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Via LexisNexis File & Serve
and First Class Mail

Mr. Robert H. Harris
87 Lotus Oval South
Valley Stream, NY 11581

Mr. Don L. Hartman
11242 Osprey Lake Lane
West Palm Beach, FL 33412

Re: Harris v. RHH Partners, LP, et al.
C.A. No. 1198-VCN
Date Submitted: February 26, 2009

Dear Mr. Harris and Mr. Hartman:

I. BACKGROUND

Respondent RHH Partners, L.P. ("RHH") is a limited partnership formed under the Delaware Revised Uniform Limited Partnership Act.[1] Petitioner Robert H. Harris ("Harris") is the sole limited partner of RHH. Respondent 1015 Broadway, Inc. ("Broadway"), a Delaware corporation, is the sole general partner of RHH. Ownership interests in RHH are allocated by its limited partnership agreement (the

[1] 6 *Del. C.* § 17-101 *et seq.*

"LP Agreement"), under which Harris, the limited partner, holds a 99% interest in RHH while Broadway, the general partner, holds a 1% interest.

The sole asset of RHH Partners is real property known as 87 Lotus Oval South, Valley Stream, New York, 11581 (the "Property"). The limited partner, Harris, and his wife, reside at the Property. Harris claims that RHH was formed for the purpose of "protecting the Property and for tax and investment purposes" for his own benefit.[2] Broadway argues RHH was established to defraud Harris's creditors.[3]

The LP Agreement required a $1,000 capital contribution from Broadway, which Harris alleges has never been made. The LP Agreement also obligated Broadway to prepare all federal, state, and local tax filings for the partnership—essentially Broadway's only obligations—and Harris alleges that Broadway failed to do so for the years of 2002-04. Harris's complaint alleges that these failures constitute both a breach of the LP Agreement and a breach of Broadway's fiduciary duties to RHH.[4] Harris seeks the removal of Broadway as general partner of RHH, and the replacement of Broadway with JP Florimar, Inc. ("Florimar"). The purpose and the control of the Florimar entity are not clear from the record.

[2] Compl. ¶ 10.
[3] Am. Answer and Countercl. ¶ 5.
[4] Compl., Counts 1 and 2.

Harris's complaint has been opposed by non-party Don L. Hartman ("Hartman") who claims to be the "sole owner" of Broadway. He alleges that he became the "sole owner" of Broadway in order to exercise control over the Property. Hartman alleges that the Property serves as collateral for a debt owed to him by Harris. Hartman asserts that Harris owes him $776,614.00 and that control of RHH, and thus control of the Property, was granted to him in order to secure the Property as collateral for this debt.[5] As a result, Hartman claims that he must be joined as a defendant for the proper adjudication of this action and seeks permission to intervene in this action pursuant to Court of Chancery Rule 24(a)(2).[6]

A reading of the pleadings in concert leads to an understanding that more than mere disagreement over the payment of taxes and the $1,000 capital contribution

[5] Am. Answer and Countercl. ¶ 45.

[6] Ct. Ch. R. 23(a)(2) governs mandatory intervention. Hartman's motion does not plead permissive intervention. Hartman also claims that Florimar is an indispensable party to this action, and the complaint should be dismissed pursuant to Chancery Court Rule 12(b)(7) for failure to join this necessary party. A party is necessary if:

> (1) in his absence complete relief cannot be accorded among those already parties, or
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Ct. Ch. R. 19(a). The burden is on the moving party to show that the dismissal for failure to join an indispensable party is proper. *Clark v. Packem Assoc.*, 1991 WL 36470, at *3 (Del. Ch. Mar. 6, 1991). Hartman has failed to make such a showing. Because, as discussed below, the rights at issue here are as between Hartman and Harris, Floirmar has not been shown to be a necessary party.

drives this action. Instead, this action to remove Broadway is the mechanism by which Harris (rightly or wrongly) seeks to wrest the Property from Hartman's control. Because the relationship between them centers on the Property, Hartman argues that the tax and capital contribution obligations of the LP Agreement are wholly inapplicable to him, and are merely convenient grounds by which Harris attempts wrongfully to usurp his interest in the Property.[7] Harris disagrees entirely.

On November 22, 2005, this Court stayed this action pending resolution of a first-filed New York action between Harris and Hartman concerning at least a portion of the alleged debt. In the subsequent months, and perhaps wisely, counsel for the respective parties sought leave to withdraw their representation. Those applications were granted and no party has counsel of record.

Now, several years later, the Court has been informed that the New York action has ended. It appears that the New York action may have resolved a portion of the dispute between Harris and Hartman. It seems unlikely—but it is not entirely clear—that the New York action fully resolved their dispute. The parties begin their battle anew in this forum. This time, without the aid of counsel, the two gentlemen

[7] Hartman claims to have never seen the LP Agreement and that its obligations applied to the former head of Broadway, Harris's own accountant. Am. Answer and Countercl. ¶¶ 11, 46.

have engaged in a back-and-forth exchange of letters to the Court, none of which may properly be characterized as a motion, and none of which is helpful. True to form, the parties disagree as to the characterization of the New York action and how this Court should now proceed. And, instead of attempting to clarify the relevant legal issues, their submissions to the Court have devolved into *ad hominem* attacks on each other's character and veracity. Neither party appears particularly credible as a result.

This letter opinion addresses two pending issues: first, the consequences of the failure to secure replacement counsel for the juristic entities involved in this action, and second, the resolution of Hartman's application to intervene.

II. DISCUSSION

A. *Claims Involving Unrepresented Juristic Entities*

By letter dated November 17, 2008, the Court reminded the parties of the general rule that artificial business entities may appear in Delaware courts only through an attorney admitted to practice law in Delaware.[8] The result for failing to comply with that order was set forth. The Court instructed that, "If those

[8] *Transpolymer Indus. v. Chapel Main Corp.*, 582 A.2d 936, 1990 WL 168276 (Del. 1990) (TABLE) (corporation may not appear in court without counsel); *see also Street Search Partners, L.P. v. Ricon Intern., L.L.C.*, 2006 WL 1313859, at *2 (Del. Super. May 12, 2006) (same as to limited partnerships); *Poore v. Fox Hollow Enters.*, 1994 WL 150872, at *2 (Del. Super. Mar. 29, 1994) (same as to limited liability companies). *But see* J. P. Ct. Civ. R. 91.

[unrepresented] entities do not obtain counsel by January 2, 2009, they will be deemed to no longer have claims which they seek to assert or defenses to claims against them which they seek to assert."[9]

The January 2, 2009, deadline to secure counsel has passed. Because no appearance has been entered on behalf of any of the entities, all claims brought by, and all defenses tendered by, those entities will be deemed abandoned, and, thus, dismissed.[10] Judgment will be entered against both RHH and Broadway as to their counterclaims (to the extent those claims are alleged by the entities) and as to Harris's claims against the entities.[11]

[9] The Court's letter, dated November 17, 2008, to Harris and Hartman.

[10] *See Spanish Tiles, Ltd. v. Hensey*, 2009 WL 86609, at *1 (Del. Super. Jan. 7, 2009) (judgment entered against two limited liability companies for failure to replace counsel after withdrawal granted).

[11] The scope of this determination may not be as broad as it seems. Specifically, this does not resolve the question of who serves as the general partner of RHH. As will be seen, Hartman's motion to intervene is granted and this action will more formally become what it has been all along—a dispute between Harris and Hartman. With the granting of the motion to intervene, Hartman will be able to assert and defend his claim that this unusual structure exists only as a means of securing a debt. Whether an enforceable security interest exists or whether the parties intended (or agreed to) any such security interest are, of course, questions that the Court does not—and cannot—address at this time. Although the claims and defenses of the juristic entities are dismissed, they remain parties to this action and subject to the Court's jurisdiction for purposes of implementing any merits-based determination that the Court may eventually make.

B. *The Motion To Intervene*

Hartman has timely applied to intervene in this action as a matter of right under Court of Chancery Rule 24(a) which provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene;[12] or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

On a motion to intervene, a party need only claim, rather than prove, an interest in the subject of the litigation;[13] the validity of that claimed interest is assessed by reference to the allegations accompanying the motion to intervene, and such allegations are accepted as true.[14] Hartman claims an interest in the subject matter of the litigation. Hartman alleges that he became the sole owner of Broadway for the purpose of controlling RHH, and thereby the Property, in order to protect what amounts to a security interest in the Property as collateral for a debt obligation owed

[12] Hartman does not claim a right to intervene conferred by statute.
[13] *Bonczek v. Helena Place, Inc.*, 1989 WL 110547, at *2 (Del. Ch. Sept. 21, 1989).
[14] *Id.* (citing *Pennamco, Inc. v. Nardo Mgmt. Co., Inc.*, 435 A.2d 726, 728 (Del. Super. 1981)).

to him by Harris. This allegation—for the purposes of this motion—must be accepted as true.

Hartman's allegations are sufficient to support intervention. That interest required to satisfy Court of Chancery Rule 24(a)(2) is not one subject to clear and objective demarcation.[15] Instead, the inquiry is fact specific, and the Court must look at more than just the purely legal effect of the action. Indeed, the plain language of Rule 24(a)(2) calls for such an evaluation, asking whether, "as a practical matter" the intervener applicant's ability to protect her rights will be impeded. Here, Hartman has made such a showing. Were Broadway replaced as general partner of RHH, Hartman would lose the only nexus by which his quasi-security interest in the Property can be protected. Although one can question the use of this series of shell entities to secure a loan obligation, the disruption of this structure, as a practical matter, would deprive Hartman of his claimed interest in the Property.

Moreover, the Property, of course, is the real subject matter of this litigation. The Property is the only asset of RHH, and Harris's pleadings make clear that the

[15] *See Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d. Cir. 1998) (no "'precise and authoritative definition' of the interest that satisfies Rule 24(a)(2)"); *National Educ. Corp v. Bell & Howell Co.*, 1983 WL 8946, at *2 (Del. Ch. Dec. 13, 1983) (interpretation of Federal Rules of Civil Procedure given great weight when considering the Chancery Rule parallel).

sole purpose of the RHH entity is the management and control of the Property.[16] That RHH exists to allocate control of the Property is one of the few points upon which Harris and Hartman seem to agree. Although the procedural posture of this action directs the focus to removal of the current general partner of RHH, the fundamental dispute at issue between the parties is control of the Property.[17] Harris's assertion that this action "does not involve the real estate property of RHH Partners" is disingenuous at best.[18] Hartman has claimed an interest in the subject matter of this action, and his ability to protect that interest would be impaired or impeded unless he is allowed to become a party. Without intervention, Hartman's interest will not be adequately represented. Indeed, it will not be represented at all. Thus, Hartman's application to intervene is granted.

III. CONCLUSION

For the foregoing reasons, Hartman's motion to intervene is granted and the claims and defenses of RHH and Broadway are dismissed, subject to the limitations

[16] Compl. ¶ 10.
[17] Harris's repeated letters to this Court, although not properly characterized as motions or pleadings, reinforce this fact. In his September 16, 2008, letter, Harris refers to RHH as "the trust which own[s his] principal residence." In his July 14, 2008, letter, he implores this Court "not to provide my home as collateral" for Hartman.
[18] Resp. in Opp'n to Mot. to Intervene ¶ 3.

set forth in footnote 11 above. Hartman shall serve his pleading asserting his claims in intervention within fifteen days of the date of this letter opinion.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K