THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC.....Appellant

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC.....Respondents

---

SUPPLEMENTAL RECORD ON APPEAL

Clayton B. McCullough, Esq.
Ross A. Appel, Esq.
McCULLOUGH KHAN, LLC
68 ½ Queen Street
Charleston, SC 29401
(843) 937-0400

ATTORNEYS FOR APPELLANT

William C. Cleveland, Esq.
Womble Carlyle Sandridge & Rice, LLP
P.O. Box 999
Charleston, SC 29401
(843) 720-4606

ATTORNEY FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC.....Appellant

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC.....Respondents

---

INDEX

Attached hereto is the record on appeal for the above-captioned appeal, including:

I: Orders/Judgments

Page No.

II: Pleadings

Page No.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	Case No.: 2009-CP-10-0553
)	
Emerald Investments, LLC,)	
)	
Plaintiff,)	
)	**ORDER DENYING PLAINTIFF EMERALD INVESTMENTS, LLC'S MOTION TO ALTER OR AMEND**
v.)	
)	
Ashley River Properties II, LLC;)	
And Kriti Ripley, LLC,)	
)	
)	
Defendants.)	
)	

FILED
2013 JUL 24 PM 4:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's counsel:	Clayton B. McCullough, Esq.
Defendants' counsel:	William C. Cleveland, Esq.
Date of Trial:	January 22-23, 2013
Court Reporter:	Joyce Rueger

THIS MATTER is before the Court on Emerald Investments' Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. The case initially came before the Court on January 22-23, 2013, for a non-jury trial on the legal cause of action of judicial dissolution of ARP-II pursuant to Section 33-44-801(4)(b) and (e) of South Carolina's Uniform Limited Liability Company Act ("the LLC Act"). At the conclusion of the trial, the Court took the matter under advisement. On April 26, 2013, this Court issued an Order denying the Plaintiff's cause of action for judicial dissolution. The Plaintiff's Motion to Alter or Amend was filed May 9, 2013 and received by the Court on May 14, 2013. Defendants' Memorandum in Opposition to the Motion to Alter or Amend was received by the Court on May 23, 2013.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v.

1 10/16

Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court has clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

ANALYSIS

Plaintiff contends the Court's Order erred in three ways: a) by finding the "Third Arbitration Award, by itself, resolves Emerald's judicial dissolution action", b) "by treating Kriti's concealment of the marina expansion permits as an 'everyday managerial function' and finding that Kriti had no duties to convey this information to Emerald", and c) "by finding that a sale of the ARP-II property was the only available remedy should dissolution [have] been ordered." The Court will address each contention in the order they were raised by the Plaintiff.

First, Plaintiff argues the Order erred by finding the Third Arbitration Award resolves Emerald's action for judicial dissolution, specifically because the Award could not have addressed the grounds for dissolution in the LLC Act and was restricted to the grounds stated in the Operating Agreement. The Consent Order entered by this Court on April 16, 2010, found "[t]he parties further stipulate and agree that the findings of the above-referenced New York

2 2416

arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II."

The arbitration panel held six hearing days and considered all allegations of misconduct asserted by the Plaintiff before issuing its Award, concluding there was no misconduct to support dissolution or dissociation. The Court's Order of April 26, 2013, specifically disposes of the exact argument Plaintiff reasserts in its Motion to Alter or Amend Judgment. While section 9.1 of the Operating Agreement does not exactly mirror the dissolution grounds in the LLC Act, when section 9.1[1] is read in conjunction with section 10.5[2], the grounds do mirror one another. The Third Award specifically found no "misconduct which would support a finding of fact requiring dissociation, dissolution or an award to Emerald of damages." It then follows that the panel must have relied on Sections 9.1 and 10.5 of the Operating Agreement, addressing both dissolution and dissociation, which together mirror the LLC Act. Considering such, if Plaintiff was permitted to re-litigate its cause of action for judicial dissolution on the ground that the arbitrators' analysis was restricted to disputes arising under the ARP-II Operating Agreement only, it would in essence circumvent the purpose of having an arbitration proceeding in the first place. Furthermore, their contention regarding the language at paragraph 19 is taken out of context. The Court, at paragraph 15, clearly makes an independent assessment and articulates its

[1] Section 9.1 includes the following grounds for dissolution: "(a) written consent of the members who own the Required Interest of the Voting Rights in the Company; (b) Any event occurs that makes it unlawful for all of substantially all of the business of the Company to be continued, but any cure of illegality with ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection; (c) the filing by the Secretary of State of a certificate of administratively dissolving the Company; (d) The expiration of the period fixed for the duration of the Company."

[2] Section 10.5 states that such events shall be a basis for wrongful dissociation: "(i) Engag[ing] in wrongful conduct that adversely and materially affected the Company's business; or (ii) Willfully or persistently commit[ing] a material breach of this Agreement or of a duty owed the Company or the other Members under Section 33-44-409 of the Act; or (iii) Engag[ing] in conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member."

findings that there was no basis for dissolution or dissociation pursuant to S.C. Code Ann. 33-44-801(4)(e) and S.C. Code Ann. 33-44-601(6). The Court stands by its previous ruling denying Plaintiff's cause of action for judicial dissolution.

Next, Plaintiff argues the Order erred in mischaracterizing Kriti's obtaining slip permits as a managerial function of the Company, while also finding Kriti had no duties to convey such information to Emerald. As articulated in the Court's Order, the panel stripped Emerald of its voting power for valid reasons. While the Plaintiff directs the Court's attention to an article authored by Chief Justice Toal on fiduciary duties of partners and limited liability companies, Plaintiff neglects a key premise of the article: "In South Carolina, a clear delineation exists between the high fiduciary standards of the partnership and the lower standards of the LLC." Jean H. Toal & W. Bratton Riley, *Fiduciary Duties of Partners and Limited Liability Company Members Under South Carolina Law: A Perspective From the Bench*, 56 S.C. L. REV. 275, 289 (2004).

The October 31, 2005, Arbitration Award considered numerous violations of the Operating Agreement before stripping Emerald of all voting rights in ARP II, leaving Kriti as the sole member with voting rights. Furthermore, the arbitration panel "did [not] hear sufficient evidence to find corporate waste by Kriti or commission of any act which would justify enjoining Kriti from violating any provision of the Operating Agreement." Among these acts was the construction of a bulkhead, dredging of a canal, construction of an out building, along with the application of funds by the Company. Kriti's decisions "did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business...'" The panel concluded that Kriti's conduct neither breached the Operating Agreement nor violated duties owed to the Company or other Members. The panel failed to find that Kriti's conduct violated

any fiduciary duties owed to Emerald. Instead, the panel deferred to the business judgment rule, which "immunizes management from liability in corporate transactions undertaken by management where there is a reasonable basis to indicate the transaction was made in good faith." Kiriakides v. Atlas Food Sys. & Servs., Inc., 343 S.C. 587, 541 S.E.2d 257 (2001). The Court stands by its previous ruling and finds no reason to find that Kriti violated any fiduciary duties owed to Emerald by way of its business decisions.

Finally, Plaintiff argues the Order erred by finding a sale of the ARP-II property was the only available remedy in the event of dissolution. The Court clearly acknowledges that the LLC Act "grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009). Further, the Court considered that while the Plaintiff sought equitable relief, "the court ha[d] not been provided nor c[ould] it discern any basis to grant such relief." At no point does the Court find that an immediate sale of the property is the only available remedy in the event of dissolution. As such, Plaintiff's contention is wholly incorrect.

CONCLUSION

Having considered the Plaintiff's Motion, the Defendants' Memorandum in Opposition thereto, as well as the various interests balanced by the Court at the time of the ruling, the Defendants' Motion to Alter or Amend is hereby DENIED.[3]

IT IS SO ORDERED.

[3] This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

5 5046 2019

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

July 24, 2013
Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & G.S.
By
DEPUTY CLERK

6 Wolfe

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
)	CASE NO.: 2009-CP-10-553
)	
Emerald Investments, LLC)	**MOTION AND ORDER INFORMATION**
Plaintiff,)	**FORM AND COVERSHEET**
vs.)	
)	
Ashley River Properties II, LLC; Kriti Ripley, LLC)	
Defendant.)	

Plaintiff's Attorney:	Defendant's Attorney:
Cleyton McCullough, Bar No. _____	William C. Cleveland, Esquire, Bar No. _____
Address:	Address:
68 1/2 Queen Street, Charleston, SC 294011	5 Exchange Street, Charleston, SC 29401
Phone: _____ Fax _____	Phone: _____ Fax _____
E-mail: _____ Other: _____	E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Notice & Motion to Alter or Amend Judgement Under Rule 59 (e), SCRCP
Estimated Time Needed: 20 Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Cleyton McCullough 5-9-13

Signature of Attorney for ☒ Plaintiff / ☒ ~~Defendant~~ Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other:	Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON EMERALD INVESTMENTS, LLC Plaintiff, vs. ASHLEY RIVER PROPERTIES II, LLC; KRITI RIPLEY, LLC, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2009-CP-10-553 **NOTICE & MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e), SCRCP**

FILED
2013 MAY -9 PM 2:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEASE TAKE NOTICE that Plaintiff, Emerald Investments, LLC ("Emerald"), pursuant to Rule 59(e), SCRCP, will move before the Honorable Deadra L. Jefferson in the Court of Common Pleas at the Charleston County Courthouse, Charleston, South Carolina on the 10th day after or at such time as counsel may be heard, for an order amending and altering the Court's Order entered April 26, 2013 in this matter by Judge Jefferson. Emerald received written notice of the aforementioned Order on April 29, 2013.

The grounds for this motion are that (a) the Order erred in finding that the Third Arbitration Award, by itself, resolves Emerald's judicial dissolution action even though the arbitrators did not (and could not) consider the grounds for judicial dissolution found in the LLC Act; (b) the Order erred by treating Kriti's concealment of the marina expansion permits as an "everyday managerial function" and finding that Kriti had no duties to convey this information toEmerald, where, in fact, such duties exist under the Operating Agreement, the LLC Act, and the common law of this state according to Chief Justice Toal; and, finally, (c) the Order erred by finding that a sale of the ARP-II property

was the only available remedy should dissolution had been ordered because the Court has broad and flexible powers to shape a fair resolution based on the unique circumstances of this case.

This motion is being supported by a memorandum being filed contemporaneously with this notice & motion.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

McCULLOUGH KHAN, LLC

Clayton B. McCullough, Esquire
Ross A. Appel, Esquire
68 ½ Queen Street
Charleston, SC 29401
T: 843.937.0401
clay@mklawsc.com

Counsel for Emerald Investments, LLC

5 9, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO.: 2009-CP-10-553
	)	
Emerald Investments, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Ashley River Properties II, LLC and Kriti Ripley, LLC	)	
	)	
Defendants.	)	

FILED
2013 MAY -9 PM 2:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I hereby certify that a true and correct copy of the **Notice & Motion to Alter or Amend Judgment Under Rule 59(e), SCRCP** has been served upon the following by mailing a copy properly addressed and with sufficient postage affixed thereto on this 9TH day of May, 2013.

William C. Cleveland, Esquire
Womble Carlyle Sandridge &Rice, PLLC
5 Exchange Street
Charleston, SC 29401

Counsel for Defendant Ashley River Properties II, LLC and Kriti Ripley, LLC

Elizabeth Plasters, Paralegal

Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON EMERALD INVESTMENTS, LLC Plaintiff, vs. ASHLEY RIVER PROPERTIES II, LLC; KRITI RIPLEY, LLC, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2009-CP-10-553 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e), SCRCP**

Plaintiff Emerald Investments, LLC ("Emerald") files this Memorandum in Support of its Motion to Alter or Amend Judgment Under Rule 59(e), SCRCP (the "Memorandum") concerning the Order in the above-captioned case, which was entered on April 26, 2013 by the Honorable Deadra L. Jefferson. Emerald received written notice of the aforementioned Order on April 29, 2013. The Order, among other things, dismissed Emerald's cause of action to judicially dissolve Ashley River Properties, II, LLC ("ARP-II") pursuant to the LLC Act.

Emerald does not take issue with the "Procedural Background" and "Findings of Fact" sections of the Order. However, Emerald does respectfully maintain that the Order contains several errors of law. These errors, which are set forth and discussed in greater detail below, are material because they resulted in Emerald's cause of action for judicial dissolution pursuant to the LLC Act being denied.

ARGUMENT

I. The Order erred by finding that the Third Arbitration Award, by itself, resolves Emerald's judicial dissolution action.

The Order properly found that the Third Arbitration Award's findings are binding and enforceable, by law, on this Court given this state's policy favoring arbitration. However, the Order incorrectly concluded that the Third Arbitration Award's findings alone addressed and controlled the outcome of Emerald's judicial dissolution action under the LLC Act. As such, the Court erred by not allowing and considering the evidence presented by Emerald at trial.

The Third Arbitration Award did not address – indeed, it could not have addressed – the grounds for dissolution found in the LLC Act because the arbitrators' analysis was expressly restricted and limited to disputes arising under the ARP-II Operating Agreement. Emerald and Krtiti Ripley, LLC ("Kriti"), the two members of ARP-II, agreed in Section 12.18 of the Operating Agreement to arbitrate "[a]ny dispute or controversy arising under or in connection with this Agreement." Consequently, the Third New York Arbitration, among other things, considered only whether ARP-II should be dissolved and whether Kriti should be dissociated *on the basis of the Operating Agreement.*

If the standards for dissolution in the Operating Agreement mirrored those in the LLC Act, then ipso facto, the arbitrator's findings as it relates to dissolution under the Operating Agreement would necessarily determine and resolve Emerald's judicial dissolution action brought under the LLC Act. However, the grounds for dissolution under the LLC Act are much broader than those found in the Operating Agreement, therefore the Third Arbitration Award alone does not resolve Emerald's statutory dissolution claim.

This is significant because, contrary to the Order, Emerald does have the right to pursue judicial dissolution under the LLC Act, notwithstanding the Operating Agreement. The Order rightly observes that, generally speaking, the terms of the Operating Agreement controls over inconsistent provisions of the LLC Act. However, the Order errs by concluding that "[h]ere, because the operating agreement clearly provides grounds upon which dissolution may occur, and the arbitration panel found no factual support for dissociation or dissolution in the Third Award, *statutory authority addressing dissolution need not be taken into account.*" (Order, p. 13, ¶ 19) (emphasis added). This conclusion is incorrect, as a matter of law, because the LLC Act prohibits an operating agreement from restricting a member's right to pursue judicial dissolution under the LLC Act. S.C. Code Ann. § 33-44-103(b)(6) ("The operating agreement may not vary the requirement to wind up the limited liability company's business in a case specified in [§] 33-44-801(3) or 33-44-801(4)."). Moreover, as will be discussed in greater detail below, the grounds for dissolution found in the Operating Agreement, which the Third New York Arbitration did consider and rule on, does not mirror the grounds for dissolution found in the LLC Act, which the Third New York Arbitration did not and could not have considered since its analysis was restricted and limited to the grounds for dissolution spelled out in the Operating Agreement.

The Operating Agreement provides grounds for dissolution in Section 9.1 and it governs dissociation in Section 10.5. Section 9.1 of the Operating Agreement provides as follows:

> ***Dissolution***. *Except as otherwise provided herein, the Company hall dissolve, its affairs shall be wound up and the Company shall terminate only upon the happening of one or more of the following events:*

(a) The written consent of those Members who own the Required Interest of the Voting Rights in the Company;

(b) Any event occurs that makes it unlawful for all or substantially all of the business of Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection;

(c) The filing by the Secretary of State of a certificate administratively dissolving the Company pursuant to the Act, unless the Company is reinstated in accordance with the Act;

(d) The expiration of the period fixed for the duration of the Company, as set forth in the Articles of Organization, unless those Members who own the Required Interest of the Voting Rights in the Company extend the term of the Company.

Emerald's judicial dissolution cause of action is based on S.C. Code Ann. § 33-44-801(4) of the LLC Act – not the Operating Agreement. S.C. Code Ann. § 33-44-801(4)(a) authorizes the dissolution and winding up of an LLC upon the application of a member and a judicial decree that: "the economic purpose of the company is likely to be unreasonably frustrated." Moreover, S.C. Code Ann. § 33-44-801(4)(e) authorizes dissolution where "the managers or members in control of the company **have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner**." (emphasis added).

Clearly, the language of Section 9.1 of the Operating Agreement (governing dissolution) and S.C. Code Ann. § 33-44-801(4)(a), (e) are not the same. In fact, they are not even similar. Whereas, Section 9.1 of the Operating Agreement addresses very specific (and limited) procedural and administrative situations, the LLC Act contemplates a broad class of hostile acts committed by one member of an LLC against

another. These sorts of acts by Kriti were the basis for Emerald's judicial dissolution action.

Despite this clear and material distinction between the Operating Agreement and the LLC Act, the Order held that the Third Arbitration Award controls the Court's analysis of S.C. Code Ann. § 33-44-801(4) not as a result of the arbitrators' analysis of the dissolution grounds in the Operating Agreement– *but as a result of the arbitrators' analysis of the* ***dissociation*** *standards found in the Operating Agreement*. Specifically, the Order found that "when Sections 9.1 and 10.5 are read in conjunction with one another, they mirror the language of the LLC Act" (Order, p. 9, ¶ 8) and that "these grounds basically mirror S.C. Code Ann. § 33-44-801." (Order, p. 13, ¶ 18.) In other words, the Order first found that the dissolution and dissociation grounds contained in the LLC Act and the Operating Agreement are functionally equivalent, and, from there, reaches the conclusion that the Third Arbitration Award settled the judicial dissolution action even though that LLC Act's dissolution provisions were never (and could never have been) before the panel.

Contrary to the Order, the grounds for dissolution in the LLC Act are materially distinct from the dissociation grounds contained in the LLC Act and the Operating Agreement. Section 10.5 of the Operating Agreement provides as follows:

> ***Wrongful Dissociation***. *Notwithstanding anything herein to the contrary, if a Member Dissociates by reason of the occurrence of any of the following events, then such Dissociation shall be a wrongful Dissociation by such Member in contravention of this Agreement:*
>
> *(a) Withdrawing, retiring or resigning from the Company without the consent of those Members who own the Required Interest of the Voting Rights in the Company.*

(b) On application by the Company or another Member, the Member's expulsion by judicial determination under Section 33-44-601(6) of the Act because the Member:

(i) Engaged in wrongful conduct that adversely and materially affected the Company's business; or

(ii) Willfully or persistently committed a material breach of this Agreement or of a duty owed to the Company or the other Members under Section 33-44-409 of the Act; or

(iii) Engaged in conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member.

The *dissociation* standards in the Operating Agreement do substantially mirror the dissociation standards contained in the LLC Act. However, as mentioned above, the dissolution standards in the Operating Agreement and the LLC Act are different in that the former is much broader than the latter.

There are several reasons why the above-quoted dissociation grounds do not "mirror" or even "basically mirror" the grounds for dissolution under the LLC Act. First, the dissolution standards contained in S.C. Code Ann. § 33-44-801(4) addresses negative conduct *in general* by one member ***against another member***, whereas the dissociation standards only address negative conduct detrimental to the entity and breaches under Section 33-44-409 of the LLC Act. This distinction is significant because oppressive conduct detrimental to the LLC does not necessarily amount to oppressive conduct against a co-member. Moreover, breaches under Section 33-44-409 of the LLC Act are merely a specific subset of the much broader harmful conduct against co-members, *not the entity*, addressed in S.C. Code Ann. § 33-44-801(4)(e), namely, "unlawful, oppressive, fraudulent, or unfairly prejudicial" conduct.

The South Carolina Supreme Court has offered guidance on what constitutes "oppressive," "fraudulent," and "unfairly prejudicial" in the closely held corporation context. These are the same terms found as grounds for dissolution under the LLC Act. Last summer, in Ballard v. Roberson, a case also involving a marina development, the Court summarized the law as follows:

> In establishing the proper considerations for finding oppression, we observed that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." We also noted this was a fact-sensitive review and should therefore be determined through a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior." Although we declined to set out specific factors in Kiriakides, we observed several commonly considered ones including: **"eliminating minority shareholders from directorate and excluding them from employment[,] . . . failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders.**"

(S.C. Sup. Ct. Op. No. 27161, filed August 29, 2012) (citing Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 541 S.E.2d 257 (2001) (internal citations omitted) (emphasis added). But perhaps most telling, "[t]he concern and focus in shareholder oppression cases is that the minority "faces a trapped investment and an indefinite exclusion [from] participation in business returns." Id. (citing Kiriakides, 343 S.C. at 604, 541 S.E.2d at 267). This is commonly known as a "freeze out" in closely held business entities like ARP-II. All of these criteria are met in the present case.

The Order concludes that since the Third Arbitration Award found that the grounds for dissociation in the Operating Agreement/LLC Act were not met, by implication, the grounds for dissolution in the LLC Act were not met either. This finding is erroneous because as discussed above, the dissolution standards are not the same as the dissociation standards. This makes sense because they are completely different

remedies. Whereas dissolution results in the termination of the company altogether, dissociation means simply that one or more members are severed from the Company. This difference accounts for why each has different grounds.

Had the legislature intended the dissolution and dissociation standards to be the same, it could have easily done so. S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 702 S.E.2d 246 (2010) ("Had the legislature intended [a meaning different from the unambiguous language in the statute], the statute would have been drafted accordingly.") However, by a plain reading of the above-quoted provisions, the legislature did not do this; therefore, it was error for this Court to not give the legislature's words their intended application. Dissolution and dissociation are different remedies with different grounds.

An additional reason why the dissolution grounds found in the LLC Act do not mirror the dissociation grounds concerns the economic viability of the LLC itself. One of the grounds for dissolution under the LLC act is if the "economic purpose of the company is likely to be unreasonably frustrated." S.C. Code Ann. § 33-44-801(4)(a). The official comments to this part of the LLC Act provide that "[a] court has discretion to dissolve a company . . . when the company has a very poor financial record that is not likely to improve." No similar language regarding economic frustration exists in the dissociation standards. As applied to the facts of this case, this distinction is significant because ARP-II is, in fact, in horrible financial shape. In fact, Kriti agrees, and it has argued in this action and in other litigation between the parties that ARP-II is insolvent and has been hemorrhaging cash for years. Certainly then, the economic purpose of the company has been and continues to be unreasonably frustrated under the last several

years of Kriti's management of ARP-II. While the LLC Act indicates that the Court has discretion to order dissolution on this ground, the Order makes clear that this part of the LLC Act was never considered by the Court. This constitutes abuse of discretion. See, e.g., Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (failure to exercise discretion constitutes abuse of discretion).

Given the foregoing, the Order contains clear errors of law because it inappropriately blurs the lines between the dissolution and dissociation grounds contained in the Operating Agreement and the LLC Act. A plain reading of these provisions shows that they do not "mirror" or even "basically mirror" one another. This, however, does not mean, as the Court was keenly concerned about, that the Court should have dispensed with the Third Arbitration Award in contravention of state policy. Rather, the Court was certainly bound by the findings of the Third Arbitration Award. However, the Court erred by not recognizing that the Third Arbitration Award did not (and could not) speak to all of the issues before the Court in Emerald's judicial dissolution action.

As discussed above, the dissolution and dissociation grounds in the Operating Agreement (which the arbitrators could only consider) are materially distinct from those dissolution grounds in the LLC Act. Therefore, the arbitrator's analysis could not have controlled and resolved all the issues before the Court. Therefore, the Court should have conducted additional analysis, guided in-part by the findings of the Third Arbitration Award, to determine whether APR-II should have been judicially dissolved. However, the Court essentially denied Emerald's request for dissolution based only on

the Third Arbitration Award and did not consider Emerald's allegations of misconduct by Kriti that were never before the Third Arbitrator or postdated the Third Arbitration Award.

In fact, although the Order states that Emerald called three witnesses, the Order contains no reference or citation to any such testimony. Moreover, although Emerald offered several exhibits into evidence (and attempted to introduce several others, but was prevented from doing so because of objections from opposing counsel and the Court), none of them are cited in the Order. The Order's treatment of the witnesses and evidence in this case reinforces the contention that the Court considered only the Third Arbitration Award in making its decision, which, as argued above, was error.

Additional analysis should have been performed by the Court – not to revisit what was decided by the arbitrators – but to complete the analysis required by the dissolution standards contained in the LLC Act. For example, Kriti's machinations to harm Emerald and its principal Stuart Longman by way of (A) a purported assignment of Lunar Systems, Ltd.'s claim against ARP-II, (B) misconduct in obtaining a default judgment against Ashley River Properties I, LLC's ("ARP-I") after obtaining the assignment of the Lunar claim, and (C) Kriti's coordinated refusal to release Lunar/ARP-II's *lis pendens* on ARP-I's property, all of which were the subject matter of that action styled *Lunar Systems, Ltd. v. Ashley River Properties One, LLC, et al. (C/A NO.: 2005-CP-10-2434)*, which was tried back-to-back with the present action, were not before the Third New York Arbitration. The Order incorrectly found that these issues were never presented by Emerald at trial. (Order, p. 8, ¶7). Counsel for Emerald made repeated attempts to argue these points, and to the extent these issues were not presented at trial, it was based purely on evidentiary and procedural rulings by the Court.

In addition to conduct by Kriti that occurred prior to the Third Arbitration, which was never considered by the arbitrators, Kriti also committed misconduct after the Third Arbitration Award. Specifically, Kriti concealed its application for and receipt of permits to dramatically expand the size of ARP-II's marina by more than one hundred additional wet-slips (thereby substantially increasing the property's value – and Emerald's proportionate interest).[1] Kriti did this in order to undervalue ARP-II while fighting Emerald in the present action and other litigation between the parties.

Both of the above instances of Kriti misconduct speak to the standards for judicial dissolution found in S.C. Code Ann. § 33-44-801(4), and should have been considered by the Court *de novo* as these matters were never before the Third New York Arbitration. Had the Court considered the above and additional instances of misconduct by Kriti, Emerald contends a different result would be reached given Kriti's history of "unlawful, oppressive, fraudulent, or unfairly prejudicial" conduct towards Emerald and the fact that the "economic purpose of the company is likely to be unreasonably frustrated" should ARP-II not be dissolved.

II. The Order mischaracterizes Kriti's obtaining permits for a substantial marina expansion as an "everyday managerial function of the company" and erroneously concludes, specifically, that Kriti had no duty to inform Emerald of this information, and, more generally, that Kriti owes no statutory or common law duties to Emerald since Emerald lacks voting rights.

At trial, Emerald argued that, since assuming managerial control over ARP-II in the wake of the First New York Arbitration, Kriti has repeatedly violated its duties and obligations (both fiduciary and otherwise) it owes to Emerald. As previously discussed,

[1] The permits in question were obtained on March 30, 2012 from the Army Corps of Engineers. It allows for an additional 11,510 linear feet of floating dock structure to accommodate 186 pleasure crafts for recreational boating. (See Plaintiff's Exhibit #6, Marina Appraisal, dated July 24, 2012, p. 7 and copies of permits attached thereto). The appraisal places a value of $3,000 per linear foot. (Id. at 29).

some, but not all, of this conduct by Kriti was addressed by the Third New York Arbitration. A major issue that was never before the arbitrators concerned Kriti's concealment of marina expansion permits that dramatically increase the value of the ARP-II property.

Even though these acts by Kriti were not addressed by the Third Arbitration Award, the Order found that they were nevertheless irrelevant to Emerald's judicial dissolution action because "[t]here is no statutory or common law authority that creates a duty for Kriti to advise Emerald of the everyday managerial functions of the company [and] Emerald was stripped of its voting power for valid reasons articulated by the arbitrators." (Order, p. 9, ¶ 11). This conclusion of law is erroneous, because it mischaracterizes the permits as an "everyday managerial function" and because the Operating Agreement does establish various duties and obligations (fiduciary and otherwise) owed by Kriti, as manager, to Emerald, as member. Moreover, in any event, the fact that Emerald has no voting rights does nothing to obviate or otherwise nullify Kriti's duties and obligations.

First, the Order errs insofar as it categorizes the marina expansion permits that almost triple the size of the ARP-II property as an "everyday managerial function" of the entity. Such a dramatic expansion and increase in value of the principal asset of the entity cannot be described as "everyday" or "routine." This is an issue that bears directly on all members of ARP-II and takes on even greater significance given the years of acrimony between Kriti and Emerald and the present dissolution action. The issue of valuation is a major consideration in whether the entity should be dissolved and how dissolution might proceed. Concealing the marina expansion permits, up to the week

before trial in the instant action, caused Emerald to substantially undervalue the ARP-II property, to its detriment, in the weeks and months prior to the trial before this Court. Moreover, the concealment of this information bears directly on Kriti's history of misconduct and supplies additional support for dissolving the entity.

The marina expansion permits were a material, game-changing piece of information, and Kriti had a duty to inform Emerald of same. The authority citied by the Order for its finding that Kriti owed Emerald no duties and obligations actually supports the opposite conclusion and the one Emerald maintains should have been reached. The Order cities to 51 AM. JUR. 2D LIMITED LIABILITY COMPANIES § 11 (2013) for the following proposition:

> [M]embers of a limited liability company are like shareholders in a corporation in that they do not owe a fiduciary duty to each other or to the company, and that as long as members of a limited liability company are not acting in a managerial capacity, they do not have fiduciary duties to on another unless such fiduciary duties are set forth in the operating agreement.

(Emphasis added). Here, however, the Operating Agreement, specifically Section 6.3, does, in fact, spell out fiduciary duties, namely that "[t]he Members shall discharge their duties and exercise any of their rights consistently with the obligation of good faith and fair dealing which they owe[] to the Company and the Members." Moreover, Section 6.1 of the Operating Agreement addresses the duty of loyalty, Section 6.2 the duty of care, and 6.4 the duty of confidentiality. Finally, Kriti is the manager of ARP-II and not a simple co-member of the entity; therefore, under the above-quoted language from American Jurisprudence, duties are owed because Kriti and Emerald are not mere co-members. To the extent the Order disregarded the fact that the Operating Agreement

establishes fiduciary duties and Kriti was the manager of ARP-II in its analysis, this was error.

Additionally, the LLC Act and the Operating Agreement specifically obligated Kriti to share information with Emerald. The LLC Act provides a statutory right to access, inspect, download, and copy ARP-II's company records. See S.C. Code Ann. § 33-44-408. Furthermore, Section 33-44-103(b)(1) of the LLC Act provides that "[t]he operating agreement may not . . . unreasonably restrict a right to information or access to records under Section 33-44-408." Indeed, under Section 12.1 of the Operating Agreement, Emerald is given the express right to access, inspect, download, and copy ARP-II's books and records and has a right to be kept informed of ARP-II's business and affairs to the extent reasonably required for the proper exercise of its rights. See Section 12.1 of the Operating Agreement. These provisions stand contrary to the Order's assertion that Kriti had no duty or obligation to provide Emerald with information regarding the marina expansion permits.

Nothing in the Operating Agreement, the LLC Act, nor the Third Arbitration Award contain any authority for the proposition that a member of an LLC loses or forfeits its rights and benefits under the LLC Act if it loses its voting rights. Nevertheless, the Order strongly implies that Emerald's loss of voting rights bears on the analysis of whether Kriti, as manager, owed it the duties and obligations required by the Operating Agreement and the LLC Act including, but not limited to, informing Emerald of the marina expansion permits. This finding is erroneous because the issue of voting rights has nothing to do with the persistence of the duties and obligations (fiduciary or otherwise) owed by a manger of an LLC to the members. Put simply, one can have

rights and benefits incident to being a member of an LLC despite lacking the right to vote.

In fleshing out the meaning of duties owed by managers of an LLC to its members, Chief Justice Toal has observed that as a practical matter, they are similar if not identical the duties that exist in the partnership context.[2] These duties, in the partnership context, have been stated as follows:

> Partners are held to a standard stricter than the morals of the marketplace, and their fiduciary duties should be broadly construed, connoting not mere honesty but the punctilio of honor most sensitive. **In all matters connected with the partnership every partner is bound to act in a manner not to obtain any advantage over his copartner in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind**.

Kuznik v Bees Ferry Associates, 342 S.C. 579, 597-98, 538 S.E.2d 15, 24 (Ct. App. 2000) (emphasis added). As previously mentioned, Emerald's contention is that Kriti concealed the marina expansion permits in order to maximize its advantage over Emerald in the present dissolution action and, more generally, in other disputes with Emerald and entities controlled by Stuart Longman. Put into context with Kriti's past conduct, this concealment should have been viewed as a violation of the obligation of good faith and fair dealing pursuant to Section 6.3 of the Operating Agreement.

Given the foregoing, the Order erred as a matter of law by finding that Kriti owed Emerald no duties and obligations (fiduciary or otherwise) as it relates to disclosing the marina expansion permits and more generally. As such, the Order should be amended

---

[2] As Chief Justice Toal has written, although there may be a difference between partnerships and LLC's under the LLC Act with respect to the good faith and fair dealing obligation "[i]n practice, the effect of this difference may be minimal." Jean H. Toal & W. Bratton Riley, Fiduciary Duties of Partners and Limited Liability Company Members under South Carolina Law: A Perspective from the Bench, 56 S.C. L. Rev. 275, 286 (Winter 2004). Justice Toal went on to point out that "courts will likely broaden the implications of the obligation [of good faith and fair dealing] such that morally offensive behavior . . . will be deemed 'bad faith' behavior resulting in a breach of the obligation of good faith and fair dealing." Id. at 289.

to recognize that, at all times relevant, Kriti owed Emerald panoply of duties and obligations under the Operating Agreement, LLC Act, and the common law of South Carolina and these were not "lost" as a result of Emerald being stripped of its voting rights. Moreover, the Court should revise the Order to state that obtaining the marina expansion permits were not an "everyday" managerial act, and that the concealment of this information caused material detriment to Emerald as it relates to the present dissolution action.

III. Even if the ARP-II Property is worth less now than it was in the past, this does not make it inequitable to order the dissolution of the entity.

The Order provides that "in light of the decline in real estate values and depressed real estate market the Court cannot justify arbitrarily forcing the parties to place this valuable real estate on the market at what would most certainly result in a substantial loss to the parties." This finding does not provide a good reason to deny the remedy of dissolution because a dissolution order does not necessarily require the property to be sold immediately, and the property may actually be worth enough to allow both Kriti and Emerald to obtain a return on their investment.

The Order correctly observes that the LLC "grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members," Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009). However, the Order erred insofar as it suggests that an immediate sale of the property is the only remedy available upon a finding that ARP-II should be dissolved. Park Regency, LLC v. R&D Development of the Carolinas, LLC, was cited by Emerald in its Trial Brief simply to demonstrate that under special circumstances,

such as those present in that and in this case, i.e. a depressed commercial real estate market, a Court has the power and the flexibility to fashion an equitable remedy that is guided by, but not strictly controlled by the LLC Act or the Operating Agreement. See Op. No. 5056 (Ct. App. Filed November 28, 2012). Though the LLC Act and the Operating Agreement must certainly guide and inform the Court's analysis, the Court's inherent equitable powers allow the Court to fashion an equitable remedy it deemed fair and appropriate in unique situations such as those involving this complex piece of waterfront property.

Perhaps, as the Order suggests, selling the ARP-II property on the courthouse steps in the near future would not be equitable. However, this does not support the view that dissolution is not the appropriate remedy. Instead, as the Court did in Park Regency, LLC, this Court had the power to fashion a dissolution remedy that is fair in these circumstances, for instance by requiring Kriti to buy-out Emerald's shares at a set price based on the most recent appraisal. In fact, Kriti could even be given a credit based on the judgment it has against Emerald. Such a remedy would not result in Kriti losing its investment in the property, plus it would allow Kriti to hang on to the property until the market rebounds – as was the case in Park Regency, LLC. This would succeed in balancing both Kriti's and Emerald's interests, and allow this incredibly dysfunctional business relationship to be severed once and for all.

Finally, the Order correctly observes that ARP-II's original property (both the upland and original marina space) has diminished in value over the last several years due to the poor economy. However, the Order fails to take into account the substantial increase in property value derived from the recently obtained marina expansion permits.

There is evidence in the record that these permits have considerable value to a subsequent purchaser. Therefore, in fashioning an equitable dissolution remedy, the Court can be encouraged that there is far more value in the property than at first blush, and that this added value provides fertile grounds for reaching a fair and just result that would end nearly a decade of litigation and acrimony between Kriti and Emerald.

CONCLUSION

For the foregoing reasons, Emerald respectfully requests that this Court reconsider its Order and alter and amend its decision based on the points raised in this Memorandum.

McCULLOUGH KHAN, LLC

Clayton B. McCullough, Esquire
Ross A. Appel, Esquire
68 ½ Queen Street
Charleston, SC 29401
T: 843.937.0400
D: 843.937.0401
clay@mklawsc.com

Counsel for Emerald Investments, LLC

5.9, 2013
Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO.: 2009-CP-10-553
	)	
Emerald Investments, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Ashley River Properties II, LLC and Kriti Ripley, LLC	)	
	)	
Defendants.	)	
	)	

I hereby certify that a true and correct copy of the **Memorandum in Support of Plaintiff's Motion to Alter or Amend Judgment Under Rule 59(e), SCRCP** has been served upon the following by mailing a copy properly addressed and with sufficient postage affixed thereto on this 9TH day of May, 2013.

William C. Cleveland, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

Counsel for Defendant Ashley River Properties II, LLC and Kriti Ripley, LLC

Elizabeth Plasters, Paralegal

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC.....Appellant

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC.....Respondents

---

CERTIFICATE OF COUNSEL

Appellant hereby certifies that this Supplemental Record on Appeal contains all of the material proposed to be included by any other parties, all that Appellant deems needed, and not any other material.

April 28, 2014

Respectfully submitted,

Clayton B. McCullough, Esq.
Ross A. Appel, Esq.
McCULLOUGH KHAN, LLC
68 ½ Queen Street
Charleston, SC 29401
(843) 937-0400
(843) 937-0706
clay@mklawsc.com
ross@mklawsc.com

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC.....Appellant

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC.....Respondents

---

PROOF OF SERVICE

I, the undersigned Paralegal of the law firm of McCullough Khan, LLC, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the **Supplemental Record on Appeal** by mailing a copy of same by United States Mail, postage prepaid, to the following addresses:

William C. Cleveland, Esq.
P.O. Box 999
Charleston, SC 29402

and fifteen copies to the Clerk of the Court of Appeals at the following address:

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Calhoun Building
1015 Sumter Street
Columbia, SC 29201

April 29, 2014

Alicia M. Benton
Paralegal