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COMMONWEALTH OF KENTUCKY
DAVIESS CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 24-CI-01426

OWENSBOROTIMES

MATTHEW HAYDEN and ESTATE OF JACK T. WELLS,
individually and derivatively on behalf of
DAVIS AUTO GROUP, LLC

PLAINTIFFS

v.

JERALD RAY DAVIS, JR., EQ BUSINESS SERVICES, LLC,
EQ GROUP REINSURANCE, INC.

DEFENDANTS

DAVIS AUTO GROUP, LLC

NOMINAL DEFENDANT

REPLY TO COUNTERCLAIM

Come now the Plaintiffs/Counterclaim Defendants, by counsel, and for their Reply to Defendant/Counterclaim Plaintiff Jerald Ray Davis, Jr.'s ("Davis") Counterclaim, state as follows:

1. On February 24, 2020, Davis, Hayden, and Jack T. Wells ("Wells") executed the "Operating Agreement of Davis Auto Group LLC – A Kentucky Limited Liability Company" (the "Operating Agreement"). *See* Operating Agreement, dated February 24, 2020 (attached as "Exhibit 1"). Generally, the Operating Agreement sets forth each putative member's respective obligations and duties owed to Davis Auto Group, LLC ("Davis Auto").

REPLY: Counterclaim Defendants admit that they executed an Operating Agreement of Davis Auto Group, LLC – A Kentucky Limited Liability Company, on or about February 24, 2020, and at that time the Contribution under Section 4.1 was blank. Counterclaim Defendants deny that the Operating Agreement attached as Exhibit 1 is a copy of the Operating Agreement

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that was executed on or about February 24, 2020. Counterclaim Defendants further admit that the written Operating Agreement of Davis Auto Group, LLC sets forth Members respective duties and obligations “to Davis Auto Group” and deny all the remaining allegations in Paragraph 1 of the Counterclaim.

2. Article IV, Section 4.1, provides that “[e]ach Member agrees to make the following initial capital contributions to [Davis Auto]:

- a. Jerald Ray Davis to contribute \$500,000.00 in exchange for a 60% majority interest in Davis Auto;
- b. Jack T. Wells to contribute \$1,450,000.00 in exchange for a 20% interest; and
- c. Matthew R. Hayden to contribute \$1,450,000.00 in exchange for a 20% interest.

REPLY: Counterclaim Defendants admit that subsequent to the execution of the Operating Agreement, a new page 7 titled Section 4.1, was prepared by Davis’s attorney as to Article IV, Section 4.1.

3. Hayden has failed to make a full capital contribution of \$1,450,000.00 as required by Article IV, Section 4.1, of the Operating Agreement.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 3 of the Counterclaim.

4. During his lifetime, Wells similarly failed to make a full capital contribution of \$1,450,000.00 as required by Article IV, Section 4.1, of the Operating Agreement.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 4 of the Counterclaim.

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5. To date, the Wells Estate has not fulfilled Wells' outstanding financial obligation to Davis Auto.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 5 of the Counterclaim.

6. On May 28, 2020, Davis – acting in his capacity as Davis Auto's Manager – executed a "Floorplan Financing and Security Agreement" with Santander Bank, N.A. ("Santander"). *See* Dealership Financing Agreement (attached as "Exhibit 2").

REPLY: Counterclaim Defendants admit the allegations set forth in Paragraph 6 of the Counterclaim.

7. Per its terms, Santander extended Davis Auto an \$11,000,000 credit facility for the purpose of purchasing new and used vehicles for eventual sale in the normal course of business – repayment personally guaranteed by Davis, Hayden and Wells.

REPLY: Counterclaim Defendants admit the allegations set forth in Paragraph 7 of the Counterclaim.

8. Less than a week later, Hayden and Wells demanded that Davis execute an amendment to Davis Auto's Operating Agreement (the "Amendment"). *See* Amendment to Operating Agreement, executed June 3, 2020 (attached as "Exhibit 3").

REPLY: Counterclaim Defendants admit that the Amendment to Operating Agreement was prepared by Davis's attorney and submitted to Counterclaim Defendants for execution and was executed on June 3, 2020. Counterclaim Defendants deny the remaining allegations contained in Paragraph 8 of the Counterclaim.

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9. As reflected in the Amendment, Hayden and Wells unilaterally decided that Davis Auto's "allocation of ownership [was] disproportionate to the cash contributed" by its purported members, and that Davis should contribute an additional \$3,850,000 of his own funds "in order for the capitalization and ownership to be proportionate." *Id.* at 2.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 9 of the Counterclaim.

10. Notwithstanding Hayden and Wells' demand for additional capital investment from Davis, his obligations to and ownership interest in Davis Auto under the Operating Agreement remained exactly the same.

REPLY: Counterclaim Defendants deny the allegations contained in Paragraph 10 of the Counterclaim.

11. Upon information and belief, Hayden and Wells threatened to breach the Operating Agreement and withdraw their initial capital investments if Davis did not agree to execute the Amendment.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 11 of the Counterclaim.

12. Davis, wishing to avoid a situation in which Davis Auto failed before getting off the ground and having already personally guaranteed repayment of the \$11,000,000 loan from Santander, had no choice but to accept the lesser of two evils, even though the demand was based on misrepresentations and made without due consideration.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 12 of the Counterclaim.

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COUNT I

OWENSBOROTIMES

(Breach of Operating Agreement)

13. Counterclaim Defendants incorporate herein by reference their prior responses.

REPLY: Counterclaim Defendants incorporate herein by reference their prior responses.

14. By failing to satisfy their respective obligations to capitalize Davis Auto, Hayden and the Wells Estate have breached the Operating Agreement.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 14 of the Counterclaim.

15. As a direct and proximate result of Hayden and Wells' breach, Davis has suffered harms for which it is entitled to compensatory damages, the exact amount of which will be determined at trial.

REPLY: Counterclaim Defendants deny the allegations set forth in Paragraph 15 of the Counterclaim

COUNT II**(Declaratory Judgment – Lack of Consideration)**

16. Counterclaim Defendants incorporate the foregoing Paragraphs as if set forth fully herein.

REPLY: Counterclaim Defendants incorporate herein by reference their prior responses.

17. The Operating Agreement is a contract. As such, any amendment to the Operating Agreement must be made with due consideration. *Vinaird v. Bodkin's Adm 'x*, 72 S.W.2d 707,

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711 (Ky. 1934) (citations omitted) (“[G]enerally a new consideration is required in order for an attempted modification of a contract to be valid.”).

REPLY: Counterclaim Defendants admit that Davis Auto Group’s Operating Agreement and Amendment is a contract and admit the case law cited is a published decision but deny the remaining allegations contained in Paragraph 17 of the Counterclaim.

18. Davis and Davis Auto received no “new consideration” under the purported-Amendment to the Operating Agreement, in exchange for Jerry Ray Davis’s promise to provide an additional capital contribution to Davis Auto.

REPLY: The allegations are vague and unclear, and Counterclaim Defendants deny the allegations in Paragraph 18 of the Counterclaim.

19. Accordingly, Davis respectfully requests that this Court enter a judgment in its favor – pursuant to CR 57 – declaring that the purported Amendment to its Operating Agreement is invalid as a matter of law.

REPLY: Counterclaim Defendants deny the allegations contained in Paragraph 19 of the Counterclaim.

COUNT III

(Declaratory Judgment – Duress in the Inducement)

20. Counterclaim Defendants incorporate the foregoing Paragraphs as if set forth fully herein.

REPLY: Counterclaim Defendants incorporate herein by reference their prior responses.

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21. The Operating Agreement is a contract. Contracts are avoidable when induced under duress. *See Fears v. United Loan & Deposit Bank*, 189 S.W. 226, 232 (Ky. 1916) (holding that duress in the inducement of a contract may be found to exist “where one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his free will.”).

REPLY: Counterclaim Defendants admit that Davis Auto Group’s Operating Agreement is a contract and admit the case law cited is a published decision, but deny the remaining allegations contained in Paragraph 21 of the Counterclaim.

22. As described in Paragraphs 8-12 of this Counterclaim, Davis was coerced by Hayden and Wells to execute the purported-Amendment to Davis Auto’s Operating Agreement or suffer the consequences of Hayden and Well’s threat to breach the Operating Agreement by withdrawing their capital investments, effectively crippling Davis Auto and, by extension, causing Davis to default on scheduled loan repayments to Santander.

REPLY: Counterclaim Defendants deny the allegations contained in Paragraph 22 of the Counterclaim.

23. Accordingly, Davis respectfully requests that this Court enter a judgment – pursuant to CR 57 – declaring that Davis was coerced to execute the purported- Amendment under duress, and that the purported-Amendment is void, or avoidable, as a matter of law.

REPLY: Counterclaim Defendants deny the allegations contained in Paragraph 23 of the Counterclaim.

Any Counterclaim allegation that is not specifically admitted herein is denied.

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AFFIRMATIVE DEFENSES

1. Counterclaimant is bound by his attorney's actions.
2. The Counterclaim fails to state a claim for relief.
3. Counterclaimant's claims are barred by course of dealing.
4. Counterclaimant's claims are barred by estoppel, waiver, release, and/or consent.
5. Counterclaimant's claims are barred by ratification, acquiescence, and/or agreement.
6. Any alleged damage was caused by Jerald Ray Davis's acts or omissions.
7. As discovery has not commenced, Counterclaim Defendants reserve the right to amend, supplement or assert additional affirmative defenses.

WHEREFORE, Counterclaim Defendants request that Counterclaimant Jerald Ray Davis, Jr., take nothing by way of his Counterclaim, that judgment be entered in Counterclaim Defendants' favor and against Counterclaimant Jerald Ray Davis, Jr., on the Counterclaim, for an award of attorneys' fees, and all other just and proper relief.

Respectfully submitted,
ZIEMER, STAYMAN, WEITZEL & SHOULDERS, LLP

By: /s/ Robert L. Burkart
Karey L. Cain, KBA #90987
Robert L. Burkart, #PH36077079
Matthew Koressel, #PH36077014
20 NW First Street, 9th Floor
P. O. Box 916
Evansville, Indiana 47706-0916
Telephone: (812) 424-7575
Facsimile: (812) 421-5089
kcain@zsws.com; rburkart@zsws.com;
mkoressel@zsws.com

Attorneys for Plaintiffs/Counterclaim Defendants

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CERTIFICATE OF SERVICE

The undersigned certifies that on the December 10, 2024, a copy of the foregoing was electronically filed via the KCOJ E-filing System and served on the following:

Benjamin J. Lewis Garret Stone DENTONS BINGHAM GREENEBAUM 3500 PNC Tower 101 South Fifth Street Louisville, KY 40202 ben.lewis@dentons.com garret.stone@dentons.com Counsel for Defendant/Counterclaim- Plaintiff, Davis Auto Group LLC	Kyle G. Bumgarner Colton W. Givens KERRICK BACHERT PSC 1411 Scottsville Road P.O. Box 9547 Bowling Green, KY 42104 kbumgarner@kerricklaw.com cgivens@kerricklaw.com Counsel for Defendants, Jerry Ray Davis, EQ Business Services, and EQ Group Reinsurance, LLC

/s/ Robert L. Burkart
Robert L. Burkart