NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

DOMINICK ALFIERI, Plaintiff/Counterdefendant, MICHAEL ALFIERI, individually and as Trustee of the 2001 MICHAEL ALFIERI FAMILY TRUST, MA-HALF ACRE ROAD, LLC, 353 HALF ACRE, LLC, ALFIERI-FINANCE, LLC, ALFIERI-HALF ACRE, LLC, Counterdefendants, v. JENNIFER ALFIERI FRANK, as Trustee of the 2001 JENNIFER ALFIERI FAMILY TRUST, Defendant/counterclaimant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MORRIS COUNTY DOCKET NO. MRS-L-1947-22 CIVIL ACTION - CBLP **OPINION**

Argued: May 30, 2025

Decided: July 1, 2025

Alan M. Lebensfeld Esq. and David M. Arroyo, Esq. of Lebensfeld Sharon & Schwartz PC, attorneys for the Plaintiff/Counterdefendants.

Michael J. Gesualdo, Esq. of Robinson Miller, LLC; Kevin J. Musiakiewicz, Esq. of Calcagni & Kanefsky LLP; and Mark Premo-Hopkins, Esq. of Kirkland & Elis LLP, attorneys for the Defendant/Counterclaimant.

Frank J. DeAngelis, P.J. Cv.,

I. BACKGROUND INFORMATION

This matter comes before the Court by way of a motion for summary judgment. By way of background, the Alfieri family is involved in several real estate ventures, the majority of which are in the State of New Jersey. Each of the Alfieri properties are owned by a one-off entity, formed as either a limited partnership or a limited liability company (the "Property Entities"), and act as a single, integrated business unit. The Property Entities are capitalized by the real estate they own and are governed by detailed entity agreements (collectively, the "Property Entity Agreements"), which were adopted in connection with the execution of Plaintiff Dominick Alfieri's ("Dominick[1]") Estate Plan. The Property Entity Agreements were the product of lengthy negotiations held between the estates and trust counsel of Dominick and Counterclaim Defendant Michael Alfieri ("Michael"), Defendant Jennifer Alfieri ("Jennifer"), and Christine Alfieri Joseph ("Christine"), Dominick's children. Defendant Jennifer Alfieri Family Trust ("JAF") presently holds a minority ownership interest (25-33%) in each of the Property Entities, including Alfieri Half Acre, L.L.C. ("Half Acre"), an entity overseeing a large area of undeveloped land on Half Acre Road in Cranbury, New Jersey ("Half Acre Property").

In accordance with the applicable Property Entity Agreements, the Alfieri projects are controlled by either Managers or General Partners. Dominick asserts that, as the holder of the majority of the management units or general partnership interests of each, he controls the operations of each of the Property Entities, as was agreed to by Michael, Jennifer, and Christine at the time of the adoption of the estate plan. Michael owns a minority of the management units and general partnership interests of each Property Entity. Dominick and Michael (collectively, "Plaintiffs[2]") contend that neither Jennifer nor Christine has ever been a Manager or General Partner of any of the Property Entities, or had any material role or involvement in the acquisition, development, financing, management or operation of any of the Alfieri projects.

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[1] Parties are referred to by their first names because the parties used or had the same surname at relevant times. The use of first names is not intended to be disrespectful to the parties.
[2] Although Michael is a counterclaim defendant and not a plaintiff, the Court will refer to Dominick and Michael collectively as Plaintiffs for clarity.

In June 2001, Dominick adopted an estate plan structure (the "Alfieri Estate Plan") that was designed to eliminate gift taxes in connection with its establishment, and to save hundreds of millions of dollars in estate taxes for the sole benefit of his children and grandchildren. This was accomplished by Dominick forming, as a grantor, trusts for each of his children. The trusts were meant to benefit each child, and upon their death, their heirs and assigns. As mentioned above, Jennifer's Trust is JAF. Michael's Trust is Michael Alfieri Family Trust ("MAF"). Each trust purchased minority interest in the Alfieri entities under the tax shield by way of the Property Entities.

One month after forming the Trusts, Dominick created Plaintiff Alfieri-Finance, LLC ("Alfieri Finance"), which serves as the internal bank to the Alfieri organization by way of interest-bearing loans to the Property Entities in furtherance of the development, construction, maintenance, management, and sales of the Alfieri projects. Alfieri Finance allocates 60% of the Management Units to Dominick and 40% to Michael, and Dominick retains 99% membership interest therein. Despite Defendants' assertion to the contrary, Plaintiffs maintain that this internal banking system, even with its comingled funds, is legal, and that there is nothing fraudulent about this system that has been in place for over two decades. Additionally, Michael created Plaintiff Alfieri, LLC ("Alfieri, LLC"), which has operated as the asset and property manager for each of the Property Entities, who pay an annual management fee pursuant to written Property Management Agreements. Michael is the sole Manager and Member of Alfieri, LLC, as per the operating agreement.

The Half Acre Operating Agreement was formed in August 2003. Plaintiffs maintain that this agreement, similar to all other Property Entity Agreements, was derived from the Alfieri Estate Plan, and thus was intended to effectuate the core foundational principles therein, which include,

(i) at any time during his lifetime and without the consent of his children, Dominick could exercise the substitution power contained in each of the Trust agreements to transfer back to himself their ownership interests in the Property Entities in exchange for equivalent value; and (ii) at all times prior to his death or disability, Dominick would retain full and unfettered control of what were, prior to execution of the Trust instruments, his properties.

The current dispute arises over the transfer of Half Acre Property. Plaintiffs maintain that they reached an oral "handshake" agreement whereby Dominick, as Manager of Half Acre and pursuant to the rights granted to him by Jennifer in the Half Acre Operating Agreement, agreed to sell the Half Acre Property to MAF for $30 per buildable square foot. This agreement was documented through a Purchase and Sale Agreement on March 1, 2021 (the "Half Acre Sale Agreement"). Plaintiffs maintain that Dominick was not required to provide Jennifer with prior notice of the sale, nor gain her consent, pursuant to the terms of the Half Acre Operating Agreement. Plaintiffs maintain that, because Dominick retained his absolute and unfettered right to sell the Half Acre Property "at such price or amount, for cash, securities or other property, and upon such other terms and conditions as [he] . . . in [his] sole and absolute discretion . . . deem[ed] proper," there cannot have been fraud.

Conversely, Defendants allege that Dominick and Michael concocted a scheme to protect themselves from a potentially risky development project, and thus fraudulently backdated the sale. Defendants assert that discovery has demonstrated that the 2019 "handshake" agreement was never memorialized in writing and that terms of the alleged sale were being considered over a year later. Defendants submit that draft versions of the Half Acre Sale Agreement were being distributed amongst Dominick, Michael, and the project manager on the morning of February 22, 2021, despite Plaintiffs' representation to the Court that the Agreement was executed in March of 2019.

Defendants insist that Half Acre ultimately received no payment for the properties through Dominick's and Michael's manipulation of the other Entities, and that no distributions were made as per the Trust Agreements.

Plaintiffs deny Defendants' allegations, insisting that, in consideration for the Half Acre Properties, the MAF issued a $43 million Promissory Note payable to Half Acre based upon $30 per square foot of buildable land, and an $88.5 million Promissory Note payable to Alfieri-Finance. Plaintiffs assert that this transaction was proper, as all funds generated by the net earnings of the Property Entities, or the net proceeds resulting from their sale, are required to be deposited into Alfieri-Finance's bank account in order to fund other Property Entity development projects, or to meet the expenses of those entities which are not generating sufficient income to do so. Ultimately, Plaintiffs argue that there was no fraud or theft, and that the sales and transactions were permitted in accordance with the by-laws of each of the Entity Properties and Trusts.

In the instant application, the parties move for partial summary judgment. Defendants make two separate applications for partial summary judgment with respect to Defendants' claim for the breach of the duty of loyalty and under the statute of frauds. Plaintiffs cross-move for same and submit a separate application for summary judgment as to (1) the alleged breach of the covenant of good faith and fair dealing, (2) Dominick's exercise of the power of substitution, (3) shareholder oppression, and (4) conspiracy.

II. STANDARD OF REVIEW

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 520 (1995) (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Id.

III. ANALYSIS

a. The Duty of Loyalty

Defendants argue that they are entitled to summary judgment for their claim for breach of the duty of loyalty. Defendants allege that Plaintiffs owed fiduciary duties to JAF under the New Jersey Revised Uniform Limited Liability Company Act (RULLCA) which provides that managers of a Limited Liability Company (LLC) owe that LLC and its members the duty of loyalty, N.J.S.A. 42:2C:39(b), and the duty of care, N.J.S.A. 42:2C:39(c). Defendants assert that Plaintiffs were both managers of Half Acre and thus, owed to Half Acre and JAF, duties to (1) "account to the company and to hold as trustee for it any property, profit, or benefit derived by the member (a) in the conduct or winding up of the company's activities [or] (b) from a use by the member of the company's property" and (2) to "refrain from dealing with the company in the conduct or winding up of the company's activities as or on behalf of a person having an interest adverse to the company." N.J.S.A. 42:2C-39(b), (h)(i)(1).

Defendants maintain that Plaintiffs did not waive these duties. Defendants provide that the Half Acre Operating Agreement expressly acknowledges that the managers could exercise their sole discretion only “for and on behalf of the LLC.” See Declaration of Michael Gesualdo, Esq., Jan. 9, 2025, (“Gesualdo Jan. Decl.”), Ex. 5; see also Paige Cap. Mgmt., LLC v. Lerner Master Fund, LLC, 2011 WL 3505355, at *32 (Del. Ch. Aug. 8, 2011) (holding that grant of “sole discretion” “does nothing to absolve [the partner] of the duty to act for a proper fiduciary purpose”); O’Malley v. Boris, 2002 WL 453928, at *3 (Del. Ch. Mar. 18, 2002).

Regardless of the provisions of the Half Acre Operating Agreement, Defendants contend that section 42:2C-11(g) of RULLCA prohibits LLCs from waiving or limiting monetary liability for breach of the duty of loyalty:

> The operating agreement … may eliminate or limit a member’s or manager’s liability to the limited liability company and members for money damages, except for (1) Breach of the duty of loyalty[.]

N.J.S.A. 42:2c-11(g)(1). Thus, Defendants assert that Michael and Dominick owed the fiduciary duty of loyalty to JAF, and they must answer in damages for any breaches of those duties.

Having alleged that Plaintiffs owed JAF and Half Acre a duty of loyalty, Defendants next argue that Plaintiffs breached said duty by selling Half Acre Property to benefit Michael at the expense of Half Acre. Defendants claim that Plaintiffs stood on both sides of the transaction, operated in Michael’s personal self-interest and against the LLC’s interests, and acted in bad faith. See William Penn P’ship v. Saliba, 13 A.3d 749, 757 (Del. 2011) (breach of the duty of loyalty where managers of an LLC acted in their own self-interest on favorable terms).

Defendants submit that to prove breach of the duty of loyalty, a plaintiff “need only prove that the defendant was on both sides of the transaction.” In re The Brown Schools, 386 B.R. 37, 47 (D. Del. 2008); accord N.J.S.A. 42:2C-39(b). Defendants elaborate that evidence that a challenged sale resulted from a conflict of interest suffices to establish a prima facie breach of the duty of loyalty. See William Penn, 13 A.3d at 756.

Defendants contend that the conflicts of interest here are undisputed: Dominick and Michael controlled the "buyer" of Half Acre's properties (MAF) and the seller (Half Acre) in the sale of Half Acre Property to Michael. Michael testified: "[M]y father controlled the transaction on both sides. He's the manager of Alfieri Half Acre. He's the manager of [] MA-Half Acre [LLC]." Gesualdo Jan. Decl., Ex. 6 (10/7/24 M. Alfieri Dep. at 58:15–25). Defendants further rely on Michael's testimony that he was a manager on both sides of the transaction, as manager of Half Acre and as beneficiary of his trust. Id. at 59:5–8 ("Q. But you are a manager on both sides, correct? A. Yes. I consider myself a copilot. And a successor pilot."). Moreover, Defendants provide that Michael deeded Half Acre to himself, with his signature appearing on both sides of the deeds. Gesualdo Jan. Decl., Ex. 25. Defendants assert that these facts alone trigger entire fairness review. In re the Brown Schools, 386 B.R. at 47 (entire fairness review triggered where defendant was on both sides of the transaction).

In addition to standing on both sides of the transaction, Defendants allege that Michael acted in his self-interest and against the interests of Half Acre. Defendants explain that a "classic example" of a loyalty breach "is when a fiduciary acts in his self-interest and against the interest of the organization." Care One, LLC v. Straus, 2022 WL 17072371, at *18 (N.J. Super. Ct. App. Div. Nov. 18, 2022); see also Principal Growth Strategies, LLC v. AGH Parent LLC, 2024 WL 274246, at *9 (Del. Ch. Jan. 25, 2024) ("A fiduciary who makes decisions based on private interests violates the standard of conduct."); N.J.S.A. 42-2C-39(b)(2).

Defendants claim that Michael never considered whether the deal would benefit Half Acre or JAF. See Gesualdo Jan. Decl., Ex. 6 (10/7/24 M. Alfieri Dep. at 15:6–21:20). Defendants submit that when asked "$30 per-square-foot land sale is the worst outcome of the three for your sisters, right?", Michael answered, "It's a way to put it, yes." Id. at 111:17–21. Defendants also provide testimony that a $30 p/s/f land sale would "generate the highest level of proceeds for" Michael. Id. at 113:6–22. In contrast to the $30 p/s/f price, Defendants assert that in 2020, one potential purchaser offered $100 p/s/f just for the land, and $165 p/s/f for the developed properties. Id. at Ex. 37. Defendants also contend that Michael admitted that $165 was "in the ballpark" of the per-square-foot value for Half Acre in January 2020. Id., at Ex. 6 (10/7/24 M. Alfieri Dep. at 209:5–209:22). Defendants maintain that nonetheless, Michael pressured Dominick to sell him Half Acre at only $30 p/s/f with an ultimatum: if he did not agree to revise the partnership agreements to transfer the minority members' interests to Michael, Michael would "just cut the tenants loose." Id. at Ex. 6 (10/7/24 M. Alfieri Dep. at 27:22–29:6). Accordingly, Defendants set forth that Michael undervalued Half Acre to benefit himself.

Defendants additionally contend that Plaintiffs acted in bad faith. Defendants submit that the duty of loyalty "includes a requirement to act in good faith." In re Dole Food Co., Inc. Stockholder Litig., 2015 WL 5052214, at *39 (Del. Ch. Aug. 27, 2015). Defendants elaborate that to show good faith, the decision-maker must act "honestly and without pretext." Id. Defendants claim that Plaintiffs acted in bad faith by alleging that Dominick and Michael agreed to the sale of Half Acre in 2019, not 2021 and backdating the transfer agreement to March 1, 2019 despite its execution on February 22, 2021. Defendants call Plaintiffs' motive into question and allege that Defendants sought to escape liability for the inadequate price Michael paid for Half Acre.

Because Plaintiffs allegedly stood on both sides of the transaction, operated in Michael's personal self-interest and against Half Acre's interests, and acted in bad faith, Defendants argue that entire fairness review has been triggered. Under this review, Defendants assert that the Half Acre transaction was not entirely fair to JAF. Defendants submit that because Plaintiffs allegedly breached the duty of loyalty, they have the burden to "demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." Valeant Pharmaceuticals Intern. v. Jerney, 921 A.2d 732, 746 (Del. Ch. 2007). Defendants state that "the transaction itself must be objectively fair, independent of [one's] beliefs." Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., 2018 WL 3326693, at *35 (Del. Ch. July 6, 2018), aff'd, 221 A.3d 100 (Del. 2019). Defendants explain that "[o]nce entire fairness applies, the defendants must establish 'to the court's satisfaction that the transaction was the product of both fair dealing and fair price.'" Id.

Defendants maintain that Plaintiffs cannot show an entirely fair process. Defendants provide that fair process for purposes of entire fairness review "involves analyzing how the transaction was structured, the timing, disclosures, and approvals." William Penn, 13 A.3d at 756. Defendants contend that where parties sell a property "without full disclosure to the other members [of the LLC], it is impossible to demonstrate that the sale was entirely fair, no matter what the price." Id. at 757; Basho, 2018 WL 3326693, at *36 (failure to disclose is an independent fairness violation); Casey v. Brennan, 344 N.J. Super. 83, 109 (App. Div. 2001) ("[I]mplied in the concept of fair dealing is the duty of candor."). Defendants claim that Plaintiffs admit they did not disclose the sale to Jennifer. See Gesualdo Jan. Decl. at Ex. 12 (12/4-6/23 D. Alfieri Preservation Dep. at 216:5–6, 226:8–12, 367:6–7 ("Q. Did you disclose the sale to Jennifer? A. No.") ("Q. You didn't tell Jennifer or Christine? A. No, they didn't ask either.") Further, when asked why he didn't disclose the deal to Jennifer, Defendants submit that Dominick admits that he did not disclose the deal to Jennifer because he "couldn't afford any legal litigation." See Gesualdo Jan. Decl. at Ex. 16 (10/3-4/24 D. Alfieri Dep. at 320:24–321:22, 362:25–363:6) (Q: "Why didn't you disclose the sale of Half Acre to Michael until Jennifer and her husband found out about it themselves? A. Because this decision I made, taking this kind of risk in a project that I couldn't afford any legal litigation….”). Defendants argue that this alone makes it impossible for Plaintiffs to prove entire fairness.

Moreover, Defendants assert that Plaintiffs cannot establish a fair process due to Plaintiffs' alleged backdating of the transaction. Defendants provide that where a transaction is "timed and structured in a way that had the foreseeable effect, if not the intent, of producing an unfair result," it is not the product of fair dealing. Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc., 532 A.2d 1324, 1336 (Del. Ch. 1987). Defendants also claim that the process was inherently unfair as neither Dominick nor Michael abstained from participating in the sale, or appointed an independent special committee, despite their clear conflict of interest. Defendants submit that courts require parties engaging in conflicted transactions to establish clear processes to prevent harming the interests of the company, which can include appointing an "independent special committee" to negotiate and/or requiring the self-interested party to engage in "total abstention." Gesoff v. IIC Indus., Inc., 902 A.2d 1130 (Del. Ch. 2006). Additionally, courts require parties engaging in conflicted transactions to seek "alternative, third-party buyers." Id. Defendants explain that Plaintiffs never marketed Half Acre; instead, they admit that they actively discouraged third-party bids for Half Acre and nearby land. See, e.g., Gesualdo Jan. Decl. at Ex. 6 (10/7/24 M. Alfieri Dep. at 212:7–10); Ex. 16 (10/3-4/24 D. Alfieri Dep. at 139:16–140:22).

As to legal representation throughout the deal, Defendants allege that neither JAF nor Half Acre were represented by legal counsel in the sale. See Macrophage Therapeutics, Inc. v. Goldberg, 2021 WL 2582967, at *1–2 (Del. Ch. June 23, 2021) (no fair process where company was unrepresented); Sealy, 532 A.2d at 1337 (holding that absence of legal counsel representing minority stockholders was one absent "procedural safeguard[]," which is "highly persuasive evidence that the merger terms were the product of unfair dealing").

Defendants argue that because Michael and Dominick "acted in their own self-interest and contrary to the interests of other members of [Half Acre], their actions precluded the possibility that the property would be sold pursuant to an open and fair process." William Penn, 13 A.3d at 757. And "[b]ecause [Michael] procured the sale of [Half Acre] without full disclosure to the other members [of Alfieri-Half Acre Road, LLC], it is impossible to demonstrate that the sale was entirely fair, no matter what the price." Id. (affirming judgment for plaintiffs where defendant did a deal in secret without full disclosure to other LLC members for $6.6 million, where appraisals valued the property at $5.4 million). Thus, Defendants maintain that as a matter of law, the Half Acre sale cannot pass entire fairness review.

Turning to the second prong of entire fairness review, Defendants contend that Plaintiffs cannot show an entirely fair price. Defendants state that the fair price inquiry does not require determination of the actual valuation of Half Acre. Defendants elaborate that "[i]nstead of picking a single number, the court's task is to determine whether the transaction price falls within a range of fairness." Tornetta v. Musk, 310 A.3d 430, 533 (Del. Ch. 2024). Defendants represent that so long as the $30 p/s/f was outside the "range of fairness," the price was not entirely fair as a matter of law. In re Dole, 2015 WL 5052214, at *33.

Defendants allege that the instant facts foreclose Defendants' ability to prove that a reasonable seller would accept $30 p/s/f for Half Acre's properties in February 2021. Defendants assert that both Michael and Dominick agreed that the properties and the building were worth more than $30 p/s/f. See Gesualdo Jan. Decl. at Ex. 6 (10/7/24 M. Alfieri Dep. at 203:7–203:15), Ex. 12 (12/4-6/23 D. Alfieri Preservation Dep. at 235:3–19); see also id. at 236:12–16 ("Q. Do you agree with that, that the – that the properties were worth more once they were built and leased? A. Well, yeah…."). Further, rather than selling mere land, Defendants emphasize that Plaintiffs sold fully developed warehouses with commercial tenants occupying the space and paying between $500,000 to $1,000,000 a month in rent. See Gesualdo Jan. Decl. at Ex. 11. As to other offers, Defendants represent that between May 2017 and January 2022, Plaintiffs received offers to buy the land at Half Acre ranging from $42 p/s/f to $165 p/s/f. Id. at Ex. 36, 37. Defendants contend that no reasonable person would turn down an offer for a substantially higher price only to sell the properties for $30 p/s/f. As such, Defendants maintain that Plaintiffs cannot establish that the price for the transaction was fair and fail to meet the entire fairness standard.

In opposition and in support of their cross-motion, Plaintiffs argue that Defendants' fiduciary duty claims must be dismissed as a matter of law. Plaintiffs allege that Defendants contractually waived Plaintiffs' obligation to act in a fiduciary capacity. Plaintiffs acknowledge that prior to Dominick's retention of his own independent counsel in June 2001, Jennifer and Christine's counsel attempted to and did insert into the draft model Operating Agreement multiple provisions attempting to restrict Dominick's, as well as Michael's authority as Managers. Such restrictions included: (1) requiring Dominick and Michael to act at all times in a "fiduciary capacity" and "in the best interests of all Partners;" (2) requiring that any sale of an Alfieri property by Dominick must be effected on "commercially reasonable terms and conditions;" (3) prohibiting Michael, from investing "in or otherwise acquir[ing] any interest in any other [project] that competes [or potentially could compete] with [an Alfieri] property...;" (4) prohibiting Dominick and Michael from using "the assets of the Partnership for any purpose other than conducting the business of the Partnership, for the full and exclusive benefit of all of its Partners…;" (5) requiring all loans from the partnership to a partner to be on "commercially arms-length" terms; (6) requiring Dominick to use "reasonable good faith business judgment in exercising his powers;" (7) prohibiting Dominick from "transfer[ring] or disposing] of the Partnership's Property … except in the ordinary course of business of the Partnership;" (8) prohibiting Dominick or Michael from "engag[ing] in any conduct that would make it impossible to carry on the intended or ordinary business of the Partnership;" and (9) requiring Dominick to "diligently and faithfully devote such of his time to the business of the Partnership as may be necessary to promote adequately the interests of the Partnership." Plaintiffs note that these attempted contractual restrictions mimicked the statutory duties of care and loyalty set forth in RULLCA, which, since March 1, 2014, has governed the operations of the Property Entities. See N.J.S.A. 42:2C-91. However, Plaintiffs submit that each of the attempted restrictions, including the requirement that Dominick and Michael act all times in a fiduciary capacity and requiring that any sale of a property be effected on commercially reasonable terms and conditions, were rejected by Dominick, were written out of the Operating Agreements and were replaced by the management powers contained in the Half Acre and Cranbury South Brunswick ("CSB") Operating Agreements, which existed as of the date of sale.

Plaintiffs assert that as a result of Dominick's actions in stripping the Operating Agreements of those provisions which would have imposed upon him and Michael fiduciary duties of care and loyalty and in particular with respect to the sale of properties, a new Section 10.4 was inserted and agreed to by Jennifer and Christine providing, in relevant part, that Dominick as the controlling Manager was "specifically empowered to …sell, exchange, or grant an option for the sale of all or any portion of any property held by the LLC at such price or amount, for cash, securities or other property, and upon such other terms and conditions as the Managers in their sole and absolute discretion shall deem proper." Certification of David Arroyo, Esq. ("Arroyo Cert."), Ex. 22. Plaintiffs maintain that in apparent exchange for the elimination of the fiduciary duty of loyalty and requirement that any sale by Dominick be on "commercially reasonable" terms, Dominick agreed to add the term "bad faith" to Section 10.7 of the Operating Agreement, providing that the Managers "shall not be liable, responsible or accountable for damages or otherwise to … any Member, for any action … or failure to act … within the scope of the authority conferred on the Managers by this Agreement … unless such action or omission was performed fraudulently, in bad faith, or constituted wanton or willful misconduct, or gross negligence." Id. Plaintiffs note that breach of fiduciary is absent from the class of permitted claims.

Plaintiffs claim that the negotiations between Dominick and Jennifer's team of counsel requires a finding that Jennifer not only waived any right she might otherwise have had to impose fiduciary duties upon Dominick or Michael, but that she did so "clearly, unequivocally, and decisively." See Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276–77 (2013) (citations omitted) ("'Waiver is the voluntary and intentional relinquishment of a known right.' …. [A] party need not expressly state its intent to waive a right; instead, waiver can occur implicitly if 'the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference.'"). As such, Plaintiffs contend that Jennifer's fiduciary duty claims against Dominick must be dismissed as a matter of law. See Quinn v. Quinn, 225 N.J. 34, 45 (2016) ("It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear. …. Stated differently, the parties cannot expect a court to present to them a contract better than or different from the agreement they struck between themselves."). Cf. Klingelhutz v. Klingelhutz, A19-1472, 2020 WL 5107335, at *4 (Minn. Ct. App. Aug. 31, 2020) (affirming dismissal of claims on summary judgment).

Plaintiffs also take issue with Defendants' claim that the fiduciary duty of loyalty cannot be modified or waived under RULLCA. Plaintiffs provide that although "RULLCA imposes a duty of loyalty on [LLC] members 'to refrain from competing with the company in the conduct of the company's activities …' N.J.S.A. 42:2C-39(b)(3) [and requires] Members … 'to account to the company and to hold as trustee for it any ... profit' the member derives 'from a use by the member of the company's property' or 'from the appropriation of a company opportunity' N.J.S.A. 42:2C-39(b)(1)(b)-(c). An operating agreement's terms, however, may restrict or eliminate this duty if the term is not manifestly unreasonable. N.J.S.A. 42:2C-11(d)(1)(c)." Lamme v. Client Instant Access, LLC, A-2689-20, 2022 WL 1276123, at *2–3 (N.J. Super. Ct. App. Div. Apr. 29, 2022).

Plaintiffs explain that in determining whether Dominick's elimination of fiduciary duty was "manifestly unreasonable" and specifically within the context of his right to sell partnership properties unchained from the obligation of having to act in a fiduciary capacity" (including having to sell on "commercially reasonable" terms), the Court is mandated to view the provisions of the Operating Agreement "as of the time … [they] became part of the operating agreement [in 2001]; by considering only circumstances existing at that time;" and "only … in light of [its then] purposes and activities" to be served. N.J.S.A. 42:2C-11h(1),(2). Plaintiffs represent that the Operating Agreements at issue emanated out of Dominick's adoption of an estate plan – and not out of a commercial venture wherein his children were intended to be, or treated as, investors or business partners. Plaintiffs argue that in applying Lamme, this Court must enforce Jennifer's waiver of fiduciary duty as the "objective" of her waiver – i.e., to avoid having potentially to pay hundreds of millions of dollars in estate taxes upon her father's death while securing her inheritance – cannot be deemed "unreasonable" in light of the "circumstances existing at that time."

Moreover, Plaintiffs submit that the economic loss doctrine requires dismissal of Defendants' fiduciary duty claims. Plaintiffs provide that the economic loss doctrine prohibits a plaintiff from recovering in tort economic losses to which its entitlement only flows from contract.

See Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 579 (1985) (dismissing plaintiff's tort-based claims as a matter of law where plaintiff alleged that defendant did not fulfill its contractual obligations). Plaintiffs assert that the provisions of the Operating Agreement at issue and particularly Section 10.4, envelop the disputed conduct in this action, to wit, Dominick's setting of the terms and conditions of sale of the Half Acre and CSB properties. Therefore, Plaintiffs purport that Jennifer's claims for breach of fiduciary duty against Dominick and Michael necessarily "fai[l] as a matter of law because the economic loss doctrine clearly bars [her] from recovering based on [Dominick's setting the terms of the sale] when [her] entitlement [if any] clearly flows from the [Operating] Agreement." Namerow v. PediatriCare Associates, LLC, 461 N.J. Super. 133, 139 (2018).

Next, Plaintiffs contend that Defendants' fiduciary claims fail because he acted in conformity with the negotiated provisions of the operating agreements. Plaintiffs maintain that Dominick was not required to sell the Half Acre and CSB properties at fair market value or at a fair price. Plaintiffs allege that Dominick was permitted to sell the Half Acre and CSB properties to Michael at a price he set and at a price he deemed "proper" in his "sole and absolute discretion," using the resources of Alfieri Finance to finance construction, and without prior notice to or the consent of Jennifer pursuant to the Half Acre Operating Agreement.

Additionally, Plaintiffs contest Defendants' reliance on Delaware law to support their application. Plaintiffs submit that the Half Acre and CSB entities were established pursuant to New Jersey's Limited Liability Company Act. Their Operating Agreements each provide that "[t]his Agreement shall be governed by and shall be construed in accordance with the laws of the State of New Jersey." Arroyo Cert., Ex. 22. Thus, Plaintiffs argue that Delaware law does not apply, especially as Delaware has not adopted RULLCA. Plaintiffs assert that the "entire fairness doctrine" applies in Delaware where the controlling, fiduciary shareholder or manager engages in a transaction that involves a conflict of interest and obtains a personal benefit. Plaintiffs acknowledge that although there are cases in New Jersey where courts have used doctrines of fairness and equity to enjoin transactions such as mergers, in those cases the precipitating party or parties were imbued with fiduciary duties of care and loyalty. See, e.g., Berkowitz v. Power/Mate Corp., 135 N.J. Super. 36 (Ch. Div. 1975) (merger transaction involving a freeze-out of minority shareholders by majority shareholders, who owed fiduciary duties to the minority, who controlled both merging entities and who personally benefited from the merger. Court held fairness of buyout price was subject to concepts of fairness and equity).

In reply and in opposition to Plaintiffs' cross-motion, Defendants reiterate their position that Plaintiffs owed JAF fiduciary duties of loyalty. Defendants first address Plaintiffs' argument regarding waiver. Defendants explain that New Jersey bars waiver of liability for money damages for breach of the duty of loyalty. Defendants assert that an LLC's members may waive or limit a manager's liability for equitable remedies for breach of the duty of loyalty— if they do so expressly, but the plain language of the statute bars LLCs from waiving monetary liability for disloyal fiduciary breaches. N.J.S.A. 42:2C-11(g)(1). Defendants note that Plaintiffs fail to cite to any case invalidating section 42:2C-11(g)(1).

Moreover, Defendants maintain that the Half Acre Operating Agreement did not waive statutory fiduciary duties. Defendants submit that parties must expressly waive statutory rights through "clear, unequivocal, and decisive" contractual language. All Saints Univ. of Medicine Aruba v. Chilana, 2012 WL 6652510, at *13–14 (N.J. Super. Ct. App. Div. Dec. 24, 2012); accord Dixon v. Rutgers, 110 N.J. 432, 460 (1988). Defendants elaborate that if the "Operating Agreement contains no language that clearly indicates that the members of the LLC by agreeing to its terms, knowingly waived the applicability of" rights enumerated in the LLC statute, then the rights apply. Id. Defendants assert that the Half Acre Operating Agreement does not include the terms "fiduciary duty," "duty of loyalty," or explicitly allow a manager to act "in conflict" with the LLC at all. Therefore, Defendants contend that the Half Acre Operating Agreement does not expressly waive the duty of loyalty.

Defendants take issue with Plaintiffs' use of Section 10.7 to establish waiver. Section 10.7 sets forth that:

> The Managers shall not be liable, responsible, or accountable for damages or otherwise to the LLC, or any member, for any action taken or failure to act on behalf of the LLC within the scope of the authority conferred on the Managers by this Agreement or by law unless such action or omission was performed fraudulently, in bad faith, or constituted wanton or willful misconduct, or gross negligence.

Gesualdo Jan. Decl., Ex. 5. Defendants argue that "[r]ather than eliminating fiduciary duties, the exculpatory language of [the same provision] recognizes their continuing existence." Feeley v. NHAOCG, LLC, 62 A.3d 649, 664 (Del. Ch. 2012). Defendants reason that this is because "a contractual duty to refrain from 'willful misconduct' or 'bad faith' corresponds with the traditional duty of loyalty, and a contractual duty to refrain from 'gross negligence' corresponds with the traditional duty of care." In re Cadira Grp. Holdings, LLC Litig., 2021 WL 2912479 (Del. Ch. July 12, 2021).

Defendants assert that there is no reason for Plaintiffs to contest their use of Delaware caselaw as RULLCA's legislative history makes clear that Delaware case law regarding waiver of statutory fiduciary duties is directly on point in New Jersey. Defendants note that the drafters of the RULLCA cited Delaware Chancery decisions fifteen (15) times, including for the proposition that "displacement of fiduciary duties is effective only to the extent that the displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence of fiduciary duty." Declaration of Michael Gesualdo, Esq., May 6, 2025 ("Gesualdo May Decl."), Ex. 90. (Uniform Limited Liability Company Act (2006), Comments at 35). With respect to the waiver of fiduciary duties, Defendants submit that the RULLCA drafters intended the statute to be even more protective of fiduciary duties, and harder to waive, than Delaware. Id. at 33–34 ("This act rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of 'freedom of contract' against the dangers that inescapably exist when some persons have power over the interests of others.").

Regarding Section 10.4, pursuant to which the managers are to act in their "sole discretion for and on behalf of the LLC," Defendants also contend that the section fails to establish a waiver of fiduciary duties. Gesualdo Jan. Decl., Ex. 5. Defendants allege that no New Jersey or Delaware case has ever found waiver of the duty of loyalty based on a "sole discretion" provision like the one here. Defendants maintain that this provision "does nothing to absolve [the general partner] of the duty to act for a proper fiduciary purpose; it simply says that [the general partner] has the singular (i.e. sole) authority (i.e. discretion) to consider and decide this matter." Paige Capital Mgmt., 2011 WL 3505355, at *32.

As to the drafting history of the Half Acre Operating Agreement, Defendants argue that the Court may not consider such history. Regardless of whether a proposed draft included fiduciary duty provision, Defendants provide that provisions that are not in a contract by definition cannot clearly and unequivocally waive statutory rights. See Teleki v. Talk Mktg. Enters., Inc., 2012 WL 2283044, at *4–5 (N.J. Super. Ct. App. Div. June 19, 2012); see also Lopez v. Palin Enterprises, 2018 WL 6332245, at *2 (N.J. Super. Ct. App. Div. Dec. 5, 2018) (holding that absence of contractual term does not create ambiguity about whether contract requires term; rather absence shows contractual requirement unambiguously is not in the contract).

To the extent that Plaintiffs argue that the economic loss doctrine bars the breach of fiduciary duty claim, Defendants represent that it does not apply. Plaintiffs explain that courts distinguish between claims based on terms of an agreement, like in Namerow, and claims that are based on common law or statutory fiduciary duty breaches.17 See, e.g., Manti Holdings LLC v. Carlyle Grp. Inc., 2022 WL 444272, at *4 (Del. Ch. Feb. 14, 2022) ("In other words, the language waives objections to the Sale itself; it does not waive objections to fiduciary duty breaches made in connection with the Sale."). Defendants elaborate that New Jersey law "permits recovery when a defendant owes a duty of care separate and apart from the contract between the parties." Chatham Asset Mgmt., LLC v. Adviser Compliance Assocs., LLC, 2023 WL 8295248, at *4 (D.N.J. Dec. 1, 2023). Defendants maintain that this is the case here as they allege that Plaintiffs have breached duties they owed under the RULLCA, not only their contractual promises. See Kaye v. Rosefielde, 223 N.J. 218, 236 (2015) (rejecting defendant's argument under economic loss theory for duty of loyalty claim).

In reply for their cross-motion, Plaintiffs contest Defendants' allegation that Jennifer did not expressly waive the fiduciary duties. Plaintiffs submit that "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights," even those that are statutory. See Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 444 (2014). Further, Plaintiffs assert that in a recent case decided under RULLCA, the Appellate Division enforced "an affirmative waiver" of fiduciary duty based on language nearly identical to that found in Operating Agreements at issue. Compare Lamme v. Client Instant Access, LLC, A-2689-20, 2022 WL 1276123, at *1 (N.J. Super. Ct. App. Div. Apr. 29, 2022) ("Nothing in this Agreement shall be deemed to restrict in any way the freedom of any Member to conduct any business or activity of whatever nature including, without limitation, the acquisition, development, exploitation or sale of real property even if such activity is in conflict with the [LLC's] activities ... without any accountability to [the LLC] or to the other Members, and no Member shall have any interest in any such other business or activity by virtue of this Agreement.") with the Half Acre Operating Agreement, §XXII ("Any Member may engage in or possess interests in other business ventures of any nature and description, independently or with others, whether such venture involves a business similar to that of the LLC or otherwise. Neither the LLC nor the Members in their capacity as Members in the LLC shall have any rights in and to such independent venture or any income or profits derived therefrom by the Members currently engaged in such competing activity.")

Plaintiffs also take issue with Defendants' assertion that the Court should not consider the parties negotiations leading up to the drafting of the Half Acre Operating Agreement. Plaintiffs point to RULLCA which states that "[t]he court: … shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time …." N.J.S.A. 42:2C-11(h). Separate and apart from RULLCA's requirements, Plaintiffs claim that courts may not and should not interpret and enforce contract terms in a vacuum, but rather in light of the parties' intent as gleaned from the circumstances leading to and surrounding execution of the agreements. Plaintiffs provide that "[r]epeatedly have our highest courts used negotiations antecedent to integration in arriving at and effectuating the specific intent of the parties, subject only to the caution that the construction adjudicated be compatible with the contractual language." <u>See</u> <u>Garden State Plaza Corp. v. S. S. Kresge Co.</u>, 78 N.J. Super. 485, 499 (App. Div. 1963). Plaintiffs contend that Jennifer's reliance upon the unreported decisions of <u>Teleki v. Talk Mktg. Enters., Inc.</u>, 2012 WL 2283044 (App. Div. June 19, 2012) and <u>Lopez v.</u>

Palin Enterprises, 2018 WL 6332245 (N.J. Super. Ct. App. Div. Dec. 5, 2018), is misplaced because Plaintiffs do not, as Jennifer wrongfully suggests, proffer parol evidence to vary any of the terms of the parties' agreements. Plaintiffs allege that the merely ask the Court to enforce the material terms of the parties' agreements according to their intended meaning.

RULLCA imposes a duty of loyalty on such members "to refrain from competing with the company in the conduct of the company's activities before the dissolution of the company." N.J.S.A. 42:2C-39(b)(3). Members are also required "to account to the company and to hold as trustee for it any . . . profit" the member derives "from a use by the member of the company's property" or "from the appropriation of a company opportunity." N.J.S.A. 42:2C-39(b)(1)(b)-(c). An operating agreement's terms, however, may restrict or eliminate this duty if the term is not manifestly unreasonable. N.J.S.A. 42:2C-11(d)(1)(c). Parties must expressly waive statutory rights through "clear and unmistakable" contractual language. See Dixon v. Rutgers, 110 N.J. 432, 460 (1988).

When determining whether a term is manifestly unreasonable, a court must first consider only the "circumstances existing at th[e] time" the operating agreement was formed, N.J.S.A. 42:2C-11(h)(1), and may invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that: (a) the objective of the term is unreasonable; or (b) the term is an unreasonable means to achieve the provision's objective.

After giving all favorable inferences to the non-moving party, the Court is satisfied that Defendants have met the standard for summary judgment with respect to the breach of the duty of loyalty and that no questions of material fact remain. Plaintiffs argue that sections 10.4 and 10.7 effectively waive the duty of loyalty in the Half Acre Operating Agreement. However, these provisions and the Half Acre Operating Agreement, as a whole, are devoid of any express reference to a fiduciary duty. The Court is unwilling to find that the provisions at issue clearly, unequivocally, and decisively waive the duty of loyalty. Moreover, the Half Acre Operating Agreement requires that Dominick act in his sole discretion "for and on behalf of the LLC." Gesualdo Jan. Decl., Ex. 5. This language is consistent with the fiduciary duty of loyalty and belies any waiver claims. Aside from waiver, Plaintiffs have made no defense or rebuttal to the violation of the duty of loyalty.

Having established that Plaintiffs did not waive any fiduciary duty, the Court must look to Plaintiffs' conduct. Dominick and Michael controlled both MAF, the "buyer" in the Half Acre transaction, and Half Acre itself, as the seller. Thus, Plaintiffs stood on both sides of the transaction, triggering entire fairness review. Following such an analysis, Plaintiffs: (1) secretly negotiated the Half Acre transaction, (2) intentionally withheld the opportunity for the sale of Half Acre from other members, and (3) executed the most favorable transaction to benefit Michael at the expense of Half Acre. In sum, Plaintiffs sold Half Acre for significantly less money than the record indicates that it was worth, without notice to the members of Half Acre. This constitutes a breach of the duty of loyalty under the entire fairness standard.

b. Statute of Frauds

Defendants argue that the Statute of Frauds ("SoF") bars any defense by Dominick and Michael to Jennifer's counterclaims based on the existence of an oral agreement for the sale of Half Acre. Defendants assert that Plaintiffs cannot prove the existence of an oral agreement by clear and convincing evidence. Defendants submit that a contract's reference to a signature or writing requirement suffices to establish the parties' intent to be bound only by writing. See e.g., Seaboard Towers Dev. Co., LLC v. AC Holding Corp. II, 2008 WL 2340016, at *13 (N.J. Super. Ct. App. Div. June 10, 2008) (affirming summary judgment on non-existence of oral agreement where "the Option Agreement itself" "reference[d] the need and expectation of signature"). Defendants rely on Morton v. Orchard Land Trust, wherein the New Jersey Supreme Court found that parties who executed a "written contract" for the real estate sale, which by its terms "was binding only on 'parties who sign it,' and the 'signed contract' had to be delivered to the parties," "intended to be bound only by a written contract." Morton v. Orchard Land Trust, 180 N.J. 118, 129 (2004).

Defendants claim that the same logic applies here. Defendants provide that the Half Acre Sale Agreement expressly conditions its effectiveness on written signature with the "Effective Date" of the Agreement being defined as the "date on which this Agreement has both been fully executed by the parties and a counterpart has been delivered to each of the parties." Declaration of Michael Gesualdo, Esq., Jan. 9, 2025 ("Gesualdo Jan. Decl.") at Ex. 11 (2021 Half Acre Sale Agreement, DAMA 032627 at 2630 § 1.2.2). Moreover, Defendants maintain that the Half Acre Sale Agreement includes an additional contingency provision requiring Michael to agree in writing for the Agreement to be binding, otherwise the entire agreement would be null and void. Id. at 2631 § 4.1. Therefore, Defendants contend that the Half Acre Sale Agreement itself "set[s] forth that the parties would not be bound absent a written contract." SDK Troy Towers, LLC v. Troy Towers, Inc., 2019 WL 612670, at *10 (N.J. Super. Ct. App. Div. Feb. 14, 2019).

Next, Defendants allege that Plaintiffs' objective actions were inconsistent with intent to be bound by an oral agreement. Defendants argue that Michael's and Dominick's exchange and rejection of multiple draft agreements for potential transactions related to Half Acre land or Half Acre LLC ownership interests over the course of several years after the alleged "handshake" agreement manifests an intent to be bound only in writing. Gesualdo Jan. Decl. at Ex. 19, 22, 30. Defendants represent that Dominick refused to sign any of the drafts until February 22, 2021. Id.

at Ex. 5 (10/7/24 M. Alfieri Dep. at 28:2–24; 31:1– 32:13). Defendants maintain that the series of draft agreements elicits a clear, objective intent to be bound in writing under New Jersey law. See Prant v. Sterling, 332 N.J. Super. 369, 379 (1999); SDK Troy Towers, 2019 WL 612670, at *10–11. Defendants also note that all formal documents, including accounting ledgers, tax documents, lease agreements, and insurance paperwork, reflected that Half Acre, not MAF, owned the Half Acre properties prior to February 2021. Accordingly, Defendants submit that the "sale of the [Half Acre] property was not expected to end on the basis of a handshake or verbal utterance." Morton, 180 N.J. at 130.

Furthermore, Defendants contend that Plaintiffs cannot prove by clear and convincing evidence that the essential terms of the transaction were agreed upon prior to 2021. Defendants explain that to overcome the SoF, Plaintiffs must prove, as essential terms of the contract, "the interest to be transferred," "the date of closing," "the kind of deed to be given," and the price and specific financing terms, by clear and convincing evidence. Hogan v. Condinho, 2006 WL 2164416, at *7 (N.J. Super. Ct. App. Div. Aug. 3, 2006); Morales v. Santiago, 217 N.J. Super. 496, 499, 502 (App. Div. 1987). Defendants maintain that at the time of the "handshake," Michael and Dominick had not agreed upon: (1) whether the deal would be a land sale, a partnership interest exchange, or an option contract; (2) the final purchase price; (3) the closing period; and (4) whether construction and development would occur before or after closing, and thus, who would bear the risk of that development. Defendants assert that uncertainty on any one of these terms negates Defendants' ability to meet their burden under the SoF.

With respect to the interest to be transferred, Defendants claim that there was no meeting of the minds for years after the purported "handshake." Defendants submit that there were multiple iterations of a deal structure, be it land or partnership interest exchange, at various points after the "handshake." Gesualdo Jan. Decl. at Ex. 5, (10/7/24 M. Alfieri Dep. at 23:19–22; 23:23–24:4; 26:18–24; 27:8–9). Defendants allege the same for the price and closing date as the draft Half Acre agreements have different terms, all of which differed from the price and closing date ultimately specified by the final Half Acre Purchase Agreement. Id. at Ex. 21, 22, 30, 11.

In opposition and in support of their cross-motion, Plaintiffs argue that the SoF does not invalidate Dominick's sale of Half Acre to Michael. Plaintiffs submit that the oral agreement between Dominick and Michael, as later confirmed in writing by the PSA executed on February 22, 2021, ipso facto removes the Half Acre sale out of the SoF. See, e.g., Morton v. 4 Orchard Land Trust, 180 N.J. 118, 125 (2004). Plaintiffs assert that oral agreement as well as the Half Acre Sale Agreement contain "a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and transferee;" and it was signed "by or on behalf of the party against whom enforcement is sought [i.e., Half Acre LLC]," allegedly satisfying the provisions of the SoF. N.J.S.A. 25:1-3a.

Furthermore, Plaintiffs contend that JAF lacks standing to assert the SoF as a bar due to its status as a non-party to the Half Acre sale transaction. See Est. of Hammerle v. Dir., Div. of Tax'n, 22 N.J. Tax 342 (2005). Plaintiffs elaborate that "the statute of frauds was enacted for the protection of the party sought to be charged, and is not available to strangers to the agreement." See id. at 348-49 (citing Zwaska v. Irwin, 52 N.J. Super. 27, 33 (Ch. Div. 1958); McCue v. Deppert, 21 N.J. Super. 591, 596 (App. Div. 1952)). Here, Plaintiffs note that JAF was neither the buyer, nor the seller of the Half Acre Properties, nor was it a party to the oral agreement between Dominick and Michael. Regardless of standing, however, Plaintiffs argue that the full performance of their oral agreement renders JAF's SoF defense as moot. Graziano v. Grant, 326 N.J. Super. 328, 341 (App. Div. 1999; citing Klockner v. Green, 54 N.J. 230, 236 1969) ("it is well settled that an oral contract or agreement which might otherwise be barred by the [SoF] is enforceable where there has been performance by one party and to do otherwise would work an inequity on the party who has performed”).

In reply and in opposition to Plaintiffs’ cross-motion, Defendants argue that Plaintiffs cannot prove their oral agreement by clear and convincing evidence. Defendants note that Plaintiffs do not contest that their “handshake” lacked the final Agreement’s essential terms, including the interest to be transferred (i.e., whether they planned to sell the Half Acre property or the LLC’s interest), the final price, the closing date, the allocation of construction costs, or contingencies, like Michael’s ability to walk away from the deal at any time. Defendants maintain that because the two parties could not agree on a sale until they agree on what to sell, Defendants cannot prove they met minds. Furthermore, Defendants assert that because Half Acre Sale Agreement is an integrated, written agreement, Defendants may not rely on evidence of an oral agreement, full stop. <u>See</u> <u>Jujutsu, LLC v. Dipalie Property Mgmt., LLC</u>, 2019 WL 5690493, at *5 (N.J. Super. Ct. App. Div. Nov. 4, 2019) (declining to use evidence of oral agreement to alter terms of integrated, written agreement).

Defendants then address their alleged lack of standing. Defendants deny Plaintiffs’ claim that Jennifer does not have standing to assert a SoF defense because she was not the “buyer or seller in the transaction.” Defendants submit that Jennifer, as a member of Half Acre LLC, was a seller in the transaction—she was a co-owner of the entity that sold the properties, and therefore plainly has standing to assert the SoF. Defendants distinguish <u>Estate of Hammerle</u>, which Plaintiffs relied upon, as the Director had no interest in the property sold at the time, before taxes became due. <u>Estate of Hammerle</u>, 22 N.J. Tax 342 (2005). Here, Defendants maintain that Jennifer owned an interest in the property sold.

Having given all favorable inferences to the non-moving party, the Court finds that no questions of fact remain and that the SoF bars Plaintiffs' relevant defenses to the counterclaims. First addressing the issue of standing, as a member of Half Acre, Jennifer was an interested party in the transaction. The facts at hand are distinguishable from the caselaw relied on by Plaintiffs wherein the parties had no interest in the properties at issue. Here, Jennifer is an interested party by way of her member status with respect to Half Acre, the "seller" in the Half Acre transaction.

As to the merits of the argument, no questions of material fact exist. The Half Acre Sale Agreement is a fully integrated document. It contains language that conditions its effectiveness on the written signature of the parties with the "Effective Date" of the Agreement being the "date on which this Agreement has both been fully executed by the parties and a counterpart has been delivered to each of the parties." Gesualdo Jan. Decl., Ex. 11 at§ 1.2.2. Further, communications and draft agreements between Michael and Dominick indicate that at the time of the oral agreement, the parties failed to identify the price and form of the transaction. Plaintiffs had not even agreed as to whether the transaction would be a sale of the land or the sale of an interest in the LLC. Pursuant to the express terms of the memorialized Half Acre Sale Agreement, the Agreement was executed when the parties signed the document on February 22, 2021.

c. The Implied Covenant of Good Faith and Fair Dealing

Plaintiffs allege that Dominick did not act in bad faith or breach the implied covenant of good faith and fair dealing. Plaintiffs submit that pursuant to Section 10.4 of the Half Acre Operating Agreement, Dominick was "specifically empowered to … sell, exchange, or grant an option for the sale of all or any portion of any property held by the LLC at such price or amount, for cash, securities or other property, and upon such other terms and conditions as [he] … in [his] sole and absolute discretion … deem[ed] proper…." Arroyo Cert., Ex. 22. Plaintiffs maintain that this right was granted to Dominick by each of his children, including Jennifer, following many months of vigorous negotiation during which each was represented by counsel. Plaintiffs contend that although "the covenant of good faith and fair dealing permit[s] inquiry into [Dominick]'s exercise of [his contractually bargained-for sole and absolute] discretion," that inquiry cannot be used to override any of his express contractual rights. See Seidenberg v. Summit Bank, 348 N.J. Super. 243, 257- 58 (App. Div. 2002). Accordingly, Plaintiffs represent that when considering whether Dominick [or Michael] breached the implied covenant, the court must respect and give effect to the parties' bargain as expressed in their contract, that is, the right of Dominick as holder of the majority in interest of the Management Units, to set the price" at which the properties could be sold. See Wilson v. Amerada Hess Corp., 168 N.J. 236, 250 (2001).

Plaintiffs explain that to give full effect to an express term of a contract vesting a party with the sole and absolute discretion to set price, "the test for determining whether the implied covenant of good faith and fair dealing has been breached" or whether, to put it conversely, the party acted in bad faith, is whether the party exercising its discretionary authority did so "arbitrarily, unreasonably, or capriciously, with objective of preventing the other party from receiving its reasonably expected fruits under the contract." Wilson, 168 N.J. at 251. Plaintiffs maintain that in the instant matter, each of the Property Entities in which Jennifer was gifted a membership interest were created in service of decidedly non-commercial goals: (1) to lawfully minimize what otherwise was anticipated to be Jennifer and her siblings' inevitable obligation to pay hundreds of millions of dollars in estate tax upon his passing – potentially resulting in the destruction and liquidation of the Alfieri family business itself – while (2) maximizing and retaining Dominick's continued unilateral control of the entities and his properties. Plaintiffs claim that in connection with the sale of the Half Acre and CSB properties, Dominick acted in the best interests of all of his beneficiaries – and not Jennifer alone –, ensuring that the vacant land in which JAF had an interest was properly developed and remained in the Alfieri family, allegedly enriching JAF in the amount of approximately $45 million.

Further, Plaintiffs contend that Dominick's decision to sell the Half Acre and CSB properties to Michael was not arbitrary, unreasonable, capricious, or a result of an ill-motive. Plaintiffs provide that as a matter of law, Jennifer must establish that Dominick acted with a "bad motive in order to successfully assert a claim of breach of the implied covenant of good faith and fair dealing," or conversely, that Dominick acted in bad faith. See Wilson, 168 N.J. at 245-46, 249. Plaintiffs elaborate that a claimant must establish "a state of mind or malice-like element to breach of good faith and fair dealing, holding that the duty excludes activity that is unfair, not decent or reasonable, nor dishonest." Espinosa v. Cnty. of Union, 212 Fed. Appx. 146, 159 (3d Cir. 2007). Plaintiffs submit that a party's action "is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached." See Witt v. Borough of Maywood, 328 N.J. Super. 432, 442 (1998), aff'd, 328 N.J. Super. 343 (App. Div. 2000).

Here, Plaintiffs allege that Defendants fail to cite to evidence establishing that Dominick's decision to sell Half Acre at $30 p/s/f in 2018, or CSB at $55 p/s/f in 2023, was driven by any bad motive or intention on their part, let alone any specific intent to thwart her expectations as one of three beneficiaries of an estate plan. Plaintiffs claim that Dominick's decision to sell the Half Acre properties to his son was based solely upon the fact that the Cranbury Half Acre Park project, consisting of 2.3 million square feet of warehouse space, required a substantial dedication of time, work and effort and significant risk, which at his advanced age he did not have the capacity to perform.

With respect to consideration, Plaintiffs assert that if Dominick had raised the land value to higher than $30 p/s/f, the return on equity from rents would have dropped below their required 7% floor. Plaintiffs contend that had the current tenants not agreed to raise the offered rent to the level required to insure a 7% return on investment, Dominick would have sold Half Acre to another party at $30 p/s/f, with the end result to Jennifer and Christine being identical to the sale to Michael. Plaintiffs claim that although Michael arguably did gain from Dominick's sale to him of the 51% of the Half Acre Properties he did not already own, Michael acted as the developer of the properties, took the substantial development risk, absorbed approximately $100 million in project costs and thereby earned entitlement to the development profits. Plaintiffs purport that neither Jennifer, nor Christine, had the experience, training or ability to develop Half Acre and were not in a position to build 2.3 million sf of industrial warehouse, and neither was Dominick. Therefore, Plaintiffs argue that Defendants cannot maintain a claim for the breach of the covenant of good faith and fair dealing.

In opposition, Defendants contend that Dominick breached the covenant of good faith and fair dealing implied in the Half Acre and CSB Operating Agreements when he allegedly circumvented the "No-Transfer" provisions and structured the Half Acre and CSB transactions as conflicted, artificially depressed real estate sales rather than membership interest sales. Defendants submit that the implied covenant of good faith and fair dealing prohibits a party to a contract from using sole discretion provisions as a weapon to undermine the expectations of the other. See Wilson v. Amerada Hess Corp., 168 N.J. 236, 250 (2001). Plaintiffs invoke the "sole… discretion" provisions in the Operating Agreements, and claim it insulated them from liability for breach of the covenant of good faith and fair dealing. However, Defendants provide that courts still apply the covenant to contracts containing sole discretion provisions. Id. Defendants elaborate that "[w]hen a party has sole discretion to make a decision, '[t]hat setting provides more reason for the implied covenant to apply, not less.'" Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC, 302 A.3d 430, 460 (Del. Ch. 2023).

Defendants allege that Dominick's decisions were arbitrary and unreasonable. As to the purported 7% return on investment, Defendants allege that Plaintiffs could use a price higher than $30 per square foot and still achieve a 7% unleveraged return. See Gesualdo May Decl., Ex. 124, 125. Defendants further refute Plaintiffs claims that Dominick transferred the properties to Michael because he was the most competent and suitable person to take on the projects. Defendants argue that even if this were true, it does not provide a reason to deprive Half Acre and its members of the fair market value of its properties.

After giving Defendants, as the non-moving parties, all favorable inferences, the Court finds that Plaintiffs have failed to meet the standard for summary judgment for questions of material fact remain. "To recover for breach of the implied covenant, a plaintiff must prove that: (1) a contract exists between the parties; (2) the plaintiff performed under the terms of the contract; (3) the defendant acted in bad faith with the purpose of depriving the plaintiff of rights or benefits under the contract; and (4) the defendant's actions caused the plaintiff to sustain damages." Luongo v. Vill. Supermarket, Inc., 261 F. Supp. 3d 520, 531-32 (D.N.J. 2017). The primary issue in the instant application is whether there is sufficient evidence on record to determine that Dominick acted in good faith. There is not. Defendants have provided evidence that Dominick could have accepted a higher price p/s/f and remained within the desired return on investment margin. As such, a reasonable jury could find that Dominick acted in bad faith in transferring the Half Acre and CSB properties for $30 p/s/f and $13 p/s/f respectively.

d. Power of Substitution

Plaintiffs submit that in Count I of Jennifer's Answer and Counterclaims, Jennifer claims that Dominick breached the JAF Trust Agreement and his duty of good faith and fair dealing "by transferring Trust assets without providing assets of equivalent value in exchange." Arroyo Cert., Ex. 101. In Count II, she further claims that Michael "tortiously interfered" with the Trust Agreement by virtue of his purchase of the Half Acre properties – three (3) years prior to Dominick's exercise of the power of substitution ("POS") – "with a suppressed valuation, understanding that his actions would artificially depress the value of the assets held by the 2001 Jennifer Family Trust Agreement." Id. Finally, in Count VI of her Counterclaims, Jennifer alleges that Dominick and Michael "breached [their] fiduciary duties by [Dominick] taking [her] membership interests without providing equivalent value for those interests [and] [i]n so doing, Dominick committed willful and wanton misconduct in bad faith – and at a minimum, was grossly negligent." Id. Plaintiffs argue each of these Counts must be dismissed on summary judgment because: (1) pursuant to Dominick's attempted exercise of his POS in September 2021, JAF's assets effectively were never transferred; (2) Jennifer rejected Dominick's exercise of the POS as *ultra vires* and in violation of the "no transfer" provisions contained in the Operating Agreements based upon Dominick's failure to obtain her prior consent to the transfer; and (3) in January 2023, Dominick, *ex abundanti cautela*, re-exercised the POS, restoring on the books and records of the Alfieri Property Entities each of JAF's membership interests and capital accounts therein as if the September 2021 POS never had occurred. Plaintiffs maintain that they have agreed to deposit any excess distributions and tax payment deductions taken on behalf of Dominick back into the applicable Alfieri Property Entity accounts maintained at Alfieri Finance, and to credit JAF's capital account for the entire amount, thereby rendering JAF whole. Thus, Plaintiffs contend that

Defendants' claims relating to Dominick's exercise of the POS must be dismissed as she has not been damaged at all.

Similarly, Plaintiffs argue that Defendants' claim against Michael for tortious interference must be dismissed. Plaintiffs provide that to establish a claim of tortious interference, Jennifer must establish that she had: "(1) a protected interest; (2) that Michael acted with malice – that is, he intentionally interfered without justification; (3) that there is a reasonable likelihood that the interference caused the loss of a prospective gain; and (4) resulting damages." See DiMaria Const., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001), aff'd, 172 NJ. 182 (2002). Plaintiffs expand this general rule to include the assertion that there is no interference when "the acts complained of were ... in the exercise of [a] defendant['s] equal or superior rights." See Kurtz v. Oremland, 33 N.J. Super. 443, 455-459 (Ch. Div. 1954), aff'd, 16 N.J. 454 (1954).

In the instant matter, Plaintiffs maintain that they had an equal or superior right to engage in the Half Acre sale pursuant to the provisions of the Operating Agreements. Plaintiffs purport that the alleged fact that Michael in purchasing the Half Acre properties acted to advance his own interests and financial position does not establish the necessary malice or wrongful conduct required to establish a tortious interference claim. Thus, Plaintiffs contend that the tortious interference claim must be dismissed.

In opposition, Defendants contend that Dominick breached the JAF Trust Agreement by substituting and resubstituting trust assets for less than equivalent value. Plaintiffs do not dispute that the JAF Trust Agreement requires Dominick to provide "equivalent value" if he transfers Trust assets to himself. Gesualdo May Decl., Ex. 85. Defendants submit that a reasonable jury could find that Dominick breached the equivalent value provision when he exercised the substitution power in September 2021 and provided a $64 million note worth less than the membership interests, and again in January 2023, when he resubstituted interests worth less than their September 2021 value. Defendants assert that both expert and fact discovery confirm that the JAF interests were worth more than $64 million in 2021, and that the January 2023 resubstitution provided interests in operating agreements that dilute the JAF's rights in those entities. Id. at Ex. 104.

Additionally, Defendants provide that Jennifer could recover the full value of the JAF membership interests without any discount for lack of marketability. Dominick applied a 54.5% discount to derive the value of the $64 million promissory note. However, Defendants explain that Plaintiffs' expert, Christopher Young, published an article confirming that "in New Jersey (and most other states) the court does not 'typically' allow for discounts like marketability and control" in cases involving breach of fiduciary duty and shareholder oppression. Id. at Ex. 133. Thus, Defendants submit that the fact that Dominick applied a 54.5% discount for lack of marketability alone requires denial of Plaintiffs' motion on this claim.

As to the shareholder oppression claim asserted against Michael, Defendants maintain that the claim should not be dismissed. Defendants allege that Michael, the president of Alfieri Finance, was directly and personally involved in Dominick's issuance of the substitution notice. Defendants also claim that Michael tortiously interfered with the JAF Trust Agreement when he transferred Half Acre's properties to his own Trust, MAF, in March 2021. Although Plaintiffs argue that acting to advance his own interests and financial position does not establish the necessary malice or wrongful conduct required to establish a tortious interference claim, Defendants provide that a defendant is liable for tortious interference when pursuing their own financial interest if they use improper or intolerable means. See Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739 (1989) (explaining that a profit-driven motive is no justification where the factfinder could conclude that the means employed were intolerable). As an example of such improper means, Defendants point to Michael's alleged concealment and backdating of the Half Acre transaction. Defendants argue that these constitute "sharp dealings" actionable under New Jersey tortious interference caselaw. See id. (noting that New Jersey law permits tortious interference actions against defendants for "sharp dealing" and collecting cases).

In reply, Plaintiffs allege that no reasonable jury could award Defendants substitution damages as regardless of whether substitution was effectuated, by reason of Dominick's re-substitution, JAF was restored to the exact same condition it would have been in had the attempted substitution never occurred.

The Court finds that questions of material fact exist with respect to the claims relating to Dominick's exercise of the POS. Plaintiffs primarily argue that these claims should be dismissed as moot because Defendants suffered no loss. However, Defendants have provided sufficient evidence that a jury could reasonably rely on that Jennifer and JAF did suffer damages as a result of Dominick's exercise of the POS. Specifically, Defendants point to the 54.5% discount applied by Dominick to derive the value of the $64 million promissory note used to "reimburse" JAF. Plaintiffs' own expert questions whether this was properly applied, suggesting that Defendants may have been owed more after Dominick conducted the initial transfer. Gesualdo May Decl., Ex 133. Moreover, Plaintiffs contend that they never effectively transferred the assets at issue as Jennifer rejected the substitution. However, if such were the case, Plaintiffs could not have then resubstituted the assets into JAF as they allege. Thus, the request to dismiss the claims is denied.

With respect to the claim for tortious interference against Michael, the Court also denies Plaintiffs' application to dismiss this claim for reasons similar to those expressed in the Court's discussions of the breach of the duty of loyalty and the implied covenant of good faith and fair dealing. Tortious interference requires that a claimant show “that it had a reasonable expectation of economic advantage, which was lost as a direct result of [defendant’s] malicious interference, and that it suffered losses thereby.” Ideal Dairy Farms, 282 N.J. Super. 140, 199 (App. Div. 1995). Here, Defendants have provided sufficient evidence that a reasonable jury could find that Michael acted maliciously in interfering with Defendants’ expectation of prospective gain.

e. Shareholder Oppression

Plaintiffs contend that Defendants’ claim for shareholder oppression must be dismissed. Plaintiffs provide that a majority shareholder “oppress[es] a minority only when his conduct defeats the minority’s ‘reasonable expectations.’” See Brenner v. Berkowitz, 134 N.J. 488, 506 (1993); see also Metro Commercial Mgmt. Servs., Inc. v. Van Istendal, 457 N.J. Super. 66 (App. Div. 2018) (former at-will employee had no reasonable expectation of continued employment that could serve as a basis for a minority shareholder oppression claim). Further, Plaintiffs explain that “[a] minority shareholder’s expectations must be balanced against the corporation’s ability to exercise its business judgment to run its business effectively.” Sipko v. Koger, Inc., A-3636-08T3, 2011 WL 2321286, at *6 (N.J. Super. Ct. App. Div. May 16, 2011), aff’d in part, rev’d in part, 214 N.J. 364 (2013).

Plaintiffs allege that Jennifer was never an investor or business partner with an expectation of profit in Dominick’s continued post-estate plan management of the properties; she paid nothing for her membership interest and invested nothing in the Half Acre or CSB properties. Plaintiffs claim that instead, in agreeing to the terms of the Operating Agreements, Jennifer knowingly and expressly negotiated away every meaningful protection that a typical business partner would bargain for in exchange for being relieved of the obligation during Dominick’s lifetime of paying income taxes on the earnings of the Alfieri Property Entities, and upon his death of being jointly responsible with her siblings for crushing estate taxes. Plaintiffs submit that these were the "fruits off the bargain" and the reasonably expected benefits of the agreements she signed. Accordingly, Plaintiffs maintain that Defendants' claims based upon "minority oppression" must be dismissed.

In opposition, Defendants argue that genuine issues of material fact remain regarding Jennifer's expectations and Plaintiffs' alleged oppressive conduct. Defendants submit that oppressive acts, such as squeezing a minority shareholder out of a corporation, that are carried out with such malevolence or indifference is "particularly harmful" to the minority shareholder in a corporation. Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984), aff'd, 802 F.2d 448 (3d Cir. 1986), and aff'd sub nom. App. of Orchard, 802 F.2d 448 (3d Cir. 1986). Defendants allege that Plaintiffs conduct with respect to the Half Acre transaction constitute freeze-out maneuvers—leaving Jennifer "locked into a meaningless, valueless stock ownership, with no expectancy of any relief, [and] no way to receive any benefit." See Bonavita v. Corbo, 300 N.J. Super. 179, 196–97 (1996).

To the extent that Plaintiffs argue that Jennifer's oppression claim is subsumed by her breach of fiduciary duty, contract, and the covenant of good faith and fair dealing, Defendants counter such a proposition as minority member oppression is a distinct statutory cause of action under NJRULLCA. See N.J.S.A. 42:2C-48(a)(5); N.J.S.A 42:2C-48(b). Defendants assert that Jennifer does not need to prove a breach of fiduciary duty or breach of contract to succeed on her shareholder oppression claim.

The Court finds that Plaintiffs have failed to demonstrate that no questions of material fact exist after giving Defendants all favorable inferences. RULLCA provides judicial recourse for minority members who have been "oppressed" by the majority members. See N.J.S.A. 42:2C-48(a)(5). Under New Jersey law, "oppression has been defined as frustrating a [member's] reasonable expectations" and "is usually directed at a minority [member] personally." Brenner v. Berkowitz, 134 N.J. 488, 506 (1993). Thus, where a minority member's reasonable expectations have been frustrated by the majority members, the minority member has been oppressed and has a genuine claim for judicial recourse under RULLCA.

Plaintiffs allege that because Jennifer received her interest in the relevant entities through part of an estate plan to avoid paying certain amounts in tax, Jennifer could not have reasonably expected to benefit from the Half Acre and CSB transactions. Just because Jennifer received her interest as part of an estate plan does not undermine her status as an interest holder with the reasonable expectation of benefiting from the sale of Half Acre and CSB properties. A reasonable jury could determine that the sale of the properties at such a price was an act of minority member oppression by Dominick and Michael.

f. Conspiracy

Plaintiffs argue that Defendants' conspiracy claim must be dismissed because it is not an independent cause of action. Plaintiffs submit that "the gist of [a civil conspiracy] claim is not the unlawful agreement, 'but the underlying wrong which, absent the conspiracy, would give a right of action.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177–78 (2005). Here, Plaintiffs assert that because Defendants' claims sounding in breach of fiduciary duty, breach of contract, breach of good faith and fair dealing, bad faith, gross negligence and wanton and willful misconduct must be dismissed as a matter of law, so must her claim of civil conspiracy.

For the same reasons expressed in relation to their other claims, Defendants in opposition argue that Plaintiffs are not entitled to summary judgment on Jennifer's conspiracy claims. Defendants maintain that because their other causes of action should not be dismissed, their conspiracy claim should remain.

As the Court denied dismissal of Defendants' other causes of action, there is no basis for dismissal of the conspiracy claim. Plaintiffs request that the Court dismiss the claim because it cannot serve as an independent cause of action. However, as all of Defendants' claims remain, the conspiracy cause of action is rightfully attached to other valid, independent causes of action.

IV. CONCLUSION

Accordingly, Defendants' motions for partial summary judgment are granted. Plaintiffs' cross-motion and severed summary judgment motion are denied.