its manager under Uniform Limited Liability Company Act); Revised Unif. Ltd. Liab. Co. Act § 409 cmt. (distinguishing duties owed by members of limited liability company from fiduciary duties that arise in other contexts). In the absence of a statutory directive, we decline to extend the duties under law applicable to close corporations to closely held limited liability companies.

The court next concluded: "Because only a member can sue for the relief sought here, and because the Bearces did not become members until December 2012, Yellowstone did not owe the Bearces a fiduciary duty prior to that time. The Board voted on the 3:1 multiplier for the seed money investors in December 2011 and October 2012, prior to the Bearces being issued their units. The Bearces have failed to show that, at the time the Board voted on the multipliers, the Board owed them a fiduciary duty that was breached by the passage of the multiplier." Because the date the Bearces acquired their interest in Yellowstone and became members was a finding of fact, the court reviewed the finding under the clearly erroneous standard. Under the North Dakota LLC statute, a person becomes a member of an LLC as provided in the operating agreement. The operating agreement (which Debra Bearce testified they never saw and never asked to see) stated that a person did not become a member of Yellowstone until that person was "listed with the appropriate number of Units on the Unit Ledger." The only Unit Ledger in which any member's units, including the units of the Bearces, were listed was the Unit Ledger issued in December of 2012. The 2010 letter sent to the Bearces prior to the conveyance of their property stated that their units would be issued "at the time shares [sic] are issued to all [Yellowstone's] members" and stated that Yellowstone had not yet

issued units to its members. The Bearces presented no evidence that any units had been allocated prior to December 2012, and Daniel Bearce testified that they did not receive their units until December 2012 and did not believe they were members of Yellowstone until that time. Thus, the court concluded that the district court's finding that the Bearces did not acquire their interest in Yellowstone until December 2012 was not clearly erroneous.

Expulsion or Withdrawal of Member

Watkins & Eager, PLLC v. Lawrence, 326 So.3d 988 (Miss. 2021).

The Mississippi Supreme Court held that, under the terms of a PLLC law firm's operating agreement, an attorney member could be terminated for any reason or no reason without an official meeting, and the member was not entitled to legal protections afforded an "employee" because a PLLC member is not an employee.

After Lawrence was expelled by his law firm (with which he had practiced law for more than 40 years), he sued for wrongful termination, alleging more than thirty causes of action in addition to wrongful termination. Lawrence's claims included breach of the firm's operating agreement, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. Lawrence alleged that he had reported acts of discrimination by the firm—which employed two African American attorneys from 2017 to 2019—and that he was expelled without cause, without adequate notice, and without an opportunity to be heard. Lawrence further alleged that his expulsion was based on his reporting of illegal activities within the firm and that he was acting as a whistleblower and thus entitled to the same protections afforded to employees of businesses pursuant to *McArn v. Allied Bruce-Terminix Co., Inc*., 626 So. 2d 603, 607 (Miss. 1993). After the trial court denied the firm's motion to dismiss, the firm filed this interlocutory appeal.

The supreme court began by examining the operating agreement of the firm, which was organized as a professional limited liability company. The operating agreement provided that "[a]ll meetings shall be held at such time and place, within or without the state of Mississippi, as shall be stated in the notice of the meeting or in a duly executed waiver of notice thereof." Article 4.12 defined an action without meeting:

> Any Action required by the act to be taken at the meeting of the Members, or any action which may be taken at the meeting of the members, may be taken without a meeting, without prior notice, and without vote, if a consent or consents in writing, setting forth the actions so taken, shall be signed by sufficient members to approve the action taken and such consent shall have the same force and effect as a vote of the required number of members.

The resolution expelling Lawrence, containing the requisite consent, was attached to his complaint.

Characterizing an LLC operating agreement as a contract that should be interpreted according to contract law, the court held that the amended PLLC agreement was a valid and binding contract. The court agreed with the firm that the provisions of the operating agreement set forth above allowed the firm to terminate Lawrence for any reason or no reason at all without an official meeting and that Article 4.12 was unambiguous on its face as a matter of law. According to the court, Lawrence characterized Section 4.12 of the operating agreement as a "sinister 'dark operations clause,'" but the court said that he failed to provide any legal authority to support his claim that the clause is void or voidable. The court explained:

> Such provisions excepting in-person meetings are commonplace in limited-liability companies and corporations. *See* Miss. Code Ann. § 79-4-7.04 (Rev. 2013). At the corporate level, as provided by state law, directors and shareholders can take action by written consent without notice. ... In the case at bar, it is undisputed that Appellee had been a member of the limited-liability organization and had agreed to be bound by all provisions for years. Appellee has been a practicing attorney since 1979. Clearly, a person with his training, expertise, and reputation and cognizant of the customs, practices, usages, and terminology of limited-liability companies would know that "actions without meeting" provisions are commonplace and actions via written consent occur. There are no other reasonable ways to interpret these provisions.

The court next rejected Lawrence's argument that he was entitled to legal protection as an "employee." The court set forth Section 11.02 of the firm's operating agreement, entitled "Expulsion":

> Upon the vote of a Super Majority of the members and of a required interest, any **Equity Member** may be immediately expelled from the company. Immediately following such expulsion, the Company shall purchase and the expelled Equity Member shall sell his membership interest, effective as of the date of such Equity Member's expulsion, for the purchase price and upon the terms hereinafter set forth in Section 11.05 of the Agreement. (Emphasis added.)

The firm relied on *Bluewater Logistics, LLC, v. Williford*, 55 So. 3d 148, 151 (Miss. 2011) to support its argument that the relationship between the firm and Lawrence was not an employee-employer relationship. In *Williford*, an ousted LLC member sued the remaining members, seeking to remain a member of the LLC. The court noted that every member of an LLC is an agent for the purpose of conducting its business and affairs and concluded that LLC members cannot be fired like employees; members may only be removed pursuant to the operating agreement.

The court further stated that there were no cases permitting the expansion of *McArn v. Allied Bruce-Terminix Co., Inc*. to members of a PLLC, and the court's research did not reveal any prior decisions by the court applying *McArn* to equity members in any limited-liability organization or extending *McArn* to include other types of employment relationships. The court declined to do so in this case, saying that "[t]here are stark differences between an employee-employer relationship and the member-company relationship of a PLLC."

In a footnote, the court noted that Lawrence's remaining contract-related claims largely turned on whether the PLLC operating agreement was breached. The court stated that a party does not breach the implied covenant of good faith and fair dealing when the party's actions are "duly authorized by the contract, " and "[w]hen an express provision of the contract lists the fiduciary duties, Lawrence must establish a breach of the operating agreement to claim a breach of fiduciary duties." Because the court held that the PLLC agreement was not breached, these rules were pertinent. The court also cited case law supporting its conclusion that Lawrence's remaining tort claims failed.

Bismarck Financial Group, LLC v. Caldwell, 950 N.W.2d 155 (N.D. 2020).

Based on the provisions of an LLC's operating agreement, the court affirmed dismissal of claims for damages by the LLC and remaining members against a dissociating member based on the

dissociating member's alleged obligation to pay his pro rata share of various company expenses and an alleged increase of the remaining members' obligation to make additional capital contributions. The court reversed dismissal of claims against the dissociating member for other unidentifiable damages allegedly caused by the member's wrongful dissociation.

James Caldwell had been a member of Bismarck Financial Group, LLC ("BFG") and disassociated from the company in 2019. BFG and its members brought suit against Caldwell, requesting a declaration that his disassociation was wrongful and seeking damages.

Caldwell moved to dismiss for failure to state a claim upon which relief can be granted under North Dakota Rule of Civil Procedure 12(b)(6).The district court granted his motion, assuming that Caldwell had wrongfully disassociated, but concluding that BFG had failed to state any cognizable claim for damages.

First, BFG sought to hold Caldwell liable for a share of various expenses (rent, office overhead expenses, and employee salary). BFJ relied on Section 3.03 of BFG's operating agreement, which stated "Net Income and Net Losses shall be allocated annually among the Members based on their Percentage Interests." The operating agreement defined "Net Income" and "Net Losses" as "the profits and losses of the Company, as the case may be, as determined for federal income tax purposes as of the close of each of the fiscal years of the Company." BFG asserted that company expenditures qualified as "Net Losses." The court concluded that the various expenses sought were factors in determining "Net Income" and "Net Losses" but existed separate and apart from "Net Income" and "Net Losses." Therefore, BFG's first claim failed as a matter of law.

Second, BFG argued that Caldwell's wrongful dissociation injured each remaining member by increasing their proportionate obligation to contribute capital to the company. However, Section 3.08 of BFG's operating agreement stated: "No Member shall have any obligation to make additional capital contributions to the Company or to fund, advance, or loan monies which may be necessary to pay deficits, if any, incurred by the Company during the term hereof." As no member had any obligation to contribute capital, BFG's second claim failed as a matter of law.

Finally, BFG claimed that it was "statutorily entitled" to any damages caused by Caldwell's dissociation. The current North Dakota Uniform Limited Liability Company Act, N.D.C.C. § 10-32.1-47(3), povides: "A person that wrongfully dissociates as a member is liable to the limited liability company and ... to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or other liability of the member to the company or the other members." Under North Dakota's rules of civil procedure, a claim only requires "(1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for the relief sought, which may include relief in the alternative or different types of relief." Thus, the allegation that Caldwell's withdrawal caused additional, currently unidentifiable damages, if proved, was sufficient to support recovery against Caldwell, and the district court erred in dismissing BFG's third claim.

Transfer of Membership Interest on Death of Member

Potter v. Potter, 252 A.3d 17 (Md. Ct. Spec. App. 2021).

The appellate court held that a member's interest in an LLC is "property" within the meaning of Maryland's testamentary and probate statutes, and a provision of an LLC operating agreement that a successor would automatically and immediately become a successor member upon the death of a member was unenforceable because it was inconsistent with the Maryland statute of wills.

James Potter owned an interest in a Maryland LLC governed by an operating agreement in which the members agreed as to who should receive each individual member's interest upon the

death of that member. When James passed away, there was a dispute as to whether his interest passed to the individual designated in the LLC agreement or to his estate. The lower court determined that James's membership interest passed to the designee, and the personal representative of the estate appealed. The court phrased the one issue in this case as follows: "Is a provision in a limited liability company operating agreement that purports to transfer a member's economic interest at death enforceable even though the agreement was not executed with the formalities required in Maryland for the execution of a will?" The court answered this question "no."

Sometime after James Potter married Ruby, he acquired a membership interest in TR Steak Pasadena, LLC, a Maryland LLC. James's rights and obligations as a member of the LLC were defined by various documents that were amended over time. The relevant agreements for this case were the third amended operating agreement (the "operating agreement") and the third amended members' agreement (the "members' agreement"), both of which were executed in 2012. The operating agreement distinguished between a member's "interest," defined as "a person's share of the profits and losses of, and the right to receive distributions" from the LLC, and a member's "rights," which are the rights of a member to participate in the management and control of the company. The operating agreement provided that, on a member's death, his or her "living trust, estate, legatee or other successor in interest" will "automatically and immediately" become a "Successor Member" as long as the successor is a member of the "Permitted Group," as defined in the members' agreement.

According to the members' agreement, James was one of eleven members of the company and owned eight of the 100 outstanding "membership interest units." Although the membership agreement did not contain the referenced definition of "Permitted Group," the court stated that the members' intentions were clear based on the following provision:

> Upon the death of a Member, all of the Membership Interests of the Company owned by him shall be transferred as shown below for each Member with the voting rights attached to their Membership Interests being assigned to the Member shown.

Immediately following this paragraph, Ruby was designated as the "successor" to James's membership interest (i.e., his economic interest). James's membership voting rights were assigned to two other members of the LLC.

James's signature on the operating agreement was not witnessed. His signature on the members' agreement apparently was witnessed by one individual, but the signature was indecipherable, and the witness was not otherwise unidentified.

James and Ruby separated in 2016 and signed a separation agreement with two relevant provisions. The first was a mutual and general assignment and release of the rights of each of them to the other's property. This assignment and release was accompanied by a promise to execute and deliver any documents necessary or convenient to enable them to deal with their property as if unmarried. The second provision related specifically to James's interest in the LLC. Ruby waived "any and all interest" in James's membership interest in the LLC and promised that James "shall maintain his shares/membership interest[ ] ... free and clear of any rights, title or interest" that could be asserted by her. Whether intentionally or by oversight, James never changed his designation of Ruby as the transferee of his interest.

After his divorce from Ruby, James married Denise, and James died intestate. Denise opened a small estate and was appointed personal representative. She listed James's interest in the LLC as an asset of the estate. Ruby brought a declaratory judgment action seeking a declaration that she was the owner of the interest as the successor named in the members' agreement. Both Denise and Ruby

sought summary judgment, and the circuit court entered judgment in favor of Ruby. The circuit court understood the separation agreement to give James "absolute free will" to change the assignee of his membership interest in the event of his death, and the court also decided, based on the undisputed facts and the language of the separation agreement, that Ruby had done nothing to waive or release her right to enforce the agreement. Because Denise did not challenge these aspects of the court's reasoning on appeal, the appellate court stated that it would assume for purposes of its analysis that the circuit court's conclusions were correct.

For statutory context, the appellate court pointed out certain provisions of the Maryland Estates and Trusts Article. As a general rule in Maryland, all "property of a decedent shall be subject to the estates of decedents law." Md. Code, Est. & Trusts § 1-301. "Property" is a defined term in the statute further discussed later in the court's opinion, but the court noted that for the purposes of Maryland's testamentary and probate law, "property" includes any interest that a decedent has in real or personal property "which does not pass, at the time of the decedent's death, to another person by the terms of the instrument under which it is held, or by operation of law." Est. & Trusts § 1-101(r). Maryland's statute of wills, codified as Est. & Trusts § 4-102, states in pertinent part:

> (a) Except as provided in §§ 4-103 and 4-104 of this subtitle, every will shall be:
> (1) In writing;
> (2) Signed by the testator, or by some other person for the testator, in the testator's presence and by the testator's express direction; and
> (3) Attested and signed by two or more credible witnesses in the presence of the testator.

Denise argued that the intended effect of the relevant provisions of the operating agreement and the members' agreement was to transfer ownership of property upon the death of a member and that the members' agreement thus constituted a testamentary instrument that did not comply with Est. & Trusts § 4-102. Ruby argued that the statutory definition of "property" for the purposes of testamentary and probate law excluded James's LLC interest because it passed to her at the time of his death "by the terms of the instrument under which it is held," i.e., the operating and members' agreements. Alternatively, Ruby argued that the Maryland Limited Liability Company Act "expressly permits members of a limited liability company to agree that the membership agreement can control the disposition of a member's interest upon the member's death." Corps & Ass'ns § 4A-606. The court was unpersuaded by Ruby's arguments and stated that her policy arguments were better directed to the General Assembly.

The court organized its analysis around the following three issues: (1) whether the operating agreement and the members' agreement—when read together as they are clearly intended to be—are testamentary in nature, that is, whether they provide for a transfer of an interest in property to be effective at the death of the owner; (2) whether Maryland law permits LLC members to agree that (i) a member's interest can transfer at death to another by means of an agreement that does not satisfy the requirements of the statute of wills, and (ii) the deceased member's interest will not be an asset of the member's probate estate; and (3) whether the relevant provisions of the Estates and Trusts Article and the Corporations and Associations Article can be harmonized so that "neither statute [will] be read so as to render the other, or any portion of it, meaningless, surplusage, superfluous or nugatory."

The court discussed at some length the history of the Estates and Trusts Article (including the *Second Report of Governor's Commission to Review and Revise the Testamentary Law of Maryland, Article 93 Decedents' Estates* (1968) issued by the so-called "Henderson Commission"),

the definition of "property" in the Estates and Trusts Article, and case law addressing potential exceptions to Maryland's testamentary laws. The court concluded its analysis of the first question as follows:

> Taken as a whole, the *Milholland* cases, *Jones v. Crisp*, *Collings*, *Cover* and *Carey* all stand for the principle that, absent an effective declaration of trust, a writing that purports to transfer the maker's property at death is testamentary in nature unless it is both irrevocable and based on an otherwise enforceable legal obligation whose performance is deferred during the maker's lifetime. This was the state of Maryland law at the time that Est. & Trusts § 1-102(r) was enacted. And, as the Henderson Commission Report made clear, with one exception, the definition of "property" was "intended to include, and be limited to, those assets which traditionally constituted what is sometimes called in Maryland the probate estate" in 1969. Contrary to the suggestion made by Ruby in her brief, our survey of the relevant caselaw indicates that the Court of Appeals has shown no tendency towards recognizing novel exceptions to the statute of wills.
>
> Returning to the case before us, James's designation of Ruby as his designee did not fit into the narrow confines of the exceptions to the statute of wills established by the Court of Appeals: His designation was certainly not irrevocable, nor was Ruby's status as his designated successor based upon any duty or obligation that he owed her. As long as James was alive, the membership interest was his and he could do with it what he liked without Ruby's permission. As the circuit court observed in its bench opinion, as regards Ruby, James had the "absolute free will" to terminate her expectancy interest at any time.
>
> Ruby also argues that Denise's contentions run counter to "the legal presumption 'that the parties to a contract bind not only themselves but their personal representatives.' " (quoting *United States ex rel. Wilhelm v. Chain*, 300 U.S. 31, 35, 57 S.Ct. 394, 81 L.Ed. 487 (1937)). We can dispose of this quickly. The issue in *Wilhelm* was whether the government could enforce the personal guarantee of a surety against his estate. Unsurprisingly, the Supreme Court held that the government could. *Id*. at 35–36, 57 S.Ct. 394.
>
> Ruby also points to two decisions based applying Maryland law. In *Lanham v. Amoco Oil Company*, 481 F. Supp. 405 (D. Md. 1979), the Court concluded that a franchise agreement that, by its terms, expired at the franchisee's death was not enforceable by the franchisee's estate. *Id*. at 406. In *Burka v. Patrick*, 34 Md. App. 181, 185–86, 366 A.2d 1070 (1976), this Court held that a contract between the decedent and his spouse and a third party to convey land was enforceable against the spouse and the decedent's estate.
>
> *Wilhelm*, *Lanham*, and *Burka* involve routine applications of the well-settled rule that "rights and liabilities under a contract not involving personal confidence or skill pass by operation of law to the executor or administrator of a deceased party." *Burka*, 34 Md. App. at 186, 366 A.2d 1070 (quoting BRANTLEY ON CONTRACTS 124 (2d ed. 1912)). What separates them from the case before us is that Ruby was not a party to the members' agreement and had no right to enforce it. This is because, in the words of the circuit court, once the separation agreement was signed, James had the "absolute free will" to designate another successor.

> Finally, Ruby relies on *Blechman v. Estate of Blechman*, 160 So. 3d 152 (Fla. Dis. Ct. App. 2015). In that case, the operating agreement at issue provided that a deceased member's interest in the company "shall pass to and immediately vest in [the decedent's] then living children and the issue of any deceased child per stirpes." *Id*. at 153. The issue before the appellate court was whether the membership interest was part of the decedent's estate. Our Florida colleagues held that it was not. *Id*. at 159.
>
> However, *Blechman* is of little assistance to Ruby. The limited liability company in question had been organized under the laws of New Jersey, and our colleagues from the Sunshine State relied on New Jersey law in its analysis. And it has long been the law of the Garden State that:
>
> > In New Jersey, parties may provide by contract that ownership of, or a designated right in, property may pass according to the terms of the contract at the promisor's death. ... Where supported by adequate consideration, such contracts transferring a property interest upon death are neither testamentary nor subject to the Statute of Wills, but are instead evaluated under contract law.
>
> *Id*. at 158 (citing, among other authorities, *Bower v. The Estaugh*, 146 N.J. Super. 116, 369 A.2d 20 (1977) and *Michaels v. Donato*, 4 N.J. Super. 570, 67 A.2d 911 (1949)). We have no quarrel with this interpretation of New Jersey law. However, as we have explained, the law of Maryland is different.
>
> For these reasons, we agree with Denise that James's membership interest in TR Steak was an interest in property that is subject to Maryland's testamentary and probate laws.

[Footnotes omitted.]

Turning to the second question, the court was unpersuaded by Ruby's argument that the General Assembly authorized members of Maryland LLCs to agree among themselves that Maryland's testamentary and probate laws do not apply to membership interests. Ruby relied heavily on Section 4A-102 of the Maryland LLC Act, which states that the "policy of this title is to give the maximum effect to the principles of freedom of contract and to the enforceability of operating agreements," but the court stated that Ruby ignored the Legislature's proviso that freedom of contract can be exercised "[u]nless otherwise provided in this title." The court pointed out that the powers granted to LLCs include to "[m]ake and alter operating agreements, *not inconsistent* with its articles of organization or *with the laws of this State*, for the administration and regulation of the affairs of the limited liability company[.]" Corps & Ass'ns § 4A-203(15) (emphasis added). Based on this restriction on the freedom to contract, the court disagreed with Ruby's assertion that the following provision of Corps & Ass'ns § 4A-606 was dispositive:

> Unless otherwise agreed, a person ceases to be a member of a limited liability company upon the occurrence of any of the following events:
> * * *
> (5) In the case of a member who is an individual, the individual's:
> (i) Death[.]

Ruby contended that § 4A-606 permits LLC members to include provisions in an operating agreement to vary the Act's default provision that a member's interest ceases at death. The court responded that the provision in the LLC operating agreement in this case did more than merely state that a deceased member's interest did not terminate on death; it provided for the automatic succession of the successor as long as the successor was a member of the Permitted Group. Because the Maryland statute of wills has been interpreted to mean that a contract attempting to transfer title to property upon the death of an individual is testamentary in nature unless it is both irrevocable and based on a present legal obligation whose performance is deferred during his or her lifetime, the provision of the operating agreement that stated that a successor member "shall automatically and immediately" become a member of the LLC upon the death of a member, which was not executed in compliance with Est. & Trusts § 4-102, was not authorized to be included in its operating agreement and was unenforceable. For the same reasons, the provisions of the members' agreement that purported to pass title to James's interest at his death were unenforceable.

To validate its reading of the plain language of §§ 4A-203 and -606, the court turned to the legislative history of the Maryland Limited Liability Company Act. After discussing the background of its drafting and enactment, the court concluded that "there is absolutely nothing that even remotely suggests that anyone who drafted or reviewed the legislation thought that it would give limited liability companies the right to transfer member's interest to other persons upon death without complying with the relevant provisions of the Estates and Trusts Article. We decline to equate the pervasive absence of any discussion about the relationship between the proposed Limited Liability Company Act and the Estates and Trusts Article with the notion that the General Assembly intended the Act to carve out exceptions to Est. & Trusts §§ 1-102(r) and 4-102." The court noted that the legislative history revealed that the section relied on by Ruby, Corps & Ass'ns § 4A-606, was derived from Corps & Ass'ns § 10-402, a provision of Maryland's Limited Liability Partnership Act, which has been in effect since 1982. The court stated that "[i]n the intervening thirty-nine years, there has been no reported Maryland decision that suggests that the statute created an exception of Maryland's testamentary and probate law."

Finally, the court addressed how to construe Est. & Trusts § 4-102 and Corps & Ass'ns § 4A-606 together in such a manner as to harmonize the two statutes so that no part of either statute is rendered "meaningless, surplusage, superfluous or nugatory." The court explained that Section 4A-606 permits LLC members to agree among themselves as to what should happen when a member ceases to be a member in order to avoid the difficult and contentious problems that can arise when the default rule under § 4A-606.1 comes into play. The court stated that "[w]hen, as in the present case, the members agree among themselves that they will avoid § 4A-606.1's requirements by designating a successor upon the death of a member, it is incumbent upon each member to take appropriate steps to assure that the succession will be effective. In the context of TR Steak, this means that the members (all of whom were natural persons) should have executed wills whose terms dovetailed with the provisions of the operating and members' agreements." The court stated that this was not an onerous requirement and that this approach gave significance to both § 4A-606 and Est. & Trusts § 4-102.

Ruby pointed to law review articles and commentary to provisions of the Uniform Probate Code to support her contention that there is a "national consensus that transfers at death outside of the probate system are valid without complying with the wills formalities and that a statutory exception is not necessary"; however, the court concluded that her policy arguments should be directed to the Legislature.

In sum, the court held that the membership interest and the proceeds of distributions associated with it were assets of James's estate.

Harris v. Harris, 193 A.D.3d 457, 148 N.Y.S.3d 1 (App. Div. 1st Dept. 2021).

The court held that a provision of a Delaware LLC's operating agreement providing that membership interests may be assigned or bequeathed only to family members was enforceable.

The court described this dispute as "a dispute between the widow and marital child of the deceased (plaintiffs), and the person whom the deceased refers to as his "loving partner" and nonmarital child of the deceased (defendants-respondents) over the ownership of part of nominal defendant TJ."

The court stated that there was no issue of fact as to whether the operating agreement was an unenforceable agreement to agree because it did not leave material terms for future negotiations. According to the court, the fact that the operating agreement referred to a "formal agreement" and "a later time" was not determinative. Although the court acknowledged that the December 1994 operating agreement referred to a limited liability company or partnership to be formed to hold title to a particular property, the court stated that there was no dispute that TJ—a Delaware limited liability company—was formed on December 20, 1994.

The court characterized the operating agreement as enforceable albeit internally inconsistent. The operating agreement stated in three provisions that Steven Harris's wife, Bernice, shall succeed to his membership interest in TJ on Harris's death; however, another provision of the agreement stated that Steven may assign his interest to a family member during his life and elect a family member to be his successor after he dies. In any event, the court held that the plaintiffs were entitled to summary judgment because "Betsy Harris a/k/a Betsy Savage, despite her argument before the motion court, is not—and indeed, in the Respondents' brief does not even claim to be—a family member; although defendant Tamara Harris is a family member, her contingent remainder is not accelerated in this case because the life estate failed (*see Matter of Fischer*, 307 NY 149, 160 [1954]); and the operating agreement, which is not "an attempted testamentary disposition" (*Matter of Hillowitz*, 22 NY2d 107, 110 [1968]), prevails over the will." [The court is apparently referring to an attempt by the deceased member to leave a life estate in his LLC interest to his loving partner and the remainder to his child with the loving partner.]

The court concluded: "The provision of the operating agreement that says that membership interests can be assigned or bequeathed only to family members must be upheld (*see Achaian, Inc. v Leemon Family LLC*, 25 A3d 800, 804 n 14 [Del Ch 2011] ["(O)ne generally is entitled to select his own business associates in a closely held enterprise, like an LLC"]). Lichtenstein "should not be bound to manage and operate an LLC with a co-member with wh[om] [he] never intended or agreed to go into business" (*Eureka VIII LLC v Niagara Falls Holdings LLC*, 899 A2d 95, 115 [Del Ch 2006])."

Judicial Dissolution

Barkalow v. Clark, 959 N.W.2d 410 (Iowa 2021).

The court addressed the standards for judicial dissolution under the Iowa LLC statute and concluded that the evidence established neither oppression nor a reasonable impracticability to carry on the business of the LLC in conformity with its certificate of organization and operating agreement. The court also held that there was no breach of fiduciary duty on the part of the majority members.

In 2009, Barkalow and three brothers—Bryan Clark, Jeff Clark, and Joe Clark—formed an LLC to purchase a rental property near Kinick Stadium in Iowa City. Bryan and Jeff were married to sisters of Barkalow's wife, and the couples socialized and took vacations together. Joe was less involved in this social circle.

Over the next couple years, the LLC acquired several more properties in Iowa City, most of them near the stadium. Each member played a different role in the LLC. Barkalow provided the day-to-day management, Bryan performed maintenance, Jeff did remodeling, and Joe was more of an investor. Pursuant to oral agreements, the Clark brothers lent Barkalow his initial capital contribution and lent the LLC amounts needed for down payments to purchase additional properties. The brothers also financed or facilitated financing for the additional properties because Barkalow had limited financial resources. Each member initially acquired a 25% interest in the LLC, but the operating agreement was amended in 2010 for estate planning purposes, and the three brothers transferred some of their interests to their children, who became non-voting members.

During 2013 through 2016, the relationship between Barkalow, on the one hand, and Bryan and Jeff, on the other, deteriorated. Joe generally tried to steer a middle ground and attempted to play the role of peacemaker. Barkalow claimed that he had always had an oral agreement to buy the entire LLC at a fee to be set by the Clarks, which the brothers denied. Barkalow began to question the validity of the Clark loans to the LLC in the absence of written loan documents, and the LLC ceased making payments on the Clark loans. Barkalow also stopped efforts by the LLC to obtain bank financing to replace the Clark loans, and he caused the LLC to make payments to his property management companies for management services. Disagreements arose over additional capital contributions that were necessary to cover a balloon payment due on seller-financed properties purchased by the LLC in 2010. In 2015, all members were given the opportunity to make additional capital contributions to enable the LLC to make the balloon payment, but Barkalow refused to contribute. Barkalow also refused an offer by the brothers to buy out his share for undiscounted fair market value at an assumed full 25% share of the company. In 2016, the Clark brothers approved another voluntary capital contribution to enable the LLC to pay off the Clark loans, and Barkalow declined to participate. Bryan and Jeff contributed to cover Barkalow's share. The additional capital contributions in 2015 and 2016 diluted Barkalow's interest to less than 1%. In 2016, Barkalow caused the LLC to pay retroactive management fees to his wholly owned management company as well as withdrawing funds for expenses for a class action settlement to which the LLC was not a party.

In 2017, Barkalow sued Bryan, Jeff, and Joe seeking various types of relief, including judicial dissolution on the basis of majority oppression and that it was not reasonably practicable to carry on the business of the LLC in accordance with its certificate of organization and operating agreement. Barkalow also sought damages for breach of fiduciary duty and breach of contract. After a bench trial, the trial court rejected Barkalow's claim for judicial dissolution based on majority oppression and found no breach of fiduciary duty or breach of contract, specifically finding that the buyout option Barkalow relied upon was too indefinite to be a binding contract. The court also found that there had been an agreement from the outset that each member would provide services to the LLC without charge. Thus, the court found that Barkalow had wrongfully converted assets by paying unapproved management fees and expenses for the unrelated class action settlement. Based on the ongoing and intensely acrimonious relationship among the members, however, the trial court granted judicial dissolution on the basis that it was not reasonably practicable to carry on in accordance with the certificate of organization and operating agreement. Furthermore, the court relied on its equitable powers to fashion a remedy to restore the members to their 25% equity position by recharacterizing the brothers' additional capital contributions as debt of the LLC.

Bryan and Jeff appealed, arguing that the trial court erred in ordering dissolution of the LLC, because the trial court had resolved the disputes, and the LLC was a viable and profitable enterprise.

They also urged that even if dissolution was proper, the court exceeded its statutory and equitable authority by recharacterizing the brothers' capital contributions as debt. Barkalow cross-appealed, maintaining that the trial court should have ordered dissolution based on oppression and awarded damages for breach of fiduciary duty.

The Iowa Supreme Court first addressed Barkalow's cross-appeal first because it set the stage for the court's ruling on the appeal by Bryan and Jeff. The Iowa LLC statute authorizes dissolution of an LLC by the court, on application by a member, when "those members in control of the company ... [h]ave acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant," and Barkalow argued that the Clark brothers engaged in oppressive conduct that directly harmed him when they diluted his ownership interest in the LLC in 2015 and 2016. The court cited Iowa case law in the corporate context in which the court said that determining whether the conduct of controlling directors and majority shareholders in a close corporation is oppressive "must focus on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances." *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013). The court then cited and discussed *Manere v. Collins*, 241 A.3d 133, 154 (Conn. App. 2020), in which the Connecticut appellate court applied the reasonable expectations standard to a claim for dissolution of an LLC based on oppression. The court in *Manere* noted that Connecticut (like Iowa) had adopted the Revised Uniform Limited Liability Company Act (RULLCA), the commentary to which "emphasizes that '[i]n many jurisdictions the concept [of oppression] equates to or at least includes the frustration of the plaintiff's reasonable expectations.'" As the *Manere* court pointed out, the RULLCA commentary stated that reasonable expectation factors include:

> whether the expectation: (i) contradicts any term of the operating agreement or any reasonable implication of any term of that agreement; (ii) was central to the plaintiff's decision to become a member of the limited liability company or for a substantial time has been centrally important in the member's continuing membership; (iii) was known to other members, who expressly or impliedly acquiesced in it; (iv) is consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff's conduct; and (v) is otherwise reasonable under the circumstances.

The supreme court agreed with the trial court's implicit determination that Barkalow's expectations were unreasonable. He contributed no money to the LLC, expected the Clark brothers to finance everything, blocked efforts to obtain outside financing, and chose to pledge his own assets as collateral for an expansion of his personal real estate holdings rather than for the use or benefit of the LLC in which he was only a 25% participant. The court also agreed with the trial court that Barkalow misread the LLC's founding documents, which are a major determinant of a member's reasonable expectations. The operating agreement made clear that a member's capital position was subject to change. Although the certificate of organization indicated that members could not be assessed for additional contributions they did not want to make, there was no guarantee that a member's relative ownership position would remain constant if he elected not to make an additional contribution when others did. The certificate of organization contemplated acquisition of other properties by stating a purposes to "to invest in real estate holdings"; therefore, it was unsurprising that additional capital would be needed. Furthermore, Barkalow refused to accept a buyout of his interest for its undiscounted fair market value, which was the very result that the minority

stockholder had been unable to obtain in *Baur* and which supported the oppression claim in that case. Although Barkalow attempted to show that Bryan and Jeff secretly plotted to dilute his interest, he never offered a practical alternative to capital contributions for settling the LLC's outstanding debts. Barkalow wanted the Clarks to continue their outstanding funding of the LLC without repayment. In essence, he wanted something from the Clarks that would function like a capital contribution without actually being a capital contribution, which was not realistic. Thus, the trial court properly rejected Barkalow's oppression claim and his related fiduciary duty claim asserting the same misconduct.

The court next turned to what it regarded as the more difficult issues—those relating to the propriety of the trial court's decree of judicial dissolution on the statutory basis that it was "not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement." Bryan and Jeff implicitly conceded that the LLC was a troubled company in 2015 and 2016, but they argued that the trial court's resolution of the capital contribution controversy and the parties' other claims set a stable path for the future. Indeed, Bryan and Jeff pointed out that the LLC continued to operate and take in rental income during the course of this litigation. Even Barkalow acknowledged the LLC was a financial success.

The court noted that it had not yet had the opportunity to interpret Iowa Code section 489.701(d)(2), but the court cited numerous cases in other jurisdictions that have analyzed the question of whether it is "not reasonably practicable to carry on" an LLC's activities and have concluded that dissolution is warranted when there is actual, unbreakable deadlock. In the absence of deadlock, the court stated that courts have been reluctant to order dissolution so long as it is possible to continue to operate the company in accordance with its certificate of organization and management agreement, i.e., a clear inability to fulfill the contracted purposes of the LLC, usually, but not always, for financial reasons.

The court discussed several notable cases in which courts have refused to order dissolution based on member disputes. For example, in *Dysart v. Dragpipe Saloon, LLC*, 933 N.W.2d 483, 484–85 (S.D. 2019), the South Dakota Supreme Court decided a case involving an LLC with four 25% owners that owned a bar and real estate. Two of the members wanted to sell their interests, and they sought judicial dissolution after two proposed transactions fell through.
The South Dakota Supreme Court reversed the trial court's order of dissolution, observing that "[a]n involuntary judicial dissolution represents an exceptional level of intervention into the otherwise private agreement of an LLC's members." The disagreement among the members about whether to sell the property and realize the gain did not mean that the LLC in that case was unable to continue to operate in accordance with its stated purposes. Even if the principal means of making money for the LLC's members was ultimately the sale of the real property, that did not mean that the members' failure to reach a consensus about a proposed sale was likely to frustrate the LLC's economic purpose. The court went on to note that under the terms of the operating agreement, the two members could resign and receive the fair market value of their interests. Because the members were not deadlocked and had multiple options for resolving their disagreement, the court rejected the "drastic remedy" of judicial dissolution.

The court said that the lesson of *Dragpipe* is that LLCs "are ultimately member contracts, and courts should not be rewriting contracts unless it is truly necessary to do so." While the operating agreement among Barkalow and the Clark brothers, unlike in *Dragpipe*, did not have an actual "put" provision allowing a member to sell his interest for fair market value, there was no indication in the record that such a buyout would not be available. And the court said that the present case was in

some ways a weaker case for judicial dissolution because the current allocation of interests meant there would be no tie votes.

The court went on to discuss several other cases from other jurisdictions and stated that the trial court in this case erred in failing to consider the judicial dissolution claim in light of its resolution of the capital contribution controversy and Barkalow's claims that Bryan and Jeff had breached their fiduciary duties to him. Here, there was no deadlock, no showing that the management of the LLC was unable or unwilling to reasonably permit or promote the stated purpose of the LLC to be realized or achieved, and no showing that continuing the LLC was financially unfeasible. In sum, according to the court, "Dissolution under Iowa Code section 489.701(d)(2) is not a wide-ranging mechanism for doing equity, but a drastic remedy to be ordered when an LLC is truly in an unmovable logjam or cannot as a practical matter carry on its contracted purpose. Neither circumstance is present here. Because we reverse the district court's decision to order dissolution of Outside Properties, we also reverse its order recategorizing the Clark capital contributions as debt that was part of the dissolution decree."

Chisum v. Campagna, 855 S.E.2d 680 (N.C. 2021).

The North Carolina Supreme Court held that the statute of limitations on a minority member's claim for declaratory judgment did not begin to run until the member became aware or should have become aware of the defendants' breaches of the operating agreements, liability for nominal damages for breach of fiduciary duty and constructive fraud can support an award of punitive damages, and judicial dissolution was supported by evidence that the majority members unilaterally determined that the minority member's interest had been extinguished and stopped communicating with the minority member.

This dispute involved three LLCs—Judges Road Industrial Park, LLC (Judges Road), Carolina Coast Holdings, LLC (Carolina Coast), and Parkway Business Park, LLC (Parkway)—formed for the purpose of developing commercial real estate. The majority member of these LLCs was an entity owned by Richard Campagna and Rocco Campagna (The Camp Group), and the minority member was Dennis Chisum. Chisum owned a 35% interest in Judges Group at the time of its formation in 1996, a one-third interest in Carolina Coast at its formation in 2000, and an 8.34% interest in Parkway when he became a member of that LLC in 2007. The operating agreement of each LLC contained provisions on future capital calls and consequences of failure to pay a capital call as well as provisions addressing transfer of membership interests.

Between 2007 and 2012, the Campagnas directed a number of capital calls. By 2010, Chisum's interest in Judges Road and Carolina Coastal had been reduced to 18.884% and 16.667%, respectively. In 2012, the Campagnas called a meeting, and the LLC's attorney sent a letter to Chisum (which Chisum testified he never received) advising Chisum that the accountant had determined that Chisum's interest had been diluted to the point that he had no remaining equity, that another capital call was being made, and that Chisum would be considered diluted in full and would no longer be a member if he did not participate in that capital call. The meeting was held without Chisum, and the minutes reflected that Chisum's membership interest would be "exhausted and extinguished if future capital calls were not timely made," but the Campagnas took control of the LLC at the conclusion of this 2012 meeting and did not communicate with Chisum after that point. Schedule 1 of the operating agreement was not amended to show Chisum's membership interest was extinguished. The Campagnas paid the entire capital call the month following the meeting and believed that they each thereafter owned a 50% interest in Judges Road, but Chisum's 2012 and 2013

K-1s showed that he held an 18.884% interest, although the 2013 K-1 showed that he owned that interest at the beginning of the year and that he held no interest by the end of the year. The 2013 K-1 indicated that it was his "final" K-1 for Judges Road.

The Campagnas took control of Parkway after the 2012 meeting as well. Chisum's 2012 and 2013 K-1s for Parkway showed that he held an 8.34% interest, although the 2013 K-1 showed that he owned that interest at the beginning of the year and that he held no interest by the end of the year. The 2013 K-1 indicted that it was his "final" K-1 for Parkway.

At a 2010 membership meeting of Carolina Coast, the Campagnas assessed a capital call to pay off a loan that Chisum had obtained and that was secured by the LLCs. Chisum did not pay the capital call. After the 2010 meeting, the Campagnas acted as if Chisum's membership interest in Carolina Coast had been extinguished in full. In 2011, Chisum received his 2010 K-1, which stated that Chisum's membership interest in that LLC had been reduced to zero and that this K-1 was his "final" K-1 for Carolina Coast. Although Chisum believed that his 2010 Carolina Coast K-1 was in error and that he continued to have an ownership interest in Carolina Coast, he never received another K-1 from Carolina Coast.

In 2016, Chisum sued the Campagnas, Judges Road, Carolina Coast, and Parkway alleging various claims, including a claim seeking a declaration that he continued to own his interests in the LLCs and a claim for judicial dissolution. In 2017, he amended his complaint to allege numerous additional claims, including individual and derivative claims for breach of fiduciary duty and constructive fraud. Prior to trial, the trial court determined that the operating agreements of Judges Road, Parkway, and Carolina Coast did not permit a member's interest to be extinguished for failure to contribute capital in response to a capital call. The trial court also dismissed Chisum's individual claims for breach of fiduciary duty and constructive fraud.

The case went to trial. The trial court entered a directed verdict in favor of the defendants on the claims related to Carolina Coast on statute of limitations grounds based on the court's view that Chisum should have known that the Campagnas were in breach of the operating agreement more than three years before he filed his lawsuit. The jury found that Chisum filed his lawsuit within three years of the date that he knew or reasonably should have known that the Campagnas no longer considered him a member of Judges Road and Parkway and found breaches of fiduciary duty on the part of the Campagnas to Judges Road (awarding nominal and punitive damages) and Parkway (awarding actual and punitive damages). The jury also found liability on the part of the Campagnas to Chisum in the amount of distributions that were diverted to The Camp Group and should have been paid to Chisum. The trial court entered judgment for compensatory and punitive damages in the amounts found by the jury and a declaration that Chisum was a 8.34% member of Parkway and an 18.884% member of Judges Road. The court also ordered dissolution of those LLCs on the basis that it was not practicable to conduct their business in conformance with the operating agreements.

On appeal, the supreme court first rejected the defendants' argument that the trial court erred in submitting the issue of when Chisum had notice of the Campagna's breaches of the operating agreements for purposes of Chisum's declaratory judgment claims. The court admitted that "a number of our prior decisions have been somewhat opaque in addressing the issue that is before us in this case," but the court concluded that "the entire principle upon which defendants' argument hinges, which is that the statute of limitations begins to run against a plaintiff who has no way of knowing that the underlying breach has occurred, runs afoul of both our recent decisions ... and basic notions of fairness." The court thus affirmed the trial court's determination that the statute of limitations applicable to Chisum's declaratory judgment claims began running at the time that he

became aware or should have become aware of the Campagnas' breaches of the operating agreements. Based on the evidence regarding communications with Chisum and the timing of the receipt of his K-1s, the court held that the record contained sufficient evidence to support the submission of the statute of limitations issue to the jury.

The court next addressed whether the trial court erred by failing to direct a verdict or enter judgment notwithstanding the verdict in their favor with respect to the derivative claims for breach of fiduciary duty and constructive fraud relating to Judges Road. The defendants argued that there was no evidence that Judges Road sustained any actual damages as a result of the Campagnas' conduct and that nominal damages, standing alone, were insufficient to support claims for constructive fraud and breach of fiduciary duty. Although the supreme court stated that it had not previously addressed the issue of whether a plaintiff is required to prove actual damages in support of breach of fiduciary duty and constructive fraud claims, the court discussed cases in which the court of appeals had addressed the issue and had held that nominal damages support an award of punitive damages. The supreme court concluded:

> [W]e adopt the reasoning of the Court of Appeals and hold that potential liability for nominal damages is sufficient to establish the validity of claims for breach of fiduciary duty and constructive fraud and can support an award of punitive damages. Aside from the fact that nothing in the prior decisions of this Court indicates that proof of actual injury is necessary in order to support a claim for breach of fiduciary duty or constructive fraud, we see no basis for treating the incurrence of nominal damages as a second-class legal citizen in this context, particularly given that such damages do reflect the existence of a legal harm and the fact that the policy of North Carolina law is to discourage breaches of fiduciary duty and acts of constructive fraud.

The court also discussed challenges made by the defendants with regard to the consistency of verdicts relating to constructive fraud and breach of fiduciary duty, the propriety of the jury instructions with respect to the Campagnas' duty to deal openly, fairly, and honestly, and the ambiguity of the identical compensatory damages awards against each of the Campagnas. The court rejected each of these challenges.

The supreme court next addressed the defendants' argument that the trial court erred by ordering dissolution of Judges Road and Parkway and by depriving the defendants of their statutory right to purchase Chisum's interest in lieu of dissolution. The North Carolina LLC statute authorizes a court to dissolve an LLC if a member establishes that (1) it is not practicable to conduct the LLCs business in conformance with the operating agreement and the statute or (2) liquidation of the LLC is necessary to protect the rights and interests of the member. If a court determines that an LLC should be judicially dissolved based on the second ground, the statute states that the court will not order dissolution if the LLC or other members elect to purchase the interest of the complaining member for its fair value in accordance with any procedures the court may provide. The court determined that Chisum's allegations reflected that he sought judicial dissolution pursuant to both grounds. The court reviewed the trial court's fact findings, which included a lack of communications between the Campagnas and Chisum from 2010 (when Chisum walked out of the Carolina Coastal meeting) until the lawsuit; the Campagnas' treatment of Chisum as if his membership interests had been extinguished without communicating to Chisum that they considered his membership interests

terminated; Richard Campagna's admission that Chisum did not fail to meet a capital call or take any specific action that would have terminated his interest in Parkway; the Campagnas' filing documents with the North Carolina Secretary of State dissolving Parkway without notifying Chisum, seeking his consent, or making any distribution to him; the Campagnas' ceasing to provide Chisum with required reports and financial information regarding Parkway and Judges Road; and Richard Campagna's ordering Mrs. Chisum to leave in a threatening manner when she visited the Campagnas' offices sometime in 2012 or 2013 to get information regarding the LLCs. The trial court also noted the extraordinary acrimony and distrust among the parties. The supreme court concluded that the evidence provided ample support for the determination that it was not practicable to conduct the LLCs' business in conformance with the operating agreement and the statute, and the trial court properly ordered judicial dissolution pursuant to the first ground without providing the Campagnas the opportunity to purchase Chisum's interests.

The court next addressed Chisum's cross appeal in which Chisum complained of the trial court's determination that his claims relating to Carolina Coast were time-barred, the failure of the judgment to ensure that the Campagnas did not share in the punitive damages award to the LLCs, and the dismissal of Chisum's individual claims for breach of fiduciary duty and constructive fraud.

With regard to Chisum's argument that the trial court erred in determining that his claims relating to Carolina Coastal were time-barred, the court rejected Chisum's argument that statutes of limitations do not apply to declaratory relief, and the court concluded that the three-year statute of limitations applied to his claims because the claims hinged upon the validity of his claim that the defendants breached the operating agreement. The court concluded, however, that there was a triable issue of fact as to when Chisum knew or reasonably should have known that the defendants breached the operating agreement. Although the court stated that there was ample evidence (including receipt of his "final" K-1) tending to show that Chisum knew or should have known of the breach more than three years before he filed the lawsuit, the court pointed to other evidence favoring Chisum on this issue, such as the fact that the schedule of members was never amended to show Chisum's membership had been fully diluted and the fact that Chisum was allowed to use his complimentary storage unit at Judges Road until 2016.

The court concluded that Chisum failed to preserve for appeal his argument that it would be inequitable for the Campagnas to share in distributions that included punitive damages awards they are required to pay the LLCs.

Finally, the court concluded that Chisum's individual breach-of-fiduciary-duty and constructive-fraud claims failed because the record did not show that he sustained a legally cognizable injury. Chisum claimed that the Campagnas attempted to "freeze [him] out of the LLCs," conducted "sham capital calls," acted as if he was no longer a member of the LLCs, and treated him in a manner that was inconsistent with his status as a member of Judges Road and Parkway. The court said that these facts simply described the specific steps that the Campagnas took to deprive Chisum of his ownership interests in Judges Road and Parkway, but did not show the sort of injury that is necessary to support claims for breach of fiduciary duty and constructive fraud. Because Chisum failed to establish that he suffered a legally cognizable injury as the result of the Campagnas' conduct, the court stated that it need not determine whether any injury that Chisum might have suffered was separate and apart from any injury suffered by Judges Road and Parkway, and the trial court did not err in dismissing Chisum's individual claims for breach of fiduciary duty and constructive fraud.

B&S MS Holdings, LLC v. Landrum, 302 So.3d 605 (Miss. 2020).

The Mississippi Supreme Court held that an LLC operating agreement may provide for mandatory arbitration of a claim for judicial dissolution, notwithstanding that the LLC statute states that the operating agreement may not waive the power of a court to decree dissolution, because the Mississippi LLC statute contains a provision that allows members to agree to arbitrate internal affairs matters. The court further found that the 51% member waived its right to seek judicial dissolution in the operating agreement and the member's claim fell within the scope of the arbitration provision in the operating agreement.

The operating agreement of Livingston Holdings, LLC (Livingston), a Mississippi LLC, contained the following arbitration provision in article XIV:

> Except for the injunctive relief provided in Article IX, any dispute, claim, or controversy in connection with or arising under this Operating Agreement, its construction, existence, interpretation, validity, or any breach hereof, which cannot be amicably settled between the parties, shall be finally and exclusively resolved by arbitration under the Rules of Arbitration of the American Arbitration Association then prevailing .... THE PARTIES HEREBY EXPRESSLY WAIVE ANY RIGHT TO TRIAL BY JURY OR CLASS TREATMENT OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE BREACH THEREOF, PROVIDED THAT NOTHING IN THIS AGREEMENT SHALL PRECLUDE A PARTY FROM SEEKING TO COMPEL ARBITRATION IN A STATE OR FEDERAL COURT OF COMPETENT JURISDICTION.

The members of Livingston at the time of this dispute were B&S MS Holdings, LLC (B&S), the 51% member, and Jill Landrum, the 49% member. In 2018, B&S filed a complaint to dissolve Livingston under Mississippi Code Section 79-29-803, alleging that it was not reasonably practicable to carry on the business in conformity with the operating agreement due to irreconcilable differences between the members and the alleged inability of Livingston to continue its business absent recovery for alleged fraudulent transactions that Landrum opposed pursuing.

Landrum filed a motion to dismiss the complaint for dissolution or to compel arbitration. Landrum relied on provisions of the operating agreement specifying that an affirmative "Majority Vote" of the members at a meeting where a quorum was present constituted the act of the members and that Livingston would be dissolved on the date specified in the certificate of formation or the affirmative "Majority Vote" of the members. No meeting or vote was held, and arbitration had not been commenced.

B&S opposed Landrum's motion on the basis of Mississippi Code Sections 79-29-123(3) and 79-29-803(1). Mississippi Code Section 79-29-123(3) states:

> (3) Except as provided in this subsection (3), the provisions of this chapter that relate to the matters described in paragraphs (a) through (d) of subsection (1) of this section may be waived, restricted, limited, eliminated or varied by the certificate of formation or operating agreement. In addition to the restrictions set forth in subsections (4) and (5) of this section, the certificate of formation or the operating agreement may not:

> ....
> (m) Vary the power of a court to decree dissolution in the circumstances specified in Section 79-29-803(1) ....

Mississippi Code Section 79-29-803(1) states:

> (1) On application by or for a member, the chancery court ... may decree dissolution of a limited liability company:
> (a) Whenever it is not reasonably practicable to carry on the business in conformity with the certificate of formation or the operating agreement ....

The chancery court found that under Mississippi Code Section 79-29-1211, LLC members have a right to agree to arbitration, and the court ordered the parties to conduct binding arbitration. Section 79-29-1211 provides in part:

> Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in this state, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of this state with respect to matters relating to the organization or internal affairs of a limited liability company.

The court noted that valid arbitration agreements are favored under Mississippi law and that an LLC's "operating agreement is a contract, subject to contract law."

The court cited prior case law characterizing judicial dissolution as an "extreme" remedy that should be exercised "sparingly" and described Landrum's argument that the relevant statutory criteria had not been met in this case. Landrum alleged that B&S had failed to make any allegations to sufficiently show why arbitration would be impracticable inasmuch as Livingston's operating agreement defined a "Majority Vote" as "a vote of the Members holding at least fifty one percent (51%) of the Membership Interest then owned by the Members," as well as providing that dissolution of the company shall occur "by the affirmative Majority Vote of the Members." Thus, Landrum argued that B&S, which held a 51% interest, could have unilaterally dissolved Livingston by calling for a vote on dissolution and exercising its vote in favor of dissolution.

The supreme court stated that the trial court correctly found that members of a Mississippi LLC have a right to agree to binding arbitration and that the members of Livingston agreed to an arbitration provision in the operating agreement. The court pointed out that Mississippi Code Section 79-29-1201 specifically states that "[t]he rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter" and that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements." Further, the court relied on Section 79-29-1211 (quoted above),which refers to the ability of members to agree to arbitrate matters relating to internal affairs.

The court summed up its analysis as follows: "In accordance with the operating agreement, dissolution of the company may occur through the majority vote of the members. B&S did not show that it is unable to comply with the operating agreement's terms and that judicial dissolution was required in this case. Further, although Section 79-29-123 states that an operating agreement may not vary the court's power to decree dissolution in certain circumstances, Section 79-29-803(1) clearly states that a trial court may decree dissolution of a limited liability company. Miss. Code

Ann. § 79-29-803(1) (Rev. 2013). It does not state that a trial court must decree dissolution of the company. Thus, the trial court correctly found that the arbitration provision contained in the operating agreement prevailed."

The court next addressed Landrum's argument that, regardless of the arbitration agreement, the members each waived their right to seek judicial dissolution under article XVI, section 16.2, of the operating agreement, which provided that "[e]ach Member irrevocably waives during the term of the Company any right that he may have to maintain any action for a decree of dissolution of the Company or for partition with respect to the property of the Company." The court stated that it was obligated to enforce the agreement based on contract case law and Section 79-29-1201, which provides that the policy of the LLC statute is "to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements." Because B&S clearly and unambiguously agreed to waive its right to maintain an action for judicial dissolution, the court held that the trial court correctly ordered the parties to conduct binding arbitration in accordance with the provisions of the operating agreement.

Alternatively, B&S argued that even without the prohibition of Section 79-29-123(3) against an operating agreement's contracting away the right of a party to seek judicial dissolution of an LLC, judicial dissolution was outside the scope of the arbitration agreement. B&S relied on two Georgia cases, but the court distinguished the Georgia cases on the basis that the parties in this case expressly agreed to waive their right to judicial dissolution in the company's operating agreement. The arbitration provision contained in the Livingston operating agreement provided that "any dispute, claim, or controversy in connection with or arising under this Operating Agreement, its construction, existence, interpretation, validity, or any breach hereof, which cannot be amicably settled between the parties, shall be finally and exclusively resolved by arbitration ...." Because the parties agreed to waive their right to judicial dissolution and because dissolution of the company by the majority vote of the members was provided for in the operating agreement, the court concluded that dissolution fell directly under the arbitration provision.

A dissenting justice argued that the plain language of the LLC statute precludes an operating agreement from varying the power of the chancery court to decree dissolution when the chancellor finds that it is not reasonably practicable to carry on the business in conformity with the operating agreement. The dissenting justice would have held that the parties' waiver of the right to seek judicial dissolution did not include a waiver of their right to judicial dissolution under the specific circumstance identified in Section 79-29-803(1), and would have further held that the provision for arbitration agreements in Section 79-29-1211 does not abrogate the directive in Section 79-29-123(3) that dissolution under 79-29-803(1) is for the chancery court.

Derivative Suits

Infinity Emergency Management Group, LLC v. Neighbors Health System, Inc. (In re Neighbors Legacy Holdings, Inc.), 628 B.R. 600 (Bankr. S.D. Tex. 2021).

This case involved a complicated structure (which the court characterized as "convoluted") involving multiple entities, including "series LLCs." The Trustee of the Debtors' Unsecured Creditor Trust challenged the standing of Infinity Emergency Management Group, LLC ("Infinity") to bring derivative claims, asserting that Infinity's claims sought relief for harm to debtor entities and thus belonged to the Unsecured Creditor Trust. Infinity maintained that its claims sought redress only on behalf of two "series LLCs," which were non-debtor entities (although the LLC that apparently

created the series was a debtor entity). The bankruptcy court concluded that some of Infinity's claims alleged harm to debtor limited partnerships and that Infinity lacked standing as to those claims. In order to assert the remaining claims, the court concluded that Infinity would need to re-plead to make clear that the alleged harms were suffered by the series LLCs in which Infinity held interests.

The dispute in this case revolved around two of 22 free-standing emergency centers that were operated by debtor Neighbors Legacy Holdings, Inc. and its subsidiaries and affiliates (the "Neighbors Network"). Each emergency center was owned by a separate limited partnership, and each limited partnership had a 1% general partner—Neighbors GP, LLC—and a 99% limited partner—NHS Emergency Centers, LLC ("NHS"). The court stated that "NHS established individual series LLCs to operate (but not to own) each emergency center," and "each series LLC was owned by two classes of shareholders." According to the court, "[t]he Class A owners of each series LLC were to be founding members of the Neighbors Network," and "[t]he Class B owners of each series LLC were physicians that 'purchased interests in [the] profits and losses [of a] specific series LLC[ ]. ... The management and administration of each emergency center, as well as the entities associated with each center, was carried out by five other Neighbors Network affiliates.'"

The court further described the structure of the two emergency centers involved in this dispute as follows:

> Those emergency centers are NEC Eastside Emergency Center, LP and NEC Zaragoza Emergency Center, LP (together, the "Center LPs"). NHS, a Debtor entity, was the sole limited partner of both Center LPs. (ECF Nos. 59-24 at 2, 10; 61-13 at 2, 10). Each Center LP is a Debtor. (ECF No. 80 at 8–9). The series LLCs associated with the Center LPs were Series 114 – Eastside, LLC and Series 115 – Zaragoza, LLC (together, the "Series LLCs"). Neither Series LLC is a Debtor. (ECF No. 80 at 8–9). The Class A shareholder of each Series LLC was Neighbors Investment, which held a 34% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). The Class B shareholder was Infinity, which held a 65% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Investment and Infinity were the sole members of the Series LLCs. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Health provided management and administrative services to the Center LPs, the Series LLCs, and NHS. (ECF Nos. 62-12; 59-29; 59-10; 62-10; 62-24).
>
> In practical terms, the emergency centers were "brick and mortar" stores for the Neighbors Network. The Center LPs were created to own these stores. To that end, the Center LPs provided facilities for Neighbors Network physicians, who provided healthcare services to patients and generated revenue through provision of these services. NHS was created to hold the majority ownership stake in the Center LPs. NHS created the Series LLCs to oversee the day-to-day operations of the Center LPs. While the Series LLCs were created to "operate" the Center LPs, the management and administration of the Center LPs—the "nuts and bolts" of day-to-day operations—was entrusted to Neighbors Health (a Debtor entity). Infinity, a member of the Series LLCs, was supposed to provide physicians to staff the emergency centers in exchange for a cut of the revenue generated by the "brick and mortar" centers. Perhaps inevitably, this convoluted structure produced litigation over which entity or successor could sue for the alleged mismanagement of the Center LPs.

The court next described the process by which Infinity invested in this arrangement and highlighted certain provisions of the series agreements executed by Infinity as well as the NHS operating agreement and the Center LP limited partnership agreements.

The court characterized the "6500 Class B shares in the Series LLCs" as "ownership interests" that "were offered by NHS," and the court stated that Infinity acquired a "65% interest in both Series LLCs," each of which was created for the purpose of operating its corresponding free-standing emergency center. Infinity purchased its interests pursuant to two identical "Series Purchase Agreements," each of which reserved the profits and losses of the relevant emergency center for the corresponding series owners. The purchase agreements required Infinity to provide clinical staffing for the emergency centers, but the clinical staff members were to be employed as independent contractors of a specified Neighbors PLLC rather than as employees of the Series LLCs or any other Neighbors Network affiliate.

The "Series Agreements" executed by Infinity described the basic structure of the Series LLCs and identified the property associated with each Series LLC. Under the series agreements, Infinity acknowledged that the Series LLCs were created to operate the "Series Business[es]," which were the Center LPs. The Series LLCs were to receive "profits, losses, distributions, and other benefits received by NHS" from the Center LPs, and these "profits, losses, [etc.]" were identified as "Series Property." Infinity was entitled to receive distributions derived from the Series Property, and Neighbors Health—the manager of the Series LLCs—was responsible for making these distributions.

Along with the series agreements, the NHS Operating Agreement defined the Series Property from which Infinity was to receive distributions. The Series LLCs were established by the NHS Operating Agreement, under which NHS was authorized to acquire interests in Texas limited partnerships. NHS was to "allocate or attribute" the "profits, losses, distributions, and allocations" from the limited partnerships to the Series LLCs. Once received or "determined" by NHS, the "profits, losses, distributions, and allocations" from the limited partnerships were considered Series Property.

Under the Center LP Limited Partnership Agreements, the "income, gain, loss, deduction, and credit of the Partnership[s]" were to be allocated 1% to Neighbors GP (the general partner of each Center LP) and 99% to NHS (the limited partner of each Center LP). Additionally, partnership revenues, which included all gross receipts of the partnership received by the partnership, were to be distributed to Neighbors GP and NHS in accordance with their respective allocations. The Center LPs were the "Series Business[es]" from which NHS was supposed to receive the "profits, losses, distributions, and other benefits," which were to be distributed to the Series LLCs.

Four years after Infinity purchased its interests in the Series LLCs, certain entities in the Neighbors Network filed for Chapter 11 relief. The Center LPs and the general and limited partners of the Center LPs, including NHS, were debtors. Neither Neighbors Investment (the Class A interest owner of the Series LLCs) nor the Series LLCs were debtors. [Interestingly, the court did not address whether the series should be included as debtors by virtue of NHS's status as a debtor (since the series that were created by NHS would not actually be separate entities from NHS under Texas law).]

At issue in this case was whether Infinity could pursue derivative claims filed against Neighbors Health and Neighbors Health's directors and officers or whether the claims belonged to the Unsecured Creditor Trust. Infinity asserted its claims on behalf of the Series LLCs based on alleged breaches of fiduciary duty, abuses of control, gross mismanagement, and waste of corporate

assets by Neighbors Health and its officers and directors. The wrongs of which Infinity complained stemmed from the directors' and officers' alleged failure to "properly oversee the operations and finances of" the Series LLCs. Infinity based the derivative claims on the defendants' actions that caused: (1) the Center LPs to enter into real property leases at above market rates; (2) Series LLC funds to be held in Center LP accounts; (3) limited partner shares of the Center LPs to be wrongly collateralized; (4) fees billed by the Center LPs to be held in Center LP accounts and never "pushed back" to the Series LLCs; (5) physician fees billed by the physicians to be held and distributed to entities other than the Series LLCs; and (6) Series LLC funds to be transferred to other "unprofitable series entities." Infinity asserted that these actions resulted in losses of revenue and profit to the Series LLCs, but the Creditor Trustee argued that the Center LPs, rather than the Series LLCs, suffered the harm alleged. The court stated that the core of the issue was which entity owned the profits that were diminished by the defendants' alleged mismanagement. Infinity claimed that the non-debtor Series LLCs owned the business operations of the emergency centers and that it was thus the Series LLCs' profits that were impaired by the mismanagement, but the Creditor Trustee contended that the Center LPs associated with the emergency centers owned the centers' operations and suffered the loss of profits, thus vesting claims for redress in the debtor Center LPs.

The court discussed at length the "web of agreements" defining what the Series LLCs owned. Although Infinity contended that the agreements clearly established that the Series LLCs owned the emergency centers' business operations, and, by implication, the profits from those business operations, the court agreed with the Creditor Trustee that the Series LLCs only had an interest in distributions from Center LP profits. According to the court, the agreements made clear that certain property identified in Infinity's complaint was, at the time it was damaged, owned by the Center LPs. Because this alleged damage occurred while the property was owned by the Center LPs, the Trustee was vested with the exclusive right to seek redress for this damage. Specifically, Infinity did not have standing to seek redress for the defendants' actions that caused: (1) the Center LPs to enter into real property leases at above market rates; (2) Series LLC funds to be held in Center LP accounts; and (3) fees billed by the Center LPs to be held in Center LP accounts and never "pushed back" to the Series LLCs.

The court concluded that it was unclear whether Infinity had a viable derivative claim based on the three remaining alleged harms, i.e., that the defendants caused: (1) physician fees billed by the physicians to be held and distributed to entities other than the Series LLCs; (2) Series LLC funds to be transferred to other "unprofitable series entities;" and (3) limited partner shares of the Center LPs to be wrongly collateralized. As to the first two of these harms, Infinity's complaint did not make clear whether the Series LLCs owned the physician fees and the funds that were allegedly wrongfully transferred. As to the claim that Center LP shares were wrongfully collateralized, Infinity's failure to specify whether the defendants were acting as managers of the Series LLCs or of NHS was significant in that the series agreement contained a provision by which the members appeared to give NHS the right to encumber the Series Property, including Center LP shares acquired by NHS and allocated to the Series LLCs. Nevertheless, the court stated that Infinity might have a contractual claim based on the defendants' "wrongful collateralization" based on the management agreement between the Series LLC and Neighbors Health, which restricted Neighbors Health's ability to borrow money or execute promissory notes on the Series LLCs' behalf. Because Infinity's complaint did not make clear its standing to pursue these claims, the court stated that Infinity must re-plead its allegations as to these claims.

Finally, the court addressed Infinity's assertion that it could invoke Section 101.463 of the Texas Business Organizations Code, which provides special rules for closely held LLCs. The court discussed these provision in this context and ultimately concluded that the issues raised (whether the fact that the defendants were no longer governing persons and officers affected Infinity's ability to rely on these provisions and whether Infinity should recover directly) were not yet ripe:

> Generally, to assert a derivative claim, a limited liability company's member must comply with sections 101.452 through 101.460. *See* TEX. BUS. ORGS. CODE ANN. § 101.463(b). However, under section 101.463, "[s]ections 101.452-101.460 do not apply to a claim or a derivative proceeding by a member of a *closely held* limited liability company against a governing person, member, or officer of the limited liability company. *Id*. § 101.463(b) (emphasis added). If a member's derivative claim is asserted "against a person *who is not* a governing person, member, or officer," sections 101.452 through 101.460 still apply. *Id*. § 101.463(b) (emphasis added).
>
> Section 101.463 also allows courts to treat derivative claims asserted by members of closely held limited liability companies as direct claims "if justice requires." *Id*. § 101.463(c). To further enable members to vindicate their derivative claims, any recovery from such a proceeding "may be paid directly to the plaintiff or [company] if necessary to protect the interests of creditors or other members." *Id*. This authorization does not, however, "transform the derivative action into a direct action." *Gill v. Grewal*, 4:14-CV-2502, 2020 WL 3171360, at *4 (S.D. Tex. June 15, 2020); *Black Elk Energy*, 2016 WL 4055044, at *2. Moreover, the Court retains the authority to direct any recovery to the entity that suffered the injury rather than to the derivative plaintiff. *Swank*, 258 S.W.3d at 665 (holding that, under the corporate analog to section 101.463(c), "the trial court has *discretion* to award damages in a derivative proceeding directly to the shareholder." (emphasis added)).
>
> At bottom, section 101.463 "offers procedural benefits to members of limited liability companies, allowing them to pursue derivative actions for their own benefit." *Black Elk Energy*, 2016 WL 4055044, at *2; *see also In re LoneStar Logo & Signs, LLC*, 552 S.W.3d 342, 349–50 (Tex. App.—Austin 2018, no pet.) (quoting *Sneed v. Webre*, 465 S.W.3d 169, 181 (Tex. 2015)) (Section 101.463 authorizes "a shareholder of a closely held corporation [to] bring a derivative proceeding ... free of the statutory standing, demand, and mandatory-dismissal requirements that would otherwise apply ...." (internal quotation marks omitted, brackets in original)). In enacting these procedural benefits, the Texas Legislature removed the ability of independent directors "to decide whether continuing the derivative proceeding is in the best interest of the corporation." *See Sneed*, 465 S.W.3d at 185–87 (examining the predecessor statute to the statute authorizing shareholder derivative proceedings against closely held corporations); *See LoneStar Logo*, 552 S.W.3d at 349–50 (relying on the Texas Supreme Court's opinion in *Sneed* to interpret section 101.463). Section 101.463 enables members of closely held limited liability companies to bring derivative litigation without the impediments that burden other derivative suits.
>
> However, plaintiff-members must qualify for access to this fast-tracked derivative relief under section 101.463. Specifically, the derivative action must be

asserted against "a governing person, member, or officer."TEX. BUS. ORGS. CODE ANN. § 101.463(b). Only then are the procedural benefits of section 101.463 unlocked.

Infinity's standing to assert its purported derivative claim turns on the applicability of section 101.463(b). That is, whether Infinity was required to comply with sections 101.452 through 101.460 in asserting a derivative claim against Defendants on behalf of the Series LLCs. *See id.* § 101.463(b). Central to Infinity's asserted standing under section 101.463(b) is the Defendants' status in relation to the Series LLCs.

At the time Infinity initiated this proceeding in state court, it was an action against "governing person[s], member[s], or officer[s]." (*See* ECF No. 1-23 at 1–4). Since then, however, the Neighbors D&Os resigned their positions as officers and directors of all Neighbors entities. (*See* Case No. 18-33836, ECF Nos. 772 at 34; 862 at 1). The Liquidating Trustee took over management of Neighbors Health and NHS. (*See* Case No. 18-33836, ECF No. 772 at 8, 11, 34). And Neighbors Health rejected all unassumed executory contracts, which may have included the Management Agreement between Neighbors Health and the Series LLCs. (Case No. 18-33836, ECF No. 772 at 36). As it stands, Infinity's derivative claim is no longer asserted against "governing person[s], member[s], or officer[s]." (ECF No. 80 at 1–4).

However, based on Infinity's pleadings, it remains unclear whether the Series LLCs suffered injuries for which Infinity could seek derivative relief. Whether Defendants' changes in status divested Infinity of its ability to rely on section 101.463 is a question that is not yet ripe.

It would also be premature to reach Infinity's request under section 101.463 that, should Infinity recover on its derivative claim, any recovery be paid directly to Infinity under section 101.463(c)(2). First, Infinity has yet to plead a viable derivative claim, accompanied by the requisite showing standing. Second, it is not clear whether justice will require Infinity to be paid directly should it recover on its derivative claim. *See* TEX. BUS. ORGS. CODE ANN. § 101.463(c). The appropriate relief, if any, will be determined at a future date. It is sufficient that Infinity is aware that its efforts may not result in any direct recovery.

Chisum v. Campagna, 855 S.E.2d 680 (N.C. 2021).

The North Carolina Supreme Court held that: the statute of limitations on a minority member's claim for declaratory judgment did not begin to run until the member became aware or should have become aware of the defendants' breaches of the operating agreements; liability for nominal damages for breach of fiduciary duty and constructive fraud can support an award of punitive damages; judicial dissolution was supported by evidence that the majority members unilaterally determined that the minority member's interest had been extinguished and stopped communicating with the minority member; and the minority member's individual claims for breach of fiduciary duty based on the majority's attempt to eliminate his LLC interests were properly dismissed because the member failed to allege that he suffered a legally cognizable injury.

This dispute involved three LLCs—Judges Road Industrial Park, LLC (Judges Road), Carolina Coast Holdings, LLC (Carolina Coast), and Parkway Business Park, LLC (Parkway)—formed for the purpose of developing commercial real estate. The majority member of these LLCs

was an entity owned by Richard Campagna and Rocco Campagna (The Camp Group), and the minority member was Dennis Chisum. Chisum owned a 35% interest in Judges Group at the time of its formation in 1996, a one-third interest in Carolina Coast at its formation in 2000, and an 8.34% interest in Parkway when he became a member of that LLC in 2007. The operating agreement of each LLC contained provisions on future capital calls and consequences of failure to pay a capital call as well as provisions addressing transfer of membership interests.

Between 2007 and 2012, the Campagnas directed a number of capital calls. By 2010, Chisum's interest in Judges Road and Carolina Coastal had been reduced to 18.884% and 16.667%, respectively. In 2012, the Campagnas called a meeting, and the LLC's attorney sent a letter to Chisum (which Chisum testified he never received) advising Chisum that the accountant had determined that Chisum's interest had been diluted to the point that he had no remaining equity, that another capital call was being made, and that Chisum would be considered diluted in full and would no longer be a member if he did not participate in that capital call. The meeting was held without Chisum, and the minutes reflected that Chisum's membership interest would be "exhausted and extinguished if future capital calls were not timely made," but the Campagnas took control of the LLC at the conclusion of this 2012 meeting and did not communicate with Chisum after that point. Schedule 1 of the operating agreement was not amended to show Chisum's membership interest was extinguished. The Campagnas paid the entire capital call the month following the meeting and believed that they each thereafter owned a 50% interest in Judges Road, but Chisum's 2012 and 2013 K-1s showed that he held an 18.884% interest, although the 2013 K-1 showed that he owned that interest at the beginning of the year and that he held no interest by the end of the year. The 2013 K-1 indicated that it was his "final" K-1 for Judges Road.

The Campagnas took control of Parkway after the 2012 meeting as well. Chisum's 2012 and 2013 K-1s for Parkway showed that he held an 8.34% interest, although the 2013 K-1 showed that he owned that interest at the beginning of the year and that he held no interest by the end of the year. The 2013 K-1 indicted that it was his "final" K-1 for Parkway.

At a 2010 membership meeting of Carolina Coast, the Campagnas assessed a capital call to pay off a loan that Chisum had obtained and that was secured by the LLCs. Chisum did not pay the capital call. After the 2010 meeting, the Campagnas acted as if Chisum's membership interest in Carolina Coast had been extinguished in full. In 2011, Chisum received his 2010 K-1, which stated that Chisum's membership interest in that LLC had been reduced to zero and that this K-1 was his "final" K-1 for Carolina Coast. Although Chisum believed that his 2010 Carolina Coast K-1 was in error and that he continued to have an ownership interest in Carolina Coast, he never received another K-1 from Carolina Coast.

In 2016, Chisum sued the Campagnas, Judges Road, Carolina Coast, and Parkway alleging various claims, including a claim seeking a declaration that he continued to own his interests in the LLCs and a claim for judicial dissolution. In 2017, he amended his complaint to allege numerous additional claims, including individual and derivative claims for breach of fiduciary duty and constructive fraud. Prior to trial, the trial court determined that the operating agreements of Judges Road, Parkway, and Carolina Coast did not permit a member's interest to be extinguished for failure to contribute capital in response to a capital call. The trial court also dismissed Chisum's individual claims for breach of fiduciary duty and constructive fraud.

The case went to trial. The trial court entered a directed verdict in favor of the defendants on the claims related to Carolina Coast on statute of limitations grounds based on the court's view that Chisum should have known that the Campagnas were in breach of the operating agreement more

than three years before he filed his lawsuit. The jury found that Chisum filed his lawsuit within three years of the date that he knew or reasonably should have known that the Campagnas no longer considered him a member of Judges Road and Parkway and found breaches of fiduciary duty on the part of the Campagnas to Judges Road (awarding nominal and punitive damages) and Parkway (awarding actual and punitive damages). The jury also found liability on the part of the Campagnas to Chisum in the amount of distributions that were diverted to The Camp Group and should have been paid to Chisum. The trial court entered judgment for compensatory and punitive damages in the amounts found by the jury and a declaration that Chisum was a 8.34% member of Parkway and an 18.884% member of Judges Road. The court also ordered dissolution of those LLCs on the basis that it was not practicable to conduct their business in conformance with the operating agreements.

On appeal, the supreme court first rejected the defendants' argument that the trial court erred in submitting the issue of when Chisum had notice of the Campagna's breaches of the operating agreements for purposes of Chisum's declaratory judgment claims. The court affirmed the trial court's determination that the statute of limitations applicable to Chisum's declaratory judgment claims began running at the time that he became aware or should have become aware of the Campagnas' breaches of the operating agreements. Based on the evidence regarding communications with Chisum and the timing of the receipt of his K-1s, the court held that the record contained sufficient evidence to support the submission of the statute of limitations issue to the jury.

The court next addressed whether the trial court erred by failing to direct a verdict or enter judgment notwithstanding the verdict in their favor with respect to the derivative claims for breach of fiduciary duty and constructive fraud relating to Judges Road. The defendants argued that there was no evidence that Judges Road sustained any actual damages as a result of the Campagnas' conduct and that nominal damages, standing alone, were insufficient to support claims for constructive fraud and breach of fiduciary duty. Although the supreme court stated that it had not previously addressed the issue of whether a plaintiff is required to prove actual damages in support of breach of fiduciary duty and constructive fraud claims, the court discussed cases in which the court of appeals had addressed the issue and had held that nominal damages support an award of punitive damages. The supreme court concluded:

> [W]e adopt the reasoning of the Court of Appeals and hold that potential liability for nominal damages is sufficient to establish the validity of claims for breach of fiduciary duty and constructive fraud and can support an award of punitive damages. Aside from the fact that nothing in the prior decisions of this Court indicates that proof of actual injury is necessary in order to support a claim for breach of fiduciary duty or constructive fraud, we see no basis for treating the incurrence of nominal damages as a second-class legal citizen in this context, particularly given that such damages do reflect the existence of a legal harm and the fact that the policy of North Carolina law is to discourage breaches of fiduciary duty and acts of constructive fraud.

The court also discussed challenges made by the defendants with regard to the consistency of verdicts relating to constructive fraud and breach of fiduciary duty, the propriety of the jury instructions with respect to the Campagnas' duty to deal openly, fairly, and honestly, and the ambiguity of the identical compensatory damages awards against each of the Campagnas. The court rejected each of these challenges.

The supreme court next addressed the defendants' argument that the trial court erred by ordering dissolution of Judges Road and Parkway and by depriving the defendants of their statutory right to purchase Chisum's interest in lieu of dissolution. The supreme court concluded that the evidence provided ample support for the determination that it was not practicable to conduct the LLCs' business in conformance with the operating agreement and the statute, and the trial court properly ordered judicial dissolution pursuant to the first ground without providing the Campagnas the opportunity to purchase Chisum's interests, which is only required with respect to the second ground.

The court next addressed Chisum's cross appeal in which Chisum complained of the trial court's determination that his claims relating to Carolina Coast were time-barred, the failure of the judgment to ensure that the Campagnas did not share in the punitive damages award to the LLCs, and the dismissal of Chisum's individual claims for breach of fiduciary duty and constructive fraud.

With regard to Chisum's argument that the trial court erred in determining that his claims relating to Carolina Coastal were time-barred, the court rejected Chisum's argument that statutes of limitations do not apply to declaratory relief, and the court concluded that the three-year statute of limitations applied to his claims because the claims hinged upon the validity of his claim that the defendants breached the operating agreement. The court concluded, however, that there was a triable issue of fact as to when Chisum knew or reasonably should have known that the defendants breached the operating agreement.

The court concluded that Chisum failed to preserve for appeal his argument that it would be inequitable for the Campagnas to share in distributions that included punitive damages awards they are required to pay the LLCs.

Finally, the court concluded that Chisum's individual breach-of-fiduciary-duty and constructive-fraud claims failed because the record did not show that he sustained a legally cognizable injury. Chisum claimed that the Campagnas attempted to "freeze [him] out of the LLCs," conducted "sham capital calls," acted as if he was no longer a member of the LLCs, and treated him in a manner that was inconsistent with his status as a member of Judges Road and Parkway. The court said that these facts simply described the specific steps that the Campagnas took to deprive Chisum of his ownership interests in Judges Road and Parkway, but did not show the sort of injury that is necessary to support claims for breach of fiduciary duty and constructive fraud. Because Chisum failed to establish that he suffered a legally cognizable injury as the result of the Campagnas' conduct, the court stated that it need not determine whether any injury that Chisum might have suffered was separate and apart from any injury suffered by Judges Road and Parkway, and the trial court did not err in dismissing Chisum's individual claims for breach of fiduciary duty and constructive fraud.

Charging Order

Blizzard Energy, Inc. v. Schaefers, 71 Cal. App. 5th 832, 286 Cal. Rptr. 3d 658 (2021).

The California appellate court concluded that there was sufficient evidence to support the trial court's finding of unity of interest and ownership (the first condition required to apply the California alter-ego doctrine) between an LLC and a manager/member in a proceeding in which the judgment creditor of the member sought application of reverse veil piercing in order to add the LLC as a judgment debtor on a foreign judgment against the member. The appellate court held that the charging order remedy did not preclude reverse veil piercing, but the court remanded to the trial

court for further consideration of competing equities in light of the potential harm that reverse piercing might inflict on the judgment debtor's wife, who owned a 50% membership interest in the LLC and claimed to be an innocent party.

In 2017, Blizzard Energy, Inc. ("Blizzard") obtained a judgment in Kansas in the amount of $3.825 million against appellant Bernd Schaefers for fraud. The Kansas judgment was entered in California under the Sister State Money Judgments Act, and Blizzard moved to have the California trial court amend the judgment to add BKS Cambria, LLC, and BKS Energy, LLC (the "BKS Entities") as judgment debtors under the reverse piercing doctrine. In July 2019, Schaefers filed a voluntary Chapter 11 bankruptcy petition, but the bankruptcy court determined that the California trial court was permitted to hear and decide the motion to amend the judgment to add the BKS Entities as judgment debtors without violating the automatic stay. The trial court found that the BKS Entities were the alter egos of Schaefers and that failing to add them to the judgment would create an unjust result. The trial court thus granted the motion to amend the judgment. BKS Cambria, LLC ("BKS Cambria") and Schaefers appealed.

The appellate court held that the issuance of a charging order was not the exclusive remedy for Blizzard to enforce its judgment against appellants. The court relied on California precedent holding that a charging order and reverse veil piercing are not mutually exclusive. *Curci Investments, LLC v. Baldwin*, 14 Cal. App. 4th 214, 221 Cal. Rptr. 3d 847 (2017). Distinguishing the LLC context from the corporate context (the *Curci* court having previously held that a creditor of a shareholder may not reverse pierce the corporation's veil), the court in *Curci* stated that the focus should be on the ends of justice and that a trial court should evaluate the same factors employed in a traditional piercing case as well as whether the claimant has any plain, speedy, and adequate remedy at law.

Appellants argued that Blizzard had multiple legal remedies under multiple statutes, including the California Revised Uniform Limited Liability Company Act and Uniform Voidable Transactions Act, but the court stated that appellants failed to explain how these statutes provided an adequate remedy at law. The court noted that, unlike the creditor of a shareholder of a corporation, an LLC member's creditor could not step into the shoes of the debtor but was limited to obtaining a charging order while the debtor remained a member with control over the LLC and the timing of distributions. Furthermore, Schaefers had filed for bankruptcy and had written his accountant a letter indicating that he intended to make it as difficult as possible to collect on the Kansas judgment by remaining as manager of the LLCs, appointing his successor as manager, and withholding distributions from the LLCs.

The appellate court proceeded to analyze whether the evidence supported the trial court's findings that there was the requisite unity of interest and ownership between Schaefers and BKS Cambria to apply the alter-ego doctrine and whether equitable considerations supported application of the doctrine. The court concluded that there was substantial evidence of unity of interest and ownership, but the court remanded the matter to the trial court for further consideration of competing equities presented by the possibility that Schaefers' wife, who was a 50% owner of BKS Cambria along with Schaefers, might be an innocent third party who would be harmed by the application of reverse veil piercing to add BKS Cambria as a judgment debtor on the judgment against Schaefers.

AOK Property Investments, LLC v. Boudreaux, 308 So.3d 1214 (La. App. 2020).

The court held that Louisiana's charging order statute applies in the context of a single-member LLC, declining to interpret the Louisiana charging order statute in the same manner as the

Florida Supreme Court interpreted the Florida statute at the time of *Olmstead v. Federal Trade Commission*, 44 So.3d 76 (Fla. 2010).

Boudreaux was the sole member and 100% owner of SCI Leasing, LLC (SCI). In 2017, Boudreaux and his father (Boudreaux, Sr.) executed an instrument transferring a 5% interest in SCI to Boudreaux, Sr. In 2018, the district court rendered a judgment in favor of AOK Property Investments, LLC (AOK) against Boudreaux. A few months later, Boudreaux and Boudreaux, Sr. admitted LeBoeuf as a member with a 10% membership interest in SCI.

After the transfers, AOK filed a petition seeking to annul the transfers to Boudreaux, Sr. and LeBoeuf and restore Boudreaux as the sole member of SCI, with the objective of seizing Boudreaux's entire membership interest in SCI in satisfaction of AOK's judgment. This appeal addressed a motion for summary judgment on one legal issue: whether a creditor is precluded by Louisiana charging order statutes from having a member's 100% membership interest in a single-member LLC seized like any other non-exempt asset. The trial court found that the charging order statute does not apply in the context of a single-member LLC, reasoning that there are no other members to protect in a single-member LLC when a creditor attempts to seize the entire membership interest, and that a single-member judgment-debtor's membership interest should not be shielded from seizure by a judgment creditor.

The trial court relied on *Olmstead v. Federal Trade Commission*, 44 So.3d 76 (Fla. 2010), (superseded by statute as stated in *Capstone Bank v. Perry-Clifton Enterprises, LLC*, 230 So.3d 970 (Fla. Dist. Ct. App. 2017)). The Florida Supreme Court concluded that the statutory charging order provision did not preclude application of the creditor's remedy of execution on an interest in a single-member LLC and found that Florida law at the time permitted a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment. The Florida Supreme Court interpreted the language of its charging order provision, which is similar to Louisiana's charging order provision, as not suggesting that the charging order was an exclusive remedy when compared with statutes for other entities.

The court here said that the Louisiana Supreme Court has not interpreted the Louisiana statute in the same manner as the Florida Supreme Court's interpretation of the Florida statute in *Olmstead*. The court explained:

> Under Louisiana law, a member's interest in an LLC is personal property that is separate and distinct from the property of the LLC. *Channelside Servs., LLC v. Chrysochoos Grp., Inc.*, 15-64 (La. App. 4 Cir. 5/13/16), 194 So.3d 751, 758, citing La. R.S. 12:1329. Pursuant to La. R.S. 12:1331, a court of competent jurisdiction may charge the membership interest of the LLC's member with payment of the unsatisfied amount of judgment with interest. To the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest. *Id*. Furthermore, La. R.S. 12:1332 states that, except [sic] otherwise provided in the articles of organization or a written operating agreement, an assignee of an LLC shall not become a member or participate in the management of the LLC; and, until the assignee of an interest in an LLC becomes a member, the assignor shall continue to be a member and shall not be released from his liability to the LLC under La. R.S. 12:1322 and 1328.
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> According to La. R.S. 12:1330 through 1332, the assignment of a member's interest in the LLC effectively separates the membership interest into two sets of

rights: financial and management rights. *Channelside Servs., LLC*, 194 So.3d at 759. The assignee is granted only the member's financial rights, while the original member retains management rights and powers, unless and until the assignee becomes a member. *Id*. A judgment creditor who obtains a charging order, thereby becoming an assignee of a member's interest, is entitled to share in the profits and losses and receive the distributions to which the member was entitled. *Id*.

While Louisiana's charging provision for LLCs does not contain the term "exclusive remedy," it does provide that a judgment creditor shall have "only" the rights of an assignee of the membership interest. Consequently, that language is all that the Louisiana Legislature provided us to rely upon, and it can be viewed as the only remedy allowed to judgment creditors. This rationale can be explained by the following excerpt:

> The one feature of the LLC system that poses a special issue is its treatment of creditors. Judgment creditors of an LLC member may not cause the debtor's member's LLC interest to be seized and sold in the ordinary way that most assets of a judgment debtor may be seized. *Judgment creditors are entitled only to obtain a "charge" against an LLC member's interest*, and this charge entitles the charging creditor only to be treated as an assignee.

Glenn G. Morris, Business Organizations § 44:20, in 8 Louisiana Civil Law Treatise (2020). (Emphasis added).

Because there has been no reverse piercing of the veil in this matter, we find that a plain reading of Louisiana's charging provision for LLCs provides the exclusive remedy of a judgment creditor.

Accordingly, the court concluded that a creditor is precluded by Louisiana charging order statutes from seizing a single-member LLC's 100% membership interest in the LLC, and the court granted Boudreaux's motion for summary judgment.

<u>Bankruptcy</u>

Infinity Emergency Management Group, LLC v. Neighbors Health System, Inc. (In re Neighbors Legacy Holdings, Inc.), 628 B.R. 600 (Bankr. S.D. Tex. 2021).

This case involved a complicated structure (which the court characterized as "convoluted") involving multiple entities, including "series LLCs." The Trustee of the Debtors' Unsecured Creditor Trust challenged the standing of Infinity Emergency Management Group, LLC ("Infinity") to bring derivative claims, asserting that Infinity's claims sought relief for harm to debtor entities and thus belonged to the Unsecured Creditor Trust. Infinity maintained that its claims sought redress only on behalf of two "series LLCs," which were non-debtor entities (although the LLC that apparently created the series was a debtor entity). The bankruptcy court concluded that some of Infinity's claims alleged harm to debtor limited partnerships and that Infinity lacked standing as to those claims. In order to assert the remaining claims, the court concluded that Infinity would need to re-plead to make clear that the alleged harms were suffered by the series LLCs in which Infinity held interests.

The dispute in this case revolved around two of 22 free-standing emergency centers that were operated by debtor Neighbors Legacy Holdings, Inc. and its subsidiaries and affiliates (the

"Neighbors Network"). Each emergency center was owned by a separate limited partnership, and each limited partnership had a 1% general partner—Neighbors GP, LLC—and a 99% limited partner—NHS Emergency Centers, LLC ("NHS"). The court stated that "NHS established individual series LLCs to operate (but not to own) each emergency center," and "each series LLC was owned by two classes of shareholders." According to the court, "[t]he Class A owners of each series LLC were to be founding members of the Neighbors Network," and "[t]he Class B owners of each series LLC were physicians that 'purchased interests in [the] profits and losses [of a] specific series LLC[ ]. ... The management and administration of each emergency center, as well as the entities associated with each center, was carried out by five other Neighbors Network affiliates.'"

The court further described the structure of the two emergency centers involved in this dispute as follows:

> Those emergency centers are NEC Eastside Emergency Center, LP and NEC Zaragoza Emergency Center, LP (together, the "Center LPs"). NHS, a Debtor entity, was the sole limited partner of both Center LPs. (ECF Nos. 59-24 at 2, 10; 61-13 at 2, 10). Each Center LP is a Debtor. (ECF No. 80 at 8–9). The series LLCs associated with the Center LPs were Series 114 – Eastside, LLC and Series 115 – Zaragoza, LLC (together, the "Series LLCs"). Neither Series LLC is a Debtor. (ECF No. 80 at 8–9). The Class A shareholder of each Series LLC was Neighbors Investment, which held a 34% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). The Class B shareholder was Infinity, which held a 65% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Investment and Infinity were the sole members of the Series LLCs. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Health provided management and administrative services to the Center LPs, the Series LLCs, and NHS. (ECF Nos. 62-12; 59-29; 59-10; 62-10; 62-24).
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> In practical terms, the emergency centers were "brick and mortar" stores for the Neighbors Network. The Center LPs were created to own these stores. To that end, the Center LPs provided facilities for Neighbors Network physicians, who provided healthcare services to patients and generated revenue through provision of these services. NHS was created to hold the majority ownership stake in the Center LPs. NHS created the Series LLCs to oversee the day-to-day operations of the Center LPs. While the Series LLCs were created to "operate" the Center LPs, the management and administration of the Center LPs—the "nuts and bolts" of day-to-day operations—was entrusted to Neighbors Health (a Debtor entity). Infinity, a member of the Series LLCs, was supposed to provide physicians to staff the emergency centers in exchange for a cut of the revenue generated by the "brick and mortar" centers. Perhaps inevitably, this convoluted structure produced litigation over which entity or successor could sue for the alleged mismanagement of the Center LPs.

The court next described the process by which Infinity invested in this arrangement and highlighted certain provisions of the series agreements executed by Infinity as well as the NHS operating agreement and the Center LP limited partnership agreements.

The court characterized the "6500 Class B shares in the Series LLCs" as "ownership interests" that "were offered by NHS," and the court stated that Infinity acquired a "65% interest in

both Series LLCs," each of which was created for the purpose of operating its corresponding free-standing emergency center. Infinity purchased its interests pursuant to two identical "Series Purchase Agreements," each of which reserved the profits and losses of the relevant emergency center for the corresponding series owners. The purchase agreements required Infinity to provide clinical staffing for the emergency centers, but the clinical staff members were to be employed as independent contractors of a specified Neighbors PLLC rather than as employees of the Series LLCs or any other Neighbors Network affiliate.

The "Series Agreements" executed by Infinity described the basic structure of the Series LLCs and identified the property associated with each Series LLC. Under the series agreements, Infinity acknowledged that the Series LLCs were created to operate the "Series Business[es]," which were the Center LPs. The Series LLCs were to receive "profits, losses, distributions, and other benefits received by NHS" from the Center LPs, and these "profits, losses, [etc.]" were identified as "Series Property." Infinity was entitled to receive distributions derived from the Series Property, and Neighbors Health—the manager of the Series LLCs—was responsible for making these distributions.

Along with the series agreements, the NHS Operating Agreement defined the Series Property from which Infinity was to receive distributions. The Series LLCs were established by the NHS Operating Agreement, under which NHS was authorized to acquire interests in Texas limited partnerships. NHS was to "allocate or attribute" the "profits, losses, distributions, and allocations" from the limited partnerships to the Series LLCs. Once received or "determined" by NHS, the "profits, losses, distributions, and allocations" from the limited partnerships were considered Series Property.

Under the Center LP Limited Partnership Agreements, the "income, gain, loss, deduction, and credit of the Partnership[s]" were to be allocated 1% to Neighbors GP (the general partner of each Center LP) and 99% to NHS (the limited partner of each Center LP). Additionally, partnership revenues, which included all gross receipts of the partnership and received by the partnership, were to be distributed to Neighbors GP and NHS in accordance with their respective allocations. The Center LPs were the "Series Business[es]" from which NHS was supposed to receive the "profits, losses, distributions, and other benefits," which were to be distributed to the Series LLCs.

Four years after Infinity purchased its interests in the Series LLCs, certain entities in the Neighbors Network filed for Chapter 11 relief. The Center LPs and the general and limited partners of the Center LPs, including NHS, were debtors. Neither Neighbors Investment (the Class A interest owner of the Series LLCs) nor the Series LLCs were debtors. [Interestingly, the court did not address whether the series should be included as debtors by virtue of NHS's status as a debtor (since the series that were created by NHS would not actually be separate entities from NHS under Texas law).]

At issue in this case was whether Infinity could pursue derivative claims filed against Neighbors Health and Neighbors Health's directors and officers or whether the claims belonged to the Unsecured Creditor Trust. Infinity asserted its claims on behalf of the Series LLCs based on alleged breaches of fiduciary duty, abuses of control, gross mismanagement, and waste of corporate assets by Neighbors Health and its officers and directors. The wrongs of which Infinity complained stemmed from the directors' and officers' alleged failure to "properly oversee the operations and finances of" the Series LLCs. Infinity based the derivative claims on the defendants' actions that caused: (1) the Center LPs to enter into real property leases at above market rates; (2) Series LLC funds to be held in Center LP accounts; (3) limited partner shares of the Center LPs to be wrongly

collateralized; (4) fees billed by the Center LPs to be held in Center LP accounts and never "pushed back" to the Series LLCs; (5) physician fees billed by the physicians to be held and distributed to entities other than the Series LLCs; and (6) Series LLC funds to be transferred to other "unprofitable series entities." Infinity asserted that these actions resulted in losses of revenue and profit to the Series LLCs, but the Creditor Trustee argued that the Center LPs, rather than the Series LLCs, suffered the harm alleged. The court stated that the core of the issue was which entity owned the profits that were diminished by the defendants' alleged mismanagement. Infinity claimed that the non-debtor Series LLCs owned the business operations of the emergency centers and that it was thus the Series LLCs' profits that were impaired by the mismanagement, but the Creditor Trustee contended that the Center LPs associated with the emergency centers owned the centers' operations and suffered the loss of profits, thus vesting claims for redress in the debtor Center LPs.

The court discussed at length the "web of agreements" defining what the Series LLCs owned. Although Infinity contended that the agreements clearly established that the Series LLCs owned the emergency centers' business operations, and, by implication, the profits from those business operations, the court agreed with the Creditor Trustee that the Series LLCs only had an interest in distributions from Center LP profits. According to the court, the agreements made clear that certain property identified in Infinity's complaint was, at the time it was damaged, owned by the Center LPs. Because this alleged damage occurred while the property was owned by the Center LPs, the Trustee was vested with the exclusive right to seek redress for this damage. Specifically, Infinity did not have standing to seek redress for the defendants' actions that caused: (1) the Center LPs to enter into real property leases at above market rates; (2) Series LLC funds to be held in Center LP accounts; and (3) fees billed by the Center LPs to be held in Center LP accounts and never "pushed back" to the Series LLCs.

The court concluded that it was unclear whether Infinity had a viable derivative claim based on the three remaining alleged harms, i.e., that the defendants caused: (1) physician fees billed by the physicians to be held and distributed to entities other than the Series LLCs; (2) Series LLC funds to be transferred to other "unprofitable series entities;" and (3) limited partner shares of the Center LPs to be wrongly collateralized. As to the first two of these harms, Infinity's complaint did not make clear whether the Series LLCs owned the physician fees and the funds that were allegedly wrongfully transferred. As to the claim that Center LP shares were wrongfully collateralized, Infinity's failure to specify whether the defendants were acting as managers of the Series LLCs or of NHS was significant in that the series agreement contained a provision by which the members appeared to give NHS the right to encumber the Series Property, including Center LP shares acquired by NHS and allocated to the Series LLCs. Nevertheless, the court stated that Infinity might have a contractual claim based on the defendants' "wrongful collateralization" based on the management agreement between the Series LLC and Neighbors Health, which restricted Neighbors Health's ability to borrow money or execute promissory notes on the Series LLCs' behalf. Because Infinity's complaint did not make clear its standing to pursue these claims, the court stated that Infinity must re-plead its allegations as to these claims.

Finally, the court addressed Infinity's assertion that it could invoke Section 101.463 of the Texas Business Organizations Code, which provides special rules for closely held LLCs. The court discussed these provision in this context and ultimately concluded that the issues raised (whether the fact that the defendants were no longer governing persons and officers affected Infinity's ability to rely on these provisions and whether Infinity should recover directly) were not yet ripe:

Generally, to assert a derivative claim, a limited liability company's member must comply with sections 101.452 through 101.460. *See* TEX. BUS. ORGS. CODE ANN. § 101.463(b). However, under section 101.463, "[s]ections 101.452-101.460 do not apply to a claim or a derivative proceeding by a member of a *closely held* limited liability company against a governing person, member, or officer of the limited liability company. *Id*. § 101.463(b) (emphasis added). If a member's derivative claim is asserted "against a person *who is not* a governing person, member, or officer," sections 101.452 through 101.460 still apply. *Id*. § 101.463(b) (emphasis added).

Section 101.463 also allows courts to treat derivative claims asserted by members of closely held limited liability companies as direct claims "if justice requires." *Id*. § 101.463(c). To further enable members to vindicate their derivative claims, any recovery from such a proceeding "may be paid directly to the plaintiff or [company] if necessary to protect the interests of creditors or other members." *Id*. This authorization does not, however, "transform the derivative action into a direct action." *Gill v. Grewal*, 4:14-CV-2502, 2020 WL 3171360, at *4 (S.D. Tex. June 15, 2020); *Black Elk Energy*, 2016 WL 4055044, at *2. Moreover, the Court retains the authority to direct any recovery to the entity that suffered the injury rather than to the derivative plaintiff. *Swank*, 258 S.W.3d at 665 (holding that, under the corporate analog to section 101.463(c), "the trial court has *discretion* to award damages in a derivative proceeding directly to the shareholder." (emphasis added)).

At bottom, section 101.463 "offers procedural benefits to members of limited liability companies, allowing them to pursue derivative actions for their own benefit." *Black Elk Energy*, 2016 WL 4055044, at *2; *see also In re LoneStar Logo & Signs, LLC*, 552 S.W.3d 342, 349–50 (Tex. App.—Austin 2018, no pet.) (quoting *Sneed v. Webre*, 465 S.W.3d 169, 181 (Tex. 2015)) (Section 101.463 authorizes "a shareholder of a closely held corporation [to] bring a derivative proceeding ... free of the statutory standing, demand, and mandatory-dismissal requirements that would otherwise apply ...." (internal quotation marks omitted, brackets in original)). In enacting these procedural benefits, the Texas Legislature removed the ability of independent directors "to decide whether continuing the derivative proceeding is in the best interest of the corporation." *See Sneed*, 465 S.W.3d at 185–87 (examining the predecessor statute to the statute authorizing shareholder derivative proceedings against closely held corporations); *See LoneStar Logo*, 552 S.W.3d at 349–50 (relying on the Texas Supreme Court's opinion in *Sneed* to interpret section 101.463). Section 101.463 enables members of closely held limited liability companies to bring derivative litigation without the impediments that burden other derivative suits.

However, plaintiff-members must qualify for access to this fast-tracked derivative relief under section 101.463. Specifically, the derivative action must be asserted against "a governing person, member, or officer."TEX. BUS. ORGS. CODE ANN. § 101.463(b). Only then are the procedural benefits of section 101.463 unlocked.

Infinity's standing to assert its purported derivative claim turns on the applicability of section 101.463(b). That is, whether Infinity was required to comply with sections 101.452 through 101.460 in asserting a derivative claim against

Defendants on behalf of the Series LLCs. *See id.* § 101.463(b). Central to Infinity's asserted standing under section 101.463(b) is the Defendants' status in relation to the Series LLCs.

At the time Infinity initiated this proceeding in state court, it was an action against "governing person[s], member[s], or officer[s]." (*See* ECF No. 1-23 at 1–4). Since then, however, the Neighbors D&Os resigned their positions as officers and directors of all Neighbors entities. (*See* Case No. 18-33836, ECF Nos. 772 at 34; 862 at 1). The Liquidating Trustee took over management of Neighbors Health and NHS. (*See* Case No. 18-33836, ECF No. 772 at 8, 11, 34). And Neighbors Health rejected all unassumed executory contracts, which may have included the Management Agreement between Neighbors Health and the Series LLCs. (Case No. 18-33836, ECF No. 772 at 36). As it stands, Infinity's derivative claim is no longer asserted against "governing person[s], member[s], or officer[s]." (ECF No. 80 at 1–4).

However, based on Infinity's pleadings, it remains unclear whether the Series LLCs suffered injuries for which Infinity could seek derivative relief. Whether Defendants' changes in status divested Infinity of its ability to rely on section 101.463 is a question that is not yet ripe.

It would also be premature to reach Infinity's request under section 101.463 that, should Infinity recover on its derivative claim, any recovery be paid directly to Infinity under section 101.463(c)(2). First, Infinity has yet to plead a viable derivative claim, accompanied by the requisite showing standing. Second, it is not clear whether justice will require Infinity to be paid directly should it recover on its derivative claim. *See* TEX. BUS. ORGS. CODE ANN. § 101.463(c). The appropriate relief, if any, will be determined at a future date. It is sufficient that Infinity is aware that its efforts may not result in any direct recovery.

Series LLCs

Infinity Emergency Management Group, LLC v. Neighbors Health System, Inc. (In re Neighbors Legacy Holdings, Inc.), 628 B.R. 600 (Bankr. S.D. Tex. 2021).

This case involved a complicated structure (which the court characterized as "convoluted") involving multiple entities, including "series LLCs." The Trustee of the Debtors' Unsecured Creditor Trust challenged the standing of Infinity Emergency Management Group, LLC ("Infinity") to bring derivative claims, asserting that Infinity's claims sought relief for harm to debtor entities and thus belonged to the Unsecured Creditor Trust. Infinity maintained that its claims sought redress only on behalf of two "series LLCs," which were non-debtor entities (although the LLC that apparently created the series was a debtor entity). The bankruptcy court concluded that some of Infinity's claims alleged harm to debtor limited partnerships and that Infinity lacked standing as to those claims. In order to assert the remaining claims, the court concluded that Infinity would need to re-plead to make clear that the alleged harms were suffered by the series LLCs in which Infinity held interests.

The dispute in this case revolved around two of 22 free-standing emergency centers that were operated by debtor Neighbors Legacy Holdings, Inc. and its subsidiaries and affiliates (the "Neighbors Network"). Each emergency center was owned by a separate limited partnership, and each limited partnership had a 1% general partner—Neighbors GP, LLC—and a 99% limited partner—NHS Emergency Centers, LLC ("NHS"). The court stated that "NHS established individual

series LLCs to operate (but not to own) each emergency center," and "each series LLC was owned by two classes of shareholders." According to the court, "[t]he Class A owners of each series LLC were to be founding members of the Neighbors Network," and "[t]he Class B owners of each series LLC were physicians that 'purchased interests in [the] profits and losses [of a] specific series LLC[ ]. ... The management and administration of each emergency center, as well as the entities associated with each center, was carried out by five other Neighbors Network affiliates.'"

The court further described the structure of the two emergency centers involved in this dispute as follows:

> Those emergency centers are NEC Eastside Emergency Center, LP and NEC Zaragoza Emergency Center, LP (together, the "Center LPs"). NHS, a Debtor entity, was the sole limited partner of both Center LPs. (ECF Nos. 59-24 at 2, 10; 61-13 at 2, 10). Each Center LP is a Debtor. (ECF No. 80 at 8–9). The series LLCs associated with the Center LPs were Series 114 – Eastside, LLC and Series 115 – Zaragoza, LLC (together, the "Series LLCs"). Neither Series LLC is a Debtor. (ECF No. 80 at 8–9). The Class A shareholder of each Series LLC was Neighbors Investment, which held a 34% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). The Class B shareholder was Infinity, which held a 65% "Sharing Ratio" in each Series LLC. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Investment and Infinity were the sole members of the Series LLCs. (ECF Nos. 59-8 at 1; 59-19 at 1). Neighbors Health provided management and administrative services to the Center LPs, the Series LLCs, and NHS. (ECF Nos. 62-12; 59-29; 59-10; 62-10; 62-24).
>
> In practical terms, the emergency centers were "brick and mortar" stores for the Neighbors Network. The Center LPs were created to own these stores. To that end, the Center LPs provided facilities for Neighbors Network physicians, who provided healthcare services to patients and generated revenue through provision of these services. NHS was created to hold the majority ownership stake in the Center LPs. NHS created the Series LLCs to oversee the day-to-day operations of the Center LPs. While the Series LLCs were created to "operate" the Center LPs, the management and administration of the Center LPs—the "nuts and bolts" of day-to-day operations—was entrusted to Neighbors Health (a Debtor entity). Infinity, a member of the Series LLCs, was supposed to provide physicians to staff the emergency centers in exchange for a cut of the revenue generated by the "brick and mortar" centers. Perhaps inevitably, this convoluted structure produced litigation over which entity or successor could sue for the alleged mismanagement of the Center LPs.

The court next described the process by which Infinity invested in this arrangement and highlighted certain provisions of the series agreements executed by Infinity as well as the NHS operating agreement and the Center LP limited partnership agreements.

The court characterized the "6500 Class B shares in the Series LLCs" as "ownership interests" that "were offered by NHS," and the court stated that Infinity acquired a "65% interest in both Series LLCs," each of which was created for the purpose of operating its corresponding free-standing emergency center. Infinity purchased its interests pursuant to two identical "Series Purchase Agreements," each of which reserved the profits and losses of the relevant emergency center for the

corresponding series owners. The purchase agreements required Infinity to provide clinical staffing for the emergency centers, but the clinical staff members were to be employed as independent contractors of a specified Neighbors PLLC rather than as employees of the Series LLCs or any other Neighbors Network affiliate.

The "Series Agreements" executed by Infinity described the basic structure of the Series LLCs and identified the property associated with each Series LLC. Under the series agreements, Infinity acknowledged that the Series LLCs were created to operate the "Series Business[es]," which were the Center LPs. The Series LLCs were to receive "profits, losses, distributions, and other benefits received by NHS" from the Center LPs, and these "profits, losses, [etc.]" were identified as "Series Property." Infinity was entitled to receive distributions derived from the Series Property, and Neighbors Health—the manager of the Series LLCs—was responsible for making these distributions.

Along with the series agreements, the NHS Operating Agreement defined the Series Property from which Infinity was to receive distributions. The Series LLCs were established by the NHS Operating Agreement, under which NHS was authorized to acquire interests in Texas limited partnerships. NHS was to "allocate or attribute" the "profits, losses, distributions, and allocations" from the limited partnerships to the Series LLCs. Once received or "determined" by NHS, the "profits, losses, distributions, and allocations" from the limited partnerships were considered Series Property.

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Federal Housing Finance Agency v. Las Vegas Development Group, LLC, No. 2:16-cv-01187-GMN-CWH, 2020 WL 1308319 (D. Nev. Mar. 19, 2020).

The plaintiffs in this action sought to quiet title and obtain declaratory relief that their deeds of trust encumbering certain properties were not extinguished by homeowners' association foreclosure sales at which the defendants acquired title to the properties. The court briefly addressed whether the court had jurisdiction over properties held by two series of an LLC that was a defendant when the series were not themselves named as defendants. The court stated:

> Defendants also argue that the Court lacks jurisdiction over two additional Properties—those located at 675 Magrath Street and 3451 Desert Cliff Street (the "Series Properties")—because they are owned by LVDG LLC, Series 129 and LVDG LCC, Series 124, which are separate limited liability companies from Defendant LVDG LLC. (Defs.' Resp. 6:14–7:9). According to Defendants, the Court does not have jurisdiction over the ... the Series Properties because of Plaintiffs' failure to join the non-party owners. (Id. 6:11–7:9).
>
> ...
>
> The Court concludes that it has jurisdiction over the Properties. ... The Court has jurisdiction over the Series Properties because although series limited liability companies may sue and be sued in their own names, they are not separate entities that prospective plaintiffs *must* sue in their own names under Nevada law. *See* NRS § 86.296(c); Bahar A. Schippel & Zachary E. Redman, *The Uncertainties of Series LLCs*, Nevada Lawyer (Dec. 2012), at 14, n.9 (explaining that a series is created under an existing limited liability company's operating agreement, but the series is not acknowledged as a separate legal entity by the Secretary of State).