Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
11/09/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-003714 11/08/2017

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

DENNIS FYFE

G GREGORY EAGLEBURGER

v.

CONCURE SYSTEMS L L C, et al.

HOWARD C MEYERS

R STEWART HALSTEAD

UNDER ADVISEMENT RULING

In Defendant Employer Concure's Motion for Partial Summary Judgment on (1) Valuation of Employee's 10% Membership Interest in Employer, (2) Employee's Liability for the Cost of the Valuation, (3) Non-Existence of Employee's Claim for LLC Distribution, and (4) for Attorney Fees ("MSJ #1"), Defendant/Counterclaimant Concure Systems, LLC ("Concure"), seeks a determination, as a matter of law, that the value of the membership interest of Plaintiff/Counterdefendant Dennis Fyfe ("Fyfe") in the company is $20,000, that he "is not owed any other monies or sums," and that he is required to pay the $6,040.38 cost of the appraisal that was completed by third party appraiser Mark R. Hughes. MSJ # 1 at p. 2.

Concure's request is based on Article V(2) of the Operating Agreement, which provides that

> A Member may withdraw from the Company at any time. If a Member elects to withdraw and the Members cannot agree on a purchase price for the Member's Interest, a third party appraiser shall be appointed by the Manager, and paid for by the withdrawing Member, to determine the liquidated value of the withdrawing Member's Interest.

Operating Agreement, Article V(2).

As a preliminary matter, the Court sees no basis for Concure's assertion that the "$20,000 valuation is binding upon the Employee Member for all purposes related to this litigation." MSJ # 1 at p. 4. Although Article V(2) establishes a mechanism for valuing a withdrawing member's interest, by its terms it does not purport to bind the parties in the event of litigation, nor does it purport to effect a waiver of the parties' right to a determination of damages by a jury at trial. The Court cannot read terms into Article V(2) that are not there. *See, e.g., G & S Investments v. Belman*, 145 Ariz. 258, 268, 700 P.2d 1358, 1368 (App. 1984) ("It is not within the power of this court to revise, modify, alter, extend or remake a contract to include terms not agreed upon by the parties."). Because Article V(2) lacks the binding language that Concure seems to attribute to it, the Court finds that Article V(2) does not limit the amount of damages that Fyfe can seek in these proceedings. *Cf. Allstate Ins. Co. v. Cook*, 21 Ariz.App. 313, 315, 519 P.2d 66, 68 (1974) ("Parties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.") (citation, internal quotations, and internal punctuation omitted).

Even if the Court were to interpret Article V(2) as effecting a waiver of Fyfe's constitutional right to assert a claim for damages before a jury, the Court agrees with Fyfe that genuine issues of material fact preclude summary judgment on whether Article V(2) was complied with. First, as Fyfe correctly notes, before a third party appraiser is appointed, Article V(2) requires the parties to attempt to agree on a purchase price. Response to Concure's Motion for Partial Summary Judgment on Valuation of Interest, Its Cost and Fyfe's Claim for Distributions ("Response to MSJ # 1") at p. 5. This, in turn, requires both parties to negotiate in good faith. *See Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1130 (D.C.Cir. 2015) ("[The] contractually binding obligation to negotiate carried with it the implied duty to do so in good faith."). Whether both parties did in fact negotiate in good faith in an attempt to reach agreement on a purchase price before a third party appraiser was appointed is an issue of fact.

Further, Article V(2) is ambiguous. It does not define "liquidated value," nor does it identify the financial information on which the third party appraiser would base his determination of "liquidated value." Fyfe has presented evidence that he understood the term "liquidated value" to be the fair market value of the company if it were being purchased as an ongoing business. August 15, 2017 Declaration of Dennis Fyfe at ¶ 25. Fyfe's evidence on this point establishes a factual dispute about the parties' understanding of the term "liquidated value" that precludes summary judgment.[1] Moreover, Article V(2) is ambiguous on its face about the

[1] Concure asserts that "liquidated value" is a term of art in the accounting field, and notes that the report of Fyfe's expert witness indicates that she understood and applied the concept of "liquidated

manner in which the third party appraiser is to determine the company's value. What information should the third party appraiser consider in making his determination? Is the withdrawing member allowed to participate in the appraisal by providing information to the third party appraiser? Or is the third party appraiser required to consider only information provided by manager? Article V(2) is unclear on these points; its ambiguity about the parties' intent raises factual questions that cannot be resolved as a matter of law. *See, e.g., Angus Medical Co. v. Digital Equipment Corp*., 173 Ariz. 159, 163-64, 840 P.2d 1024, 1028-29 (App. 1992).

Even if the Court were to accept that Article V(2) is both binding and unambiguous, the Court could not determine, as a matter of law, that Fyfe's interest in the company is worth $20,000. Even accepting the truth of Concure's assertion that its expert determined that "the market value of" Fyfe's interest in the company is $20,000 and that Fyfe "has failed to submit any admissible and competent evidence to controvert" that opinion, Defendant Employer's Reply in Support of Motion for Partial Summary Judgment on (1) Valuation of Employee's 10% Membership Interest in Employer, (2) Employee's Liability for the Cost of the Valuation, (3) Non-Existence of Employee's Claim for LLC Distribution, and (4) for Attorney Fees and Non-Taxable Costs at p. 3, a jury is not required to accept even the uncontroverted testimony of one party's expert witness. *Cf. Premier Fin. Servs. v. Citibank (Arizona)*, 185 Ariz. 80, 86, 912 P.2d 1309, 1315 (App. 1995) ("[A] trial court is not bound to accept even the uncontradicted evidence of a disinterested party."). Fyfe has challenged the methods used and assumptions made by the third party appraiser in valuing Fyfe's interest. *See* Response to MSJ # 1 at pp. 3, 6. The jury may consider these challenges in evaluating the third party appraiser's testimony at trial, and may discount the appraiser's opinions as a result. *See County of La Paz v. Yakima Compost Co*., 224 Ariz. 590, 608, 233 P.3d 1169, 1187 (App. 2010) (holding that counterdefendant's challenge to the "accuracy and reliability" of assumptions underlying opinions of counterclaimant's damages expert "was a question of fact for the jury," and recognizing that "the jury may have rejected some of the assumptions as it failed to award the full amount of [the expert's] calculated damages.").

No good cause appearing,

IT IS ORDERED denying Defendant Employer Concure's Motion for Partial Summary Judgment on (1) Valuation of Employee's 10% Membership Interest in Employer, (2) Employee's Liability for the Cost of the Valuation, (3) Non-Existence of Employee's Claim for LLC Distribution, and (4) for Attorney Fees.

---

value." The issue, however, is the contracting parties' understanding of the term, not Fyfe's expert's understanding.

In Concure's Motion for Partial Summary Judgment Re One-Year Statute of Limitations ("MSJ # 2"), Concure seeks a determination that Fyfe's claims for breaches relating to his 10% membership interest in the company are barred by the one-year statute of limitations set forth in A.R.S. § 12-541(3).

A.R.S. § 12-541(3) establishes a one-year statute of limitations for claims alleging a "breach of an oral or written employment contract." As Fyfe points out, however, his claims relating to his 10% membership interest are not based on the Employment Agreement, and are therefore not subject to A.R.S. § 12-541(3). Fyfe's Response to Motion for Partial Summary Judgment Re: One Year Statute of Limitations ("Response to MSJ # 2") at p. 4. As Fyfe notes, it is through the Purchase Agreement that he acquired his 10% interest in the company, and through the Operating Agreement that he acquired his right to a share of the company's profits. *Id*. at pp. 3, 4. His claims are based, he asserts, on "a breach of the Operating Agreement." *Id*. at p. 4.

Concure argues that, because the Operating Agreement incorporates the Employment Agreement, the one-year statute of limitations relating to claims arising under the latter also apply to Fyfe's claims. It is well-established, however, that, because "[t]he defense of the statute of limitations is not favored," "where two constructions are possible, the longer period of limitations is preferred." *Woodward v. Chirco Constr. Co., Inc*., 141 Ariz. 520, 524, 687 P.2d 1275, 1279 (App. 1984). Concure's suggestion that the incorporation by reference of the Employment Agreement into the Operating Agreement effects the shortening of the limitations period for claims arising out of the Operating Agreement turns this well-established principle on its head.

In support of its assertion that the limitations period applicable to claims arising out of employment agreements should be applied to Fyfe's claims because the Operating Agreement incorporates the Employment Agreement, Concure cites *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, 183 P.3d 544 (App. 2008). In *Redhair*, the Court held that an associate attorney's claim for an unpaid bonus relating to a case that he brought to the law firm was subject to the one-year limitations period established by A.R.S. § 12-541(3). In so holding, the Court rejected the employee's assertion that "the bonus agreement was unique and unrelated" to his employment. *Id*. at 297-98, 183 P.3d at 548-49. Noting that bonuses are "a common form of employee compensation," the Court found that the bonus agreement was "integrally related to his employment with the firm." *Id*. at 298, 183 P.3d at 549.

Redhair is distinguishable because, unlike the bonus agreement at issue in this case, the agreements at issue here by which Fyfe acquired his 10% ownership interest in the company and is right to share in company profits is neither "a common form of employee compensation" nor "integrally related to" employment. On the contrary, one can acquire an ownership interest in a

business without being an employee, just as one can be an employee without ever acquiring an ownership interest in the business. The Court finds nothing in *Redhair* to support Concure's position that the Operating Agreement's incorporation by reference of the Employment Agreement has the effect of shortening the limitations period applicable to Fyfe's claims arising out of the Operating Agreement.

Even if A.R.S. § 12-541(3) applied to his claims, Fyfe has presented evidence that Concure concealed Fyfe's cause of action from him by withholding financial information about the company from him, information that would have "alert[ed] him to the fact that he was owed money." Response to MSJ # 2 at pp. 6-7. Fyfe supports his assertions on this point with his own declaration. August 15, 2017 Declaration of Dennis Fyfe at ¶¶ 26-28. Whether Concure wrongfully concealed Fyfe's cause of action, thereby tolling the statute of limitations, is a question of fact that cannot be resolved on summary judgment. *See, e.g., Ulibarri v. Gerstenberger*, 178 Ariz. 151, 162, 871 P.2d 698, 709 (App. 1993).

Concure asserts that Fyfe's August 15, 2017 declaration is a "sham" because, in a prior declaration dated July 31, 2017, Fyfe stated that he made annual inquiries about receiving a K-1 and was told each year that the company had not distributed any income to the members. Defendant Employer's (1) Reply in Support of Motion for Partial Summary Judgment on One Year Statute of Limitations of A.R.S. 12-541(3) Filed on June 14, 2017 and (2) Evidentiary Objection to the Controverting Declaration of Dennis Fyfe Dated August 15, 2017 Based Upon the Sham Affidavit and Other Grounds at pp. 6-7.

The "sham affidavit" rule applies when a party submits an affidavit in connection with a motion for summary judgment "which contradicts his own prior deposition testimony." *MacLean v. State Dep't of Educ*., 195 Ariz. 235, 241, 986 P.2d 903, 909 (App. 1999) (citation and internal quotations omitted). The "sham affidavit" rule is to be "applied with caution," *Van Asdale v. Internat'l Game Tech*., 577 F.3d 989, 998 (9th Cir. 2009) (citation and internal quotations omitted), and only where the subsequent affidavit "clearly conflict[s]" with the prior testimony. *MacLean*, 195 Ariz. at 241, 986 P.2d at 909. *See also Tippens v. Celotex Corp*., 805 F.2d 949, 953-54 (11th Cir. 1986) (because "[i]ssues concerning the credibility of witnesses and weight of the evidence are questions of fact which require resolution by the trier of fact," a court should not "allow every…variation in a witness's testimony to be disregarded as a sham").

Here, the Court does not find that the statements in Fyfe's July 31, 2017 declaration to the effect that he made inquiry about a K-1 "every year" and was told that "the company had not distributed any income to the Members," July 31, 2017 Declaration of Dennis Fyfe at ¶¶ 1-2, to directly contradict the statements in his August 15, 2017 declaration that "in 2015" he "was told that Concure had not made any distributions to owners and did not issue any reports or K-1's." August 15, 2017 Declaration of Dennis Fyfe at ¶ 26. The subsequent declaration does not, in

other words, assert that 2015 was the *first* year in which Fyfe had inquired about a K-1, or the *first* time he was told that the company had not distributed income to members. The subsequent declaration goes on to state that it was not until 2015 that Fyfe learned, for the first time, that Concure was required to issue K-1s each year even if no profits were earned or distributed. *Id*. at ¶ 27. It was not until then, the subsequent declaration indicates, that Fyfe learned that he had been denied access to financial information to which he was entitled. *See id*. The subsequent declaration does not, therefore, directly contradict Fyfe's statements in the prior affidavit about his annual inquiries about K-1's. Because the two declarations do not directly contradict each other, the Court finds that the "sham affidavit" rule does not apply here.

Concure also seeks a determination as a matter of law that Fyfe "had no vested right in the 10% Membership Interest" at the time he withdrew from the company. MSJ # 2 at p. 10. The Court sees no basis for this assertion. As Fyfe correctly notes, the Purchase Agreement reflects the sale of a 10% ownership interest in the company to Fyfe "for Ten Dollars ($10.00) and other good, valuable, and sufficient consideration," without indicating that the sale is incomplete or contingent on future events. Response to MSJ # 2 at p. 2, *citing* Purchase Agreement at ¶ 1. Although Concure asserts that Paragraph 3 of the Employment Agreement provides that Fyfe's "[r]etention of the Interest described in [P]aragraph 2" is contingent on certain occurrences, MSJ #2 at pp. 8-9, the "interest" referred to in Paragraph 2 of the Employment Agreement is the "additional membership interest" that Fyfe had the contractual right to purchase. *See* Employment Agreement at ¶¶ 2, 3. Since it is undisputed that Fyfe never exercised his contractual right to purchase any additional membership interest in the company, Paragraph 3 of the Employment Agreement has no application.

No good cause appearing,

IT IS ORDERED denying Concure's Motion for Partial Summary Judgment Re One-Year Statute of Limitations.

In Concure's Motion for Partial Summary Judgment on (1) Existence of a Good Faith Wage Dispute Precluding Treble Damages and (2) Enforceability of Express Contractual Right to Withhold Wages as a Setoff Against Indemnity Claims ("MSJ # 3"), Concure seeks summary judgment on Fyfe's claim for treble damages under A.R.S. § 23-350 *et seq*. on the basis that Concure is entitled, as a matter of law, to withhold commissions otherwise due and payable to Fyfe. MSJ # 3 at p. 2.

A.R.S. § 23-355 provides for an award of treble damages in favor of an employee whose wages are wrongfully withheld. A.R.S. § 23-352(3) permits the withholding of wages if "[t]here is a reasonable good faith dispute as to the amount of wages due, including the amount of …any claim of debt, reimbursement, recoupment or set-off asserted by the employer against the

employee." A.R.S. § 23-352(3). Concure acknowledges that it has withheld commissions from Fyfe, but asserts that its withholding of such commissions is authorized by the terms of the Employment Agreement. MSJ # 3 at pp. 2-3.

Section 9(e) of the Employment Agreement provides,

> In the event of termination, any accrued but unpaid commission shall be paid within seventy-two (72) hours of the date of termination, provided that any payment of compensation shall be subject to withholding by Employer in such amount as it may deem reasonable to compensate Employer for any damages or liability resulting from Employee's breach of this Agreement or any overpayment of Employee's income. Such deduction shall be deemed to be made pursuant to a good faith dispute of the wages or compensation due.

Employment Agreement, § 9(e). Concure's asserts that Fyfe "is bound by his advance consent and agreement contained in [Section 9(e)] of the Employee Agreement" that Concure's "withholding" of commissions "shall represent a deduction…deemed to be made pursuant to a good faith dispute of the wages or compensation due." MSJ # 3 at pp. 4-5.

The Court disagrees. Section 9(e) of the Employment Agreement purports to provide that any dispute that may arise in the future will be deemed to be a good faith dispute. Whether the parties to a dispute are acting in good faith cannot, however, be determined in advance, before a dispute actually arises. By purporting to deem any dispute that may arise in the future as a dispute in good faith - - no matter what the circumstances are, and no matter how groundless the employer's position may prove to be - - Section 9(e) of the Employment Agreement in effect denies the employee the protection of A.R.S. § 23-350 *et seq*. A contractual provision that conflicts with a statute is void as contrary to public policy. *Cf. Spain v. Valley Forge Ins. Co*., 152 Ariz. 189, 193, 731 P.2d 84, 88 (1986) (insurance policy provision that "attempt[ed] to reduce" amount of coverage "the legislature has given the insured the right to buy" by offsetting the amount paid under liability coverage against amount due under uninsured motorist coverage "violates the uninsured motorist statute and is therefore void as against public policy").

Even if Section 9(e) of the Employment Agreement were valid and enforceable to effect the waiver of the protection of A.R.S. § 23-350 *et seq*., the plain language of Section 9(e) does not authorize the withholding of commissions due Fyfe. By its terms, Section 9(e) purports to authorize Concure to withhold funds to compensate it "for any damages or liability." Section 9(e) does not, however, authorize the withholding of compensation for *potential* damages or claims that *may* arise in the future. As Fyfe argues, Concure has presented no evidence that it

has incurred any actual damages or liability based on customer complaints. Fyfe's Response to Motion for Partial Summary Judgment Re: Good Faith Wage Dispute and Contractual Right of Indemnity at p. 8. While the June 14, 2017 Declaration of Emil Pikula ("Pikula") asserts that, since Fyfe's departure from the company, Concure has "received claims and demands from customers…and/or [has] actual knowledge of [such] claims and demands" that arise out of "acts of commission and omission" by Fyfe, June 14, 2017 Declaration of Emil Pikula at ¶¶ 8-9, Pikula does not assert that Concure has actually paid any damages or suffered any monetary loss. Concure's fear that it may incur damages or liability in the future is insufficient to trigger the application of Section 9(e).

Even if Section 9(e) were interpreted as applying under the circumstances of this case, the Court finds that issues of fact exist precluding summary judgment. In support of its assertion that it is entitled to withhold commissions due Fyfe, Concure has presented evidence that it has received complaints about Fyfe's performance of his job duties from customers. June 14, 2017 Declaration of Emil Pikula at ¶¶ 8-13. Fyfe disputes Concure's assertions, contending that the complaints cited by Concure concern matters that were outside his job responsibilities. August 15, 2017 Declaration of Dennis Fyfe at ¶¶ 34-45. The Court cannot resolve these factual disputes. Instead, whether Concure is acting in good faith in withholding commissions due Fyfe is a factual issue that will have to be resolved by the jury at trial.

No good cause appearing,

IT IS ORDERED denying Concure's Motion for Partial Summary Judgment on (1) Existence of a Good Faith Wage Dispute Precluding Treble Damages and (2) Enforceability of Express Contractual Right to Withhold Wages as a Setoff Against Indemnity Claims.

In Defendant Employer's Motion (1) for Partial Summary Judgment Pursuant to ARCP 56 on the Issue of Plaintiff Employee's Breach of Fiduciary Duty and (2) for Case Terminating Sanctions Pursuant to ARCP 37(g) Due to Bad Faith Spoliation of Electronically Stored Information ("MSJ # 4"), Concure alleges that it provided Fyfe with two computers during his employment for his use in working on company business, and that, when his employment ended, Fyfe did not return the computers until after he had had their hard drives "wiped" to eliminate any electronically stored data. MSJ # 4 at pp. 4-5. Concure asserts that Fyfe's actions constitute the spoliation of evidence and the destruction of property belonging to Concure in violation of the terms of Fyfe's Employment Agreement, warranting the imposition of case-terminating sanctions and/or a determination that Fyfe breached his fiduciary duty to the company as a matter of law. *Id*. at pp. 8, 10.

Fyfe does not dispute deleting data from the laptops, but argues that he did so only after downloading all data relating to Concure onto a thumb drive that he then had his former lawyer

provide to Concure. Plaintiff's Response to Defendant's Motion for Partial Summary Judgment on Employee's Breach of Fiduciary Duty and Sanctions at p. 5. Fyfe further asserts that emails he exchanged with customers and vendors were sent using Concure's email accounts and server, and therefore that such data is "readily accessible" to Concure. *Id*. at pp. 5-6.

In response, Concure denies receiving any thumb drive from Fyfe or anyone acting on his behalf. Employee's [sic] (A) Reply in Support of Defendant Employer's Motion (1) for Partial Summary Judgment Pursuant to ARCP 56 on the Issue of Plaintiff Employee's Breach of Fiduciary Duty; and (2) for Case Terminating Sanctions Pursuant to ARCP 37(g) Due to Bad Faith Spoliation of Electronically Stored Information at p. 3. Moreover, Concure asserts, even if Fyfe had provided such a thumb drive, his "wiping" of the hard drive eliminated any opportunity to verify Fyfe's claim to have returned all company information to Concure, and further eliminated any opportunity to gather information from the "metadata" that might have been present. *Id*. at pp. 5-6.

Although Concure seeks the dismissal of Fyfe's claims, the Court cannot consider such a remedy without holding an evidentiary hearing, which has not been requested. *See Rivers v. Solley*, 217 Ariz. 528, 531, 177 P.3d 270, 273 (App. 2008) ("The extreme sanction of dismissal requires an evidentiary hearing and is warranted only when the court makes an express finding that a party…has obstructed discovery and that the court has considered and rejected lesser sanctions as a penalty.") (citation and internal quotations omitted). Further, the uncertain state of the facts - - in particular, whether Fyfe did in fact attempt to preserve electronically stored information relating to Concure by downloading it to a thumb drive that was provided to Concure as he has stated in his declaration, and whether he still has access to the data that was downloaded onto the thumb drive - - render the imposition of sanctions at this point in the proceedings premature at best.[2] For the time period, therefore, the Court is not prepared to do more than hold that the parties will be permitted to present evidence at trial regarding Fyfe's "wiping" of the hard drives, and the jury will be allowed to determine the significance of his actions. *See Hudgins v. Southwest Airlines Co*., 221 Ariz. 472, 485-86, 212 P.3d 810, 823-24 (App. 2009) (trial court properly instructed jury on concealment of evidence based on evidence that defendant corporation improperly withheld report of internal investigation).

Based on the foregoing,

IT IS ORDERED denying Defendant Employer's Motion (1) for Partial Summary Judgment Pursuant to ARCP 56 on the Issue of Plaintiff Employee's Breach of Fiduciary Duty and (2) for Case Terminating Sanctions Pursuant to ARCP 37(g) Due to Bad Faith Spoliation of

[2] Of course, if further discovery suggests that Fyfe did not in fact download all of Concure's information and provide it to Concure, the Court may revisit this issue.

Electronically Stored Information, pending further discovery and without prejudice to the claims for relief asserted therein being re-urged at a later time.