IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RALPH GRANT,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Civil Action No. 18370
JULEE MITCHELL,	)	
	)	
Defendant,	)	
and	)	
	)	
EPASYS, INC., a Delaware corporation,	)	
	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: January 26, 2001
Date Decided: February 23, 2001

David A. Jenkins and Michele C. Gott, Esquires, of SMITH, KATZENSTEIN & FURLOW, Wilmington, Delaware; Of Counsel: Michael J. Tuteur and Carrie J. Fletcher, Esquires, of EPSTEIN, BECKER & GREEN, Boston, Massachusetts, Attorneys for Plaintiff.

Arthur G. Connolly, III, Esquire, of CONNOLLY, BOVE, LODGE & HUTZ, Wilmington, Delaware; Of Counsel: Joanne D'Alcomo, Esquire, of SCHNEIDER REILLY, Boston, Massachusetts, Attorneys for Defendant.

STRINE, Vice Chancellor

Plaintiff Ralph Grant brings this action under 8 Del. C. § 225 to determine the proper directors and officers of nominal defendant, Epasys, Inc. Grant contends that he is the sole director of Epasys, under authority of an incorporator's consent he executed on August 24, 2000.

Defendant Julee Mitchell denies Grant's contention and argues that Grant had earlier exercised his authority as sole incorporator to create a two-person board comprised of Mitchell and himself. In support of that argument, Mitchell points out that Grant signed a sworn "Foreign Corporation Certificate" on January 7, 2000 that identified Epasys's directors and officers. The Foreign Corporation Certificate identified Grant and Mitchell as the directors.

In this post-trial opinion, I conclude that it is more likely than not that Grant named an initial board of directors comprised of Mitchell and himself at or around the time Epasys was incorporated. The most reliable evidence in the record — the Foreign Corporation Certificate and documents created by the lawyers Grant chose to represent Epasys — supports this conclusion.

As a result, Grant's attempt to name himself as sole director in August 2000 was invalid and Mitchell is entitled to judgment in her favor.

I. Factual Background

A. The Genesis Of Epasys

This case requires this court to address a small sliver of a much larger dispute among the founders of Epasys. The founders of Epasys were plaintiff Grant, defendant Mitchell, and non-party Jack Meltzer.

The founders began their relationship in 1998. At that time, Mitchell and Meltzer were seeking to bring a computer software program, "Monitor," to market. Monitor was designed to help businesses keep track of the federal and state environmental requirements (e.g., discharge limits) that apply to their facilities and operations. Grant was then working for a systems integration business, and had cash resources he could invest.

The founders agreed to try to develop Monitor into a commercially viable program under the rubric of a business named Phoenix Environmental, LLC ("Phoenix"), an Arizona limited liability company. Grant agreed to invest $500,000 as an initial matter, in exchange for one-third of Phoenix's stock. Mitchell and Meltzer, who are romantic as well as business partners, held the remaining two-thirds interest.

In 1999, Grant invested another $500,000 into Phoenix. In exchange, he was given 9% more stock and the right to use all of the tax losses

generated by Phoenix. Thus, as of that time, Grant owned 42% of Phoenix's equity, and Mitchell and Meltzer held 29% apiece.

Later in 1999, the founders began the process of converting Phoenix from an LLC into a corporation. It was the intention of the founders to seek venture capital financing for the new corporation and to add representatives of the investors to the new corporation's board of directors. The founders were apparently optimistic that they could obtain such outside financing in a relatively short time. The founders also decided to relocate the business from Phoenix, Arizona to Boston, Massachusetts.

B. The Founders Seek The Advice Of McDermott, Will & Emery

To assist them in the task of forming a new corporation, the founders consulted with John Egan, a corporate partner at the Boston office of McDermott, Will & Emery.[1] According to Egan, he informed the founders that it was typical for a party like Grant, who was putting in cash equity, to get a preferred or priority equity position, and for sweat equity investors like Mitchell and Meltzer to get equity positions that were earned over time. The rationale for this distinction was that venture capitalists who would want to invest in the business would want assurance that the sweat equity was

[1] McDermott, Will & Emery is often abbreviated as "MWE" in the footnotes.

actually delivered before Mitchell and Meltzer became vested in their ownership positions.

Egan claims that the founders discussed the fact that Grant would have control of the corporation until the new investors came on board. Egan also says that the founders discussed the fact that Grant would be the incorporator of the new corporation, which the founders agreed to call Epasys.

Egan also testified that the founders discussed the composition of Epasys's board of directors. He says that the founders agreed that there would eventually be a five-person board comprised of Grant, Mitchell, and three representatives of the new outside investors.

Grant's recollection of the meeting is substantially similar to Egan's. Grant claims that it was agreed that he would have control, and that he would have the sole right to select the board as the incorporator.

Mitchell, however, denies that she was advised by Egan that Grant was to have sole power to select the board by virtue of his status as incorporator. And while she admits that Egan did discuss the priority often given to cash investors, she contends that she and Meltzer never assented to giving such priority to Grant and never would have.

C. Epasys Is Incorporated

After the meeting with Egan, the founders proceeded with the creation of Epasys.[2] On December 23, 1999, Epasys's certificate of incorporation was filed with the Secretary of State's office. The certificate named Ralph Grant as incorporator.

McDermott, Will also prepared two other documents dated December 23, 1999. One of the documents was a "Unanimous Written Consent Of The Directors In Lieu Of An Organizational Meeting."[3] The directors' consent purported to adopt the second of the documents, a set of bylaws.[4] The directors' consent also elected Ralph Grant as President, and Julee Mitchell as Treasurer and Secretary of Epasys. Finally, the directors' consent purported to ratify actions taken by Grant as incorporator in a consent dated December 22, 1999.

The directors' consent had signature lines for Grant and Mitchell, thus signifying that the creator of the document believed that they were the two initial directors of Epasys selected by Grant as incorporator. The directors' consent, however, was never executed. Nor has the incorporator's consent of December 22, 1999 emerged.

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[2] In keeping with their habitual lack of formality, the founders did not formally dissolve Phoenix.

[3] JX 61 at "Minutes" tab.

[4] ***Id.*** at "Bylaws" tab.

In his deposition testimony, however, Grant recalled receiving the bylaws at the time Epasys was incorporated. Grant assumed that he signed the bylaws and that the bylaws were valid.[5]

D. The Founders' Divergent Testimony About The Composition Of Epasys's Board

Grant contends that before Epasys began doing business, he and the other founders discussed two critical subjects: (1) what equity stakes each would hold in the company; and (2) the composition of the Epasys board. As to the first subject, Grant says that the founders agreed that the initial equity stakes would be the same as their final equity positions in Phoenix.[6] As to the composition of Epasys's board, Grant testified as follows:

> Q. Now, prior to the formation of EpaSys, did you have any discussions with Ms. Mitchell, Mr. Meltzer, or both of them, about who would be on the board of directors of EpaSys?
>
> A. Yes.
>
> Q. Please relate those discussions.

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[5] Grant Dep. 34-36.

[6] Tr. 26-27. That the initial equity interests of the founders were to be in the same proportion as in Phoenix is supported by several McDermott, Will documents. JX 37-41. While there seems to have been some discussion of having Mitchell's and Meltzer's positions vest over time, the founders apparently wished that Mitchell and Meltzer be able to vote their collective 58% position immediately. JX 42 (3/01/00 memo of MWE partner Thomas to Egan stating: "They would like to issue 42 percent of the stock to Ralph and have it vest immediately in light of his financial contribution. 29 percent each to Jack and Julee, half vested now, the remainder over three years. However, they would ideally like to have Jack and Julee's shares to be voting shares, even before they are vested. Can this be done?").

A. We - - I said that following John Egan's advice, it probably should be a board consisting of five people - - three at the minimum, but more likely five - - and that we wanted to attract people of some substance - - that is, people who would give us credibility in either the marketplace or credibility with venture capitalists - - and that we didn't have that credibility at that time. I wanted to wait until such time as we had something that would attract people of some stature on to the board.

Q. At any time did you ever discuss with Ms. Mitchell or Mr. Meltzer, or both of them, about putting either or both of them on the board of directors of EpaSys?

A. Yes.

Q. Please relate those discussions.

A. I indicated that I thought it would be appropriate for one, not both, to be on the board, and at such time as we had three or more people that were going to be on the board.

Q. Why did you think it appropriate for only one, but not both of them, to be put on the board?

A. Because I thought that our interests at that time were close to equal, our equity interests, and that it would be inappropriate to have two of them with voting rights on the board, compared to my one vote.

Q. This discussion with Ms. Mitchell and Mr. Meltzer about putting one but not both on the board when the board of directors was five, when did that occur, if you recall?

A. I can't recall whether it was prior to EpaSys - - it was either immediately prior to or shortly after EpaSys began operations.[7]

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[7] Tr. 34-3.5.

Mitchell has a far different recollection. She claims that the founders had discussed the board composition issue many times and that it was agreed that all three of the founders would be on the board.[8] Mitchell also said that the founders discussed adding outside members at some later time, but denies Grant's contention that no board was to be formed until outside investors were identified. She also claims never to have agreed to permitting Grant to be sole incorporator, and to have questioned Grant's status as sole incorporator with him when it came to her attention. Grant allegedly told her that McDermott, Will had said that it was only possible to have one incorporator.[9]

E. Grant Signs A Foreign Corporation Certificate Identifying Mitchell And Himself As The Directors Of Epasys

On January 7, 2000, the McDermott, Will firm delivered a Massachusetts Foreign Corporation Certificate to the offices of Epasys for signature by Grant and Mitchell. Grant was to sign in his purported capacity as President. Mitchell was to sign as Treasurer and Secretary.

The Foreign Corporation Certificate was required as a condition for Epasys to do business in Massachusetts. By law, the Foreign Corporation

[8] Tr. 306-307.

[9] Tr. 306.

Certificate must identify the directors and officers of the corporation and must be signed under penalties of perjury.[10]

The Certificate identifies the officers and directors of Epasys as follows:

> 1 I. The name and business address of the officers and the directors of the corporation are as follows:
>
> | | Name' | Business Address |
> |---|---|---|
> | President: | Ralph Grant | 163 West Newton St., Boston MA 02118 |
> | Treasurer: | Julee Mitchell | 163 West Newton St., Boston MA 02 118 |
> | Secretary: | Julee Mitchell | 163 West Newton St., Boston MA 02118 |
> | Directors: | Ralph Grant | 163 West Newton St., Boston MA 02118 |
> | | Julee Mitchell | 163 West Newton St., Boston MA 02 11 8[11] |

Grant signed the document. So did Mitchell.

Both have strikingly different recollections about doing so. Grant says he was rushed to sign it, did not read it carefully, and failed to pick up the fact that the document listed himself and Mitchell as directors. Had he seen that part of the document, Grant claims he would not have signed it because it was not correct. Grant says he knew that there was no board at

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[10] *See* Mass. Gen. Laws ch. 181, § 4 (1998) ("Every foreign corporation doing business in the commonwealth shall file with the state secretary, within 10 days after it commences doing business in the Commonwealth, a certificate signed under penalties of perjury by its president or a vice-president and its clerk or an assistant clerk, or secretary or an assistant secretary, in such form as the state secretary shall require, stating: . (6) the name and business addresses of its president, treasurer, clerk or secretary and directors.")

[11] JX 2.

that point because he was the incorporator and had not named a board. Grant further contends that he did not give McDermott, Will any information about the officers and directors of Epasys from which to prepare the Certificate and has no idea who did.

Mitchell testified that the Certificate upset her because it did not list Meltzer as a director. Mitchell claims that she raised this issue with Grant either later that same day or the next day. When confronted with this fact, Grant allegedly said that he did not know why Meltzer was not listed as a director. After discussing the issue with Meltzer privately, Mitchell says they elected not to rock the boat and to live with only herself being a director along with Grant.

F. Epasys Begins Operating

Epasys then began to do business. The founders each held themselves out to be officers of the company when dealing with third-parties.

Consistent, however, with the lack of documentation that characterized their dealings, the founders did not issue stock to themselves in amounts reflecting their agreement as to their respective equity stakes. And while the founders met to discuss business on a regular basis, there is no evidence that Grant and Mitchell ever met formally as a board of directors.

Initially, Epasys operated out of a Boston townhouse in which Mitchell and Meltzer were living (the "Townhouse"). Grant procured a Boston apartment, which Epasys paid for.

Consistent with their prior arrangement at Phoenix, Grant provided continuing cash infusions into the company while the company sought outside investors. Because he would have simply been paying himself, Grant took no salary as President. Mitchell and Meltzer did receive salaries of $160,000 each, far more than either had ever made in a previous job.

Epasys began hiring other staff and offering them stock options. This was problematic, of course, because the founders had not even issued stock to themselves. McDermott, Will was asked to draft the stock option plan. It also worked on drafts of the documents necessary to grant equity to the founders.

Grant says that he was comfortable proceeding to fund the business while the company's equity ownership was still undocumented because it was understood that he would eventually receive additional equity in exchange for the cash he was contributing to fund Epasys's operations. In fact, Grant claims that the other founders eventually agreed that he would receive an additional 5% equity for every million dollars he put into the business.

Mitchell denies that this was the arrangement. Instead, she says that Grant agreed to provide interim funding as a low-interest rate loan until such time as Epasys could secure venture capital financing.

Neither Grant's nor Mitchell's version of what Grant was to receive for his cash support of the business is corroborated by documentary evidence or the testimony of other witnesses.

G. The Relationship Among The Founders Fall Apart And Grant Acts To Remove Mitchell And Meltzer From Their Offices

During the late spring and summer of 2000, the working relationship among the founders deteriorated. The company had not secured outside financing and its product development efforts were not as advanced as the founders wished.

According to Mitchell, Grant began to make decisions in isolation from her and Meltzer. Moreover, Grant appeared to be preoccupied with minor issues such as the need for a corporate dress code. For his part, Grant believed that Mitchell and Meltzer were not working hard and were causing morale problems among the company's other employees. After the company moved its offices out of the Townhouse, Grant says that Mitchell and Meltzer would often remain at the Townhouse during the workday and not come to Epasys's offices. Grant alleges that Mitchell and Meltzer were

far behind in writing the necessary text to help Epasys's software development team update the Monitor software.

By August, Grant was set on removing Mitchell and Meltzer from their offices. As part of his justification, Grant claimed that Mitchell and Meltzer had improperly awarded themselves bonuses earlier in the year, which they had used to buy a new car. Grant also alleges that Mitchell "forged" Grant's name on a renewal of the Townhouse lease.

Grant enlisted the help of the McDermott, Will firm in August 2000 to aid him in removing Mitchell and Meltzer. McDermott, Will considered a number of issues in that regard. Most notably, the firm fixated on the question of whether Grant could remove Mitchell from the board. The documentary evidence supports the conclusion that McDermott, Will believed that Mitchell was a board member.[12]

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[12] The billing records and notes of McDermott, Will attorneys support the inference that the firm's lawyers came upon the argument that Mitchell was never a director as an afterthought. The primary emphasis of the firm in working with Grant at that time seemed to be on whether it was possible for Grant to remove Mitchell as a director for cause. For example, the billing records of McDermott, Will attorney Sam Webb state that he was assigned to: "Review organizational issues in light of potential Director conflict; review Restricted Stock Agreements and related documents and corisider MWE's duties in the event of a conflict between Directors on a board of 2 with no stocks [sic] issued." JX 36 (8/15/00 time entry for MWE attorney Webb); see also id. (8/17/00 time entry for MWE attorney Webb referring to research on board "deadlock").

Even more revealing are the notes taken by a McDermott, Will attorney of a strategy meeting firm lawyers held about how to assist Grant in removing Mitchell and Meltzer from their positions at Epasys. The meeting notes suggest that McDermott, Will attorney:: started from the premise that Mitchell was a director and brainstormed their way into the idea that she had never been put on the board in the first place. These excerpts from the notes show the backdoor way in which the idea that Mitchell had never been appointed crept into their discussion:

The founders engaged in some efforts to resolve their differences, which did not bear fruit. In the end, McDermott, Will and Grant decided to take an approach premised on the theory that no board of Epasys had been named as of August, 2000. Using this premise, McDermott, Will prepared a

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Issues to be resolved:

1) Corp. Issues –

Remove Julee as member of BoD . . .

Legal Issues re BD (board of directors) stalemate . . .

- No clear way to break logjam under DE law. . .

SW [WME Attorney Webb] - - Comfortable that it is in the best interests of the Company to remove directors . . .

Corp. Options

1) Seek receivership in Delaware Chancery Court

2) Dissolve Entity

3) Remove Julee from BoD, Ralph Takes Control of BoD and Company (or Julee never on the BoD)(will result in litigation) . . .

? Delaware law

- Can Company remove Board of Directors member for cause?

Breach of Fiduciary Responsibility

- Who can remove Board of Directors member?

JX 46 (notes of MWE attorney Mahoney of strategy meeting in 8/21/00).

Although McDermott, Will attorneys ascribe their research into removing Mitchell as an examination of 'options that Grant had in the event that Mitchell (claimed to be a director, the record is, on balance, more supportive of the view that the relevant McDermott, Will attorneys believed that a two-person board had been formed earlier, but then seized on the lack of documentation of that formation to come up with a creative argument for their client to use to achieve his ends.

If McDermott, Will had not earlier believed that a two-person board had been formed, it seems likely that one of the many attorneys working on the matter would have raised the issue with the founders or have instructed McDermott, Will paralegal Renee Carson to correct the documents she had prepared listing Grant and Mitchell as directors. In this regard, it is notable that the corporate notebook that McDermott, Will prepared for itself and Epasys included the unsigned directors' consent that listed Mitchell and Grant as board members. This notebook was the compilation of the company's official documents, including its charter, the December 23, 1999 bylaws, and the Foreign Corporation Certificate.

written consent of the sole incorporator in which Grant named himself as the sole director. Grant then executed a later consent as sole director naming himself to all the statutory offices at Epasys. He thereafter removed Mitchell and Meltzer from their jobs.

A flurry of litigation then ensued. Mitchell and Meltzer sued Grant in Massachusetts seeking, among other relief, a determination that they collectively owned a majority of Epasys's stock and a compulsory annual meeting. Acting as members of Phoenix, Mitchell and Meltzer removed Grant as managing director of that LLC, and demanded that Epasys cease using the Monitor software, which Mitchell and Meltzer contended was still owned by Phoenix.

Grant sought to have Epasys put into bankruptcy, under terms which would have effectively assured his control of the company. When that strategy stalled, Grant initiated this action seeking a declaration that he is the sole director of Epasys. He also filed suit in Arizona for a declaration that Phoenix was dissolved and that its assets were transferred to Epasys as of the time of Epasys's creation.

II. The Limited Purpose Of This Proceeding

It is important to keep in mind the limited utility of this action in the larger scheme of the fight among Epasys's founders. Epasys is overdue for

an annual meeting. As a result, any declaration I make is necessarily ephemeral.

Notably, I am not being asked to decide who owns what **equity** interest in Epasys. I am only being asked to decide who were the members of Epasys's initial board of directors.

Because of my limited mandate, I will endeavor to write my opinion as narrowly as possible. I am sensitive to the fact that a judicial colleague in Massachusetts will soon be asked to determine the more important issue of who owns what equity in Epasys, and I therefore do not intend to make findings of fact regarding that issue.[13] With that in mind, I turn to my resolution of this dispute.

III. Legal Analysis

This case does not turn on complicated questions of law, but on a single question of fact: when did Grant first exercise his authority as incorporator to name Epasys's board?

As sole incorporator, Grant had the limited but important authority spelled out in § 108 (a) and (c) of Title 8:

> § 108. Organization meeting of incorporators or directors named in certificate of incorporation.

[13] Nor need I decide whether Grant's contentions that Mitchell and Meltzer engaged in malfeasance are well-founded.

> (a) After the filing of the certificate of incorporation an organization meeting of the incorporator or incorporators, or of the board of directors if the initial directors were named in the certificate of incorporation, shall be held, either within or without this State, at the call of a majority of the incorporators or directors, as the case may be, for the purposes of adopting bylaws, electing directors (if the meeting is of the incorporators) to serve or hold office until the first annual meeting of stockholders or until their successors are elected and qualify, electing officers if the meeting is of the directors, doing any other or further acts to perfect the organizations of the corporation, and transacting such other business as may come before the meeting.
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> * * *
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> (c) Any action permitted to be taken at the organization meeting of the incorporators or directors, as the case may be, may be taken without a meeting if each incorporator or director, where there is more than 1, or the sole incorporator or director where there is only 1, signs an instrument which states the action so taken.

This case turns on when Grant first exercised his authority as an incorporator. He says he did not do so until August 2000. Mitchell claims Grant did so at the latest on January 7, 2000 when he executed the Foreign Corporation Certificate.

After considering the record evidence carefully, I am persuaded that it is more probable than not that Grant acted as incorporator on or around the date of Epasys's creation to name himself and Mitchell as the initial directors of Epasys. Although it is odd to think of a single incorporator holding a meeting with himself, § 108 does not preclude a single incorporator from meeting with himself to make such a decision. Indeed,

the first sentence of § 108(a) explicitly contemplates a meeting of "the incorporator." It is not inconceivable to think that a single incorporator could decide on the initial board of directors but fail to document that decision immediately. That is what most likely occurred here. In my view, Grant's sworn signature on the Foreign Corporation Certificate is the most reliable evidence of his actions.[14] While this factual conclusion is not free from doubt, several reasons convince me it is the correct one.

First, Grant's contention that Mitchell and Meltzer would have consented to allowing him free rein to name a board without either of them on it is not convincing. Grant was making progress over the status quo at Phoenix by forming an initial Epasys board on which he would have equal say and would not be outnumbered by Mitchell and Meltzer. By even his own testimony, Grant admits that he told Mitchell and Meltzer that one of them would be on the board at the time Epasys was formed.

Second, I do not find Egan's testimony about the supposed initial deal among the founders to be particularly helpful. Grant's own testimony suggests that the founders did not follow Egan's supposed advice, because Grant himself admits that the equity interests of the founders were to be

[14] In the alternative, this sworn, official document is a sufficiently reliable recordation of his intentions as incorporator to satisfy § 108(c).

identical to those they held in Phoenix. Furthermore, Egan's testimony that Mitchell and Meltzer were mere sweat investors ignores the fact they were the ones that had developed the Monitor software that was the heart of Epasys's business plan. This software was a tangible capital contribution that was not dependent on future sweat. Most fundamentally, however, Egan simply does not shed light on what transpired between his initial meeting with the founders and the December 23, 1999 formation of Epasys.

Third, it is clear that something transpired at or around Epasys's formation that made employees of McDermott, Will believe that a two-person board comprised of Grant and Mitchell was formed. What is striking about this belief is that the record shows that it was Grant, rather than Mitchell or Meltzer, who was in contact on a regular basis with McDermott, Will.

What is also striking is that Grant says that McDermott, Will got the officer designations correct on the Foreign Corporation Certificate. That is, Grant says that it is correct that he was to be the President and Mitchell was to be the Treasurer and Secretary.[15] But Grant claims it was not correct that he and Mitchell were to be the directors.

[15] Tr. 264.

It is improbable that McDermott, Will would have gotten the officers correct and the directors incorrect by sheer luck. It is also improbable that McDermott, Will would have prepared an initial consent of the directors identifying Grant and Mitchell as the directors without client input. It is much more likely that the firm received the necessary information to prepare these documents from Grant himself.

Moreover, it is clear that employees at McDermott, Will who were working on Epasys matters harbored the belief that Grant and Mitchell were directors well into the year 2000. Employees of the firm prepared various draft corporate documents identifying the two of them as the directors.[16]

If McDermott, Will believed that Epasys had not formed a board of directors, it is somewhat difficult to imagine that the firm would not have written a memorandum to the founders suggesting the need for the company to do so promptly. After all, McDermott, Will was in the process of drafting stock option plans and the documents necessary for Epasys to issue stock to the founders. That is, the firm was drafting documents involving corporate actions typically performed by boards of directors, not incorporators.

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[16] See, e.g., JX 37 (2/2/00 memo from McDermott, Will paralegal Renee Carson to McDermott, Will partner Michael Thomas asking him to have Mitchell and Grant execute a written consent of the directors); JX 43 (4/12/00 e-mail to Grant and various McDermott, Will attorneys from Renee Carson attaching a written consent of directors for Mitchell and Grant to sign, along with draft stock option plans and agreements; although memo asked Grant to contact McDermott, Will with any questions about the e-mail, he did not do so).

Instead of urging the formation of a board, the McDermott, Will employees involved in that process seem to have believed that Grant and Mitchell were the two directors.[17]

Furthermore, I give very little weight to McDermott, Will's after-the-fact discovery in August, 2000 that Grant did not name directors upon the formation of Epasys. For whatever reason, McDermott, Will decided to treat Grant as their sole client contact and to rely exclusively upon his word in determining what advice to give. Contrary to Grant's assertion, the record is clear that McDermott, Will undertook to represent Grant personally and aggressively against the other founders and only withdrew from that representation when the founders complained that McDermott, Will had a conflict of interest.[18]

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[17] The extent to which an incorporatorcan refuse to name a board of directors until the first annual meeting and manage the corporation pursuant to the powers granted by 8 Del. C. $107 has never been decided. Most of the learned commentators wisely counsel the rapid formation of a board whenever the new corporation intends to commence genuine business activity. See, e.g., D. DREXLER, IL. BLACK, JR. & A. SPARKS, III, DELAWARE CORPORATION LAW AND PRACTICE § 8.01, at 8-3-8-4 (2000).

[18] Numerous documents illustrate the extent to which McDermott, Will aligned itself with Grant personally. The firm's lawyers counseled with Grant on how to negotiate with the other founders and considered the extent to which the threat of criminal liability could be implicitly used to induce the other founders to settle with Grant on terms favorable to him. JX 46 ("Negotiating Strategy - - Threaten individual claim by Ralph based on forgery. Imply criminal case also but don't raise it explicitly. Part of consideration for settlement."). For example, McDermott, Will attorney Webb's notes reflects the importance Grant placed on "scaring the pants off' Mitchell and Meltzer in order to get them to compromise. JX 20. Indeed, Grant ultimately asked McDermott, Will to negotiate with the other founders on his behalf, which the firm began to do. See JX 49 (8/23/00 e-mail from MWE attorney Webb requesting that Mitchell and Meltzer address communications to MWE, which intended to continue to represent Epasys and "if necessary, Ralph Grant in matters concerning the ongoing conflict between the Company, Ralph and yourselves."'); see *also* JX 5 1 (MWE memorandum addressing negotiation and other issues

McDermott, Will's opinion that Grant never acted as incorporator before August 2000 is the one that would be expected from lawyers who then saw themselves as zealous advocates of Grant's personal position. That creative lawyers would take such a position in the absence of a signed incorporator's minute is also to be expected. But that opinion is undercut by the pre-August 2000 evidence from McDermott, Will's own files that reflects the firm's belief that Grant had formed a board of Grant and Mitchell.

Fourth, I do not rest my decision in any way on whether Grant or Mitchell was the more credible witness. Quite candidly, parts of the testimony of each struck me as unlikely to be true. Without denigrating the basic integrity of either Grant or Mitchell, it is clear that this dispute has engendered deep feelings of ill-will on both sides, feelings that do little to instill confidence in either's recitation of the facts. If there were no documentary evidence, it would be almost impossible to decide this case.

But it is in precisely these circumstances that it is appropriate for a court to look to some more reliable indicator of what actually happened as the basis for its decision. In this case, that indicator is the Foreign Corporation Certificate. Grant signed that official document under penalty

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relating to Grant's attempt to remove Mitchell and Meltzer from Epasys involvement).

of perjury. The Foreign Corporation Certificate is a simple, easy-to-read form. It is much harder to miss the part of the document identifying the directors than it is to see it.

Fifth, I note that there is no contradiction between the formation of an initial two-person board and the founders' desire to add additional outsiders later. As the sole owners of equity in Epasys, the founders could obviously expand the board, and the bylaws drafted by McDermott, Will permitted the board to be expanded to five members without additional stockholder approval. Put simply, it was a rational business strategy to form an initial board that could be expanded, especially because the company intended to undertake initiatives, such as the creation of an employee stock option plan, that required a board's approval.

Finally, I reject Grant's inconsistent reliance on formalism as a defense. Grant insists that he could not have acted as an incorporator in December or January because he did not sign a formal written consent. He also insists he did not take a meeting with himself and make the decision to name himself and Mitchell as directors. But when confronted with his own signature under penalty of perjury on an official document identifying himself and Mitchell as directors, Grant claims that the document is not a

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McDermott, Will only withdrew from its role once Mitchell's attorney raised a conflict concern.

valid recordation of his actions as incorporator because he signed it as an officer of Epasys and not as incorporator.

I find this argument unpersuasive. The fact that Grant signed as an officer does not undercut the reliability of the Foreign Corporation Certificate as evidence of what Grant had previously done as an incorporator. Indeed, the fact that Grant would sign an official document in his capacity as an officer strengthens the conclusion that he had earlier acted as incorporator to form a board. Grant could only have signed as an Epasys officer if he was appointed by the directors of Epasys to that position. One assumes that Grant believed he could honestly execute this formal document in that capacity because he and Mitchell, as the two directors, had agreed that he would be President.[19]

In this regard, it is worth noting that McDermott, Will provided Epasys with a corporate notebook comprised of the company's key documents. This notebook included not only Epasys's charter, but also the Foreign Corporation Certificate, the unsigned directors' consent, and the

[19] Grant has not argued that he acted as incorporator to name officers. While such an argument could be literally consistent with 8 Del. C. § 107, it would certainly have been an unusually aggressive exercise in incorporator-decisionmaking. In any event, my decision rests on the factual determination that Grant first acted as incorporator to form a two-person board, which then became vested with the responsibility for managing Epasys and naming officers. See 8 Del. C. §§ 107,141.

December 23, 1999 bylaws. Thus, the company's own compilation of its key corporate records suggested that a two-person board had been created.

Grant's current litigation posture therefore emerges as a lawyer-generated strategy based on Grant's own failure to formally execute an incorporator's minute, and Grant's and Mitchell's joint failure to sign the initial directors' consent prepared by McDermott, Will. These lapses in documentation were seized upon as support for an argument that Grant never named an initial board as incorporator in December 1999 or January 2000.

The Foreign Corporation Certificate, however, as well as all the other documentary evidence suggests otherwise. All of that evidence suggests that: (1) Grant formed a two-person board of Mitchell and Grant, and (2) that the board by informal means appointed Grant as President and Mitchell as Treasurer and Secretary.

Because I conclude that Grant named an initial board of directors comprised of himself and Mitchell, his later August, 2000 attempt to name himself as sole director of Epasys was invalid. As a natural consequence, any actions he took as sole director of Epasys are equally invalid as against Mitchell and Meltzer.

This ruling leaves neither party a winner. Since August 2000, Grant has continued to provide substantial funding to Epasys. Upon this

determination, Grant may well decide to stop doing so, which could force the company into bankruptcy. One hopes that the parties will consider their predicament at this point, rationally and not emotionally. It is in all of the founders' interests to work out their disputes amicably or, at the very least, promptly obtain a definitive ruling regarding their respective ownership interests in Epasys.[20]

IV. Conclusion

For the foregoing reasons, Mitchell is entitled to a judgment in her favor. Counsel shall present an implementing order, agreed upon as to form, within seven days of this opinion.

[20] To the parties' credit, they did mediate their differences but were unable to reach an accord.

ORIGINAL 5E

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RECEIVED
MAR 07 2001
DAJ

RALPH GRANT,

Plaintiff

v.

JULEE MITCHELL

Defendant

and

EPASYS, INC.,. a Delaware corporation,

Nominal Defendant

C.A. NO. 18370NC

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FINAL ORDER AND JUDGMENT

This 6th day of March 2001, the Court having considered the evidence admitted at trial, the briefs and arguments of the parties, and for the reasons stated in the Memorandum Opinion of the Court dated February 23, 2001 (the "Opinion"),

IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that:

1. Beginning no later than January 7, 2000, Epasys, Inc. had a Board of Directors consisting of Julee Mitchell and Ralph Grant;

2. Beginning no later than January 7, 2000, and at least up until and including the trial in this action on January 3 and 4, 2001, the officers of Epasys, Inc. were: President, Ralph Grant; Treasurer, Julee Mitchell; and Secretary, Julee Mitchell;

3. Ralph Grant was not the sole officer of Epasys, Inc at any time from the date of its incorporation at least up until the trial in this action on January 3 and 4, 2001;

4. Any actions taken by Ralph Grant as sole director of Epasys, Inc. are invalid as against Julee Mitchell and John Meltzer; and,

5. Costs shall be awarded to Julee Mitchell as the prevailing party.

Vice Chancellor