IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO. 2024-009353 CA 44

EDGAR ANDRAUS, *et al.*,

Plaintiffs,

vs.

RP I-DRIVE, LLC, a Florida limited liability company, RP I-DRIVE MANAGER, LLC, a Florida limited liability company, RODRIGO E. AZPURUA, and DANIA C. AZPURUA, Individually,

Defendants.
_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiffs/Appellants, **EDGAR ANDRAUS, et al.** ("**Plaintiffs**" or **Appellants**"), appeal to the Third District Court of Appeal, the Court's Order rendered on July 29, 2024 (the "**Order**"), Denying Plaintiffs' Motion for Injunctive Relief and Plaintiffs' Motion for Appointment of a Receiver, a copy of the Order [D.E. 92] is annexed hereto as **Exhibit "A."**[1]

[1] The Appellants respectfully note that an Emergency Motion for Reconsideration of the July 29, 2024, Order on Plaintiffs' Emergency Motion to Appoint Receiver and for a Temporary Injunction and Emergency Motion to Reinstitute Status Quo Order is currently pending before the Trial Court (the "**Reconsideration Motion**") [D.E. 101]. Appellants understand that this Court loses jurisdiction to alter, modify, or vacate the Order once this Notice of Appeal is filed. To allow this Court the opportunity to rule on the pending Reconsideration Motion, and to toll the 20-day deadline for the initial appellate brief, Appellants intend to file a motion with the Third District Court of Appeal requesting a temporary relinquishment of jurisdiction as soon as a case number is issued from the Third District Court of Appeal.

Dated this 28 day of August, 2024.

Respectfully submitted,

By: */s/Aliette D. Rodz*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed via the Florida Courts E-Filing Portal on August 14, 2024, and is being served on all counsel of record by e-mail generated by the E-Portal system.

Aliette D. Rodz
OF COUNSEL

STATE OF FLORIDA, COUNTY OF MIAMI-DADE
I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE 8-29 AD 2024
JUAN FERNANDEZ-BARQUIN, Clerk of the Court and Comptroller, Miami-Dade County
Deputy Clerk 12662

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2024-009353-CA-01
SECTION: CA44
JUDGE: Lisa Walsh

Edgar Andraus et al

Plaintiff(s)

vs.

RP I-Drive, LLC et al

Defendant(s)

_____/

ORDER DENYING PLAINTIFFS' EMERGENCY MOTIONS TO APPOINT RECEIVER AND FOR A TEMPORARY INJUNCTION AND PLAINTIFFS' EMERGENCY MOTION TO REOPEN EVIDENCE (DE 34, 3, 76)

THIS CAUSE came before the Court on (1) Plaintiffs' Emergency Motion to Appoint Receiver; and (2) Plaintiffs' Emergency Motion for a Temporary Injunction. After holding an evidentiary hearing on June 12, 2024, June 18, 2024, and July 1, 2024, having reviewed the pleadings, motions, and other filings of the parties, the arguments of counsel and having considered the entire record herein, the Court denies both Emergency Motions for the reasons set forth below.

I. PROCEDURAL HISTORY

On May 21, 2024, Plaintiffs filed an Emergency Pre-Arbitration Verified Complaint for Temporary Injunction and Other Relief (the "Complaint"), which seeks "pre-arbitration relief" in four counts: I (Temporary Injunction); II (Dissociation as Manager under Fla.Stat.§605.0602); III (Forensic Accounting); and IV (Judicial Dissolution pursuant to Section 605.0702(1)(b)(3) and 605.0702(1)(b)(4)). D.E. 2. That same day, Plaintiffs filed an Emergency Motion to Appoint a Receiver. D.E. 3. The Court set a status conference for 8:45 am on May 24, 2024, during which Defendants stated that the hotel sale at issue was not scheduled to close until July 1, 2024. The Court issued a status quo order prohibiting a sale or other conveyance of the hotels at issue until the conclusion of an evidentiary hearing to be scheduled between June 3 and June 14, 2024. D.E. 23 at 3.

On June 4, 2024, Plaintiffs filed an Emergency Motion for Temporary Injunction. D.E. 34. On June 5, 2024, Defendants RP I-Drive, LLC and RP I-Drive Manager, LLC filed their Memorandum of Law in Response to Plaintiffs' Motion to Appoint Receiver, D.E. 40, and on June 10, 2024, Defendants filed their Memorandum of Law in Opposition to Plaintiffs' Motion for Temporary Injunction, D.E. 46. The individual defendants filed responses as well, adopting the arguments of the corporate entities. D.E. 43, 49.

The Court started this evidentiary hearing in the afternoon of June 12, 2024. At approximately 1:40 am on June 18, 2024, the date for the continued evidentiary hearing, Plaintiffs submitted to the American Arbitration Association ("AAA") a Demand for Arbitration ("Arbitration Demand"), which Plaintiffs later filed on the docket before this Court. D.E. 60. The hearing continued all day on June 18, 2024, and resumed at approximately 10:30 am on July 1, 2024, concluding after closing arguments at approximately 9:30 pm that day. The evidence was closed, and the Court directed the parties to submit proposed orders on the motions.

On July 9, 2024, Plaintiffs filed a Notice of Filing: - NEWLY DISCOVERED INFORMATION DIRECTLY RECEIVED FROM COUNSEL FOR DEFENDANT'S MORTGAGE LENDER AND TO SUPPLEMENT THE RECORD ON PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER AND PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION. (DE 74) The court directed the Plaintiffs to file a motion, as there is no basis for the court to simply accept or consider attachments to a "notice of filing" after closure of an evidentiary hearing. Defendants had no opportunity to contest the authenticity, admissibility, or weight to give this purported new evidence. On July 10, 2024, Plaintiffs filed PLAINTIFFS' EMERGENCY MOTION TO REOPEN EVIDENTIARY PROCEEDINGS TO CONSIDER NEWLY DISCOVERED MATERIAL EVIDENCE IN SUPPORT OF PLAINTIFFS' MOTION TO APPOINT RECEIVER AND PLAINTIFFS' MOTION FOR TEMPOARY INJUNCTION. (DE 76) On July 25, 2024, the court heard this motion and ruled, without objection, that the court would take judicial notice of the fact of RP-I Drive LLC's monetary default on its loan with Seacoast Bank and unpaid property taxes.

II. FACTUAL BACKGROUND

A. The Parties

Plaintiffs are made up of 26 Class B Members and 31 Class C Members. Class A Members provided seed money of $4 million. This sum was repaid several years ago. Class B Members comprise 26 non-EB5 equity investors who invested a combined $21 million. Class C Members comprise 31 common EB5 investors, who invested $500k each in an entity called RP I-Drive EB-5 Investors, LLC ("the Class C Member"). The Plaintiffs are individual ivestors in the Class C Member. The Class C Member itself– the RP-I Drive EB-5 Investors, LLC entity – is not a party in this action. It should be noted that the Class C Plaintiffs are not direct investors in RP-I Drive, LLC. They are investors in RP-I Drive EB-5 Investors, LLC.

RP I-Drive, LLC (the "Company" or "Master Company") is a Florida manager-managed Limited Liability Company formed in 2016 and managed by RP I-Drive Manager, LLC, which is managed by its sole member Miami Agora, LLC, whose members are Rodrigo and Dania Azpurua. 7.1.24 Hr'g Tr. (D.E. 73) at 60:4–18. RP I-Drive Manager, LLC ("Manager") is the Manager of RP I-Drive LLC. Azpurua and his wife were the authorized members until 2018, when they replaced themselves with Miami Agora, LLC. Rodrigo Enrique Azpurua ("Mr. Azpurua") is the president / CEO of multiple entities related to the Orlando Project. Dania Carmela Azpurua ("Mrs. Azpurua") is the Wife of Mr. Azpurua who is also involved in these entities.

B. Formation and Purpose of RP I-Drive, LLC and Initial Equity Raises

The Company was formed "for the sole purpose of acquiring, developing, operating and/or selling" two hotels on International Drive (known as I-Drive) in Orlando. Exh. A, § 2.5; *see also id.* at 12 (defining "Project"). Using seed capital of $4,000,000 contributed by the Class A Member, Doral Economic Impact Holdings, LLC ("DEIH"), the Company acquired a 3.32-acre site on International Drive, near Sea World. 7.1.24 Hr'g Tr. at 47:13–8, 168:12–19.

On November 30, 2016, the Company issued a Confidential Private Placement Memorandum ("PPM") to raise "[u]p to $6,000,000" in Class B Equity Non-EB-5 Membership Interests. Exh. B. The offering price was $100,000 per unit, and the PPM cautioned that "THE CLASS B MEMBERSHIP INTERESTS ARE SPECULATIVE AND PRESENT A HIGH DEGREE OF RISK." *Id.* at iii. The PPM also listed various risk factors and cautioned that the forward-looking statements contained in the PPM were "based on current expectations" and involve "a number of risks and uncertainties." *Id.* at vii and 49–60. The Company raised $6,000,000 from 29 Class B members, each of whom signed a Subscription Agreement. Exh. C.

In 2017, RP I-Drive EB-5 Investors, LLC (the "Class C Member") was formed to provide equity financing to the Company for the development of two hotels, by this time identified as a LaQuinta Inn and Suites Hotel and a TRYP by Wyndam Hotel (the "Hotels"). Exh. D. The Class C Member was issued one Class C unit. Exh. A, §3.1(e). On June 17, 2017, the Class C Member published its own PPM to raise capital from EB-5 investors with an offering price of $500,000 per Unit. *See* Exh. E at 2. At the time, the maximum Class C offering was "$12,000,000." *Id.* at 2, 18. The Class C Member raised $12,000,000 from 24 EB-5 investors. 7.1.24 Hr'g Tr. at 54:10–55:11. The PPM provided the same or similar disclosures as the PPM for Class B and also included disclosures to the effect that EB-5 approval was not guaranteed. Exh. E at 6–8, 10, 62–67, 69 ("PURCHASE OF A COMPANY INTEREST DOES NOT GUARANTEE LAWFUL PERMANENT RESIDENCE IN THE UNITED STATES"), 70–78.

B. Development of the Hotels, the Apollo Bank Loan, and the Additional $7,000,000 Class C Capital Raise

Construction of the La Quinta Hotel began in October 2017 and the TRYP Hotel in October 2018. 7.1.24 Hr'g Tr. at 60:21–61:5, 64:23–65:1. The total cost of development was estimated at $32.5 million when the Project began, but due to rising construction costs in the Orlando area, it rose to be approximately $42 million by 2020. 7.1.24 Hr'g Tr. at 61:6–20. In 2018, the Company had borrowed $17.75 million from Apollo Bank, later acquired by Seacoast Bank ("Seacoast"), to help fund construction, which loan is personally guaranteed by Mr. and Mrs. Azpúrua. *See* Exhs. T and 4. In 2019, so that the construction of the TRYP Hotel could be completed, an additional $7,000,000 via 14 additional EB-5 investors was raised by the Class C Member. 7.1.24 Hr'g Tr. at 66:11–69:7. The La Quinta Hotel started operations in December 2019 and the TRYP Hotel officially opened in November 2020 during the pandemic. *Id.* at 69:6–70:6. Thus, both hotels, the subject of this venture, were constructed and operational.

C. Financial Challenges in 2021 to the Present, the Replacement of Coakley Williams, and Newsletters Reflecting the Hotels' Financial Struggles

The lockdowns and travel restrictions related to the pandemic had a devasting effect on the hospitality industry and the Hotels. *Id.* at 69:10–70:6. Even after the pandemic subsided, from 2021

to 2023, numerous economic factors adversely impacted the Hotels. *Id.* at 116:6–120:21. For instance, inflation led to a substantial escalation in the overall cost of doing business, including rising labor, energy, transportation, insurance, and operational costs. *Id.* Consequently, the Hotels struggled due to these conditions. In June 2022, pursuant to its loan documents with Seacoast, the Company was required to make principal payments on the loan in addition to interest at the rate of 6%. *Id.* at 120:22–121:6. The Hotels' average daily room rate ("ADR") was approximately $120 in 2023, versus the $180 forecasted when the Project started. *Id.* at 186:4–12.

In mid-2019, the Company engaged Coakley Williams to manage the Hotels, but after alleged performance problems experienced with Coakley's management of the Hotels, the Company decided to terminate Coakley effective December 31, 2021. *Id.* at 70:7–73:9. Part of the issue related to Coakley losing a significant part of its staff and portfolio during the Pandemic. The Manager decided to replace Coakley with a newly formed affiliate, Reliance Point Hospitality, LLC ("RHP"), which was an internally-created entity formed by his wife. A Newsletter published to investors stated that "**we would be self-managing**" going forward. Exh. J; 7.1.24 Hr'g Tr. at 70:7–74:2 (emphasis added).

Reviews of the hotels while Coakley was the manager were very favorable; reviews under RHP management remained similarly favorable. Throughout 2021 to 2023, the quarterly Newsletters emailed to investors reflected that the Hotels' financial performance was significantly below the proforma projections when the project began and that the Hotels were performing poorly. *E.g.*, Exhs. K, L, 9, and 10. In May 2023, the Company sent a pre-recorded webinar to investors that informed them that the Hotels were struggling financially. Exh. W.

D. Events in Late 2023 until the Lawsuit Commenced

During 2023, the Manager unsuccessfully sought investors and lenders to shore up the Company's finances. 7.1.24 Hr'g Tr. at 189:16–191:4, 201:10–207:1. In November 2023, while budgeting for 2024, the Company forecasted that the Hotels would "be dried up on cash right at the beginning of summer" of 2024, which would jeopardize the Company's ability to timely satisfy its debt service payments to the bank as well as its other financial obligations. *Id.* at 130:15–131:3, 189:16–191:4; Exh. 8 (12/1/23 Memo.) at 7–8 ("Continuing operations without a future infusion of more debt or equity capital will result in a default under the mortgage loan," and the hotels owe vendors more than $600,000). In November 2023, the Company also received two non-binding Letters of Intent ("LOI") to buy the Hotels. 7.1.24 H'rg Tr. at 194:21–195:8. One LOI was for $30 million and another for about $23 million. *Id.*

To alert its investors of this impending financial predicament, on December 1, 2023, the Company sent investors a Memorandum with numerous attachments (the "12/1/23 Memo"), which included the LOIs. Exh. 8. The 12/1/23 Memo also included two suggested options for the investors: (1) sell the Hotels; or (2) infuse approximately $2.20 million in additional capital to stabilize the Hotels through the end of 2024. 7.1.24 Hr'g Tr. at 204:22–206:15. Many investors objected to the sale option. *See* Exh. 39. In January and February 2024, numerous communications, including in-person meetings, between the Company and investors ensued. Exhs. P, O, Y, Z, AA, and II. The Company expressed that it was open to the capitalization option if the investors would commit to raising at least $2.04 million; confirm that 80% of that funding was immediately available; and execute consents to the recapitalization and a necessary amendment to the

Company's Operating Agreement. 7.1.24 Hr'g Tr. at 211:2–24. The investors raised approximately $1.4 million, which was short of the minimum amount the Company determined was necessary. *Id.* at 211:25–212:8. Because franchise fees were owed to Wyndam, which temporarily cut off the reservation system in February 2024, investors loaned $228,000 to the Company to restore the reservation system. *Id.* at 206:16–207:22. The investors, however, were unwilling to invest further funds until Driftwood Management replaced RPH as hotel manager. *Id.* at 208:3–21.

Although the Manager encouraged the investors to infuse $2.04 million in capital to shore up the balance sheet before approaching Seacoast for its required consent to change hotel managers, the investors insisted that Driftwood replace RPH. *Id.* at 212:9–213:15. The Promissory note requires such consent. Exh. S ¶ 8(k) of Promissory Note; 7.1.24 Hr'g Tr. at 81:8–82:16. On March 5, 2024, the Manager asked for Seacoast's consent.[1] Exh. BB. On March 25, 2024, Seacoast rejected the substitution and issued a Default Notice to the Company based on the Company's failure to meet its FF&E reserve requirement as well as the debt service covenant ratio requirement. Attach. to Exh. M. In addition, Seacoast demanded that the Company pay down the loan principal by $12,000,000 within 60 days to cure the latter default. *Id.* The Company then asked Seacoast for various options for relief, but the bank rejected all of those requests. *Id.*; 7.1.24 Hr'g Tr. at 219:21–221:24.

Shortly after its receipt of the Default Notice, the Manager decided to sell the Hotels. Accordingly, on March 28, 2024, the Company retained the Kabani Group and Ten-X to market the hotels and conduct an on-line auction scheduled for May 28–30, 2024. 7.1.24 Hr'g Tr. at 225:21–226:16. As part of the marketing process, and prior to the scheduled Ten-X auction, the Company received 8 non-binding LOIs and 4 executed Purchase and Sale Agreements ("PSA"). *Id.* at 229:1–230:20. The Company accepted the highest PSA of $22.2 million, which scheduled a July 1, 2024 closing. *Id.* at 233:1–237:17. Consequentially, the auction was then cancelled. Plaintiffs then commenced this lawsuit. *Id.* at 226:14–16.

III. STANDARDS FOR THE TWO EMERGENCY MOTIONS AT ISSUE

A. Standard for Appointing a Receiver

"Appointing a receiver is a rare and extraordinary remedy." *Plaza v. Plaza*, 78 So. 3d 4, 6 (Fla. 3d DCA 2011) (citation omitted); *accord Se. Bank, N.A. v. Ingrassia*, 562 So. 2d 718, 721 (Fla. 3d DCA 1990) ("A receivership is an extraordinary remedy, and frequently an expensive one."). "Equitable receiverships are a creation of common law" that "should be reserved for cases involving fraud, self-dealing, or waste." *Granada Lakes Villas Condo. Ass'n v. Metro-Dade Invs. Co.*, 125 So. 3d 756, 759 (Fla. 2013) (citations omitted). "While the appointment of a receiver in litigation is to a large extent within the sound judicial discretion," the Florida Supreme Court has cautioned that "there are certain well-established rules that should be observed in exercising such discretion[,]" including that "fraud or imminent danger, if the immediate possession should not be taken by the court, must be clearly proved." *Mirror Lake Co. v. Kirk Sec. Corp.*, 124 So. 719, 721 (Fla. 1929) (quoting *Lehman v. Tr. Co. of Am.*, 49 So. 502, 503 (Fla. 1909)). "[A] receiver should not be appointed unless 'there is strong reason to believe that the party asking for a receiver will recover.'" *Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241, 248 (Fla. 1930) (quoting *Apalachicola N. R. Co. v. Sommers*, 85 So. 361, 362 (Fla. 1920)).

B. **Standard for a Temporary Injunction**

"[A] temporary injunction is an extraordinary and drastic remedy which should be granted sparingly[.]" *Jennings v. Perrine Fish Market, Inc.*, 360 So. 2d 434, 435 (Fla. 3d DCA 1978) (per curiam). A party moving for a temporary injunction must plead and establish: "(1) a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) that the threatened injury to the petitioner outweighs any possible harm to the respondent; and (4) that the granting of a temporary injunction will not disserve the public interest." *Cordis Corp. v. Prooslin*, 482 So. 2d 486, 489–90 (Fla. 3d DCA 1986) (citations omitted). Such an injunction may be granted "only in clear cases, reasonably free from doubt[,] … and the complainant has the burden of proving the facts which entitle him to relief." *Sackett v. City of Coral Gables*, 246 So. 2d 162, 164 (Fla. 3d DCA 1971).

Further, an order on a motion for receivership and injunction must contain specific findings as to all four elements. Berk-Fialkoff v. Wilmington Tr., Natl. Assn., 358 So. 3d 472, 476 (Fla. 5th DCA 2023). Strict compliance with rule 1.610, Florida Rules of Civil Procedure, is required.

DISCUSSION AND ANALYSIS

The Complaint seeks "pre-arbitration" provisional remedies and pleads only remedies, not substantive causes of action. Florida Statutes Section 682.031 authorizes a court to order "provisional remedies" upon a showing of "good cause," but only "upon motion of *a party to an arbitration proceeding*." § 682.031(1) (emphasis added). At the time the motion as filed, no claim or cause of action was pending. The court advised the Plaintiff at a preliminary hearing that no injunction or receiver could be granted in the absence of a substantive claim for relief.

> Allowing a preliminary injunction to issue in the absence of a pending request for ultimate relief would be contrary to the purpose behind temporary injunctions: maintaining the status quo until the merits of the dispute can be resolved at a final hearing. See *See* [*Tamiami Trail Tours, Inc. v. Greyhound Lines, Inc.*, 212 So.2d 365, 366 (Fla. 4th DCA 1968)]. Furthermore, in order to be entitled to the issuance of a temporary injunction, the moving party must show, among other things, a substantial likelihood of success on the merits in the action. *See Playpen S., Inc. v. City of Oakland Park*, 396 So.2d 830, 831 (Fla. 4th DCA 1981). This essential requirement would be rendered meaningless if, as here, the petition for temporary injunction was filed where there was no pending action.

Intl. Village Ass'n, Inc. v. Schaaffee, 786 So. 2d 656, 658 (Fla. 4th DCA 2001).

Plaintiffs commenced an arbitration on June 18, 2024, nearly a month after they filed the Complaint, and only after this Court questioned its ability to grant equitable relief in the absence of any substantive cause of action. *See* 6.12.24 Hr'g Tr. (D.E. 53) at 116:10–118:21.

The Statement of Claim in the Arbitration Demand sets forth three liability theories under four causes of action: (1) breach of contract; (2) breach of fiduciary duty; (3) misrepresentation and fraudulent inducement; and (4) fraudulent concealment.[2] *See* D.E. 60. The three liability theories asserted under each cause of action revolve around: (a) the capital raise of $7 million in 2019; (b)

the replacement of Coakley Williams by RHP in 2022; and (c) that: (i) the EB-5 investors did not consent to a sale of the Hotels; (ii) the Manager allegedly harmed them by signing the PSA; and (iii) the full $500,000 capital contribution per investor will not be available for redeployment.

Whether the filing of the Arbitration Demand cured the Complaint's lack of a substantive cause of action and the procedural misstep of seeking the provisional remedies pre-arbitration is not a question this Court needs to answer. That is because, even assuming that the Court is free to consider the Statement of Claim in the Arbitration Demand, which the Court has considered, the Court denies Plaintiffs' Emergency Motions for the reasons set forth below.

A. **Irreparable Harm and Inadequate Remedy at Law**

With respect to a remedy at law, the Court notes that Plaintiffs have available adequate legal remedies in the form of money damages. *See* Plaintiffs' 6.26.24 Notice of Filing Statement of Claim in Arbitration Proceedings (arbitration demand seeking $21 million in damages), D.E. 66. Plaintiffs argue that the reduced likelihood of achieving an immigration adjustment manifesting the intent of the EB-5 program constitutes irreparable harm for which monetary relief cannot suffice. The court rejects this argument. First, the EB-5 program presupposes (and requires) that the investment must be "at risk." A risk-free investment would not qualify for the EB-5 program, and the fact of the risk and that the investment is failing does not justify or warrant stopping a future sale which would ameliorate the current losses. Further, while it is not necessary for this court to fix the fair market value of the hotels, this court cannot and does not find that the amount necessary to fully redeploy all EB-5 investors' money can be realized by any realistic sale, not even close. Finally, there is no expert testimony that selling the properties for less than the full amount of the investments will doom the effort to redeploy what is left and make a strong argument to immigration authorities that the investors still qualify for an adjustment of status. The court elaborates these reasons below.

As to irreparable harm, Plaintiffs "must state facts which will enable the court to judge whether the injury will in fact be irreparable, and mere general allegations of irreparable injury will not suffice." *First Nat'l Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 423-24 (Fla. 2d DCA 1963) (citations omitted). "The facts comprising such injury must be presented clearly so that the court may determine the exact nature and extent of the possible injury." *Id.* (citations omitted). "If the injury complained of is doubtful, eventual, or contingent, injunctive relief will not be afforded." *Id.* (citations omitted). A "speculative" injury is thus "insufficient to meet the irreparable injury standard." *Biscayne Park, LLC v. Wal-Mart Stores East, LP*, 34 So. 3d 24, 26–27 (Fla. 3d DCA 2010) (citation omitted).

Plaintiffs do not contend that Class B Plaintiffs face irreparable harm, but do contend that the Class C Plaintiff EB-5 Investors "will more likely than not lose their ability to continue with their EB-5 investor visa applications" if their request for an injunction is denied. *See* Temporary Injunction Mot. (D.E. 34) at 10–11. Upon consideration of the evidence, the risks (if any) of which the EB-5 Investors complain are at best speculative and thus they cannot carry their burden to show irreparable harm.

By way of background, the EB-5 Program was conceived in 1990 when Congress amended the Immigration and Nationality Act of 1965. *See* Exh. II, Decl. of Daniel Lundy at ¶ 13 (citations

omitted). Foreign nationals may be eligible for an EB-5 immigrant visa if they have invested, or are actively in the process of investing $1 million (or $500,000 in a high unemployment or rural area), in a qualifying New Commercial Enterprise ("NCE"), and that investment results in the creation of at least ten jobs for U.S. workers.[3] *See id.* (citations omitted). The NCE must make the investment capital available to a Job Creation Entity ("JCE"). *See id.* at ¶¶ 21–22. To qualify as an "investment" in the EB-5 Program, foreign nationals must place their capital "at risk." *See id.* at ¶ 13 (citations omitted).

To become a Lawful Permanent Resident ("LPR") through the EB-5 Program, a foreign national must initially file with the U.S. Citizenship and Immigration Services ("USCIS") a Form I-526 Immigrant Petition by Alien Entrepreneur, which, if approved, makes the foreign national eligible to receive an EB-5 visa. *See id.* at ¶ 14 (citation omitted). At the conclusion of a two-year period of conditional residency (the "Sustainment Period"), the foreign national must file a Form I-829 Petition to Remove the Conditions on his or her LPR status. If the foreign national has fulfilled the EB-5 requirements, then the conditions will be removed.

Defendants' EB-5 expert, Daniel Lundy, opined that a sale of the Hotels would not impact EB-5 Investors' immigration status. *See* Ex. II ¶¶ 31–39. He also offered extensive testimony on these matters. Mr. Lundy opined that "[i]n this case, it appears that EB-5 investors invested in a NCE (i.e., RP I-Drive EB-5 Investors, LLC), the proceeds of that investment were deployed to a JCE (i.e., RP I-Drive), which completed its project at the Property according to the business plan submitted with investor petitions, and created at least 10 jobs for each investor." *Id.* ¶ 31. As a result, he opined, "the EB-5 program requirements have been met." *Id.* at ¶ 32. Even if the EB-5 investment "becomes a complete loss, whether because post-sale no capital was left to be returned or the property is foreclosed upon, such a scenario alone will not negatively impact the EB-5 investors' compliance with the EB-5 program requirements." *Id.* at ¶ 35. If, Mr. Lundy explained, "an investor had met all the requirements, the investor qualifies for conditional or unconditional residence. Even if an investor loses all of the investor's money, such a result does not impact EB-5 status if the other EB-5 program requirements are met." *Id.* at ¶ 39. And Kraig Schwigen, an EB-5 consultant retained by Defendants, testified based on his firsthand knowledge of other EB-5 development projects that had resulted in a total loss of investor funds, that the total loss did not negatively impact the foreign nationals' EB-5 visa application process. *See* 7.1.24 Hr'g Tr. at 326:22–327:4.

Plaintiffs' EB-5 expert witness, Ronald Klasko, testified that the current status of the EB-5 investor law, with regard to sustainment of an investment, is "muddled and inconsistent." 6.12.24 Hr'g Tr. at 29:8–9. Even when questioned about the scenario Plaintiffs contend may occur here in the absence of an injunction (a substantial or complete loss), Mr. Klasko was inconclusive in testifying that "If I am representing an investor, and the immigration services says that, I will put together a strong legal argument that the investor has sustained or maintained his investment. However, it's not clear whether the immigration service agrees with that at any given point in time. At times they seem to, at times they don't seem to, and at times it depends on adjudicator by adjudicator." *See* 6.12.24 Hr'g Tr. at 35:3–15, 37:1–10. Mr. Klasko conceded that it cannot be certain what action USCIS may or may not take with respect to the EB-5 Investors' visa applications upon the sale of the Hotels. *See id.* at 49:14–18 ("Q. So really with respect to your opinion today of what USCIS might do with respect to the specific investors here in this project, ***at***

best your opinion is speculative; isn't that right? A. ***Yes***.") (emphasis added).

While the Court is not insensitive to the perceived risks to the immigration process espoused by the EB-5 Investors, the potential loss of a yet-to-be-conferred benefit—*i.e.*, unconditional LPR status under the EB-5 Program—is, at best, speculative. *See, e.g.*, *Kale v. Mayorkas*, No. 21-08095 (FLW), 2021 WL 2652124 *6 (D.N.J. June 28, 2021) (denying motion for mandatory injunction to force USCIS to adjudicate petitioners' I-485 Petitions and noting that because "Plaintiffs are not certain to obtain an EB-5 immigrant visa and so their loss of this not-yet-obtained benefit is speculative," accordingly, Plaintiffs failed to demonstrate irreparable harm). Because the potential risk to EB-5 Investors absent an injunction is at best speculative, Plaintiffs fail to carry their burden of showing a clear likelihood of irreparable harm sufficient to support the extraordinary relief they seek.

The court adds that appointing a receiver is not a panacea that will ensure protection of the investors' EB-5 status and adjustment. Further, appointing a receiver and removing the manager as requested in the emergency motion may have the unintended consequence of increased fees and costs.

B. **Likelihood of Success on the Merits**

Each of Plaintiffs' claims raised in their AAA Statement of Claim is addressed below.

1. **Raising $7,000,000 of Additional Class C Capital Theory**

Both the RP I-Drive, LLC PPM, which relates to the Class B Members, and the RP I-Drive EB-5 Investors, LLC PPM, which relates to the investors in the Class C Member, and the RP I-Drive Operating Agreement indicated that the Class C raise was "up to $12,000,000." *E.g.*, Exh. A at 8, 16; Exh. B at ii; Exh. E at 2,3,4,19. In fact, the initial Class C capital that was raised was $12,000,000. Defendants put forth unrebutted evidence that by 2019 an additional $7,000,000 was needed to finish the construction of the Hotels and after not being able to borrow additional funds in 2019, RP I-Drive raised an additional $7 million through EB-5 Investors, LLC, from 14 new EB-5 investors. 7.1.24 Hr'g Tr. 66:9–69:5.

Even assuming that the PPM language was incorporated into the Company's Operating Agreement, it does not appear that this 2019 capital raise breached the Operating Agreement, as it does not have an anti-dilution provision and does not cap the amount of Class C capital that could be raised. Section 4.5 of the Company's Operating Agreement gave authority to RP I-Drive to raise Additional Interests and "to do or cause to be done any other act that the Manager considers to be appropriate to carry out any of its powers or in furtherance of the purposes and character of the Company." Exh. A, §4.5(d) and (n). Accordingly, the Court finds that Plaintiffs have not shown a substantial likelihood of success as to their breach of contract theory tied to the $7,000,000 additional capital raise.[4] Further, should the Plaintiffs prevail on such a breach of contract claim in the Arbitration, as noted above, money damages would be available to compensate for any dilution that occurred.

The evidence also does not establish a substantial likelihood of success on a claim for breach of fiduciary duty because, without the additional $7,000,000, the TRYP Hotel could not

have been completed. 7.1.24 Hr'g Tr. 69:3–5. The Court will not substitute its own judgment for that of the Manager's validly exercised business judgment. In Florida, the business judgment rule "protects officers and directors [and managers of manager-managed limited liability companies] from judicial review of their acts, provided that 'business judgments are made in good faith based on reasonable business knowledge.'" *New Horizons Condo. Master Ass'n, Inc. v. Harding*, 336 So. 3d 796, 799 (Fla. 3d DCA 2022) (citation omitted) (recognizing that the business judgment rule applies to limited liability companies); *see Lake Region Packing Ass'n, Inc. v. Furze*, 327 So. 2d 212, 216 (Fla. 1976) ("a court of equity will not attempt to pass upon questions of the mere exercise of business judgment"). The Company used the $7,000,000 for its intended purpose and thus benefitted the Plaintiffs as the property would be worth far less if the TRYP Hotel had not been finished. The Court finds that this additional capital raise was made in good faith based on the Manager's reasonable business judgment.

With respect to the fraud-based theories, the evidence reflected that at the time Defendants made representations before 2019 as to the "up to $12,000,000" statements, that was their intent. That there was a later need to raise an additional $7,000,000 from Class C does not serve as a basis for an affirmative misrepresentation or fraudulent concealment claim. *See Brod v. Jernigan*, 188 So. 2d 575, 579 (Fla. 2d DCA 1966) ("[F]raud cannot be predicated on statements which are promissory in their nature, or . . . consist of mere broken promises, unfulfilled predictions or expectations, or erroneous conjectures as to future events. . . (quoting 37 C.J.S. Fraud § 11)); *see also Bruce v. Am. Dev. Corp.*, 408 So. 2d 857, 858 (Fla. 3d DCA 1982) ("An unfulfilled promise to perform something in the future is not actionable." (citing *Brod*)).

2. **Replacing Coakley Williams**

In their Arbitration Demand, Plaintiffs claim that Coakley Williams should not have been replaced as hotel manager and that the use of RPH "caused substantial financial damages" to them because of "increased management fees, operational inefficiencies, and a decline in the performance of the hotels." Arbitration Demand ¶ 162.

Both PPMs represented that Coakley Williams *or a comparable hotel operator* will serve as the Hotel Manager. E.g., Exh. B at 20, 22, 52; Exh. E at 14, 16, 18, 31. There were assurances that the choice of hotel manager would be independent of ownership of the entities. Starting in mid-2019, RP I-Drive engaged Coakley Williams to serve as the hotel manager and it served in that capacity until it was terminated at the end of 2021. In the Fourth Quarter 2021 Newsletter emailed to investors in early March 2022, RP I-Drive informed investors that Coakley Williams was being terminated effective December 31, 2021 and that "we would be self-managing as of January 1st, 2022." Exh. J.

Section 4.5 of the Company's Operating Agreement broadly gives the Manager the authority to "to do or cause to be done any other act that the Manager considers to be appropriate in furtherance of the purposes and character of the Company." Exh. A. Mr. Chuman testified that Coakley Williams was not responsive during the Covid-19 pandemic and had its own internal problems with personnel, and thus RP I-Drive decided to replace it as hotel manager. 7.1.24 Hr'g Tr. 71:6–72:20. There was testimony that Coakley's portfolio and staff significantly decreased during this period of time, affecting Coakley's responsiveness. Quality-wise, under RPH, the Hotels won ten awards for good service between 2022 and 2024. *Id.* at 374:5-6. This is comparable

performance to that of Coakley. In terms of expense, there was evidence that the per hotel room expenses were above average in the industry and could be reduced by a new owner. Defendants, however, explained that the 2% Asset Management Fee pursuant to the Operating Agreement is not related to hotel management (and should therefore not have been included as part of the per room expenses) and that the Hotels relied, to a greater extent than the many Marriot and Hilton hotels located in Orlando, on bookings by On-Line Travel Agents ("OTAs") whose commissions are significantly higher than the Wyndham referral system expenses. *Id.* at 112:9–113:7. These OTA commissions account for a large component of the Hotels' per room expenses. *Id.* The Court thus concludes that Plaintiffs do not have a substantial likelihood of success as to this breach of contract claim and, even if there were a breach, it could be addressed by monetary damages in the Arbitration.

As to breach of fiduciary duty, Section 4.7(d) of the Company's Operating Agreement allows RP I-Drive to conduct business with Affiliates, such as RPH, "provided that such undertakings are on arm's length or market terms, or otherwise fair to the Company" and "shall not be deemed a breach of fiduciary duties or any other obligations it may have under this Agreement or the Act if they satisfy the above criteria." Exh. A at 23. Consequently, Plaintiffs cannot establish that Defendants engaged in self-dealing by contracting with affiliate RPH to manage the Hotels, as the hotel management fee, discussed further below, was on market terms. *See Hallock v. Holiday Isle Resort & Marina, Inc.*, 4 So. 3d 17, 20–21 (Fla. 3d DCA 2009) ("If the complained-of [behavior] is allowed under the contract, it cannot form the basis for a breach of fiduciary duty claim."); *see also Peebles v. Sheridan Healthcare, Inc.*, 853 So. 2d 559, 561–63 (Fla. 4th DCA 2003) (no breach of fiduciary duty where conduct had been expressly authorized by written contract).

When RPH took over for Coakley Williams, it charged a hotel management fee of 3% during 2022, the same as Coakley Willams for the two years it managed the Hotels, and raised the fee to 4% starting in January 2023 to cover increased labor expenses. 7.1.24 Hr'g Tr. 107:16–108:7. Plaintiffs' appraisal expert Mr. Starkey testified that the "market was showing 2.9 to 5 percent" based on "comparables" of "2.9, 3, 4 and 5 percent." 6.12.24 Hr'g Tr. at 81:1–4; *accord* Chuman, 7.1.24 Hr'g Tr. at 109:11–25. Accordingly, the 4% fee in 2023 onward charged by RPH is not outside of the market and thus Plaintiffs do not have a substantial likelihood of success on the merits as to this breach of fiduciary duty claim based upon self-dealing.

To the extent that Plaintiffs contend that RPH mismanaged the Hotels by having a higher than average operation expense ratio and per room expense, the Court finds that Plaintiffs do not have a substantial likelihood of success as to this theory either. As noted above, the 2% Asset Management Fee was a contract requirement of the Company's Operating Agreement and the Hotels were burdened with paying greater commission amounts to OTAs than the many Marriott family and Hilton family hotels. Even if RHP's management operated at below average for efficiency, this does not establish corporate waste unless there was evidence, for example, that expenses were intentionally inflated as part of a kick-back scheme. *See Seasons P'ship I v. Kraus-Anderson, Inc.*, 700 So. 2d 60, 61 (Fla. 2d DCA 1997) (reversing the trial court's appointment of a receiver due to the lack of evidence of waste when "[t]here was no evidence that [a defendant] was stealing or misapplying the net rental income.").

With respect to their fraud-based claims tied to Coakley Williams, Plaintiffs presented no evidence that the Company intended to use any operator other than Coakley Williams when it made representations about it in 2016 through 2019. In fact, the evidence was to the contrary as the Company engaged Coakley Williams for approximately 2 ½ years. Similar to the fraud-based arguments pertaining to the additional $7 million capital raise, Plaintiffs have not demonstrated a substantial likelihood of success as to their fraud-based claims tied to Coakley Williams being replaced by RPH.

3. **Breach of the EB-5 PPM and EB-5 Investors, LLC Operating Agreement by Accepting the Sale Offer and Signing a Binding Purchase Agreement**

In their Statement of Claim, Plaintiffs claim that the consent of Class C Members is required before RP I-Drive can sell the Hotels. Arbitration Demand ¶ 169. The Court finds that the Company's Operating Agreement does not require consent by any member for the selling the Hotels. The Operating Agreement for RP I-Drive, LLC (referred to as the "Master Company" in the EB-5 Investors Operating Agreement) directs the Manager (who would be acting in its capacity as manager of the Master Company) to pursue the Master Company's "sole purpose," which is "acquiring, developing, operating and/or selling" the Hotels "according to such plans and on such terms as the Manager determines to be in the best interests of the [Master] Company and all of its Members." Exh. A (RP I-Drive, LLC Operating Agreement), § 2.5. The Manager has the sole responsibility for and "complete authority, power, and discretion to manage and control the business, affairs and properties of the [Master] Company," *id.*, § 4.2, including the power "to sell … [Master] Company property." *Id.*, § 4.5(b). No Member of the [Master] Company has consent rights pertaining to a sale of the Hotels.

After the sale of the Hotels closes, and if there are funds available for reinvestment that are transferred to the NCE, RP I-Drive EB-5 Investors, LLC ("EB-5 Investors LLC"), only then would the consent of the EB-5 investors be required to approve reinvesting the remaining capital. That is, Section 4.16 of the EB-5 Investors PPM requires that EB-5 Investors LLC obtain consent only with respect to reinvestment of capital remaining from the sale of the Hotels—not the sale of those assets themselves. *See* Exh. 4 (EB-5 PPM) at 54 (providing that RP I-Drive EB-5 Investors, LLC "shall, with the consent of the Investing Members then holding a majority of the outstanding Membership Interests in the [EB-5 Investors LLC], have the option to reinvest the remaining Capital Contribution amounts" (emphasis added)).[5] At this time, with respect to their consent theory, Plaintiffs fail to show that a breach of contract by, either or both, EB-5 Investors LLC, or the Manager, occurred.

Plaintiffs additionally claim that the Manager, "[b]y signing the Purchase Agreement," breached Sections 8.4 and 8.5 of the EB-5 Operating Agreement (Exh. D) because it forbids the Manager from "caus[ing] [EB-5 Investors LLC] to take any action which would materially affect the Investing Members' immigration status" and requires the Manager to "keep the [full] $500,000 Capital Contributions invested in job-creating activity until such Investing Member has received adjudication of the removal of conditions for permanent residence." *See* Arbitration Demand ¶¶ 168, 170.

As a threshold matter, this breach of contract theory fails because it conflates the corporate LLC entities involved here. The party to the EB-5 PPM and Operating Agreement is RP I-Drive

EB-5 Investors, LLC, which is not a named defendant in the Complaint. Moreover, such a claim would be unripe because EB-5 Investors, LLC has not yet received any funds from a sale of the Hotels.

To the extent that Plaintiffs contend that the Manager, by signing the PSA, can be liable for a breach of Sections 8.4 and 8.5 of the EB-5 Operating Agreement (Arbitration Demand ¶¶ 168-169), Plaintiffs clearly conflate the actions of RP I-Drive Manager, LLC in its distinct roles as Manager of EB-5 Investors LLC (*see* Exh. D at 1) and, separately, as Manager of the Master Company. *See* Exh. A at 10. An entity "can, of course, act only through its agents." *Nguyen v. Perspective Glob., LLC*, 2024 WL 2868779, at *2 (Fla. 2d DCA June 7, 2024) (quoting *Houri v. Boaziz*, 196 So. 3d 383, 391 (Fla. 3d DCA 2016)). Under Florida law, an agent's actions cannot be imputed to each and every entity for whom it acts as an agent. Rather, under Florida's LLC Act, the manager of a "manager-managed limited liability company . . . is an agent of the limited liability company for the purpose of its activities and affairs," and the manager's actions bind the LLC when conducted "in the ordinary course of the [LLC]'s activities and affairs." Fla. Stat. § 605.04074(2)(b) (emphases added). Consequently, because the Manager's actions conducted in the ordinary course of RP I-Drive, LLC's activities and affairs are thus distinct from its actions on behalf of EB-5 Investors LLC, the Manager's execution of the PSA to sell property owned by RP I-Drive, LLC—not EB-5 Investors LLC—was not an action on behalf of EB-5 Investors LLC and thus could not constitute a breach of the EB-5 PPM or EB-5 Operating Agreement.

In addition, as a factual matter and as addressed above, Plaintiffs do not show a substantial likelihood of success on their argument that the sale of the Hotels will (negatively) "materially affect" the EB-5 investors' immigration status.

Plaintiffs further contend that, by having less than their full $500,000 capital contribution available after the sale, Defendants will have breached the EB-5 PPM because: (1) "Capital Contributions" means each investor's full $500,000 investment; and (2) Section 4.16 of the EB-5 PPM requires that any sale of assets by the JCE (a separate entity) must make the full $500,000 available for redeployment. The Court adopts Defendants' analysis in their July 1, 2024 Bench Memorandum that several contract provisions contradict Plaintiffs' position that the full $500,000 must be left remaining for each EB-5 investor. This argument actually undermines the EB-5 visa program's requirements that the investors' capital must constantly remain "at risk" during their conditional permanent residency sustainment period. D.E. 68 at 7-9. In any event, given that the development costs exceeded $42 million, there is no realistic scenario under which the Class C Plaintiffs would ever receive a return of their full $500,000 investment, even if a temporary injunction to prevent the current sale was ordered.

With respect to breach of fiduciary duty, Plaintiffs repeat the same breach of contract arguments addressed above and further claim that the sale process was "rushed," the purchase price was "undervalued," and was conducted "without adequate disclosure." Arbitration Demand ¶¶ 189–196. As noted above, consent of the Plaintiffs to sell the Hotels was not required. Nor did the Operating Agreement require advance disclosure to the investors.

The evidence reflects that RP I-Drive has been and will continue to operate at a negative cash flow and had projected that it would not be able to make payment on the Seacoast Bank loan by sometime in the Summer of

2024.[6] On March 25, 2024, Seacoast Bank issued a Default Notice, giving RP I-Drive 60 days to pay down $12 million on the loan. Following receipt of the Default Notice, the Manager hired the Kabani Group and Ten-X to market and sell the Hotels. Under the foregoing circumstances, the Court does not find a substantial likelihood of success for Plaintiffs to prove that Defendants failed to exercise reasonable business judgment by marketing the Hotels as they did.

The evidence confirms that the Hotels were widely marketed, starting in early April through mid-May 2024, resulting in 98,000 potential purchasers being contacted, 430 potential purchasers signing confidentiality agreements and accessing the data room, 11 Letters of Intent submitted by 8 prospective buyers ranging from $15,000,000 to $22,000,000, and four signed PSAs with the highest at $22,200,000. 7.1.24 Hr'g Tr. at 225:1–230:1–11; Exhs. CC, DD, EE, FF. Mr. Nusynkier, himself a Plaintiff in this case and an experienced commercial real estate broker in Florida, submitted offers on behalf of a prospective buyer of $20,000,000 and $22,000,000 and stated in an email that he thought $23,000,000 is what the Hotels would sell for in an auction. 6.18.24 Hr'g Tr at 355:25–357:2; 358:5–10.

Defendants submitted the appraisal report of John Lancet who valued the hotels at $22,000,000. Mr. Lancet's appraisal report provided rebuttal evidence to Plaintiffs' expert Mr. Starkey's valuation of roughly $28.5 to $30.5 million, specifically noting that Mr. Starkey's appraised value was inflated because: (1) he used aggressive assumptions that immediate expense stabilization would occur; (2) there was a 4.3% decrease in ADR in the Orlando market for the first four months of 2024, which reflected an unstable market; and (3) there was an increase in the supply of rooms about to reach the Orlando market. 7.1.24 Hr'g Tr. at 379:16–383:17; Exh. JJ, including p. 61 (Rebuttal Opinions). Moreover, Mr. Starkey admitted that his valuation assumed that the Hotels could be marketed for 6 months, which is not realistic under the circumstances, and did not take into account the effects of an impending foreclosure. 6.12.24 Hr'g Tr. at 105:5–106:25.

At this stage, it is not for the Court to determine the fair market value of the Hotels. Rather, based upon the evidence, the Court finds that Plaintiffs have not met their burden to show a substantial likelihood of success on the merits that the Manager's business judgment to sell the Hotels under the process undertaken was not reasonable or that a sale of the Hotels in the range provided by the 4 PSAs in May 2024 was so far outside of the market that it could be considered corporate waste. *See New Horizons Condo. Master Ass'n*, 336 So. 3d at 799; *Lake Region Packing Ass'n, Inc. v. Furze*, 327 So. 2d at 216 ("a court of equity will not attempt to pass upon questions of the mere exercise of business judgment"). The Court finds it instructive to look to Delaware case law for examples of corporate waste because Delaware law is more developed than Florida law in this context. In Delaware, corporate waste is defined as "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *White v. Panic*, 783 A.2d 543, 553–554 (Del. Supr. 2001) (citation omitted) (affirming trial court's dismissal of complaint alleging demand futility where plaintiff failed to show corporate waste). Accordingly, to recover on a claim for corporate waste, a plaintiff must show that an "exchange [of corporate assets] was so one sided that no business person of ordinary, sound judgment would conclude that the corporation has received adequate consideration." *Freedman v. Adams*, 58 A.3d 414, 417 (Del. Supr. 2013) (citation omitted) (affirming trial court's dismissal of waste claim when decision made by board, even if "poor[,]" was not "unconscionable or irrational."). "A claim of waste will arise only in the rare,

unconscionable case where directors irrationally squander or give away corporate assets." *Id.* (citation omitted).

The court takes judicial notice that subsequent to the hearing on the Plaintiffs' motion, in fact, RP-I Drive. LLC has received notice from Seacoast Bank of a monetary default and that taxes for 2023 remain unpaid. These developments are not the result of mismanagement or waste, but rather, fully expected result as forecasted in December 2023. Certainly, appointing a receiver with all the additional costs and fees that would entail would not pull RP-I Drive from this financial abyss. This reality further convinces the court of the need to actualize a fair market value sale.

The Court finds that Plaintiffs cannot show a substantial likelihood of success on a claim that waste occurred here and declines to substitute its judgment for the business judgement of the Manager acting for RP I-Drive, LLC.

4. **Miscellaneous Theories in the Complaint**

Although not set forth in the Statement of Claim, the Complaint alludes to several possible liability theories that the Court will briefly address.

Farce Sale Process

In the Complaint (¶ 8), Plaintiffs allege an "extreme cause for concern" that the sale process was a "farce" with the sale being to a "related party." The evidence showed that the sale process was handled by professionals who engaged in a reasonable sale process under the circumstances. Further, the sale (which has now fallen through as of June 28, 2024) was to an unrelated party as part of a competitive process and was negotiated at arm's length. 7.1.24 Hr'g Tr. at 233:21–234:4.

In any case, the sale pending at the time of the injunction hearing has fallen through.

Class A Seed Money

The Complaint also alleges that "by 2021" in the "midst of the Covid-19 pandemic. . . Azpurua authorized a distribution of $4 million to himself, the only Class A Founding Member." Compl. ¶ 123. The evidence reflects that the Class A Member was DEIH, who contributed an initial $4,000,000 and $1.2 million subsequently, all of which was returned to DEIH by April 2018 pursuant to §3.7 of the Company's Operating Agreement. 7.1.24 Hr'g Tr. at 49:13–50:5. The evidence further showed that Mr. Azpurua owned no units in DEIH and the monies were not given to him. *Id.* at 50:6–8.

Manager's Equity

The Complaint (¶ 107) alleges that some information in the 12/1/23 Memo (Exh. 8) suggested that Mr. Azpurua held $2,571,42 in Class A Members equity, which Plaintiffs allege was inconsistent with other information. These allegations do not support any claim in the Statement of Claim. However, Mr. Chuman explained that the figure should have been listed as Manager's Equity, a bookkeeping entry to reflect the Manager's 30% profit interest based on the proforma projections at the start of the project, which will not be realized unless the Hotels are sold for more

than $42 million and will have no effect on Plaintiffs.

Financial Information Issues in Late 2023 to 2024

The Complaint and Plaintiffs' fact witnesses at the hearing further complained about investors not receiving all the financial information they requested in late 2023 and 2024 and that some of the information was inconsistent with other information they had previously received. The Court notes that the time periods when this allegedly occurred was long after Plaintiffs had made their investments and thus cannot serve as the basis for a fraud claim, and Plaintiffs do not identify a contract provision that requires production of the information they claim they requested but did not receive. Nor do Plaintiffs make this a liability theory in their Statement of Claim.[7]

Alleged Inflation of Construction Costs

The Complaint (¶ 111) alleges that the Manager was to be paid a fee of 9% of development costs and "inflated" construction costs to its benefit. The evidence showed that the Manager was paid a flat fee and by virtue of a 30% profit interest was incentivized to reduce costs. 7.1.24 Hr'g Tr. at 61:18–64:11. Plaintiffs offered no evidence of any intentional inflation of construction or other costs.

Alleged Misappropriation by the Individual Defendants

Without any specifics, the Complaint (¶¶ 102, 128, 140) asserts that Mr. and Mrs. Azupura misappropriated investor funds to give to charities or to use for their personal benefit, but Plaintiffs offered no evidence to support such allegations. All evidence is to the contrary.

Mr. Nusynkier's Attempts to Negotiate a $12 Million Deal

Plaintiffs elicited testimony from Class B Plaintiff Mr. Nusynkier that he approached Mr. Azpurua on behalf of a potential unidentified investor with a business proposal and was frustrated that Mr. Azpurua did not engage more with him. Mr. Azpurua testified that he did not pursue what Mr. Nusynkier proposed because it contemplated paying off the La Quinta portion of the loan, but did not include the $2 million capital infusion which was needed to clean up the balance sheet, and the proposed structure would break the link between the NCE and JCE to the detriment of the EB-5 investors. 7.1.24 Hr'g Tr. at 235:1–236:10. This testimony does not support any claim in the Statement of Claim, and this Court will not disturb the Manager's reasonable business judgment to not consider the proposal; moreover, it is speculative whether a deal along the lines suggested ever would have been consummated.

Radisson Red Miami Airport Project

Plaintiffs attempted to call Hector Naranjo to testify. He was not an investor in the Project at issue, but in the Radisson Red Miami Airport project. The Court sustained Defendants' objection to him based on relevance and disallowed him from testifying. 7.1.24 Hr'g Tr. at 39:3–24. The Court, however, admitted, over Defendants' objections, Exhibits 41, 42, 43 and 44 to give them what weight the Court determines. Having reviewed the exhibits, the Court gives no weight to them. They involve a different project with different investors. As the Statement of Claim does not

set forth a fraudulent scheme cause of action, the exhibits are irrelevant, and are inadmissible under Rule 90.403 as well.

For all the foregoing reasons, the Court finds that Plaintiffs have not met their burden to establish a substantial likelihood of success on the merits of the claims they set forth in the Arbitration Demand's Statement of Claim.

Emergency Motion by Plaintiff to Reopen Evidence in this Case

The court has reviewed the Plaintiff/Petitioner's Emergency Motion to Reopen Evidence (DE 76). The court has reviewed this motion uploaded as an emergency motion. The court accepts the proffer of Plaintiff and there is no need to reopen evidence because the attached evidence does not change the court's analysis. The attachments consist of a number of emails from counsel for the Petitioner to Seacoast Bank's counsel. These emails allege that Seacoast advised Plaintiff that Defendant RP-I Drive LLC is in default for loan payments to the bank in June and July 2024. The Plaintiff also filed a record from the tax collector indicating that taxes for 2023 are delinquent. All of these delinquencies do not refute the Defendant's position -- that sale of the properties is imperative because the inability of the Defendant to pay the carrying costs for these properties will further diminish whatever interest the investors

5. **Balance of Harm and Public Interest**

As noted above, the alleged impact of a sale of the Hotels on the Class C investors appears to be speculative at best. Their EB-5 status should not be at risk after a sale. This has to be weighed against the potential that enjoining a sale until the conclusion of the arbitration will result in a foreclosure sale where the bank's full balance may not be paid, and the unsecured creditors will be at risk of losing most if not all of their outstanding receivables. This factor mitigates in favor of denying the Motion. Similarly, the public interest in Florida prioritizes secured and then unsecured creditors over equity holders and thus tilts in favor of denying the injunctive relief sought.

V. **APPOINTMENT OF A RECEIVER**

For the same reasons why Plaintiffs cannot establish a substantial likelihood of success on the merits to warrant a temporary injunction, Plaintiffs have not met their burden to "clearly prove[]" fraud or to otherwise establish a "strong reason to believe" that Plaintiffs "will recover" on their claims of fraud or breach of fiduciary duty concerning self-dealing or waste in order to justify a receiver being appointed under Florida law. *See Mirror Lake Co.*, 124 So. at 721 (quoting *Lehman*, 49 So. at 503); *Carolina Portland Cement Co.*, 128 So. at 248 (quoting *Apalachicola N. R. Co.*, 85 So. at 362). That the Hotels may not have been managed post-pandemic in the most efficient manner in terms of the per room expenses or operating expense ratio does not justify the extraordinary remedy of appointing a receiver. As noted above, Plaintiffs adduced no evidence that Defendants stole, misappropriated, or misused funds or revenue in any way that warrants the appointment of a receiver. *See Seasons P'ship I*, 700 So. 2d at 61.

VI. **CONCLUSION**

For the foregoing reasons, (1) the Emergency Motion to Appoint a Receiver (D.E. 3) is DENIED; (2) the Emergency Motion for Temporary Injunction (D.E. 34) is DENIED; and (3) the May 24, 2024 status quo order (D.E. 23) is hereby dissolved.

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[1] Plaintiffs intimate that Mr. Azpurua asked Seacoast Bank to declare a default, which he denied. 7.1.24 Hr'g Tr. at 290:17–25; 292:1–10. Regardless, the evidence reflected that the loan unquestionably was in default for at least two reasons at that time and Seacoast Bank sent a default notice on March 25, 2024.

[2] A plaintiff in a breach of contract action must plead and ultimately prove: (1) a valid contract existed; (2) a material breach of the contract; and (3) damages. *People's Tr. Ins. Co. v. Alonzo-Pombo*, 307 So. 3d 840, 842–843 (Fla. 3d DCA 2020). The elements of a claim for breach of fiduciary duty are: "the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages." *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002). In Florida, the elements of fraudulent misrepresentation are: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." *Moriber v. Dreiling*, 194 So. 3d 369, 373 (Fla. 3d DCA 2016) (citations omitted). The elements of a fraudulent concealment claim are as follows: "(i) the defendant concealed or failed to disclose a material fact; (ii) the defendant knew or should have known the material fact should be disclosed; (iii) the defendant knew its concealment of or failure to disclose the material fact would induce the plaintiff to act; (iv) the defendant had a duty to disclose; and (v) the plaintiff detrimentally relied on the concealed information." *Philip Moris USA Inc. v. Principe*, 337 So. 3d 821, 827 n.7 (Fla. 3d DCA 2021) (citation omitted).

[3] Based on the Baker Tilly report, the job creation requirement has been met in relation to the Hotel project at issue in this case. *See* 6.12.24 Hr'g Trans. at 45:19–46:19; *see also* Exh. II at ¶¶ 31 and 32; *see* Exh. 8, Schedule 1, An I-892 Economic Analysis of the RP I-Drive Hotels Project, prepared by Baker Tilly US, LLP, dated February 2022.

[4] Class B Plaintiffs complain that they were not given notice of the additional raise and the opportunity to participate, citing §3.3 of the Operating Agreement. 6.18.24 Hr'g Tr. (D.E. 63) at 286:25–287:15. Defendants offered testimony that, because Class B Members could not legally participate in this Class C raise, the notice provision did not apply. 7.1.24 Hr'g Tr. at 67:22–68:14. Regardless, even if not providing notice was a contract breach, no damages were caused by it because whatever additional amounts a Class B investor would have invested would have been largely, if not entirely, lost.

[5] The Class B investor Plaintiffs lack standing with respect to Plaintiffs' contract theories because Class B Plaintiffs are not part of the EB-5 program.

[6] To the extent that Plaintiffs contend that the Company's late payments or non-payment of franchise fees, property taxes to Orange County, or FF&E reserve amounts, for example, constitute waste, Florida law does not consider this to be waste unless "[t]here was [] evidence that [a defendant] was stealing or misapplying the net rental income." *Seasons P'ship I v. Kraus-Anderson, Inc.*, 700 So. 2d 60, 61 (Fla. 2d DCA 1997) (reversing the trial court's appointment of a receiver due to the lack of evidence of waste). Based on the record, Plaintiffs here have not shown that Defendants have misappropriated or misused hotel revenues or the net operating income. Rather, the inability or difficulty in satisfying

debt obligations was due primarily to market conditions and cost inflation, neither of which constitute waste.

[7] Plaintiffs Mr. Rodriguez and Ms. Fernandez testified that they met in person with Mr. Azpurua in his offices in October or early November 2023 and told them to the effect that now is not the time to sell, and Mr. Rodriguez testified that Mr. Azpurua told him "everything is fine and not to worry." 6.18.24 Hr'g Tr. at 209:23–25; 210:1–10. Mr. Azpurua denied making the latter statement and testified that he told him "about the bad financial situation." 7.1.24 Hr'g Tr. at 192:1–7. The Newsletters sent to the investors reflected that the financial for the Hotels were not fine. These conversations about not being the time to sell occurred before the Company did its budget for 2024 during November 2023.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 29th day of July, 2024.

2024-009353-CA-01 07-29-2024 4:55 PM
Hon. Lisa Walsh

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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