STATE OF NORTH CAROLINA WAKE COUNTY JOHN NORMENT, Plaintiff, v. ROBERT GARY RABON, JAMES MIKLOSKO, ADVANTAGE LENDING LLC, CAVALIER MORTGAGE GROUP, INC., STEEL HOLDINGS, LLC and ADVANTAGE LENDING, a common law partnership, Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 7014 **ORDER ON MOTION FOR APPROPRIATE EQUITABLE RELIEF**

1. THIS MATTER comes before the Court on Plaintiff John Norment's Motion for Appropriate Equitable Relief During Pendency of Litigation ("Motion" or "Motion for Equitable Relief," ECF No. 166). The Court, in its discretion, concludes that the Motion should be GRANTED, in part, and DENIED, in part, for the reasons set forth below.

FINDINGS OF FACT

2. The Court's factual findings are made solely for purposes of deciding the present Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) (cleaned up) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at trial on the merits.").

3. Since 2014, John Norment, James Miklosko, and Robert Gary Rabon have each owned a one-third membership interest in Advantage Lending, LLC ("Advantage"), a company engaged in the business of mortgage lending.

4. Rabon served as the sole manager of Advantage until 28 March 2019, at which time Miklosko and Rabon—acting "as the majority in interest of the members of Advantage"— appointed Miklosko as the company's new manager. (ECF No. 182, at ¶ 3.)

5. Because the terms of Advantage's Operating Agreement are relevant to the present Motion, the Court will quote pertinent provisions of that document.

6. The Agreement contains the following definitions:

> *"Company Cash Flow"* for any period means the excess, if any, of (A) the sum of (i) all gross receipts from any source for such period, other than from Company loans, Capital Transactions, and Capital Contributions, and (ii) any funds released by the Company from previously established reserves, over (B) the sum of (i) all cash expenses paid by the Company for such period (including any compensation to the Managers and their Affiliates); (ii) all amounts paid by the Company in such period on account of the amortization of the principal of any debts or liabilities of the Company (including loans from any Member); (iii) capital expenditures of the Company; and (iv) a reasonable reserve for future expenditures as provided by Section 11.3*; provided, however,* that the amounts referred to in (B) (i), (ii), and (iii) above shall be taken into account only to the extent not funded by Capital Contributions, loans or paid out of previously established reserves. Such term shall also include all other funds deemed available for distribution and designated as Company Cash Flow by the Managers.
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> *"Distribution"* means any money or other property distributed to a Member with respect to the Member's Membership Interest, but shall not include any payment to a Member for materials or services rendered nor any reimbursement to a Member for expenses permitted in accordance with this Agreement.

> *"Majority in Interest"* means a combination of any Members who, in the aggregate, own more than fifty percent of the Membership Interests of all Members.
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> "*Manager"* means each Person executing this Agreement as a Manager, any other Person that succeeds such Manager, or any other Person elected to act as Manager of the Company as provided in this Agreement. "*Managers*" refers to such Persons as a group.
>
> *"Member"* means each Person designated as a member of the Company on Schedule I hereto or any other Person admitted as a member of the Company in accordance with this Agreement or the Act. *"Members"* refers to such Persons as a group.

(ECF No. 167.1, at pp. 3–6.)

7. Article 3.1 of the Operating Agreement reads, in pertinent part, as follows:

> *The Managers*. Except as otherwise may be expressly provided in this Agreement, the Articles of Organization, or the Act, all decisions with respect to the management of the business and affairs of the Company shall be made by action of a Majority of the Managers taken at a meeting or evidenced by a written consent executed by a Majority of the Managers. . . . The Managers shall have full and complete authority, power, and discretion to manage and control the business of the Company, to make all decisions regarding those matters, and to perform any and all other acts customary or incident to the management of the Company's business, except only as to those acts as to which approval by the Members is expressly required by the Articles of Organization, this Agreement, the Act, or other applicable law. . .

(*Id*. at p. 9.)

8. Section 3.3 states in relevant part as follows:

> *Compensation and Expenses*. Except as otherwise determined by written agreement of the Members, the Managers shall not receive any compensation from the Company for serving as Managers, but the Company will reimburse Managers for expenses incurred by the Managers in connection with their service to the Company.

(*Id*. at p. 10.)

9. Article 4 contains the following relevant provisions:

> 4.2. *No Management by Members*. The Members in their capacity as Members shall not take part in the management or control of the business, nor transact any business for the Company, nor shall they have power to sign for or to bind the Company.
>
> 4.4 *Action by Members*. Any action to be taken by the Members under the Act or this Agreement may be taken . . . by written action of a Majority in Interest of the Members; *provided, however,* that any action requiring the consent of all Members under this Agreement, the Act, or other applicable law taken by written action must be signed by all Members.

(*Id*. at p. 11.)

10. Section 5.5 of the Operating Agreement reads as follows:

> *Capital Accounts.* A Capital Account shall be established for each Member and shall be credited with each Member's initial and any additional Capital Contributions. All contributions of property to the Company by a Member shall be valued and credited to the Member's Capital Account at such property's Gross Asset Value on the date of contribution. All distributions of property to a Member by the Company shall be valued and debited against such Member's Capital Account at such property's Gross Asset Value on the date of distribution. Each Member's Capital Account shall at all times be determined and maintained pursuant to the principles of this Section 5.4 and Treasury Regulations Section 1.704-1(b)(2)(iv). Each Member's Capital Account shall be increased in accordance with such Regulations by:
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> (a) The amount of Profits allocated to the Member pursuant to this Agreement;
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> (b) The amount of all Gains from Capital Transactions allocated to the Member pursuant to this Agreement; and
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> (c) The amount of any Company liabilities assumed by the Member or which are secured by any Company Property distributed to such Member.
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> Each Member's capital account shall be decreased in accordance with such Regulations by:

(a) The amount of Losses allocated to the Member pursuant to this Agreement;

(b) The amount of Company Cash Flow distributed to the Member pursuant to this Agreement;

(c) The amount of Company Sales Proceeds and Company Refinancing Proceeds distributed to the Member pursuant to this Agreement; and

(d) The amount of any liabilities of the Member assumed by the Company or which are secured by any property contributed by such Member to the Company.

In addition, each Member's Capital Account shall be subject to such other adjustments as may be required in order to comply with the capital account maintenance requirements of Section 704(b) of the Code. In the event that the Managers shall determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto (including, without limitation, debits or credits relating to liabilities that are secured by contributed or distributed property or that are assumed by the Company or the Members), are computed in order to comply with such Treasury Regulations, the Managers may make such modification, provided that it is not likely to have a material effect on the amounts distributable to any Member upon dissolution of the Company. The Managers also shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of Company capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Treasury Regulations Section 1.704-1(b)(2)(iv)(g) and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Treasury Regulations Section 1.704-1(b).

(*Id*. at pp. 13–14.)

11. Section 7.1 of the Operating Agreement contains the following provision:

Company Cash Flow. The Company Cash Flow for each Fiscal Year, to the extent available, shall be distributed to the Members at such times as are determined by the Managers in accordance with the Members' respective Percentage Interests.

(*Id*. at p. 18.)

12. Between 2014 and 2016, Norment performed loan refinancing duties for Advantage. (ECF No. 61.7, at ¶¶ 7, 9, 14.)

13. Norment resigned from Advantage on 31 March 2016 via a letter from his attorney and demanded—unsuccessfully—that Advantage return to him his $1,000,000 capital contribution. (*Id.* at ¶ 14.)

14. After Norment's resignation in March 2016, Rabon and Miklosko continued to perform various services on behalf of Advantage. (ECF No. 176.4, at ¶¶ 4–12.)

15. Advantage's tax returns between 2014 and 2020 reflect its net profits and losses for each of those years as follows:

2014: $26,232.00

2015: $262,270.00

2016: ($70,480.00)

2017: ($122,258.00)

2018: ($53,216.00)

2019: $376,172.00

2020: $419,363.00

(ECF No. 176.1.)

16. Since December 2015, Norment has not received any funds from Advantage. (ECF No. 61.7, at ¶ 11.)

17. Despite Section 7.1 of the Operating Agreement as well as the fact that Advantage earned a net profit in 2014, 2015, 2019, and 2020, Defendants assert that

Advantage has never issued any distributions to its members. (ECF No. 176.4, at ¶ 19.) Advantage has, however, periodically made certain payments to its members between 2014 and 2020 in the amounts set out below that it characterized as "guaranteed payments" —a term that is nowhere found in the Operating Agreement:

2014: None

2015: $36,000 to Norment, $36,000 to Miklosko; and $0 to Rabon

2016: None

2017: None

2018: $44,000 to Miklosko

2019: $181,000 to Miklosko; $39,000 to Rabon; $0 to Norment

2020: $1,275,000 to Miklosko; $184,025 to Rabon; $0 to Norment[1]

(ECF No. 159.1, at ¶¶ 2–7; ECF No. 182, at ¶ 13.)

18. These "guaranteed payments" were described in a joint affidavit by Rabon and Miklosko as payments made based upon a determination by Advantage's management that such payments were appropriate compensation for services rendered to Advantage. (ECF No. 159.1, at ¶¶ 2–7.)

19. Between 2018 and 2021, Rabon and Miklosko executed a series of documents that were all titled either "Written Consent" or "Consent Without Meeting." These documents (each of which bear the signatures of both Miklosko and Rabon) sought to retroactively ratify various actions previously taken by Rabon and Miklosko during that year, including the issuance of the "guaranteed payments" to

[1] The record currently before the Court does not disclose whether any guaranteed payments have been made in 2021 or 2022.

them by Advantage. None of these documents contained Norment's signature, referenced his consent, or mentioned him at all. (ECF Nos. 176.6, 176.7, 176.8, 176.9, 176.10.)

20. In his deposition, Miklosko testified as follows concerning payments he and Rabon received from Advantage:

> Q. What distributions have you received from Advantage Lending during 2020?
> A. I have no idea what the totals are.
> Q. How is it determined what distributions you receive?
> A. I don't know exactly how that's determined either. Seems to be generally determined when the year and the financials are over.
> Q. Well, are you receiving money from Advantage Lending --strike that. Have you received any money from Advantage Lending during 2020?
> A. Yes.
> Q. How much?
> A. I don't know.
> Q. More than $100,000?
> A. I think so.
> Q. More than $200,000?
> A. Not sure. Haven't paid attention.
> Q. More than $300,000?
> A. Don't think so. Haven't -- haven't had time to even look at that.
> Q. Does somebody at Advantage just send you money and you don't know whether they're sending it or not or how much it is or how does a payment to you get initiated?
> A. I guess when I need money, I pay myself.
> . . .
>
> Q. All right. What's the distinction in your mind between compensation and distributions?
> A. I believe some of it is -- is a guarantee and other is not.
> Q. Okay. Are you guaranteed a certain amount?
> A. I think so. I just -- I suppose I really haven't paid attention because I work so much for free that I really haven't got a lot of money out of it.
> Q. Well, how much are you guaranteed?
> A. I'm not even sure.
> Q. Well, who made the guarantee?
> A. Not even sure of that.
> . . .

Q. And the -- I think you said that you understand you're guaranteed certain payments. What are you guaranteed?
A. I'm not sure what that amount is.
Q. Well, who would know?
A. I don't know. I guess I'd have to get with Gary and see what that amount is. I've never really paid attention. My focus is keeping the business going, closing loans.
Q. And you don't know how much -- have you been paid anything since March the 22nd of 2019 that was approved by somebody other than you?
A. Not sure.
Q. Well, what do you mean you're not sure?
A. I don't know if the system's set up -- I'm not really sure what the system's set up for approval is.
Q. You're the manager of Advantage Lending and you don't know what the system is set up for approvals of payments to you?
A. Never paid much attention because I never really receive much money.
. . .

Q. The money you've been paid are checks you wrote yourself, correct?
A. Yes.
Q. And you didn't go to anybody and get approval before you wrote those checks, did you?
A. Nope.
. . .

Q. But whatever those payments were, were amounts that you decided to write the checks to yourself, correct?
A. That's my recollection.
Q. Did you ever have any conversation with John [Norment] about how much you would be paid?
A. Nope.
Q. Did you ever ask John to approve or agree to how much you were paid?
A. No.
. . .

Q. And as the manager of Advantage Lending since March of 2019, do you run things by Gary [Rabon] as to what you're doing, how's it -- how it's going, decisions that need to be made?
A. Just kind of depends upon what it is. I mean, if it's some big, major move, sure. I don't -- I don't run by any kind of day-to-day or normal operations stuff by him unless I feel like it's something that he would want to know about or I want to get his opinion or take on something.

> Q. Do you run by him how much you pay yourself?
> A. I have not because, again, up until this year, I haven't really paid myself. I mean, he has at times encouraged me to pay myself more and I've been hesitant to do that because I want to make sure that the company is able to stay intact and run and function.
> Q. Has Gary taken capital out of the company in 2018, '19 or '20?
> A. I believe he has. I don't know the dollar amounts, but--
> Q. Why have you allowed Gary to take capital out of the company?
> A. Because it's something I feel is the right thing to do because he's working and, you know, he helps me -- helps me run the company and make -- try to make the company successful.
> Q. Have you made any distributions to John Norment in 2018, '19 or '20?
> A. Not that I'm aware of.
> Q. If John Norment asked to take his capital out of the company today, what would be your response to that?
> A. I would call Rick Farrell.
> Q. Well, as the manager of Advantage Lending, are you prepared for John Norment to take capital out of the company?
> A. I would only do it if Rick Farrell told me I had to.
> . . .
>
> Q. Have you ever consulted with an attorney before giving distributions to Mr. Rabon? I'm not asking what you asked or what information you were provided. I'm asking if you've ever consulted with an attorney before making distributions to Mr. Rabon?
> A. Not that I recall.

(ECF No. 162.5, at pp. 151–60.)

21. As discussed more fully below, Miklosko's testimony suggests that the "written consent[s]" and "consent[s] without meeting" he and Rabon signed were "after the fact" attempts to provide legal justification for purely *ad hoc* payments they made to themselves from Advantage's assets whenever they wanted and in whatever amounts they desired.

22. On 28 May 2019, the present action was filed. (ECF No. 3.)

23. In this lawsuit, Norment has asserted individual claims for monetary damages on a variety of legal theories along with various statutory claims, including a claim seeking the dissolution of Advantage. (ECF No. 20, at ¶¶ 107–214.)

24. On 15 November 2021, Norment filed the present Motion for Appropriate Equitable Relief During Pendency of Litigation. (ECF No. 166.) The Motion seeks the following relief:

> A. a preliminary injunction requiring Rabon and Miklosko to cease all payments by Advantage LLC to themselves and requiring them to comply fully with the Operating Agreement pending resolution of this litigation;
> B. appointment of a Receiver to operate Advantage LLC during the pendency of this litigation and any resulting dissolution;
> C. a preliminary injunction prohibiting payment of kickbacks to Rabon; and
> D. Such other and further relief as the Court deem[s] appropriate.

(*Id*. at p. 4.)

25. The Court has conducted a hearing on the Motion for Equitable Relief, and the Motion is now ripe for decision.

CONCLUSIONS OF LAW

BASED UPON the foregoing FINDINGS OF FACT, the COURT makes the following CONCLUSIONS OF LAW:

26. Norment argues that he is likely to succeed on the merits of his dissolution claim based, in part, on evidence establishing that the payments Rabon and Miklosko caused Advantage to make to them without Norment's consent were a violation of the Operating Agreement and constituted unauthorized self-interested payments. Specifically, Norment contends that (1) these payments violated the

provision of the Operating Agreement prohibiting managers from receiving compensation for their services absent the consent of all members; (2) the payments were in violation of the requirement in the Operating Agreement that Company Cash Flow be distributed to members equally according to their respective percentage interests in Advantage; and (3) although the payments to Miklosko and Rabon were characterized as compensation for employment-related services, they were instead—for all practical purposes—distributions paid to some, but not all, members.

27. Defendants deny that Advantage's payments to Rabon and Miklosko were improper. (ECF No. 176.4, at ¶¶ 4–18.) As an initial matter, they take the position that under the Operating Agreement consent by merely a *majority* of members is sufficient to authorize the payment of compensation to managers for their service in that capacity— such that Norment's consent was not required. They further contend that the payments at issue were made to "ensur[e] the continued employment of Miklosko, and . . . the continuing profitability of Advantage" as well as for Rabon's "invaluable management and supervisory services to Advantage on a day-to-day basis[.]" (*Id*. at ¶¶ 9, 12.) To that end, Rabon testified that Advantage's profitability in 2019 and 2020 was considered by "management" in its decisions relating to the "guaranteed payments" made in 2020. (ECF No. 159.1, at ¶ 7.)[2]

28. Defendants assert that these payments were proper compensation to Rabon and Miklosko for providing day-to-day services to Advantage and that

[2] However, in other testimony Rabon stated that "[n]o such payments were calculated in a manner that was dependent on the income of Advantage in any year." (ECF No. 182, at ¶ 14.)

Norment's failure to likewise receive such payments was due solely to the fact that, following his departure from Advantage in 2016, he ceased performing work for the company.

29. Defendants further maintain that the Operating Agreement gives managers complete discretion to determine whether distributions should be issued at all during any given year—regardless of the company's profitability during that year.

30. In his Motion, Norment seeks the issuance of a preliminary injunction and the appointment of a temporary receiver for the remainder of this litigation. The Court will discuss in turn the applicability of each of these remedies.

I. Preliminary Injunction

31. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo*[.]" *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400 (1983) (quoting *State v. School*, 299 N.C. 351, 357–58 (1980)). When seeking a preliminary injunction, the moving party must show (i) a "*likelihood* of success on the merits" and (ii) that the moving party is "likely to sustain irreparable loss unless the injunction is issued, or[,]" that an injunction "is necessary for the protection of [the moving party's] rights during the course of litigation." *Id.* at 401 (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)); *see also* N.C. R. Civ. P. 65; N.C.G.S. § 1-485 (2021).

32. The issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities[,]" *A.E.P.*, 308 N.C. at 400 (quoting *School*, 299 N.C. at 357–58), but it cannot be issued "unless the movant carries the burden of persuasion as to each of these prerequisites[,]" *Air*

Cleaning Equip., Inc. v. Clemens, 2016 NCBC LEXIS 199, at *17 (N.C. Super. Ct. Apr. 29, 2016) (citation omitted).

33. To prove irreparable loss or injury,

> it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.

A.E.P., 308 N.C. at 407 (cleaned up).

34. Norment contends that he is entitled to a preliminary injunction because he has shown a likelihood of success on the merits of his claim seeking the dissolution of Advantage.

35. The North Carolina Limited Liability Company Act ("LLC Act") provides, in pertinent part, as follows:

> The superior court may dissolve an LLC in a proceeding brought by either of the following:
>
> . . .
>
> (2) A member, if it is established that (i) it is not practicable to conduct the LLC's business in conformance with the operating agreement and this Chapter or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member.

N.C.G.S. § 57D-6-02 (2021).

36. The LLC Act further provides that managers of an LLC shall discharge their duties in good faith. N.C.G.S. § 57D-3-21 (2021). The duty of good faith prohibits acts that constitute self-dealing. *Seraph Garrison, LLC v. Garrison*, 247 N.C. App. 115, 129 (2016).

37. The Court is satisfied that Norment has demonstrated a likelihood of success on the merits of his dissolution claim based on subpart (ii) of N.C.G.S. § 57D-6-02(2).

38. Since 2015, Norment has not received any monetary sums whatsoever from Advantage. During that time, Miklosko has received payments totaling well over $1,000,000 and Rabon has been paid over $200,000. (ECF No. 182, at ¶ 13.)

39. Moreover, as discussed below, it appears that Defendants have violated the Operating Agreement by failing to make distributions to all of its members and have instead made the above-referenced payments to Miklosko and Rabon, at least in part, as "disguised distributions" that would inure only to their benefit and not to Norment's benefit.

40. As an initial matter, Defendants correctly note that Sections 3.1 and 4.2 of the Operating Agreement make clear that the power to make all business decisions relating to Advantage rests with the company's managers and that members have no say in the management or control of the LLC. .

41. As referenced above, Section 3.3 states that "[e]xcept as otherwise determined by written agreement of the Members, the Managers shall not receive any compensation from the Company for serving as Managers[.]" (ECF No. 167.1, at p. 10.) Although the parties disagree whether the term "Members" in this section refers to *all* members or merely a *majority* of the members, the Court need not resolve this dispute. This is so because in their brief in opposition to Norment's Motion Defendants take the position that the payments at issue were *not*, in fact,

compensation for their service as managers, but rather were made "for direct full-time, on-site day-to-day services provided by Miklosko, and for services provided by Rabon, to Advantage, for which they had been largely unpaid for several years." (ECF No. 177, at p. 15.)

42. However, even assuming that Defendants were able to show that *some* amount of compensation was appropriate for Rabon and Miklosko based on services they legitimately performed for Advantage, Defendants have failed to establish that any such right to compensation would justify the sort of unconstrained payments that Miklosko has testified he (and Rabon) made to themselves and has implied that, unless enjoined, will continue to be made in the future.

43. The Court finds that the absence of any appropriate pre-payment process justifying the payments to Miklosko and Rabon—particularly those made in 2019 and 2020— is aptly revealed by the above-quoted excerpts from Miklosko's deposition testimony. The Court is unable to draw any conclusions from this testimony other than that Miklosko and Rabon (1) believed that they were entitled to pay themselves as much money from Advantage's assets as they felt they were due at any given moment in time; and (2) were under the impression they could take such action without any accompanying oversight and without consulting—much less obtaining the consent of—Norment.

44. Defendants' repeated justification that these sums were simply "guaranteed payments" is not tethered to the Operating Agreement's terms and does nothing to alleviate the Court's concern that, unless enjoined, Miklosko and Rabon

will continue to pay themselves potentially limitless amounts from Advantage's assets under their belief that they have unrestrained authority to make such payments. While Defendants may have subsequently classified these amounts as "guaranteed payments" for tax or accounting purposes, such classifications beg the question as to whether the payments were properly made in the first place. Furthermore, it appears to the Court based on the present record that the "written consent[s]" and "consent[s] without meeting" executed by Miklosko and Rabon were nothing more than "after the fact" attempts to place a veneer of propriety upon the payments they received. (ECF Nos. 176.6, 176.7, 176.8, 176.9, 176.10.)

45. Finally, the Court does not find persuasive Defendants' attempt to rebut Norment's argument that he has wrongfully been denied distributions from Advantage.

46. As noted above, Section 7.1 provides that "[t]he Company Cash Flow for each Fiscal Year, to the extent available, shall be distributed to the Members at such times as are determined by the Managers in accordance with the Members' respective Percentage Interests."[3] (ECF No. 167.1, at p. 18.)

47. Defendants do not argue that Advantage has never had available Company Cash Flow over the last five years. Instead, they contend that, as managers, Miklosko and Rabon were given full discretion under Section 7.1 to forego entirely the issuance of distributions to Members—regardless of Advantage's financial performance during the year in question.

[3] The term "Company Cash Flow" is defined in Section 2.1 of the Agreement.

48. Based on the arguments the parties have made in connection with this Motion, the Court disagrees with Defendants' interpretation of the Operating Agreement. Although Section 7.1 confers discretion upon Advantage's managers to determine the precise time period in which to issue distributions to its members, that provision does not appear to permit managers to decline to issue any distributions *at all* in the event that Company Cash Flow is available. It bears repeating that Defendants take the position that Advantage's managers have *never* issued distributions to its members and that there is no requirement that they *ever* do so.

49. The evidence of record shows that Defendants have not attempted to refute Norment's assertion that communications between him and Miklosko/Rabon have been virtually non-existent since 2016 and that he has essentially been cut off from any meaningful contact regarding Advantage. There is no reasonable basis to forecast when, if ever, Norment will receive *any* payments at all stemming from his membership interest in Advantage, regardless of how profitable Advantage becomes, absent dissolution of the company. It appears to the Court, based on the evidence presented, that the payments at issue to Miklosko and Rabon were simply an "end around" the Operating Agreement's requirement that Company Cash Flow, when available in a given year, be distributed to *all* members, including Norment, in accordance with their respective membership interests.

50. Based on all of the above, the Court concludes that Norment has met his burden of showing a likelihood of success on his dissolution claim and, in particular,

that the dissolution of Advantage is necessary to protect his rights and interests as a member.

51. The Court further concludes that Norment has likewise met his burden to show irreparable harm if a preliminary injunction is not granted. Based on the past actions of Miklosko and Rabon, it is likely that, absent an injunction, they will continue to make large payments to themselves from Advantage's assets without making any distributions to Norment. Left unchecked, such payments could jeopardize the solvency of the company and, in turn, the value of Norment's membership interest, as well as deny Norment his proportional share of company distributions.

52. As a result, the Court finds that an injunction is necessary to protect Norment's rights during the remainder of this litigation. *See*, *e.g.*, *Gruber v. Wright*, 2022 NCBC LEXIS 15, at *9 (N.C. Super Ct. Feb. 17, 2022) (cleaned up) ("Unless enjoined, [defendant] will continue to breach these provisions and cause [plaintiff] irreparable harm by prohibiting [plaintiff] from exercising his contractual rights under the Operating Agreement to participate in management decisions through his consent or veto of distributions and salary or other compensation.").

53. Finally, the Court believes that a balancing of the equities likewise supports the issuance of an injunction. Based on the terms of the Court's injunction as set forth below, Miklosko and Rabon will still be able to receive payments from Advantage as long as they obtain the prior written consent of Norment. The Court is satisfied that any hardship to them stemming from an injunction is outweighed by

the reasonable likelihood of a significant diminution in the value of Norment's membership interest in Advantage pending the final resolution of this litigation in the event injunctive relief is denied.

54. Therefore, the Court concludes, in its discretion, that Norment is entitled to a preliminary injunction enjoining Miklosko and Rabon from receiving any future payments from Advantage during the remainder of this litigation absent prior written consent by Norment.

55. The Court next considers an appropriate bond. "The trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant no material damage, and where the applicant for equitable relief has considerable assets and is able to respond in damages if the [enjoined party] does suffer damages by reason of a wrongful injunction." *Red Valve, Inc. v. Titan Valve, Inc.*, 2018 NCBC LEXIS 41, at **42 (N.C. Super. Ct. April 17, 2018) (quoting *Stevens v. Henry*, 121 N.C. App. 150, 154 (1995)) (cleaned up).

56. The Court, having carefully considered the record, the briefs, and the arguments of counsel, concludes, in its discretion, that a bond of $10,000.00 is a proper security, without prejudice to either party's right to request that the amount of the bond be increased or decreased for good cause shown.

II. Appointment of a Receiver

57. N.C.G.S. § 57D-6-04 provides in relevant part that "[t]he court in a proceeding brought under G.S. 57D-6-02 to dissolve an LLC . . . may appoint one or

more persons to serve as a receiver to manage the business of the LLC pending the court's decision on dissolution and if dissolution is decreed by the court to wind up the LLC." N.C.G.S. § 57D-6-04(a) (2021). However, this Court has emphasized that "the appointment of a receiver is a harsh remedy," as it "takes custody of the disputed property out of the parties' hands on an interlocutory order, before the court has had the opportunity to hear the merits of the case." *759 Ventures, LLC v. GCP Apt. Inv'rs, LLC*, 2018 NCBC LEXIS 44, at *6–7 (N.C. Super. Ct. May 9, 2018) (cleaned up). Moreover, "[o]ur case law strongly disfavors the appointment of a receiver when a business is an active, solvent corporation or LLC." *Id*. at *10 (cleaned up).

58. After careful consideration of the parties' competing arguments, the Court concludes that Norment has failed to demonstrate that the appointment of a temporary receiver is appropriate at this time based on the record currently before the Court. Norment has not rebutted Defendants' evidence that Advantage is currently a solvent and profitable entity with twenty-one employees. Moreover, Norment's evidence does not establish that, apart from the above-referenced payments made to Miklosko and Rabon, Advantage is being mismanaged, and the Court does not believe that it is in the best interests of Advantage for a temporary receiver to be appointed at the present time.[4] The Court is satisfied that the

[4] Norment also alleges that certain payments Advantage made to Rabon violate the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq*. Specifically, Norment contends that Rabon has received (and, unless enjoined, will continue to receive) direct payments from Advantage for mortgages referred by his real estate company, Caldwell Banker Advantage Realty, and that such payments constitute illegal "kickbacks" under RESPA. However, the Court need not determine whether these payments actually violate RESPA at this time, given that the preliminary injunction issued herein will serve to preclude any future payments of this nature to Rabon without Norment's consent.

injunction granted herein will be sufficient to protect Norment's legitimate interests during the remainder of this litigation.[5]

CONCLUSION

THEREFORE, for the reasons set forth above and in the exercise of the Court's discretion, Norment's Motion for Appropriate Equitable Relief is GRANTED, in part, and DENIED, in part, as follows:

1. Norment's Motion for a preliminary injunction is GRANTED. Defendants Robert Gary Rabon and James Miklosko, and their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice in any manner of this Order by personal service or otherwise, are hereby RESTRAINED and ENJOINED, during the pendency of this action, from receiving any salary, payments, property, assets, or any other form of compensation (monetary or non-monetary) from Advantage Lending, LLC, or from any entity controlled by Advantage Lending, LLC, without Plaintiff John Norment's prior written consent.

    a. Pursuant to the provisions of Rule 65(c), and as a condition of this Order, Norment shall post security in the amount of $10,000.00 in the form of

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[5] In his briefs in support of his Motion, Norment makes the additional argument that because the payments to Miklosko and Rabon were unlawful, they should be treated as withdrawals from their respective capital accounts such that Norment should now be deemed to hold a majority ownership interest in Advantage. However, this argument is based largely, if not entirely, upon the affidavit testimony of Norment's expert witness, Elizabeth Berry. By separate order, the Court has ordered that Berry's affidavit testimony be stricken. Therefore, the Court need not, and does not, address this issue at the present time.

cash, check, surety bond, or other undertaking satisfactory to the Wake County Clerk of Superior Court.

b. The terms and conditions of this Order shall be in force and take effect immediately upon Norment's posting of security as provided herein.

2. Norment's Motion for the appointment of a temporary receiver is DENIED.

SO ORDERED, this the 7th day of July, 2022.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases