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Delaware LLC and Partnership Law Update

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Campus Eye Management Holdings v. DiDonato: Delaware Court of Chancery Upholds Amendment of LLC Agreement via Merger

In *Campus Eye Management Holdings, LLC v. E. Bruce DiDonato, OD*, C.A. 2024-0121-LWW (Del. Ch. August 30, 2024), the Delaware Court of Chancery held that an amendment to a limited liability company agreement (an "LLC Agreement") that was adopted by merger was valid and enforceable, notwithstanding that a different vote that was not attainable under the circumstances would have been required to adopt the amendment in accordance with the amendment provision of the LLC Agreement. The Court's ruling highlights the importance to minority members of expressly providing that an LLC Agreement's amendment provision applies to amendments by merger.

In December 2021, Dr. E. Bruce DiDonato, OD ("DiDonato") sold approximately 65% of Campus Eye Management Holdings, LLC ("MSO Parent") to The Beekman Group ("Beekman") – a private equity firm. DiDonato and Beekman negotiated an LLC Agreement for MSO Parent as part of the sale, which LLC Agreement provided DiDonato with the right to appoint only a minority of the managers of MSO Parent. At the time of the sale, MSO Parent was the sole member of a management services organization called Campus Eye Management, LLC ("MSO"), and DiDonato was the named "initial Manager" of MSO in its LLC Agreement (the "MSO LLC Agreement").

A few months after the closing of the sale transaction, the managers of MSO Parent appointed by Beekman (the "Beekman Managers") purported to cause MSO Parent to unilaterally amend the MSO LLC Agreement to remove DiDonato as the manager of MSO. In an earlier decision of the Court (*E. Bruce DiDonato, OD v. Campus Eye Management, LLC*, C.A. No. 2023-0671-LWW (Del. Ch. Jan. 31, 2024)) (the "Prior Decision"), the Court analyzed the amendment provision of the MSO LLC Agreement. The amendment provision stated: "The [MSO LLC] Agreement may be amended, modified, waived or supplemented by the Manager with the written consent of all Members." The Court determined that the MSO LLC Agreement could not be amended in accordance with its amendment provision without DiDonato's involvement, as manager, and invalidated an amendment unilaterally adopted by MSO Parent, as member, purporting to remove DiDonato as manager.

On the day the Court issued the Prior Decision, the Beekman Managers caused MSO Parent to form a new Delaware limited liability company that was wholly owned by MSO Parent ("Newco") and caused Newco to merge with MSO, with MSO surviving the merger (the "Merger"). As part of the Merger, the MSO LLC Agreement was amended to provide that MSO was managed by its sole member, MSO Parent (the "Merger Amendment"), which effectively removed DiDonato as manager of MSO without his consent to such amendment. In so doing, MSO Parent utilized

Section 18-209(f) of the Delaware Limited Liability Company Act (the "LLC Act"). Section 18-209(f) states:

> An agreement of merger or consolidation or a plan of merger approved in accordance with subsection (b) of this section may: (1) Effect any amendment to the limited liability company agreement; or (2) Effect the adoption of a new limited liability company agreement, in either case, for a limited liability company if it is the surviving or resulting limited liability company in the merger or consolidation. Any amendment to a limited liability company agreement or adoption of a new limited liability company agreement made pursuant to the foregoing sentence shall be effective at the effective time or date of the merger or consolidation and shall be effective notwithstanding any provision of the limited liability company agreement relating to amendment or adoption of a new limited liability company agreement, other than a provision that by its terms applies to an amendment to the limited liability company agreement or the adoption of a new limited liability company agreement, in either case, in connection with a merger or consolidation….

In short, Section 18-209(f) provides that a merger agreement approved in accordance with the LLC Act may amend an LLC Agreement of a surviving company notwithstanding the amendment provision of the surviving company's LLC Agreement, except for a provision that by its terms applies to an amendment in connection with a merger.

DiDonato raised a series of arguments claiming that the Merger Amendment was invalid. The Court disposed of all of the arguments raised, concluding, among other things, that (i) neither the LLC Act nor the LLC Agreement of MSO Parent required advance notice to all board members of an action by written consent of the board of MSO Parent;[1] (ii) Section 18-209(f) of the LLC Act does not require that a merger have a business purpose separate from effecting an amendment of the LLC Agreement; (iii) the implied covenant of good faith and fair dealing is not used to fill a "gap" in a contract when a default term of the LLC Act applies to the specific issue; and (iv) the Merger did not implicate a breach of fiduciary duties because DiDonato was not owed any fiduciary duty to remain a manager of MSO.

The Court's opinion in *Campus Eye Management Holdings* is a reminder that the default provisions of the LLC Act apply in the absence of a term of an LLC Agreement and of the importance of understanding the default rules when drafting LLC Agreements. In this case, the Court's ruling highlights the default provisions of the LLC Act permitting amendments to an LLC Agreement by merger, which may require a different consent than the consent that would otherwise be required to amend the LLC Agreement in accordance with the amendment provision of the LLC Agreement.

[1] Under different facts, the Court has determined that equitable principles required advance notice to a board member. *See VGS, Inc. v. Castiel*, 2000 WL 1277372 (Del. Ch. August 31, 2000).