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Re: *Smashburger Master LLC v. Prokupek*
C.A. No. 9898-VCN
Date Submitted: January 7, 2015

Dear Counsel:

The parties selected a Special Master to help with this matter in which the Defendant¹ seeks valuation of and payment for his interest in Plaintiff limited liability company and the Plaintiff also seeks a determination of value. Plaintiff and Defendant agreed that an independent firm would perform a valuation function. The question is how much (or how little) should a judge intervene into the efforts of the independent firm and the Special Master? In contemplating this fundamental consideration, some blind alleys were traversed.

¹ David Prokupek and Vine Street Holdings, LLC are both defendants. This letter opinion refers to them together as "Defendant."

* * *

In the most general sense, three primary issues must be addressed: (1) selection of the independent firm to perform the valuation; (2) whether discovery should be stayed; and (3) whether Defendant's counterclaims can survive Plaintiff's Motion to Dismiss Counterclaims or, in the Alternative, to Stay or Bifurcate Counterclaims (the "Motion to Dismiss").² Resolution of the first issue has been delegated to the Special Master.³ The second two are the subjects of Plaintiff's current motions.

Underlying all issues is debate about some accounting decisions Plaintiff made when it valued Defendant's prior interest and whether the independent firm is to value only the corporation as a whole or also to value Defendant's units. Although those efforts may ordinarily be similar, this case is complicated by questions of whether the company (which one of the defendants supervised)

² Defendant's second counterclaim is no longer subject to the Motion to Dismiss. Disputes related to the vesting of units or the number of options Defendant is entitled to receive are committed to this Court. Stip. and Order Regarding Count II of Defs.' Countercls.

³ There are related issues regarding the nature of the independent firm's work. Such questions will be addressed (in the first instance) by the Special Master in accordance with this letter opinion.

achieved certain performance hurdles, resulting in Defendant's entitlement to additional units, and whether the value of Defendant's units is subject to a minority discount. Plaintiff's Motion to Dismiss and its Motion to Stay Discovery (the "Motion to Stay") essentially seek a determination of how procedurally the various disputes between the parties will be decided.

* * *

The Court is obligated to manage its affairs and achieve the orderly disposition of its business in pursuit of an efficient administration of justice.⁴

Here, the Court is guided by Smashburger's LLC Agreement, which binds the parties and tasks the independent firm (to be designated) with responsibility for performing a valuation. If that firm can, in its professional judgment, follow the terms of the parties' agreement, it should do so. If not, it should petition for instructions. Because of the presence of a Special Master, such inquiry should be directed to him.⁵

⁴ See, e.g., *TA Instruments-Waters, LLC v. Univ. of Conn.*, 31 A.3d 1204, 1210 (Del. Ch. 2011).

⁵ Adopting this procedure substantially confirms the Court's preliminary determination that the Special Master should have leeway to decide (at least in the

It is acknowledged that this process may turn out to be cumbersome and may not work well with the timing anticipated by the parties. Unfortunately, I see no better way of dealing with these issues, while, at the same time, implementing the parties' agreement as to how to value the company (or Defendant's interest in the company). With the goal of adopting a procedure to resolve most efficiently the parties' disputes, this Court's consideration of Defendant's counterclaims should be stayed.⁶

Similarly, Defendant's proposed discovery is directed primarily at valuation issues. The independent firm should determine in the first instance what information is necessary or helpful for its valuation work. Indisputably, the

first instance) a reasonable range of issues between the parties. *See* Nov. 28, 2014, letter from the Court to the Special Master. At least as an initial matter, the Special Master should answer questions regarding the nature of the independent firm's delegation. However, the independent firm should determine initially what materials it needs as part of the scope of its valuation work. It may turn to the Special Master for any needed guidance.

Defendant has requested that the Special Master preside over and make a recommendation concerning a forensic accounting effort before any valuation. *See* Defs.' Response to the Court's Nov. 28, 2014, letter. Whether such an accounting is necessary can be determined initially by the independent firm, with direction as needed from the Special Master.

⁶ Accordingly, the Court reserves decision on the Motion to Dismiss.

independent firm will be tasked with determining Plaintiff's value. Whether its valuation will go further is now uncertain. However, its work is likely to include valuation determinations potentially relevant to resolving Defendant's counterclaims, including Count II. The independent firm will probably use EBITDA numbers. Disputes regarding EBITDA are central to Defendant's counterclaims. Even if the Court must decide issues after the independent firm completes its work, responding to discovery here, in addition to the independent firm's likely requests, could result in duplicative efforts. Again, if Defendant is unable to make his points because the Plaintiff has all the data, the fundamental fairness and effectiveness of the valuation process may be called into question.

* * *

Because of the interrelated issues, establishing the proper sequence for performing the various tasks is difficult. The Motion to Dismiss and the Motion to Stay both tie into how the independent firm (perhaps as guided by the Special Master) goes about its task. It is tempting to step in to resolve almost piecemeal the various issues, but that might disrupt the independent firm's work (or even its designation). As mentioned, some of the issues framed by the two formally

pending motions will likely be resolved (or at least touched upon in a significant way) through the alternate dispute resolution process chosen by the parties. There is the risk that the parties and the independent firm may go through the work required for the valuation and have all that effort for naught because of later judicial review. What now looks most efficient may ultimately be problematic. This risk is potentially exacerbated because authority given to the independent firm is arguably (and something the Court does not decide) narrower than the authority typically given to an arbitrator.

The Court, however, must be careful not to interfere unduly with the process selected by the parties. Thus, the appropriate approach is to adhere as closely to the parties' agreement as possible. That places the valuation effort, as an initial matter, in the hands of the independent firm.⁷ If the independent firm has difficulty resolving some of the numerous issues (or is professionally unwilling to make

⁷ Again, the Court recognizes that resolution of Defendant's second counterclaim is within its province. That claim's relation to the other issues in this case suggests that it should be addressed after the independent firm performs its work. Also, the Court may ultimately decide Defendant's other counterclaims. Nothing in this letter opinion should be interpreted as a conclusion on the scope of the agreed-upon valuation effort. Rather, the Court is deferring its consideration of the various issues.

Smashburger Master LLC v. Prokupek
C.A. No. 9898-VCN
March 27, 2015
Page 7

what may be viewed as legal, or perhaps accounting, determinations) the Special Master should be consulted first. The Court, thus, will stay its handling pending this process.

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Counsel are requested to confer and to submit an implementing form of order. This request is made in part because counsel are likely in a better position to fine-tune some aspects of the process the Court has set forth above.⁸

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Neal C. Belgam, Esquire
Register in Chancery-K

⁸ This decision moots Plaintiff's January 29, 2015, Motion for a Protective Order to Stay Discovery.