IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEVEN M. MIZEL ROTH IRA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 5566-VCN**
	:	
LAURUS U.S. FUND, L.P.,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: November 10, 2010
Date Decided: February 25, 2011

Norman M. Monhait, Esquire of Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Bruce L. Silverstein, Esquire and Kathaleen St. J. McCormick, Esquire of Young Conaway Stargatt & Taylor LLP, Wilmington, Delaware; and Hillary Richard, Esquire and David Elbaum, Esquire of Brune & Richard LLP, New York, New York, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Steven M. Mizel Roth IRA is a limited partner of Defendant Laurus U.S. Fund, L.P. (the "Fund"), a Delaware limited partnership. Substantially all of the Fund's assets are invested in the Laurus Master Fund, Ltd. (the "Master Fund"), a Cayman Islands entity. The Master Fund entered into voluntary liquidation under the supervision of the Grand Court of the Cayman Islands (the "Cayman Court"). The general partner of the Fund, Laurus Financial LLC (the "General Partner"), functions as the Fund's representative on a six-member liquidation committee (the "Liquidation Committee") formed by the Cayman Court.

In this action, the Plaintiff seeks judicial dissolution of the Fund under 6 *Del. C.* § 17-802 and requests that the Court appoint a receiver to act on behalf of the Fund. Now before the Court are the Plaintiff's motion for summary judgment and the Fund's motion to dismiss under Court of Chancery Rule 12(b)(6).

II. BACKGROUND[1]

In August 2002, the Plaintiff made an initial investment of $240,000 in the Fund and, sometime later, became a limited partner—a position continually held

[1] The factual background is based upon the allegations in the amended complaint (the "Complaint" or "Compl."). The Court may consider documents integral to the Complaint on a motion brought under Court of Chancery Rule 12(b)(6). *Orman v. Cullman*, 794 A.2d 5, 15-16 (Del. Ch. 2002).

since that time. As of August 31, 2009, the Plaintiff's capital account in the Fund amounted to $720,000.[2]

The Fund is a Delaware limited partnership that was formed in January 2001.[3] Established as an investment vehicle, it invests substantially all of its assets in the Master Fund, of which it is one of two shareholders—the other is the Laurus Offshore Fund, Ltd. (the "Offshore Fund"), a Cayman Islands entity.[4] Eugene and David Grin (the "Grin Brothers") are principals of the General Partner and also control the Fund's investment decisions through Laurus Capital Management, LLC (the "Investment Manager").[5] A monthly management fee of 2% is charged against each limited partner's capital account for the benefit of the "Investment Advisor."[6] Additionally, the General Partner has a right to 20% of the first 25% per annum of the Fund's net annual profits, with that right increasing to 30% of all profits exceeding that threshold amount.[7]

Although the Fund enjoyed a period of success, by 2008 its investment returns had diminished.[8] Around that time, the largest investor in the Offshore Fund submitted a redemption request, which caused that fund's board to consider a

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[2] Compl. ¶ 7.
[3] *Id.* ¶ 3.
[4] *Id.* ¶ 4.
[5] *Id.* ¶¶ 3, 5.
[6] *Id.* ¶ 5. It is not clear that the "Investment Advisor" is the Investment Manager, although that seems likely.
[7] *Id.*
[8] *Id.* ¶ 8.

restructuring.[9] Litigation ensued in the Cayman Islands resulting in the proposed restructuring being enjoined.[10] Thereafter, the Grin Brothers placed the Master Fund and the Offshore Fund into voluntary liquidation under the supervision of the Cayman Court—the General Partner notified the Fund's investors of the liquidation in a letter dated September 23, 2008.[11] That letter also informed the Fund's investors that it was in "dissolution mode in accordance with Delaware law" and that redemptions were forbidden.[12]

In addition to forming the Liquidation Committee, the Cayman Court also appointed two voluntary liquidators for the Master Fund (the "Liquidators")—the Liquidation Committee serves in an advisory capacity to the Liquidators. The six-member Liquidation Committee is comprised of one member for each of the two largest investors in the Offshore Fund, two members representing other investors in the Offshore Fund, the Investment Manager in its role as a creditor, and the General Partner as a representative of the Fund.[13] Because of their connection with both the Investment Manager and the General Partner, the Plaintiff contends that the Grin Brothers "effectively have two of the six seats on the Liquidation Committee."[14]

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[9] *Id.* ¶ 9.
[10] *Id.*
[11] *Id.* ¶¶ 9-10.
[12] *Id.* ¶ 10 and Ex. C (General Partner's Letter, dated Sept. 23, 2008).
[13] *Id.* ¶ 11.
[14] *Id.*

Although the Fund stated that it is in "dissolution mode" and that it plans to liquidate as it receives distributions from the Master Fund, the Fund's obligation to pay certain expenses remains.[15] For example, although payment of management fees at the Fund level was suspended at some point during the Master Fund's liquidation, the Liquidators and the Investment Manager agreed to a predetermined management fee that would be payable at the Master Fund level with the Fund then responsible for its pro rata share.[16] That fixed monthly fee decreases at six-month intervals, starting at $900,000 and eventually falling to $300,000.[17] Before the agreement on a fixed monthly fee, the management fee at the Master Fund level had averaged over $1 million per month from January 2009 through September 2009.[18] Moreover, expenses from the voluntary liquidation totaled over $35 million from September 2008 to February 2010—among those expenses were fees paid to the Investment Manager, which was retained by the Liquidators to dispose of the Master Fund's investment portfolio.[19] Fees incurred by the Liquidators require approval of the Liquidation Committee and the Cayman Court.[20]

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[15] *See id.* ¶¶ 13-14.
[16] *Id.* ¶ 13 and Ex. G (Liquidators' Fourth Report) at 11-13.
[17] Compl. ¶ 13. The fee schedule contemplates a target date of March 2012 for the completion of the Master Fund's liquidation.
[18] *Id.*
[19] *Id.* ¶¶ 14-15. Related to the Investment Manager's role in liquidating the Master Fund's investment portfolio, the Plaintiff alleges that "the Master Fund sold a number of its investment positions to other funds" managed by the Grin Brothers. *Id.* ¶ 17.
[20] *Id.* ¶ 16.

Around January 2010, Mr. Mizel—the Plaintiff's beneficiary—inquired of the Liquidators and the General Partner about obtaining expense reports of both the Liquidators and their consultants and a copy of the Liquidators' fee application.[21] His efforts were rebuffed, and Mr. Mizel received only limited information from the General Partner on the expenses of the Fund.[22] Subsequently, he sent a letter to the Cayman Court outlining his concerns regarding the liquidation's costs and memorializing his earlier queries directed to the Liquidators and the General Partner.[23] In a letter dated June 30, 2010, the clerk of the Cayman Court responded that the Liquidators had no obligation to provide Mr. Mizel with the requested information and that the court would not order them to do so.[24]

The Plaintiff seeks judicial dissolution of the Fund and appointment of a receiver to manage the Fund's affairs and to serve as its representative on the Liquidation Committee in place of the General Partner. These actions are appropriate, the Plaintiff contends, because, first, it is no longer reasonably practicable to continue the Fund's business in accordance with its limited partnership agreement (the "LPA")[25] and, second, the Grin Brothers have interests in the liquidation process that conflict with the Fund's investors—specifically, they

[21] *Id.* ¶ 18.
[22] *Id.* ¶¶ 18-19.
[23] *Id.* ¶ 20 and Ex. M (Letter of Mr. Mizel, dated June 21, 2010).
[24] *Id.* ¶ 20 and Ex. N (Letter of the Clerk of the Cayman Court, dated June 30, 2010).
[25] *Id.*, Ex. B (LPA).

have an interest in prolonging that process to increase their total fees and, because some of the Master Fund's assets are being purchased by the Grin Brothers' other managed funds, they are incentivized to liquidate those assets at lower prices.[26]

III. ANALYSIS

The Fund requests dismissal of this action under Court of Chancery Rule 12(b)(6). Because "the Fund's actions remain fully consistent with its business purpose," the Fund contends, the Plaintiff does not allege any facts to support the extreme remedy of judicial dissolution.[27] Moreover, the Plaintiff "does not even come close to alleging a legally cognizable basis for the judicial appointment of a receiver."[28] Because the Plaintiff "has not met (and cannot meet) the pleading standard to support the extraordinary relief" requested, the Fund argues, "[t]here is no basis for the Court to intervene."[29]

A. *Motion to Dismiss Standard*

Under Court of Chancery Rule 12(b)(6), the Court must decide "whether the complaint offers sufficient facts plausibly to suggest that the plaintiff ultimately will be entitled to the relief she seeks."[30] If the Complaint fails to satisfy this standard and "instead asserts mere conclusions," the Court must grant the Fund's

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[26] *Id.* ¶¶ 23-24.
[27] Def.'s Opening Br. in Supp. of Mot. to Dismiss Pl.'s Am. Compl. ("Def.'s Br.") at 15-16.
[28] *Id.* at 30.
[29] *Id.* at 1-2.
[30] *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *3 (Del. Ch. Dec. 30, 2010) (citing *Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007)).

motion to dismiss for failure to state a claim upon which relief can be granted.[31] Accordingly, the Plaintiff must make specific factual allegations that "logically tend to support the [P]laintiff's conclusions."[32] The Court will accept the truthfulness of all well-pleaded factual allegations in the Complaint along with all reasonable inferences that can be drawn in the Plaintiff's favor from those well-pleaded allegations.[33] The Court will not, however, "blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiff's favor unless they are reasonable inferences."[34] For that reason, "[m]ere conclusions of law or fact are insufficient."[35]

B. *Judicial Dissolution*

Under 6 *Del. C.* § 17-802, the Court "may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement." It is a limited remedy that Delaware courts grant sparingly.[36] In considering an application for judicial dissolution of a limited partnership, the Court must assess "whether it is 'reasonably practicable' to carry on the business of [the] limited partnership, and not whether it is

[31] *Desimone*, 924 A.2d at 929.
[32] *Berger v. Intelident Solutions, Inc.*, 911 A.2d 1164, 1169 (Del. Ch. 2006).
[33] *Id.*
[34] *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 832 (Del. Ch. 2006).
[35] *Berger*, 911 A.2d at 1169.
[36] *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682, at *2 (Del. Ch. Apr. 23, 2009).

impossible."[37] For that reason, the Court generally must determine the nature of the limited partnership's business and whether the general partner can continue that business in accordance with the limited partnership agreement.[38] That analysis requires the Court to observe what "the purpose clause set[s] forth in the governing agreements . . . ."[39]

Under the LPA, the Fund's purpose "is to serve as a fund through which the assets of its [p]artners will be utilized to invest, hold and trade in securities and other financial instruments of any name and nature which exist now or are hereafter created and rights and options relating thereto."[40]

Because the Fund was designed as a mechanism to invest in the Master Fund, the Plaintiff contends that the Fund's only remaining function "is to serve as a conduit for liquidation proceeds from the Master Fund . . . ."[41] Accordingly, with the Fund admittedly in "dissolution mode" and no longer seeking capital appreciation, the Plaintiff asserts that it is plausible, based on the allegations in the

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[37] *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005) (internal quotation omitted); *see also Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *6 (Del. Ch. Sept. 10, 1999) ("[T]he standard to be applied in a dissolution proceeding under § 17-802 is that of reasonable impracticability rather than impossibility . . . ."); *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, 1989 WL 63901, at *6 (Del. Ch. June 8, 1989) ("The standard set forth by the Legislature is one of reasonable practicability, not impossibility.").

[38] *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *5 (Del. Ch. Sept. 3, 1996) (citing *Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prods., Inc.*, 1993 WL 287620, at *1 (Del. Ch. July 28, 1993)).

[39] *In re Seneca Invs. LLC*, 970 A.2d 259, 263 (Del. Ch. 2008).

[40] LPA § 1.03.

[41] Pl.'s Answering Br. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Br.") at 11.

Complaint, that it is no longer reasonably practicable to carry on the business of the Fund.[42]

In response, the Fund asserts that it "continues to operate in conformity with the [LPA]."[43] With substantially all of its assets invested in the Master Fund, the Fund suggests that it "cannot wind-up and dissolve before the Master Fund makes a final distribution to the Fund."[44] Although it is operating in "dissolution mode," the Fund contends that it continues to function as a passive investor in the Master Fund and that the General Partner continues to manage the Fund and to represent its interests in the Master Fund's liquidation by serving on the Liquidation Committee.[45]

Even if the Fund is in "dissolution mode" with its assets invested in a liquidating entity, the Plaintiff has failed to allege facts sufficient to support a claim that it is reasonably impracticable to continue the Fund's business. The Plaintiff concedes that the Fund maintains a passive investment in the Master Fund—a function that falls squarely within the broadly worded purpose clause of the LPA. Moreover, the Fund's continuing operation in "dissolution mode" does

[42] *Id.*
[43] Def.'s Br. at 2.
[44] *Id.* at 15.
[45] *Id.* at 15-16.

not render the Fund formally dissolved under 6 *Del. C.* § 17-801,[46] and the Complaint is devoid of any such allegation. Although the Plaintiff suggests that the Grin Brothers—and by implication, the General Partner—are conflicted because of their role in the Master Fund's liquidation,[47] the Complaint fails to allege that the General Partner cannot achieve the Fund's business purpose in conformity with the LPA. The purported conflict involves the Master Fund's liquidation, which falls under the Cayman Court's jurisdiction and is outside of the province of this Court. Of the six representatives on the Liquidation Committee, the Grin Brothers appear to control only two of those six seats. Thus, the other four representatives comprise a majority and are not alleged to have interests inconsistent with those of the Fund's investors.

Although the Court recognizes the significant costs borne by the Fund and its investors because of the Master Fund's voluntary liquidation, judicial dissolution under § 17-802 is a limited remedy appropriate only where it is not reasonably practicable to continue the business of the limited partnership.[48] Here, the Complaint fails to allege facts sufficient to suggest plausibly that the Plaintiff is entitled to a decree of judicial dissolution. Indeed, even assuming the truthfulness

[46] *See Techmer Accel Hldgs., LLC v. Amer*, 2010 WL 5564043, at *7 n.86 (Del. Ch. Dec. 29, 2010) (observing that "a limited partnership dissolves upon the first to occur of" five statutory events of dissolution or upon the entry of a decree of dissolution).
[47] *See* Compl. ¶¶ 24-25.
[48] *Arrow Inv. Advisors, LLC*, 2009 WL 1101682, at *2.

of the factual allegations in the Complaint and drawing all reasonable inferences in the Plaintiff's favor, the Court can only infer that the Fund continues to invest its assets passively in the Master Fund with the General Partner acting on the Fund's behalf to carry out its business in accordance with the LPA. Thus, the Court will grant the Fund's motion to dismiss the Plaintiff's claim for judicial dissolution under Court of Chancery Rule 12(b)(6).[49]

C. *Appointment of a Receiver*

Related to its request for a decree of judicial dissolution, the Plaintiff also seeks the appointment of a receiver to wind up the Fund's affairs and to replace the General Partner as its representative on the Liquidation Committee.[50] In the Plaintiff's opposition brief to the Fund's motion to dismiss, there is little mention of a receiver.[51] Rather, the Plaintiff mainly argues for the appointment of a liquidating trustee.[52] For that reason, the Fund contends that the Plaintiff has abandoned any claim for the appointment of a receiver and instead seeks, through briefing, to allege a new claim for the appointment of a liquidating trustee.[53] At oral argument, counsel for the Plaintiff argued that, for purposes of § 17-802, a receiver and a liquidating trustee are interchangeable and that the Plaintiff has

[49] The Fund also argues that its motion to dismiss under Court of Chancery Rule 12(b)(6) should be granted because the Plaintiff is contractually precluded from seeking judicial dissolution. Because the Court grants the Fund's motion on other grounds, it need not reach this issue.
[50] Compl. ¶¶ 1, 26.
[51] *See* Pl.'s Br. at 2.
[52] *Id.* at 16-18.
[53] Def.'s Reply Br. in Supp. of Mot. to Dismiss Pl.'s Am. Compl. at 1, 12-15.

always sought an individual to be appointed in place of the General Partner.[54] Whether the Plaintiff requests that the Court appoint a receiver or a liquidating trustee, however, is of no consequence; in either case, the Complaint does not offer sufficient facts to suggest plausibly that the Plaintiff is entitled to that relief.

A "liquidating trustee" is defined as "a person, other than a general partner, but including a limited partner, *carrying out the winding up* of a limited partnership."[55] In Part III.B *supra*, the Court observed that the Plaintiff has made no allegation that the Fund was formally dissolved under 6 *Del. C.* § 17-801 and it concluded that the Complaint failed to allege facts sufficient to support a determination that the Plaintiff was entitled to judicial dissolution. Absent a basis upon which to deem the Fund dissolved, there exists no need for the Fund to wind up its affairs—dissolution precedes the winding up of a limited partnership.[56] Thus, the Court may not exercise its discretion to appoint a liquidating trustee because there is no plausible basis for the Fund to commence its wind up.

Likewise, the Complaint lacks sufficient factual allegations to suggest that a receiver should be appointed to manage the Fund's affairs. The Court may appoint a receiver if a statutory basis exists for doing so or "by way of the Court's general

[54] Oral Arg. on Def.'s Mot. to Dismiss and Pl.'s Mot. for Summ. J., Tr. 5, 43.
[55] 6 *Del. C.* § 17-101(10) (emphasis added).
[56] *Insituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347, at *12 n.9 (Del. Ch. Apr. 19, 1999) ("[T]he termination of a partnership is a three-step process: dissolution, winding up, and then termination.").

equity powers."[57] The Court may appoint a receiver for a limited partnership only in narrow circumstances under 6 *Del. C.* § 17-805. The Plaintiff, however, seemingly disclaims the applicability of that provision to the facts presented here and, also, fails to cite any statutory basis other than § 17-802 in requesting that the Court appoint a receiver.[58] Even assuming that § 17-802 authorizes appointment of the sort requested by the Plaintiff, the Court has already concluded that the Plaintiff's claims predicated on that statutory provision must be dismissed under Rule 12(b)(6). Without any statutory basis for the appointment of receiver, therefore, the Court may only do so under its general equity powers.

Delaware courts "exercise this power with great caution" because appointing a receiver is an extraordinary remedy.[59] Here, the Complaint lacks allegations that, if true, would support such an extreme response by the Court. Although the Plaintiff suggests that the General Partner has incentives to act contrary to the interests of the Fund's investors in its representative capacity on the Liquidation Committee, any action by the General Partner in that role is tempered by four other members of that committee, the Liquidators, and the Cayman Court. The Plaintiff makes no specific allegations in the Complaint to suggest that the General Partner

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[57] *Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2010 WL 3448227, at *6 & n.29 (Del. Ch. Sept. 2, 2010).

[58] *See* Pl.'s Br. at 16-17 (suggesting that the Court may appoint "a liquidating trustee . . . as an incident to the Court's dissolution authority under" § 17-802 and that "the Fund's resort to . . . § 17-805 is irrelevant").

[59] *Ross Hldg. & Mgmt. Co.*, 2010 WL 3448227, at *6 (internal quotation omitted).

is engaged in fraudulent activity or gross mismanagement of the Fund's affairs. Thus, no plausible basis is sufficiently alleged for the Court to exercise its discretion to appoint a receiver under its general equity powers.

Accordingly, because the Plaintiff has failed to offer specific factual allegations sufficient to suggest plausibly that the Court could appoint a liquidating trustee or a receiver, the Court will grant the Fund's motion to dismiss under Court of Chancery Rule 12(b)(6).[60]

IV. CONCLUSION

For the foregoing reasons, the Fund's motion to dismiss is granted. As a result, the Plaintiff's motion for summary judgment is moot. An implementing order will be entered.

[60] As with the Plaintiff's claim for judicial dissolution, the Fund contends that its motion to dismiss should be granted as to the Plaintiff's request for the appointment of a receiver because the Plaintiff is contractually precluded from seeking that relief. Because the Court grants the Fund's motion on other grounds, it need not reach this issue.