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Re: *Graven v. Lucero*
C.A. No. 8919-VCN
Date Submitted: November 25, 2013

Dear Counsel:

In this summary proceeding to determine the rightful controller of a Delaware limited liability company, Plaintiff has moved for summary judgment based upon his argument that the Defendant made certain factual admissions which entitle Plaintiff to that relief. Plaintiff contends that the Defendant has conclusively indicated that a certain version of the company's operating agreement, under which Plaintiff would control the company, is the execution copy. In addition, Plaintiff argues that Defendant admitted that such agreement has not otherwise been amended. Plaintiff also accuses the Defendant of

improperly seeking to create an issue of fact by denying his initial admissions in later affidavits. For the reasons that follow, Plaintiff's motion for summary judgment is denied.

I. BACKGROUND

Plaintiff Douglas Graven ("Graven") and Defendant Frank L. Lucero, Jr. ("Lucero") are two founding principals of Launchpad Healthcare Solutions, LLC, a Delaware limited liability company (the "Company"), who disagree about which one of them is the proper managing principal of the entity. Their dispute does not arise from conflicting interpretations of the Company's operating agreement, but rather arises from a disagreement as to which members of the Company are founding principals and which are not. The operating agreement permits two-thirds of the founding principals to remove and replace the managing principal, who is responsible for managing the business and affairs of the Company.[1] Lucero currently serves as the managing principal.

The Company's records have not been perfectly maintained. The parties dispute which version of the operating agreement was fully executed and is

[1] Pl.'s Verified Compl., Ex. A (the "December Operating Agreement") § 5.1 ("The Managing Principal shall be elected and or replaced by a 2/3rds majority vote of the Company's Founding Principals.").

therefore operative. Graven argues that in early December 2011, Lucero sent the operating agreement to twenty individuals and requested that they execute the operating agreement by signing it with electronic signatures (the "December Email"). On December 7, 2011, Graven and Lucero both executed the attached operating agreement and exchanged it by email (the "December Operating Agreement"). Graven argues that this version of the agreement lists John Baj ("Baj") as a founding principal, along with Lucero, Graven, Frank Gray ("Gray"), and Jeff Field ("Field").[2] Graven also argues that Lucero has admitted there has been no "unanimous written agreement" to amend the operating agreement and thus the terms of the December Operating Agreement remain in effect.[3]

Graven asserts that Gray and Field resigned from their roles as founding principals before September 5, 2013. Thus, when Graven and Baj executed written consents on September 6 which purported to replace Lucero as managing principal with Graven, two of the three founding principals complied with Section 5.1 of the operating agreement to deliver operational control of the Company to Graven.

[2] December Operating Agreement § 2.1.
[3] Pl.'s Mot. for Summ. J. at 5 ("OB") (citing Def.'s Answer to Verified Compl. ¶ 11).

Lucero argues that there were several drafts of the operating agreement and the version signed by only Graven and Lucero is not the final version. Furthermore, there is no evidence that the December Email was received by Baj or that Baj executed the December Operating Agreement.[4] Lucero also asserts that Baj declined to become a founding principal sometime between December 2011 and February 2012[5] and that the only version of the operating agreement that Baj signed was executed in his capacity, not as a founding principal, but as a "Principal/Team Builder."[6] Lucero claims it took months to obtain all of the signatures to execute a version of the operating agreement fully, which was the version in existence when the Company's certificate of formation was filed with the Delaware Secretary of State on April 23, 2012. That version is signed by Baj only as a principal/team builder. Lucero argues that because Baj was not designated as a founder, he had no authority to sign the written consent as such. Thus, only one founder, Graven, voted for Lucero's removal, which did not fulfill the two-thirds vote requirement.

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[4] Def.'s Answering Br. in Opp'n. to Pl.'s Mot. for Summ. J. at 5-6 ("AB") (citing Graven Dep. 54).
[5] *Id.* at 6 (citing Lucero Aff. ¶ 8).
[6] Lucero Aff., Ex. 2. This exhibit reflects an operating agreement dated January 1, 2012, and includes Baj's electronic signature on Exhibit 1 to the agreement.

Lucero also disputes that Field resigned in February 2013. He argues that Graven produced a backdated resignation form dated February 15, 2013, which was executed on September 8, 2013.[7] Thus, Lucero contends, a factual dispute over the timing of the resignation is present. This is so despite the fact that Field was removed from the Company's website on March 21, 2013, because Lucero had requested that Field remain available to serve as a "below the radar" founding principal.[8] Field's status as a "below the radar" founder, Lucero argues, also creates some debate as to whether Field validly resigned as a co-founder. If Field did not validly resign and instead remained with the Company as a founding principal, then even if Baj was a founding principal only two of four founders would have voted. Such a vote would have also failed to satisfy the two-thirds vote requirement of Section 5.1.

[7] Graven Dep. Ex. 2.

[8] AB at 14 (citing Graven Dep., Ex. 13). The question of what is a "below the radar" founding principal presents something of a metaphysical conundrum which Lucero did not bother to explain. The notion that a director (or his equivalent) can serve "below the radar" would seem to be at odds with the attributes required of those who manage an entity's business and affairs and generally owe fiduciary duties to investors. In any event, Field's status is best resolved through a fact-finding effort.

II. ANALYSIS

A motion for summary judgment may be granted pursuant to Court of Chancery Rule 56(c) if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[9] The moving party bears the initial burden and the Court must view the evidence in the light most favorable to the nonmoving party. A fact is material if it "might affect the outcome of the suit under the governing law."[10] A genuine issue of material fact is present "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[11]

Graven's argument relies on a conclusion that the December Operating Agreement is the sole, fully-executed operating agreement. He states that Lucero admitted as much in his interrogatory response indicating that Baj was among those individuals who "executed the Operating Agreement in the months following the initial [December Email]."[12] Graven then argues that because Lucero admitted

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[9] Ct. Ch. R. 56(c); *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009).
[10] *Deloitte LLP*, 2009 WL 5200657, at *3 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[11] *Id.*
[12] OB at 10 (citing Def.'s Resps. and Objections to Pl.'s First Set of Interrogs. Directed to Def. ("Def.'s Interrog. Resps.") ¶ 4).

that he was not aware of any amendment of the Company's operating agreement according to its terms, the December Operating Agreement remains in force and contains the proper list of founding principals.

Lucero, however, has repeatedly asserted in his verified answer and interrogatory responses a contradictory position that Baj was not a founding principal. Lucero specifically denied that "Baj is a Founding Principal of the Company,"[13] answered that the final version of the operating agreement differed from the December Operating Agreement because the full roster of principals was not completed at that time,[14] and explained that Baj told Lucero that Baj "didn't have the time to devote to such responsibilities" and thus declined to become a founding principal.[15] Lucero has not been shy about his denials and instead has asserted a conflicting set of facts from those Graven has sponsored.

Furthermore, Lucero's interrogatory response, that "Baj [and others]. . . executed the Operating Agreement in the months following the initial e-mail communication as shown in Exhibit A, and their eSignatures appear on the final

[13] Def.'s Answer to Verified Compl. ¶ 12.
[14] Def.'s Interrog. Resps. ¶ 5.
[15] *Id.* ¶ 10.

version named Launchpad HcS Master operating Agreement v7-fl.pdf,"[16] is not the judicial admission Graven makes it out to be.[17] The meaning of the sentence is ambiguous and could not be the basis for resolving a motion for summary judgment. One possible meaning for the phrase, divorced from context, could be the version Graven offers: that Baj and the other parties to whom the email was addressed all executed the attached December Operating Agreement.[18] Such a result would make Baj a co-founder of the Company. However, other interpretations of the response are also available.

First, though the sentence states that electronic signatures appear on a final version of the operating agreement, it does not clearly state that the version attached is the final version. Indeed, the response states that in the months following the email, the operating agreement was fully executed. There was plenty

[16] *Id.* ¶ 4.

[17] Graven also argues that Lucero's statement that "all signatures for the Operating Agreement were captured prior to our April Filing in Delaware" further supports Graven's sham affidavit theory. Pl.'s Reply Br. in Further Support of Mot. for Summ. J. at 7 n.3. Such a statement does not address the central problems Graven faces: that Lucero may be discussing different versions of the operating agreement and that the time period is not specified. Such a statement can be entirely consistent with Graven's theory that as various updates to the list of principals were completed, further updates were made to the operating agreement culminating in the capture of all signatures prior to the lodging of the certificate of formation with the Delaware Secretary of State in April. Thus, Lucero has made no admission in this context for purposes of summary judgment or for purposes of invoking the sham affidavit doctrine. *See infra* note 21.

[18] Graven has not offered such an executed copy to the Court bearing all parties' signatures.

of time in which further alterations could have been made to the agreement as a result of feedback from other parties. Second, the final clause in the response states that a final version contained the relevant signatures. Because the interrogatory response discusses a final version, one possible inference that may be drawn is that the final version differs from the attached version in some way. Otherwise, the author of the response could have omitted the qualifier and stated that the electronic signatures appeared on *that* version of the operating agreement attached to the email.[19]

Third, the interrogatory response which immediately follows Lucero's purported admission is an explanation by him that further updates were made to the December Operating Agreement in order to create a final roster of principals.[20] Thus, even if the prior interrogatory response was unclear, Lucero's next response asserts his position that several versions of the operating agreement existed, that

[19] Additionally, the version attached to the email is titled "Launchpad HcS Operating Agreement v7-fl.docx," while the version discussed in the interrogatory response is titled "Launchpad HcS Master Operating Agreement v7-fl.pdf." One title is designated as the "master" agreement while the other lacks such a designation. Where the author has edited the title, one cannot exclude the possibility that other edits may have been made to the document's contents as well. Thus the Court cannot conclude that the two documents are the same based solely on Lucero's interrogatory response, especially when the standard on summary judgment requires considering, to the extent reasonable, all possible disputed facts in the light most favorable to the nonmoving party.

[20] Def.'s Interrog. Resps. ¶ 5.

further edits and revisions were necessary, and that the December Operating Agreement was not the final, executed agreement.

Lucero's alternate factual account, alongside the fact that he has not unambiguously admitted the finality of the December Operating Agreement, is material because the outcome of the control dispute would be altered if Lucero could prove his version. Thus, the Court cannot avoid fact-finding to determine which operating agreement was executed and who was properly designated as a founding principal.

Graven also seeks to negate Lucero's later factual recitations in the affidavit attached to his answering brief through the sham affidavit doctrine.[21] First, the Court notes that it has relied upon Lucero's statements in his answer and interrogatory responses in denying Graven's motion for summary judgment.[22]

[21] The Supreme Court, during its most thorough evaluation of the sham affidavit doctrine, declined to adopt or reject the doctrine, or to define its contours. The Court did, however, describe the doctrine as a situation in which "a witness at a deposition has previously responded to unambiguous questions with clear answers that negate the existence of a genuine issue of material fact," and as a result of such response, the witness cannot "thereafter create a fact issue by submitting an affidavit which contradicts the earlier deposition testimony, without an adequate explanation." *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003). The Court of Chancery has also acknowledged the doctrine. *See, e.g.*, *Grunstein v. Silva*, 2011 WL 378782, at *10, *12 (Del. Ch. Jan. 31, 2011). As set forth below, the Court need not endorse or define the scope of the doctrine.

[22] *See supra* notes 13-16, 20 & accompanying text.

Reliance upon Lucero's later-sworn affidavit is unnecessary to determine that a material dispute of fact is present.

Second, Graven relies upon the same purported admission from Lucero's interrogatory response discussed above, that the December Operating Agreement was the final executed agreement.[23] For the same reasons discussed there, the interrogatory response cannot be considered an admission capable of invoking the sham affidavit doctrine. Thus, the Court need not address the doctrine's contours and may deny Graven's motion.

Finally, the Court notes that the factual issues surrounding Field's resignation and the amendments to the Company's operating agreement need not be resolved at this time. Because Baj's status as a founding principal alone presents a genuine issue of material fact requiring further factual development, the Court declines to rule on the other issues because none of them would be dispositive.

[23] *See supra* text accompanying notes 16-18.

III. CONCLUSION

Graven's motion for summary judgment is denied because Lucero, through his factual responses to the litigation, has created a genuine issue of material fact as to which version of the operating agreement is the final executed version. His responses, to which Graven directs the Court, did not clearly admit facts that Lucero later sought to qualify and thus the sham affidavit doctrine is not properly implicated.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K