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CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: June 3, 2008
Decided: June 6, 2008

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Re: *Maitland v. Int'l Registries, LLC, et al.*
Civil Action No. 3669-CC

Dear Counsel:

Presently before the Court are two motions of plaintiff Guy E.C. Maitland. The first seeks an order striking the answer of defendant Vienna Holdings, LLC ("Vienna") and disqualifying Vienna's counsel, Prickett, Jones, & Elliott, P.A. ("Prickett"). The second is a motion for a commission requesting documents and deposition testimony from nonparty McGladrey & Pullen, LLP ("M&P"), the outside auditing firm of defendant International Registries ("IR"). For the reasons explained below, I grant plaintiff's motion to strike and disqualify but deny the motion for a commission.

Maitland's motion to strike and disqualify is based on the organizational structure of one of the defendants. Maitland is one of two members of Vienna and holds a fifty percent interest. Maitland contends that Vienna's answer in this case was filed and counsel was retained in violation of its LLC Agreement, which requires action by majority. Because Maitland owns fifty percent of the LLC, Vienna could not possibly have validly retained counsel and filed an answer without his assent. Vienna, whose actions in the case are being directed by

Florigio Guida, the other fifty percent member, contends that the LLC Agreement vests both members with management rights and that Maitland's motion is motivated by a desire for indemnification of his attorneys' fees.[1] I conclude—admittedly somewhat formalistically—that Maitland's interpretation of the LLC Agreement is correct, and that his motion to strike and disqualify should be granted. However, I further conclude that Guida must be permitted to intervene in this case and defend on behalf of Vienna.

Because limited liability companies are organized by contract, the Court must begin its analysis with Vienna's LLC Agreement.[2] Section 7 of that document provides:

> Management of the Company shall vest solely in the Members, and the decision of the Members holding a majority of all LLC Interests as to all such matters shall be controlling. The Initial Members [Maitland and Guida] are hereby granted all rights, powers, authorities, and authorizations necessary, appropriate, and advisable and/or convenient to manage the Company and to determine and carry out its affairs.

Vienna argues that the second sentence in that excerpt establishes that Guida has the power to retain counsel and file an answer on behalf of the LLC. The logic of that argument, however, is self-defeating. If Guida's interpretation were correct, Maitland would have an equal right to appoint counsel and file an answer on behalf of Vienna; the two men are co-owners with equal ownership interests. Although the second sentence may vest in each man the power to manage Vienna when his co-owner is silent, it does not contemplate and cannot allow one owner's

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[1] Although the parties devote substantial portions of their briefs to the issue of attorneys' fees, I see no need to address this issue now. Therefore, as of now, the traditional American rule applies and each party should bear its own costs and fees. *See Korn v. New Castle County*, C.A. No. 767-CC, 2007 WL 2981939, at *2 (Del. Ch. Oct. 3, 2007) ("Generally, Delaware courts follow the American Rule, under which 'prevailing litigants are responsible for the payment of their own attorney's fees.'" (quoting *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043–44 (Del. 1996).

[2] *Cf. Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008) ("In the context of limited liability companies, which are creatures not of the state but of contract, . . . duties or obligations must be found in the LLC Agreement or some other contract." (footnote omitted)).

management wishes to trump the other's where they differ. That conclusion is mandated by the first sentence, which says that the wishes of a majority are "controlling." So long as Vienna has only two members, neither Guida nor Maitland can unilaterally control the LLC. Where they disagree, the LLC is deadlocked.[3]

A deadlocked LLC cannot validly retain counsel and file an answer. In a somewhat analogous case, *Engstrum v. Paul Engstrum Associates*,[4] Chancellor Seitz granted a motion to strike an answer filed by a corporation that had just two stockholders, each owning fifty percent, and where, as here, the complaint was filed by one of the two owners. Although "the complaint is directed against the corporation," the Court noted that "the dispute is actually between the two stockholders."[5] Therefore, the Court "conclude[d] that the 'other' stockholder should be permitted to intervene as a party defendant with authority to defend on behalf of the corporate defendant."[6] I conclude that the same should occur here. Consequently, I grant Maitland's motion to strike Vienna's answer and disqualify Prickett as counsel to Vienna, but I do so while explicitly permitting Guida "to intervene as a party defendant with authority to defend on behalf of" Vienna.

I must, however, deny Maitland's motion for commission. At its core, this case is an action under 6 *Del. C.* § 18-305 for inspection of the books and records of two limited liability companies, Vienna and IR. Section 18-305 provides for summary proceedings, and the issues in such proceedings are necessarily limited.[7]

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[3] This Court has construed similar language in an LLC Agreement before. *See NAMA Holdings, LLC v. World Mkt. Center Venture, LLC*, --- A.2d ---, 2007 WL 5212036, at *7 (Del. Ch. July 20, 2007) (applying a provision in an LLC agreement that vested the managing members "with both the power and the obligation to do 'any and all things necessary, proper, convenient or advisable to manage the assets and affairs'" of the LLC). In *NAMA*, however, there was no dispute between the managing members in which each contended to be authorized to act by virtue of that broadly enabling provision. *Id*. (noting that the two managing members were working in concert against the interests of a non-managing member).

[4] 124 A.2d 722 (Del. Ch. 1956).

[5] *Id.* at 723.

[6] *Id.*

[7] *Cf. Meltzer v. CNET Networks, Inc.*, C.A. No. 3023-CC, 2007 WL 2593065, at *1 (Del. Ch. Sept. 6, 2007) ("There are few issues implicated in a § 220 proceeding."); *see also* 3 EDWARD P. WELCH, ANDREW J. TUREZYN, AND ROBERT S. SAUNDERS, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 18-305.6 (5th ed. 2006) (noting that the Court's jurisdiction under § 18-305 enables it to determine the single issue of "whether or not the person seeking information is entitled to the information.").

Rule 26, of course, restricts discovery to matters "relevant to the subject matter involved in the pending action."[8] Because the issues in a books and records case are narrow, discovery is necessarily narrow as well.[9] Maitland's motion for commission, however, is anything but. In his motion, Maitland seeks thirty-two categories of documents from nonparty M&P and deposition testimony from a representative of M&P on ten different topics, one of which is the subject matter of all of the documents.

To grant this motion for commission would be effectively to grant Maitland final relief in this proceeding. The vast majority of the materials Maitland seeks through the commission overlap almost precisely with the materials Maitland sought in the demand letter he sent to Mr. Guida. As the Court held in *Security First*, Maitland cannot use the discovery process in a books and records case to gain access to the books and records ultimately at issue.[10]

Maitland contends he needs access to these materials to counter defendants' argument that his claims were mooted when Vienna and IR turned over a substantial number of documents and records after his initial demand. Maitland intends to use the materials gathered from M&P to show that the initial production was insufficient. That is not necessary. Maitland must already have a reason to believe that the initial production was insufficient, and he is, therefore, already equipped to present this reason in response to defendants' argument his claim is moot. It would create a perverse precedent to allow Maitland to use the discovery process as an end-run around the LLC Agreement and the statute simply because IR and Vienna attempted to comply with Maitland's demand and produce the requested materials. Because Maitland has failed to show why the proposed commission seeks materials relevant or would lead to the discovery of materials relevant to the narrow issues in this case, his motion for commission is denied.

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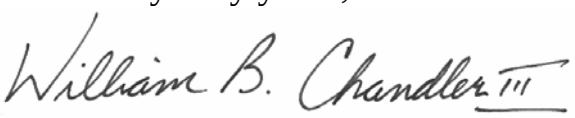
[8] Ct. Ch. R. 26(b)(1).

[9] *Cf. U.S. Die Casting & Dev. Co. v. Sec. First Corp.*, C.A. No. 14019, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995) ("Because the issues created by a § 220 action are narrow and specific, the scope of discovery is restricted to these issues.").

[10] *See id.* ("To grant U.S. Die its complete requested discovery would obviate the need for the § 220 action because U.S. Die would obtain through discovery all of the documents requested before a determination of the scope of its rights under § 220. Customarily, plaintiffs elect to pursue an expedited, summary § 220 action understanding one price paid for the election is limited discovery because of the limited relief available.").

IT IS SO ORDERED.

Very truly yours,



William B. Chandler III

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