UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 8, 2015

CBCA 4612(3359)-REM

WESTERN STATES FEDERAL CONTRACTING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Robert J. Berens and Adam D. Melton of Langley LLP, Phoenix, AZ, counsel for Appellant.

Daniel J. McFeely, Office of General Counsel, Department of Veterans Affairs, Phoenix, AZ, counsel for Respondent.

Before Board Judges **SHERIDAN**, **KULLBERG**, and **SULLIVAN**.[1]

SHERIDAN, Board Judge.

In *Western States Federal Contracting, LLC v. Department of Veterans Affairs*, CBCA 3359, 14-1 BCA ¶ 35,530, *motion for reconsideration denied*, 14-1 BCA ¶ 35,620, this Board dismissed for lack of jurisdiction an appeal brought by Western States Federal Contracting, LLC (Western States or appellant). We took this action because Western States, having ceased to be in good standing in its state of formation, lacked capacity to maintain its

[1] Judge Marian E. Sullivan replaced Judge R. Anthony McCann on the panel subsequent to Judge McCann's retirement from federal service.

action at the Board. In a nonprecedential order dated March 19, 2015, the United States Court of Appeals for the Federal Circuit vacated that decision, and, on the Government's motion, remanded the case back to the CBCA to consider two questions: (1) "whether Western [States] had standing under [Federal Rule of Civil Procedure (FRCP)] 17(b)(3)(A) as an 'unincorporated association,'" and (2) "whether Western [States'] appeal should have been dismissed because its representative was not authorized to certify a claim to the [Department of Veterans Affairs (VA)] contracting officer or file an appeal at the CBCA on its behalf." *Western States Federal Contracting, LLC v. Department of Veterans Affairs*, No. 2014-1541 (Fed. Cir. Mar. 19, 2015).

We docketed the remanded matter as CBCA 4612(3359)-REM and requested briefing from the parties on the two questions posed by the Federal Circuit. For the reasons below, we conclude that (1) Western States did not have capacity pursuant to FRCP 17(b)(3)(A) to maintain its appeal at the CBCA, even though (2) Western States' representative was authorized to certify the claim it submitted to the VA's contracting officer and file an appeal of that claim to this Board. Therefore, the appeal may not proceed.

Background

On September 30, 2009, Western States entered into contract VA258-C-0320 with the VA for, among other things, the alteration and expansion of the fire alarm and sprinkler system at the VA Medical Center, Phoenix, Arizona. Western States was a Delaware limited liability company (LLC), doing business as a foreign limited liability company in the state of Arizona. On April 26, 2012, Western States submitted a claim, certified by Mr. Jose A. Perea, Jr., to a VA contracting officer alleging 699 days of VA-caused delay and seeking $461,706.01 in damages for extended home office overhead and $299,146 in other delay damages. When a timely final decision was not forthcoming, Western States appealed the deemed denial to the Board on April 29, 2013.

Mr. Perea filed a notice of appearance on behalf of Western States. Shortly thereafter, the VA, respondent, filed a motion to strike the appearance of Mr. Perea. In its motion, the Government alleged that Mr. Perea had not proven that he met the Board's requirements for representation of the limited liability company and that, even if Mr. Perea could represent the limited liability company before the Board, the limited liability company needed to be in good standing in its state of formation, Delaware, in order to maintain the action. The VA argued that a limited liability company that is not in good standing "may not maintain any action, suit or proceeding in any court . . . until such domestic LLC . . . has been restored and has the status of a domestic limited liability company . . . in good standing." Del. Code Ann. tit. 6, § 18-1107(l) (2012).

Thereafter, Mr. Perea submitted a revised notice of appearance. Attached to the revised notice, Mr. Perea included a document that indicated that "this limited liability company is in good standing in Arizona." The VA responded, arguing that Western States should provide proof that it was in good standing in Delaware, its state of formation.

On May 29, 2013, the Board issued an order directing appellant to provide Western States' articles of organization in Delaware and proof of its status in both Delaware and Arizona. Appellant responded on June 5, 2013, by attaching a document from the Delaware Department of State Division of Corporations identifying Western States as a Delaware limited liability company. The document also stated that Western States had ceased to be in good standing on June 1, 2012, and had an outstanding franchise tax liability of $981.

After receiving Western States' filing, which did not address its *current* standing in both Delaware and Arizona, the Board conducted a telephone conference on June 11, 2013, which was memorialized by an order issued that same day. During the conference, the VA indicated it would be filing a motion arguing that the appeal should be dismissed because Western States was not in good standing in Delaware when the appeal was made to the Board. The Board's order directed appellant to provide, by no later than June 17, 2013, proof of Western States' good standing that was previously demanded in the Board's order of May 29, 2013.

On June 17, 2013, Western States, by Mr. Perea, submitted a statement that did not fully address the concerns raised in the May 29 order. Soon thereafter, the VA filed a motion to dismiss. The VA reiterated the arguments it made in its motion to strike Mr. Perea's appearance, essentially that Western States lacked standing to maintain this appeal. Western States' response to the VA's motion did not address the limited liability company's standing in Delaware.

On October 24, 2013, the Board held another telephone conference to discuss the issues raised by the Government's motion to dismiss. The presiding judge explained that she saw several potential problems that needed to be resolved prior to moving forward with the appeal. The overriding issue was that Western States had not provided the Board with evidence of its good standing in Delaware. The presiding judge explained that Western States' ability to maintain an action before the Board is determined by the laws of the state under which it was organized, which require it to be in good standing. The presiding judge also noted that there were steps a not-in-good-standing limited liability company could take to restore its standing, and that if good standing was restored, for purposes of this action, it would be as if the limited liability company had consistently remained in good standing.

Mr. Perea indicated during the telephone conference that he intended to pay the limited liability company's overdue taxes so as to bring the limited liability company into good standing in Delaware. Following the conference, the Board reiterated in an order issued the same day that the next crucial step for Western States to take on the standing issue was to file, by no later than November 15, 2013, an affidavit establishing Western States' good standing in Delaware. Appellant was also ordered to provide a certificate of good standing issued by the Delaware Secretary of State. The order warned that, if such affidavit was not timely produced, the appeal would be dismissed.

On November 15, 2013, Mr. Perea filed an affidavit addressing several issues raised during the October 24 telephone conference, but not proof of Western States' current standing in Delaware. Mr. Perea moved for an extension of time to file the Delaware certificate of good standing. The Board granted appellant's request for an extension until November 26, 2013.

After receiving no further submissions or correspondence from Western States, the Board issued an order on December 2, 2013, directing appellant to show cause by December 6, 2013, why the appeal should not be dismissed for failure to prosecute. Western States failed to respond to the Board's show cause order. A second show cause order was issued on January 22, 2014, ordering appellant to show cause by January 29, 2014, why the appeal should not be dismissed for lack of jurisdiction or failure to prosecute. The order warned appellant that, "for the Board to have jurisdiction to address this dispute, appellant must establish that it is an LLC in good standing in Delaware, the state of its organization."

After Western States failed to respond to the December 2, 2013, and January 22, 2014, show cause orders, the Board dismissed the underlying case for lack of jurisdiction because Western States was not a limited liability company in good standing in its state of formation, Delaware. For this conclusion, the Board cited generally to *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630, and FRCP 17(b), "[a]s corporations and LLCs are both creatures of the state with state-given limited liability." 14-1 BCA at 174,130.

Discussion

1. Did Western States Have Standing Under FRCP 17(b)(3)(A)?

The Federal Circuit has directed us to determine "whether Western [States] had standing under [FRCP] 17(b)(3)(A) as an 'unincorporated association.'" For the reasons below, we conclude that Western States did not.

Parties' Arguments

First, appellant argues that a limited liability company should be treated as an "unincorporated association" under FRCP 17(b)(3)(A), thereby allowing it to prosecute a federal claim at the Board even if it lacks standing under the laws of its state of formation. Second, appellant argues that, even if FRCP 17(b)(3)(A) does not apply, the only period of time under Delaware law when a limited liability company's actions are invalidated is during the period of time in which its certificate of formation is canceled, which it argues never happened to Western States. Third, appellant argues that, because Western States is now in good standing in Delaware, all of its actions should be given retroactive effect.

Respondent argues that, even if the Board were to apply FRCP 17(b)(3)(A), the appeal should still be dismissed because FRCP 17(b)(3)(A) does not provide an avenue to establish standing in a federal tribunal for an entity that has capacity to sue in the state where the forum is located.

Federal Rule of Civil Procedure 17(b)[2]

We begin our analysis with the text of FRCP 17(b), Capacity to Sue or Be Sued:

> Capacity to sue or be sued is determined as follows:
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> (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;
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> (2) for a corporation, by the law under which it was organized; and

[2] The Board conducts its proceedings in accordance with the Civilian Board of Contract Appeals Rules of Procedure (CBCA Rules). 48 CFR 6101.1(a) (2014). Under the CBCA Rules, "[t]he Board looks to . . ." and "takes into consideration those Federal Rules of Civil Procedure which address matters not specifically covered [by the CBCA Rules]." 48 CFR 6101.1(c), (d).

> (3) for all other parties, by the law of the state where the court[3] is located,[4] except that:
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> > (A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and
> >
> > (B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

Pursuant to this rule, an individual's capacity to sue is determined by "the law of the individual's domicile" (FRCP 17(b)(l)); a corporation's capacity to sue is determined by "the law under which it was organized" (FRCP 17(b)(2)); and the capacity of "all other parties" to sue is determined by the "law of the state where the court is located" (FRCP 17(b)(3)). As there are two exceptions to FRCP 17(b)(3), a Justice on the United States Supreme Court has described FRCP 17(b) in the following way: "An artificial entity has the capacity to sue or be sued in federal court as long as it has that capacity under state law (and, in some circumstances, even when it does not)." *Rowland v. California Men's Colony*, 506

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[3] The CBCA is not a "court." *SMS Data Products Group, Inc. v. Austin*, 940 F.2d 1514, 1517 (Fed. Cir. 1991); *ViON Corp. v. United States*, 906 F.2d 1564,1567 (Fed. Cir. 1990). However, because the Federal Circuit has mandated that we review Western States' capacity to sue under FRCP 17(b)(3)(A), we do so.

[4] Although the CBCA is headquartered in Washington, D.C., it has worldwide jurisdiction with the power to sit in any locality. When the CBCA originally dismissed Western States' appeal for lack of jurisdiction, it was sitting in Washington, D.C. The fact that the CBCA is located in Washington, D.C., does not change our original result because, as discussed below, courts sitting in the District of Columbia apply the law of the state of formation for foreign limited liability companies when determining their capacity to sue. Delaware law still controls Western States' capacity to sue. The court with which the CBCA has concurrent jurisdiction over disputes arising under the Contract Disputes Act, the Court of Federal Claims, has determined, through promulgating a capacity rule that applies to parties before it, that the "law of the applicable state" should determine capacity to sue. *See International Federal of Professional & Technical Engineers v. United States*, 111 Fed. Cl. 175 (2013). The applicable state, here, is Delaware.

U.S. 194, 214 (1993) (Thomas, J., dissenting). The exception that the Federal Circuit mandates that we analyze is at FRCP 17(b)(3)(A), which states that an unincorporated association possesses the capacity to sue in federal court "to enforce a substantive right existing under the United States Constitution or laws," when such entity has "no such capacity" under state law.

Analysis Under FRCP 17(b)(3)

Because FRCP 17(b) does not specifically mention limited liability companies, we must first determine which subsection of the rule applies to them. In *Albers v. Gunthy-Renker Corp.*, 92 Fed. App'x 497, 499 (9th Cir. 2004), the court noted that, because the entity at issue was a limited liability company rather than a corporation, the court would look to the law of the state where the district court is located to determine whether the entity had capacity to sue. District courts have similarly determined that limited liability companies' capacity to sue should be analyzed under FRCP 17(b)(3). *E.g.*, *Merry Gentleman, LLC v. George & Leona Products*, No. 13-C-2690, 2014 U.S. Dist. LEXIS 105084, at *8 (N.D. La. Aug. 1, 2014) ("The capacity of a limited liability company to bring suit is governed by Rule 17(b)(3), which applies to 'all other parties,' Fed. R. Civ. P. 17(b)(3), meaning parties other than individuals (who are covered by Rule 17(b)(1)) and corporations (who are covered by Rule 17(b)(2))."); *HWI Partners, LLC v. Choate, Hall & Stewart, LLP*, C.A. No. 13-918-RGA-MPT, 2013 WL 6493118, at *3 (D. Del. Dec. 11, 2013); *Zuffa LLC v. Thomas*, No. 8:11-cv-00673-AW, 2012 WL 6617334, at *6 (D. Md. Dec. 18, 2012); *In re Dairy Farmers of America, Inc. Antitrust Litigation*, 767 F. Supp. 2d 880, 892 (N.D. Ill. 2011). Likewise, a limited liability company's capacity to sue or be sued is determined "by the law of the state where the court is located." FRCP 17(b)(3).

Analyzing limited liability companies pursuant to FRCP 17(b)(3) means that the law of the state where the court is located governs their capacity to sue or be sued. As the CBCA is located in Washington, D.C., the law of the District of Columbia controls.

As "[entities] distinct from its member or members," D.C. Code § 29-801.04(a) (2012), pursuant to D.C. law, limited liability companies have the right to sue and be sued in their legal name. *Id.* § 29-801.05 ("A limited liability company shall have the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs."). However, courts located in the District of Columbia that have considered the conditions under which a foreign limited liability company may maintain an action in the District have concluded that questions concerning a foreign limited liability company's capacity to sue should be resolved using the law of the state in which the limited liability company was organized. *See, e.g.*, *Ass'n of Merger Dealers, LLC v. Tosco Corp.*, 167 F. Supp. 2d 65, 72 n.12 (D.D.C. 2001) (construing Rule 17(b) to conclude that

"[q]uestions concerning a [Maryland limited liability company's] capacity to sue therefore should be resolved under Maryland law as [the limited liability company] was organized in Maryland"); *Mero v. City Segway Tours of Washington DC, LLC*, 826 F. Supp. 2d 100 (D.D.C. 2011).

Western States is a limited liability company organized under the laws of the state of Delaware. Thus, Delaware law controls its capacity to sue and be sued. Under Delaware law, Western States had the power to sue and be sued under the broad grant of powers and privileges necessary to conduct the business of the limited liability company. Del. Code Ann. tit. 6, § 18-106(b). However, Delaware law circumscribes the ability of limited liability companies to maintain suit when they fail to maintain good standing. *See id.* § 18-1107(l) ("A domestic limited liability company that has ceased to be in good standing . . . by reason of its neglect, refusal or failure to pay an annual tax may not maintain any action, suit or proceeding in any court of the State of Delaware until such domestic limited liability company . . . has been restored to and has the status of a domestic limited liability company . . . in good standing").

At the time we dismissed the case, Western States was not in good standing in Delaware, as it had not paid its taxes. Therefore, Western States lacked the capacity to sue or be sued unless the exception set forth in FRCP 17(b)(3)(A) applies.

Analysis Under FRCP 17(b)(3)(A)

FRCP 17(b)(3)(A) mentions two types of entities: partnerships and unincorporated associations. Therefore, analyzing this subsection requires an initial analysis of whether a limited liability company fits the definition of either of these types of entities. We conclude that a limited liability company is neither a partnership nor an unincorporated association, as those terms are defined by federal courts.

At the time FRCP 17 was enacted in 1937, many jurisdictions followed the common law rule that partnerships and unincorporated associations could not be parties to litigation in their own right, in effect barring access to both state and federal courts for those entities in states that followed the common law rule. *See Brown v. United States*, 276 U.S. 134, 141 (1928) ("The general rule is that in the absence of statute an unincorporated association is not a legal entity which may be sued in the name of the association."). "The notes of the Advisory Committee and the commentary make clear that Rule 17(b) did not change the law concerning the capacity to sue or be sued but merely codified existing case law." *Penrod Drilling Co v. Johnson*, 414 F.2d 1217, 1223 (5th Cir. 1969). The exception at FRCP 17(b)(3)(A) was created to ensure that partnerships and unincorporated associations would have access to federal courts if otherwise *completely* denied by state law, and could not use

state law as a shield from suit on matters implicating substantive rights under federal law. *See Lundquist v. University of South Dakota Sanford School of Medicine*, 705 F.3d 378, 381 n.2 (8th Cir. 2013). Limited liability companies are "a relatively new business structure allowed by state statute," *McNamee v. Department of the Treasury*, 488 F.3d 100, 107 (2d Cir. 2007) (quoting a 2000 Internal Revenue Service publication), that did not exist prevalently, if at all, when FRCP 17 was promulgated.

"The question of what constitutes a partnership or unincorporated association with capacity to bring a federal claim is governed by federal law." 4-17 James Wm. Moore et al., *Moore's Federal Practice - Civil* § 17.26; *accord Southern California Darts Ass'n v. Zaffina*, 762 F.3d 921, 927 (9th Cir. 2014) ("For purposes of Rule [17(b)(3)(A)], the determination of what constitutes an 'unincorporated association' is a question of federal law.") (quoting *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 820 (9th Cir. 1996))).

"[A] partnership nominally has a well-defined meaning[:] 'A partnership is an association of two or more persons to carry on as co-owners a business for profit.'" *Penrod Drilling Co.*, 414 F.2d at 1222 (citing Uniform Partnership Act § 6(1)). "[E]xploring the legal theory behind an unincorporated association to determine the difference between that form of enterprise and a partnership can certainly be an exercise in futility [because] no sharp legal boundaries appear." *Id.* at 1223. However, "[c]ourts have generally defined an 'unincorporated association' as 'a voluntary group of persons, without a charter,[5] formed by mutual consent for the purpose of promoting a common objective.'" *Committee for Idaho's High Desert, Inc.*, 92 F.3d at 820 (quoting *Local 4076, United Steelworkers v. United Steelworkers*, 327 F. Supp. 1400, 1403 (W.D. Pa. 1971)); *see Southern California Darts Ass'n*, 762 F.3d at 927; *see also Prescription Containers, Inc. v. Cabiles*, No. 12-Civ-4805, 2014 U.S. Dist. LEXIS 40250, at *16 (E.D.N.Y. 2014); *Goldenberg v. Indel, Inc.*, 741 F. Supp. 2d 618, 628 (D.N.J. 2010); *Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression & the Criminalization of a Generation v. City of Seattle*, No. C04-0860L, 2005 U.S. Dist. LEXIS 39175, at *5 (W.D. Wash. 2005); *In re Magnetic Audiotape Antitrust Litigation*, No. 99-Civ-1580, 2000 U.S. Dist. LEXIS 18197, at *4 (S.D.N.Y. 2000). "At common law an unincorporated association, as regards its rights and liabilities, is fundamentally a large partnership." *Penrod Drilling Co.*, 414 F.2d at 1222.

Federal courts, however, distinguish between limited liability companies and partnerships. *See, e.g.*, *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (noting that "the principal difference is that a limited liability company need have no equivalent to a general partner, that is, an owner who has unlimited personal liability for the debts of the

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[5] A "charter" is a "government act that creates a business . . . ; also, the document evidencing this act." Black's Law Dictionary, 9th ed., at 267.

firm"). Therefore, Western States does not fit into the category of "partnership" under FRCP 17(b)(3)(A).

Having determined that a limited liability company is not a partnership, we next must determine whether a limited liability company is an "unincorporated association," as defined by federal courts. We begin this analysis by recognizing that federal courts have a particular definition for unincorporated association, as that term is used in FRCP 17. Because the definition of unincorporated association that the federal courts generally use specifies that such an association not have a charter, a limited liability company, which requires a charter to be formed, cannot be an unincorporated association. Moreover, because unincorporated associations do not have charters, such associations do not generally benefit from limited liability. Another distinction between an unincorporated association, as defined by federal courts, and a limited liability company is that an unincorporated association requires more than one person to form. A limited liability company may consist of just one member. *Accord McNamee v. Department of the Treasury*, 488 F.3d 100, 107 (2d Cir. 2007) (noting that a limited liability company "hardly seems to be a[n] . . . 'association,' as one person does not associate with himself").

Both in Washington, D.C., and Delaware, limited liability companies can only be formed by filing a certificate of formation, or charter, with the state and may consist of just one person.

Section 29-101.02 of the D.C. Code defines "limited liability company" as "a domestic limited liability company formed under or subject to [the limited liability company chapter] or a foreign limited liability company." Section 29-801.02(5) of the D.C. Code defines "foreign limited liability company" as "an unincorporated entity formed under the law of a jurisdiction other than the District which would be a limited liability company if formed under the law of the District." In Washington, D.C., "[o]ne or more persons may act as organizers to form a limited liability company by signing and delivering to the Mayor for filing a certificate of organization," or charter. "A limited liability company is formed when the Mayor has filed the company's certificate of organization [or charter] and it becomes effective and at least one person becomes a member." D.C. Code § 29-802.01(d).

Section 18-101(6) of title 6 of the Delaware Code defines "limited liability company" as "a limited liability company formed under the laws of the State of Delaware and having 1 or more members." In Delaware, "[i]n order to form a limited liability company, 1 or more authorized persons must execute a certificate of formation, [which] shall be filed in the office of the Secretary of State . . . ." Del. Code Ann. tit. 6, § 18-201(a). "A limited liability company is formed at the time of the filing of the initial certificate of formation in the office

of the Secretary of State or at any later date or time specified in the certificate of formation . . . [and] shall be a separate legal entity." *Id.* § 18-201(b).

Therefore, we conclude that the distinctions between a limited liability company and an unincorporated association, as defined by federal courts, means that a limited liability company is not an unincorporated association, as that term is used in FRCP 17(b)(3)(A).

Furthermore, the text of FRCP 17(b)(3) contemplates that "all other parties" are not only "partnership[s] or other unincorporated association[s]." If "all other parties" were simply "partnership[s] or other unincorporated association[s]," the phrase "partnership or other unincorporated association" would be superfluous. We interpret the FRCP using the same canons that we use to interpret statutes. *See Hillis v. Heineman*, 626 F.3d 1014, 1017 (9th Cir. 2010). Therefore, so as not to create surplusage, *see Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 489 n.13 (2004), we hold that "all other parties" does not *only* mean "partnership[s] or other unincorporated association[s]."

However, even if a limited liability company is an unincorporated association for purposes of FRCP 17(b)(3)(A), the exception does not mean that such entity automatically has capacity to sue in federal court to enforce rights arising under the laws of the United States. In a recent case construing FRCP 17(b)(3)(A), *Lundquist*, 705 F.3d at 380-81, the United States Court of Appeals for the Eighth Circuit engaged in a textual analysis of the rule. The Eighth Circuit interpreted FRCP 17(b)(3)(A) to provide an unincorporated association the right to sue in a federal tribunal only when it has absolutely no such right under the laws of the state where the court is located:

> By its express terms, . . . the exception permits a partnership or unincorporated association "with no . . . capacity" to sue or be sued under [state] law to be sued in its common name in an action to enforce federal rights . . . . When state law *does* grant such an entity the capacity to sue or be sued, but specifies the manner in which that capacity may be exercised, state law limitations on the manner of exercise apply. *See Arbor Hill Concerned Citizens Neighborhood Association v. City of Albany*, 250 F. Supp. 2d 48, 61-62 (N.D.N.Y. 2003) [("[O]nly if New York State law does not grant plaintiff capacity to sue, and plaintiff is seeking redress for the alleged violation of a federal right, does Fed. R. Civ. P. 17(b)(1) allow suit to proceed in plaintiff's name.")].

705 F.3d at 380-81.

This textual reading of the rule is also supported by *Albers*, 92 Fed. App'x at 499 (holding that, despite FRCP 17(b)(3)(A), appellants' Racketeer Influenced and Corrupt Organizations Act claims could not be saved because the state required that appellant make preliminary showings before such claims could proceed in federal court); *see also Northbrook Excess & Surplus Insurance Co. v. Medical Malpractice Joint Underwriting Ass'n*, 900 F.2d 476 (1st Cir. 1990).

Because D.C. law provides capacity for foreign limited liability companies to sue and be sued, and Delaware law provides such capacity for its domestic limited liability companies, the exception in FRCP 17(b)(3)(A) does not apply to Western States. Delaware law places limits on the exercise of that capacity – limits that apply to this case – by specifying the "manner in which that capacity may be exercised," 705 F.3d at 380-81, i.e., in order to exercise such capacity, a Delaware limited liability company must be in good standing. The grant of capacity to Western States pursuant to FRCP 17(b)(3)(A) would allow Western States to avoid those limitations, which is not the purpose of the exception.[6]

Western States' Other Arguments Are Unavailing

Western States seeks to have us hold that, even if FRCP 17(b)(3)(A) does not apply, the only period of time under Delaware law when a limited liability company's actions are invalidated is during the period in which its certificate of formation is canceled. Arguing that Western States' certificate of formation was never canceled, Western States avers that it always had capacity to maintain suit at the Board. We disagree. Section 18-1107(l) of title 6 of the Delaware Code provides that a limited liability company is unable to maintain suit if it ceases to be in good standing. Whether Western States' certificate of formation was ever canceled is not relevant.

Western States would also have us hold that, because it has now paid its taxes and is in good standing in Delaware, all of its prior actions should be given retroactive effect. This argument is unavailing because, at the time we dismissed this case for lack of jurisdiction, Western States was not in good standing, and Board Rule 26(a) (48 CFR 6101.26(a) (2014)) does not allow relief based on evidence that could have been presented at the underlying proceeding. In our ruling denying Western States' motion for reconsideration, we emphasized that Western States' ability to revive its standing during the underlying action disallowed relief on reconsideration:

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[6] The second exception, at FRCP 17(b)(3)(B), does not apply to Western States, as it is not a receiver appointed by a United States court to sue or be sued in a United States court.

> [A]ppellant was warned of the danger that the Board would dismiss its appeal for lack of jurisdiction if Western States did not produce proof of the LLC's good standing in Delaware. When Western States failed to produce the required evidence, the appeal was dismissed for lack of jurisdiction. Western States has failed to establish that any of the reasons to grant reconsideration exist here. The fact that Western States may now be in good standing in Delaware is not a compelling reason to grant reconsideration. Had appellant acted diligently, and returned itself to good standing earlier, it may have avoided the dismissal of its action.

Western States, 14-1 BCA at 174,464. Analyzing Western States' capacity under FRCP 17(b)(3)(A), instead of 17(b)(2), does not change this result.

2. Should Western States' Appeal Have Been Dismissed Because Its Representative Was Not Authorized to Certify a Claim to the Department of Veterans Affairs Contracting Officer or File An Appeal at the CBCA on Its Behalf?

The Federal Circuit has also directed us to determine whether Western States' appeal should have been dismissed because its representative was not authorized to certify a claim to the VA contracting officer or file an appeal at the CBCA on its behalf. For the reasons below, we find that Western States' representative was authorized to certify the claim it submitted to the VA contracting officer and file an appeal of that claim to this Board.

Parties' Arguments

Appellant argues that Mr. Jose A. Perea, Jr., as the managing member of Western States, had the authority to certify the claim on behalf of Western States and the authority to file the appeal at the CBCA.

Respondent argues that the certification and appeal are ineffective because appellant does not support its contention that Mr. Perea has the authority to bind the limited liability company.

Who may certify a claim on behalf of a limited liability company formed in Delaware?

The Contract Disputes Act requires that claims of more than $100,000 be certified "by an individual authorized to bind the contractor with respect to the claim." 41 U.S.C. § 7103(b)(2) (2012). The rules for which persons representing a limited liability company may bind such an entity are established by the laws of the entity's state of formation. Under Delaware law, "[u]nless otherwise provided in a limited liability company agreement, each

member or manager has the authority to bind the limited liability company." Del. Code Ann. tit. 6, § 18-402.

Who may file an appeal at the CBCA on behalf of a limited liability company?

CBCA Rule 2 provides that "[a] notice of appeal shall be signed by the appellant or the appellant's attorney or authorized representative." Therefore, in order for Mr. Perea to have capacity to file a notice of appeal at the Board on behalf of Western States, he must be an authorized representative of Western States.

Western States has submitted to the Board a declaration from Mr. Perea, in which Mr. Perea states:

> 3. Since its formation, and continuing to the present day, I have owned a 51% membership interest in Western States.
>
> 4. Since its formation, and continuing to the present day, Western States has always had three members: Hoover Development Company, LLC, Mr. Richard W. Szurgot, Jr. and me.
>
> 5. In or about August, 2009, all of the members of Western States . . . orally agreed that I would be the manager with the power to act on behalf of Western States.

The Government has submitted no documentary evidence to rebut any of the assertions made by Mr. Perea related to Mr. Perea's ability to bind Western States. We conclude that Mr. Perea is a member of Western States. Thus, as of August 2009, Mr. Perea had the authority to bind the limited liability company, pursuant to Del. Code Ann. tit. 6, § 18-402. Mr. Perea also had the authority to certify the claim pursuant to the CDA and file an appeal at the CBCA pursuant to CBCA Rule 2.

Decision

We conclude that Western States did not have capacity pursuant to FRCP 17(b)(3)(A) to maintain its appeal at the CBCA. In light of this conclusion, even though Mr. Perea had the authority to act on behalf of Western States, the appeal may not proceed. The appeal is, therefore, **DISMISSED FOR LACK OF JURISDICTION**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

MARIAN E. SULLIVAN
Board Judge