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Re: *United Brotherhood of Carpenters Pension Plan v. Fellner*
C.A. No. 9475-VCN
Date Submitted: April 17, 2014

Dear Counsel:

Petitioners,¹ the collective owners of 78.61% of the beneficial interest of Nominal Defendant TSPF Millenia Property Liquidating Series Trust (the "Millenia Trust"), seek removal of Respondent Michael J. Fellner, its trustee. Millenia Trust is a series trust of Respondent Trade Street Property Fund I, LP

¹ The Petitioners are United Brotherhood of Carpenters Pension Plan, Carpenters Labor Management Pension Fund, Southwest Carpenters Pension Fund, Florida UBC Health Fund, and South Florida Electrical Workers Pension Plan and Trust.

Liquidating Trust (the “Master Trust”). The Master Trust’s trustee is Respondent BSF-TSC GP, LLC, an entity allegedly controlled by Michael Baumann, which appointed Fellner as Millenia Trust’s trustee. Baumann also allegedly controlled Trade Street Residential, Inc., a Maryland real estate investment trust (the “REIT”).

Petitioners claim that Fellner contributed two parcels of land (the “Millenia Property”) to the REIT in exchange for some of its common and preferred stock in December 2012. They sought to remove Fellner, after they learned that he had entered into a term sheet with the REIT allowing it to repurchase its preferred stock, allegedly at a dramatic discount. A status quo order was approved at the end of an earlier hearing.² The terms of the order prevent Fellner from executing the transaction contemplated by the term sheet. The other two Respondents in this action, the Master Trust and its trustee, who were not in attendance at the earlier hearing, now seek to vacate the order. The Court thus reconsiders the topic and concludes that the order should be vacated.

² Teleconference-Mot. to Expedite Proceedings and to Preserve Status Quo, C.A. No. 9475-VCN (Del. Ch. Mar. 31, 2014).

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The Court's analysis of whether a status quo order should be granted considers whether plaintiffs have demonstrated a reasonable likelihood of success on the merits, that the order will avoid imminent irreparable harm, and that the harm to plaintiffs outweighs the harm to the defendants.³

Petitioners argue that Fellner should be removed under the Series Trust Agreement (the "Agreement")⁴ of Millenia Trust or under 12 *Del. C.* § 3327.⁵ Section 3.7 of the Agreement allows 75% of the trust's beneficiaries to vote to remove the trustee if he is "(i) found by a court of competent jurisdiction . . . to have been guilty of gross negligence, willful misconduct or fraud" in connection with his service as trustee.⁶ Petitioners also assert that Section 3327 permits the Court to remove Fellner on grounds of unfitness, unwillingness, or inability to

³ See *Raptor Sys., Inc. v. Shepard*, 1994 WL 512526, at *2 (Del. Ch. Sept. 12, 1994).

⁴ Verified Pet. for Removal of Trustee, Ex. A.

⁵ See 12 *Del. C.* § 3809.

⁶ Agreement § 3.7 (The Agreement also provides for removal upon a pleading, or conviction, of a crime involving fraud or dishonesty.).

administer the trust properly or because hostility between the beneficiaries and Fellner threatens the efficient administration of the trust.⁷

Petitioners argue that the transaction contemplated by the term sheet is inadequate and has resulted in a large loss of value between the valuation of the REIT's preferred stock at the time of the December 2012 transaction and its value under the term sheet. However, the terms of the beneficiaries' powers under the Agreement require a court to have found that Fellner breached his fiduciary duties before it can properly remove him. The petition does not ask the Court to make such a finding and thus there is no probability of success on the merits based on Petitioners' pleadings.

In addition, Petitioners seek removal under 12 *Del. C.* § 3327; however, they do not explain why Fellner should be removed under this provision.⁸ The Court has found no allegations that the hostilities that may exist between Fellner and the beneficiaries are threatening the efficient administration of the trust. The petition also does not allege that Fellner is unfit, unwilling, or unable to serve as a trustee—

⁷ 12 *Del. C.* § 3327(3)(b)-(c).

⁸ Petitioners' arguments based on 12 *Del. C.* § 3327 focus on the Court's power to effect such a removal, instead of explaining how Fellner has acted with hostility or why he is unfit. *See* Petitioners' Opp'n to Mot. to Vacate at 11-12.

it alleges the Petitioners' dissatisfaction with certain transactions Fellner has executed or plans to execute. Thus, Petitioners have not buttressed their request for removal with allegations that support their prayers for relief.

Furthermore, Petitioners may be awarded damages if the trust's assets are sold for less value than they are worth and if that sale is the product of a breach of fiduciary duty. Thus, on this record, the Court cannot conclude that Petitioners are likely to suffer irreparable harm. On the other hand, because of their significant economic interests, the harm to Petitioners from allowing a possibly improvident transaction to go forward might outweigh any harm to Respondents. However, this possibility does not justify a status quo order, primarily, because of the problems the Petitioners encounter on the merits of their claim.⁹

⁹ Judicial review of a trustee's status has not evolved comparably to, for example, disputes about the composition of a corporation's board of directors. Although status quo orders may be characterized as customary in the summary proceedings brought under 8 *Del. C.* § 225, see Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 8.08[f] (2013), those are cases where the disputes are over which directors were properly elected. Here, there is no dispute about who was appointed to be the trustee and who currently serves as the trustee. The underlying issue is whether the Petitioners can meet the contractual (as set forth in the Agreement) or statutory standards for removal of a trustee.

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Petitioners' allegations do not support the interim relief they seek.
Therefore, the status quo order, entered March 31, 2014, is vacated.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

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cc: Register in Chancery-K