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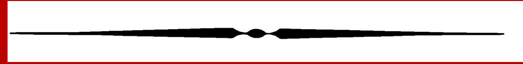
New York Supreme Court

Appellate Division—Fourth Department



Docket Nos.:
CA 18-01322
CA 18-02140
CA 18-02142

WILLIAM HOWARD, suing in the right of Archer Rd. Vista, LLC, WILLIAM HOWARD, Individually, and WESTSIDE DEVELOPMENT OF ROCHESTER, INC.,

Plaintiffs-Respondents,

– against –

GARY L. POOLER,

Defendant-Appellant,

– and –

ARCHER RD. VISTA LLC and GARY L. POOLER as Manager of ARCHER RD. VISTA LLC,

Intervenors-Appellants.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

"You are never going to get a dime out of this project." (2058). That is what Gary Pooler ("Pooler") told William Howard ("Howard") in a 2013 meeting regarding Archer Rd. Vista, LLC (the "Company"), of which both Pooler and Howard are members. In this action, Howard brought to light the means by which Pooler sought to achieve this end, and to assure that every dime taken out of the Company would ultimately line Pooler's pockets. Howard demonstrated that Pooler treated the Company as his own personal fiefdom, managed it for his own personal benefit, and denied both the Company and Howard the opportunities and benefits for which the parties had bargained. In finding Pooler liable, the trial court properly condemned Pooler's misconduct. On appeal, Pooler asks this Court to condone it.

Certain of Pooler's misconduct was so blatant that the trial court granted summary judgment as to liability. The remainder of Pooler's misconduct was the subject of six days of lay and expert testimony, at the conclusion of which the trial court, having considered the documentary evidence, the credibility of the witnesses, and the well-settled law of New York State: (1) found Pooler liable to the Company, Howard, and Westside Development of Rochester, Inc. ("Westside"); (2) awarded damages and declaratory relief in connection with

Pooler's wrongdoing; and (3) ordered the dissolution of the Company in an equitable fashion.

Pooler does not challenge the trial court's factual findings in any meaningful way. Instead, with his misconduct laid bare, Pooler attempts to hide behind an overreaching and self-serving misinterpretation of the Company's Operating Agreement ("OA") that ignores both statutory and common law. The trial court considered and rejected Pooler's arguments. Pooler now asks this Court to disturb the trial court's findings, and to absolve Pooler from the consequences of his actions. This Court should reject the invitation, and should affirm the trial court's findings in their entirety.

QUESTIONS PRESENTED

There are two questions presented by this appeal:

(1) whether the trial court properly applied well-settled New York law to the undisputed (or undisputable) facts in awarding Howard partial summary judgment as to liability on his derivative claims; and

(2) whether the trial court properly applied well-settled New York law to both the undisputed and contested facts at trial and, upon reviewing the evidence, hearing testimony, weighing the credibility of the witnesses, and considering the parties' summations: (1) properly awarded judgment against Gary Pooler and in favor of the Company, Howard, and Westside; and (2) fashioned an appropriate

Order dissolving the Company and setting forth the parameters pursuant to which such dissolution should occur.

Both of these questions should be answered in the affirmative, and this Court should affirm the trial court's findings in their entirety.

SUMMARY OF THE FACTS

Pooler and Howard executed the OA and formed the Company effective June 29, 2007. (64, 2880-2992). The Company was formed to develop a residential subdivision in Chili, New York. (64). Pursuant to the OA, both Howard and Pooler own 50% voting interests in the Company, but Pooler's and Howard's membership interests for purposes of allocating profits, losses, and distributions are allocated on a 60% to 40% basis, respectively. (64, 2922). Pooler is the Company's managing member. (64).

Almost immediately, Pooler set about to completely divert all benefits of the Company to himself, to sap revenue from the Company by overcharging for self-dealing site work through an arrangement with his development company, and to squeeze Howard out of the equation. Pooler also attempted to transfer property from which he was required to provide Howard's company, Westside, with easement rights. And, when Howard initiated this action seeking a cessation of, and remedies for, Pooler's misconduct, Pooler diverted still more Company money

toward his personal attorneys' fees. As the trial court properly found, the evidence of Pooler's misconduct was overwhelming.

First, the trial court found that Pooler breached the OA by causing the Company to incur debt of over $970,782.32 (as of December 2014) from Pooler Enterprises and various other entities owned by Pooler, through a series of *ad hoc* transfers, without providing notice to, or receiving approval from, Howard. (65-68; 169, 375, 256-69; 289-300).[1] By April 2016, these transfers ballooned to $1,506,623.35. (2967). Characterized by Pooler as "loans," these transfers were neither documented nor subject to any terms. (178-82).

Second, the trial court found that because Pooler incurred this debt from his own entities, he violated his fiduciary duty to the Company by placing "him in a compromising position as his own entity was assured of obtaining payment before [the Company] and its members." (70). The trial court held that Pooler "placed his personal interests in conflict with" the Company's and found that Howard met his burden of demonstrating that "Pooler used the loans as a means to ensure that [the Company's] revenue was paid first to Pooler Enterprises and to Pooler's individual debts." (71-73).

Third, the trial court found that Pooler breached his fiduciary duty to the Company by causing the Company to "contract" with Pooler Enterprises to

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[1] For ease of reference, these entities will be referred to collectively as "Pooler Enterprises."

perform site work without: preparing a proposal for the work using Pooler Enterprises' ordinary methods; executing a written, memorialized contract; maintaining or submitting backup documentation to support payment applications to the Company; or ever even questioning the invoices before causing the Company to pay them. (71). In granting judgment as to liability, the trial court found that Pooler "fail[ed] to produce admissible evidence that he did not personally profit from the self-dealing." The trial court also found that Pooler misappropriated company revenue to the extent that "the intercompany loans and undocumented contracts were used by Pooler to frequently transfer [Company] revenue to Pooler Enterprises." (72).

Fourth, the trial court found that Pooler had used Company funds to pay his personal attorneys' fees in this litigation and that if it was "ultimately determined that Pooler engaged in conduct whereby he financially profited or gained some other advantage to which he was not entitled, Section 420 [of the New York Limited Liability Company Law] (the "LLC Law") will require him to pay back any fees 'reimbursed' to him." (74).

Fifth, the trial court found that, "based upon the evidence presented at trial and testimony heard," Pooler "demonstrated a lack of good faith" and a "disregard for his obligations under the [OA]" by stripping Howard of his contractual right to act as listing agent for Company lot sales, thereby destroying Howard's right to

receive the benefit of their bargain. (13-14). Indeed, this right underpinned the parties' agreement to allocate Company profits on a 60/40, rather than a 50/50 basis, and the trial court found that Pooler's testimony to the contrary "was not credible." (14).

Sixth, the trial court held that Pooler's attempt to transfer certain of the Company's land to the Town of Chili, which included land needed by Westside for wetland mitigation and sewer easement, violated the OA, and that the amount and location of the land necessary for mitigation would need to ultimately be determined at a later date. (14-15).

Seventh, the trial court, after hearing expert testimony which went unrebutted by Pooler, awarded both the Company and Howard damages in connection with the above-referenced misconduct. (13-16). Pooler does not challenge these damages calculations on appeal.

Finally, the trial court determined that both parties had made their initial capital contributions to the Company back in 2007; that Howard was, in fact, a member of the Company; and that "Pooler's arguments to the contrary lack credibility." (17).

Ultimately, based on its factual findings, the trial court found "without question that it is no longer practicable for Howard and Pooler to carry on the business of [the Company], and ordered that the Company be dissolved. (16-17).

The trial court fashioned a dissolution remedy for the purpose of doing equity between the parties and appointed a receiver to carry out the requirements of that order. (17).

These are the facts as determined by the trial court. The record evidence supporting the trial court's summary judgment determination is set forth in substantial detail in the materials submitted by Howard in support of that motion. (138-379). The evidence proffered at trial is set forth in substantial detail in Howard's Proposed Findings of Fact and Conclusions of Law, which were submitted to the trial court, along with citations to the applicable testimonial and documentary evidence, in lieu of closing statements. (2876-77; 3631-3758).

In the interest of economy, rather than repeating herein the entirety of the factual record upon which the trial court's decision is supported, this brief instead cites applicable record evidence for the specific facts necessary to support the legal arguments that follow.

ARGUMENT

With respect to matters decided at trial, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses." Claridge Gardens, Inc. v. Menotti, 160 A.D.2d

544, 544-45 (1st Dep't 1990). See also Niemira v. Dean, 245 A.D.2d 1068, 1069 (4th Dep't 1997) (quoting Menotti). Here, the trial court heard a week of lay and expert testimony, including substantial testimony from the parties on both direct and cross examination. The trial court had the opportunity to consider and weigh the credibility of these witnesses and, ultimately, rendered a decision that was not only consistent with, but compelled by, the evidence.

The remainder of this brief will address the following issues: (1) general statutory and common law principles that Pooler has either ignored or misapplied; (2) the proper interpretation of the OA in light of those principles; and (3) the evidence supporting the trial court's findings of fact; and (4) the grounds upon which the trial court appropriately applied the law to those findings.

POINT I

POOLER'S APPEAL IGNORES THE LIMITED LIABILITY COMPANY LAW

The gravamen of Pooler's appeal in this action is that the trial court improperly found Pooler personally liable, to both Howard and the Company, because of certain exculpatory language in §§5.6(f) and (g) the OA that purports to shield Pooler from liability to the Company or its members. Pooler also relies on language in §7.1 that provides indemnity to the Manager and Members "[e]xcept

as otherwise provided in [the OA] or required by the non-waivable provisions of the [LLC Law]."[2]

Bizarrely, however, Pooler entirely ignores §417(a)(1) of the LLC Law, which expressly provides that while an operating agreement "may set forth a provision eliminating or limiting the personal liability of managers to the limited liability company or its members for damages for any breach of duty in such capacity," "no such provision shall eliminate or limit the liability of any manager if a judgment or other final adjudication adverse to him or her establishes that his or her acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled." (LLC Law §417(a)(1); emphasis added).

Put another way, §417(a)(1) expressly prohibits the elimination of a manager's personal liability under precisely the set of facts presented before the trial court in this action. See, e.g., TIC Holdings, LLC v. HR Software Acquisitions Group, Inc., 301 A.D.2d 414, 415 (1st Dep't 2003) (holding exculpatory and indemnification provisions of operating agreement ineffective

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[2] To the extent Pooler as "Intervenor" asserts arguments with respect to anything other than issues relating to the Notice of Pendency filed with respect to this action, the Court should disregard such arguments. The only claims asserted by Pooler as an "Intervenor" in this action pertained to the propriety of the Notice of Pendency,. (100-09). The Court should reject attempts to buttress Pooler's individual defenses under the guise of an "Intervenor" appeal.

pursuant to LLC Law §§417(a)(1) and 420). Remarkably, neither of Pooler's briefs even mentions this dispositive statutory provision.

Thus, regardless of any contrary provision in the OA, the trial court could award damages against Pooler personally in favor of both the Company and Howard in the event that the trial court found – as it did here – that Pooler acted in bad faith, or engaged in intentional misconduct, or breached any obligation that resulted in personal gain or some other advantage to which Pooler would not have otherwise obtained.

POINT II

POOLER MISINTERPRETS THE OA

In addition to ignoring LLC Law §417(a)(1), Pooler misinterprets and misapplies the exculpatory provisions on which he relies, and further ignores other relevant provisions in the OA relating to his liability. It is an "elementary" proposition that "clauses of a contract should be read together contextually in order to give them meaning" and the "cardinal rule of construction that a court adopt an interpretation that renders no portion of the contract meaningless." Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp, 82 A.D.3d 421, 422 (1st Dep't 2011) (internal citations omitted).

Here, Pooler's narrow focus on the exculpatory language in §5.6(g) ignores and/or renders meaningless other applicable provisions in the OA. Specifically,

§5.6(g) applies only where Pooler performs acts authorized "in this Agreement." (2901). The provision is silent as to acts or omissions by Pooler that are <u>not</u> authorized "in this Agreement."

Acts that are not authorized by the OA are addressed in §5.6(f), which provides that where Pooler takes actions that are <u>not</u> authorized by the OA, Pooler is shielded from liability only where Pooler takes actions "in a manner <u>reasonably</u> believed by him to be within the scope of the authority granted to the Manager," unless it is proved that his conduct "was not in good faith . . . <u>or</u> resulted from his . . . intentional breach of this Agreement." (2901; emphasis added). If Pooler acts outside the scope of his authority, and <u>either</u> of these conditions is met, Pooler can be held personally liable to the Company and to any member.

Finally, while Pooler is the manager of the Company, he is also a member. Thus, where Pooler acts outside the scope of his authority and §5.6(f) does not apply, then Pooler is subject to §5.5(c), which provides that any member who acts beyond the scope of the authority granted by the OA <u>shall</u> be personally liable in damages to the Company and each member "for any costs, losses or damages that any of them may incur or suffer as a consequence . . . and shall reimburse, indemnify and hold harmless the Company . . . and any other [m]ember with respect to any such costs, losses, and damages."

By failing to address this unambiguous contractual framework, and instead focusing exclusively on §5.6(g), Pooler fails to read these various provisions "together contextually in order to give them meaning" and "to adopt an interpretation that renders no portion of the contract meaningless." By contrast, the trial court's findings do give each of these provisions meaning.

POINT III

THE TRIAL COURT PROPERLY REACHED ISSUES REGARDING POOLER'S BREACHES OF FIDUCIARY DUTY

Pooler argues, incorrectly, that Howard's derivative claims for breach of fiduciary "must be dismissed" as duplicative of his breach of contract claim.

New York law provides that "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." Mandelblatt v. Devon Stores, 132 A.D.2d 162, 167-68 (1st Dep't 1987). See also Bullmore v. Ernst & Young Cayman Is., 45 A.D.3d 461, 463 (1st Dep't 2007); Sally Lou Fashions Corp. v. Camhe-Marcille, 300 A.D.2d 224, 225 (1st Dep't 2002).

This case presents precisely such a situation. While Pooler had specific contractual obligations set forth in the OA, Pooler also had fiduciary obligations as manager, both at common law and pursuant to the LLC Law, that were themselves independent of the OA. For example, Pooler had a fiduciary duty to make full

disclosure of all material facts to other members of the Company. See, e.g., Salm v. Feldstein, 20 A.D.3d 469, 470 (2d Dep't 2005) (citing cases). Further, "it is elemental" that Pooler "owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." Pokoik v. Pokoik, 115 A.D.3d 428, 429 (1st Dep't 2014) (quoting Birnbaum v. Birnbaum, 73 N.Y.2d 461 (N.Y. 1989)).

Further still, Pooler was statutorily required to "perform his . . . duties as a manager . . . in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." (LLC Law §409(a)).

Here, the trial court found Pooler to have breached not only contractual obligations expressly included in the OA, but also fiduciary duties arising out of the relationship created by the OA that are independent of that agreement itself. For example, the trial court found that Pooler breached §§5.4 and 5.11 of the OA by authorizing the Company to borrow funds in excess of $50,000 without informing Howard or obtaining Howard's consent. (67-68). The trial court also found, however, that Pooler breached a separate fiduciary obligation, independent of the contract itself but arising out of the relationship created by the OA. (70-71).

Specifically, the trial court found that Pooler breached his fiduciary obligation to the Company to "not incur debt through self-dealing arrangements that placed his personal interests in conflict with the interests of the [Company]." (70-71). The trial court also found that Pooler's misconduct misappropriated Company revenue to the extent he used "the intercompany loans and undocumented contracts . . . to frequently transfer [Company] revenue to Pooler Enterprises" and to "ensure that [the Company's] revenue was paid first to Pooler Enterprises and to Pooler's individual debts." (72). In other words, the nature of Pooler's misconduct – coupled with the fact that such misconduct placed Pooler's self-interest in direct conflict with the interests of the Company – meant that the same conduct that constituted the breach of Pooler's contractual obligation also constituted a breach of Pooler's fiduciary duties.

Similarly, the trial court found that Pooler breached his fiduciary obligations to the Company by causing the Company to "contract" with Pooler Enterprises to perform site work without: pricing the work in the ordinary course; executing a written, memorialized contract; or providing or maintaining any backup documentation showing amount of work performed or supporting the payments that Pooler caused the Company to make to Pooler Enterprises. (71-72). Again, this arrangement placed Pooler's interests directly in conflict with the Company's, resulting in Pooler "personally profiting from the self-dealing" (71).

Ultimately, the trial court found that Pooler caused Pooler Enterprises to substantially overcharge, and the Company to substantially overpay, for the work actually performed, thereby resulting in ill-gotten gains for Pooler to the detriment of the Company. (16).

Accordingly, as a matter of law, the trial court properly considered both the breach of contract and breach of fiduciary duty claims.

POINT IV

THE TRIAL COURT FASHIONED AN EQUITABLE REMEDY IN THE CONTEXT OF JUDICIAL DISSOLUTION

At trial, Pooler did not contest Howard's request for dissolution of the Company or appointment of a receiver. Indeed, Pooler conceded that dissolution was appropriate and that he was not contesting Howard's request for the same. (2284).

Nor does Pooler address – let alone dispute – that the trial court had discretion to fashion a judicial dissolution for the purpose of doing equity among the members. See, e.g., Matter of Superior Vending, LLC, 71 A.D.3d 1153, 1154 (2d Dep't 2010); Flax v. Shirian, 2014 N.Y. Misc. LEXIS 3679, at ***25-26 (Sup. Ct., Suffolk Co., 2014) (remedy of dissolution is equitable and the court may fashion a remedy suitable to the circumstances) (citing Misrahi v. Cohen, 104 A.D.3d 917, 920 (2d Dep't 2013)). See also Matter of Superior Vending, LLC, 71 A.D.3d 1153, 1154 (2d Dep't 2010) (Supreme Court properly exercised discretion

in determining the most equitable method of liquidation, which included adjustments based on the parties' conduct as determined by the Court); Lyons v. Salamone, 32 A.D.3d 757, 758-59 (1st Dep't 2006) (trial court was authorized to determine an equitable method of liquidation).

Here, the trial court's dissolution order was fashioned equitably so as to do justice between the parties. Indeed, shortly before trial commenced – in the context of a request by Pooler for dissolution – the trial court noted that upon dissolution, "the Court may make findings as to whether and to what extent, among other things: Pooler is required to compensate the [C]ompany for damages caused or pay restitution for misappropriated funds, Pooler must compensate Howard, the Company will grant easement rights and/or ownership interest in certain real property, entitlement to attorneys' fees, and the share each party is entitled to upon distribution of the [C]ompany's assets at dissolution." The trial court also noted that "[a]ny eventual order of dissolution may involve equitable considerations." (32).

At bottom, the trial court did precisely this. (16-17). This Court should not disturb the trial court's findings with respect to how the Company's dissolution is most equitably achieved.

POINT V

THE EVIDENCE SUPPORTED THE TRIAL COURT'S FINDINGS

A. The Trial Court Properly Found Pooler Liable for his "Loans" to the Company

1. The "Loans" Breached the OA

The trial court awarded partial summary judgment on the ground that Pooler breached §§5.4(g) and (h) by authorizing the Company to borrow in excess of $50,000 without Howard's approval and breached §5.11 by failing to disclose these "loans" to Howard. (66-68). Pooler did not dispute that, through December 2014, he caused the Company to borrow $970,782.32 from Pooler Enterprises through a series of irregular transactions, nor did Pooler dispute – rather, he admitted – that he engaged in these transactions "without prior notice to Mr. Howard." (486).

Further, Pooler testified that he never discussed these transactions with Howard because, in his words, "I was monitoring everything and it was our money. He wasn't putting a dime in it." (180). These facts demonstrate, on their face, a breach of §§5.4(g) and (h) and §5.11 of the OA.

Nevertheless, Pooler offers on appeal the same disingenuous arguments that he offered before the trial court. First, Pooler argues that of the myriad transfers between Pooler Enterprises and the Company, the only loans requiring consent

were discrete loans exceeding $50,000. This argument was properly rejected by the trial court, which held that this tortured interpretation of §5.4(g) "would produce an absurd result that would render Section 5.4 meaningless," and would "allow [Pooler] to accrue massive debt without majority consent so long as no individual loan exceeded $49,999.99." (68). See, e.g., Matter of Lipper Holdings v. Trident Holdings, 1 A.D.3d 170, 171 (1st Dep't 2003) ("a contract should not be interpreted to produce a result that is absurd . . . commercially unreasonable . . . or contrary to the reasonable expectations of the parties").

Moreover, even if the Court were to accept Pooler's interpretation of §5.4(g), the arrangement established by Pooler between the Company and Pooler Enterprises nevertheless violated §5.4(h), which prohibits Pooler from entering into any "agreement, arrangement or understanding, written or oral, to" authorize or approve the Company to borrow an amount in excess of $50,000.

Pooler acknowledged that he transferred money to and from Pooler Enterprises and the Company "on a regular basis," "as needed," (179-80), and his employees confirmed that these transfers were done on an *ad hoc* basis, "like they were a line of credit." (202). The record shows a voluminous series of transfers by and between Pooler Enterprises and the Company, all in differing amounts and all in furtherance of Pooler's unauthorized scheme. (256-69; 289-300). At a minimum, then, there existed an "arrangement, or understanding" pursuant to

which Pooler caused the Company to borrow from Pooler Enterprises an amount well in excess of $50,000.

Pooler also points to OA §5.3(g), which permits Pooler to "borrow money and incur obligations on behalf of, and otherwise commit the credit of, the Company." (2898). That authority is expressly limited, however, by qualifying language which grants such authority "[e]xcept to the extent otherwise provided in this Agreement." (2896-97). Thus, Pooler is permitted to borrow money and incur obligations, <u>except to the extent</u> limited by §§5.4(g) and (h). As Pooler himself acknowledges in one of his briefs, "clauses similar to the phrase '[n]otwithstanding any other provision' trump conflicting contract terms." <u>Beardslee v. Inflection Energy, LLC</u>, 25 N.Y.3d 150, 158 (2015).

In this case, §5.4(g) and (h) provide, without excpetions, that Pooler "shall not authorize or approve the Company to borrow an amount in excess of $50,000" nor "enter into any agreement, arrangement or understanding, written or oral, to do" the same. (2899). Accordingly, the trial court properly found that Pooler breached these provisions of the OA. (66-68).

2. <u>The "Loans" Breached Pooler's Fiduciary Duties</u>

In addition, the self-dealing and undocumented "loans" were clear violations of Pooler's fiduciary duties to the Company. Again, a fiduciary "owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to

protect," and this is a "sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." Birnbaum, 73 N.Y.2d at 466. Included within this rule's broad scope "is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person in such close relation to the fiduciary that possible advantage to such other person might consciously or unconsciously influence the fiduciary's judgment." Id.

Further, "deceitful intent is not an element of a cause of action for breach of fiduciary duty as it has consistently been articulated by the New York courts." Dayan v. Witkoff, 2009 N.Y. Misc. LEXIS 5355, at *15-16 (Sup. Ct., N.Y. Cty., 2009). See also, Schneider v. Wien & Malkin LLP, 2004 N.Y. Misc. LEXIS 2044, at ***18 (Sup. Ct., N.Y. Cty., 2004) (noting that New York courts have consistently held that no showing of wrongful intent is required to establish a fiduciary duty claim).

Although Pooler argues that these self-dealing "loans" were necessary "to maintain the viability of the Company," this argument – apart from being completely unsupported at trial – misses the point. Among other things, Pooler ignores the multitude of other funding options (or possibilities such as selling the project rather than incurring additional debt) that were available in addition to the

self-serving option that constituted a breach of his fiduciary obligation. Further, although Pooler argues that the loans were necessary to "pay off S&T debt," the evidence showed that Pooler first caused the Company to these transfers in 2007 – before the S&T loan even closed. (2689-91; 2964; 3492). Further still, any claims by Pooler as to "what would have happened" if he had not breached his duties are purely speculative, and Pooler presented no evidence supporting any such claims.

Here, the trial court properly found that the self-dealing nature of the unapproved loans "placed [Pooler's] personal interests in conflict with the interests of the [Company]." (71). Among other things, Pooler's actions "placed him in a compromising position as his own entity was assured of obtaining payment before [the Company] and its members." (70). This is particularly true given Pooler's reliance on OA §11.2(a) for his claim that these very transfers should be repaid prior to any other distributions upon dissolution.

Indeed, Pooler's argument before the Court demonstrates precisely why the trial court appropriately found that Pooler breached his fiduciary duty. By placing himself in a position where (he believed) his own entity was assured of receiving payments before proceeds are otherwise distributed, Pooler made it impossible to avoid "situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." Birnbaum, 73 N.Y.2d at 466. Thus, Pooler placed himself in a position where his personal interest (receiving payments

from the Company to Pooler Enterprises) necessarily conflicts with the interest of the Company (maximizing and receiving distributions of revenue).[3]

3. The "Loans" Resulted in Personal Gain and Advantage to Pooler

Further, the trial court specifically found that Pooler's breaches with respect to these "loans" resulted in Pooler receiving personal gain and advantages to which he was not otherwise entitled.

Among other things, it was undisputed that Pooler in fact caused the Company "to pay Pooler Enterprises over $1,000,000 for undocumented loans, interest, and payments for undocumented site work contracts, but [the Company] did not have any money for the purposes of distribution to members." (70).

Of this amount, it was undisputed that Pooler in fact caused the Company to transfer to Pooler Enterprises $901,557.51 through April 2016 in connection with these "loans," while making zero distributions to members. (2447-49, 3036, 3130). It was also undisputed at trial that Pooler caused the Company to pay Pooler Enterprises $70,630 in interest (15; 2936). Thus, Pooler undisputedly: (1) received the advantage of having "his own entity . . . assured of obtaining payment before [the Company] and its members" (70); and (2) received personal gain in the form of $70,630 in interest. Further, Pooler's end game is even more apparent

[3] For example, Pooler, personally, was incentivized to dispose of Company assets – including Company real property – at below fair-market value, or at a value less than could otherwise be achieved, in order to assure that the "loans" plus interest were paid back to Pooler Enterprises.

given his argument on appeal (addressed in more detail in Point IX, below), that the trial court's dissolution order should be disturbed because it fails to provide for Pooler Enterprises to receive repayment of these self-dealing loans before any other funds are distributed. In other words, even on appeal Pooler seeks to make sure that Howard is "never going to get a dime out of this project."

Pooler's transfers reflect precisely the kind of "financial profit" or "other advantage" to which Pooler was not legally entitled. Thus, the trial court properly awarded judgment against Pooler and in favor of the Company in connection therewith. (15-16).

4. Pooler Did not "Reasonably Believe" He was Authorized to Incur the Debt

Because Pooler did not have authority under the OA to cause the Company to incur debt of over $1,000,000 to Pooler Enterprises, Pooler is not shielded from liability pursuant to §5.6(g) even if he did not gain a financial or other advantage as a result. Rather, pursuant to the framework discussed above, the question becomes whether, under §5.6(f), Pooler "reasonably believed" that he had the authority to cause the Company to take on this debt. Under New York law, contractual "reasonableness" provisions generally require an objective, rather than a subjective, standard. MBIA Ins. Corp. v. Patriarch Partners VIII, LLC, 842 F.Supp.2d 682, 704-05 (S.D.N.Y. 2012) (applying New York law) (citing cases). In this case, Pooler's argument that he believed he could borrow from Pooler

Enterprises because various of the discrete transfers to the Company were below $50,000 does not fall within any objective standard of "reasonableness." Indeed, for the reasons set forth above, the trial court found such an interpretation "absurd." (67-68). Further, Pooler acknowledges that several of the individual transfers did exceed $50,000.

Accordingly, Pooler could not have "reasonably believed" that he was acting in accordance with his authority under the OA, and Pooler is required, therefore, to reimburse, indemnify, and hold harmless the Company and Howard with respect to any costs, losses, and/or damages associated with these loans pursuant to OA §5.5(c).

B. The Trial Court Properly Found Pooler Liable for Causing the Company to Make Inflated Site Work Payments to Pooler enterprises

1. The Site Work Arrangement Constituted a Breach of Fiduciary Duty

With respect to the site work for which Pooler caused the Company to pay Pooler Enterprises, the trial court properly found Pooler liable and awarded judgment to the Company.

The primary basis for Pooler's appeal on this issue is that OA §5.11 permitted him to contract with Pooler Enterprises to perform site work. This argument, however, is a red herring. Pooler's breach of fiduciary duty was not that he arranged for Pooler Enterprises to perform the work, but it was the manner in

which he operated that relationship and, ultimately, allowed Pooler Enterprises to grossly overcharge the Company for the work performed.

As a fiduciary, Pooler was required to explain all transactions fully and show that he did not take advantage of his position. Russo v. Zaharko, 53 A.D.2d 663, 666 (2d Dep't 1976). Further, Pooler had a statutory duty pursuant to LLC Law §409(a) to act in good faith and with the ordinary care that a person in a similar position would demonstrate. (LLC Law §409(a)). See Willoughby Rehab. & Health Care Ctr., LLC v. Webster, 2006 NY Slip Op 52067(U) at * 3 (New York Sup. Ct. October 26, 2006).

Although Pooler relies on §5.11 for the proposition that he could utilize Pooler Enterprises to perform site work pursuant to terms that were "in his sole discretion" commercially reasonable, Pooler cites no law showing that this provision somehow limits his statutory or common law fiduciary duties, and he ignores the well-settled principle that where a contract provides that one party may act in its discretion, such party is obligated "to exercise such discretion in good faith, not arbitrarily or irrationally." See, e.g., Maddaloni Jewelers, Inc. v. Rolex Watch U.S. A., Inc., 41 A.D.3d 269, 270 (1st Dep't 2007).

Here, the evidence showed, and the trial court found, that breached his fiduciary duty to the Company in the manner in which he caused the Company to

"contract" with Pooler Enterprises to perform site work for the Company. (71-72; 16).

Among other things, the undisputed facts before the trial court showed that: (1) in setting the "contract" price, Pooler simply cut a previous bid in half without reviewing whether the work reflected on the new proposal equaled the amount that was left to be performed (186-90); (2) never signed a contract because he was "[k]ind of working for [himself]" (187); (3) utilized an unsigned "Proposal" as the only document that in any way reflects the self-dealing arrangement, without any written terms, conditions, or other protections for the Company (194-96); and (4) caused the Company to pay the full amount of Pooler Enterprises' invoices, totaling over $700,000 – more than $317,000 in excess of the work actually performed – without providing any backup documentation to support such payments. (279-87).

Thus, far from entering into a contract on "commercially reasonable terms," Pooler did not enter into any contract, on any terms. Moreover, Pooler failed to exercise literally any care with respect to this self-dealing arrangement, let alone "that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." Further, the arrangement placed Pooler's interests directly in conflict with the Company's.

Given these undisputed facts, the trial court properly held that Pooler breached his fiduciary duties to the Company with respect to this site work and that Pooler "fail[ed] to produce admissible evidence that he did not profit" from this arrangement. (71).

2. Pooler's Breach Resulted in Unwarranted Personal Gain

In rendering judgment, the trial court found that Pooler's testimony "with respect to the contract price was not credible" and that Pooler had no "back-up documentation for his allegations at trial." (16). By contrast, Howard established that Pooler caused the Company to contract for work with Pooler Enterprises that either was not necessary or had already been completed. Howard further established that Pooler caused the Company to pay Pooler Enterprises for far more work than Pooler Enterprises actually performed. Specifically, the evidence showed that Pooler caused the Company to pay Pooler Enterprises $317,146 more than the value of the work performed, and $103,812 in overhead and profit, thereby resulting in "ill-gotten gain" for Pooler to the Company's detriment. (16).

Remarkably, Pooler ignores this evidence in his brief, despite citing case law noting that "the determination of commercial reasonableness is usually a factual determination best made by the trier of fact." Leigh Co. v. Bank of New York, 617 F.Supp. 147, 153 (S.D.N.Y. 1985). In any event, the evidence of Pooler's "ill-

gotten gain" from overcharging the Company for work performed was overwhelming.

The "contract" that Pooler caused the Company to enter into with Pooler Enterprises included a price to perform the necessary site work for 44 lots. (2250, 3241). Pooler admitted, however, that the Company ultimately only developed 41 lots. (2252). Further still, Pooler admitted that when the OA was signed, six of those 41 lots were already saleable. (2241). Then, although Pooler testified at trial that Pooler Enterprises performed site work on those six lots, he was forced to admit that he had previously acknowledged that Pooler Enterprises "stopped at 35" lots. (2242-44). Thus, although the "contract" purported to include a scope of work for 44 lots, Pooler's own testimony confirmed that Pooler Enterprises actually only performed site work for 35 lots.

The evidence also showed that with respect to these 35 lots, a substantial portion of the site work had already been completed before the contract was entered into. Specifically, the sewers for those lots, as well as additional lots that were not ultimately developed further by the Company, were substantially completed at the time the OA was executed. (2234-36). Pooler also admitted that some earth work and some storm work had previously been completed. (2236).

Thus, although Pooler caused the Company to enter into a contract with Pooler Enterprises to perform all of the necessary site work for 44 lots, the

evidence – principally Pooler's own testimony – showed that Pooler Enterprises ultimately only performed work on 35 lots, for which a substantial portion of the "contract" had already been completed.

At trial, Howard proffered the expert testimony of Keven Mahoney, who summarized and analyzed the relevant evidence both in his testimony and in his Expert Report. (3170-3211). Mahoney's forensic review of the relevant source material and testimony, coupled with his own independent research and analysis, yielded the conclusion that the actual value of work performed by Pooler Enterprises – even if the Court were to credit Pooler Enterprises with performing all such work required for the 35 lots – was $407,260, or $379,335 below the $786,595 self-awarded contract value. (2377-79; 2381-2384; 3175-76; 3179-80; 3241-45). Mahoney also concluded that, as of the date of Pooler Enterprises' final payment application, Pooler had overcharged the Company $32,326 relating to road installation. (3179). This expert testimony went unrebutted.

Contrary to the assertions in Pooler's brief, Mahoney, an expert qualified by the trial court, did not "admit that he did not review the relevant documentation." Indeed, Mahoney testified that he had sufficient information, generally accepted in his field, to perform an analysis for the cost of a project, to render an opinion, unrebutted by Pooler at trial, with a reasonable degree of certainty. (2351-52; 2383-84).

Pooler ultimately caused the Company to pay Pooler Enterprises $692,080.00 on this "contract." (2574-78; 2456-57; 3040). Of this amount, the trial court found that at least $103,812 constituted overhead and profit. (16). This was demonstrated by Pooler's testimony that Pooler Enterprises' bids generally include 8% overhead and 6% to 8% profit and that the initial bid on which he based the "contract" several years later was consistent with that figure. (2237; 3249-52).

Because the actual value of the work contemplated by the Pooler Enterprises contract was just $407,260, and at least $32,326 of this work was not completed, the actual amount of work Pooler Enterprises performed for the Company was, at a maximum, worth $374,934. Nevertheless, as set forth above, Pooler caused the Company to pay Pooler Enterprises $692,080, or $317,146 more than the demonstrated value of the work performed, as determined by the trial court, and to pay $103,812 in overhead and profit. (16).

Accordingly, the trial court's award of these amounts, plus pre-judgment interest thereon, was compelled by the evidence, particularly given that the trial court expressly found that Pooler's contrary testimony was "not credible." (16).

Pooler's single-minded reference to the exculpatory provision in the OA is invalid, as the Company is prohibited from shielding Pooler for liability for

misconduct from which he gained a financial profit or other advantage to which he was not legally entitled. (LLC Law §417(a)(1)).[4]

3. Pooler Could not have "Reasonably Believed" he was Acting within his Authority

Lastly, there are no circumstances pursuant to which Pooler had authority to cause the Company to transfer over $300,000 in overcharges to Pooler Enterprises, nor could Pooler have "reasonably believed" that he was acting within his authority by doing so. Thus, even independent of LLC Law §417(a)(1), Pooler is liable to the Company for damages pursuant to §5.5(c).

C. The Court Properly Awarded the Company Damages Relating to Pooler's Payment of Attorneys' Fees

The Court should further affirm the trial court's finding that Pooler is required to pay back to the Company the legal fees incurred in his defense of this action. At trial, Pooler did not contest the amount of fees that he caused to be paid, which was established by Howard's damages expert, Thomas Tette. (2449-2451; 3039). Nor has Pooler attempted to challenge this amount on appeal.

Instead, Pooler argues that the trial court erred because Pooler "was within his rights to have the Company pay attorney's fees" in defense of this litigation. This argument is contrary to the law.

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[4] To the extent Pooler attempts to distinguish Excelsior 57th Corp. v. Lerner, 160 A.D.2d 407 (1st Dep't 1990), Pooler fails to demonstrate that the central proposition in Excelsior, that a fiduciary is required to disgorge any ill-gotten gain so as to prevent misconduct from occurring, is no longer good law. Id. at 408-09.

Specifically, as the trial court noted when granting summary judgment to Howard on this issue, LLC Law §420 expressly precludes a company from indemnifying a manager "if a judgment or other final adjudication adverse to such member . . . establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled." (LLC Law §420(a); 73-4). The trial court further noted that "[i]f it is ultimately determined that Pooler engaged in conduct whereby he financially profited or gained some other advantage to which he was not entitled, Section 420 will require him to pay back any fees 'reimbursed to him.'" (74).

Here, the evidence showed that Pooler gained a financial profit and other advantages to which he was not entitled. Thus, even if Pooler were entitled to have the Company advance his legal fees pursuant to the OA (a question which is now moot), Pooler is nevertheless required to reimburse the Company for those fees, in the amount awarded by the trial court. In so holding, the trial court acted consistently with other New York courts dealing with similar situations. See, e.g., Bonanni v. Horizons Invs., Corp., 2016 N.Y. Misc. LEXIS 739, at *39-40 (Sup. Ct., Suffolk Co., 2016) (ordering that advanced legal fees be repaid upon final adjudication); Noe v. Friedberg, 2009 N.Y. Misc. LEXIS 3810, at

*12-13 (Sup. Ct., N.Y. Co., 2009) ("[a]dvances are amounts due under an indemnification obligation, and advancement implies that if the underlying conduct is ultimately judged to be not entitled to indemnification, the advanced party must repay") (citing Bishop and Kleinberger, Limited Liability Companies: Tax and Business Law §10.08, sec. [1][c][2009] [Westlaw ed, Limited Liab Co 10.08]).

D. The Trial Court Properly Found Awarded Judgment Relating to Pooler's Bad Faith Termination of Howard's Rights

Pooler next challenges the trial court's finding that Pooler breached his duty of good faith to Howard by improperly terminating Howard's responsibilities for lot sales. (13-14). In so doing, Pooler ignores the overwhelming evidence at trial, and accepted by the trial court, that "Pooler's actions demonstrate a lack of good faith" and "disregard for his obligations under the [OA]," and that "Pooler's testimony was not credible" with respect to this issue. (13-14).

1. The Facts Compelled a Determination of Liability

While the OA provides that each of Howard and Pooler has a 50% voting interest in the Company, it provides that profits are allocated 60% to 40% in Pooler's favor. Howard testified credibly that he and Pooler specifically allocated profits in this manner because Howard was to earn additional money through commissions earned on lot sales and home sales. (2013-17; 2094-95; 2097-98; 2105; 2900; 2903).

Howard confirmed that he was the sole owner of Prudential-K.A.R.E.S., and Pooler expressly acknowledged that OA §5.14, referencing Prudential-K.A.R.E.S., referred to Howard. (2017; 2266-67; 2903). Pooler acknowledged his understanding that part of his agreement with Howard was that Howard would not only be selling lots for the Company but would then benefit by acting as the listing agent for homes subsequently built on those lots. (2270). Unjustifiably depriving Howard of this benefit

was just one more means by which Pooler sought to assure that Howard would "never get a dime" out of the project.

In connection with OA §5.14, Howard procured a contract (the "Biltucci Contract"), executed by Pooler on the Company's behalf, that gave Biltucci the exclusive right to purchase lots and required Biltucci to purchase a minimum of sixteen lots per year at a purchase price of $50,000 for certain lots and $40,000 for other lots. (2268-70; 3265). As Manager, only Pooler – not Howard – had the authority to terminate the Biltucci Contract. (2050; 2275). As the trial court held, Howard's procurement of this Biltucci Contract satisfied his obligation under the OA, although he nevertheless continued to take actions to increase lot sales, only to have those efforts rebuffed by Pooler. (13).

Specifically, when a downturn in the housing market occurred in 2008, both Biltucci and Howard made repeated requests to Pooler to allow a reduced price per

lot in order to facilitate additional sales, but Pooler uniformly refused these requests. (2030; 2032-35; 2039; 2226-28).

Howard and Biltucci also attempted to bring other builders to the Project through a "Homearama" event, but rather than agreeing to reduce lot prices to facilitate this effort, Pooler insisted on lot prices higher than the prices required in the Biltucci Contract, resulting in the Home Builders Association deciding not to do Homearama. (2033-39; 2049-50; 2323; 3479).

Pooler admitted that, despite the OA providing that: (1) Howard was to be primarily responsible for lot sales and Company relations with builders; and (2) Howard was to be the exclusive listing agent for each of the lots, Pooler had discussions as early as 2009 with another entity about purchasing lots from the Company. (2276-77). Specifically, in 2009, and without notice to Howard, Pooler approached another buyer, Faber Construction Co., Inc. ("Faber"). (Id.).

Pooler's approach to Faber was not coincidental. Paul Skelly, Pooler Enterprises' corporate secretary, testified that Pooler had a relationship with Faber in connection with which Faber gave contracts to Pooler Enterprises to perform site work for Faber projects. (2335). Thus, Pooler had a personal incentive to sell lots to Faber at lower prices in order to foster a relationship that would result in Faber awarding additional site work contracts to Pooler Enterprises in the future. And, indeed, that is what Pooler did.

By letter dated July 16, 2012, and without any prior notice to Howard, Pooler removed from Howard the right to be primarily responsible for lot sales and Company relations with builders. He also discontinued the use of Prudential-K.A.R.E.S. as the exclusive listing agent for the Company's lots. (2040-41; 2272; 3271).

At no point prior to July 16, 2012 had Pooler sought to obtain a release of the exclusivity provision from the Biltucci Contract. Thus, at no point did Biltucci not have an exclusive right to purchase lots from the Company. (2042-43). Further, prior to July 16, 2012, Pooler never offered Howard the opportunity to engage new builders to purchase lots from the Company. (Id.).

Thus, in the absence of any waiver by Biltucci of the exclusivity provision in the Biltucci Contract, Howard was not even permitted to attempt to engage any new builders. In other words, there was literally never a window within which Howard could engage a new builder.

In response to the July 16, 2012 letter, Howard asked Pooler for an opportunity to find a new builder, but was advised by Pooler that he already had a deal in place with another builder. Specifically, Pooler advised Howard that he was going to execute a contract with Faber to purchase lots. Pursuant to this new contract, Pooler permitted Faber to purchase lots for prices ranging from $22,000 to $31,000, far lower than the $40,000-$50,000 prices Pooler had required Biltucci

to pay for the same lots. This contract also required Faber to purchase fewer lots than Biltucci was required to purchase. (2042-48; 3233-38; 3265-67).

Pooler knew that by signing the contract with Faber, he would also be denying Howard the opportunity to earn commissions on home sales for those lots, because Faber had its own in-house realty team. (2043-44). Yet, Howard was never given an opportunity by Pooler to engage new builders before the Faber contract was executed, and Howard was never given an opportunity to sell lots at these lower prices. (2050-51).

In September 2013, as the Faber contract was winding down, Howard approached Pooler with a proposed contract that would provide for lot sales at a price of $40,000 per lot. (2063; 3257-64). Pooler was not receptive. Instead, without Howard's knowledge, Pooler entered into an "Addendum" to the Faber contract, which again provided for lot sales of just $31,000. (3239-40).

Thus, the facts demonstrate that: (1) Howard procured a contract with Biltucci; (2) Pooler almost immediately sought to usurp Howard's role to engage a builder from whom Pooler Enterprises received site work contracts; (3) Pooler refused to permit Biltucci to lower the price of the lots or to obtain a waiver of the Biltucci Contract's exclusivity provision; (4) Pooler never gave Howard a window to engage a new builder; (5) Pooler terminated Howard's rights without notice; and (6) Pooler then entered into a new contract with Faber to sell <u>fewer</u> lots at far <u>lower</u>

prices than he had previously permitted. Further, as that contract was winding down, Howard presented Pooler with a new contract, at higher prices, which Pooler refused in favor of extending the Faber contract, again at lower prices.

Given these facts, the trial court's determination that Pooler breached his duty of good faith and fair dealing, and acted in disregard for his obligations under the OA, was well-founded.

Pooler's actions to curtail Howard's rights were nothing if not bad faith. Indeed, Pooler did not even testify that he believed his conduct was sanctioned by the OA or that he acted in good faith. Nor did Pooler deny telling Howard that Howard was "never going to get a dime" out of the Project. (2057-58). Instead, Pooler simply decided to squeeze Howard out, and then proceeded to do so whole-heartedly and with absolute disregard for Howard's rights under the OA or otherwise. Pooler's actions were knowing, intentional, and, as the trial court found, made with complete disregard for his obligations under the OA.

2. <u>Pooler's Breach Was Not Authorized</u>

As the trial court properly held, "implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." (14; <u>citing Dalton v. Educ. Testing Serv.</u>, 87 N.Y.2d 384, 389 (1995)). This "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract;" and,

moreover, "[w]here the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." Id. Further, encompassed within this covenant are "any promises which a reasonable person in the position of the promise would be justified in understanding were included." Id.

The trial court found, after hearing the testimony, that "Pooler was not justified when he refused to allow Howard to procure a new builder," and that, indeed, Pooler's actions in this regard "demonstrate a lack of good faith." Indeed, the Court found that Pooler's bad faith actions rendered further performance by Howard impossible. (13). The Court further found – on the basis of unrebutted testimony – that Pooler's bad faith caused Howard not to receive the fruits of the OA, which were established to include Howard's ability to act as agent for home sales on the lots sold by the Company and receive commissions thereon.

Plainly, the scope of Pooler's authority under the OA cannot be read to include authority to breach the covenants of the OA – whether explicit or implicit. And, in any event, the evidence showed that Pooler's actions were undertaken in bad faith. Thus, Pooler's misconduct does not fall within the shield of liability included in §5.6(g). Further, because the trial court found that Pooler did not act in good faith, his misconduct is not shielded by §5.6(f), either. Accordingly, the trial

court properly held Pooler liable for, and awarded damages to Howard in connection with, Pooler's breach.

3. Pooler Does Not Challenge Howard's Damages Calculation

It is well settled that in the context of a breach of contract, damages are meant "to make good or replace the loss caused by the breach of contract." Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C., 91 N.Y.2d 256, 261 (1998). Damages are meant "to place the nonbreaching party in as good a position as it would have been had the contract been performed." Id. Here, the trial court awarded Howard damages associated with the commissions that the evidence showed he would have received: (1) initially for lot sales; and, then, (2) as listing agent and buyer's agent for home sales. (13-14).

Although Pooler asserts on appeal that the trial improperly awarded damages to Howard in connection with Pooler's termination of Howard's responsibilities, Pooler does not question the damages amount that was calculated by Howard's expert and awarded by the trial court. Accordingly, there is no basis for this Court to disturb those findings.

4. Pooler Improperly Relies on the OA's Merger Clause

Pooler argues that the trial court improperly awarded Howard damages for lost commissions based on the OA's merger clause. (2920). Contrary to Pooler's contention, however, the merger clause is not implicated here, where the trial

court's finding is entirely consistent with the other terms in the OA and, indeed, intrinsic to the OA's terms. See, e.g., Havel v. Kelsey-Hayes Co., 83 A.D.2d 380, 384 (4th Dep't 1981) (merger provision not relevant to finding of breach of implied covenant of good faith and fair dealing). It is well established that, under New York law, "a merger clause does not prevent a court from inferring a covenant of good faith and fair dealing," and "a plaintiff adequately states an implied covenant claim by alleging conduct that subverts the contract's purpose without violating its express terms." Dorset Indus. v. Unified Grocers, Inc., 893 F.Supp.2d 395, 407 (E.D.N.Y. 2012) (internal quotations and citations omitted) (applying New York law). Thus, "a party's actions may implicate the implied covenant of good faith when it acts so directly to impair the value of the contract for another party that it may be assumed that they are inconsistent with the intent of the parties." Id.

Here, the evidence showed, as the trial court concluded, that the very underpinning for the 60/40 allocation of profits was the parties' understanding of the value of Howard's ability to generate commissions. Thus, Pooler's actions "so directly impaired the value of the contract for" Howard that the merger clause is inapplicable.

OA §5.5(b), also relied upon by Pooler, is likewise unavailing. That provision provides that "[u]nless authorized by the Manager, no Member shall

perform any services for the Company or be entitled to compensation or reimbursement of expenses therefor." (2900). OA §5.14, however, expressly covenants that Howard would be the "exclusive listing agent for each of the Property's lots," thereby rendering §5.5(b) inapplicable under these circumstances. And, again, the evidence showed that Howard's anticipated commissions constituted the very basis for the 60/40 split in allocation of the profits.

POINT VI

THE TRIAL COURT APPROPRIATELY FOUND THAT HOWARD MADE HIS CAPITAL CONTRIBUTION

One of the more confounding claims made by Pooler at trial – and now on appeal – is that Howard never made his required capital contribution to the Company and, therefore, has no ownership interest therein. Contrary to Pooler's claim on appeal, the trial court did find that Howard made his capital contribution. (17). Pooler's contention that Howard did not – made for the first time by Pooler some eight years after the Company was formed – is patently absurd, and the trial court properly rejected it.

Pooler's story with respect to Howard's capital contribution is virtually impossible to believe. Specifically, to believe Pooler's account, the Court would have to believe that Pooler – the manager of the Company with exclusive control over the Company's books and records – failed to recognize for eight years that Howard did not make his initial contribution to the Company of over $900,000,

which accounted for approximately half of the Company's entire capital input. Such a scenario is absurd on its face.

In any event, because Pooler continues to pursue this avenue on appeal, Howard will address its merits herein.

A. Pooler is Estopped from Challenging Howard's Capital Contribution

Pooler acknowledges that since the Company's formation in 2007, Pooler exclusively maintained financial records, authorized the preparation of personal and Company tax documents (including Schedule K-1 forms), and caused balance sheets and profit and loss statements to be prepared.

All of the tax returns, Schedule K-1's, and balance sheets prepared and filed under Pooler's direction reflected that Howard made his initial capital contribution and is a member of the Company. (3274-3476). Pooler never made any claim that Howard had not made an initial capital contribution until after Howard initiated this lawsuit. (2670-71; 2815-16).

For this reason alone, Pooler is estopped, both individually and as "Intervenor," from asserting that Howard did not make a capital contribution, because "[a] party to litigation may not take a position contrary to a position taken in an income tax return." Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422 (2009).

This proposition has been universally upheld in the context of disputes over ownership or membership interests in a business. See, e.g., Matter of Tehan, 144 A.D.3d 1530, 1532 (4th Dep't 2016); Man Choi Chiu v. Chiu, 125 A.D.3d 824, 825-26 (2d Dep't 2015); Livathinos v. Vaughan, 121 A.D.3d 485, 486 (1st Dep't 2014); Czernicki v. Lawniczak, 74 A.D.3d 1121, 1126 (2d Dep't 2010).

Here, Pooler's position is inconsistent with years of tax returns, all of which were authorized by Pooler. His position is also inconsistent with all other corporate records prepared, kept, and maintained by Pooler from December 2007 through May 2016. Accordingly, Pooler is estopped from challenging Howard's capital contribution in the context of this litigation.

B. In Any Event, the Evidence Showed that Howard Made his Contribution

Upon hearing the evidence, the trial court also found that Howard did, in fact, make his capital contribution. The evidence was conclusive.

1. Howard made his Contribution in the Manner Determined by Pooler's Attorneys

The specific means by which the Company was to purchase the property, and by which Howard and Pooler would make their contributions, was initially set forth in an e-mail exchange and documentation from Pooler's agents and attorneys, which Pooler's agent then forwarded to Howard. In other words, the structure of the transaction was determined by Pooler's counsel, and merely communicated to

Howard. Specifically, Howard was copied on a June 12, 2007 e-mail chain from Pooler's agent, Paul Skelly, to Pooler's attorney, Jeffrey DeVoesick, in which DeVoesick, on June 6, 2007, advised the attorney for Paul Adams and Ben Kendig that "Pooler's offer is the 615k plus the 335k." (2790-93; 3522-24).

This "offer" as relayed by DeVoesick on Pooler's behalf, corresponds exactly with a draft agreement that Howard also received from the attorneys representing Pooler, Adams, and Kendig in connection with the deal, which stated explicitly that the purchase price for "all of the membership interests in Vista Villa Homes, LLC," which owned the entirety of the property purchased by the Company, was $1,515,028.34, "to be reduced by approximately Nine Hundred Thousand Dollars ($900,000.00) when monies are released to Vistas at Black Creek, LLC by Canandaigua National Bank from an escrow account which presently is collateral for a letter of credit which escrow account is to be replaced by a line of credit." (2794-96; 3525-27; emphasis added). This agreement further specifies that the monies are anticipated to be released "within a couple of weeks," leaving the balance as "approximately Six Hundred Fifteen Thousand Dollars ($615,000.00)." (Id.).

This document – again, provided to Howard by Pooler's attorney – goes on to state that the purchase price will also include amounts related to taxes of $338,057.76. (Id.). Accordingly, the entire purchase price would be

$1,515,028.34 plus the roughly $338,057 in taxes. Thus, the transaction, as contemplated, conceived, negotiated, and explicitly proposed and agreed by Pooler's attorney, would involve Pooler paying "the 615k plus the 335k" after approximately $900,000 was "released to Vistas at Black Creek, LLC by Canandaigua National Bank." This $900,000 reflected Howard's contribution.

As the evidence showed, Howard, in connection with this agreement, authorized a transfer of $901,166.27 from a Ballantyne Development account that he controlled to an account "to be determined" in the name of Vistas at Black Creek, LLC, which funds were then held in escrow by Canandaigua National Bank, precisely as set forth in the e-mail exchange and agreement proposed, negotiated, and drafted by Pooler's attorney. (3624; 3629). Pooler understood that Ballantyne Development was Bill Howard's company. (673). These funds were then released "within a couple of weeks," on June 13, 2007, again as contemplated in those same documents. (3522-27). Then, ultimately, on July 30, 2007, Pooler executed a final purchase and sale agreement under which he agreed to pay the remaining balance of $932,316.52, again as contemplated, proposed, and negotiated by Pooler's attorney. (3528-34).

As part of that agreement, the seller agreed to keep in place the letter of credit, again as contemplated by the correspondence and draft agreement from

Pooler's attorney, until such time as purchaser obtained a letter of credit. (3529, ¶6).

Thereafter, a series of assignments were entered into by, between, and among Adams, Kendig, Howard, and Pooler, and the transaction closed in September 2007, with Pooler making his contribution to the purchase price of the property (which Pooler acknowledges as his capital contribution) via a payment to Kend Enterprises, Inc. <u>not</u> to the Company. (2811-12; 2671-72; 3491; 3515).

In connection with the closing, the parties – Kendig, Howard, Pooler, and the Company – entered into an agreement pursuant to which Kendig agreed to keep the line of credit referenced in paragraph 2(A) of Trial Exhibit 68 in place for a period of thirty more days after closing, thereby securing the letter of credit until the Company put a new letter of credit in place. (3525; 3571; 3580-82; 3515 at 7). Thus, when the Company put the new letter of credit in place, Kendig could remove the letter of credit and, with it, Howard's $900,000 contribution from May 2007. In short, Howard's contribution was made in precisely the manner contemplated by Pooler's attorneys. Absent that contribution, there would have been no way for the transaction to close.

2. <u>Pooler Agreed that Howard Made his Capital Contribution</u>

Pooler affirmatively acknowledged Howard's contribution almost immediately thereafter. Specifically, Howard introduced e-mail correspondence

from December 28, 2007 in which Pooler's agent, Bill Price, asked Howard for "documentation of your $909,000 equity in the project" and, in particular, referenced that "there is likely a payment to Ben Kendig, taxes and interest." (3485; emphasis added). This information was needed not because there was any question of whether Howard had made the contribution, but rather because S&T Bank needed the documentation "prior to closing the loan" with the Company. (Id.).

In response, on January 2, 2008, Howard sent Price the very May 25, 2007 letter from CNB to Howard, referenced above, in which Howard authorized the transfer of $901,166.27 from a Ballantyne Development account into a CNB escrow account in the name of Vistas at Black Creek. (3485-87, 3624). In response, neither Pooler nor Price questioned or challenged whether Howard had made his contribution. Instead, Price simply thanked Howard. (3488). It was not disputed that the S&T Bank loan then closed on January 25, 2008. (2689-91; 3492-3519). Pooler never raised an issue regarding Howard's capital contribution until eight years later, when this litigation was initiated.

3. Pooler's New Position is Demonstrably False

During the litigation, Pooler's story with respect to Howard's capital contribution changed multiple times. In the face of the above-referenced documentary evidence (and simple common sense), Pooler's manufactured and

belated claim that Howard did not make a capital contribution lacked any credibility, as the trial court appropriately found. (17).

On direct examination, Pooler refused to acknowledge the $900,000 contribution that Howard plainly made via the May 25, 2007 transfer, instead claiming that Howard had represented to him that Howard could not "get to his cash" to put into the Company "until I [Pooler] posted a new Letter of Credit that would relieve the restraints on his cash so he could put it into the new entity." (2608). He further stated that he "knew Bill Howard was not going to be able to show up at closing with a check" and that he "knew if Bill Howard came to closing, there would be no check because he couldn't access his cash." (2609-10; 2627-29).

Pooler's testimony was impeached numerous times, including as follows:

First, Pooler testified that Howard "never" told him that the cash in the CNB account was owned by Ballantyne Development. (2629). Yet, Pooler was forced to acknowledge that in a sworn affidavit submitted on February 13, 2017, he averred that "Howard had represented to me that he controlled Ballantyne's CNB savings account" and that "[t]hroughout negotiations, Howard represented to me that he or Ballantyne owned the CNB savings account." (2629-31) (emphasis added). Thus, Pooler's own prior statements showed that he was aware that Howard's contribution would come from the Ballantyne Development savings

account with CNB. Indeed, Pooler's false claim in this regard is particularly ironic given that Pooler himself made his contribution using funds from Pooler Development rather than from personal funds. (2668-70; 3491).

Second, Pooler testified at trial that he understood Howard would not make his contribution at closing, but would instead make it after closing, and only after the Company had posted a letter of credit.

Again, however, Pooler was again confronted with a previous affidavit, sworn to August 17, 2015, in which he swore that "[i]n September 2007 . . . I believed Mr. Howard was truthful in his statements to me that he had, in fact, used personal cash to pay Mr. Kendig's enterprise to allow the Company to acquire Vista Villa Homes and the subject property." (2638-39). Thus, Pooler understood Howard to have already made a payment to "Mr. Kendig's enterprise" in September 2007 when he entered into the OA.

This testimony completely contradicts Pooler's new story at trial. Further, still, while Pooler testified initially that Howard would be putting his cash "into the new entity" after Pooler posted a letter of credit (2608), Pooler changed his testimony later in the trial to assert that Howard was "supposed to give a check to Ben Kendig." (2861-62). Pooler's testimony, in other words, was inconsistent even between the days of the trial.

Third, Pooler's testimony that Howard's contribution was to come only after execution of the OA and after Pooler had posted a letter of credit was contrary to yet another affidavit, this one on August 24, 2015, in which Pooler averred that the "Members' initial capital contributions were to be delivered in cash by both Members in September 2007 at the time when we signed up the [OA]." (2661-63). Further, Pooler acknowledged that on June 22, 2015, he gave a sworn affidavit in which he averred that "based on representations made to me by Mr. Howard at the time the Company was formed, I believed that Mr. Howard individually contributed cash in the amount of approximately $909,000." (2665-66) (emphasis added). Thus, again, Pooler's testimony at trial contradicted his prior sworn statements regarding the transaction.

4. The Court should Reject Pooler's Hyper-technical "Cash" Argument

With the documentary evidence showing conclusively that Howard made his contribution, and the testimonial evidence eviscerating Pooler's credibility with respect to the same, Pooler's final, desperate argument is that the Court should find that Howard did not make his capital contribution because he did not actually write a check to the Company. In other words, because Howard made his contribution by transferring his contribution before the OA was executed, Pooler claims that his contribution somehow failed to conform with the OA. This argument is entirely lacking in merit for several independent reasons.

First, the evidence showed that Howard did make his contribution via the May 25, 2007 authorization, as negotiated and agreed by Pooler and his attorneys. That $900,000 payment was part of the overall transaction in which Howard and Pooler purchased their interests in the Company's property, which transaction closed in September 2007 when they executed the OA. This cannot plausibly be disputed, as the Company did not acquire the membership interests in Vista Villa Homes, LLC – and thereby the property for which they paid a combined $1,515,028.34, plus the above-referenced taxes and other expenses – until the closing in September 2007.

Second, the fact that Howard transferred funds to Vistas at Black Creek, LLC (and ultimately Ben Kendig), rather than to the Company directly, cannot possibly be considered to be non-compliant with the OA. That is because Pooler himself wrote the check that he deems to be his capital contribution to Kend Enterprises, Inc., not to the Company. (3491). Thus, if Howard lacks a membership interest because he did not contribute "cash to the Company," then Pooler, too, lacks such an interest.

Third, Pooler ratified Howard's performance by, among other things: (1) accepting the benefit of Howard's capital contribution (e.g., the $900,000 payment used to purchase the Company's property); (2) acquiescing for over 8 years after Howard made his contribution; (3) treating Howard as a member; and (4)

affirmatively acknowledging Howard's performance by, among other things, applying Howard's contribution to internal Company records and publicly filed tax returns. See, e.g., TPG Architecture LLP v. Biopartners at Lake Success, Inc., 2010 N.Y. Misc. LEXIS 1731, at *4-5 (Sup. Ct., N.Y. Co., 2010) (citing Jaywyn Video Productions, Ltd. v. Servicing All Media, Inc., 179 A.D.2d 397, 398 (1st Dep't 1992) (defendants ratified agreement by adhering to it and deriving benefit from it without objection)).

Finally, to the extent Pooler argues that the trial court "disregarded" the accounting provided by Pooler, this argument, too, is misguided. The accounting, which was itself prepared by court order as a remedy to Howard and the Company (76), "was based on information provided by Pooler and his attorneys." (37). Notably, the accounting did not reference any of the correspondence or documentation from 2007 demonstrating Pooler's knowledge and acceptance of Howard's initial contribution, nor any of the other documentary evidence proffered at trial establishing the same.

In addition, the trial court did not qualify the accounting's preparer as an expert to testify about his opinions, conclusions, and narratives. See, e.g., Johnson v. Time Warner Entertainment, 115 A.D.3d 1295, 1296 (4th Dep't 2014) (where witness was not qualified as an expert, any opinion is without any probative value); Stafford v. Mussers Potato Chips, Inc., 39 A.D.2d 831, 831 (4th Dep't 1972)

(conclusions drawn by State Trooper not properly considered since he was not qualified as an expert). Further, he: (1) did not testify regarding the accounting or its accuracy, methodology or analysis; (2) was not subject to cross-examination regarding the narratives, opinions, and conclusions included in the accounting; and (3) otherwise provided neither any basis nor any foundation for the opinions, conclusions, justifications, or narratives included in the accounting. Nor does the accounting itself claim to have reached the conclusions therein with any degree of certainty. Thus, any conclusions regarding the purported lack of a capital contribution should not be credited by the Court, in any event.

POINT VII

THE NOTICE OF PENDENCY WAS PROPER AND THE TRIAL COURT PROPERLY REFUSED TO CANCEL IT

To the extent Pooler argues as "Intervenor" that the Notice of Pendency in this action was improper, or that the action was filed in "bad faith," such argument is entirely without merit. The Complaint asserted several causes of action supporting a Notice of Pendency pursuant to CPLR §6501, namely: (1) Westside's claim based on contractual rights to a sewer easement and use of land for mitigation; and (2) Howard's derivative claims seeking, among other things, a constructive trust relating to Pooler's attempt to transfer Company-owned real property in an improper manner and a dissolution of the Company pursuant to which the assets of the Company, including its real property, would be marshalled

by a receiver for ultimate disposition. All of these claims involve the title to, or the possession, use or enjoyment of, real property. (See CPLR §6501).

Further, given that the trial court denied numerous applications by Pooler, individually and as "Intervenor," seeking cancellation of the Notice of Pendency, and ultimately awarded judgment on behalf of the Company, Howard, and Westside in this action, including on their claims relating to the Company's real property, it can hardly be said that the action was commenced or prosecuted in "bad faith" pursuant to CPLR §6514. (30). In short, the Notice of Pendency was proper, and this Court should not disturb the trial court's findings in that regard.

With respect to Pooler's claim that the Notice of Pendency was filed in "bad faith" because Howard "failed to make his initial contribution" to the Company, that argument can be rejected out of hand for the reasons set forth in Point VI, above.

Finally, to the extent Pooler claims on appeal that the Notice of Pendency was improper because "Westside failed to make a written request to [the Company] for a sewer easement or lands for wetland mitigation," such an argument is meritless. Pooler does not dispute that OA §5.14 obligates the Company "to take such action as may be necessary to: (a) grant a sewer easement to [Westside], located at 420 Ballantyne Road; (b) to grant land use for wet land

mitigation to Westside." (2903). Pooler admitted that the Company was obligated under the OA to give Westside whatever was necessary for mitigation. (2262-63).

OA §5.14 does not impose a time limit on when Westside is required to enforce its rights, nor does anything in the OA permit Pooler to unilaterally determine how much land the Company will "reserve" for Westside or where such land will be located. Yet, this is precisely what Pooler has argued he is entitled to do.

It was established at trial that the genesis of Westside's claim in this regard was an attempt by Pooler to convey 187 acres of Company land to the Town of Chili. (2051-53; 3208). It was also established that Westside will likely need a substantial portion of this land for purposes of wetland mitigation relating to the project that Westside is developing on property adjacent to the Company's property, although it is not possible to know how much land will be needed or where that land must come from until those matters are negotiated with certain regulatory agencies. (2190-92; 3212). It is likewise not known where any required sewer easement would have to be located. (2192). The trial court properly made findings of fact with respect to each of these issues. (14-15).

Nevertheless, although Pooler acknowledged that the OA requires the Company to give Westside whatever is necessary for mitigation and sewer easement, Pooler refused to acknowledge that he, personally, could not simply

decree what was necessary, stating that any claims to the contrary were "asinine." (2295-98). Given these facts, Westside appropriately sought a declaration as to its easement and mitigation rights (which the trial court ultimately granted (14-15)), and the Notice of Pendency was, accordingly, appropriately filed.

POINT VIII

THE TRIAL COURT PROPERLY AWARDED HOWARD ATTORNEYS' FEES

The trial court also properly awarded Howard attorneys' fees incurred as a derivative plaintiff. (17-18). On appeal, Pooler does not challenge the amount of the fee award, but only its propriety. There were several grounds upon which the trial court could award fees, and several means by which the trial court could effectuate such an award. The trial court appropriately exercised its discretion in this regard.

A. Howard is Entitled to Attorneys' Fees by Virtue of the Common Fund Doctrine

First, Howard is entitled attorneys' fees pursuant to the common-fund doctrine. This doctrine, an exception to the so-called "American rule," is available to a party who successfully litigates a suit that results in the creation or preservation of a common fund to be distributed to a class of additional individuals. See, e.g., Sbar v. District Council 37 Health & Sec. Fund Trust, 2006 N.Y. Misc. LEXIS 1697, at ***10-15 (Sup. Ct., N.Y. Co., 2006) (citing cases).

The award of fees to a successful litigant in these circumstances "is justified by the equitable need to apportion expenses among all who have benefitted from the suit." Id.

The common fund doctrine applies to a successful derivative litigation, in which the monetary benefit thereof redounds to the company. Seinfeld v. Robinson, 246 A.D.2d 291, 294 (1st Dep't 1998). In such a situation, the courts' overriding concern is to equitably compensate a successful derivative plaintiff. Id. at 297.

Here, the trial court found that Howard derived a benefit to the Company meriting an award of attorneys' fees in that Howard proved not only that Pooler is liable to the Company, but also that the Company is entitled to substantial damages as a result of Pooler's misconduct. (17-18). Thus, the common fund doctrine instructs that Howard – who bore the entirety of the cost to assert the Company's rights and recover such damages – was appropriately awarded the attorneys' fees that he incurred in obtaining that benefit.

B. Howard is Entitled to Attorneys' Fees by Virtue of Pooler's Willful and Wanton Misconduct

It is well-settled in New York that attorneys' fees may be awarded in the context of a breach of fiduciary duty claim where, as here, the defendant's operation of the business "amounted, at least, to willful or wanton negligence" and or to "a wanton or reckless disregard of plaintiff's rights." Giblin v. Murphy, 73

N.Y.2d 769, 772 (1988). See also Stein v. McDowell, 74 A.D.3d 1323, 1326 (2d Dep't 2010) (punitive damages are recoverable for breach of fiduciary duty where the breach demonstrates a high degree of moral culpability) (citing cases). The conduct must, essentially, have "a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." Home Ins. Co. v. Amer. Home Prods. Corp., 75 N.Y.2d 196, 203-04 (1990) (internal quotations and citations omitted). The conduct need not be intentionally harmful, but may consist of actions which constitute willful or wanton negligence or recklessness. Id.

Here, Pooler's breaches of fiduciary duty were willful and wanton, and Pooler's misconduct demonstrated nothing if not a "conscious disregard" of the Company's rights. As the trial court found, Pooler conducted himself with literally no regard for the requirements of the OA or his fiduciary obligations, no regard for the outpouring of funds improperly transferred from the Company to Pooler Enterprises, no regard for his obligations under the LLC Law, and no regard for the fact that the Company was not simply a subsidiary of Pooler Enterprises. Rather, Pooler's only regard was for his determination to suck all proceeds from the Company for his personal benefit and to assure that, in his own words, Howard was "never going to get a dime." Thus, even absent the common fund doctrine, the trial court was justified in awarding attorneys' fees to Howard.

C. Howard is Entitled to Attorneys' Fees as Part of the Court's Equitable Dissolution of the Company

Finally, the trial court had discretion to compensate Howard for attorneys' fees incurred on the Company's behalf in the context of fashioning its dissolution award. As noted above, the trial court had authority to dissolve the Company so as to do equity between the members. In that regard, the trial court could factor into its dissolution order Howard's having incurred substantial attorneys' fees in the process of uncovering and demonstrating Pooler's misconduct. To find otherwise would be to effectively punish Howard for having proceeded with an action on behalf of the Company that resulted in a judgment on the Company's behalf.

POINT IX

THE TRIAL COURT PROPERLY REQUIRED POOLER TO INDEMNIFY THE COMPANY FOR ANY OUTSTANDING "LOAN" BALANCE

Finally, Pooler argues that the trial court erred when, in fashioning its equitable order of dissolution, it required Pooler to indemnify the Company against claims by Pooler Enterprises for interest and principal on additional "loans" not otherwise covered by its trial Decision. (16-17). In support of this proposition, Pooler cites to OA §11.2(a), which requires creditor loans to be repaid prior to cash capital contributions to partners. (2913-14). This argument is flawed for several reasons.

Primarily, for the reasons set forth above, because Pooler acted outside of his authority in causing the Company to incur these "loans" in the first place, and because by doing so Pooler obtained personal gain and other advantages to which he was not otherwise entitled, the trial court properly determined that Pooler could be held liable in connection with these loans. The trial court did not find that "creditor loans" could not be repaid, but rather that Pooler was required to indemnify the Company with respect to any such "creditor loans" deemed to have come from Pooler Enterprises. This decision is well-grounded in the law.

Under New York law, where an agent acts without actual authority in connection with a third-party transaction, the agent must indemnify the principal with respect to such acts. See, e.g., Amusement Indus. v. Stern, 693 F.Supp.2d 301, 309 (S.D.N.Y. 2010) (applying New York law) (citing Gleason v. Temple Hill Assoc., 159 A.D.2d 682, 683-84 (2d Dep't 1990)). This principle alone supports the trial court's decision.

In addition, as discussed above, because Pooler caused the Company to incur this debt without authority, and without any reasonable belief that he had such authority, OA §5.5(c) provides that he shall, among other things "indemnify and hold harmless the Company . . . and every other Member with respect to" any associated costs, losses and damages. (2900).

Accordingly, in fashioning its dissolution Order, the trial court properly required Pooler to indemnify the Company from and against claims by Pooler Enterprises with respect to any purportedly outstanding "loans." The alternative would be to require – upon a dissolution occasioned entirely by Pooler's misconduct – that the first several hundred thousand dollars received by the Company upon liquidation would go directly to the benefit of the individual who engaged in such misconduct. Indeed, it would reward Pooler's breaches of the OA and fiduciary duties, and it would do for precisely the reasons that his conduct constituted a breach in the first place. To the contrary, by requiring that Pooler indemnify the Company with respect to these purported "outstanding loans," the trial court assured that the Company's assets upon liquidation would be distributed equitably.

CONCLUSION

WHEREFORE, Howard and Westside respectfully request that this Court affirm the trial court's rulings in their entirety.

Dated: July 15, 2019
Rochester, New York

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