SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 71

19STCV42090 March 21, 2022
STANLEY BLACK vs ROBERT K. BARTH, et al. 7:53 AM

Judge: Honorable Monica Bachner CSR: None
Judicial Assistant: A. Barton ERM: None
Courtroom Assistant: None Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

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NATURE OF PROCEEDINGS:
Ruling on Submitted Matter

The Court, having taken the matter under submission on January 24, 2022, now rules as follows:

On June 3, 2020, Stanley Black ("Black") filed the First Amended Complaint derivatively on behalf of JBR Alondra LLC ("Alondra") and Centerville Place, LLC ("Centerville") (collectively "the LLCs"). The FAC brought six causes of action: breach of fiduciary duty against Robert Barth ("Barth) (1st cause of action), misappropriation of opportunity against Barth (2nd cause of action), removal of managing member against Barth (3rd cause of action), breach of contract against Barth (4th cause of action), and two causes of action for conversion against the entities Rivetage (5th cause of action) and Eastwind Financial, LLC ("Eastwind") (6th cause of action). 1 On April 27, 2021, Haderway PTC, LLC ("HPTC") was substituted as the Plaintiff. On October 12, 2021, Rivetage was dismissed. On the first day of trial, the Court allowed the substitution of another entity BFSB Portfolio, LP ("BFSB") as the proper plaintiff for Alondra. Thus at trial there were two plaintiffs.

The court conducted a court trial on October 4, 5, 6, 12, 13, 14, 29, 2021and November 29, 2021. The following witnesses testified: Robert Barth, Scott Murphy, Erik Finkelstein, Eric Sussman, Shelly Cuff, Zachary Zalben, Tali Klapach, Bernhard Punzet, Dennis Roach (by deposition), Leon Vahn, Nicole Frank, Herbert Klein, Constantijn Panis, John DeCero, Kathy Stimson, and Karen Sloane. Plaintiffs filed their opening post-trial brief on December 15, 2021, Defendants filed their post-trial brief on January 6, 2022, and Plaintiffs filed their reply on January 19, 2021. The parties presented closing arguments on January 24, 2022.

In making its factual determinations, the Court has accepted and applied the credible testimony of the various witnesses. 2 With that in mind, the Court make the following factual

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determinations:

The Relationship between Barth and Black

Barth and Black are sophisticated real estate investors who began investing together in commercial real estate in the 1980s. (RT 62:10-14, 939:27-940:4.) The two acquired properties in the name of Black Equities, with Black as the company's Chairman and Barth as its CEO. (RT 511:21-512:5, 514:23-515:3.) Investors included the "Johnson family" from New York. (RT 254:20-22.)

In the mid-1990s, Barth and Black formed Brighton Properties, Inc. ("Brighton"), also known as SB Management, to operate as their "in-house property management division" and manage their joint real estate investments. (RT 62:15-17, 940:25-941:19, 942:12-22, 945:7-25; 513:18-26, 514:12-15.) Black and Barth were equal partners in the venture, which they ran informally from the start. Specifically, other than the initial formation documents, there were no written agreements, there was never a board of directors meeting, there were no corporate resolutions or minutes. (RT 62:18-63:8.) Barth and Murphy described the practice as handshake deals. (RT 50:2-17, 200:19-23, 201:23-25; 284:20-285:3, 300:9-28.)

Until the fall of 2019, Barth and Black had offices in the same suite, separated by about 20 feet with a shared wall. (RT 64:21-65:1, 942:23-25; 299:15-17; 459:18-23, 461:14-17.) Barth and Black spoke face-to-face, typically a couple of times a day. (RT 64:21-65:1; 595:13- 596:3.)

In consideration for its property management services, Brighton collected property management fees ranging from one to five percent of gross rents. (RT: 227:21-28.) Barth and his affiliates generally collected transaction fees of between one-half of a percent and two percent in connection with acquisitions and dispositions of real property that they organized on behalf of the investor group. (RT 227:21-228:4, 946:13-21, 947:2-20.)

The LLCs Alondra and Centerville

Alondra

Alondra is a California limited liability company that was formed in 1995 to acquire an industrial property located at 7210-7314 Alondra Boulevard in Paramount, California (the "Paramount Property"). (Ex. 1 (§ 1.03); RT 953:10-14.) Barth and David Bryant ("Bryant") were appointed as the Managing Members of Alondra. (Ex. 1 at 30 (Ex. A); RT 289:9-11.) Johnson had a 50 percent interest in Alondra, which he assigned to an affiliate, 610 RE Partners, in 2012. (Ex. 267;

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Barth, Tr. at 1051:8-25.) 3 Black had a 29 percent interest in Alondra, which he assigned to BFSB in 2012. (Ex. 201). The remaining interests in Alondra were held by Barth and several other investors. (Ex. 1 at 30 (Ex. A).)

Section 2.01 of Alondra's Operating Agreement provides that, with certain enumerated exceptions, "the Managing Members shall have the full and complete charge of all affairs of the Company, and the management and control of the Company's business shall rest exclusively with the Managing Members." (Ex. 1 (§ 2.01).) Either Managing Member, "acting alone," is authorized to act on behalf of the company in all respects. (Id). The Managing Members are permitted to engage in activities that "are competitive with the Company or otherwise, without having or incurring any obligation to offer any interest in such activities to the Company or to the other Members." (Id. (§ 1.04).) The fiduciary duties of the Managing Members are "limited solely" to those arising from the acquisition, management, or disposition of the Paramount Property. (Id. (§§ 1.03, 1.04).) The Operating Agreement further provides that the Managing Members may not "be liable or accountable in damages or otherwise to the Company or to the other Members for any error of judgment or any mistake of fact or law or for anything that [the Managing Member] may do or refrain from doing hereafter except in the case of willful misconduct or gross negligence." (Id. (§ 2.04).) Each Managing Member is held "wholly harmless from and against any loss, expense or damage suffered … by reason of anything which [the Managing Member] may do or refrain from doing hereafter in good faith for and on behalf of the Company and in furtherance of its interest." (Id.)

In 2017, Barth arranged for Alondra's sale of the Paramount Property for approximately $19 million. (RT 85:12-26, 967:1-6; Ex. 13 at 8.) Barth obtained an authorizing resolution of a majority-in-interest of the members, as required by section 2.02 of the Operating Agreement. (RT 85:5-11, 90:9-12; Ex. 1 (§ 2.02).) That authorizing resolution, dated as of July 14, 2017, expressed Alondra's desire for both the sale of the Paramount Property and its "transfer/exchange … for one or more other properties … in a transaction or transactions which would qualify as an exchange under section 1031 of the Internal Revenue Code." (Ex. 11 at 1.) The authorizing resolution specifically directed Barth to execute documents and "to take such other actions as [he] may deem appropriate in order to consummate" those transactions. (Id. at 2.) Upon the closing of Alondra's sale of the Paramount Property, Barth caused the net proceeds of that sale (approximately $12.2 million) to be deposited and held by RPM Investments, an independent qualified intermediary. (Ex. 13 at 2; RT 81:9-15, 85:15-26.)

Centerville

Centerville is a Delaware limited liability company that was formed in 2009 to acquire a

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shopping center located at 1023 South Main Street in Centerville, Ohio (the "Centerville Property"). (RT 958:5-23; Ex. 2 (§ 1.03).) BRG Properties, LLC ("BRG"), a limited liability company, was appointed as the Managing Member of Centerville. (Ex. 2 at 31 (Ex. A)). Medford HAH, LLC ("Medford HAH") acquired a nearly 58% interest in Centerville, which it continues to hold through today. (Id.; RT 960:7-15.) Black acquired an 11.31% interest in Centerville. (Ex. 2 at 31 (Ex. A).) The remaining interests in Centerville were held by two other investment entities, c/o Barth. (Id.)

The Centerville Operating Agreement, like the Alondra Operating Agreement, vests the Managing Member with full and complete charge of all affairs of the Company except for a short list of matters that require a vote of the Investor Members. (Ex. 2 (§§ 2.01, 2.02).) Unlike the Alondra Operating Agreement, the Centerville Operating Agreement does not give the Investor Members the right to vote on the disposition of the Centerville Property or the acquisition, management, or disposition of any other property. (Id. (§ 2.02).) Instead, the Managing Member and its representatives have full and complete authority over any and all such transactions. (Id.) The Centerville Operating Agreement, like the Alondra Operating Agreement, provides that the Managing Member may not "be liable or accountable in damages or otherwise to the Company or to the other Members for any error of judgment or any mistake of fact or law or for anything that [the Managing Member] may do or refrain from doing hereafter except in the case of willful misconduct or gross negligence." (Id. (§ 2.04).) The Managing Member is held "wholly harmless from and against any loss, expense or damage suffered … by reason of anything which [the Managing Member] may do or refrain from doing hereafter in good faith for and on behalf of the Company and in furtherance of its interest." (Id.) The Operating Agreement also authorizes the Managing Member or its affiliates "to provide development, management, brokerage or other services to the Company in connection with the development, management, leasing, sale, financing, and other activities of the Company, and to receive compensation therefor on a basis comparable to that which would be payable to unrelated third parties." (Id. (§ 2.06).)

In 2017, Barth arranged for Centerville's sale of the Centerville Property for $9.2 million. (RT 85:12-26, 967:1-6; Ex. 14 at 8.) Here, the Operating Agreement did not require Investor Member approval for the transaction and no Investor Member approved the transaction. Rather, Barth signed an authorizing resolution for the managing member BRG, as its sole manager. (RT 232:27-233:2; Ex. 2 (§ 2.02); Ex. 10.) That authorizing resolution, which is dated as of July 12, 2017, expressed the company's desire for both the sale of the Centerville Property and its "transfer/exchange … for one or more other properties … in a transaction or transactions which would qualify as an exchange under section 1031 of the Internal Revenue Code." (Ex. 10 at 1.) The authorizing resolution appointed and directed Barth to execute documents and "to take such

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other actions as [he] may deem appropriate in order to consummate" those transactions. (Id. at 2.) Upon the closing of Centerville's sale of the Centerville Property, Barth caused the net proceeds of that sale (approximately $1.97 million) to be deposited and held by RPM Investments. (Ex. 14 at 2; Barth, Tr. at 85:15-26.)

Purchase of Greenway Property

In December 2017, the LLCs purchased a home on 840 Greenway Drive, Beverly Hills (the Greenway property) for $17,086,000, as part of an IRC section 1031 exchange. (Exs. 16, 17, 18, 19; RT 84:19-86:27.) Centerville and Alondra subsequently leased the property to a third party, Eric Baker. (Ex. 25; RT 973:28-974:6; 93:25-94:1.)

On August 2, 2018, Baker made a written offer to Centerville and Alondra to purchase the Greenway property for $21,250,000. (Ex. 34; RT 95:8-13.) On August 14, 2018, Barth caused Centerville and Alondra to deliver a written counteroffer to Baker for $25,000,000, which Baker accepted. (Ex. 39; RT 97:12-18.) Centerville, Alondra, and Baker opened escrow to complete the sale of the Greenway property. (Ex. 40.) Thus, as of August 14, 2018, Centerville and Alondra had a binding contract to sell the Greenway property for $25,000,000, which would have resulted in a $6,692,740 profit for the LLCs and their investors.

In August 2018 Barth directed his personal attorney to create a Purchase and Sale Agreement between himself and the LLCs. There are two copies of the agreement: one appears to be backdated "as of March 2, 2018," and has a signature date of 8/14/18 (Ex. 27), the other is dated "as of August 2, 2018) and has the same signature date of 8/14/18 (Ex. 33). Barth testified he signed the agreement on August 18 and "had no idea where that [the March 2, 2018 date] came from." (RT 98:1-101:2; 104:5-28.)

The reasonable inference from the evidence is that Barth knew exactly where the March 2nd date came from because the document was created after the fact to make the Johnson family's representative, Scott Murphy believe that Barth had had an agreement to buy the Greenway property prior to Baker's August 2, 2018 offer. Murphy testified his stomach was sickened in November 2019 when he first learned that the property had been purchased by Barth for $17 million and resold to Baker for $25 million, after having reported to the Johnsons that the property had been sold to the tenant for $17 million. (RT 270:27-271:10; 275:10-276:12.) He further testified that the March 2, 2018 document was part of a review that alleviated his concern as it showed that Barth had the intent to buy the property prior to August 2018. (RT 277:25-279:21)

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The Purchase and Sale Agreement transferred the Greenway property from the LLCs to Barth for $16,900,000. (Exs. 27, 33; RT 100:18-22.) At this time, Barth was the managing member of Alondra and the agent of both Centerville and Alondra in the Greenway transaction. (Exs. 10, 11; 76:5-15, 81:21-82:12, 84:5-18.) Barth signed the Purchase and Sale Agreement on behalf of both the buyer and the sellers of the Greenway property, for $186,000 less than the LLCs had paid. (Exs. 27, 33.)

On August 21, 2018, Barth caused Alondra and Centerville, in an amendment signed by Barth, to assign their rights as seller in their escrow with Baker to Barth's wholly owned company, defendant Eastwind Financial, LLC. (Ex. 40; RT 107:27-108:10.) That same day, Barth also caused the LLCs to amend the escrow instructions in the escrow with Baker to substitute defendant Eastwind Financial, LLC as the seller in place of the LLCs. (Ex. 41; RT 107:27-108:10.) Then, on December 27, 2018, Barth executed a grant deed on behalf of the LLCs transferring the Greenway property from the LLCs to his wholly owned entity, Eastwind Financial.(Ex. 44; R 131:13-19.). Nineteen days later, on January 15, 2019, Eastwind Financial sold the Greenway property to Baker's assignee, Cobra Kai Holdings, LLC, for $25,000,000. (Ex. 45; 132:13-17, 133:9-17.) These actions deprived the LLCs of the more than $6 million in profits.

Barth claims that in August 2017, he identified the home on Greenway Drive as a potential Internal Revenue Code section 1031 exchange property for the benefit of the LLCs in August 2017. (Defendant's Opening Brief, pg. 16) This was a property he identified to his fiancé Nicole Frank, as a home he was purchasing for himself. Barth claims that instead, he used the property as a short-term bridge for the investors until a suitable long-term commercial or industrial investment property could be located, and that he was obligated to cover the LLC's losses. According to Barth, the home could be rented, generating income for the investors and satisfying the requirements of section 1031. (RT 239:6-13, 241:9-18, 971:20- 972:3.)

Barth further claims that before submitting an offer on Greenway on behalf of Alondra and Centerville, Barth drove Black by the home and explained that while he planned to buy Greenway for his own use, he could instead use it as a short-term exchange property for the LLCs and thereby defer approximately $4-5 million in capital gains taxes. (RT 48:2-10, 48:19-22, 186:27-187:4.) Barth claims that Black had no objection, provided that Barth would purchase Greenway from the LLCs for the same price, would bear the loss if the house went down in value, and thereby protect the investors against the risk of depreciation. (RT 47:24-48:10, 48:19-22, 1029:18-22.) Finally, Barth claims he assured Black that he would. (Id.) (See Defendants' Post-Trial Brief, pg. 16.)

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Barth's claim is not credible. In fact, Barth did not disclose his purchase and sale of the Greenway property to any of the investors. (RT 48:2-5, 113:28-114:9, 127:19-27, 129:4-15). Barth did not tell Scott Murphy, his colleague at Brighton Properties and the Johnson family's representative, that he was buying the Greenway property himself and keeping the $6 million in profits, even though Barth interacted "regularly," "maybe even daily," with Murphy. (RT 138:6-140; 10/5/21 259:11-15, 270:14-271:10.). Barth did not tell Zach Zalben or Stanley Black that he was selling the Greenway property to himself and keeping $6 million in profits. (RT 461:23-463:18, 466:3-15, 507:26-508:6; 771:2-14, 773:4-774:4.) Nor did Barth tell his ex-wife, Suzanne Barth, or her divorce attorney that he was planning to sell the Greenway property to himself and keep the $6 million in profits. (RT 146:12-148:7; Ex. 32.) Barth did not disclose to Herb Klein (the controller at Brighton Properties), Kathy Stimson (head of property management at Brighton Properties), or John DeCero (Barth's banker) the terms on which he was buying the Greenway property or the fact that he was personally receiving $6 million in profits from its sale. (RT 836:21-837:14, 913:2-12, 923:26-924:2, 932:12-24.) Barth told his fiancée, Nicole Frank, that he had personally purchased the Greenway property and concealed from her the fact that he had actually caused the home to be purchased by investors using investor money. (RT 679:1-11) . Nor did he inform her he was selling the Greenway property that she believed would be their home. (RT 673:3-6, 678.) Finally, Barth's testimony was uncorroborated by any documentation. (RT 200:4-10.) When compared to the testimony of Zeldin, Murphy, Frank, Klein, Stimson, and DeCero, his claim is not credible.

Analysis of the Law

Breach of Fiduciary Duty (1st Cause of Action)

The elements of a breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damages proximately caused by that breach. (Meister v. Mensinger (2014) 230 Cal.App. 4th 381, 395.)
"A fiduciary relationship is 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . .'" (Wolf v. Superior Court (2003) 107 Cal.App.4th 25, 29.)
As the managing member of Alondra, Barth owed the investor members fiduciary duties of loyalty and care. (Corp. Code § 17704.09(a).) Thus, Barth was "obligated to act with the utmost loyalty and in the highest good faith when dealing with any member of the LLC." (Feresi v. The

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Livery, LLC (2014) 232 Cal.App. 4th 419, 425 [A manager is "obligated to act with the utmost loyalty and in the highest good faith when dealing with any member of the LLC. He may not obtain any advantage over … any … member of the LLC by even the slightest misrepresentation or concealment."].) The managing member owes the duty of loyalty (Corp. Code § 17704.09(b)(1)-(3)) and a separate duty of care to the LLC and its member investors. "A member's duty of care to a limited liability company and the other members in the conduct … of the activities of the limited liability company is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." (Corp. Code § 17704.09(c).)

Barth was the agent of Centerville in connection with the Greenway transaction. He was appointed as the agent and authorized signatory of the Centerville (Ex. 10, 10/4/21 Tr. at 80-82, 84; 10/5/21 Tr. at 235) and executed lease agreements (Ex. 25), purchase and sale agreements (Exs. 27, 33), counteroffer (Ex. 39), and the grant deed (Ex. 44.)

Barth violated his fiduciary duties, as the managing member of Alondra, and the agent of Centerville, when as discussed above, he directed his personal attorney to create a Purchase and Sale Agreement between himself and the LLCs. Barth then executed the Purchase and Sale Agreement on both his own personal behalf and on behalf of the LLCs, transferring the Greenway property from the LLCs to himself for $16,900,000. On August 21, 2018, Barth caused the LLCs to assign to Barth's wholly owned company, defendant Eastwind Financial, LLC, their rights as seller in their escrow with Baker. That same day, Barth also caused the LLCs to amend the escrow instructions in the escrow with Baker to substitute defendant Eastwind Financial, LLC as the seller in place of the LLCs. Thereafter, on December 27, 2018, Barth executed a grant deed on behalf of the LLCs formally transferring the Greenway property from the LLCs to his wholly owned entity, Eastwind Financial. Nineteen days later, on January 15, 2019, Eastwind Financial consummated the sale of the Greenway property to Baker's assignee, Cobra Kai Holdings, LLC, for $25,000,000. Taken together, the effect of Barth's actions was to deprive the LLCs of their lucrative $25,000,000 sale to Baker, pay the LLCs less than the $17,086,000 they originally paid for the Greenway property, and substitute Barth in the LLCs' place in the pending sale, so that Barth and his wholly owned entity, Eastwind Financial, could reap over $6 million in profits from the Baker transaction. Barth violated his fiduciary duty of loyalty by engaging in self-dealing transactions, misappropriating the LLCs' Greenway property at far less than its actual value, and then seizing for his own personal gain over $6 million in profits that the LLCs would have obtained from their pending sale agreement with Baker. Barth also violated his fiduciary duty of care by willfully taking steps to advance his own personal financial interests at the expense of Centerville and Alondra.

Barth claims that he did not breach a duty because the operating agreements contain provisions that modify the duties owed by the managing member, such that he is only liable in a case of willful misconduct or gross negligence. (Defendants' Opening Brief, pgs. 39-42; see Ex. 1 §

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2.04, Ex. 2 § 2.04.) Here, based on the evidence discussed above, the Court finds that the decision was not made in good faith to advance the interests of the LLC, but rather was willful misconduct, intended to advance Barth's own interests. Although Barth argues the evidence supports his good faith because the members would have been taxed more than $4 million in capital gains there was no actual evidence presented as to the actual tax implications for the investors.

Misappropriation of Opportunity (2nd Cause of Action)

"[T]he doctrine of corporate opportunity … prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence." (Kelegian v. Mgrdichian (1995) 53 Cal.App.4th 982, 988-89.) "Public policy … has established a rule that demands of a corporate officer or director … the most scrupulous observance of his duty … to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers." (Bancroft-Whitney Co. v. Glen (1966) 64 Cal.2d 327, 345, citing Guth v. Loft, Inc. (Del. Ch. 1939) 5 A.2d 503, 510.) Under the controlling tests, "a corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." (Ibid.; see Yiannatsis v. Stephanis (Del. 1995) 653 A.2d 275 [elements of misappropriation of corporate opportunity claim are (1) a corporate opportunity is presented to a corporate officer or director, which the corporation is financially able to undertake; (2) the opportunity is in the line with the corporation's business and is of practical advantage to it; (3) the opportunity is one in which the corporation has an interest or a reasonable expectancy; and (4) by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation].)

As discussed above, Barth's conduct in this case constitutes the misappropriation of a corporate opportunity under both California and Delaware law. The LLCs were involved in the business of real estate investment, and the Greenway property was such an investment. Greenway was an investment property used by the LLCs for business purposes. Not only did the LLCs have the financial ability to undertake the sale of the Greenway property, they had, in fact, already entered into a legally binding contract to sell the Greenway property to a third party for over $6 million in profits. The LLCs had both an interest and an expectancy in the Greenway property and in obtaining the substantial profits from its pending sale. Barth misappropriated that opportunity for his own benefit and to the detriment of the LLCs.

Breach of Contract (4th Cause of Action)

"To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. [Citation]" (Harris v. Rudin, Richman & Appel (1999) 74 Cal.App.4th 299,

307.) The FAC alleges Barth breached sections 2.02(c) and 2.05 of the Operating Agreement. In their post-trial brief, Plaintiffs present no argument regarding these allegations, but rather argue other breaches. Plaintiffs has waived any claim to relief by failing to present argument about the claim. (Barker v. Lull Eng'g Co.(1978) 20 Cal. 3d 413, 422 n.3.)

Conversion (6th Cause of Action)

In the FAC, Plaintiffs allege that Eastwind converted the specific identifiable sum of $170,860 relating to the acquisition of Greenway. (FAC ¶ 44.) In the post-trial brief, Plaintiffs again presented no argument regarding this allegation, but rather argues that Barth and Eastwind converted the $6 million in profits. Plaintiffs have waived any claim to relief by failing to present argument about the claim.

Affirmative Defenses

Standing

Defendants claim Plaintiffs lack standing. An LLC member is a nominal plaintiff who files a derivative action on the LLC's behalf to vindicate the LLC's rights. (Grosset v. Wenaas (2008) 42 Cal.4th 1100, 1108.) "When a derivative action is successful, the corporation is the only party that benefits from any recovery; the shareholders derive no benefit except the indirect benefit resulting from a realization upon the corporation's assets." (Ibid.) For this reason, there are only two, basic requirements for a shareholder's standing: (1) the member must have owned an interest in the LLC at the time of the alleged wrongdoing; and (2) the member must continue to own that interest during the litigation. (Id. at p. 1109; Corp. Code § 17709.02(a)(1); Del. Code § 18-1002.) Plaintiffs meet these requirements with respect to both LLCs.

(a) HPTC has standing

The Black family's interest in Centerville has been owned since at least 2017 by the Stanley Black Trust and the Black Marital Trust, for which Haderway PTC, LLC (HPTC) is the current trustee. (RT 533:20-23, 536:2-7). From at least 2017 through the filing of the lawsuit, the nominal holder of the Centerville interest was Cupita, an interim administrative trust of the Stanley and Joyce Black Family Trust which was formed after Joyce Black's death for the sole purpose of allocating the Stanley and Joyce Black Family Trust's assets between the survivor's trust (the Stanley Black Trust) and the marital trust (the Black Marital Trust). (RT 536:2-537:23, 539:4-13, 1189:13-16, Ex. 225.) This allocation was completed on November 30, 2020, at which point the Cupita administrative trust allocated the Stanley and Joyce Black Family Trust's Centerville interest equally between the survivor's trust (the Stanley Black Trust) and the marital trust (the Black Marital Trust). (RT 536:2-537:23, 539:4-13, 1189:13-16, Ex 225.) In November 2020 HPTC became the successor trustee of all of the Black family trusts. (Exs. 224, 225, RT 532:4-10, 536:2-24, 730:12-26.) As successor
trustee, HPTC has standing to litigate a derivative action on behalf of the trusts and their beneficiaries. (See, e.g., Pearce v. Superior Court (1983) 149 Cal.App.3d 1058, 1062-67;

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Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal.App.4th 153, 170, abrogated on other grounds by People v. Rogers (2013) 57 Cal.4th 296, 330.)
Alternatively, Barth argues that any transfer from Black was void under Centerville's operating agreement as no notice was given. However, Barth presented no evidence at trial that no notice was given. Moreover, Plaintiffs established by a preponderance of the evidence that Barth, the managing partner, had notice. This is a logical inference from the evidence before the Court that Barth was aware that Black allocated his investments through family trusts. (RT 183: 6-16.)

(b) BFSB has standing

BFSB has owned the Black family's 29% interest in Alondra since 2012. (RT: 533:24-535:7, 578:10-579:5; Ex. 230.) Indeed, in December 2012, Barth personally signed a written assignment and amendment to Alondra's operating agreement acknowledging the validity of BFSB's membership status. (Ex. 230.)
In January 2020, BFSB mistakenly transferred its Alondra interest to another entity owned by the Black family, Haderway Properties, LLC ("HP"), as part of an estate planning "roll up." (RT 534:13-535:7.). When it was discovered this roll up of Alondra could have adverse and unintended effects on the Black family's ability to pursue this litigation, the transfers of BFSB's Alondra's interest to the Black family trusts and HP were rescinded, and the Alondra interest was restored to BFSB. (RT 534:13-535:7; 1185:1-1186:22 Exs. 81-1 to 81-15.) A rescission renders an assignment "void ab initio, as if it never existed." (DuBeck v. California Physicians' Service (2015) 234 Cal.App.4th 1254, 1264.)

These recissions were effectively made by the 2020 trusts, which were the successors in interest to the 2012 trusts. The 2012 trusts were "decanted into the 2020 trusts, whereby the 2020 trusts acquired all of the assets and liabilities of the 2012 trusts. (Probate Code, § 19527 [""("A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power."]) (RT 1170: 1174: Exs. 273R at pgs. 273-6, 273-66-68, 272R at pgs. 272-6, 272-64, 271R at pgs. 271-6-271-64, 270R at pgs. 270-6, 270-64, 275 at pg. 275-2.) Although Nevada does not have a specific statute describing the successor status of a decanted trust, Nevada law treats "successors in interest" similarly to California. (See, e.g. Village Builders 96, L.P. v. U.S. Labs., Inc. (Nev. 2005) 112 P.3d 1082, 1087 ["[W]hen one corporation sells all of its assets to another corporation," the purchaser becomes "liable for the debts of the seller" where, as here, "the purchaser expressly or impliedly agrees to assume such debts," "the transaction is really a consolidation or a merger" or "the purchasing corporation is merely a continuation of the selling corporation."].)

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Ratification
Defendants claim that a majority of Centerville's disinterested members have ratified the Greenway transaction. (Defendants' Opening Brief, pgs. 50-54.) The Court notes that Defendants have abandoned this claim as to Alondra.
This claim also fails as to Centerville. Under Delaware law, where the manager's act being challenged "constitutes a gift of corporate assets to executives or was ultra vires, illegal, or fraudulent," then "its defects will not be cured by stockholders' ratification unless such ratification was unanimous." (Kerbs v. California Eastern Airways (Del. 1952) 90 A.2d 652, 655-56.) Here, there was not unanimous ratification. Indeed, Defendants only argue that a majority-in-interest ratified the transactions. (See Defendants' Opening Brief, pg. 50.) Here, as discussed above, the transaction was at a minimum, fraudulent.

Release

Defendants argue Plaintiffs' claims are barred by releases signed by a majority of disinterested members of Centerville and David Bryant, the other managing member of Alondra. (Defendants' Opening Brief, pg. 54; Exs. 311, 312, 314, 317, 319, 320 and 322.) Defendant cites one federal case regarding the authority of a company to release claims asserted by a derivative plaintiff (Wolf v. Barkes (2d Cir. 1965) 348 F.2d 994, 997 for the proposition that releases signed by a majority-in interest of its disinterested members (Centerville), and by a disinterested managing member (Alondra) is a valid release of a claim asserted by a derivative plaintiff, even after the derivative suit has commenced. Defendant fails to explain how this class action case applies to LLCs, nor did Defendants establish that Bryant was actually disinterested. (See Clark v. Loas & Nettleton Financial Corp. (5th Cir. 1980) 625 F.2d 49, 52 ["As with other management functions, however, the power to control corporate litigation presupposes that the directors have no interest in its exercise."].
Estoppel
Defendants' argument that Black's purported agreement to Barth's proposal to defer his purchase of Greenway for the benefit of the LLCs and purchase the house at cost one year later fails. (See Defendant's Post-Trial Brief, pg. 55.) As described above, Defendants failed to establish that Black made that agreement, nor do Defendants present authority that if such an agreement was made by Black it would bind the LLCs.
Damages
Plaintiffs established $6,692,740 in lost profits as a result of Barth's actions. These damages are based upon a determination of the total profits the LLCs would have received if they had sold the Greenway property directly to Baker for the $25,000,000 sales price. (RT 428:7-21, 432:26-

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440:3.)
Punitive damages
Plaintiffs request punitive damages in the amount of $10,000,000. A plaintiff may seek punitive damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice…." (Civil Code §3294(a).) "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civil Code §3294(c)(1)-(3).)
"In arriving at any award of punitive damages, [the trier of fact is] to consider the following: [¶] (1) The reprehensibility of the conduct of the defendant, [¶] (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition, [¶] (3) That the punitive damages must bear a reasonable relation to the actual damages." (Gagnon v. Continental Casualty Co. (1989) 211 Cal.App.3d 1598, 1603 [quoting BAJI 14.71]; see also CACI 3942 (2020 ed.).)

Plaintiffs have established by clear and convincing evidence their entitlement to punitive damages. Here, Barth maliciously and fraudulently diverted the profits of the Greenway property sale, using a double escrow where he signed the documents for both parties. Plaintiffs established that Barth has a net worth of between $100 and $125 million. (Ex. 85; RT 204:13-205:25.) The Court finds that punitive damages in the amount of $ 6,692,740 are appropriate.

Attorney's Fees

Plaintiffs argue that they are entitled to additional attorney's fees based upon Paragraph 8.03 of the Alondra and Centerville Operating Agreements which provide: "[i]f any proceeding. . . is brought by any Member against any other Member that arises out of this Agreement, then the prevailing Member is such proceeding . . . shall be entitled to recover reasonable attorney's fees and costs." (Exs. 1 and 2.) Plaintiffs have not established their entitlement to fees. Regarding Centerville, neither Barth nor Eastwind is a member of the company or a party to the Operating Agreement, thus they are not subject to fee-shifting. (Ex. 2, § 8.03.) As to both Alondra and

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Centerville, since HPTC and BFSB are only nominal plaintiffs, and Alondra and Centerville are the real parties in the action, the action is not a proceeding by a Member against any other Member. (See Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 1003 [" 'the particular stockholder who brings the suit is merely a nominal party plaintiff.' "].) Plaintiffs may seek attorneys' fees in a post-judgment motion under the common fund doctrine. (See In re Oracle Sec. Litig. (N.D. Cal. 1994) 852 F. Supp. 1437, 1445 [applying Delaware law]; Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 320 ["The common-fund doctrine has been held to apply in favor of a plaintiff who has successfully maintained a stockholder's derivative action on behalf of a corporation."].)

This Proposed Statement of Decision will become the Final Statement of Decision if objections are not filed within the time allowed by law, pursuant to CRC 3.1590. Plaintiffs are ordered to lodge a proposed Judgment within 10 days of the Statement of Decision becoming final.

The Clerk is to provide notice to the parties.

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1 In their trial brief, Plaintiffs indicated that they had withdrawn the third cause of action (Trial Brief, pg. 10, n. 2.)
2 When a citation to the transcript includes objections, the Court has not considered testimony as to which an objection was sustained.
3 When a citation to the transcript includes objections, the Court has not considered testimony as to which an objection was sustained.

The Court's written Ruling on Submitted Matter is signed and filed this date.

Certificate of Mailing is attached.

Judge: Honorable Monica Bachner CSR: None
Judicial Assistant: A. Barton ERM: None
Courtroom Assistant: None Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

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NATURE OF PROCEEDINGS:
Ruling on Submitted Matter

The Court, having taken the matter under submission on January 24, 2022, now rules as follows:

On June 3, 2020, Stanley Black ("Black") filed the First Amended Complaint derivatively on behalf of JBR Alondra LLC ("Alondra") and Centerville Place, LLC ("Centerville") (collectively "the LLCs"). The FAC brought six causes of action: breach of fiduciary duty against Robert Barth ("Barth) (1st cause of action), misappropriation of opportunity against Barth (2nd cause of action), removal of managing member against Barth (3rd cause of action), breach of contract against Barth (4th cause of action), and two causes of action for conversion against the entities Rivetage (5th cause of action) and Eastwind Financial, LLC ("Eastwind") (6th cause of action). 1 On April 27, 2021, Haderway PTC, LLC ("HPTC") was substituted as the Plaintiff. On October 12, 2021, Rivetage was dismissed. On the first day of trial, the Court allowed the substitution of another entity BFSB Portfolio, LP ("BFSB") as the proper plaintiff for Alondra. Thus at trial there were two plaintiffs.

The court conducted a court trial on October 4, 5, 6, 12, 13, 14, 29, 2021and November 29, 2021. The following witnesses testified: Robert Barth, Scott Murphy, Erik Finkelstein, Eric Sussman, Shelly Cuff, Zachary Zalben, Tali Klapach, Bernhard Punzet, Dennis Roach (by deposition), Leon Vahn, Nicole Frank, Herbert Klein, Constantijn Panis, John DeCero, Kathy Stimson, and Karen Sloane. Plaintiffs filed their opening post-trial brief on December 15, 2021, Defendants filed their post-trial brief on January 6, 2022, and Plaintiffs filed their reply on January 19, 2021. The parties presented closing arguments on January 24, 2022.

In making its factual determinations, the Court has accepted and applied the credible testimony of the various witnesses. 2 With that in mind, the Court make the following factual

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determinations:

The Relationship between Barth and Black

Barth and Black are sophisticated real estate investors who began investing together in commercial real estate in the 1980s. (RT 62:10-14, 939:27-940:4.) The two acquired properties in the name of Black Equities, with Black as the company's Chairman and Barth as its CEO. (RT 511:21-512:5, 514:23-515:3.) Investors included the "Johnson family" from New York. (RT 254:20-22.)

In the mid-1990s, Barth and Black formed Brighton Properties, Inc. ("Brighton"), also known as SB Management, to operate as their "in-house property management division" and manage their joint real estate investments. (RT 62:15-17, 940:25-941:19, 942:12-22, 945:7-25; 513:18-26, 514:12-15.) Black and Barth were equal partners in the venture, which they ran informally from the start. Specifically, other than the initial formation documents, there were no written agreements, there was never a board of directors meeting, there were no corporate resolutions or minutes. (RT 62:18-63:8.) Barth and Murphy described the practice as handshake deals. (RT 50:2-17, 200:19-23, 201:23-25; 284:20-285:3, 300:9-28.)

Until the fall of 2019, Barth and Black had offices in the same suite, separated by about 20 feet with a shared wall. (RT 64:21-65:1, 942:23-25; 299:15-17; 459:18-23, 461:14-17.) Barth and Black spoke face-to-face, typically a couple of times a day. (RT 64:21-65:1; 595:13- 596:3.)

In consideration for its property management services, Brighton collected property management fees ranging from one to five percent of gross rents. (RT: 227:21-28.) Barth and his affiliates generally collected transaction fees of between one-half of a percent and two percent in connection with acquisitions and dispositions of real property that they organized on behalf of the investor group. (RT 227:21-228:4, 946:13-21, 947:2-20.)

The LLCs Alondra and Centerville

Alondra

Alondra is a California limited liability company that was formed in 1995 to acquire an industrial property located at 7210-7314 Alondra Boulevard in Paramount, California (the "Paramount Property"). (Ex. 1 (§ 1.03); RT 953:10-14.) Barth and David Bryant ("Bryant") were appointed as the Managing Members of Alondra. (Ex. 1 at 30 (Ex. A); RT 289:9-11.) Johnson had a 50 percent interest in Alondra, which he assigned to an affiliate, 610 RE Partners, in 2012. (Ex. 267;

Barth, Tr. at 1051:8-25.) 3 Black had a 29 percent interest in Alondra, which he assigned to BFSB in 2012. (Ex. 201). The remaining interests in Alondra were held by Barth and several other investors. (Ex. 1 at 30 (Ex. A).)

Section 2.01 of Alondra's Operating Agreement provides that, with certain enumerated exceptions, "the Managing Members shall have the full and complete charge of all affairs of the Company, and the management and control of the Company's business shall rest exclusively with the Managing Members." (Ex. 1 (§ 2.01).) Either Managing Member, "acting alone," is authorized to act on behalf of the company in all respects. (Id). The Managing Members are permitted to engage in activities that "are competitive with the Company or otherwise, without having or incurring any obligation to offer any interest in such activities to the Company or to the other Members." (Id. (§ 1.04).) The fiduciary duties of the Managing Members are "limited solely" to those arising from the acquisition, management, or disposition of the Paramount Property. (Id. (§§ 1.03, 1.04).) The Operating Agreement further provides that the Managing Members may not "be liable or accountable in damages or otherwise to the Company or to the other Members for any error of judgment or any mistake of fact or law or for anything that [the Managing Member] may do or refrain from doing hereafter except in the case of willful misconduct or gross negligence." (Id. (§ 2.04).) Each Managing Member is held "wholly harmless from and against any loss, expense or damage suffered … by reason of anything which [the Managing Member] may do or refrain from doing hereafter in good faith for and on behalf of the Company and in furtherance of its interest." (Id.)

In 2017, Barth arranged for Alondra's sale of the Paramount Property for approximately $19 million. (RT 85:12-26, 967:1-6; Ex. 13 at 8.) Barth obtained an authorizing resolution of a majority-in-interest of the members, as required by section 2.02 of the Operating Agreement. (RT 85:5-11, 90:9-12; Ex. 1 (§ 2.02).) That authorizing resolution, dated as of July 14, 2017, expressed Alondra's desire for both the sale of the Paramount Property and its "transfer/exchange … for one or more other properties … in a transaction or transactions which would qualify as an exchange under section 1031 of the Internal Revenue Code." (Ex. 11 at 1.) The authorizing resolution specifically directed Barth to execute documents and "to take such other actions as [he] may deem appropriate in order to consummate" those transactions. (Id. at 2.) Upon the closing of Alondra's sale of the Paramount Property, Barth caused the net proceeds of that sale (approximately $12.2 million) to be deposited and held by RPM Investments, an independent qualified intermediary. (Ex. 13 at 2; RT 81:9-15, 85:15-26.)

Centerville

Centerville is a Delaware limited liability company that was formed in 2009 to acquire a

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shopping center located at 1023 South Main Street in Centerville, Ohio (the "Centerville Property"). (RT 958:5-23; Ex. 2 (§ 1.03).) BRG Properties, LLC ("BRG"), a limited liability company, was appointed as the Managing Member of Centerville. (Ex. 2 at 31 (Ex. A)). Medford HAH, LLC ("Medford HAH") acquired a nearly 58% interest in Centerville, which it continues to hold through today. (Id.; RT 960:7-15.) Black acquired an 11.31% interest in Centerville. (Ex. 2 at 31 (Ex. A).) The remaining interests in Centerville were held by two other investment entities, c/o Barth. (Id.)

The Centerville Operating Agreement, like the Alondra Operating Agreement, vests the Managing Member with full and complete charge of all affairs of the Company except for a short list of matters that require a vote of the Investor Members. (Ex. 2 (§§ 2.01, 2.02).) Unlike the Alondra Operating Agreement, the Centerville Operating Agreement does not give the Investor Members the right to vote on the disposition of the Centerville Property or the acquisition, management, or disposition of any other property. (Id. (§ 2.02).) Instead, the Managing Member and its representatives have full and complete authority over any and all such transactions. (Id.) The Centerville Operating Agreement, like the Alondra Operating Agreement, provides that the Managing Member may not "be liable or accountable in damages or otherwise to the Company or to the other Members for any error of judgment or any mistake of fact or law or for anything that [the Managing Member] may do or refrain from doing hereafter except in the case of willful misconduct or gross negligence." (Id. (§ 2.04).) The Managing Member is held "wholly harmless from and against any loss, expense or damage suffered … by reason of anything which [the Managing Member] may do or refrain from doing hereafter in good faith for and on behalf of the Company and in furtherance of its interest." (Id.) The Operating Agreement also authorizes the Managing Member or its affiliates "to provide development, management, brokerage or other services to the Company in connection with the development, management, leasing, sale, financing, and other activities of the Company, and to receive compensation therefor on a basis comparable to that which would be payable to unrelated third parties." (Id. (§ 2.06).)

In 2017, Barth arranged for Centerville's sale of the Centerville Property for $9.2 million. (RT 85:12-26, 967:1-6; Ex. 14 at 8.) Here, the Operating Agreement did not require Investor Member approval for the transaction and no Investor Member approved the transaction. Rather, Barth signed an authorizing resolution for the managing member BRG, as its sole manager. (RT 232:27-233:2; Ex. 2 (§ 2.02); Ex. 10.) That authorizing resolution, which is dated as of July 12, 2017, expressed the company's desire for both the sale of the Centerville Property and its "transfer/exchange … for one or more other properties … in a transaction or transactions which would qualify as an exchange under section 1031 of the Internal Revenue Code." (Ex. 10 at 1.) The authorizing resolution appointed and directed Barth to execute documents and "to take such

other actions as [he] may deem appropriate in order to consummate" those transactions. (Id. at 2.) Upon the closing of Centerville's sale of the Centerville Property, Barth caused the net proceeds of that sale (approximately $1.97 million) to be deposited and held by RPM Investments. (Ex. 14 at 2; Barth, Tr. at 85:15-26.)

Purchase of Greenway Property

In December 2017, the LLCs purchased a home on 840 Greenway Drive, Beverly Hills (the Greenway property) for $17,086,000, as part of an IRC section 1031 exchange. (Exs. 16, 17, 18, 19; RT 84:19-86:27.) Centerville and Alondra subsequently leased the property to a third party, Eric Baker. (Ex. 25; RT 973:28-974:6; 93:25-94:1.)

On August 2, 2018, Baker made a written offer to Centerville and Alondra to purchase the Greenway property for $21,250,000. (Ex. 34; RT 95:8-13.) On August 14, 2018, Barth caused Centerville and Alondra to deliver a written counteroffer to Baker for $25,000,000, which Baker accepted. (Ex. 39; RT 97:12-18.) Centerville, Alondra, and Baker opened escrow to complete the sale of the Greenway property. (Ex. 40.) Thus, as of August 14, 2018, Centerville and Alondra had a binding contract to sell the Greenway property for $25,000,000, which would have resulted in a $6,692,740 profit for the LLCs and their investors.

In August 2018 Barth directed his personal attorney to create a Purchase and Sale Agreement between himself and the LLCs. There are two copies of the agreement: one appears to be backdated "as of March 2, 2018," and has a signature date of 8/14/18 (Ex. 27), the other is dated "as of August 2, 2018) and has the same signature date of 8/14/18 (Ex. 33). Barth testified he signed the agreement on August 18 and "had no idea where that [the March 2, 2018 date] came from." (RT 98:1-101:2; 104:5-28.)

The reasonable inference from the evidence is that Barth knew exactly where the March 2nd date came from because the document was created after the fact to make the Johnson family's representative, Scott Murphy believe that Barth had had an agreement to buy the Greenway property prior to Baker's August 2, 2018 offer. Murphy testified his stomach was sickened in November 2019 when he first learned that the property had been purchased by Barth for $17 million and resold to Baker for $25 million, after having reported to the Johnsons that the property had been sold to the tenant for $17 million. (RT 270:27-271:10; 275:10-276:12.) He further testified that the March 2, 2018 document was part of a review that alleviated his concern as it showed that Barth had the intent to buy the property prior to August 2018. (RT 277:25-279:21)

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The Purchase and Sale Agreement transferred the Greenway property from the LLCs to Barth for $16,900,000. (Exs. 27, 33; RT 100:18-22.) At this time, Barth was the managing member of Alondra and the agent of both Centerville and Alondra in the Greenway transaction. (Exs. 10, 11; 76:5-15, 81:21-82:12, 84:5-18.) Barth signed the Purchase and Sale Agreement on behalf of both the buyer and the sellers of the Greenway property, for $186,000 less than the LLCs had paid. (Exs. 27, 33.)

On August 21, 2018, Barth caused Alondra and Centerville, in an amendment signed by Barth, to assign their rights as seller in their escrow with Baker to Barth's wholly owned company, defendant Eastwind Financial, LLC. (Ex. 40; RT 107:27-108:10.) That same day, Barth also caused the LLCs to amend the escrow instructions in the escrow with Baker to substitute defendant Eastwind Financial, LLC as the seller in place of the LLCs. (Ex. 41; RT 107:27-108:10.) Then, on December 27, 2018, Barth executed a grant deed on behalf of the LLCs transferring the Greenway property from the LLCs to his wholly owned entity, Eastwind Financial.(Ex. 44; R 131:13-19.). Nineteen days later, on January 15, 2019, Eastwind Financial sold the Greenway property to Baker's assignee, Cobra Kai Holdings, LLC, for $25,000,000. (Ex. 45; 132:13-17, 133:9-17.) These actions deprived the LLCs of the more than $6 million in profits.

Barth claims that in August 2017, he identified the home on Greenway Drive as a potential Internal Revenue Code section 1031 exchange property for the benefit of the LLCs in August 2017. (Defendant's Opening Brief, pg. 16) This was a property he identified to his fiancé Nicole Frank, as a home he was purchasing for himself. Barth claims that instead, he used the property as a short-term bridge for the investors until a suitable long-term commercial or industrial investment property could be located, and that he was obligated to cover the LLC's losses. According to Barth, the home could be rented, generating income for the investors and satisfying the requirements of section 1031. (RT 239:6-13, 241:9-18, 971:20- 972:3.)

Barth further claims that before submitting an offer on Greenway on behalf of Alondra and Centerville, Barth drove Black by the home and explained that while he planned to buy Greenway for his own use, he could instead use it as a short-term exchange property for the LLCs and thereby defer approximately $4-5 million in capital gains taxes. (RT 48:2-10, 48:19-22, 186:27-187:4.) Barth claims that Black had no objection, provided that Barth would purchase Greenway from the LLCs for the same price, would bear the loss if the house went down in value, and thereby protect the investors against the risk of depreciation. (RT 47:24-48:10, 48:19-22, 1029:18-22.) Finally, Barth claims he assured Black that he would. (Id.) (See Defendants' Post-Trial Brief, pg. 16.)

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Barth's claim is not credible. In fact, Barth did not disclose his purchase and sale of the Greenway property to any of the investors. (RT 48:2-5, 113:28-114:9, 127:19-27, 129:4-15). Barth did not tell Scott Murphy, his colleague at Brighton Properties and the Johnson family's representative, that he was buying the Greenway property himself and keeping the $6 million in profits, even though Barth interacted "regularly," "maybe even daily," with Murphy. (RT 138:6-140; 10/5/21 259:11-15, 270:14-271:10.). Barth did not tell Zach Zalben or Stanley Black that he was selling the Greenway property to himself and keeping $6 million in profits. (RT 461:23-463:18, 466:3-15, 507:26-508:6; 771:2-14, 773:4-774:4.) Nor did Barth tell his ex-wife, Suzanne Barth, or her divorce attorney that he was planning to sell the Greenway property to himself and keep the $6 million in profits. (RT 146:12-148:7; Ex. 32.) Barth did not disclose to Herb Klein (the controller at Brighton Properties), Kathy Stimson (head of property management at Brighton Properties), or John DeCero (Barth's banker) the terms on which he was buying the Greenway property or the fact that he was personally receiving $6 million in profits from its sale. (RT 836:21-837:14, 913:2-12, 923:26-924:2, 932:12-24.) Barth told his fiancée, Nicole Frank, that he had personally purchased the Greenway property and concealed from her the fact that he had actually caused the home to be purchased by investors using investor money. (RT 679:1-11) . Nor did he inform her he was selling the Greenway property that she believed would be their home. (RT 673:3-6, 678.) Finally, Barth's testimony was uncorroborated by any documentation. (RT 200:4-10.) When compared to the testimony of Zeldin, Murphy, Frank, Klein, Stimson, and DeCero, his claim is not credible.

Analysis of the Law

Breach of Fiduciary Duty (1st Cause of Action)

The elements of a breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damages proximately caused by that breach. (Meister v. Mensinger (2014) 230 Cal.App. 4th 381, 395.)
"A fiduciary relationship is 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . .'" (Wolf v. Superior Court (2003) 107 Cal.App.4th 25, 29.)
As the managing member of Alondra, Barth owed the investor members fiduciary duties of loyalty and care. (Corp. Code § 17704.09(a).) Thus, Barth was "obligated to act with the utmost loyalty and in the highest good faith when dealing with any member of the LLC." (Feresi v. The

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Livery, LLC (2014) 232 Cal.App. 4th 419, 425 [A manager is “obligated to act with the utmost loyalty and in the highest good faith when dealing with any member of the LLC. He may not obtain any advantage over … any … member of the LLC by even the slightest misrepresentation or concealment.”].) The managing member owes the duty of loyalty (Corp. Code § 17704.09(b)(1)-(3)) and a separate duty of care to the LLC and its member investors. “A member's duty of care to a limited liability company and the other members in the conduct … of the activities of the limited liability company is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.” (Corp. Code § 17704.09(c).)

Barth was the agent of Centerville in connection with the Greenway transaction. He was appointed as the agent and authorized signatory of the Centerville (Ex. 10, 10/4/21 Tr. at 80-82, 84; 10/5/21 Tr. at 235) and executed lease agreements (Ex. 25), purchase and sale agreements (Exs. 27, 33), counteroffer (Ex. 39), and the grant deed (Ex. 44.)

Barth violated his fiduciary duties, as the managing member of Alondra, and the agent of Centerville, when as discussed above, he directed his personal attorney to create a Purchase and Sale Agreement between himself and the LLCs. Barth then executed the Purchase and Sale Agreement on both his own personal behalf and on behalf of the LLCs, transferring the Greenway property from the LLCs to himself for $16,900,000. On August 21, 2018, Barth caused the LLCs to assign to Barth’s wholly owned company, defendant Eastwind Financial, LLC, their rights as seller in their escrow with Baker. That same day, Barth also caused the LLCs to amend the escrow instructions in the escrow with Baker to substitute defendant Eastwind Financial, LLC as the seller in place of the LLCs. Thereafter, on December 27, 2018, Barth executed a grant deed on behalf of the LLCs formally transferring the Greenway property from the LLCs to his wholly owned entity, Eastwind Financial. Nineteen days later, on January 15, 2019, Eastwind Financial consummated the sale of the Greenway property to Baker’s assignee, Cobra Kai Holdings, LLC, for $25,000,000. Taken together, the effect of Barth’s actions was to deprive the LLCs of their lucrative $25,000,000 sale to Baker, pay the LLCs less than the $17,086,000 they originally paid for the Greenway property, and substitute Barth in the LLCs’ place in the pending sale, so that Barth and his wholly owned entity, Eastwind Financial, could reap over $6 million in profits from the Baker transaction. Barth violated his fiduciary duty of loyalty by engaging in self-dealing transactions, misappropriating the LLCs’ Greenway property at far less than its actual value, and then seizing for his own personal gain over $6 million in profits that the LLCs would have obtained from their pending sale agreement with Baker. Barth also violated his fiduciary duty of care by willfully taking steps to advance his own personal financial interests at the expense of Centerville and Alondra.

Barth claims that he did not breach a duty because the operating agreements contain provisions that modify the duties owed by the managing member, such that he is only liable in a case of willful misconduct or gross negligence. (Defendants’ Opening Brief, pgs. 39-42; see Ex. 1 §

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2.04, Ex. 2 § 2.04.) Here, based on the evidence discussed above, the Court finds that the decision was not made in good faith to advance the interests of the LLC, but rather was willful misconduct, intended to advance Barth's own interests. Although Barth argues the evidence supports his good faith because the members would have been taxed more than $4 million in capital gains there was no actual evidence presented as to the actual tax implications for the investors.

Misappropriation of Opportunity (2nd Cause of Action)

"[T]he doctrine of corporate opportunity … prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence." (Kelegian v. Mgrdichian (1995) 53 Cal.App.4th 982, 988-89.) "Public policy … has established a rule that demands of a corporate officer or director … the most scrupulous observance of his duty … to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers." (Bancroft-Whitney Co. v. Glen (1966) 64 Cal.2d 327, 345, citing Guth v. Loft, Inc. (Del. Ch. 1939) 5 A.2d 503, 510.) Under the controlling tests, "a corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." (Ibid.; see Yiannatsis v. Stephanis (Del. 1995) 653 A.2d 275 [elements of misappropriation of corporate opportunity claim are (1) a corporate opportunity is presented to a corporate officer or director, which the corporation is financially able to undertake; (2) the opportunity is in the line with the corporation's business and is of practical advantage to it; (3) the opportunity is one in which the corporation has an interest or a reasonable expectancy; and (4) by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation].)

As discussed above, Barth's conduct in this case constitutes the misappropriation of a corporate opportunity under both California and Delaware law. The LLCs were involved in the business of real estate investment, and the Greenway property was such an investment. Greenway was an investment property used by the LLCs for business purposes. Not only did the LLCs have the financial ability to undertake the sale of the Greenway property, they had, in fact, already entered into a legally binding contract to sell the Greenway property to a third party for over $6 million in profits. The LLCs had both an interest and an expectancy in the Greenway property and in obtaining the substantial profits from its pending sale. Barth misappropriated that opportunity for his own benefit and to the detriment of the LLCs.

Breach of Contract (4th Cause of Action)

"To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. [Citation]" (Harris v. Rudin, Richman & Appel (1999) 74 Cal.App.4th 299,

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307.) The FAC alleges Barth breached sections 2.02(c) and 2.05 of the Operating Agreement. In their post-trial brief, Plaintiffs present no argument regarding these allegations, but rather argue other breaches. Plaintiffs has waived any claim to relief by failing to present argument about the claim. (Barker v. Lull Eng'g Co.(1978) 20 Cal. 3d 413, 422 n.3.)
Conversion (6th Cause of Action)
In the FAC, Plaintiffs allege that Eastwind converted the specific identifiable sum of $170,860 relating to the acquisition of Greenway. (FAC ¶ 44.) In the post-trial brief, Plaintiffs again presented no argument regarding this allegation, but rather argues that Barth and Eastwind converted the $6 million in profits. Plaintiffs have waived any claim to relief by failing to present argument about the claim.

Affirmative Defenses
Standing
Defendants claim Plaintiffs lack standing. An LLC member is a nominal plaintiff who files a derivative action on the LLC's behalf to vindicate the LLC's rights. (Grosset v. Wenaas (2008) 42 Cal.4th 1100, 1108.) "When a derivative action is successful, the corporation is the only party that benefits from any recovery; the shareholders derive no benefit except the indirect benefit resulting from a realization upon the corporation's assets." (Ibid.) For this reason, there are only two, basic requirements for a shareholder's standing: (1) the member must have owned an interest in the LLC at the time of the alleged wrongdoing; and (2) the member must continue to own that interest during the litigation. (Id. at p. 1109; Corp. Code § 17709.02(a)(1); Del. Code § 18-1002.) Plaintiffs meet these requirements with respect to both LLCs.
(a) HPTC has standing
The Black family's interest in Centerville has been owned since at least 2017 by the Stanley Black Trust and the Black Marital Trust, for which Haderway PTC, LLC (HPTC) is the current trustee. (RT 533:20-23, 536:2-7). From at least 2017 through the filing of the lawsuit, the nominal holder of the Centerville interest was Cupita, an interim administrative trust of the Stanley and Joyce Black Family Trust which was formed after Joyce Black's death for the sole purpose of allocating the Stanley and Joyce Black Family Trust's assets between the survivor's trust (the Stanley Black Trust) and the marital trust (the Black Marital Trust). (RT 536:2-537:23, 539:4-13, 1189:13-16, Ex. 225.) This allocation was completed on November 30, 2020, at which point the Cupita administrative trust allocated the Stanley and Joyce Black Family Trust's Centerville interest equally between the survivor's trust (the Stanley Black Trust) and the marital trust (the Black Marital Trust). (RT 536:2-537:23, 539:4-13, 1189:13-16, Ex 225.) In November 2020 HPTC became the successor trustee of all of the Black family trusts. (Exs. 224, 225, RT 532:4-10, 536:2-24, 730:12-26.) As successor
trustee, HPTC has standing to litigate a derivative action on behalf of the trusts and their beneficiaries. (See, e.g., Pearce v. Superior Court (1983) 149 Cal.App.3d 1058, 1062-67;

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Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal.App.4th 153, 170, abrogated on other grounds by People v. Rogers (2013) 57 Cal.4th 296, 330.)
Alternatively, Barth argues that any transfer from Black was void under Centerville's operating agreement as no notice was given. However, Barth presented no evidence at trial that no notice was given. Moreover, Plaintiffs established by a preponderance of the evidence that Barth, the managing partner, had notice. This is a logical inference from the evidence before the Court that Barth was aware that Black allocated his investments through family trusts. (RT 183: 6-16.)

(b) BFSB has standing

BFSB has owned the Black family's 29% interest in Alondra since 2012. (RT: 533:24-535:7, 578:10-579:5; Ex. 230.) Indeed, in December 2012, Barth personally signed a written assignment and amendment to Alondra's operating agreement acknowledging the validity of BFSB's membership status. (Ex. 230.)
In January 2020, BFSB mistakenly transferred its Alondra interest to another entity owned by the Black family, Haderway Properties, LLC ("HP"), as part of an estate planning "roll up." (RT 534:13-535:7.). When it was discovered this roll up of Alondra could have adverse and unintended effects on the Black family's ability to pursue this litigation, the transfers of BFSB's Alondra's interest to the Black family trusts and HP were rescinded, and the Alondra interest was restored to BFSB. (RT 534:13-535:7; 1185:1-1186:22 Exs. 81-1 to 81-15.) A rescission renders an assignment "void ab initio, as if it never existed." (DuBeck v. California Physicians' Service (2015) 234 Cal.App.4th 1254, 1264.)

These recissions were effectively made by the 2020 trusts, which were the successors in interest to the 2012 trusts. The 2012 trusts were "decanted into the 2020 trusts, whereby the 2020 trusts acquired all of the assets and liabilities of the 2012 trusts. (Probate Code, § 19527 ["("A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power."]) (RT 1170: 1174: Exs. 273R at pgs. 273-6, 273-66-68, 272R at pgs. 272-6, 272-64, 271R at pgs. 271-6-271-64, 270R at pgs. 270-6, 270-64, 275 at pg. 275-2.) Although Nevada does not have a specific statute describing the successor status of a decanted trust, Nevada law treats "successors in interest" similarly to California. (See, e.g. Village Builders 96, L.P. v. U.S. Labs., Inc. (Nev. 2005) 112 P.3d 1082, 1087 ["[W]hen one corporation sells all of its assets to another corporation," the purchaser becomes "liable for the debts of the seller" where, as here, "the purchaser expressly or impliedly agrees to assume such debts," "the transaction is really a consolidation or a merger" or "the purchasing corporation is merely a continuation of the selling corporation."].)

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Ratification
Defendants claim that a majority of Centerville's disinterested members have ratified the Greenway transaction. (Defendants' Opening Brief, pgs. 50-54.) The Court notes that Defendants have abandoned this claim as to Alondra.
This claim also fails as to Centerville. Under Delaware law, where the manager's act being challenged "constitutes a gift of corporate assets to executives or was ultra vires, illegal, or fraudulent," then "its defects will not be cured by stockholders' ratification unless such ratification was unanimous." (Kerbs v. California Eastern Airways (Del. 1952) 90 A.2d 652, 655-56.) Here, there was not unanimous ratification. Indeed, Defendants only argue that a majority-in-interest ratified the transactions. (See Defendants' Opening Brief, pg. 50.) Here, as discussed above, the transaction was at a minimum, fraudulent.

Release

Defendants argue Plaintiffs' claims are barred by releases signed by a majority of disinterested members of Centerville and David Bryant, the other managing member of Alondra. (Defendants' Opening Brief, pg. 54; Exs. 311, 312, 314, 317, 319, 320 and 322.) Defendant cites one federal case regarding the authority of a company to release claims asserted by a derivative plaintiff (Wolf v. Barkes (2d Cir. 1965) 348 F.2d 994, 997 for the proposition that releases signed by a majority-in interest of its disinterested members (Centerville), and by a disinterested managing member (Alondra) is a valid release of a claim asserted by a derivative plaintiff, even after the derivative suit has commenced. Defendant fails to explain how this class action case applies to LLCs, nor did Defendants establish that Bryant was actually disinterested. (See Clark v. Loas & Nettleton Financial Corp. (5th Cir. 1980) 625 F.2d 49, 52 ["As with other management functions, however, the power to control corporate litigation presupposes that the directors have no interest in its exercise."].
Estoppel
Defendants' argument that Black's purported agreement to Barth's proposal to defer his purchase of Greenway for the benefit of the LLCs and purchase the house at cost one year later fails. (See Defendant's Post-Trial Brief, pg. 55.) As described above, Defendants failed to establish that Black made that agreement, nor do Defendants present authority that if such an agreement was made by Black it would bind the LLCs.
Damages
Plaintiffs established $6,692,740 in lost profits as a result of Barth's actions. These damages are based upon a determination of the total profits the LLCs would have received if they had sold the Greenway property directly to Baker for the $25,000,000 sales price. (RT 428:7-21, 432:26-

440:3.)
Punitive damages
Plaintiffs request punitive damages in the amount of $10,000,000. A plaintiff may seek punitive damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice…." (Civil Code §3294(a).) "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civil Code §3294(c)(1)-(3).)
"In arriving at any award of punitive damages, [the trier of fact is] to consider the following: [¶] (1) The reprehensibility of the conduct of the defendant, [¶] (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition, [¶] (3) That the punitive damages must bear a reasonable relation to the actual damages." (Gagnon v. Continental Casualty Co. (1989) 211 Cal.App.3d 1598, 1603 [quoting BAJI 14.71]; see also CACI 3942 (2020 ed.).)

Plaintiffs have established by clear and convincing evidence their entitlement to punitive damages. Here, Barth maliciously and fraudulently diverted the profits of the Greenway property sale, using a double escrow where he signed the documents for both parties. Plaintiffs established that Barth has a net worth of between $100 and $125 million. (Ex. 85; RT 204:13-205:25.) The Court finds that punitive damages in the amount of $ 6,692,740 are appropriate.

Attorney's Fees

Plaintiffs argue that they are entitled to additional attorney's fees based upon Paragraph 8.03 of the Alondra and Centerville Operating Agreements which provide: "[i]f any proceeding. . . is brought by any Member against any other Member that arises out of this Agreement, then the prevailing Member is such proceeding . . . shall be entitled to recover reasonable attorney's fees and costs." (Exs. 1 and 2.) Plaintiffs have not established their entitlement to fees. Regarding Centerville, neither Barth nor Eastwind is a member of the company or a party to the Operating Agreement, thus they are not subject to fee-shifting. (Ex. 2, § 8.03.) As to both Alondra and

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Centerville, since HPTC and BFSB are only nominal plaintiffs, and Alondra and Centerville are the real parties in the action, the action is not a proceeding by a Member against any other Member. (See Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 1003 [" 'the particular stockholder who brings the suit is merely a nominal party plaintiff.' "].) Plaintiffs may seek attorneys' fees in a post-judgment motion under the common fund doctrine. (See In re Oracle Sec. Litig. (N.D. Cal. 1994) 852 F. Supp. 1437, 1445 [applying Delaware law]; Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 320 ["The common-fund doctrine has been held to apply in favor of a plaintiff who has successfully maintained a stockholder's derivative action on behalf of a corporation."].)

This Proposed Statement of Decision will become the Final Statement of Decision if objections are not filed within the time allowed by law, pursuant to CRC 3.1590. Plaintiffs are ordered to lodge a proposed Judgment within 10 days of the Statement of Decision becoming final.

The Clerk is to provide notice to the parties.

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1 In their trial brief, Plaintiffs indicated that they had withdrawn the third cause of action (Trial Brief, pg. 10, n. 2.)
2 When a citation to the transcript includes objections, the Court has not considered testimony as to which an objection was sustained.
3 When a citation to the transcript includes objections, the Court has not considered testimony as to which an objection was sustained.

The Court's written Ruling on Submitted Matter is signed and filed this date.

Certificate of Mailing is attached.

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