AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

RV SOLUTIONS GROUP, LLC,
a Texas limited liability company,

Claimant

v.

RV QUEST, LLC, a Michigan limited liability company, and QUEST TOWING SERVICES, LLC, a Michigan limited liability company,

Respondents.

AAA Case No. 01-20-0010-0653

Gene J. Esshaki, Arbitrator

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FINAL AWARD OF ARBITRATOR
DATED JULY 21, 2022

The undersigned, Gene J. Esshaki, Arbitrator, having been designated pursuant to the arbitration clause contained in Section 12.02 of that certain Operating Agreement executed between the parties in September, 2016 and having been duly sworn, and having received the evidence and arguments of counsel hereby awards as follows:

BACKGROUND

This matter was brought on for hearing on May 9, 2022 and May 10, 2022 at the offices of the undersigned located in Troy, Michigan. The matter was continued via Zoom conference hearing on May 27, 2022. At the conclusion of the hearing on May 27, 2022, both sides rested and advised that they had no further evidence to present. The parties submitted their post-hearing briefs dated July 1, 2022 and on July 5, 2022 the hearings were declared closed.

At the hearings, each side introduced extensive documentary evidence and was permitted to call witnesses to testify. Prior to testifying, each witness was duly sworn under oath. The undersigned was thus accorded an opportunity to judge the credibility of each testifying witness.

The Claimant in this matter, RV SOLUTIONS GROUP, LLC, was represented in the hearings by Mark C. Rossman, Esq. and Taras Garapiak, Esq. of Rossman, P.C. Claimant was also represented at the hearings by David B. Viar, Esq. of The Miller Law Firm, P.C.

Respondents, RV QUEST, LLC and QUEST TOWING SERVICES, LLC, were represented at the hearings by William C. O'Neil, Esq. and Thomas F. McAndrew, Esq. of Winston & Strawn, LLP.

NATURE OF DISPUTE

The Demand for Arbitration and testimony presented at the hearings established that in early September, 2016 Claimant and Respondent, Quest Towing Services, LLC, established a new Michigan limited liability company named RV Quest, LLC. Under the terms of the Operating Agreement, which was introduced as an exhibit in the proceedings, the Claimant owned 30% of the equity of the LLC and Respondent owned 70% of the equity. The Demand for Arbitration indicates that under Article 1 of the Operating Agreement, Respondent, Quest Towing Services, LLC, was designated as Manager of RV Quest, LLC.

The Demand for Arbitration alleged that the managing member breached the Operating Agreement in numerous ways, including: failing to provide complete and accurate financial data; refusing to provide Federal K-1s on a timely basis; commingling funds between the company and the managing member; terminating Lopez's employment relationship; selling a majority interest of the Managing Member holding majority interest in RV Quest, LLC without notice; and failing to execute its obligations pursuant to the Operating Agreement or to act for the benefit of the company.

The Demand for Arbitration also alleged that the actions of the majority and managing member constituted oppression pursuant to MCL 450.4515.

Respondents denied the allegations of the demand and further filed a counterclaim against Claimant for violation of the non-competition provision set forth in Section 13.15 of the Operating Agreement. Respondent sought return of consulting fees paid to Claimant both during the term of employment of Lopez, and thereafter.

ANALYSIS

The following issues were the focus of the hearings in this matter:

A. Accounting Irregularities. Claimant's first witness at the hearings was Maurice Atkinson, the former controller of Quest Towing Services, LLC. Mr. Atkinson testified under oath that he was specifically assigned the task by his employer of investigating certain accounting irregularities that existed on the books and records of Quest Towing Services, LLC and RV Quest, LLC. Mr. Atkinson testified that he spent an inordinate amount of time tracking down these irregularities that resulted in significant journal entries being made on the books of each entity in excess of $100,000 per year in order to reconcile the financial relationships between the entities. Mr. Atkinson testified that in his professional opinion, these entries were not willful, nor deceitful,

but were at best negligent. In Claimant's damage expert report, no mention is made of these financial irregularities, nor are they raised in Claimant's post-closing brief. The undersigned awards Claimant $0 on its claim for damages arising from financial irregularities.

B. Commingling of Funds. Mr. Atkinson also testified that funds for sales made by RV Quest, LLC were initially deposited into the bank account of Quest Towing Services, LLC, its managing/majority member. Thereafter, funds would be distributed to the account of RV Quest, LLC. Once again, Mr. Atkinson did not ascribe any malintent to this activity and deemed it simply negligence. The issue of commingling of funds was also not raised in the expert report of damages submitted by Claimant or in Claimant's post-closing brief. The undersigned awards Claimant $0 on its demand for commingling.

C. Delayed K-1s. Daniel Lopez, the Manager and an equity owner of Claimant, testified at the hearings that Respondent, Quest Towing Services, LLC, as Manager of RV Quest, LLC, did not meet its commitment to issue timely Federal K-1 statements, which were necessary in order for Claimant to report its share of income/loss on its annual federal tax returns. While Mr. Lopez testified that this failure to timely report caused him to have to file amended tax returns, nowhere in the damage report or the post-closing brief is there any quantification of these damages. The undersigned awards Claimant $0 on its claim for failure to publish timely K-1 reports.

D. Wrongful Termination. During the hearing, Claimant's manager/member Daniel Lopez conceded that Respondent, Quest Towing Services, LLC, the manager of RV Quest, LLC, had the right to terminate his employment. This claim is deemed withdrawn and $0 are awarded to Claimant on that demand.

E. Improper Sale or Transfer of Membership Interest. Claimant asserts that a private equity sale of a majority of the equity of Respondent, Quest Towing Services, LLC, violated Section 5.02 of the parties Operating Agreement. That section provides as follows:

> Each of the Members hereby acknowledges and agree that they have entered into this Agreement in reliance on the continued participation of each Member in the activities of the Company. The Members hereby agree that no Member shall be permitted to transfer its membership interest to a competitor of the Company and the ownership interests of RV Solutions Group, LLC shall not be transferred to a competitor of the Company.

* * *

Section 5.02 clearly prohibits a member of RV Quest, LLC from selling or assigning their equity interest in that LLC to a competitor. In the transaction complained of by Claimant in its demand, it is undisputed that Quest Towing Services, LLC did not sell, assign or transfer its equity interest in RV Quest, LLC to a competitor, but instead a company acquired a majority interest of Quest Towing Services, LLC. Among the assets held by this LLC, was the 70% equity interest in RV Quest, LLC. This is not, however, a specific transfer of that discrete equity interest to a competitor.

Additionally, Section 5.02 provides a separate restriction on Claimant from transferring the ownership interests of RV Solutions Group, LLC to a competitor. If a private equity firm had acquired the entire equity interest of RV Solutions Group, LLC, it would have been a direct violation of the provisions of Section 5.02. In this case, however, no such direct violation exists because no such restriction on a sale of the equity interest of Quest Towing Services, LLC is set forth in this section. This is a one-way prohibition against the sale of the equity interests of RV Solutions Group, LLC and not a restriction on the sale of the equity interests of Quest Towing Services, LLC. On this claim the undersigned awards Claimant $0.

F. Shareholder Oppression/Call Center Cost Allocation. The crux of the Demand for Arbitration centers around Claimant's assertion that the arbitrary assessment of a call center operation fee by Quest Towing Services, LLC to RV Quest, LLC was made without consent and without substantiation and constituted an interested party transaction that has resulted in oppression of the minority member.

The business of RV Quest, LLC was to provide roadside assistance to recreational vehicle owners much along the lines of the American Automobile Association Roadside Assistance Program. RV owners could buy an annual contract for roadside assistance or participate on a per call basis whenever they needed a tire changed or a repair to their vehicle. Customers were provided the information for RV Quest, LLC from recreational vehicle dealers and received the necessary information to initiate a request for help at the time of purchasing or servicing their vehicle.

In order to sustain the national assistance program, a national call center had to be established in which customer calls were received and participating service providers engaged to respond to the requests for assistance.

Both sides acknowledged that RV Quest, LLC could not perform its core function without the support of a backroom call center to field the incoming calls and engage the independent contractors who had signed up to provide assistance in their territories for customers in distress. The heart of this dispute is that Claimant asserts Respondent, Quest Towing Solutions, LLC, had agreed to provide the use of its already existing call service center to RV Quest, LLC without charge and as an additional capital contribution. Respondent, Quest Towing Services, LLC, asserts that while it agreed to provide its backroom call-in facilities during the startup phase of RV Quest, LLC, it was never the intent of the parties that these services would be provided without charge

forever. Accordingly, approximately two years into the venture, Quest Towing Services, LLC, without consent of Claimant, started allocating a per call fee to RV Quest, LLC to cover the cost of the backroom call-in service. This charge had a dramatic impact on the profitability of RV Quest, LLC since it amounted to hundreds of thousands of dollars per year that were flowing from RV Quest, LLC to Quest Towing Services, LLC and thus little to no profit existed at the end of each year for RV Quest, LLC.

Prior to addressing the call center fee allocation dispute, it is essential to review the terms of the parties' Operating Agreement. In many respects, the Agreement is not just incomprehensible but outright contradictory in its provisions. By way of example, the Agreement was never dated. All the parties can testify to is that it was executed between the parties sometime in early September 2016. Some of the more troubling provisions include the following:

a. Article 1 indicates that the Managers shall manage the company. It also indicates that Quest Towing Solution, LLC is the Manager.

b. Article 6 indicates that the Managers shall have the exclusive right to manage the company. It also provides that all decisions by the Managers shall be made by unanimous consent.

c. Section 6.03 of the Operating Agreement provides for a list of restricted activities which cannot be implemented without the majority consent of the Members. On the other hand, Section 6.04 indicates that the restricted activities referenced in 6.03 require the unanimous consent of the Members to pass.

d. Section 6.03(g) indicates it's a prohibited act to cause the company or the operating entities to enter into any transaction with any affiliate of the Managers or Members. Does this section mean that the company cannot enter into any transaction with

an affiliate of the Manager or any Member or does it mean it cannot enter into with an affiliate of either? Respondent suggests that the latter is the correct interpretation, however, it is wholly illogical to assume that a Manager or Member may not enter into a transaction with the company via an affiliate, but may do so directly and not violate the self-interest provisions of the Limited Liability Company Act.

e. Section 6.07 provides that the Mangers and Members may participate in outside endeavors even if they are in competition with the activities of the company. Contrast this with Section 13.15, which restricts RV Solutions Group, LLC and Daniel Lopez during the term of the Agreement and for a period of 12 months after its termination from engaging in any competition with the company.

f. Section 6.09 provides that there shall be meetings of the Managers and Section 6.11 provides that each Manager shall have the right to vote.

g. Section 7.07 provides that each Member shall have the right to vote.

h. Section 6.04 provides for an impasse resolution mechanism where unanimous agreement is not available among the Members. Contrast that to Section 12.02, which provides that if the Members are unable to resolve their disputes, the same shall be submitted to arbitration.

i. Amendment One to the Operating Agreement effective January 16, 2019, clearly provides that QTS and RVSG are Members and Managers of RV Quest, LLC.

j. The Schedule K-1s prepared by a recognized national accounting firm for the LLC clearly reference that RV Solutions Group, LLC is a Manager and Member of RV Quest, LLC.

The undersigned is now required to reconcile the competing provisions of the Operating Agreement in a manner he deems in accordance with the parties' intention at the time of execution. In doing so, it is necessary to interpret the document in a manner that saves as much of the original draft as is possible and thus preserves the essential terms of the Agreement.

Turning now to the dispute referenced above concerning the call center fee cost allocation, Section 6.03 of the Operating Agreement provides as follows:

> 6.03 Limitation of Authority of the Managers. Notwithstanding the generality of the powers granted hereby, the Managers shall not have the authority to do any of the following without the consent of a Majority Interest of the Members:
>
> (g) Except as authorized by this Agreement, cause the company or the operating entities to enter into any transaction with any affiliate of the Managers or Members;

Section 6.04 of the Operating Agreement contains the following:

> 6.04 Resolution of Impasse. In the event the Members are unable to **unanimously** agree on any matter set forth in paragraph 6.03 or any other matter requiring the unanimous consent of the Members, the matter shall be submitted to an individual jointly selected by the Certified Public Accountants of each Member, which individual shall then render a decision within three (3) business days following his/her appointment. Such decision shall be final and binding upon the Managers and the Members.

While Section 6.03 states that the consent of a majority interest of the members is required to take a prohibited action, Section 6.04 indicates the consent must be unanimous among the members.

The undersigned is forced to reconcile the discrepancy between Sections 6.03 and 6.04 by discerning the intent of the parties. The undersigned is forced to conclude that Section 6.03 was intended to be unanimous consent of the members and not simply majority consent. This conclusion is forced by an analysis that indicates if a majority interest of members can approve any action of the manager, why even have a prohibited list of actions of the manager. The

prohibited list is designed to protect the interests of the minority members and accordingly is only reasonable if unanimous consent is required.

Respondent argued at the hearing and in its post-closing brief that Section 6.04 provides for a contractual resolution of disputes among members and accordingly is exempt from the general arbitration clause contained in Section 12.02 of the Operating Agreement. The undersigned is forced to conclude that the general arbitration provision contained in Section 12.02 of the Operating Agreement exclusively governs this dispute. Section 6.04 was designed to address day-to-day operating issues of disputes among the members. If this section was not invoked or, if invoked, did not produce an acceptable resolution to one member, the arbitration provisions of Section 12.02 are still available for final and binding resolution. To read Section 6.04 as exclusive, as suggested by Respondent, nullifies Section 12.02 in its' entirety. General rules of contract interpretation require that nullification of any provision of a contract shall be avoided if at all possible. Accordingly, Section 6.04 and Section 12.02 must be read as complimenting one another to reconcile an apparent conflict so that both provisions remain effective.

In this dispute, the call center fee allocation goes to the very existence of the LLC and whether or not it can survive as a viable entity. Such a significant decision would not have been allocated by the parties to a decision by an outside third person. Instead, going to the heart of the entire Operating Agreement requires the provisions of Section 12.02 on arbitration to control. To that end, Respondents argument that this is a simple contractual dispute where the undersigned does not have jurisdiction is hereby denied.

As I have interpreted the provisions of 6.03, 6.04 and 12.02 of the Operating Agreement, Claimant's argument comes down to the following: the imposition of the call center cost fee by

Respondent is a prohibited transaction under Section 6.03(g) to the extent that the Manager has caused the company or the operating entities to enter into a transaction with a Member. This prohibited transaction can only occur with the unanimous consent of the Members as required under Section 6.04. This action also violates Section 7.07 of its Operating Agreement to the extent it does not accord Claimant its right to vote on matters that are required to be brought before the Members. This violation alone is enough to invoke the provisions of the Arbitration Clause in Section 12.02 and may constitute minority oppression. This was a unilateral imposition of a fee to an interested party that stripped out a significant portion of the profits of RV Quest, LLC and shifted them to its Majority Member Quest Towing Solutions, LLC.

Claimant's post-closing brief sites the case of *Castle v Shoham*, 218 Mich. App. LEXIS 2975; 2018 WL 374 6550. The facts of the *Castle* case are very similar to the facts in this matter. In *Castle*, a minority member was faced with a unilateral capital call and a significant increase in a management fee by the majority member without consent and without the right to vote. The court in *Castle* held that the minority member's right to vote was sacrosanct and, even if his vote could not change the outcome of the dispute because he held only a minority position, he had the legal right to vote. Denying a minority member the right to vote where such right exists is itself a significant violation of that member's rights. In this matter, Respondent denied Claimant its right to vote on an interested party transaction. This is sufficient alone to bring the matter in to the dispute resolution mechanism set forth in Section 12.02 without regard to the operation of Section 6.04.

The *Castle* court also analyzed the interrelationship between MCL 450.4409 (the interested party transaction statute) and MCL 450.4515 (the minority member oppression statute). Under MCL 450.4409, an interest party transaction may not be overturned or set aside if (a) the

transaction was fair to the company at the time entered into. In *Castle,* the Trial Court found that the transaction, being an increase in management fee/rent, was fair, was in fact incorrect. The Court of Appeals looked at significant contradictory evidence indicating that there was not a proper allocation of fees and expenses and the rent set was substantially higher than the market rate for comparable space in the area.

With respect to the call center fee imposed by Respondent on RV Quest, LLC, Respondent argues that the fee was fair. That position is simply not supported by the evidence.

The call center fee was initially set at $5.65 per call. No one at the hearing could explain how this number was arrived at or what factors went into determining that it was a fair assessment. The fee then went from $5.65 to $12.71, $14.54, $15.24 and finally $12.98. During the hearing there was simply no substantiation for any of these numbers, nor an explanation of why they so wildly and rapidly changed. The undersigned cannot say the imposition of the call center fee at whatever number imposed by Respondent was "fair" because no such evidence was introduced to substantiate that conclusion. It was Respondents' burden to establish fairness by the evidence. The only conclusion that can be reached is that the call center fee was arbitrary, frequently changed and had little, if any, relationship to the actual costs incurred in operating that portion of the call center actually utilized by RV Quest, LLC. There was, in fact, direct testimony that employees retained in the call center and assigned exclusively to field calls for RV Quest, LLC on many occasions were performing direct services for Quest Towing Solutions, LLC, without any allocation of time between the two entities.

The undersigned concludes that the imposition of the call center processing fee by Respondent Quest Towing Services, LLC upon RV Quest, LLC was not fair.

The court in *Castle* then analyzed whether the unilateral imposition of a management fee/rent by the majority interest member upon the LLC constituted oppressive conduct within the definition of MCL 450.4515. That section provides in relevant part as follows: if the acts of the managers and members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair oppressive conduct toward the limited liability company or the member, they are actionable. In this dispute, the actions of Quest Towing Services, LLC in unilaterally imposing a call center service fee upon the profits of RV Quest, LLC, not being fair on its face, constitutes oppressive conduct towards Claimant RV Solutions Group, LLC, the minority member.

The remedy for the oppressive conduct under the statute is the minority equity interest held by RV Solutions Group, LLC must be redeemed by RV Quest, LLC. The expert testimony presented in this case could not be farther apart on the valuation of this minority interest. Claimant's expert testified that the damages incurred by Claimant were in excess of $2 million, meaning the value of RV Quest, LLC exceeds $6 million in total. Respondents' expert testified that no damages were incurred by Claimant because the company had zero value.

Having established that there was wrongful conduct and that such conduct caused damage, the undersigned is required to assign a value to the damages incurred. In this matter, the undersigned orders that the minority interest of RV Solutions Group, LLC in RV Quest, LLC be redeemed by the company for $500,000 cash.

COUNTERCLAIM

As previously indicated, Respondent Quest Towing Services, LLC filed a counterclaim against RV Solutions Group, LLC for certain consultant activity undertaken by Daniel Lopez, President of RV Solutions Group, LLC during the course of his employment and subsequent thereto. Respondent asserts that this consulting violates Section 13.15 of the Operating Agreement

which prohibits RV Solutions Group, LLC and Daniel Lopez from engaging in any activity competitive with RV Quest, LLC during the term of the Agreement and for a period of 12 months after termination thereof. There are two problems with the argument put forth by Respondent concerning the noncompete restriction.

Initially, Section 6.07 expressly provides that the Managers and Members need not devote full time to the company's business and may engage in and possess interest in other business ventures of any and every type and description, independently or with others, including ventures in competition with the company, with no obligation to offer to the company or any other Member, Manager or Officer the right to participate therein. These two provisions 6.07 and 13.15 are directly contradictory and cannot be reconciled.

Michigan courts have a long history of disfavoring restrictive employment covenants. These covenants are anticompetitive and in direct violation of the concept of free commerce. This policy alone is enough to invalidate Section 13.15.

While Michigan courts have recognized and enforced covenants not to compete, in every instance they must be deemed reasonable and designed to protect a specific interest by prohibiting competition. The undersigned concludes that Section 13.15 is not reasonable and not enforceable. As implemented, this section would prohibit Daniel Lopez and RV Solutions Group, LLC, whose joint sole business has been dedicated to the recreational vehicle industry, from engaging in any recreational vehicle activities until the Operating Agreement for RV Quest, LLC terminates and for a period of 12 months thereafter. If the Agreement never terminates, as currently seems to be the case, Mr. Lopez will be prohibited from engaging in his exclusive occupation until his death. This is patently unreasonable.

The undersigned awards Respondents $0 upon their counterclaim.

AWARD

The undersigned awards as follows:

1. RV Quest, LLC shall redeem the entire equity interest of RV Solutions Group, LLC for the total sum of $500,000.00 cash.

2. Respondents are awarded $0 upon their counterclaims.

3. All other claims and demands are hereby denied.

4. Any claim or demand not specifically mentioned herein is hereby denied.

5. Each side shall bear their respective costs and fees, as incurred. The administrative fees of the American Arbitration Association totaling $20,575.00 and the compensation of the Arbitrator totaling $28,500.00 shall be shared equally between the parties. Therefore, Respondent RV Quest, LLC and Quest Towing Services, LLC shall reimburse Claimant RV Solutions Group, LLC, an amount of $2,037.50 representing that portion of said fees in excess of the apportioned costs previously incurred and paid by Claimant.

IT IS SO ORDERED.

Dated: July 21, 2022

/s/ Gene J. Esshaki
Gene J. Esshaki, Arbitrator

I, Gene J. Esshaki, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument as my full and final award.

Dated: July 21, 2022

/s/ Gene J. Esshaki
Gene J. Esshaki, Arbitrator

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