To be Argued by:
KERRIN KLEIN
(Time Requested: 30 Minutes)

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Appellate Division–First Department Appellate Case No. 2022-03237

Court of Appeals

of the

State of New York

ALBERT BEHLER,

Plaintiff-Appellant,

– against –

KAI-SHING TAO,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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STATUTES

Defendant-Respondent Kai-Shing Tao ("Defendant-Respondent" or "Tao"), by his attorneys, Olshan Frome Wolosky LLP, respectfully submits this brief in response to the Brief for Plaintiff-Appellant Albert Behler ("Plaintiff-Appellant" or "Behler"), dated June 21, 2024 (the "Br."), appealing the March 14, 2024 Order of the Supreme Court, Appellate Division, First Department (the "Order"), which affirmed the June 8, 2022, Decision + Order on Motion (the "Decision") of the Supreme Court, New York County, which granted Tao's motion to dismiss Behler's complaint (the "Complaint").

Preliminary Statement

Behler brought this lawsuit against Tao, the sole manager of Digipac, LLC ("Digipac"), based on an alleged oral agreement that purportedly induced Behler to invest $3 million to acquire membership interests in Digipac. According to Behler, Tao agreed to "provide Behler the opportunity to cash out within five years of the initial investment." (R. 12, ¶ 23.) Based on that allegation, Behler brought claims against Tao (not Digipac) for breach of contract and promissory estoppel. The IAS Court dismissed those claims as barred by the terms of Digipac's Amended and Restated Limited Liability Company Agreement (the "LLC Agreement") and because the alleged oral agreement or promise was vague and indefinite. The Appellate Division, in a well-reasoned Opinion, affirmed. Each of Behler's arguments on appeal have no merit.

First, the Appellate Division properly affirmed the IAS Court's holding that Behler is bound by Digipac's LLC Agreement, including the merger clause contained therein. Behler complains that Tao "unilaterally" amended Digipac's original LLC agreement (the "Initial Agreement") into the LLC Agreement after he invested in Digipac. But the Initial Agreement – which indisputably bound Behler upon his investment – was a barebones two-page agreement, which vested Tao with "sole discretion" over all aspects of Digipac, including its management, contributions, and distributions, and was inconsistent with the alleged oral agreement between Behler and Tao that Behler claims afforded Tao no such discretion. And importantly, the Initial Agreement contemplated a future amendment solely in the form of a "writing signed by" only Tao. (R. 24-25.) Not only was the alleged oral agreement never reduced to writing, but the Initial Agreement contemplated and permitted Tao to "unilaterally" amend Digipac's Initial Agreement to create a more fulsome operating agreement. When Tao so amended Digipac's Initial Agreement in 2014, he provided advanced notice and a draft of the LLC Agreement to Behler, and Behler did not object to the LLC Agreement's terms. In fact, Behler explicitly accepted and ratified Digipac's amended LLC Agreement by, *inter alia*, sending multiple letters to Tao's counsel invoking and citing specific provisions of the LLC Agreement that were not present in the Initial Agreement. *See* Point I.A., *infra*.

Instead of reasonably disputing any of the clear facts above, Behler makes the absurd argument that the amendment of Digipac's Initial Agreement is unenforceable as it was part of a fraudulent scheme by Tao. Behler's Complaint lacks *any* allegations of a fraudulent or illicit scheme or intent, which are in fact belied by the record. Moreover, Behler's argument is barred by his failure to raise it before the IAS Court. Thus, Behler is bound by the LLC Agreement. *See* Point I.A.2., *infra*.

Second, the Appellate Division properly held that the terms of Digipac's LLC Agreement bar Behler's claims. Behler argues that the LLC Agreement's merger clause is somehow ambiguous. But courts have repeatedly held similar merger clauses to be clear and enforceable. Behler also claims that the merger clause is not applicable because the alleged oral agreement is "separate" from and consistent with the LLC Agreement. But the LLC Agreement and alleged oral agreement are not independent and are in direct conflict. And, Behler argues that he did not "waive" or "release" his rights under the alleged oral agreement. But Behler fails to cite a single case applying the standard for release or waiver to a merger clause because that standard does not apply. Where Digipac's Initial Agreement provided for the mechanism by which that agreement could be amended, and Digipac and Tao followed that agreement, Behler should not be heard to complain about the result. *See* Point I.B., *infra*.

Third, this Court should affirm dismissal of Behler's Complaint because Behler failed to state a claim for breach of contract as the alleged promise to "provide Behler the opportunity to cash out within five years" is too indefinite to form an enforceable agreement. Behler's claim that the alleged oral agreement contained a formula to calculate the cash-out price is false. And Behler's suggestion that the Court may simply look to the publicly available share price of Remark stock to determine the parties' agreed "exit" price is meritless where he pled that Digipac invested in Remark through a series of loans, not merely publicly held stock. Behler also did not identify other key material terms necessary for a definitive contract. For example, Behler failed to plead the form of the alleged "exit opportunity" or whether Tao promised to provide the "exit opportunity" in his individual capacity or in his capacity as Manager of Digipac. *See* Point II., *infra*.

Fourth, the Appellate Division properly affirmed the dismissal of Behler's promissory estoppel claim because Behler could not have reasonably relied on the hopelessly vague alleged promise to provide an "opportunity" to "exit" Digipac. That claim is also barred by the merger clause contained in the Digipac LLC Agreement, and is impermissibly duplicative of Behler's breach of contract claim. *See* Point III., *infra*.

Thus, for the reasons set forth herein, the Appellate Division's Opinion should be affirmed.

Questions Presented

1. Did the Appellate Division properly affirm the IAS Court's Decision granting Defendant-Respondent's motion to dismiss Behler's breach of contract claim where Behler is bound by the terms of Digipac's LLC Agreement, and the terms of Digipac's LLC Agreement bar Behler's claim?

Yes.

2. Did the Appellate Division properly affirm the IAS Court's Decision granting Defendant-Respondent's motion to dismiss Behler's breach of contract claim where Behler failed to plead a legally enforceable agreement or a breach thereof?

Yes.

3. Did the Appellate Division properly affirm the IAS Court's Decision granting Defendant-Respondent's motion to dismiss Behler's promissory estoppel claim where that claim is barred by Digipac's LLC Agreement, where Behler could not have reasonably relied on Tao's vague alleged "promise" to provide Behler an "opportunity" to "exit" Digipac, and where that promissory estoppel claim is duplicative of Behler's breach of contract claim?

Yes.

Counter-Statement of the Case[1]

The Parties and Digipac

Plaintiff-Appellant Behler is a sophisticated investor that invested $3 million in exchange for a membership interest in Digipac. (R. 12-15, ¶¶ 23-25, 37, 40, 46.) He is the Chairman, Chief Executive Officer, and President of Paramount Group, Inc., a publicly traded real estate company (ticker PGRE on the New York Stock Exchange) with a market capitalization of over $1 billion.

Digipac is a Delaware limited liability company that was formed in 2012 in order to make loans to and acquire shares of common stock in Remark Holdings, Inc. (f/k/a Remark Media, Inc.) ("Remark"). (R. 11-12, ¶¶ 17-20, 22, 27; R. 22-23; R. 34, § 2.5.) Remark's shares traded on NASDAQ under the ticker MARK.

Defendant-Respondent Tao is, and was at all times, the sole Manager of Digipac. (R. 11, ¶ 20; R. 19, ¶ 2; R. 25, § 10; R. 31, § 1.24.)

Behler Becomes a Member of Digipac

Behler became a member of Digipac in November 2012. On November 26, 2012, Behler wired an investment of $1.5 million to Digipac. (R. 12, ¶ 25.) He wired another investment of $1.5 million to Digipac on October 31, 2013. (*Id.*)

[1] The facts set forth herein are taken from Behler's Complaint, which Tao accepts as true solely for purposes of this appeal to extent not contradicted by documentary evidence, and documentary evidence annexed to Tao's motion papers below. Citations herein to "R." refer to the Record on Appeal.

Following his second investment, Behler held a 24.14 % membership interest in Digipac. (*Id*.)

Behler's Acceptance and Ratification of the LLC Agreement

Digipac's operations were initially governed by a Limited Liability Company Agreement dated October 11, 2012 (the Initial Agreement). (R. 24-26.) The Initial Agreement was a short two-page agreement that contemplated a future, more fulsome agreement. The Initial Agreement vested broad authority in Tao, including "sole discretion" to determine distributions and contributions, or to dissolve Digipac, and provided that Digipac would be "managed exclusively" by Tao. (R. 24-25.) Importantly, it also provided that the Initial Agreement "may be amended only in a writing signed by the Sole Member," where "Sole Member" was defined to be Tao unless he transferred "all of his membership interest in the Company" to a transferee. (R. 25.)[2]

As the Initial Agreement contemplated, Digipac and its members (the "Members," or each individually a "Member") entered into an Amended and Restated Limited Liability Company Agreement on June 4, 2014 (the LLC Agreement), which was signed by Tao. (R. 27-55.) That detailed agreement was 28

[2] Tao transferred 24.14% of his membership interest to Behler, and thus remained the Sole Member at all times relevant to this dispute. (R. 157 n.3; R. 12, ¶ 25.)

pages in length – 14 times the length of the Initial Agreement – and spelled out in detail the rights and responsibilities of Digipac's Members. (*Id*.)

Behler received copies of the LLC Agreement and related subscription agreement by email on June 2, 2014. (R. 56-97.) Behler alleges that he did not sign those documents. (R. 9, ¶ 7; Br. at 12, 31.) However, he does not dispute that he did not object upon their receipt. In fact, Behler acted at all times as a Member of Digipac. (R. 19-20, ¶ 5.) Digipac has provided Behler with Schedule K-1's annually for each year since 2013 that reflect Behler's membership interest in Digipac. (R. 20, ¶ 6; R. 98-130.)

On April 2, 2019, Becker, Glenn, Muffly, Chassin & Hoskinski LLP, as counsel for "Albert Behler, a Member of Digipac, LLC," sent a demand letter to counsel for Digipac and Tao, demanding certain documents "[p]ursuant to Section 7.3 and 7.4(a) of the Amended and Restated Limited Liability Agreement of Digipac, LLC" (*i.e.*, the LLC Agreement) (the "Demand"). (R. 135-36.) Behler explicitly "request[ed] this information in his capacity as a Member of Digipac." (*Id*.) Behler reiterated his Demand, and reconfirmed his status a Member of Digipac pursuant to the LLC Agreement, by letters dated May 31, 2019 and August 13, 2019. (R. 137-45.) In October, 2019, Digipac and Tao produced documents in response to the Demand. (R. 131-32, ¶ 6.)

Terms of the LLC Agreement

The LLC Agreement, which is governed by Delaware law,[3] set forth the rights of all Digipac Members, and contains a merger clause which states that the LLC "Agreement, together with the Certificate of Formation, each Subscription Agreement and all related Exhibits and Schedules, constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter . . ." (R. 51, § 13.2.) Thus, the sole agreement relating to Behler's investment in Digipac is the LLC Agreement.

The LLC Agreement is clear as to the Digipac Members' rights. For example, under Section 3.3, "[e]xcept in accordance with the terms of this [LLC] Agreement, no Member shall be entitled to receive any distributions, whether of money or property, from the Company." (R. 35.) And "[e]xcept as expressly set forth in this [LLC] Agreement, no Member shall have any rights or preferences in addition to or different from those possessed by any other Member." (R. 40, § 6.1.) Digipac's Manager (Tao) is vested with the authority to determinate distributions of cash "in his sole discretion." (R. 37, § 4.3.) And "a Member may only Transfer all or any part of its Membership Interest upon the prior written approval of the Manager,

[3] (R. 52, § 13.4.)

which may be withheld or conditioned for any reason." (R. 43, § 8.1.) Such transfer may only occur following a written offer meeting the requirements detailed in the LLC Agreement, and only after Member Park One Investments, LLC fails to exercise its right of first refusal. (R. 29, 33, 44-45, §§ 1.6, 1.32, 8.5.)

In addition, under the LLC Agreement, "[e]ach Member shall look solely to the assets of the Company [Digipac] for the return of its investment . . ." and "shall have no recourse" against other Members. (R. 47, § 9.4.) Tao "shall not be liable to the Company or any Member for any claims, costs, expenses, damages or losses arising out of or in connection with the performance of his duties as the Manager, or for any act or omission performed or omitted to be performed by the Manager in good faith and pursuant to the authority granted to the Manager under this [LLC] Agreement, other than those directly attributable to the Manager's willful misconduct." (R. 39, § 5.1(c).) No term of the LLC Agreement "may be waived except by an express written instrument to such effect signed by the party hereto to whom the benefit of such term, condition or provision runs." (R. 53, § 13.9.)

The Alleged Oral Agreement

Notwithstanding the clear terms of the LLC Agreement, Behler alleges that he had an oral agreement with Digipac's Manager, Tao, concerning his investment in Digipac (the "Alleged Oral Agreement"). According to Behler, the agreement had two components: First, "if the price of Remark were to hit $50/share," Tao

"would cause Digipac to sell its shares of [R]emark and distribute the proceeds (based on Behler's pro rata share of Digipac) to Behler." (R. 9, ¶ 5; *see also R.* 12, ¶ 23.) Second, "within five years of the initial investment," Tao "would provide Behler with an exit opportunity" or an "opportunity to cash out" from Digipac "based on the value of Digipac's Remark holdings" or "Remark shares." (R. 9, 12, ¶¶ 5, 23.) Remark's stock price never reached $50 per share, and Behler never received the alleged second "exit opportunity." (R. 13-14, ¶¶ 33, 39-41.)

The IAS Court's Decision

Behler filed the underlying lawsuit on June 18, 2020. (R. 7-16.) Behler asserted two claims against Tao, each based on the Alleged Oral Agreement. First, Behler sought over $11 million in damages based on a failure to provide an "exit opportunity" from Digipac in 2017. Second, Behler sought at least $3 million on the theory of promissory estoppel. Tao moved to dismiss each of Behler's claims.

On June 8, 2022, the IAS Court (Hon. Andrew Borrok) granted Tao's motion in its entirety. Justice Borrok properly held that:

1. "[T]he terms of th[e] alleged oral agreement are unenforceable because they are indefinite and incapable of being enforced. No agreement or formula is alleged as to the terms of any such exit option after the five years the defendant [Tao] purportedly promised to provide [Behler] with an exit strategy." (R. 5.)

2. Tao's motion to dismiss must be granted because Digipac's "operating agreement . . . does not provide for an automatic exit option and the operating Agreement otherwise indicated that it superceded any prior or contemporaneous agreement . . . Behler is bound by the operating agreement because he is a member of Digipac . . . It does not matter that he did not sign it (6 Del C § 18-101(9)." (R. 5.)
3. Behler's "promissory estoppel claim fails because Mr. Behler's reliance on Mr. Tao's alleged promise was unreasonable based on the lack of definite terms as to any purported guaranteed exit strategy." (R. 5-6.)

The Appellate Division's Opinion Affirming the Decision

On March 14, 2024, in the 3-2 Opinion, the Appellate Division affirmed the IAS Court's Decision. (R. 152-76.) Writing for the Majority, Justice Manzanet-Daniels properly held that the Alleged Oral Agreement "was superseded by the amended LLC [A]greement, and that [Defendant-Respondent's] obligations under the exit opportunity agreement were extinguished by the terms of the amended LLC [A]greement." (R. 157). The Appellate Division further held, *inter alia*, that:

1. Digipac's Initial Agreement authorized Tao to "unilaterally enter Digipac into the amended LLC [A]greement without the consent,

written or otherwise, of plaintiff or any other members of Digipac." (R. 157.)

2. Digipac's amended LLC Agreement did not need to "expressly reference[ ]" the Alleged Oral Agreement in order to supersede that alleged agreement. (R. 157-58.) Rather, Behler agreed to the terms of Digipac's Initial Agreement (including its terms regarding future amendments to the LLC agreement by Tao) and its subsequent amendment by investing in Digipac. (*Id*.)
3. Under clear Delaware law, Behler was a party to, and bound by, both the Initial Agreement and the LLC Agreement regardless of whether or not he signed those documents, and thus was bound by the merger clause contained in the LLC Agreement. (R. 158-59.)
4. The merger clause superseded the Alleged Oral Agreement, where they both concerned, *inter alia*, the transfer of membership interests in Digipac, distributions among Digipac's Members, and the rights, obligations, and interests of the Members to each other and to Digipac. Moreover, mandating performance of the Alleged Oral Agreement would be "inconsistent with many of the amended LLC [A]greement's core terms, including, among other things, that: (i) no member is entitled to receive distributions from Digipac, (ii) defendant has sole

discretion to determine distributions to members, (iii) no member shall have any rights or preferences in addition to or different from those of any other member unless specified in the agreement, and (iv) defendant must consent in writing to any transfer of membership interest, and such consent may be withheld or conditioned for any reason." (R. 159-60.)

5. Tao's alleged verbal acknowledgements of the Alleged Oral Agreement do not vary the Appellate Division's affirmance, where the LLC Agreement required all modifications to be in writing, and pursuant to Delaware law prohibiting oral modifications of LLC agreements unless the parties' course of conduct explicitly evidences a modification. (R. 160-61.)

6. Behler's promissory estoppel claim was barred because such a claim does not apply where an enforceable contract – here, the LLC Agreement – governs the alleged promise at issue. Yet even if the Alleged Oral Agreement was enforceable, it would be a contract governing the promise at issue and thus would also serve to bar a promissory estoppel claim. And the promissory estoppel claim would also have been properly dismissed under New York law as duplicative of the breach of contract claim. (R. 161-62.)

The Majority thus affirmed the IAS Court's Decision dismissing Behler's claims in their entirety. The Majority did not address the IAS Court's holding that the Alleged Oral Agreement was indefinite and incapable of being enforced, holding that the issue was "academic . . . given [the] finding the exit opportunity agreement, if enforceable at its inception, was superseded by the amended LLC agreement and rendered unenforceable." (R. 156 at n.2.)

Justice Gesmer dissented, asserting, *inter alia*, that: (i) the Alleged Oral Agreement was sufficiently definite to survive a motion to dismiss, (ii) the record supported a cognizable theory that the Alleged Oral Agreement was not superseded by the LLC Agreement, and (iii) Behler adequately pled a claim for promissory estoppel. (R. 163-76.)

On April 8, 2024, Behler filed his Notice of Appeal to this Court. (R. 150.)

Argument

I.

THE APPELLATE DIVISION PROPERLY HELD THAT THE LLC AGREEMENT BARS BEHLER'S BREACH OF CONTRACT CLAIM

The Appellate Division properly affirmed the IAS Court's holding that the LLC Agreement bars Behler's claims. As a Member of Digipac, Behler's claims relating to his investment in Digipac are governed by the LLC Agreement. That LLC Agreement is governed by Delaware law, which thus applies to Behler's claims. (*See R.* 52, § 13.4; R. 156.) *See LCM Holdings GP, LLC v. Imbert*, 114

A.D.3d 406, 406 (1st Dep't 2014) (applying Delaware law and noting that the "parties' rights vis-à-vis each other as members of a Delaware LLC are defined by the operating agreement").[4] Behler does not, and cannot, dispute that he was bound by Digipac's Initial Agreement upon his investment in Digipac. Nor can Behler reasonably argue that he was not bound by the amended LLC Agreement. Instead, he makes a series of meritless arguments, each founded on the erroneous contention that the Alleged Oral Agreement and LLC Agreement are not in conflict or, alternatively, that the LLC Agreement's provisions should be disregarded as a product of an "illicit scheme" that was not pled in Behler's Complaint. Each of those arguments should be rejected on appeal.

A. The Appellate Division Properly Held that Behler is Bound by the LLC Agreement

Behler does not, because he cannot, dispute that he is a Member of Digipac. Behler pled that following his second $1.5 million investment in Digipac, he "held a 24.14% stake in Digipac." (R. 12, ¶ 25; *see also R.* 14, ¶ 40.) And since 2013, Behler received annual Schedule K-1s from Digipac reflecting his membership interest in Digipac. (R. 20, ¶ 6; R. 98-130.) Behler also repeatedly expressly referred to himself as a "Member of Digipac" and invoked the benefits of specific provisions of Digipac's LLC Agreement that provide Members the right to access

[4] But even if New York law were applied, the result would be no different and Behler's Complaint was properly dismissed.

certain documents (which provisions were absent from Digipac's Initial Agreement). (R. 135-45. *See also R.* 24-26; R. 42-43, §§ 7.3, 7.4.)

Behler now complains about Tao's "unilateral" amendment of the Initial Agreement. But under the clear terms of Digipac's Initial Agreement – which was in effect at the time Behler first became a member of Digipac – the company's LLC agreement was properly amended. (*See R.* 24-26, at p. 1 and §§ 10, 13.) Digipac's Initial Agreement was a barebones, two-page operating agreement that contemplated a future amendment. It also vested Tao with sole discretion and authority with respect to Digipac's distributions, contributions, dissolution, and management. And it vested sole discretion in Tao to amend the Initial Agreement, stating that the Initial Agreement could be amended "only in a writing signed by the Sole Member" – defined as Tao. (R. 24-26.) Behler does not dispute that he was bound by that provision allowing Tao to amend Digipac's Initial Agreement. Nor does Behler dispute that he was, in fact, provided a draft of the amended LLC Agreement on June 2, 2014 – two days before it was signed – and did not contest its terms. (R. 27-97.)

Instead of disputing the enforceability of the LLC Agreement at any time between 2014 and the filing of the underlying action in 2020, Behler specifically invoked the benefits of that agreement. In April 2019, Behler made a formal request for information from Tao and Digipac "in his capacity as a Member of Digipac" and "[p]ursuant to" the LLC Agreement. (R. 135-36.) Behler expressly cited Sections

7.3 and 7.4 of the LLC Agreement, which sections were not present in Digipac's Initial Agreement, and which provide that Digipac and its Manager (Tao) must maintain specific documents and "[u]pon the request of any Member, for purposes reasonably related to the interests of such Member . . . cause to be promptly delivered to such Member" a copy of such documents. (R. 135-36; R. 42-43, §§ 7.3-7.4. *See also R.* 24-26.) Behler's counsel repeatedly reaffirmed his status as a Member of Digipac in written correspondence to Tao and Digipac's counsel. (R. 137-45.) And Tao and Digipac ultimately produced documents in response to Behler's Demand. (R. 131-32, ¶ 6. *See also* R. 137 ("We appreciate Digipac's agreement to provide non-privileged documents . . .").)

1. The Appellate Division Properly Held that Tao Properly Amended the Initial Agreement, and Neither the Initial Nor Amended LLC Agreement Required Behler's Signature

Behler repeatedly protests that Tao "unilaterally" amended Digipac's Initial Agreement. But the Appellate Division correctly held that whether or not Behler signed the LLC Agreement is irrelevant. Under clear Delaware law, "[a] member or manager of a limited liability company or an assignee of a limited liability company interest is bound by the limited liability company agreement whether or not the member or manager or assignee executes the limited liability company agreement." 6 Del. C. § 18-101(9) ("A written limited liability company agreement . . . [s]hall not be unenforceable by reason of its not having been signed by a person being

admitted as a member . . ."). *See also Seaport Vill. Ltd. v. Seaport Vill. Operating Co., LLC*, No. CIV.A. 8841-VCL, 2014 WL 4782817, at *2 (Del. Ch. Sept. 24, 2014) ("In 2005, the General Assembly added . . . language to the LLC Act to clarify that members also are bound by the LLC's operating agreement, regardless of whether they execute the agreement."); *LCM Holdings GP, LLC v. Imbert*, 114 A.D.3d at 406 ("parties' rights vis-à-vis each other as members of a Delaware LLC are defined by the operating agreement").

Behler protests that this statute cannot be applied to void the Alleged Oral Agreement because the Alleged Oral Agreement is not a "limited liability company agreement" concerning the affairs of Digipac under 6 Del. C. § 18-101. (Br. at 37-40.) Not only does Behler fail to provide any cases that support his proposition, but that proposition entirely misses the point. Tao does not argue that Behler was bound by the Alleged Oral Agreement without his signature. Rather, under clear law, Behler was bound by Digipac's Initial Agreement and its current LLC Agreement. Both of those agreements concern the affairs of Digipac and are clearly governed by 6 Del. C. § 18-101.[5] While "'only parties to a contract are bound by that contract' . . . [b]y binding a Delaware LLC and its members to their operating agreement, Section 18-101([9]) makes them parties to the operating agreement" and thus bound

[5] The Appellate Division correctly held that the Alleged Oral Agreement concerns the same subject matter as the LLC Agreement. (R. 159-60.)

by that agreement. *Seaport Vill. Ltd. v. Seaport Vill. Operating Co., LLC*, 2014 WL 4782817, at *2.

There is thus no dispute that Behler was bound by Digipac's Initial Agreement upon his investment in Digipac. (R. 24-26.) That Initial Agreement vested sole discretion in Tao, including sole authority to amend that agreement. The sole exception was where Tao transferred all of his membership to another investor. (R. 24-26, at p. 1 and §§ 10, 13; R. 157.) There was no such transfer in this case, so Tao remained the sole member authorized to amend Digipac's LLC agreement at the time of the amended LLC Agreement. (*See R.* 12, ¶ 25; R. 157 n.3.) The Initial Agreement also required all amendments to be in writing, which the Alleged Oral Agreement indisputably was not. (R. 25, § 13.) Behler chose to invest in Digipac notwithstanding the clear language granting sole discretion to Tao – including the sole discretion to amend the Initial Agreement – and requiring all amendments be in writing. He also chose to invest without obtaining a written modification of the Initial Agreement. He thus has no basis to now complain about Tao's purported "unilateral" amendment of Digipac's Initial Agreement and adoption of the LLC Agreement.

2. This Court Should Reject Behler's New Argument of an "Illicit Scheme"

Behler argues that the LLC Agreement's "merger clause was potentially a key element of an illicit scheme perpetrated by Tao" and thus cannot be enforced. (Br.

at 52-54.) Behler failed to make this argument before the IAS Court. That alone precludes his argument on appeal. *See Merrill by Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988) ("While the Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, the Court of Appeals may not address such issues in the absence of objection in the trial court. Accordingly, the dissent was not on a question of law which would be reviewable by the Court of Appeals and the appeal must be dismissed.").[6]

However, even if the Court were to consider Behler's new argument, it has no merit. Despite Behler's claim of an "illicit scheme" concocted by Tao to "lure[ ]" Behler into an investment and then "conceal" his termination of the Alleged Oral Agreement, those allegations are found nowhere in Behler's Complaint. (Br. at 52-53; *see generally R.* 8-16.) Behler's Complaint has *zero* allegations of an alleged illicit or fraudulent scheme or intent, but rather sounds merely in breach of the Alleged Oral Agreement. (*See generally* R. 8-16.) And Behler's claim that Tao "discreetly amended the LLC Agreement" (Br. at 53) is not only absent from the Complaint, but belied by the record on appeal, which shows that Behler was, in fact, provided a draft of the amended LLC Agreement on June 2, 2014 – two days before it was signed. (R. 27-97.) Moreover, Tao's amendment of the Initial Agreement

[6] Behler's claim of "accidental termination" also was not presented to the IAS Court. (*See* Br. at 22.)

was provided for by the terms of that agreement. The Initial Agreement was a barebones, two-page agreement that expressly granted Tao sole discretion over Digipac and contemplated a future amendment solely in the form of a writing signed by Tao. (R. 24-26.) The record also shows that Behler was fully aware of the LLC Agreement where he invoked that agreement and its provisions to seek documents from Tao and Digipac over a year before commencing this action. (R. 135-45.)

The cases cited by Behler do not support his argument that he, as plaintiff, should be permitted to rely on un-pled theories of fraud to sustain a breach of contract claim. (*See* Br. at 52-54.) Instead, those cases stand for the unremarkable proposition that a plaintiff may not sue to collect fruit of a crime or illegality. In *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 469 (1960), this Court reversed a decision striking affirmative defenses, and held that a plaintiff may not successfully sue for fruit of a crime (bribery). In *Summit Rest. Repairs & Sales, Inc. v. New York City Dep't of Educ.*, 201 A.D.3d 612 (1st Dep't 2022), the Appellate Division denied summary judgment where there were questions of fact regarding whether plaintiff's submission of fabricated documents to comply with its contractual obligations was a central part of the parties' course of conduct, which would bar plaintiff from recovering. In *B.D. Est. Plan. Corp. v. Trachtenberg*, 134 A.D.3d 650 (1st Dep't 2015), the Appellate Division reversed in part a decision denying defendant's motion to amend her answer to plead affirmative defenses of

bribery and corruption where plaintiff's sole owner, principal and employee was convicted of mail and wire fraud in connection with a scheme to defraud, which scheme may have related to the promissory note at issue. *See also Innovative Mun. Prod. (U.S.), Inc. v. Cent. Equip., LLC*, 54 Misc. 3d 1224(A), 55 N.Y.S.3d 692 (N.Y. Sup. 2017) ("if the proof at trial shows that the invoices upon which [counterclaim plaintiff] seeks to recover are the product of fraud or illegality, [counterclaim plaintiff] may be precluded from turning to the courts for recovery").

3. Alternatively, Behler Intended to be Bound By, and/or Ratified, the LLC Agreement

Behler's appeal entirely ignores that he also is bound by the terms of the LLC Agreement because it is evident that Behler "intended to be bound" by the LLC Agreement and operated under its terms. *Whittington v. Dragon Grp. L.L.C.*, No. CIV.A. 2291-VCP, 2013 WL 1821615, at *3-4 (Del. Ch. May 1, 2013) ("Nothing in the law of contracts requires that a contract be signed to be enforceable." Rather, the relevant inquiry is whether the parties "intend[ed] to be bound" by the contract.). *See also God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 374 (2006); *Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 N.Y.3d 363, 369 (2005) ("an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound").

Behler made two investments in Digipac, received several annual Schedule K-1s reflecting his interest in Digipac, and acted at all times as a Member of Digipac.

(*See* R. 19-20, ¶ 5; R. 98-130; R. 12, ¶ 25.) In addition, Behler explicitly invoked his membership in Digipac and the provisions of the LLC Agreement, demanding documents "[p]ursuant to" the LLC Agreement and "in his capacity as a Member of Digipac." (R. 131-145.) The provisions of the amended LLC Agreement through which he sought (and obtained) documents were not present in Digipac's Initial Agreement. (*Id.*; R. 24-26; R. 42-43, §§ 7.3, 7.4.) This clearly demonstrated Behler's acceptance of the terms of Digipac's amended LLC Agreement.

Even if Behler was not initially bound by the LLC Agreement (which he was), through his conduct, including express admissions as to the binding nature of the LLC Agreement and acceptance of the benefits of the LLC Agreement, he ratified that agreement. *See Cianci v. JEM Enter., Inc.*, No. CIV. A. 16419-NC, 2000 WL 1234647, at *12 (Del. Ch. Aug. 22, 2000) (where party "accepted all of the benefits of the bargain, and even partially performed it, without asserting that the contract was tainted . . . . he ratified it and should be bound to its terms"); *U.O.T.S. Inc. v. DeBaron Assocs. LLC*, 89 A.D.3d 538, 539-40 (1st Dep't 2011) ("Plaintiff's board acknowledged its awareness of the lease terms in 1992 and, during the next 17 years, raised only various complaints regarding non-compliance with certain lease provisions, although taking no identifiable action and never arguing that the monthly rent provision, the lengthy lease term, or any other provisions were unauthorized or unconscionable. Thus, the evidence supports the conclusion that plaintiff's board

ratified the lease, or, at the very least, that it is barred from contesting the lease provisions based on the doctrine of laches."); *Friedman v. Garey*, 8 A.D.3d 129 (1st Dep't 2004) ("defendant implicitly ratified the [unsigned] settlement by accepting substantial sums under its terms, and with respect to her reversal of course on the confidentiality provision now at issue, by failing to make formal objection during the months in which various other provisions were being negotiated").

By demanding and obtaining documents under the specific provisions of the LLC Agreement not present in Digipac's Initial Agreement, Behler obtained the benefits of the LLC Agreement and should be estopped from now claiming that he is not bound by that agreement. *See Cianci v. JEM Enter., Inc.*, 2000 WL 1234647, at *12 (where party "accepted all of the benefits of the bargain" without "asserting that the contract was tainted" he "should be bound to its terms"); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (applying "'[o]rdinary principles of contract and agency'" to hold that non-signatory to agreement was bound by agreement where non-signatory "failed to object to the Agreement when it received it" and "knowingly accepted the benefits of the Agreement"). Behler "may not pick and choose which provisions suit [his] purposes" by demanding to be treated as a Member under the LLC Agreement in order to obtain documents, but not for other purposes. *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d at 374.

B. The IAS Court Properly Held that the Terms of the LLC Agreement Bar Behler's Claim

In a misguided attempt to evade the terms of the LLC Agreement and clear law, Behler argues that: (i) the LLC Agreement's merger clause is ambiguous, (ii) the Alleged Oral Agreement is separate and distinct from the LLC Agreement, so the merger clause does not control, and (iii) the merger clause does not control because it does not specifically mention the Alleged Oral Agreement or otherwise waive or release Behler's purported rights under that agreement. Each of Behler's arguments fail.

1. The Merger Clause is Clear and Unambiguous

The LLC Agreement contains a clear and unambiguous merger clause, which provides that:

> This Agreement, together with the Certificate of Formation, each Subscription Agreement and all related Exhibits and Schedules, constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter, including the Original Agreement.

(R. 51, § 13.2.) The "subject matter" includes the management and business of Digipac, and the "rights, obligations and interests of the Members" of Digipac with respect to their investments in Digipac. (*See, e.g.*, R. 28.)

Behler claims that this merger clause is ambiguous. According to Behler, the ambiguity is based on "Tao's intent, illustrated by his post-amendment conduct and representations to Behler." (Br. at 49-52.) But where the language of a contract is clear, courts may not look to extraneous evidence to find ambiguity. *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001) ("The duty of the courts is to examine solely the language of the contractual provisions in question to determine whether the disputed terms are capable of two or more reasonable interpretations. In so doing, Delaware courts are obligated to confine themselves to the language of the document and not to look to extrinsic evidence to find ambiguity."); *S. Rd. Assocs., LLC v. Int'l Bus. Machines Corp.*, 4 N.Y.3d 272, 278 (2005) ("Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous . . . Further, 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face'").

Here, the LLC Agreement's merger clause is nearly identical to merger clauses that have been held to be clear and unambiguous bars to extrinsic evidence of contradictory agreements. *See, e.g.*, *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013); *Scott v. Land Lords, Inc.*, 616 A.2d 1214, 1992 WL 276429 (Del. 1992); *Hynansky v. Vietri*, No. 14645-NC, 2003 WL 21976031, at *4 (Del. Ch. Aug. 7, 2003); *Phoenix Racing, Ltd. v. Lebanon Valley Auto Racing Corp.*, 53 F. Supp.

2d 199, 213 (N.D.N.Y. 1999) (merger clause contained "the traditional language used to constitute a merger clause and is therefore not ambiguous at all in its legal effect"). That merger clause is thus clear and unambiguous.

Behler relies on two inapposite cases to claim ambiguity. First, Behler cites *Burke v. Cmty. Brands Holdco, LLC*, No. N23C-05-012 JRJ, 2023 WL 7098174 (Del. Super. Ct. Oct. 26, 2023), as corrected (Jan. 4, 2024). (Br. at 50-51.) *Burke* is an unpublished trial court case in which the court found ambiguous whether a merger provision in an employment offer letter for a promotion covered a past incentive award of compensation, analogous to a fully vested bonus. In *Burke*, unlike here, the court found no explicit conflicts between the offer letter and the prior award. *Id*. (*See also R.* 159-60 (finding explicit conflicts between the LLC Agreement and Alleged Oral Agreement); Point II.B.2., *infra*.) Second, Behler cites *Wattenberg v. Wattenberg*, 277 A.D.2d 69 (1st Dep't 2000). (Br. at 51.) *Wattenberg* involved a post-nuptial agreement concerning distribution of the parties' property and a release and indemnification agreement that dealt with the issue of income taxes and tax liability. The Appellate Division, without considering whether the merger clause at issue was ambiguous, held that those two agreements were "separate contracts, dealing with different subject matters and supported by independent consideration." *Wattenberg*, 277 A.D.2d at 69. Here, the LLC Agreement and Alleged Oral

Agreement both deal with the same subject matter and are supported by the same consideration – Behler's investment in Digipac.

2. The Alleged Oral Agreement is not Separate from and is in Direct Conflict with the LLC Agreement

The Appellate Division correctly found that the Alleged Oral Agreement and the LLC Agreement were in direct conflict, and that the Alleged Oral Agreement was thus superseded by the LLC Agreement. (R. 159-60.)

Behler makes the meritless argument that the Appellate Division "contrived" a conflict and "impermissibly recast the allegations of the Complaint." (Br. at 45-40.) But it is not solely the Complaint's allegations that are relevant; it is the clear terms of the LLC Agreement that are in conflict with the Alleged Oral Agreement.

Behler's Complaint in fact undercuts his claim that there is no conflict between the LLC Agreement and the Alleged Oral Agreement. Behler alleged that he was induced by Tao, the Manager of Digipac, to become a Member of Digipac and invest his money in Digipac based on the Alleged Oral Agreement. (R. 9, 11-12, 15, ¶¶ 6-7, 20, 23-25, 45-46.) Behler claimed that the performance required of him under the Alleged Oral Agreement was solely his investment in Digipac. (R. 12, ¶ 25.) Behler cannot dispute that his investment in Digipac was at all times governed by Digipac's LLC Agreement (and, before its amendment, Digipac's Initial Agreement). *See* Point I.A., *supra*. *See also LCM Holdings GP, LLC v. Imbert*, 114

A.D.3d at 406. Behler's Alleged Oral Agreement is thus inextricably linked to the LLC Agreement governing his investment in Digipac.

It is also clear that the LLC Agreement and Alleged Oral Agreement are not "separate and distinct" because they are in direct conflict. For example, the LLC Agreement provides, *inter alia*, that:

- "[A] Member may only Transfer[7] all or any part of its Membership Interest upon the prior written approval of the Manager, which may be withheld or conditioned for any reason." (R. 43, § 8.1.) Thus, Digipac's Manager would have been required to consent in writing to any transfer of interests, and could withhold such consent for any reason. On the other hand, Behler alleged in his Complaint that Tao had no discretion under the Alleged Oral Agreement. (R. 9, ¶ 5.) And, it is clear based on this provision that any transfer based upon the Alleged Oral Agreement could not have been effected without Tao exercising his discretion as Manager of Digipac, rather than acting solely in his individual capacity.

- No Member is entitled to distributions "[e]xcept in accordance with the terms of this [LLC] Agreement," and which Digipac's Manager is authorized to determine "in his sole discretion." (R. 35, 37, §§ 3.3, 4.3.) But Behler here claims that the Manager has no discretion and is required to provide an "exit opportunity" in year five. (R. 9, ¶ 5.)

- No Member shall have any rights or preferences in addition to or different from those of any other Member if not detailed in the LLC Agreement. (R. 40, § 6.1.) But the Alleged Oral Agreement would have given Behler – and not any other Members of Digipac – "the opportunity to cash out within five years of" Behler's initial investment in Digipac. (R. 12, ¶ 23.)

- "Each Member shall look solely to the assets of the Company [Digipac] for the return of its investment . . ." (R. 47, § 9.4.) But here Behler

[7] "Transfer" is defined to include "any sale" of a membership interest. (R. 33, § 1.38.)

seeks to hold Tao, not Digipac, responsible for the return of Behler's investment in Digipac.

- No Member can seek to recoup damages or losses from Tao for performance of his duties as Manager of Digipac except in the case of "willful misconduct." (R. 39, § 5.1(c).) But Behler did not allege any willful misconduct by Tao and yet seeks to hold him responsible for Behler's claimed losses.

The above is just a sample of the principal conflicts. There are others, including but not limited to restrictions relating to the transfer of membership interests in Digipac. (*See* R. 29, 33, 43-45, §§ 1.6, 1.32, 8.1, 8.5.)

Not only do these provisions govern and conflict with Behler's Alleged Oral Agreement and the damages sought in this action, but the LLC Agreement's clear merger clause bars Behler's claims. Where an unambiguous "contract contains a merger clause, a court is obliged 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.'" *Schron v. Troutman Sanders LLP*, 20 N.Y.3d at 436. *See also Scott v. Land Lords, Inc.*, 616 A.2d 1214, at *3 ("'Where the parties have made a contract and have expressed it in writing to which they both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understanding and negotiations will not be admitted for the purpose of varying or contradicting the writing.'"). Thus, because of the LLC Agreement's merger clause, Behler "is precluded from claiming that he relied on [Tao's] oral . . . representations with respect to his right to completely withdraw his

capital investment" from Digipac. *Basel v. Traders Commercial Capital, LLC*, 11 Misc. 3d 1089(A), 819 N.Y.S.2d 846 (N.Y. County Sup. Ct. 2006) ("[B]oth the Subscription Agreement and Operating Agreement contained explicit integration clauses, providing that the written terms constituted the entire agreement between plaintiff and [defendant]. Such a provision makes written documents themselves the 'exclusive evidence of the parties' intent.'").

Behler argues that the Appellate Division "recasts the [Alleged Oral Agreement] between Tao and Behler as an agreement between Behler and Digipac. . ." (Br. at 46.) But that misreads the Appellate Division's Opinion. Moreover, Behler did not plead whether Tao purportedly entered into the Alleged Oral Agreement in his individual capacity or as manager of Digipac. (*See generally* R. 8-16.) Nor could Tao have performed the Alleged Oral Agreement without taking action in his capacity as Manager of Digipac. *See supra*.

Behler also argues that the conflicts between the LLC Agreement and Alleged Oral Agreement identified by the Appellate Division are "phony." (Br. at 7, 47-48.) According to Behler, there is no plausible conflict between the transfer and distribution provisions of the LLC Agreement and the Alleged Oral Agreement. But the Alleged Oral Agreement contemplated a transfer or distribution with respect to Behler's membership interest in Digipac, which was governed by the terms of the LLC Agreement set forth above. The Alleged Oral Agreement also provided that

Tao would "cause Digipac to sell its shares of [R]emark and distribute the proceeds" in the event that Remark's share price were to hit $50 per share. (R. 9, ¶ 5.) But no such sale, transfer or distribution was permitted without action by Digipac's Manager – *i.e.*, Tao acting in his capacity as Manager of Digipac, and not in his individual capacity. And under the LLC Agreement, Tao had sole discretion to take or decline to take such action as Manager. *See supra* at pp. 9-10, 30-31. (*See also R.* 24-26 (providing Tao with sole discretion under the Initial Agreement).) That directly conflicts with the purported terms of the Alleged Oral Agreement.

Behler also argues, for the first time on appeal, that the Alleged Oral Agreement was in fact a "subscription agreement" that would not be superseded by the amended LLC Agreement. Since Behler failed to raise this argument below, it may not be considered on this appeal. *See Merrill by Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988) ("While the Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, the Court of Appeals may not address such issues in the absence of objection in the trial court. Accordingly, the dissent was not on a question of law which would be reviewable by the Court of Appeals and the appeal must be dismissed."). Further, Behler did not plead that the Alleged Oral Agreement was a "subscription agreement." Instead, his Complaint alleged that in November 2012, Tao "sent Behler a separate subscription agreement between Digipac and Behler," which Behler "never signed." (R. 9, ¶ 7.) The record

also establishes that Tao also caused Behler to be sent an email on June 2, 2014 – two days before the amended LLC Agreement was signed – that stated "Please find attached the subscription document and LLC agreement for your investment in Digipac . . ." (R. 56.) The "subscription document" attached was a document entitled "Subscription Agreement" that also contained a merger provision and contained no mention of the Alleged Oral Agreement. (R. 88-97.) There simply is no merit in Behler's newfound argument that the Alleged Oral Agreement was a "Subscription Agreement" under the meaning of the LLC Agreement.

Since the Alleged Oral Agreement that Tao would provide Behler with an "exit opportunity" from Digipac within five years of his investment is not a term of the LLC Agreement and is directly contradicted by its other provisions, Behler's claims are barred by the merger clause contained in the LLC Agreement.

3. The Concepts of Modification, Waiver and Release are Inapposite

Behler argues that his breach of contract claim is not barred by the LLC Agreement because the LLC Agreement did not contain a "voluntary and intentional" waiver of the Alleged Oral Agreement. That argument fails because the legal concepts of waiver and release do not apply to merger clauses such as the one contained in the LLC Agreement.

The cases that Behler cites in support of his argument do not discuss or consider whether a merger clause serves as a waiver or release. (*See* Br. at 34-37

(citing *Jefpaul Garage Corp. v. Presbyt. Hosp. in City of New York*, 61 N.Y.2d 442 (1984) (acceptance of rent was not a waiver of lease violations where lease contained non-waiver provision); *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 27 A.3d 522 (Del. 2011) (defendants decided to waive deadline and accept forms after initial deadline); *Peck v. Peck*, 232 A.D.2d 540 (2d Dep't 1996) (former wife's practice of misplacing checks from husband or delaying cashing them was not a waiver of right to payment); *Booth v. 2669 Delaware, Inc.*, 92 N.Y.2d 934 (1998) (release in settlement agreement was binding and valid); *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d. 178 (S.D.N.Y. 2008) (holding that releases in agreements were valid and precluded claims); *Adams v. Jankouskas*, 452 A.2d 148 (Del. 1982) (considering release of claims relating to bequest in will); *Corp. Prop. Assocs. 6 v. Hallwood Grp. Inc.*, 817 A.2d 777 (Del. 2003) (considering release relating to prepayment of note)).)

Behler furthers claims that the Appellate Division erred by failing to require an explicit mention of the Alleged Oral Agreement in the LLC Agreement to permit the Alleged Oral Agreement to be waived or released. (Br. at 41-45.) But the law is clear that where an unambiguous "contract contains a merger clause, a court is obliged 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing,'" irrespective of whether the doctrine of release or waiver otherwise applies. *Schron*

v. Troutman Sanders LLP, 20 N.Y.3d at 436. *See also Scott v. Land Lords, Inc.*, 616 A.2d 1214 ("'Where the parties have made a contract and have expressed it in writing to which they both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understanding and negotiations will not be admitted for the purpose of varying or contradicting the writing.'"); *Purchase Partners II, LLC v. Westreich*, 14 Misc. 3d 1228(A), 836 N.Y.S.2d 494 (N.Y. Cnty Sup. Ct. 2007), *aff'd as modified*, 50 A.D.3d 499 (1st Dep't 2008) (distinguishing between arguments that claims were barred by merger clause and by release). This law applies with equal force to merger clauses contained in limited liability company agreements. Thus, "the merger clause contained in the . . . LLC Agreement operates to bar parol evidence, such as the alleged Oral Agreement, from varying its terms." *Ritorto v. Silverstein*, 10 Misc. 3d 1051(A), 862 N.Y.S.2d 811 (Sup. Ct. N.Y. Cnty 2005).

Behler cites an unpublished Delaware trial court decision to argue that this Court must consider the parties' "intentions" in connection with the LLC Agreement's merger clause. (Br. at 41 (citing *Burke v. Cmty. Brands Holdco, LLC*, No. N23C-05-012 JRJ, 2023 WL 7098174, at *3 (Del. Super. Ct. Oct. 26, 2023), as corrected (Jan. 4, 2024).) But the law is clear that where, as here, the language of a contract is unambiguous, courts may not consider extrinsic allegations or evidence of "intent" to vary those terms. *See, e.g.*, *See O'Brien v. Progressive N. Ins. Co.*,

785 A.2d at 289 ("The duty of the courts is to examine solely the language of the contractual provisions in question to determine whether the disputed terms are capable of two or more reasonable interpretations. In so doing, Delaware courts are obligated to confine themselves to the language of the document and not to look to extrinsic evidence to find ambiguity."); *S. Rd. Assocs., LLC v. Int'l Bus. Machines Corp.*, 4 N.Y.3d at 278 ("Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous . . . Further, 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face'").

The other cases cited by Behler are inapposite. In *Weksler v. Weksler*, 140 A.D.3d 491, 492–93 (1st Dep't 2016), the Appellate Division held that "general merger clauses in" a stock purchase agreement and a shareholders agreement, "which d[id] not concern the same subject matter as the alleged [oral] promise [to transfer stock], d[id] not bar the promissory estoppel claim." The Court did not, as Behler claims, hold that any of those agreements "govern[ed] the affairs of that company." (Br. at 41-42.) Nor did the Court consider whether the promise to transfer stock conflicted with any other provisions of the agreements at issue. Here, on the other hand, the LLC Agreement concerns the terms of Members', including Behler's, membership in Digipac and is in direct conflict with the Alleged Oral Agreement. *See also Matter of Primex Int'l Corp. v. Wal-Mart Stores*, 89 N.Y.2d

594 (1997) (holding that that if "an antecedent agreement has no effect to vary, contradict or supplement the terms of a later agreement containing [a] general merger clause, the prior agreement remains enforceable"); *Urban Holding Corp. v. Haberman*, 162 A.D.2d 230, 231 (1st Dep't 1990) (stating, without providing the language described, that "merger clause [wa]s of a very general nature," did not contradict allegations, and was "unclear" as to whether the parties intended the clause to encompass all agreements at issue); *In re Matter of Wenzel*, 85 A.D.3d 563 (1st Dep't 2011) (no discussion of merger clause in dispute relating to separation agreement); *Clark v. Kelly*, No. C.A. 16780, 1999 WL 458625, at *3, n. 6 (Del. Ch. Jun. 24, 1999) (interpreting agreement without discussion of any merger clause); *3850 & 3860 Colonial Blvd. LLC v. Griffin*, No. CV 9575-VCN, 2015 WL 894928 (Del. Ch. Feb. 26, 2015) (no discussion of merger clause, and holding that dispute resolution provision of certificate of incorporation did not supersede limited liability company agreement with respect to arbitration clause contained therein); *Carrow v. Arnold*, No. CIV.A. 182-K, 2006 WL 3289582, at *11 (Del. Ch. Oct. 31, 2006), *aff'd*, 933 A.2d 1249 (Del. 2007) ("The parol evidence rule bars the admission of the oral statements and representations Carrow alleges Arnold made during the course

of negotiations because those alleged representations are inconsistent with the express written terms of the Agreement.").[8]

Behler's attempts to distinguish *Levy Family Inv'rs, LLC v. Oars + Alps LLC*, C.A. No. 2021-0129-JRS, 2022 WL 245543 (Del. Ch. Jan. 27, 2022) and *In re Coinmint*, 261 A.3d 867 (Del. Ch. 2021), each cited by the Appellate Division, also fails. (Br. at 44-45.)

In *Levy*, the Court of Chancery of Delaware dismissed a claim for breach of an alleged oral agreement to substitute a promissory note with a convertible note where the promissory note contained an explicit merger clause, and that clause did not reference the alleged oral contract, rejecting plaintiff's argument that the alleged oral agreement was "an entirely separate oral agreement that sets forth independent rights and obligations." *Levy Family Inv'rs, LLC v. Oars + Alps LLC*, 2022 WL 245543. Behler argues that *Levy* is distinguishable because the parties and subject matter of the agreements were identical. Here, too, Tao and Behler are parties to the LLC Agreement and the alleged parties to the Alleged Oral Agreement, and both agreements concern the same subject matter – Behler's investment in Digipac.

[8] Behler also claims that there were discussions between Tao and Behler after the date of the LLC Agreement in which Tao purportedly admitted to obligations under the Alleged Oral Agreement. Behler implies that those vague discussions somehow void the merger clause's clear effect. (Br. at 44.) The Appellate Division correctly held that those alleged discussions did not constitute a modification of the amended LLC Agreement. (R. 160-61.) Nor could they under the terms of the LLC Agreement or clear Delaware law. (*Id.*)

In *Cointmint*, the Court of Chancery of Delaware noted that "integration clauses proscribe the Court's consideration of all oral and written communications and agreements that occurred prior to [an LLC] agreement when interpreting it." *In re Coinmint, LLC*, 261 A.3d at 897. Behler argues that the Appellate Division "did not employ the integration clause to preclude parol evidence in interpreting the 2014 LLC Amendment" but rather "to release Tao from his obligations under the" Alleged Oral Agreement. (Br. at 44-45.) Not so. As stated above, the concept of "release" is inapposite. It is Behler, not Tao, that seeks to vary the terms of the parties' agreement (the LLC Agreement), through his claims based on the Alleged Oral Agreement that is entirely inconsistent with the unambiguous and fully integrated LLC Agreement.

II.

ALTERNATIVELY, THE IAS COURT PROPERLY DETERMINED THAT BEHLER FAILED TO ALLEGE AN ENFORCEABLE ORAL AGREEMENT

Behler makes the meritless argument that the terms of the Alleged Oral Agreement were sufficiently pled. The Appellate Division's Majority declined to consider this issue, finding that it was "academic . . . given our finding that the [Alleged Oral Agreement], if enforceable at its inception, was superseded by the

amended LLC [A]greement and rendered unenforceable." (R. 156 n.1).[9] However, if this Court reaches the issue, it should hold that the IAS Court properly dismissed Behler's breach of contract claim because "the terms of th[e] alleged oral agreement are unenforceable because they are indefinite and incapable of being enforced. No agreement or formula is alleged as to the terms of any such exit option after the five years the defendant [Tao] purportedly promised to provide [Behler] with an exit strategy." (R. 5.)

"Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract. The doctrine of definiteness serves two related purposes. *First*, unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy . . . . *Second*, the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement." *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 482 (1989) (internal citations omitted), *cert. denied*, 498 U.S. 816 (1990). Allegations are insufficient where they cause "speculat[ion] as to the parties

[9] The Majority did not, as Behler claims, "implicitly" find that the Alleged Oral Agreement was adequately pled in rejecting Behler's promissory estoppel claim. (*See* Br. at 17-18 n.1; R. 161-62.)

involved and the conditions under which this alleged [ ] contract was formed." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011).

Here, the relevant portion of Alleged Oral Agreement was that Tao would "provide Behler the opportunity to exit the Digipac investment . . . within five years of his investment" "based on the value of Digipac's Remark holdings." (R. 9, 12, 13, 15, ¶¶ 5, 23, 33, 45.) This is extraordinarily vague, and stands in contrast to the other purported portion of the alleged agreement: that "if the price of Remark were to hit $50/share," Tao "would cause Digipac to sell its shares of [R]emark and distribute the proceeds (based on Behler's pro rata share of Digipac) to Behler." (R. 9, ¶ 5.) While somewhat less vague, this other portion is irrelevant here because, as Behler concedes, Remark's shares never hit $50 per share. (R. 9-10, 13, ¶¶ 8, 33.)

Behler argues on appeal that his Complaint alleged "an agreed upon objective methodology to supply the missing price term." (Br. at 28.) But that misstates Behler's Complaint, which merely alleged that the parties agreed that the alleged exit opportunity would be vaguely "based on the value of Digipac's Remark holdings." (R. 9, 12, 15, ¶¶ 5, 23, 45.) While Behler's Complaint purported to allege his understanding that the "cash-out would be derived from the value of Remark shares" and calculated the price he alleged Tao "should have provided" (R. 12, 14, ¶¶ 23, 39-40), he did not allege that the parties actually agreed to use such a calculation. Behler also did not allege the date that the "value" of Digipac's Remark

holdings would be measured, or how such measurement would take place. Nor did Behler allege who would be providing him with the funds for the alleged cash-out – Tao individually or Digipac, the entity with whom Behler invested and for which Tao is the sole Manager.

Behler, and the dissenting opinion below, suggest that the agreed-upon price point could be derived from the publicly-traded price of Remark. (Br. at 29; R. 167-68.) But this ignores that Digipac did not merely hold publicly traded Remark shares. Instead, beginning in 2012 (when Behler first invested in Digipac), Digipac held value in Remark through convertible loans issued to Remark. (R. 12, ¶¶ 22, 27 (recognizing that "Digipac invested in Remark through a series of convertible loan agreements, starting in 2012"); R. 34, § 2.5.).) It thus cannot be inferred that the "value of Digipac's Remark holdings" alleged by Behler (R. 9, 12, 15, ¶¶ 5, 23, 45) was equal to the value of Remark's public stock price times the number of shares of Remark stock held by Digipac, as Digipac did not solely invest in Remark solely through publicly traded stock. Rather, in 2012, Digipac invested in Remark by issuing loans to Remark.

Not only did Behler's Complaint fail to plead the price term of the Alleged Oral Agreement, but it also failed to plead the form the claimed "exit opportunity" would take. For example, Behler did not allege whether Tao agreed to cause Digipac to liquidate its shares and distribute the proceeds to all Members, whether Tao agreed

to buy Behler out of his membership interest and cause such interest to be transferred to Tao, or whether there was some other form the claimed "exit opportunity" would take.

Since the Alleged Oral Agreement "is not reasonably certain in its material terms, there can be no legally enforceable contract." *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d at 482. *See also Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981) ("[B]efore the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves. Thus, definiteness as to material matters is of the very essence in contract law."); *Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 589 (1999) ("To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms").

The three cases that Behler relies on his appeal are inapposite. (Br. at 25-31.) In each, there was a written contract that lacked an explicit price term but provided for the price term to be fixed by a designated third party. In *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, the Court held that a price

term was not indefinite where the written contract provided that a third party – the Department of Health – had the discretion to fix sales price in accordance with its rules and regulations. Similarly, in *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88 (1991), the Court considered a signed lease that held that a third party (an arbitrator) was to determine the price term if the parties could not reach agreement. And in *Tonkery v. Martina*, 78 N.Y.2d 893 (1991), the parties signed an agreement that provided that the purchase price was to be either the sum offered by a bona fide third-party purchaser, or, in the alternative, the price fixed by three appraisers to be selected in the manner set forth in the agreement. Here, on the other hand, the Alleged Oral Agreement was not in writing and the Complaint does not allege that the parties agreed that price would be fixed by a third party. Where, as here, an alleged agreement contains *neither* the price nor the methodology for determining that price, it is impermissibly vague and indefinite and cannot be enforced. *See Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981) (finding lack of definiteness as to price where the agreement did not include the rent to be paid, or a methodology for determining the rent).[10]

[10] Behler also implies that his payment of the $3,000,000 should somehow relieve him being required to plead definiteness as to the material terms of the Alleged Oral Agreement. But that proposition is unsupported by the law. Moreover, it ignores the benefit Behler received from his investment – his membership interest in Digipac.

Thus, this Court should affirm dismissal of Behler's breach of contract claim for failure to allege an enforceable agreement.

III.

THE APPELLATE DIVISION PROPERLY AFFIRMED THE IAS COURT'S DISMISSAL OF BEHLER'S PROMISSORY ESTOPPEL CLAIM

The Appellate Division also properly affirmed dismissal of Behler's promissory estoppel claim. The Appellate Division held that multiple bases existed to affirm dismissal of Behler's promissory estoppel claim. *First*, the Order held that Behler's promissory estoppel claim was barred because such a promissory estoppel claim does not apply where an enforceable contract – here, the LLC Agreement – governs the alleged promise at issue. *Second*, the Order held that even if the Alleged Oral Agreement was enforceable, that agreement would be a contract governing the promise at issue and thus would also serve to bar a promissory estoppel claim.[11] *Third*, the Order held that Behler's promissory estoppel claim would also have been properly dismissed under New York law as duplicative of his breach of contract claim. (R. 161-62.) Each of those holdings should be affirmed.

On appeal Behler makes two arguments. He first argues that the elements of promissory estoppel were adequately pled and that the alleged promise was

[11] The Appellate Division did not, as Behler claims, imply that the Alleged Oral Agreement would in fact be enforceable if not barred by the terms of the LLC Agreement. (*See* Br. at 17-18 n.1; R. 161-62.)

sufficiently definite. (Br. at 54-56.) Whether this Court proceeds under Delaware law (as suggested by the Appellate Division) or New York (as suggested by Behler) is immaterial, because it is undisputed that in both jurisdictions, a claim for promissory estoppel requires a plaintiff's reliance on defendant's clear and unambiguous promise. *See MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 841–42 (1st Dep't 2011), *lv denied*, 21 N.Y.3d 853 (2013); *James Cable, LLC v. Millennium Digital Media Sys., L.L.C.*, No. CIV.A. 3637-VCL, 2009 WL 1638634, at *5 (Del. Ch. June 11, 2009) ("the promise must be reasonably definite and certain").

As set forth in detail above, the alleged promise at issue was vague, ambiguous, and indefinite, and therefore incapable of being enforced. *See* Point II., *supra*. Behler thus could not have reasonably relied on the impossibly vague and ambiguous alleged "promise" at issue – that Tao would "provide Behler the opportunity to exit the Digipac investment . . . within five years of his investment" based on the value of Digipac's Remark holdings. (R. 15, ¶ 45; *see also R.* 9, 12, 13, ¶¶ 5, 23, 33.) *See also Bd. of Managers of Trump Tower at City Ctr. Condo. by Neiditch v. Palazzolo*, 346 F. Supp. 3d 432, 469 (S.D.N.Y. 2018) (alleged promise to grant individual "'full and complete control over'" account "'and permission and authority to engage in transactions involving the Board, which in [the individual's] experience, were in the best interests of the Board and the Condominium'" was

vague and indefinite as it did not "set the parameters" of relationship); *James v. W. New York Computing Sys., Inc.*, 273 A.D.2d 853, 854 (4th Dep't 2000), *abrogated on other grounds by Am. Tower Asset Sub, LLC v. Buffalo-Lake Erie Wireless Sys. Co.*, LLC, 104 A.D.3d 1212 (4th Dep't 2013) (complaint failed to state a claim for promissory estoppel because alleged "oral agreement [wa]s unclear concerning the duration of plaintiff's employment, the specifics of the plan in which plaintiff [wa]s to participate, what plaintiff's 'opportunity' entails, or the amount of money plaintiff would receive from the stock"); *Sanyo Elec., Inc. v. Pinros & Gar Corp.*, 174 A.D.2d 452, 453 (1st Dep't 1991) (affirming dismissal where "alleged promise was not only vague and indefinite but [ ] it was completely contradicted shortly thereafter by written representations"); *James Cable, LLC v. Millenium Digital Media Sys., L.L.C.*, 2009 WL 1638634, at *5-6 (dismissing promissory estoppel claim because alleged promises were "vague" and plaintiff "fail[ed] to allege any 'definite and certain' promise").

Behler argues that New York courts routinely "find that promises with far more ambiguity are sufficiently clear to form the basis of a promissory estoppel claim." (Br. at 55.) But the cases he cites are inapposite because the promises at issue were in fact far less vague than the oral promises alleged here. *See Paramax Corp. v. VoIP Supply, LLC*, 175 A.D.3d 939 (4th Dep't 2019) (involving promise to provide 5% success fee in order to induce plaintiff to continue work); *Castellotti v.*

Free, 138 A.D.3d 198 (1st Dep't 2016) (Plaintiff "agreed to pay [the parties' late mother's] estate taxes with his share of [her] life insurance proceeds. In return, [Defendant] agreed to give [Plaintiff] 50% of the assets upon the finality of his divorce, and 50% of the income and proceeds generated from the assets before the divorce was final. [Defendant] also agreed to name [Plaintiff] as sole beneficiary of a life insurance policy valued at no less than $5 million, and to maintain that policy until the assets were physically transferred to [Plaintiff]"); *Weksler v. Weksler*, 140 A.D.3d at 492 (sole missing term was the timing of required performance); *Univ. Veterinary Specialist, LLC v. Four Dimensional Digital Imaging LLC*, No. 650104/2017, 68 Misc. 3d. 1204(A), 2020 WL 4280793 (N.Y. Sup. Ct. July 23, 2020) (not discussing ambiguity of alleged oral agreement to purchase scanner).

The Appellate Division also properly affirmed dismissal of Behler's promissory estoppel claim because the alleged promise was barred by the clear language of the LLC Agreement. *See* Point I., *supra*. A promissory estoppel claim cannot stand where it is governed by, and contradicted by, the parties' written agreement. *See Capricorn Inv'rs III, L.P. v. Coolbrands Int'l, Inc.*, 66 A.D.3d 409, 410 (1st Dep't 2009) ("promissory estoppel claim was properly dismissed because it was flatly contradicted by the parties' written agreement which covered the same subject matter and expressly superseded all other prior agreements and understandings, written and oral"); *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d

330, 348 (Del. 2013) ("Promissory estoppel does not apply, however, where a fully integrated, enforceable contract governs the promise at issue").

Second, Behler argues that his promissory estoppel claim was not impermissibly duplicative of his breach of contract claim, as a promissory estoppel claim may be pled as an alternative to a breach of contract claim where there is a dispute concerning the existence of a contract. (Br. at 56-57.) But the law is clear that a promissory estoppel claim is impermissibly duplicative of a breach of contract claim where, as here, a plaintiff does not allege any legal duty independent of the alleged contract. *See Brown v. Brown*, 12 A.D.3d 176 (1st Dep't 2004) (promissory estoppel claim "precluded by the fact that a simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract—i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself—has been violated . . . the tort claims were merely duplicative of the insufficiently pleaded breach of contract causes of action"); *Martin Greenfield Clothies, Ltd. V. Brooks Brothers Group, Inc.*, 175 A.D.3d 636 (2d Dep't 2009) (affirming dismissal of promissory estoppel claim for failure to state a claim because "the cause of action is impermissibly predicated on allegations that the defendant violated the same promise it made under the oral agreement" that was dismissed as violative of the statute of frauds); *Kim v. Francis*, 184 A.D.3d 413, 414 (1st Dep't 2020) ("We modify to dismiss the promissory estoppel claim, however, because

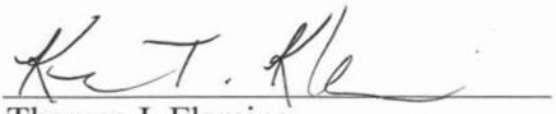
although it was adequately pleaded, the allegations were duplicative of the breach of contract claim"); *Susman v. Commerzbank Capital Markets Corp.*, 95 A.D.3d 589, 590 (1st Dep't 2012) (promissory estoppel claim properly dismissed as duplicative of breach of contract claim that was dismissed based on documentary evidence). The sole case cited by Behler, *Tahari v. Narkis*, 216 A.D.3d 557, 559 (1st Dep't 2023), is not to the contrary. Rather, that case involved alleged breach of written contracts – an unsigned note and subsequent signed loan agreement, the validity of which was in question – as well as distinct oral promises. Here, there is no distinction – the alleged promise is the Alleged Oral Agreement. Behler's promissory estoppel claim was thus properly dismissed as duplicative of the contract claim.

Conclusion

For the reasons set forth herein, Defendant-Respondent Tao respectfully submits that the Opinion of the Appellate Division, First Department should be affirmed in its entirety.

Dated: New York, New York
August 5, 2024

OLSHAN FROME WOLOSKY LLP

By: 

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On August 5, 2024

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Mariana Braylovskiy

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