STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 8617
JAMES H. Q. DAVIS TRUST and WILLIAM R. Q. DAVIS TRUST, Plaintiffs, v. JHD PROPERTIES, LLC, BERRY HILL PROPERTIES, LLC, and CHARLES B. Q. DAVIS TRUST, Defendants.	**ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

1. **THIS MATTER** is before the Court upon Intervenor-Defendant Charles B. Q. Davis Trust's (the "Charles Trust" or "Defendant") Motion for Summary Judgment[1] (the "Charles Motion") and Plaintiffs James H. Q. Davis Trust (the "Jim Trust") and William R. Q. Davis Trust's (the "Tad Trust," collectively, "Plaintiffs") Motion for Summary Judgment[2] (the "Jim Motion"; together with the Charles Motion, the "Motions").

2. After considering the Motions, the parties' briefs in support of and in opposition to the Motions, the relevant record, and the arguments of counsel at the hearing held on the Motions, the Court **GRANTS** Plaintiffs' Motion, **DENIES** Defendant's Motion, and **ENTERS** summary judgment for Plaintiffs on their dissolution claim.

[1] (Charles B. Q. Davis Trust's Mot. Summ. J [hereinafter "Def.'s Mot. Summ. J"], ECF No. 47.)

[2] (Pls.' Mot. Summ. J., ECF No. 45.)

Everett Gaskins Hancock LLP, by E.D. Gaskins, Katherine A. King, and James Hash, for Plaintiffs James H. Q. Davis Trust and William R. Q. Davis Trust.

Meynardie & Nanney, PLLC, by Joseph H. Nanney, Jr, for Intervenor-Defendant Charles B. Q. Davis Trust.

No counsel appeared for Defendants JHD Properties, LLC and Berry Hill Properties, LLC.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

3. While the Court does not make findings of fact on a motion for summary judgment, "it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment." *Collier v. Collier*, 204 N.C. App. 160, 161–62 (2010) (citation and quotation marks omitted). Accordingly, the following background, drawn from the undisputed evidence submitted by the parties, is intended only to provide context for the Court's analysis and ruling and not to resolve issues of material fact.

4. Many of the facts alleged in Plaintiffs' Complaint have now been established by the undisputed evidence of record. As the Court noted in its earlier Order denying Defendant's Motion to Dismiss,[3] this action arises from disagreements over estate planning vehicles established by James H. Davis, M.D. ("Dr. Davis"). In 2001 and

[3] (*See James H. Q. Davis Tr. v. JHD Props., LLC*, 2022 NCBC LEXIS 153, at *2 (N.C. Super. Ct. Dec. 9, 2022); Order and Op. Def. Charles B. Q. Davis Trust's Mot. Dismiss, ECF No. 28.)

2002, Dr. Davis set up two limited liability companies, JHD Properties, LLC ("JHD") and Berry Hill Properties, LLC ("Berry Hill"; together with JHD, the "LLCs").[4] Dr. Davis also established four trusts, one for each of his sons, James H. Q. Davis ("Jim"), William R. Q. Davis ("Tad"), Jonathon O. Q. Davis ("Jon"), and Charles B. Q. Davis ("Charles").[5] Each son is the sole beneficiary of the trust bearing his name.[6] The four trusts are the only members of the LLCs, and each trust holds an equal, 25% equity interest in both LLCs.[7] Charles and Jim are the only managers of the LLCs; Tad and Jon only have a membership interest with no management authority.[8]

5. The LLCs own four adjacent tracts of land in Wake County, North Carolina, which comprise approximately 68 acres (the "Property").[9] Except for one abandoned structure, the Property is undeveloped.[10]

6. Under the LLCs' operating agreements (the "Operating Agreements"), which are substantially identical, neither company may take binding action without

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[4] (Aff. Charles B. Q. Davis, dated July 17, 2023, at ¶ 5, [hereinafter "Charles Aff."], ECF No. 49; Aff. James H. Q. Davis, dated July 14, 2023, at ¶2, [hereinafter "Jim Aff."], ECF No. 46.4.)

[5] (Jim Aff. ¶ 2; Charles Aff. ¶ 3.)

[6] (Charles Aff., ¶¶ 2–4.)

[7] (Charles Aff. ¶ 3.)

[8] (Jim Aff. ¶ 4; Charles Aff. ¶ 6.)

[9] (Charles Aff. ¶ 8; Jim Aff. ¶ 3.)

[10] (Charles Aff. ¶8; Jim Aff. ¶ 3.)

the consent of "a [m]ajority of the [m]anagers."[11] Because the LLCs have two managers, this provision in practice requires unanimous agreement between Charles and Jim to take binding action.[12]

7. The Operating Agreements provide that "[t]he purpose and business of [the LLCs] shall be to engage in the purchase, development, rental, ownership, and sale of real property and in any other lawful business for which the limited liability companies may be organized under the Act."[13] Charles and Jim have largely cooperated on matters necessary for the passive maintenance of the LLCs since their formation, including making tax payments, preparing Secretary of State filings, financing the LLCs, and selecting and managing the LLCs' accountant.[14]

8. The LLCs have devoted part of the Property to timber in order to enjoy tax benefits available to timber farms.[15] The LLCs have made only one timber sale, however—in 2004—which was before Dr. Davis's death.[16] Berry Hill was subject to

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[11] (Compl. Ex. 1, Operating Agreement of JHD Properties, LLC, Art. 1.5, Ex. 2, Operating Agreement of Berry Hill Properties, LLC, Art. 1.5 [hereinafter "Operating Agreements"], ECF No. 3.)

[12] "Except as otherwise may be expressly provided . . . all decisions with respect to the management of the business and affairs of the [LLCs] shall be made by action of a Majority of the Managers[.]" (Operating Agreements, Art. 3.1.)

[13] (*See* Operating Agreements, Art. 1.5(a).)

[14] (Jim Aff. ¶4; Charles Aff. ¶ 16; Pls.' Mem. Supp. Mot. Sum. J. Ex. 3, Dep. James H. Q. Davis, dated June 13, 2023, at 55:22–56:4 [hereinafter "Jim Dep."], ECF No. 46.3.)

[15] (Charles Aff. ¶ 9; Jim Dep. 52:4–52:19; Jim Aff. ¶ 3.)

[16] (Jim Aff. ¶¶ 4, 5; Compl. ¶ 18; Answer Defendant-Intervenor Charles B. Q. Davis Trust ¶ 18 [hereinafter "Answer"], ECF No. 29.)

a Forestry Management Plan, but that Plan expired in March 2022.[17] There is no evidence that JHD was ever subject to a Forestry Management Plan. Although Charles and Jim both testified at their depositions that they would be willing to hire a forestry manager and harvest timber on the Property, there is no evidence in the record to suggest that either manager has attempted to reach agreement with the other to hire a forester,[18] and there is no other evidence that the LLCs intend to engage in timber harvesting or sale in the future.[19]

9. In 2016, a small portion of the Property was taken by eminent domain, resulting in the LLCs' receipt of $129,866.67 in proceeds.[20] Other than the LLCs' receipt of these funds and the timber sale in 2004, the LLCs have produced no income since their formation.[21]

10. Beginning in 2018 or 2019, Charles and Jim have disagreed about the use or disposition of the Property.[22] Jim, supported by Tad and Jon, has favored a sale of the Property.[23] Charles has opposed a sale.[24]

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[17] (Charles Aff. ¶ 11; Charles Aff. Ex. A, ECF No. 49.1; Jim Dep. 52:24–53:2.)

[18] (Charles Aff. ¶ 14; Jim Dep. 58:24–59:2.)

[19] (Charles Aff. ¶ 7; Jim Aff. ¶ 5.)

[20] (Charles Aff. ¶ 13.)

[21] (Jim Aff. ¶ 5.)

[22] (Charles Aff. ¶ 25; Jim Aff. ¶ 4.)

[23] (Jim Aff. ¶ 4; Aff. William R. Q. Davis, dated July 13, 2023, at ¶ 3, ECF No. 46.5; Aff. Jonathan O. Q. Davis, dated July 13, 2023, at ¶ 3, ECF No. 46.6.)

[24] (Jim Aff. ¶ 5; Charles Aff. ¶ 19.)

11. In April 2020, Charles sent Jim an e-mail suggesting that they create a plan for the LLCs to develop the Property.[25] Charles and Jim exchanged e-mails discussing proposals for the next two months, but they ultimately could not agree.[26]

12. Beginning in August 2020, Charles and Jim again exchanged numerous e-mails, this time concerning Jim's interest in listing and selling the Property, and Charles's interest in potentially buying the Property.[27] These e-mails culminated in Charles presenting to Jim in April 2022 a non-binding term sheet by which Charles offered to negotiate with Jim for Charles's purchase of the Property ("the Original Term Sheet").[28] Jim responded by advising Charles that the term sheet was unsatisfactory, and Charles and Jim were unable to reach an agreement to list or sell the Property, either to Charles or to anyone else.[29]

13. In May 2022, Jim sought Charles's permission to negotiate a contract with a developer who had submitted a non-binding letter of intent to the LLCs to purchase a majority of the Property (the "Letter of Intent").[30] Charles responded to Jim's request on 14 June 2022 with a revised term sheet (the "Revised Term Sheet") but without authorizing Jim to negotiate with the developer.[31] Charles did not act on the

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[25] (Jim. Dep. Ex. 6, 8–9, ECF No. 50.5.)

[26] (Jim. Dep. Ex. 6, 1–10.)

[27] (Pls.' Br. Opp. Def.'s Mot. Summ. J., Ex. R-2, ECF No. 52.2.)

[28] (Charles Aff. ¶ 28; Jim Aff. ¶ 8.)

[29] (Charles Aff. ¶ 28; Jim Aff. ¶¶ 7, 8.)

[30] (Jim Aff. ¶ 8; Charles Aff. ¶ 29.)

[31] (Jim Aff. ¶ 9; Charles Aff. ¶¶ 29, 30.)

Letter of Intent, and the Letter expired by its own terms on 30 June 2022.[32] Jim did not accept Charles's Revised Term Sheet[33] and instead again asked Charles for permission to negotiate with the developer, which he did not receive.[34] With Charles and Jim at loggerheads over the proper disposition or use of the Property for at least the past three years, no sale, development, or active use of the Property has occurred,[35] leading Plaintiffs to initiate this litigation.

B. Procedural History

14. Plaintiffs filed this action against JHD and Berry Hill on 12 July 2022, seeking judicial dissolution of the LLCs under N.C.G.S. § 57D-6-02(2)(i).[36] Plaintiffs allege that Charles and Jim's disagreement over the disposition and use of the Property has rendered it "impossible and impracticable" to conduct the business of the LLCs, and that the LLCs should therefore be judicially dissolved.[37]

15. The Charles Trust filed an unopposed Motion to Intervene as a nominal defendant in this action with the Wake County Clerk of Superior Court on 11 August 2022,[38] which it amended and re-filed on the Business Court docket on 18 August

[32] (Charles Aff. ¶ 29; Jim Aff. ¶ 8.)

[33] (Charles Aff. ¶¶ 29, 32; Jim Aff. ¶¶ 9, 10.)

[35] (Charles Aff. ¶¶ 33, 34; Jim Aff. ¶¶ 12, 13.)

[36] (Compl. ¶¶ 28–32, ECF No. 3.)

[37] (Compl. ¶¶ 28–32.)

[38] (Mot. Intervene, ECF No. 10.)

2022.[39] The Court granted the Amended Motion to Intervene on 19 August 2022.[40] Since that time, Plaintiffs and the Charles Trust have been the active opposing parties in this litigation. The LLCs have not retained counsel and thus have not appeared at any time.[41] As noted, the Court denied Defendant's Motion to Dismiss on 9 December 2022.

16. Plaintiffs and Defendant filed the current Motions on 17 July 2023.[42] The Court held a hearing on the Motions on 7 September 2023, at which Plaintiffs and Defendant were represented by counsel (the "Hearing"). The Motion has been fully briefed and is now ripe for decision.

II.

LEGAL STANDARD

17. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). An issue is genuine if it is

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[39] (Am. Mot. Intervene, ECF No. 7.)

[40] (Order Granting Am. Mot. Intervene, ECF No. 11.)

[41] The Court and the parties agree that Charles and Jim, as the LLCs' managers, are the primary disputants in this action. (*See* Am. Mot. Intervene ¶¶ 5–8.) Plaintiffs bring this action to remedy alleged deadlock in the affairs of the LLCs brought about by disagreement between Charles and Jim, which, among other things, has prevented the LLCs from agreeing to retain counsel to defend this litigation. Without counsel, the LLCs cannot appear. *See LexisNexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209 (2002) (holding that, subject to limited exceptions not applicable here, "in North Carolina a [business entity] must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*[.]").

[42] (Pls.' Mot. Summ. J.; Def.'s Mot. Summ. J.)

"supported by substantial evidence," and "an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (cleaned up).

18. "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000). The responding party may not "rest upon the mere allegations or denials" in the pleadings, and its response "must set forth specific facts showing that there is a genuine issue for trial." N.C. R. Civ. P. 56(e).

19. When considering a motion for summary judgment, evidence must be viewed in the light most favorable to the non-moving party. *Pennington*, 356 N.C. at 579.

III.

ANALYSIS

20. Plaintiffs' sole claim in this action is that operating the LLCs is "not practicable" within the meaning of N.C.G.S. § 57D-6-02(2)(i) and that the LLCs

should therefore be judicially dissolved.[43] Plaintiffs and Defendant both seek summary judgment as to Plaintiffs' claim.

21. Plaintiffs argue that the undisputed facts show that conducting the business of the LLCs is "not practicable" because Charles and Jim are deadlocked over the disposition or use of the Property, the Operating Agreements do not provide a mechanism to break the managers' deadlock, and the value of the Property cannot be realized unless the managers agree to develop or sell the Property.[44] Plaintiffs further argue that Charles's conduct has eroded the trust between the two managers such that judicial dissolution is the only way to overcome the deadlock.[45]

22. Defendant contends in opposition that no deadlock exists because Charles and Jim have agreed to maintain the LLCs' existence by paying taxes and filing documents with the Secretary of State in furtherance of the LLCs' timber and real estate holding businesses[46] and because all four brothers agreed in a 6 May 2020 e-mail not to pursue a sale of the Property at that time.[47] Defendant further contends that deadlock does not exist because Charles and Jim have displayed an attitude of

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[43] (*See* Compl.)

[44] (*See* Pls.' Mem. Supp. Mot. Summ. J. 7, 8, ECF No. 46.)

[45] (*See* Pls.' Mem. Supp. Mot. Summ. J. 11; Jim Aff. ¶¶ 10–13.)

[46] (*See* Charles B. Q. Davis Trust's Br. Supp. Its Mot. Summ. J. 10 [hereinafter "Def.'s Br. Supp. Mot. Summ. J."], ECF No. 48.)

[47] (*See* Charles Aff. ¶ 27; Jim Dep. 70:07–70:11.)

cooperation in their e-mail exchanges, but in which they express their persistent disagreement concerning the disposition or use of the Property.[48]

23. Under the North Carolina Limited Liability Company Act (the "Act"), judicial dissolution of a limited liability company is appropriate where "it is established that [ ] it is not practicable to conduct the LLC's business in conformance with the operating agreement and [Chapter 57D.]" N.C.G.S. § 57D-6-02(2). The Court considered the meaning of this statutory section at length in its ruling on the Motion to Dismiss and incorporates that discussion here,[49] including the Court's conclusion that " 'not practicable' in section 57D-06-02(2)(i) . . . means 'unfeasible' and does not mean 'impossible.' " *James H. Q. Davis Tr. v. JHD Props., LLC*, 2022 NCBC LEXIS 153, at *13 (N.C. Super. Ct. Dec. 9, 2022). The Court thus applies this understanding in determining whether the undisputed evidence compels a factfinder to conclude that "it is not practicable to conduct the LLC[s'] business in conformance with the operating agreement and [Chapter 57D]" under section 57D-6-02(2)(i). The Court concludes that it does.

24. As an initial matter, the Operating Agreements provide that the purpose of the LLCs is "the purchase, development, rental, ownership, and sale of real property and in any other lawful business."[50] That the Operating Agreements include active

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[48] (*See* Charles Aff. Ex. G, 1, ECF No. 49.7; Charles Aff. Ex. F, ECF No. 49.6; Charles Aff. Ex. C, 27–28, ECF No. 49.3; Jim Dep. 21:24–22:05; Charles Aff. ¶ 24; *see also* Def.'s Br. Supp. Mot. Summ. J. 19.)

[49] *See Davis Tr.*, 2022 NCBC LEXIS 153, at *7–14.

[50] (Operating Agreements, Art. 1.5(a).)

uses of land, like development, rental, and sale, shows that the Property was intended to be used or sold to maximize its value. Indeed, it is evident from Charles's and Jim's dogged pursuit of their separate preferred uses or dispositions of the Property that they recognize this expectation of active use.

25. The Operating Agreements require Charles's and Jim's agreement for either of the LLCs to take binding action, and the undisputed evidence shows that Charles and Jim have not been able to reach agreement to permit the LLCs to engage in any economic activity for at least the last three years. The evidence Defendant relies on—e-mails exchanged proposing pathways forward with neither manager adopting the other's plans—only strengthens the conclusion that Charles and Jim are deadlocked over whether to develop or sell the Property. That the communications between the managers are cordial and cooperative in tone, while laudable, is not determinative.[51] More significantly, the communications show that the LLCs' managers have failed to reach any concrete agreement for the disposition or use of the Property since at least early 2020 with no reasonable prospect that they will reach agreement in the future.[52]

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[51] This Court noted in the Order and Opinion on Defendant's Motion to Dismiss that in *Chisum v. Campagna*, the Supreme Court of North Carolina affirmed dissolution of a limited liability company, noting in particular that the trial court observed an extraordinary level of hostility and distrust between the company's managers. *Davis Tr.*, 2022 NCBC LEXIS 153, at *10–11. Such "acrimony and distrust" between managers supports a determination that a limited liability company should be dissolved, but it is not a *necessary* condition of managerial deadlock.

[52] The managers' deadlock is made all the more apparent by Charles's view that neither he nor Jim "has any obligation to consider or approve a sale of the [Property]." (*See* Aff. Charles B. Q. Davis Supp. Mot. Dismiss ¶ 30, ECF No. 22; Jim Aff. ¶11.) The Court notes that Charles's compliance with his fiduciary duties as a manager of the LLCs has not been placed at issue in this litigation.

26. Similarly, the fact that over three years ago the four brothers agreed not to sell the Property does not refute the evidence of deadlock. The question is not whether the managers are capable of agreement but whether managerial deadlock is preventing the conduct of the LLCs' businesses. Here, the undisputed record shows that Charles and Jim's deadlock is doing precisely that.

27. In addition, Charles and Jim's agreement to maintain the LLCs' existence and their willingness—but not agreement—to hire a forestry manager[53] do not permit a conclusion that the managers are not deadlocked and are successfully operating a timber business or a real estate holding company, nor do they preclude a conclusion that the managers' deadlock is preventing the LLCs from being operated in accordance with the Operating Agreements and Chapter 57D. Indeed, as one federal court concluded long ago under a different statute but on facts similar to those here:

> [T]he defendant in error and its predecessor in interest owned and held this tract of timber land as their only asset. During that period they made no use of the land, added nothing to it, took nothing from it, engaged in only such narrow activities as are incident to the ownership of property, and it would be going very far to say that such corporations are carrying on or doing business within the meaning of a revenue law.

United States v. Hotchkiss Redwood Co., 25 F.2d 958, 959 (9th Cir. 1928); *see also, e.g.*, *Lane Timber Co. v. Hynson*, 4 F.2d 666, 666 (5th Cir. 1925) (noting under Revenue Acts that "[o]wning land is not doing business, nor is paying taxes"); *Pittsburgh, Cincinnati, Chi. & St. Louis R.R. Co. v. United States*, 74 F. Supp. 558, 567 (Ct. Cl. 1947) (noting under Revenue Act that a party was not "doing business . . . if its activities are limited to owning and holding property").

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[53] (*See* Def.'s Br. Supp. Mot. Summ. J. 24; Jim Dep. 58:24–59:02.)

28. In short, the core factual allegations of Plaintiffs' Complaint are undisputed and show that the managers cannot agree on the use or disposition of the Property and have not been able to reach agreement for at least three years, there is no mechanism in the Operating Agreements to break the deadlock, the LLCs have not conducted any economically useful activity since 2004, and there is no way for the LLCs to conduct any business, realize any profit, or dispose of any assets so long as the unbreakable deadlock persists. The Court found that Plaintiffs' allegations to this effect were "sufficient to show that it is not practicable to conduct the LLCs' business in conformance with the Operating Agreements and Chapter 57D" in denying Defendant's Motion to Dismiss, *Davis Tr.*, 2022 NCBC LEXIS 153, at *14, and the Court reaches this same conclusion based on the undisputed evidence, cited above, that now establishes Plaintiffs' allegations as true.

29. As it did in denying Defendant's Motion to Dismiss, the Court draws support for this conclusion, in the absence of helpful guidance from the North Carolina appellate courts, from courts in other states and jurisdictions applying the same, or a nearly identical, "not practicable" standard used in this State. *Id.* at *14–15 (collecting cases); *see also, e.g.*, *In re GR BURGR, LLC*, 2017 Del. Ch. LEXIS 156, at *17 (Del. Ch. Aug. 25, 2017) ("Where there are two 50% owners of a company, an unbreakable deadlock can form a basis for dissolution even if the company is still engaged in marginal operations"); *Vila v. BVWebTies LLC*, 2010 Del. Ch. LEXIS 202, at *22, 54 (Del. Ch. July 6, 2010) (holding dissolution warranted where the managers were deadlocked over "serious managerial issues" and the operating agreement

provided no method to break the deadlock); *Kirksey v. Grohmann*, 754 N.W.2d 825, 831 (S.D. 2008) (holding dissolution appropriate where two coequal managers were in an "impenetrable deadlock"); *Haley v. Talcott*, 864 A.2d 86, 97 (Del. Ch. Dec. 16, 2004) (holding that dissolution was appropriate where there was "strident disagreement" between the parties over the sole asset of an LLC).[54]

IV.

CONCLUSION

30. **WHEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** Plaintiffs' Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and **ENTERS** summary judgment for Plaintiffs on their dissolution claim. The Court will, by separate order, notice a conference with counsel to discuss the process for dissolution of JHD and Berry Hill, as well as the parties' rights under N.C.G.S. § 57D-6-03(d), the entry of a decree of judicial dissolution under N.C.G.S. § 57D-6-05, and the process for the winding up of JHD and Berry Hill under N.C.G.S. § 57D-6-07.

SO ORDERED, this the 14th day of November, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

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[54] Defendant also argued at the Hearing that dissolution under Chapter 57D is not an appropriate remedy because the terms of the Operating Agreements set forth an exclusive list of the ways the LLCs may be dissolved. The Court disagrees because Article 10.1(e) of both Operating Agreements provides that the dissolution of the LLCs may occur upon "[t]he entry of a decree of judicial dissolution," which is the relief Plaintiffs seek here.