IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

E. BRUCE DIDONATO, OD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2023-0671-LWW
	)	
CAMPUS EYE MANAGEMENT, LLC,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: October 11, 2023
Date Decided: January 31, 2024

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WILL, Vice Chancellor

This is an action under 6 *Del. C.* § 18-110 to confirm whether Dr. Bruce DiDonato remains the manager of Campus Eye Management, LLC. To resolve it, I must determine whether two private equity affiliates on the parent entity's board of managers successfully amended the LLC agreement to remove DiDonato. There is no meaningful dispute that the amendment is invalid.

The operative LLC agreement unambiguously requires that the manager—DiDonato—be involved in any amendment. He played no role whatsoever. He first learned about the attempted amendment a year after the fact because the defendant sent notice to the wrong person.

Although the defendant offers a multitude of justifications, none change the reality that the amendment was unauthorized. DiDonato remains the LLC's manager. DiDonato's motion for summary judgment is therefore granted. The defendant's cross-motion for summary judgment is denied.

I. FACTUAL BACKGROUND

Unless otherwise noted, the following background is drawn from the undisputed facts in the parties' pleadings and documentary exhibits.

A. The MSO

Plaintiff E. Bruce DiDonato is an optometrist.[1] He founded his New Jersey eye care practice and the Ambulatory Surgical Center (the "ASC," and together with

[1] Def.'s Answer to Verified Compl. (Dkt. 16) ("Answer") ¶ 17.

the practice, the "Healthcare Companies") in the 1980s.[2] The ASC provides surgical facilities for outpatient surgical eye care.

In 2021, DiDonato created a management services organization called Campus Eye Management, LLC (the "MSO") as part of a transaction to restructure his ownership of the Healthcare Companies and sell equity interests.[3] The MSO is a Delaware entity that holds the practice's non-clinical assets.[4] The restructuring was necessary before the MSO could sell equity interests because New Jersey law prohibits investment companies from investing in medical practices.[5] Investment companies are, however, permitted to invest in businesses that provide non-clinical services to or manage non-clinical aspects of medical practices.[6]

The Limited Liability Company Agreement of Campus Eye Management, LLC dated December 14, 2021 (the "MSO LLC Agreement") formed a manager-managed entity and authorized DiDonato as the "initial" Manager to run "the business and affairs of the Company."[7] The Manager has the "power to do any and all acts, enter into any and all agreements, and engage in any and all transactions

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[2] Pl.'s Verified Compl. (Dkt. 1) ("Compl.") ¶ 43; Answer ¶ 44.

[3] Answer ¶ 3.

[4] *Id.* ¶ 4.

[5] N.J. Stat. Ann. § 14A:17-5(a); *id.* § 14A:17-10(a).

[6] N.J. Admin. Code § 13:35-6.16.

[7] Compl. Ex. A ("MSO LLCA") § 6.

necessary, advisable or as a convenience to or for the furtherance of the operation and management of the Company."[8] The MSO LLC Agreement can be amended pursuant to Section 25, which states: "The Agreement may be amended, modified, waived or supplemented by the Manager with the written consent of all Members."[9]

Once the restructuring was accomplished, DiDonato sold equity interests in the MSO to Beekman-Campus Eye Holdings, LLC ("Beekman-Purchaser"), an affiliate of private equity firm The Beekman Group, and Virtua-West Jersey Health System, Inc., a non-profit healthcare group.[10] According to the governing agreements of the Healthcare Companies and their affiliates, DiDonato retained significant governance rights and indirect interests in both the MSO and the Healthcare Companies.[11]

The MSO is a wholly owned subsidiary of Campus Eye Management Holdings, LLC ("MSO Parent"), a Delaware limited liability company.[12] DiDonato owns approximately 35% of MSO Parent and Beekman-Purchaser owns the

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[8] *Id.*

[9] *Id.* § 25.

[10] Answer ¶ 3.

[11] MSO LLCA §§ 6, 25; Opening Br. in Supp. of Pl.'s Mot. for Summ. J. (Dkt. 34) ("Pl.'s Opening Br.") Ex. D §§ 6.5, 14.5; Pl.'s Opening Br. Ex. E § 6.1; Pl.'s Opening Br. Ex. F § 12; Pl.'s Opening Br. Ex. C.

[12] MSO LLCA Schedule A.

remaining 65%.[13] DiDonato is entitled to appoint two members of MSO Parent's five-member board of managers (the "MSO Parent Board"), and Beekman-Purchaser is entitled to appoint the other three.[14] Since the restructuring transaction, the MSO Parent Board has consisted of three managers: Andrew Marolda, Jonathan Keleman (together, the "Beekman Managers"), and DiDonato. The limited liability company agreement of MSO Parent permits the MSO Parent Board to act by majority written consent.[15]

Before March 15, 2023, DiDonato believed that he was a member of the MSO Parent Board, the Chief Executive Officer of the MSO, and the MSO's sole Manager.[16]

B. DiDonato's Exile

On March 8, 2023, counsel for DiDonato sent Marolda a letter demanding that Marolda "cease unilaterally entering into contractual obligations and making or otherwise authorizing expenditures on behalf of" MSO Parent and the MSO.[17] The

[13] Answer ¶¶ 19, 28.

[14] Pl.'s Opening Br. Ex. D § 6.5.

[15] *Id.* § 6.4.

[16] Answer ¶ 6; *see also* DiDonato Aff. (Dkt. 35) ¶¶ 4-5.

[17] Pl.'s Opening Br. Ex. O.

letter stated "only Dr. DiDonato has the authority to sign contractual obligations on behalf of" the MSO absent prior approval of the MSO Parent Board.[18]

On March 15, DiDonato received three letters informing him that he had been effectively expelled from the MSO and Healthcare Companies.[19]

First, counsel for Beekman-Purchaser sent DiDonato a letter declining to make an earnout payment to DiDonato's personal holding company that was a component of the investment transaction.[20]

Second, Marolda sent a letter ostensibly on behalf of the MSO.[21] It enclosed a majority written consent by the MSO Parent Board signed by the Beekman Managers. The letter and written consent stated that DiDonato's employment as CEO of the MSO had been terminated for cause and that he had been removed from substantially all of his positions within the capital structure, except for his seat on the MSO Parent Board.[22] The letter stated that DiDonato's removal for allegedly "acting as someone with authority on behalf of Total Eye Care Centers, P.C., and causing [Total Eye Care Centers, P.C.] to breach its employment agreements" with

[18] *Id.*

[19] Answer ¶ 8; Pl.'s Opening Br. Ex. I; Pl.'s Opening Br. Ex. J; Pl.'s Opening Br. Ex. K.

[20] Pl.'s Opening Br. Ex. I.

[21] Pl.'s Opening Br. Ex. J.

[22] *Id.*

two doctors under its employ.[23] DiDonato was instructed not to return to the MSO or ASC's offices.[24]

Third, counsel for the MSO and MSO Parent sent DiDonato's counsel a letter in reply to the March 8 cease and desist correspondence. The letter represented that the MSO LLC Agreement had been amended and restated on July 11, 2022 by MSO Parent ("Purported Amendment").[25] The letter stated:

> [Y]ou may not be aware that the Limited Liability Company Agreement of Campus Eye Management, LLC (the "MSO") was amended and restated on July 11, 2022, by MSO Parent, as the sole owner of the MSO, to provide that the MSO is managed by its sole member, MSO Parent. I am enclosing a copy of that amended and restated agreement with this letter. As such, Andrew Marolda has authority to execute contracts on behalf of the MSO in his capacity as Vice President of the MSO's sole manager.[26]

Neither the MSO nor MSO Parent provided a copy of the Purported Amendment to DiDonato before March 15, 2023.[27]

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[23] *Id.*

[24] *Id.*; Answer ¶¶ 8, 65.

[25] Pl.'s Opening Br. Ex. M.

[26] *Id.*

[27] Answer ¶ 13.

C. The Information Request

DiDonato remains a manager on the MSO Parent Board and served an information demand in that capacity.[28] On June 2, MSO Parent produced documents responsive to the demand, which sought records about the Purported Amendment and other governance and operational matters.[29] The production cover letter attempted to explain why DiDonato had not learned about the Purported Amendment for almost a year.[30]

The production included one communication about the Purported Amendment: a June 30, 2022 email from the MSO's counsel.[31] Both Beekman Managers were copied on the email, which attached the Purported Amendment.[32] But the email was addressed to the wrong Bruce. As the June 2, 2023 cover email noted, "[t]he 'Bruce' identified as the recipient of [the June 30, 2022] email" disclosing the Purported Amendment "was not Dr. DiDonato."[33]

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[28] *Id.* ¶ 8.

[29] Pl.'s Opening Br. Ex. Q; Pl.'s Opening Br. Ex. P.

[30] Pl.'s Opening Br. Ex. Q.

[31] Pl.'s Opening Br. Ex. P at 100.

[32] *Id.*

[33] Pl.'s Opening Br. Ex. Q.

D. This Litigation

On June 29, 2023, DiDonato commenced this litigation against the MSO.[34] He advances a single claim under 6 *Del. C.* § 18-110.[35] On July 17, I granted DiDonato's motions to expedite and for a status quo order pending the resolution of this litigation.[36]

Briefing on cross-motions for summary judgment ensued and was completed on October 3.[37] On September 22, DiDonato filed a motion to show cause why the MSO should not be held in contempt for violating the status quo order.[38] I heard oral argument on the pending motions and took them under advisement on October 11.[39]

II. ANALYSIS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[40] When presented with cross-motions for summary judgment, "the court must examine each motion separately and only grant a motion for summary judgment to

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[34] Dkt. 1.

[35] Compl. 19.

[36] Dkts. 12, 22.

[37] Dkts. 33-36, 40-41, 44-46, 59.

[38] Dkt. 49.

[39] Dkt. 66.

[40] Ct. Ch. R. 56(c).

one of the parties when there is no disputed issue of material fact and that party is entitled to judgment as a matter of law."[41] The "facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact."[42]

The parties' motions turn on the terms of the MSO LLC Agreement. This matter is "readily amenable to summary judgment" because "proper interpretation of language in a contract . . . is treated as a question of law."[43] When interpreting limited liability company agreements, "Delaware [courts] adhere to the 'objective' theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party."[44] The court will grant a motion for summary judgment "in two scenarios: (1) when the contract is unambiguous, or (2) when the extrinsic evidence fails to create a triable issue of material fact."[45] "The

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[41] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003) (citation omitted).

[42] *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Hldgs. Co.*, 853 A.2d 124, 126 (Del. Ch. 2004).

[43] *Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at *3 (Del. Ch. Mar. 19, 2021) (first quoting *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249, at *5 (Del. Ch. Nov. 7, 2013); and then quoting *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991)).

[44] *Zohar III Ltd. v. Stila Styles, LLC*, 2022 WL 1744003, at *8 (Del. Ch. May 31, 2022) (citation omitted).

[45] *Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610, at *7 (Del. Ch. Oct. 31, 2019), *aff'd*, 241 A.3d 220 (Del. 2020).

parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous."[46]

The plain terms of the MSO LLC Agreement support judgment in DiDonato's favor. The MSO LLC Agreement provides that the Manager must be involved in any amendment. But DiDonato—the MSO's sole Manager—played no role in the Purported Amendment, which is invalid for want of authority. None of the defenses raised by the MSO lead to a different result.

A. The Purported Amendment's Invalidity

DiDonato avers that the Purported Amendment is invalid because the Beekman Managers lacked authority to amend the MSO LLC Agreement absent DiDonato's involvement.[47] The MSO LLC Agreement's terms unambiguously support his position.

In response, the MSO advances a different reading of the LLC Agreement under which the Purported Amendment is valid irrespective of whether DiDonato was the Manager. It also argues that it removed DiDonato immediately before amending the MSO LLC Agreement, such that the MSO was "managerless" at the

[46] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("The determination of ambiguity lies within the sole province of the court." (citation omitted)); *see also Cox Comm., Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022) ("Critically, a contractual provision is 'not rendered ambiguous simply because the parties in litigation differ' as to the proper interpretation." (citation omitted)).

[47] Pl.'s Opening Br. 20.

time of the Purported Amendment.[48] It further contends that the Beekman Managers were permitted to waive any consent rights that DiDonato had regarding an amendment. I consider these arguments in turn.

1. Section 25 of the MSO LLC Agreement

"In governance disputes among constituencies in an LLC, the starting (and end) point almost always is the parties' bargained-for operating agreement, and the court's role in these disputes is to 'interpret [the] contract [and] effectuate the parties' intent.'"[49] "LLC agreements are creatures of contract, which should be construed like other contracts."[50] If "a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent."[51]

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[48] Def. Campus Eye Mgmt., LLC's Combined Opening Br. in Supp. of Cross-Mot. for Summ. J. and Answering Br. in Opp'n to Pl.'s Mot. for Summ. J. (Dkt. 41) ("Def.'s Opening Br.") 39.

[49] *A & J Cap., Inc. v. Law Office of Krug*, 2018 WL 3471562, at *5 (Del. Ch. July 18, 2018) (alterations in original) (quoting *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *7 (Del. Ch. June 21, 2012)); *see also Godden v. Franco*, 2018 WL 3998431, at *7 (Del. Ch. Aug. 21, 2018); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999).

[50] *Mickman v. Am. Int'l Processing, LLC*, 2009 WL 2244608, at *2 (Del. Ch. July 28, 2009) (citing *Arbor Place, L.P. v. Encore Opportunity Fund, LLC*, 2002 WL 205681, at *4 (Del. Ch. Jan. 29, 2002))

[51] *Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 924 (Del. 2023) (quoting *City Inv. Co. Liquidating Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993)).

Section 18-302(e) of the Delaware LLC Act states that "[i]f a limited liability company agreement provides for the manner in which it may be amended, . . . it may be amended only in that manner or as otherwise permitted by law . . . ."[52] Consistent with Section 18-302(e), Section 25 of MSO LLC Agreement explicitly provides a manner of amendment: by the Manager, with the written consent of all members.[53] Section 25 (titled "Amendment") states that "[t]he Agreement may be amended, modified, waived or supplemented by the Manager with the written consent of all Members."[54] This language is unambiguous.[55] It expressly requires the Manager to be involved if the MSO LLC Agreement were to be amended.

The MSO admits that "DiDonato never amended, proposed amending, or approved an amendment of the MSO LLC Agreement."[56] Instead, it argues that the Purported Amendment complied with the MSO LLC Agreement because Section 25 is "permissive, not mandatory" and does not "preclude other forms of amendment."[57]

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[52] 6 *Del. C.* § 18-302(e).

[53] MSO LLCA § 25.

[54] *Id.*

[55] The MSO asks me to consider communications between the parties or "contemporaneous LLC agreements that DiDonato executed [to] reveal[]…the parties' intent." *See* Def.'s Opening Br. 30, 43, 47. Because Section 25 is unambiguous, "only the language of the contract itself is considered in determining the intentions of the parties." *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

[56] Answer ¶ 79.

[57] Def.s' Opening Br. 42.

The purpose of Section 25, in the MSO's estimation, is not to require the Manager's involvement in an amendment but to serve "as a limitation on the ability of the Manager to amend without 'the written consent of all Members.'"[58]

But the MSO Parent lacks authority to amend the MSO LLC Agreement absent compliance with Section 25—the only provision addressing amendment. And Section 25 does not contemplate unilateral amendment by members. Under Section 18-302(e), the MSO LLC Agreement "may" only be amended in the manner provided for in the agreement or another positive law.[59] As in the statute, the use of "may" in Section 25 indicates that an amendment is permitted (not mandated), so long as it is done in accordance with the MSO LLC Agreement's terms.[60]

The MSO next avers that Section 18-302(e) of the LLC Act permitted the Beekman Managers to waive any consent right DiDonato had concerning amendment to the MSO LLC Agreement.[61] Section 18-302(e) allows for the waiver

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[58] *Id.* at 42-43 (quoting MSO LLCA § 25).

[59] 6 *Del. C.* § 18-302(e).

[60] *See id.* ("If a limited liability company agreement provides for the manner in which it *may be amended*, including by requiring the approval of a person who is not a party to the limited liability company agreement or the satisfaction of conditions, *it may be amended* only in that manner or as otherwise permitted by law, including as permitted by § 18-209(f) of this title (provided that the approval of any person *may be waived* by such person and that any such conditions *may be waived* by all persons for whose benefit such conditions were intended)." (emphasis added)).

[61] Def.'s Opening Br. 44.

of consent rights by "all persons for whose benefit such conditions were intended."[62] DiDonato was, however, a person "for whose benefit" Section 25 of the MSO LLC Agreement was intended. He never waived this right.

The MSO also invokes Section 18-302(f) of the LLC Act, which states that "[i]f a limited liability company agreement does not provide for the manner in which it may be amended, the limited liability company agreement may be amended with the approval of all of the members."[63] That provision is inapplicable given the existence of Section 25, which sets out a manner of amendment. Section 25 forecloses any argument that a free floating right to amend is granted to members. To adopt the MSO's reading would render Section 25 meaningless.[64]

2. DiDonato's Purported Removal

According to the MSO, DiDonato was removed as Manager just before the Purported Amendment, allowing MSO Parent to unilaterally amend the MSO LLC Agreement.[65] The only evidence offered in support are affidavits from the Beekman Managers. Marolda states that "[o]n July 11, 2022, acting on behalf of MSO Parent,

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[62] 6 *Del. C.* § 18-302(e).

[63] *Id.* § 18-302(f).

[64] *See Julian v. E. States Const. Serv., Inc.*, 2008 WL 2673300, at *7 (Del. Ch. July 8, 2008) ("[W]hen interpreting a contractual provision, a court attempts to reconcile all of the agreement's provisions when read as a whole, giving effect to each and every term." (citation omitted)).

[65] Def.'s Answering Br. 39.

[he] removed [DiDonato] from his position as Manager of the MSO."[66] Keleman states that he is "aware that Mr. Marolda, acting on behalf of MSO Parent, removed [DiDonato] from his position as Manager of the MSO."[67] Rather than demonstrate whether (or how) a removal occurred, the MSO offers a circular argument: that DiDonato was removed through the Purported Amendment that attempted to make the MSO member-managed.[68]

Indeed, the MSO concedes that at the time of the Purported Amendment, DiDonato remained the Manager.[69] The Purported Amendment itself indicates that DiDonato held that role when the Beekman Managers attempted to execute it: "WHEREAS, the Manager and Member have approved the amendment and restatement of the MSO LLC Agreement."[70] DiDonato did not approve the

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[66] Marolda Aff. (Dkt. 41) ¶ 18.

[67] Keleman Aff. (Dkt. 41) ¶ 18.

[68] *See* Def.'s Opening Br. Ex. 5 at 4-5; Oral Arg. on Cross-Mot. for Summ. J. and Pl.'s Mot. for Order to Show Cause (Dkt. 73) ("H'rg Tr.") 39-42; *see also* Def.'s Opening Br. 14 ("Marolda, in his duly appointed officer capacity with authority so to act, *caused* MSO Parent to exercise its 100% equity ownership of the MSO to remove DiDonato from his position as the 'initial Manager' of the MSO." (emphasis added)). How Marolda, as the Vice President of MSO Parent, was authorized to remove the CEO of MSO Parent (DiDonato) from his position as the Manager of MSO Parent's sole subsidiary is equally unclear.

[69] Answer ¶ 9 ("[O]n July 11, 2022, the MSO Parent, acting through a duly appointed officer, amended the MSO LLC Agreement to replace Plaintiff as initial Manager[.]").

[70] Pl.'s Opening Br. Ex. N.

Purported Amendment.[71] He was unaware of it, since the MSO's counsel emailed notice of the Purported Amendment to the wrong person.[72] In fact, the email acknowledged that DiDonato remained the MSO's Manager.[73] Against this record, the bare statements in Keleman and Marolda's affidavits fail to create a genuine issue of material fact.[74]

Even if the MSO were managerless, MSO Parent would remain unable to unilaterally amend the MSO LLC Agreement under Section 25. The MSO contends that, in these circumstances, a severability clause in Section 28 of the MSO LLC Agreement would require Section 25 to be read out of the agreement on impossibility grounds.[75] Section 28, however, provides that "invalid, unenforceable or illegal" provisions may be severed. Section 25 is none of those things.[76]

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[71] Answer ¶ 73.

[72] Pl.'s Opening Br. Ex. P at 100.

[73] *Id.* ("As you know, the [MSO] is managed by you as the single manager under the LLC Agreement that was put in place prior to Closing. We are planning to revise the management structure from a single manager to member-managed, meaning the entity will be governed by [MSO Parent]. . . .").

[74] *See Haft v. Haft*, 671 A.2d 413, 419 (Del. Ch. 1995) ("The 'mere existence of a scintilla of evidence in support of the [non-moving party's] position' is not sufficient." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986))); *Dieckman v. Regency GP LP*, 2019 WL 5576886, at *11 (Del. Ch. Oct. 29, 2019) (concluding that an argument that a written consent was circulated in error was insufficient to create a genuine issue of material fact).

[75] Def.'s Opening Br. 40.

[76] MSO LLCA § 28 ("Severability. Each provision of this Agreement shall be considered severable, and if for any reason any provision or provisions herein are determined to be invalid, unenforceable or illegal under any existing or future law, such invalidity,

That is not to say that DiDonato can never be removed as Manager. Section 6 of the MSO LLC Agreement reflects that DiDonato was the MSO's "initial"—not eternal—Manager.[77] But the MSO LLC Agreement does not grant members the power to remove him. Instead, a removal could be carried out by amending the MSO LLC Agreement through Section 25.[78]

The MSO's argument that MSO Parent could nonetheless remove DiDonato by unilaterally amending the MSO LLC Agreement contravenes this bargained for arrangement. MSO Parent lacked any independent authority to remove DiDonato. Section 25, however, provides a means to resolve the issue and does not "violate[] one of the [LLC Act]'s mandatory provisions."[79] Because its terms are

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unenforceability or illegality shall not impair the operation of or [e]ffect of those portions of this Agreement that are valid, enforceable or legal."). The MSO does not explain how acts of the members invokes the severability provision when the language seems to be triggered by "any existing or future law." *Id.* Moreover, the doctrine of impossibility does not aid the MSO. "It is only fortuitous impossibility that excuses from liability." *Martin v. Star Pub. Co.*, 126 A.2d 238, 242 (Del. 1956) (quoting 6 Williston on Contracts § 1959); *see also Murphy Marine Servs. of Del., Inc. v. GT USA Wilm., LLC*, 2022 WL 4296495, at *15 (Del. Ch. Sept. 19, 2022).

[77] MSO LLCA § 6; *see Initial*, Meriam-Webster, https://www.merriam-webster.com/dictionary/initial (last visited Jan. 28, 2024) (defining "initial" to mean "of or relating to the beginning" or "placed at the beginning").

[78] MSO LLCA § 25.

[79] *In re Coinmint, LLC*, 261 A.3d 867, 900-01 (Del. Ch. 2021). If the MSO LLCA were silent on means of removal, there are no applicable default provisions under the LLC Act. *See* 6 *Del C.* § 18-402 ("Subject to § 18-602 of this title, a manager shall cease to be a manager as provided in a limited liability company agreement."); *id.* § 18-602 ("A manager may resign . . . in accordance with the limited liability company agreement. A limited liability company agreement may provide that a manager shall not have the right to resign as a manager of a limited liability company."); *see also XRI Inv.*, 304 A.3d at 931 ("Failure

unambiguous, the MSO's argument that I ought to gap fill,[80] look to parole evidence to inform me of the parties' intentions when contracting,[81] or wield equity to afford it the ability to remove DiDonato are unavailing.[82]

It is not inherently problematic that an LLC agreement for a manager-led entity lacks a manager removal provision.[83] Nor is it commercially unreasonable in these circumstances. DiDonato beneficially owns about 35% of the MSO's equity through his MSO Parent units.[84] MSO Parent could have worked with DiDonato to effectuate an amendment. Had DiDonato refused to cooperate in contravention of

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to give effect to that unmistakably clear language used in the alternative entity context allows courts to simply rewrite the contract. Such a result would negatively impinge on the goal of achieving predictability in contracts and undermine the important principle of freedom of contract legislatively embodied in the alternative entity statutes.").

[80] Def.'s Opening Br. 32.

[81] *Id.* at 30-32.

[82] *Id.* at 33.

[83] Notably, the LLC Act allows for operating agreements to prohibit managers from resigning. *See* 6 *Del C.* § 18-402 ("Subject to § 18-602 of this title, a manager shall cease to be a manager as provided in a limited liability company agreement."); *see also id.* § 18-602 ("A manager may resign . . . in accordance with the limited liability company agreement. A limited liability company agreement may provide that a manager shall not have the right to resign as a manager of a limited liability company.").

[84] Answer ¶ 19.

his fiduciary duties, equity might provide room for relief.[85] Those are not the facts before me.[86]

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DiDonato did not approve any amendment to the MSO LLC Agreement. He did not resign. And he was not properly removed as Manager of the MSO.[87] Despite their number, the arguments raised by the MSO do nothing to change this outcome.

B. The MSO's Affirmative Defenses

In addition to their legal arguments, the MSO invokes equity to aid it. It maintains that if DiDonato's removal and the Purported Amendment are deemed invalid and ineffective, the acts could have been properly achieved.[88] For example, the MSO could lawfully enact the Purported Amendment and DiDonato's removal with DiDonato's approval.[89]

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[85] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 186 (Del. Ch. 2005) ("Corporate fiduciaries may not utilize corporate machinery for the purpose of perpetuating themselves in office."); *see also Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("[I]nequitable action does not become permissible simply because it is legally possible.").

[86] *See supra* notes 29-35 and accompanying text.

[87] Answer ¶ 79.

[88] *See* Def.'s Opening Br. 49.

[89] *See Harbor Finance Patrners. v. Huizenga*, 751 A.2d 879, 896 (Del. Ch. 1999) ("Voidable acts are traditionally held to be ratifiable because the corporation can lawfully accomplish them if it does so in the appropriate manner . . . . In contrast, void acts are said to be non-ratifiable because the corporation cannot, in any case, lawfully accomplish them."); *see also Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014) ("[T]he essential distinction between voidable and void acts is that the former are those which may

Voidable acts are "subject to equitable defenses."[90] The MSO raises four: laches, acquiescence, quasi-estoppel, and unclean hands.[91] Each fails.

1. Laches

The "touchstone of the laches inquiry is whether an inexcusable delay leads to an adverse change in the condition or relations of the property or parties."[92] To establish laches, the MSO must show three elements: "(1) plaintiff's knowledge that [he] has a basis for legal action; (2) plaintiff's unreasonable delay in bringing a lawsuit; and (3) identifiable prejudice suffered by the defendant as a result of the plaintiff's unreasonable delay."[93] Because determining the sufficiency of these elements is generally a fact-based inquiry, summary judgment is rarely granted when a laches defense is offered.[94] But when there is a "'clear showing of the absence of

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be found to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from acts which are *ultra vires*, fraudulent or gifts or waste of corporate assets."); *XRI Inv.*, 304 A.3d at 923 (citing *Klaassen* when discussing precedent distinguishing between void and voidable actions in the LLC context).

[90] *XRI Inv.*, 304 A.3d at 922 (citing *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816-17 (Del. 2018)).

[91] Def.'s Opening Br. 49-55.

[92] *Whittington v. Dragon Grp. L.L.C.*, 2009 WL 1743640, at *12 (Del. Ch. June 11, 2009).

[93] *Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *7 (Del. Ch. Mar. 22, 2004).

[94] *Clark v. Packem Assoc.*, 1991 WL 36470, at *5 (Del. Ch. Mar. 6, 1991).

a genuine issue of material fact upon the issue of laches,' summary judgment will be granted by the Court."[95]

DiDonato learned of his attempted removal on March 15, 2023, when he was first notified of the Purported Amendment.[96] He then waited three and a half months before filing this action (and litigation in New Jersey).[97] His brief delay was reasonable.[98] The only resulting prejudice identified by the MSO is that DiDonato's delay "'jeopardize[s] all of the actions taken by' MSO Parent and the MSO's officers since DiDonato's removal."[99] This is a problem of the MSO's own making, since its attempted notice on June 30, 2022 was ineffective.[100]

The MSO avers that March 15 is not the correct date to apply in a laches analysis since "DiDonato has been aware of his removal as 'initial Manager' of the MSO since[] November 30, 2022."[101] On that date, DiDonato signed a written

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[95] *Tafeen*, 2004 WL 556733, at *8 (citing *Church of Religious Sci. v. Fox*, 266 A.2d 881, 884 (Del. 1970)).

[96] Pl.'s Opening Br. Ex. M.

[97] Dkt. 1; *see* Compl., *DiDonato v. Beekman*, No: MER C-45-23 (N.J. Super. June 30, 2023).

[98] *See Zohar*, 2022 WL 1744003, at *9 (Del. Ch. May 31, 2022) (holding that a five month delay could "hardly be characterized as unreasonable given the many disputes that were percolating or in litigation between these parties at the same time").

[99] Def.'s Opening Br. 52 (citing *Nevins v. Bryan*, 885 A.2d 233, 254 (Del. Ch. 2005)).

[100] *See supra* notes 33-35 and accompanying text.

[101] Def.'s Opening Br. 50.

consent allowing MSO Parent to take certain actions on behalf of the MSO otherwise reserved to the Manager under the MSO LLC Agreement.[102] Why this would have alerted DiDonato that the MSO no longer considered him the Manager is unapparent.[103] Both DiDonato's March 8, 2023 cease and desist letter and the MSO's March 25 response reflect a belief that DiDonato remained in that role.[104]

2. Acquiescence and/or Estoppel

The doctrine of acquiescence applies when a plaintiff "has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved."[105] The doctrine of quasi-estoppel is invoked "when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit."[106] Neither doctrine applies.

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[102] *Id.* Ex. 7. Under the MSO LLC Agreement, the Manager remains able to ratify "[a]ll acts . . . pursuant to authority" he delegates "without limitation." MSO LLCA § 24.

[103] Def.'s Opening Br. Ex. 7. Notably, the November 2022 written consent identified the MSO LLC Agreement as operative. *Id.*

[104] Pl.'s Opening Br. Ex. O.

[105] *NTC Gp., Inc. v. West-Point Pepperell, Inc.*, 1990 WL 143842, at *5 (Del. Ch. Sept. 26, 1980).

[106] *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 872-73 (Del. Ch. 2015) (citation omitted).

DiDonato waited a reasonable amount of time before filing this action.[107] He has not acted in a manner inconsistent with his litigation positions. And he has never recognized that the Purported Amendment was in place or that he has been removed as the MSO's Manager.[108]

The MSO maintains that the litigation should be barred on quasi-estoppel grounds because DiDonato is bringing forth "baseless" claims as "mere leverage in support of resolution" of the New Jersey action.[109] But this litigation is not baseless. The MSO also provides no support for the notion that pressing related claims in multiple jurisdictions can yield an unconscionable benefit allowing claims to be equitably barred.

3. Unclean Hands

The unclean hands doctrine provides that a "litigant who engages in reprehensible conduct in relation to the matter in controversy . . . forfeits [his] right to have the court hear [his] claim."[110] The problematic actions must be "immediate and necessary [] to the claims for which the plaintiff seeks relief."[111]

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[107] *See supra* notes 99-105 and accompanying text.

[108] *See id.*

[109] Def.'s Opening Br. 53-54.

[110] *Nakahara v. NS 1991 Am. Tr.*, 739 A.2d 770, 791-92 (Del. Ch. 1998).

[111] *Macrophage Therapeutics, Inc. v. Goldberg*, 2021 WL 2582967, at *16 (Del. Ch. June 23, 2021) (cleaned up).

The MSO argues that DiDonato "orchestrate[d] myriad egregious misconduct that subjects both the MSO and DiDonato to substantial liability," which precludes him from pursuing his claims.[112] Regardless of any problematic conduct DiDonato may have engaged in, there is no suggestion that it relates to the validity the Purported Amendment. "This court has consistently refused to apply the doctrine of unclean hands to bar an otherwise valid claim of relief where the doctrine would work an inequitable result."[113] This case is no exception.

C. The MSO's Contempt

Court of Chancery Rule 70(b) empowers this court with broad latitude to "remedy violations of its orders."[114] "To establish civil contempt, [the movant] must demonstrate that the [contemnors] violated an order of this Court of which they had notice and by which they were bound."[115] The violation must "constitute a failure

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[112] Def.'s Opening Br. 55.

[113] *Portnoy v. Cyro-Cell Int'l, Inc.*, 940 A.2d 43, 81 (Del. Ch. 2008); *see also Gener8, LLC v. Castanon*, 2023 WL 6381635, at *30-31 (Del. Ch. Sept. 29, 2023) (declining to apply the doctrine where the plaintiff's behavior was "neither directly related to the underlying litigation nor 'so offensive' as to invoke unclean hands" (quoting *Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461, 494 (Del. Ch. 2022))).

[114] Ct. Ch. R. 70(b); *TR Invs., LLC v. Genger*, 2009 WL 4696062, at *15 (Del. Ch. Dec. 9, 2009), *aff'd*, 26 A.3d 180 (Del. 2011).

[115] *TR Invs.*, 2009 WL 4696062, at *15 (citation omitted).

to obey the Court in a meaningful way."[116] Technical violations are insufficient.[117] The movant must "establish contemptuous conduct by a preponderance of the evidence."[118] Once this burden is met, the burden shifts "to the contemnors to show why they were unable to comply with the order."[119]

A Status Quo Order was entered by this court on July 24, 2023.[120] It prohibits the MSO from taking "any actions . . . outside of the ordinary course of business, or as otherwise expressly stated herein, during the pendency of this Action."[121] The ordinary course restrictions encompass actions regarding "managed professional practice entities," including "the DeVenuto Medical Practice."[122] At the time of the Status Quo Order, the DeVenuto Medical Practice had an office in Fairless Hills, Pennsylvania.

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[116] *Dickerson v. Castle*, 1991 WL 208467, at *4 (Del. Ch. Oct. 15, 1991) (citation omitted).

[117] *Id.*; *see also Macrophage Therapeutics, Inc. v. Goldberg*, 2021 WL 2585429, at *2 (Del. Ch. June 23, 2021).

[118] *TransPerfect Glob., Inc. v. Pincus*, 278 A.3d 630, 644 (Del. 2022) (quoting *Wilm. Fed'n of Tchrs. v. Howell*, 374 A.2d 832, 838 (Del. 1977)) (cleaned up).

[119] *TR Invs.*, 2009 WL 4696062, at *15.

[120] Order to Maintain Status Quo (Dkt. 22) ("Status Quo Order").

[121] *Id.* ¶ 2; *see id.* ¶ 4 (providing a non-exhaustive list of actions outside the ordinary course).

[122] *Id.* ¶ 3.

On September 3, DiDonato received a copy of a forwarded email that originated from the MSO's president.[123] The original email, dated August 9, details the MSO's decision to close the Fairless Hills office "as of September 29, 2023."[124] On September 5, DiDonato requested an explanation from the MSO.[125] In response, the MSO confirmed that it would carry out the closure.[126]

On September 22, DiDonato filed a motion to show cause why the MSO should not be held in contempt for violating the Status Quo Order.[127] The MSO filed a response to the motion on October 5.[128] On October 9, DiDonato filed a reply in further support of his motion.[129] Argument was presented alongside the summary judgment motions on October 11.

DiDonato has met his burden of showing contempt. The MSO had notice of and was bound by the Status Quo Order, which was negotiated by its counsel. Closing a branch of the eye care practice is not ordinary course. The Status Quo

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[123] DiDonato Aff. (Dkt. 49) Ex. T.

[124] *Id.*

[125] Burton Aff. (Dkt. 51) Ex. 8.

[126] *Id.* Exs. 7, 9.

[127] Pl.'s Mot. for Order to Show Cause (Dkt. 49).

[128] Def.'s Response to Pl.'s Mot. for Order to Show Cause for Violation of Status Quo Order (Dkt. 61) ("Def.'s Response").

[129] Pl.'s Reply in Further Supp. of His Motion for Order to Show Cause for Violation of Status Quo Order (Dkt. 62).

Order contained an express carve out for renovations of another DeVenuto Medical Practice office.[130] No carve outs concerning the Fairless Hills location were included.

The MSO responds that it is not in contempt because the decision to close the Fairless Hills office predated this action.[131] In support, it cites to a June internal presentation recommending the closure of the Fairless Hills office and an early July email with proposed next steps.[132] These documents show that the MSO merely *planned* to close the branch. No irreversible steps towards closure had been taken when the Status Quo Order was entered. If the MSO felt that closure was necessary during the pendency of this action, it could have expressly excluded the closure from the Status Quo Order, sought a waiver from DiDonato, or moved for relief from the Status Quo Order. It did none of these things.

The MSO also contends that laches bars DiDonato's motion because he was aware of the closure plan since at least August 2. On that date, he received a document titled "DeVenuto FH Transition Plan," which contained action items to effectuate the closure.[133] Counsel for the parties also allegedly discussed the closure

[130] Status Quo Order ¶ 4(h).

[131] Def.'s Response ¶ 26.

[132] *Id.*; *see id.* Exs. 1-2.

[133] Def.'s Response ¶ 46; *id.* Ex. 3; *see also* H'rg Tr. 95.

while negotiating exceptions to the Status Quo Order.[134] Awareness of an intention to close the Fairless Hills office does not, however, indicate that DiDonato knew the closure would proceed while the Status Quo Order was in place. There is no evidence that DiDonato learned about concrete actions to close the Fairless Hills office until he received the September 3 email.

The closure has now occurred. DiDonato does not seek to unwind it. Instead, he requests payment of the reasonable attorneys' fees and expenses he incurred in pursuing the contempt motion. This is an appropriate sanction. "An award of counsel fees is [] a proper consideration for civil contempt."[135] It serves the remedial purpose of preventing DiDonato from "bear[ing] the cost[] of bringing [the MSO's] contumacious behavior to light."[136]

III. CONCLUSION

DiDonato's motion for summary judgment is granted; the MSO's cross-motion for summary judgment is denied. The MSO LLC Agreement is valid and operative, excluding the Purported Amendment. DiDonato remains the MSO's Manager.

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[134] Def.'s Response ¶ 47; *id.* Ex. 8; Aiello Aff. (Dkt. 61) ¶¶ 5-6.

[135] *Isr. Disc. Bank of N.Y. v. First State Depository Co., LLC*, 2013 WL 2326875, at *28 (Del. Ch. May 29, 2013) (citation omitted).

[136] *Gener8*, 2023 WL 6381635, at *17.

The MSO is in contempt of the Status Quo Order. As a remedy, I award DiDonato his reasonable attorneys' fees and expenses incurred in bringing the contempt motion. The parties shall confer on a schedule for submissions to resolve the fees and expenses DiDonato may recover as a sanction for the MSO's contempt.