9-28-2023

Bernard Parks, Jr., et. al. v. Kelly King et al., Order on Cross Motions for Summary Judgment Regarding Plaintiffs' Claims against Defendants

John J. Goger
Superior Court of Fulton County, Metro Atlanta Business Case Division

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
METRO ATLANTA BUSINESS CASE DIVISION

BERNARD PARKS, JR. and BPJ ENTERPRISES, INC.,	)	
Plaintiffs,	)	CASE NO. 2020CV342680
v.	)	
KELLY KING, et al.	)	
Defendants.	)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT REGARDING PLAINTIFFS' CLAIMS AGAINST THE KING DEFENDANTS

This matter comes before the Court on the Plaintiffs' Motion for Partial Summary Judgment and the King Defendants' Motion for Summary Judgment.[1] Having reviewed the record and considered the argument of counsel during a September 21, 2023 hearing, the Court issues the following order.

1. BACKGROUND

1.1 Oakwood's Projects

Plaintiff Bernard Parks, Jr. conceived of Defendant Oakwood Development Group, LLC ("Oakwood") as a minority-owned commercial real estate company.

[1] The King Defendants include: Kelly King, CIAL, LLC, Oakwood Development Group, LLC, Oakwood Summerhill, LLC, Kelly King & Co., and Oakwood Herndon Development Group, LLC. (King Defs.' Mot. 1.)

(3rd Am. Ver. Compl. ¶ 24.) It and its related entities played roles in certain real estate projects including the redevelopment of the Atlanta sports stadium formerly known as Turner Field and the surrounding area (the "Turner Field Project").

As described below, the Turner Field Project is at the forefront of this dispute. However, Oakwood and its affiliated entities were also involved in two other pertinent development efforts. Oakwood entered into a deal involving affordable housing projects with New Columbia Residential ("New Columbia") whose principal was Noel Khalil. (Id. ¶¶ 37-45.) Additionally, the Hunt Companies ("Hunt") and Oakwood were selected by the Atlanta Housing Authority to redevelop Herndon Homes, a former low-income housing project. (Id. ¶¶ 42-43.) Defendant Oakwood Herndon Development Group, LLC was formed as Oakwood's joint venture entity for this particular project. (Id. ¶ 43.)

These projects generated developer fees and other revenues for Oakwood and its affiliated entities.

1.2 The Turner Field Project

When the Atlanta Braves baseball team announced they would be vacating Turner Field, the City of Atlanta (the "City") and the Atlanta Fulton County Recreational Authority ("AFCRA"), which owned or controlled the stadium and many of the surrounding parcels of land, sought proposals concerning the area's redevelopment. (Ver. Compl. ¶ 36.) Former Defendant Carter and Associates

Enterprises, Inc., a real-estate investment and development firm headquartered in Atlanta and related entities pursued the opportunity.[2] (Carter & Assoc. Ent. Ver. Ans. 1; R. Peterson Dep. 104-105, 113.)

In preparing its redevelopment plan, Carter took two steps that are relevant to this dispute. First, in May of 2014, it secured an exclusivity agreement with the Georgia State University Foundation (the "Foundation") to form a public-private partnership that would seek to acquire and redevelop the area into a mixed-use development. (Injunc. Hrg. Tr. 138-139; R. Peterson Dep. 104-105.)[3] Carter also secured Oakwood as a minority participant to help pursue the opportunity. (3rd Am. Ver. Compl ¶ 47.)

As Carter has acknowledged, the City and AFCRA asked that proposals "offer a plan to use good faith efforts to propose development teams comprised of diverse team members performing commercially useful functions." (Def. Carter & Assoc. Ent. Ver. Ans. ¶ 38.) Parks contends he was fundamental in securing Oakwood's connection to Carter and the Turner Field Project. (3rd Am. Ver. Compl ¶ 47.)

Throughout the record, various references are made to MBE (minority-owned business), WBE (woman-owned business), DBE (disadvantaged business

[2] Carter and some related entities that were named as Defendants in this suit are referred to collectively as "Carter."
[3] On April 16, 2021, the Court conducted an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction. A transcript of that hearing is Exhibit 1 to the Carter Defendants' Notice of Filing Original Discovery in Support of Motion for Summary Judgment.

enterprise), CBE (certified minority business) status and/or certifications. Neither of these parties has defined any of these designations with precision or has identified the requirements associated with any particular designation. For example, Parks generally testified DBE as being a designation that can be imposed by different levels of government or different governmental entities using their own particular criteria. (Parks Dep. 46-47.) King generally testified about the "disclosure and ongoing compliance" obligations imposed upon the owners of companies that participated in "public-private partnerships." (Injunc. Hrg. Tr. 36-37.) A Carter representative testified that Oakwood eventually "became a qualified CBE as in a certified minority business owner." (Injunc. Hrg. Tr. 112.) This same Carter representative testified that the City and AFCRA asked for an MBE plan when soliciting proposals for the Turner Field Project and some specific targets were negotiated once they accepted Carter's proposal. (Id. 137.) Accordingly, these terms will be used in the same general way they have been employed by the parties.

Oakwood's participation in the Turner Field Project is further detailed below.

1.3. The Formation of Oakwood

Parks selected an old acquaintance, Defendant Kelly King to serve in an executive capacity with Oakwood. (3rd Ver. Am. Compl. ¶¶ 24, 26-28.) Parks envisioned that King would handle the company's daily operations, and he would focus on strategy and business development. (Id. ¶ 28.) In 2014, Parks engaged his

attorney, Brandon Williams, to form Oakwood. (King Defs.' SUMF ¶ 1; Pls.' Resp. to King Defs.' SUMF ¶ 1.) Parks understood Williams would represent both him and King with respect to Oakwood's formation. (Id. ¶ 2.; Pls.' Resp. to King Defs.' SUMF ¶ 2.) Williams filed Oakwood's Articles of Organization with the Georgia Secretary of State on July 14, 2014, and a Certificate of Organization was issued. (Id. ¶ 3; Pls.' Resp. to King Defs.' SUMF ¶ 3.) However, it took much longer to establish an operating agreement to govern the newly-created company as there were ongoing discussions regarding its ownership structure. That structure is the primary issue in this dispute.

On July 14, 2014, the same time Williams filed Oakwood's Articles of Organization, he circulated the first version of an Oakwood operating agreement that provided Parks would hold a 75% membership interest and Defendant CIAL, LLC, an entity wholly owned by King ("CIAL"), would hold a 25% membership interest, but that agreement was never signed by either Parks or King. (Id. ¶ 5.; Pls.' Resp. to King Defs.' SUMF ¶ 5.)

According to Parks, he and King had a discussion with Scott Taylor, Carter's president and CEO. (3rd Ver. Am. Compl. ¶ 31; Parks Dep. 51; Injunc. Hrg. Tr. 92.) Taylor suggested King be made "the majority Member of Oakwood so the company would qualify as a double minority, i.e. African American and female owned." (Id.; Parks Dep. 51.) Both Parks and King found this to be a good idea. (Parks Dep. 51.)

Parks instructed the Oakwood attorney to alter the draft operating agreement so that King would own 51% of Oakwood via CIAL and Parks would own the remaining 49% via Plaintiff BPJ Enterprises, Inc., an entity solely owned by Parks ("BPJ"). (Parks Dep. 51, Ex. 8-9.) Williams first presented Parks and King with such a draft in September of 2014. (King Defs.' SUMF ¶ 6; Pls.' Resp. to King Defs.' SUMF ¶ 6.) However, it was not immediately signed. Williams circulated an operating agreement with the same 51/49 ownership split on January 2, 2015 (the "51/49 Operating Agreement").

King apparently executed the 51/49 Operating Agreement on behalf of CIAL shortly after receiving the attorney's email as she quickly responded, "Hi, Did I sign correctly???" (Am. Ver. Compl. (filed Mar. 1, 2021) ¶ 93, Ex. A 31.) King's email query to Oakwood's counsel included a scanned replica of the signature page reflecting her wet ink signature. (Id. Ex. A 31.) For purposes of these motions, the Court will assume King signed the 51/49 Operating Agreement in January of 2015.[4]

[4] As reflected herein, there were at least five versions of the Oakwood operating agreement that were circulated to Parks and King by Oakwood's counsel: (1) the July 14, 2014 version that was not signed by either party; (2) the September 2014 version that was not signed by either party; (3) the January 2015 version which is the 51/49 Operating Agreement at issue here; (4) the June 2015 version which is the 100/0 Operating Agreement that made King the 100% owner of Oakwood which she signed, and (5) the January 2017 version in which CIAL replaced King as the 100% owner of Oakwood which was also signed by King.

King has offered some conflicting testimony as to whether and when she signed what version of these Oakwood operating agreements. As reflected above, documentary evidence reflects King signed the 51/49 Operating Agreement in January of 2015, shortly after receiving it from Oakwood's counsel. King's counsel seemed to confirm this position during the oral argument on these motions.

However, during her deposition, King disputed the authenticity of her signature on this particular agreement, suggesting she likely would not have signed an agreement with this particular signature block. (King Defs.' Resp. to Pls.' SUMF ¶ 3; King Dep. 142-143.) In an affidavit filed on April 4, 2021, shortly after this case was filed, King averred she signed the version of the operating agreement that made CIAL the sole owner of Oakwood in January of

Parks claims that he also executed the 51/49 Operating Agreement. (Parks Dep. 75.)(1st) Aff. ¶ 4.) However, Parks testified he is uncertain about when he did so – he assumes he signed it in January of 2015. (Parks Dep. 53, 67-68, 70-71.) Plaintiffs admit Parks did not forward this fully executed version of the 51/49 Operating Agreement to anyone, including King or Oakwood's counsel, before this litigation commenced. (King Defs.' SUMF ¶ 24; Pls.' Resp. to King Defs.' SUMF ¶ 24.) During oral argument of these motions, Plaintiffs' counsel acknowledged he was unaware that Parks communicated to anyone that he had signed the 51/49 Operating Agreement before this litigation commenced.

The King Defendants dispute that Parks agreed to the 51/49 Operating Agreement. King contends Parks "was always clear he did not want to be an [Oakwood] owner" (King Dep. 145-146.) She claims his reluctance was based on various disclosure and compliance requirements that would be required of him if Oakwood was to work on projects requiring MBE, WBE or DBE or similar certifications. According to King, because these types of certifications were often needed to work on the public/private projects Oakwood hoped to pursue and they required owners to disclose certain personal and financial information. She testified, "in order for me to be an owner in Oakwood, I have to agree to periodic background

2015. (King Aff. ¶ 4.) As set forth below, emails between King, Parks, and Oakwood's counsel indicate King signed this particular version of the operating agreement in June of 2017.

checks, credit checks, criminal checks, all sorts of disclosures and ongoing compliance." (Injunc. Hrg. Tr. 36.) King alleges Parks "would not or could not" agree to these disclosure requirements which she contends were necessary to be a "documented owner of the company." (Id. 36, 41-45, 57, 63-64; King Dep. 146.) King also testified Parks "had not filed taxes" and thus "could not be a part of" the company's business tax identification number. (Id. 44.) King testified that Parks sought to continue his work with Oakwood as a consultant in order to avoid these disclosure requirements and even invoiced the company for consulting work although this consulting arrangement was never formally documented. (King Dep. 146-147.)

Plaintiffs dispute that Parks was unwilling to participate in any necessary disclosure or compliance requirements. Plaintiffs note the record contains no evidence, other than King's testimony, that Parks was unwilling to and/or failed to complete any requested or necessary documentation. (Pls.' Resp. to King Defs.' SUMF ¶ 7.) Parks avers he was "never asked" to complete any type of documentation regarding his tax status or "any paperwork regarding Oakwood's status as a disadvantaged business enterprise or minority business enterprise."[5]

[5] Parks further avers that Williams, Oakwood's counsel, advised both him and King that it was not necessary for Parks to make any formal disclosures to a government agency that certified Oakwood as a minority business enterprise. (Parks (2nd) Aff. ¶ 3.) This hearsay evidence was raised as part of Plaintiffs' response to the King Defendants' Motion. O.C.G.A. § 24-8-801(c).

(Parks (2nd) Aff. ¶ 2.)[6]

Because the status of the 51/49 Operating Agreement is such a key issue in these motions, some discussion is merited about the unusual way in which Plaintiffs presented the evidence about its execution. In their initial complaint, filed November 19, 2020, Plaintiffs alleged the 51/49 Operating Agreement had been signed by both King and Parks on behalf of their respective entities; however, Plaintiffs attached a copy only executed by King on behalf of CIAL. (Ver. Compl. ¶ 93, Ex. A; King Defs.' SUMF ¶ 23; Pls.' Resp. to King Defs.' SUMF ¶ 23.) After this failure was noted in a Carter pleading, Plaintiffs filed their Amended Verified Complaint, attaching a fully executed version as an exhibit. (Carter Mot. to Dismiss 5; Am. Ver. Compl. Ex A.) During his subsequent deposition, Parks had little recollection about when he signed the document. He assumed it was sometime around January 2015, but he could not recall the exact date. (Parks Dep. 53, 67, 70-71.) He offered only a vague explanation of his belated discovery of the fully executed version. (Id. 73-75.)

1.4 The 100/0 Operating Agreement Giving King Sole Ownership of Oakwood

In the summer of 2015, Carter was actively pursuing the opportunity to redevelop the Turner Field with Oakwood as its minority partner; however, Carter

[6] Parks' first-filed affidavit was attached as Exhibit A to Plaintiffs' Brief in Opposition to the Carter Defendants' Motion for Summary Judgment, filed December 12, 2022. His second-filed affidavit is attached as Exhibit B to Plaintiffs' Brief in Opposition to King Defendants' Motion for Summary Judgment.

discovered some community opposition to Parks' participation in the project. (3rd Ver. Am. Compl. ¶ 59.) Based on the opposition expressed by some neighborhood organizers, Parks alleges Taylor "insisted" Parks publicly distance himself from the Turner Field Project while promising Parks would continue to play a behind-the-scenes role. (Id. ¶¶ 59-61; Parks (1st) Aff. ¶¶ 11-12.) Plaintiffs have alleged, "[s]eeking to do what was in the best interest of the development team and believing that Taylor would keep his word, Parks acquiesced to Carter's demand that he not publicly associate himself with the Turner Field Project." (Id. ¶ 61.)

On June 5, 2015, Oakwood's attorney circulated to Parks and King a third version of the Oakwood operating agreement that gave King a 100% membership interest in Oakwood (the "100/0 Operating Agreement"). (Parks Dep. 80-81, Ex. 12; 3rd Am. Ver. Compl. ¶ 79.) King signed this agreement, and the King Defendants claims it was the first enforceable Oakwood operating agreement. (King Defs.' SUMF ¶ 9; Pls.' Resp. to King Defs.' SUMF ¶ 9; King Defs.' Resp. to Pls.' SUMF ¶¶ 3-14.)

Parks acknowledges he was aware of and did not object to this 100/0 Operating Agreement. (Pls.' Resp. to King Defs.' SUMF ¶ 11.) He offers two explanations for his silence. He alleges that 100/0 Operating Agreement was merely guise "to quell neighborhood concerns regarding his involvement in the Turner Field Project." (Id. ¶¶ 11-12.) He asserts King "understood and agreed this [100/0]

Operating Agreement did not supersede, rescind or in any way alter the terms of the [51/49] Operating Agreement . . .” (3rd Am. Ver. Compl. ¶ 79.) He also contends that pursuant to ¶ 5 of the 51/49 Operating Agreement, he was under no obligation to object because the transfer was not permitted without BPJ’s consent and was thus void.[7] (Pls.’ Resp. to King Defs.’ SUMF ¶¶ 11-12.)

On October 6, 2015, King emailed the Oakwood attorney with a question about how to address CIAL in an Oakwood application for DBE certification, expressly referencing that she alone was the Oakwood’s sole member. (King Defs.’ SUMF ¶ 19; Pls.’ Resp. to King Defs.’ SUMF ¶ 19.) Oakwood’s attorney responded to King’s question that there was, “[n]o need to mention CIAL on the DBE form. Oakwood is owned 100% by you, individually . . . .” (Id. ¶ 21; Pls.’ Resp. to King Defs.’ SUMF ¶ 21.) Parks was copied on this email correspondence and, again, made no objection to the statements made by King or the Oakwood attorney that King solely owned Oakwood. (Id. ¶¶ 20, 22; Pls.’ Resp. to King Defs.’ SUMF ¶¶ 20, 22.)

1.5 Carter and Oakwood Sign a Non-binding Letter of Intent and Carter Submits its Proposal to the City and AFCRA

On November 23, 2015, Oakwood and Carter memorialized their agreement

[7] Paragraph 5 of the 51/49 Operating Agreement addresses the transfer of membership interests. A transfer will be considered “permitted” if it occurs “with the advance written consent of a unanimous vote of all of” Oakwood’s members or upon notice if current members are transferring interests among themselves. (3rd Am. Compl. Ex. A ¶ 5.1.2). Paragraph 5 further provides that any transfer not thus permitted “shall be null and void and of no effect . . .” (Id. Ex. A ¶ 5.1.3(e).)

to jointly pursue Turner Field Project with a non-binding letter of intent ("LOI"). (Parks Dep. 110, Ex. 28.) The LOI specifies that Oakwood "shall serve as local MBE / WBE participant . . ." (Id. Ex. 28 2.) According to the LOI, Carter was to have a 90% share in equity commitments, land ownership, and the receipt of developer fees while Oakwood would share the remaining 10%. (3rd Am. Ver. Compl. ¶¶ 53-56.) During this same time frame, Carter submitted its response to the City's and AFCRA's request for proposals regarding the Turner Field Project, setting forth its redevelopment plan. (Carter & Assocs. Ent. Ver. Ans. Ex. A.) The proposal indicated King owned 100% of Oakwood and noted Oakwood was in the process of obtaining its MBE and WBE certifications. (Id. Ex. A. 3, 54.) While the proposal mentioned another executive and project manager who would be working for Oakwood on the Turner Field Project, it made no reference to Parks. (Id. Ex. A 54, 60, 85, Appx. 19-20.)

1.6 The Proposal for the Turner Field Project is Accepted

The City and AFCRA accepted Carter's redevelopment proposal for Turner Field. The actual purchase began to take shape with the Foundation buying most or all of the real property for approximately $30 million. (Injunc. Hrg. Tr. 97, 99; R. Peterson Dep. 106-107.) The Foundation would keep some of the land including the stadium and would immediately transfer or lease some of the land to Carter-affiliated entities. (Id. 97-102; R. Peterson Dep. 106.) The land controlled by the Carter-

related entities would be used to construct various projects. (Id. 97-102.) A closing on all these transactions was set to occur in January of 2017. (Id. 101.)

1.7 The Side Letter

Based on the way the deal evolved, Parks became dissatisfied with the 10% share allocated to Oakwood which reached a crescendo during a tumultuous meeting with Carter in November of 2016.[8] As a result of this meeting, Carter decided it no longer wanted Parks to have any involvement in the Turner Field Project. Carter was uncertain of the precise relationship that existed between Oakwood and Parks, and it sought assurances that Oakwood would not permit Parks to be involved in the Turner Field Project going forward. (Id. 104-105, 110-111, 116; Taylor Dep. 152.)

A closing on the Turner Field Project was set to occur on January 5, 2017. Whereas previously, Carter and Oakwood's agreement was set forth in the nonbinding LOI, as part of that closing, Carter and Oakwood were to enter into a formal joint venture agreement establishing Oakwood Summerhill, LLC, as Oakwood's joint venture member. Initially, Carter requested that the joint venture agreement specifically prohibit Parks from being involved in the Turner Field Project. (Parks Dep. Ex. 40 (D. Pritzkerd Dec. 29, 2016 email).) However, Oakwood's lawyers requested the issue be removed from the joint venture

[8] This dispute is more fully described in § 2.8 of the (Corrected) Order on the Carter Defendants' Motion for Summary Judgment and Partial Motion to Dismiss the Third Amended Complaint, entered January 26, 2023 (the "Carter MSJ Order").

agreement, and Carter agreed so long as the issue would be addressed in a side letter (the "Side Letter"). (Id.)

Carter forwarded a proposed Side Letter to Oakwood's counsel on December 29, 2016, and its terms were negotiated over the next few days.[9] (Id. Ex. 41 (D. Priztkerd Dec. 29, 2016 email).) Parks has acknowledged that Oakwood's attorneys who negotiated the Side Letter were paid at his direction and generally followed his instructions.[10] (Parks Dep. 161-162.) As the closing neared, Carter announced it was willing to proceed on the Turner Field Project without Oakwood unless it received a signed copy of the Side Letter. (Id. Ex. 27 (S. Taylor Jan. 5, 2017 7:55 a.m. email).) On the advice of Oakwood's counsel, King executed the Side Letter in which she expressly warranted that Parks was not a principal or agent of the Oakwood joint venture member, and it "would not permit the involvement by Parks in the business affairs" of Oakwood affiliates concerning the Turner Field Project. (King Dep. 79; Parks Dep. Ex. 39.)

Parks admits he was aware of these pre-closing negotiations regarding the Side Letter and knew Carter was requesting this representation about his lack of future involvement in the Turner Field Project. (Parks Dep. 164-165, 167, 177-178.) Parks avers he,

considered the Side Letter an additional instance where Carter

[9] The negotiations regarding the Side Letter are more thoroughly described in § 2.9 of the Carter MSJ Order.
[10] Brandon Williams, who was Oakwood's counsel in matters related to its operating agreements, was not among the Oakwood lawyers who negotiated the Side Letter.

> determined that my involvement in the project needed to be denied to another party. I thus remained silent. As was the case with Carter's previous denials of my involvement, I expected to continue with my role on the development team.

(Parks (1st) Aff. ¶¶ 16-17.)

1.8 Oakwood's Capital Contribution

As the closing approached, Carter offered to loan Oakwood the funds necessary to fund its original capital contribution. (Parks Dep. 134-135.) Parks contends he had discussions with King about Carter's offer of a loan. (Parks Dep. 135.) He cannot recall if King wanted to accept it, but he wanted Oakwood to fund its own capital contribution which is what happened. (Id.) Khalil provided $300,000 to be used as Oakwood's capital contribution. (Id. 158, 188; King Defs.' SUMF ¶ 45.) These funds were provided directly from Khalil to the "trust company charged with collecting funds for the financial closing" and were never held by any King Defendant. (Parks Dep. 188; Pls.' Resp. to King Defs.' SUMF ¶ 45.) A number of disputed questions exist regarding these funds.

Parks claims Khalil personally owed Parks for work Parks performed "sourcing deals" and the $300,000 was Khalil's repayment of that debt as reflected in a $350,000 promissory note.[11] (Parks Dep. 120-123, 158; Pls.' Mot. Ex. C.) Parks

[11] During his deposition, Parks testified about an unsigned version of this promissory note. (Parks Dep. 119, 123.) Plaintiffs have attached a copy of a fully executed promissory note as Exhibit C to Plaintiffs' Motion. This Exhibit C also reflects that the note has been stamped as "Paid." It is not clear if or where in the record this particular version of the promissory note has been authenticated.

testified that Khalil came to owe him this money because he "brought deals to Khalil" although he could not identify any such deals with much specificity. (Id. 120-123.) By contrast, King contends Khalil paid this money on behalf of his company New Columbia based upon her offer for Oakwood to forfeit its future proceeds under a deal it had with New Columbia. (King Dep. 98, 99, 103; Injunc. Hrg Tr. 82; 3rd Ver. Am. Compl. ¶¶ 37-40.) The agreement she alleges was not reduced to writing.

The record also reflects a dispute regarding how the funds were transmitted to the closing. Parks and King recalled Khalil transmitted the funds to the closing attorney via wire transfer. (Parks Dep. 179; King Dep. 110.) Contemporaneous email communications indicate a wire was expected. (Parks Dep. Ex. 43, 44.) However, two Carter representatives recall the funds were provided via check. (R. Peterson Dep. 204-205; Nelson Dep. 59-62.) The record does not presently contain any evidence, such as banking records, that might more definitively address how Oakwood's capital contribution came to be received. For purposes of these motions, the Court will consider the funds were transmitted via wire.

During closing, Oakwood's required capital contribution was only $225,330, and Carter immediately directed the remaining $74,670 be returned. (Parks Dep. Ex. 43; Nelson Dep. 61-62.) Parks has averred that he discussed how to handle the overage with King, and Parks directed that the overage be deposited into an Oakwood account. (Park (2nd) Aff. ¶ 8.)

1.9 CIAL Replaces King as the Sole Owner of Oakwood

On January 21, 2017, shortly after closing, King emailed Oakwood's attorney, noting it was initially intended that her solely-owned company CIAL would own Oakwood, not King individually. (King Defs.' SUMF ¶ 35; Pls.' Resp. to King Defs.' SUMF ¶ 35.) On February 2, 2017, Oakwood's attorney, via email, presented King with a revised 100/0 Operating Agreement that replaced King with CIAL as the sole owner of Oakwood. (Id. ¶ 36; Pls.' Resp. to King Defs.' SUMF ¶ 36.) King signed the revised 100/0 Operating Agreement that same day and returned it to counsel via email. (Id. ¶ 37; Pls.' Resp. to King Defs.' SUMF ¶ 37.) Parks was copied on all three of these emails, and, again, he did not respond or object to King's discussion with Oakwood's counsel in which both indicated Plaintiffs had no ownership interest in Oakwood. (Id. ¶¶ 35- 37; Pls.' Resp. to King Defs.' SUMF ¶¶ 35-37.)

1.10 Oakwood Sells Half of its Interest in the Turner Field Project to Carter

In December of 2018, King approached Peterson and requested Carter purchase one-half of Oakwood's 10% interest in the Turner Field Project. (Carter 30(b)(6) Dep. (Nov. 11, 2022 Tr.) 79; King Dep. 119.) Peterson testified he tried to dissuade King, "but she was adamant. . ." (Id. 79.) On behalf of Oakwood, she sold the 5% interest to Carter for approximately $300,000. (King Dep. 123.) King did not seek nor obtain Plaintiffs' approval for this transfer. (Id. 120-121.)

1.11 Distributions and Fees Received by Oakwood for its Various Development Projects

The King Defendants admit Oakwood received "in excess of $1 million in distributions and developer fees associated with the Turner Field Project." (King Defs.' Resp. to Pls.' SUMF ¶ 24.) Parks has averred that Oakwood and its related entities continue their work on the Herndon Homes Project, and "King has refused to accept funds due and owing to Oakwood from the New Columbia project." (Parks (2nd) Aff. ¶¶ 9-10.)

King testified that Parks, through his attorneys, sought payments from Oakwood that she deemed were contrary to the various disclosure requirements related to Oakwood's MBE, WBE, or similar certifications. (King Dep. 58, 90-92.) In her estimation, Parks was asking her to operate Oakwood as some form of "illegal pass-through operation," and she rebuffed his efforts to act as a "silent owner" in Oakwood. (Id. 53-54, 57-59, 67-68.)

2. PROCEDURAL POSTURE

Parks and BPJ filed the underlying lawsuit on November 19, 2020, almost four years after the closing on the Turner Field Project. On March 4, 2021, it was transferred to the Metro Atlanta Business Case Division. Carter, King, CIAL, Oakwood, and several John Does were originally named as Defendants. During the course of discovery, Plaintiffs subsequently identified some of those John Doe defendants and added them to the case including Oakwood Summerhill, LLC,

Oakwood Herndon Development Group, LLC and Kelly King & Co. (See generally 2nd Am. Ver. Compl.; 3rd Am. Ver. Compl.)

Early in the case, the Court conducted a lengthy evidentiary hearing on Plaintiffs' request for interlocutory injunctive relief which the Court denied. The parties were permitted a substantial discovery period, and the Court was asked to resolve various discovery issues. In January of 2023, the Court dismissed or granted summary judgment on all claims Plaintiffs lodged against Carter and the Carter-related Defendants, leaving only Plaintiffs' claims against the King Defendants which are the subject of the instant motions.

Plaintiffs' operative pleading is their Third Verified Amended Complaint, filed September 27, 2022. It raises a variety of breach of contract claims together with certain torts and requests for equitable relief. Plaintiffs also seek punitive damages and attorney's fees.

3. STANDARD OF REVIEW

In Fulton County v. Ward-Poag, 310 Ga. 289, 292 (2020), the Georgia Supreme Court reiterated the "well-established principles" guiding a trial court's review of a motion for summary judgment. "A trial court can grant summary judgment to a moving party only if there are no genuine issues of material fact and the undisputed evidence warrants judgment as a matter of law. See O.C.G.A. § 9-11-56(c). In reviewing the evidence, a court must construe all facts and draw all

inferences in favor of the non-movant." Ward-Poag expressly relied on Messex v. Lynch, 255 Ga. 208, 210 (1985) which further provides, "[t]he party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists, and the trial court must give that party the benefit of all favorable inferences that may be drawn from the evidence."

"On cross-motions for summary judgment, each party must show there is no genuine issue of material fact and that each, respectively, is entitled to summary judgment as a matter of law; either party, to prevail by summary judgment, must bear its burden of proof." (Citation omitted.) White v. Gens, 348 Ga. App. 145, 146 (2018).

4. ANALYSIS

4.1 Contract-Based Claims Dependent upon the Enforceability of the 51/49 Operating Agreement: Counts I, II, IV, V, VI, VII, and XIII

Plaintiffs contend the undisputed evidence of record establishes that the parties agreed to be bound by the 51/49 Operating Agreement, and they seek partial summary judgment on their claims for breach of various provisions. (Pls.' Mot. 7, 15.) The King Defendants disagree. They contend, "there was no agreement or understanding that Plaintiffs held an ownership interest in Oakwood . . ." (King Defs.' Mot. 9.) They seek summary judgment on all Plaintiffs' claims based on the 51/49 Operating Agreement.

4.1.1 Mutual Assent Key to Formation of Binding Contract

"The consent of the parties being essential to a contract, until each has assented to all the terms, there is not binding contract . . . " O.C.G.A. § 13-3-2. "In determining if parties had mutual assent or meeting of the minds necessary to reach agreement, courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of intent." Groves v. Gibbs, 367 Ga. App. 730, 733 (2023).

As outlined above, there were two prior versions of the Oakwood operating agreement that had been previously circulated by Oakwood's attorney but never signed. Here, Plaintiffs claim Parks signed the third version, the 51/49 Operating Agreement, on behalf of BPJ at some unspecified time, most likely in January of 2015 and acknowledge that he kept his signed copy without sharing it with anyone. (Parks Dep. 53, 67-68, 70-71, 75; King Defs.' SUMF ¶ 24; Pls.' Resp. to Defs.' SUMF ¶ 24.) The record contains no evidence that Plaintiffs communicated BPJ's acceptance of this 51/49 Operating Agreement to King, Oakwood's attorney, or anyone else. Applying the objective theory of intent, based on this silence, a reasonable man would conclude Plaintiffs did not agree to the 51/49 Operating Agreement. In June of 2015, when Oakwood's attorney began to circulate the 100/0 Operating Agreement reflecting Kelly King was the sole owner of Oakwood, Plaintiffs raised no concern based on the 51/49 Operating Agreement which they now assert is controlling. (Pls.' Resp. to King Defs.' SUMF ¶ 11.) Again, a reasonable

man would find that, based on their silence, Plaintiffs did not intend to be bound by the 51/49 Operating Agreement.[12]

4.1.2 The Legal Significance of a Signed Contract or the Sharing of a Signed Contract with the Other Contracting Parties

Plaintiffs offer technical arguments that there is no requirement for a signed contract to be shared between the contracting parties or for a contract to even be signed in order for it to be enforced. However, Plaintiffs rely on factually dissimilar cases and fail to acknowledge that, unlike the cases they cite, this record lacks evidence of their assent to the underlying agreement.

Plaintiffs broadly argue, "when one party executes the contract but fails to circulate it to the other parties it does not diminish the binding effect of the agreement in any way whatsoever," citing Traxler Co. v. John Hancock Mut. Life Ins. Co., 209 Ga. App. 434 (1993). (Id. 8.) However, in Traxler & Co. one contracting party's failure to immediately return the signed agreement to the other did not bar the contract's enforcement because there was no dispute that the parties had reached the subject agreement.[13] Plaintiffs also cite

[12] With regard to this 100/0 Operating Agreement, Plaintiffs' Third Amended Complaint offered a verified allegations that, "King and Parks understood and agreed that this [100/0 Operating Agreement] did not supersede, rescind or in any way alter the terms of the [51/49 Operating Agreement]." This alleged accord between King and Parks is not addressed in the summary judgment briefing, and Plaintiffs have not offered any specific evidence illuminating this covert understanding. As for the vague, verified allegation, the Court finds these types of "self-serving and conclusory statements [do] not preclude the grant of summary judgment." See generally Whitcomb v. Bank of American, N.A., 365 Ga. App. 795, 804 (2022)("In the absence of substantiating facts, a self-serving and conclusory affidavit is insufficient to create an issue for trial.")

[13] In Traxler & Co., a landlord and tenant agreed to resolve their dispute about the condition of the leased premises with the tenant paying certain sums to the landlord in exchange for the ability to depart the premises prior to the lease term's end. The tenant signed the written release agreement and forwarded it to the landlord, but several weeks passed without it receiving an executed version in return. When the landlord sought payment owned under the release agreement, the tenant argued that the landlord's delay in returning the fully executed agreement constituted its rejection. Thus, the tenant reasoned it could claim it was constructively evicted based on the poor condition of the premises and leave without paying the landlord as required under the release agreement. The

Warthen v. Moore, 258 Ga. 198 (1988) to suggest that even if Parks failed to sign the contract, such failure does not bar the contract's enforcement. (Id.) Again, in that case, assent was not an issue. Rather, the appellate court in Warthen found that while the contracting party never signed the written contract, the contractual obligation existed based on the "uncontroverted [evidence] that all parties understood and assented to that contract's terms." Id. at 199.

Plaintiffs offer another technical argument that regardless of whether Parks signed the 51/49 Operating Agreement on behalf of BPJ, CIAL is bound under that contract simply because CIAL signed it. (Id. 9.) Plaintiffs rely on a single case that is 165 years old and can be distinguished. In Samuel D. Linton & Co. v. Williams, 25 Ga. 391 (1858), the Georgia Supreme Court determined an agreement did not violate then governing statute of frauds and was enforceable because it was signed by the party to be charged.[14] Id. at 395. Like Traxler and Warthen, *supra*, this opinion indicates no dispute that parties assented to the contract even though one had not signed the written agreement.

Plaintiffs misconstrue the King Defendants' arguments regarding the failure of Parks to share his executed version of the 51/49 Operating Agreement. The failure to share the

landlord obtained summary judgment for tenant's breach of the settlement agreement which was affirmed on appeal. Reviewing the record in that case, the appellate court found undisputed evidence that the parties reached an agreement as to release terms, and "it [was] not legally significant that [the landlord] did not immediately sign and return the agreement." Id. at 435.

[14] Samuel D. Linton & Co. v. Williams, 25 Ga. 391 (1858) concerned an option contract whereby the seller agreed to supply goods at a set price upon the buyer's demand during the upcoming winter. The seller signed the contract while the purchaser did not. Later that winter, purchaser tendered payment and demanded the goods which the seller refused to provide. The purchaser sued under the contract. The trial court granted a directed verdict against the purchaser finding the contract to be unenforceable which the Georgia Supreme Court determined to be error.

signed copy with the King Defendants was important -- not in and of itself -- but as evidence that Plaintiffs failed to indicate to the other contracting party or its representative that Plaintiffs assented to the 51/49 Operating Agreement.

4.1.3 Plaintiffs' Contention that their Performance Rendered the 51/49 Operating Agreement Enforceable

Plaintiffs also argue their performance rendered the 51/49 Operating Agreement binding regardless of whether BPJ signed it. (Pls.' Mot. 10-14.) As recognized in Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 144 (2014), one of the purposes for securing the signatures of the parties to a written contract is to reflect their assent. However, "[i]f one of the parties has not signed [the contract], his acceptance is inferred from a performance under the contract, in part or in full . . . (citation omitted)." Id.

As the primary evidence of their part performance, Plaintiffs cite to the $300,000 that Parks purportedly provided as Oakwood's capital contribution to the Turner Field Project. (Id. 11.) Considering the evidence in the light most favorable to Plaintiffs, the Court will assume Parks provided his personal funds for Oakwood's contribution. However, Plaintiffs have not indicated what provision of the 51/49 Operating Agreement he was performing. More importantly, the timing of this particular payment belies Plaintiffs' argument. This $300,000 was provided for the January 5, 2017 closing of the Turner Field Project which took place two years after Plaintiffs purports to have agreed to the 51/49 Operating Agreement. This was one and one-half years after Parks knew that King had signed the 100/0 Operating Agreement. It was also more than one year after Carter had publicly and

formally relied upon the 100/0 Operating Agreement in its efforts to secure the Turner Field Project in November of 2015. (Ver. Carter Ans. ¶ 38, Ex. A 3, 54.) Based upon this timing, the Court does not find it reasonable to infer that these funds were offered by Plaintiffs in part performance of the 51/49 Operating Agreement.

As further evidence of their part performance under the 51/49 Operating Agreement, Plaintiffs cite the "continuous advocating" Parks performed, lobbying Carter to provide Oakwood with a larger stake in the Turner Field Project. (Pls.' Mot. 11.) Had these efforts been successful, Oakwood would have benefitted, but Plaintiffs have not indicated any such advocacy was a contractual obligation of the 51/49 Operating Agreement or why it would constitute partial performance of that agreement. Moreover, this advocacy must have occurred after November 2015 when Oakwood and Carter signed their LOI which established Oakwood's 10% stake. Plaintiffs specifically cites a December 2016 email as evidence of this advocacy. (Id. 11, Ex. D.) As above, because of the timing, the Court does not find it reasonable to infer that this advocacy was done in part performance of the 51/49 Operating Agreement.

4.1.4 Summary Judgment is Appropriate as to All of Plaintiffs' Claims based on the 51/49 Operating Agreement

In light of the foregoing, the Court rejects Plaintiffs' claims that arise from the 51/49 Operating Agreement, finding that it never became a binding and enforceable contract due to the lack of mutual assent. Therefore, the Court grants summary judgment against Plaintiffs on Counts II, IV, V, VI for breach of contract.

The Court also grants summary judgment on Plaintiffs' Count I which asserts a claim for a constructive trust and a corresponding request for permanent injunctive relief. In this count, Plaintiffs sought to protect "BPJ's interest in Oakwood" which Plaintiffs claim arose under the 51/49 Operating Agreement. (3rd Am. Compl. ¶¶ 90-91.)

Additionally, the Court grants summary judgment on Count VII where Plaintiffs sought a declaratory judgment that the 100/0 Operating Agreement was null and void under the terms of the 51/49 Operating Agreement.

Further, the Court grants summary judgment on Plaintiffs' Count XIII wherein they seek "an equitable accounting relating to the Turner Field Project and Oakwood's use, allocation, disbursement, receipt, and appropriation of funds, distributions, salary, credit, equipment, and other assets no matter how used or for what they were intended to be used." (3rd Am. Ver. Compl. ¶ 206.) The nature of such an accounting is based on BPJ's purported membership status in Oakwood under the unenforceable 51/49 Operating Agreement.[15]

4.2 Plaintiffs' Claims for Breach of Fiduciary Duty - Count III

Plaintiffs claim that King and CIAL breached fiduciary duties owed to them. (3rd Am. Ver. Compl. ¶¶ 106-109.) Defendants seek summary judgment on the grounds that

[15] Moreover, the Court finds Plaintiffs are ineligible for equitable relief. Plaintiffs have admitted their ill-defined relationship with Oakwood resulted from an intentional effort to hide that relationship from the public so as to improve Oakwood's chances of working with Carter on the Turner Field Project. (3rd Am. Compl. ¶¶ 61, 79; Pls.' Resp. to King Defs.' SUMF ¶¶ 11-12, 20, 22.) Plaintiffs cannot now invoke the Court's equitable powers to investigate the finances of a business when they specifically intended to disguise the nature of that relationship to the public, including the governing authorities that awarded the Turner Field Project. O.C.G.A. § 23-1-10 ("He who would have equity must do equity . . ."); see also Whitcomb v. Bank of America, N.A., 365 Ga. App. 795, 802 (2022)(O.C.G.A. § 23-1-10 speaks to the unclean hands doctrine as well as "the concept that one will not be permitted to take advantage of his own wrong.") Additionally, the Court notes Plaintiffs were permitted an extensive discovery period to investigate Oakwood's finances.

Plaintiffs have failed to demonstrate any such duty existed. (King Defs.' Resp. 14.) To the extent that Plaintiffs assert the fiduciary duty arose by virtue of the BPJ's status as a member of Oakwood, such claim is precluded by the Court's determination that the 51/49 Operating Agreement is not enforceable. Nevertheless, Plaintiffs maintain a fiduciary duty existed by virtue of their relationship with King and CIAL. (Pls.' Resp. 21-22.) A fiduciary duty can arise when parties share a relationship of mutual confidence. O.C.G.A. § 23-2-58.

Plaintiffs contend, "for years on end both Parks and King worked in the common interests of growing [Oakwood] as a company, sourcing opportunities, advocating for the company's interest and affirmatively presenting themselves to third parties as 'partners' in the business." (Pls.' Resp. 22.) Construing the evidence in the light most favorable to Plaintiffs, Parks was key to securing the funds that were used as Oakwood's contribution to the Turner Field Project. Further, the record reflects Parks and King, both individually and through their companies, had a continuing business relationship that involved Oakwood. (See e.g. Injunc. Hrg. Tr. 20-21, 29-30, 98-99, Ex. 4, 6, 9-10.)

Determining whether a fiduciary or confidential relationship has been created by circumstances rather than by law or contract is fact-intensive. Bienert v. Dickinson, 276 Ga. App. 621, 624 (2005). "Because a confidential relationship may be found whenever one party is justified in reposing confidence in another, the existence of a confidential or fiduciary relationship is generally a factual matter for the jury to resolve." Id.

Accordingly, a jury will need to determine whether King or CIAL owed Plaintiffs a

fiduciary duty.

4.3 Plaintiffs' Claims for Unjust Enrichment – Count VIII

Plaintiffs make an alternative claim for unjust enrichment asserting the King Defendants "have unjustly benefited from Plaintiffs' provision of capital and other services for the Turner Field Project and their improper denial of the benefits" arising therefrom. (3rd Am. Ver. Compl. ¶ 130.) "The theory of unjust enrichment is basically an equitable doctrine that the benefited party equitably ought to either return or compensate for the conferred benefits when there was no legal right to pay." Holllifield v. Monte Vista Biblical Gardens, Inc., 251 Ga. App. 124, 130 (2001). In Hollifield, summary judgment was properly granted on a claim for unjust enrichment because of the claimant's unclean hands. Id. at 131. The Court finds Plaintiffs are likewise ineligible for equitable relief. See n. 15, supra. Therefore, the Court grants summary judgment on Plaintiffs' claim for unjust enrichment.

4.4 Plaintiffs' Claim for Conversion – Count IX

In asserting conversion, Plaintiffs allege the King Defendants' wrongful conduct deprived Plaintiffs "of the money Plaintiffs caused to be invested into the Turner Field Project" in addition to "profits and revenue from Oakwood." (Id. ¶ 134.)

Georgia law defines conversion as the,

> an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation. Any distinct act of dominion

> wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion.

Bearoff v. Craton, 350 Ga. App. 826, 839-840 (2019). Among the other elements, a claimant must demonstrate that the other party has "actual possession" of the converted property. Capital Fin. Serv. Grp., Inc. v. Hummel, 313 Ga. App. 278, 280-281 (2011).

As Plaintiffs' pleadings reflect, Parks paid $300,000 "on behalf of Oakwood" and this money "served as Oakwood's capital contribution to the Turner Field Project." (3rd Ver. Am. Compl. ¶¶ 83-84.) It is undisputed this money went directly from Khalil to "the trust company" collecting money for the closing. (Parks Dep. 158, 188; Pls.' Resp. to King Defs.' SUMF ¶ 45.) The money never passed into the hands of a King Defendant and Plaintiffs have offered no evidence that these funds were used for anything other than their intended purpose. As to Plaintiffs' claims that the King Defendants converted BPJ's ownership interest in Oakwood and thereby deprived him of its profits and revenues, as outlined above, the Court finds BPJ never had such an ownership interest.

Accordingly, the Court grants summary judgment on Plaintiffs' conversion claim.

4.5 RICO and Conspiracy to Violate RICO – Counts X and XI

4.5.1 General Nature of RICO Claim and Plaintiffs' RICO Allegations

The King Defendants seek summary judgment on Plaintiffs' RICO and RICO

conspiracy counts. See Wylie v. Denton, 323 Ga. App. 161, 165 (2013) (conspiracy to violate Georgia's RICO Act is a derivative to the claim of a RICO violation).

Z-Space, Inc. v. Dantanna's CNN Ctr., LLC, 349 Ga. App. 248, 252 (2019) outlines the prerequisites of a civil RICO claim under Georgia law,

> [t]he Georgia civil RICO statute prohibits a person from obtaining money or participating in an 'enterprise' through a 'pattern of racketeering activity.' OCGA § 16-14-4 (a), (b). The term 'racketeering activity' means the commission of at least one of the enumerated types of crimes listed in the RICO statute, also known as predicate offenses. OCGA § 16-14-3 (5) (A), (C); [Cit.]. As is relevant here, a 'pattern' means '[e]ngaging in at least two acts of racketeering activity.' OCGA § 16-14-3 (4) (A).

As predicate acts, Plaintiffs allege theft by taking, theft by deception as well as wire and mail fraud. (3rd Am. Ver. Compl. ¶¶ 152-168.)

Plaintiffs generally begin their RICO allegations with the following summary:

> [a]s a result of the fraud perpetrated by Defendants, Plaintiffs have paid Three Hundred Thousand ($300,000) Dollars associated with the Turner Field Project. Defendants represented to Plaintiffs that they would participate in, and benefit from, developer fees and other revenue generated by the Turner Field Project. However, Defendants through methods of artful device and deception conspired with each other to procure Plaintiffs' $300,000 and then exclude them from such participation.

(3rd Am. Ver. Compl. ¶ 139.)

The King Defendants assert Plaintiffs lack any evidence to support their fraud-based RICO claims.[16] (King Defs.' Mot. 25.) Accordingly, a Plaintiffs "cannot rest on [their]

[16] The King Defendants also assert summary judgment is merited because Plaintiffs failed to allege their fraudulent conduct with the requisite specificity. (King Defs.' Mot. 22-25.) However, this is not a dispositive issue to be addressed on summary judgment. "The

pleadings, but rather must point to specific evidence giving rise to a triable issue (citation omitted)." Roberts v. Beacon Funding Corp., 367 Ga. App. 656, 658 (2023). This Plaintiffs have failed to do.

4.5.2 Theft by Taking

A theft by taking occurs when one, "unlawfully takes, or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated." O.C.G.A. § 16-8-2. With regard to the $300,000 Plaintiffs claim they provided as Oakwood's capital contribution to the Turner Field Project, the King Defendants never had possession of these funds. (Parks Dep. 158, 188; Pls.' Resp. to King Defs.' SUMF ¶ 45.) Accordingly, they cannot be the subject of the King Defendants' alleged theft. Conklin v. Zant, 216 Ga. App. 357, 359 (1995) (summary judgment properly granted on theft-based RICO claim when defendants never had possession of the disputed funds).

With regard to fraudulent promises whereby the King Defendants purportedly represented to Plaintiffs that "they would participate in, and benefit from, developer fees and other revenue generated by the Turner Field Project," Plaintiffs have pointed to no evidence supporting this claim apart from their contentions about the enforceability of the

proper remedy for seeking more particularity is by motion for a more definite statement at the pleading stage or by the rules of discovery thereafter (citations omitted)." Falanga v. Kirschner & Venker, P.C., 286 Ga. App. 92, 96–97 (2007)(defendants failed to pursue remedies for an indefinite fraud pleading, and summary judgment was not merited because plaintiffs failed to plead fraud allegations with specificity). Here, the King Defendants never moved for a more definite statement or sought to resolve any discovery issue regarding the generalized nature of Plaintiffs' fraud allegations. Hence, this pleading deficiency is not a sound basis for summary judgment.

51/49 Operating Agreement. (3rd Am. Compl. ¶ 139.) Accordingly, the Court finds Plaintiffs have failed to establish the predicate offense of theft by taking.

4.5.3. Theft by Deception

"A person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property." O.C.G.A. § 16-8-3(a). Theft by taking is a general offense that encompasses the more specific offense of theft by deception. See Mathis v. State, 343 Ga. App. 206, 211-212 (2017) (finding theft by taking was a general crime that merged into the more specific crime of theft by deception which arose from the same conduct) *overruled on other grounds* Middleton v. State, 309 Ga. 337, 341 (2020). Therefore, for the reasons outlined above with regard to theft by taking, Plaintiffs have failed to establish theft by deception as a predicate offense.

However, Plaintiffs face another difficulty with their theft by deception claim. Plaintiffs offer conclusory allegations regarding the purportedly "deceitful means or artful practice" by which Plaintiffs' funds were allegedly taken. O.C.G.A. § 16-8-3(a). The party that bears the burden of production on summary judgment may not rely on vague and conclusory statements. Chatham Area Transit Auth. v. Brantley, 353 Ga. App. 197, 204 (2019). Plaintiffs offer no specific communications with corresponding dates that could be used to correlate when the deceitful conduct occurred in relation to the evolving Turner Field Project. This would be vital to

determining whether Plaintiffs' reliance on any fraudulent statement was reasonable. See Vernon v. Assurance Forensic Accounting, LLC, 333 Ga. App. 377, 392 (2015) ("[w]ithout reasonable reliance on a false representation, there can be no deception, and without deception, of course, there can be neither theft by deception nor a valid RICO claim based upon theft by deception.")

4.5.4 Mail and Wire Fraud

Plaintiff have also asserted the King Defendants engaged in wire and mail fraud. (3rd Am. Ver. Compl. ¶¶ 160-168.)

> Mail and wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme . . . A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property. (Citations omitted.)

Z-Space, Inc. at 254.

Again, Plaintiffs fail to point to specific evidence in the record to support their wire and mail fraud claims apart from Khalil's wire of $300,000 to the closing for the Turner Field Project. Just prior to the closing, Parks remembers having a conversation with Kelly King about whether Oakwood should accept Carter's offer of a loan, but he could not recall her position. (Parks Dep. 135.) Parks strongly believed Oakwood should fund its own contribution, and expressly stated, "I directed [Khalil] to wire the money." (Id. 134-135, 158.) While a wire may have been involved in the underlying transaction, Plaintiffs have pointed to no evidence as to how the King Defendants "used" the wires to

perpetuate their fraudulent scheme against the Plaintiffs. Plaintiffs have also failed to point to specific evidence of the material representation made by any of the King Defendants with the intention of deceiving Plaintiffs out of their money or property. Accordingly, the Court finds that Plaintiffs have failed to create a triable issue that the King Defendants participated in mail or wire fraud.

In light of the foregoing, the Court grants summary judgment on Plaintiffs' Count X and Count XI for violations of Georgia's RICO Act and conspiracy to commit RICO violations.

4.6 Plaintiffs' Claims Punitive Damages and Attorney's Fees – Counts XIV and XV

Plaintiffs have asserted claims for punitive damages and attorney's fees against all the King Defendants. These types of claims are derivative. See generally ABH Corporation v. Montgomery, 356 Ga. App. 703, 706 (2020). Based on the Court's determinations above, no claims remain pending against Defendants Oakwood Development Group, LLC, Oakwood Summerhill, LLC, Kelly King & Co., or Oakwood Herndon Development Group, LLC, so that these derivative claims fail. Id.

As one claim for breach of fiduciary duty remains pending against CIAL and King which would support an award of punitive damages under O.C.G.A. § 51-12-5.1 and/or attorney's fees under O.C.G.A. § 13-6-11, the Court denies summary judgment on these derivative claims as to Defendants CIAL and King.

5. CONCLUSION

In light of all the foregoing, the Court **ORDERS:**

a. Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

b. King Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Summary Judgment is **GRANTED** as to the following claims:

Count I – Constructive Trust with injunctive relief (against all King Defendants);

Count II- Breach of Contract (against CIAL and King);

Count IV - Breach of Oakwood Operating Agreement – Sale of Joint Venture Interest (against CIAL and King);

Count V - Breach of Oakwood Operating Agreement – Quarterly Tax Distributions and Remaining Net Income (against CIAL and King);

Count VI – Indemnification (against CIAL and King);

Count VII – Declaratory Judgment (against CIAL and King);

Count VIII – Unjust Enrichment (against CIAL and King);

Count IX – Conversion (against all King Defendants);

Count X – Violations of Georgia's Civil RICO Act (against all King Defendants);

Count XII – Conspiring and Endeavoring to Violate Georgia RICO (against all King Defendants);

Count XIII – Accounting (against all King Defendants);

Count XIV - Punitive Damages (against Oakwood Development Group, LLC, Oakwood Summerhill, LLC, Kelly King & Co., and Oakwood Herndon Development Group, LLC), and

Count XV – Attorney's Fees (against Oakwood Development Group, LLC, Oakwood Summerhill, LLC, Kelly King & Co., and Oakwood Herndon Development Group, LLC).

2. Summary judgment is **DENIED** as to the following claims:

Count III – Breach of Fiduciary Duty (against CIAL and King);

Count XIV – Punitive Damages (against CIAL and King), and

Count XV – Attorney's Fees (against CIAL and King).

So Ordered this 28th day of September, 2023.

/s/ John J. Goger
JOHN J. GOGER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit
Metro Atlanta Business Case Division

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