SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

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Re: Grosvenor Orlando Associates v. HCP Grosvenor Orlando LLC, Civil Action No. 7246-VCG

Dear Counsel:

This Letter Opinion addresses the parties' Cross-Motions for Judgment on the Pleadings. Grosvenor Orlando Associates ("GOA") and RFP VI Hotel Grosvenor Investor, LLC (the "Operating Member") created HCP Grosvenor Orlando, LLC (the "Company") by entering into the Limited Liability Company Agreement of HCP Grosvenor Orlando LLC (the "Operating Agreement").[1] The Company is the sole member of Defendant HCP Grosvenor Orlando Owner LLC ("Owner").[2] Grosvenor Properties Ltd. ("Properties") is the general partner of GOA.[3] Section 6.5.3(b) of the Operating Agreement states:

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[1] Am. Compl. ¶ 3.
[2] *Id*.
[3] Am. Compl. ¶ 1.

> The Operating Member hereby Approves the payment to Grosvenor Properties, Ltd. by the Company or Owner of an annual asset management fee in an amount equal to one percent (1.0%) of Gross Receipts, which asset management fee shall be payable monthly in arrears in the same manner that payments are made to TPG Hospitality Management, Inc. under the Hotel Management Agreement.[4]

From this language, the Plaintiffs argue that the Company (or Owner) is obligated to pay such an asset management fee to Plaintiff Properties. The only other section of the Operating Agreement that references the asset management fee is section 6.3(o). Under section 6.3(o), the Operating Member, without the consent of GOA, may "enter into or amend, modify or terminate any property management, asset management, brokerage franchise or other similar agreement . . . ."[5] However, specifically exempt from that approval is "the payment of *the* asset management fee to Grosvenor Properties Ltd."[6] The Plaintiffs argue that section 6.5.3(b) of the Operating Agreement unambiguously requires the Defendants to pay the asset management fee at issue and that section 6.3(o) prevents the Operating Member from avoiding this obligation.[7] The Plaintiffs further assert that the materials

[4] Pl.'s Op. Br. Ex. A § 6.5.3(b).
[5] *Id.* at § 6.3(o).
[6] *Id.* (providing that the Operating Member, without first obtaining consent from GOA, may "[e]nter into or amend, modify or terminate any property management, asset management, brokerage franchise or other similar agreement, except as contemplated by the Operating Plan and Budget and this Agreement with respect to the payment of the asset management fee to Grosvenor Properties Ltd") (emphasis added).
[7] Pl.'s Op. Br. at 22.

incorporated into the Amended Complaint establish that Defendants understood that section 6.5.3(b) required them to pay the asset management fee.[8]

The Defendants argue that section 6.5.3(b) imposes no such obligation to pay the 1% asset management fee.[9] The Defendants contend that the only reasonable interpretation of section 6.5.3(b) is that it is a standard related-party-transaction provision in which the parties to the Operating Agreement merely chose to provide a prospective waiver of a potential conflict of interest, should an asset management fee ultimately be agreed to.[10]

On January 11, 2013, the Plaintiffs, GOA and Properties, filed the Amended Verified Complaint naming the Company and the Operating Member, and Owner as Defendants.[11] The parties cross-moved for judgment on the pleadings, and on May 23, 2013, I heard oral argument. Because I find that the contract is ambiguous, I deny both parties' Motions.

This Court will grant a motion for judgment on the pleadings pursuant to Court of Chancery Rule 12(c) if there are no material issues of fact and the movant

[8] Am. Compl. ¶ 12. (These materials included: a Term Sheet that provided that GOA "shall be paid an additional Asset Management Fee of 1%," *see* Am. Compl. ¶13; defendants' payment to plaintiffs of the asset management fee, including twenty-one separate monthly payments, s*ee* Am. Compl. ¶ 17; and communications with in-house counsel of HCP Owner, *see* Am. Compl. ¶ 20.
[9] Defs.' Op. Br. at 1.
[10] *Id.*
[11] Am. Compl. at 1.

is entitled to judgment as a matter of law.[12] Similar to a Motion to Dismiss under Rule 12(b)(6), when considering a Rule 12(c) motion, the Court must assume the truthfulness of all well-pled allegations in the complaint and draw all reasonable inferences in favor of the plaintiff.[13]

Under Delaware rules of contract interpretation, contracts should be examined as a whole to give effect to the intentions of the parties.[14] Courts will consider extrinsic evidence to interpret the agreement only to the extent that the contract is ambiguous.[15] Where the language of the contract is clear and unambiguous, courts interpret the contract in accordance with the ordinary and usual meaning of the language.[16] A contract is not rendered ambiguous merely because the parties disagree as to the proper interpretation of the contract.[17] "Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more different meanings."[18]

The Plaintiffs contend that the language in section 6.5.3(b) of the Operating Agreement, in which the Operating Member "Approves" of the payment of the asset management fee, obligates either the Company or Owner to pay the asset

[12] Ct. Ch. R. 12(c); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499 (Del. Ch. 2000).
[13] *McMillan*, 768 A.2d at 500.
[14] *Nw. Nat. Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996).
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

management fee to the Plaintiffs. On its face, the provision imposes no obligation on any party. It merely "Approves" a payment by third parties without imposing a duty on these parties. The Operating Agreement, however, makes clear that the Operating Member controls both the Company and the Owner. Under the Plaintiffs' interpretation, that control, in connection with other provisions, creates an unambiguous duty to pay the asset management fee. The Defendants contend that the section merely provides a prospective waiver of a potential conflict-of-interest because the parties' were contemplating entering into a separate agreement on management fees in the future. Defendants note that section 6.5.3(b), in the context of the Agreement read as a whole, is one of a series of waivers of conflicts that must be read in context with one another. Though the mere fact that the parties dispute what the Operating Agreement means does not create an ambiguity, upon further review, I find that section 6.5.3(b) is ambiguous. Therefore, there remains an issue of material fact, the intended meaning of section 6.5.3(b), and neither party is entitled to judgment as a matter of law. As a result, the Motions for Judgment on the Pleadings are denied. As I indicated at oral argument, either party may supplement the record through discovery to provide clarification of the parties' intent. Furthermore, the Defendants are free to supplement the record

regarding their affirmative defenses.[19] An appropriate Order accompanies this Letter Opinion.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[19] Given my decision, the Plaintiffs' request for attorney's fees and indemnification is premature, since rights to attorney's fees under the Operating Agreement are conditioned on the Plaintiffs prevailing on their claims. *See* Pl.'s Op. Br. Ex. A § 11.7.