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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Date Decided: May 29, 2012

Michael A. Weidinger
Elizabeth Wilburn Joyce
Pinckney, Harris & Weidinger, LLC
1220 North Market Street, Suite 950
Wilmington, Delaware 19801

Tasha Marie Stevens
Fuqua, Yori and Willard, P.A.
26 The Circle, P.O. Box 250
Georgetown, Delaware 19947

Re: *Paul v. Delaware Coastal Anesthesia, LLC, et al.*
Civil Action No. 7084-VCG

Dear Counsel:

The matter before me concerns whether the language of an LLC agreement prescribed the sole manner by which the company's members could vote their shares, preempting the statutory default, which favors action by written consent, as found in the Delaware Limited Liability Company Act (the "Act").

I. FACTS

Dr. Leena Paul, the Plaintiff, was a shareholder and member of Delaware Coastal Anesthesia, LLC (the "LLC") from at least June 5, 2007 to August 17, 2011. The LLC members comprised the Plaintiff and the three individual Defendants. Dr. Paul and the individual Defendants each owned 25% of the LLC.

Exhibit E, Section 8(a), of the LLC's operating agreement (the "Operating Agreement") states that a member of the LLC can be terminated without cause "at

any time upon ninety (90) days written notice by . . . the Company acting by vote of seventy-five percent (75%) of the holders of the Company's Shares."[1] On April 25, 2011, the three individual Defendants, representing 75% of the shares, voted or agreed by written consent to terminate Dr. Paul's membership in the LLC. The individual Defendants then sent Dr. Paul written notice of her termination.

II. STANDARD OF REVIEW

The issue is whether the individual Defendants' vote was effective to terminate Dr. Paul's membership. Dr. Paul contends that the Operating Agreement required a member meeting for any vote to be effective; the Defendants argue that they could act by written consent under the Act. Accordingly, the question before me is a matter of contract and statutory law.[2] As this issue is purely one of law, a decision on a motion to dismiss is, therefore, appropriate.[3]

The pleading standard at the motion to dismiss stage is a minimal one.[4] It requires this Court to deny the motion if there is any reasonably conceivable set of circumstances under which the plaintiff would be entitled to recover.[5] In making my determination, I draw all reasonable inferences in favor of the Plaintiff, and

[1] Compl. ¶ 11. The Operating Agreement then directs the remaining members to purchase the interest of the terminated member.
[2] *See Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800, 813 n.16 (Del. Ch. 2011).
[3] *See id.* at 805.
[4] *See Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Hldgs. LLC*, 27 A.3d 531, 536–37 (Del. 2011).
[5] *Id.* at 536.

accept all well pled factual allegations as true.[6] I also consider documents "integral to [the P]laintiff's claim and incorporated into the complaint."[7]

III. ANALYSIS

Dr. Paul asserts that the individual Defendants breached the Operating Agreement because that agreement does not allow the LLC members to vote by written consent. She argues that the Operating Agreement only allows members to vote their shares at a member meeting. Dr. Paul specifically points to Section 7.8, which addresses "Notice of Meetings", and Section 7.12, which addresses "Voting of Membership Shares".

Section 7.8 provides that notice of meetings must be given to each member "not less than seven (7) days before the date of the meeting" and that the notice must state the "place, date, and hour of the meeting, and in the case of a special meeting, the purpose or purposes for which the meeting is called."[8] Section 7.12 states:

> Members entitled to vote shall have voting power in proportion to their Membership Shares. At a meeting of Members at which a quorum is present, the affirmative vote of Members holding a majority of the Membership Shares and entitled to vote on the matter shall be the act of the Members, unless a greater numbers is required by the Act.[9]

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[6] *Id.*
[7] *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) (quoting *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996)).
[8] Compl. ¶ 18; *id.* Ex. A.
[9] *Id.* ¶ 17; *id.* Ex. A.

Dr. Paul contends that the individual Defendants' vote is void because no membership meeting was held and because proper notice of the action was not given to the members.[10]

The Defendants assert that the individual Defendants' action by written consent is effective under § 18-302 of the Act, which provides:

> Unless otherwise provided in a limited liability company agreement, on any matter that is to be voted on, consented to or approved by members, the members may take such action without a meeting, without prior notice and without a vote if consented to, in writing or by electronic transmission, by members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members entitled to vote thereon were present and voted.

If § 18-302 controls, the "vote" by which members (representing 75% of the interest in the LLC) could terminate a member could be taken by written consent, and the termination of Dr. Paul was therefore effective. The only question before

[10] Dr. Paul also argues that a stockholder has a fundamental right to vote her shares, making her exclusion from the vote problematic, and that this Court addressed a similar issue in *Nevins v. Bryan*, 885 A.2d 233 (Del. Ch. 2005). In *Nevins*, the board of directors of a non-profit corporation voted to remove the plaintiff from his position as a director. *See id.* at 237. The plaintiff challenged his removal on the ground that only members, not directors, are permitted to remove a director, and that he was improperly prevented from voting. *Id*. at 251. The defendants noted that the other members-directors of the corporation unanimously voted to remove the plaintiff as a director; therefore, "even if [the plaintiff] had been permitted to vote in his favor, the result of the votes would have remained unchanged." *Id*. at 252. While "it [was] undisputed that all members and directors of [the corporation] were present," the vice chancellor expressed caution because of the "slippery slope concerns" implied by that kind of "'no harm, no foul' type argument." *Id*. at 251-52. *Nevins*, however, concerned rights under the Delaware General Corporation Law which are not present here. Moreover, such a public policy argument is foreclosed in this case by the fact that our General Assembly has expressed that members of LLCs may take action by written consent rather than voting at a meeting, unless otherwise provided by an LLC agreement. *See* 6 *Del. C.* § 18-302.

me is whether the Operating Agreement "otherwise provided" for the manner in which votes must be taken, thus preempting the statute. In making my determination of whether the Operating Agreement controls how the members may vote, or whether the statutory default applies, I note that our law provides that LLCs are contractual in nature[11] and that an LLC's members have wide latitude to craft the members' rights and obligations.[12] The Act, on the other hand, exists as a "gap filler," supplying terms not fully explicated in an LLC agreement.[13] As this Court noted in *Achaian, Inc. v. Leemon Family LLC*, "the default rule [of the Act] may be displaced by the provisions of an LLC agreement itself[, but] in the event of a conflict, the LLC agreement prevails."[14]

Citing sections 7.8 and 7.12 of the Operating Agreement, which provide the procedure by which meetings of the members may be held, Dr. Paul argues that the Operating Agreement prohibits action by written consent. But this argument begs the question of whether votes must be taken *only* at such meetings, preempting the statutory default. The Defendants argue that the Operating Agreement does not prevent the individual Defendants from acting by written consent, and in fact contemplates action by that method. The Defendants point to Section 7.9 of the

[11] *Achaian*, 25 A.3d at 813 n.10.
[12] *Elf Atochem North Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) ("[I]t is the policy of [the Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." (quoting 6 *Del. C.* § 18-1101(b))).
[13] *Achaian*, 25 A.3d at 802 ("[The Act is] an enabling statute whose primary function is to fill gaps, if any, in a limited liability company agreement.").
[14] *Id*. at 805.

Operating Agreement, which addresses "Fixing of Record Date," and Section 7.11, which addresses "Proxies," both of which state that members can "express consent to Company action in writing without a meeting." Beyond requiring a vote of 75% of the membership interest, the provision under which Dr. Paul's interest was purportedly terminated, Exhibit E, Section 8(a), of the Operating Agreement, is by contrast silent as to the method by which voting members may terminate a member. Reading the Operating Agreement as a whole, I do not find that it dictates the method by which votes terminating membership must be taken. Certainly nothing in the Operating Agreement specifically disallows votes by written consent.

In other words, I find that the Operating Agreement does not "otherwise provide," so as to preempt, actions by written consent to terminate a member.[15] Accordingly, with respect to a vote to terminate, as "on any matter that is to be voted on . . . the members may take such action without a meeting, without prior notice and without a vote if consented to, in writing . . . by members having not less than the minimum number of votes that would be necessary" to take the action. Having found that the members could act by written consent, I therefore find that the vote by written consent of 75% of the members to terminate Dr. Paul as a member was valid under Exhibit E, Section 8(a), of the Operating Agreement.

[15] 6 *Del. C.* § 18-302.

There being no conceivable set of facts under which Dr. Paul could recover, the motion to dismiss is granted.

IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III