

**BEFORE  
THE ILLINOIS COMMERCE COMMISSION**

Niatel, LLC	)	
	)	
Application for a certificate of Local and	)	Docket No. 09-0509
Interexchange authority to operate as a	)	
Reseller of telecommunications services	)	
Throughout the state of Illinois	)	

**RESPONSE TO MOTION TO STRIKE THE RESPONSE &  
MOTION FOR LEAVE TO AMEND, FILED BY NIATEL, LLC**

Pursuant to Section 200.190(e) of the Illinois Administrative Code, Transcend Multimedia, LLC (“Transcend”), by and through its undersigned attorneys, and together with the undersigned Illinois counsel, hereby files this Response to Niatel, LLC’s (“Niatel”) “Motion to Strike the Response and Motion for Leave to Amend filed by Transcend Multimedia, LLC” (“Second Motion to Strike”), and in support thereof states the following:

**A. Transcend’s Reinstatement Moots Niatel’s Objections**

Niatel’s argument that Transcend cannot participate in this proceeding because of its involuntary dissolution is now moot. (Second Motion to Strike p. 3) As noted in its Response to Motion to Strike Filed by Niatel, LLC (“First Response”), the involuntary dissolution was the direct and proximate result of non-compliance with a Management Agreement between Transcend and Niatel’s related entity, Airdis, LLC (“Airdis”).<sup>1</sup> (First Response p. 2) The principals of Niatel

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<sup>1</sup> In its Second Motion to Strike, Niatel admits that its related entity, Airdis, was required to make “regulatory filings” pursuant to the terms of the Management Agreement between Niatel’s related entity and Transcend (collectively “the parties”). (Second Motion to Strike p. 4) Niatel also notes that, in Illinois, limited liability companies, such as Transcend, are statutorily required to file an annual report and pay fees to the Illinois Secretary of State (“IL SOS”). (*Id.*) Niatel then makes the absurd assertion that these required filings with the IL SOS — a regulatory body — somehow do not meet the definition of “regulatory filings” as that term is used in everyday English and the parties’ Management Agreement. Niatel provides absolutely no explanation as to why the Commission should consider a required filing with the IL SOS to be anything other than a regulatory filing. And Niatel does not provide any justification for a

(Michael Danis and Scott Sinclair) and Airdis failed to care for the day-to-day business of maintaining Transcend's good standing, the filing of necessary regulatory and legal paperwork, and the payment of associated fees. (*Id.*) However, since the termination of the Management Agreement between Transcend and Airdis, Patrick Hafner, one of Transcend's principals, through local counsel, has repeatedly sought to correct the actions and omissions of Mr. Danis, Mr. Sinclair, and Airdis by filing to reinstate Transcend with the Illinois Secretary of State. (*Id.*)

On January 12, 2010, Mr. Hafner and Transcend succeeded in returning Transcend to good standing with the Illinois Secretary of State ("IL SOS"). (See Exhibit A) Under 220 Ill. Comp. Stat. 5/10-101, once the IL SOS officially files a Limited Liability Company's ("LLC") application for reinstatement, the law treats the LLC as though its existence continued without interruption regardless of any dissolution, and any act performed on its behalf in the period between its dissolution and reinstatement is considered valid.<sup>2</sup> Thus, the Commission should dismiss both of Niatel's Motions to Strike as they pertain to Transcend's status with the IL SOS.

**B. Niatel's Legal Assertions Lack Merit and are Misleading**

The provisions of 220 Ill. Comp. Stat. 5/10-101 regarding the revival of a dissolved LLC directly counter Niatel's unsupported assertion, in its Second Motion to Strike, that all filings previously made by Transcend were "void *ab initio*." (Second Motion to Strike p. 3) This is but one example of a troubling pattern exhibited by Niatel's counsel throughout the company's Second Motion to Strike, which is replete with legal assertions absent citations to supportive regulations,

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conclusion that filings with the IL SOS were in some way different than the other regulatory filings that its related entity was admittedly required to make.

<sup>2</sup> 805 Ill. Comp. Stat. 180/35-40(d) provides "[u]pon the filing of the application for reinstatement, the limited liability company existence shall be deemed to have continued without interruption from the date of the issuance of the notice of dissolution, and the limited liability company shall stand revived with the powers, duties, and obligations as if it had not been dissolved; and all acts and proceedings of its members or managers, acting or purporting to act in that capacity, that would have been legal and valid but for the dissolution, shall stand ratified and confirmed."

statutes or case law. In several instances highlighted below, Niatel counsel's assertions are either wholly unsupported or even contradicted by the plain language of the applicable statutes and case law.

The most disturbing manifestation is Niatel's citation to the case *Katris v. Carroll*.<sup>3</sup> (Second Motion to Strike p. 3; Attached as Exhibit B). Niatel uses this case to support its assertion that "by operation of law under the Illinois Limited Liability Act and regardless of fault, Transcend cannot 'participate in administrative or other proceedings, in its name.'" (Second Motion to Strike p. 3). However, *Katris v. Carroll* in no way supports such a conclusion.<sup>4</sup> The cited Illinois Court of Appeals decision does not deal with or even mention a dissolved LLC.<sup>5</sup> In fact, the *Katris v. Carroll* case primarily dealt with the issue of whether a member of manager-managed LLC owed a fiduciary duty to the LLC "for which he was liable for allegedly colluding with accounting firm and its employee to develop software similar to software owned by LLC."<sup>6</sup>

It is unclear from Niatel's Second Motion to Strike whether its citation to *Katris v. Carroll* was the result of carelessness or whether it was purposefully cited in an effort to mislead the Commission. Regardless of intent, it is deeply troubling that Niatel submitted *Katris v. Carroll* to Commission to support a legal proposition that is far removed from the actual facts and holdings contained the case.

In addition to *Katris v. Carroll*, Niatel cites 805 Ill. Comp. Stat. 180/1-30 for its assertion that a dissolved LLC cannot "participate in administrative or other proceedings, in its name." (*Id.*). This Illinois statute does not support Niatel's legal conclusion. 805 Ill. Comp. Stat. 180/1-30 simply provides a list of the generic powers of an LLC under Illinois law. Notably, it only lists what an

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<sup>3</sup> *Katris v. Carroll*, 362 Ill. App. 3d 1140, 1144 (1st Dist. 2005).

<sup>4</sup> See *Id.*

<sup>5</sup> See *Id.*

<sup>6</sup> *Id.*

LLC can do and does not list what a dissolved LLC cannot do, as Niatel suggests in its Second Motion to Strike. This citation provides yet another example of Niatel offering a legal citation without a clear connection to the proposition for which it is used and without Niatel providing any sort of further explanation to the Commission.

Transcend raises its concerns regarding these matters to alert the Commission and its staff to “be on its toes.” The examples described above, though limited and not yet a “pattern,” are nonetheless cause for concern; future submissions warrant close inspection of the case law and citations used in support of Niatel’s arguments.

**C. Transcend’s Appearance is Proper**

Niatel’s Second Motion to Strike notes that Transcend’s attorney of record, Jonathan Marashlian, is not licensed to practice law in Illinois and asserts that Mr. Marashlian’s filings on behalf of Transcend with the Illinois Commerce Commission (“ICC” or “Commission”) should be stricken. (Second Motion to Strike p. 2) However, Niatel once again provides little or no legal support for this conclusion. For example, without providing a single citation to any statute, regulation, or case law, Niatel concludes that “[u]ntil Transcend’s attorney, Mr. Marashlian, is granted leave to appear by the Administrative Law Judge, any filings by Mr. Marashlian on Transcend’s behalf are *per se* improper and must be stricken.” (*Id.*) Contrary to Niatel’s unsupported arguments and claims, both the Commission and the Illinois Courts have allowed out-of-state attorneys, such as Mr. Marashlian, to appear before the Commission in almost identical circumstances.<sup>7</sup> According to the record in the Illinois Court of Appeals case *Alhambra-Grantfork Telephone Co. v. Illinois Commerce Com’n*,

“[O]n January 20, 2004, Philip R. Schenkenberg, an out-of-state attorney, filed with the Commission a petition for an investigation of Alhambra’s wireless

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<sup>7</sup> *Alhambra-Grantfork Telephone Co. v. Illinois Commerce Com’n*, 358 Ill.App.3d 818, 823, 832 N.E.2d 869, 873, 295 Ill.Dec. 419, 423 (Ill. App. Ct. 2005).

termination tariff on behalf of a number of wireless carriers. During a status hearing held on February 9, 2004, attorney Schenkenberg advised the presiding hearing examiner that he was not licensed to practice law in Illinois, and he moved to be allowed to appear in the pending proceedings pursuant to section 200.90 of Title 83 of the Administrative Code. The motion was granted.”<sup>8</sup>

Similarly, Niatel mischaracterizes Transcend’s association with John Madden as “an attempt to sidestep the Commission’s procedural rules,” without citing which of the Commission’s rules it is accusing Transcend of attempting to evade. (Second Motion to Strike p. 3) Contrary to Niatel’s unsupported accusations, Transcend has made a good faith attempt to comply with the Commission’s procedural rules for the practice of out-of-state attorneys before the Commission. As noted in Transcend’s First Response, an attorney licensed out of state can be authorized to practice before the ICC based on reciprocity. *See* 83 Ill. ADM. CODE 200.90(a). According to 220 Ill. Comp. Stat. 5/10-101, an attorney licensed out of state “shall be allowed to appear before the Commission upon the same terms and in the same manner that counselors and attorneys at law licensed in this State now are or hereafter may be admitted to appear in such other state or territory before its Commission or equivalent body.”<sup>9</sup> In the state of Maryland, where Mr. Marashlian is licensed to practice law, counselors and attorneys at law licensed in the State of Illinois are allowed to practice before the Maryland Public Service Commission, an equivalent body to this Commission, in matters of this type when an “attorney with a full-time office in [Maryland] is associated with him or her in the matter.” *See* Code of Maryland Regulations, §20.07.01.04(B).

As noted in Transcend’s First Response, Mr. Marashlian is associated with John Madden, a licensed attorney in Illinois practicing with O’Malley & Madden, P.C. (First Response p. 2). Through Mr. Marashlian’s association with John Madden, Mr. Marashlian appears before the Commission in the same manner that attorneys licensed in Illinois are admitted to appear before the

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<sup>8</sup> *Id.*

<sup>9</sup> 220 Ill. Comp. Stat. 5/10-101.

Maryland Public Service Commission. Thus, Niatel's Motion to Strike Transcend's Appearance should be dismissed with respect to any claims as to the validity of Mr. Marashlian's Appearance.

Nonetheless, Mr. Marashlian and Transcend stand willing to take any additional measures that the Commission feels are appropriate for his Appearance and representation of Transcend in this matter.

**WHEREFORE**, for the foregoing reasons and those cited in its First Response, Transcend prays that the Commission deny both of Niatel's Motions to Strike filed in the above docket.

Respectfully submitted,

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Attorneys for Transcend Multimedia, LLC

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## CERTIFICATE OF SERVICE

On this 22nd day of January 2010, the undersigned caused the "Response to the Motion to Strike Response & Motion for Leave to Amend, Filed by Niatel, LLC," in Docket No. 09-0509, to be electronically served on the parties listed below:

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/s/ Jonathan S. Marashlian

Jonathan S. Marashlian

EXHIBIT A

Printout of Transcend Multimedia, LLC's status with the Illinois Secretary of State



SERVICES    PROGRAMS    PRESS    PUBLICATIONS    DEPARTMENTS    CONTACT

### LLC FILE DETAIL REPORT

Entity Name	TRANSCEND MULTIMEDIA, LLC	File Number	01210149
Status	ACTIVE	On	01/12/2010
Entity Type	LLC	Type of LLC	Domestic
File Date	06/09/2004	Jurisdiction	IL
Agent Name	NATIONAL REGISTERED AGENTS INC	Agent Change Date	01/12/2010
Agent Street Address	200 WEST ADAMS STREET	Principal Office	6 WEST HUBBARD ST., SUITE 301 CHICAGO, IL 60610
Agent City	CHICAGO	Management Type	MGR <a href="#">View</a>
Agent Zip	60606	Duration	
Annual Report Filing Date	01/12/2010	For Year	2009
Series Name	NOT AUTHORIZED TO ESTABLISH SERIES		

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EXHIBIT B

Katris v. Carroll

N.E.2d 290 (1978). The ordinances were intended to address the problems associated with the diversion of automatic amusement games from lawful activity to illegal gambling. To that end, section 4-156-150 identifies the characteristics of an illegal gambling device and defines those characteristics narrowly, even providing a few exceptions to and limitations on the general definition in order to prevent an overbroad application. The ordinances are precisely tailored to curtail the possession of only those devices possessing these characteristics, characteristics identified by the City Council as providing the most telling indicators of use of a device for illegal gambling, and then only if used for illegal gambling. Should a device possess the salient “illegal” characteristics but not be used for illegal gambling, the ordinance provides for a hearing upon seizure of any suspected illegal amusement device and lawful use of the machine can be shown at that time. We find the ordinances are narrowly tailored to serve the significant government interest in protecting citizens from the evils associated with illegal gambling.

Lastly, any free speech information implicated by the ordinance can be communicated in a myriad of other ways. The players of these devices are free to play any device, automatic or otherwise, expressing the identical informational or story content, as long as the device does not contain the prohibited mechanical or statistical characteristics identifying it as a gambling device. These characteristics are entirely unrelated to the plot, character, story line and informational content of the device. They are nothing more than tools used by the owners and operators of the devices to track money made and lost on the machines, unrelated to the expression of a player’s ideas and feelings, to the character development of a game or the milieu in which the game is played out. If

a player is truly not gambling on an amusement device, he has no interest in these mechanisms and can find a machine to play that does not contain them. Accordingly, because the restrictions in the contested ordinances are content-neutral, are narrowly tailored to serve a significant government interest and leave open a myriad of other channels for communication of the information contained in to amusement devices, the restrictions are reasonable and the ordinances are a legitimate restriction on protected first amendment expression.

For the reasons stated above, we find plaintiff has not met his burden of rebutting the presumption that sections 4-156-150, 4-156-190 and 4-156-280 are constitutional and reverse the decision of the trial court permanently enjoining defendants from enforcing these Code section.

Reversed.

HOFFMAN, P.J., and ERICKSON, J., concur.



362 Ill.App.3d 1140

299 Ill.Dec. 482

**Peter KATRIS, Individually and in a Derivative Capacity on Behalf of Vipster Execution Systems, L.L.C., Plaintiff-Appellant,**

v.

**Patrick CARROLL and Ernst & Company, Defendants-Appellees (Stephen Doherty and William Behrens, Defendants).**

**No. 1-04-3639.**

Appellate Court of Illinois,  
First District, Sixth Division.

Dec. 23, 2005.

**Background:** Manager of limited liability company(LLC) sued member claiming

member usurped a corporate opportunity and colluded with accounting firm and its employee to develop software similar to software that was the main asset of the LLC, in breach of the member's fiduciary duties. The Circuit Court, Cook County, Martin S. Agran, J., entered summary judgment for member. Manager appealed.

**Holding:** The Appellate Court, McNulty, P.J., held that member owed no fiduciary duty to the LLC.

Affirmed.

### 1. Appeal and Error ◊893(1)

A circuit court's grant of summary judgment is reviewed de novo.

### 2. Statutes ◊181(1)

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.

### 3. Statutes ◊188, 214

When construing a statute, the plain meaning of the language used by the legislature is the best indication of legislative intent, and when the language is clear, a court should not look to extrinsic aids for construction.

### 4. Statutes ◊206

A statute should be construed so that no part is rendered superfluous or meaningless, if possible.

### 5. Limited Liability Companies ◊21

Member of manager-managed limited liability company (LLC) owed no fiduciary duty to the LLC under the Illinois Limited Liability Company Act for which he was liable for allegedly colluding with accounting firm and its employee to develop software similar to software owned by LLC, even though LLC manager claimed that member's promotion to "Director of Technology" gave him some power and authority as a manager, out of which a fiduciary

duty to the LLC arose; LLC was a manager-managed entity, member was not a manager under terms of operating agreement, promotion did not alter terms of operating agreement that there were only two managers and that member was not one of them. S.H.A. 805 ILCS 180/15-3(g)(3), 15-5(a).

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William P. Suriano, Law Offices of William P. Suriano, Riverside, for Appellant.

Steven M. Malina, Beth A. Black, Morgan, Lewis & Bockius L.L.P., Chicago, for Appellees.

Presiding Justice McNULTY delivered the opinion of the court:

This case concerns the applicability of fiduciary duties to a member of a manager-managed limited liability company under the Illinois Limited Liability Company Act (805 ILCS 180/1-1 *et seq.* (West 2002)) (Act). Plaintiff-appellant Peter Katris, individually and in a derivative capacity on behalf of Viper Execution Systems, L.L.C. (the LLC), asserted a cause of action for collusion against defendants-appellees Patrick Carroll and Ernst & Company (Ernst). Katris, a manager of the LLC, contended that Carroll and Ernst colluded with a member of the LLC in the member's breach of his fiduciary duties to Katris and the LLC. The circuit court of Cook County granted summary judgment in favor of Carroll and Ernst, finding that the LLC member did not owe the LLC or Katris any fiduciary duty.

In affirming the circuit court's grant of summary judgment, we follow the plain meaning of section 15-3(g)(3) of the Act. 805 ILCS 180/15-3(g)(3) (West 2002). This section imposes fiduciary duties only on a member of a manager-managed limit-

ed liability company who exercises some or all of the authority of a manager pursuant to the operating agreement. 805 ILCS 180/15-3(g)(3) (West 2002). The facts in this case showed that the member did not exercise any such authority pursuant to the operating agreement. Accordingly, the member did not owe any fiduciary duties, and, as a result, the collusion claim fails and summary judgment was proper.

#### BACKGROUND

In the early to mid-1990s, Stephen Doherty wrote a software program called “Viper” for Lester Szlendak. Subsequently, Katris and William Hamburg, both Ernst employees, expressed interest in Viper, and on February 14, 1997, they joined Szlendak and Doherty in forming the LLC to exploit the capabilities of the software. On that date, they filed the LLC’s articles of organization with the Secretary of State. In it, they indicated that management of the LLC was vested in its managers, Katris and Hamburg, and not retained by its members.

Pursuant to the LLC’s operating agreement, signed by the four members on February 14, 1997, each member held a 25% interest, and as a condition of the operating agreement, Szlendak and Doherty assigned their rights, interest and title to Viper to the LLC. The operating agreement provided that the “business and affairs of the [LLC] shall be managed by its [m]anagers” and that the members agreed to elect Katris and Hamburg as the “sole [m]anagers” of the LLC. The operating agreement also enumerated the powers of the managers and set forth the rights and obligations of the members. However, none of the provisions setting forth the rights and obligations of the members provided the members with any managerial authority. Pursuant to its terms, the operating agreement could “not be amended

except by the affirmative vote of [m]embers holding a majority of the [p]articipating [p]ercentages.”

Also on February 14, 1997, Katris and Hamburg, as managers of the LLC, prepared a written consent adopting certain resolutions in lieu of holding an initial meeting of the managers. They resolved, *inter alia*, to adopt the operating agreement dated February 14, 1997, as the operating agreement of the LLC and to elect the following: Hamburg as chief executive officer, Katris as chief financial officer, Szlendak as director of marketing, and Doherty as director of technical services. The written consent contained signature lines for Hamburg and Katris, who were identified as “all of the [m]anagers” of the LLC.

Prior to and at the time of the LLC’s formation, Doherty worked as an independent contractor for Hamburg and Carroll (also an Ernst employee); however, in late 1997, Ernst hired Doherty to work for Carroll. As part of his duties for Carroll, Doherty worked with a programmer hired by Ernst to adapt a software program ultimately called “Worldwide Options Web (WWOW).”

Katris initiated this action on January 16, 2002, and ultimately asserted a breach of fiduciary duty claim against Doherty and a claim for collusion against Doherty, Carroll and Ernst. He alleged that WWOW was functionally similar to Viper and contended that Doherty usurped a corporate opportunity of the LLC by working in secret with Carroll and the programmer hired by Ernst to develop competing software for Ernst. He further contended that Carroll and Ernst colluded with Doherty in the breach of Doherty’s fiduciary duties to the LLC.

Doherty subsequently settled with Katris, providing Katris with an affidavit setting forth his involvement in the case in

exchange for his dismissal. As a result of Doherty's dismissal from the case, only Katris' claim for collusion against defendants-appellees Carroll and Ernst remained.

Carroll and Ernst filed a motion for summary judgment asserting, *inter alia*, that Katris' collusion claim failed because Doherty, as a nonmanager member of the manager-managed LLC, did not owe Katris or the LLC a fiduciary duty under section 15-3(g) of the Act (805 ILCS 180/15-3(g) (West 2002)), and thus they could not collude with Doherty to breach a fiduciary duty under that section.

In response, Katris filed an affidavit attaching the February 14, 1997, written consent. Katris stated that the written consent constituted an amendment to the operating agreement and that, pursuant to the terms of that amendment, Doherty was named "Director of Technology" and "given the sole management responsibility for developing, writing, revising and implementing the Viper software." According to Katris' affidavit, Doherty "was in charge of adapting the software to route options orders, in addition to stock orders," and the "LLC relied on him totally to develop the Viper software." Katris contended that pursuant to section 15-3(g)(3) of the Act (805 ILCS 180/15-3(g)(3)(West 2002)), Doherty was thus subject to the standards of conduct imposed upon managers under the Act and breached those duties by usurping a corporate opportunity belonging to the LLC.

On October 1, 2004, the circuit court entered an order granting Carroll and Ernst's motion for summary judgment. The court subsequently denied Katris' motion for reconsideration, and this appeal follows.

#### ANALYSIS

[1] In this appeal, Katris contends that the trial court erred in granting summary

judgment on his collusion claim against Carroll and Ernst. We review the circuit court's grant of summary judgment *de novo*. *Morris v. Margulis*, 197 Ill.2d 28, 35, 257 Ill.Dec. 656, 754 N.E.2d 314 (2001). Summary judgment is appropriate where the pleadings, depositions, affidavits, admissions, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 333, 214 Ill.Dec. 831, 662 N.E.2d 397 (1996).

Here, Katris asserted a cause of action for collusion against Carroll and Ernst. He contended that Carroll and Ernst colluded with Doherty in breaching Doherty's fiduciary duty to Katris and the LLC. Accordingly, Katris' claim against Carroll and Ernst depended upon a finding that Doherty owed Katris and the LLC a fiduciary duty. *Chicago Park District v. Kenroy, Inc.*, 78 Ill.2d 555, 564-65, 37 Ill.Dec. 291, 402 N.E.2d 181 (1980). In this appeal, Katris contends that summary judgment was improper because Doherty owed Katris and the LLC such a fiduciary duty.

We look to the applicable provisions of the Act in determining the fiduciary duties owed by the managers and members of the LLC. *Anest v. Audino*, 332 Ill.App.3d 468, 475-76, 265 Ill.Dec. 840, 773 N.E.2d 202 (2002); see also *Harbison v. Strickland*, 900 So.2d 385, 389 (Ala.2004) ("Like corporations and limited partnerships, limited liability companies are creatures of statute"). The parties here agree that section 15-3(g) of the Act (805 ILCS 180/15-3(g) (West 2002)) applies to determine Doherty's fiduciary duties.

Katris acknowledges that theirs was a manager-managed LLC and that, pursuant

to the Act, a member of a manager-managed LLC “who is not also a manager owes no duties to the company or to the other members solely by reason of being a member.” 805 ILCS 180/15-3(g)(1) (West 2002). Katris thus concedes that Doherty did not owe any fiduciary duties solely by reason of being a member of the LLC.

Katris contends, however, that Doherty owed fiduciary duties to the LLC pursuant to section 15-3(g)(3) of the Act. Section 15-3(g)(3) provides:

“[A] member who pursuant to the operating agreement exercises some or all of the authority of a manager in the management and conduct of the company’s business is held to the standards of conduct in subsections (b), (c), (d), and (e) of this Section to the extent that the member exercises the managerial authority vested in a manager by this Act[.]” 805 ILCS 180/15-3(g)(3) (West 2002).

Katris contends that Doherty exercised some of the authority of a manager in his capacity as director of technology for the LLC and thus falls within the ambit of this section. Carroll and Ernst disagree, contending that pursuant to the plain terms of the statute, Doherty was only subject to fiduciary duties if he exercised managerial authority pursuant to the operating agreement. 805 ILCS 180/15-3(g)(3) (West 2002). They maintain that Doherty did not have any such managerial authority under the operating agreement. We agree.

[2-4] “The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *In re Application of the County Collector*, 356 Ill.App.3d 668, 670, 292 Ill.Dec. 515, 826 N.E.2d 951 (2005), quoting *People ex rel. Ryan v. McFalls*, 313 Ill.App.3d 223, 226, 245 Ill.Dec. 795, 728 N.E.2d 1152 (2000). The plain meaning of the language used by

the legislature is the best indication of legislative intent, and when the language is clear, this court should not look to extrinsic aids for construction. *Department of Transportation v. Drury Displays, Inc.*, 327 Ill.App.3d 881, 888, 261 Ill.Dec. 875, 764 N.E.2d 166 (2002). If possible, a statute should be construed so that no part is rendered superfluous or meaningless. *In re Application of the County Collector*, 356 Ill.App.3d at 670, 292 Ill.Dec. 515, 826 N.E.2d 951.

Looking at the plain language of section 15-3(g)(3) of the Act, Doherty was subject to fiduciary duties if he exercised some or all of the authority of a manager pursuant to the LLC’s operating agreement. 805 ILCS 180/15-3(g)(3) (West 2002). The Act provides for the creation of an operating agreement, stating that “[a]ll members of a limited liability company may enter into an operating agreement to regulate the affairs of the company and the conduct of its business and to govern relations among the members, managers, and company.” 805 ILCS 180/15-5(a) (West 2002). The four members of the LLC here entered into such an operating agreement on February 14, 1997.

[5] Looking to that operating agreement, it specifically provides that the business and affairs of the LLC “shall be managed by its [m]anagers,” provides for the election of Katris and Hamburg as the “sole [m]anagers” of the LLC, and sets forth the powers of the managers of the LLC. Although the operating agreement also sets forth the rights and obligations of the members, these provisions do not provide for any managerial authority. Accordingly, Doherty did not exercise any managerial authority pursuant to the LLC’s operating agreement. 805 ILCS 180/15-3(g)(3) (West 2002) (imposing fiduciary duties on member who exercises

some or all of the authority of a manager pursuant to the operating agreement); 805 ILCS 180/15-5(a) (West 2002) (operating agreement governs relations among members, managers, and company; Act applies to the extent not otherwise provided in operating agreement).

Katris contends, however, that the managers amended the operating agreement by passing the February 14, 1997, written consent wherein they elected Doherty “Director of Technology.” He contends that Doherty’s designation as “Director of Technology” elevated him to a position beyond that of a mere member of the LLC and was sufficient to impart on him some managerial authority. This argument fails for two reasons.

First, Katris has provided no authority for his contention that the written consent constituted an amendment to the operating agreement. Pursuant to its own terms, an amendment to the operating agreement required the “affirmative vote of [m]embers holding a majority of the [p]articipating [p]ercentages.” Katris and Hamburg were the sole participants to the February 14, 1997, written consent and held only a combined 50% interest in the LLC. They thus could not amend the operating agreement without an additional vote. See 805 ILCS 180/15-5 (West 2002) (setting forth applicability of operating agreement in regulating affairs of the LLC). Accordingly, the facts do not support Katris’ contention that the written consent constituted an amendment to the operating agreement.

Second, even if the written consent were viewed as part of the operating agreement, it did not change and, indeed, it reaffirmed the terms of the operating agreement. Katris and Hamburg executed the written consent in their capacities as the managers of the LLC. In it, they specifically resolved to adopt the operating agreement the four

members had executed that day as the operating agreement of the LLC. In the signature lines to the written consent, Katris and Hamburg designated themselves as “all of the [m]anagers” of the LLC. In light of these facts, something more than the managers’ designation of Doherty as “Director of Technology” was required to change the terms of the operating agreement and grant Doherty managerial authority pursuant to it. 805 ILCS 180/15-3(g)(3), 15-5 (West 2002).

In reaching this conclusion, we find Katris’ contentions in his affidavit, wherein he enumerates the managerial authority Doherty held as a result of being named “Director of Technology” in the written consent, inapposite under section 15-3(g)(3) of the Act. By its terms, that section applies where the non manager member exercises some or all of the authority of a manager *pursuant to the operating agreement*. 805 ILCS 180/15-3(g)(3) (West 2002). To look beyond the operating agreement to Katris’ affidavit would be to ignore the plain meaning of the statute and to render the express words used therein superfluous or meaningless. This we cannot do. *In re Application of the County Collector*, 356 Ill.App.3d at 670, 292 Ill.Dec. 515, 826 N.E.2d 951; *Drury Displays, Inc.*, 327 Ill.App.3d at 888, 261 Ill.Dec. 875, 764 N.E.2d 166.

The undisputed facts of this case show that Doherty was a member of a manager-managed LLC and exercised no managerial authority pursuant to the LLC’s operating agreement. Accordingly, the undisputed facts show that Doherty owed no fiduciary duties to Katris or the LLC pursuant to the Act and Katris’ collusion claim against Carroll and Ernst fails as a matter of law. We therefore conclude that the circuit court properly granted the motion

for summary judgment and affirm its judgment.

Affirmed.

TULLY and O'MALLEY, JJ., concur.



363 Ill.App.3d 121

299 Ill.Dec. 488

The PEOPLE of the State of Illinois,  
Plaintiff–Appellee,

v.

Daniel WEAD, Defendant–Appellant.

No. 1–02–1878.

Appellate Court of Illinois,  
First District, Fifth Division.

Dec. 23, 2005.

**Background:** Defendant was convicted in the Circuit Court, Cook County, Stuart E. Palmer, J., of first-degree murder, and he was sentenced to 38 years in prison. Defendant appealed. The Appellate Court reversed and remanded, 355 Ill.App.3d 586, 291 Ill.Dec. 182, 823 N.E.2d 192. The state petitioned for leave to appeal. The Supreme Court denied petition but directed the Appellate Court to vacate its judgment and reconsider its decision.

**Holdings:** On reconsideration, the Appellate Court, Neville, J., held that:

- (1) defendant's initial encounter with two police officers and his transportation to police station did not constitute an arrest;
- (2) defendant was under arrest when he arrived at police station;
- (3) detective did not have probable cause to detain defendant at police station;
- (4) information provided by witness to police officers about theft did not provide

probable cause to arrest defendant; and

- (5) defendant's confession at police station was involuntary.

Reversed and remanded with directions.

#### 1. Arrest ⇌68(3)

Defendant's initial encounter with two police officers and his transportation to police station did not constitute an arrest, even though officers, while on street with defendant, searched him and confiscated his pocket knife; defendant agreed to accompany officers to police station, was not compelled to go to police station with display of weapons or handcuffs or with use of language, and, according to one officer, would not have been deprived of his freedom and forced to go to police station had he stated that he did not want to assist with investigation. U.S.C.A. Const. Amend. 4; S.H.A. 725 ILCS 5/102–5, 107–2.

#### 2. Arrest ⇌68(4)

Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person. U.S.C.A. Const.Amend. 4.

#### 3. Arrest ⇌68(3)

An arrest is accomplished by an actual restraint of a person or by his submission to custody. U.S.C.A. Const.Amend. 4; S.H.A. 725 ILCS 5/102–5.

#### 4. Arrest ⇌68(3)

Test for determining whether a suspect has been arrested is whether, in light of all of the facts and circumstances of the particular case, a reasonable person would have believed that at the time in question he was no longer free to leave. U.S.C.A. Const.Amend. 4; S.H.A. 725 ILCS 5/102–5, 107–2.