WP Church, LLC v. Whalen, 2025 NCBC Order 70.

STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 25CV028702-590
WP CHURCH, LLC, directly on behalf of itself and derivatively on behalf of 5CHURCH CHARLESTON, LLC, Plaintiff, v. PATRICK WHALEN, Defendant, and 5CHURCH CHARLESTON, LLC, Third-Party Plaintiff, v. WP CHURCH, LLC, WHITE POINT PARTNERS, LLC, WPSP BELVIDERE, LLC, WPSP MEETING, LLC, ERIK JOHNSON, JAY LEVELL, RYAN HANKS, Third-Party Defendants.	**ORDER ON WP CHURCH, LLC'S MOTION FOR PRELIMINARY INJUNCTION**

1. **THIS MATTER** is before the Court on WP Church, LLC's ("WP Church" or "Plaintiff") Motion for Preliminary Injunction ("PI Motion," ECF No. 34).

2. Having considered the PI Motion; the briefs, affidavits, exhibits, and other submissions of the parties; the arguments of counsel; and all applicable matters

of record, the Court makes the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW** and hereby **GRANTS** the PI Motion as set forth below.

FINDINGS OF FACT

3. The Court makes the following findings of fact, which are made solely to decide the PI Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits.") (cleaned up).

4. WP Church is a North Carolina limited liability company whose principal place of business is in Mecklenburg County, North Carolina. (Compl. ¶ 6.)

5. Ryan Hanks, Jay Levell, and Erik Johnson are the managers of WP Church. (Am. 3d Party Compl., ¶¶ 6-8, ECF No. 16.)

6. 5Church Charleston, LLC ("5Church") is a South Carolina limited liability company formed in 2014 by Patrick Whalen, WP Church, and several other investors for the purpose of operating a restaurant in downtown Charleston, South Carolina called Church and Union Charleston ("C&U Charleston"). C&U Charleston opened in 2015. (Compl. ¶ 8; Johnson Decl. ¶¶ 7, 10, ECF No. 35.2.)

7. Whalen is a citizen of North Carolina and is the sole manager of 5Church. (Compl. ¶ 7.) Whalen is also the chief executive officer of Fifth Street Group, LLC ("Fifth Street"), a North Carolina limited liability company that owns and operates other restaurants around the country. Those restaurants include Church and Union Charlotte, Church and Union Nashville, Ophelia's, Tempest (Pink

Moon), Church and Union Denver, and Church and Union Miami. (Johnson Decl. ¶ 13.)[1]

8. According to the First Amendment to 5Church's Operating Agreement, the ownership interests for the company are as follows: Whalen–40%, WP Church–35%, Alejandro Torio–15%, Dr. Maurice Whalen–10%, and Jamie Lynch–8%. (Compl., Ex. B, at Ex A-1)[2]

9. WP Church is the only one of 5Church's members that does not hold any ownership interest in the other restaurants. Although the record is not entirely clear on this point, it appears that Fifth Street was the sole owner of all of the Affiliate Restaurants except for C&U Charleston. (Johnson Decl. ¶ 16.)

10. 5Church's Operating Agreement grants broad—but not unfettered—authority to Whalen, as the company's Manager, to make business decisions on behalf of 5Church. (Operating Agreement § 4.1.)

11. Because C&U Charleston struggled initially, Whalen made the decision—in his capacity as the Manager of Church and Union Charlotte ("C&U Charlotte)—for C&U Charlotte to loan C&U Charleston $500,000. (Whalen Decl. ¶¶ 10, 12–13, ECF. 44.8.)

12. As discussed in more detail throughout this Opinion, Whalen made many similar loans between the various Affiliate Restaurants on an *ad hoc* basis whenever one of the restaurants needed an infusion of funds, and he refers to this

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[1] Throughout this Order, these other restaurants are referred to collectively as the "Affiliate Restaurants."

[2] This listing of the ownership percentages is obviously incorrect, however, as they total *108%.*

practice as "balance sheet loans."[3] They were not traditional loans, however, because when each so-called balance sheet loan was made, no contemporaneous promissory note or other written agreement setting out the terms of the loan was executed. As a result, key terms were absent—such as, for example, the applicable interest rate for the loan or the deadline for repayment.

13. Whalen testified that he viewed these balance sheet loans as essential to the success of C&U Charleston and the other Affilitate Restaurants because traditional sources of credit became unavailable during the COVID 19 pandemic. (Whalen Decl. ¶ 24.) Whalen ultimately decided to treat all of the capital of the Affiliate Restaurants as a central fund from which he could essentially move money around between them as he saw fit. (Whalen Decl. ¶ 25.)

14. Whalen testified in his Declaration that he noted each of these balance sheet loans on the books of the lender entity and of the debtor entity. (Whalen Decl. ¶ 14.)

15. The above-referenced $500,000 loan to C&U Charleston was repaid in full after C&U Charleston became profitable. (Whalen Decl. ¶ 17.)

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[3] 5Church disputes the characterization of these payments that involved 5Church's funds as loans and instead contends they were barely documented and unauthorized transfers of 5Church's funds to separately owned companies. Nevertheless, for ease of reference, the Court will refer in this Order to these payments as either "loans" or "balance sheet loans."

16. Over the next five years, Whalen made a large number of balance sheet loans in which funds belonging to C&U Charleston (that is, belonging to 5Church) were given to other Affiliate Restaurants.[4]

17. In 2017, Whalen and WP Church began discussing a proposal to merge 5Church and the Affiliate Restaurants into a single corporate entity, a move that Whalen believed would streamline the operations of the various restaurants. (Whalen Decl. ¶¶ 19–20.) These negotiations between Whalen and WP Church ceased in 2020 with the onset of the pandemic. (Whalen Decl. ¶ 21.)

18. C&U Charleston was the only restaurant operated by Whalen that remained operational during the pandemic. Accordingly, Whalen used the revenue from 5Church to keep the other Affiliate Restaurants "afloat." (Whalen Decl. ¶ 27.)

19. Whalen testified that he was concerned by the prospect of a scenario in which one of the Affiliate Restaurants "failed or faced permanent closure, particularly the 'Church and Union' brand restaurants[;] then the other affiliates would suffer by association." (Whalen Decl. ¶ 31.)

20. As a member of 5Church, WP Church received quarterly financial reports for the company from Whalen. (Whalen Decl. ¶ 34.) Although these reports reflected the amounts of each balance sheet loan as well as the lender and the borrower (and occasionally the date), they did not contain any further explanatory information.

[4] WP Church contends—and Whalen does not dispute—that these loans numbered in the thousands.

21. It appears that the amounts owed by the Affiliate Restaurants to 5Church stemming from balance sheet loans between 2020 and 2025 were as follows:

Year	**Net Amount Owed to 5Church**
2020	$657,811.29
2021	$1,801,502.70
2022	$3,034,703.91
2023	$4,405,285.56
2024	$4,205,138.03
2nd Quarter 2025	$4,055,648.29

(Whalen Decl. ¶¶ 36–41.)

22. In June 2022, the merger negotiations between Whalen and WP Church resumed but ultimately stalled. (Whalen Decl. ¶¶ 49, 51.)

23. On 28 March 2024, one of WP Church's managers, Jay Levell, sent an email to Whalen which stated in pertinent part as follows:

> Seems like this partnership has backed several of the other restaurants and continues to hold notes, and because we have backed them should get either interest payments or a stake in them as equity partners. But I'm not sure what exactly the notes are for so let's discuss. Been out there for a while too as payables.

(Ex. D, at 4, ECF No. 44.4.)

24. Whalen testified in his declaration that he engaged in "several conversations" with WP Church's members in 2024 regarding how to treat the balance sheet loans in the context of the merger that was being discussed.

Ultimately, Whalen testified, he submitted a formal merger proposal, pursuant to which WP Church would be granted a 15% interest in the merged company. (Whalen Decl. ¶ 53.)

25. On 5 November 2024, Eric Johnson, another manager of WP Church, sent an email inquiring about Whalen's progress in "updating the books" regarding money owed to 5Church by the Affiliate Restaurants. (Ex. C, at 7–10, ECF No. 44.3.)

26. On 9 January 2025, Whalen sent WP Church's members via email copies of executed promissory notes (the "Promissory Notes") purportedly evidencing terms related to at least some of the loans from 5Church to the Affiliate Restaurants that remained outstanding. This was the first time WP Church's members had seen any such documentation regarding the loans.

27. The Promissory Notes were all dated 15 December 2024 and contained identical repayment terms of 1% per annum, with quarterly payments of $30,000 to begin on 1 May 2025. Despite the 15 December 2024 date that was listed on each of the Promissory Notes, it appears to be undisputed that Whalen actually prepared the documents in January 2025 and backdated them to the previous month.[5]

28. The Promissory Notes encompassed the following loans:

(a) A note memorializing an unsecured loan from La Belle Helene (lender) to 5Church (borrower)[6] for $376,739.08.

[5] The actual loans appear to have all been made prior to December 2024.

[6] Although the record is not entirely clear, it appears that this entry incorrectly lists 5Church as the borrower rather than the lender.

(b) A note memorializing an unsecured loan from 5Church (lender) to 5Church Charlotte (borrower) for $2,097,788.

(c) A note memorializing an unsecured loan from 5Church (lender) to Church and Union Denver, LLC (borrower) for $1,027,142.58.

(d) A note memorializing an unsecured loan from 5Church (lender) to Church and Union, LLC (borrower) for $451,935.96

(e) A note memorializing an unsecured loan from 5Church (lender) to Ophelia's TN, LLC (borrower) for $384,053.96.

(f) A note memorializing an unsecured loan from 5Church (lender) to Pink Moon SC, LLC (borrower) for $316,004.83.

(Ex. F, ECF No. 35.7.)

29. During that same month, Whalen sent a new merger proposal to WP Church. (Johnson Decl. ¶ 22; Ex. C, ECF. No. 35.4.)

30. On 22 January 2025, Levell (on behalf of WP Church) sent a letter to Whalen in which he asserted that the balance sheet loans from 5Church to the Affiliate Restaurants constituted a misappropriation of 5Church's funds and a breach of the fiduciary duty Whalen owed to the company. The letter further noted that the repayment terms set out in the Promissory Notes were not favorable to 5Church and contended that the funds used to make the loans should have instead been distributed to the members of 5Church. Levell also made clear in the letter that WP Church would not consider the merger proposal until the balance sheet loans were repaid

with "market interest." Finally, the letter requested that Whalen provide WP Church with the following:

> (1) pursuant to the Books and Records provision of the Operating Agreement, all information on the Loans, including when the Loans were originally made, any documentation of the Loans at the time made, and repayment terms (if any) for the Loans when originally made; (2) confirm the amounts that are to be paid to WP Church and the other members of the Company to cure the improper redirection of Company funds; and (3) provide a timeline for repayment of misappropriated funds with an appropriate market interest charge.

(Ex. H, ECF No. 35.9.)

31. In a response sent via email to Levell's 22 January letter, Whalen stated his belief that the balance sheet loans were within "my authority as the manager in our operating agreement." (Ex. I, at 3, ECF No. 35.10.)

32. The following day, Whalen emailed WP Church's members as follows:

> I forgot.
> Please disregard the loan docs. They are null and void immediately.

(Ex. I, at 1.)

33. In March 2025, WP Church was granted access to the books and records of 5Church. As a part of that examination, it learned for the first time that Whalen had used the funds of 5Church to pay, among other things, legal expenses for various other companies totaling in excess of $550,000; $115,00 in rent payments for apartment leases in North Carolina and Tennessee; and $50,000 in automobile lease payments for "luxury" vehicles. (Johnson Decl. ¶¶ 27–28.)

34. Pursuant to South Carolina Code § 33-44-1101, WP Church sent a pre-suit demand letter to Whalen in his capacity as the Manager of 5Church on 23 May

2025. The 23 May letter set forth WP Church's allegations of breach of fiduciary duty, conversion, and self-dealing by Whalen. The letter demanded that 5Church initiate a lawsuit to redress the alleged breaches of the Operating Agreement. (Compl., Ex. C.)

35. On 4 June 2024, Whalen, in an email to 5Church's members, characterized WP Church's demand as

> a ludicrous position. There is no reason to incur that kind of expense. There's no reason to, I mean, to me, it's just sort of a flailing, grasping attempt to threaten us with litigation, which I find kind of hilarious[.]

(Compl. ¶ 37.)

36. Whalen's counsel confirmed to WP Church on 6 June 2025, that Whalen would not institute a lawsuit as demanded in the 23 May letter. (Compl. ¶ 38.)

37. WP Church initiated this lawsuit on 10 June 2025 by filing a Verified Complaint in Mecklenburg County Superior Court against Whalen, alleging derivative claims on behalf of 5Church for breach of fiduciary duty, conversion, breach of contract, unjust enrichment, and wrongful conduct warranting disassociation under S.C. Code Ann. § 33-44-601, along with a derivative and direct claim for "Oppression of Minority Interest-Holder Warranting Forced Purchased [sic] of WP Church's Membership Units." (Compl., ECF No. 3.)

38. This action was designated as a complex business case and assigned to the undersigned on 11 June 2025. (ECF Nos. 1–2.)

39. On 15 July 2025, WP Church learned that Whalen was continuing to make balance sheet loans from 5Church funds, and that the amount owed 5Church

had increased from $4,205,138.03 in December 2024 to $4,955,648.29 in June 2025. (Johnson Decl. ¶ 31; Ex. D, ECF No. 35.5; Ex. J, ECF No. 35.11.)

40. On 29 July 2025, Plaintiff filed the present PI Motion.

41. The Court held a hearing on the PI Motion on 9 September 2025 via Webex at which all parties were represented by counsel.

42. At the Court's direction, the parties submitted supplemental briefs on various issues discussed at the 9 September hearing.

43. The PI Motion is now ripe for resolution.

CONCLUSIONS OF LAW

44. **BASED UPON** the foregoing **FINDINGS OF FACT**, the Court makes the following **CONCLUSIONS OF LAW**.

45. Any finding of fact that is more appropriately deemed a conclusion of law, and any conclusion of law that is more appropriately deemed a finding of fact, shall be so deemed and incorporated by reference as a finding of fact or conclusion of law, as appropriate.

46. A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation," *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983), and "will not be lightly granted." *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 692 (1976) (citation omitted). When seeking a preliminary junction, the moving party must show (i) a "likelihood of success on the merits" and (ii) that the moving party is "likely to sustain irreparable loss unless the injunction is issued, or[,]" that an injunction "is necessary for the protection of [the

moving party's] rights during the course of litigation." *A.E.P. Indus., Inc.*, 308 N.C. at 401 (cleaned up); *see also* N.C. R. Civ. P. 65; N.C.G.S. § 1-485.

47. "Likelihood of success on the merits" does not mean certainty, but rather "probable cause to believe the [moving party] may prevail at the hearing." *A.E.P. Indus., Inc.*, 308 N.C. at 401. To prove irreparable loss or injury,

> it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.

Id. at 407 (cleaned up).

48. The issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *Id.* at 400 (cleaned up). "The [trial] judge in exercising his discretion should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86 (1978).

I. Likelihood of Success on the Merits

49. As an initial matter, the Court notes that the parties agree South Carolina law is applicable based on Section 11.3 of the Operating Agreement, which reads as follows:

> **Governing Law**. This Agreement must be governed by and construed in accordance with the laws of the State of South Carolina, without regard to choice of law principles of any jurisdiction.

(Operating Agreement, § 11.3.)

50. WP Church primarily contends that it has shown a likelihood of success on the merits with regard to its derivative claim on behalf of 5Church for breach of the fiduciary duty that Whalen owed to the company as its Manager. WP Church argues that this duty was breached by Whalen's acts of improperly using the company's funds to make thousands of improper payments to the Affiliate Restaurants (along with expenditures for leases and vehicles)—none of which actually benefited 5Church.

51. Section 33-44-409 of the South Carolina Uniform Limited Liability Company Act (the "Act") sets forth general standards of conduct for members and managers of limited liability companies and states in pertinent part as follows:

> (b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:
>
> > (1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;
> >
> > (2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and
> >
> > (3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.
>
> (c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.
>
> (d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating

agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A member of a member-managed company does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the member's own interest.

(f) A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.

(g) This section applies to a person winding up the limited liability company's business as the personal or legal representative of the last surviving member as if the person were a member.

(h) In a manager-managed company:

(1) a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member;

(2) a manager is held to the same standards of conduct prescribed for members in subsections (b) through (f);

(3) a member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standards of conduct in subsections (b) through (f) to the extent that the member exercises the managerial authority vested in a manager by this chapter; and

(4) a manager is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (f) to the extent of the managerial authority delegated to the members by the operating agreement.

S.C. Code Ann. §33-44-409.

52. Pursuant to this statute, courts applying South Carolina law have held that the manager of a limited liability company owes a duty of loyalty to the company itself.

> Pursuant to S.C. Code Ann. §§ 33-44-409(b) and (h)(2), a manager of a manager-managed company or member of a member-managed company owes the company and the other members a duty of loyalty. The duty of loyalty requires that the manager: account to the company and to hold as trustee for it any property, profit or benefit derived by the members in the conduct…of the company's business[.]

In re JK Harris & Co., LLC, 512 B.R. 562, 566 (Bankr. D.S.C. 2012).

53. Under the Act, this duty of loyalty cannot be waived in an operating agreement, but the operating agreement can "identify specific types of categories of activities that do not violate the duty of loyalty, *if not manifestly unreasonable*." S.C. Code Ann. §33-44-103(b)(2)(i) (emphasis added).

54. In response, Whalen argues that his ability to make the balance sheet loans is encompassed within the broad managerial authority granted to him under Section 4.1 of the Operating Agreement, which states in relevant part:

> (a) Except as otherwise expressly provided in this Agreement (including without limitation Section 4.3) or the Act, the Manager shall have full, exclusive and complete discretion to manage and control the business and affairs of the Company, to make all decisions affecting the business and affairs of the Company and to take all such actions as they deem necessary or appropriate to accomplish the purposes and direct the affairs of the Company. The rights and authority granted to the Manager in the preceding sentence shall include, but are not limited to, the power:
>
> (i) to direct the business and operations of the Company;
>
> (ii) to form subsidiaries in connection with the Company Business;
>
> (iii) to enter into any kind of activity and to enter into, perform and carry out contracts of any kind necessary to, in connection with, or incidental to the accomplishment of the purposes of the Company.

(iv) to open, maintain and close bank accounts and draw checks or other orders for the payment of money and open, maintain and close brokerage, money market fund and similar accounts;

(v) to employ, engage and dismiss, on behalf of the Company, any Person, including an Affiliate of any Member or the Manager, to perform services for, or furnish goods to, the Company;

(vi) to hire, for usual and customary payments and expenses, consultants, brokers, attorneys, accountants and such other agents for the Company as it may deem necessary or advisable, and authorize any such agent to act for and on behalf of the Company;

(vii) to purchase insurance policies, including for director and officer liability and other liabilities for the Company;

(viii) to pay all fees and expenses of the Company;

(ix) to cause the Company to borrow money from any Person, including any Member or the Manager or any Affiliates thereof (subject, in the case of any such borrowing between the Company and the Manager or its Affiliates, to the provisions of Section 4.1(c) hereof);

(x) to cause the Company to guarantee loans or other extensions of credit in furtherance of the Company Business;

(xi) to sue and be sued, to prosecute, settle or compromise all claims against third parties, to compromise, settle or accept judgment with respect to claims against the Company and to execute all documents and make all representations, admissions and waivers in connection therewith; and

(xii) to take any and all other actions which are determined by the Manager to be necessary, convenient or incidental to the conducting of the Company Business or for the quiet enjoyment or maintenance of the Company and its assets.

. . .

(c) To the extent the Manager and its Affiliates provide services to the Company that would otherwise be performed by independent third

> parties, the Manager and its Affiliates shall be entitled to receive fees at rates customarily charged for similar services by Persons engaged in the same or substantially similar activities. The provisions of any such agreement to provide services entered into between the Company and the Manager or its Affiliates shall be at least as favorable to the Company as the terms reasonably expected by the Manager to be available in an arm's-length transaction with an independent third party. To the extent the Manager or its Affiliates make loans to the Company, such loan shall bear interest at the interest rate at which the Company could borrow such funds in an arm's-length transaction with an independent third party and shall have other terms at least as favorable to the Company as the terms reasonably expected by the Manager to be available in an arm's-length transaction with an independent third party.

(Operating Agreement §§ 4.1(a), (c).)

55. Additionally, Whalen seeks to rely upon Section 4.9 of the Operating Agreement as providing limits on his liability for the decisions he makes as the Manager of 5Church. That provision reads as follows:

> **Limitation on Liability of Manager.**
>
> (a) To the fullest extent permitted under the Act or any other applicable law as currently or hereafter in effect, neither the Manager nor any officer, or any Affiliate of a Manager, shall be personally liable, responsible or accountable in damages or otherwise to the Company or any of its Members or Holders for or with respect to any action taken or failure to act on behalf of the Company within the scope of the authority conferred on the Manager by this Agreement or by law. In addition to, and not by way of limitation of, the preceding sentence, no Manager or officer shall be liable to the Company or its Members or Holders for monetary damages for breach of fiduciary duty as the Manager or an officer, except for liability for acts or omissions not in good faith or which involve fraud, gross negligence, willful misconduct or a knowing violation of law. Any repeal or modification of this Section 4.9 shall not adversely affect any right or protection of the Manager or an officer existing prior to such repeal or modification.
>
> (b) The Manager and each officer shall be fully protected in relying in good faith upon the records of the Company and upon such

information, opinions, reports or statements presented to the Company by any Person as to the matters such Manager or officer reasonably believes are within such other Person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits, losses or net cash flow or any other facts pertinent to the existence and amount of assets from which distributions to the Holders might properly be paid.

(Operating Agreement § 4.9.)

56. Whalen further cites Section 4.3 of the Operating Agreement, which states as follows:

> **Restrictions on Authority of the Manager.** Except with the approval of Members holding 51% of the outstanding Units, the Manager shall not have the authority to:
>
> (a) sell, lease, transfer, assign or otherwise dispose of all or substantially all of the assets of the Company or any subsidiary thereof;
>
> (b) merge or convert the Company (or any subsidiary thereof) into or with another unaffiliated limited liability company or entity;
>
> (c) liquidate or dissolve the Company; or
>
> (d) enter into an agreement that would provide for the Company to incur indebtedness for money borrowed in excess of $50,000.
>
> The Manager's ability to amend this Agreement (or waive any provision hereof) and/or the Articles is governed by Article IX.

(Operating Agreement § 4.3.)

57. Based on its careful review of the record in this case, the Court finds that WP Church has shown a likelihood of success on its claim that Whalen breached the fiduciary duty he owed to 5Church as its Manager.

58. First, Whalen has not pointed to any specific provision of the Operating Agreement purporting to authorize him to enter into a transaction as to which he had a conflict of interest. Given his ownership interest in each of the Affiliated Restaurants, he had a financial interest in the receipt of funds by those restaurants from 5Church, which conflicted with his duty of loyalty to 5Church.

59. Second, even if any of the above-quoted provisions of the Operating Agreement could be construed to approve of these acts, it would be "manifestly unreasonable" to give them effect. *See* S.C. Code Ann. §33-44-103(b)(2)(i). Whalen's argument is essentially that at all times he possessed the power to take as much of 5Church's funds as he desired and use them for purposes that benefited his other business interests, which is the epitome of a conflicted transaction. *See Triple H Family Ltd. P'rship v. Neal*, 2018 Del. Ch. LEXIS 262, *47 (Del.Ch. July 31, 2018.) ("The duty of care requires that managers avoid conduct that constitutes reckless indifference or actions that are without the bounds of reason."); *Synectic Ventures I, LLC v. EVI Corp*., 353 Ore. 62, 78 (2012) (noting that a manager of an LLC has "vast opportunities to personally benefit at the LLC's expense" and accordingly, a manager is held to a duty to "refrain from dealing with a limited liability company in a manner adverse to the limited liability company and to refrain from representing a person with an adverse interest to the limited liability company.").

60. Moreover, while Whalen asserts that the other members of 5Church besides WP Church supported his decision to engage in these balance sheet loans, he ignores the fact that those other members shared his financial interest in the Affiliate

Restaurants. WP Church was the only member of 5Church that did not have a financial interest in the Affiliate Restaurants and was therefore the only disinterested member. *See In re Soundview Elite, Ltd.,* 594 B.R. 108, 129 (Bankr. S.D.N.Y 2018) ("When conflict exists, it is incumbent on managers to pursue approval from disinterested directors in order to determine if a conflicted transaction is proper.").

61. Next, Whalen contends that the balance sheet loans actually were in the best interests of 5Church. Based on the present record, the Court is not convinced.

62. Whalen argues that the creation of a centralized fund served to ensure that 5Church (like all the other Affiliate Restaurants) would have "access to capital" without the necessity of incurring loans from third parties, thereby avoiding "punitive" interest rates and repayment terms. (Whalen Decl. ¶¶ 18, 24.)

63. The Court rejects this argument. Although 5Church may have benefited from the receipt of the $500,000 shortly after C&U Charleston first opened, it is difficult to conceive of any tangible benefit to 5Church from having millions of dollars of its assets paid out thereafter to separate entities with no commercially reasonable repayment terms or, for that matter, any repayment terms *at all*.

64. Indeed, the record reflects that 5Church received approximately $500,000 in loans, yet it currently is owed more than $4 million because of these balance sheet loans. Based on this glaring asymmetry in the respective amounts, it is putting it mildly to say that 5Church has gotten the short end of the stick.

65. Moreover, the Court further finds that the alleged "benefit" to 5Church of a centralized fund is purely speculative. Indeed, the parties agree that C&U Charleston is currently profitable, and there is no indication in the record that it will require loans in the foreseeable future.[7]

66. Whalen's related contention that a "rising tide lifts all boats" fares no better. In this argument, Whalen seeks to justify the desirability of transferring 5Church's funds to the other Affiliate Restaurants on the theory that it is in the best interests of 5Church that all of these restaurants be successful. In his Declaration, he states the following:

> [I]f any Fifth Street Group restaurants failed or faced permanent closure, particularly the "Church and Union" brand restaurants, then the other affiliates would suffer. This concern stemmed from the proximity of most of these restaurants in this region of the country and the negative public perception that would be generated by their failure.

(Whalen Decl. ¶ 31.)

67. However, other than Whalen's conclusory statement to this effect, there is no evidence in the record providing support for this assertion. Moreover, the Court notes that several of the Affiliate Restaurants at issue——such as Tempest (Pink Moon) and Ophelia's—are not part of the Church and Union brand, and it is not clear how a customer would know they are affiliated with restaurants that actually do have "Church and Union" in their name.

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[7] Furthermore, given the *ad hoc* nature of these balance sheet loans, it would likely be subject to the whims of Whalen whether C&U Charleston would actually receive any needed funds from the Affiliate Restaurants.

68. In addition, Whalen's argument fails to account for the transfers of 5Church funds that were used to lease vehicles and apartments, pay legal fees, and settle lawsuits. Although Whalen contends that these expenses were legitimately incurred in his management of the Affiliate Restaurants, any possible benefit to 5Church is difficult to fathom.

69. Based on the present record, the Court cannot accept Whalen's argument that the managerial authority he possesses over 5Church extends this far. Although a merger would have placed all the Affiliate Restaurants under common ownership, such a merger—at least as of the present date—has never been agreed to by WP Church.

70. Nor can Whalen find refuge in the business judgment rule.

71. The South Carolina Supreme Court has explained this rule in the corporate context as follows:

> In South Carolina, courts apply the business judgment rule to protect corporate directors. Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.

Fisher v. Shipyard ViII. Council of Co-Owners, Inc., 415 S.C. 256, 270 (2016).

72. For purposes of the present PI Motion, the Court finds that the business judgment rule does not apply here. As demonstrated above, WP Church has satisfied its burden at the preliminary injunction stage of showing that Whalen lacked the authority to make the balance sheet loans at issue. Moreover, given his financial interests in the Affiliate Restaurants, the evidence currently before the Court

suggests that his acts were not taken in good faith and were instead based on a conflict of interest through his desire to benefit his other business interests at the expense of 5Church. The business judgment rule cannot provide justification for these loans because Whalen effectively stood on both sides of the transaction—as both lender and borrower. *See In re SandRidge Energy, Inc. S'holder Derivative Litig.*, 302 F.R.D. 628, 649 (W.D. Okla. 2014) ("The business judgment rule will be rebutted…where a plaintiff has shown that the Directors were not sufficiently disinterested."); *In re Perry H. Koplik & Sons, Inc.*, 476 B.R. 746, 803 (Bankr. S.D.N.Y., 2012) ("Where officers or directors of a corporation considering a transaction are not disinterested and have a personal stake in the outcome, their determination is not entitled to the deference usually given under the business judgment rule.").

73. Next, Whalen takes the position that even if the balance sheet loans were made in violation of WP Church's Operating Agreement, his actions were nevertheless ratified by 5Church's other members, including WP Church.

74. In support of this argument, Whalen contends that by regularly sharing financial information concerning 5Church to all of its members, those members (including WP Church) were aware of the balance sheet loans at issue yet failed to object to them.

75. Ratification under South Carolina law requires "(1) acceptance by the principal of the benefits of the agent's acts; (2) *full* knowledge of the facts; and (3) circumstances or an affirmative election indicating an intention to adopt the

unauthorized arrangements." *Anthony v. Padmar, Inc.*, 320 S.C. 436, 452 (S.C. Ct. App. 1995).

76. With regard to the first element, the Court—as discussed in detail above—is unable to find that 5Church actually received a benefit from the balance sheet loans.

77. Nor can Whalen satisfy the second element as the record fails to show that Whalen made a full disclosure of the true circumstances of these loans to WP Church until early 2025. The financial information sent by Whalen prior to that date appears to have consisted at most of a bare-bones listing of the amount of each monetary transfer, the date of the transfer, and the names of the borrowing and lending companies. Therefore, WP Church does not appear to have been previously apprised of the actual terms of the loans (or the lack thereof).

78. Furthermore, as Whalen's counsel conceded at the 9 September hearing, any such ratification—even if previously given—would be revocable for prospective acts. Given Levell's 22 January 2025 letter, the 23 May 2025 pre-suit demand letter, and the filing of this lawsuit, even if WP Church was somehow deemed to have previously acquiesced to Whalen's conduct, any such ratification has long since been revoked.

79. The Court is also unpersuaded by Whalen's remaining arguments. First, Whalen argues that the pre-suit demand letter was insufficient under South Carolina law to authorize a subsequent derivative lawsuit. Under South Carolina law, before initiating a derivative action, a member must make a written demand on the

company in a manner that (1) identifies the alleged wrongdoer; (2) describes the factual basis of the wrongful acts and the harm caused to the company; and (3) requests remedial relief. *Adkins v. I'On Co. LLC,* 439 S.C. 568, 588-89 (2023).

80. The Court has reviewed the 23 May 2025 letter sent by WP Church's attorney to Whalen, and it appears to sufficiently describe WP Church's allegations that Whalen improperly committed the acts discussed throughout this Order.

81. Moreover, in addition to identifying the wrongdoer and the wrongful acts, the 23 May letter also demanded that Whalen initiate a lawsuit on behalf of 5Church to redress these wrongs. Accordingly, Whalen has not shown how the letter was insufficient under South Carolina law.

82. In the alternative, even if the 23 May letter was somehow deemed deficient, South Carolina law recognizes futility as a basis for excusing compliance with the pre-suit demand requirement for derivative actions. *See*, *e.g.*, *Grant v. Gosnell*, 266 S.C. 372, 375-76 (1976) ("[P]etitioning the Bank for redress prior to instituting this suit would have been an exercise in futility and, therefore, such demand was unnecessary."). Here, the sole individual alleged to have committed the wrongful acts was Whalen himself. As such, a demand that he—on behalf of 5Church—sue himself can properly be characterized as a futile act.[8]

[8] In Whalen's response brief, he also contends that the 23 May letter was improperly mailed to him at his personal address as opposed to being served on 5Church's registered agent. Based on the statements by Whalen's counsel at the 9 September hearing, however, Whalen appears to have abandoned this argument.

83. In his final argument, Whalen argues that WP Church's claims are barred by the three-year statute of limitations applicable under North Carolina law to each of its claims.[9]

84. However, as Whalen's counsel conceded at the 9 September hearing, a question of fact exists as to when WP Church was on actual or constructive notice of the absence of loan documentation or repayment terms for the balance sheet loans. Therefore, based on the present record, it cannot be determined when WP Church's claims actually accrued. For this reason, further factual development is necessary on this issue.

85. For all of these reasons, the Court finds that WP Church has met its burden of showing a likelihood of success on the merits. *See, e.g.*, *Epic Chophouse, LLC v. Morasso*, 2020 NCBC LEXIS 104 (N.C. Super. Ct. Sept. 9, 2020) (finding that injunctive relief was appropriate where limited liability company manager diverted company funds).

II. Irreparable Harm

86. "Injunctive relief is granted only when irreparable injury is real and immediate." *Hall v. City of Morganton*, 268 N.C. 599, 600–01 (1966). A plaintiff may demonstrate irreparable injury by showing that "the injury is beyond the possibility of repair or possible compensation in damages" or "that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict,

[9] Whalen asserts (and WP Church does not dispute) that North Carolina law applies to the statute of limitations issue because statutes of limitation are procedural rather than substantive in nature. *See, e.g., Martin Marietta Materials, Inc. v. Bondhu*, LLC, 241 N.C. App. 81, 84 (2015).

and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *A.E.P.*, 308 N.C. at 407 (emphasis omitted). A court should not enter an injunction if there is a "full, complete and adequate remedy at law." *Bd. of Light & Water Comm'rs v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 423 (1980). In addition, the trial court must weigh the potential harm a plaintiff will suffer if no injunction is entered against the potential harm to a defendant if the injunction is issued. *See Williams v. Greene*, 36 N.C. App. 80, 86 (1978).

87. The Court is also satisfied that WP Church has made a sufficient showing of irreparable harm.

88. The record shows Whalen's history of repeatedly using 5Church funds to provide financial assistance to his other business ventures to the detriment of 5Church—even after he was formally put on notice by WP Church through demand letters and the filing of this lawsuit of its contention that such conduct was unlawful. The entry of a preliminary injunction is the only way to ensure that 5Church's funds will be protected during the pendency of this lawsuit

89. For this reason, WP Church has satisfied the irreparable harm element. *See, e.g., Air Cleaning Equip., Inc., v. Clemens,* 2016 NCBC LEXIS 199, *32 (N.C. Super. Ct. April 29, 2016) ("The Court concludes that Plaintiff has suffered and continues to suffer irreparable harm. . . and that Plaintiff will suffer irreparable harm if Defendants and all other person in active concert or participation with any Defendant are not preliminarily enjoined[.]"); *First Citizens BancShares, Inc., v. KS Bancorp, Inc.*, 2018 NCBC LEXIS 23 (N.C. Super. Ct. March 21, 2018) ("The Court

concludes that under the circumstances present in this case, the injury to the Plaintiff's rights would be irreparable").

III. Balancing of the Equities

90. Additionally, the Court finds that a balancing of the equities clearly favors the entry of a preliminary injunction. The harm to 5Church if Whalen is permitted to continue transferring its funds to other companies is severe. Conversely, the Court is unable to ascertain any legitimate prejudice Whalen will suffer from a preliminary injunction. Indeed, the only effect of such an injunction will be Whalen's inability to continue taking assets belonging to 5Church and using them to fund his other business interests.

CONCLUSION

91. **THEREFORE**, based upon the foregoing **FINDINGS OF FACT** and **CONCLUSIONS of LAW**, the Court **GRANTS** the PI Motion, and it is hereby **ORDERED**, in the exercise of the Court's discretion, as follows:

(a) Whalen is hereby **RESTRAINED** and **ENJOINED** during the pendency of this litigation from:

i. Transferring, selling, or otherwise disposing of 5Church's funds or assets outside the ordinary course of business; and

ii. Transferring 5Church's funds or assets to any business or organization Whalen owns or controls.

(b) The Court concludes, in its discretion, that WP Church shall not be required to post a bond in connection with the entry of this Order.

SO ORDERED, this the 26th day of September, 2025.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases