STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: December 14, 2017)

MARION FILIPPI and STEVEN FILIPPI,	**:**	
Plaintiffs,	**:**	
	:	
v.	**:**	**C.A. No. WC/KB-2016-0627**
	:	
BLAKE FILIPPI and PAUL FILIPPI,	**:**	
Individually and as Trustees of the Marion C.	**:**	
Filippi Trust – 2007,	**:**	
Defendants.	**:**	

DECISION

STERN, J. Marion Filippi (Marion) and Steven Filippi (Steven) (collectively, Plaintiffs, Counterclaim Defendants, or Marion and Steven) move for partial summary judgment, requesting judgment as a matter of law on their Amended Complaint on Count I: Breach of Contract with respect to the 2007 Purchase and Sale Agreement (2007 P&S Agreement); Count II: Breach of Contract with respect to the LLC Operating Agreements; and Count IV: Declaratory Judgment. The Plaintiffs also seek partial summary judgment on Blake Filippi (Blake) and Paul Filippi's (Paul) (collectively, Defendants, Counterclaimants, or Blake and Paul) counterclaims, which assert counts for breach of contract and request declaratory relief. The Counterclaimants have filed a cross motion for partial summary judgment, maintaining that they are entitled to judgment as a matter of law on the following counterclaims: (a) Count II – Breach of Fiduciary Duty Against Steven; (b) Count VII – Declaratory Relief Against Marion and Steven; and (c) Count VIII – Breach of Contract – Estate Planning Agreement Against Marion.[1]

[1] The Court will refer to Plaintiffs/Counterclaim Defendants and Defendants/Counterclaimants—Marion, Steven, Blake, and Paul—collectively as "the Filippi Family" throughout the course of this Decision. The Court may also refer to Steven, Blake, and Paul collectively as "Boys."

Blake and Paul object to both of Plaintiffs' summary judgment motions, and Marion and Steven object to Blake and Paul's cross motion for partial summary judgment. Jurisdiction is pursuant to Super. R. Civ. P. 56(c) and G.L. 1956 § 9-30-1.

I

Facts and Travel

In 1973, Paul A. Filippi (Paul Sr.) and Marion married. *Filippi v. Filippi*, 818 A.2d 608, 612 (R.I. 2003). Paul Sr., known as a successful businessman and restauranteur, owned substantial real estate and a number of businesses in the Town of New Shoreham, more commonly known as Block Island. *See id.* Together, Paul Sr. and Marion had three children: Paul, in 1975; Steven, in 1979; and Blake, in 1980. *Id.*

In 1989, Paul Sr. and Marion entered into a Contract to Make and Maintain Wills and Trusts (1989 Wills Contract). *See* Corrected Mem. of Law in Supp. of Defs.' Objs. to Pls.' Mot. for Partial Summ. J. and Counterclaimants' Cross Mot. for Summ. J. (hereinafter, Defs.' Mot.), Ex. 1. The 1989 Wills Contract (1) required that Paul Sr. and Marion execute wills and trusts; (2) barred Paul Sr. and Marion from "execut[ing] any other trust or estate planning document which [would] have the effect of defeating the intent of their estate plans"; and (3) prohibited Paul Sr. and Marion from "alter[ing] or revok[ing] any of the provisions of their respective wills or trust without first procuring the written and acknowledged consent of the other." *Id.* Additionally, Paul Sr. executed a trust agreement in 1989. Defs.' Mot., Ex. 2. The 1989 Wills Contract was amended in 1992 to reflect the 1989 trust agreement. *See id.*

Paul Sr. passed away in 1992. At that time, he owned 100% of the stock in Shoreham, Inc., d/b/a Ballard's Inn and Restaurant (Shoreham), the entity which owns all of the physical assets of Ballard's Inn and Restaurant and operates the business. *Filippi*, 818 A.2d at 612. Paul

Sr.'s stock in Shoreham became part of his estate upon his passing, in accordance with his estate plan. *See* Defs.' Mot., Ex. 5. Paul Sr.'s estate, however, was not closed until early 2006, three years after extensive litigation between the Filippi Family and Paul Sr.'s three older children from a former marriage. *See* Defs.' Mot., Ex. 6; *see also Filippi*, 818 A.2d 608; *Filippi v. Citizens Trust Co.*, 2001 WL 99860 (R.I. Super. Feb. 1, 2001).

When Paul Sr.'s estate was closed, the Shoreham shares, among other things, were deposited into Paul Sr.'s marital trust (Marital Trust). *See* Defs.' Mot., Ex. 6. According to Paul Sr.'s extensive estate plan, the income emanating from the Shoreham shares in the Marital Trust was to be used for Marion and for the support of her minor children, while a residuary trust (Residuary Trust) was to be established to provide for the Boys. *See* Defs.' Mot., Ex. 1 at D1342-1345. As set forth in the 1989 Wills Contract, the assets in the Marital Trust were to be transferred to the Residuary Trust for the benefit of Steven, Blake, and Paul upon Marion's death. *Id.* at D1373-84, 1342-45. However, the Filippi Family and Citizens Bank RI (Citizens Bank)—the corporate trustee of the Marital Trust—agreed to a distribution of the assets in the Marital Trust to Marion individually, on the condition that each member of the Filippi Family execute Citizens Bank's requested releases. *See* Defs.' Mot., Ex. 9.[2]

One year earlier, on July 9, 2004, Marion transferred her real property located at 42 Water Street, New Shoreham, Rhode Island—the land and building utilized by Ballard's Inn—to a newly-formed LLC, Ballard's Inn Realty, LLC (R.I.). *See* Mem. in Supp. of Pls.' Mot. for Partial Summ. J. on Defs.' Countercls. (hereinafter, Pls.' Second Mot.). Approximately one year after the aforementioned agreement with Citizens Bank, in August 2006, Marion transferred

[2] It was a topic of dispute at oral arguments on the instant motion whether Marion approached Citizens Bank proposing such distribution or whether Citizens Bank approached Marion to initiate the distribution of the Marital Trust. However, although it is disputed, who initiated the distribution is not a material fact.

additional real property she owned, located at 74 Water Street, New Shoreham, Rhode Island—the land and the building constituting the Overlook Hotel—to a newly-formed entity, Overlook Realty, LLC (R.I.). *Id.* Both properties originated from Paul Sr.'s estate and were transferred to Marion individually at the time of his death. *See Filippi v. Citizens Trust Co.*, 2001 WL 99860, at *6, *8 (R.I. Super. Feb. 1, 2001) ("Marion wanted to have control of the family real estate and not to be subject to a trust, as it had been under prior plans. Paul [Sr.] wanted to be assured that it would remain for the children of his marriage with Marion. . . . [T]he mutual contracts were devised to satisfy Paul [Sr.] and not Marion. It was Paul [Sr.] who wanted to be assured that, if he left the family real estate to Marion, it would remain in the family, meaning, of course, the younger children. . . . [T]he contract resolved [Paul Sr.'s] concern about leaving the real estate to Marion outright."). At the time that Marion transferred the properties to the two LLCs, Marion was the sole member of Ballard's Inn Realty, LLC (R.I.) and Overlook Realty, LLC (R.I.). *Id.*

Afterwards, on September 28, 2006, the Filippi Family entered into an agreement entitled "Filippi Family Estate Planning Agreement" (Family EPA). Defs.' Mot., Ex. 10. The Family EPA provided:

> "**WHEREAS**, Paul [Sr.] was the late husband of Marion and the late father of Paul, Steven and Blake; and
>
> "**WHEREAS**, Citizens Bank . . ., Executor under the will of Paul Filippi and Trustee of the [Marital Trust] . . ., has proposed closing the probate estate of Paul [Sr.] and terminating the Marital Trust by transferring all assets remaining in its possession as Executor and Trustee, including stock in the Rhode Island corporation, Shoreham, Inc., to Marion, but [Citizens] Bank is unwilling to do so unless Paul, Steven and Blake release the Bank for such action; and
>
> "**WHEREAS**, Paul, Steven and Blake are unwilling to execute releases unless Marion agrees to take certain actions in connection with her own estate plan; and

> "**WHEREAS**, Marion is willing to take such actions,
>
> "**NOW, THEREFORE**, Marion, Paul, Steven and Blake, agree as follows:
>
> "(1) Paul, Steven and Blake will forthwith execute the releases in favor of Citizens Bank that have previously been provided to them.
>
> "(2) Marion agrees that she will complete revisions to her current estate plan within nine (9) months of the date of this Agreement (including wills and trusts and any related instruments).
>
> "(3) Marion agrees that in the event she does not complete the contemplated revisions to her current estate plan within nine (9) months of the date of this Agreement or said revisions are not acceptable to any two (2) of Paul, Steven and Blake, she will transfer seventy-five percent (75%) of her interest in Shoreham, Inc., in equal shares to Paul, Steven and Blake." Defs.' Mot., Ex. 10.

The Family EPA bore the signature of each member of the Filippi Family. *Id.* In addition, the Filippi Family purportedly entered into what Blake and Paul characterize as "the Shoreham Agreement," which, in part,[3] provided:

> "This agreement is hereby entered into by Marion . . ., Paul . . ., Steven . . . and Blake . . . . Wherefore all the undersigned parties agree to the following:
>
> "1) Each party has an economic interest in Shoreham . . .
>
> "2) Each party is entitled to 25% of the profits of Shoreham . . ., to be determined by a majority of the aforementioned parties and paid on or by October 1 (Combined profits from Ballard's and the Overlook Hotel).
>
> "3) Shoreham . . . will pay Marion . . . $200,000 in rental for the Ballard's Inn and Overlook properties

[3] This Court was provided the "entire" agreement during oral arguments on the instant motions, which was marked as Pls.' Ex. 1. Blake and Paul contend that the exhibit provided by Plaintiffs to this Court was not the Shoreham Agreement; instead, they maintain only Defs.' Mot., Ex. 11 encompassed the agreement while the other pages attached in the version submitted by Plaintiffs were never a part of the agreement. Defs.' Mot.

> "4) The sole managerial responsibilities will rest with Steven . . . who will receive compensation from Shoreham . . . under the following terms
>
> "Base Salary: $100,000.00
>
> "Incentive: If revenues of both Ballard's and the Overlook reach $2.75 Million [Steven] will be paid $150,000.00 total, including base salary[.] If revenues reach $3 Million, [Steven] will be paid $200,000.00 total including base salary[.]
>
> "Steven . . . will be responsible for all aspects of the operations of Ballard's, including but not limited to, bank accounts, receivables, cash deposits and all personnel decisions. In turn, [Steven] will provide all information on all aspects of the operations including financials, of Ballard's to any of the aforementioned parties to this agreement[.]" Defs.' Mot., Ex. 11.[4]

In accordance with the Family EPA, Steven, Blake, and Paul executed the releases mentioned therein. *See* Defs.' Mot., Ex. 12.[5] Marion also retained Attorney William Kirchick (Attorney Kirchick) to quarterback her estate planning. *See* Defs.' Mot., Ex. 4 (hereinafter, Marion Dep.) at 53:5-12; Pls.' Second Mot., Ex. I. Blake, a third-year law student at the time, participated in Marion's estate planning with Attorney Kirchick at Marion's request. *See* Marion Dep. at 52:16-62:1; Pls.' Second Mot., Ex. J (email from Marion to Attorney Kirchick) ("Just to re-iterate [sic], please copy to Blake what you send to me. At this point it isn't necessary to send to Paul and Steven as we are in the working document stage and Blake is the one with the legal background.").

Subsequently, in December 2007, Marion executed an irrevocable trust agreement, entitled "The Marion C. Filippi Irrevocable Trust – 2007" (2007 Trust), as well as other estate planning documents prepared by Attorney Kirchick. *See* Defs.' Mot., Ex. 18; Defs.' Ans. ¶ 6.

[4] Due to the fact that the signatures were cut off, it is not possible for this Court at this juncture to determine which parties, if any, executed the Shoreham Agreement. *See* Defs.' Mot., Ex. 11.

[5] Although the copy of Defs.' Mot., Ex. 12 provided to the Court does not bear the signature of the Boys, it is uncontradicted that Marion and the Boys executed the releases contemplated by the Family EPA.

Attorney Kirchick crafted the 2007 Trust to be an intentionally defective grantor trust.[6] *See* Defs.' Mot., Ex. 15 at 2. In pertinent part, Article Third of the 2007 Trust provides that all property that is held in the 2007 Trust is to be divided into three separate sub-trusts: (1) the Share Trust f/b/o Paul C. Filippi (Paul Share Trust); (2) the Share Trust f/b/o Steven C. Filippi (Steven Share Trust); and (3) the Share Trust f/b/o Blake A. Filippi (Blake Share Trust) (collectively, Share Trusts). *See* Defs.' Mot., Ex. 18. Marion was listed as the grantor of the 2007 Trust, and Steven, Blake, and Paul named as trustees of the 2007 Trust and as co-trustees of each of the Share Trusts. *See* Defs.' Mot., Exs. 22-23. Article Seventh of the 2007 Trust permits the Share Trusts to make discretionary decisions upon approval of the majority of trustees—*i.e.*, two of the three Boys. Defs.' Mot., Ex. 18. Among other things, however, Article Tenth of the 2007 Trust limits the authority of trustees to make distributions of "principal" to an "interested person." *Id.*

[6] As explained by this Court in its previous decision in this case, intentionally defective grantor trusts "work by designing a transfer of assets by the grantor at a certain value to an irrevocable trust for the benefit of future beneficiaries—typically children or grandchildren—in exchange for compensation of some sort from the funded trust assets, such as a promissory note." Nancy Shurtz, *Effective Guide to Intentionally Defective Grantor Trusts*, 43 Estate Planning 40, 41 (2016), available at 2016 WL 4986853. As more specifically explained,

> "Assets held in an intentionally defective grantor trust ('IDGT') are excluded from the grantor's estate for estate tax purposes, but the income generated by the assets is taxable to the grantor. Because the grantor is legally responsible for the payment of the tax, that payment is not considered a gift. *See* Rev. Rul. 2004-64, 2004-2 CB 7. There are a number of interests in, or powers over, a trust that a grantor may have that will cause it to be classified as an IDGT. One common provision used by planners is for the IDGT to give the grantor or a nonadverse person the power, acting in a nonfiduciary capacity, to reacquire the trust principal by substituting other property of equivalent value. *See* Section 675(4). The IRS recently confirmed that the possession of such a power by a grantor will not cause the inclusion of trust assets in the grantor's estate under Section 2036 or 2038. Rev. Rul. 2008-22, 2008-16 IRB 796." Francis W. Dubreuil & Jon Ruff, *Leveraging Liquid Wealth to Transfer Illiquid Assets*, 36 Est. Plan. 24, 24 n.1, 2009 WL 281663 at *1 (2009).

Attorney Kirchick's estate planning procedure also required the creation of Overlook Realty, LLC (Overlook LLC) and Ballard's Inn Realty, LLC (Ballard's LLC) (collectively, the LLCs) under the state laws of Delaware. *See* Defs.' Mot., Ex. 15 at 2; Defs.' Mot., Exs. 19-20. The LLCs were created with a three percent voting membership interest (Voting Interest) and a ninety-seven percent non-voting membership interest (Non-Voting Interest). *See* Defs.' Mot., Exs. 19-20. On December 21, 2007, the Filippi Family executed the Operating Agreement for Overlook LLC (Overlook Operating Agreement) and the Operating Agreement for Ballard's LLC (Ballard's Operating Agreement) (collectively, Operating Agreements). *See id.* The Operating Agreements, among other things, appointed Marion, Steven, Blake, and Paul as managers of the LLCs. Defs.' Mot., Ex. 19 at 19-20; Defs.' Mot., Ex. 20 at 19-20.

In further accordance with Attorney Kirchick's estate planning advice, Marion gifted each Share Trust a one percent Voting Interest and a two-thirds percent Non-Voting Interest in each of the LLCs. *See* Defs.' Mot., Exs. 22-23. In addition, Marion sold each Share Trust a fifteen percent Non-Voting Interest in the LLCs in exchange for the Share Trusts each paying Marion $587,700 (2007 Sale). *See* Defs.' Mot., Exs. 24-27. Therefore, each Share Trust held: (1) a one percent Voting Interest in Overlook LLC and Ballard's LLC; and (2) a fifteen and two-thirds percent Non-Voting Interest in Overlook LLC and Ballard's LLC; Marion owned the remaining fifty percent of the Non-Voting Interest in the LLCs for tax-related reasons.[7] *See* Defs.' Mot., Exs. 17, 29-30; *see also supra* n.6. It appears from the record that around the time the 2007 Trust was created, Marion intended to sell or otherwise transfer the remaining fifty

[7] Prior to the Share Trusts being put in place, Overlook LLC and Ballard's LLC were converted into LLCs under the laws of the State of Delaware. *See* Defs.' Motion, Ex. 15 at 2. Such conversions were performed to afford greater opportunity to discount the value of the Non-Voting Interests for tax purposes. *See* Defs.' Motion, Ex. 16 at 2. Essentially, by Marion establishing the 2007 Trust, Marion was able to avoid significant capital gains taxes while also staying within her lifetime gift tax exemption. *See* Defs.' Motion, Ex. 15 at 2.

percent Non-Voting Interest that she held to the Share Trusts after certain valuations were completed and the three-year IRS lookback period had expired. *See* Defs.' Mot., Exs. 29-30.

In connection with the 2007 Sale, the Boys, acting in their capacity as co-trustees of each Share Trust, executed promissory notes in the amount of the purchase price to Marion (2007 Notes). *See* Defs.' Mot., Ex. 27. In addition, Marion and the Boys, acting as trustees of the Share Trusts, also executed the 2007 P&S Agreement to memorialize the 2007 Sale. *See* Defs.' Motion, Ex. 24. Among other things, the 2007 P&S Agreement provided as follows:

> "5. *Preconditions to Future Sale or Distribution by the Purchasers.*
>
> "(a) *Notice.* Each of the Purchasers [the Share Trusts] hereby agrees that, so long as the Seller [Marion] is living, no Purchaser shall sell, pledge, distribute to its beneficiaries, or otherwise transfer or encumber all or any portion of the Interests received by such Purchaser without first providing at least thirty (30) days advance notice to the Seller."
>
> "(b) *Payment of Note*. Each Purchaser further agrees that such Purchaser shall not sell, pledge, distribute or otherwise transfer all or any portion of the Interests received by such Purchaser, or any other interest of such Purchaser in [Overlook LLC] or [Ballard's LLC], until such Purchaser has paid such Purchaser's Note in full." *Id.*

"Interests," as defined by the 2007 P&S Agreement, included "a 15% Non-Voting Membership Interest in [Ballard's LLC], and a 15% Non-Voting Membership Interest in [Overlook LLC]." *Id.*

Thereafter, in 2008, Steven, Blake, and Paul, in their capacity as trustees of the Share Trusts, again issued promissory notes to Marion (2008 Notes) in connection with the 2007 Sale. *See* Pls.' Mem. in Supp. of Mot. for Partial Summ. J. (hereinafter, Pls.' First Mot.), Ex. I. Steven and Marion characterize the 2008 Notes as "replacement notes" meant only to operate as a renegotiation of the 2007 Notes in order to reflect more favorable interest rates. *See* Pls.' First

Mot. at 5-6. The same holds true for promissory notes executed in 2009 by Steven, Blake, and Paul on behalf of the Share Trusts (2009 Notes); Steven and Marion maintain that the 2009 Notes were renegotiations of the original bargain underlying the 2007 Sale to reflect more favorable interest rates. *See id.*; *infra* n.8. Blake and Paul contend that the 2008 Notes were meant to operate as payment in full of the 2007 Notes; a new bargain resulted in the 2008 Notes. *See* Defs.' Mot. at 56. Blake and Paul maintain the same position with regard to the 2009 Notes. *See id.* at 56-57.[8]

During the years 2008 through 2016, the 2007 Trust operated as follows: payments from the LLCs were distributed evenly to Marion and the 2007 Trust, and the 2007 Trust would issue checks to Marion from the 2007 Trust representing payments of principal and interest. *See* Defs.' Mot., Exs. 33-35. Steven and Marion contend that these distributions of principal were to pay off the balance on the promissory notes owed to Marion; they claim that the LLCs obtained

[8] The 2007 Notes were dated December 31, 2007 and issued to Marion from the trustees of the Share Trusts for the principal amount of $587,700. *See* Pls.' First Mot., Ex. I. The interest rate was set by the 2007 Notes at 4.13% per annum. *Id.* The outstanding balance of the principal was set to be paid by or on December 31, 2016, along with any accrued (but unpaid) interest. *See id.* At the bottom of the instrument, Marion's signature appears immediately below the following text stamped onto the documents: "The undersigned hereby acknowledges receipt IN FULL of the principal amount of $587,700 and interest in the amount of $10,080.18 this 31st day of May, 2008." *Id.* Meanwhile, the 2008 Notes were dated May 31, 2008—the same date Marion acknowledged payment of the 2007 Notes—and issued from Marion to the trustees of the Share Trusts for the principal amount of $597,780.18. *See* Pls.' First Mot., Ex. J. Notably, the principal amount on the 2008 Notes, $597,780.18, is equal to "the principal amount of $587,700 and interest in the amount of $10,080.18" that Marion acknowledged on the face of the 2007 Notes. *See* Pls.' First Mot., Exs. I, J. The 2008 Notes are identical to the 2007 Notes, except the 2008 Notes set an annual interest rate at 2.74% and set the date for payment to May 30, 2016. *See* Pls.' Mot., Ex. J. In addition, in the same spot as on the 2007 Notes, Marion's signature appears on the 2008 Notes under a stamped phrase which states: "The undersigned hereby acknowledges . . . $537,910.23 and interest of $1,924.22 this 1st day of February, 2009." *See id.* The sum of these amounts—$537,910.23 and $1,924.22—equals the principal amount of the 2009 Notes, which were executed on February 1, 2009. *See* Pls.' Mot., Ex. N. With a principal amount set at $539,834.45, the 2009 Notes extended the date payable to September 31, 2058 and set the annual percentage rate at 2.96%. *See id.*

money from Shoreham, deposited the income into the 2007 Trust, and the cash flowed to Marion. *See* Marion Dep. at 110, 124.

Blake and Paul contend that from 2007 to 2013, the three Boys received payments in the amount of twenty-five percent of Shoreham's profits, purportedly in accordance with the Shoreham Agreement. *See* Marion Dep. at 70:16-71:3. Meanwhile, Steven and Marion contend that the Boys did not receive twenty-five percent of Shoreham's profits; Yolanda Samson, who has been employed by Shoreham since 2002 as its accountant, stated in an affidavit that "[i]n 2008, [the Boys] each received 7.86%; in 2009, 6.48%; in 2010, 17.53%; in 2011, 9.71%; in 2012, 7.70%; and in 2013, 8.33%." Pls.' Obj. to Defs.' Cross-Mot. for Summ. J., Ex. EE at ¶¶ 2-3.

On October 30, 2014, Marion, acting as CEO of Shoreham, and Steven, acting as manager of Ballard's Inn, executed an agreement entitled "Operating Agreement Outline 10/17/2014," which provided in part:

> "***Compensation/Profit Sharing***
>
> "1. [Marion] is personally guaranteed by [Steven] $300,000 per year and a 2% cost of living increase in 2016 and each year after. [Steven's] compensation is a [$599,000] base salary with a 2% cost of living increase in 2016 . . . .
>
> "2. Marion will receive 50%, Paul 16%, Blake 16% and Steve 16% of profits. As per the ownership of [Ballard's LLC].
>
> "3. Paul and Blake will receive no less than $75,000.
>
> "4. Both Marion and Steven must approve in writing the distributions to Paul and Blake." Defs.' Mot., Ex. 37.

Around the same time, Marion and Steven applied for and received $2,500,000 in financing from Bank Rhode Island (Bank RI), which listed Ballard's LLC as the borrower (2014 Loan). Defs.' Mot., Ex. 38. In his capacity as "President" of Ballard's LLC, Steven signed a commitment

letter with Bank RI on October 7, 2014 in connection with the 2014 Loan (2014 Commitment Letter) on behalf of Ballard's LLC. *See id.* The 2014 Commitment Letter listed Shoreham and Steven as guarantors of the $2.5 million loan. *See id.* Bank RI and Ballard's LLC thereafter entered into a loan agreement for the 2014 Loan (2014 Loan Agreement); curiously, this time, Marion executed the 2014 Loan Agreement as "President" of Ballard's LLC. *See* Defs.' Mot., Ex. 39. The 2014 Loan Agreement resulted in Ballard's LLC pledging Ballard's Inn as collateral on the 2014 Loan, granting Bank RI a first position mortgage on Ballard's Inn. *See id.*

In connection with the 2014 Loan, Marion also signed a document entitled "Certificate of the Sole Member of Ballard's Inn Realty, LLC" on October 29, 2014 (Ballard's Inn Certificate). Defs.' Mot., Ex. 42. The Ballard's Inn Certificate provided that (1) Marion was the sole member of Ballard's LLC; (2) the attached "Amended and Restated Operating Agreement" of Ballard's LLC was in full force and effect; (3) the resolutions attached to the Ballard's Inn Certificate were put into place by Marion as the sole member of Ballard's LLC; and (4) such resolutions were at the time in full force and effect. *See* Defs.' Mot., Ex. 42. Attached as Exhibit C to the Ballard's Inn Certificate was a document entitled "Ballard's . . . LLC Action by Consent of the Member" (Member Consent). *See id.* The Member Consent, which was signed by Marion as the "Sole Member" of Ballard's LLC, stated that Ballard's LLC was "authorized to borrow a mortgage loan from [Bank RI] . . . in the original principal amount of *Two Million Five Hundred Thousand and 00/100 ($2,500,000.00) Dollars* . . . and secure[d] the same with a security interest in all of the assets of [Ballard's LLC]." *Id.*

Throughout the period of time during which Marion and Steven were signing documents with respect to the 2014 Loan, Attorney K. Erik Wallin (Attorney Wallin) was retained to represent Shoreham, Steven, and Ballard's Inc. Defs.' Motion, Ex. 43 at 38:24-39:8. During

Attorney Wallin's deposition for the case at bar, Attorney Wallin testified that at the time of the 2014 Loan, "it was represented . . . that Marion was the sole owner of all the shares [of Ballard's LLC]," and that he did not have access to the Ballard's LLC Operating Agreement. *See id.* at 40:18-41:11, 47:5-19. In connection with the 2014 Loan, Attorney Wallin prepared an Amended Ballard's LLC Operating Agreement, which Marion executed as the "sole member" of Ballard's LLC. *See* Defs.' Mot., Ex. 45. The Amended Ballard's LLC Operating Agreement was submitted to Bank RI as part of the application process for the 2014 Loan. *See id.* Notably, the original Ballard's LLC Operating Agreement required that amendments to such operating agreement could only be done with consent of Marion and the Share Trusts. *See* Defs.' Mot., Ex. 19 at § 10.07; *see also* Defs.' Mot., Ex. 18, at Art. Seventh. The 2014 Loan eventually closed on November 5, 2014. Defs.' Mot., Ex. 39.

Around the same time, the real estate and business operations of Hotel Manisses (Manisses), located at 251 Spring Street, New Shoreham, Rhode Island, was put up for sale by its owner, Block Island Resorts, Inc. *See* Defs.' Mot., Ex. 35 at 62:21-63:19. Steven, Blake, and Paul initially became interested in the potential purchase of Manisses as a joint venture among the three Boys. *See id.* at 64:21-65:2. On September 16, 2014, Steven hired Advantage Home Inspections to perform an inspection of Manisses. Defs.' Mot., Ex. 48. However, Steven stated that the sale of Manisses (with Blake and Paul involved) ended up falling through because the seller backed out. Defs.' Mot., Ex. 35 at 65:9-14. Nevertheless, in the Spring of 2015, Block Island Resorts, Inc. entered into a purchase and sale agreement with Presidio Capital Hotels, Inc. (Presidio) for the purchase of Manisses (Manisses P&S Agreement). Defs.' Mot., Ex. 49. At that time, Presidio was a corporation owned solely by Steven. Defs.' Mot., Ex. 35 at 74:22-75:14. Steven testified at his deposition that his intent was to own the entirety of Manisses

independent of Paul and Blake, and that he did not intend to tell Blake or Paul about the acquisition until after the closing date. *Id.* at 80:13-17, 86:11-22. Steven stated, in October 2015:

> "So the way I looked at it, . . . Ballard's is worth 20…let's say Ballard's is worth $25 million. I thought that I owned 16% of it, Mom owned 50% of it, so we…whatever that number comes to, I was going to use my money that I have tied up in Ballard's to do the Manisses. I have the personal guarantee on the loan, not anyone else, and I put as much…as little as I can on Ballard's at $1.5 and $4.3 on the Manisses, so you guys [Blake and Paul] wouldn't get upset. And I was still going to give you guys profit share. That was the whole intent. And I never wanted to tell you because I didn't want you guys to jump in, and I didn't want you guys to say, 'I want ownership in the real estate. I want to do this.' I WANTED TO BE independent. That's my fault. It's not Mom's fault. . . . And I apologize to you, and if I could go back and do it differently, I would. That's the truth." Defs.' Mot., Ex. 54 at 51:23-52:14.

Steven eventually signed the Manisses P&S Agreement in May 2015 on behalf of Presidio. Defs.' Mot., Ex. 49; Ex. 35 at 79:8-16.

In connection with the purchase of Manisses, Bank RI issued a commitment letter for a $4,340,000 loan secured by the real estate owned by Ballard's LLC. Defs.' Mot., Ex. 50. In addition, Bank RI issued a commitment letter for a $1,510,000 construction loan, which was secured by a second position mortgage on the real estate owned by Ballard's LLC. Defs.' Mot., Ex. 51. Both commitment letters from Bank RI listed Presidio as the borrower; on July 30, 2015, Steven signed the commitment letters on behalf of Presidio, and Marion signed on behalf of Ballard's LLC. Defs.' Mot., Exs. 50, 51.

Unsure of whether the Manisses purchase by Steven (through Presidio) was gossip, Blake and Paul sat down for a meeting with Marion and Steven regarding a potential purchase of Manisses on October 15, 2015 (October 15 Meeting). *See* Defs.' Mot., Ex. 35 at 86:11-22; Ex.

53. Blake secretly recorded the October 15 Meeting. *See* Defs.' Mot., Ex. 53. At the October 15 Meeting, Marion and Steven explained that they would like Manisses to be owned solely by Steven, and that a $6 million loan for the purchase of Manisses could be secured by Ballard's Inn. *Id.* at 19:24-21:2, 21:11-22:4, 41:16-42:7. Steven also contended that at the time of the October 15 Meeting, no purchase and sale agreement for the Manisses had been signed, and both Marion and Steven denied signing any documents related to a purchase of Manisses. *Id.* at 51:24-52:12, 63:23-64:8. Although the Filippi Family agreed to meet the next day, on October 16, 2015, no meeting was held; however, Steven confirmed the closing date for the purchase of Manisses on behalf of Presidio for the upcoming Monday. *See* Defs.' Mot., Ex. 35 at 174:8-13.

On October 17, 2015, during a phone conversation between Blake and Attorney Wallin, Attorney Wallin confirmed that the closing date for the Manisses purchase was scheduled for October 19, 2015. Defs.' Mot., Ex. 43 at 64:15-20. The next day, on October 18, 2015, the Filippi Family met once again (October 18 Meeting). *See* Defs.' Motion, Ex. 35 at 105:11-22. At the October 18 Meeting, Steven informed Blake and Paul that the closing on Manisses was to go forward as scheduled and instructed his brothers to refrain from calling Attorney Wallin; Blake and Paul advised Steven that their consents—as members of Ballard's LLC by way of the Share Trusts—were required for the purchase. *See id.*; Defs.' Mot., Ex. 54 at 46:2-19, 101:10-21. Blake and Paul at that time also requested distribution checks from Shoreham, in accordance with the Shoreham Agreement. Defs.' Mot., Ex. 35 at 126:18-128:23. After the October 18 Meeting, Marion and Steven provided Attorney Wallin with a closing binder, which contained the original Ballard's LLC Operating Agreement. *See* Defs.' Mot., Ex. 35 at 107:5-23; Marion Dep. at 179:22-24. After reviewing the original Ballard's LLC Operating Agreement, Attorney Wallin agreed that Paul and Blake's consents were required in order to go through with the

Manisses acquisition. Defs.' Mot., Ex. 43 at 69:9-19; Defs.' Mot., Ex. 55. Attorney Wallin advised Steven and Marion of the same and cancelled the closing of Manisses. *See* Defs.' Mot., Ex. 35 at 110:8-111:6; Defs.' Mot., Ex. 55.

The Filippi Family met again on October 19, 2015 at Attorney Wallin's office (October 19 Meeting); this meeting was also secretly recorded by Blake. *See* Defs.' Mot., Ex. 35 at 110:8-111:6. At the October 19 Meeting, Paul and Blake again asked for distribution checks from Shoreham, to which Marion and Steven responded that such distribution checks would be provided if Blake and Paul (1) authorized the loan for the purchase of Manisses and (2) ratified the 2014 Loan. *See id.* at 128:8-16 ("Blake came in and Blake demanded - - I'm glad you brought this up. Blake demanded the distribution checks first, and I said I want - - I think he yelled, I'm not sure. I want my checks from the summer, and da, da, da, da, da, da. And I said 'Well, Blake, you've got to help us out on the 2014 [L]oan,' and he said, 'No, I want it now.' So I gave them the checks. That's exactly what happened."). After meeting for approximately one hour, Paul and Blake presented Marion and Steven—in Attorney Wallin's presence—with revised versions of the documents connected to the purchase of the Manisses (Revised Manisses Documents). The Revised Manisses Documents included papers which approved and consented to: (1) the sale of 1% of the Voting Interests in the LLCs from the Paul Share Trust to Paul individually; (2) the sale of 1% of the Voting Interests in the LLCs from the Blake Share Trust to Blake individually; and (3) removal of Marion and Steven as managers of the LLCs (2015 Sale). *See* Defs.' Mot., Ex. 54 at 79:8-82:4; Exs. 57-66.[9] The purchase price of the 2015 Sale was

[9] Also included among the 2015 Sale documents were documents which approved and consented to the sale of one percent of the Voting Interests in the LLCs from Steven Share Trust to Steven individually. *See* Defs.' Mot., Ex. 54 at 79:8-82:4.

calculated at $39,127.16 to be paid by each Share Trust, and was based on a valuation performed in 2007. *See* Defs.' Mot., Exs. 32, 57, 62.[10]

In exchange for Marion and Steven executing the Revised Manisses Documents, Blake and Paul ratified the 2014 Loan. *See* Defs.' Mot., Ex. 70. The consent documents gave Marion the authority to sign as President of Ballard's LLC. *Id.* In addition, Blake and Paul consented to Marion's consummation of a loan for the purchase of Manisses. *See* Defs.' Mot., Ex. 71. Thereafter, on October 22, 2015, 251 Spring Street, LLC—a newly formed entity owned evenly by Steven, Blake, and Paul—purchased the real estate upon which Manisses operates. *See* Defs.' Mot., Ex. 75. Ballard's LLC and 251 Spring Street, LLC, entered into a $4,340,000 mortgage loan and a $1,510,000 construction loan with Bank RI for the purchase and rehabilitation of Manisses. *See* Defs.' Mot., Exs. 72, 73.

Since the time of the Manisses acquisition, Marion and Steven have filed a Complaint with this Court, which, among other things, brought claims related to the 2015 Sale. Blake and Paul, in response, asserted counterclaims for, among other things, breach of fiduciary duty against Steven and Marion and a breach of contract claim against Marion. The within motions for partial summary judgment were argued on August 3, 2017. At the conclusion of oral arguments on the instant motions, this Court reserved its decision and granted the parties leave to file supplemental memoranda and affidavits based on issues brought up at oral arguments.

II

Standard of Review

A court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[10] Attorney Wallin was present for the entirety of the October 19 Meeting in his capacity as Marion and Steven's attorney. *See* Defs.' Mot., Ex. 54 at 40:1-13.

genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Super. R. Civ. P. 56(c). "When 'ruling on a motion for summary judgment[,] the [hearing] justice must consider affidavits and pleadings in the light most favorable to the opposing party, and only when it appears that no genuine issue of material fact is asserted can summary judgment be ordered.'" *Multi-State Restoration, Inc. v. DWS Props., LLC*, 61 A.3d 414, 418 (R.I. 2013) (quoting *O'Connor v. McKanna*, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976)). The nonmoving party "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996). Accordingly, summary judgment is appropriate if the nonmoving party "'fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . .'" *Beauregard v. Gouin*, 66 A.3d 489, 493-94 (R.I. 2013) (quoting *Lavoie v. Ne. Knitting, Inc.*, 918 A.2d 225, 228 (R.I. 2007)). The mere existence of a factual dispute alone will not preclude summary judgment; rather, "'the requirement is that there be no *genuine* issue of *material* fact.'" *Bucci v. Hurd Buick Pontiac GMC Truck, LLC*, 85 A.3d 1160, 1169 (R.I. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "Cross motions for summary judgment do not affect the basic application of these rules; they simply require a court to determine whether either party 'deserves judgment as a matter of law on facts that are not disputed.'" *Huguenin v. Ponte*, 29 F. Supp. 2d 57, 61 (D.R.I. 1998) (quoting *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)).

III

Analysis

A

Marion and Steven's Motion for Partial Summary Judgment on Amended Complaint

Marion and Steven first move for summary judgment on Counts I, II, and IV of their Amended Complaint. Count I of the Amended Complaint alleges that Blake and Paul breached the 2007 P&S Agreement "by attempting to transfer LLC voting interests out of the 2007 Trust before the promissory notes payable to Marion were paid in full and without thirty days [sic] notice." Am. Compl. ¶ 73. Count II alleges that Blake and Paul breached the Operating Agreements of the LLCs by transferring interests from the Share Trusts to themselves individually and removing managers without giving notice to Steven—*i.e.*, by entering into the 2015 Sale and the related documents. Count IV of the Amended Complaint requests a declaration that Blake and Paul's transfer of LLC Voting Interests from the Share Trusts to themselves as individuals—*i.e.*, the 2015 Sale—is void because of the share transfer restriction contained in the 2007 P&S Agreement; lack of proper notice and consent; and/or because under the 2007 Trust, Blake and Paul were "interested persons" lacking authority to make such transfers.

1

The 2007 Trust

The common element across Counts I, II, and IV of Marion and Steven's Amended Complaint is the 2007 Trust. Under the 2007 Trust, the Voting Interests in the LLCs—the subject of the 2015 Sale—were originally held by the Share Trust. Steven, Blake, and Paul are co-trustees of the Share Trusts while Marion is the grantor of the 2007 Trust. *See* Defs.' Mot.,

Ex. 18. Thus, the authority granted under the 2007 Trust is relevant to whether there was a breach of the 2007 P&S Agreement and/or the Operating Agreements.

The 2007 Trust includes several provisions cited by the parties. With respect to Blake and Paul's authority to transfer Voting Interests in the LLCs from the Share Trusts to themselves individually, Articles Eighth, Tenth, and Twentieth are of significance. Under Article Eighth, entitled "Special Business Powers," the 2007 Trust provides:

> "A. My Trustees shall have full power to and may, in their discretion, without order or license of any court, retain as trust property and continue to operate [Ballard's LLC], [Overlook LLC], any successor to either said LLC or any other business in which any Transferor owns an interest, whether such business is a corporation, partnership, limited liability company, limited liability partnership or sole proprietorship (each of said businesses being hereinafter referred to as a 'Business'), if any such Business should now or hereafter become trust property, for such periods of time as my Trustees shall deem advisable. In particular, and in addition to the powers enumerated above in ARTICLE SEVENTH, which powers shall be applicable to any Business, *my Trustees shall, with respect to every Business, have the power to*:
> . . . .
>
> "(14) Take *any action necessary* to merge or consolidate any Business with any other business and to *sell* or liquidate all or *any part of a Business* or its assets *or any interest in any Business* or any stock or securities representing any interest in any Business at such time and price and upon such terms and conditions *as my Trustees shall in their sole and absolute discretion deem advisable, my Trustees being specifically authorized and empowered to make such sale* to any partner, officer or employee of the Business, to any beneficiary hereunder, to any director, officer or employee of any Trustee hereunder or *to any Trustee hereunder*[.]" Defs.' Mot., Ex. 18 (emphasis added).[11]

[11] The term "Business" was defined as "[Ballard's LLC], [Overlook LLC], and any successor to either said LLC or any other business in which any Transferor owns an interest, whether such business is a corporation, partnership, limited liability company, limited liability partnership or sole proprietorship . . . ." Defs.' Mot., Ex. 18, Art. Eighth, § A.

Blake and Paul contend that Article Eighth of the 2007 Trust gave them the "absolute discretion" to transfer the LLC Voting Interests from the Share Trusts to themselves individually. Marion and Steven, in contrast, argue that the sale of the LLCs' Voting Interests from the Share Trusts to Blake and Paul as individuals violated Article Tenth. Article Tenth of the 2007 Trust provides that "an *interested person* shall not have any power, authority, or . . . discretionary decision concerning: . . . (2) *the payment of principal* of said trust[.]" Defs. Mot., Ex. 18 (emphasis added). An "interested person" is defined by the 2007 Trust as "with respect to any trust hereunder, any Transferor and any other person who is at the time eligible to receive net income and/or principal from such trust or is legally obligated to support a person so eligible[.]" *Id.* at Art. Twentieth, § A(2). Blake and Paul concede that they are interested persons under this definition. *See* Defs.' Mot. at 49. Accordingly, Marion and Steven characterize the 2015 Sale as a principal payment in violation of Article Tenth.

Steven and Marion's understanding of the 2007 Trust differs from that of Blake and Paul. "'This Court's primary objective when construing language in a will or trust is to ascertain and effectuate the intent of the testator or settlor as long as that intent is not contrary to law.'" *Lazarus v. Sherman*, 10 A.3d 456, 462 (R.I. 2011) (quoting *Steinhof v. Murphy*, 991 A.2d 1028, 1033 (R.I. 2010)) (internal quotation marks omitted). Such a task initially requires an examination of the "trust's 'plain language.'" *Id.* (quoting *Fleet Nat'l Bank v. Hunt*, 944 A.2d 846, 851 (R.I. 2008)). "However, the language of a phrase 'should be interpreted with reference to the whole trust[.]'" *Id.* (quoting *Steinhof*, 991 A.2d at 1033). "'[W]hen [the] intent can be determined from within the four corners of the [trust], resort to extrinsic evidence is unnecessary and improper, and the invocation of rules of construction is uncalled for.'" *Id.* (quoting *Hayden v. Hayden*, 925 A.2d 947, 951 (R.I. 2007)) (internal quotation marks omitted). "Therefore, [the]

rules of construction should be used only when the meaning of a trust is not apparent from the plain and ordinary meaning of its language or, in other words, when it is ambiguous." *Steinhof*, 991 A.2d at 1033-34. If a trust is ambiguous, questions of material fact exist, precluding summary judgment. *See id.* at 1035.

Blake and Paul were granted the explicit authorization by the 2007 Trust to transfer the Voting Interests of the LLCs from the Share Trusts to themselves as individuals; such was the intent of the 2007 Trust. As per Article Eighth, the 2007 Trust clearly grants the "Trustees"—*i.e.*, the Boys—the authority to sell any interest in the LLCs to any trustee, and that such decision is left in the "*sole and absolute discretion*" of the Trustees. Defs.' Mot., Ex. 18 (emphasis added); *see also Indus. Nat'l Bank of R.I. v. R.I. Hosp.*, 99 R.I. 289, 297, 207 A.2d 286, 290 (1965) (quoting 1 Restatement (Second) *Trusts*, § 187) ("'The extent of the discretion conferred upon the trustee depends primarily upon the manifestation of intention of the settlor. The language of the settlor is construed so as to effectuate the purposes of the trust . . . . The settlor may . . . manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes

of the trust, or ordinarily to act arbitrarily without an exercise of his judgment.'"). Paul, Blake, and Steven collectively approved the 2015 Sale from Paul Share Trust to Paul, and from Blake Share Trust to Blake. *See* Defs.' Mot., Exs. 57-59, 62-64. As such, the discretionary decision to enter into the 2015 Sale was authorized by Article Eighth and conducted in accordance with its language because discretionary decisions need majority approval under Article Seventh.

This Court need not consider whether the 2015 Sale amounted to a "payment of principal," an action prohibited under Article Tenth when made to "interested persons." This Court's primary goal is to effectuate the intent of the grantor. *See Lazarus*, 10 A.3d at 462. Article Tenth includes, after the "interested persons" prohibition provision, a sentence which reads: "This provision is *intended* to preclude the possibility of the imposition of estate, inheritance, or other taxes which in its absence might be sought from said persons or from their estates." Defs.' Mot., Ex. 18 (emphasis added). Plaintiffs, however, have not submitted anything other than conclusory statements to indicate that the 2015 Sale would implicate such tax concerns. As such, Plaintiffs have not satisfied their burden on summary judgment to convince this Court as a matter of law that the 2015 Sale would violate Article Tenth. *See Accent Store Design, Inc.*, 674 A.2d at 1225; *Beauregard*, 66 A.3d at 493-94. Thus, it would be contrary to the intention of Article Tenth to apply the prohibition to transactions which do not carry such risks.

Even if this Court was obligated to consider whether the 2015 Sale amounted to a payment of principal, the plain and ordinary language governing the 2007 Trust indicates otherwise. The word "payment" is defined as "the discharge in money of a sum due or the performance of a pecuniary obligation by compliance with the terms of the obligation." 70 C.J.S. *Payment* § 1; *see also* Merriam-Webster, *payment* (last visited Aug. 4, 2017) (defining

payment as "the act of paying" or "something that is paid.").[12] The definition of "pay," in turn, is expansive: "pay," when used as a transitive verb, means "to make due return to for services rendered or property delivered," "to give in return for goods or service," "to make a disposal or transfer of (money)," "to give or forfeit in expiation or retribution," "to make compensation . . . for," "to give, offer, or make freely or as fitting," "to return value or profit to." Merriam-Webster, *pay* (last visited Aug. 4, 2017). When used as an intransitive verb, "pay" is defined as "to discharge a debt or obligation." *Id.* Thus, in the context of the 2007 Trust, which prohibits "payment" of principal, "payment" can clearly and unambiguously refer to either periodic payments of money from a trustee to a beneficiary listed thereunder, or payments of principal on the 2007 Notes (which list the Share Trusts as the issuers of such notes).

"Payment," however, does not contemplate a *quid pro quo* transaction. *See, e.g., Sullivan v. Murphy*, 2001 WL 968094, No. 99-P-1135, at *4 (Mass. App. Ct. 2001) ("[S]elling, bartering, lending and borrowing can be seen to implicate either quid pro quo transactions or an expectation that an item will be returned, while 'transfer' and 'exchange' suggest a more permanent conveyance, neither involving of necessity a quid pro quo nor creating an expectation that the item will be returned."). Throughout the 2007 Trust, the term "payment of principal" is used in reference to monies, not to intangible shares of the LLCs. *See, e.g.*, Defs.' Mot., Ex. 18 at Art. Fourth ("Whenever any property becomes distributable by my Trustees, . . . the exercise of my Trustees' power to make discretionary payments of income and/or principal, to any

[12] This Court declines to recognize Plaintiffs' ascribed definition of the word "payment." Plaintiffs contend that this Court should recognize "the act of giving money for something" or "something that is given to someone in exchange for something else" as the plain and ordinary meaning of "payment." Plaintiffs derive these meanings from a section of Merriam-Webster's online dictionary entitled "*Definition of PAYMENT for English Language Learners*." Merriam-Webster, *payment* (last visited Aug. 4, 2017) (emphasis added). This Court, and the parties to this action, are not "English Language Learners."

grandchild or further descendent of mine who is then less than thirty-five (35) years of age, said property shall be held by my Trustees as a separate trust as follows: . . . My Trustees may, at any time or times, pay any part or all of the net income and/or principal of the trust to said beneficiary, as my Trustees deem desirable for his or her health, maintenance, education and support, any net income not so paid to be added to the principal of the trust at such times as my Trustees shall determine and in any event upon the termination of the trust."); Art. Ninth.

Accordingly, Blake and Paul were authorized and empowered by Article Eighth of the 2007 Trust to sell the Voting Interests in the LLCs from the Paul Share Trust to Paul individually and from the Blake Share Trust to Blake individually. In addition, Steven, Blake, and Paul—as trustees of each Share Trust—consented to such transfers, satisfying their obligations under Article Seventh. As such, the 2015 Sale is not invalidated on the ground that Blake and Paul lacked authorization under the 2007 Trust.[13]

2

Operating Agreements

Since this Court has determined that the 2015 Sale was authorized under the 2007 Trust—and was conducted in accordance with Article Seventh—this Court next considers whether the 2015 Sale breached the LLCs' Operating Agreements. Specifically, Plaintiffs argue that Steven was entitled to notice, and that his approval of the 2015 Sale was necessary.

The subject provision of the Operating Agreements, § 8.01,[14] provides as follows:

> "No Member may assign, transfer, pledge or grant a security interest in all or any part of its interest in the LLC[s] without the

[13] Accordingly, for the same reasons, this Court declines to issue Plaintiffs' requested declaratory relief—that the 2015 Sale is invalid due to a breach of the share transfer restriction and/or lack of notice and/or lack of authorization under the 2007 Trust.

[14] Section 8.01 in the Ballard's LLC Operating Agreement is identical to § 8.01 of the Overlook LLC Operating Agreement. *Compare* Defs.' Mot., Ex. 19 *with* Defs.' Mot., Ex. 20.

> prior written approval of One Hundred Percent (100%) of the Membership Voting Interests, which approval may be withheld or denied for any reason or for no reason.
>
> "No assignee of the whole or any portion of a Member's interest in the LLC shall have the right to become a Member in place of his or her assignor without the prior written approval of One Hundred Percent (100%) of the Membership Voting Interests, which approval may be withheld or denied for any reason or for no reason." Defs.' Mot., Exs. 19, 20.

In addition, the Operating Agreements require that "any one or more of the Managers may be removed, with or without cause, only by vote of One Hundred Percent (100%) of the Membership Voting Interests." Defs.' Mot., Exs. 19, 20, § 3.06. The requirement of prior written approval and the requirement for a vote were waivable upon consent, as provided for in § 2.04 of the Operating Agreements,[15] which states:

> "Any action that is to be voted on by Members may be taken without a meeting, without prior notice and without a vote, if a written consent, setting forth the action so taken, shall be signed by Members having not less than the minimum of votes that would be necessary to authorize or take such action at a meeting." Defs.' Mot., Exs. 19, 20.

In this case, it is clear from the record that the owners of 100% of the Voting Interests—the Boys via the Share Trusts—approved the 2015 Sale and signed documents removing Steven and Marion as managers. Indeed, Steven, Blake, and Paul signed documents—in their capacity as trustees of each of the Share Trusts—approving the 2015 Sale. *See* Defs.' Mot., Exs. 58-59, 63-64. Moreover, because the Share Trusts could make discretionary decisions based on majority approval, Blake and Paul's approval was sufficient, on behalf of the Share Trusts, to satisfy the obligation under § 8.01 of the Operating Agreements. Indeed, Paul and Blake constituted a majority of the trustees of each Share Trust. *See* Defs.' Mot., Exs. 22-23.

[15] Section 2.04 in the Ballard's LLC Operating Agreement is identical to § 2.04 of the Overlook LLC Operating Agreement. *Compare* Defs.' Mot., Ex. 19 *with* Defs.' Mot., Ex. 20.

Moreover, the Boys—who all approved of the transactions that were the subject of the 2015 Sale—constituted the majority of disinterested trustees on the separate transactions: the sale from Paul Share Trust to Paul was approved by both Steven and Blake, and the sale from Blake Share Trust to Blake was approved by both Paul and Steven. In addition, § 2.04 of the Operating Agreements makes clear that advance notice is not required for written consents for action, such as those signed by the Boys. Finally, Blake and Paul, constituting a majority of the trustees of the Share Trusts owning 100% of the Voting Interests in the LLCs, were authorized under the discretionary power granted by the 2007 Trust and empowered by the Operating Agreements to remove managers, and did so in accordance with § 3.06 of the Operating Agreements. *See* Defs.' Mot., Ex. 67. Accordingly, the 2015 Sale and the simultaneous removal of managers did not result in a breach of the Operating Agreements.

3

2007 P&S Agreement

Plaintiffs further contend that the 2015 Sale resulted in a breach of the 2007 P&S Agreement because the 2015 Sale violated the transfer restriction under § 5(b), and the Defendants failed to give the Plaintiffs proper notice of the sale under § 5(a).

In this case, the transfer restriction set forth in the 2007 P&S Agreement contains the following language:

> "5. *Preconditions to Future Sale or Distribution by the Purchasers*.
> . . . .
>
> "(b) *Payment of Note*. Each Purchaser further agrees that such Purchaser *shall not sell, pledge, distribute or otherwise transfer* all or any portion of the *Interests* received by such Purchaser, or *any other interest of such Purchaser in Overlook Realty, LLC or Ballard's Inn, LLC, until such Purchaser has paid such*

> *Purchaser's Note in full.*" Pls.' First Mot., Ex. H (emphasis added).

The terms of the 2007 P&S Agreement defined "Purchaser" as the separate Share Trusts "under ARTICLE THIRD of the Marion C. Filippi Irrevocable Trust – 2007[.]" *See id.* at 1. In addition, the term "Note" referred to in § 5(b) of the 2007 P&S Agreement was also defined by the 2007 P&S Agreement in the following context:

> "2. *Purchase Price; Method of Payment.*
>
> "(a) The total consideration (the 'Purchase Price') to be paid by each Purchaser to the Seller for each Purchaser's Interest shall be $587,700.
>
> "(b) Each Purchaser shall tender the Purchase Price to the Seller at the Closing (as defined in Section 6) by the execution and delivery of a promissory note in favor of the Seller for the entire Purchase Price, which note shall be substantially in the form attached hereto as *Exhibit A* (the 'Note')." *Id.*

At issue is whether a breach of the 2007 P&S Agreement occurred as a result of the 2015 Sale. In interpreting contracts, the Court must first determine whether the contract is ambiguous. *See Botelho v. City of Pawtucket Sch. Dep't*, 130 A.3d 172, 176 (R.I. 2013). If a contract is determined to be unambiguous, the interpretation of the contract is a question of law. *Id.* at 177-78. A contractual term is ambiguous if it is "'reasonably and clearly susceptible to more than one rational interpretation.'" *Id.* at 176 (quoting *Miller v. Saunders*, 80 A.3d 44, 49 (R.I. 2013)). In making its determination on ambiguity, courts must construe the terminology "'*in an ordinary common sense manner.*'" *Sturbridge Home Builders, Inc. v. Downing Seaport, Inc.*, 890 A.2d 58, 63 (R.I. 2005) (quoting *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 638 A.2d 537, 541 (R.I. 1994)). In unambiguous contracts, the Court "'give[s] words their plain, ordinary, and usual meaning. . . . The subjective intent of the parties may not properly be considered by the Court; rather, [the Court] consider[s] the intent expressed by the language of the contract.'" *Botelho,*

130 A.3d at 176 (quoting *JPL Livery Services, Inc. v. R.I. Dep't of Admin.*, 88 A.3d 1134, 1142 (R.I. 2014)).

The Court finds that the transfer restriction contained in § 5(b) of the 2007 P&S Agreement is clear and unambiguous. Under the terms of the 2007 P&S Agreement, it would be a violation under § 5(b) for any Share Trust to transfer *any* interest in the LLCs "until such [Share Trust] has paid such Purchaser's Note in full." The "Purchaser's Note" refers specifically to a promissory note encompassing the Purchase Price that is tendered at the date of closing for the transaction—*i.e.*, the 2007 Notes. In other words, until the 2007 Notes issued by the Share Trusts were "paid . . . in full," the 2007 P&S Agreement forbid any transfer in interest of Overlook LLC and/or Ballard's LLC.

However, whether there was indeed a breach of the transfer restriction contained in § 5(b) of the 2007 P&S Agreement—*i.e.*, whether the promissory notes underlying the 2007 Sale were paid in full prior to the 2015 Sale—is a factual determination. With respect to whether a party has breached his or her contractual obligation is ordinarily a question for the factfinder. *See Women's Dev. Corp. v. City of Central Falls*, 764 A.2d 151, 158 (R.I. 2001). Marion and Steven contend that § 5(b)'s limitation on transferring interest applies until the entirety of the purchase price secured by the promissory notes is paid and that the issuance of the 2008 Notes and 2009 Notes merely amounted to issuance of renewal notes, not a discharge of the financial obligations underlying the original 2007 Notes. Blake and Paul read the word "Note" in the context of the 2007 P&S Agreement to mean only the note that was attached to the 2007 P&S Agreement as Exhibit A. Therefore, Blake and Paul aver that the payment of the promissory notes occurred upon issuance of the replacement notes in 2008. *See supra* note 8.

This Court concludes that there exists a genuine issue of material fact as to whether the 2007 Notes were paid in full by the 2008 Notes or whether the 2008 Notes acted as renewal notes. Generally speaking, a renewal note is a note "which merely extends the time for payment, and does not discharge the original underlying obligation" absent an intention to the contrary. *In re Bogosian*, 114 B.R. 7, 9 & n.2 (Bankr. D.R.I. 1990). "The renewal note evidences 'the same debt by a new promise.'" *Id.* (quoting *Farmer's Union Oil Co. v. Fladeland*, 178 N.W.2d 254, 257 (Minn. 1970)). "Because a renewal or substitute note is not intended to extinguish the original obligation, a security agreement that encompasses the original obligation also secures the new note." *Id.* at 9 n.4. However, "a renewal note does not operate to discharge the note in renewal of which it is given, unless there is an agreement that it shall have that effect." 52 A.L.R. 1416 (originally published in 1928); *see Merriman v. Soc. Mfg. Co.*, 12 R.I. 175, 178 (1878) ("The doctrine of this court, established by repeated decisions, is that a negotiable promissory note, given by the debtor for a preexisting debt, does not pay the debt unless given and received as payment, the burden of proving that it was so given and received being on the party who maintains it."). "The authorities are agreed that whether a renewal note operates as a discharge of the note of which it is a renewal is *dependent on the intention of the parties*. *It is a question of fact, not of law*." 52 A.L.R. 1416 (originally published in 1928) (emphasis added). Accordingly, material factual issues related to whether there was a breach of § 5(b) of the 2007 P&S Agreement and whether the 2008 Notes paid off the 2007 Notes exist. *See Merriman*, 12 R.I. at 178; *Women's Dev. Corp.*, 764 A.2d at 158; *see also First Nat'l Bank v. Littlefield*, 28 R.I. 411, 67 A. 594, 597 (1907) (distinguishing facts from those contained in *Merriman* largely due to the intent of the parties).[16]

[16] This Court declines to address Marion and Steven's argument that the 2015 Sale was

Next, Marion and Steven argue that the 2007 P&S Agreement required that Marion receive thirty days advance notice prior to the 2015 Sale, irrespective of whether the underlying notes were paid in full. Blake and Paul claim that Share Trusts were not required to give notice to Marion under the plain language of the 2007 P&S Agreement because the notice requirement applies only to transfers of the Non-Voting Interests of the LLCs. In support of this contention, Blake and Paul point out that the notice provision applies only when an "Interest"—as defined by the 2007 P&S Agreement to include only Non-Voting Interests—is transferred from the Share Trusts. Marion and Steven contend that use of the defined term "Interest" in the notice provision was merely a drafting error, and it was the long-held intention of the parties that Marion receive notice whenever a Share Trust initiates the transfer of *any* interest in the LLCs.

The Court ordinarily must determine whether a contractual term is unambiguous and, if so, apply the plain and ordinary meaning of the terminology in question. *See Women's Dev. Corp.*, 764 A.2d at 158. However, "[w]hen, at the time of formation, the parties attach the same meaning to a contract term and each party is aware of the other's intended meaning, or has reason to be so aware, the contract is enforceable in accordance with that meaning." Margaret N. Kniffin, *Corbin on Contracts* § 24.5, at 16 (1998); *see* Restatement (Second) *Contracts* § 201(1). Accordingly, "[c]ontracting parties are free to define a term as they see fit[.]" *Garden City Treatment Ctr. v. Coordinated Health Partners, Inc.*, 852 A.2d 535, 543 (R.I. 2004).

The Court concludes that in light of the defined term "Interest" in the 2007 P&S Agreement, § 5(a) does not require that Marion receive notice when the Voting Interests in the

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unaccompanied by adequate consideration. "Under Rhode Island law, adequacy of consideration is a question reserved for the trier of fact." *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 51 F. Supp. 2d 81, 92 (D.R.I. 1999) (citing *Nisenzon v. Sadowski*, 689 A.2d 1037, 1043-45 (R.I. 1997)). This Court will not invade the factfinder's role on a motion for summary judgment. *See Estate of Giuliano v. Giuliano*, 949 A.2d 386, 391 (R.I. 2008).

LLCs were transferred. Section 5(a) of the 2007 P&S Agreement clearly and unambiguously provides:

> "5. *Preconditions to Future Sale or Distribution by the Purchasers.*
>
> "(a) *Notice.* Each of the Purchasers hereby agrees that, so long as the Seller is living, *no Purchaser shall* sell, pledge, distribute to its beneficiaries, or otherwise *transfer* or encumber *all or any portion of the* ***Interests*** *received by the Purchaser without first providing at least thirty (30) days advance notice to the Seller*." Pls.' First Mot., Ex. H at § 5(a) (emphasis added).

"Interests," as defined by the 2007 P&S Agreement, included "a 15% *Non-Voting* Membership Interest in [Ballard's LLC], and a 15% *Non-Voting* Membership Interest in [Overlook LLC]." *Id.* (emphases added). Because the parties chose at the outset of the agreement to define the term "Interest" in such a manner that Voting Interests in the LLCs were not included, the contract is enforceable as such. *See Garden City Treatment Ctr.*, 852 A.2d at 543; Margaret N. Kniffin, *Corbin on Contracts* § 24.5, at 16 (1998); Restatement (Second) *Contracts* § 201(1). Thus, because the 2015 Sale encompassed Voting Interests in the LLCs, no advance notice to Marion was required under the clear and unambiguous terms of the 2007 P&S Agreement.[17]

[17] Moreover, without making a factual ruling, this Court notes that Marion and Steven's argument—that the exclusion of the term "any other interest" from § 5(a) was a drafting error—fails because the term was included in § 5(b). *See* Defs.' Motion, Ex. 24 ("[§ 5(b)] *Payment of Note*. Each Purchaser further agrees that such Purchaser shall not sell, pledge, distribute or otherwise transfer all or any portion of the Interests received by such Purchaser, or *any other interest* of such Purchaser in Overlook Realty, LLC or Ballard's Inn, LLC, until such Purchaser has paid such Purchaser's Note in full." (emphasis added)). If the parties to the 2007 P&S Agreement included such a phrase in § 5(b), they certainly would have done the same with regard to § 5(a); however, they did not. Rhode Island courts "'decline to read nonexistent terms or limitations into a contract.'" *Inland Am. Retail Mgmt. LLC v. Cinemaworld of Fl., Inc.*, 68 A.3d 457, 464 (R.I. 2013) (quoting *Pearson v. Pearson*, 11 A.3d 103, 109 (R.I. 2011)). Requiring that the Share Trusts give notice to Marion whenever a transfer of something outside the definition of "Interests" would do just that, as it would impose an obligation that is not expressly provided for in the 2007 P&S Agreement.

B

Marion and Steven's Second Motion for Summary Judgment and Paul and Blake's Cross Motion for Partial Summary Judgment

Steven and Marion seek summary judgment on Blake and Paul's counterclaim that Blake and Paul are entitled to two-thirds of Marion's estate, pursuant to the 1989 Wills Contract. Steven and Marion argue that such claim must be dismissed due to lack of standing. In addition, Steven and Marion contend that the statute of limitations has run. Moreover, Steven and Marion aver that even if Blake and Paul have standing and the statute of limitations has not run, they are entitled to judgment as a matter of law because the 1989 Wills Contract and related trust documents do not require that Marion divide her estate equally among Steven, Blake, and Paul. Additionally, Steven and Marion claim that judgment should be entered as a matter of law against Blake and Paul on their claim demanding fifty percent of Shoreham pursuant to the Family EPA, based on the theory of laches. Paul and Blake ask for an entry of summary judgment in their favor as it pertains to these issues, and also request judgment as a matter of law on their breach of fiduciary duty claim against Steven. The Court will consider these claims *in seriatim*.

1

1989 Wills Contract

Steven and Marion primarily argue that Blake and Paul lack standing to bring a breach of contract counterclaim emanating from the 1989 Wills Contract. Relying heavily on *Glassie v. Doucette*, 157 A.3d 1092 (R.I. 2017), Marion and Steven maintain that as third-party beneficiaries of a contract to establish wills and trusts, Blake and Paul do not have standing to sue on the 1989 Wills Contract. Blake and Paul respond that *Glassie* is distinguishable and therefore has no bearing on the case at bar.

In *Glassie*, our Supreme Court held that only the trustee of a trust created pursuant to a property settlement agreement between two divorcing parents—and not their daughter, the intended third-party beneficiary of the property settlement agreement—could bring suit against the estate for allegedly underfunding the trust. *See Glassie*, 157 A.3d at 1097 n.8. Pursuant to the property settlement agreement, the husband agreed to create a trust with a principal amount of $100,000 for the benefit of a daughter of the marriage. *See id.* at 1094. The husband established the trust, but the trust instrument did not include language to the effect that the trust was created pursuant to the property settlement agreement. *See id.* at 1095. By the time of the husband's death, he had failed to fund the trust to the level described in the property settlement agreement. *See id.* The daughter thereafter filed a claim against the estate of the husband, alleging that the husband failed to meet his obligation under the property settlement agreement to fund the trust appropriately. *See id.*

On appeal, our Supreme Court applied the law of trusts, not contracts, to the obligation to fund the trust at issue, despite the fact that the provision obligating such funding was contained in the property settlement agreement. *See id.* at 1099. In so doing, the *Glassie* Court emphasized that the clause which required the husband to fund the trust "relate[d] to [the daughter's] status as a beneficiary of the *Trust* and not as a third-party beneficiary of the property settlement agreement." *Id.* Thus, the daughter's "status [was] not that of a third-party beneficiary, but that of a 'beneficiary,' in the colloquial sense of the word, based on her status as the sole beneficiary of the Trust." *Id.* The Court found that "once the Trust was created, the law of trusts became the governing law. From that point forward, [the daughter's] beneficiary status was that of a trust beneficiary, not of a third-party beneficiary to a contract." *Id.* at 1100.

Accordingly, the beneficiary lacked standing to sue the estate of the deceased husband because she was not the trustee. *See id.*

Pursuant to *Glassie*, this Court finds that Blake and Paul lack standing to sue on the 1989 Wills Contract. Paul and Blake's status under the 1989 Wills Contract became a matter of estate law once the relevant wills and trusts were established in accordance with the 1989 Wills Contract. *See id.* Accordingly, the only proper party to bring a breach of contract claim based on the 1989 Wills Contract is the trustee of the trust created pursuant to the 1989 Wills Contract. *See id.* at 1097 n.8. Blake and Paul are not such trustees; accordingly, they do not have standing to sue on the 1989 Wills Contract.[18] *See id.*

2

Family EPA

Marion and Steven next claim that they are entitled to judgment as a matter of law on Blake and Paul's counterclaim that they breached the Family EPA and request specific performance (Counts VIII and IX of Counterclaimants' Counterclaim). In their counterclaim, Blake and Paul state that Marion breached the Family EPA by failing to complete revisions to her estate plan within nine months, or to the satisfaction of Blake and Paul, as required by the

[18] Blake and Paul's argument that Marion and Steven should be judicially estopped from arguing that Marion is entitled to leave her estate to Blake, Paul, and Steven in uneven proportions is without merit. "'A trial justice has the discretion to invoke judicial estoppel when he or she finds that a party's *inconsistent positions* would create an unfair advantage.'" *Plainfield Pike Dev., LLC v. Victor Anthony Props., Inc.*, 160 A.3d 995, 1004 (R.I. 2017) (emphasis added) (quoting *Iadevaia v. Town of Scituate Zoning Bd. of Review*, 80 A.3d 864, 870 (R.I. 2013)) (internal quotation marks omitted). Marion and Steven's argument—that Marion can exercise her power of appointment to leave the estate to the boys in differing portions—is not *inconsistent* with her appellate argument in *Filippi*, 818 A.2d 608, where Marion averred that the intent of Paul Sr.'s estate plan was to provide for the Boys and not for his children from a previous marriage. *See* Defs.' Mot., Ex. 3 at 18, 22, 32-33, 38; *see also Filippi*, 818 A.2d at 616, 630 ("[Paul Sr.] was influenced only by his affection and love for Marion and this three younger children." (internal quotation marks omitted)). Indeed, Marion still has the capability to provide for the Boys adequately at differing percentages.

terms of the Family EPA. Countercl. ¶ 158. In response, Marion and Steven argue that the Court should apply the doctrine of laches to Blake and Paul's claims emanating from the Family EPA because of the lapse of nearly a decade since the expiration of the nine-month period contained in the Family EPA, and because Blake and Paul participated in and accepted the benefits of Marion's estate planning efforts. Blake and Paul argue that the delay in bringing their claim was excusable and explainable because Marion indicated that she would transfer her remaining interest in the LLCs after the three-year IRS lookback period had expired. Steven and Marion reply that even if so, Marion substantially performed her duties under the Family EPA by establishing the 2007 Trust.

"'Laches is an equitable defense that involves not only delay but also a party's detrimental reliance on the status quo.'" *Am. Condo. Ass'n, Inc. v. IDC, Inc.*, 844 A.2d 117, 133 (R.I. 2004) (quoting *Adam v. Adam*, 624 A.2d 1093, 1096 (R.I. 1993)). Such delay under the laches doctrine must be unreasonable. *See id.* More specifically,

> "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." *Id.* at 134 (quoting *Adam*, 624 A.2d at 1096).

"When confronted with a defense of laches, a trial justice must apply a two-part test: 'First, there must be negligence on the part of the plaintiff that leads to a delay in the prosecution of the case. . . . Second, this delay must prejudice the defendant.'" *Hazard v. E. Hills, Inc.*, 45 A.3d 1262,

1270 (R.I. 2012) (quoting *Sch. Comm. of Cranston v. Bergin-Andrews*, 984 A.2d 629, 644 (R.I. 2009)). In addition, although summary judgment is not precluded on the issue of laches, "[w]hether or not there has been unreasonable delay and whether prejudice to the adverse party has been established are both questions of fact, and a determination must be made in light of the circumstances of the particular case." *Raso v. Wall*, 884 A.2d 391, 396 & n.13 (R.I. 2005).

This Court concludes that summary judgment on laches in favor of Marion and Steven is not appropriate in this case because the unreasonableness of the delay with regard to Marion's obligations under the Family EPA, and whether Blake and Paul were prejudiced by such delay are factual issues more suitable for a factfinder to establish after a full review at trial. *See id.* at 396. Both parties shoulder the responsibility of the delay on each other: on one hand, Steven and Marion state that Blake and Paul sat on their rights for upwards of a decade continuing to reap the benefits of Marion's generosity; on the other hand, Blake and Paul claim that their delay was the result of an unmemorialized agreement to allow their mother more time to put her estate into place. Thus, the unreasonableness of the delay involves a fact-finding journey not appropriately conducted on summary judgment. It is well settled that this Court's purpose on summary judgment is issue finding, not fact finding. *See Estate of Giuliano*, 949 A.2d at 391.

Additionally, Marion argues that she substantially performed her obligations under the Family EPA by establishing the 2007 Trust. As an initial matter, this Court notes that Plaintiffs have not cited to any case law to support their claim that substantial performance applies to Marion's conduct. "The doctrine of substantial performance recognizes that it would be unreasonable to condition recovery upon strict performance where minor defects or omissions could be remedied . . . ." *Nat'l Chain Co. v. Campbell*, 487 A.2d 132, 135 (R.I. 1985). However, the doctrine of substantial performance is applied primarily to building and

construction contracts. *See, e.g., Women's Dev. Corp.*, 764 A.2d at 158; *Woodland Manor III Assocs. v. Keeney*, 713 A.2d 806 (R.I. 1998); *Iannuccillo v. Material Sand & Stone Corp.*, 713 A.2d 1234 (R.I. 1998); *Nat'l Chain Co.*, 487 A.2d at 135. This Court has been unable to locate—and Plaintiffs have neglected to cite to—any case law where substantial performance has been applied in a case that has remotely similar facts to those present here. Accordingly, this Court declines to apply the doctrine of substantial performance to the facts of this case.

For the sake of argument, even if the substantial performance doctrine was applicable to the facts of this case, it would be inappropriate for this Court to determine whether Marion substantially performed her obligations under the Family EPA on a motion for summary judgment. First, "whether a party has substantially performed . . . its contractual obligations is usually a question of fact to be decided by the jury." *Women's Dev. Corp.*, 764 A.2d at 158 (citing *Nat'l Chain Co.*, 487 A.2d at 135). As such, it would be more appropriate for a jury to determine whether Marion's establishment of the 2007 Trust and Marion's other estate planning activities amounted to substantially performing her obligations under the Family EPA. Second, substantial performance does not excuse a breach; it merely "entitles a party to the contract to recover the contract price less the amount needed by the party benefiting from that performance to remedy any defects . . . ." *Butera v. Boucher*, 798 A.2d 340, 346 (R.I. 2002). Such calculus is not currently in the purview of this Court's role on summary judgment, as this Court must only determine whether there exist genuine issues of material fact such that judgment as a matter of law is appropriate. *Estate of Giuliano*, 949 A.2d at 391.

3

Count II – Breach of Fiduciary Duty Against Steven

Blake and Paul contend that they are entitled to judgment as a matter of law on their breach of fiduciary duty claim against Steven. Blake and Paul aver that

> "Steven breached his fiduciary obligations to the LLCs' members and the Share Trusts' beneficiaries by (i) making misrepresentations to [Bank RI] in connection with the 2014 Loan, (ii) entering into a loan on behalf of Ballard's LLC without obtaining consent of a majority of the managers as required by Ballard's Operating Agreement, (iii) failing to disclose the 2014 Loan to Ballard's LLC's members, (iv) encumbering Ballard's Inn without obtaining consent of a majority of the managers as required by Ballard's Operating Agreement, (v) failing to disclose to the members of Ballard's LLC that Marion encumbered Ballard's Inn, (vi) attempting to enter into an additional loan on behalf of Ballard's LLC for the purchase of Manisses solely for his benefit without obtaining consent of a majority of the managers as required by Ballard's Operating Agreement, (vii) misrepresenting and deceiving the members of Ballard's LLC regarding the purchase of Manisses and the funding, and (viii) decreasing the value of the 2007 Trust assets by encumbering Ballard's Inn." Countercl. ¶ 121.

In response, Steven and Marion contend that the 2014 Loan was merely a method to refinance $2.5 million in old debt accrued by Overlook LLC between 2006 and 2014. In addition, Steven and Marion point out that Steven's "attempt" to solely benefit from the Manisses transaction never went through; in fact, Blake, Paul, and Steven now equally own 251 Spring Street, LLC, the entity that owns and operates Manisses.

The elements of a breach of fiduciary duty claim have been discussed in the Superior Court. In general, to succeed on a breach of fiduciary duty claim in this state, the plaintiff must show "(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." *See R.I. Res. Recovery Corp. v. Van Liew Trust Co.*, No. PC-10-4503, 2011 WL 1936011, at *7 (R.I. Super. May 13, 2011) (Silverstein, J.); *see also Manchester v.*

Pereira, 926 A.2d 1005, 1013 (R.I. 2007) (Rhode Island Supreme Court, in finding the imposition of a constructive trust, required plaintiff to show that a fiduciary duty existed between the parties and that either a breach of a promise or an act involving fraud occurred as a result of that relationship). The Court will consider each allegation separately.[19]

a

2014 Loan

With respect to breaches of fiduciary duty emanating from the 2014 Loan, there exist genuine issues of material fact. On one hand, Plaintiffs allege that the 2014 Loan was a method of refinancing old debt done in the ordinary course of business and consummated in order to serve the best interests of the entities involved. On the other hand, Defendants allege that the 2014 Loan was a conclusive breach of fiduciary duty because Defendants were not aware of the 2014 Loan at the time and, under the Operating Agreement, had a right to vote on whether it was in the best interests of the entities involved.

This Court is not satisfied that there is conclusive evidence of a breach of fiduciary duty. A breach of fiduciary duty claim is factually intensive, taking into consideration all the facts relevant to the action undertaken by the fiduciary. *See Hendrick v. Hendrick*, 755 A.2d 784, 792 (R.I. 2000) (in breach of fiduciary duty case, "the correct judicial role in a summary judgment motion hearing is simply to identify disputed material fact issues, and not to resolve them"). The fact that the 2014 Loan was entered into without giving the trustees a chance to vote on whether it was in the entities' best interests raises concerns. However, the Plaintiffs' claims that the transaction was done in the ordinary course of business raises enough dispute for this Court to identify an issue of material fact. For such reasons, it is best left in the hands of a jury to

[19] It is undisputed that Steven owed a fiduciary duty to his fellow members of the LLCs. As such, this Court need not address the existence of such duty.

determine the disputed facts after hearing the relevant evidence and closing arguments at trial. *See id.* Therefore, this Court finds that Blake and Paul are not entitled to judgment as a matter of law for the breaches of fiduciary duty emanating from the 2014 Loan.

b

2015 Loan – Manisses Transaction

This Court denies judgment as a matter of law with respect to whether Steven breached his fiduciary duties by attempting to acquire the Manisses for his sole benefit. Blake and Paul have not claimed that the purported breaches proximately caused them or Ballard's LLC damages—a necessary element for a breach of fiduciary duty claim. *See A. Teixeira & Co. v. Teixeira*, 699 A.2d 1383, 1388 (R.I. 1997); *R.I. Res. Recovery Corp.*, 2011 WL 1936011, at *7. In fact, it seems that Blake and Paul have benefitted from the transaction to acquire the Manisses, as they own two-thirds of 251 Spring Street, LLC, the entity which owns and operates the hotel; no immediate injury to their interest in the real estate of Ballard's LLC has been alleged. Accordingly, Blake and Paul have not maintained their burden on summary judgment because they have failed to demonstrate as a matter of law how Steven's activities proximately caused them and Ballard's LLC damage warranting judgment as a matter of law.

4

Counterclaim Count VII – Declaratory Relief Against Marion and Steven

Blake and Paul's counterclaim also requests declaratory relief with respect to Marion and Steven. Blake and Paul seek declarations that the documents underlying the 2015 Sale are legal, valid, and binding; Blake and Paul are the sole managers of the LLCs; and Marion is "bound by the [1989 Wills Contract] to not alter her will or estate plan." Countercl. ¶¶ 149, 151, 153. Marion and Steven respond that the duo did not sign the Revised Manisses Documents

voluntarily; rather, they were threatened and coerced into doing so. In addition, Marion contends that Blake abused his position of trust as her attorney in forcing her to sign the Revised Manisses Documents and the documents related to the 2015 Sale. Marion and Steven also suggest that Attorney Wallin could not represent them at the October 19 Meeting because he had previously represented Overlook LLC and Ballard's LLC and as such was conflicted out. Marion and Steven contend that such disputed facts also prevent a declaration stating that Blake and Paul are the only managers of the LLCs. Lastly, Marion and Steven argue that Blake and Paul lack standing to request a declaration regarding the 1989 Wills Contract.

Addressing the standing argument first, this Court finds that Blake and Paul do not have standing to request a declaration regarding the 1989 Wills Contract. As stated above, the Rhode Island Supreme Court, in a matter regarding the underfunding of a trust, ruled that only the trustee of a trust could bring suit against the estate. *See Glassie*, 157 A.3d at 1097 n.8. This Court has already determined that Blake and Paul do not have standing to sue on the 1989 Wills Contract. *See supra* Part III.B.1. Accordingly, this Court finds that Blake and Paul also do not have standing to seek declaratory relief regarding the 1989 Wills Contract.

With respect to the remaining issues regarding Count VII of the Counterclaim, this Court is faced with factual disputes that preclude it from issuing judgment as a matter of law. It is not within this Court's purview at this stage to determine as a matter of law whether the documents underlying the 2015 Sale are valid and binding in light of the factual issues regarding payment of the 2007 Notes. *See supra* note 8. In addition, Steven and Marion have contended that they were coerced or threatened into entering into the 2015 Sale, while Blake and Paul contend that the documents Steven and Marion signed during the October 19 Meeting are valid because Steven and Marion cite to no statement evidencing a threat and because such documents were

reviewed in the presence of Attorney Wallin. Accordingly, this Court finds that genuine issues of material fact prevent this Court from summarily granting declaratory relief. *See Estate of Giuliano*, 949 A.2d at 391. Moreover, with regard to the removal of Marion and Steven as managers of the LLCs, as such documents which purported to do so were signed in conjunction with the remaining 2015 Sale documents, genuine issues of material fact exist.[20]

IV

Conclusion

Based on the reasons articulated, this Court denies Plaintiffs' motion for partial summary judgment on Counts I, II, and IV alleged in the Amended Complaint. Plaintiffs'/Counterclaim Defendants' motion for summary judgment is granted with respect to Defendants'/Counterclaimants' breach of contract counterclaim emanating from the 1989 Wills Contract. Plaintiffs'/Counterclaim Defendants' motion for summary judgment is denied with respect to Defendants'/Counterclaimants' counterclaim alleging the Plaintiffs breached the

[20] This Court finds Marion's contention that Blake acted as her attorney at the time that the 2015 Sale was consummated to be without merit. Marion's claim is unsubstantiated by the volumes of evidence submitted to this Court, which include the recordings and transcriptions of the October 19 Meeting. Rather, this Court finds that Marion's supplemental affidavit submitted on August 11, 2017—approximately two years after the 2015 Sale—constituted merely an attempt to create a genuine issue of material fact. *See Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc.*, 447 F.3d 105, 110 (1st Cir. 2006) ("In both *Colantuoni* [*v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1994)], and *Torres v. E.I. Dupont De Nemours & Co.*, 219 F.3d 13, 20 (1st Cir. 2000), we found such a chronology to be probative of the fact that the non-movant was merely attempting to create an issue of fact."); *see also* Marion Supp. Aff. ¶ 2 ("It was my understanding that Blake continued to represent and provide legal advice to me as a licensed attorney throughout 2015."). Moreover, Plaintiffs have not clearly argued why, even if Blake was acting as Marion's attorney at the time of the 2015 Sale, the attorney-client relationship should have any bearing on the validity of the 2015 Sale. Instead, it appears that Plaintiffs only intend to bring Blake's professional responsibility into question in front of this Court as an attempt to create, at the last minute, genuine issues of material fact without explaining why it would preclude the entry of summary judgment. *See* Pls.' Obj. to Defs.' Cross-Mot. for Summ. J. at 13 ("Blake's misconduct as Marion's attorney raises issues of material fact and precludes entering summary judgment on Counterclaim Count VII.").

Family EPA and request for specific performance (Counts VIII and IX of Counterclaimants' Counterclaim). Defendants'/Counterclaimants' motion for summary judgment regarding the breach of fiduciary duty claim against Steven, request for declaratory relief, and breach of contract claim against Marion regarding the Family EPA contained in their Counterclaim are denied. Counsel shall present the appropriate order and judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Marion Filippi, et al. v. Blake Filippi, et al.**
CASE NO:	**WC/KB-2016-0627**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**December 14, 2017**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Robert K. Taylor, Esq.** **Jeffrey H. Gladstone, Esq.**
For Defendant:	**Stephen J. Brouillard, Esq.** **Theresa L. Sousa, Esq.**