

**DISTRICT COURT OF APPEAL
THE STATE OF FLORIDA
SIXTH DISTRICT OF FLORIDA**

MARK 48, LLC
and MARK KINCHLA

Case No. 6D23-3962
L.T. No.: 2015-CA-009902-O

Appellants,

v.

NANLANN, INC.,
and KILGORE PROPERTIES, LLC,

Appellees.

APPELLEES' ANSWER BRIEF

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PRELIMINARY STATEMENT

Reference to the Record on Appeal shall be cited as [R. _____].

STATEMENT OF THE CASE AND FACTS

This lawsuit initially arose out of a dispute over the management of a Florida limited liability company, Kilgore Properties, LLC (“Kilgore”), that was created in 2006. [R. 332]. Appellee, Nanlann, Inc., is a Florida corporation that was formed by Robert Pola (“Pola”) and Jennifer Baker (“Baker”), who were its original directors. [R. 332]. Nanlann’s ultimate owner is Andrew McKelvey (“McKelvey”). Nanlann was formed for the purpose of facilitating McKelvey’s investment in Kilgore. [R. 333].

Appellant, Mark Kinchla (“Kinchla”), and is the sole member of Appellant Mark 48, LLC (“Mark 48”) [R. 332] Mark 48 is a Florida limited liability that was formed by Jenemi Associates, Inc. (“Jenemi”) in 2007. [R. 332]. Jenemi is a Florida corporation that provided accounting and financial services to Kilgore and Nanlann, Inc., through Baker. [R. 332].

Kilgore’s original members were Jenemi and Swanlea, Inc. (“Swanlea”). [R. 332]. At the time of Kilgore’s formation, Pola was Jenemi’s president, and his daughter, Jennifer Baker (“Baker”), who was then known as Jennifer Pola, was its vice president. [R. 332].

In 2007, Kinchla, through a limited liability company known as Newton Corner, LLC (“Newton Corner”), owned certain real property fronting South Orange Avenue in Orlando, Florida. [R. 333].¹ Kinchla was Newton Corner’s sole owner. [R. 333]. At that time, Kinchla was attempting to sell the Newton Corner Land in order to obtain funds to pay a \$293,936.29 lien assessed against him by the Internal Revenue Service. [R. 333].

On March 13, 2007, Kinchla sent Pola an email attaching an informational package that listed the value of the Newton Corner Land as \$1,500,000.00. [R. 333-334]. That same day, Kinchla sent a second email to Pola with an “abbreviated pro forma” for developing the Newton Corner Land, listing its value as \$1,600,000.00. [R. 333-334].² On March 25, 2007, Kinchla sent a term sheet contemplating a loan for the development of the Newton Corner Land, listed the cost of the Newton Corner Land as

¹ The property ran east from South Orange Avenue along E. Muriel Street. Kilgore built and sold townhomes on the land fronting E. Muriel Street. [R. 333] The portion of the property on which the townhomes were built is referred to as the “Project”. The portion of the property that remained after the townhomes were completed and sold fronted S. Orange Ave. and is referred to as the “Property”. The Property and the Project are referred to collectively as the “Newton Corner Land”.

² A pro forma is a document that states the anticipated financial return on a real estate development project and is used to market real estate to potential investors. [R. 334]

\$1,600,000.00 in multiple entries. [R. 334]. Kinchla was involved in the preparation of the information packet and pro forma. [R. 334].

Despite knowing the Newton Corner Land was worth no more than \$1,600,000.00, Kinchla and Pola devised a plan to artificially inflate the value of that property to enrich themselves. [R. 334]. On April 12, 2007, Pola sent an email to Kinchla proposing to form a new company to buy the Newton Corner Land. [R. 334]. Pola proposed a purchase price of \$2,150,000.00 for the Newton Corner Land and that he would find an investor to contribute \$1,800,000.00. [R. 334-335]. The balance of the purchase price would represent Kinchla's investment in the new limited liability company, while Pola would take \$200,000.00 from the \$1,800,000.00 contributed by the "investor." [R. 334-335]. On April 24, 2007, Pola emailed Kinchla confirming the plan and indicating he had received a "green light" from his investor. [R. 335].

During the next two months, Kinchla and Pola put their plan into motion with two minor changes. First, rather than receive \$200,000.00 immediately, Pola agreed to take \$100,000.00 in cash and a \$100,000.00 promissory note from Kinchla in favor of Jenemi. [R. 335-336]. Additionally, the \$100,000.00 that Pola took upfront was transferred to a company called Sandhill Homes,

Inc., which he represented was “one of [his] companies.” [R. 336]. Those changes to the plan were reflected in a May 3, 2007 email from Pola to Kinchla. [R. 336].

Pola convinced McKelvey, through Nanlann, to act as his investor in Kilgore. [R. 337]. McKelvey’s understanding of the transaction was as follows: (i) Kilgore would buy the Newton Corner Land for \$2,150,000.00 in an arms-length transaction; (ii) Nanlann would invest \$1,800,000.00 in Kilgore, consisting of a \$650,000.00 capital contribution and a \$1,150,000.00 loan; and (iii) Kinchla would make a \$350,000.00 capital contribution to Kilgore to achieve the \$2,150,000.00 purchase price. [T. 337].

Kilgore’s purchase of the Newton Corner Land closed on June 15, 2007. [R. 337]. Consistent with its commitment to provide funding, Nanlann arranged for \$1,800,000.00 to be provided for Kilgore’s purchase through an entity known as Swiss Global, S.A. (“Swiss Global”). [R. 337-338]. The \$1,800,000.00 consisted of Nanlann’s \$650,000.00 capital contribution to Kilgore and a \$1,150,000.00 loan to Kilgore. [R. 338].

Upon closing of the purchase, Kinchla, not Newton Corner, received \$254,043.39 in cash from the funds arranged by Nanlann. [R. 338]. On August 13, 2007, Kinchla, not Newton Corner, received an additional

\$86,000.00 that was initially held back due to a dispute with a broker. [R. 338].

Prior to closing, Kinchla formed Mark 48 for the purpose of taking a thirty-five percent ownership interest in Kilgore. [R. 338]. Although Mark 48 did not contribute any money to Kilgore it received a thirty-five percent membership interest in Kilgore in connection with Kilgore's purchase of the Newton Corner Land. [R. 338].

Sandhill Homes received \$100,000.00 when Kilgore's purchase of the Newton Corner Land closed. [R. 4284]. Jenemi received a promissory note from Kinchla in the amount of \$100,000.00 (the "Kinchla Note"). [R. 338]. The \$100,000.00 Kinchla Note and the \$100,000.00 transferred to Sandhill Homes and the Kinchla Note represent the \$200,000.00 that Pola took from his "investor", Nanlann. [R. 338].

The same day Kilgore closed on the purchase, Kinchla forwarded Pola an email attaching three pro formas for the development of the Newton Corner Land. [R. 339]. Each of those pro formas showed the acquisition cost of the Newton Corner Land as \$1,600,000.00. [R. 339]. Also on June 15, 2007, Nanlann and Mark 48 executed an Amended and Restated Operating Agreement of Kilgore Properties, LLC (the "Operating

Agreement”). [R. 339]. Kinchla was the Operating Agreement’s primary drafter; Pola made only minor few revisions. [R. 339]. Relevant to this appeal, the Operating Agreement provides:

Each Member shall indemnify and hold harmless the Company, each and every other Member, the Manager, and any officers, directors, shareholders, managers, members, employees, partners, agents, attorneys, accountants, or affiliates of any such Member of Manager for any loss, liability, claim, damage, expense (including without limitation the costs of investigation and defense) of diminution of value caused by the acts or omission of such Member, whether or not involving a third-party claim (collectively “Indemnifiable Damages”) including without limitation those Indemnifiable Damages arising from or in connection with any breach of any representation or warranty made by such Member in this Agreement or any breach of any covenant or obligation of such Member in this Agreement. The indemnification provided by this Section 11.13 shall not be deemed exclusive of any other rights or remedies to which a party seeking indemnification hereunder may be entitled. The rights to indemnification provided by this Section 11.13 shall be binding on, and enforceable against, any Member who has ceased to be a Member or the estate or personal representative of such Member. The rights of any person or entity entitled to indemnification hereunder shall inure to the benefit of the heirs successors and assigns of such person or entity.

[R. 207-208].

Between June 2007 and July 2012, Kilgore built and sold townhomes on the Project. [R. 340]. In April 2008, Kilgore borrowed over seven million dollars from Orange Bank secured by a mortgage on the Project in order to fund that construction. [R. 340].

Subsequently, a dispute arose between Kinchla and Pola and, on May 6, 2008, Pola sent Kinchla an email stating:

You owned the Lot and wanted \$1.8m for it. I got a buyer in at a higher price of \$2.15m on condition that you paid me a fee of \$200k. This way you gained \$150k net and I gained \$200k. This was the deal and we agreed and went ahead with it. It is as simple as that.

[R. 340]. Kinchla did not dispute Pola's characterization of the transaction.

[R. 340].

In 2013, the townhome lots had been fully sold and the Property was Kilgore's only remaining asset. [T. 231-32]. At that time McKelvey and Kinchla agreed to explore both selling the property and developing the Property if financing acceptable to both members could be obtained. [R. 776-784]; [R. 4807-09]. No acceptable financing for the development of the Property was ever secured. [R. 776-784].

Kilgore engaged Jake Johnson ("Johnson"), a real estate broker working with Orlando Hub Real Estate, Inc., to assist in its efforts to market the Property. [R.,. 341]. Kinchla was heavily involved in these efforts and corresponded with Johnson. [R. 341]. At no time prior to August 1, 2014 did Kinchla state that he objected to or did not consent to Kilgore's efforts to sell the Property. [R. 341]

In September 2013, Johnson was approached by Haresh Karamchandi, also known as Harry Kaye (“Kaye”), regarding a potential purchase of the Property by NGI Investments. [R. 341]. After speaking with Kinchla, Kaye increased his offer to purchase the Property to \$1,600,000.00. [R. 341]. Those discussions did not result in an agreement to sell the Property; however, in April 2014 Kaye contacted Johnson a second time regarding the Property. [R. R. 341].

From May 2014 through July 2014, Kaye, Johnson, McKelvey and Kilgore’s attorney, Joy Ewertz (“Ewertz”), negotiated the terms of a contract for the purchase and sale of the Property. [R. 342]. Kinchla was informed of these discussions as they occurred. [R. 342].

On July 22, 2014, a new entity owned by Kaye, Sai Baba of Orlando, Inc. (“Sai Baba”) signed an agreement to purchase the Property for \$1,600,000.00 (the “PSA”), which McKelvey forwarded to Kinchla. [R. 342]. Between July 22, 2014, and July 30, 2014, McKelvey and Kinchla exchanged multiple emails regarding the contract, including a July 26, 2014 email in which McKelvey told Kinchla he would instruct Baker to countersign the agreement. [R. 342]. On July 29, 2014, Baker executed the PSA on Kilgore’s behalf. [R. 342].

On July 31, 2014, Kinchla, for the first time, objected to the sale of the Property. [R. 342]. That objection was not based on a disagreement with the material terms of the transaction. Instead, Kinchla objected because neither he nor Mark 48 would receive any proceeds from the sale. [R. 342]. On November 5, 2014, Kinchla demanded payment of \$500,000.00 in exchange for withdrawing his objection to the sale of the Property. [R. 342-343].

By August 2014, Kilgore had no liquid assets. Repayment of Kilgore's loan was guaranteed by Nanlann, Pola, and Kinchla, and was further secured by the pledge of a deposit account owned by Nanlann with a balance of One Hundred Thousand Three Hundred Seven Dollars and Twenty-Seven Cents (\$100,307.27) (the "Nanlann Account"). [R. 343]. On November 4, 2014, Floridian Bank ("Floridian") declared Kilgore in default. [R. 343]. On January 12, 2015, and January 30, 2015, Floridian applied the funds held in the Nanlann Account to Kilgore's debt. [R. 343].³

Kilgore had no choice but to sell the Property to Sai Baba before Floridian could foreclose its lien on the Property. [R. 343]. The deadline for

³ One Hundred Thousand Dollars and No Cents (\$100,000.00) was applied on January 12, 2015 and Three Hundred Seven Dollars and Twenty Seven Cents (\$307.27) was applied on January 30, 2015. [R. 343].

closing under the PSA was set for February 28, 2015 (the “Closing Date”). [R. 343]. Although the closing date was set after the maturity of the Floridian loan, the sale could have closed earlier and would have closed earlier but for Kinchla’s objection. [R. 343]. Sai Baba then declared Kilgore in default under Section 8(a) of the PSA and it eventually intervened in this suit to assert a claim for specific performance. [R. 343]. Appellee filed the instant lawsuit in September of 2012 seeking judicial dissolution of Kilgore. [R. 62-66]. The proceedings were bifurcated so that the trial court could determine (i) whether Nanlann and Mark 48 were deadlocked in the management of Kilgore’s affairs; and (ii) whether the PSA was a valid and enforceable agreement and in December 2015, the lower court conducted a trial on those issues. [R. 344]. On February 15, 2016, the trial court entered a Partial Final Judgment, finding Kilgore’s members were deadlocked in but that Sai Baba was not entitled to specific performance. [R. 72-20].

The trial court directed the Property to be sold, and on March 28, 2016, the trial court entered an Order on Offers to Purchase 2121 S. Orange Avenue (the “Sale Order”) in which it reviewed three offers to Purchase the Property. [R. 345]. The trial court ordered that the prospective purchaser who tendered the highest closing price to Kilgore’s attorney would be entitled

to purchase the Property. [R. 345]. Ultimately, the Property was purchased by an entity known as LG 2121 S. Orange, LLC (“LG 2121”) on April 8, 2016. [R. 345].

Unbeknownst to Nanlann, Kinchla corrupted the process established by the Sale Order for his own gain. LG 2121 was willing to pay \$2,050,000.00 for the Property and informed Kinchla of that fact. [R. 345]. Rather than presenting an offer for \$2,050,000.00, Kinchla entered into an agreement with LG 2121 so that if the Property was sold to it for less than \$2,050,000.00, Kinchla would receive the difference. [R. 345]. LG 2121 ultimately acquired the property for \$2,050,000.00, paying \$1,750,000.00 to Kilgore and \$300,000.00 to Kinchla. [R. 345]. Kinchla’s corruption of the Court Order Sale Process was not uncovered until the subsequent trial which began on January 24, 2022.

On April 19, 2019, the Court entered summary judgment, granting judgment in favor of Kinchla on Nanlann’s claims for breach of fiduciary duty owed to Kilgore, breach of fiduciary duty owed to Nanlann, specific performance, indemnification on behalf of Kilgore and indemnification of Nanlann. [R. 1472]. However, the trial court’s order permitted Nanlann to amend its complaint to join Kinchla in its claims against Mark 48 through

allegations that would support piercing the corporate veil. [R. 1472]. Nanlann filed its Fifth Amended Complaint asserting those claims on May 9, 2019]. [R. 153].

On September 8, 2020, Kinchla filed his Motion for Attorney's Fees and Costs. [R. 535-536]. In that motion, Kinchla argued that he was entitled to an award of attorneys' fees against Nanlann pursuant to the indemnification provision of Kilgore's Operating Agreement. [R. 535-536]. On November 3, 2020, the trial court denied Kinchla's Motion for Attorney's Fees and Costs without prejudice as premature, noting that Nanlann "seeks indemnity from Defendant through piercing of the corporate veil." [R. R. 536].

These proceedings culminated in a seven-day bench trial, from January 24, 2022, to February 2, 2022, on Nanlann's claims for (i) Breach of Fiduciary Duty Owed to Kilgore by Mark 48; (ii) Breach of Fiduciary Duty Owed to Nanlann by Mark 48; (iii) Indemnification; and (iv) Nanlann's request to pierce the corporate veil. The Court also tried Mark 48's claim for indemnification against Nanlann. On May 5, 2022, the Court entered its Final Judgment in Favor of Plaintiff Nanlann, Inc. (the "Final Judgment"), finding in favor of Nanlann on all counts. [R. 2836-75].

On June 6, 2022, Nanlann filed its Motion for Attorneys Fees and Costs. [R. 331]. Appellants filed a Memorandum in Opposition to Nanlann's Motion for Attorney's Fees and Costs on June 27, 2022. In its opposition Appellants inexplicably, and without explanation, retreated from their earlier position that the Operating Agreement's indemnification provision authorized the recovery of attorneys' fees and costs. [R. 1964]. Appellants also argued that Nanlann failed to establish the amount of attorneys' fees and costs as an element of its derivative claim for indemnification. [R. 1965-66]. On July 7, 2022, Nanlann filed its Reply to Memorandum in Opposition to Nanlann's Motion for Attorneys' Fees and Costs. [R. 1968].

Proceedings on Nanlann's Motion for Attorney's Fees were bifurcated into two separate hearings: (i) a hearing on the issue of Nanlann's entitlement; and (ii) an evidentiary hearing on the amount of fees and costs to be awarded. [R. 2048]. The hearing on the issue of Nanlann's entitlement to fees and costs was held on December 22, 2022. [R. 528].

On January 25, 2023, the trial court entered its Order on Motion for Attorney's Fees and Costs finding that Nanlann was entitled to an award of fees and costs for all claims asserted in action. [R. 530]. The trial court found that the indemnification provision of Kilgore's Operating Agreement,

and specifically, the provision providing for recovery of “any loss, liability, claim, damage, expense (including without limitation the costs of investigation and defense) clearly contemplates recovery of fees and costs incurred in litigation.” [R. 538-539]. The trial court further found that Nanlann was entitled to recover attorneys’ fees and costs for all claims it asserted and defended against in the lawsuit as they involved a common core of facts and were based on related legal theories. [R. 539-540].

That same day, the trial court entered its Order for Scheduling Conference Preliminary to Hearing to Tax Costs and Award Attorneys’ Fees governing these proceedings. [R. 545]. Pursuant to that order, Nanlann filed a schedule of its exhibits and served Defendants with copies of the documentation supporting its claims for fees and costs that were not previously filed with the Motion. On May 5, 2023, Defendants filed their Objections to Attorneys’ Fees. [R. 562]. The trial court’s scheduling order required the Appellants to respond to each item of costs and fees sought, directing that “[f]or each objection, counsel shall state the basis and cite the supporting authority.” [R. 545]. Notwithstanding that direction Appellants’ Objection set forth seven generic objections to the fees and costs and attached a spreadsheet identifying specific line items that Appellants

contended fell within those categories with no further explanation as to why they believed those specific items were objectionable. [R. 562-83].

On October 12, 2023, the trial court conducted an evidentiary hearing on the amount of fees and costs to be awarded. [R. 762]. On October 30, 2023, the Court entered its Final Judgment as to Attorneys' Fees and Costs. [R. 767].

SUMMARY OF THE ARGUMENT

I. The Trial Court correctly awarded Nanlann its attorneys' fees pursuant to the indemnification provision of the Operating Agreement. Under Florida law, the general rule is that an indemnitee is entitled to recover reasonable attorney's fees and legal costs which he is compelled to pay. Nanlann was not required to present evidence of its attorneys fees during the trial of this matter as the indemnification claim that was tried was brought derivatively on behalf of Kilgore. Nanlann's direct claim for indemnification was resolved by a motion for summary judgment in Kinchla's favor. Finally, Appellants' claim that Nanlann failed to demand attorney's fees in its pleadings is incorrect. Nanlann's Fifth Amended Complaint quoted the indemnification provision of the Operating Agreement, which, under Florida law includes the right to recover reasonable attorney's fees and legal costs.

The trial court also correctly awarded attorneys' fees for Nanlann's prosecution and defense of all claims asserted in this action as those claims arose from a common set of facts and related legal theories. All of Nanlann's claims, including those tried in the 2015 trial and those against defendants other than Appellants, arose out of Kilgore's purchase of the 2121 S. Orange Ave. Property in 2007 and Appellants' belated objection to the sale of the Property. Each of the legal claims asserted by Nanlann sought to remedy the damages caused by those acts through different theories of liability. As such, Nanlann's attorneys did not spend a separate and distinct amount of time on claims for which attorneys' fees were not permitted by contract or statute.

ISSUE I

THE TRIAL COURT CORRECTLY FOUND THAT NANLANN WAS ENTITLED TO RECOVER ATTORNEY'S FEES PURSUANT TO THE INDEMNIFICATION PROVISION OF THE OPERATING AGREEMENT

STANDARD OF REVIEW

"When entitlement to attorney's fees is based on the interpretation of a contractual provision, it presents a question of law" which is reviewed de novo. *Civix Sunrise, GC, L.L.C. v. Sunrise Rd. Maint. Ass'n*, 997 So. 2d 433, 435 (Fla. 2d DCA 2008).

ARGUMENT

The trial court correctly found that the indemnification provision of Kilgore’s Operating Agreement authorized the recovery of attorneys’ fees in this matter. “Under Florida law, the general rule is that an indemnitee under an indemnification agreement is entitled to recover reasonable attorney’s fees and legal costs which he is compelled to pay as a result of suits brought against him relating to matters for which he is entitled to be indemnified.” *Law v. Law*, 299 So. 3d 505, 509 (Fla. 3d DCA 2020).

In *Law*, the contractual provision at issue stated “[e]xcept as provided herein the parties shall be solely liable for any debts and obligations in his or her sole name, holding the other harmless.” *Law*, 299 So. 3d at 509. The Court construed that provision as an indemnification agreement and cited *Shannon v. Kaiser Aluminum & Chem. Corp.*, 749 F.2d 689, 690-91 (11th Cir. 1985) for the proposition that “the general rule is that an indemnitee under an indemnification agreement is entitled to recover reasonable attorney’s fees and legal costs which he is compelled to pay as a result of suits brought against him relating to matters for which he is entitled to be indemnified. This rule is equally applicable whether the indemnitee is successful in his defense of the suit or not.” *Id.* at 509. The general rule that

an indemnitee is entitled to recover reasonable attorneys' fees is well settled under Florida law. See *Brown v. Fin. Indem. Co.*, 366 So. 2d 1273, 1274 (Fla. 4th DCA 1979); *Fontainebleau Hotel Corporation v. Postol*, 142 So.2d 299 (Fla. 3rd DCA 1962).

Appellants' argument that the trial court erred in finding Nanlann was entitled to recover attorneys' fees because the indemnification provision of the Operating Agreement does not explicitly say "attorneys' fees" is misplaced. The contractual provision in *Law* did not include a specific reference to the recovery of attorneys' fees, stating only that the parties would hold each other harmless. Similarly, the contract in *Brown* did not include a provision for the recovery of attorney's fees on appeal. See *Brown*, 366 So. 2d at 1273. Finally, in *Fontainebleau Hotel*, there was no contract between the indemnitor and the indemnitee. Instead, the indemnification obligation arose from the bailor/bailee relationship between the parties. See *Fontainebleau Hotel*, 142 So. 2d at 300.

In this case, the indemnification provision is significantly broader than the hold harmless agreement at issue in *Law*. It provides that

Each Member shall indemnify and hold harmless the Company, each and every other Member, the Manager, and any officers, directors, shareholders, managers, members, employees, partners, agents, attorneys, accountants, or affiliates of any such

Member or Manager **for any loss**, liability, claim, **damage, expense (including without limitation the costs of investigation and defense)**...

[R. 207-208] (emphasis added). As such, there is no doubt that the indemnification at issue in this case authorizes an award of attorneys' fees.

Appellants' reliance on *MV Senior Mgmt., LLC v. Redus Fla. Hous., LLC*, 319 So. 3d 66, 67 (Fla. 1st DCA 2020) is likewise misplaced. In that case both the indemnitor and indemnitee were sued by a third party and the indemnitee filed a cross claim for indemnification. See *MV. Senior Mgmt.*, 319 So.3d at 67. The Court held that the indemnitee's attorneys' fees were not recoverable because none of the fees awarded were due to the litigation with a third party. See *id.* As Appellants' correctly concede, the indemnification provision of the Operating Agreement is not limited to claims asserted by third parties. Initial Brief at 18. Moreover, unlike *VV Senior Mgmt.* this action does not involve a claim brought by a third party against the indemnitee. Finally, there is no discussion of Florida's general rule that an indemnitee under an indemnification agreement is entitled to recover reasonable attorney's fees and legal costs. Appellants cannot square their reading of *MV. Senior Mgmt.* with the decisions in *Law, Brown* and *Fontainbleau Hotel*. Each of those cases involved an indemnitee's claim

against the indemnitor. See *Law*, 299 So. 3d at 510 (stating that the indemnitee properly enforced the agreement via a motion filed in family court); *Brown*, 366 So. 2d at 1273 (noting that respondent sued petitioner to recover on an indemnification agreement); *Fontainbleau Hotel*, 142 So. 2d 299 (stipulation that in the event a judgment was entered against the indemnitee, the indemnitor was entitled to a judgment in like amount). As such, the trial court determination that Kilgore's Operating Agreement authorized an award of attorneys' fees to Nanlann was correct.

That conclusion is confirmed by the Kinchla's effort to recover attorneys fees and costs against Nanlann pursuant to the same indemnification provision of Kilgore's Operating Agreement. In his Motion for Attorneys' Fees and Costs, Kinchla sought an award of attorneys' fees and costs from Nanlann pursuant to the Operating Agreement's indemnification provision, arguing that "Mr. Kinchla is entitled to an award of fees and costs pursuant to Paragraph 11.3 of the Amended and Restated Operating Agreement of Kilgore Properties, LLC ... [and that] [p]ursuant to Paragraph 11.3, Nanlann agreed to pay all damages, costs and attorney's fees incurred by Mark 48, as well as Mark 48's officers, directors. See [R. 207-208]. Indeed, Kinchla argued that the Operating Agreement was so

broadly drafted that it authorized an award of attorneys' fees incurred for litigating both entitlement and the amount of fees to be awarded. See [R.535-536]. For those reasons, the trial court's judgment should be affirmed.

ISSUE II

THE TRIAL COURT CORRECTLY FOUND THAT NANLANN WAS ENTITLED TO RECOVER ATTORNEY'S FEES ON COUNTS AGAINST PARTIES OTHER THAN APPELLANTS

STANDARD OF REVIEW

"When entitlement to attorney's fees is based on the interpretation of a contractual provision, it presents a question of law" which is reviewed de novo. *Civix Sunrise*, 997 So. 2d 433, 435 (Fla. 2d DCA 2008). "[T]he determination of whether multiple claims within a lawsuit are separate and distinct is a matter of law to be reviewed de novo. *Waverly at Las Olas Condo. Ass'n v. Waverly Las Olas, Ltd. Liab. Co.*, 88 So. 3d 386, 388 (Fla. 4th DCA 2012).

ARGUMENT

Appellant's contention that the Lawsuit went through three different phases is incorrect. While the issue of Kilgore's dissolution and the sale of the Property to Sai Baba was bifurcated and tried separately from Nanlann's

other claims, that bifurcation did not create separate “phases” of the lawsuit. Appellants’ objection to the sale of the Property to Sai Baba was at issue during the initial trial on Nanlann’s claim for dissolution as well as the subsequent trial on the claims asserted in the Fifth Amended Complaint. [R. 72-20]; [R. [R. 153].

Appellants’ characterization of Nanlann’s Third and Fourth Amended Complaints as limited to efforts to pursue Pola, Baker, Jenemi and Sandhill is likewise incorrect. See Initial Brief at 28. Nanlann’s Third and Fourth Amended Complaints also sought relief from Appellants arising from a common core of facts and asserted the overlapping legal claims against Pola, Baker, Jenemi, Sandhill and Appellants. *Compare* [R. 81-115] (Third Amended Complaint at ¶ 36, ¶¶ 38-42 and ¶¶ 54-63) *with* [R. 117-152] (Fourth Amended Complaint at ¶¶22-32, ¶¶ 48-58, ¶¶ 60-62, and ¶¶ 84-89) *and with* [R. 153-293] (Fifth Amended Complaint at ¶¶ 28-33, ¶¶ 59-62, *id.* at ¶¶ 84-89). Those same factual allegations were addressed by the trial court in its Final Judgment. [R. 355] (finding that Kinchla and Pola “agreed to inflate the value of the Project so that they could each individually profit”); [R. 354] (finding that Mark 48 failed to make its capital contribution to Kilgore

as required by the Operating Agreement); [R. 349] (finding Mark 48 breached its fiduciary duties by objecting to the sale of the Property).

The trial court correctly found that Nanlann was entitled to recover attorneys' fees for all claims asserted in this lawsuit, including claims asserted against parties other than Appellants. "[T]he party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible." *River Bridge Corp.*, 76 So. 3d at 989 (citing *Lubkey v. Compuvac Sys., Inc.*, 857 So. 2d 966, 968 (Fla. 2d DCA 2003)). Under Florida law, where a party has a contractual or statutory basis for an award of fees for some, but not all, claims involved in a lawsuit,

[T]he trial court must evaluate the relationship between the claims and "where the claims involve a 'common core' of facts and are based on 'related legal theories,' a full fee may be awarded unless it can be shown that the attorneys spent a separate and distinct amount of time on counts as to which no attorney's fees were sought [or authorized].

Chodorow v. Moore, 947 So. 2d 577, 579 (Fla. 4th DCA 2007).

In this case, all of Nanlann's claims arose out of the scheme to inflate the purchase price of the Property in 2007 and the Appellants' belated objection to the sale of the property in 2014. Specifically, Nanlann's claim for dissolution arose from Appellant's objection to the sale of the Property,

while the claims against Pola, Baker and Jenemi arose from the artificial inflation of the purchase price of the property. As set forth above, both issues were address by the trial court in its Final Judgment entered against Appellants. [R. 334] (holding that “Kinchla and Pola devised a plan to inflate the value of the Project to \$2,150,000...”; [R. 349] (finding Mark 48 breached its fiduciary duties by objecting to the sale of the Property). As such there is no doubt that Nanlann’s claims against Pola, Baker and Jenemi arose from a common core of facts as the claims on which Nanlann prevailed at trial.

There is no legitimate claim that the claims against Pola, Baker and Jenemi were based on unrelated related legal theories to those advanced against Appellants. Despite the fact that Nanlann’s claims were directed at Appellants in differing capacities, they ultimately amounted to “alternative theories of liability for the same wrong.” See *Shelly L. Hall, M.D., P.A. v. White*, 97 So. 3d 907 (Fla 1st DCA 2012). Those wrongs - the scheme to artificially inflate the value of the Project so that Pola and Kinchla could siphon funds from it at Nanlann’s expense and Kinchla’s objection to the sale of the Property – undergird all of Nanlann’s claims in this action. Regardless of the legal theory or capacity in which the various defendants were sued, this basic allegation remained the focal point of these proceedings.

The fact that the Pola defendants prevailed against Nanlann on the claims asserted against them does not change the fact that those claims were based on related legal theories. To that end, the Pola defendants prevailed due to a technical argument, lack of standing. [R. 1469] (“[T]he Court determines that Nanlann lacks standing to bring direct claims against Mr. Pola, Ms. Baker and Jenemi arising out of an alleged inflated purchase price”). Nevertheless, the claims against them were based on the same wrong that the trial court addressed in the Final Judgment.

Appellants’ argument, that nothing they did “forced Nanlann to sue Pola, Baker, Jenemi or Sandhill” and therefore attorney’s fees for those claims were not caused by Appellants’ acts or omissions misses the mark. See Initial Brief at 31. The acts that caused Nanlann’s loss in this matter were clearly taken by Kinchla. Kinchla agreed to artificially inflate the value of the Project. [R. 334]. Kinchla formed Mark 48 to conceal the fact that he was both buyer and seller in the 2007 transaction. [R. 358]. Mark 48 failed to make its capital contribution to Kilgore. [R. 354]. Kinchla and Mark 48 objected to the sale of the Property to Sai Baba. [R. 351]. As such, there is no doubt that Nanlann’s damages were caused by Appellants acts.

Appellants' reliance on *Mainstream America, Inc. v. Capital Prop. Mgmt.*, 732 So. 2d 401 (Fla. 3d DCA 1999) is misplaced. In that case, the trial court found that the purchaser of a property was not liable to a broker for payment of the broker's commission and therefore the indemnity clause of the contract between the buyer and the seller "was not triggered." See *Mainstream America*, 732 So. 2d at 401. In this case, there is no doubt that the indemnification provision of the Operating Agreement was triggered. As set forth above, the trial court correctly found that Pola and Kinchla engaged in a scheme to inflate the purchase price of the Property in 2007 and that Appellants' belated objection to the sale of the property in 2014 was improper. Those actions caused Nanlann to incur "loss ... damage, [and] expense..." Thus, because the indemnification provision of the Operating Agreement was triggered in this case, *Mainstream America*, is inapposite.

In sum, the trial court correctly found that the on which Nanlann prevailed were inextricably intertwined with its claims against the Pola defendants and its claim for dissolution of Kilgore and the trial court's judgment should be affirmed.

ISSUE III

THE TRIAL COURT CORRECTLY RULED THAT NANLANN WAS ENTITLED TO FEES ON COUNTS THAT IT LOST

STANDARD OF REVIEW

“[T]he determination of whether multiple claims within a lawsuit are separate and distinct is a matter of law to be reviewed de novo. *Waverly at Las Olas Condo. Ass'n v. Waverly Las Olas, Ltd. Liab. Co.*, 88 So. 3d 386, 388 (Fla. 4th DCA 2012).

ARGUMENT

The trial court correctly found that Nanlann could recover fees for claim that it did not prevail on as those claims were inextricably intertwined with claims on which it did prevail. Under Florida law a prevailing party may recover attorneys' fees for claims on which it did not prevail where the claims are “alternative theories of liability for the same wrong.” *Anglia Jacs & Co. v. Dubin*, 830 So. 2d 169, 171 (Fla. 4th DCA 2002); *Regency Homes v. McMillen*, 689 So. 2d 1204, 1205 (Fla. 3d DCA 1997) (“The record made in this case, however, indicates that the issues involved in defending against the construction lien claim are intertwined with the remaining issues in the case, and that the attorney's time cannot reasonably be apportioned.”).

As set forth in detail above, Nanlann's claims in this matter arose, in part, out of the scheme to inflate the purchase price of the Property. That scheme was developed and carried out by the Pola defendants and the

Appellants acting in concert. The fact that the Pola defendants and Appellants were able to prevail on a subset of Nanlann's claims based on a technicality does not alter the fact that all of Nanlann's claims arise out of the same wrong or that those claims were alternative theories of liability for that same wrong. To that end, the Court did not reach the merits of the claims asserted against Pola, Baker and Jenemi. Instead, the Court found that Nanlann lacked standing to pursue those claims. The claims upon which Appellants prevailed were dismissed for the same reason.

The "prevailing party" for purposes of entitlement to attorney's fees is "the party prevailing on the significant issues in the litigation." *Isola Bella Homeowners Ass'n v. Clement*, 328 So. 3d 1132, 1134 (Fla. 4th DCA 2021); *T & W Developers, Inc. v. Salmonsens*, 31 So. 3d 298, 302 (Fla. 5th DCA 2010). In this case, Nanlann prevailed on the significant issues in this litigation establishing Appellants culpability for their wrongful action. That Appellants prevailed on certain legal claims in this case does not alter that conclusion. For that reason the Court should find that the trial court properly awarded Nanlann its fees for all counts asserted in the suit.⁴

⁴ Appellant's initial brief includes a one sentence request asking the Court to "permit Appellants to recover fees for the time spent successfully litigating the counts that they prevailed on." Initial Brief at 37. However, that

ISSUE IV

THE TRIAL COURT CORRECTLY RULED THAT NANLANN WAS NOT REQUIRED TO PRESENT EVIDENCE OF ITS FEES AT TRIAL

STANDARD OF REVIEW

As set forth in the Initial Brief, the standard of review of a trial court's determination of attorneys' fees is abuse of discretion. *Santiago v. Sunset Cove Invs., Inc.*, 198 So. 3d 658, 659 (Fla. 2d DCA 2015) (“We review a trial court's determination of entitlement to attorneys' fees for abuse of discretion.”).

ARGUMENT

The trial court properly found that Nanlann was not required to pursue its claim for attorneys' fees as part of its derivative claim for indemnification at trial and appellants' reliance on *Caribbean Fire & Assocs. v. Coastal Constr. Group*, 985 So.2d 1197 (Fla. 3d DCA 2008) is misplaced. In *Caribbean Fire*, the Court held that where “the attorney fees and costs

request should be denied as filed Mark Kinchla's Renewed Motion for Attorneys' Fees and Costs and Mark 48's Motion for Attorneys Fees and Costs on July 11, 2022. As the Court's Final Judgment was entered on May 22, 2022, Appellant's request for attorneys fees was untimely. See Fla. R. Civ. P. 1.525 (requiring motion for attorneys fees and costs to be filed within thirty days after judgment).

sought are ***an element of the damages recoverable as part of the main claim***, the amount of attorney fees and costs sought must be proven by the claimant during the proof of that claim, just as any other element of damages.” See *Caribbean Fire*, 985 So. 2d. at 1199 (emphasis added).

In this case the trial court correctly found that attorneys’ fees sought by Nanlann were not an element of damages recoverable because Nanlann’s indemnification claim was brought derivatively on Kilgore’s behalf. In a derivative suit, a member of a limited liability company such as Kilgore seeks to enforce a corporate right or remedy a wrong to a company. See § 605.0802, Fla. Stat. (“A member may maintain a derivative action to enforce a right of a limited liability company if: ...”). The attorneys’ fees and costs Nanlann incurred were paid by Nanlann, not Kilgore. As such, those amounts were not damages that Kilgore suffered due to Mark 48’s actions. For that reason, there is no doubt that the attorney’s fees and costs Nanlann incurred were not an element of the damages recoverable by Kilgore.

That conclusion is confirmed by Florida law. Attorneys’ fees may be an element of damages where a party seeks “to recover ***previously incurred attorney’s fees*** as an element of damages in a breach of contract action.” See *Sea World of Fla., Inc. v. Ace Am. Ins. Cos.*, 28 So. 3d 158, 161

(Fla. 5th DCA 2010) (emphasis added). In this case, Nanlann did not previously incur attorneys' fees that Kilgore could recover. Similarly, in *Mainstream America*, which was cited in *Caribbean Fire*, the Court held that "[a]lthough attorney's fees often are an element of damages in an action for indemnity **where underlying liability is established**, in the absence of any derivative liability, indemnity for attorney's fees does not lie." *Id.* (emphasis added). In this case, Appellant's underlying liability to Kilgore was not established until entry of the Final Judgment. As such, the attorneys' fees sought by Nanlann are collateral and were not an element of Kilgore's damages. Consequently, the trial court correctly found that Nanlann was not required to present evidence of, or pursue, its claim for attorneys' fees during trial.

Further, Appellants claim that Nanlann failed to demand attorney's fees in its pleadings is incorrect. Nanlann's Fifth Amended Complaint quoted the indemnification provision of the Operating Agreement, which, under Florida law includes the right to recover reasonable attorney's fees and legal costs. [R. 179-80].

Appellant's effort to distinguish *Sea World of Fla., Inc. v. Ace American Ins. Cos., Inc.*, 28 So. 3d 158 (Fla. 5th DCA 2010) falls short. While *Sea*

World does not involve a derivative claim, the court held that attorneys' fees may be an element of damages where a party seeks "to recover previously incurred attorney's fees as an element of damages in a breach of contract action." See *Sea World*, 28 So. 3d 161. In this case, the trial court correctly concluded that Nanlann was not seeking to recover previously incurred fees. As such, the Court should affirm the trial court's Final Judgment.

CONCLUSION

The trial court correctly found that Nanlann was entitled to recover its attorneys' fees pursuant to the indemnification provision of the Operating Agreement. Moreover, Nanlann was not required to present evidence of its attorney's fees during the trial of this matter as those fees were not previously incurred and the indemnification claim that was tried was brought derivatively on behalf of Kilgore. Additionally, the trial court correctly awarded attorneys' fees Nanlann's prosecution and defense of all claims asserted in this action as those claims arose from a common set of facts and related legal theories. All of Nanlann's claims arose out of Kilgore's purchase of the 2121 S. Orange Ave. Property in 2007 and Appellants' belated objection to the sale of the Property. Each of the legal claims asserted by Nanlann sought to remedy the damages caused by those action through different theories of liability.

For all the foregoing reasons, the Final Judgment should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic transmission this 5th day of September, 2024 to: Christopher C. Cathcart, Esquire and Heidi Hebden, Esquire, Cathcart Law Group, P.A., 225 S. Westmonte Dr., Suite 1160, Altamonte Springs, Florida 32714 (Email: chris@lawccc.com and heidi@lawccc.com).

CERTIFICATE OF COMPLIANCE

Respondent hereby certifies that the text of this Answer Brief complies with the font requirements set forth in Rule 9.210, Florida Rules of Appellate Procedure.

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