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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0145-06T50145-06T5

GEORGE FLORES, LARRY MILBY, ANN

MARIE MILBY, KEITH SAVEL, HOWARD

ZIMMERMAN, DAVID SEE, and CHARLES

RIZKALLA,

Plaintiffs-Respondents,

v.

JOHN MURRAY,

Defendant/Third-Party

Plaintiff-Appellant,

v.

CRYSTEX COMPOSITES, LLC,

Third-Party Defendant.

Submitted September 17, 2007 - Decided October 19,
2007

Before Judges Lintner, Parrillo and Sabatino.

On appeal from the Superior Court of

New Jersey, Law Division, Passaic County,

L-769-05.

Collier & Basil, attorneys for appellant (Robert J. Basil,
on the brief).

Hoagland, Longo, Moran, Dunst & Doukas, attorneys
for respondents (Robert G. Kenny and Michael J.
Baker, of counsel; Aaron M. Bender, on the brief).

PER CURIAM

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Following a five-day bench trial, the judge rendered a decision in favor of plaintiffs, George Flores, Larry Milby, Ann Milby, Keith Savel, Howard Zimmerman, David See, and Chares Rizkalla, investors/shareholders in Crystex Composites, LLC (Crystex) against defendant John Murray. The judge found that defendant had no employment contract with Crystex and had violated his contractual obligation with plaintiffs and Crystex by failing to contribute \$200,000 as promised, thus forfeiting his ownership interest. The judge also found that defendant breached his fiduciary duty to the investors/shareholders by repaying a personal loan with Crystex funds and making unauthorized payments to his son from the company's operating account. He found that defendant fraudulently induced plaintiffs to invest in Crystex by promising that he would invest \$200,000 of his own money in the LLC and fraudulently induced Larry Milby (Milby) to pledge stock as collateral for a loan to Crystex by promising him a minimum distribution of \$94,500 per year, and created ultra vires documents for the purpose of paying personal debt.

The judge also ordered that defendant pay 50% of plaintiffs' counsel fees, an amount totaling \$68,049.95. A judgment order memorializing the judge's findings was executed on July 28, 2006. Defendant's motion for reconsideration of the counsel fee award was denied, following which defendant appealed. We now reverse the judgment insofar as it found that defendant fraudulently induced plaintiffs to invest in Crystex and awarded counsel fees. In all other respects, the judgment is affirmed.

The following facts are relevant to the disposition of this appeal. In 1969, George Flores began employment as a production machinist with Mykroy/Mycalix (M&M), a manufacturer of glass and ceramic electronic components and a division of Spaulding Composites Company, Inc. (Spaulding). Eventually, Flores rose to the position of general and plant manager for M&M. In 2001, Spaulding filed for bankruptcy, at which time Flores was approached by many potential investors who were interested

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in buying M&M on the condition that Flores remain with the company. One of those individuals was defendant, who had been employed as a temporary accountant for Spaulding through a staffing agency and become a best friend of Flores.

Defendant introduced Flores to his longtime friend Milby, with whom defendant had served in the Air Force. Flores, defendant, and Milby each agreed to invest \$200,000. However, they believed they needed another \$200,000. The group then borrowed \$100,000 from Milby's niece, Donna Franks, in return for which defendant executed, as CEO of Mykroy Composites, LLC, a promissory note stating that Mykroy Composites, LLC agreed to pay Franks \$200,000 with interest from November 1, 2005, on the unpaid principal at the rate of 6% interest per year.

Flores consulted with an attorney to assist the group in purchasing M&M. The total purchase price was \$764,290.50, which included a \$400,000 initial deposit, a \$100,000 second deposit, and the remaining \$264,290.50 to be financed by a loan from CIT Corporation. Thus, the group did not have to put up a \$600,000 deposit as originally discussed. Flores put in his \$200,000 while Milby put in \$190,000, which he raised by selling his and his wife's IRAs, increasing his home equity loan, and borrowing from his brother.

Defendant did not come up with his \$200,000 but instead told Flores that "he had [American Bio Medica Corporation (ABMC)] stock that was going to go through the roof" and it would be foolish to cash the stock in because "he knew people [at ABMC who] could tip him off about the stock." Milby also had ABMC stock. Defendant told Milby that they needed to pledge their combined shares of stock to be used as collateral for the loan from CIT. Milby had reservations about pledging his shares if he did not have control over when he could sell them. Defendant promised to guarantee Milby \$94,500, as a minimum distribution, if he would pledge his shares. Consequently, defendant executed a guarantee to Milby and Milby's wife, dated

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October 1, 2003, and endorsed the guarantee as the "CEO/Chairman" of Crystex. The letter stated:

As an inducement for your investment in CRYSTEX COMPOSITES, LLC this letter serves as our guarantee that you will receive a 13.5% distribution of minimum annual net earnings of seven hundred thousand dollars (\$700,000) annually during the first five years beginning January 1, 2004.

As of January 1, 2009, your distribution will be based on your then current percentage against then current net earnings.

This guaranteed minimum (\$94,500) shall remain effective:

1. If net annual earnings are less than seven hundred thousand dollars (\$700,000).
2. Whether your investment percentage becomes diluted by additional stockholder memberships during the same five-year period.

Defendant testified that he had actually created this letter in November 2003, but had backdated it to October 1, 2003, "to give [Milby] credit for being in there before we commenced operations of the company." Milby did not receive the letter until April 2004.

Flores was unaware of the guarantee to Milby. Defendant contradicted Flores's account and testified that he was "sure [Flores] saw it." Flores was worried that the group did not have enough money to cover the down payment as well as the operating costs and attorney's fees. He contacted three investors: Keith Savel, Howard Zimmerman, and David See (the Prime Boys). Zimmerman and See had been part of Prime Environmental, a company that did consulting work for M&M. In early October 2003, the Prime Boys agreed to invest \$150,000 for a 10% interest in Crystex. Charles Rizkalla, a ceramics engineer formerly employed by Spaulding, was given a 5% interest as "sweat equity" in return for working at a lower salary than he was used to.

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The Prime Boys eventually contacted Flores when they learned that defendant had not put up his \$200,000. Flores explained that defendant had stock that he claimed has "enough equity . . . to cover for his portion of the investment[] but does not want to cash in the stock because [it] . . . supposedly is going to go up in value within a six-month period." Savel and defendant had a discussion during which defendant reiterated his position regarding his stock and stated that he wanted to take out a loan from CIT in lieu of his cash contribution. Savel responded that he "was not favorable to that" and although he "understood [defendant's] predicament . . . [defendant could] get his \$200,000 any way he liked to. It wasn't [Savel's] . . . job to determine how [defendant] should raise that capital." Savel was aware that the value of defendant's stock at the time was approximately \$110,000. He "was very uncomfortable going into a deal without [defendant] having some liability and the liability up to \$200,000, as we agreed to."

The Prime Boys set up a conference call with defendant and told him that they were going to prepare a Memorandum of Understanding (MOU) that set forth that defendant would come up with \$200,000 and that at that time he would either cash in the stock or forfeit his interest. According to Flores, defendant was very angry after the conference call and stated that he would "come after" the Prime Boys and "kick them out at the end." After the Prime Boys faxed the MOU to Flores and defendant, they participated in several telephone conferences during which Savel made it clear that, if the MOU was not signed, they were not going to release their capital contribution.

The MOU states that it is "between the following two parties": (1) "Crystex Composites LLC - [defendant]/George Flores" and (2) "Investment Group - Keith Savel/Howard Zimmerman/David See." Defendant, George Flores, Larry Milby, Investment Group, and Charles Rizkalla are listed as "Key Investors." A handwritten notation by defendant dated October 14, 2003, set forth the parties' ownership interests as: (1) [defendant's] interest - 35.75%; (2) Flores' interest - 35.75%; (3)

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Data Milby's interest - 13.5%; (4) Investment Group's interest - 10%; and (5) Rizkalla's interest - 5%.

The MOU further stated: "[Defendant] shall utilize his shares of ABMC as collateral against the Note held by CIT stipulated below. [Defendant] must execute the sale of said shares or otherwise contribute the \$200,000 investment within a 6 month period ending in March of 2004 or forfeit his shares and ownership in Crystex."

Under the heading, "Crystex/CIT Purchase Agreement," the MOU broke down the purchase price for M&M's business and property. In another handwritten revision by defendant, the figures showed that the total price was \$764,000, which consisted of \$500,000 in cash and \$264,000 in a note "held by CIT (guaranteed by ABMC shares owned by [defendant])." The remaining portions of the MOU read as follows:

Key Employee Salaries: as stipulated in draft LLC Members Agreement dated 10/7/03.

Profits Distribution/Compensation:
Establishment of a Compensation Committee made up of (3) members. All decisions made by unanimous vote. Committee is formed from the following:

Crystex - [defendant] or George Flores - (1) member

Larry [Milby] - Larry [Milby] - (1) member

Investment Group - Keith S/Howard Z/ David S - (1) member

Should the Purchase Agreement between Crystex and CIT not go through, all monies will be returned [to] all investors.

The MOU was dated October 10, 2003, and signed by defendant, Flores, Savel, Zimmerman, and See on October 14, 2003. Although Milby and Rizkalla did not sign the MOU at that time, they ratified and agreed to be bound by it on May 3, 2004.

According to Milby, defendant told him that the MOU did not "mean anything" and was "just garbage." Defendant testified that when he signed the MOU

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Data he had not seen it before and was told by Savel that "it's just a memo . . . outlining where we are right now."

The LLC Members Agreement, dated October 7, 2003, and referred to in the MOU, imposed a salary limitation on defendant and Flores, providing that each may elect to defer actual payment in the event funds are needed for ongoing capital investment, in which case they "will be treated as a loan and not an increase in Base Investment . . . [in which event] the company will pay interest at prime plus 2% for the use thereof." The LLC Members Agreement contained the following provision detailing "Profit Distributions":

At the end of each year all profits will be divided and distributed to the LLC members by March 30th of the following year. LLC members include All Investors or key employees given a membership percentage in the LLC. In the event there are further capital requirements to maintain or expand the business, All members of the LLC will be given an opportunity to invest amounts necessary to maintain their original ownership percentage.

A corrected Certificate of Formation naming Crystex Composites, LLC was filed on October 15, 2003. That same day, the United States Bankruptcy Court for the District of New Hampshire issued an order granting the sale of M&M's assets and properties. Flores testified that upon the formation of Crystex, the attorney presented a form Operating Agreement. The attorney advised, "[p]lease make sure you fill out all of the forms. Then . . . please before you rip each other apart, will you please put an Operating Agreement restriction in place. I will be glad to sit down with you and help you put a proper Operating Agreement in place." When asked whether they followed the attorney's instructions, Flores related that "[defendant] said, are you kidding? We all do business. What else do we need? We're the majority."

The Operating Agreement, dated October 15, 2003, states that it is "by and between the Initial Members and all others admitted as Members pursuant to the terms hereof." It is signed by defendant, Flores, and Milby. The Operating Agreement states

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that a 51% interest is required for decisions regarding the "PURCHASE/SALE/MORTGAGE OF PROPERTY AND BUSINESS." Also, a 25% interest is necessary to call a meeting of the Members. The Operating Agreement provides a "Shareholder List" naming: (1) "[Defendant] Chairman, CEO," (2) "George Flores[,] Vice President, Sec.," (3) "Lawrence & Ann Milby," (4) "Ann Milby," (5) "Charles Rizkalla," (6) "Keith P. Savel," (7) "Howard M. Zimmerman," and (8) "David F. See." On separate pages of the Operating Agreement, "Initial Member Information" was provided for Defendant, Flores, the Milbys, and Rizkalla.

The remaining portions of the Operating Agreement set forth the "GENERAL PROVISIONS." Savel testified at trial that he was not made aware of the Operating Agreement until November or December 2003. According to Savel, none of the Prime Boys investors were ever asked to sign the Operating Agreement. Because he never signed the Operating Agreement, Savel believed that the MOU was still a viable agreement and defendant was required to contribute his \$200,000 within the six months.

Crystex began operations in October 2003. According to Flores, by January 2004, defendant was "acting strange." Defendant refused to honor a financial obligation owed to one of the company's manufacturing representatives, wanted to penalize valued customers, and used offensive language when dealing with Crystex's accounts payable clerk.

Difficulties also developed when defendant hired his son. Flores agreed defendant's son would receive eighteen dollars per hour. Defendant wanted to pay his son twenty-five dollars per hour and agreed that the extra money would come out of his own pocket. Later, however, Flores discovered that defendant was paying his son extra money from the company's operating account. He found that "the cost was buried into . . . other expenses, and it was buried into [the synthetic mica department], precisely the department where [defendant's] son worked."

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Defendant testified that his "son lived in Warwick, New York . . . [and] to come to Clifton every day was a considerable expense for him. So . . . part of the [extra] \$7 was to defray . . . his travel." Although defendant admitted that it was "[p]robably not" a wise decision to pay his son an extra seven dollars per hour from the operating account as opposed to the payroll, he claimed that Flores had agreed to the arrangement. Defendant also denied telling Flores that he would pay his son out of his own pocket.

Flores also discovered that defendant's son was not treating his job seriously and taking two to three hour lunches. In April 2004, Flores had a meeting with defendant to discuss his concerns. He also discussed defendant's failure to pay the \$200,000 within the agreed-upon time.

Flores learned that some employees' checks bounced because defendant forgot to transfer money from the operating account to the payroll account. Flores had to advance monies of his own to the company, and did not cash his own checks. Eventually, Flores had the finance department scrutinize the company's books and found a \$2000 wire transfer to Milby's personal checking account. When Flores confronted Milby, Milby explained that the monies were part of a promissory note owed him by defendant that existed prior to Crystex's existence. Milby thought the money was coming from defendant's personal account. Flores maintained that defendant did not have authority from any member of Crystex to pay the money from Crystex's account.

Defendant claimed that the money was an advance on Milby's distributions, not to pay off the promissory note. He stated:

Well, I didn't do it without first apprising [Flores] that [Milby] had called me and had . . . expressed a problem. He had a cash flow problem. He had put most of his monies, I guess, into Crystex into his initial investment, and he had called me and told me he was hurting for money and asked me if there was something I could do for him. And I told him well, how much do you need? And he told me 24,000, you know,

2,000 a month would probably get him by. I said fine, I'll talk to [Flores]. And I did.

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Stating that he "couldn't take the pain any longer," Flores called a special meeting with the other members, including defendant, to discuss the retention of defendant as CEO and discuss forfeiture of his shares. The meeting was scheduled for May 3, 2004. Meanwhile, defendant hired counsel and filed an Order to Show Cause (OTSC) with temporary restraints seeking to enjoin the meeting. Flores, Milby, Rizkalla, Savel, See, and Zimmerman attended the meeting along with an attorney representing the shareholders. At the same time, defendant was at the Passaic County Courthouse attempting to obtain an injunction. The group voted to dismiss defendant's OTSC and the attorney he hired. After his attempt to obtain injunctive relief failed, defendant attended the meeting. Flores testified that defendant told the group:

[T]he value [of his ABMC stock] had gone up in value, I believe, it was in February, but because of the terms that he had worked out with CIT, he needed to find some sort of an agent to help cash in . . . these shares, but he couldn't because they had to go through CIT. Something along those lines. And because I believe time was of the essence. Within a short period of time, the stock started depreciating. That was his explanation . . . at the board meeting.

Defendant explained at trial that on January 12, 2004, he had requested to sell his stock. CIT, in turn, passed the request along to its broker PMK Securities. However, by the time PMK received the faxed offer from CIT on January 21, 2004, the value of the ABMC stock had dropped.

A majority voted "that [defendant] failed to live up to his obligations and that he no longer had an interest in Crystex." All of the members, with the exception of Milby, who abstained, voted to terminate defendant as the CEO of Crystex.

Several months after the board meeting, Flores was looking through files when he came across a document entitled "Employment Agreement" executed by defendant as both employer and employee. According to Flores, defendant never had authority

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Data from the majority of members or the Compensation Committee to execute an employment agreement for himself. Flores then conducted an investigation and found on defendant's computer an employment agreement file created on April 27, 2004, which confirmed his suspicions that defendant created the employment agreement after receiving notice of the board meeting.

Defendant denied creating the document in April 2004. The Employment Agreement states that it "is made effective as of October 23, 2003, by and between Crystex . . . and [defendant]." The "**COMPENSATION OF EMPLOYEE**" provision of the Agreement states an annual salary of \$104,000 in 2004 and \$140,000 in 2005 plus 3% on gross sales in excess of \$3,000,000. The "**TERM/TERMINATION**" provision of the Agreement provides:

[Defendant's] employment under this Agreement shall be for a period of five years on an "at will" basis. This Agreement may not be terminated by Crystex for cause. If Crystex shall so terminate this Agreement, [defendant] shall be entitled to full compensation for the remaining life of this agreement. The compensation paid under this Agreement shall be [defendant's] exclusive remedy.

On appeal, defendant raises the following points:

- A. PLAINTIFFS FAILED TO PROVE THAT [DEFENDANT] WAS LIABLE FOR "FRAUD IN THE INDUCEMENT" BASED UPON THEIR OWN ADMISSIONS IN PLEADINGS AND AT TRIAL.
- B. THE TERMS OF THE OPERATING AGREEMENT CONTROL [DEFENDANT'S] RIGHT TO RETAIN HIS OWNERSHIP AND MEMBERSHIP IN CRYSTEX, NOT ANY OTHER PURPORTED AGREEMENT.
- C. NEW JERSEY'S LIMITED LIABILITY ACT AUTHORIZES [DEFENDANT'S] CONTRIBUTION OF \$200,000 TO BE IN A NON-CASH FORM.
- D. THE MEMORANDUM OF UNDERSTANDING, WHICH PRE-DATED THE OA, IS WITHOUT FORCE OR EFFECT REGARDING THE RIGHTS OF [DEFENDANT] AS A MEMBER OF CRYSTEX.
- E. THE TRIAL COURT ERRED IN HOLDING THAT [DEFENDANT] BREACHED THE MOU; HE DID NOT BREACH, AND THE MOU WAS NOT A BINDING CONTRACT.

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1. The MOU Could Not Bind [Defendant] Individually.

2. The Court Should Not Have Amended The MOU To [Defendant's] Detriment.

3. Any Ambiguity In The MOU Should Have Been Resolved In Favor Of [Defendant], The Non-Drafter.

4. The MOU Fails As A Contract Due To Lack Of Mutual Consideration.

5. The Forfeiture Provision Of The MOU Was Unenforceable In A Court Of Equity.

6. [Defendant] Did Not Breach The MOU.

F. [DEFENDANT] IS NOT LIABLE FOR BREACH OF FIDUCIARY DUTY.

G. THE TRIAL COURT ERRED IN VOIDING [DEFENDANT'S] INTEREST AB INITIO; HE IS ENTITLED TO HIS SHARE OF PROFITS UP UNTIL THE DATE OF JUDGMENT.

H. THE COURT'S FINDINGS OF FACT UNDERLYING THE BREACH OF FIDUCIARY DUTY HOLDINGS WERE ERRONEOUS.

I. THE PLAINTIFFS ARE NOT ENTITLED TO ATTORNEY'S FEES OR OTHER RELIEF AS "OPPRESSED SHAREHOLDERS," AS THEY ARE NEITHER "OPPRESSED," NOR "SHAREHOLDERS," AND THEY HOLD THE MAJORITY INTEREST IN CRYSTEX COMPOSITES LLC.

J. [DEFENDANT'S] EMPLOYMENT AT CRYSTEX WAS WRONGFULLY TERMINATED, AND HE IS ENTITLED TO REINSTATEMENT WITH BACK PAY.

K. IN THE EVENT THIS MATTER IS REMANDED, THE REMAND MUST BE TO A NEW JUDGE.

We first discuss defendant's contention on appeal that the Operating Agreement controlled his right to retain ownership interest in Crystex and that the earlier MOU was without force and effect, not binding, unenforceable, lacking consideration, and ambiguous. We also address his claim that the judge erred in finding that he breached the MOU.

The merger clause in the Operating Agreement provided:

This Agreement (including all exhibits, schedules and other attachments hereto and all other agreements referred to herein) incorporates and embodies the

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entire understanding and agreement between the parties hereto with reference to the subject matter hereof and to any of the matters hereinbefore discussed or mentioned in reference to the subject matter hereof; all prior promises, representations, agreements, understandings and arrangements thereto being herein merged.

Although Savel, Zimmerman, See, and Rizkalla did not sign the Operating Agreement, they were still members of the LLC. N.J.S.A. 42:2B-21a provides:

In connection with the formation of a limited liability company, a person acquiring a limited liability company interest is admitted as a member of the limited liability company upon the later to occur of:

- (1) The formation of the limited liability company; or
- (2) The time provided in compliance with the operating agreement or, if the operating agreement does not so provide, when the person's admission is reflected in the records of the limited liability company.

The record established that the Prime Boys and Rizkalla held interests in Crystex and all parties intended that they be considered members. The MOU set forth the ownership interests of the "Key Investors," which included the Prime Boys investors and Rizkalla. Indeed, defendant himself revised the document to reflect more accurately the percentage of interest each party held. The "Shareholder List" attached to the Operating Agreement laid out the percentage "Own[ed]" by each party. Thus, the individual Prime Boys and Rizkalla became "members" upon "[t]he formation of the limited liability company" which occurred when Crystex filed its certificate of formation. N.J.S.A. 42:2B-21a(1).

In reaching his decision that the agreements did not merge, the judge noted that the Prime Boys investors "are not bound by the operating agreement, because they're not a part of it" and "you simply can't merge something into something when parties are not part of it." He concluded that they were "both to be construed in determining the intent of the parties with respect to . . . this business deal." He pointed out that the MOU "is really part of the operating agreement to be looked at in interpreting what the parties meant"

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"A contract is an agreement resulting in obligation enforceable at law; and it is basic to an agreement entailing obligatory jural consequences that the parties have a distinct intention common to both." Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956). "When one party, however, presents a contract for signature to another party, the omission of that other party's signature is a significant factor in determining whether the two parties mutually have reached an agreement." Leodori v. Cigna Corp., 175 N.J. 293, 305, cert. denied, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed.2d 250 (2003). In Leodori, the Court held that an employee was not bound by the arbitration provision of an employment agreement because the employee did not sign the agreement and there was no other "explicit indication that the employee intended to abide by that provision." Ibid.

Similarly, here, the Prime Boys and Rizkalla neither signed the Operating Agreement nor was there any testimony or evidence that they intended to be bound by it. Thus, the merger provision, which is cited by defendant as a conflict between the Operating Agreement and the MOU, could not bind those members who did not sign it. In our view, the judge correctly determined that both documents had to be read together to ascertain the true intent of the parties. See Graybar Elec. Co. v. Cont'l Cas. Co., 50 N.J. Super. 289, 294 (App. Div. 1958) ("An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the result of the writings so adopted." (emphasis added)). Moreover, contrary to defendant's contention, the mere lack of any reference to defendant's \$200,000 obligation and the consequences of non-payment in the Operating Agreement did not amount to an inconsistency between the two documents.

We next address defendant's multiple arguments that the MOU does not bind him individually because it bound only two entities, Crystex and the Investment Group; that it (1) did not obligate him personally because he was not a party to the

agreement; (2) was ambiguous as to defendant's personal obligation and should be read against its author, Savel; and (3) lacked mutual obligations between the parties.

Generally, our courts will "consider all of the relevant evidence that will assist

[them] in determining the intent and meaning of [a] contract." Conway v. 287 Corp.

Ctr. Assocs., 187 N.J. 259, 269 (2006).

"This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing - not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretative function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose."

[Ibid. (quoting Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301-02 (1953)).]

When examining the extrinsic evidence to interpret a contract, a court may consider "the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." Ibid. (quoting Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 221 (1979)).

"Semantics cannot be allowed to twist and distort [the words'] obvious meaning in the minds of the parties.' Consequently, the words of the contract alone will not always control." Id. at 269-70 (quoting Schwimmer, supra, 12 N.J. at 307).

Both Savel and Flores testified that, at the time the MOU was signed, it was specifically discussed with defendant who understood it to mean that he was

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obligated to pay his \$200,000 contribution as a key investor within six months or forfeit his shares. The judge found defendant's testimony that he had not seen the MOU until the day he signed it and his recollection that Savel told him it was just a memo outlining where the Prime Boys were at that point not credible.

A fair reading of the MOU, coupled with the credible evidence in the record concerning the circumstances surrounding its execution, indicate that all the parties, including defendant, intended the terms of the MOU to personally obligate defendant to "contribute the \$200,000 investment within a six month period ending in March of 2004 or forfeit his shares and ownership in Crystex." See Pacifico v. Pacifico, 190 N.J. 258, 267-68 (2007). There was no ambiguity.

We also reject defendant's contention that the MOU should be interpreted against the drafter. Even were we to accept defendant's argument that the MOU was ambiguous, which we do not, there is nothing in the record to indicate that the parties had unequal bargaining power. Thus, the "last resort" doctrine of contra proferentem urged by defendant is not applicable here. Ibid.

Equally unavailing is defendant's contentions that he was not a party to the MOU, and it did not place any mutual obligation on the parties. While it is true that the introductory paragraph of the MOU states "This 'MEMORANDUM OF UNDERSTANDING' is between the following two parties currently known as (1) Crystex Composites LLC and Investment Group," it identified the "key investors," their individual interests and contributions, including defendant's and provided for the consequences in the event defendant did not meet his obligation. It was signed by all the individuals personally.

Further, defendant's obligation, as well as that of the other members, was spelled out. Defendant promised to provide a \$200,000 investment to be paid before the end of March 2004. He testified that the purpose of the attempted sale of his stock was "to come up with my \$200,000 to satisfy the operating agreement

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requirement." In consideration for defendant's contribution, the remaining parties agreed to contribute their capital investments so that M&M could be purchased and each party, including defendant, could receive an ownership interest in the soon-to-be-formed Crystex. The testimony at trial established that the Prime Boys would not have risked an investment in Crystex without defendant's capital contribution had defendant refused to agree to the terms of the MOU. They accepted the risk of contributing capital investments without a present contribution by defendant in order to form Crystex in exchange for defendant's promise to contribute his investment by the end of March 2004 or forfeit his ownership interest. The judge correctly found that there was mutual consideration and the MOU was enforceable.

Defendant's contention that he met his obligation is likewise unavailing. His contention that he met his \$200,000 non-cash contribution by "continuing to pledge his ABMC stock as collateral to CIT" is belied by his own admissions at trial that it was his intention in October 2003 to contribute \$200,000 by converting his shares of stock, which were then worth \$110,000 as an offset toward the \$200,000 he owed. Moreover, he conceded that the purpose for the January 12 attempted sale of stock was to get the \$200,000. It is also noteworthy that Milby's contribution included both a \$190,000 cash contribution plus a pledge of significant shares of stock as partial collateralization for the CIT loan. The record does not support defendant's assertion that his contribution was limited to the use of his ABMC stock as partial collateralization of the CIT loan to Crystex.

The New Jersey Limited Liability Company Act (LLC Act), N.J.S.A. 42:2B-1 to -70, envisions cash contribution to an LLC as a type of obligation that may be required from a member, N.J.S.A. 42:2B-32, and allows the LLC to provide for specific consequences, including forfeiture in the event the contribution is not made. N.J.S.A. 42:2B-33c. The MOU provides for just such a forfeiture. Moreover, the General Provisions of the Operating Agreement indicated that allocations and distributions are to be made "among the Members according to their Limited

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It was legally appropriate for defendant to forfeit his ownership interest, as well as distributions and profits. His failure to deliver his contribution rendered his membership interest a nullity. The judge aptly noted:

What is important here is that there's a total failure of consideration. He never paid the money, he never sold his stock, he never subjected his own capital to the risk of a new company.

I'm satisfied that Mr. Murray never acquired a membership interest in Crystex. And any interest of his is therefore void. Any interest of Murray in the ownership of Crystex is null and void and his shares are forfeited.

The judge's finding that defendant breached his agreement by not making the required \$200,000 contribution is supported by adequate credible evidence in the record. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974); In re Will of Liebl, 260 N.J. Super. 519, 523 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993).

We next address defendant's contention that the trial court erred in finding that he committed fraud in the inducement. The judgment sets forth the judge's findings that plaintiff prevailed on the two counts (Counts Seven and Eight) of their complaint alleging fraud in the inducement by "proving that defendant fraudulently induced plaintiffs to invest in Crystex by promising that he would within a certain time frame invest \$200,000 of his own money" and by acting "fraudulently in order to induce Larry Milby into investing in Crystex."

In order to succeed in an action for common law fraud, a plaintiff must show: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages."

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Data Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). Those elements must be proven by clear and convincing evidence. Simpson v. Widger, 311 N.J. Super. 379, 392 (App. Div. 1998). Normally, "to form the basis for an action in deceit, the alleged fraudulent representation must relate to some past or presently existing fact and cannot ordinarily be predicated upon matters in futuro. An exception exists in the case of a false representation of an existing intention, i.e., a 'false state of mind.'" Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 380 (App. Div. 1960) (citations omitted). "The distinction is whether the representation of an intention is in fact a mere promise collateral to the contract or an affirmation of a present state of mind." Comfort Spring Corp. v. Brooks Equip. Corp., 13 N.J. Super. 564, 566 (App. Div. 1951). To be sure, "it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Id. at 567.

Misrepresentation of a present state of mind, with respect to a future matter, may be concluded from the utter recklessness and implausibility of the statement in light of subsequent acts and events; from a showing that at the time of the making of the promise, the promisor's intention to perform was dependent upon contingencies known to the promisor and unknown to the promisee; or from circumstances indicating that the promisor must have known at the time of his promise that he could not or would not fulfill it.

[Ocean Cape Hotel Corp., supra, 63 N.J. Super. at 381 (citations omitted).]

In our view, the evidence failed to demonstrate, through clear and convincing evidence, that defendant had an existing intention, at the time the MOU was entered into, to renege on his \$200,000 contribution. Instead, the evidence points to the contrary conclusion. The letter from CIT to PMK Securities was sent within six months of the execution of the MOU and specifically authorized the sale of defendant's 106,000 shares of ABMC stock "[p]ursuant to [defendant's] request" with the proceeds to be paid directly to CIT "subject to [its] lien under the Pledge Agreement." The letter was dated January 12, 2004, but was not faxed by CIT to PMK until January 21, 2004. At the time defendant authorized the sale, the price of the

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stock was \$2.10 per share and, had the stock been sold on January 12, it would have yielded over \$200,000. By January 21, however, the stock price had fallen to \$1.80 per share and the shares were never sold.

At trial, defendant testified that he wanted to sell the stock "at the price he was looking for." He also acknowledged that his purpose was "to get the \$200,000 to satisfy the operating agreement requirement." The evidence that defendant neither sold his stock nor came up with his capital contribution, while sufficient to establish a breach of the MOU, did not amount to clear and convincing evidence of an intention, at the time the MOU was entered into, not to meet his obligation. Thus, plaintiffs' proofs failed to prove that defendant fraudulently induced them to enter into the MOU.

We come to a different conclusion respecting defendant's contention that the proofs were insufficient to establish Milby's claim that defendant fraudulently induced him to invest his 150,000 shares of ABMC stock to collateralize the CIT loan. Defendant asserts that Milby did not properly present a fraud claim because he did not seek damages.

When defendant advised Milby that CIT would not permit Milby to control his stock, Milby balked at pledging his shares. Defendant then guaranteed him a minimum payment of \$94,500 per year after the first year in exchange for pledging his stock as collateral and losing control of it. Although defendant did not give Milby the typed guarantee until April 2004, it was dated in October and the promise was made in October to induce Milby to pledge his stock. The credible evidence established that defendant did not advise Flores or the other members of the guarantee and he did not have the members' authority to bind the company. Paragraph 8.7 of the General Provisions provides in part that "no Member shall receive preference over any other Member with regard to any distribution from the Company." Paragraph 8.8 provides that "no distributions shall be made except as deemed appropriate by a Majority of the Members." Although Milby did not seek

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damages in his complaint, he testified that he never received the \$94,500 defendant guaranteed. As such, the record presented clear and convincing evidence that defendant fraudulently induced Milby into pledging his stock by promising him a guarantee that he knew the company could not deliver, to Milby's financial detriment.

We next consider defendant's contentions that his expulsion was not warranted. He argues that he did not breach his fiduciary duty to the LLC but, if he did, the breaches were not sufficiently material to warrant expulsion. He also maintains that the forfeiture provision in the MOU was unenforceable in a court of equity. We reject those contentions.

There was ample evidence supporting the judge's finding that defendant breached his fiduciary duty to Crystex. The Operating Agreement required the members to "conduct the business of Company in a prudent and businesslike manner consistent with all fiduciary obligations imposed by law." Defendant does not dispute that, as a member, he had fiduciary obligations to the company. Instead, he "contests the findings of fact underlying" the judge's conclusion that he breached these duties.

We need not revisit the testimony concerning the defendant's hidden salary payments to his son from the company's operating account, the evidence surrounding defendant's use of company funds to pay a \$2000 personal debt evidenced by a promissory note between defendant and Milby entered into in July 2003, before the formation of the company, or his secret unauthorized guarantee to Milby. Suffice it to say, the judge's findings and conclusions are entitled to great deference in light of the judge's opportunity to perceive the witnesses and assess their credibility and should not be disturbed unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms, *supra*, 65 N.J. at 484. Credibility is always for the fact finder to determine, Ferdinand v. Agric. Ins. Co., 22 N.J. 482, 492 (1956), and we will not make independent credibility determinations unless the trial

judge's reasoning was not articulated and cannot be inferred from the record. State v. Locurto, 157 N.J. 463, 472-75 (1999). These bedrock principles of appellate review are particularly applicable here where defendant's testimony was inconsistent with that given by both Flores and Milby.

Our determination that the judge correctly found that defendant's failure to pay his capital contribution nullified his ownership from the beginning renders moot defendant's contention that his breach of fiduciary duties was neither material nor equitably sufficient to warrant his forfeiture of ownership. See, e.g., Sebring Assocs. v. Coyle, 347 N.J. Super. 414, 430-32 (App. Div.), certif. denied, 172 N.J. 355 (2002). The judge found that defendant breached his fiduciary duty to Crystex. However, he never made a determination that the breach was material. Indeed, defendant's counsel never specifically argued in his summation that the breach was not material. Nevertheless, we address the issues raised, substantively.

N.J.S.A. 42:2B-24b(3) states that a member may be disassociated from an LLC by judicial determination because

- (a) the member engaged in wrongful conduct that adversely and materially affected the limited liability company's business;
- (b) the member willfully or persistently committed a material breach of the operating agreement; or
- (c) the member engaged in conduct relating to the limited liability business which makes it not reasonably practicable to carry on the business with the member as a member of the limited liability company.

At trial, defendant admitted that his use of the operating account to make extra payments to his son that would not have shown up on a 1099 or W-2 violated both state and federal tax laws. Moreover, defendant's misappropriation of corporate funds to pay a non-company personal debt subjected him to potential criminal liability, see In re Imbriani, 149 N.J. 521, 524-25 (1997), and exposed both the company and the other members to potential serious liability. See 26 U.S.C.A. § 7206

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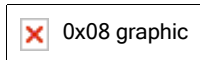
(2); Francis v. United Jersey Bank, 87 N.J. 15, 31 (1981) (noting that corporate directors were liable for fellow director's conversion of trust funds because "[d]irectors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect."). Consequently, although not specifically argued, the illegality of defendant's conduct supports the conclusion that the payments to his son and Milby not only constituted a material breach of his fiduciary obligations under the Operating Agreement but was also a potential detriment to the company's business. See In re Niles Trust, 176 N.J. 282, 290-91 (2003) (trustee's embezzlement of assets constituted breach of fiduciary duty); Dodd v. Wilkinson, 42 N.J. Eq. 647, 650 (1887) (noting that the alleged illegal conduct of defendants characterizes their course of dealing in their fiduciary capacity).

Defendant's reliance, for the first time on appeal, on the equitable maxim that "equity abhors a forfeiture" is likewise wide of the mark. Defendant asserts that, because he ran the "company for seven months with outstanding financial results for all of them," it was inequitable for him to forfeit his equity and his interest in the undistributed profits. "Equity regards that as done which ought to be done." Wohlegmuth v. 560 Ocean Club, 302 N.J. Super. 306, 312 (App. Div. 1997). "Applying principles of fairness and justice, a judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). "[O]ne who seeks the intervention of a court of equity must do equity." Morsemere Fed. Sav. & Loan Ass'n v. Nicolaou, 206 N.J. Super. 637, 645 (App. Div. 1986). "A suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." Borough of Princeton v. Bd. of Chosen Freeholders, 169 N.J. 135, 158 (2001) (quoting A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 2325,

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246 (1949)). "In simple parlance, it merely gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Ibid.* (quoting *Faustin v. Lewis*, 85 N.J. 507, 511 (1981)). Equitable intervention to set aside his forfeiture of ownership or allow him to recover undistributed profits was not warranted given defendant's adverse conduct. His contentions to the contrary lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Next, we address the judge's award of counsel fees pursuant to N.J.S.A. 14A:12-7(1)(c) and N.J.S.A. 14A:12-7(10). Those provisions permit counsel fees under specified circumstances related to corporations. As an LLC, Crystex is not governed by the provisions of Title 14A. N.J.S.A. 42:2B-64 of the LLC Act permits a court to award reasonable counsel fees to a plaintiff if successful, in whole or part, in a derivative action. Here, the plaintiffs sued as individuals rather than on behalf of the company. *See, e.g., In re PSE&G S'holder Litig.*, 173 N.J. 258, 307 (2002); 68th St. Apts. Inc. v. Lauricella, 142 N.J. Super. 546, 552 (Law Div. 1976), aff'd o.b. 150 N.J. Super. 47 (App. Div. 1977). The Law Division was without statutory or rule authority to award counsel fees. *See R. 4:42-9*.



Finally, to the extent we have not expressly addressed any of defendants' remaining arguments, we deem them not to require discussion. R. 2:11-3(e)(1)(E). We reverse that portion of the judgment awarding counsel fees and the finding that defendant fraudulently induced plaintiffs to invest in Crystex. In all other respects, the judgment is affirmed.

Defendant filed a counterclaim asserting breach of contract, breach of covenant of good faith and fair dealing, tortious interference with prospective economic advantage, breach of fiduciary duty, fraud, negligent misrepresentation, securities fraud, unjust enrichment, oppression, civil conspiracy, and defamation. He prosecuted only the defamation claim. In his decision, the judge found that defendant did not prove the defamation claim. He dismissed defendant's counterclaim, as well as defendant's third-party complaint against Crystex. Defendant does not appeal those dismissals.

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Flores testified that "[o]riginally, the deal was for \$800,000." A search performed by the attorney revealed a tax lien. A compromise was worked out with CIT by which CIT deducted \$36,000 off the \$800,000 to come up with the \$764,000 figure.

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