



COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

DONALD F. PARSONS, JR.  
VICE CHANCELLOR

New Castle County CourtHouse  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801-3734

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Decided: March 10, 2006

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Re: *In re Grupo Dos Chiles, LLC*,  
Civil Action No. 1447-N

Dear Counsel:

This is a dispute over the membership and future of Grupo Dos Chiles LLC (“Grupo”), a Delaware limited liability company. Petitioner seeks reformation of Grupo’s Certificate of Formation to the effect that he and Respondent Yolanda Martinez (“Martinez”) are the members of the LLC, a finding that Grupo was not properly returned to good standing with the State of Delaware and an order dissolving the limited liability company. This Court bifurcated the question of whether Grupo should be dissolved and held a trial on October 26, 2005 to determine the members of Grupo and whether Grupo was properly returned to good standing. At argument on January 30, 2006, the parties informed the Court that trial in an earlier filed, related case was to begin in Virginia on

March 3 to determine whether Grupo should be dissolved and requested a ruling before that date. In a teleconference on March 2, the Court communicated its ruling to the parties and indicated that a written opinion embodying the Court's post-trial findings of fact and conclusions of law would follow.

For the reasons stated in this letter opinion, the Court concludes that Petitioner and Martinez are the members of Grupo and that Grupo was not properly returned to good standing with the State of Delaware.

## I. BACKGROUND

Petitioner is Alfred "Trip" Shriver ("Shriver"). Respondents are Yolanda Martinez (a/k/a Yolanda Rivera) and her son Jamie Rivera ("Rivera").<sup>1</sup> Grupo is a Delaware LLC whose business is the operation of a restaurant called Dancing Peppers Cantina in Alexandria, Virginia.<sup>2</sup> Shriver and Martinez had a personal relationship and lived together at the time they formed Grupo.<sup>3</sup> By July 2003 at the latest, their relationship had ended.<sup>4</sup>

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<sup>1</sup> Pretrial Stip. ¶¶ 3, 5.

<sup>2</sup> *Id.* ¶ 5.

<sup>3</sup> Tr. at 46 (Shriver). Citations in this form are to the trial transcript ("Tr.") and indicate the page and, where it is not clear from the text, the witness testifying.

<sup>4</sup> *See* Tr. at 62 (Shriver) (testifying that he and Martinez's relationship ended in July 2002); Tr. at 170–71 (testifying that she and Shriver's relationship ended in July of 2002 or 2003).

A Certificate of Formation (“CoF”) for Grupo was filed with the Delaware Secretary of State in or about February 2000 naming Rivera as the “initial member.”<sup>5</sup> In or about March 2000, Shriver and Martinez executed an “LLC Agreement” for Grupo (the “Agreement”) naming themselves “managing partners.”<sup>6</sup> The Agreement is relatively short and provides in its entirety as follows:

Yolanda Martinez and Alfred W. Shriver, III manage Grupo Dos Chiles, DBA Dancing Peppers Cantina. Each has signature authority for all aspects of the business. In the event one managing partner is unable to perform their duties the other will assume responsibility in their absence.

Should either party decide to leave the business the sole remaining partner will be given total control of the business. However, any personnel [sic] guaranties will not be released without written approval from the appropriate entity and the remaining partner.

At the present time Jamie Rivera is registered agent for the LLC. However, he has no other interest in the company, including signing authority, or a managerial role.<sup>7</sup>

Both Shriver and Martinez signed the Agreement.<sup>8</sup>

Grupo lost its good standing with the State of Delaware on June 1, 2003 because of a failure to pay Delaware taxes.<sup>9</sup> In or about December 2004, Shriver filed an action

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<sup>5</sup> DX 2.

<sup>6</sup> DX 4.

<sup>7</sup> *Id.*

<sup>8</sup> Tr. at 49 (Shriver); Tr. at 161 (Martinez).

<sup>9</sup> PX 4 (“[T]he aforesaid limited liability company is no longer in existence and good standing under the laws of the State of Delaware having become canceled

in Virginia seeking an order to wind up Grupo's affairs and the appointment of a liquidating trustee (the "Virginia Action").<sup>10</sup> According to Shriver, the Delaware Secretary of State had cancelled Grupo's status as an LLC and thus Grupo had been dissolved by operation of law.<sup>11</sup> Shriver further argued that he and Martinez were at an impasse.<sup>12</sup> Shriver served Martinez with his Virginia petition in or about December 2004.<sup>13</sup>

In or about January 2005, Martinez, without consulting with Shriver, paid Grupo's back taxes and had Grupo restored to good standing with the State of Delaware.<sup>14</sup> Shriver then filed this action.

## II. ANALYSIS

There is a certain irony in this case. Limited liability companies are designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the

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the first day of June, A.D. 2003, by reason of its neglect, refusal, or failure to pay it's [sic] annual taxes.").

<sup>10</sup> PX 87 (Petition for Order [in the Virginia Action] to Wind Up Business Affairs and Appoint a Liquidating Trustee).

<sup>11</sup> *Id.* ¶¶ 2–3.

<sup>12</sup> *Id.* ¶¶ 49–51.

<sup>13</sup> Pretrial Stip. ¶ 9.

<sup>14</sup> DX 5. Martinez also restored Grupo's status as a foreign limited liability company in Virginia. *See* DX 6 (letter from the Virginia State Corporation Commission to Martinez providing, in pertinent part, "This is your receipt for \$125.00, to cover the fees for filing an application for reinstatement with this office.").

parties involved.<sup>15</sup> Substance is supposed to be paramount over form. Yet, Respondents advance a very technical argument that Rivera is the sole member of Grupo. They contend that because Grupo's CoF listed Rivera as an "initial member," the membership of Grupo cannot change without an amendment to the CoF to reflect the change. Petitioner argues for a more flexible approach.

With respect to the restoration of Grupo's good standing, the positions are reversed. Petitioner argues that the payment of Grupo's back taxes and the restoration of its good standing required a vote of Grupo's membership, not just a unilateral decision by one member, Martinez. Petitioner cites statutory provisions that purportedly support this argument. Respondents, in contrast, contend that the Delaware Secretary of State cancelled Grupo's status as an LLC because of a ministerial oversight by Martinez, *i.e.*, the failure to pay taxes. Thus, Respondents posit, Martinez herself had the authority to correct the lapse without input from Shriver.

Both sides to this dispute have put too much emphasis on formalities. The Court considers the underlying facts and course of dealing among the parties at least equally important. Thus, the Court will examine the arguments based on the formalities in light of the facts and evidence of the parties' intentions.

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<sup>15</sup> See *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999) (observing that "[t]he LLC is an attractive form of business entity because it combines corporate limited liability with partnership-type flexibility and tax advantages. The [Delaware Limited Liability Company] Act can be characterized as a 'flexible statute' because it generally permits members to engage in private ordering with substantial freedom of contract to govern their relationship . . . .") (internal citations omitted).

### A. The Members of Grupo

Shriver argues that this Court should reform or amend Grupo's CoF to "reflect the true intention and agreement of the parties," *i.e.*, that he and Martinez are the members of Grupo.<sup>16</sup> Respondents contend that the CoF was correct when filed and represents the intent of the parties to make Rivera the sole member of Grupo.<sup>17</sup> The Court need not and does not decide whether the CoF was correct when filed. Rather, the Court concludes that it is immaterial whether Rivera was, in fact, the "initial member" of Grupo when Martinez filed the CoF in February 2000.

It is immaterial because regardless of whether the parties intended Rivera to be the initial member or even *the* member of Grupo, the Agreement, entered into in March 2000, makes it clear that Shriver and Martinez are the members. The Agreement superceded the CoF. As the Delaware Supreme Court has noted: "The certificate of formation is a relatively brief and formal document that is the first statutory step in creating the LLC as a separate legal entity. The certificate does not contain a comprehensive agreement among the parties . . . ."<sup>18</sup> Rather, the Delaware Limited Liability Company Act ("DLLCA") "contemplates that the certificate of formation is to be complemented by the terms of the Agreement."<sup>19</sup> Here, the "comprehensive

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<sup>16</sup> Pet'r's Post-Trial Br. ("POB") at 4.

<sup>17</sup> Post-Trial Br. of Resp'ts [Martinez and Rivera] ("ROB") at 6-7.

<sup>18</sup> *Elf Atochem*, 727 A.2d at 288 (internal citation omitted).

<sup>19</sup> *Id.* (internal citation omitted).

agreement among the parties” is the Agreement, a document which accurately describes how Shriver and Martinez operated Grupo until their falling out.

Respondents point out that the Agreement refers to Shriver and Martinez as the “Managing Partners” of Grupo, not as the members. The Court does not consider the parties’ failure to use the term “member” significant because the “[DLLCA] is a statute designed to permit members maximum flexibility in entering into an agreement to govern their relationship.”<sup>20</sup>

Further, the documentary evidence makes clear that the parties intended Shriver and Martinez to be the members of Grupo. For example, Petitioner adduced a loan document between Grupo and Advanceme, Inc., a restaurant lender,<sup>21</sup> dated February 5, 2003.<sup>22</sup> This document identifies Shriver and Martinez as owners of Grupo and is signed by both of them.<sup>23</sup> Similarly, Petitioner’s Exhibit 29 is a loan document between Grupo and Advanceme dated November 11, 2003. Once again, Shriver is identified as the

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<sup>20</sup> *Id.* at 293 (internal citations omitted); *see also id.* at 291 (“[I]t is the policy of [the Act] to give the maximum effect to the principle of freedom of contract and the enforceability of limited liability company agreements.”) (internal citation omitted).

<sup>21</sup> Tr. at 77 (Shriver) (testifying that Advanceme, Inc. is “a company that will advance businesses money based on what they do with credit card sales” and agreeing that “it is fair to say they’re a restaurant lender”).

<sup>22</sup> PX 28.

<sup>23</sup> *Id.*; Tr. at 77–78 (Shriver); Tr. at 170 (Martinez).

owner of Grupo, while both Shriver and Martinez personally guaranteed the debt.<sup>24</sup> Shriver and Martinez each signed this document.<sup>25</sup>

About seventeen months later, in a letter to a Ms. Cheryl Swanson<sup>26</sup> dated March 22, 2005, Shriver and Martinez identified themselves as the members of Grupo.<sup>27</sup> Both Shriver and Martinez signed this letter.<sup>28</sup> There are several other documents in evidence in which Shriver, Martinez or both identify themselves as the members, managers or owners of Grupo.<sup>29</sup>

In contrast, Respondents identified only one document that indicates that Rivera is the “Managing Partner.”<sup>30</sup> Rivera acknowledged signing that document, but testified that the title “Managing Partner” under his signature was not in his handwriting.<sup>31</sup> Having

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<sup>24</sup> PX 29.

<sup>25</sup> Tr. at 79 (Shriver); Tr. at 172 (Martinez).

<sup>26</sup> Swanson had guaranteed a credit application for a prior venture of Shriver and Martinez. PX 77 (“Several years ago, Dancing Peppers, Inc., established an account with Sysco food distribution, and we acknowledge that you were kind enough to serve as a surety on this account.”).

<sup>27</sup> PX 77.

<sup>28</sup> Tr. at 89 (Shriver); Tr. at 154 (Martinez).

<sup>29</sup> *See, e.g.*, PX 11 (identifying Martinez as a member and manager); PX 39 (identifying Shriver as the managing member).

<sup>30</sup> DX 7 (Customer Account Application for Sysco of Baltimore dated January 25, 2001).

<sup>31</sup> Tr. at 211. The evidence does not conclusively show who wrote “managing partner” on the document. It is possible, for example, that Sysco’s representative inserted that term.



reviewed this document, along with all of the other documentary evidence and testimony,<sup>32</sup> the Court remains convinced from the clear weight of the evidence that the March 22, 2000 Agreement superceded the CoF filed on February 3, 2000. Thus, at all times relevant to this action, Shriver and Martinez were the members of Grupo.

Respondents half-heartedly argue that removing Rivera as the initial member of Grupo required an amendment to the CoF.<sup>33</sup> The Court concludes otherwise. Section 18-202(b)<sup>34</sup> of the DLLCA provides that a certificate of formation shall be amended if it becomes false in any material respect or was false when made. In addition, under Section 18-211(a),<sup>35</sup> any certificate authorized to be filed with the Secretary of State that

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<sup>32</sup> Shriver's testimony on the formation of Grupo was credible; Martinez's and Rivera's was not. Rivera's testimony, in particular, was marked by inconsistencies and defied common sense. For example, Rivera testified that if Grupo were sold, he would get to decide who would receive the proceeds, even though he put no money into the business and had limited involvement with it. Tr. at 225–28. The Court does not find that testimony credible.

<sup>33</sup> See ROB at 7 (“The procedure to amend the Certificate of Formation for a limited liability company is set forth in 6 *Del. C.* § 18-202.”).

<sup>34</sup> 6 *Del. C.* § 18-202(b) (“A manager or, if there is no manager, then any member who becomes aware that any statement in a certificate of formation was false when made, or that any matter described has changed making the certificate of formation false in any material respect, shall promptly amend the certificate of formation.”).

<sup>35</sup> 6 *Del. C.* § 18-211(a) (“Whenever any certificate authorized to be filed with the office of the Secretary of State under any provision of this chapter has been so filed and is an inaccurate record of the action therein referred to, or was defectively or erroneously executed, such certificate *may* be corrected by filing with the office of the Secretary of State a certificate of correction of such certificate.”) (emphasis added).

inaccurately recorded the action referred to or was defective or erroneously executed may be corrected. It appears to the Court, however, that none of these circumstances ever occurred in this case. Assuming the parties intended Rivera to be the initial member then the CoF was correct when filed and never became false.<sup>36</sup> When Shriver and Martinez executed the Agreement, they became the members of Grupo, but that would not make the CoF naming Rivera as the *initial* member false. Further, because the DLLCA does not require that the members of an LLC be set out in the certificate of formation,<sup>37</sup> there does not appear to be a continuing obligation to amend a certificate of formation anytime the members change.

#### **B. Martinez's Attempt to Return Grupo to Good Standing**

Petitioner argues that paying Grupo's back taxes and restoring its good standing required a vote of Grupo's membership.<sup>38</sup> Respondents contend that the acts were "ministerial" and thus did not require a vote of Grupo's membership.<sup>39</sup>

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<sup>36</sup> The parties disagree as to whether Shriver approved the listing of Rivera in the CoF as the initial member of Grupo. Martinez approved that listing and contends Shriver did, as well. Although Shriver denies approving the listing, the Court does not believe the mere existence of a dispute among the current members of Grupo as to the identity of the initial member, if any, requires an amendment of the CoF under section 18-202(b).

<sup>37</sup> *See 6 Del. C. § 18-201(a)* (providing that a limited liability company's certificate of formation shall set forth the name of the company, the address of the registered office and the name of the registered agent and any other matters the members determine to include).

<sup>38</sup> POB at 21.

<sup>39</sup> ROB at 7–8.

A limited liability company that fails to pay its taxes to the State of Delaware when due ceases to be in good standing.<sup>40</sup> Pursuant to Section 18-1107(i) of the DLLCA, however, a limited liability company may regain its good standing simply by paying the tax owed, along with any penalties.

On June 1, 2003, the Delaware Secretary of State canceled Grupo's status as a Delaware LLC because of a failure to pay the taxes Grupo owed the State under the DLLCA. In January 2005, Martinez, with full knowledge of Shriver's Virginia action to dissolve Grupo, paid the owed taxes and penalties and caused the Delaware Secretary of State to restore Grupo's good standing. Martinez knew that Shriver would not agree with her decision to restore Grupo's good standing; indeed, she knew Shriver wanted Grupo dissolved.

In deciding whether Martinez's restoration of Grupo's good standing is valid, the Court considers it unnecessary to reach the question of whether restoring the good standing of an LLC that has been cancelled by the Delaware Secretary of State for failure to pay taxes is a ministerial act that any member or manager may take or whether it requires a vote of the members. The facts of this case present a much narrower issue. That issue is whether once an LLC has lost its good standing for nonpayment of its taxes and the member attempting to restore good standing represents less than a majority of the voting power of the LLC and knows that there is a dispute as to whether the company should continue and where another co-equal member of the LLC has initiated litigation to

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<sup>40</sup> 6 *Del. C.* § 18-1107(h).

dissolve the company, the member with that knowledge can unilaterally restore the LLC to good standing. In other words, could Martinez unilaterally restore Grupo's good standing when she and Shriver were involved in litigation to dissolve Grupo?

Martinez's action strikes this Court as contrary to the intent of the Agreement and therefore impermissible without Shriver's consent. Thus, the Court voids the Delaware Secretary of State's January 4, 2005 restoration of Grupo's good standing and concludes, in the unique circumstances of this case, that Grupo's good standing was not properly restored.<sup>41</sup>

### III. CONCLUSION

For the reasons stated, the Court concludes that: (1) Shriver and Martinez are the members of Grupo Dos Chiles LLC and have been since at least the execution of the LLC Agreement in March 2000; and (2) Grupo was not properly restored to good standing and therefore is not presently a Delaware LLC in good standing.<sup>42</sup>

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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<sup>41</sup> *Cf. Laster v. Waggoner*, 1989 WL 126670, at \*13 (Del. Ch. Oct. 13, 1989) (accorded little weight to a certificate of correction filed after the initiation of litigation that purported to give a board of directors the very power the plaintiffs contended the board did not have), *aff'd sub nom.*, 581 A.2d 1127 (Del. 1990).

<sup>42</sup> No order accompanies this Letter Opinion because the Court ordered the effectuation of its conclusions when it delivered its oral ruling on March 3, 2006. Oral Ruling Tr. at 15.