ELECTRONICALLY FILED AUG 11, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
No. 19-1790

TRACY BARKALOW, TSB HOLDINGS, L.L.C., and BIG TEN PROPERTY MANAGEMENT, LLC,
Plaintiffs-Appellees/ Cross-Appellants,
vs.
BRYAN CLARK, JEFFREY CLARK,
Defendants-Appellants/ Cross-Appellees,
and JOSEPH CLARK,
Defendant-Appellee/ Cross-Appellee.

BRYAN CLARK AND JEFFREY CLARK,
Counterclaim Plaintiffs/ Appellants/ Cross-Appellees,
v.
TRACY BARKALOW
Counterclaim Defendant/ Appellee/ Cross-Appellant.

Appeal from the Iowa District Court in and for Johnson County
Case No. LACV079040
The Honorable Paul D. Miller

DEFENDANT-APPELLEE / CROSS-APPELLEE JOSEPH CLARK'S FINAL BRIEF

John E. Beasley (AT0002953)
William N. Toomey (AT00l 1184)
Phelan Tucker Law LLP
321 East Market Street
Iowa City, IA 52240
Telephone: 319-354-1104
Facsimile: 319-354-6962
beasley@phelantuckerlaw.com
toomey@phelantuckerlaw.com

ATTORNEYS FOR DEFENDANT-APPELLEE/ CROSS-APPELLEE JOSEPH CLARK

TABLE ON CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUES PRESENTED FOR REVIEW 6

ROUTING STATEMENT 8

STATEMENT OF THE CASE 9

STATEMENT OF FACTS 13

A. Outside Properties, LLC Background 13

B. December 2015: Shultz Payoff 21

C. February 2016: Clark Family Loans Payoff 23

D. Interim Management Agreement 30

ARGUMENT 31

I. THE DISTRICT COURT CORRECTLY ORDERED DISSOLUTION OF OUTSIDE PROPERTIES, LLC, UNDER IOWA CODE § 489.701(1)(d)(2) 31

A. Preservation of Error 31

B. Standard of Review 31

C. Argument 31

II. THE DISTRICT COURT PROPERLY ORDERED THAT THE DECEMBER 2015 AND JUNE/JULY 2016 FINANCIAL CONTRIBUTIONS BE RECATEGORIZED AS LOANS AND THAT TRACY, BRYAN, JEFF, AND JOE EACH HAVE A 25% MEMBERSHIP/EQUITY INTEREST IN THE COMPANY 42

A. Preservation of Error 42

B. Standard of Review 42

C. Argument 42

III. THE DISTRICT COURT CORRECTLY ORDERED DISMISSAL OF TRACY'S CLAIMS THAT IN DECEMBER 2015, JOE OPPRESSED TRACY AND BREACHED JOE'S FIDUCIARY DUTIES TO TRACY BY PURPOSEFULLY DILUTING TRACY'S MEMBERSHIP INTEREST IN THE COMPANY 55

A. Preservation of Error 55

B. Standard of Review 55

C. Argument 55

CONCLUSION 64

REQUEST FOR SUBMISSION WITH ORAL ARGUMENT 65

CERTIFICATE OF COST 66

PROOF OF SERVICE AND CERTIFICATE OF FILING 66

CERTIFICATE OF COMPLIANCE 67

TABLE OF AUTHORITIES

Case Law:

American Tower, L.P. v. Local TV Iowa, L.L.C., 809 N.W.2d 546 (Iowa Ct. App. 2011) 61

Baur v. Baur Farms, Inc., 832 N.W.2d 663 (Iowa 2013) 57, 58

Becker v. Central States Health and Life Co. of Omaha, 431 N.W.2d 354 (Iowa 1988) 43

Donovan v. Quade, 830 F.Supp.2d 460 (N.D. Ill. 2011) 35, 36

Fakiris v. Gusmar Enterprises, LLC, New York Supreme Court, Queens County No. 14652/14, 2016 WL 6882889 (N.Y. Sup. Ct. November 21, 2016) 34

Farmers Sav. Bank, Joice v. Gerhardt, 372 N.W.2d 238 (Iowa 1985) 43

Fisk Ventures, LLC v. Segal, No. 3017–CC, 2009 WL 73957 (Del. Ch. Jan. 13, 2009) 33

Gagne v. Gagne, 338 P.3d 1152 (Colo. Ct. App. 2014) 32-34

Iowa Dept. of Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980) 43

Johnston Equip. Corp. of Iowa v. Industrial Indemnity, 489 N.W.2d 13 (Iowa 1992) 43

Knoblock v. Home Warranty Inc., No. C15-4239-MWB, 2016 WL 6662709 (N.D. Iowa 2016). 57, 58, 62

Rand, Algeier, Tosti & Woodruff v. Braun, No. L-2833-02, 2011 WL 4862136 (N.J. Sup. Ct. Oct. 14, 2011). 35

Tri-State Refining and Inv. Co. v. Opdahl, 481 N.W.2d 710 (Iowa Ct. App. 1991) 43

Van Horn v. R.H. Van Horn Farms, Inc., No. 17-0324, 919 N.W.2d 768, 2018 WL 3060240 (Iowa Ct. App. June 20, 2018) 58

Statutes:

Iowa Code § 489.102(24) 53

Iowa Code § 489.110(2) 52

Iowa Code § 489.403(3) 49-50

Iowa Code § 489.409 . . . . 59, 57-60

Iowa Code § 489.409(2) 59

Iowa Code § 489.409(3) 41, 60-62

Iowa Code § 489.409(4) 41, 61

Iowa Code § 489.409(7) 60-61

Iowa Code § 489.701(1)(d)(2) 31, 38, 42

Iowa Code § 489.702(1) 51

Iowa Code § 489.708. 51-53

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT CORRECTLY ORDERED DISSOLUTION OF OUTSIDE PROPERTIES, LLC, UNDER IOWA CODE § 489.701(1)(d)(2).

Case Law:

Donovan v. Quade, 830 F.Supp.2d 460 (N.D. Ill. 2011) 35

Fakiris v. Gusmar Enterprises, LLC, New York Supreme Court, Queens County No. 14652/14, 2016 WL 6882889 (N.Y. Sup. Ct. November 21, 2016) 34

Fisk Ventures, LLC v. Segal, No. 3017–CC, 2009 WL 73957 (Del. Ch. Jan. 13, 2009) 33

Gagne v. Gagne, 338 P.3d 1152 (Colo. Ct. App. 2014) 32-34

Rand, Algeier, Tosti & Woodruff v. Braun, No. L-2833-02, 2011 WL 4862136 (N.J. Sup. Ct. Oct. 14, 2011). 35

Statutes:

Iowa Code § 489.409 41

Iowa Code § 489.409(3) 41

Iowa Code § 489.409(4) 41

Iowa Code § 489.701(1)(d)(2) 31, 38, 42

II. THE DISTRICT COURT PROPERLY ORDERED THAT THE DECEMBER 2015 AND JUNE/JULY 2016 FINANCIAL CONTRIBUTIONS BE RECATEGORIZED AS LOANS AND THAT TRACY, BRYAN, JEFF, AND JOE EACH HAVE A 25% MEMBERSHIP INTEREST IN THE COMPANY.

Case Law:

Becker v. Central States Health and Life Co. of Omaha, 431 N.W.2d 354 (Iowa 1988) 43

Farmers Sav. Bank, Joice v. Gerhardt, 372 N.W.2d 238 (Iowa 1985) 43

Iowa Dept. of Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980) 43

Johnston Equip. Corp. of Iowa v. Industrial Indemnity, 489 N.W.2d 13 (Iowa 1992) 43

Tri-State Refining and Inv. Co. v. Opdahl, 481 N.W.2d 710 (Iowa Ct. App. 1991) 43

Statutes:

Iowa Code § 489.102(24) 53

Iowa Code § 489.110(2) 52

Iowa Code § 489.403(3) 49-50

Iowa Code § 489.702(1) 51

Iowa Code § 489.708. 51-53

III. THE DISTRICT COURT CORRECTLY ORDERED DISMISSAL OF TRACY'S CLAIMS THAT IN DECEMBER 2015, JOE OPPRESSED TRACY AND BREACHED JOE'S FIDUCIARY DUTIES TO TRACY BY PURPOSEFULLY DILUTING TRACY'S MEMBERSHIP INTEREST IN THE COMPANY.

Case Law:

American Tower, L.P. v. Local TV Iowa, L.L.C., 809 N.W.2d 546 (Iowa Ct. App. 2011) 61

Baur v. Baur Farms, Inc., 832 N.W.2d 663 (Iowa 2013) 57, 58

Knoblock v. Home Warranty Inc., No. C15-4239-MWB, 2016 WL 6662709 (N.D. Iowa 2016). 57, 58, 62

Van Horn v. R.H. Van Horn Farms, Inc., No. 17-0324, 919 N.W.2d 768, 2018 WL 3060240 (Iowa Ct. App. June 20, 2018) 58

Statutes:

Iowa Code § 489.409 57-60

Iowa Code § 489.409(2) 59

Iowa Code § 489.409(3) 60-62

Iowa Code § 489.409(7) 60-61

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(3)(a) and (b) because it does not present a fundamental and urgent issue of broad public importance requiring prompt determination by the Iowa Supreme Court.

STATEMENT OF THE CASE

This appeal involves claims and disputes among members of an Iowa limited liability company, the judicial dissolution of the company, and the categorization of certain member financial contributions to the company.

Plaintiffs-Appellees/Cross-Appellants are Tracy Barkalow ("Tracy"), TSB Holdings, LLC, and Big Ten Property Management, LLC (collectively "Plaintiffs"). Defendants-Appellants/Cross-Appellees are Bryan Clark ("Bryan") and Jeffrey Clark ("Jeff"). Defendant-Appellee/Cross-Appellee is Joseph Clark ("Joe").

Bryan and Jeff have filed an appeal and Tracy a cross-appeal, and pursuant to the Order of this Court filed June 1, 2020, Joe submits this combined Brief in response to both Bryan's and Jeff's appeal and Tracy's cross-appeal.

Tracy brought several claims against Joe before the District Court:

Count II: Judicial Dissolution of Outside Properties, LLC ("Company"), under Iowa Code § 489.701, on the grounds (a) that it is not reasonably practicable to carry on the Company's activities in conformity with the Certificate of Organization and Operating Agreement (Iowa Code §§ 489.701(1)(d)(2)) and (b) that Joe oppressed Tracy by making a December 2015 financial contribution to the Company and thereby

purposefully diluted Tracy's membership interests in the Company (Iowa Code § 489.701(1)(e)(2)).

Count III: Breach of Fiduciary Duty, alleging that Joe breached his fiduciary duties to Tracy by making a December 2015 financial contribution to the Company and thereby purposefully diluted Tracy's membership interest the Company.

Count IX: Civil Conspiracy, alleging that Joe conspired with Bryan and Jeff to make December 2015 financial contributions to the Company and thereby purposefully diluted Tracy's membership interest in the Company.

Count X: Injunctive Relief, requesting that Joe be prohibited from oppressive conduct in the form of diluting Tracy's membership interest in the Company.

Joe agreed with Tracy that the Company be judicially dissolved under Iowa Code § 489.701(1)(d)(2) as it is not reasonably practicable to carry on the Company's activities in conformity with its Certificate of Organization and Operating Agreement. (App. Vol. I. pp. 222-224; Joe's Post Trial Brief pp. 3-5)

However, Joe denied Tracy's claims in Count II that Joe oppressed Tracy and thereby purposefully diluted Tracy's membership interest in the Company. In addition, Joe denied Tracy's claims in Count III (Breach of

Fiduciary Duty), Count IX (Civil Conspiracy) and Count X (Injunctive Relief). The District Court dismissed Tracy's claims in Count II for judicial dissolution based on oppression under Iowa Code § 489.701(1)(e)(2), Count III (Breach of Fiduciary Duties), Count IX (Civil Conspiracy) and Count X (Injunctive Relief).

The District Court, as requested by Tracy and Joe, found that it is not reasonably practicable to carry on the Company's activities in conformity with its Certificate of Organization and Operating Agreement under Iowa Code § 489.701(1)(d)(2) and judicially dissolved the Company. (App. Vol. I. pp. 298-299; Ruling pp. 37-38). Specifically, the District Court found that "[i]t is an undisputable fact that Tracy's, Bryan's and Jeff's relationship is acrimonious and toxic and that issues between the three (3) of them have existed for over five (5) years." (App. Vol. I. p. 297; Ruling p. 36). The District Court also found that "I cannot ignore what I consider to be total dysfunction at the governance level" and that "[t]he relationship between the members is not repairable and certainly the duty of good faith that each must bring to the Company will be nonexistent in the future." (App. Vol. I. p. 298; Ruling p. 37).

The District Court ordered that "[t]o accomplish the dissolution, the 2015 and 2016 capital contributions will be re-categorized as loans with the

principal loan balance for the December 2015 contribution being $1,001,896.86 and the principal loan balance for the 2016 contributions being $950,000" and ordered interest at a rate of 3.85% per annum beginning December 9, 2015, for the December 2015 contributions and July 1, 2016, for the June/July 2016 contributions. (App. Vol. I. p. 299; Ruling p. 38). In addition, the District Court ordered that Tracy, Bryan, Jeff, and Joe are each restored to 25% membership interest in the Company. (App. Vol. I. p. 299; Ruling p. 38).

Bryan and Jeff have appealed the District Court's Ruling dissolving the Company pursuant to Iowa Code § 489.701(1)(d)(2), the District Court's recategorization of the December 2015 and June/July 2016 financial contributions as loans in order to accomplish dissolution, and the District Court's restoration of Tracy, Bryan, Jeff, and Joe to 25% membership interests. Tracy has appealed the District Court's Ruling dismissing his claims that the Company be dissolved based on oppression, that Bryan, Jeff, and Joe breached their fiduciary duties to Tracy, and that Tracy be awarded damages on his oppression and breach of fiduciary duty claims if the Company is not dissolved.

Tracy does not appeal the District Court's Ruling dismissing his Civil Conspiracy and Injunctive Relief claims against Joe. In addition, Tracy does

not appeal the District Court's entry of judgment of $153,203.25 against Tracy and Big Ten Property Rentals, LLC, based on Bryan's and Jeff's counterclaims.

It is Joe's position that the District Court's Ruling dissolving the Company pursuant Iowa Code § 489.701(1)(d)(2), the recategorization of the December 2015 and June/July 2016 financial contributions as loans in order to accomplish dissolution, and the restoration of Tracy, Bryan, Jeff, and Joe to 25% membership interests is correct and should be affirmed. In addition, it is Joe's position that the District Court's Ruling dismissing Tracy's claims based on oppression and breach of fiduciary duties is correct and should be affirmed.

STATEMENT OF FACTS

A. Outside Properties, LLC, Background

Outside Properties, LLC (the "Company"), was formed in 2009. (App. Vol. I. pp. 321-328 and 391-393; Exs. 1 and 36). The Company's initial members were Tracy, Bryan, Jeff, and Joe and they each had a 25% membership interest in the Company. (App. Vol. I. pp. 321-328 and 391-393; Exs. 1 and 36). Bryan, Jeff, and Joe are brothers. (Trial Tr. Vol 4, pp. 81:25-82:1). Tracy, Bryan, and Jeff are married to sisters. (Trial Tr. Vol. 1, pp. 47:25-48:8).

The Company was formed to purchase a residential rental property located at 817 Melrose Avenue, Iowa City, Iowa. (Trial Tr. Vol. 1, p. 61:8-18 and Vol. 4, pp. 193:24-194:1).

The Company's governance documents include a Certificate of Organization filed with the Iowa Secretary of State on October 2, 2009, an Operating Agreement, a First Amendment to Operating Agreement, and Management Certificates issued to Tracy, Bryan, Jeff, and Joe. (App. Vol. I. pp. 321-328, 329-330 and 462-469; Exs. 1, 2, 36, and 319-322). The Company is member-managed. (App. Vol. I. p. 327; Ex. 1, p. 7, ⁋ 5.1).

Paragraph 7 of the Company's Certificate of Organization provides:

> 7. Additional Liability of Members. That no additional capital contributions will be required.

(App. Vol. I. p. 391; Ex. 36, p. 1, ⁋ 7).

Article IV of the Company's Operating Agreement provides in part that:

> "[t]he members may from time to time unanimously declare, and the company may distribute, accumulated profits that the members agree are not necessary for the cash needs of the company's business."

(App. Vol. I. p. 327; Ex. 1, p. 7, Article IV).

Prior to the filing of the Company's Certificate of Organization with the Iowa Secretary of State, attorney Joe Holland notified Jeff and Tracy of

several concerns and deficiencies regarding the Company's operational documents and advised them that the Company's operational documents "should be revised and finalized prior to any significant business activities". (App. Vol. I. pp. 441-443; Ex. 82). It appears the concerns raised by Mr. Holland were not addressed. (App. Vol. I. pp. 321-328, 391-393 and 441-443; Exs. 1, 36, and 82; Trial Tr. Vol. 1, pp. 71:14-73:3).

Between August 25, 2009, and September 3, 2010, the Company acquired an interest in seven (7) residential rental real estate properties. (App. Vol. II. p. 219; Ex. 121). Five (5) of the properties are located approximately within a block of Kinnick Stadium and the University of Iowa Children's Hospital. (Trial Tr. Vol. 4, p. 14:11-14:20).

Four (4) of the Company's properties were purchased by seller financing; the Company made cash down payments and the seller financed the balance of the purchase price. (App. Vol. II. pp. 187-192 and 219; Exs. 103 and 121). Two (2) of the Company's properties were purchased with a cash down payment and loans from US Bank. (App. Vol. II. pp. 187-192 and 219; Exs. 103 and 121). One (1) property was purchased with money borrowed from companies owned by Bryan, Jeff, and Joe, and/or their family members. (App. Vol. II. p. 219; Ex. 121; Trial Tr. Vol. 1, pp. 67:23-68:17 and Vol. 4, pp. 194:25-195:3).

After Tracy's, Bryan's, Jeff's, and Joe's initial capital contributions of $41,000 each to purchase the first property at 817 Melrose Avenue, a significant amount of the cash for the Company's purchase and remodeling of properties, repayment of US Bank loans, and operating expenses was loaned to the Company by several entities owned by Bryan, Jeff, Joe, their parents, and/or their sisters. (App. Vol. II. pp. 091-112, 161-184, 185-186 and 187-192; Exs. 78, 99, 100, and 103; Trial Tr. Vol. 1, pp. 68:18-69:3). These loans have been referred to in in this litigation as "Clark family loans" or "Clark entity loans." Although the Clark family loans were neither documented by promissory notes nor secured with mortgages, these loans were documented on the Company balance sheets, tax returns, and internal QuickBooks statements by Jason Wagner, the Company's accountant. (App. Vol. II. pp. 014-015, 016-017, 018-019, 020-021, 022-024, 025-028, 091-104, 161-184, 185-186 and 187-192; Exs. 56-61,78, 99, 100, and 103; Trial Tr. Vol. 3, pp. 28:14-31:15 and Vol. 4, pp. 26:3-26:9 and 159:20-25). Bryan testified that the Clark family loans were booked by the Company's accountant in order to be fair. (Trial Tr. Vol. 4, p. 195:15-19). The Company's accountant also set up amortization schedules and payment schedules for the Clark family loans. (App. Vol. II. pp. 161-184 and 185-186; Exs. 99 and 100; Trial Tr. Vol. 3, pp. 30:5-21 and 32:14-33.5).

The Company's December 31, 2015, Balance Sheet shows the balance of the Clark family loans on December 31, 2015, to be $675,132.36 and a balance of monies owed by the Company to Bryan ($17,634.20), Jeff ($121,436.22), and Joe ($15,394.12). (App. Vol. II. pp. 022-024; Ex. 60).

In 2010, Tracy, Bryan, Jeff, and Joe amended the Company's Operating Agreement to permit the four (4) initial members to convert voting membership units to nonvoting membership units and transfer nonvoting membership units to their children. (App. Vol. I. pp. 329-330; Ex. 2). Pursuant to the First Amendment to Operating Agreement, Bryan, Jeff, and Joe each converted 11% of their membership units to nonvoting membership units and transferred the nonvoting membership units to their children for estate planning purposes. (App. Vol. II. pp. 029-064; Ex. 62; Trial Tr. Vol. 3, p. 117:13-17 and Vol. 4, pp 85:8-86:4). After these transfers, Bryan and his children, Jeff and two of his children, and Joe and his children each had a 25% membership interest in the Company. (App. Vol. II. pp. 029-064; Ex. 62).

The Company operated well from its inception until the summer of 2013 when the relationship between Tracy, Bryan, and Jeff deteriorated. (Trial Tr. Vol. 4, pp. 83:20-85:7).

Joe became more actively involved in the day-to-day operations of the Company in the summer of 2013 when the relationship between Tracy, Bryan, and Jeff deteriorated. (Trial Tr. Vol 2, p. 225:9-16; Vol 4, p. 85:2-6). After becoming more actively involved in the Company, Joe tried to act as peacemaker between his brothers and Tracy and made several good faith efforts to resolve disputes and issues that were caused by Tracy's, Bryan's, and Jeff's acrimonious and toxic relationship. (App. Vol. I. pp. 427-428; App. Vol. II. pp. 065-071; App. Vol. I. pp. 437-438 and 439-440; Exs. 66, 68, 75, and 76; Trial Tr. Vol. 2, p. 225:9-16 and Vol. 4, pp. 94:5-98.10 and 100:12-101:22). Joe's efforts to resolve Company issues between Tracy, Bryan, and Jeff were in the best interests of the Company. (Trial Tr. Vol 2, p. 225:9-19).

Joe's multiple efforts to resolve issues between his brothers and Tracy regarding the Company were unsuccessful and this litigation followed. (Trial Tr. Vol 4, pp. 94:5-98:10).

It is an undisputable fact that Tracy's, Bryan's, and Jeff's relationship is acrimonious and toxic and that issues between the three (3) of them existed for over five (5) years prior to this litigation. As a result, the following disputes have arisen:

- Disputes as to how to interpret the Company’s Operating Agreement.
- Disputes as to the duties of the Company member managers, general manager, and property manager, and who is the general manager.
- Disputes as to ownership interests and voting interests in the Company.
- Disputes as to whether to treat financial events as distributions or expenses.
- Disputes regarding how to treat cash infusions.
- Disputes regarding refinancing the Company’s debt.
- Disputes regarding keeping the Company’s books.
- Disputes regarding the payment of property management fees.
- Disputes over who was to provide the Company's accountant the information to do the accounting for the Company.
- Disputes as to who the tax matters member should be and who should sign tax returns.
- Disputes as to who the Company’s accountant should be.
- Disputes as to who should have possession of the Company checkbook and sign the Company’s checks.

- Disputes over the scheduling of Member meetings.

(App. Vol. I. pp. 369-371, 372-386, 410, 411-415, 432-435, 444-447 and 448-453; App. Vol. II. pp. 142-153 and 154-160; Ex. 32, 33, 44, 45, 72, 85, 87, 97, 98; Trial Tr. Vol 3, pp. 79:15-82:12 and Vol 4, pp. 40:22-42:25).

Jason Wagner, the Company's accountant, testified that the disputes have made it extremely difficult, or nearly impossible, for him to do the Company's accounting properly. (Trial Tr. Vol 3, p. 82:8-12).

The District Court accurately noted in its Ruling that the members have their attorneys present at Company meetings. (App. Vol. I. p. 298, Ruling p. 37).

Furthermore, in 2011, Bryan borrowed funds from Clark family entities to almost retire US Bank loans in excess of $500,000 that were not due nor in default. (App. Vol. II. pp. 014-015 and 132; Exs. 56 and 80 9 and 103; Trial Tr. Vol. 3, pp. 69:24-72:11, 178:15-180.16, and Vol. 4, pp. 160:5-8 and 192:17-193.1). Joe did not consent to nor was he aware of these actions at the time Bryan made the payments. (Trial Tr. Vol 4, pp. 109:18-111:2). Joe was also not aware of Bryan's and Jeff's June/July 2016 financial contributions to the Company until several months after the contributions were made and Joe had trouble obtaining information from

Bryan and Jeff regarding these additional contributions. (App. Vol. II. pp. 073-079; Ex. 74 pp. 2-8).

The District Court concluded that the Company had "total dysfunction at the governance level", that "[t]he relationship between the members is not repairable and certainly the duty of good faith that each must bring to the Company will be nonexistent in the future", and that the District Court "cannot repair the lack of trust in the relationship between Jeff, Bryan, and Tracy". (App. Vol. I. p. 298; Ruling p. 37). The testimony and exhibits submitted in this case support these findings and conclusions.

B. December 2015: Shultz Payoff

On September 3, 2010, the Company purchased three (3) properties from Ellis and Cathleen Shultz ("Shultz") for a total purchase price of $1,200,000. The Company made a $120,000 down payment and Schultz financed the balance of the purchase price of $1,080,000 pursuant to a promissory note secured by a mortgage. (App. Vol. I. pp. 397-399; Ex. 39). The promissory note had a balloon payment due on December 1, 2015, for approximately $1,000,000. (App. Vol. I. pp. 355 and 397-399; Exs. 17 and 39). Tracy, Bryan, Jeff, and Joe all did not realize the balloon payment on the promissory note was due on December 1, 2015, and Schultz refused to extend the balloon payment beyond December 9, 2015. (App. Vol. I. pp.

397-399; Ex. 39). The Company did not have the funds to pay the balance due on the promissory note on December 9, 2015. (App. Vol. I. pp. 397-399; Ex. 39).

Between December 1, 2015, and December 7, 2015, Tracy, Bryan, Jeff, and Joe had several discussions about what to do about paying the Shultz promissory note. (Trial Tr. Vol. 4, pp. 87:2-88:18 and 123:9-20). Joe did want to lose the three (3) properties and believed it was in the Company's best interests to pay Shultz in full by the December 9, 2015, deadline. (Trial Tr. Vol. 4, pp. 86:20-89:13). Bryan and Jeff felt that the Shultz loan was in default and that they needed to find funds to meet Shultz's December 9, 2015, payment deadline. (Trial Tr. Vol. 3, pp. 138:8-10, 139:24-25, 141:7-142:2, and Vol. 4, p. 172:3-6). Tracy, however, took the position that the Shultz loan was not in "default" even though he admitted it was past due/matured. (Trial Tr. Vol. 2, p. 87:2-13). Therefore, Joe and his brothers made a financial contribution to the Company on December 9, 2015, in the amount of $1,001,869.86 in order to pay the Shultz promissory note in full. (App. Vol. II. p. 207 and 208; Exs. 112 and 113; Trial Tr. Vol. 4, pp. 16:24-17:7 and 86:20-89:13). The Company did not have a formal vote prior to or after these financial contributions on the issue of whether these contributions should be treated as loans to the Company or

as capital contributions. (App. Vol. I. p. 400 and 401; Exs. 40 and 41; Trial Tr. Vol. 4, pp. 114.23-115:5).

The December 2015 financial contributions were booked as capital contributions from Bryan, Jeff, and Joe. (App. Vol. II. p. 207 and 208; Exs. 112 and 113). As a consequence, Tracy's percentage membership interest in the Company was significantly decreased. (App. Vol. II. p. 207 and 208; Exs. 112 and 113).

The December 2015 financial contributions associated with the payment of the Shultz promissory note were the first financial contributions booked as capital contributions rather than as loans since the initial $41,000 per-Member capital contributions were made when the Company was first formed in 2009. (Trial Tr. Vol. 3, pp. 201:21-202.15).

C. February 2016: Clark Family Loans Payoff

On December 31, 2015, the Clark family loans to the Company totaled approximately $675,132.36. (App. Vol. II. p. 022-024; Ex. 60). As previously stated, the Company's accountant had documented the Clark family loans in the Company financial documents and had prepared amortization schedules and payment schedules for the Clark family loans. (App. Vol. II. pp. 014-015, 016-017, 018-019, 020-024, 025-028, 161-184 and 185-186; Exs. 56-61, 99, and 100). As the Company had not made

payments on the Clark family loans between July 2014 and December 2015, at a December 17, 2015, voting Member's meeting, Tracy, Bryan, Jeff, and Joe voted on whether to "immediately pay back 'all Clark entity loans' interest and required back payments…" (App. Vol. I. pp. 401-403; App. Vol. II. pp. 091-112, 161-184 and 187-192; Exs. 41, 78, 99, and 103). Bryan, Jeff, and Joe voted in favor of this proposal, Tracy voted against this proposal, and the proposal passed. (App. Vol. I. pp. 401-403; Ex. 41). Based on this proposal passing, the Company paid the Clark family loans for unpaid interest and back payments on or about December 19, 2015. (App. Vol. II. pp. 091, 101, 104, 105, 108, 110 and 112; Ex. 78, pp. 11, 14, 15, 18, 20, and 22; Trial Tr. Vol. 3 p. 210:5-22).

At the Company's January 15, 2016, voting members' meeting, Tracy, Bryan, Jeff, and Joe voted on whether to "continue to pay all 'Clark entity loans' interest and required payments from the Outside Properties, LLC checking account…" and to authorize Bryan "to immediately cut checks for payment until a time all Clark entity loans are paid off". (App. Vol. I. pp. 404-405; Ex. 42). Bryan, Jeff, and Joe voted in favor of this proposal, Tracy voted against this proposal, and the proposal passed. (App. Vol. I. pp. 404-405; Ex.42). Based on this resolution passing, the Company made payments on these loans on or about January 30, 2016. (App. Vol. II.

pp. 091, 101, 104, 105, 108, 110 and 112; Ex. 78, pp. 11, 14, 15, 18, 21, and 22).

Also at the January 15, 2016, meeting, proposals were made to obtain financing from a financial institution to repay the Clark family loans in full, or, if Tracy, Bryan, Jeff, and Joe did not unanimously agree to obtain financing from a financial institution to repay the Clark family loans, that the voting members make capital contributions to repay the Clark family loans. (App. Vol. I. pp. 404-405; Ex. 42). Tracy voted against the proposal to obtain financing from a financial institution to pay the Clark family loans in full and therefore this proposal failed. (App. Vol. I. pp. 404-405; Ex. 42). Joe requested that the proposal that Tracy, Bryan, Jeff, and Joe make capital contributions in order to repay Clark family loans in full be deferred until February 2016 in order to give the voting members an opportunity to determine a fair solution to the repayment issue. (App. Vol. I. pp. 404-405; Ex. 42; Trial Tr. Vol. 4, pp. 100:21-101:9). Joe's request was approved. (App. Vol. I. pp. 404-405; Ex. 42).

As of January 15, 2016, the Clark family loans were not past due nor in default and had written amortization schedules and payment schedules pursuant to which the Company would repay the Clark family loans with

interest over a 10-year period. (App. Vol. II. pp. 091-112, 161-184 and 185-186; Exs. 78, 99, and 100; Trial Tr. Vol. 3, pp. 29:14-33:5 and 76:7-77:17).

On February 19, 2016, a Company Special Meeting for voting members was held. (App. Vol. I. pp. 406-409; Ex 43). During this meeting, Bryan, Jeff, and Joe made an offer to purchase Tracy's interest in the Company. (App. Vol. I. pp. 406-409; Ex. 43). Tracy rejected this offer. (App. Vol. I. pp. 406-409; Ex.43). Bryan, Jeff, and Joe made a second offer to Tracy that would resolve several outstanding Company issues and Tracy rejected this second offer. (App. Vol. I. pp. 406-409; Ex. 43). A vote was then made on a proposal for Tracy, Bryan, Jeff, and Joe to contribute $950,000 to pay off Clark family loans. (App. Vol. I. pp. 406-409; Ex. 43). Joe, Bryan, and Jeff voted in favor and Tracy voted against a capital contribution of $950,000. (App. Vol. I. pp. 406-409; Ex. 43). The Company's resolution that Tracy, Bryan, Jeff, and Joe contribute $950,000 to pay off Clark family loans <u>did not</u> include a deadline by which members were required to contribute an equal share of the $950,000. (App. Vol. I. pp. 406-409; Ex. 43). Therefore, no deadline has ever been set by which the members are required to contribute an equal share of $950,000. It is also important to note that the capital contribution of $950,000 included funds to pay not only the Clark family loans but also funds to pay the Company

obligations for loans from Bryan, Jeff, and Joe individually. (App. Vol. II. pp. 025-028 and 205-206; Exs. 61 and 111).

On June 23, 2016, Jason Wagner e-mailed a plan for Bryan, Jeff, and Joe to finance the financial contributions to pay off the Clark family loans to the Company. (App. Vol. II. pp. 678-681; Ex. 413). On June 23, 2016, Joe made it clear to Bryan and Jeff that he did not agree with a loan from Iowa-Illinois Square, LLC, a Clark family entity, as the source of funds to make the financial contribution to the Company to pay off Clark family loans to the Company unless voted on by all Clark family members. (App. Vol. II. pp. 678-681; Ex. 413). Joe had several questions he needed answered and did not agree with using loans from a Clark family entity to pay off Clark family entity loans to the Company. (App. Vol. II. pp. 072-090 and 678-681; Exs. 74 and 413).

On June 24, 2016, Joe e-mailed Jeff requesting answers to his questions in previous e-mails. (App. Vol. II. p. 081; Ex. 74, p. 10).

On June 29, 2016, Joe received a check from Iowa-Illinois Square, LLC, a Clark family entity, for $316,666. (App. Vol. II. p. 073; Ex. 74, p. 2). As there was no explanation what this check was for, Joe assumed this was for payment of Clark family loans with the Company. (App. Vol. II. p. 073; Ex. 74, p. 2). Joe did not agree with the source of these funds (Clark

family loans) and did not cash the check. (App. Vol. II. pp. 072-073; Ex. 74, pp. 1-2; Trial Tr. Vol. 4, p. 120:14-19).

On June 29, 2016, Bryan and Jeff each contributed $316,666 to the Company. (App. Vol. II. pp. 205-206; Ex. 111). Three days later, on July 1, 2016, Bryan and Jeff each contributed an additional $158,333 to the Company. (App. Vol. II. pp. 205-206; Ex. 111).

These financial contributions were used to pay off the Clark family loans, loans from Bryan, Jeff, and Joe, and were booked as capital contributions and not as loans, thereby decreasing Joe's membership interest in the Company. (App. Vol. II. pp. 025-028, 205-206, 207 and 208; Exs. 61, 111, 112, and 113). When paid, the Clark family loans were not due nor in default. (Trial Tr. Vol. 4, p. 151:17-20).

On July 15, 2016, Joe sent Bryan and Jeff an e-mail/text requesting information on the "Outside Properties situation", and as no meetings had been held since February 19, 2016, presumed they were at a "standstill with this situation" until funding issues could be resolved. (App. Vol. II. p. 074; Ex. 74, p. 3).

On August 18, 2016, as Joe had not received responses to his June 23, 2016, and July 15, 2016, e-mails, Joe e-mailed Bryan and Jeff requesting an

update on the "Outside Properties situation". (App. Vol. II. p. 075; Ex. 74, p. 4). Joe stated in this e-mail:

> Even though I question whether we should be paying off loans to ourselves, which I did not have knowledge of in the beginning, I do not want to lose any membership shares within the partnership. Since no deadline was ever placed on this second payoff, and there is no external pressures forcing us to pay back this loan immediately (note coming due at bank, contract expiring with third-party, etc.), I think we need to discuss our options (including cash disbursements from other partnerships to cover the Outside Properties debt) prior to any action being taken. Borrowing money from ourselves again to pay off the original debt will not be viewed the same as paying off the debt with cash.

(App. Vol. II. p. 075; Ex.74, p. 4) (emphasis added).

On January 12, 2017, Joe e-mailed Bryan and Jeff requesting updated information on the "loan situation" within the Company and ownership shares. (App. Vol. II. p. 077; Ex. 74, p.6).

On January 30, 2017, in a text exchange with Bryan, Joe learned that Bryan was taking the position that Joe's membership interest in the Company had been decreased as a result of the Bryan's and Jeff's June/July financial contributions. (App. Vol. II. pp. 072-090 at p. 078; Ex. 74, p. 7). On January 31, 2017, Joe finally received information from the Company's accountant that Bryan and Jeff had contributed the $950,000 in June/July 2016 and that Joe's membership interest in the

Company had been decreased. (App. Vol. II. pp. 205-206 and 207; Exs. 111 and 112).

Despite repeated requests over several months for information pertaining to the Company and 2016 financial contributions, Joe was not notified that Bryan was taking the position that Joe's membership interest had been decreased until January 30-31, 2017. (App. Vol. II. pp. 072-090; Ex. 74).

D. Interim Management Agreement

Bryan and Jeff take the position that the Company has been functioning fine since its inception and that since many of the disputes are now resolved by the District Court the Company will operate in a profitable manner in the future. (Bryan's and Jeff's Brief pp. 35-36.). Since October 2017, the Company has not been operating pursuant to its Certificate of Organization and Operating Agreement but rather pursuant to an Interim Management Agreement that was entered into by the parties in order to resolve Tracy's Application for Receiver pursuant to Iowa Code § 680.1 and Bryan's and Jeff's Application for Temporary Injunction filed in this case. (App. Vol. I. pp. 013-014 and 011-012; Plaintiff's Withdrawal of Verified Application to Appoint Receiver pursuant to Iowa Code 680.1 and Bryan

Clark and Jeff Clark's Withdrawal of Request for Preliminary Injunctive Relief). In fact, the District Court found the following:

> The Company is also operating now under an "Interim Management Agreement", so obviously all issues concerning ordinary governance procedures and operating the company in the future have not been resolved and will continue to be future disputes if not dissolved. The Interim Management Agreement was entered into only to avoid the necessity of appointing a receiver or possibly issue a temporary injunction during the pendency of the lawsuit. I cannot ignore what I consider to be total dysfunction at the governance level.

(App. Vol. I. p. 298; Ruling p. 37).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ORDERED DISSOLUTION OF OUTSIDE PROPERTIES, LLC, UNDER IOWA CODE § 489.701(1)(d)(2).

A. Preservation of Error.

Joe agrees that Bryan and Jeff preserved error on this issue.

B. Standard of Review.

Joe agrees with the standard of review set forth in Bryan's and Jeff's Brief.

C. Argument.

Tracy and Joe requested that the Court judicially dissolve the Company under Iowa Code § 489.701(1)(d)(2). (App. Vol. I. pp. 222-224; Joe's Post-Trial Brief pp. 3-5). Joe's position is that the District Court's

judicial dissolution of the Company under Iowa Code § 489.701(1)(d)(2) was correct and should be affirmed. In support of Joe's position, Joe joins with and adopts Argument Section I of Tracy's Brief, pp. 31-38.

In addition to the cases already cited by Tracy, other opinions throughout the country support the judicial dissolution of closely held entities when the relationship between the owner-managers has become so bad that the management of the entity becomes dysfunctional.

In Gagne v. Gagne, 338 P.3d 1152 (Colo. Ct. App. 2014), the Colorado Court of Appeals held that a triable issue existed as to whether a mother and son could pursue the purposes for which their LLCs were formed in a reasonable, sensible, and feasible manner. The court observed that the business relationship between the parties "has been exceedingly difficult, and it has been marked by extreme dysfunction, allegations of physical altercations, mutual distrust, ongoing allegations of wrongdoing by the other, and legal proceedings or threats thereof." Gagne, 338 P.3d at 1156. The court observed that the Colorado Limited Liability Act does not define "reasonably practicable" in its section governing judicial dissolution. Id. at 1159. After reviewing common dictionary definitions, the court came to the following conclusion:

> Based on these common definitions, we conclude that to show that it is not reasonably practicable to carry on the

> business of a limited liability company, a party seeking a judicial dissolution must establish that the managers and members of the company are unable to pursue the purposes for which the company was formed in a reasonable, sensible, and feasible manner.

Id. at 1160 (citations omitted). Importantly, the court identified that "the test is whether it is reasonably practicable to carry on the business of the LLC, not whether it is impossible to do so." Id. (emphasis added); see also Fisk Ventures, LLC v. Segal, No. 3017–CC, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009) (unpublished opinion), aff'd, 984 A.2d 124 (Del. 2009).

The court then surveyed case law from other jurisdictions and compiled the following list of factors to be weighed when contemplating judicial dissolution:

> In determining whether it is reasonably practicable to carry on the business of a limited liability company, courts have considered a number of factors that should be weighed in considering a request for judicial dissolution of a limited liability company. These include, but are not limited to, (1) whether the management of the entity is unable or unwilling reasonably to permit or promote the purposes for which the company was formed; (2) whether a member or manager has engaged in misconduct; (3) whether the members have clearly reached an inability to work with one another to pursue the company's goals; (4) whether there is deadlock between the members; (5) whether the operating agreement provides a means of navigating around any such deadlock; (6) whether, due to the company's financial position, there is still a business to operate; and (7) whether continuing the company is financially feasible.

> No one of these factors is necessarily dispositive. Nor must a court find that all of these factors have been established in order to conclude that it is no longer reasonably practicable for a business to continue operating.

Gagne, 338 P.3d at 1160-1161 (citations omitted).

Courts in other jurisdictions have ruled in favor judicial dissolution when personal conflict between business principals made the continuation of the business impracticable. See Fakiris v. Gusmar Enterprises, LLC, New York Supreme Court, Queens County No. 14652/14, 2016 WL 6882889, at *2-3 (N.Y. Sup. Ct. November 21, 2016) (holding that a party had "established prima facia that the management of the company has become so dysfunctional that it is no longer practicable to operate the business" where: "Plaintiff Marina and defendant Kostas have equal votes in the company and cannot agree on such fundamental matters as the refinancing of the mortgages. The parties cannot agree on the rent that Summit Development, owned by defendant Kostas, should be paying for the occupancy of a building owned by Gusmar. They cannot even agree on the release of $495,000 held in escrow for the benefit of Gusmar. They are suing each other for financial improprieties. While it is true that the operating agreement authorizes defendant Neubauer to cast a tie-breaking vote, the relationship between plaintiff Marina and defendant Neubauer has totally

broken down, and, indeed, the former has sued the latter in this action for financial misconduct. Kostas and Marina cannot agree on someone to replace Neubauer as the tie-breaker."); Rand, Algeier, Tosti & Woodruff v. Braun, No. L-2833-02, 2011 WL 4862136, at *8 (N.J. Sup. Ct. Oct. 14, 2011) (holding that there was no genuine issue of material fact "that there was a sufficiently dysfunctional relationship to warrant dissolution of the corporation and a remedy that would not require any continuing cooperation between Braun and the Novin Trust where: "the adversarial relationship between the shareholders, whatever the merits of who was at fault for their dysfunctional relationship, was simply not conducive to such a result. For such a distribution to work, Braun and the Novin Trust would have had to work together to a significant degree to effectuate an in-kind partition of the property into separate building lots and then in the development of their own lots despite their separate ownership. The history of their contentious relationship strongly suggests that they would not have been able to do so."; Donovan v. Quade, 830 F.Supp.2d 460, 489 (N.D. Ill. 2011) ("The drastic remedy of dissolution is warranted here. Because of the parties' distrust, noncommunication, and inability to continue harmoniously the affairs of QDE, it is not practicable to carry on the business of QDE. The high level of animosity the parties hold for each other has divided the management and

operation of the corporation. There has been no joint decision-making since prior to 2003. The directors/shareholders have gone without meetings. The distribution of profits and royalties has gone unsettled. . . . The dissatisfaction and dissension among Donovan and Quade has been so long and bitter than any prior harmony and trust cannot be reestablished. The parties' differences are irreconcilable. Given this relationship between Donovan and Quade, the business and affairs of QDE cannot be operated to the advantage of all shareholders.").

Joe has been a member of the Company since its inception. (App. Vol. I. pp. 321-328 and 391-393; Exs. 1 and 36). Joe became more actively involved in the day-to-day operations of the Company in the summer of 2013 when the relationship between Tracy, Bryan, and Jeff deteriorated. (Trial Tr. Vol. 2, p. 225:9-16 and Vol. 4, p. 85:2-6). After becoming more actively involved in the Company, Joe tried to act as peacemaker between his brothers and Tracy and made several good faith efforts to resolve disputes and issues that were caused by Tracy's, Bryan's, and Jeff's acrimonious and toxic relationship. (App. Vol. I. pp. 427-428; App. Vol. II., pp. 065-071; App. Vol. I. pp. 437-438 and 439-440; Exs. 66, 68, 75, and 76; Trial Tr. Vol. 2, p. 225:9-16, and Vol. 4, pp. 94:5-98.10 and 100:12-101:22). Joe's efforts to resolve Company issues between Tracy, Bryan, and Jeff were

in the best interests of the Company. (Trial Tr. Vol. 2, p. 225:17-19). Joe's efforts to resolve Company issues between Tracy, Bryan, and Jeff were unsuccessful. (Trial Tr. Vol. 4, pp. 94:5-98:10).

It is an undisputed fact the Tracy's, Bryan's, and Jeff's relationship is acrimonious and toxic, and that issues between the three (3) of them existed for over five (5) years prior to this litigation and has resulted in many Company disputes and issues. (App. Vol. I. pp. 369-371, 372-386, 410, 411-415, 432-435, 444-447, 448-453; App. Vol. II. pp. 142-153 and 154-160; Exs. 32, 33, 44, 45, 72, 85, 87, 97, and 98; Trial Tr., Vol. 3, pp.79:15-82:12, and Vol. 4, pp. 40:22-42:25).

Jason Wagner, the Company's accountant, testified that the disputes have made it extremely difficult, or nearly impossible, for him to do the Company's accounting properly. (Trial Tr. Vol. 3, p. 82:8-12). The District Court accurately noted that the members have their attorneys present at Company meetings. (App. Vol. I. p. 298, Ruling p. 37).

The District Court concluded that the Company had what the District Court considered "total dysfunction at the governance level", that "[t]he relationship between the members is not repairable and certainly the duty of good faith that each must bring to the Company will be nonexistent in the future", and that the District Court "cannot repair the lack of trust in the

relationship between Jeff, Bryan, and Tracy". (App. Vol. I. p. 298; Ruling p. 37). The testimony and exhibits submitted in this case support these findings and conclusions of the District Court.

Iowa Code § 489.701 provides in part:

> 1. A limited liability company is dissolved, and its activities must be wound up, upon the occurrence of any of the following:
> . . .
> d. On application by a member, the entry by a district court of an order dissolving the company on the grounds that any of the following applies:
> . . .
> (2) It is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement.
> . . .

As the District Court found, "[i]t is simply not reasonably practicable to carry on the Company's activities in conformity with the certificate of organization and operating agreement in light of the intensity, longevity and number of disputes and issues existing between Tracy, Bryan and Jeff which are fueled by their continuing long-time acrimonious, bitter, and toxic relationship." (App. Vol. I. p. 298; Ruling p. 37).

There are significant deficiencies and problems with the Company's operational documents. The Company's operational documents may have been adequate and sufficient for the initial purchase in 2009 of a single rental property (817 Melrose Ave.) when Tracy, Bryan, and Jeff were best of

friends. However, the Company's operational documents are neither adequate nor sufficient for the proper conducting of Company business now that the Company has an ownership interest in seven (7) rental properties valued in excess of 3,000,000 and Tracy, Bryan, and Jeff have an acrimonious, bitter, and toxic relationship. On September 8, 2009, attorney Joe Holland notified Jeff and Tracy of several concerns and deficiencies regarding the Company's operational documents and advised them that the Company's operational documents "should be revised and finalized prior to any significant business activities". (App. Vol. I. pp. 441-443; Ex. 82). The concerns raised by Mr. Holland were not addressed and many disputes resulted. (App. Vol. I. pp. 321-328, 391-393 and 441-443; Exs. 1, 36, and 82).

Furthermore, Article IV of the Company's Operating Agreement provides the following:

> Article IV – Distribution of Profits:
>
> The members may from time to time <u>unanimously</u> declare, and the company may distribute, accumulated profits that the members agree are not necessary for the cash needs of the company's business. Unless otherwise provided, retained profits shall be deemed an increase in the capital of the company.

(App. Vol. I. p. 327; Ex. 1, p. 7, Article IV) (emphasis added).

Therefore, in order to distribute any Company profits, consent of all the members is required. Based on the acrimonious and toxic relationship between Tracy, Bryan, and Jeff, it is highly unlikely, if not impossible, that the members will ever agree on distribution of profits. Without distribution of Company profits, the specific purpose of the Company of investing in real estate is meaningless.

The Company simply cannot operate under existing Company operational documents and it would be impossible for the members to agree on necessary amendments to the Company's operational documents.

In their Brief, Bryan and Jeff take the position that the Company has been functioning fine since its inception and that, since many of the disputes are now resolved by the District Court, the Company will operate in a profitable manner in the future. (Bryan's and Jeff's Brief, pp. 35-36). Since October 2017, the Company has not been operating pursuant to its Certificate of Organization and Operating Agreement, but rather pursuant to an Interim Management Agreement that was entered into by the parties in order to resolve Tracy's Application for Receiver pursuant to Iowa Code § 680.1 and Bryan's and Jeff's Application for Temporary Injunction. (App. Vol. I. pp. 013-014 and 011-012; Plaintiff's Withdrawal of Verified Application to Appoint Receiver pursuant to Iowa Code 680.1 and Bryan

Clark and Jeffrey Clark's Withdrawal of Request for Preliminary Injunctive Relief). On this matter, the District Court found the following:

> The Company is also operating now under an "Interim Management Agreement", so obviously all issues concerning ordinary governance procedures and operating the Company in the future have not been resolved and will continue to be future disputes if not dissolved. The Interim Management Agreement was entered into only to avoid the necessity of appointing a receiver or possibly issue a temporary injunction during the pendency of the lawsuit. I cannot ignore what I consider to be total dysfunction at the governance level.

(App. Vol. I., p. 298; Ruling p. 37).

Tracy, Bryan, Jeff, and Joe, as members of the Company, have a fiduciary duty of care to the Company and each other to act with "the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the [C]ompany." See Iowa Code § 489.409(3). Members in a limited liability company shall discharge their duties of loyalty and care "consistently with the contractual obligation of good faith and fair dealing." Iowa Code § 489.409(4).

With the relationship between Tracy, Bryan and Jeff so acrimonious, bitter, and unrepairable, it is impossible that the duties of loyalty and care will be exercised consistently with the contractual obligation of good faith and fair dealing in the future. As the District Court correctly concluded,

"[t]he relationship between the members is not repairable and certainly the duty of good faith that each must bring to the Company will be nonexistent in the future." (App. Vol. I. p. 298; Ruling p. 37). As Joe testified, "I don't believe that we can go on the way that we're going and not be back here in a couple of years with another situation." (Trial Tr. Vol. 4, pp. 152:22-153:6).

Therefore, the District Court's judicial dissolution of the Company under Iowa Code § 489.701(1)(d)(2) was correct and should be affirmed.

II. THE DISTRICT COURT PROPERLY ORDERED THAT THE DECEMBER 2015 AND JUNE/JULY 2016 FINANCIAL CONTRIBUTIONS BE RECATEGORIZED AS LOANS AND THAT TRACY, BRYAN, JEFF, AND JOE EACH HAVE A 25% MEMBERSHIP INTEREST IN THE COMPANY.

A. Preservation of Error.

Joe agrees that Bryan and Jeff preserved error on this issue.

B. Standard of Review.

Joe agrees with the standard of review set forth in Bryan's and Jeff's Brief.

C. Argument.

Joe requested that the District Court categorize the December 2015 and June/July 2016 financial contributions as loans. (App. Vol. I. p. 229; Joe's Post-Trial Brief, p. 10). The effect of this is that Tracy, Bryan and his children, Jeff and two (2) of his children, and Joe and his four (4) children each have a 25% membership/equity interest in the Company. The District

Court's Ruling that the December 2015 and June/July 2016 financial contributions shall be recategorized as loans and that Tracy, Bryan, Jeff, and Joe each have a 25% membership/equity interest was correct and should be affirmed. In support of Joe's position, Joe joins with and adopts Argument Section II of Tracy's Brief, pp. 39-50. In addition, Joe submits the following supplemental argument.

The issue of dissolution of the Company was tried in equity. "Equity jurisdiction allows a court the necessary flexibility to determine the equities between the parties." Farmers Sav. Bank, Joice v. Gerhardt, 372 N.W.2d 238, 245 (Iowa 1985). "[A] court sitting in equity necessarily has considerable flexibility in framing a remedy[.]" Iowa Dept. of Social Services v. Blair, 294 N.W.2d 567, 570 (Iowa 1980). "Equity is not bound by forms, fiction or technical rules but will seek and determine the true situation." Vanhorn Refining and Inv. Co. v. Opdahl, 481 N.W.2d 710, 712 (Iowa Ct. App. 1991). Any situation that is contrary to equitable principals and can be redressed within the scope of judicial action may have a remedy devised to meet it, even though no similar relief has ever been given. Becker v. Central States Health and Life Co. of Omaha, 431 N.W.2d 354, 356 (Iowa 1988), *overruled on other grounds by* Johnston Equip. Corp. of Iowa v. Industrial Indemnity, 489 N.W.2d 13, 16-17 (Iowa 1992).

As the issue of the dissolution of the Company was tried in equity, the District Court had the authority and flexibility to fashion a remedy that the District Court determined was appropriate based on the evidence presented at trial.

The District Court stated the following in its Ruling:

> I am using my equitable powers to fashion a remedy that I believe is as fair as possible to all members. I am ordering that the 2015 capital contributions by Jeff, Joe, and Bryan and the 2016 capital contributions by Jeff and Bryan will be re-categorized as debt and will be treated as loans to the Company and the members will be returned to their initial equity position of 25% each.

(App. Vol. I. p. 298; Ruling p. 37).

There are several reasons why categorizing the December 2015 and June/July 2016 financial contributions as loans and returning Tracy, Bryan, Jeff, and Joe to their initial membership/equity position of 25% each is fair and equitable.

Tracy, Bryan, Jeff, and Joe as member managers were all responsible for knowing that the Shultz promissory note was due on December 1, 2015, and having the Company in a financial position to timely pay it. Therefore, Tracy, Bryan, Jeff, and Joe as member managers are all responsible for missing the December 1, 2015, due date of the Schultz promissory note. As a result of their combined oversight, the Company was required to raise

approximately $1,000,000 in a very short time; i.e., nine (9) days. (App. Vol. I. pp. 397-399; Ex.39).

It would not be fair and equitable to treat the December 2015 financial contributions as capital contributions when Tracy, Bryan, Jeff, and Joe all were responsible for being aware of the December 1, 2015, due date for payment of the Shultz promissory note and the Company was faced with very little time to fund an approximately $1,000,000 payoff. A member should not be permitted to increase their membership interest (or decrease another member's membership interest) from a crisis that is in part their own making. This is especially true if certain members had sufficient and readily available funds to pay in a very short time an equal share of a financial contribution.

Furthermore, the December 2015 financial contributions associated with payment of the Shultz promissory note were the first financial contributions to the Company that were booked as capital contributions rather than as loans since the initial $41,000 per-member capital contributions were made in 2009 when the Company was first formed. (Trial Tr. Vol. 3, pp. 201:21-202:15). After six (6) years of treating Clark family money contributed to the Company as loans, to change how financial

contributions are treated in the Company in a crisis situation with a very short time to raise approximately a $1,000,000 is neither fair nor equitable.

The resolution to contribute $950,000 to pay the Clark family loans was passed on February 19, 2016. (App. Vol. I. pp. 406-409; Ex. 43). At the time this resolution was passed there were disputes among the Members as to Member's voting interests in the Company. (App. Vol. II. pp. 205-206, 207; and App. Vol. I. pp. 474-475, 476 and 477-479; Exs. 111, 112, and 402-404). No deadline was ever set by which Members were required to contribute an equal share of $950,000. (App. Vol. I. pp. 406-409; Ex.43).

On June 23, 2016, over four (4) months after the February 19, 2016, resolution, Joe was notified by the Company accountant regarding a plan for Bryan, Jeff, and Joe to fund their share of the $950,000 financial contribution. (App. Vol. II. pp. 678-681; Ex. 413). In response, Joe communicated to his brothers and the Company accountant that he had several concerns and questions about the funding plan and the need to pay the Clark family loans. (App. Vol. II. pp. 072-090 and 678-681; Exs. 74 and 413). Bryan and Jeff each contributed $316,666 on June 29, 2016, and then on July 1, 2016, an additional $158,333 each. (App. Vol. II. pp. 205-206; Ex. 111). Bryan testified that he gave Joe until the end of the month to make his financial contribution (before Bryan and Jeff made Joe's share of the

financial contribution), but that Joe probably could have made his contribution by the end of the year. (Trial Tr. Vol. 4, p. 176:14-177:17).

There was no Company vote in June/July 2016, or at any time, that a Member's equal share of the $950,000 contribution was due in June/July 2016. Bryan and/or Jeff unilaterally decided that Joe needed to make his equal share of the $950,000 contribution on or about June 29, 2019. (App. Vol. II. pp. 072-090 and 678-681; Exs. 74 and 413). Bryan and Jeff are not authorized to make unilateral decisions for the Company and exceeded their authority in deciding when the equal shares of the $950,000 were required to be paid. (App. Vol. I. pp. 321-328 and 391-393; Exs. 1 and 36).

Furthermore, there were amortization schedules and payment schedules for the Clark family loans set up by the Company's accountant. (App. Vol. II. pp. 161-184 and 185-186; Exs. 99 and 100; Trial Tr. Vol. 3, pp. 30:5-21 and 32:14-33.5). At the time Bryan and Jeff made the June/July 2016 financial contributions to the Company and the Clark family loans were paid, the Clark family loans were neither past due nor in default. (App. Vol. II. pp. 025-028 and 205-206; Exs. 61 and 111; Trial Tr. Vol. 4, p. 151:17-20). As Joe stated in an August 18, 2016, e-mail to Bryan and Jeff, "[s]ince no deadline was ever placed on this second payoff, and there is no external pressures forcing us to pay back this loan immediately (note coming

due at bank, contract expiring with third-party, etc.), I think we need to discuss our options (including cash disbursements from other partnerships to cover the Outside Properties debt) prior to any action being taken". (App. Vol. II. p. 75; Ex. 74, p.4).

It is neither fair nor equitable to treat financial contributions as capital contributions (which increases and decreases membership interests) when the purpose of the financial contribution is to pay loans that are neither due nor in default and already have established amortization and repayment schedules. What is equitable and fair is to treat the financial contribution as a loan to the Company, thereby not increasing or decreasing a member's membership interest.

The Company's Certificate of Organization is silent on the issues of how financial contributions are to be treated and the effect of financial contributions on a member's membership interest (App. Vol. I. pp. 391-393; Ex. 36).

The Company's Operating Agreement is also silent on additional capital contributions, except to provide that, upon demand, voting rights are in proportion to capital contributions as adjusted from time to time to reflect any additional contributions or withdrawals. (App. Vol. I. pp. 321-328; Ex. 1).

The Company's Certificate of Organization and Operating Agreement do not provide any guidance as to when financial contributions are appropriate and the consequences of making or not making a financial contribution as to a member's percentage membership interest, including rights to profits, or whether the financial contribution should be treated as a capital contribution or a loan. (App. Vol. I. pp. 321-328 and 391-393; Exs. 1 and 36).

Iowa Code § 489.403(3) provides:

> An operating agreement may provide that the interest of any member who fails to make a contribution that the member is obligated to make is subject to specified penalties for, or specified consequences of, such failure. The penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating the member's interest to that of a nondefaulting member, a forced sale of the member's interest, forfeiture of the member's interest, the lending by other members of the amount necessary to meet the member's commitment, a fixing of the value of the member's interest by appraisal or by formula and redemption, or sale of the member's interest at such value or other penalty or consequence.

Jason Wagner, the Company's accountant, testified that is fairly common for an operating agreement for a limited liability company to include a provision regarding the effect and treatment of the additional financial contributions within a company. (Trial Tr. Vol. 3, pp. 78:12-79:8).

The Company's Operating Agreement simply does not provide provisions contemplated by Iowa Code § 489.403(3) notwithstanding that the Company's accountant testified that such provisions are fairly common in operating agreements.

Although the Company's Management Certificates state "that capital contribution and proportionate equity interest is subject to change" this provision does not provide any detail on the relationship, if any, between additional capital contributions and proportionate membership/equity interests. (App. Vol. I. pp. 462-463, 464-465, 466-467 and 468-469; Exs. 319-322). The Company's Management Certificates contemplate that a member's capital contribution may change, and their proportionate equity interest may change, however, the Management Certificates do not provide specifically how additional capital contributions affect a member's proportionate membership/equity interest, if at all. (App. Vol. I. pp. 462-463, 464-465, 466-467 and 468-469; Exs. 319-322).

When, as here, the Company's governance documents are so deficient and do not provide provisions regarding treatment of financial contributions and the effect of financial contributions on membership/equity interests, it is fair and equitable to treat the December 2015 and the June/July 2016 financial contributions as loans to the Company without any corresponding

increase or decrease in a Member's membership/equity interest. This is consistent with both the Company's Certificate of Organization (that members are not required to make capital contributions) and the first six (6) years of the Company's history regarding financial contributions to the Company.

The Court Ordered that "[t]o accomplish the dissolution, the 2015 and 2016 capital contributions will be re-categorized as loans with the principal loan balance for the 2015 contributions being $1,001,896.86 and the principal loan balance for the 2016 contributions being $950,000." (App. Vol. I. p. 299; Ruling p. 38).

Iowa Code § 489.702(1) provides the following:

> A dissolved limited liability company shall wind up its activities, and the company continues after dissolution only for the purpose of winding up.

Therefore, as the District Court has judicially dissolved the Company, the Company is required to wind up its activities. Iowa Code § 489.702(1).

The Company's Certificate of Organization and Operating Agreement do not contain any provisions that set forth how Company assets, including any surplus of Company assets, are to be distributed upon winding up of the Company's affairs. (App. Vol. I. pp. 321-328 and 391-393; Exs. 1 and 36). Therefore, Iowa Code § 489.708 controls the distribution of the Company's

assets upon dissolution and winding up of the Company's affairs. See Iowa Code § 489.110(2).

Iowa Code §489.708 provides the following:

> 1. In winding up its activities, a limited liability company must apply its assets to discharge its obligations to creditors, including members that are creditors.
>
> 2. After a limited liability company complies with subsection 1, any surplus must be distributed in the following order, subject to any charging order in effect under Section 489.503:
>
> a. To each person owing a transferable interest that reflects contributions made by a member and not previously returned, an amount equal to the value of the unreturned contributions.
>
> b. In equal shares among members and disassociated members, except to the extent necessary to comply with any transfer effective under section 489.502.
>
> 3. If a limited liability company does not have sufficient surplus to comply with subsection 2, paragraph "a", any surplus must be distributed among the owners of transferable interests in proportion to the value of their respective unreturned contributions.
>
> 4. All distributions made under subsections 2 and 3 must be paid in money.

A "'[t]ransferrable interest' means the right, as originally associated with a person's capacity as a member, to receive distributions from a limited liability company in accordance with the operating agreement, whether or

not the person remains a member or continues to own any part of the right." Iowa Code § 489.102(24).

All of the members of the Company have a transferrable interest. Therefore, the Company, in winding up its activities, must apply its assets and any surplus as follows and in the following order:

1. Creditors, including members that are creditors;
2. To each person owning a transferrable interest in an amount equal to the member's unreturned contribution; and
3. In equal shares among members.

Iowa Code § 489.708.

Upon dissolution and winding up of the Company's affairs, distribution of the assets of the Company pursuant Iowa Code § 489.708 is the same whether the December 2015 and June/July 2016 contributions are treated as loans or capital contributions; i.e., Bryan, Jeff, and Joe will receive their December 2015 financial contributions, Bryan and Jeff will receive their June/July 2016 financial contributions, and any surplus will be distributed in equal shares among members.

Therefore, whether the December 2015 and June/July 2016 financial contributions are treated as capital contributions or loans, these financial

contributions will first be repaid before any surplus is distributed to members.

As previously stated, Joe has tried to act as peacemaker and resolve disputes between Tracy, Bryan, and Jeff. (App. Vol. I. pp. 427-428, 437-438, 439-440 and App. Vol II. p. 065; Exs. 66, 68, 75, and 76, Trial Tr. Vol. 2, p. 225:9-16, and Vol. 4, pp. 94:5-98:10 and 100:12-101:22). Joe has tried to be fair to Tracy, Bryan, Jeff, and the Company. (Trial Tr. Vol. 2, p. 229:9-24). Despite Joe's repeated requests over several months for information pertaining to the Company and the 2016 financial contributions, Joe was not notified until January 30-31, 2017, that Bryan was taking the position that Joe's membership interest had been decreased by Bryan and Jeff's June/July 2016 financial contributions. (App. Vol. II. pp. 072-090, 205-206 and 207; Exs. 74, 111, and 112).

It is neither fair nor equitable to permit Joe's membership interest in the Company be decreased based on June/July 2016 financial contributions when he has always acted in the best interests of the Company, tried to act as peacemaker to resolve disputes between his brothers and Tracy, there is no deadline in which to make a financial contribution, and the repayment of the loans for which the financial contributions were made are not due, are not in default, and have amortization and payment schedules.

III. THE DISTRICT COURT CORRECTLY ORDERED DISMISSAL OF TRACY'S CLAIMS THAT IN DECEMBER 2015 JOE OPPRESSED TRACY AND BREACHED JOE'S FIDUCIARY DUTIES TO TRACY BY PURPOSEFULLY DILUTING TRACY'S MEMBERSHIP INTEREST IN THE COMPANY.

A. Preservation of Error.

Joe agrees that Tracy preserved error on these issues.

B. Standard of Review.

Joe agrees with the standard of review set forth in Tracy's Brief.

C. Argument.

Tracy appeals the District Court's dismissal of Tracy's claims based on oppression and breach of fiduciary duty against Joe. The District Court was correct in dismissing these claims.

Tracy claims that Joe oppressed him and breached his fiduciary duties to Tracy by making a December 2015 financial contribution to the Company, thereby purposefully diluting Tracy's membership interest in the Company. Joe denied these claims.

Joe's December 2015 financial contribution was paid to the Company in order to pay the Shultz promissory note which was due on December 1, 2015. (App. Vol. I. p. 355, 397-399; App. Vol. II. p. 207 and 208; Exs. 17, 39, 112, and 113; Trial Tr. Vol. 4, pp. 16:24-17:7 and 86:20-89:13).

Tracy testified that Joe was acting as peace maker and that Joe wanted to resolve Company issues and did not want to dilute anybody. (Trial Tr. Vol 2, pp. 225:9-226:1). Tracy also testified that he does not believe Joe intentionally or in bad faith tried to dilute him, that that Joe's December 2015 financial contribution was not done intentionally to dilute Tracy's interest in the Company or in bad faith. (Trial Tr. Vol. p. 226:2-9). In addition, Tracy admitted at trial that in Tracy's deposition he stated that he never observed Joe do anything in regard to the Company that was not in the Company's best interests. (Trial Tr. Vol. 2, p. 227:1-12).

Joe agreed to make the December 2015 financial contribution to the Company in order to pay the Shultz promissory note because he did not want to lose the Schultz real estate and the legal obligation to Shultz was due and needed to be paid. (App. Vol. I. pp. 355 and 397-399; Exs. 17 and 39; Trial Tr. Vol 4, pp. 86:20-89:13). Joe also testified that when he made his decision to contribute financially to the Shultz payoff, dilution of anybody was not part of his decision making, in fact, Joe did not know what "dilution" was. (Trial Tr. Vol. 4, p. 89:2-17). Joe was focused on not losing the Shultz properties and meeting a legal obligation to Shultz. (Trial Tr. Vol. 4, pp. 86:20-89:13). By contributing to the Shultz payoff, Joe was not intending to dilute Tracy's interest in the Company. (Trial Tr. Vol. 4, p.

89:2-17). By contributing to the Shultz payoff, the Shultz properties were not lost and the legal obligation due and owing to Shultz under a written promissory note was satisfied. In short, by making a December 2015 financial contribution to the Company in order to pay the Shultz promissory note, Joe acted in the best interests for the Company.

In order to prevail on an oppression claim, a minority shareholder must prove that a majority of shareholders acted oppressively by defeating a minority shareholder's reasonable expectations as a minority shareholder under the relevant governing documents. Baur v. Baur Farms, Inc., 832 N.W.2d 663, 673-674 (Iowa 2013). Expectations are governed by a reasonableness standard. Id.

In order to prevail on a claim of breach of fiduciary duty under Iowa law, a Plaintiff must prove the following elements:

1. Defendant owed a fiduciary duty to the Plaintiff;
2. Defendant breached the fiduciary duty;
3. The breach of fiduciary duty was a proximate cause of damage to Plaintiff; and
4. Amount of damages, if any.

Knoblock v. Home Warranty Inc., No. C15-4239-MWB, 2016 WL 6662709, at *4 (N.D. Iowa Nov. 10, 2016).

Majority shareholder(s) owe fiduciary duties to minority shareholder(s). Id. at *5. The fiduciary duties of majority shareholder(s) to minority shareholder(s) include the duty of care, duty of loyalty, and duty not to conduct themselves in a manner that is oppressive to minority shareholder(s). Baur, 832 N.W.2d at 673-674; see also Knoblock, 2016 WL 6662709, at *5.

A breach of fiduciary duty claim against majority shareholder(s) may arise from oppressive conduct by majority shareholder(s) against minority shareholder(s). Knoblock, 2016 WL 6662709, at *5. In addition, "conduct constituting breach of fiduciary duty can also amount to minority shareholder oppression." Id. at *6.

Therefore, when a Plaintiff's allegations of breach of fiduciary duty also serve as the exclusive basis for a Plaintiff's oppression claim, Plaintiff's claims for breach of fiduciary duty and oppression are indistinct for purposes of analysis. Id. Evidence of breach of fiduciary duty may be considered evidence of oppression. Id.

A court will defer to the strategic decisions made under the business judgment rule. Van Horn v. R.H. Van Horn Farms, Inc., No. 17-0324, 919 N.W.2d 768, 2018 WL 3060240, at *7 (Iowa Ct. App. June 20, 2018). "The business judgment rule presumes the directors' decisions are informed, made

in good faith and honestly believed them to be in the best interests of the company." Id. (internal quotations omitted).

The Company is a member-managed limited liability company. (App. Vol. I. p. 327; Ex. 1, p.7, para. 5.1). Iowa Code § 489.409 sets out the standards of conduct for members and managers of an Iowa limited liability company. "A member of a member-managed limited liability company owes to the company and, subject to §489.901, subsection 2, the other members the fiduciary duties of loyalty and care" as set forth in Iowa Code §§ 489.409(2) and (3). Iowa Code § 489.409(1).

Iowa Code § 489.409(2) provides that the duty of loyalty in a member-managed limited liability company includes the following duties:

> a. To account to the company and to hold as trustee for it any property, profit, or benefit derived by the member regarding any of the following:
>
> (1) In the conduct or winding up of the company's activities.
> (2) From a use by the member of the company's property.
> (3) From the appropriation of a limited liability company opportunity.
>
> b. To refrain from dealing with the company in the conduct or winding up of the company's activities as or on behalf of a person having interest adverse to the company.
>
> c. To refrain from competing with the company in the conduct of the company's activities before the dissolution of the company.

Iowa Code § 489.409(3) provides the following regarding the duty of care:

> Subject to the business judgment rule as stated in subsection 7, the duty of care of a member of a member-managed limited liability company in the conduct and winding up of the company's activities is to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company. In discharging this duty, a member may rely in good faith upon opinions, reports, statements, or other information provided by another person that the member reasonably believes is a competent and reliable source of the information.

Iowa Code § 489.409(7) provides the following regarding the business judgment rule:

> a. A member satisfies the duty of care in subsection 3 if all of the following apply:
>
> (1) The member is not interested in the subject matter of the business judgment.
> (2) The member is informed with respect to the subject of the business judgment to the extent the member reasonably believes to be appropriate in the circumstances.
> (3) The member has a rational basis for believing that the business judgment is in the best interests of the limited liability company.
>
> b. A person challenging the business judgment of a member has the burden of proving a breach of the duty of care, and in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the limited liability company.

With the regard to the December 2015 financial contribution to pay the Shultz promissory note, duty of loyalty is not at issue. Tracy, Bryan,

Jeff, and Joe, as Members of the Company, have a fiduciary duty of care to the Company and each other to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner that the member reasonably believes to be in the best interests of the Company. Iowa Code § 489.409(3). The duty of care is satisfied by a member's compliance with the business judgment rule. Iowa Code § 489.409(7)(a).

Iowa Code § 489.409(4) requires that all the members of the Company exercise their duties and obligation consistent with the principals of good faith and fair dealing. Iowa Code §489.409(4). In other words, the members cannot do anything which will have the effect of destroying or injuring the right of members to receive the fruits of the Operating Agreement. See American Tower, L.P. v. Local TV Iowa, L.L.C., 809 N.W.2d 546, 550 (Iowa Ct. App. 2011).

A member satisfies the duty of care if the requirements of Iowa Code § 489.409(7)(a) are met. Furthermore, the party challenging the business judgement rule has the burden of proving a breach of the duty of care, and in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the limited liability company. Iowa Code § 489.409(7)(b).

The focus of the duty of care under Iowa Code § 489.409(3) is what is in the best interests of the Company. Therefore, when evaluating Joe's conduct as a member and whether he satisfied his duty of care, one must focus on what is in the best interests of Company. Iowa Code §§ 489.409(3) and (7). Therefore, subject to the business judgment rule and good faith and fair dealing, all members have a fiduciary duty of care to do what is in the best interests of the Company.

Because Tracy's allegations of breach of fiduciary duty also serve as the exclusive basis for his oppression claims against Joe, Tracy's breach of fiduciary duty claims and oppression claims are indistinct for purposes of analysis. See Knoblock, 2016 WL 6662709, at *6.

Tracy claims Joe breached fiduciary duties to Tracy and oppressed him by Joe making a financial contribution to the Company in December 2015 in order to satisfy the Shultz promissory note and thereby purposefully diluting Tracy's membership interest in the Company. The payment of the Shultz promissory note was necessary in order to prevent the potential loss of three (3) very valuable rental properties and to satisfy an approximately $1,000,000 legal obligation that was due and owing. (App. Vol. I. pp. 355, 397-399 and App. Vol. II. p. 219; Exs. 17, 39, and 121). In short, it was in the best interest of the Company that the Shultz promissory note be paid in

early December 2015. The Shultz payoff situation was an urgent situation that required immediate action. Joe satisfied his fiduciary duties of care to the Company and the other members by contributing to the Shultz payoff and therefore, in addition, did not oppress Tracy.

As Joe did not breach fiduciary duties to Tracy and did not oppress Tracy in regard to Joe's December 2015 financial contribution to the Company in order to pay the Shultz promissory note, the District Court was correct in dismissing Tracy's claims based on oppression and breach of fiduciary duties and the District Court's Ruling on these claims should be affirmed.

CONCLUSION

After consideration of testimony from eight (8) witnesses over four and a half (4 1/2) days of trial, approximately 160 exhibits, and post-trial briefs, the District Court entered a Ruling that judicially dissolved Outside Properties, LLC, recategorized the 2015 and 2016 financial contributions as loans in order to accomplish dissolution, restored Tracy, Bryan, Jeff, and Joe to 25% membership/equity interests, and dismissed Tracy's claims based on oppression and breach of fiduciary duties. The District Courts ruling is based on the evidence submitted in this case, is equitable, and should be affirmed.

REQUEST FOR SUBMISSION WITH ORAL ARGUMENT

Pursuant to Iowa R. App. P. 6.903(2)(i), this party requests oral argument.

/s/ John E. Beasley
John E. Beasley (AT0002953)
William N. Toomey (AT00l 1184)
Phelan Tucker Law LLP
321 East Market Street
Iowa City, IA 52240
Telephone: 319-354-1104
Facsimile: 319-354-6962
beasley@phelantuckerlaw.com
toomey@phelantuckerlaw.com

ATTORNEYS FOR DEFENDANT-APPELLEE/CROSS-APPELLEE JOSEPH CLARK

CERTIFICATE OF COST

I hereby certify that the foregoing Brief was e-Filed, and therefore incurred no printing costs.

/s/ John E. Beasley

John E. Beasley

PROOF OF SERVICE AND CERTIFICATE OF FILING

I, John E. Beasley, attorney for Defendant-Appellee/Cross-Appellee, certify that I filed this Final Brief with the Clerk of the Supreme Court via EDMS/e-Filing on the 11th day of August, 2020.

I further certify that I served this document on all parties in this matter via EDMS/e-Filing on the 11th day of August, 2020.

/s/ John E. Beasley

John E. Beasley

CERTIFICATE OF COMPLIANCE

WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[**X**] this brief contains **12,263** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

[ ] this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[**X**] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in size 14 Times New Roman font, or

[ ] this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ John E. Beasley | August 11, 2020

John E. Beasley | Date