

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELAINE MICKMAN, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 3869-VCP  
 )  
 AMERICAN INTERNATIONAL )  
 PROCESSING, L.L.C. and LFF, L.L.C., )  
 )  
 Defendants. )

**MEMORANDUM OPINION**

Submitted: June 8, 2009

Decided: July 28, 2009

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**PARSONS, Vice Chancellor.**

This action for inspection of books and records of two Delaware LLCs under 6 *Del. C.* § 18-305 and the LLCs’ operating agreements is before me on two narrow issues identified in Mr. Casarino’s letter to the Court dated May 21, 2009. First, the parties seek a decision on whether or not Plaintiff, Elaine Mickman, is entitled to photocopies of the general ledgers of Defendants, American International Processing, L.L.C. (“AIP”), and LFF, L.L.C. (“LFF” and with AIP, the “LLCs” or the “Companies”). Second, Plaintiff has moved to recover the attorneys’ fees and costs she incurred in prosecuting this action based on the alleged bad faith of AIP and LFF. The parties settled all other aspects of this litigation and agreed that the Court could dispose of these two remaining issues “on the papers.”

For the reasons stated in this letter opinion, I find Plaintiff is entitled to copies of the LLCs’ general ledgers under the Companies’ operating agreements. I do not find, however, that Defendants conducted this litigation vexatiously or in bad faith. Accordingly, I grant Plaintiff’s request for copies of the general ledgers and deny her motion for attorneys’ fees and costs.

## **I. DISCUSSION**

### **A. Plaintiff’s Request for Copies of the General Ledgers**

Plaintiff asserts two primary arguments in support of her request for copies of the general ledgers of AIP and LFF. First, she contends Defendants waived any objections to her obtaining that information. Second, Plaintiff argues that, in any event, she is entitled to copies of the general ledgers under both the operating agreements of the LLCs and the applicable statute, 6 *Del. C.* § 18-305. I address those contentions seriatim.

Plaintiff avers that because Defendants granted her counsel the opportunity to review both LLCs' general ledgers, they have waived any objections to providing Plaintiff copies of those documents. A waiver is the "intentional relinquishment of a known right, either expressly or by conduct, which clearly indicates an intention to renounce a known privilege or power. It involves both knowledge and intent."<sup>1</sup>

Here, Defendants did not waive their objections to Plaintiff obtaining photocopies of the general ledgers. While Defendants allowed Plaintiff's counsel to review the LLCs' general ledgers, and take notes regarding them, they never permitted Plaintiff's counsel to photocopy the documents.<sup>2</sup> In fact, the affirmative steps Defendants took to deny Plaintiff the right to photocopy the general ledgers clearly indicate their intent to preserve, not relinquish, objections to Plaintiff obtaining copies. Defendants, therefore, did not waive their objections to Plaintiff obtaining the general ledgers. Hence, I must determine whether Plaintiff has a legal right to copies of those documents.

Plaintiff claims a right to photocopies of the general ledgers under the LLCs' operating agreements and the LLC books and records statute, 6 *Del. C.* § 18-305. LLC

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<sup>1</sup> *Moore v. Travelers Indem. Ins. Co.*, 408 A.2d 298, 302 (Del. Super. 1979); *see also Glaser v. Norris*, 1992 WL 14960, at \*16 (Del. Ch. Jan. 6, 1992) ("A waiver must be clear and unequivocal . . ."); *Kortum v. Webasto Sunroofs, Inc.*, 769 A.2d 113, 125 (Del. Ch. 2000) ("there can be no waiver of . . . inspection right[s] unless that waiver is clearly and affirmatively expressed").

<sup>2</sup> Plaintiff and Defendants agree that Plaintiff's counsel was denied permission to make copies of the general ledgers of AIP and LFF during the books and records inspection meetings. Pl.'s Letter to the Court dated June 3, 2009 at 3; Defs.' Letter to the Court dated May 29, 2009 at 4.

agreements can grant members inspection rights that exceed the rights provided for in the statute.<sup>3</sup> Indeed, “the basic approach of the [LLC] Act is to provide members with broad discretion in drafting the agreement and to furnish default provisions when the members’ agreement is silent.”<sup>4</sup> Therefore, I will determine first whether Plaintiff has a right to the photocopies under the Companies’ operating agreements.

LLC agreements are creatures of contract, which should be construed like other contracts.<sup>5</sup> The construction of an LLC agreement, therefore, begins with the language of the agreement.<sup>6</sup> Turning to the language of AIP and LFF’s operating agreements, section 4.3 expressly grants members the following inspection rights:

Upon request, the Members and their designated representatives shall have access to all books and records of the Company at all reasonable times, provided that written notice has been given to the Company at least one (1) day prior to requesting such access.<sup>7</sup>

Plaintiff is a member of AIP, and for purposes of determining whether Plaintiff is entitled to the general ledgers, the parties have stipulated she is a member of LFF, as well. Thus,

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<sup>3</sup> See *Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C.*, 2002 WL 205681, at \*4 (Del. Ch. Jan. 29, 2002).

<sup>4</sup> *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290-91 (Del. 1999); see generally 6 Del. C. § 18-1101(b) (“It is the policy of the LLC Act to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”).

<sup>5</sup> *Arbor Place*, 2002 WL 205681, at \*3.

<sup>6</sup> *Id.*

<sup>7</sup> Pl.’s Exs. C and D, AIP and LFF operating agreements, respectively, at 7, § 4.3, Access to Records.

pursuant to the operating agreements, Plaintiff and her designated representatives “shall have access to all books and records” of those entities. Beyond that, however, the operating agreements do not define explicitly what “access to all books and records” of the LLCs means in terms of specific documents or rights. Because the parties disagree as to the proper interpretation of “access to all books and records,” I must determine whether that clause includes obtaining photocopies of the general ledgers.

The court often looks to Delaware corporate statutes and case law when interpreting similar provisions in an LLC agreement “due to the paucity of reported decisions in the LLC context.”<sup>8</sup> While the operating agreements do not elaborate further on the meaning of “access to all books and records,” the phrase frequently is used in operating agreements to define inspection rights.<sup>9</sup> Indeed, “all books and records” commonly denotes a grant of broad inspection rights.<sup>10</sup> Under this broad access term, general ledgers have been identified as among the documents to which members are entitled.<sup>11</sup> In fact, courts have construed narrower inspection access terms, such as

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<sup>8</sup> *Nama Holdings, L.L.C. v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 415, 421 n.30 (Del. Ch. 2007). See, e.g., *Somerville S. Trust v. USV Partners, LLC*, 2002 WL 1832830, at \*5 n.4 (Del. Ch. Aug. 2, 2002); *Arbor Place*, 2002 WL 205681, at \*3 n.3; *Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 746 A.2d 842, 851 (Del. Ch.1999).

<sup>9</sup> See *Arbor Place*, 2002 WL 205681, at \*3.

<sup>10</sup> *Id.*

<sup>11</sup> See *Helmsman Mgmt. Servs., Inc. v. A&S Consultants, Inc.*, 525 A.2d 160, 163 (Del. Ch. 1999) (“access to all books . . . e.g., general ledgers”).

“books and records” or “books of accounts,” to include general ledgers among the documents to which members are entitled.<sup>12</sup>

In this case, nothing in the LLCs’ operating agreements implies Defendants intended to limit the breadth of documents or to use “all books and records” in a more restrictive manner than its ordinary meaning.<sup>13</sup> The parties to the LLC agreements undoubtedly knew how to use more limiting language, but did not.<sup>14</sup> Instead, AIP and LFF granted their members rights to *all* books and records. “It is difficult to infer an implicit limitation on the availability of corporate documents in the face of this broad language,”<sup>15</sup> and Defendants have offered no plausible alternative interpretation under which the general ledgers would fall outside the scope of “all books and records.” Therefore, I interpret “all books and records” to include the general ledgers. Then, the

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<sup>12</sup> See *Pami-Lamb, Inc. v. EMB-NHC, LLC*, 857 A.2d 998, 1011 (Del. Ch. 2004) (including access to general ledgers under partnership agreement’s grant of “access to books and records”).

<sup>13</sup> Indeed, in the applicable access provision § 4.3, the term “all” is unconditional and not associated with any limiting or qualifying language.

<sup>14</sup> In other aspects of the books and records provision, the LLC agreements explicitly use limiting language. For example, members enjoy their access rights *provided that* written notice is given to the Companies at least one day in advance. In addition, members must exercise their inspection rights at *reasonable times*. While this language places procedural limitations on members’ inspection rights, no such limitations are placed on members’ substantive rights to inspect the Companies’ books and records. See *Nama Holdings*, 948 A.2d at 418-19 (placing the adjective “reasonable” before the “books and records” provision in the LLC agreement signaled a limit to the breadth of books and records and the terms and conditions upon which inspection could occur).

<sup>15</sup> *Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C.*, 2002 WL 205681, at \*3 (Del. Ch. Jan. 29, 2002).

question arises whether Plaintiff’s right to “access” the general ledgers includes the right to obtain photocopies of those ledgers.

Although the operating agreements do not explicitly define “access,” the term is commonly used in defining inspection rights. Under the analogous corporate books and records statute, 8 *Del. C.* § 220(b), for example, if a shareholder is granted inspection rights, the shareholder has the right “to make copies and extracts” of the document. And long before the statute was enacted, courts similarly found that, “[i]f there be a right to examine . . . there is a corresponding right to make the examination beneficial by taking copies thereof.”<sup>16</sup>

Here, the LLCs’ operating agreements place no limitation on the grant of “access,” but rather provide members with a general access right. In *Ostrow v. Booney Forge Corp.*, a corporate shareholder plaintiff enjoyed a similar general right to access books and records under a shareholder agreement. Because the right to access and inspect books and records typically includes a right to copies of those books and records, this Court granted the plaintiff inspection rights that included the right to make copies, even though the agreement did not expressly provide a right to make copies.<sup>17</sup> In fact, courts have interpreted a more restrictive access right, “reasonable access,” to include the right

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<sup>16</sup> *State v. Superior Oil Corp.*, 13 A.2d 453, 463 (Del. Super. 1940); *see also Ostrow v. Booney Forge Corp.*, 1994 WL 114807, at \*10 (Del. Ch. Apr. 6, 1994) (“It had similarly been judicially determined that a shareholder’s rights of inspection of corporate books includes the right to make copies . . .”).

<sup>17</sup> *Ostrow*, 1994 WL 114807, at \*10.

to make copies.<sup>18</sup> Because the AIP and LFF operating agreements place no restrictions on members' access rights and contain a broad access provision in § 4.3, I construe "access" as having its ordinary meaning, which includes the right to make photocopies. Defendants again failed to offer any reasonable alternative to this interpretation.

Defendants' arguments against a right to photocopies focus on contentions that Plaintiff did not include the general ledgers in her demand. The demand requirement, however, exists under the relevant statute, 6 *Del. C.* § 18-305, not the operating agreements. The only requirement under the operating agreements is that members give at least one day written notice of a request to access documents. There is no dispute Plaintiff satisfied that requirement. Further, as for any concern Defendants have expressed regarding the purpose of the Plaintiff's request, the operating agreements do not impose any proper purpose requirement. In addition, I find that Plaintiff's offer to enter into an appropriate confidentiality agreement should minimize any legitimate concern about an improper purpose.

Therefore, pursuant to section 4.3 of the operating agreements, Plaintiff's right to access all books and records includes the right to obtain photocopies of the LLCs' general ledgers. Because the LLC agreements provide Plaintiff with a contractual right to copies

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<sup>18</sup> *See Nama Holdings*, 948 A.2d at 418.

of the LLCs' general ledgers, I need not address her additional arguments for inspection rights under § 18-305 or Defendants' opposition to those arguments.<sup>19</sup>

### **B. Plaintiff's Motion for Attorneys' Fees and Costs**

Plaintiff also contends she is entitled to recover the attorneys' fees and costs she incurred throughout this litigation. Delaware follows the "American Rule," under which a prevailing party generally is expected to pay its own attorneys' fees and costs.<sup>20</sup> There are limited exceptions to this general rule. The exception upon which Plaintiff relies permits a court to award attorneys' fees to a prevailing claimant if the losing party acted in bad faith in opposing relief being sought in a lawsuit.

A subset of this 'bad faith' exception authorizes an award of attorneys' fees if defendant's conduct forced the plaintiff to file suit to "secure a clearly defined and established right."<sup>21</sup> Nevertheless, "this Court does not invoke the bad faith exception lightly and imposes the stringent evidentiary burden of producing clear evidence of bad faith conduct on the party seeking an award of fees."<sup>22</sup> Thus, to prevail and be awarded attorneys' fees, Plaintiff must show by clear evidence that she had a clearly defined right

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<sup>19</sup> See *Arbor Place*, 2002 WL 205681, at \*3 (noting that because the LLC agreements provided the plaintiff the inspection rights it sought, the Court "need not reach any issues raised in connection with § 18-305").

<sup>20</sup> *Johnston v. Arbitrium (Cayman Is.)*, 720 A.2d 542, 545 (Del. 1998); *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. Ch. 2005).

<sup>21</sup> *McGowan v. Empress Entm't, Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000).

<sup>22</sup> *Carlson v. Hallinan*, 2006 WL 771722, at \*23 (Del. Ch. Mar. 21, 2006).

to inspect Defendants' books and records, and Defendants' conduct forced her to litigate to enforce that right.

To support her position that Defendants acted in bad faith, Plaintiff relies heavily on *McGowan v. Empress Entertainment*.<sup>23</sup> In that case, the plaintiff was a director of the corporate defendant and unquestionably was entitled to receive the documents he requested. Yet, for sixteen months, the corporation continued to promise, but never produced, the requested documents. After waiting to no avail for sixteen months for the corporation to fulfill its promise, the plaintiff sued to enforce his "clearly defined right" to the books requested. The corporation responded to the suit by immediately producing the books and records and offered no defense for failing to comply with plaintiff's previous request. Under those circumstances, the plaintiff established that he had to sue to enforce his clearly defined right and, thus, was awarded attorneys' fees associated with his prosecution of the books and records action.<sup>24</sup>

Here, unlike the plaintiff in *McGowan*, Plaintiff has not shown she had a "clearly defined or established right" to inspect LFF's books and records. To have a clearly defined right, or any right at all, to the books and records, Plaintiff had to prove she was a member of each LLC, under either the statute or the operating agreements. In contrast to the corporate defendant in *McGowan*, however, Defendants asserted an affirmative

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<sup>23</sup> 791 A.2d 1 (Del. Ch. 2004).

<sup>24</sup> *McGowan*, 791 A.2d at 5.

defense in this case—*i.e.*, that Plaintiff had no membership rights in LFF. While Plaintiff challenges the validity of this defense, she failed to show it was frivolous or vexatious.

In the case of AIP, Plaintiff relies on the deposition testimony of Richard Mickman to prove she is a member of AIP. In fact, Defendants do not contest Plaintiff's membership in AIP; rather, they assert that a miscommunication occurred, which created the mistaken impression that they disputed that fact. In particular, until Defendants recently stipulated to Plaintiff's membership in LFF for the limited purpose of this books and records litigation, Defendants had denied Plaintiff is a member of LFF. On that basis, Defendants also denied Plaintiff's claim that she has a membership interest in the "Companies." With the benefit of hindsight, that statement could have been clearer and might have been misunderstood to mean Defendants deny Plaintiff's claimed membership not only in AIP, but also LFF, as well. Still, a miscommunication or mistake of this nature provides no basis for a finding of bad faith or vexatious conduct by Defendants in this litigation.

Similarly without merit is any suggestion that Defendants acted in bad faith in denying, through most of this case, that Plaintiff is a member of LFF. While Plaintiff is listed as a member on LFF's 2001 tax return and under the schedule K-1 filed by LFF for 2001, her name is omitted from the list of members in LFF's operating agreement.<sup>25</sup> Thus, because Defendants had at least a colorable basis for denying Plaintiff is a member

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<sup>25</sup> Pl.'s Answering Br. Ex. J at 16.

of LFF, she lacks a “clearly defined and established interest” to inspect LFF’s books and records.

Defendants actively pursued their affirmative defense that Plaintiff is not a member of LFF throughout briefing and argument on the parties’ cross motions for summary judgment. Although I denied Defendants’ motion for summary judgment, I also found their position regarding Plaintiff’s lack of membership in LFF sufficiently colorable to warrant taking under advisement for further study Plaintiff’s cross motion for summary judgment on that issue. For most of this litigation, therefore, Defendants have maintained their position that Plaintiff is not a member of LFF, and Plaintiff has not shown they did so in bad faith.<sup>26</sup>

Accordingly, I find that Plaintiff has not shown Defendants conducted this litigation vexatiously or in bad faith. Thus, Plaintiff is not entitled to attorneys’ fees and costs.

## **II. CONCLUSION**

For the reasons stated in this letter opinion, Plaintiff’s request to inspect and make copies of AIP and LFF’s general ledgers is granted. Further, Plaintiff’s request for attorneys’ fees and costs is denied.

**IT IS SO ORDERED.**

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<sup>26</sup> Although Defendants ultimately stipulated that Plaintiff was a member of LFF for purposes of this Court’s consideration of whether she had the right to copy the general ledgers, Defendants expressly have reserved their right to contest Plaintiff’s membership rights in LFF in future litigation.