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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ERIC BAURLE, M.D., VIRAJ PARIKH, M.D., and DIVISION STREET LAND PARTNERS, LLC,	)	
Plaintiffs/Counter-Defendants,	)	
VS.	)	**NO. 16-229-BC**
TRAVIS J. KELTY,	)	
Defendant/Counter-Plaintiff.	)	
WITH	)	
TODD PRESNELL and BERTIL WESTIN,	)	
Interested Parties.	)	
TRAVIS J. KELTY and DIVISION STREET LAND PARTNERS, LLC,	)	
Counter-Plaintiffs,	)	
VS.	)	
TODD PRESNELL and BERTIL WESTIN,	)	
Third-Party Defendants.	)	

MEMORANDUM AND ORDER: (1) GRANTING SUMMARY JUDGMENT DISMISSING COUNT III UNJUST ENRICHMENT COUNTERCLAIM; (2) ENTERING CONCLUSIONS OF LAW ON OTHER PARTS OF PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT; AND (3) SETTING TIMETABLE FOR DISPOSITION OF REMAINDER OF SUMMARY JUDGMENT AND THE LAWSUIT

This lawsuit was filed by two investors in an LLC that was formed to acquire a tract of land in the Gulch in Nashville to develop a multi-story, multi-use building.

The Plaintiff Investors have sued the commercial real estate developer who formed the LLC, and who solicited and managed their investment. The Interested Parties are the other two of the four investors in the LLC. They are also now the Third-Party Defendants in the Defendant's Counterclaim.

A dispute has ensued because events did not unfold as anticipated in the LLC Operating Agreement. The issue fueling the lawsuit is the application of the Operating Agreement to the events which did occur. In addition, the lawsuit includes derivative claims of other alleged self-dealing transactions by Defendant Kelty.

The plan the Operating Agreement provided was for the LLC to acquire and own the Property by initial capital contributed by investors for pursuit costs followed by additional capital raised from investors to purchase the Property. These steps then were to trigger other LLC actions that affected membership percentages, such as preemptive rights and redemption. The steps provided for in the Operating Agreement of the LLC buying and owning the Property never occurred.

The LLC only acquired an agreement to purchase the Property. The LLC was unable to raise the capital to buy the Property. Instead, it contributed an assignment of the Purchase Agreement to a General Partnership it formed with another company who contributed the capital for the General Partnership to buy and own the Property. The status of the Property

is that the General Partnership is looking to sell the Property, and the LLC has a right of first refusal if a buyer makes an offer.

That the acquisition of the Property occurred in the manner it did has resulted among the parties in differing constructions and application of the LLC Operating Agreement related to the status and percentages of the parties' LLC memberships. The Plaintiffs claim that the four Investors hold combined 49% memberships in the LLC, and the Defendant holds a 51% membership interest. The Plaintiffs also claim they remain members of the LLC and that no redemption has occurred. The Defendant claims that he holds an 81.15% membership interest and that the memberships of the other four parties have been redeemed.

The case is presently before the Court on the Plaintiffs' Motion for Partial Summary Judgment. This motion seeks construction and application of the Operating Agreement to asserted undisputed facts for entry of a judgment on some of Plaintiffs' claims and dismissal of the Defendant's defenses and Counterclaim. This Motion was a measure provided for in the Rule 16 case management plan to narrow and/or eliminate issues to focus and complete the litigation. The Plaintiffs' derivative claims are not included in the summary judgment.

After the Plaintiffs' Motion for Partial Summary Judgment was filed an impediment arose. The Defendant obtained another, third set of attorneys who objected to proceeding with summary judgment because they asserted they needed additional discovery. The Defendant's previous attorneys, however, had served and received discovery.

Plaintiff Baurle provided a 19-page response to Kelty's interrogatories; Plaintiff Parikh provided a 16-page response. Both of the Plaintiff Investors responded to Kelty's 11 requests for admission. Both of the Plaintiff Investors underwent an extensive process to collect, review, and produce responsive, non-privileged emails and other documents in response to Kelty's request for the production of documents. The Plaintiffs hired a third-party vendor to collect their emails—as part of a reciprocal agreement by which Kelty promised to do the same—the Plaintiff Investors have undergone substantial personal expense to ensure their production was complete. Plaintiff Baurle produced 2,952 pages, and Plaintiff Parikh produced 1,189 pages. In addition. Plaintiff Baurle used a third-party vendor to harvest his text messages and produced 433 text messages. Plaintiff Baurle and Plaintiff Parikh have been deposed. Third-Party Defendants Westin and Presnell, however, have not been deposed, and this, in particular, was the objection lodged by new Counsel for Defendant Kelty.

The point of the case management plan is that delay in this case is costing the LLC $27,000 per month in interest payments which accrue to its partner, and the uncertainty of its affairs is damaging to the LLC.

Under these circumstances, the Court reviewed the Motion for Partial Summary Judgment, and the discovery the Plaintiffs and Third-Party Defendants ("Investors") had provided to the Defendant, and determined that certain parts of the Motion appeared to be pure issues of law and could proceed, and on other parts of the Motion, taking the Presnell

and Westin depositions might possibly lead to the discovery of admissible evidence. Accordingly, in a May 11, 2017 Order certain parts of the Motion for Partial Summary Judgment were designated to proceed, and rulings on other parts were held in abeyance for completion of the Westin and Presnell depositions.

Contained below are the rulings on the parts of the Plaintiffs' Partial Motion for Summary Judgment on which the Court determined it could proceed and a schedule for disposition of the other claims.

The pleadings context for the Plaintiffs' Motion for Partial Summary Judgment is that the Complaint consists of ten causes of action. Four of those are the subject of the motion for summary judgment. The Counts on which the Plaintiffs seek summary judgment are

- Count I: declaratory judgment that Version 1 of the Operating Agreement is controlling
- Count II: that Defendant Kelty breached the parties' Operating Agreement by his unauthorized capital contribution
- Count III: that Defendant Kelty breached the parties' Operating Agreement by his failure to honor their preemptive rights
- Count V: declaratory judgment that the Investors remain members in the Company.

All of these causes of action are direct claims. The other direct claims filed by the Plaintiff Investors, not part of the motion for summary judgment, are Count IV: breach of fiduciary duty alleging self-dealing by Defendant Kelty with respect to the capital

contribution, and Count X in which the Plaintiff Investors seek access to Company information under Section 9.1 of the Operating Agreement and Tennessee Code Annotated section 48-249-308.

The remaining Counts are brought both derivatively on behalf of the LLC and as direct claims. These causes of action which are not the subject of the partial summary judgment are

- Count VI: fraudulent inducement with respect to the Contribution Agreement
- Count VII: breach of fiduciary duty concerning taking a developer's fee
- Count VIII: breach of contract by taking a developer's fee
- Count IX: breach of fiduciary duty by Defendant paying himself a broker's fee.

The Counterclaim filed by Defendant Kelty and the LLC on April 26, 2016, is a lawsuit against the Plaintiffs as well as Todd Presnell and Bertil Westin who are made Third-Party Defendants. Five causes of action were asserted. In a June 28, 2016 Memorandum and Order the Court dismissed Counts II (Breach of Defendants' Duties of Care and Good Faith) and IV (Intentional Interference with Business Relations) and denied dismissal of Counts III (Unjust Enrichment) and V (Fraud). The Court, as well, in an August 11, 2016 Memorandum and Order dismissed paragraph 104 of Count I breach of contract of the counterclaim asserting that the escrow agreement is unconscionable and the corollary allegation in paragraph 82 of economic duress. The Court denied the motion to dismiss

paragraphs 101-103 and 105-107 of Count I of the counterclaim, asserting breach of the Operating Agreement.

Having provided the context of the pleadings, the Court issues the following rulings on the parts of the Motion for Partial Summary Judgment listed in the May 11, 2017 Order which the Court determined would proceed.

It is ORDERED that as to Count III of the Counterclaim (unjust enrichment), summary judgment is entered, and Count III (unjust enrichment) of the Counterclaim is dismissed. The basis for the ruling is that all of the allegations in Count III of the Counterclaim fall within the scope of the Operating Agreement or Escrow Agreement. Under Tennessee law unjust enrichment is available only where a contract does not exist. *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1988).

As to the remainder of the matters listed in the May 11, 2017 Order to proceed on summary judgment, the following conclusions of law are issued. The Court was able to make determinations on these as a matter of law because it involved construing and applying the Operating Agreement and Escrow Agreement to undisputed facts. At this time only conclusions of law are entered. A determination on entry of summary judgment on the specific Counts of the pleadings which relate to these matters shall await completion of the Westin and Presnell depositions and the additional briefing provided for below. Even though the Plaintiffs have prevailed on summary judgment on their construction and application of

the Operating Agreement, still to be decided on summary judgment, after the Westin and Presnell depositions, is the Defendant's defense that his actions and application of the Operating Agreement were ratified by the Plaintiffs.

Accordingly, the following conclusions of law are entered at this time. Upon applying the provisions of the Operating Agreement[1] to the undisputed facts, the Court concludes the following as a matter of law.

1. Count 1 of the Complaint—The Operating Agreement was not duly amended according to its terms. Under the Operating Agreement, Defendant Kelty controlled 51% of the voting power in April of 2014, when he attempted to amend the Operating Agreement before Westin and Presnell were members, and he did not hold a 75% super-majority to unilaterally amend the Operating Agreement. Version 2 of the Operating Agreement was not a valid amendment of the Operating Agreement, and, therefore, Version 2 never took effect. The Operating Agreement governs the LLC and its members.

2. Count 2 and Count 3 of the Complaint—Kelty's disputed $200,000 contribution did not constitute a capital contribution that gained him more membership percentage because he did not control a 75% super-majority of the LLC's voting power and he failed to honor the Plaintiff Investors' preemptive rights

[1] The reference herein to "Operating Agreement" is the document signed by the Plaintiffs. "Version 2" is a reference to the Operating Agreement which Defendant Kelty claims to have amended and which was signed by Westin and Presnell.

3. Count 5 of the Complaint—The Investors' membership interests were not redeemed because the LLC did not finance the purchase of the Property under Section 3.4 by admitting new members. Also, the Escrow Agreement does not function as a redemption event because it does not state that it serves that function.

The following portions of the Plaintiffs' motion for summary judgment are not ruled upon and are held in abeyance for the Defendant to complete the depositions of Westin and Presnell:

— The Defendants' assertion of the affirmative defense of ratification—Not yet determined is whether the foregoing rulings as a matter of law on the construction of the Operating Agreement are dispositive because of potential genuine issues of material fact on the Defendant's affirmative defense of ratification. As referenced above, the May 11, 2017 order provided Defendant's Counsel the opportunity to depose Westin and Presnell before ruling on summary judgment on ratification.

— Count I of the Counterclaim of breach of the Operating Agreement that the Investors conspired to in effect exercise rights of managers, and interfered with Defendant raising capital and developing the Property.

— Count V of the Counterclaim that the Investors defrauded Kelty.

To complete the summary judgment rulings on these defenses and Counterclaims, the following is ORDERED.

— By September 8, 2017, Defendant Kelty shall have completed the depositions of Third-Party Defendants Westin and Presnell.

— By September 29, 2017, Defendant Kelty shall file any supplemental briefing on the matters listed above that have been held in abeyance in ruling on Plaintiffs' Partial Motion for Summary Judgment.

— Plaintiffs' Supplemental Reply is due October 13, 2017.

— Thereafter, the Court shall rule on the papers on the remaining parts of the Plaintiffs' Motion for Partial Summary Judgment.

— The Defendant has the burden of proof on ratification because it is an affirmative defense.

In addition, it is ORDERED that on August 17, 2017, at noon a telephone conference shall be initiated by the Docket Clerk for the Court and Counsel to set a date for the bench trial of this case and any deadlines needed to complete preparation of the case for trial.

The undisputed facts, law and analysis on which the above orders and rulings are based are as follows.

Undisputed Facts Established By the Summary Judgment Record

This lawsuit concerns Division Street Land Partners, LLC ("DSLP," the "Company" or the "LLC"), a member managed LLC. The Company was formed in February 2014 by Defendant Kelty. He has been a developer of commercial real estate for 20 years. The purpose of the LLC, as stated in Section 2.4 of its Operating Agreement, was to enter into a real estate purchase agreement for the acquisition of a 1.81 acre tract of real property known as 641 and 701 Division Street in the Gulch (the "Property") to develop as a multi-story, multi-use building.

The plan set out in Section 2.4 of the Operating Agreement to attain this purpose had three steps:

(1) engage in due diligence and pursuit related activities in connection with the acquisition;

(2) acquire the real estate; and

(3) entitling such real estate for development as a multi-story, multi-use building.[2]

This plan, designated in Section 2.4 of the Operating Agreement as the "Acquisition Purpose," was to be implemented by Defendant Kelty initially contributing his work/services, and capital was to be contributed by members admitted to the LLC. Memberships, contributions and percentages were set out in Schedule A to the Operating Agreement.

There were three classes of membership listed in Schedule A. Defendant Kelty had a Class A Membership for "never less than a 51.001%" membership. Class B and Class C membership interests were created to raise the capital to cover DSLP's expected pursuit costs.

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[2]The text of Section 2.4 reads as follows:

> **Section 2.4 Purposes**. The nature of the business or purposes to be conducted or promoted by the Company is to engage in any lawful act or activity for which limited liability companies may be organized under the Act, including (without limitation) entering into a real estate purchase agreement for the acquisition of real estate located in Davidson County, Tennessee, and municipally known as 641 and 701 Division Street, engaging in all diligence and pursuit-related activities in connection with such putative acquisition, acquiring such real estate, and entitling such real estate for development as a multi-story, multi-use building (the "Acquisition Purpose").

Notice of Filing, Exhibit A, Operating Agreement (Version 1), March 6, 2017, page 8-9.

Step 1 was to be implemented prior to the Property being acquired. Step 1 consisted of selling Membership Interests for those Capital Contributions to be used for pursuit costs and third-party expenses incurred prior to the purchase of the Property. This is set out in Section 3.3 of the Operating Agreement.

The other part of Step 1 of the Acquisition Purpose Plan was provided in Section 3.4. It anticipated that the Class B and C Members would provide the initial Capital Contribution for pursuit costs and third party expenses incurred in connection with the Acquisition Purpose but prior to the acquisition, and that additional capital would be raised to finance the purchase.[3] The precise wording of Section 3.4 is quoted as follows.

> **Section 3.4 Required Redemption of Class B and C Members**. Notwithstanding any other provision herein to the contrary or in any Contribution Agreement between a Member and the Company, the Class B and C Members acknowledge and agree that [i] their initial Capital Contributions shall be used by the Company for pursuit costs and third-party expenses incurred in connection with the Acquisition Purpose but prior to the acquisition of the Acquisition Purpose real estate; [ii] that the Company intends to raise additional capital to, among other things, finance the purchase of such Acquisition Purpose real estate by admitting new Members; and [iii] if the Company raises such additional capital in sufficient quantity to fulfill the Acquisition Purpose, in the Manager's sole discretion and if the Company acquires the Acquisition Purpose real estate, the Class B and C Membership Interests shall be redeemed by the Company. The Class B and C Members expressly agree to such redemption. Such redemption shall be a Distribution for purposes of Section 6.4, including Section 6.4(d). Nothing herein shall prevent any Class B or C Member from obtaining new Membership Interests in connection with the anticipated capital raise, subject to the terms thereof,

[3] Paragraphs 24 and 25 of Defendant Kelty's *Rule 13 Complaint, Counter-claims and Third-Party Claims* assert that pursuit costs of a project of this magnitude typically range from $750,000 to $2,000,000, and that he projected DSLP needed to raise $750,00 for pursuit costs.

> and all Class B and C Members shall be offered such new Membership Interests, subject to the terms of such anticipated capital raise.

Notice of Filing, Exhibit A, Operating Agreement (Version 1), March 6, 2017, page 10-11.

As just quoted, Section 3.4 also required Class B and C Members to be redeemed prior to the acquisition of the Property if the following conditions were met

> — if the Company raised additional capital in sufficient quantity to fulfill the Acquisition Purpose [acquire the Property], to be determined by the Manager (Defendant Kelty) in his sole discretion; and
>
> — if the Company acquired the Acquisition Purpose Real Estate.

On March 3, 2014, Eric Baurle, M.D. invested $50,000 to purchase a Class B membership interest. He executed a Contribution Agreement that entitled him to 3.26% of the total Membership Interest of DSLP. Viraj Parikh, M.D. on March 7, 2014, invested $25,000 into DSLP to purchase a Class C membership. Plaintiff Parikh also executed a Contribution Agreement stating that his $25,000 entitled him to 1.63% of the total Members Interest of DSLP. Assuming DSLP would raise the full $750,000, Plaintiff Baurle's fully-diluted percentage interest would be 3.266% if he had never reinvested, and Plaintiff Parikh's fully-diluted percentage would be 1.633% if he had never reinvested.

After the Plaintiffs had made the total $75,000 contribution, on April 8, 2014, DSLP entered into a real estate purchase agreement with Artemis Real Estate LLC which provided DSLP the right to acquire the Property for 18 months.

It was at this time, in April of 2014, that Defendant Kelty asserts that he amended the Operating Agreement with what is referred to herein as Version 2. The effectiveness of Version 2 is disputed by the Plaintiffs.

On June 8, 2014, Bertil Westin invested $25,000 in DSLP to purchase a Class C membership interest. Upon Mr. Westin investing his $25,000 into DSLP he executed a Contribution Agreement entitling him to a 1.63% of the total member interests of DSLP. Assuming that DSLP would have raised the full $750,000 in capital, Westin's fully-diluted percentage interest would be 1.633% if he had never reinvested. On December 9, 2014, Todd Presnell invested $25,000 in DSLP to purchase a Class C membership interest. Mr. Presnell executed a Contribution Agreement stating that his $25,000 investment entitled him to a 1.63% of the total membership interests of DSLP. Based upon the assumption that DSLP would raise the full $750,000 in capital, Mr. Presnell's fully-diluted percentage interest would be 1.633% if he had never reinvested.

The percentage memberships were as follows:

- Kelty = 51.001%
- Baurle = 3.2666%
- Parikh = 1.6333%
- Westin = 1.6333%
- Presnell = 1.6333%
- [Hypothetical Investors] = 40.8325%

Through December 2014, DSLP had raised a total of $125,000 of capital from Baurle, Parikh, Westin and Presnell (the "Investors"). No additional members have been admitted to DSLP since Mr. Presnell's admission in December 2014.

Over the ensuing year, as the value of real estate in the Gulch increased, the price at which the Company was under contract to purchase the Property was less than its market price, and the parties stood to reap financial benefits.

By June of 2015, Defendant Kelty had been unable to find a joint-venture partner to purchase the Property. In June of 2015, DSLP entered into an assignment with a large developer, Llewellyn Development, LLC, which agreed to pay DSLP $3,000,000 in exchange for DSLP assigning Llewellyn the Purchase Agreement (the "Assignment"). The Assignment was set to close at the end of August 2015. On July 14, 2015, after the Assignment had been executed, Defendant Kelty emailed the Investors that "it will be necessary for us to raise some additional capital."

On July 27, 2015, without advance notice to the other members of DSLP, Defendant Kelty purported to make a $200,000 capital contribution to DSLP. On July 28, 2015, at the members' meeting, Defendant Kelty told the Investors that as a result of his $200,000 no further capital was needed.

The next week, on August 5, Kelty emailed the Investors a revised Schedule A reflecting his asserted impact of his $200,000 contribution on DSLP's percentage interests:

- Kelty = 51.001% + 13.0664% = 64.0674%
- Baurle = 3.2666%
- Parikh = 1.6333%
- Westin = 1.6333%
- Presnell = 1.6333%
- "Reserved" = 27.7661%

None of the Investors approved the $200,000 Contribution. The Investors promptly objected, individually and through counsel, and informed Defendant Kelty that they considered the $200,000 contribution was null and void, and that it should be rescinded.

Thereafter, Llewellyn decided not to consummate the Assignment.

On November 2, 2015, DSLP entered into a General Partnership Agreement with MGT Partners to purchase the Property. The General Partnership Agreement between DSLP and MGT Partners formed a Tennessee general partnership called Highpoint Division Partners. DSLP contributed an assignment of the Purchase Agreement for the Property. MGT Partners contributed $6.5 million to Highpoint Division Partners to purchase the Property. Highpoint Division Partners purchased the Property, not DSLP. The Property is owned by Highpoint Division Partners. MTG Partners is not and has never been a member of DSLP. The purchase of the Property was not financed by admitting new members but by entering into a general partnership with MGT Partners. DSLP does not own the Property. In Section 2.6 of the Partnership Agreement, DSLP has the right of first refusal upon the Partnership receiving an offer to sell the Property.

In connection with the transaction with MGT Partners, Defendant Kelty did not offer any new membership interests to the four LLC Investors. Rather than offering the Investors the right to participate through the purchase of new membership interests, Defendant Kelty presented the Investors with an Action by Written Consent which sought the Investors' approval of the transaction as DSLP's members.

As part of the transaction with MGT Partners, DSLP received $1.1 million. Because the parties did not agree on their LLC membership percentages, they did not initially agree on how DSLP's profits should be distributed. An Escrow Agreement was entered into which agreed on how DSLP's funds would be used, disbursed or escrowed. In the Escrow Agreement, the parties agreed to put $100,000 in DSLP's operating account to pay its expenses, and then to make distribution of the remainder of DSLP's funds. The disbursement consisted of returning capital contributions and paying preferences to DSLP's members, and then making a distribution of the remaining funds based on the undisputed portion of the parties' membership interests. Under this method, the Investors collectively have received 18.85% of the balance, and Defendant Kelty received 51% of the balance. The remaining 30.15% of the balance was placed in escrow subject to a resolution of the parties' dispute.

It is Defendant Kelty's position that upon the purchase of the Property by the Partnership and distribution to the four Investors, the Investors' membership interests were redeemed entirely. The Investors dispute this.

On March 7, 2016, the Plaintiffs filed this lawsuit naming Mr. Kelty as the Defendant, and Mr. Presnell and Mr. Westin as Interested Parties. Mr. Presnell and Mr. Westin were then sued as Third-Party Defendants in the Counterclaim filed by Mr. Kelty.

Summary Judgment Standard

As provided in the briefing, summary judgment is proper where the resolution of legal issues will dispose of the case. *See, e.g., Colonial Pipeline Co. v. Nashville & Eastern R.R. Corp.*, 253 S.W.3d 616, 621 (Tenn. Ct. App. 2007); *Hawkins v. Case Mgmt., Inc.*, 165 S.W.3d 296, 299 (Tenn. Ct. App. 2004). Summary judgment is appropriate "when there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *Johnson v. LeBonheur Children's Medical Center*, 74 S.W>3d 338, 342 (Tenn. 2002). Thus, summary judgment should be granted when "there is no dispute over the evidence establishing the facts control the application of a rule of law." *Terry v. Niblack*, 979 S.W.2d 583, 585-86 (Tenn. 1998).

Construction and Application of Operating Agreement To Undisputed Facts

Putting aside, to be determined in a subsequent Memorandum and Order, Defendant Kelty's defense of ratification to Plaintiffs' Partial Motion for Summary Judgment, the Court in this section of its decision construes the Operating Agreement and applies it to the undisputed facts to arrive at conclusions of law to narrow the issues.

Conclusion of Law 1: Version 2 Never Went into Effect to Amend the Operating Agreement; Defendant Kelty Did Not Hold a Super-majority in April 2014

The first part of the Operating Agreement the Court addresses is Section 12.4 "Amendment or Modification." The application of this section of the Operating Agreement to the undisputed facts is very significant to the outcome of the lawsuit. Defendant Kelty asserts that the Operating Agreement was amended with, what will be referred to herein as, Version 2, on April 8, 2014, when Artemis Real Estate, LLC, provided DSLP the right for 18 months to acquire the Property. The significance of whether Version 2 was an effective amendment is that it removes the 75% super-majority approval of Section 3.3 of the Operating Agreement to issue additional memberships as well as the granting of preemptive rights. For clarity the two versions of Section 3.3 are quoted as follows to compare.

Here is the text of Section 3.3 of the Operating Agreement.

> **Section 3.3 Additional Members**. Upon the recommendation of the Manager(s), the Company may sell additional Membership Interests, subject to the provisions of Section 5.7 (granting preemptive rights), upon approval of a super-majority of Percentage Interests. The parties hereto agree that as a condition precedent to the issuance by the Company of Membership Interests, the Company shall require such Person purchasing such Membership Interests to execute this Agreement or a Joinder Agreement and thereby enter into and become a party to this Agreement. Neither anything contained herein nor ownership of any Membership Interests shall confer upon any Member the right to employment or to remain in the employ of the Company or any of its subsidiaries. Notwithstanding anything herein to the contrary, nothing in this section shall preclude or limit the Manager's sole authority to admit additional Members in connection with the anticipated additional capital raise referenced in Section 3.4, the parties intending that this section relate to new admissions prior to such anticipated additional capital raise.

Here is the text of Section 3.3 of Version 2.

> **Section 3.3 Additional Members**. Until the Company has received $750,000 in initial Capital Contributions, the Manager may unilaterally admit new Members, upon payment of an initial Capital Contribution pro rata with existing Class B and C Members, (*i.e.* based on the same contributed capital per Percentage Interest point). Upon the Company receiving at least $750,000 in initial Capital Contributions, upon the recommendation of the Manager(s), the Company may sell additional Membership Interests, subject to the provisions of Section 5.7 (granting preemptive rights), upon approval of a super-majority of Percentage Interests. The parties hereto agree that as a condition precedent to the issuance by the Company of Membership Interests, the Company shall require such Person purchasing such Membership Interests to execute this Agreement or a Joinder Agreement and thereby enter into and become a party to this Agreement. Further, notwithstanding anything herein to the contrary, nothing in this section shall preclude or limit the Manager's sole authority to admit additional Members in connection with the Acquisition Raise (defined below), the parties intending that this section relate to new admissions prior to the Acquisition Raise.

As can be seen by the above comparison, Section 3.3 of the Operating Agreement requires a super-majority approval of 75% of percentage interest to sell additional membership interests. This was specifically negotiated by Plaintiff Baurle. Section 3.3 of the Operating Agreement also provides that the sale of any additional membership interests

will be subject to Section 5.7[4] which grants preemptive rights to existing members to participate in any subsequent offering.

The undisputed facts concerning Version 2 are that Plaintiff Baurle had asked that a certain change be made to the Operating Agreement to revise Section 3.4 to allow investors to roll over their initial pre-acquisition capital contribution and Preference to a post-acquisition membership interest tax free. This change was made by Defendant Kelty in the Operating Agreement. On April 27, 2014, Defendant Kelty emailed Plaintiff Baurle Version 2. In the cover email, Defendant Kelty stated that the pertinent section where the "discussed changes" were made is the second paragraph of Section 3.4.

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[4]**Section 5.7 Preemptive Rights**. The terms of this Section 5.7 are subject to the provisions of Sections 3.3 and 3.4 and shall not limiting any term or provision thereof, it being the intention of the parties that this Section 5.7 apply to proposed Membership Interest issuances prior to the acquisition of the real estate that this is the subject of the Acquisition Purpose. The Members will have a preemptive right (the "Preemptive Right") to purchase all or any portion of any new Membership Interest that the Manager(s) may, from time to time, propose to sell and issue after the date of this Agreement. If the Company proposes to issue any new Membership Interest, it will give the Members prior written notice of its intention, describing the new Membership Interest and the price, the terms and conditions upon which the Company proposes to issue the new Membership Interest. The Members will have twenty (20) days from the giving of such notice to agree to purchase the Member's proportionate share or any portion of the new Membership Interest for the price and upon the terms and conditions specified in the notice by giving written notice to the Company and stating the portion of the new Membership Interest to be purchased. If the Members fail to exercise in full the Preemptive Right, the Company will have ninety (90) days thereafter to sell the new Membership Interest in respect of which the Members' rights were not exercised, at a price and upon general terms and conditions materially no more favorable to the purchasers thereof than specified in the Company's notice to the Members. If the Company has not sold such new Membership Interest within ninety (90) days of the notice provided hereunder, the Company will not thereafter issue or sell any new Membership Interest without first offering such securities to the Members in the manner provided above. The Members may, by written notice to the Company, waive their Preemptive Right to the extent so provided in such notice.

Notice of Filing, Exhibit A, Operating Agreement (Version 1), March 6, 2017, page 16.

Also, however, Defendant Kelty made the significant change described above—removing from Section 3.3 the requirement of the super-majority approval (75%) to issue additional membership interests and removing the preemptive rights. Defendant Kelty admits in his responses to requests for admissions nos. 4, 6, 7, 8 and 9 that the Plaintiff Investors did not specifically request that DSLP revise Section 3.3 of the Operating Agreement, and it is undisputed that Defendant Kelty did not specifically point out to Plaintiff Baurle that the investor protections had been removed from Section 3.3 in Version 2. Also, it is undisputed that Defendant Kelty did not send Plaintiff Baurle a comparison redline showing the changes.

Plaintiff Baurle admits at the time Version 2 was emailed to him he did not reread the entire Version 2, in an attempt to detect whether any changes had been made in the 37-page document.

It is further undisputed that

— no meeting and vote, as is required by Section 12.4 of the Operating Agreement to amend it, was convened;

— the Plaintiff Investors never signed Version 2 of the Operating Agreement;

— there was no written instrument from DSLP to amend the Operating Agreement; and

— Defendant Kelty never presented a copy of Version 2 to Plaintiff Parikh.

It is undisputed that Mr. Kelty never told any of the Investors that he had given them two distinct Operating Agreements to sign, the second of which purported to significantly reduce the Investors' rights as agreed in the first version.

Plaintiff Baurle asserts that he discovered the changes to Section 3.3 in Version 2 on or about August 3, 2015. It was at that time that Plaintiff Baurle discovered that Todd Presnell and Bertil Westin had signed what the parties now know as Version 2 of the Operating Agreement.

The issue these undisputed facts present is whether Version 2 was an effective amendment.

The text of Section 12.4 of the Operating Agreement on amendments states the following.

> **Section 12.4 Amendment or Modification**. Except as otherwise provided in this Agreement, this Agreement and any provision hereof may be amended or modified from time to time only by a written instrument approved by the Members as a Major Decision; provided, however, that (a) except as otherwise expressly provided herein, an amendment or modification (other than amendments or modifications adding new classes of interests or issuing Additional Membership Interests) reducing disproportionately a Member's interest in profits or losses or in distributions or increasing a Member's Capital Contribution shall be effective only with that Member's consents, and (b) an amendment or modification reducing the required interest for any consent or vote in this Agreement shall be effective only with the consent or vote of Members having the interest theretofore required for such consent or vote. Notwithstanding the preceding sentence, (i) the Manager(s) unilaterally may amend and modify the provisions of this Agreement (including Article 6 and Schedule A hereto) to the extent necessary to reflect the issuance of interests (including new classes of interests, and including the issuance or exercise of

> Membership Interest) in the Company and admission or substitution of any Member permitted under this Agreement and changes in Percentage Interests under Section 3.1(c) and to the extent necessary to effectuate the issuance of Additional Membership Interests pursuant to Section 3.3; (ii) the Manager(s) unilaterally may amend and modify the content of Schedule B to the extent necessary to reflect additions or changes relative to equity interests owned by the Company.

Notice of Filing, Exhibit A, Operating Agreement (Version 1), March 6, 2017, page 31.

Applying the text of Section 12.4 to the undisputed facts, the Court concludes that the Operating Agreement was not duly amended according to its terms.

First, comparing the text of Section 12.4 to the record, it is undisputed that:

— no meeting and vote, as is required by Section 12.4 of the Operating Agreement to amend it, was convened;

— the Plaintiff Investors never signed Version 2 of the Operating Agreement; and

— Defendant Kelty never presented a copy of Version 2 to Plaintiff Parikh.

Next, the requirements of Section 12.4 of a "written instrument" approved by the Members as a Major Decision does not exist. In response to Plaintiffs' Statement of Undisputed Material Fact ("PSUMF") 19, the Defendant admits "that there was no separate written instrument amending" the Operating Agreement. In the remainder of Defendant's response to PSUMF 19, he asserts that there was a written instrument sufficient to satisfy Section 12.4. There are, however, insufficient facts of record to support this assertion. There are four facts listed at page 16 of Defendant Kelty's May 18, 2017 *Opposition,* which appear to be used by the Defendant to assert the Plaintiffs by their conduct ratified Version 2. Yet,

as to the required element of Section 12.4 of a written instrument, these facts do not include any written instruments. While there are some emails, these are not instruments, and these emails contain no approval of the Members as a Major Decision.

With respect to the other element of Section 12.4 that amendments or modifications of the Operating Agreement require approval "by the Members as a Major Decision," Section 3.1(b) "Voting" requires a super-majority—"75% of the Percentage Interests of Members" for a Major Decision. Article 1 includes within its definition of "Major Decision," the modification or amendment of the Operating Agreement.

Defendant Kelty asserts he held a super-majority of the Percentage Interests of Members such that he could and did unilaterally amend the Operating Agreement with the written instrument Version 2. The Plaintiff Investors contend that Defendant Kelty did not hold a super-majority. In the analysis below, the Court concludes that in April of 2014 Defendant Kelty held 51%—not the 75% super-majority required to unilaterally amend the Operating Agreement.

The operative provision on Percentage Interests of Members to calculate a super-majority is footnote 2 to Schedule A of the Operating Agreement. Because of the significance of the content of Schedule A itself and its footnotes to construction and application of the Operating Agreement, it is reproduced in its entirety as follows:

SCHEDULE A

MEMBER NAMES, ADDRESSES, CLASSES, AND PERCENTAGE INTERESTS; COMPANY ADDRESS FOR NOTICE PURPOSES

Member	Address for Notices	Membership Class	Initial Capital Contribution[1]	Percentage Interest[2]
Travis J. Kelty	9416 Brookview Drive, Brentwood, TN 37027	Class A	Services	51.001%
Eric Baurle, M.D.		Class B	$50,000	3.2666%
David Adams		Class C	$50,000	3.2666%
Reserved[3]		Class C	*$650,000*[4]	*42.4658%*[5]
			Total: $750,000	Total: 100%

Company's address for notice purposes:
9416 Brookview Drive
Brentwood, Tennessee 37027

_____

[1] The parties acknowledge that the Manager anticipates that the initial cash contributions will total $750,000, but without the consent of all Members, the initial cash contributions shall not exceed $750,00.

[2] Percentage Interest allocations shall be finalized once all initial Members are admitted and shall vary directly with the final amount of initial cash contributions; provided, however, that [i] the Class A Member's Percentage Interest shall never be less than 51% and [ii] to the extent the initial capital contributions do not amount to $750,000, based on the Manager's sole assessment of necessary initial capital, the Percentage Interests of the Class B and Class C Members shall increase pro rata. Nothing herein shall limit or affect the provisions of Sections 3.3 and 3.4.

[3] To be determined once all initial Members are admitted. See *supra*, footnote 2.

[4] Varies with the total initial cash contributions. See *supra*, footnote 1.

[5] Varies with the total initial cash contributions. See *supra*, footnote 1.

Notice of Filing, Exhibit A, Operating Agreement (Version 1), March 6, 2017, page 36.

Although Schedule A to the Operating Agreement references David Adams as making a $50,000 capital contribution, he never did so and never became a member of DSLP.

Page 6 of the Operating Agreement provides that a Member's voting rights are allocated according to each Member's Percentage Interest "as set forth on Exhibit A." Additionally the total Company Percentage Interests, consisting of the Membership Interests, equals 100%. Review of Schedule A above lists the Members' respective Percentage Interests and contains a "Reserved" on the listing. How to deal with this Reserved element is where the parties disagree.

Defendant Kelty equates the text of footnote 2 that he had "sole discretion to determine whether initial capital is sufficient," with the act of capping the initial capital raise. Since neither party disputes the $750,000 was not raised, Defendant Kelty argues that the initial capital raise was not capped when Defendant Kelty claims he amended with Version 2. Thus, Defendant Kelty's argument goes that if percentage interests had to total 100% and the reserved Percentage Interests had to be allocated to a Member, "then they would have had to go to the only other class of Members, Class A Members, as a class that only consisted of Mr. Kelty alone." As Defendant Kelty asserts in his Counterclaim,

> 28. The Initial Operating Agreement designated three classes of potential pre-acquisition membership interests. "Class A" represented a minimum of 51% of the Company and was owned entirely by Kelty, for originating the Company and the Project. "Class B" and "Class C" membership interests were created to raise the $750,000 that Kelty projected DSLP would need to cover DSLP's pursuit costs. These shares were collectively ***capped*** at up to 49% of the Company.

> 29. A footnote in the agreement permitted Kelty, in his "sole discretion" to "cap" Class B and C capital contributions to DSLP at some amount below the $750,000 Kelty projected DSLP would need, and provided that upon his imposing such a cap (*and only thereupon*), the percentage interests of Class B and Class C members would increase pro rata.
>
> 30. This term was not intended to inhibit DSLP's ability to raise capital by incentivizing the current investors to artificially boost their percentage ownership undermining DSLP efforts to raise necessary capital, but the Defendants have attempted to do just that.
>
> * * *
>
> 41. At the time that the Final Operating Agreement [Version 2] was made, Kelty had not "capped" the initial capital raise at an amount below $750,000, so Baurle and Parikh remained extreme minority owners of DSLP. Kelty owned a super-majority of shares.
>
> 42. Kelty — as the Manager and super-majority owner of DSLP — did not need Baurle or Parikh's consent to make the relatively minor clarifications and revisions of the Initial Operating Agreement, which produced the Final Operating Agreement [Version 2].

Defendant Kelty asserts that he enjoyed unilateral authority to amend DSLP's Operating Agreement by virtue of controlling a super-majority of DSLP's voting rights. Defendant Kelty asserts that the Court should grant summary judgment to him on the issue that Version 2 is valid and effectively governs DSLP. The alternative Defendant Kelty provides is if none of the Members are entitled to vote for the reserved Percentage Interests, the only other possibility is that unissued Membership Interests (reflected in Schedule A as the "reserved Percentage Interests") are not considered for purposes of determining the total Company Percentage Interests. Instead, Percentage Interests are determined by considering the Membership Interest each party owns relative to the total number of outstanding

Membership Interests. When all outstanding Membership Interests are pooled to total 100%, each Member's Percentage Interest increases relative to their ownership of the 55.9% of outstanding Membership Interests. Under this calculation, Mr. Kelty controlled 91.2% of the Percentage Interests, Dr. Baurle controlled 5.8%, and Dr. Parikh controlled 2.9% at the time Mr. Kelty amended the Operating Agreement.

Defendant Kelty's construction, however, does not comport with the text. Schedule A lists the Reserved shares as part of Class C. This is consistent with the Section 2.4, 3.3 and 3.4 plan of the Operating Agreement that Class B and C members are those who contribute cash. As of the time of the purported Version 2 amendment, in April of 2014, Defendant Kelty had not contributed cash; therefore the Reserved shares would not be allocated to him. As explained by the Plaintiffs in their briefing:

> As shown on Schedule A of the Operating Agreement, DSLP "reserved" units for future members on the assumption Kelty would raise a total of $750,000. Kelly attempted to change the operating agreement before Messrs. Westin and Presnell were admitted as members. Mr. Westin made his capital contribution in June 2014. At that time, Baurle hadcontributed $50,000, and Parikh had contributed $25,000. Thus, at that time. $675,000 was "reserved." Assuming the remaining $675,000 of capital would eventually be raised, the members had the following fully-diluted percentage interests: Kelty 51%, Baurle 3.266%. and Parikh 1.633%.
>
> These fully-diluted percentage interests, however, cannot serve as the parties' voting power, because they sum to 55.8%. Under the Operating Agreement, the percentage interests must, at all times, sum to 100%. *See* Operating Agreement § 1.1 (stating in the definition of "percentage interests" that they "shall equal 100%"). Further, "reserved" is not a person, and only persons can vote. *See id.* § 1.1 (providing that a "member" must be a "person"). As a practical matter, the collective voting power must sum to more than 55.8% because, otherwise, obtaining a super-majority of 75% would

> be impossible. Without a super-majority, DSLP could not raise more capital and would be stuck on the starting blocks. In addition, ownership in 100% for any extended time is required by basic rules of taxation: LLCs are pass-through entities, and if DSLP received any income, taxes would need to be paid on 100% of that income.
>
> Although the Operating Agreement does not expressly state which member can vote on behalf of "reserved" units, its only guidance is footnote 2 to Schedule A. Schedule A provides for three classes of membership interests: Class A to Kelty for his "services" (51% interest); Class B to Baurle for his capital contribution (3.3% interest), and Class C interests for subsequent investors (including Dr. Parikh). Footnote 2 provides that "to the extent the initial capital contributions do not amount to $750,000 . . . the Percentage Interests of the Class B and C Members shall increase pro rata." Thus, footnote 2 instructs that if Kelty were unable to raise $750,000 in initial capital, his Class A interest of 51% would remain the same, and the Class B and C interests of capital investors would increase pro rata to fill the remaining 49%.
>
> Footnote 2 is the only guidance as to how the parties sought to allocate the voting power for "reserved" units: Kelty's voting power would remain at 51%, and the investors (Class B and C members) would fill up the remaining 49%. This is confirmed by footnote 2's instruction that percentage interests "shall vary directly with the final amount of initial cash contributions." In other words, Kelty received 51% for services, and the 49% would be allocated based on cash. Under footnote 2, Kelty controlled 51% of the voting power as a Class A member, and Drs. Baurle and Parikh controlled 49% of the voting power as Class B and C members.

Plaintiffs' Memorandum of Law and Facts In Support of Motion for Partial Summary Judgment, March 6, 2017, at 17-18.

Further, contemporaneous communications of a May 1, 2014 email from Plaintiff Baurle to Defendant Kelty confirm that Defendant Kelty's 51% for contributing his work gave him a simple majority. Because that would, in Dr. Baurle's words, allow Defendant Kelty to "single handedly decide to bring in more members," Dr. Baurle proposed, and

Defendant Kelty made the change, which appears in Section 3.4 of the Operating Agreement that the decision to dilute for additional capital should be a super-majority decision.

Other evidence is that Defendant Kelty's 2014 K-1 for DSLP states that he owns 51%. Also, in 2015, only days before he made his disputed $200,000 capital contribution, Kelty's sworn application to the Tennessee Department of Revenue for franchise and excise taxes stated that he owned 64% (crediting himself an additional 13% as a result of his disputed capital contribution + 51%).

Further indications that Defendant Kelty's construction is not consistent with the text are that Schedule A makes clear that DSLP's percentage interests vary based on cash contributions, which excludes Class A (which pertains only to a contribution of "services") from such an increase. Footnote 2 also states that percentage interests "shall vary directly" with cash contributions and that if DSLP did not raise all $750,000 (and it is undisputed that DSLP did not) the Class B and C interests shall increase pro rata.

Additionally, the "never be less" clause in part [i] of footnote 2, sets a floor to Kelty's ownership percentage. It ensures that Kelty would always own at least a simple majority of DSLP. This is clear when clause [i] is read in concert with clause [ii]. Clause [ii] provides that once the initial capital raise is capped, the Class B and C shares "shall increase pro rata." Footnote 2 does not say, however, how far the Class B and C shares increase. That is where clause [i] comes into play. It reveals that the Class B and C shares increase up to the floor set by Kelty's 51%. Thus, the Class B and C shares fill up the other 49%.

Applying the provisions of the Operating Agreement to the events and matters taking place in April 2014, it is clear and certain that Defendant Kelty did not hold a 75% super-majority to unilaterally amend the Operating Agreement with Version 2. The result is that Version 2 did not go into effect.

Conclusion of Law 2: Kelty's $200,000 Contribution Did Not Gain Him More Membership Percentage

This issue relates to when the Company was under contract to make a profit simply by assigning its right to purchase the Property to a large, regional developer. Mr. Kelty purported to make a $200,000 capital contribution over the Investors' objection. The amended Scheduled A he issued shows that Defendant Kelty believed that the $200,000 contribution diluted the Investors and increased his share. Defendant Kelty asserted that the contribution corresponded to a $13.07% Class C interest. Defendant Kelty also refused to allow the Investors to participate in this capital raise. The Plaintiffs objected to the $200,000 contribution. They assert there was no need at that time for further capital because of the assignment. Defendant Kelty justifies the $200,000 contribution as his way to defend against the Investors trying to prevent him from raising additional capital.

Regardless, having concluded Version 2 never went into effect, the Court concludes as a matter of law that the $200,000 contribution was null and void to increase Defendant Kelty's membership percentage because it violated the Sections 3.4 and 5.7 rights of the

Plaintiffs to veto capital contributions and to participate in any such capital raise through preemptive rights.

Conclusion of Law 3: The Investors' Membership Interests Have Not Been Redeemed

With respect to redemption, the Operating Agreement contained two steps in Section 2.4 to lead to redemption in Section 3.4. Step 1 was the sale of memberships to fund pursuit costs prior to the acquisition of the Property, and Step 2 of the Acquisition Purpose Plan was DSLP acquiring the Property. The significance of whether these steps have occurred is that if they have the Plaintiff Investors' Membership Interests have been redeemed. The Plaintiff Investors assert steps 1 and 2 have not occurred, with the result that there can be and has been no redemption of their Membership Interests, and that they remain members. Defendant Kelty's position is that steps 1 and 2 have occurred, and that there has been a redemption.

On this issue, the Court concludes as a matter of law that based upon the undisputed facts and the text of the Operating Agreement, no redemption has occurred. The undisputed facts are that the conditions required by Section 3.4 for a redemption have not occurred.

— DSLP did not acquire the Property. It contributed an assignment of the Purchase Agreement for the Property as a partner in Highpoint Division Partners. The other partner in the partnership, MTG, contributed $6.5 million. It was then Highpoint who purchased and owns the Property.

— The purchase of the Property was not financed by admitting new members as provided in Section 3.4 but by entering into a general partnership with MTG Partners.

As to Defendant Kelty's argument that the paying out of distributions and preferences in connection with the Escrow Agreement constituted a redemption, it is not supported by the text of the Escrow Agreement. Nowhere in that document does it state the matters provided therein constitute a redemption. Additionally, that the Partnership Agreement with MGT Partners provides DSLP a right of first refusal on purchasing the Property is also inconsistent that a redemption has occurred. Section 3.4 provides for redemption upon DSLP purchasing the Property. That has not occurred.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:
John Farringer IV
Ryan Holt
William B. Hawkins, III
Eric G. Evans
William J. Quinlan
Seth Corthell
Robert Boston
Samuel Funk
Gil Schuette
Charles Robert Bone