
New York Supreme Court

Appellate Division—First Department

SJI RENEWABLE ENERGY VENTURES, LLC,

Plaintiff-Respondent,

**Appellate
Case No.:
2025-05726**

– and –

SJI RNG DEVCO, LLC and RED RIVER RNG, LLC,

Plaintiffs,

– against –

REV LNG LLC, REV LNG HOLDINGS, LLC,
E. DAVID KAILBOURNE and JACOB DIGEL,

Defendants-Appellants.

BRIEF FOR PLAINTIFF-RESPONDENT

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
Attorneys for Plaintiff-Respondent
One Manhattan West
New York, New York 10001
(212) 735-3000
betsy.hellmann@skadden.com
jennifer.permesly@skadden.com
kristina.fridman@skadden.com
zack.rynhold@skadden.com

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Plaintiff-Respondent SJI Renewable Energy Ventures, LLC (“SJI”), by its attorneys, Skadden, Arps, Slate, Meagher & Flom LLP, respectfully submits this Brief in Opposition to the briefs submitted by Defendants-Appellants (1) REV LNG Holdings, LLC (“REV Holdings”), E. David Kailbourne (“Kailbourne”), and Jacob Digel (“Digel”) on September 26, 2025 (the “RH Brief”), and (2) REV LNG LLC (“REV LNG” or the “Company”) on September 29, 2025 (the “Company Brief”) appealing from the Decision and Order of the Supreme Court of the State of New York (the “Trial Court”) by the Honorable Justice Andrew Borrok dated September 5, 2025 (the “Injunction”).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Trial Court abuse its discretion in issuing a preliminary injunction to enforce the termination of Kailbourne where (i) the Company’s operating agreement permits the managers appointed by SJI (the “SJI-Managers”) to vote to terminate Kailbourne given his affiliation with REV Holdings; (ii) the Appellants’ refusal to recognize SJI’s exercise of such bargained-for minority shareholder voting rights caused irreparable harm, and the operating agreement provides that there is no adequate remedy at law; and (iii) the balance of equities favored maintaining the status quo of Kailbourne’s termination? No.

2. May this Court consider for the first time on appeal Appellants' new theories that are not "purely legal" concerning SJI's purported reason for terminating Kailbourne? No.
3. Where Appellants failed to submit any evidence to the Trial Court concerning the amount of an undertaking, and on appeal fails to articulate any basis to find the undertaking insufficient, did the Trial Court abuse its discretion in setting it at \$5000? No.

PRELIMINARY STATEMENT

This appeal seeks to overturn the Trial Court's ruling to enforce a validly-taken action of the Board of Managers of REV LNG (the "Board") to terminate its former-CEO, Kailbourne, pursuant to the Fourth Amended and Restated Limited Liability Company Agreement of REV LNG LLC (the "LLCA"). The LLCA contains an express provision permitting SJI to exercise a minority-member right to terminate employees of the Company affiliated with the majority member, which SJI exercised. The Trial Court soundly exercised its discretion to grant SJI the Injunction to enforce Kailbourne's termination because SJI satisfied all the elements for it.

In 2020, when SJI invested in the Company as its minority member, it obtained certain rights to protect itself vis-à-vis the majority member, REV Holdings. Such rights are an important part of SJI's investment due to the substantial

overlap of personnel between the Company and REV Holdings. In particular, the Company's then-CEO, Kailbourne, is also CEO of REV Holdings, in which he holds a substantial financial stake. As Appellants themselves recognize, SJI Renewable secured the "Interested Member Matter" provision in the LLCA as a safeguard against self-dealing and oppression by REV Holdings and the Company's officers.

Regrettably, after investing, the Company did not perform as Kailbourne forecast. Further, he took a number of actions that benefitted himself and REV Holdings, to the detriment of the Company and SJI, and that contravened the LLCA, good governance, and sound stewardship of capital. After many attempts by SJI to course correct, by 2025, SJI had lost confidence in Kailbourne's leadership. After being stymied several times, the SJI-Managers finally exercised their rights and terminated Kailbourne on June 17, 2025.

Kailbourne refused to vacate his position, and the Company and REV Holdings, dominated by Kailbourne, refused to recognize the vote or effect his termination. SJI was thus forced to sue for breach of contract and specific performance, and to seek a temporary restraining order ("TRO") and preliminary injunction to enforce Kailbourne's termination.¹ *See* R. 14-579. After argument on

¹ The Company's lack of good governance and self-dealing under Kailbourne is on full display in the Company's submissions to the Court, in which the Company takes unnecessary and partisan positions that favor Kailbourne and REV Holdings, even going as far as to argue that the LLCA exists solely to ensure that SJI will favorably buyout REV Holdings. (Company Brief at 35-37.) Below, Appellants fully incorporated each other's briefs into their own. R.
(cont'd)

July 28, 2025, the Trial Court granted the TRO, and on September 5, 2025, after full briefing by Appellants and additional argument, it granted the Injunction. R. 7-15.

The Trial Court did not abuse its discretion in granting the Injunction. First, SJI demonstrated that it is likely to succeed on the merits because Appellants breached Section 8.1(f), which unambiguously permits the SJI-Managers to cast the sole votes on matters in which REV Holdings is an “Interested Member”, including employment matters concerning an affiliated employee. The Trial Court held that under the plain language of “Section 8.1(f) of the LLCA, the parties agreed that neither Interested Members nor Managers appointed by Interested Members are entitled to vote or otherwise participate in any action or decision of the Board of Managers in an Interested Member Matter” and that such right “indisputably includes the decision to terminate Mr. Kailbourne’s employment as CEO” R. 9-10. The Trial Court found that the SJI-Managers exercised this right in accordance with the LLCA: “On June 17, 2025, the three managers representing SJI voted to terminate Mr. Kailbourne as CEO. As they were permitted to do, they did not

680; R. 707. This is not the proper role for a company. *See In re Aerojet Rocketdyne Holdings, Inc.*, No. CV 2022-0127-LWW, 2022 WL 2180240, at **13-14 (Del. Ch. June 16, 2022) (“The corporation—‘neutral res’—cannot take sides while the control dispute is unresolved.”). It is also telling that Digel, Kailbourne’s second-in-command and the current interim CEO of the Company, curiously purports to insert himself into this proceeding even though he was not named as a party to SJI’s motion.

include in the vote managers appointed by the Interested Member.” R. 11 (citation omitted). Those facts are not in dispute.

Appellants suggest alternative readings of the LLCA, but those theories contravene the text, commercial logic and common sense, and principles of contract interpretation. Appellants feign shock that managers appointed by the minority member, SJI, could take an action without the votes of REV Holdings’ appointed managers (the “RH-Managers”), but that’s precisely what the LLCA allows. There is nothing surprising about minority members negotiating for certain rights that are greater than their corresponding number of shares; indeed, such negotiations can often predominate in transactions for a minority interest. In fact, Appellants themselves assert that SJI insisted on including the provisions concerning Interested Member Matters. *See* R. 884-85 (Coyle Aff. ¶¶ 12-14) (“The language of § 8.1, including § 8.1(f), in both the Third LLCA and the current LLCA was primarily drafted by [SJI] In particular, § 8.1(f)(iv) was drafted entirely by SJI . . . and not by, or on behalf of, the Company or the RH Member.”).

Appellants also urge a reading of Section 8.1(f)(i) that would render any action taken by the Board with respect to the LLCA an “Interested Member Matter” and, consequentially, would require all managers to recuse themselves from any decision under the LLCA – meaning that the very people charged under the LLCA to oversee the Company would be powerless to take any of the actions they were put

in place to take. The law prohibits such an absurd interpretation. *See Binswanger of Pa., Inc. v. TSG Real Est. LLC*, 217 A.3d 256, 263 (Pa. 2019) (rejecting reading of contract that would render its terms internally inconsistent).

Appellants’ “course of performance” argument focuses on instances in which SJI supposedly did not exercise its minority voting rights in the past, but Appellants ignore entirely the LLCA’s sweeping no-waiver provision (LLCA § 15.3), which has the consequence that any purported “course of performance” does not override the Interested Member Matter provisions of the LLCA. *See Prusky ex rel. Windsor Ret. Tr. v. Phoenix Life Ins. Co.*, No. CIV.A. 02-6010, 2005 WL 1754948, at *17 (E.D. Pa. July 26, 2005) (course of performance did not effect waiver). Further, even absent the LLCA’s no-waiver provision, any claimed “course of performance” cannot change the LLCA’s express terms. *See J.W.S. Delavau, Inc. v. E. Am. Transp. & Warehousing, Inc.*, 810 A.2d 672, 683-84 (Pa. Super. Ct. 2002) (course of performance following contract formation cannot change terms). In all events, there is no “course of performance”: the Board actions Appellants proffer all differ from one another and none are analogous to the circumstances here.

Second, SJI demonstrated irreparable harm by Appellants’ refusal to honor Kailbourne’s termination. Under applicable law (which Appellants fail to distinguish), where a party is denied a clear legal right, such as bargained-for minority rights, irreparable harm ensues. *See Wisdom Imp. Sales Co., LLC v. Labatt*

Brewing Co., 339 F.3d 101, 107 (2d Cir. 2003) (“[D]enying [the defendant] the opportunity to exercise its bargained-for minority consent rights,” “constituted irreparable harm in and of itself[.]”); *see also Audubon Levy Invs., LP v. E. W. Realty Ventures, LLC*, No. CV09-4576 (ADS) (WDW), 2010 WL 11651600, at *3 (E.D.N.Y. Feb. 18, 2010) (member continuing to act in managerial role after being removed under operating agreement constituted irreparable harm). Plainly, Kailbourne acting as CEO when he has been removed for incompetence and self-dealing causes irreparable harm. Section 15.13 of the LLCA confirms this, specifying that there is no “remedy at law” for breaches of Section 8.1. R. 114. This Court has held that specific enforcement provisions are sufficient to establish irreparable harm under New York law. *See Seitzman v. Hudson River Assocs.*, 126 A.D.2d 211, 214 (1st Dep’t 1987) (specific performance clause sufficient to prove irreparable harm). Together, these provisions protect SJI in the present scenario: where a majority shareholder (attempts to) coerce the minority to accept how it runs the company to the company’s and the minority shareholder’s detriment.

Third, SJI demonstrated that the balance of equities favored granting the Injunction. After SJI terminated Kailbourne, Appellants refused to recognize the termination. Kailbourne continued to hold himself out as CEO, denying SJI its bargained-for minority shareholder rights and subjecting it to a CEO it cannot trust. *See Audubon*, 2010 WL 11651600, at *3. The LLCA confirms the importance of

SJI's rights by requiring specific performance as the only remedy. LLCA § 15.13. Appellants, on the other hand, only speculate as to any supposed harm, for which they provide no evidence. Further, Appellants' own position is that there is little harm in terminating Kailbourne because REV Holdings remains the majority member and continues to exert management control over the Company. *See* RH Brief at 41-42.

Given the weakness of their case, Appellants make fresh allegations about SJI's intent that were not before the Trial Court, claiming that the Trial Court somehow erred by not considering SJI's supposed motivation for terminating Kailbourne. Such arguments are not only false, they are not properly before this Court. Moreover, because Appellants did not submit facts to support this theory below, they have waived these arguments on appeal. *See U.S. Bank N.A. v DLJ Mortg. Cap., Inc.*, 146 A.D.3d 603, 603 (1st Dep't 2017) ("new theory, which is not a purely legal argument" waived due to failure to raise below). In any event, any alleged motivations would be irrelevant to the legal analysis here: Kailbourne was an at-will employee, and SJI had the right under the LLCA to terminate him.

Finally, Appellants did not submit any evidence to the Trial Court to support any undertaking and thus they cannot now argue that it was an abuse of discretion for the Trial Court to order a \$5000 bond (which has been posted).

For all these reasons, the Appellants have not met their burden of proving an abuse of discretion. The Court should therefore dismiss the appeal and affirm the Injunction.

STATEMENT OF FACTS

I. The Parties

SJI is a Delaware limited liability company. R. 157 (Schempp Aff., Ex. 2 ¶ 16).² On December 23, 2020, SJI purchased a 35% interest in REV LNG, a New York company incorporated in Pennsylvania, from REV Holdings. R. 42 (Schempp Aff. ¶ 3); R. 55 (Schempp Aff., Ex. 1); R. 161 (Schempp Aff., Ex. 2, ¶ 30). At the time of the investment, Appellants touted that REV LNG had and would grow, among other things, a pipeline of development rights with dairy farms to develop anaerobic digestors to produce renewable natural gas (“RNG”) from cow manure on dairy farms (each, a “RNG Project”), services to develop those RNG Projects from inception to operation, and trucking services to deliver gas to and from the projects. R. 154, 160-61 (Schempp Aff, Ex. 2 ¶¶ 2, 29-30).

² Numbers preceded by “R” refer to the Record on Appeal. SJI was not given an opportunity to reply to Appellants’ submissions in the proceeding below. *See* R. 15 (Order to Show Cause, dated July 29, 2025). SJI does not accept Appellants’ factual assertions made below and/or in their submissions on appeal. SJI also understands that Appellants have submitted a motion to stay the Injunction pending appeal and have gone well beyond the record. Any attempt by Appellants to enlarge the record in this appeal through the stay would be improper and to the extent they attempt to do so, SJI reserves all rights, including to move to strike.

REV Holdings is REV LNG's majority member, with a 65% interest. R. 42 (Schempp Aff. ¶ 3). Kailbourne is REV Holdings' CEO and most substantial owner. R. 42, 43-44 (Schempp Aff. ¶¶ 5, 10); R. 153-54 (Schempp Aff., Ex. 2 ¶ 1). Until June 17, 2025, Kailbourne was also REV LNG's CEO. R. 42 (Schempp Aff. ¶ 5).

REV LNG is governed by the LLCA, which is governed by Pennsylvania law. R. 42 (Schempp Aff. ¶ 5); R. 112 (LLCA § 15.6). REV LNG is managed by a Board of seven (7) managers—the four (4) RH-Managers and the three (3) SJI-Managers. R. 42 (Schempp Aff. ¶ 3); R. 86 (LLCA § 8.1(b)). Kailbourne and Digel are two of the RH-Managers. R. 612 (Kailbourne Aff. ¶ 32).

II. Kailbourne Fails as CEO

Under Kailbourne's leadership, REV LNG failed to achieve his projections for the Company in any year since SJI's investment. R. 42 (Schempp Aff. ¶ 6). Kailbourne also failed to fulfill his duties as CEO. R. 43 (Schempp Aff. ¶ 7). He consistently breached the LLCA's governance provisions and his fiduciary duties, including pushing through transactions without proper approval and unilaterally distributing cash without establishing reserves. R. 153-214 (Schempp Aff., Ex. 2). SJI commenced a comprehensive litigation (not before this Court) against Kailbourne and Appellants on April 21, 2025, and subsequently amended its claims in July. *Id.* Kailbourne nonetheless continued to fail. Despite repeated requests, he failed to deliver a budget that the Board could approve, to provide a "budget vs

actual” analysis to the Board to track REV LNG’s performance versus his forecasts, and to present an executable business plan that addressed SJI’s questions and concerns. R. 43 (Schempp Aff. ¶¶ 7-8). Kailbourne developed no capital plan, despite REV LNG being a capital-intensive business, and failed to establish adequate reserves. R. 43 (Schempp Aff. ¶¶ 8-9).

Consequently, SJI decided that the Company needed new leadership. R. 43 (Schempp Aff. ¶ 10). SJI detailed these problems and others in a letter to the Company dated May 27, 2025, requesting that a Special Board Meeting be scheduled to vote on removing Kailbourne (the “May 27 Letter”). R. 44 (Schempp Aff. ¶ 11); R. 529 (Schempp Aff., Ex. 3). While REV Holdings asserts in this appeal that “SJI had provided no prior notice regarding its intention to consider a potential removal of Kailbourne”, that is false; REV Holdings acknowledges that it received and answered SJI’s May 27 Letter. RH Brief at 21-22.

Under Section 8.1(h) of the LLCA, the Company was required to call a Special Board Meeting “upon receipt of a written request of any Manager”, R. 89 (Schempp Aff., Ex. 1), *i.e.* upon receiving the May 27 Letter. Instead, what followed was a series of obstructions by Appellants to prevent the vote on Kailbourne’s termination from taking place. *See* R. 44-46 (Schempp Aff. ¶¶ 11-19). A week after receiving the May 27 Letter and not responding, on June 3, 2025, the Company scheduled a Special Board Meeting for June 17, 2025 to discuss other topics. R. 44

(Schempp Aff. ¶ 12); R. 537 (Schempp Aff., Ex. 4). On June 6, 2025, the Company’s in-house counsel, Brandon Coyle (“Coyle”), finally responded to SJI’s meeting request, attempted to deflect blame for Kailbourne’s failures, and deemed the request for a Special Board Meeting “premature.” R. 44 (Schempp Aff. ¶ 13); R. 540 (Schempp Aff., Ex. 5).

SJI followed up the same day, June 6, reiterating that the LLCA requires the Company to schedule a Special Board Meeting upon any Manager’s request. R. 44 (Schempp Aff. ¶ 14); R. 546 (Schempp Aff., Ex. 7). On June 9, 2025, Coyle responded by unilaterally setting a date for the meeting almost three weeks’ hence, on June 26, 2025. R. 45 (Schempp Aff. ¶ 15); R. 545 (Schempp Aff., Ex. 7). Contrary to past practice, Coyle did not consult any SJI-Managers (and perhaps no managers) about their availability for such a meeting. R. 45 (Schempp Aff. ¶ 15). On June 12, 2025, the SJI-Managers advised that they were not available on June 26, and demanded that Kailbourne’s termination be added to the agenda for the Special Board Meeting already scheduled for June 17. R. 45 (Schempp Aff. ¶ 16); R. 549 (Schempp Aff., Ex. 8). On June 14, the Company claimed—without basis—that it could not amend the June 17 agenda. R. 45 (Schempp Aff. ¶ 17); R. 553 (Schempp Aff., Ex. 9).

III. SJI Renewable Terminates Kailbourne in Accordance with the LLCA

On June 17, 2025, the Board held a Special Board Meeting. R. 45 (Schempp Aff. ¶ 18). There is no dispute that there was quorum at the meeting. R. 45 (Schempp Aff. ¶ 18); R. 89-90 (Schempp Aff., Ex. 1). There is also no dispute that the Board had more than ten (10) business days' notice of the SJI-Managers' request to discuss Kailbourne's termination. R. 45 (Schempp Aff. ¶ 18). There is likewise no dispute that all three SJI-Managers voted in favor of Kailbourne's termination. R. 45 (Schempp Aff. ¶ 19). The RH-Managers subsequently adjourned the meeting over the SJI-Managers' objection, without discussing any other Board matters. R. 45-46 (Schempp Aff. ¶ 19).

The SJI-Managers' vote to terminate Kailbourne conformed with, and was specifically authorized by, the LLCA. Under Section 8.1(f), "any matter or action . . . in respect of . . . (iv) officers, employees or other personnel of any Company Entity employed by or otherwise associated with a Member or any of its Affiliates" is an "Interested Member Matter" and "neither the Interested Member nor the Manager appointed by such Interested Member . . . shall be entitled to vote or otherwise participate in any action or decision by the Board of Managers in respect of such Interested Member Matter[.]" R. 88 (Schempp Aff., Ex. 1) (emphasis in original).

The decision to terminate Kailbourne was a matter in respect of an officer of a Company Entity, REV LNG, who was employed by and otherwise associated with

a member of the Company, REV Holdings. It was, therefore, an “Interested Member Matter”, making REV Holdings an “Interested Member” and the RH-Managers all “Interested Member Managers” within the meaning of the LLCA. Thus, Section 8.1(f) excluded all RH-Managers from voting. “[H]iring and dismissal decisions with respect to any Key Employee or Officer of the Company” (R. 149 (LLCA Schedule D) require a supermajority “of all less one of the Managers entitled to vote” under Section 8.1(e)(ii). R. 88. Thus, the termination required only two of three SJI-Managers to approve. Because at least two of the SJI-Managers agreed to terminate Kailbourne, he was validly terminated by a supermajority of the Board entitled to vote on the matter. R. 45 (Schempp Aff. ¶ 19); R. 555 (Schempp Aff., Ex. 10).

By Appellants’ own telling, SJI specifically bargained for Section 8.1(f). *See supra* at 5. Section 8.1(f) is an important minority shareholder protection for SJI because of the substantial overlap between REV LNG and REV Holdings’ personnel, particularly Kailbourne’s (former) dual positions. R. 587 (July 28, 2025 Transcript at 8:13-16).

IV. Appellants Refuse to Accept Kailbourne’s Termination

Despite Kailbourne’s valid termination, Appellants refused to accept it. After the June 17, 2025, Special Board Meeting, the SJI-Managers followed up the next day, June 18, requesting confirmation that the Company was effecting Kailbourne’s

removal. R. 46 (Schempp Aff. ¶ 20); R. 555 (Schempp Aff., Ex. 10). The Company responded on June 23, claiming that the vote was legally ineffective. R. 46 (Schempp Aff. ¶ 21); R. 557 (Schempp Aff., Ex. 11). On July 2, the SJI-Managers responded, reiterating that the vote was effective. R. 46 (Schempp Aff. ¶ 22); R. 559-65 (Schempp Aff., Ex. 12). For the avoidance of doubt, the SJI-Managers included a written consent ratifying the vote on June 17. R. 46 (Schempp Aff. ¶ 22); R. 563-65 (Schempp Aff., Ex. 12).³

The Company responded on July 11, claiming that both the vote on June 17 and the written consent on July 2 were legally ineffective and stating that the Company would not recognize them. R. 46 (Schempp Aff. ¶ 23); R. 566-68 (Schempp Aff., Ex. 13). On July 17, 2025, having given the Company multiple chances to comply, SJI wrote to the Company for a final time, stating that if REV LNG and REV Holdings did not confirm that they were effecting Kailbourne’s termination, it would bring suit to enforce its rights. R. 47 (Schempp Aff. ¶ 24); R. 569-71 (Schempp Aff., Ex. 14). Kailbourne responded on behalf of REV Holdings demanding an apology. R. 47 (Schempp Aff. ¶ 25); R. 572-74 (Schempp Aff., Ex. 15). Coyle responded on July 18, claiming that SJI’s “ongoing letter writing

³ Section 8.1(k) of the LLCA allows the Board to take “[a]ny action required or permitted to be taken at a meeting of the Board” by “a consent in writing” as long as it is “signed by that number of Managers then in office that represent the minimum number of Managers that would be required to take such action” and “delivered to the Company.” R. 90 (Schempp Aff., Ex. 1).

campaign on these topics serves no purpose.” R. 47 (Schempp Aff. ¶ 26); R. 575 (Schempp Aff., Ex. 16). At that point, SJI had no choice but to seek a TRO and preliminary injunction. *See* R. 14.

V. The Trial Court Issues an Injunction Enforcing Kailbourne’s Termination

On July 25, 2025, SJI filed an order to show cause and supporting documents. R. 14-579. On the same day, SJI and other plaintiffs amended the complaint that they had filed months earlier (on April 21, 2025) to address (among other things) Kailbourne’s termination. R. 153-528.

On July 28, 2025, following a hearing before Justice Borrok during which SJI and Appellants were each heard, *see* R. 580-605, the Trial Court issued a TRO against Appellants. R. 14-15. The TRO prevented Kailbourne from “(i) having signing authority for REV LNG; or (ii) access to REV LNG’s credit cards, bank accounts, computer systems, company vehicles, technology, offices, or any other company property” pending a preliminary injunction hearing. R. 15.

On August 25, 2025, Appellants made voluminous submissions in opposition. *See* R. 606-1056. The Trial Court did not give SJI the opportunity to file reply papers. R. 15.

On September 4, 2025, the parties appeared in person before Justice Borrok, who heard argument and ultimately granted the injunction. *See* R. 1059-94. Among other things, Justice Borrok succinctly summarized the purpose of Section 8.1(f):

“you don’t get to get the buddies that you put on the board [to] save your job.” R. 1075 (Sept. 4 Transcript, 19:23-24).

Importantly, the injunction hearing was the first time that counsel for REV Holdings and Kailbourne floated the suggestion (with no support) that SJI terminated Kailbourne to evade a closing condition for the potential buyout of REV Holdings’ membership interests.⁴ R. 1087 (Sept. 4 Transcript, 31:3-14). Recognizing that this issue will not arise unless and until SJI is obligated to close and refuses based on the failure of this condition, Justice Borrok observed that it “sound[ed] like a counterclaim.” R. 1087 (Sept. 4 Transcript, 31:15). Counsel for REV Holdings agreed, stating “it sounds like a great big long litigation,” *id.* (31:20-21), and that “this is a preliminary injunction hearing . . . not the final decision in this case.” R. 1088 (Sept. 4 Transcript, 32:7-9). As discussed further below, Appellants now (improperly) attempt to make this the feature of their appeal.

On September 5, 2025, Justice Borrok issued the Decision and Order, finding:

⁴ REV Holdings did not mention the phrase “closing condition” even once in its Trial Court brief, but before this Court invokes it over thirty times. As for the Company, it did not cite the closing condition as a basis for claiming that SJI’s motive for terminating Kailbourne was to avoid the buyout. R. 720 (citing closing condition only to imply that SJI would also be an “Interested Member” “[t]o the extent [it] contends” at some point in the future that Kailbourne’s termination would vitiate the closing condition). None of the Appellants even mentioned SJI’s purported intent in the affirmations they submitted to the Trial Court, and thus are unable to cite to any facts in the record to support their new theory on appeal.

1. “As relevant, pursuant to Section 8.1(f) of the LLCA, the parties agreed that neither Interested Members nor Managers appointed by Interested Members are entitled to vote or otherwise participate in any action or decision of the Board of Managers in an Interested Member Matter (which indisputably includes the decision to terminate Mr. Kailbourne’s employment as CEO).” R. 9-10.
2. “Conduct that unnecessarily frustrates a party’s participation in the management of a company may constitute irreparable harm (*Wisdom Import Sales Co., L.L.C. v Labatt Brewing Co., Ltd.*, 339 F3d 101, 114 [2d Cir 2003]). This is particularly so where a person who is no longer the CEO were to hold themselves out as CEO of the company when in fact they are not. Even if this were not the case, the parties agreed pursuant to Section 15.13 of the LLCA, that monetary damages would not be an adequate remedy for violation of Section 8.1 of the LLCA.” R. 11.
3. “Unquestionably, under the circumstances, the balance of equities favors granting the injunction.” R. 11.
4. “For the avoidance of doubt, it is irrelevant that the managers appointed by SJI may have previously failed to object to prior Interested Member Matters because the parties agreed to a broad non-waiver provision

which provides that a prior waiver of any provision of the LLCA would not constitute a subsequent waiver of the same or any other provision.”

R. 12.

5. “The Court has considered the defendants’ remaining arguments and finds them unavailing.” R. 12.

VI. Appellants’ New Theories About a Closing Condition That Is Not Ripe and Has No Relevance to Kailbourne’s Termination Cannot Be Considered on Appeal

On appeal, Appellants focus on a baseless theory—unsupported by any facts in the record or otherwise—that SJI terminated Kailbourne in order to avoid a buyout process that Appellants claim has been triggered. This is a lawyer’s concoction, mentioned only in passing in the Company’s brief below (*see* R. 720) and at the eleventh hour of the injunction hearing by REV Holdings (*see* R. 1087). The Appellants’ voluminous submissions to the Trial Court included three factual affirmations with hundreds of assertions, but not one of those witnesses swore any evidence that SJI ever intimated any desire to avoid its obligations under the LLCA, including with respect to the buyout, or that it terminated Kailbourne for any reason other than stated in its letters. Appellants had the chance to plead facts to support this theory below, but did not.

Further, the theory rests on a series of hypotheticals – none of which are relevant to the current appeal and that may never come to pass. Appellants’

hypothetical assumes (with no basis) that (1) both the Initial Financial Milestone and Final Financial Milestone (as defined in the LLCA) have been satisfied (an issue that is the subject of the Amended Complaint pending between the parties in the Trial Court,⁵ *see* R. 153-214 (Schempp Aff., Ex. 2)); (2) the parties have completed an appraisal process to arrive at an “FMV Multiple” (as defined in the LLCA); (3) the FMV Multiple is determined to be greater than seven (7.0) (which is by no means assured); (4) Kailbourne and Digel have executed non-compete agreements “in form and substance satisfactory to” SJI; (5) the parties have agreed on the terms of a Purchase and Sale Agreement; and (6) that only then, with a closing having ripened, SJI has refused to waive the remaining closing condition (as would be its right to do as the beneficiary) and, citing the failure of the condition, has refused to close. *See* R. 63-65, 105-108 (Schempp Aff., Ex. 1).

ARGUMENT

I. STANDARD OF REVIEW

Procedural issues, including the standard of review on appeal and the elements of an injunction, are governed by New York law. *See Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 54 (1999) (procedural matters are subject to law of forum).

⁵ Appellants claim that SJI brought this lawsuit to “block” a buyout. RH Brief at 31. This is false. None of the 18 counts in the complaint (which SJI brought well before the events in question here) seeks such relief. To the contrary, SJI commenced the litigation to (among other things) get a ruling on legal issues that must be resolved as part of any buyout. *See* R. 153-528 (Schempp Aff., Ex. 2).

Contractual interpretation issues concerning the LLCA are governed by Pennsylvania law. R. 112 (LLCA § 15.6); *see also* *Ministers & Missionaries Benefit Bd. v. Snow*, 26 N.Y.3d 466, 470 (2015) (contract interpretation governed by law of contract).

“The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court. Thus, this Court will not disturb a trial court's grant of a preliminary injunction absent an improvident exercise of discretion.” *Gilliland v Acquafredda Enters., LLC*, 92 A.D.3d 19, 24-25 (1st Dep’t 2011) (citation omitted). The amount of an undertaking is likewise subject to the sound discretion of the Trial Court. *See, e.g., 7th Sense, Inc. v. Liu*, 220 A.D.2d 215, 217 (1st Dep’t 1995) (no improvident exercise of discretion where defendants provided conclusory and unsupported testimony to support amount).

The Company does not quarrel with the standard of review. *See* Company Brief at 23 (citing abuse of discretion standard). REV Holdings, however, mis-cites case law, including cases concerning the review of decisions by “Special Term” courts, which are irrelevant because the Commercial Division is not such a court. *See* RH Brief at 24-25 (citing *Att’y-Gen. of State of N.Y. v. Katz*, 434 N.E.2d 712, 713 (N.Y. 1982); *O’Neill v. Poitras*, 158 A.D.2d 928, 928 (4th Dep’t 1990)). REV Holdings also cites cases for the unremarkable proposition that, under the right

circumstances, an injunction can be reversed. *See* RH Brief at 24-25. None of the conditions in those cases are present here.⁶

It is well established that an appellant may not “argue on appeal a theory never presented to the court of original jurisdiction.” *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 276 (1st Dep’t 1988). A corollary doctrine is that this Court may not consider factual arguments not raised below, nor may it consider new legal arguments that are not grounded in the record. *Kapitus Servicing, Inc. v. Ms Health, Inc.*, 216 A.D.3d 459, 460 (1st Dep’t 2023) (declining to consider factual argument

⁶ There are no facts in dispute as to the terms of Section 8.1(f) or SJI’s exercise of its rights thereunder, unlike in REV Holdings’ cited cases. *See R&G Brenner Income Tax Consultants v. Fonts*, 206 A.D.3d 943, 945 (2d Dep’t 2022) (“[T]here are issues of fact as to what the parties agreed to, including whether the plaintiff purchased the rights to the defendant’s clients pursuant to the parties’ agreements and whether the plaintiff breached its own obligations pursuant to those agreements.”); *O’Neill*, 158 A.D.2d at 929 (facts “sharply in dispute”); *Scotto v. Mei*, 219 A.D.2d 181, 184 (1st Dep’t 1996) (“sharp, factual disputes between the parties”, the contract on which PI was premised was illegal, and trial court failed to require undertaking); *Shake Shack Fulton St. Brooklyn, LLC v. Allied Property Group, LLC*, 177 A.D.3d 924, 928 (2d Dep’t 2019) (“disputed and unresolved issues”). Similarly, SJI has presented a clear legal right under the LLCA, unlike the litigant in *SportsChannel America Associates v. National Hockey League*, 186 A.D.2d 417, 418 (1st Dept. 1992) (“SportsChannel itself offers several conflicting interpretations of its alleged right of first refusal”). Notably, neither *SportsChannel* nor the other cases cited by Appellants, support their (false) contention that “[t]he mere fact that a contract is susceptible to even a *plausible* alternative reading is itself enough to defeat preliminary relief.” RH Brief at 39 (citing *Gulf & Western Corp. v. N.Y. Times Co.*, 81 A.D.2d 772 (1st Dep’t 1981) (ambiguous contract); *Silverstrim v. Loonhaven Realty, LLC*, 60 Misc. 3d 1225(A) (Sup. Ct., Warren Cnty. 2018) (same)). In addition, Appellants have not alleged that SJI’s injury is compensable by money damages (nor could it given LLCA Section 15.13), making those cases irrelevant. *See CMB Export Infrastructure Investment Group 48, LP v. Motcomb Estates, Ltd.*, 223 A.D.3d 513, 513-14 (1st Dep’t 2024) (plaintiff additionally failed to allege specific facts to support claim); *Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 93 A.D.3d 570, 570-71 (1st Dep’t 2012) (also, plaintiffs’ affidavits contradicted by own emails). Finally, the requirement to exhaust administrative remedies is not applicable in this case. *See Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep’t 2001) (party seeking injunction failed to exhaust administrative remedies and made no reference to elements for such relief).

raised for the first time on appeal because it “cannot be determined on the record before [the Court].”); *Tsai v. Lo*, 212 A.D.3d 547, 548-49 (1st Dep’t 2023) (declining to consider arguments “improperly made for the first time on appeal and do not involve purely legal issues that could not have been avoided if raised before Supreme Court.”). Such arguments are waived, and thus they cannot form the basis for this Court’s decision. *See U.S. Bank N.A.*, 146 A.D.3d at 603 (argument that was not “purely legal” waived due to failure to raise below).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION

There are three elements for a preliminary injunction under New York law: (1) a likelihood of success on the merits; (2) a danger of irreparable harm without an injunction; and (3) a balance of the equities in favor of the movant. *See Max v. ALP, Inc.*, 206 A.D.3d 495, 495 (1st Dep’t 2022). The Trial Court did not abuse its discretion in finding that SJI established all elements.

A. SJI Is Likely to Succeed on Its Clear Legal Right

To establish a likelihood of success on the merits, a “prima facie showing of a reasonable probability of success is sufficient; actual proof of the [plaintiff’s] claims should be left to a full hearing on the merits.” *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 (1st Dep’t 2016). SJI made a prima facie case showing that Appellants breached Section 8.1(f) of the LLCA.

1. The SJI-Managers Terminated Kailbourne Under the Plain Terms of Section 8.1(f)

Pennsylvania law provides that courts must give effect to clear and unambiguous terms of a contract to discern the parties' intent. *See Khawaja v. RE/MAX Cent.*, 151 A.3d 626, 631 (Pa. Super Ct. 2016).

The plain language of Section 8.1(f) is clear. An "Interested Member Matter" includes "any meeting or action or decision of the Board of Managers regarding any matter or action in respect of . . . (iv) officers, employees or other personnel of any Company Entity employed by or otherwise associated with a Member or any of its Affiliates" R. 88. Accordingly, any "meeting or action or decision" of the Board "regarding any matter or action in respect of . . . (iv) officers, employees or other personnel of [REV LNG]", i.e., Kailbourne, who was "employed or otherwise associated with" a member (REV Holdings), is an Interested Member Matter. *Id.* Because of Kailbourne's affiliation, REV Holdings is an "Interested Member." *Id.*

Only certain managers may vote "in respect of such Interested Member Matter." *Id.* Specifically, "neither the Interested Member nor the Manager appointed by such Interested Member (the 'Interested Member Manager'), if any, shall be entitled to vote or otherwise participate in any action or decision by the Board of Managers." *Id.* Thus, under the plain terms of Section 8.1(f), neither REV Holdings nor the RH-Managers were permitted to vote on the Interested Member Matter at issue here, namely, the termination of Kailbourne. As the Trial Court put

it succinctly: “you don't get to get the buddies that you put on the board [to] save your job.” R. 1075 (Sept. 4 Transcript, 19:23-24). The votes of the three (3) SJI-Managers were thus sufficient to terminate Kailbourne, and Appellants’ refusal to respect their vote was a clear breach of the LLCA. R. 88.

2. Appellants’ Contrary Interpretation Arguments Are Meritless

Appellants’ alternative readings of Section 8.1(f) ignore the plain text, contravene principles of contract interpretation, and contradict one another.

First, Appellants claim that the language of Schedule D(iv), which requires the approval of a supermajority of the Board for (among other things) “hiring and dismissal decisions with respect to any Key Employee or Officer of the Company”, is more specific than the language of Section 8.1(f)(iv), and thus that Schedule D should prevail. *See* Company Brief at 34; RH Brief at 30.⁷ This argument, however, ignores the express text of Section 8.1(e)(ii). While that section states that (generally) “the prior written approval of a Super-Majority in Interest of the Board of Managers shall be required for the matters set forth in **Schedule D**”, it expressly

⁷ Appellants also make a similar, but slightly different argument that that Section 8.1(f)(iv) is less specific than Schedule D(iv) because it refers to “little ‘o’ officers” rather than the defined term “Officers.” Company Brief at 34, n. 1; *see also* R. 690 (RH Trial Court Brief, p. 11). The Trial Court ruled against this “strange interpretation” because it asked the Court “to read out of existence the language of the Agreement, and [] advanc[e] a definition of officer which is at odds with the definition of officer.” R. 1074 (Sept. 4 Transcript, 18:3-21).

provides that such requirement will give way in connection with Interested Member Matters by specifying that:

In the event one or more Managers is pursuant to **Section 8.1(f)** below excluded from voting on any matter that requires the Super-Majority in Interest decision of the Managers, such decision will require the vote of all less one of the Managers entitled to vote with respect to such matter.

R. 88 (LLCA 8.1(e)(ii)). Section 8.1(e)(ii) thus expressly provides that the number of managers needed for a supermajority is recalibrated in circumstances where some managers are excluded from voting. Here, the only managers entitled to vote under Section 8.1(f) were the three (3) SJI-Managers, and thus a supermajority was satisfied by two (2) votes. The votes of the three (3) SJI-Managers were thus more than sufficient to terminate Kailbourne, and SJI demonstrated a likelihood of success on the merits of its claim that Appellants breached the LLCA when they refused to respect Kailbourne's termination.

This demolishes Appellants' claim that Schedule D somehow prevails, because Section 8.1(e)(ii) specifically accounts for how Section 8.1(f) and Schedule D intersect and that Section 8.1(f) is carved out from the more general Section 8.1(e)(ii) and Schedule D. Appellants' own case law supports this conclusion. *See Nitardy v. Chabot*, 195 A.3d 941, 952 (Pa. Super. Ct. 2018) (general rule absolving tenant of responsibility for ordinary wear and tear gives way to specific provision making tenant responsible for pet-related amelioration); *Baltic Dev. Co. v. Jiffy Enters., Inc.*, 257 A.2d 541, 543 (Pa. 1969) (controlling provision specifically cross-

references the other); *Binswanger*, 217 A.3d at 263 (reading two provisions together and rejecting interpretation that would render contract “internally inconsistent”); *LJL Transp., Inc. v. Pilot Air Freight Corp.*, 599 Pa. 546, 560 (2009) (annulment of terms disfavored); *see also Lesko v. Frankford Hosp.-Bucks Cnty.*, 609 Pa. 115, 126 (2011) (“[T]he same sentence naming the general amount owed under the contract is clearly qualified by specific contractual provisions.”).⁸

Second, Appellants assert that the interpretation of Section 8.1(f) that permits termination of Kailbourne by two (2) out of the three (3) SJI-Managers “leads to an absurd and unreasonable result” Company Brief at 30; *see also* R. 723 (Company Trial Court Brief, p. 17).⁹ Not only does this ignore the plain language of the LLCA, but also ignores commercial reality and practice. When investors buy a minority position in a company, it is not unusual for them to secure certain minority shareholder protections – if it were otherwise, there would be little or no need to negotiate transaction documents. *See, e.g.*, 2 Oppression of Min. Shareholders and

⁸ Appellants’ argument fails for the additional reason that it reads Section 8.1(e)(ii) out of the LLCA. *See Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 468 (Pa. 2015) (rejecting “restrictive[]” reading that would annul other clauses); *Manzella v. Paul Revere Life Ins. Co.*, 1994 WL 137003, at *3 (E.D. Pa., Apr. 19, 1994) (“proposed interpretation simply ignores most of the language in the release agreement.”). The Trial Court agreed. *See* R. 1074 (Sept. 4 Transcript, 18:3-10) (“I’d be reading out of existence [Section] 8.1.”).

⁹ Appellants’ case law on this point favors SJI (*Binswanger*, 217 A.3d at 263) and counsels against Appellants’ attempted nullification of SJI’s minority protections. *See Allure Hair Designs v. George*, 2021 WL 211464, at *6 (Pa. Sup. Ct. 2021) (rejecting interpretation because “[n]o rational person . . . would accept such illusory protection in a commercial lease.”).

LLC Members § 9:23 (“To minimize the disadvantages in the use of veto arrangements, the scope of the veto can be limited to areas in which it is felt protection is most needed by the minority—perhaps to fundamental corporate action and to decisions on the employment and discharge of key employees and the fixing of their compensation.”); *Wisdom Imp. Sales Co.*, 339 F.3d at 114 (“The right of a minority owner to block certain transactions is strategic: it might well provide present or future leverage between partners and gives the weaker partner the ability to achieve some balancing not always available to it.”). Appellants, in fact, themselves assert that Section 8.1(f) “was primarily drafted by [SJI]” and subsection (iv) “[i]n particular . . . was drafted entirely by SJI . . . and not by, or on behalf of, the Company or the RH Member.” R. 884-85 (Coyle Aff. ¶¶ 12-14). It is thus disingenuous for Appellants to feign shock that SJI exercised such right.

Further, while Appellants would like to depict SJI’s bargained-for minority shareholder right as an “elephant in a mousehole,”¹⁰ they exaggerate its scope. Under Section 8.1(f), SJI does not, as Appellants contend, have an unmitigated right to “change the CEO.” Company Brief at 31. Rather, in this case, the right applies because the CEO is affiliated with REV Holdings, making it an Interested Member

¹⁰ RH Brief at 28 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)). Notably, this quote says nothing about contract interpretation and instead relates to the drafting of legislation.

Matter. *See* R. 1075 (Sept. 4 Transcript, 19:23-24 (“you don't get to get the buddies that you put on the board [to] save your job.”)).

Third, even more remarkably, the Company asserts that Kailbourne’s designation in the LLCA as a “Key Employee” somehow guarantees him perpetual employment. *See* Company Brief at 34 (“Kailbourne, unlike the other Key Employees identified, cannot be replaced, except by amending the LLCA.”).¹¹ The problem for the Company is that it cannot point to anything in the LLCA that says a “Key Employee” must remain in the Company’s employment. REV Holdings admits that the definition of “Key Employee” “simply defines Kailbourne himself as a Key Employee, with no provision for removal of this designation” and nothing more – acknowledging that the designation itself means nothing.¹² RH Brief at 12 n. 2. Appellants’ drastic reading of the definition of “Key Employee” to guarantee Kailbourne’s permanent employment would need to be express to override the undisputed fact that he was an at-will employee. R. 43-44 (Schempp Aff. ¶ 10); *see*,

¹¹ This would mean that the hiring and dismissal of Key Employees could not be effected without amending the LLCA, which requires unanimous consent. *See* Company Brief at 13, 27-28. But that would contravene the express terms of Schedule D, which states, without qualification, that such actions with respect to “any Key Employee or Officer” are subject to a supermajority vote. R. 149 (LLCA, Schedule D(iv)) (emphasis added).

¹² REV Holdings mentions “key man’ insurance” (RH Brief at 29), but that is a different term and, in any event, a “key-man” designation often is made as part of a company’s risk management planning, *see, e.g.*, 1 Est. Tax & Pers. Fin. Plan. § 2:13 (“[K]ey man insurance merely is a means by which a business enterprise insures itself against potential financial losses it may incur on the premature death of a key employee.”), and anticipates the departure of an employee – the opposite of perpetual employment.

e.g., McPherson v. U.S. Clearing Corp., 214 A.D.2d 340, 341 (1st Dep’t 1995) (“The limitation urged by plaintiff on an employer’s otherwise unfettered right to terminate an employee at will must be express.”). Further, Appellants’ position that Kailbourne’s designation as a “Key Employee” somehow renders nugatory the unambiguous language of Sections 8.1(e)(ii), 8.1(f), and Schedule D would contravene the principles of contract interpretation upon which Appellants themselves purport to rely.¹³ See Company’s Brief at 35 (“A contract should be read as a whole”); RH Brief at 28 (Courts “will not interpret one provision of a contract in a manner which results in another portion being annulled.”) (quoting *UPMC*, 129 A.3d at 463-64).

Fourth, as far as Appellee can understand the argument, Appellants assert that the SJI-Managers cannot have voted to terminate Kailbourne because, like the RH-Managers, they also were “Interested Member Manager[s]” excluded from voting. Appellants’ theory is that Section 8.1(f)(i)’s reference to any Board action “in respect of any agreement between a Company Entity and a Member” includes the LLCA itself – thereby disqualifying the SJI-Managers from voting on Kailbourne’s

¹³ Even if “Key Employee” meant perpetual employment, the Trial Court astutely questioned its enforceability. See R. 1093 (Sept. 4 Transcript, 37:3-9) (“I didn’t think your client had a credible basis upon which to say that he is the only keyman in the company under these circumstances or that there’s a basis upon which keymen can’t be terminated because there’s no reservation of rights with respect to that; and I don’t believe it would be enforceable in any event even if it did say that.”).

termination because his employment is a closing condition to SJI's obligation to buyout REV Holdings under the LLCA. RH Brief at 31-32; Company Brief at 25-26; *see also* R. 596 (July 28 Transcript, 17:3-6) ("if the parties are both interested . . . if you read it broadly, neither side can vote."); R. 719 ("By seeking to remove Kailbourne as CEO, the SJI Member's Managers are unquestionably 'taking . . . action in respect of' the LLCA . . ."). But if this interpretation were correct, then any time the Board took any "action or decision . . . regarding any matter or action . . . with respect to" the LLCA (R. 88), *i.e.*, all the time, the managers appointed by both members would be interested, rendering the Board—whose very existence derives from the LLCA—completely useless. Under Appellants' own case law, the LLCA cannot be interpreted in a way that leads to an absurd result or renders itself ineffective. Company Brief at 29; RH Brief at 28 (quoting *Binswanger*, 217 A.3d at 262) (rejecting a reading of the contract that would render its terms internally inconsistent).

The Trial Court well understood this. It did not "ignore" Appellants' argument in this regard. *See* Company Brief at 25. Rather, REV Holdings raised this argument during the TRO hearing and Justice Borrok rejected it. *See* R. 596 (July 28 Transcript, 17:3-25) (recognizing the argument to be "silly"). The Company raised this argument again prior to the preliminary injunction, *see* R. 719-

20, and the Trial Court ultimately rejected it. R. 1088 (Sept. 4 Transcript, 32: 21-23).

Fifth, Appellants argue that because Section 8.1(f) refers to “Manager” in the singular, it cannot exclude more than one RH-Manager from voting. *See* RH Brief at 32.¹⁴ The LLCA’s rules of interpretation provide a complete answer to Appellants’ argument: its definitions “include the plural as well as the singular,” meaning that “Manager” should be read as “Managers” (and vice versa) where the context so requires.¹⁵ *See* R. 72 (LLCA § 1.2(a)). Appellants’ reading would needlessly, and in contravention of logic and the LLCA’s interpretation rules, render nugatory Section 8.1(f) on the basis of one (purportedly) missing “s”. Appellants’ own case law instructs against this. *See* Company’s Brief at 35 (“A contract should be read as a whole”); RH Brief at 28 (Courts “will not interpret one provision of a

¹⁴ REV Holdings also posits that because at least one RH and SJI Manager must be present to establish a quorum, it is not possible to exclude all Interested Managers without destroying the quorum. RH Brief at 32. But Section 8.1(j) explicitly excludes Interested Managers from the quorum calculation with respect to Interested Member Matters. R. 89 (LLCA § 8.1(j)) (“at any meeting at which an Interested Member Matter is the sole subject of such meeting, the applicable Interested Member Manager shall be excluded from the calculation of the Majority in Interest for purposes of determining a quorum.”).

¹⁵ In addition, under the LLCA, the members do not vote at the Board level—managers do. R. 85-86 (LLCA § 8.1(a)). Because Section 8.1(f) excludes not only the “Interested Member Manager, if any,” but also the “Interested Member” itself, it means that the Interested Member as a whole, *i.e.*, all of its appointed Managers, are excluded from voting. The Trial Court observed that the LLCA “makes clear that in an 8.1(f) situation, you don’t need to get those people because they’re interested and they’re a part of the group of people that were appointed by the interested person that’s affected by whatever the otherwise unanimous matter would be; . . .” R. 1080-81 (Sept. 4 Transcript, 24:25-25:4).

contract in a manner which results in another portion being annulled.”) (quoting *UPMC*, 129 A.3d at 463-64).¹⁶

Finally, Appellants claim that the LLCA must be read as a whole and that the overriding purpose of the LLCA is for REV Holdings to be favorably bought out of its ownership interests by SJI and for “ensuring Kailbourne’s continued involvement and leadership throughout.” Company Brief at 36. This is patently false. The preamble of the LLCA states that its purpose is to “set forth [the parties’] agreements, right and obligations with respect to the Company.” Article III of the LLCA sets forth the “Business of the Company,” which is “to engage in the Business” – defined primarily as goods and services related to CNG, LNG and RNG – and that “the Company’s business objective shall be its long-term profitability and growth, as distinct from any related other businesses of its Members or their Affiliates.” R. 58, 74. There is no mention of a buyout or the perpetual employment

¹⁶ In *UPMC*, cited by Appellants, the Pennsylvania Supreme Court rejected a “restrictive[.]” approach of interpreting a single word the same way throughout an agreement because doing so would annul other clauses and contravene the contract’s overall purpose. *See UPMC*, 129 A.3d at 468; *accord Equitrans Services, LLC v. Precision Pipeline, LLC*, 154 F. Supp. 3d 189, 199 (W.D. Pa. 2015). That is precisely what Appellants propose to do here: employ hyper-technical (and incorrect) arguments that would read entire clauses and provisions out of the LLCA.

At the same time, Appellants would like new text read into the LLCA. In a new argument on appeal, REV Holdings asserts that the Court should read into Section 8.1(f)(iv) that it somehow applies to personnel matters with respect to third parties (and therefore doesn’t apply to Kailbourne). RH Brief at 35. There is no support for this argument and Pennsylvania law is to the contrary. *See Binswanger*, 655 Pa. at 176 (“[W]hen a writing is clear and unequivocal, its meaning must be determined only by its terms.”).

of Kailbourne. As Appellants’ own case law confirms, it defies reason that the LLCA, which runs over sixty (60) pages and covers all aspects of the Company’s operation, would be interpreted to focus on a non-guaranteed buyout that is contingent on fulfillment of a variety of requirements and the purported perpetual employment of one at-will employee. *See UPMC*, 129 A.3d at 468 (“restrictive[]” interpretation would contravene contract’s overall purpose); *Toth v. Toth*, 324 A.3d 469, 486 (Pa. Super. Ct. 2024) (“[A] contract must be interpreted to give effect to all of its provisions.”). In any event, the general proposition that a contract should be read as a whole does not lead to reading provisions such as Section 8.1(f) out of the LLCA, particularly where such provisions are bargained-for minority rights.

3. Appellants Fail to Demonstrate a “Course of Performance” or Why It Can Be Considered

Appellants urge this Court to ignore the LLCA’s plain text based on the parties’ purported “course of performance.”¹⁷ Specifically, Appellants refer to an

¹⁷ Appellants conflate two distinct legal concepts: “course of dealing” and “course of performance.” The former permits supplementing or qualifying contractual terms based on the conduct of the parties prior to contract formation, whereas the latter relates only to interpretation of the contract based on conduct following contract formation. *J.W.S. Delavau v. E. Am. Transp. & Warehousing, Inc.*, 810 A.2d 672, 683-84 (Pa. Super. Ct. 2002). The conduct that Appellants raise all follows contract formation, thus the relevant legal concept is course of performance, which, at best, “can only be used to interpret, but not to supplement, the terms of an existing agreement.” *Id.* at 684. The case law cited by the Company that pertains to pre-contract formation course of dealing, *see* Company Brief at 26-27 (citing *IAP Worldwide Servs., Inc. v. UTi United States, Inc.*, No. Civ. A 04–4218, 2006 WL 305443, at *8 (E.D. Pa. Feb. 8, 2006)), is thus inapposite.

assortment of Board actions – all of which are distinct from each other and none of which include termination of an employee – in which they say SJI did not insist on excluding the RH-Managers. Company Brief at 31; RH Brief at 37. There is no merit to this argument.

First, even assuming there is relevant prior “performance”, the LLCA conclusively bars it from having any relevance to SJI’s exercise (or non-exercise) of its rights here. As the Trial Court noted, *see* R. 12 (“it is irrelevant that the managers appointed by SJI may have previously failed to object to prior Interested Member Matters because the parties agreed to a broad non-waiver provision”), the text of Section 15.3 of the LLCA is extraordinarily broad and states, in relevant part:

No delay on the part of any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any waiver of any partial exercise of any such right, power or privilege preclude any further exercise thereof or the exercise of any other such right, power or privilege. No waiver of any breach, term or condition of this LLC Agreement by any party shall constitute a subsequent waiver of the same or any other breach, term or condition.

R. 112. Under this provision, the fact that SJI (purportedly) did not insist on its rights under Section 8.1(f) on prior occasions does not mean that it relinquished such rights. Appellants’ case law does not dispute this fact. *See Prusky ex rel. Windsor Ret. Tr. v. Phoenix Life Ins. Co.*, No. CIV.A. 02-6010, 2005 WL 1754948, at *17-18 (E.D. Pa. July 26, 2005) (citing *Atl. Richfield Co. v. Razumic*, 480 Pa. 366 (1978) and *Langer v. Monarch Life Ins. Co.*, 879 F.2d 75 (3d Cir. 1989)) (holding that in

presence of a no waiver clause, the fact that party had permitted frequent account transfers despite having the right to limit such transfers did “not constitute clear evidence that [it] would never exercise its right to limit the number of transfers. . . . [rather, its] course of performance instead demonstrates that it simply did not exercise its right to limit the number of Subaccount transfers until [a later date].”¹⁸

Second, even if the LLCA did not contain a no-waiver provision, a “course of performance” (to the extent one even exists) cannot introduce new terms or modify a contract’s plain meaning. *See J.W.S. Delavau*, 810 A.2d at 683-84. Here, Sections 8.1(f) and (e)(ii) provide for how the parties should deal with Kailbourne’s termination, requiring the vote of two (2) of the three (3) SJI-Managers. Under Appellants’ own case law, they cannot purport to override the plain meaning of the LLCA based on claimed “course of performance.” *See id.*

Finally, even if “course of performance” could be relevant to interpreting the LLCA (which it is not), there is no course of performance because Appellants’ disparate list of actions do not have any bearing on this situation. None of the actions identified by Appellants involved the termination of any employee or any contested matter. *See* R. 886 (bonus for Digel; reaffirmation of Kailbourne as CEO and

¹⁸ Appellants’ other authorities are inapposite. *See Atlantic Richfield Co.*, 480 Pa. at 375-76 (determining whether franchise relationship existed); *Tax Matrix Techs., LLC v. Wegmans Food Markets, Inc.*, 154 F.Supp.3d 157, 176 (E.D. Pa. 2016) (unlike here, contract facially ambiguous); *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 501 (2001) (remanding to consider trade usage, not course of performance).

appointment of Digel as COO; whether to engage in a transaction;¹⁹ whether to approve acquisition of interest in an airplane; whether to approve a sale of two RNG Projects from the Company to SJI²⁰). Moreover, each of the actions identified by the Appellants involved ones that were unanimously approved by all members of the Board and so the issue of who could or could not vote never arose. *See* R. 886. Thus, there was no “sequence of previous conduct between the parties which is fairly regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” *J.W.S. Delavau*, 810 A.2d at 683. In other words, Appellants did not demonstrate any “course of performance.”

¹⁹ Transactions between the Company and a Kailbourne-owned entity are similarly unrelated to termination and do not establish any course of performance. *See* Company Brief at 32. The fact that Kailbourne voluntarily decided to recuse himself in an otherwise-unanimous approved transaction says nothing about SJI’s understanding of Section 8.1(f) or its rights concerning employees affiliated with REV Holdings.

²⁰ Appellants argue that an email from Donna Schempp of SJI (“Schempp”) in 2023 proposing that all managers vote on the Company entering into the sale of two RNG Projects to SJI’s affiliate shows that SJI views unanimous approval to be needed in situations where both parties (purportedly) are “interested.” *See* Company Brief at 27; *see also* RH Brief at 19. But Schempp made that proposal because both members were to be signatories to the purchase/sale agreement for the 2023 transaction, falling squarely within Section 8.1(f)(i) (“entering into . . . any agreement between a Company Entity and a Member or an Affiliate of a Member”). *See* R. 951 (Coyle Aff., Ex. 5). There is no reason to view Schempp’s proposal as having any bearing on Kailbourne’s termination or somehow having created a unanimity requirement that would contravene Sections 15.3, 8.1(f)(iv), 8.1(e)(ii), and Schedule D. Moreover, the LLCA specifically provides that REV Holdings is the interested member in circumstances where decisions regarding employees affiliated with it are at issue. Appellants’ suggestion that the 2023 transaction related to a Section 11.7 buyout (Company Brief at 27) is simply false.

B. Appellants’ Denial of SJI’s Clear Legal Right, Which Is Specifically Enforceable, Caused Irreparable Harm

SJI established irreparable harm because the Appellants’ failure to respect SJI’s termination of Kailbourne denied its minority voting rights. New York courts have found the denial of such rights to be irreparable harm on multiple occasions. *See Wisdom*, 339 F.3d at 107 (“[D]enying [the defendant] the opportunity to exercise its bargained-for minority [consent] rights,” “constituted irreparable harm in and of itself.”);²¹ *see also Audubon*, 2010 WL 11651600, at *3 (member continuing to act in managerial role after being duly removed under the LLC operating agreement constituted irreparable harm).²²

The legal right in question is under Section 8.1(f). That right was irreparably harmed when Appellants refused to comply with the June 17 vote terminating Kailbourne.²³ The parties agreed that such harm would be irreparable under LLCA Section 15.13:

Each party hereto acknowledges that the provisions of **Section 8.1** . . . shall be specifically enforceable, it being agreed by the parties that any remedy at law, including monetary damages, for breach of any such provision shall not

²¹ Appellants attempt to distinguish *Wisdom* by arguing that whereas the minority member there was denied its right to a supermajority vote, here the minority member seeks to prevent a supermajority vote. Company Brief at 40-41. This is a distinction without a difference that simply attempts to distract from Appellants violation of SJI’s bargained-for minority rights.

²² Notably, Appellants fail to address *Audubon* altogether below and on appeal.

²³ SJI moved for a TRO and preliminary injunction immediately after Appellants continued to hold Kailbourne out as CEO. R. 47-48 (Schempp Aff. ¶¶ 24-28). There was thus no “long delay” as alleged by Appellants (Company Brief at 43) and accordingly, *Mercury Service Systems, Inc. v. Schmidt*, 50 A.D.2d 533 (1st Dep’t 1975) (3.5-month delay) is not instructive.

be an adequate remedy and that any defense in any action for specific performance of any such provision that a remedy at law would be adequate is waived.

R. 114. Under Pennsylvania law, courts may consider such agreements as evidence that the parties intended to classify the specified breaches as irreparable harm. *See CKHS, Inc. v. Prospect Med. Holdings, Inc.*, 329 A.3d 1204, 1216-17 (Pa. 2025).

Appellants seek an escape hatch from this provision by citing *LGC USA Holdings, Inc. v. Taly Diamonds, LLC*, 121 A.D.3d 529 (1st Dep’t 2014) for the proposition that a specific performance clause is not sufficient to show irreparable harm. *See* Company Brief at 42; RH Brief at 42. This Court recently gave *LGC* a much narrower reading, however, holding only that such clauses cannot create irreparable harm if “money damages would adequately compensate [the injured party].” *Noyack Med. Partners, LLC v. OSK IX, LLC*, 206 A.D.3d 429, 430 (1st Dep’t 2022). Here, Section 15.13 does not call only for specific performance but also expressly specifies that money damages would not compensate SJI for infringement of its rights under Section 8.1.²⁴

²⁴ In *LGC*, the Court held that the “motion court properly exercised its discretion in denying the preliminary injunction on the ground that the alleged harm is compensable by money damages and therefore is not irreparable.” 121 A.D.3d at 530. Here, the Trial Court granted the Injunction and no money damages are at issue. Further, *LGC* cited with approval *Seitzman v. Hudson River Assocs.*, 126 A.D.2d at 214, in which it held that a specific performance provision was sufficient to prove irreparable harm because the loss extending from the breach “cannot be duplicated.” So too here: Section 15.13 provides that specific performance is the only adequate remedy available for a breach of Section 8.1. This clause moots Appellants’ remaining cases on the subject. *See Lehey v. Goldburt*, 90 A.D.3d 410, 411 (1st Dep’t 2011) (failure to show entitlement to relief where affidavits conflicting and assets disputed);

(cont’d)

In addition to the fact that Section 15.13 establishes irreparable harm, Appellants also irreparably harmed SJI by entrenching Kailbourne as CEO after his termination. As Justice Borrok noted: “don’t you think holding yourself out as the CEO of a company when you have no right to do so constitutes irreparable harm?” R. 1083 (Sept. 4 Transcript, 27:13-15); *see also Audubon*, 2010 WL 11651600, at *3 (member continuing as manager after termination constituted irreparable harm). Section 8.1(f) was designed to protect the minority member in circumstances where, as here, it is being oppressed by a CEO who is acting in his own interest and that of the majority member, to the detriment of SJI and the Company.

In sum, the LLCA and case law confirm that SJI suffered irreparable harm.

C. The Balance of Equities Favors an Injunction Because SJI Has Suffered Irreparable Harm, Unlike Appellants

Although New York law does not require a balancing inquiry where, as here, a party demonstrated irreparable harm due to the violation of its bargained-for minority rights (*see Wisdom*, 339 F.3d at 107), the balance of equities nonetheless weighs in favor of an injunction.

Zodkevitch v. Feibush, 49 A.D.3d 424, 425 (1st Dep’t 2008) (financial harm compensable by damages); *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep’t 1995) (alleged harm in the future); *Trump v. Trump*, 69 Misc. 3d 285, 303 (Sup. Ct. Dutchess Cnty. 2020) (“unsupported and conclusory” harm allegations); *Faiveley Transp.t Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 115-16 (2nd Cir. 2009) (no evidence in record of irreparable harm).

“The balancing of the equities requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief.” *Barbes*, 140 A.D.3d at 432.²⁵ In this instance, the prejudice to SJI is significant, immediate, irreparable and clear. After Appellants attempted numerous times to preclude SJI from having the chance to exercise its rights under Section 8.1(f), SJI exercised such rights and terminated Kailbourne. Appellants then refused to recognize the vote, and Kailbourne continued to hold himself out as CEO, denying SJI’s bargained-for minority voting rights, in breach of the LLCA. *Shagalov v. Edelman*, 161 A.D.3d 455, 456 (1st Dep’t 2018) (balance of the equities favored plaintiffs where defendants took active steps to frustrate plaintiffs’ rights).

Appellants hypothesize that enforcing the removal of the Company’s “first and only CEO” would “interfere with REV LNG’s governance” (RH Brief at 43) and “could seriously damage the Company’s continued growth and prosperity.” Company Brief at 44.

²⁵ The cases cited by Appellants concerning the balance of equities are nothing like this case. See *Credit Index, L.L. v. RiskWise Int’l L.L.C.*, 722 N.Y.S.2d 862 (1st Dep’t 2001) (“contractual language ‘leaves the rights of the parties open to doubt and uncertainty’”); *J.S.I.K. Int’l LLC v. Schuster*, 225 A.D.3d 472 (1st Dep’t 2024) (no irreparable harm because claim was for money and balance of equities could not ignore recipient’s interest in those funds); *Price Paper & Twine Co. v. Miller*, 582 N.Y.S.2d 746 (2d Dep’t 1992) (injunction implicated public policy against enforcement of restrictive covenant; also “there are key facts in dispute” and damages were compensable by money).

This claimed harm is hypothetical and amorphous and not supported by any evidence. Where the harm to one party is immediate and identifiable (here, for SJI, the denial of its minority rights), and the harm claimed by the other party is speculative and unsupported, the balance of equities favors the former.²⁶ See *Overtime Partners, Inc. v. 320 W. 31st Assocs., LLC*, No. 650901/2018, 2018 WL 2045538, at *7 (N.Y. Sup. Ct. May 02, 2018) (equities favored movant where asserted hardship of defendant was “speculative and unsupported.”); *Spivak v. Bertrand*, 147 A.D.3d 650, 652 (1st Dep’t 2017) (balance of equities lay with plaintiff because defendants “presented no evidence [of] . . . financial distress.”).

In any event, Appellants themselves assert that Kailbourne’s termination will not interfere with the Company’s performance or its governance. According to REV Holdings, “the LLCA vests ‘management’ authority—rather than merely ‘oversight’ or ‘strategic’ authority—in the Board of Managers, which has a contractually-enshrined 4-3 majority in RH’s favor. [Thus,] removing Kailbourne as CEO . . . does not change the fact that RH itself will continue to have ‘management’ authority

²⁶ REV Holdings makes the naked claim that removing Kailbourne “obstruct[s] the ability of the Company’s first and only CEO to serve in that role—a CEO who again has presided over substantial growth in REV LNG’s revenue and profitability during the parties’ relationship.” RH Brief at 43. The Company cites Digel’s opinion that “the Company’s success and growth has been in large part due to Mr. Kailbourne[]” and that termination would “damage the Company’s ongoing success.” R. 747 (Digel Aff. ¶¶ 64, 67). Such puffery is not evidence of how Kailbourne’s absence would impact the Company going forward or identify any non-speculative consequence such as specific customers that the Company would lose.

over REV LNG by virtue of its Board majority.” RH Brief at 41-42 (internal citation omitted). The lack of any purported harm to Appellants confirms that the equities favor SJI.²⁷ *See Advent Software, Inc. v. SEI Glob. Servs., Inc.*, 195 A.D.3d 498, 500 (1st Dep’t 2021) (balance of equities favored injunction where defendant would continue receiving fees under the parties’ contract and could recover any monetary damages upon final determination of merits). Further, Digel, one of the RH-Managers, COO of REV LNG, and member of REV Holdings has been acting as interim CEO of the Company. R. 894 (Coyle Aff. ¶ 50).

Appellants’ argument of last resort is to petition for a higher standard reserved for mandatory injunctions. *See* Company’s Brief at 24; RH Brief at 44. Specifically, they claim that the Injunction changed the status quo by removing Kailbourne. That is not true. On June 17, 2025, SJI exercised minority shareholder rights that it had secured in 2020 to terminate Kailbourne as an Interested Member Matter. It was only after that, when Appellants refused to respect the vote and confirmed their intention to further entrench Kailbourne as CEO that SJI sought relief from the Trial Court in July to enforce the status quo, which was that Kailbourne had been terminated a month earlier. It is not the termination itself that is the target of the Injunction, rather it is Appellants’ repudiation of the same. As the Trial Court noted,

²⁷ The Company cannot claim any separate harm (nor does it identify any). Indeed, as Justice Borrok observed, the Company does not have “an o[a]r in the fight” concerning a member’s exercise of its contractual rights. R. 599 (July 28 Transcript, 20: 5-6).

the “status quo [was] that he’s terminated.” R. 600 (July 28 Transcript, 21:1). Appellants’ breach distorted that status quo.

Appellants’ notion of the status quo would require ignoring the bona fide exercise of contractual rights. While “[t]o a breach of contract defendant, any injunction requiring performance may seem mandatory,” as long as the “injunction [does not] make it difficult or impossible to render a meaningful remedy to a defendant who prevails on the merits at trial, . . . there is no reason to impose a higher standard.” *Tom Doherty Assocs. v. Saban Ent., Inc.*, 60 F.3d 27, 35 (2d Cir. 1995) (affirming injunction where contract’s plain meaning entitled plaintiff to relief). Obligating Appellants merely to comply with the terms of their bargain does not justify a higher standard. See *BFG 104 LLC v. Greenwich Bus. Cap., LLC*, No. 652255/2023, 2025 WL 244207, at *2 (N.Y. Sup. Ct. Jan. 20, 2025) (“The purpose of this preliminary injunction [directing defendants to turn over collections and freeze assets] was, and is, to maintain the status quo by directing defendants to comply with the existing contracts.”); *Priv. One of NY, LLC v. JMRL Sales & Serv., Inc.*, 21 Misc. 3d 1106(A), at *12 (N.Y. Sup. Ct., Kings Cnty. 2008) (granting preliminary injunction that “would maintain the status quo and prevent any further alleged breach of the contract” in accordance with “the terms for which defendants bargained and to which they expressly agreed.”).

Even assuming, *arguendo*, that the Injunction is mandatory in nature, it would be warranted. Appellants' refusal to comply with the June 17 vote inflicted irreparable harm on SJI. SJI was therefore entitled to injunctive relief because it demonstrated a clear right under the LLCA. *See Second on Second Café, Inc. v. Hing Sing Trading*, 66 A.D.3d 255, 271-73 (1st Dep't 2009) (quoting *Bachman v Harrington*, 184 NY 458, 464 (1906) and affirming order to install equipment necessary to fulfill express contractual requirement in order to maintain status quo pending trial).²⁸

²⁸ Appellants' other authorities on mandatory injunctions similarly support SJI. The cases in which an injunction was disfavored are nothing like the case here. The injunction in *St. Paul Fire & Marine Insurance Company v. York Claims Service, Inc.*, 308 A.D.2d 347 (1st Dep't 2003) required the return of disputed funds (*i.e.*, money damages), which was not the status quo. In *New York Automobile Insurance Plan v. New York Schools Insurance Reciprocal*, there was no irreparable harm and the injunction would have required insurer to newly provide insurance – a change that would have “dramatically altered” the status quo by imposing forward-looking liability obligations. 241 A.D.2d 313, 314-15 (1st Dep't 1997). *SHS Baisley, LLC v. Res Land, Inc.*, 18 A.D.3d 727 (2d Dep't 2005) was equally dramatic; there, the court granted relief not even requested that would have lifted a stop-construction order and authorized a building to be completed. None of these situations are like the Injunction here, which orders Appellants to recognize a validly-taken Board action under a contract provision that SJI bargained for. The remaining cases suffered from issues of proof and factual disputes that are not present here. In *Rosa Hair Stylists, Inc. v. Jaber Food Corp.*, 218 A.D.2d 793 (2d Dep't 1995), the plaintiff failed to submit sufficient proof of injury and the record revealed many unresolved issues precluding relief. In *Lehey v. Goldburt*, conflicting affidavits raised sharp issues of fact warranting an evidentiary hearing. 90 A.D.3d at 412.

III. APPELLANTS CANNOT RELY ON A NEW THEORY FOR THE FIRST TIME ON APPEAL

For the first time on appeal, Appellants advance an argument that the Trial Court should not have decided SJI's motion for a preliminary injunction without determining "whether SJI's actions complied with [its] obligation [of good faith and fair dealing]." RH Brief at 40. Appellants' speculation that SJI's "real purpose [in terminating Kailbourne] was part of an effort to obstruct the closing condition for SJI's purchase obligation rather than to address any legitimate concern over Kailbourne's performance" is unfounded and beyond the scope of this appeal. RH Brief at 40. The short answer is that this is a new legal claim based on new factual allegations of motive not found in the record, and thus this argument cannot be considered on appeal. *See Kapitus Servicing*, 216 A.D.3d at 460 (declining to consider factual argument not raised below); *U.S. Bank*, 146 A.D.3d at 603 (argument that was not "purely legal" waived due to failure to raise below).

Appellants' after-the-fact invention as to motive is a belated lawyer creation. Appellants submitted affirmations to the Trial Court spanning approximately 400 pages (with exhibits), including affirmations from Kailbourne, Digel, and Coyle, as the Company's former CEO, COO, and General Counsel, respectively. Nowhere in those submissions did Appellants claim that SJI's "real purpose" in terminating Kailbourne was to obstruct a closing condition to the buyout. In fact, Kailbourne dedicated a section in his affirmation to the buyout process, but discussed only the

purported “value of [his] leadership,” and did not assert any motive by SJI. R. 617 (Kailbourne Aff. ¶ 66). Appellants had the opportunity to introduce evidence of SJI’s purported motive but did not—and could not (because it is not true).

REV Holdings did not raise this novel idea even once in its pleadings below, waiting until the latter stages of the September 5 injunction hearing to orally suggest, for the first time, that SJI was “trying to avoid [the buyout] by having Mr. Kailbourne not be an employee because a closing condition of that sale is that he be an employee.” R. 1087 (Sept. 4 Transcript, 5-7). The Company suggested only that SJI would also be an “Interested Member” “[t]o the extent [it] contends” at some point in the future that Kailbourne’s termination would defeat the closing condition. R. 720. The Trial Court rejected this suggestion – not “ignored” it as the Company submits. Company Brief at 25; R. 596 (July 28 Transcript, 17:9-25).

During the preliminary injunction hearing, the Trial Court noted that REV LNG’s belated closing condition argument might be a future counterclaim. *See* R. 1087 (Sept. 4 Transcript, 31:15). Counsel for REV Holdings and Kailbourne agreed, even going so far as asking Justice Borrok to “fill in the blank” as to what the cause of action underlying the counterclaim would be, which he declined to do as it was clearly beyond the scope of the injunction. R. 1087-88 (Sept. 4 Transcript, 31:22-

32:2).²⁹ If the circumstances ever arise in the future, and Appellants believe that SJI wrongfully has refused to close, Appellants can then bring a claim and let the Trial Court decide whether SJI's refusal to close was proper. As discussed above, this circumstance may never arise given the many significant other conditions that need to be (and may never be) satisfied before a closing ever becomes a ripe issue.

In any case, the Trial Court indeed found that SJI had valid reasons, not connected to the buyout, for terminating Kailbourne, including his self-dealing and failure to comply with basic duties, which were set forth in documents sent to the Board. *See* R. 598 (July 28 Transcript, 19:10-19) (“I did hear things about irreparable harm and imm[i]nent harm. . . . a transaction was entered into which they disagree with and which they're concerned about. And they say, when they raised their concerns about the transaction, their concerns were finally answered by the company saying, too bad, too late, it has already been booked; . . .”); *see also* R. 529-36 (Schempp Aff., Ex. 3).

²⁹ The Trial Court did not, therefore, “overlook” or “fail[] to even mention” the “buyout”, as the Company contends. *See* Company’s Brief at 36-37. Rather, the Trial Court understood that the buyout was irrelevant to the question of whether Kailbourne was terminated. Further, the Company’s invocation of the principle that contracts “must be read as a whole,” *id.* at 37, has no application because such principle cannot backfill the Appellants’ failure to present evidence and arguments to the Trial Court. It is troubling that the Company—which should not have “an o[a]r in the fight,” R. 599 (July 28 Transcript, 20:5-6)—is so strenuously pushing this narrative on appeal.

Further, Appellants' new claim that SJI purportedly breached its duty of good faith and fair dealing has no bearing on the meaning of Section 8.1(f). Under REV Holdings' own case law, the duty of good faith and fair dealing "cannot vary express contractual terms." *Henry v. PNC Bank, N.A.*, No. GD-10-022974, 2013 WL 10253091, at *10 (Pa. Ct. C.P. 2013). Thus, Appellants cannot purport to import an intent requirement into Section 8.1(f).

Finally, the closing condition that Kailbourne remain employed in the event that SJI acquires REV Holdings' 65% interest is for the sole benefit of SJI. *See* Company's Brief at 12 ("SJI insisted that he remain employed as a condition for closing.").³⁰ Thus, it is SJI's choice whether to stand on this condition to facilitate a buyout. *See Turk v. D. Katz & Sons, Inc.*, 385 A.2d 583, 587 (Pa. Super. Ct. 1978) (citing *Robert F. Felte, Inc. v. White*, 451 Pa. 137, 302 (1973)) (holding that appellee was entitled to waive condition that was for its sole benefit). If SJI so chooses, it can waive the closing condition of Kailbourne's employment because the condition accrues to its benefit. *See Turk*, 385 A.2d at 586-87. This appeal is not the appropriate venue for addressing a hypothetical concern about a buyout that may

³⁰ Notably, REV Holdings agreed to this closing condition at the same time as Section 8.1(f) and without an employment agreement in place for Kailbourne. If REV Holdings wanted a carveout from Section 8.1(f) – whether it be for matters related to Kailbourne's employment or matters related to Section 11.7 – it could have negotiated for one.

never arise. The Court should disregard Appellants' arguments about SJI's motive and dismiss the appeal.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING AN UNDERTAKING IN THE ABSENCE OF ANY DATA FROM APPELLANTS

The Trial Court's decision to set an undertaking of \$5,000 was reasonable and therefore did not abuse its discretion.

CPLR 6312(b) governs undertakings in connection with the grant of a preliminary injunction. As Appellants' own case law acknowledges, the amount of the undertaking need only be "rationally related" to the potential damages recoverable. *Spivak*, 147 A.D.3d at 652. An undertaking is not "rationally related" where it is based on speculation or "conclusory and unsupported testimony." *7th Sense*, 220 A.D.2d at 217.

Before the Trial Court, none of the Appellants submitted any evidence about the appropriate amount of an undertaking, leaving the matter entirely in the Trial Court's discretion to set a \$5,000 bond. *See Gerald Modell Inc. v. Morgenthau*, 196 Misc. 2d 354, 363 (Sup. Ct. 2003) (fixing the amount of undertaking is within the sound discretion of trial court). Given SJI's clear legal right, and that Appellants suffer no real harm as a result of the present injunction, the Trial Court was well within its discretion to set such amount. *7th Sense, Inc.*, 220 A.D.2d at 217 (trial court did not improvidently exercise discretion by refusing to raise undertaking amount where defendants provided only conclusory and unsupported testimony).

Even now, Appellants suggest no benchmark or even a possible range of figures that would be more appropriate, and thus have provided no basis to find that the Trial Court abused its discretion. Curiously, only the Company addresses the undertaking and vaguely references a “potential harm the Company may face without Kailbourne.” Company Brief at 45. Such assertion is not only conclusory and unsupported, *7th Sense, Inc.*, 220 A.D.2d at 217, but also a legal nullity because an LLC does not have an independent interest in the identity of its CEO.

In all events, even if Appellants had demonstrated on appeal that the Trial Court abused its discretion, such finding would not justify reversal of the Injunction. Rather, the appropriate course of action would be to remand to the Trial Court to modify the undertaking. *See 1414 Holdings, LLC v. BMS-PSO, LLC*, 116 A.D.3d 641, 644 (1st Dep’t 2014).

* * *

CONCLUSION

For the foregoing reasons, this Court should **AFFIRM** the Decision and Order of the Trial Court.

Respectfully submitted,



Jennifer Permesly
Elizabeth A. Hellmann
Kristina Fridman
Zack Rynhold
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
One Manhattan West
New York, NY 10001

*Attorneys for SJI Renewable Energy
Ventures, LLC, SJI RNG DevCo LLC,
and Red River RNG, LLC*

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