IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AVGIRIS BROTHERS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2021-0741-LWW
	)	
THEODOROS BOUIKIDIS and SAVVAS BOUIKIDIS,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
A-B BROTHERS, LLC,	)	
	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: June 10, 2022
Date Decided: September 30, 2022

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Barry M. Klayman and Kaan Ekiner, COZEN O'CONNOR, Wilmington, Delaware; Robert W. Hayes, COZEN O'CONNOR, Philadelphia, Pennsylvania; *Counsel for Defendants Theodoros Bouikidis and Savvas Bouikidis*

WILL, Vice Chancellor

This case involves two sets of brothers who joined forces to open a fast casual Greek restaurant in Philadelphia. The Avgiris brothers took on the bulk of the capital contributions needed to open the business and were allocated 65% of the membership interests of A-B Brothers, LLC. The Bouikidis brothers contributed their restaurant industry experience but significantly less of the start-up funds and were allocated the remaining 35%. A-B Brothers' limited liability company agreement memorialized these interests and named the four brothers as the entity's managers.

Over time, the brothers' relationships became divided along family lines. Eventually, the Avgiris brothers—acting as A-B Brothers' majority interest holder—acted to remove the Bouikidis brothers as managers, in accordance with the terms of the LLC agreement. The Bouikidis brothers rejected the contractual reality that they were no longer managers. Litigation pursuant to 6 *Del. C.* § 18-110 was brought by the Avgiris brothers as a result.

In this post-trial decision, I conclude that the Bouikidis brothers were properly removed as managers of A-B Brothers. What should have been a straightforward decision in a summary proceeding was, however, muddled by a series of grievances advanced by the Bouikidis brothers in the form of affirmative defenses. None of those defenses affect the outcome of this case. Judgment will be entered for the plaintiff.

I. FACTUAL BACKGROUND[1]

Unless otherwise noted, the facts described in this section were either stipulated to by the parties or proven by a preponderance of the evidence. Trial was conducted by Zoom over two days during which five fact witnesses testified.[2] The parties introduced 67 exhibits including four deposition transcripts.[3]

To the extent that any conflicting evidence was presented, I have weighed it and made findings of fact accordingly.

A. The Brothers Go into Business Together.

Plaintiff Avgiris Brothers, LLC is a Delaware limited liability company formed by brothers Constantine (Dean) and Christopher (Chris) Avgiris, the two members of Avgiris Brothers.[4] Avgiris Brothers along with defendants (and brothers) Theodoros and Savvas Bouikidis are the members of nominal defendant A-B Brothers, LLC, a Delaware limited liability company.[5]

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[1] Where facts are drawn from exhibits jointly submitted by the parties at trial, they are referred to according to the numbers provided on the parties' joint exhibit list (cited as "JX __") unless defined. Depositions are cited as "[Name] Dep. __" and trial testimony is cited as [Name] Tr. __."

[2] *See* Dkts. 85, 88-90.

[3] *See* Dkt. 80.

[4] Joint Pre-trial Stipulation and Order (Dkt. 83) ("PTO") ¶¶ 9, 10. At times, to avoid confusion, I will refer to the members of the Avgiris and Bouikidis families by their first names. No disrespect is intended.

[5] PTO ¶¶ 8-11; JX 5 ("LLC Agreement").

The relationship between the Avgiris and Bouikidis families began when Chris Avgiris was hired to work at Zesto Pizza, a restaurant operated by the defendants in Philadelphia, Pennsylvania.[6] Chris became friends with Theodoros and Savvas Bouikidis, and the three discussed the prospect of opening and operating a fast casual restaurant serving Greek cuisine.[7] In early 2016, as these conversations progressed, Chris involved Dean in business development plans given Dean's business knowledge and background.[8]

Avgiris Brothers engaged Pryor Cashman LLP as legal counsel to help formalize the parties' relationship, negotiate a lease for retail space, form an entity to operate the business, and prepare the new company's governing documents.[9] In June 2016, Pryor Cashman prepared an initial draft of a limited liability company agreement for A-B Brothers, which Dean shared with the defendants.[10]

Pryor Cashman also negotiated a lease for the planned restaurant.[11] The defendants had an existing relationship with the prospective landlord because one of their Zesto Pizza locations was located in the same shopping center as the open retail

[6] Chris Avgiris Tr. 103; Chris Avgiris Dep. 12-13, 15-16; S. Bouikidis Dep. 18-20.

[7] D. Avgiris Tr. 12; Chris Avgiris Tr. 104.

[8] Chris Avgiris Tr. 105.

[9] D. Avgiris Tr. 13-15.

[10] *Id.* at 16, 55.

[11] *Id.* at 17.

space.[12] The parties formed an entity called GRK Boys, LLC, which signed a storefront lease agreement dated July 11, 2016.[13]

The parties began building out the restaurant space shortly after leasing it.[14] Both Avgiris Brothers and the defendants were spending money towards this goal, though they had yet to execute a written agreement memorializing their relationship. Catherine (Cathy) Avgiris, the mother of Chris and Dean, maintained a spreadsheet to track expenditures during the buildout phase given her finance background (including as a public company CFO).[15]

B. The LLC Agreement

It was not until July 2017 that the parties began to meaningfully negotiate their respective membership interests. The parties forecasted that startup costs for the restaurant would total $500,000.[16] Avgiris Brothers took the position that ownership percentages should be based on contributions to upfront capital costs, meaning that a contribution of $250,000 would equate to a 50% interest.[17] The Bouikidis brothers

[12] *Id.*; Chris Avgiris Dep. 26-27.

[13] D. Avgiris Tr. 16 (explaining that GRK Boys, LLC later became a wholly-owned subsidiary of A-B Brothers); JX 4.

[14] D. Avgiris Tr. 14-17; Chris Avgiris Dep. 31-36.

[15] Cathy Avgiris Tr. 156-60, 166; JX 2.

[16] D. Avgiris Tr. 22; JX 8 at 1 ("[W]e are anticipating an ultimate upfront capital commitment of $500K."); S. Bouikidis Tr. 378.

[17] D. Avgiris Tr. 22.

desired credit for providing their experience in the restaurant industry.[18] The parties reached a handshake deal on an initial 65%-35% membership allocation in A-B Brothers, with Avgiris Brothers holding the former and the two Bouikidis brothers collectively holding the latter.[19]

On July 28, 2017, Dean emailed the defendants' attorney, Marc Zaid, noting that the Bouikidises had "collectively committed about $55K to date, with [Avgiris Brothers] committing the rest. Based on this, ownership interest would be 89% (Avgiris) vs. 11% (Bouikidis)."[20] Consistent with the parties' agreement, however, Dean stated "we would like to go in with a day 1 ownership structure of 65% (Avgiris) vs. 35% (Bouikidis)."[21]

The Limited Liability Company Agreement (the "LLC Agreement"), executed by Chris on behalf of Avgiris Brothers, and the defendants in their individual capacities, reflects this agreement.[22] Membership interest and capital

[18] *See* T. Bouikidis Tr. 247-48.

[19] D. Avgiris Tr. 23; Chris Avgiris Tr. 124-25; Cathy Avgiris Tr. 163-65; T. Bouikidis Tr. 263; S. Bouikidis Tr. 377.

[20] JX 7 at 1; *see* T. Bouikidis Tr. 232, 305-06; D. Avgiris Dep. 69-70.

[21] JX 7 at 1.

[22] PTO ¶ 17; LLC Agreement at 1. The LLC Agreement is "dated as of April 1, 2017." *Id.* The version of the LLC Agreement attached to Dean's July 28, 2017 email (which includes Schedule A and appears consistent with the executed version introduced as JX 5) is also "dated as of April 1, 2017." JX 7 at 2. The parties' signature page to the LLC Agreement is undated. Although this creates some confusion concerning when the final version of the LLC Agreement was signed, the record suggests that the final document is backdated. The

contributions as of August 1, 2017 are memorialized in Schedule A to the LLC Agreement:[23]

Member Name	Membership Interest	Capital Contribution as of 8/1/2017
Avgiris Brothers, LLC	65%	$445,000
Theodoros Bouikidis Savvas Bouikidis	35%	$55,000
TOTAL	100%	$500,000

The LLC Agreement also provided that the four "Managers" of A-B Brothers were "Constantine Avgiris, Christopher Avgiris, Theodor[os] Bouikidis, and Savvas Bouikidis."[24]

A 35% interest for the defendants would equate to a total contribution of $175,000.[25] To address the deficit, Avgiris Brothers offered to supply a loan to the defendants for the majority of their capital contribution. Dean proposed to the defendants' counsel that the defendants pay $120,000 "over the course of 5 years,

final version of the LLC Agreement executed by the parties after July 2017 included Schedule A and the 65%-35% allocation of membership interests discussed above.

[23] LLC Agreement at Schedule A; *see* JX 7 at 36.

[24] LLC Agreement § 7.02; *see* PTO ¶ 18. "Managers" is defined as "(a) each Person identified as of the date hereof as a Manager in Section 7.02 and (b) each Person who is hereafter elected as a Manager in accordance with Section 7.02." LLC Agreement § 1.01.

[25] JX 7.

amounting to a $2K collective monthly payment."[26] To "secure this payment commitment," Dean indicated that Avgiris Brothers was open to "either (1) collateral, or (2) the reversion of [the defendants'] ownership interest in the business" in the event of default.[27]

Avgiris Brothers' loan to the defendants was memorialized in a promissory note (the "Note") for $120,000 dated September 1, 2017.[28] The Note was secured by a Pledge Agreement, also dated September 1, 2017, that was executed by each of the Bouikidis brothers and by Chris on behalf of Avgiris Brothers.[29] In the Pledge Agreement, the defendants pledged their interests in A-B Brothers to secure their obligations under the Note.[30] Both the Pledge Agreement and Note required that any modifications or amendments to either contract be made in writing and signed by all parties.[31]

Pursuant to the Pledge Agreement, if A-B Brothers distributed money to its members, the defendants' portion of the distribution would be applied to repayment of their obligations under the Note.[32] Section 7 of the Pledge Agreement provides:

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[26] *Id.* at 1.

[27] *Id.*

[28] JX 10 ("Note"); PTO ¶ 19.

[29] JX 9 ("Pledge Agreement").

[30] Pledge Agreement at 1.

[31] Pledge Agreement § 11; Note at 1.

[32] Pledge Agreement § 7.

> Pledgor [Savvas and Theodoros Bouikidis, jointly and severally] hereby assigns to Pledgee [Avgiris Brothers] all cash otherwise distributable, from time to time, by A-B Brothers, LLC in respect to the Collateral, as further security for the Obligations, which, when distributed to Pledgee in respect to the Collateral, shall be accounted for and applied by Pledgee as Pledgor's payments toward the Pledgor's' [sic] monthly payment installments, or portions thereof, then (after distribution of such distributable cash) due or coming due from Pledgor to Pledgee. Notwithstanding any of the above, Pledgor agrees that it will be bound to remit, at a minimum, the monthly payments set forth in the Note, regardless of any cash distributions by A-B Brothers, LLC to Pledgor and even during such times as A-B Brothers, LLC may make no cash distributions to Pledgor. In the event of an uncured default by Pledgor, all rights of the Pledgor to receive cash distributions from A-B Brothers, LLC, to which it would otherwise be entitled with respect to the Collateral, shall cease and all such rights shall thereupon become vested in the Pledgee, except with respect to the rights to such cash distributions that accompany any portion of the Collateral retained by the Pledgor as provided by Section 6 of this agreement, above.[33]

Dean had previously explained to Zaid and the defendants that the language in the second sentence of Section 7 was intended to address the "concept" that "the minimum payment monies are still owed even at times when the business does not distribute cash to any owners."[34]

C. Yiro Yiro Opens.

The planned Greek restaurant, called Yiro Yiro, opened on September 1, 2017 in the Roxborough section of Philadelphia.[35] The restaurant saw early success.[36]

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[33] *Id.*

[34] JX 75; *see also* D. Avgiris Tr. 27-28; T. Bouikidis Tr. 305-06.

[35] PTO ¶¶ 13-15.

[36] *See* T. Bouikidis Tr. 270-71; S. Bouikidis Tr. 412.

Shortly after it opened, Cathy Avgiris met with the defendants to discuss the spreadsheet of startup costs she had been keeping.[37] She gave the defendants credit for certain payments that were not supported by receipts.[38] With those changes, the total expenses for the restaurant's opening amounted to $485,952.[39]

On December 22, 2017, Dean filed a certificate of formation for A-B Brothers, LLC with the Delaware Secretary of State.[40] The certificate states that it was executed as of July 10, 2017.[41]

Around February 2018, Avgiris Brothers, the defendants, and an additional partner formed Yiro Yiro, LLC, a Pennsylvania entity, for the purpose of opening a second Yiro Yiro location on 40th Street in Philadelphia.[42] Avgiris Brothers holds a 25% interest in Yiro Yiro, LLC.[43]

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[37] Cathy Avgiris Tr. 168.

[38] *Id.* at 169.

[39] *Id.*; JX 2.

[40] JX 13.

[41] *Id.*

[42] PTO ¶ 20.

[43] D. Avgiris Tr. 78; Chris Avgiris Tr. 129.

D. A Dispute Emerges.

Beginning in early 2018, Chris took money from A-B Brothers' accounts to support an addiction.[44] The parties met on June 18, 2018 to discuss Chris's actions.[45] They agreed that Chris had taken approximately $40,000.[46] Dean wired $40,000 to an A-B Brothers account on June 19.[47] One day later, Chris enrolled in a 30-day rehabilitation program.[48]

While Chris was receiving treatment and recovery, he did not participate in the day-to-day management of the restaurant. Dean and Cathy, along with the defendants and the restaurant employees, picked up the slack.[49] Dean and Savvas coordinated to ensure that the restaurants' vendors were paid.[50] In one communication on July 13, Savvas raised the issue of payments on the Note, explaining that store revenue would not be sufficient to cover the payment and that he was "not putting money out of [his] pocket to pay it and [Theodoros was] working both stores for free."[51] Dean replied, "we can pause the loan repayment right now

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[44] PTO ¶ 21; *see* T. Bouikidis Tr. 273-74; Chris Avgiris Tr. 109-10.

[45] PTO ¶ 22.

[46] D. Avgiris Tr. 31-32; T. Bouikidis Tr. 272-73.

[47] PTO ¶ 22; D. Avgiris Tr. 31-32.

[48] D. Avgiris Tr. 32.

[49] *Id.* at 32-33; S. Bouikidis Dep. 45, 98-103.

[50] D. Avgiris Tr. 34-35.

[51] JX 19 at 4.

until we get everything under control."[52] The defendants did not make any further payments on the Note after that time.

When Chris returned to work in September 2018, he resumed his role as the principal manager of Yiro Yiro's Roxborough location.[53] The defendants have not worked or assisted with the management of that restaurant since late 2018.[54]

E. The Defendants Ask to Be Bought Out.

The parties' relationship continued to deteriorate. The last payment credited on the Note was in October 2019.[55] On November 4, 2019, Theodoros requested a meeting with Cathy to discuss a potential buy-out of the defendants' interest in A-B Brothers.[56] The two met in person, and Cathy conveyed that the business would need to be appraised before any deal would be considered.[57] Cathy engaged an independent business appraiser who produced reports separately analyzing the value of the Roxborough and 40th Street Yiro Yiro locations.[58] The defendants rejected

[52] *Id.*

[53] D. Avgiris Tr. 38; Chris Avgiris Tr. 118-119; T. Bouikidis Tr. 302-303, 366; S. Bouikidis Tr. 375, 389.

[54] T. Bouikidis Tr. 299-303; S. Bouikidis Tr. 376-77.

[55] *See* JX 28.

[56] T. Bouikidis Tr. 276; JX 104.

[57] Cathy Avgiris Tr. 185-86.

[58] *Id.* at 186-87, 189.

the appraisal, which was below their perceived value.[59] The discussions about a buy-out did not progress further.[60]

F. The Pennsylvania Litigation

By the spring of 2020, the parties were communicating through lawyers. On April 30, Avgiris Brothers' then-counsel informed the defendants' counsel that the defendants had defaulted on the Note.[61] On June 10, Avgiris Brothers' counsel advised the defendants that, since they had not cured their default, Avgiris Brothers was "seizing the stocks held as collateral, less the 16% share the Bouikidises ha[d] paid for" pursuant to the Pledge Agreement.[62]

On July 9, the defendants filed a lawsuit against Avgiris Brothers and Chris in the Court of Common Pleas of Philadelphia County (the "Pennsylvania Action").[63] The defendants' initial complaint sought a declaration that no default had occurred under the Note, replevin of their membership interests in A-B Brothers, and alternatively, monetary damages for the value of those interests.[64] They also asserted claims against Chris regarding alleged misappropriation of assets and self-

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[59] *See* T. Bouikidis Tr. 277-78; Cathy Avgiris Tr. 189.

[60] Cathy Avgiris Tr. 189-90.

[61] JX 28.

[62] JX 29.

[63] PTO ¶¶ 23-24.

[64] *Id.* at ¶ 24.

dealing (which were later dropped from an amended complaint).[65] The purportedly improper payments complained of included the use of the A-B Brothers' credit card to make fictitious charges through SquareUp and Venmo accounts.[66]

Avgiris Brothers and Chris sought dismissal of the Pennsylvania Action. On March 3, 2021, the Pennsylvania court issued an order denying their motion.[67]

G. The Removal

On March 22, 2021, Avgiris Brothers as the "majority shareholder[] of A-B Brothers," acted by written consent to remove the defendants as managers of A-B Brothers.[68] The written consent "request[ed]' that Defendants . . . turn over all passwords, surveillance equipment, and banking access" and stated that Savvas would be "restricted from physically being at or within 100 feet of the Roxborough store."[69]

On June 15, 2021, Avgiris Brothers and Chris filed counterclaims in the Pennsylvania Action for, among other things, a declaration regarding the validity of the removal.[70] The defendants sought several times to dismiss the counterclaims.

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[65] *Id.*; JX 57.

[66] *See* D. Avgiris Tr. 42-43; T. Bouikidis Tr. 290.

[67] JX 27.

[68] JX 32.

[69] *Id.*; *see* PTO ¶ 25.

[70] JX 34.

On July 22, Avgiris Brothers and Chris filed a Praecipe to Withdraw Defendants' Second Amended Counterclaim.[71] On November 17, the Pennsylvania court issued an Order dismissing the counterclaims (the "November Order").[72] The court gave leave for Avgiris Brothers and Chris to file a Third Amended Counterclaim "within twenty (20) days of the date of entry."[73] The November Order stated in a footnote:

> [Avgiris Brothers and Chris] appear to be asserting derivative claims on behalf of a non-party Delaware limited liability company of which they claim all the parties are members. If so, that entity would need to be joined as a party. . . . Defendants should re-plead their claims properly if they wish to pursue them.[74]

They opted not to re-file in Pennsylvania.

H. The Delaware Litigation

On August 27, 2021, Avgiris Brothers filed its Verified Complaint in this court.[75] The complaint advances a single count seeking a declaration pursuant to 6 *Del. C.* § 18-110 that Avgiris Brothers owns a majority of the outstanding membership interests of A-B Brothers and, thus, that it had the power under the LLC Agreement to remove the defendants as Managers.[76] Trial was held virtually over two days on January 27 and 28, 2022. After post-trial briefing and supplemental

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[71] JX 36 at 11.

[72] JX 46.

[73] *Id.*

[74] *Id.*

[75] Dkt. 1.

[76] *Id.* ¶¶ 25-28.

briefing concerning a May 10, 2022 Order in the Pennsylvania Action (the "May Order") was complete, the matter was submitted for decision as of June 10, 2022.[77]

II. LEGAL ANALYSIS

This court has the authority under 6 *Del. C.* § 18-110(a) to "hear and determine the validity of any . . . removal or resignation of a manager of a limited liability company . . . and the right of any person to become or continue to be a manager of a limited liability company."[78] The court "may determine the person or persons entitled to serve as managers; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers, and records of the [entity]."[79] The plaintiff "bears the burden of proving by a preponderance of the evidence that it is entitled to relief."[80]

I begin by considering the defendants' argument that the plaintiff's claim is barred by the doctrine of res judicata. After determining that it is not, I address the merits and conclude that, pursuant to the terms of the LLC Agreement, Avgiris Brothers owns a majority of the membership interests of A-B Brothers and validly removed the defendants as Managers. Where appropriate, I address the panoply of

[77] *See* Dkts. 91, 92, 95, 96, 102, 106, 107.

[78] 6 *Del. C.* § 18-110 (a).

[79] *Id.*

[80] *IAC/InterActiv Corp.*, 948 A.2d 471, 493 (Del. Ch. 2008).

affirmative defenses raised by the defendants. To the extent that any are properly raised in this proceeding, none succeed.

A. The Plaintiff's Claims Are Not Barred By Res Judicata.

As a threshold issue, the defendants argue that res judicata bars the plaintiff's claim. They contend that the Pennsylvania court rendered a final decision on the merits when it dismissed Avgiris Brothers' Second Amended Counterclaim in its November Order.[81]

In Delaware, "the preclusive effect of a foreign judgment is measured by the standards of the rendering forum."[82] Pennsylvania law therefore controls whether the November Order has a preclusive effect. In Pennsylvania, "[r]es judicata, which is also known as claim preclusion, holds that a final judgment on the merits by a court of competent jurisdiction will bar any future action on the same cause of action between the parties and their privies."[83] For the doctrine to apply, Pennsylvania law requires that "both the former and latter suits possess [four] common elements: (1) identity in the thing sued upon; (2) identity in the cause of action; (3) identity of

[81] In this section, I discuss the Second Amended Counterclaim as those of Avgiris Brothers for simplicity's sake. It should be understood that Chris was also a party to those counterclaims. *See* JX 34.

[82] *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991).

[83] *Khalil v. Travelers Indem. Co. of Am.*, 273 A.3d 1211, 1223 (Pa. Super. Ct. 2022) (quoting *Rearick v. Elderton State Bank*, 97 A.3d 374, 380 (Pa. Super. Ct. 2014)).

persons and parties to the action; and (4) identity of the capacity of the parties suing or being sued."[84]

These "four identities" are uncontested by the parties. The thing sued upon, and the relevant cause of action here and in the Second Amended Counterclaim, concern the control of A-B Brothers. The claims in both actions were brought by a combination of Avgiris Brothers, Savvas, Theodoros, and Chris.

Nevertheless, the plaintiff's claim in the present action is not barred by res judicata because the November Order does not constitute a final judgment on the merits in the Pennsylvania Action. "Once it has been established that the concurrence of these four identities exist, it must be determined whether the ultimate and controlling issues have been decided in the prior proceeding."[85]

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[84] *Chada v. Chada*, 756 A.2d 39, 42 (Pa. Super. Ct. 2000) (citing *Matternas v. Stehman*, 642 A.2d 1120, 1123 (Pa. Super. Ct. 1994)).

[85] *Brandschain v. Lieberman*, 466 A.2d 1035, 1038-39 (Pa. Super. Ct. 1983) (holding that because the issues before the court "were not litigated or resolved by agreement in the prior action and because no final judgment was entered on their merits," the doctrine of res judicata was inapplicable); *see also Thompson v. Karastan Rug Mills*, 323 A.2d 341, 344 (Pa. Super. Ct. 1974) ("Once it is determined that the concurrence of four identities exist, the only remaining inquiry of the court should be to determine 'whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and asset their rights.'" (quoting *Callery v. Mun. Auth. of Blythe Twp.*, 243 A.2d 385, 387 (Pa. 1968))); *Hammel v. Hammel*, 636 A.2d 214, 218 (Pa. Super. Ct. 1994) ("The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights.").

The November Order did not, however, resolve the identity of A-B Brothers' Managers. It expressly allowed Avgiris Brothers to refile their claims within a set timeframe.[86] Under Pennsylvania law, an order of dismissal with leave to file an amended pleading is an interlocutory order that does not put a party "out of court."[87]

The defendants, relying on federal authority, assert that courts have held that declining to replead claims following dismissal with leave to amend automatically converts the dismissal into a final order.[88] By their logic, Avgiris Brothers' failure to replead their counterclaims rendered the November Order final. Avgiris Brothers argues, in response, that it withdrew its Second Amended Counterclaim before the November Order was issued.

The parties have debated at great length whether the Second Amended Counterclaim was properly withdrawn, citing to minutiae of Pennsylvania civil procedure. For example, they ask this court to consider such questions as whether Avgiris Brothers' attempted "withdrawal" should have been filed as a "discontinuance"; whether the Bouikidises were obliged to either praecipe the Pennsylvania court's prothonotary or move that court for entry of a final order if they intended to argue that the November Order has a preclusive effect; whether

[86] JX 46.

[87] *In re Nazdam*, 203 A.3d 215, 219 (Pa. Super. Ct. 2019).

[88] Defs.' Opening Post-trial Br. 15, 18 (citing to Third, Sixth, and Eighth Circuit case law).

Pennsylvania Rule of Civil Procedure 237.1 is applicable to a court order rather than an administrative action; and whether Avgiris Brothers was required to file third amended counterclaims to "revive" its claims.[89]

Fortunately, this dense procedural fog was lifted when the Pennsylvania court issued its May Order, demonstrating that it does not share the defendants' view of finality.[90] The May Order resolved, among other things, a motion to amend filed by the Bouikidis brothers, in which they sought to bring new claims against Avgiris Brothers and Chris based on the LLC Agreement.[91] There, the Bouikidises argued that Avgiris Brothers and Chris waived the LLC Agreement's Delaware forum selection clause by asserting their prior counterclaims for, among other things, a declaration that the Bouikidis brothers were properly removed as Managers of A-B Brothers.

The Pennsylvania court disagreed:

> Defendants did not waive the Delaware forum selection clause in the LLC Agreement by asserting in this action counterclaims based on the LLC Agreement where those counterclaims were subsequently withdrawn or dismissed without prejudice and never refiled.[92]

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[89] *E.g.*, Defs.' Post-trial Opening Br. 16-17, 19; Defs.' Post-trial Answering Br. 10-11; Pl.'s Post-trial Opening Br. 23-27; Pl.'s Post-trial Answering Br. 12-18.

[90] *See* Defs.' Suppl. Post-trial Br. (Dkt. 106) Ex. D ("May Order").

[91] *See* Pl.'s Suppl. Submission (Dkt 107) 2.

[92] May Order ¶ 2 n.3.

The May Order eliminates any confusion regarding the preclusive effect (or lack thereof) of the November Order. The withdrawal of the Second Amended Counterclaim was viewed by the Pennsylvania court as equivalent to a dismissal without prejudice. Moreover, the fact that the Second Amended Counterclaim was never refiled was viewed by the Pennsylvania court as insufficient to cause a waiver of the forum selection clause. It is not apparent to me, then, how the November Order could be considered a final decision on the merits that precludes this litigation.[93]

The November Order—consisting of four lines and a footnote—lacks any indication that its dismissal of Avgiris Brothers' Second Amended Counterclaim was final, preclusive, or with prejudice.[94] It does not address the merits of the claim or hold that no viable cause of action had been pleaded. Rather, by the time the November Order was issued, Avgiris Brothers had already filed the present action under Section 18-110 in accordance with the Delaware forum provision.[95]

The public policy considerations underlying res judicata support the conclusion that the doctrine does not apply. Res judicata is intended "to minimize the judicial energy devoted to individual cases, establish certainty and respect for

[93] *See supra* note 85-87 and accompanying text.

[94] *See* JX 46.

[95] *See supra* note 75 and accompanying text.

court judgments, and protect the party relying on the prior adjudication from vexatious litigation."[96] But Avgiris Brothers lacked certainty on its claim after the November Order. To apply res judicata would eliminate its quest for certainty on the identity of A-B Brothers' Managers entirely. Avgiris Brothers would be placed in an untenable situation where it would be unable to press this claim in the Pennsylvania Action due to the forum selection clause (which Avgiris Brothers would have to waive) or to bring it in this court due to res judicata. Such an austere outcome surely cannot derive from the public policy principles underlying the doctrine.

Accordingly, I proceed to consider the merits of Avgiris Brothers' claim.

B. Avgiris Brothers Validly Removed the Defendants as Managers.

Avgiris Brothers proved that it is entitled to relief pursuant to Section 18-110 of the LLC Act. Avgiris Brothers held a majority of A-B Brothers' membership interests as of March 22, 2021.[97] Under the terms of the LLC Agreement, it therefore had the authority to remove the defendants as Managers, with or without cause. The removal of the defendants as Managers is valid.

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[96] *Bailey v. Harleysville Mut. Ins. Co.*, 491 A.2d 888, 890 (Pa. Super. Ct. 1985); *see State Hosp. for Crim. Insane v. Consol. Water Supply Co.*, 110 A. 281, 283 (Pa. 1920) (explaining that res judicata is "based on the principle that the general welfare requires litigation not to be interminable").

[97] *See supra* note 68 and accompanying text.

1. Avgiris Brothers Held the Majority Interest in A-B Brothers.

"[T]he parties to an LLC Agreement have substantial authority to shape their own affairs[.]"[98] A-B Brothers' LLC Agreement defines "Membership Interest" as "an interest in the Company owned by a Member" and provides that the "Membership Interest of each Member shall be expressed as a percentage interest and shall be the same proportion that such Member's total Capital Contribution bears to the total Capital Contributions of all Members as set forth on the Members Schedule."[99] The "Members Schedule" has "the meaning set forth in Section 3.01."[100]

Section 3.01 of the LLC Agreement provides that each member "is deemed to own Membership Interests in the amounts set forth opposite such Member's name and address on Schedule A attached [t]hereto."[101] Schedule A, in turn, provides for respective interests and contributions as of August 1, 2017.[102] Schedule A states

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[98] *Achaian, Inc. v. Leemon Fam. LLC*, 25 A.3d 800, 802-03 (Del. Ch. 2011); *see TravelCenters of Am., LLC v. Brog*, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008) ("Limited Liability Companies are creatures of contract, 'designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved.'" (quoting *In re Grupo Dos Chiles, LLC*, 2006 WL 668443, at *2 (Del. Ch. Mar. 10, 2006))).

[99] LLC Agreement § 1.01 (defining "Membership Interest"). "Capital Contribution" means "for any Member, the total amount of cash and cash equivalents and the Book Value of any property contributed to the Company by such Member." *Id.* (defining "Capital Contribution").

[100] *Id.* (defining "Members Schedule").

[101] LLC Agreement § 3.01.

[102] *Id.* at Schedule A.

that: Avgiris Brothers held a 65% membership interest and had made a $445,000 capital contribution; and that Theodoros and Savvas Bouikidis collectively held the remaining 35% membership interest and had made a $55,000 capital contribution.[103] The contract memorialized the parties' agreement that Avgiris Brothers would be the majority interest holder with an allotted 65% membership interest, with the defendants holding 35%.[104]

A 35% membership interest equated to a total capital contribution of $175,000. Because the defendants fell well short at a $55,000 capital contribution, Avgiris Brothers agreed on "day 1" to a 65%-35% split, with the defendants making up the shortfall through repayment of the $120,000 Note over five years.[105] That is, the defendants owned a full 35% membership interest pursuant to the terms of the LLC Agreement, with the only variable being whether a portion of that interest would be subject to foreclosure upon default of the Note.[106] Section 7 of the Pledge

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[103] *Id.*

[104] *See* T. Bouikidis Tr. 262-63.

[105] JX 7.

[106] *See* Pledge Agreement at 2-3; Note. The defendants attempted to argue that they were not in default on the Note because Dean Avgiris had agreed to pause their payment obligations while Chris was away. *See* Defs.' Post-trial Opening Br. 9; T. Bouikidis Tr. 281-82; S. Bouikidis Tr. 412-13. But that pause was not an indefinite waiver of the defendants' obligations under the Note and Pledge Agreement. *See* Savvas Tr. 382 ("Q: "But you agree that Dean Avgiris was not telling you that you never needed to make payments on the loan again is that right? A: Yeah, of course. Q: In fact, it was your understanding that once the agreed-upon $40,000 was paid back that it would be time to continue making the loan payments; is that right? A: Yes, of course.").

Agreement specifies that upon an uncured default, the defendants would only be entitled to retain the portion of the membership interest in A-B Brothers they had already paid for through monthly payments.[107]

The defendants' interest in A-B Brothers was therefore *capped* at 35% pursuant to the terms of the LLC Agreement.[108] There is no evidence to demonstrate that the parties agreed the defendants could ultimately own more than 35%.[109] Nothing in the LLC Agreement, Note, or Pledge Agreement provides for that outcome.

a. The LLC Agreement Is Effective and Binding.

The defendants assert that they are not bound by the LLC Agreement because it was executed before the certificate of formation for A-B Brothers was filed.[110]

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[107] Pledge Agreement ¶ 7.

[108] LLC Agreement at Schedule A; Pledge Agreement; Note; D. Avgiris Tr. 99 ("Q: If the Bouikidis brothers had paid off the entire amount of the loan, what would have been their capital interest - - or membership interest in the company? A: 35 percent.").

[109] The defendants argue that the parties' "course of dealing" supports a "rebalancing" of A-B Brothers member interest because the Avgiris family consistently tracked contributions made after the LLC Agreement's execution and adjusted the parties' capital contributions accordingly. Defs.' Post-trial Opening Br. 27 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997)). Not only are the terms of the Note, Pledge, and LLC Agreement unambiguous with regard to membership interest, but there is also no evidence to support the conclusion that tracking the parties' respective contributions would allow the Bouikidis brothers to increase their ownership beyond 35%. Instead, the defendants would receive membership interest capped at 35% commensurate with their net repayment of the Note. *See* D. Avgiris Tr. 99; Note.

[110] Defs.' Post-trial Opening Br. 25-26.

They further assert that there is "no evidence that A-B Brothers ever ratified" the LLC Agreement.[111] That argument belies the record and misconstrues Delaware law.

The execution of the LLC Agreement by A-B Brothers' members is evidence that the parties assented to and agreed to be bound by its terms.[112] A-B Brothers' signature on the LLC Agreement was not necessary to make the agreement binding. Section 101(9) of the LLC Act provides that "[a] limited liability company is bound by its limited liability company agreement whether or not the limited liability company executes the limited liability company agreement."[113] The record demonstrates that the parties understood and abided by the terms of the LLC Agreement.[114] Its effectiveness was never in doubt.

Furthermore, the date upon which A-B Brothers filed its certificate of formation with the Delaware Secretary of State is not determinative of when the LLC Agreement became effective. The LLC Act provides that a limited liability company agreement may be entered into *before* the filing of a certificate of formation

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[111] *Id.*

[112] *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999) (holding that a limited liability company was bound by the agreement defining its governance and operation even though the company did not itself execute the agreement); *see* LLC Agreement at 29.

[113] 6 *Del. C.* § 18-101(9).

[114] *E.g.*, LLC Agreement at Schedule A; PTO ¶ 17; S. Bouikidis Tr. 377 (discussing signing and executing the LLC Agreement).

and "may be made effective as of the effective time of such filing or at such other time or date as provided" in that agreement.[115] The defendants cite no authority supporting their argument to the contrary.

b. A Reallocation of Membership Interests Is Not Warranted.

The defendants also contend that they are entitled to a reallocation of the membership interests in A-B Brothers, such that Avgiris Brothers no longer holds a majority.[116] The LLC Agreement provides no support for that position. Section 3.02 states: "Any future Capital Contributions made by any Member shall only be made with the consent of the Managers and, in connection with an issuance of Membership Interests, made in compliance with Section 8.01."[117] There has never been a capital call on the members of A-B Brothers pursuant to Section 3 of the LLC Agreement.[118]

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[115] *See* 6 *Del. C.* § 18-201(d) ("A limited liability company agreement may be entered into either before, after or at the time of the filing of a certificate of formation and, whether entered into before, after or at the time of such filing, may be made effective as of the formation of the limited liability company or at such other time or date as provided in the limited liability company agreement.").

[116] Defs.' Opening Post-trial Br. 28 ("[T]he profit distributions to Avgiris and his misappropriations served to reduce Avgiris Brothers' ultimate contribution to the fit-out and other startup costs and concomitantly increase the Bouikidis Brothers' share of those costs."); Defs.' Answering Post-trial Br. 15 ("Regardless of the parties' intentions, this wrongful conduct entitles the Bouikidis Brothers to allocate the excess distributions to the payment of the Note and subsequently to their capital contributions."); S. Bouikidis Tr. 384.

[117] LLC Agreement § 3.02.

[118] T. Bouikidis Tr. 317-18; S. Bouikidis Tr. 389.

Nor have a majority of the entity's Managers ever consented to capital contributions beyond that initially invested when A-B Brothers was founded.[119]

Yet the defendants insist that the court must undertake a balancing of the parties' respective ownership interests based on a variety of factors. They first maintain that the defendants contributed more upfront capital than is reflected in the LLC Agreement.[120] The evidence, however, indicates that the defendants' initial contribution was roughly $3,000 more than the $55,000 reflected in Schedule A to the LLC Agreement. The spreadsheet maintained by Cathy detailed "the total contributions made on [the defendants'] behalf," including "monies that they expended to start up the business" totaling $58,166.59.[121]

The defendants next say that they were not appropriately compensated because they "conceived of and developed the concept and provided the industry expertise" for the restaurant.[122] It is unclear how the defendants intended to be compensated for intangibles such as prior experience in the restaurant industry. In any event, that argument is inconsistent with the bargain the parties struck in the

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[119] T. Bouikidis Tr. 317-318; S. Bouikidis Tr. 384-86.

[120] *See* Defs.' Post-trial Br. 29-30 (citing to JX 12) (asserting that the Bouikidis brothers "bore $114,303 of the fit-out and other start-up costs").

[121] Cathy Avgiris Tr. 173. The record supports the completeness of that spreadsheet. *See* D. Avgiris Tr. 69; S. Bouikidis Tr. 354-55.

[122] Defs.' Post-trial Opening Br. 29; *see, e.g.*, S. Bouikidis Tr. 345, 400; T. Bouikidis Tr. 321.

LLC Agreement. If the defendants wished to be compensated with a greater membership stake because of their prior experience in the restaurant industry, they should have negotiated for different terms.

The defendants further argue that Avgiris Brothers wrongfully "appropriate[ed] to itself disproportionate profit distributions and all of the profits since 2019."[123] But pursuant to the Pledge, distributions to the defendants were attributed to repayment of the Note. The Note was payable to Avgiris Brothers, meaning that the payments by the defendants were not additional capital contributions to A-B Brothers but reimbursements to Avgiris Brothers.[124] The defendants' dissatisfaction with that bargain does not extinguish the LLC Agreement's express terms.[125]

Finally, the defendants insist that Chris's improper withdrawals of company funds and charges of personal expenses to company credit cards were de facto distributions, 35% of which should be credited to the defendants.[126] As with their argument about the profit distributions, the suggestion that the misappropriation of

[123] Defs.' Post-trial Opening Br. 29.

[124] *See generally* Pledge Agreement; Note.

[125] *Arwood v. AW Site Servs., LLC*, 2022 WL 705841, at *29 (Del. Ch. Mar. 9, 2022) ("Delaware is more contractarian than most states, and our law respects contracting parties' right to enter into good and bad contracts. Our courts enforce[ ] both." (citations omitted)).

[126] *See* Defs.' Post-trial Opening Br. 29-30; T. Bouikidis Tr. 285-86, 335. This argument also assumes that Chris's actions can be imputed to Avgiris Brothers and treated as distributions. Whether that is a fair assumption is unbriefed and unproven.

funds alters the parties' membership interests is belied by the LLC Agreement's terms, which provide that the defendants have a 35% interest in A-B Brothers.

To the extent there is an equitable mechanism to recut the division of Membership Interests, the evidence does not support a reallocation that would reduce Avgiris Brothers' interest below a majority. The defendants insist that their share of startup and fit-out costs plus accredited Note payments (totaling $114,303), in addition to 35% of "admitted" improper credit card charges $126,435.39 (i.e., $44,252), provides that they made a capital contribution of at least $158,555 in the business.[127] That figure is still short of the $175,000 that equates to a 35% interest—not to mention at least $91,000 short of a $250,000 contribution that could equate to a 50% interest.[128]

The defendants argue that they should receive further credit for 35% of $623,076.33 "in additional charges and missing payments" that were "misappropriated."[129] That figure is based on (1) a series of credit card purchases through SquareUp and Venmo accounts (for example, charges from Lowe's, Gravity Hair Salon, Bala Motor Sports, Wawa, and 7-Eleven) totaling $23,490.75; (2) "an analysis of the restaurant's point of sale system" that "identified $352,527.21 in

[127] Defs.' Post-trial Opening Br. 29-30, 32.

[128] *See supra* notes 16-21 and accompanying text.

[129] Defs.' Post-trial Opening Br. 32.

unaccounted for cash payments to the restaurant," which the defendants say suggests further misuse of company funds; and (3) the fact that Chris withdrew amounts totaling $270,549.12 from the company's bank account.[130] According to the defendants, "the Bouikidis [b]rothers would jointly hold a majority interest if just $264,042 of the $623,076.33 in additional charges and missing payments were actually misappropriated."[131]

But there is no basis in the record to support a finding that the vast bulk of these charges reflect misappropriation. To start, I give the "point of sale" analysis no weight. It is based on a demonstrative exhibit unsupported by an audited report, independent analysis, or adequate backup documentation showing what the defendants purportedly analyzed.[132] Furthermore, the defendants' identification of $352,527.21 in unaccounted for cash payments and $270,549 of withdrawals from A-B Brothers' bank account does not mean the funds were stolen or put to improper

[130] *See* JX 20. The evidence also demonstrates that Cathy and Dean reviewed the charges and reimbursed A-B Brothers for improperly taken funds. *See* D. Avgiris Tr. 32, 48; Cathy Avgiris Tr. 197-98; JX 11.

[131] Defs.' Post-trial Opening Br. 32. 35% of $264,042 is $92,415.

[132] *Zutrau v. Jansing*, 2014 WL 3772859, at *30 (Del. Ch. July 31, 2014), *aff'd*, 123 A.3d 938 (Del. 2015) (holding that use of a "demonstrative exhibit . . . presented at trial" was not substantive evidence and is not sufficient to meet a party's burden of proof when not supported by "particularized testimony as to the contested charges or documentation to support the business purposes listed on the demonstrative").

uses.[133] That leaves—at most—$23,490.75, which comes nowhere close to an amount that could hypothetically support a finding that the defendants hold a majority of A-B Brothers' Membership Interests.[134]

2. Avgiris Brothers Properly Removed the Defendants as Managers.

The LLC Agreement provides that a removal of a Manager may be accomplished "with or without cause" by "Members holding a majority of the Membership Interests."[135] By written notice dated March 22, 2021, Avgiris Brothers—holding a 65% interest in A-B Brothers—removed Savvas and Theodoros as managers.[136] Specifically, the written consent stated: "On behalf of Avgiris Brothers, LLC, we, the majority shareholders of A-B Brothers, move to remove

[133] The defendants speculated at trial that certain cash shorts must have been improper because they "know how the business operates." T. Bouikidis Tr. 331. But the defendants admitted they had not worked at the Roxborough location of Yiro Yiro since the fall of 2018. *Id.* at 331; S. Bouikidis Tr. 376-77.

[134] Further, I am unable to conclude that the many charges reflected by that figure are wrongful. For example, these purportedly improper charges include four payments to CT Corporations Systems—AB Brothers' registered agent. *See* JX 13. The weight of the evidence indicates that Avgiris Brothers endeavored to investigate, identify, and reimburse all amounts that the defendants characterized as misappropriated. Cathy testified about the meticulous nature of her investigation into the charges. Cathy Avgiris Tr. 193-197. She, along with Dean, identified problematic charges, reached out to vendors, and reimbursed A-B Brothers. *See id.*; D. Avgiris Tr. 44-47.

[135] LLC Agreement 7.03(a).

[136] JX 32.

Theodoros Bouikidis and Savvas Bouikidis as Managers of A-B Brothers, LLC."[137] The technical propriety of the form of removal by written consent is undisputed.

* * *

In sum, the LLC Agreement and the record support a finding that Avgiris Brothers held a majority of A-B Brothers' Membership Interests at all relevant times. Avgiris Brothers therefore had the contractual right to remove the defendants from their positions as Managers of A-B Brothers. Avgiris Brothers exercised that right through the March 22, 2021 written consent. Accordingly, the defendants are no longer Managers of A-B Brothers.

C. The Defendants' Defenses Are Unsupported.

The defendants endeavor to attack the clear outcome of this litigation from a multitude of angles. Each attempt shares the same decisive flaw. Given the narrow nature of this statutory proceeding, my focus is necessarily on whether these defenses cast doubt on my determination that the defendants were removed as Managers of A-B Brothers.[138] None do. Rather, the defendants' list of grievances

[137] *Id.*

[138] *Genger v. TR Invs., LLC*, 26 A.3d 180, 199 (Del. 2011) ("A Section 225 proceeding is summary in character, and its scope is limited to determining those issues that pertain to the validity of actions to elect or remove a director or officer.").

about ways they believe the Avgiris family wronged them concern "collateral" matters that "must be raised in a [separate] plenary proceeding."[139]

For the sake of completeness, I briefly address the defendants' affirmative defenses concerning material breach of contract and equitable principles.[140]

1. The Material Breach Defense

The defendants argue that Avgiris Brothers materially breached the LLC Agreement such that it is foreclosed from enforcing its terms.[141] They cite no authority in support of the proposition that a prior breach of an LLC agreement prevents the majority holder from exercising its contractual right to remove managers. They point only to the general proposition that a "substantial [] breach" going "to the substance of the contract" excuses performance.[142]

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[139] *Id.*; *see also Fine v. Clune*, C.A. No. 3547-VCP, at 20-21 (Del. Ch. Nov. 12, 2008) (TRANSCRIPT).

[140] The affirmative defenses pleaded in the defendants' answer but not briefed after trial are waived. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."). Those waived defenses include that a prior agreement to split membership interests 50/50 existed, a failure of conditions precedent, and equitable estoppel. *See* Dkt. 36.

[141] Defs.' Post-trial Opening Br. 33-34.

[142] *See DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005).

The defendants bear the burden of proving the existence of a prior material breach.[143] They did not meet their burden regarding any of the "numerous breaches of the LLC Agreement" complained of.[144]

The defendants focus primarily on a purported breach of Section 7.01 of the LLC Agreement, which gives Managers the authority "to carry out any and all of the objectives and purposes of the Company."[145] They argue that this broad authorizing provision imposes an obligation to achieve those objectives and purposes.[146] They say that provision was breached by Chris's misappropriation of "over $800,000 from A-B Brothers."[147] But the record does not support that contention for the reasons previously discussed with regard to the defendants' reallocation theory.[148]

The defendants further aver that the implied covenant of good faith and fair dealing that inheres in Section 7.01 was breached insofar as Avgiris Brothers failed

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[143] *See Zimmerman v. Crothall*, 62 A.3d 676, 691 (Del. Ch. 2013).

[144] Defs.' Post-trial Opening Br. 34. I address only on the specific alleged breaches included in the defendants' post-trial briefing.

[145] LLC Agreement § 7.01.

[146] Defs.' Post-trial Opening Br. 34.

[147] *Id.*

[148] *See supra* note 119 and accompanying text; *see also* D. Avgiris Tr. 32, 48; Cathy Avgiris Tr. 197-98; JX 11. The defendants also argue that this provision was breached by Avgiris Brothers "grossly mismanaging" the restaurant because certain health code violations occurred. Defs.' Post-trial Opening Br. 35. The documents cited to for health code violations occurred in September and November 2021. *See* JX 37; JX 38; JX 40. Removal of the defendants as Managers occurred on March 22, 2021. These violations could not support a prior material breach theory given they occurred months after the removal.

to achieve the business purposes for which the A-B Brothers was created.[149] That argument is untethered from the focus of this proceeding.[150] To the extent that it is a maladroit attempt to implicate Avgiris Brothers' exercise of its rights to remove Managers under the LLC Agreement, it still fails.[151] The defendants have not identified a gap in the LLC Agreement's removal provision.[152]

The defendants point to additional provisions of the LLC Agreement they say were breached:

- Section 7.03, which requires that "[t]he funds of the Company shall not be comingled with the funds of any other person";
- Section 10.05, which requires Managers to cause to be delivered to each member "IRS Schedule K-1 to Form 1065 and such other information with respect to the Company as may be necessary for the preparation of such" member's taxes;
- Section 10.06, which requires that "[t]he funds of the Company shall not be commingled with the funds of any other Person."[153]

[149] *See* Defs.' Post-trial Opening Br. 13, 34.

[150] *See supra* note 142.

[151] To be clear, this argument was not advanced in the defendants' post-trial briefing.

[152] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (explaining that the implied covenant "cannot be used to circumvent the parties' bargain, or to create a 'free-floating duty . . . unattached to the underlying legal documents'" (quoting *Glenfed Fin. Corp., Com. Fin. Div. v. Penick Corp.*, 647 A.2d 852, 858 (N.J. Super. Ct. App. Div. 1994))); *DG BF, LLC v. Ray*, 2021 WL 776742, at *15-16 (Del. Ch. Mar. 1, 2021) ("[P]arties may not invoke the implied covenant with respect to 'conduct authorized by the terms of the agreement.'" (quoting *Dunlap*, 878 A.2d at 441)).

[153] LLC Agreement §§ 7.03, 10.05, 10.06.

Setting aside whether these provisions were breached in the first place, none would support a finding of a material breach of the LLC Agreement. A material breach under Delaware law is one which "touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract."[154] These provisions do not.

2. The "Wrongful Conduct" Defense

The defendants next argue that this court should look past the plaintiff's technical compliance with the LLC Agreement and preclude Avgiris Brothers from obtaining relief for equitable reasons.[155] Their arguments invoke both the equitable principles articulated in *Schnell v. Chris-Craft Industries* and the doctrine of unclean hands.[156] These defenses, again, do not bear on the outcome of this proceeding: that the defendants were validly removed as Managers of A-B Brothers.

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[154] *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *98 (Del. Ch. Nov. 30, 2020), *aff'd,* 268 A.3d 198 (Del. 2021); *see Murphy Marine Servs. of Delaware, Inc. v. GT USA Wilmington, LLC*, 2022 WL 4296495, at *15 (Del. Ch. Sept. 19, 2022).

[155] Defs.' Post-trial Opening Br. 36-42.

[156] *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("[I]nequitable action does not become permissible simply because it is legally possible."); *see Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 80-81 (Del. Ch. 2008) (explaining that the equitable doctrine of unclean hands "provides that 'a litigant who engages in reprehensible conduct in relation to the matter in controversy . . . forfeits his right to have the court hear his claim'" (quoting *Nakahara v. NS 1991 Am. Tr.*, 739 A.2d 770, 791-92 (Del. Ch. 1998))). The defendants' arguments about these (and potentially other vaguely discussed) notions of equity overlap.

This court has considered "cognizable allegations of fraud, deceit, breach of contract, breach of fiduciary duty, and other claims that 'if meritorious, would help the court decide the proper composition of the corporation's board or management team'" in the context of a Section 18-110 proceeding (or its corporate analog).[157] Here, however, a link between the so-called inequitable conduct the defendants complain of and the proper identities of A-B Brothers' Managers is missing. None of the defendants' many quarrels with the Avgiris family—about the misuse of funds, a plan to "squeeze out" the defendants,[158] customer goodwill, and ceased distributions—concern "the validity of actions to elect or remove a director or officer."[159] To wade into these personal disputes would be contrary to the *in rem*

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[157] *DG BF*, 2021 WL 77642, at *26 (considering, at the pleading stage, allegations of misconduct in a scheme to remove a manager that included trickery regarding the execution of written consents that removed the manager); *see also Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 96-97 (Del. 2021) (explaining that Delaware courts "have used their equitable powers on numerous occasions to invalidate otherwise lawful board actions tainted by inequitable deception").

[158] The defendants say that their removal as Managers was part of a "squeeze out" plan that amounts to a breach of fiduciary duty by the plaintiff. Defs.' Post-trial Opening Br. 39-40. But the LLC Agreement waived all fiduciary duties. LLC Agreement § 9.02(a) ("[E]ach of the Members and the Company hereby waives any and all fiduciary duties that, absent such waiver, may be implied by Applicable Law, and in doing so, acknowledges and agrees that the duties and obligation of each Covered Person to each other and to the Company are only as expressly set forth in this Agreement."); *see* 6 *Del. C.* § 18-1101(c). Moreover, this argument finds no support in the record.

[159] *Genger*, 26 A.3d at 199; *see also Kahn Bros. & Co., Inc. Profit Sharing Plan and Tr. v. Fischbach Corp.*, 1988 WL 122517, at *5 (Del. Ch. Nov. 15, 1998) (explaining that "it has long been the rule that wrongs alleged perpetrated by directors will not be adjudicated" in a Section 225 action unless they are "necessary for decision of" the question of "whether defendants validly hold office").

nature of this proceeding, "where the 'defendants' are before the court, not individually, but rather, as respondents being invited to litigate their claims to the *res* (here, the disputed corporate office)."[160]

The only issue raised by the defendants that is ostensibly relevant to the scope of this Section 18-110 action concerns whether the removal was retaliatory.[161] The defendants point out that the March 22 written consent was executed "within weeks" of the Philadelphia court's rejection of Avgiris Brothers' motion to reconsider its denial of their motion to dismiss and on the same day that Avgiris Brothers filed counterclaims in the Pennsylvania Action seeking to confirm the removal.[162] On these facts, the mere circumstance that the written consent came during litigation or that it prompted a request for judicial intervention does not call into question its validity.[163]

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[160] *Genger*, 26 A.3d at 199.

[161] *See* Defs.' Post-trial Opening Br. 7.

[162] *See id*. at 38-40; JX 33 (reflecting certification of service on Mar. 22, 2021); JX 36 (denying Avgiris Brothers' motion for reconsideration on March 3, 2021).

[163] The defendants also twist Cathy's testimony that she was unwilling to abandon her son during a challenging time in his life (as she believed the Bouikidises had done), calling that testimony a "confession." Defs.' Post-trial Opening Br. 38 (citing Cathy Avgiris Tr. 193). This argument is baseless. The testimony cited concerns her discovery of certain improper charges by Chris—not the removal of the Bouikidis brothers. The absurdity of the defendants' position is underscored by the fact that, at another point in their brief, they accuse Cathy of "orchestrat[ing]" a plan "to squeeze [] out" the defendants "in retaliation for seeking a buyout." Defs.' Post-trial Opening Br. 13. But the record demonstrates that Cathy endeavored to work with the defendants on their buyout demand. *See supra* notes 55-59 and accompanying text. There is no evidence whatsoever indicating that Cathy

Simply put, there is no "immediate and necessary" relation between the "inequitable conduct" complained of and the Section 18-110 claim on which Avgiris Brothers seek relief.[164] The defendants would have been wise to limit their pursuit of these matters to the plenary lawsuits they are pressing.[165] To address them further here would needlessly clutter what should have been a focused proceeding.[166]

D. Relief Compelling the Return of Company Property is Not Warranted.

In addition to declaratory relief, Avgiris Brothers asks that I order the defendants to return company property, including passwords and surveillance equipment, as the defendants are no longer Managers.[167] They cite no precedent awarding such relief in a Section 18-110 proceeding. It is unsupported by the statute and the terms of the LLC Agreement.

Avgiris set out to punish the Bouikidises or caused Avgiris Brothers to seize the defendants' Membership Interests.

[164] *Cf. Lynch v. Gonzalez*, 2020 WL 4381604, at *44 (Del. Ch. July 31, 2020), *aff'd*, 253 A.3d 556 (Del. 2021) (addressing an unclean hands affirmative defense that was related directly to the ownership and management dispute the court was resolving).

[165] I note that, in addition to the Pennsylvania Action, the defendants have filed a plenary action in this court that raises many of the same allegations they have advanced in this proceeding as affirmative defenses. *See Theodoros Bouikidis v. Avgiris Brothers, LLC*, C.A. No. 2022-0813-LWW (Del. Ch.) (Dkt. 1).

[166] *Kahn Bros. & Co.*, 1998 WL 122517, at *5 (describing the goal that a Section 225 "form of action . . . be as uncluttered as possible so that prompt resolution of the vital question [of] whether defendants validly hold office may be had").

[167] Pl.'s Post-trial Opening Br. 50.

Section 18-110 grants this court jurisdiction "to determine who validly holds office as a manager of a Delaware limited liability company."[168] It does not address the retention of property by removed managers or dictate what is required in that regard of managers who have been properly removed. It does not contemplate that the court will bar former managers from the premises of company property. That ancillary relief is beyond the scope of this particular proceeding.

Avgiris Brothers argues, in the alternative, that the LLC Agreement compels the defendants to return the company property that they retain. As support, it points to Section 7.01, which provides that "[t]he business and affairs of the Company shall be managed, operated and controlled by . . . the Managers."[169] But nothing in that provision requires removed Managers to return property. Moreover, the defendants remain members of A-B Brothers, who are entitled to "have access to and become acquainted with trade secrets, proprietary information and confidential information belonging to the Company and its affiliates."[170]

Accordingly, I decline to order the return of property requested by Avgiris Brothers.

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[168] *Feeley v. NHAOCG, LLC*, 2012 WL 966944, at *5 (Del. Ch. Mar. 20, 2012).

[169] LLC Agreement § 7.01.

[170] *Id.* § 3.02.

III. CONCLUSION

For the reasons stated in this post-trial opinion, Avgiris Brothers is entitled to judgment in its favor. Avgiris Brothers holds a majority of the Membership Interests in A-B Brothers. Theodoros and Savvas Bouikidis were removed as Managers of A-B Brothers effective as of March 22, 2021, making Chris and Constantine Avgiris the sole Managers of A-B Brothers. The parties are directed to confer on and submit a proposed form of final judgment within ten days.