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IN THE IOWA DISTRICT COURT FOR LINN COUNTY

LORIANN BUSSE and LISA CARPENTIER, ALEXANDRA RENEE CARPENTIER; DEVAN MICHELE CARPENTIER; and MARIE JOSEE CARPENTIER, A Minor Through Her Mother and Next Best Friend LISA CARPENTIER, Plaintiffs, v. JEFFREY BUSSE; LAVERN T. BUSSE; BUSSE FINANCIAL ADVISORS, LLC; BUSSE FAMILY LIMITED PARTNERSHIP; AB BI NOTE LIMITED PARTNERSHIP; LAVERN T. BUSSE AND AUDREY BUSSE FOUNDATION and Nominal Defendants: LTB 2002 IRREVOCABLE TRUST; LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O LORIANN BUSSE; LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O ALEXANDRA RENEE CARPENTIER; LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O DEVAN MICHELE CARPENTIER; and LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O MARIE-JOSEE CARPENTIER, Defendants.	CIVIL NO. LACV083022 RULING ON DEFENDANTS BUSSE FINANCIAL ADVISORS, LLC; BUSSE FAMILY LIMITED PARTNERSHIP; AB BI NOTE LIMITED PARTNERSHIP; LAVERN T. BUSSE AND AUDREY BUSSE FOUNDATIONS' MOTION FOR SUMMARY JUDGMENT ON COUNTS V, VI, IX, and XIII

Defendants, Busse Financial Advisors, LLC ("BFA"); Busse Family Limited Partnership ("BFLP"); AB BI Note Limited Partnership ("AB BI"), and Lavern T. Busse and Audrey Busse Foundation (hereinafter collectively referred to as "Entity Defendants"), filed a Motion for Summary Judgment together with a Memorandum and Statement of Undisputed Facts on September 8, 2016. Plaintiffs, LoriAnn Busse ("LoriAnn") and Lisa Carpentier ("Lisa"), filed a Resistance to Entity Defendants' Motion for Summary Judgment together with a Memorandum and Response to Entity

Defendants' Statement of Undisputed Facts on September 30, 2016.[1] Entity Defendants filed a Reply to LoriAnn and Lisa's Resistance on October 11, 2016.

Oral argument on Entity Defendants' Motion for Summary Judgment was held on November 7, 2016. The parties appeared by their attorneys of record. The Court has considered counsels' briefs, the parties' exhibits, and the applicable law, and now makes the following ruling:

Factual Background and Proceedings

In order to reach the merits of the controversy before the Court, a brief background of the trusts benefitting Busse family members, and the corporations and partnerships at issue is necessary. This factual background is intended to provide a broad understanding of the trusts benefitting Busse family members, and the corporations and partnerships at issue.[2] The Court will address additional facts in subsequent sections as necessary to resolve the particular counts on which Entity Defendants seek summary judgment.

A. Relevant history of BFLP

Busse Family Limited Partnership ("BFLP") was formed in 2004 and holds substantial assets (primarily marketable securities) that Lavern primarily manages. BFLP is owned by Busse family members individually, trusts benefitting Busse family members, and BFA. As of March 15, 2006, the limited partnership interest in BFLP was divided as follows: BFA owned 1.33%, LoriAnn owned 11.82%, Lisa and Lisa's daughters owned 26.58%, Jeff and his children owned 38.25%, and Lavern owned 22.02%.

The BFLP Partnership Agreement designated BFA as the General Partner. The "exclusive management, operation and control of the business and affairs of" BFLP was vested in the General Partner. Under the BFLP Partnership Agreement, BFA designated Jeff and Lavern to act on its behalf

[1] LoriAnn and Lisa's Resistance was timely filed pursuant to Court Orders entered on September 22, 2016 and September 26, 2016 that granted the parties' requests for an extension of Summary Judgment Resistance Deadlines.

[2] On January 5, 2017, the Court filed a Ruling on Jeff Busse and Lavern T. Busse's Motion for Partial Summary Judgment. In that Ruling, the Court provides a more in depth factual background relating to the Busse family, trusts benefitting Busse family members, the corporations and partnerships at issue, and the family dispute. Here, the Court focuses on the facts relevant to the claims related to the Entity Defendants' Motion for Summary Judgment.

as managers of BFLP. Neither Jeff nor Lavern are General Partners of BFLP. The BFLP Partnership Agreement provides: "Cash may be distributed at the sole discretion of the General Partner among the Partners pro rata in accordance with their Sharing Ratios," subject to Article XII and other provisions of the operating agreement. (Def. App. 87, BFLP Agreement, Article XI, A, p.24). The BFLP Partnership Agreement further provides: "Because the Partnership has been formed and created to manage the Partners' investments in a single entity, the General Partner shall have complete and absolute discretion and authority in determining whether any distribution, including Cash distributions, shall be made by the Partnership." (Def. App. 88, BFLP Agreement, Art. XII, p. 25). The BFLP Partnership Agreement further provides that the General Partner may be removed with a 70 percent vote of Limited Partners. (Def. App. 74, BFLP Agreement, Article VI, p. 11). If the General Partner is removed or cannot serve, the Limited Partners may elect a successor General Partner by a simple majority. (Def. App. 95, BFLP Agreement, Article X, C.4). The BFLP Partnership Agreement contains the following integration clause: "**Entire Agreement.** This Agreement contains the entire agreement among the Partners with respect to the matters of this Agreement and shall supersede and govern all prior agreements, written or oral." (Def. App. 103, BFLP Partnership Agreement, p. 40, Art. XIX.H).

On December 17, 2014, Lavern, through his revocable trust, the LTB Revocable Trust, purchased a .05% limited partnership interest in BFLP from Jeff for $9,147.67. On March 2, 2015, Lavern, through his revocable trust, the LTB Revocable Trust, made an optional capital contribution of $2,812,597 into BFLP resulting in 9.49% ownership of BFLP ("Optional Capital Contribution"). (Def. App. 9, 32, 177-178, Lavern Dep. Tr. 74:10-14; Jeff Dep. Tr. 205:19-23). BFA as the General Partner of BFLP consented to the Optional Capital Contribution. (Entity App. 223-224).

The BFLP Partnership Agreement allows partners to make non-pro rata optional contributions to the Partnership as long as proper approval is provided and the General Partner maintains ownership of at least 1% share of the Partnership. (Entity App. 100, BFLP Partnership Agreement § VIII(B)).

Additional voluntary contributions by limited partners are "subject to the consent of the General Partner," while additional contributions by a General Partner are subject to "the consent of 70 Percent in Interest of Limited Partners." (Entity App. 100, BFLP Partnership Agreement Article VII, Section B, at 18).

B. Relevant History of AB BI

AB BI Note Limited Partnership ("AB BI") was formed on May 5, 2011. (Entity App. 5, 128). It is owned by trusts created by Lavern benefitting his three children, Jeff, Lisa, and LoriAnn, and by its General Partner, BFA. (*Id.*). The trusts benefitting Jeff, Lisa, and LoriAnn each hold a 32.9% ownership interest in AB BI and BFA holds a 1.3% ownership interest in AB BI. AB BI holds a portfolio of marketable securities. AB BI also holds notes entitling it to principal and interest payments on loans it made to BI and Lavern's individual trust, LTB 1996 Trust.

Under the AB BI Partnership Agreement, BFA designated Jeff and Lavern to act on its behalf as managers of ABI BI. Neither Jeff nor Lavern are General Partners of AB BI. The AB BI Partnership Agreement provides: "Cash may be distributed at the sole discretion of the General Partner among the Partners pro rata in accordance with their Sharing Ratios," subject to Article XII and other provisions of the Partnership Agreement. (Def. App. 133, AB BI Partnership Agreement, p. 25, Art. XI.A). The AB BI Partnership Agreement further provides: "Because the Partnership has been formed and created to manage the Partners' investments in a single entity, the General partner shall have complete and absolute discretion and authority in determining whether any distribution, including Cash distributions, shall be made by the Partnership." (Def. App. 134, AB BI Partnership Agreement, p. 26, Art. XII). The AB BI Partnership Agreement contains the following integration clause: "**Entire Agreement**: This Agreement contains the entire agreement among the Partners with respect to the matters of this Agreement and shall supersede and govern all prior agreements, written or oral." (Def. App. 149, AB BI Partnership Agreement, p. 41, Art. XIX.M).

C. Relevant History of BFA

Busse Financial Advisors, LLC ("BFA") was formed on December 20, 2004. (Entity App. 52, 56). BFA is a manager-managed LLC, managed by a Board of Managers consisting of two managers. (Entity App. 60, BFA Operating Agreement Article 5). The original managers of BFA were Jeff and Lavern. Nothing in the Operating Agreement requires a manager of BFA to also have an ownership interest in BFA. (*Id.*; Plfs. Response to Entity SOF ¶ 25).The original members of BFA were Lavern, Jeff, LoriAnn, and Lisa, and each member held a 25% interest. BFA's primary function is to operate and manage BFLP and AB BI. (Def. App. 104, 151, BFLP Agreement, p. 41; AB BI Agreement, p. 43; *see* Plfs. SOF to Def. Motion for Partial Summary Judgment ¶ 11).

On September 15, 2012, Lavern sold his 25% interest in BFA to Jeff, a permitted transfer under the BFA Operating Agreement. (Entity App. 70, 75, BFA Operating Agreement §§ 11.1, 11.5; Plfs. Response to Entity SOF ¶ 32). Plaintiffs allege they were told by Jeff and Lavern during a May 20, 2013 meeting that Lavern had resigned as a manager of BFA. (LoriAnn Dep. Tr. 36:1 – 7; 36:23 – 37:16, Plfs. App. 234). Lavern alleges he continued to serve as a manager of BFA after he sold his interest in BFA to Jeff. (Lavern Dep. Tr. 63:5 – 64:2, 64:21 – 25, Entity App. 253-54). Lavern never gave a written resignation of his management position. (Lavern Dep. Tr. 62:22 – 63:1, Entity App. 252-53, LoriAnn Dep. Tr. 183:25 – 185:3, Entity App. 292-94, Lisa Dep. Tr. 147:16 – 22, 197:22 – 199:2, Entity App. 270, 276-78).

D. The Busse Foundation

The Lavern T. Busse and Audrey Busse Foundation ("Busse Foundation") is a non-profit organization formed in 1990 to coordinate charitable giving of a portion of Lavern and Audrey's wealth. The Busse Foundation is governed by Articles of Incorporation and By-Laws. (Entity App. 29-33, D1-D5; Entity App. 34-51, D6-D23). The Busse Foundation is governed by a Board of Trustees. (Entity App. 34, By-Law § 2.01, D6). Lavern, Audrey, Jeff, LoriAnn and Lisa served as the original Trustees on the Board.

In 2004 a Busse Foundation Pledge ("Foundation Pledge") was prepared which indicated, among other things, that LoriAnn, Lisa, and Jeff would deposit the excess of each of their estates over their estate tax exemption amount into the Busse Foundation under certain circumstances and with certain conditions. (*See* Plfs. Entity App. 394, Busse Foundation Pledge PLFS007375). In 2012, the Foundation Trustees, including LoriAnn and Lisa, entered into a Charitable Distribution Resolution Procedure ("Distribution Resolution"). (Entity App. 176-177, D356-57). The Distribution Resolution reflected the allocation of charitable giving by the Foundation among Busse Family Members based on their proportionate share of assets contributed to the Foundation. (Entity App. 176, Distribution ¶ 1, D356). Under the Distribution Resolution, any Busse Family Member can assign their contribution allocation to any other Busse Family Member in any proportion they choose. (Entity App. 176, Distribution Resolution ¶ 2, D356). If a Busse Family Member does not make an assignment pursuant to paragraph 2 of the Distribution Resolution prior to their death, then the Distribution Resolution provides that, after their death, their allocation percentage will be assigned proportionally to that person's lineal descendants. (Entity App. 176-177, Distribution Resolution ¶ 7, D356-357).

Applicable Law and Analysis

I. Summary Judgment Standard

A motion for summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3) (2015). The moving party carries the burden of proving the absence of a fact issue. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (citations omitted). "If reasonable minds could differ on how to resolve an issue, then a genuine issue of material fact exists." *Id.* However, speculation and mere allegations are not material facts. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005) (citations omitted).

In ruling on a motion for summary judgment, the court must look at the facts in a light most

favorable to the nonmoving party. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. *Id.* "An inference is legitimate if it is 'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004) (quoting *McIlravy*, 653 N.W.2d at 328). But an inference based on "speculation or conjecture" is not to be indulged. *Id.*

If summary judgment cannot be granted with regard to the entire action, the Court may grant partial summary judgment on the material facts that "exist without substantial controversy and [determine] what material facts are actually and in good faith controverted." Iowa R. Civ. P. 1.981(4). The court will deem these material facts that are not controverted as established at trial. *Id.*

II. Analysis

Plaintiffs have asserted two direct claims against Entity Defendants: Count V seeking judicial dissolution of BFA and Count VI seeking to bring a Derivative Action Claim as shareholders of BFA. Plaintiffs also seek a Declaratory Judgment in Count IX concerning the validity of the Optional Capital Contribution, and they seek a Declaratory Judgment in Count XIII concerning the enforceability of the Foundation Pledge. Entity Defendants move for summary judgment on Counts V, VI, IX, and XIII.

A. Count V: Judicial Dissolution – BFA

In Count V, Plaintiffs seek judicial dissolution of BFA pursuant to Iowa Code section 489.701. Plaintiffs assert that there is currently only one manager of BFA, contrary to the BFA Operating Agreement. Plaintiffs assert further the members were unable to agree on a replacement manager at the August 28, 2014 member meeting, resulting in a deadlock on who should be the second manager, with no "reasonable basis to believe this deadlock will be resolved." (Petition ¶¶ 170-72). Plaintiffs also assert that there is a deadlock at the member level because Jeff owns 50% of BFA and Lisa and

LoriAnn collectively own 50% of BFA, which "has resulted in the inability to elect the proper number of managers and led to one manager, Jeff, controlling the affairs of BFA without any meaningful input or control from the other equal members, LoriAnn and Lisa." (Petition ¶ 176). Finally, Plaintiffs assert that Jeff, as manager of BFA, has acted oppressively toward Plaintiffs by withholding distributions from BFLP and AB BI in an effort to "get further concessions" from Plaintiffs related to control over BI. (Petition ¶¶ 177-81).

Plaintiffs rely on Iowa Code section 489.701 for their request for judicial dissolution of BFA. (Petition ¶ 183). Iowa Code section 489.701 provides in pertinent 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:
>
> (1) The conduct of all or substantially all of the company's activities is unlawful.
>
> (2) It is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement.
>
> e. On application by a member or transferee, the entry by a district court of an order dissolving the company on the grounds that the managers or those members in control of the company have done any of the following:
>
> (1) Have acted, are acting, or will act in a manner that is illegal or fraudulent.
>
> (2) Have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.

IOWA CODE § 489.701 (2015). This section specifically provides that the Court, upon application by a member of a limited liability company, may dissolve the limited liability company on a variety of grounds, including that it is "not reasonably practicable" to carry on the company's activities or that the managers or members in control "[h]ave acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant." *Id.* Plaintiffs allege both of those grounds are

applicable here and there is a genuine issue of material fact as to whether dissolution of BFA is appropriate.

According to Entity Defendants, they are entitled to summary judgment on Count V because (1) there are two managers, in compliance with the BFA Operating Agreement, so there is no deadlock at the management level; (2) deadlock in and of itself is not a basis for statutory dissolution of a limited liability company under Iowa law; and (3) even taking Plaintiffs allegations as true, Plaintiffs have failed to provide sufficient evidence of oppression to support judicial dissolution of BFA. The Court will address BFA's arguments in turn.

1. Lavern's status as a manager of BFA

On September 15, 2012, Jeff and Lavern executed an assignment and consent form that transferred Lavern's 25% interest in BFA to Jeff. (Jeff. Dep. Tr. Vol. I 171:7 – 11, Plfs. Def. App. 163). LoriAnn testified that Jeff and Lavern told her during a May 20, 2013 meeting that Lavern had resigned as a manager of BFA in the fall of 2012 when he sold his 25% interest in BFA to Jeff. (LoriAnn Dep. Tr. 36:1 – 7, 36:23 – 37:16). At an August 28, 2014 meeting, Jeff stated "there's a vacancy in the role of the manager" and the members of BFA—LoriAnn, Lisa, and Jeff—voted on a replacement manager for Lavern's position. (Plfs. Def. App. 792, BFA Meeting Transcript Excerpt 8/28/2014; Plfs. Entity App. 392, Minutes of the Meeting of the Members of BFA 8/28/14). The notice of the August 28, 2014 meeting included this vote on the agenda. (Plfs. Entity App. 393). LoriAnn and Lavern were nominated. The vote was deadlocked. Specifically, LoriAnn and Lisa voted their collective 50% interest in favor of LoriAnn, and Jeff voted his 50% interest in favor of Lavern. Lavern attended the meeting. Lavern did not assert that he was still a manager during the meeting. (Lavern Dep. Tr. Vol. I 63:15 – 64: 25, Plfs. Def. App. 219).

In December 2014, BFA responded to a request for information. In this letter, Jeff, in his capacity as Manager for BFA, stated "[t]he current manager of the Company is Jeffrey Vern Busse. Mr. Busse owns 50% of the Company." (Plfs. Entity App. 258, 12/30/14 Letter from BFA). Jeff also

stated in the letter that "[t]he original Managers of the Company were Jeffrey Vern Busse and Lavern T. Busse, each of whom owned 25% of the outstanding Units of BFA at the time they were designated as the initial managers by the Operating Agreement." (*Id.*). In the Answer filed in this litigation on June 15, 2015, Defendants admitted that BFA only had one manager. (Answer, ¶ 169). Defendants were later granted leave to amend their Answer and denied this prior admission.

Pursuant to the BFA Operating Agreement, Jeff and Lavern were expressly designated as "[t]he Managers of initial Board of Managers" for BFA, and they were to "serve until their successor are elected and qualified, or until their earlier death, resignation or removal." (Entity App. 60, BFA Operating Agreement § 5.3). Section 5.4 of the BFA Operating Agreement provides:

> A Manager may resign at any time by giving a written resignation to the secretary or president of the Company. The resignation is effective without acceptance when it is actually received by the secretary or president, unless a later effective time is specified in the resignation. A Manager may be removed by the Members only at a meeting called for the purpose of removing the Manager, and the meeting notice must state that the purpose, or one (1) of the purposes, of the meeting is to remove one (1) or more Managers. If a vacancy occurs, it may be filled only at a meeting of the Members called for the purpose of filling the vacancy, and the meeting notice must state that the purpose, or one (1) of the purposes, of the meeting is to elect the Manager.

(Entity App. 60, BFA Operating Agreement § 5.4). Thus, pursuant to the BFA Operating Agreement, a manager may resign by providing written notice of his resignation or he may be removed at a special meeting called for that purpose.

LoriAnn testified that she is unaware of a written notice of resignation and has never received written notice that Lavern resigned as a manager of BFA. (LoriAnn Dep. Tr. 183:25 – 185:3, Entity App. 292-3). Likewise, Lisa testified she is unaware of a written notice of resignation and has never received written notice that Lavern resigned as a manager of BFA. (Lisa Dep. Tr. Vol. II 147:16 -22, 197:22 – 199:2, Entity App. 147, 276-278). LoriAnn acknowledged that, pursuant to the BFA Operating Agreement, Jeff and Lavern were duly appointed as managers of BFA, and they each

continued as managers "[a]s long as they were elected and qualified or until their earlier death, resignation or removal." (LoriAnn Dep. Tr. 183:25 – 184:6, Entity App. 292-3).

In addition, Plaintiffs agree that no meeting or vote was ever held to remove Lavern as a manager. (Entity App. 226-227, 234-235, Plfs. 11/9/15 Answer to Interrogatory # 7; Entity App. 282, LoriAnn Dep. Tr. 37:12 – 21; Entity App. 270, 276-278, Lisa Dep. Tr. Vol. II 147:16 – 22, 197:22 – 199:2). The August 28, 2014 vote to elect a replacement manager cannot be considered a vote to remove Lavern because no replacement manager was elected. (*See* Entity App. 52-82, BFA Operating Agreement § 5.3 (providing that Lavern, as a manager, "shall serve until [his] successor[is] elected and qualified…")).

Plaintiffs do not claim that Lavern is incompetent or otherwise unqualified to act as a manager of BFA. Plaintiffs claim that there is only one manager of BFA because Jeff and Lavern, through their representations and conduct, led Plaintiffs to believe Lavern resigned as a manager of BFA once he sold all of his interest in BFA. There is nothing in the BFA Operating Agreement or in the Limited Liability Company Act, however, that precludes a non-member from serving as a manager. The parties' mistaken belief that Lavern was no longer eligible to serve as a manager of BFA is insufficient to amend the requirements under the BFA Operating Agreement relating to resignation and removal of a manager. *Recker v. Gustafson*, 279 N.W.2d 744, 759 (Iowa 1979) ("new consideration is necessary to support a contract modification.").

Similarly, the general proposition that written contracts may be amended orally does not assist Plaintiffs because Plaintiffs present no evidence that the members of BFA reached an agreement to modify the BFA Operating Agreement. *Terukina v. Gazelle Vill., Inc.*, 715 N.W.2d 770, No. 05-1109, 2006 WL 782749, at *2 (Iowa Ct. App. Mar. 29, 2006) ("A modification occurs when the contracting parties agree to incur different duties and obligations from those in the original contract. Generally, new consideration is needed to support the new agreement." (citing *Recker*, 279 N.W.2d at 759; *Quigley v. Wilson*, 474 N.W.2d 277, 280 (Iowa Ct. App. 1991))); *Whalen v. Connelly*, 545 N.W.2d

284, 291 (Iowa 1996) ("A written contract can be amended by oral agreement and a provision in a written contract that it can be modified or rescinded *only* in writing is ineffective (**subject, of course to the doctrine of consideration** and the statute of frauds) (italics in original) (bold font added) (citations omitted); *Recker*, 279 N.W.2d at 759 ("new consideration is necessary to support a contract modification."). Because there is no evidence the members of BFA reached an agreement to amend the BFA Operating Agreement, there is no genuine issue of material fact which, if resolved in Plaintiffs' favor, would allow the fact finder to conclude the BFA Operating Agreement was modified to allow resignation of a manager to be made orally.

It is undisputed Plaintiffs are unaware of a written notice of resignation and have never received written notice that Lavern resigned as a manager of BFA. It is also undisputed a meeting or vote has never been held to remove Lavern as a manager. Therefore, there is no genuine dispute of material fact which, if resolved in Plaintiffs' favor, would allow the fact finder to conclude Lavern resigned or has been removed as a manager of BFA pursuant to the BFA Operating Agreement. *See Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011) (an inference to create a triable issue in response to a motion for summary judgment cannot be based on conjecture or speculation).

Notwithstanding, the evidence viewed in the light most favorable to the nonmoving party creates a genuine issue of material fact as to whether Lavern waived or abandoned the right to manage BFA under the doctrine of estoppel by acquiescence.

> " '[E]stoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right.' " *Garrett v. Huster,* 684 N.W.2d 250, 255 (Iowa 2004) (quoting *In re Marriage of Fields,* 508 N.W.2d 730, 731 (Iowa 1993)). "Although this doctrine bears an 'estoppel' label, it is, in reality, a waiver theory." *Westfield Ins. Cos. v. Econ. Fire & Cas. Co.,* 623 N.W.2d 871, 880 (Iowa 2001). Unlike equitable estoppel, estoppel by acquiescence does not require a showing of detrimental reliance or prejudice. *Id.* Estoppel by acquiescence applies when (1) a party "has full knowledge of his rights and the material facts"; (2) "remains inactive for a considerable time"; and (3) acts in a manner that "leads the other party to believe the act [now complained of] has been approved." 28 Am. Jur. 2d *Estoppel and Waiver* § 63, at 489–90 (2000); *accord Anthony v. Anthony,* 204 N.W.2d 829, 834 (Iowa 1973) (stating estoppel by acquiescence "is applicable 'where a person knows or ought to

> know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right' " (quoting *Humboldt Livestock Auction, Inc. v. B & H Cattle Co.,* 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967))).

Markey v. Carney, 705 N.W.2d 13, 21 (Iowa 2005); *see also Woodroffe v. Woodroffe*, No. 13-2034, 2015 WL 1546365, at *2 (Iowa Ct. App. April 8, 2015) ("This doctrine applies where a person knows or ought to know that he is entitled to enforce his right…and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right.").

Plaintiffs point to specific facts that indicate Jeff and Lavern acted for over two years as though Lavern was no longer a manager of BFA. LoriAnn testified that Lavern and Jeff told her during a May 20, 2013 meeting that Lavern had resigned as a manager of BFA in the fall of 2012 when he sold his 25% interest to Jeff; the BFA meeting wherein Plaintiffs and Jeff voted to elect a "replacement" manager took place on August 28, 2014; Jeff advised Plaintiffs' counsel that he was the only manager of BFA in December 2014; and such admission was made in June 2015. It is undisputed that Jeff is a manager of BFA and Lavern, at a minimum, was a former manager of BFA. Therefore, a genuine issue of material fact exists as to whether Jeff and Lavern knew or ought to have known the requirements of the BFA Operating Agreement and their alleged neglect to assert Lavern's status as a manager of BFA for approximately two years engenders a genuine dispute of material fact as to whether Lavern waived or abandoned the right to manage BFA under the doctrine of estoppel by acquiescence. Therefore, Entity Defendants are not entitled to summary judgment with respect to Count V on the basis that there are currently two managers of BFA in compliance with the BFA Operating Agreement.

2. Deadlock and Statutory Dissolution of a Limited Liability Company

Next, Entity Defendants assert they are entitled to summary judgment on Count V because dissolution is not a proper remedy. Entity Defendants note that deadlock is not a statutorily enumerated basis for dissolving an Iowa limited liability company under Iowa Code section 489.701. Entity Defendants note further that BFA's only activity is to act as the General Partner of two family-

owned limited partnerships, BFLP and AB BI. According to Entity Defendants, BFA continues to operate and provide management of BFLP and AB BI; therefore, even if there is only one manager of BFA, there is no basis to dissolve BFA.

Although deadlock is not an independent ground for judicial dissolution of a limited liability company under Iowa Code section 489.701, the Court finds deadlock is relevant to whether it is "reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement." IOWA CODE § 489.701(d)(2) (2015). This conclusion is reinforced by the treatise Entity Defendants cite to support their proposition that deadlock is not a basis for judicial dissolution of a limited liability company under Iowa law:

> The judicial applications of deadlock have arisen in states with no specific mention of deadlock in their statute; as discussed in a prior section, deadlock becomes a reason for finding that continuation of the entity is not "reasonably practicable." This perspective was set out in a New York case that noted deadlock was not an independent ground for dissolution in that state's LLC statute as it was for corporations statute, so this factor would be relevant only within the court's evaluation of the entity's "continue ability function." A New Jersey court was unwilling to look to the definition of deadlock in its corporate statute, since the LLC statute did not repeat that term, looking instead to the definition in Black's law dictionary. But, as discussed in a prior section, deadlock regularly shows up in judicial discussions of whether it is "not reasonably practicable" for an entity to continue. As noted in a Delaware case, the inability to resolve deadlock, even one intentionally provided by the operating agreement, itself can increase the case for dissolution.

O'Neal & Thompson, 1 Close Corp and LLCs: Law and Practice § 5:24 (Rev. 3d ed).

There is no reported Iowa decision interpreting "reasonably practicable" within the context of Iowa Code section 489.701. Courts in other jurisdictions, when interpreting statutes similar to Iowa Code section 489.701 and determining whether it is appropriate to judicially dissolve a limited liability company, "have emphasized that the test is whether it is reasonably practicable to carry on the business of the limited liability company, not whether it is impossible to do so." *Gagne v. Gagne*, 338 P.3d 1152, 1160 (Colo App. 2014) (citing *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); *In re*

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1545 Ocean Ave., LLC, 72 a.d.3D 121,893 N.Y.S.2d 590, 598 (N.Y.App.Div.2010)). In determining whether it is reasonably practicable to carry on the business of a limited liability company, courts in other jurisdictions have considered and weighed a number of factors 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. *See Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* Nos. 4479–VCN, 4886–VCN, 2010 WL 3314484, at *22 (Del. Ch. Aug. 2, 2010) (unpublished opinion); *In re Cat Island Club, L.L.C.,* 94 So.3d 75, 79–80 (La.Ct.App.2012); *1545 Ocean Ave.*, 893 N.Y.S.2d at 597–98.

Gagne, 338 P.3d at 1160–61. "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." *Id.* at 1661 (citation omitted).

In considering these factors, the Court finds there is a genuine issue of material fact as to whether it is "reasonably practicable to carry on [BFA's] activities in conformity with the certificate of organization and the operating agreement." IOWA CODE § 489.701(d)(2) (2015). As discussed above, there is a genuine issue of material fact as to whether Lavern waived or abandoned the right to manage BFA. Therefore, there is a genuine issue of material fact as to whether BFA is currently operating with only one manager. (Entity App. 52, BFA Operating Agreement § 5.2 ("The number of Manager(s) to constitute the Board of Managers shall be two (2), and the number shall not be changed without the affirmative vote of Members holding a majority of the outstanding Membership Interests.")). It is undisputed the BFA members reached an impasse when trying to elect a "replacement" manager on August 28, 2014. Therefore, there is a genuine issue of material fact as to whether there is deadlock between the members.

Furthermore, for reasons discussed below, the Court finds there are genuine issues of material fact as to whether Jeff breached fiduciary duties he owed to Plaintiffs in his role as manager of BFA and as a BFA-appointed-manager of BFLP and AB BI. Therefore, there are genuine issues of material fact as to whether Jeff, as a BFA manager and acting on behalf of BFA, has engaged in misconduct.

Because there are genuine issues of material fact as to whether, at a minimum, two of the factors courts typically weigh in considering a request for judicial dissolution of a limited liability company are present in this case, the Court finds there is a genuine issue of material fact as to whether it is "reasonably practicable to carry on [BFA's] activities in conformity with the certificate of organization and the operating agreement." IOWA CODE § 489.701(d)(2) (2015). Accordingly, Entity Defendants are not entitled to summary judgment on Count V insofar Count V seeks to judicially dissolve BFA on the basis it is no longer "reasonably practicable" to carry on BFA's business activities.

3. Judicial Dissolution under the Oppression Standard

Next, Entity Defendants assert that, even taking Plaintiffs' allegations as true, Plaintiffs have failed to provide sufficient evidence of oppression to support the remedy of dissolution of BFA. Plaintiffs allege that Jeff, acting on behalf of BFA, has engaged in the following oppressive conduct: (1) Jeff delayed or withheld distributions from BFLP and AB BI for reasons related to Plaintiffs' control over BI; (2) Jeff authorized a series of transactions to allow Lavern to make the Optional Capital Contribution in an effort to ensure that Plaintiffs would not hold majority voting power over BFLP in the event BFA is dissolved; and (3) Jeff diverted funds from AB BI to fund Lavern's "retribution" against LoriAnn, Lisa, and Lisa's children to the detriment of the members of BFA and partners of AB BI, which include BFA. The Court will address Plaintiffs' allegations in turn. Then the Court will assume Plaintiffs' allegations are true and consider whether judicial dissolution of BFA is appropriate on the basis of alleged minority oppression.

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The Court's analysis is governed by the principle that minority oppression is closely linked with fiduciary duty under Iowa law. *See Baur v. Baur*, 832 N.W.2d 663, 673-74 (Iowa 2013) ("The fiduciary duty also mandates that controlling directors and majority shareholders conduct themselves in a manner that is not oppressive to minority shareholders."). Therefore, evidence of a breach of fiduciary duty supports a finding of minority oppression. *See Knobloch v. Home Warranty, Inc.*, No. C15-4239-MWB, 2016 WL 6662709, at *6 (N.D. Iowa Nov. 10, 2016) ("Evidence of a breach of fiduciary duty will be considered as evidence of oppressive conduct.") (cited *Baur*, 832 N.W.2d at 670); *Goettsch v. Goettsch*, 29 F.Supp.3d 1231, 1243 (N.D. Iowa 2014) ("Undoubtedly, some of the defendants' conduct could—if found to constitute a breach of fiduciary duty by the jury—also support a finding of minority oppression.") (cited *Baur*, 832 N.W.2d at 670).

Jeff, as a manager of BFA, owes the members of BFA a duty of loyalty and duty of care. IOWA CODE § 489.409 (2015). This duty includes the duty to "refrain from dealing with the company in the conduct…of the company's activities as or on behalf of a person having an interest adverse to the company." *Id.* As manager of BFA, Jeff also owes the members of BFA a duty of good faith and fair dealing. *Id.*

In addition, BFA is the General Partner of BFLP. The BFLP Partnership Agreement provides that the General Partner of BFLP has a duty of loyalty and a duty of care towards BFLP. "The General Partner will owe a duty of loyalty and a duty of care to the Partnership." (BFLP Partnership Agreement VII(H)(5), Entity Def. App. 96). Iowa Code section 488.408 also codifies a General Partner's duties of loyalty, care, and good faith and fair dealing. *See* IOWA CODE § 488.408 (2015). Iowa Code section 488.408 provides that the duty of loyalty owed by a General Partner includes the duty to: "refrain from dealing with the limited partnership in the conduct…of the limited partnerships activities as or on behalf of a party having an interest adverse to the limited partnership." IOWA CODE § 488.408(2)(b) (2015). Iowa Code section 488.408 provides further that "[a] general partner shall discharge the duties to the partnership and the other partners under this chapter or under the

partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." IOWA CODE § 488.408(4) (2015).

Notably, minority oppression may arise without a breach of fiduciary duty. Under Iowa law, "oppression is 'an expansive term used to cover a multitude of situations dealing with improper conduct which is neither illegal nor fraudulent.' " *Baur*, 832 N.W.2d at 670 (quoting *Maschmeier v. Southside Press, Ltd.*, 435 N.W.2d 377, 380 (Iowa Ct. App. 1988)). In *Baur v. Baur Farms, Inc.*, the Supreme Court of Iowa discussed the term "oppressive" as used in Iowa Code section 490.1430(2)(b) of the Iowa Business Corporations Act, which provides for dissolution of a corporation based upon "illegal, oppressive, or fraudulent" action by directors of a corporation. The *Baur* Court found that, under the Iowa Business Corporations Act, the determination of whether conduct is oppressive "must focus on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances." *Baur*, 832 N.W.2d at 673-74. "When this reasonable expectation is frustrated, a shareholder-oppression claim may arise." *Id.* at 673. *Baur*'s "reasonable expectations" standard governs a limited partner's application for judicial dissolution under Iowa Code section 489.701(1)(e)(2). *See Morse v. Rosendahl*, No. 15-0912, 2016 WL 3273725, at *6 (Iowa Ct. App. June 15, 2016).

a. Distributions from BFLP and AB BI

First, Plaintiffs allege BFA has engaged in oppressive conduct because Jeff, acting as a BFA-appointed manager of BFLP, delayed or withheld distributions from BFLP and AB BI for reasons related to Plaintiffs' control over BI.

In ruling on Jeff and Lavern's Motion for Partial Summary Judgment, the Court found "while BFA and BFA-appointed-managers of BFLP and AB BI have discretion to make distributions, the discretion is constrained by the fiduciary obligations of loyalty and good faith." (Ruling on Jeff and Lavern's Motion for Partial Summary Judgment p. 31). The Court also found "Plaintiffs have engendered a genuine dispute of material fact as to whether Jeff, acting as a BFA-appointed-manager

of BFLP and AB BI, exercised his discretion in making distributions from BFLP and AB BI consistent with his fiduciary obligations of loyalty and good faith." (*Id.*). Specifically, the Court found "a genuine issue of material fact [exists] as to whether Jeff delayed or withheld distributions from BFLP and AB BI for reasons related to Plaintiffs' control of BI. If Jeff delayed or withheld distributions from BFLP and AB BI on the sole basis that Plaintiffs were exercising control over BI, this would support Plaintiffs' claim that Jeff breached fiduciary duties he owed to them and their Dynasty Trusts as limited partners of BFLP and AB BI."[3] (*Id.*). Similarly, if Jeff delayed or withheld distributions from BFLP and AB BI on the sole basis that Plaintiffs were exercising control over BI, this would support Plaintiffs' claim that their "reasonable expectations," as members of BFA and limited partners of BFLP and AB BI, have been "frustrated under the circumstances." *Baur*, 832 N.W.2d at 673-74.

In reaching this conclusion, the Court has considered Entity Defendants' argument that "[a]s a matter of law, the refusal to make discretionary distributions in a single year is not the type of oppression that can support judicial dissolution of BFA." (Entity Def. Motion for Summary Judgment Brief p. 25). The Court finds this argument unavailing because it would effectively immunize a majority shareholder from any allegation of oppressive conduct, so long as the alleged conduct had not spanned a certain length of time. Further, Iowa courts have found oppression or breaches of duty where the plaintiff previously received dividends or distributions but stopped receiving them after a parting of ways. *See e.g. Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517 (Iowa 1974) (finding successful derivative claim based on "freeze-out" of stockholder who had previously received dividends but did not receive any after resigning as employee for company); *Maschmeierv. Southside Press, Ltd.*, 435 N.W.2d 377 (Iowa Ct. App. 1989) (finding oppression of shareholder sons who had been "well compensated" as employees of family corporation but were frozen-out from distributions after their employment terminated).

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[3] In reaching this conclusion, the Court noted "the parties dispute whether Plaintiffs' Dynasty Trusts were properly admitted as Substitute Limited Partners in BFLP and AB BI." (Ruling at p.32 n.15).

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b. Jeff's authorization of a series of transactions that transferred a fractional interest in BFLP to Lavern's personal trust, LTB Revocable Trust.

Next, Plaintiffs allege "[b]y utilizing three separate capacities to orchestrate a transfer of a small partnership interest to Lavern/LTB Trust so that Lavern could use that as a foothold to dilute the interests of other limited partners, Jeff breached…the duties of loyalty and good faith and fair dealing owed by Jeff, when acting as General Partner for BFA and as Manager for BFLP." (Plfs. Resistance to Entities Motion for Summary Judgment p. 27).[4] Plaintiffs allege further that Jeff, in authorizing a series of transactions on BFA's behalf to transfer a fractional interest in BFLP to himself and then Lavern, "breached his duties to the members of BFA, which was purposefully structured to include the limited partners of BFLP." (*Id.*).

In ruling on Jeff and Lavern's Motion for Partial Summary Judgment, the Court found "there is a genuine dispute of material fact as to whether Jeff, acting on behalf of BFA, breached the duties of good faith and fair dealing he owed to Plaintiffs as limited partners in BFLP by authorizing a series of transactions that transferred a fractional interest in BFLP to Lavern's personal trust, LTB Revocable Trust." (Ruling on Jeff and Lavern's Motion for Partial Summary Judgment p.53). Specifically, the Court found that

> [w]hen viewing… the summary judgment record in the light most favorable to the nonmoving party, a reasonable jury could infer that Jeff acted on behalf of BFA to approve both the transfer of a 0.1% interest in BFLP to himself and the transfer of a 0.05% interest in BFLP to Lavern's personal trust to allow the Optional Capital Contribution to occur in an effort to ensure that, in the event BFA was dissolved, Plaintiffs would not have majority control over BFLP and the ability to appoint a new General Partner of BFLP. (*See* Def. App. 95, BFLP Agreement, Article X, C.4 (the Limited Partners may elect a successor General Partner by a simple majority if the General Partner is removed or cannot serve)). If Jeff acted on behalf of BFA to authorize the transfer of a fractional interest in BFLP to himself and then Lavern for this sole purpose, it would support a finding that Jeff breached the duties of good faith and fair dealing he owed Plaintiffs when he stepped into the shoes and obligations of BFLP's General Partner, BFA.

[4] This transaction is discussed in greater depth *infra*.

(*Id.* at 53-54).[5] Similarly, if Jeff acted on behalf of BFA to authorize the transfer of a fractional interest in BFLP to himself and then Lavern for the singular purpose of ensuring that, in the event BFA was dissolved, Plaintiffs would not have majority control over BFLP and the ability to appoint a new General Partner of BFLP, this, when viewed in the light most favorably to Plaintiffs, would support Plaintiffs' claim that their "reasonable expectations," as members of BFA and limited partners of BFLP, have been "frustrated under the circumstances." *Baur*, 832 N.W.2d at 673-74.

c. Management of AB BI

Next, Plaintiffs allege "Jeff used his position as manager of AB BI—a position secured by his role as sole Manager of BFA, which is General Partner to AB BI—to divert $2.65 million eligible for distribution to its partners, or for investment for a better return to its partners, to instead fund Lavern's 'retribution' against LoriAnn and Lisa and Lisa's children. In doing so, Jeff failed to act with loyalty, care, or good faith and fair dealing and acted oppressively toward LoriAnn and Lisa, or their Dynasty Trusts, as limited partners of AB BI, and towards LoriAnn and Lisa as members of BFA, which also has an interest in AB BI." (Plaintiffs' Resistance to Entity Defendants' Motion for Summary Judgment Brief p. 21-22).

On August 25, 2014, AB BI loaned Lavern's personal trust, the "LTB 1996 Trust," $2.65 million at a rate of 3%. (Jeff Dep. Tr. Vol. I, 143:11 – 145:7, Plfs. App. 156). Thereafter, Lavern substituted half of the proceeds from AB BI's $2.65 million loan for the BI non-voting stock in LoriAnn and Lisa's daughters' Grantor Trusts. (Jeff Dep. Tr. Vol. I 146:12 – 23, Plfs. App. 157). Lavern testified that he swapped the BI non-voting stock for cash out of the LoriAnn and Lisa's daughters' Grantor Trusts because he "was mad, very mad," and "wanted to do something" in the form of retribution after LoriAnn and Lisa refused to put him on the BI Board. (Lavern Dep. Vol. II at 138:L12 – 139:L20, Plfs App. 226).

[5] In reaching this conclusion, the Court found "there is no genuine issue of material fact which, if resolved in Plaintiffs' favor, would entitle them to a declaration that the conduct of Jeff and Lavern in making the Optional Capital Contribution violated the duty of loyalty." (Ruling on Jeff and Lavern's Motion for Partial Summary Judgment p.54).

In ruling on Jeff and Lavern's Motion for Partial Summary Judgment, the Court found that the "facts, when viewed in the light most favorable to Plaintiffs, support an inference that Jeff used AB BI's cash reserves to fund Lavern's 'retribution' against Plaintiffs at the expense of pursuing better investment opportunities or distributing the money to the entities that held a limited partnership interest in AB BI." (*Id*. at 36). The Court found further that "[i]f Jeff used AB BI's cash reserves to fund Lavern's 'retribution' against Plaintiffs, rather than distributing the money to the entities holding limited partnership interests in AB BI, this would support a finding that Jeff, acting as a BFA-appointed-manager of AB BI, breached his fiduciary obligations of loyalty and good faith." (*Id.*). Similarly, if Jeff used AB BI's cash reserves to fund Lavern's "retribution" against Plaintiffs, rather than distributing the money to the entities holding limited partnership interests in AB BI, this would support a finding that Jeff, acting as a BFA-appointed-manager of AB BI, frustrated Plaintiffs' "reasonable expectations," as members of BFA and primary beneficiaries of their Dynasty Trusts, which hold, at a minimum, an economic interest in AB BI. *Baur*, 832 N.W.2d at 673-74.

d. Plaintiffs' allegations relating to oppressive conduct and Judicial Dissolution of BFA

As outlined above, there are genuine issues of material fact as to whether Jeff, acting on behalf of BFA, breached fiduciary duties he owed to Plaintiffs and frustrated Plaintiffs' "reasonable expectations," as members of BFA, limited partners of BFLP, and primary beneficiaries of their Dynasty Trusts, which hold, at a minimum, an economic interest in AB BI. The issue before the Court, however, is not simply whether the summary judgment record, when viewed in the light most favorably to Plaintiffs, engenders a genuine dispute of material fact as to whether Jeff, acting on behalf of BFA, acted in an oppressive manner towards Plaintiffs. Instead, the more nuanced issue before the Court is whether, assuming Plaintiffs allegations are true, do their allegations warrant judicial dissolution of BFA.

"[T]he remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one-oppression of the majority by the minority." *Polikoff v. Dole & Clark Bldg. Corp.*, 37 Ill. App. 2d 29, 35-38, 184 N.E.2d 792, 795 (Ill. App. Ct. 1962) (cited *Maschmeier*, 435 N.W.2d at 383); *see also Afshar v. WMG, L.C.,* 310 F.R.D. 408, 411-12 (N.D. Iowa 2015) (recognizing dissolution as a drastic remedy). The Supreme Court of Iowa has "caution[ed]…that courts must be careful when determining relief to avoid giving the minority a foothold that is oppressive to the majority." *Baur*, 832 N.W.2d at 678.

In light of the foregoing case law, the Court finds Entity Defendants' argument—that, even taking Plaintiffs allegations as true, Plaintiffs have failed to provide sufficient evidence of oppression to support judicial dissolution of BFA—may have some merit. Notwithstanding, the issue of whether Jeff, acting on behalf of BFA, breached fiduciary duties owed to Plaintiffs survived Jeff and Lavern's Motion for Partial Summary Judgment; thus, evidence on this issue will be presented at trial. From the standpoint of judicial economy, therefore, partial summary judgment here would not be effective. *See Baur*, 832 N.W.2d at 673-74 (finding minority oppression is closely linked with fiduciary duty under Iowa law); *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 344 (Iowa 1986) (finding summary judgment inappropriate because "it was almost certain to result in piecemeal litigation and increased costs in time and money."). Furthermore, if the fact issues discussed in the Court's ruling on Jeff and Lavern's Motion for Partial Summary Judgment are resolved in favor of Jeff and Lavern at trial, the Court may not have to reach the issue of whether judicial dissolution of BFA is appropriate on the basis of minority oppression. *See Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) (the Court "neither has a duty nor the authority to render advisory opinions.") (citations omitted). In any event, the Court would be better equipped to determine whether judicial dissolution of BFA on the grounds of minority oppression is appropriate after having gauged the credibility of witnesses and having weighed all the evidence presented at trial. *See Baur*, 832 N.W.2d at 677 ("The district court

shall take whatever additional evidence is required for the proper development of the record…”). Therefore, Entity Defendants are not entitled to summary judgment on Count V insofar Count V seeks to judicially dissolve BFA on the basis “the managers or members in control” “[h]ave acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.” IOWA CODE § 489.701 (2015).

B. Count VI: Derivative Action – BFA

Next, Entity Defendants assert they are entitled to summary judgment in their favor with respect to Count VI. Count VI is a derivative action pursuant to Iowa Code Chapter 489 in which Plaintiffs, as members of BFA, assert that they made a demand on September 4, 2013 for distributions from entities controlled by BFA, and Jeff, acting on behalf of BFA, rejected those demands. Plaintiffs claim BFA should bring an action against Jeff for his alleged failure to make distributions from BFLP and from AB BI, and Plaintiffs seek the removal of Jeff as manager of BFA because BFA allegedly will not bring an action for Jeff’s removal. Plaintiffs ask the Court to remove Jeff as manager of BFA and appoint Lisa and LoriAnn as BFA managers.

“A derivative lawsuit is unique in that the shareholders allege the company’s directors have directly harmed it [the company] by their acts and omissions such that the company has suffered a loss. The shareholders indirectly assert their rights through the rights of the company.” *Weltzin v. Nail*, 618 N.W.2d 293, 295 (Iowa 2000). Iowa Code section 489.902 allows a member of a limited liability company to bring a derivative action to enforce the rights of the company under certain circumstances. Unless it “would be futile,” a member must first make a demand on the managers that “they cause the company to bring an action to enforce the right.” IOWA CODE § 489.902(1)-(2) (2015).

Entity Defendants allege that Count VI fails as a matter of law because Plaintiffs’ complaints are specific to their rights as members and not related to the rights of BFA. Entity Defendants allege further that Plaintiffs cannot assert a derivative action because Plaintiffs did not make the required demand of the manager(s) of BFA.

1. Direct Action vs. Derivative Action

As a preliminary matter, Entity Defendants contend Count VI fails as a matter of law because Plaintiffs' claims under Count VI are direct, not derivative. With respect to Count VI, Plaintiffs allege that "BFA is harmed because it is a shareholder in BFLP and AB BI…[and] Jeff…has acted to refuse to provide distributions based on his anger about a completely separate entity…."[6] (Plfs. Resistance to Entity Defendants' Motion for Summary Judgment p. 28). According to Entity Defendants, "[i]t is clear the derivative claim was brought to vindicate Plaintiffs' own rights, not those of BFA…As members of BFA, they would only be entitled to 25% (their ownership interest in BFA) of 1.33% (BFA's ownership interest in BFLP and ABBI), or .3325% of any distribution made by BFLP or ABBI. This is clearly not the interest Plaintiffs' seek to vindicate. They seek their own distributions as limited partners of BFLP and ABBI." (Entity Def. Reply Brief p. 20).

In the context of corporations, the Supreme Court of Iowa has explained:

> As a matter of general corporate law, shareholders have no claim for injuries to their corporations by third parties unless within the context of a derivative action.
>
> There is, however, a well-recognized exception to the general rule: a shareholder has an individual cause of action if the harm to the corporation also damaged the shareholder in his capacity as an individual rather than as a shareholder.
> …
>
> …[T]he test is best stated in the disjunctive: in order to bring an individual cause of action for direct injuries a shareholder must show that the third-party owed him a special duty or that he suffered an injury separate and distinct from that suffered by the other shareholders.

Cunningham v. Kartridg Pak Co., 332 N.W.2d 881, 883-84 (Iowa 1983). Further:

> The fact that a stockholder suffers indirect harm, such as diminution in the value of corporate shares resulting from the impairment of corporate assets, due to a wrong done to the corporation by a third party, does not give the stockholder an individual right of action since such an action would authorize multitudinous litigation and ignore the corporate entity.

Ezzone v. Riccardi, 525 N.W.2d 388, 394 (Iowa 1994).

[6] BFA is not a "shareholder," but is the General Partner of BFLP and AB BI, holding a 1.33% interest in each.

In other words, a derivative action is a vehicle to redress harm to the corporation, while an individual action is a vehicle to redress harm to the shareholder that is separate and distinct from that suffered by other shareholders. A claim to redress harm to a corporation must be brought derivatively to avoid a multiplicity of suits by shareholders for injury to the corporation. A further rationale for requiring such claims to be brought derivatively is that it assures the recovery is for the benefit of the corporation itself and thus available for all creditors of the corporation as opposed to merely benefitting one shareholder.

Although Count VI involves members of a limited liability company and not corporate shareholders, the Court finds the underlying logic of the shareholder derivative cases applicable in the current context. As with corporate shareholders, the Iowa Code provides for derivative actions by limited liability company members. *Compare* Iowa Code §§ 490.741-.742 (corporations) *with id.* 489.902 (limited liability companies); *see also Taylor v. Hogan*, No. 12-0898, 2013 WL 1749777, at *6 (Iowa Ct. App. April 24, 2013) (applying the underlying logic of the shareholder derivative cases in the context of a limited liability company).

In considering the nature of the alleged wrong under Count VI the Court finds Count VI is a derivative claim. BFA owns a 1.33% interest in both BFLP and AB BI and, therefore, is directly harmed if distributions from BFLP or AB BI are improperly delayed or withheld. Specifically, BFA's value is lessened if distributions from BFLP and AB BI are improperly delayed or withheld, as Plaintiffs allege, which would result in an injury to BFA, and then to Plaintiffs as members of BFA. Therefore, any harm to Plaintiffs attributable to delayed or withheld distributions to BFA devolves upon them in the form of the proportionally reduced value of BFA—a loss suffered by all members of BFA. *See Kartridg Pak Co.*, 332 N.W.2d at 883-84 (finding a mere economic loss to the value of a shareholder's stock is not a "separate and distinct" interest allowing a direct cause of action because it is a loss suffered by all shareholders, albeit to differing extents). Because Plaintiffs would be prohibited from bringing a direct cause of action alleging distributions to BFA were improperly

delayed or withheld, the Court finds Plaintiffs have set forth a derivative claim under Count VI. Therefore, Entity Defendants are not entitled to summary judgment on Count VI on the basis that Plaintiffs have set forth direct claims under Count VI.

2. Demand on the manager(s) of BFA

Next, Entity Defendants assert they are entitled to summary judgment on Count VI because Plaintiffs failed to make the required demand on the manager(s) of BFA.[7] The Court finds this argument unavailing because there is a genuine issue of material fact as to whether a demand would have been futile. *See Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 523 (Iowa 1974) (noting "principle of law obviating such requirement where a demand would be a vain and useless thing."). Jeff is a manager of BFA and is a BFA-appointed-manager of BFLP. The BFLP Partnership Agreement gives Jeff, as a BFA-appointed-manager of BFLP, sole and absolute discretion in making distributions.[8]

In ruling on Jeff and Lavern's Motion for Partial Summary Judgment, the Court found "Plaintiffs have engendered a genuine dispute of material fact as to whether Jeff, acting as a BFA-appointed-manager of BFLP and AB BI, exercised his discretion in making distributions from BFLP and AB BI consistent with his fiduciary obligations of loyalty and good faith." (*Id.*). Specifically, the Court found "a genuine issue of material fact [exists] as to whether Jeff delayed or withheld distributions from BFLP and AB BI for reasons related to Plaintiffs' control of BI. If Jeff delayed or withheld distributions from BFLP and AB BI on the sole basis that Plaintiffs were exercising control over BI, this would support Plaintiffs' claim that Jeff breached fiduciary duties he owed to them and their Dynasty Trusts as limited partners of BFLP and AB BI."[9] (*Id.*). Similarly, if Jeff delayed or withheld distributions from BFLP and AB BI on the sole basis that Plaintiffs were exercising control over BI, this would support Plaintiffs' claim that "demand would be futile under Iowa Code §

[7] For purposes of its analysis, the Court will assume, without deciding, that Plaintiffs made an ineffective demand on BFA's manager(s) to make distributions from BFLP and AB BI.

[8] Although the BFLP Partnership Agreement gives Jeff, as a BFA-appointed-manager of BFLP, sole and absolute discretion in making distributions, the BFLP Partnership Agreement does not absolve Jeff of his duties of loyalty and good faith that are owed to the limited partners in each partnership. *See* IOWA CODE § 488.408 (2015).

[9] In reaching this conclusion, the Court noted "the parties dispute whether Plaintiffs' Dynasty Trusts were properly admitted as Substitute Limited Partners in BFLP and AB BI." (Ruling at p.32 n.15).

489.904(2) because Jeff was not disinterested or independent when he decided to withhold distributions from companies BFA controlled…" (Amended Petition ¶ 188)

Because there is a genuine issue of material fact as to whether a demand on the manager(s) of BFA to make distributions from BFLP and AB BI would have been futile, Entity Defendants are not entitled to summary judgment on Count VI on the basis Plaintiffs failed to make a demand on the manager(s) of BFA. *See* IOWA CODE § 489.902 ("A member may maintain a derivative action to enforce a right of a limited liability company as follows:…(2) A demand under subsection 1 would be futile.").

C. Count IX: Declaratory Judgment – BFLP

Count IX is a Declaratory Judgment claim seeking a declaration of the parties' rights under the BFLP Partnership Agreement with respect to Lavern's Optional Capital Contribution. In Count IX, Plaintiffs seek the following declaration of the parties' rights under the BFLP Partnership Agreement: (1) "[t]he conduct of Jeff and Lavern in making the optional capital contribution violated the duty of good faith and fair dealing owed to LoriAnn and Lisa as part of the Partnership." (Amended Petition ¶ 211); (2) "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution." (Amended Petition ¶ 210); and (3) "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution because the effect of the contribution is to dilute the interest of LoriAnn and Lisa and allow Jeff and Lavern to have majority control over BFLP." (Amended Petition ¶ 209).

Entity Defendants move for summary judgment on Count IX, arguing the Optional Capital Contribution was made by a limited partner, subject only to the approval of the General Partner. Entity Defendants argue further that the BFLP Partnership Agreement expressly authorizes limited partners to make non-pro rata contributions. Entity Defendants move to dismiss Count IX in its entirety. (Entity

Def. Motion for Summary Judgment ¶ 3 "Judgment should be entered against Plaintiffs on the Declaratory Judgment claim.").

Because Entity Defendants seek summary judgment on Count IX in its entirety, the Court will address Plaintiffs' requests for declaratory relief in Count IX in turn. The Court's analysis is governed by the BFLP Partnership Agreement and Iowa Code section 488.408. The BFLP Partnership Agreement provides that the General Partner of BFLP has a duty of loyalty and a duty of care towards BFLP. "The General Partner will owe a duty of loyalty and a duty of care to the Partnership." (BFLP Partnership Agreement Article VII(H)(5); Entities App. 96). Iowa Code section 488.408 also codifies a General Partner's duties of loyalty, care, and good faith and fair dealing. *See* IOWA CODE § 488.408 (2015). Iowa Code section 488.408 provides that the duty of loyalty owed by a General Partner includes the duty to: "refrain from dealing with the limited partnership in the conduct…of the limited partnerships activities as or on behalf of a party having an interest adverse to the limited partnership." IOWA CODE § 488.408(2)(b) (2015). In addition, "A general partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." IOWA CODE § 488.408(4) (2015).

1. The conduct of Jeff and Lavern in making the Optional Capital Contribution

On December 17, 2014, Jeff requested a distribution of 0.1% of BFLP interest from his MMB Grantor Trust. (Dep. Ex. 18, Plfs. Entity App. 249).[10] Jeff's personal friend Mr. Touro, the MMB Grantor Trust's Independent Trustee, distributed this fractional share of BFLP to Jeff. (Jeff Dep. Tr. Vol. I 67:18 – 22, Plfs. Entity App. 137 (Touro's status as a personal friend); Jeff Dep. Tr. Vol. I 203:5 – 10, Plfs. Entity App. 171 (fact of distribution)). The next day, on December 18, 2014, Jeff then acted

[10] On December 17, 2014, neither Jeff nor Lavern held a personal interest in BFLP. In 2011 Lavern gifted an equal portion of his 22.02% limited partnership interest in BFLP to each of his children's Dynasty Trusts. On September 15, 2012, Jeff transferred his entire interest in BFLP to Michelle. (Jeff Dep. Tr. Vol. I 173:7 – 23, Plfs. Def. App. 163). Michelle held Jeff's former personal interest in BFLP for several months prior to transferring the asset into the MMB Grantor Trust to utilize a significant portion of her $5 million estate tax exclusion that expired at the end of 2012. (*Id.*).

in three separate capacities to execute a transfer of this fractional partnership interest to himself personally. Jeff confirmed the transfer as Investment Trustee of the MMB Grantor Trust, approved the transfer on behalf of BFA, and accepted the transfer on behalf of himself personally, signing the document in these three separate capacities. (Dep. Ex. 19, Plfs. Entity App. 250). Jeff then, on December 19, 2014, personally sold a 0.05% interest in BFLP to Lavern's personal trust, LTB Revocable Trust, and approved the transfer on behalf of BFA. (Dep. Ex. 20, Plfs. Entity App. 251; Lavern Dep. Tr. Vol. I 77:23 – 78:2, Plfs. Entity App. 220-221). Jeff testified during his deposition that both the transfer of a 0.1% interest in BFLP to himself and the transfer of a 0.05% interest in BFLP to Lavern's personal trust were necessary for Lavern to make the Optional Capital Contribution. (Jeff Dep. Tr. Vol. I 205:24 – 206:4, Plfs. App. 171-172). Jeff testified further during his deposition that the Optional Capital Contribution diluted Plaintiffs' ownership interest in BFLP.[11] (Jeff Dep. Tr. Vol. I 129:19 – 132:6, Plfs. App. 152-153).

Plaintiffs allege "[b]y utilizing three separate capacities to orchestrate a transfer of a small partnership interest to Lavern/LTB Trust so that Lavern could use that as a foothold to dilute the interests of other limited partners, Jeff breached…the duties of loyalty and good faith and fair dealing owed by Jeff, when acting as General Partner for BFA and as Manager for BFLP." (Plfs. Resistance to Entity Def. Motion for Summary Judgment Brief p. 27). For reasons that follow, the Court finds there is a genuine dispute of material fact as to whether Jeff, acting on behalf of BFA, breached the duties of good faith and fair dealing he owed to Plaintiffs as limited partners in BFLP by authorizing a series of transactions that transferred a fractional interest in BFLP to Lavern's personal trust, LTB Revocable Trust.

As Jeff acknowledged during his deposition, this is not a situation where Lavern was already a Limited or General Partner in BFLP and decided to make a capital contribution. Instead, Jeff had to

[11] During this portion of his testimony, Jeff emphasized that any reduction in Plaintiffs' percentage ownership of BFLP from the Optional Capital Contribution was equalized by the additional capital in BFLP. (Jeff Dep. Tr. Vol I 129:22 – 24, Plfs. App. 152).

transfer interests in BFLP to himself, which he then transferred to Lavern, to allow the Optional Capital Contribution to occur. Jeff acknowledged further during his deposition that the Optional Capital Contribution diluted Plaintiffs' interests in BFLP. Notably, Jeff acted on behalf of BFA to authorize these transactions after the members of BFA reached an impasse with respect to the appointment of a new manager of BFA at the August 28, 2014 meeting. Prior to the Optional Capital Contribution, Plaintiffs controlled 53.08% of the limited partnership ownership interest in BFLP.[12] When viewing these specific facts in the summary judgment record in the light most favorable to the nonmoving party, a reasonable jury could infer that Jeff acted on behalf of BFA to approve both the transfer of a 0.1% interest in BFLP to himself and the transfer of a 0.05% interest in BFLP to Lavern's personal trust to allow the Optional Capital Contribution to occur and ensure that, in the event BFA was dissolved, Plaintiffs would not have majority control over BFLP and the ability to appoint a new General Partner of BFLP. (*See* Def. App. 95, BFLP Agreement, Article X, C.4 (the Limited Partners may elect a successor General Partner by a simple majority if the General Partner is removed or cannot serve)).[13] If Jeff acted on behalf of BFA to authorize the transfer of a fractional interest in BFLP to himself and then Lavern for this sole purpose, it would support a finding that Jeff breached the duties of good faith and fair dealing he owed Plaintiffs when he stepped into the shoes and obligations of BFLP's General Partner, BFA. Therefore, Entity Defendants are not entitled to summary judgment with respect to Count IX to the extent Count IX seeks a declaration that "[t]he conduct of Jeff and Lavern in making the optional capital contribution violated the duty of good faith and fair dealing owed to LoriAnn and Lisa as part of the Partnership Agreement." (Amended Petition ¶ 211).

Although not alleged in their Petition, Plaintiffs argue in their resistance that Jeff also violated the duty of loyalty he owed Plaintiffs by executing the series of transactions on BFA's behalf that gave

[12] As outlined in the Court's Ruling on Jeff Busse and Lavern T. Busse's Motion for Partial Summary Judgment, there is a genuine issue of material fact as to whether a portion of Plaintiffs' collective 53.08% interest in BFLP was merely an economic interest. (*See* Section III.B.2.a.i).

[13] This inference is further supported by Jeff stating his daughters were added the Busse Foundation Board of Trustees, and not Lisa's daughters, because "[Lavern] did not want to happen to the foundation what appears to have just happened with Busse Investments with regard to the voting." (Jeff Dep. Tr. Vol. I 125:12 – 15, Plfs. Def. App. 151).

rise to the Optional Capital Contribution because "Lavern's interest was adverse to LoriAnn and Lisa and Jeff, as General Partner, executed a plan to dilute their interest for the interest of Lavern, a non-partner." (Plfs. Resistance to Entity Motion for Summary Judgment Brief p.19). The Court finds this argument unavailing. The BFLP Partnership Agreement does not place a duty of loyalty on the General Partner. (*See* BFLP Partnership Agreement Article VII(H)(5); Entities App. 96). Therefore, BFA's duty of loyalty to BFLP and other partners is confined by statute. *See* IOWA CODE § 488.408(1)-(2)(c) (2015). In this context, a General Partner's duty of loyalty to a limited partnership and other partners is limited "[t]o refrain from dealing with the limited partnership…as or on behalf of a party having an interest *adverse to the limited partnership*." IOWA CODE §488.408(2)(b) (2015) (emphasis added). To the extent Lavern's interest in acquiring a fractional interest in BFLP was adverse to Plaintiffs, it was not adverse to BFLP. Furthermore, a General Partner of a limited partnership does not violate a duty or obligation under Iowa Code section 488.408 "merely because the general partner's conduct furthers the general partner's own interest." IOWA CODE § 488.408(5) (2015). Therefore, there is no genuine issue of material fact which, if resolved in Plaintiffs' favor, would entitle them to a declaration that the conduct of Jeff and Lavern in making the Optional Capital Contribution violated the duty of loyalty.

2. Approval of the Optional Capital Contribution and the BFLP Partnership Agreement

Next, Plaintiffs seek a declaration that "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution." (Amended Petition ¶ 210). Entity Defendants assert that Plaintiffs fail to state a claim for declaratory relief because the Optional Capital Contribution was permitted under the BFLP Partnership Agreement.

The BFLP Partnership Agreement allows Limited Partners to make optional capital contributions, which need only the consent of the General Partner. Section VIII(B) of the BFLP Partnership Agreement provides:

> Optional Contributions. The Partners shall be permitted to make additional Capital Contributions to the Partnership. Optional Capital Contributions by a Limited Partner will be subject to the consent of the General Partner. Optional Capital Contributions by a General Partner will be subject to the consent of 70 Percent in Interest of Limited Partners. Any optional Capital Contributions may be on a non-pro rata basis. A General Partner is required to maintain a General Partnership Interest of at least one percent (1%) at all times. The required consent need not be in writing, and any optional Capital Contributions will be presumed to have been made with the required consent unless there is clear and convincing evidence to the contrary.

(BFLP Partnership Agreement Article VII, Section B, at 18, Entity App. 100). It is undisputed that as of March 2, 2015, Lavern's personal trust, LTB Revocable Trust, was a limited partner of BFLP, having purchased a .05% interest from Jeff on December 17, 2014 for $9,147.67. (Entity App. 182; *see* Plfs response to Entity SOF ¶10; *see* Ruling on Jeff Busse and Lavern T. Busse's Motion for Partial Summary Judgment section III.B.2.a.i). On that date, Lavern through the LTB Revocable Trust provided notice of his intent to make a voluntary contribution to BFLP. (Def. App. 181). Jeff, acting on behalf of BFA, the only General Partner of BFLP, consented to the Optional Capital Contribution. (Entities App. 223-224, Depo. Ex. 54 at 2).

Plaintiffs contend the Optional Capital Contribution breached material terms of the BFLP Partnership Agreement because Lavern was acting as a General Partner in making the contribution and did not obtain the requisite 70 percent limited partner approval. In support of this position, Plaintiffs rely on Section VII(B)(2) of the BFLP Partnership Agreement, which provides that "[t]he Manager may exercise all of the powers which could be exercised by majority consent of the General Partners. If a Manager is designated, any reference to 'General Partner' in this Agreement shall also include 'Manager' *if applicable*." (Entity App. 92, § VII(B)(2) (emphasis added)).

Resolution of whether the Optional Capital Contribution was made by a limited partner or General Partner, involves interpretation and construction of the BFLP Partnership Agreement. "Interpretation is the search for the meaning of contractual terms; construction is ascertaining their legal effect." *Pathology Consultants v. Gratton*, 343 N.W.2d 428, 433 (Iowa 1984). "Insofar as the partnership agreement covers the relationship of the parties, it is a contract between them." *Wolf v.*

Murrane, 199 N.W.2d 90, 97 (Iowa 1972). "Interpretation of a contract is a legal issue unless the interpretation of the contract depends on extrinsic evidence." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435 (Iowa 2008); *see also Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999) ("when no relevant extrinsic evidence exists, the resolution of any ambiguity in a written contract is a matter of law for the court."). "Words are assigned their ordinary meaning in the interpretation of a contract." *Northern Natural Gas Co. v. Knop*, 524 N.W.2d 668, 671 (Iowa Ct. App. 1994) (citation omitted). Words are also "interpreted within the context in which they are used." *Id.*

"When construing a written contract, [Iowa courts] are guided by the rule that the intent of the parties controls and, except in cases of ambiguity, intent is determined by what the contract itself says." *Anderson v. Aspeimeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 600 (Iowa 1990) (citations omitted). "The court will not resort to rules of construction where the intent of the parties is expressed in clear and unambiguous language." *Pathology Consultants v. Gratton*, 343 N.W.2d 428, 434 (Iowa 1984) (citation omitted). "[A]lthough summary judgment will be refused if the…agreement…is ambiguous, the preliminary question of whether an ambiguity does exist is a question of law that may be resolved summarily by the court." *Boge v. State*, 309 N.W.2d 428, 430 (Iowa 1981) (quoting 10 C. Wright and A. Miller, Federal Practice and Procedure s 2730, at 585-87 (1973)).

Plaintiffs rely on Section VII(B)(2)'s statement that any reference to a General Partner also includes a manager, if applicable, to conclude that Lavern is a General Partner of BFLP and therefore his Optional Capital Contribution was subject to "the consent of 70 Percent in Interest of Limited Partners." (BFLP Partnership Agreement Article VII, Section B, at 18, Entity App. 100). Plaintiffs' reliance on Section VII(B)(2), however, is misplaced. First, the statement at issue must be read in context. *See Hartig*, 602 N.W.2d at 798 ("[P]articular words and phrases are not interpreted in isolation…[but] are interpreted in a context in which they are used." (internal citations omitted)). Section VII(B) governs the management of BFLP, which is vested in the General Partners. (Entity

App. 92). Furthermore, the statement that any reference to General Partner includes a Manager follows the sentence: "The Manager may exercise all of the powers which could be exercised by majority consent of the General Partners." Taken in context, the clear and unambiguous meaning of the statement that references to General Partners includes Managers, if applicable, is that the named managers are authorized to carry out the management functions of the General Partner, even though the Partnership Agreement delegates that authority to the General Partners. *See, e.g., People ex re. Burris v. Mem'l Consultants, Inc.*, 587 N.E.2d 34, 37 (Ill. Ct. App. 1992) (concluding that 'if applicable' language in stipulation was unambiguous and limited required application to condition made "applicable").

Plaintiffs' interpretation also ignores the limiting language at the end of the sentence: "If a Manager is designated, any reference to 'General Partner' in this Agreement shall also include 'Manager' *if applicable*." (Entity App. 92, § VII(B)(2) (emphasis added)). (emphasis added). Every term in the Partnership Agreement must be given effect, including the term 'if applicable." *Iowa Fuel & Minerals*, 471 N.W.2d at 863 ("Because a contract is to be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). Under Plaintiffs' interpretation, the limiting phrase "if applicable" would have no meaning, and one could simply replace "General Partner" with "Manager" throughout the Partnership Agreement.

Finally, Plaintiffs' interpretation overlooks the principle that "a contract is to be interpreted as a whole." *Iowa Fuel & Minerals*, 471 N.W.2d at 863. Section VIII(D) of the BFLP Partnership Agreement requires that "[t]he Sharing Ratios of each General Partner shall at all times equal or exceed one percent (1%)." (Entity App. 100). Therefore, if Lavern became a General Partner upon his appointment as Manager, Jeff would also have become a General Partner, and each of their sharing ratios would have been required to equal or exceed one percent of the total ownership of BFLP at all

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times. It is undisputed that Lavern and Jeff have not always held at least one percent of the total ownership of BFLP.

Setting aside problems of interpretation and construction, Plaintiffs' reliance on Section VII(B)(2)'s statement that any reference to a General Partner also includes a manager overlooks that LTB Revocable Trust made the Optional Capital Contribution, not Lavern individually. Thus, even if Plaintiffs' interpretation of the BFLP Partnership Agreement was correct, the Optional Capital Contribution was made by the LTB Revocable Trust, which is not a manager of BFLP.

In light of the foregoing, the Court finds the Optional Capital Contribution was made by a limited partner, subject only to the approval of the General Partner. Because it is undisputed that BFA approved the Optional Capital Contribution, Entity Defendants are entitled to summary judgment in their favor with respect to Count IX insofar Count IX seeks a declaration that "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution…"(Amended Petition ¶ 210).

3. Approval of the Optional Capital Contribution and the duties of good faith and fair dealing

Next, Plaintiffs seek a declaration that "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution because the effect of the contribution is to dilute the interest of LoriAnn and Lisa and allow Jeff and Lavern to have majority control over BFLP." (Petition ¶ 209). Entity Defendants assert they are entitled to summary judgment on this portion of Plaintiffs' request for declaratory relief in Count IX because the BFLP Partnership Agreement expressly authorizes limited partners to make non-pro rata contributions. For reasons that follow, the Court finds Entity Defendants are entitled to summary judgment on this portion of Plaintiffs' request for declaratory relief in Count IX.

It is undisputed that as of March 2, 2015, Lavern's personal trust, LTB Revocable Trust, was a limited partner of BFLP, having purchased a .05% interest from Jeff on December 17, 2014 for $9,147.67. (Entity App. 182; *see* Plfs response to Entity SOF ¶10; Court's Ruling on Jeff Busse and Lavern T. Busse's Motion for Partial Summary Judgment section III.B.2.a.i). Therefore, to the extent Plaintiffs assert Jeff breached the duties of good faith and fair dealing by approving the Optional Capital Contribution on BFA's behalf, Jeff likewise owed those same duties of good faith and fair dealing to LTB Revocable Trust. Plaintiffs assert, without authority, that a general partner owes a fiduciary duty to reject expressly authorized non-pro rata capital contributions by one limited partner where it would have the effect of reducing the percentage ownership of another limited partner. Plaintiffs' argument would effectively write out the non-pro rata contribution provision in the BFLP Partnership Agreement, because all non-pro rata contributions would have this effect. Furthermore, Plaintiffs' argument overlooks the well-settled principle that where a partnership agreement expressly allows the action taken, the same action cannot form the basis for a claim of breach of fiduciary duty. "[B]ecause the partnership agreement had not been breached, there could be no breach of any fiduciary duty." *Whalen v. Connelly*, 545 N.W.2d 284, 292 (Iowa 1996) (holding a limited partner may validly consent in advance to transactions by the general partner that might otherwise constitute a breach of fiduciary duty).

Because the BFLP Partnership expressly authorizes limited partners to make non-pro rata contributions, Plaintiffs have failed to assert an enforceable right under the BFLP Partnership Agreement with respect to the approval of the Optional Capital Contribution. Therefore, Entity Defendants are entitled to summary judgment in their favor with respect to Count IX insofar Count IX seeks a declaration that "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution…" (Amended Petition ¶ 209).

D. Count XIII: Declaratory Judgment—Busse Foundation

Count XIII is a declaratory Judgment claim seeking a declaratory judgment relating to the Busse Foundation. In Count XIII, Plaintiffs seek permanent seats on the Foundation Board of Trustees and a declaration that the 2004 Busse Foundation Pledge Agreement is unenforceable. Entity Defendants argue they are entitled to summary judgment on Count XIII because Plaintiffs have no legally enforceable right to permanent seats on the Busse Foundation Board of Trustees under the Foundation's bylaws and there is no legal basis for declaring the Foundation Pledge Agreement unenforceable.

1. Permanent seats on the Busse Foundation Board of Trustees

The Busse Foundation is a non-profit corporation governed by Articles of Incorporation and By-Laws. (Entity App. 29-33, D1-D5; App. 34-51, D6-D23). The Foundation is governed by a Board of Trustees. (Entity App. 34, By-Law § 2.01, D6). The number of Trustees on the Board may be varied between three and ten members. (Entity App. 34, By-Law § 2.02, D6). Trustees serve for one-year terms. (*Id.*). "The Board of Trustees shall consist of members of the general community who have expressed an interest and desire to aid in the fulfillment of the purposes of this Foundation." (*Id.*). Any vacancy on the Board, including due to the increase in the number of trustees, may be filled by a majority vote of current trustees. (Entity App. 35, By-Law § 2.05, D7). Any trustee may be removed, with or without cause, by a vote of a majority of the members of the Board of Trustees. (Entity App. 36, By-Law § 2.12, D8). The original Trustees in 1990 included: Lavern, Audrey, Jeff, LoriAnn, and Lisa.

Based on the Busse Foundation by-laws cited above, the Court finds there is no legal basis under the Busse Foundation by-laws for Plaintiffs' request for permanent seats on the Busse Foundation Board of Trustees. Under Iowa law, the articles of incorporation and bylaws of a non-profit corporation like the Busse Foundation "create a contractual relationship between the parties." *Oberillig v. W. Grand Towers Condo Ass'n*, 807 N.W.2d 143, 149-50 (Iowa 2011) (citations omitted). Thus, Iowa courts "apply the general rules for contracts to construe a corporation's governing

documents." *Id.* (citation omitted). With respect to the composition of the Foundation Board of Trustees, the Busse Foundation by-laws specifically provide for one-year terms for Trustees. It is undisputed that the vote to add Jeff's daughters to the Busse Foundation Board of Trustees and increase the number of Board members from five to eight complied with the Busse Foundation bylaws. (Plfs. Response to Entity SOF ¶ 40).

Plaintiffs argue they are entitled to permanent seats on the Busse Foundation Board of Trustees because Jeff and Lavern have diluted their influence on the Board by adding Jeff's three daughters contrary to the spirit of the Foundation Pledge. In support of this argument, Plaintiffs rely on a single sentence in the prefatory paragraph of the 2004 Busse Foundation Pledge that states: "Specifically, we recognize that our parents would like the assets of our families be used to fund the LAVERN T. BUSSE AND AUDREY BUSSE FOUNDATION (the "Foundation") created by our parents on August 28, 1990, and an organization that we and our parents serve as directors." (Plfs. Entity App. 394, PLFS007375). The Court finds Plaintiffs reliance on this sentence unpersuasive. The sentence simply identifies the Foundation and its current Board of Trustees. It does not control who serves on the Board of Trustees.

Construing this sentence from the 2004 Busse Foundation Pledge Agreement to confer permanent seats to the initial trustees would directly conflict with the Busse Foundation's by-laws, which were enacted in 1990. Permanent seats for anyone, including Plaintiffs, are contrary to several terms of the Busse Foundation by-laws, particularly the provisions that all trustees serve one-year terms and "[a]ny trustee, other than the Chairman, may be removed either for or without cause…" (Entity Def. App. 34-36, By-Law §§ 2.02, 2.12). Permanency is the opposite of one-year terms and removal with or without cause.

In addition, construing the 2004 Busse Foundation Pledge Agreement to confer permanent seats is contrary to the Revised Iowa Nonprofit Corporation Act, which requires the Foundation's articles of incorporation or by-laws to control governance of its board and limits the length of a

trustee's term to five years "except as otherwise provided in the articles or bylaws." IOWA CODE § 504.805(1) (2015). Therefore, even if the Busse Foundation by-laws did not provide for one-year terms for all Trustees, the Plaintiffs' terms would be limited by statute to five years. Under Iowa Code section 504.805(1), permanent board seats are created in the articles or by-laws, and the Foundation's by-laws specifically provide for one-year terms for all Trustees.

Accordingly, the Court finds Plaintiffs have no legally enforceable right to permanent seats on the Busse Foundation Board of Trustees under the Busse Foundation's by-laws. Therefore, Entity Defendants are entitled to summary judgment on Count XIII insofar Plaintiffs seek permanent seats on the Busse Foundation Board of Trustees under Count XIII.

In reaching this conclusion, the Court has considered Plaintiffs' argument that permanent seats on the Busse Foundation Board of Trustees is an alternative remedy to dissolution of the Foundation under Iowa Code section 504.1431. (Plfs. Brief in Resistance to Entity Def. Motion for Summary Judgment Brief at 32). The Court finds this argument unavailing because Plaintiffs did not seek dissolution of the Foundation (or an alternative remedy) under Iowa Code section 504.1431 in their pleadings. The deadline to amend pleadings has long passed, and Plaintiffs cannot seek a remedy for alleged oppression of their rights with respect to the Busse Foundation when all they sought is a declaration of their rights under the Foundation agreements.

Under Iowa Rule of Civil Procedure 1.1102, "Any person interested in an oral or written contract…may have any question of the construction or validity thereof or arising thereunder determined, and obtain a declaration of rights, status or legal relations thereunder." Nothing in the Rule 1.1102 provides a mechanism for seeking additional relief. Rather, a "declaratory judgment action is a remedy that can be invoked to secure a declaration of rights." *Whitworth v. Heinzle*, 246 Iowa 1155, 1158, 70 N.W.2d 536, 538 (1955). If Plaintiffs wanted to seek remedies under Iowa Code section 504.1431, they were required to plead a claim under that statute. Because Plaintiffs did not do so, they are entitled, at most, to "a declaration of rights, status or legal relations" under the Foundation

agreements, which provide no legally enforceable right for permanent seats on the Busse Foundation Board of Trustees.

2. The 2004 Busse Foundation Pledge Agreement

In 2004 the Foundation Pledge was prepared which indicated, among other things, that LoriAnn, Lisa, and Jeff would deposit the excess of each of their estates over their estate tax exemption amount into the Busse Foundation under certain circumstances and with certain conditions. (*See* Plfs. Entity App. 394, Busse Foundation Pledge PLFS007375). According to Entity Defendants, the Foundation Pledge is obligatory and Plaintiffs cannot articulate any legal grounds to refuse its enforcement.

In resistance, Plaintiffs argue the Foundation Pledge fails to meet the standard of a charitable subscription. According to Plaintiffs, the Foundation Pledge is merely a statement of future intent to make a will or bequest. As a corollary to this argument, Plaintiffs assert the Foundation Pledge is nonobligatory because the pledge fails to fund a specific amount and specific action.

At issue for the Court is whether the Foundation Pledge is merely a statement of future intent to make a will or bequest as Plaintiffs argue, or a binding promise and charitable subscription as Entity Defendants contend. Statements of future intent to make a will or bequest, without more, cannot give rise to a binding obligation. *Houlette v. Johnson*, 216 N.W.2d 679, 681 (Iowa 1927) (noting essential contractual elements were required for promise of inheritance, including consideration). A charitable subscription[14], however, is binding if the maker intends to be bound, as revealed by the terms used in the subscription and any extrinsic evidence of the maker's intent to be bound, regardless of consideration or reliance. *Salsbury v. Northwestern Bell Tel. Co.,* 221 N.W.2d 609, 613 (Iowa 1974). In the context of determining whether a pledge is obligatory, the Supreme Court of Iowa has explained the distinction between a statement of intention and a promise as follows:

[14] "A charitable subscription is an oral or written promise to do certain acts or to give real or personal property to a charity, or for a charitable purpose. Charitable subscriptions are considered under contract principles." *In re Estate of Schmidt*, No. 06-0330, 2006 WL 2561231, at *2 (Iowa Ct. App. Sept. 7, 2006) (citations omitted).

> A statement of intention is the mere expression of a state of mind, put in such a form as neither to invite nor to justify action in reliance by another person. A promise is also the expression of a state of mind, but put in such a form as to invite reliance by another person

Pappas v. Bever, 219 N.W.2d 720, 721-22 (Iowa 1974) (quoting 1 Corbin on Contracts s 15 at 35 (1963)).

Resolution of whether the Foundation Pledge is sufficiently obligatory to meet the standard of a charitable subscription involves construction of the Foundation Pledge. That is, the Court must determine the legal effect of the Foundation Pledge. "When construing a written contract, [Iowa courts] are guided by the rule that the intent of the parties controls and, except in cases of ambiguity, intent is determined by what the contract itself says." *Anderson*, 461 N.W.2d at 600 (citations omitted). "[A]lthough summary judgment will be refused if the…agreement…is ambiguous, the preliminary question of whether an ambiguity does exist is a question of law that may be resolved summarily by the court." *Boge*, 309 N.W.2d at 430 (quoting 10 C. Wright and A. Miller, Federal Practice and Procedure s 2730, at 585-87 (1973)). The test for ambiguity is whether the language is susceptible to two interpretations. *Oberbillig v. West Grand Towers Condo Ass'n*, 807 N.W.2d 143, 150 (Iowa 2011).

In entering the Foundation Pledge, the Busse children recognized their "parents' philosophy of returning to others" and stated they wanted "on our deaths, a substantial portion of what we may have received from our parents or that we will or may receive in the future, to be returned to others through gifts to charities." (Plfs. Entity App. 395). In furtherance of this commitment, the Busse children stated: "we, in reliance upon each other's promise to the other, agree among ourselves… to dispose of our estates" in a specified manner and then "[t]he remainder of the Marital Trust shall go to the Foundation" and "If we leave no surviving spouse…the balance of our estate shall go to the Foundation." (Plfs. Entity App. 394-95). Thus, the Busse children specifically invited "reliance upon each other's promise to the other" in entering the Foundation Pledge. The Busse children also

expressed an unequivocal intent to leave the remainder of their estates to the Busse Foundation as revealed by the Foundation Pledge utilizing obligatory language with respect to the Busse Foundation: "The remainder of the Marital Trust *shall go* to the Foundation" and "If we leave no surviving spouse…the balance of our estate *shall go* to the Foundation." (Plfs. Entity App. 395 (emphasis added)). The Busse children further expressed an unequivocal intent to leave the remainder of their estates to the Busse Foundation by agreeing: "this Pledge shall be enforceable against me or my estate by the Foundation, by one or more of my siblings…or one or more of my siblings' descendants." (*Id.*).

The Busse children's unequivocal intent to leave the remainder of their estates to the Busse Foundation, however, is insufficient to constitute a promise to the Busse Foundation. *See Pappas v. Bever,* 219 N.W.2d 720, 721 (Iowa 1974) (noting there must be a promise to a charitable organization, and not a mere statement of intent); *Pappas v. Hauser,* 197 N.W.2d 607, 613 (Iowa 1972) ("mere declarations of intention, no matter how clearly proven, would not give rise to binding obligations."). Moreover, the Busse children inviting "reliance upon each other's promise to the other" in entering the Foundation Pledge, does not necessarily invite the Busse Foundation to rely on their promises. Indeed, a reasonable fact finder could infer that the Busse Foundation has nothing more than a hope or mere expectation to receive a portion of the Busse children's respective estates because only the "remainder of the Marital Trust" or "the balance of [their] estate" shall go to the Foundation. (Plfs. Entity App. 394-95). This is further supported by the Foundation Pledge not being for a specific amount or to fund a specific action. The Foundation Pledge also contains paragraphs that broadly describe how the Busse children intend to distribute their assets upon their death. The Foundation Pledge describes how the Busse children intend to distribute "Household goods, furniture, furnishings, household equipment, dishes, silverware" etc. (Plfs. Entity App. 394 ¶ 1), their homestead and vacation homes (¶ 2), and "assets depending on their marital status (¶¶ 3 and 4). Finally, in paragraph 3 of the Foundation Pledge, the Busse children state "It is our intent that assets shall be transferred to descendants of Lavern T. and Audrey F. Busse…" (¶ 3).

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The Court finds the Foundation Pledge's discussion of how personal effects are to be disposed of upon the Busse children's death, the use of the words "it is our intent…", and the potential uncertainty that the Busse Foundation will receive any portion of the Busse children's respective estates creates a genuine issue of material fact concerning the intent of Plaintiffs in entering the Foundation Pledge. *See Hamilton v. Wosepka*, 154 N.W.2d 164, 169 (Iowa 1967) ("The polestar of construction is the intention of the parties to the contract as revealed by the language used…"). Specifically, the language in the Foundation Pledge is not clear as to whether Plaintiffs were making a pledge to the Busse Foundation or whether Plaintiffs were merely expressing their intent to make such a bequest in their wills. *See* Entity Def. Reply Brief p. 10 (Plaintiffs agreed "that the remainder of their respective estates, after making transfers to their spouses and the lineal descendants of Lavern and Audrey that maximized their applicable tax exclusion amount, *would be left to the Foundation in their wills*." (emphasis added)). The test for ambiguity is whether the language is susceptible to two interpretations. *Oberbillig*, 807 N.W.2d at 150. "[S]ummary judgment will be refused if the…agreement…is ambiguous…." *Boge*, 309 N.W.2d at 430 (quoting 10 C. Wright and A. Miller, Federal Practice and Procedure s 2730, at 585-87 (1973)). Accordingly, Defendants are not entitled to summary judgment on Count XIII to the extent Plaintiffs seek a declaration that the Foundation Pledge is unenforceable under Count XIII.

RULING

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants, Busse Financial Advisors, LLC, Busse Family Limited Partnership, AB BI Note Limited Partnership, and Lavern T. Busse and Audrey Busse Foundation's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART as follows:

1. Entity Defendants' Motion for Summary Judgment on Count V: Judicial Dissolution – BFA is DENIED.
2. Entity Defendants' Motion for Summary Judgment on Count VI: Derivative Action – BFA is DENIED.

3. Entity Defendants' Motion for Summary Judgment on Count IX: Declaratory Judgment – BFLP is GRANTED IN PART and DENIED IN PART:

    a. Entity Defendants' Motion for Summary Judgment on Count IX is DENIED to the extent Count IX seeks a declaration that "[t]he conduct of Jeff and Lavern in making the optional capital contribution violated the duty of good faith and fair dealing owed to LoriAnn and Lisa as part of the Partnership Agreement." (Petition ¶ 211).

    b. Entity Defendants' Motion for Summary Judgment on Count IX is GRANTED to the extent Count IX seeks a declaration that "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution…" (Petition ¶ 210).

    c. Entity Defendants' Motion for Summary Judgment on Count IX is GRANTED to the extent Count IX seeks a declaration that "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution…" (Petition ¶ 209).

4. Entity Defendants' Motion for Summary Judgment on Count XIII: Declaratory Judgment – Busse Foundation is GRANTED IN PART and DENIED IN PART:

    a. Entity Defendants' Motion for Summary Judgment on Count XIII is GRANTED to the extent Plaintiffs seek permanent seats on the Foundation Board under Count XIII.

    b. Entity Defendants' Motion for Summary Judgment on Count XIII is DENIED to the extent Count XIII seeks a declaration that the Foundation Pledge is unenforceable.

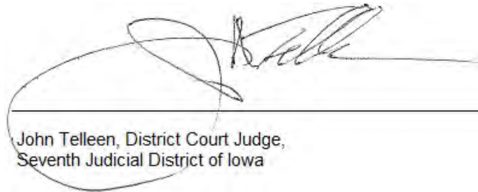
ALL OF THE ABOVE IS SO ORDERED. The Court directs the clerk to provide copies of this Ruling and Order to the counsel of record.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV083022	(BC)LORIANN BUSSE & LISA CARPENTIER ET AL VS JEFFREY BUSSE

So Ordered



John Telleen, District Court Judge,
Seventh Judicial District of Iowa