

Keeping current: LLC governance

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Delaware decision puts premium on careful drafting

In *NAMA Holdings, LLC v. World Market Center Venture, LLC*, C.A. No. 2756-VCL, 2007 WL 2088851 (Del. Ch. July 24, 2007), the Delaware Court of Chancery reinforced the freedom of contract in Delaware's Limited Liability Company Act (the LLC Act) by holding that a contractual right of inspection of an LLC's books and records may be broader or narrower than that provided by the LLC Act. *NAMA* teaches three critical lessons to both drafters of LLC agreements and litigators. First, although the court found that 6 Del. Code § 18-305, the LLC Act's right of inspection, "might be useful" in interpreting an ambiguous inspection provision in an LLC agreement, absent an ambiguity, the plain language of the contract should govern and the court will enforce the parties' bargain. Second, because the court will enforce the benefit of the bargain, drafters must be precise in drafting language to govern both the right to and procedures for inspection. Third, if the terms governing inspection, such as "reasonable access," are not defined, the court may rely not only on books and records cases involving the LLC Act but also upon analogous cases applying 8 Del. Code § 220 (section 220), the Delaware General Corporation Law's (DGCL) statute per-

mitting shareholders to inspect corporate books and records.

In *NAMA*, the plaintiff, *NAMA Holdings LLC* (*NAMA*), brought an action to enforce its right to inspect certain books and records of the defendant, *World Market Center Venture, LLC* (*Venture*), a Delaware limited liability company. At the time of the filing, *Venture* owned and operated *World Market Center* (*WMC*), a real estate development project in Las Vegas. *Venture* was owned and managed

Precise language is critically important when drafting a right to inspection of books and records of an LLC.

by *Related World Market Center, LLC* (*Related*) and *Network World Market Center, LLC* (*Network*). In turn, *Network* was wholly owned by *Alliance Network, LLC*. *NAMA* was the principal investor in *Alliance Network*.

A dispute arose between *NAMA* and other investors over a capital call and the alleged withholding of certain proceeds from a loan financing. *NAMA* attempted to inspect certain books and records of *Venture*. The amended and restated operating agreement of *Venture* (*Venture agreement*) provided that *NAMA*

shall have reasonable access at reasonable times on business days upon prior written notice to the books and records of [*Venture*] and any of [*Venture's* subsidiaries] in which *Network*

has a direct, or indirect, interest, in the same manner, to the same extent, and otherwise upon the same terms and conditions as the Members [of *Venture*] are permitted access to such books and records in accordance with Section 9.1 of this Agreement.

Section 9.1 set forth a number of categories of documents that a member might access. *Venture* claimed that the LLC agreement empowered the managing members of *Venture*, *Network*, and *Related* to place reasonable limitations on *NAMA's* right to inspection. *Venture* informed *NAMA* that it would (1) strictly enforce the contractual language allowing inspection, (2) require *NAMA* to execute a confidentiality agreement prior to any inspection, and (3) only allow a principal of *NAMA* to inspect the books and records. *NAMA* argued that the contract allowed it as much access as the "members" of *Venture*. Because the only members of *Venture* were its managing members, *Related* and *Network*, *NAMA* argued it should be afforded as much access as they had without any limitations.

NAMA filed an action seeking to enforce its contractual right of inspection. One of *Venture's* primary defenses was that the contractual right of inspection should be no different than the statutory right of inspection pursuant to 6 Del. Code § 18-305. Rejecting this argument and reinforcing the freedom to contract in the LLC context, the court stated:

[O]ne of *Venture's* primary arguments—that the contractual provisions at issue in this litigation should be construed to mirror 6 Del. C. § 18-305(c)—is a non-starter. While that statute might be a useful referent to resolve ambiguity, if ambiguity in fact existed, within the

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relevant provisions, the court cannot allow the statute to overshadow the express contractual agreement the parties reached on inspection rights in this case.

The court determined that the inclusion of the phrase “reasonable access” granted the managers of Venture, pursuant to their managerial authority, the discretion to place reasonable limitations on NAMA’s right to inspection. When determining what limitations on access were reasonable, the court turned to case law developed

under section 220 of the DGCL. In particular, the court relied on section 220 cases in finding that a confidentiality agreement “is a virtual *sine qua non* of a books and records inspection conducted of a Delaware entity.” Similarly, in rejecting as unreasonable Venture’s requirement that a principal of NAMA conduct the inspection, the court relied on section 220 cases that allowed attorneys or other agents to conduct an inspection.

The NAMA holding teaches that precise language and well-defined

terms are critically important when drafting a contractual right to inspection of books and records of an LLC. Under Delaware law, the plain language of the contract will govern when the language governing a contractual inspection right is unambiguous. However, if contractual provisions, such as “reasonable access,” are ambiguous or left undefined, one must expect that the Court of Chancery will rely upon the well-developed case law arising out of section 220 of the DGCL to fill in any gaps.