COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: September 14, 2008
Decided: September 23, 2008

I. Jay Katz
Jay Katz LL.M. Taxation, LLC
1300 North Market Street, Suite 303
Wilmington, DE 19801

Michael W. Modica, Esquire
715 N. King Street, Suite 300
P.O. Box 437
Wilmington, DE 19899

Re: *Weir v. JMACK, Inc, et al.*
Civil Action No. 3263-CC

Dear Counsel:

I have read the parties' briefs before me and in my judgment the dispositive question to be resolved by the Court is this: has petitioner met his burden by demonstrating that respondents' improper actions sufficiently reach the high threshold of justifying the Court appointing a receiver and dissolving a solvent corporation?

For the reasons briefly described below in this letter opinion, I conclude that petitioner's claims do not satisfy his burden to show that respondents' actions are sufficiently severe to merit dissolution of JMACK, Inc. The Court denies petitioner's motion and grants summary judgment *sua sponte* against petitioner and in favor of respondents.

The basic facts in this case are not in serious dispute. I will briefly summarize them. JMACK, Inc. ("JMACK" or the "Crerand") is a Delaware corporation incorporated on October 17, 2003, with the purpose of operating

Crerand, a restaurant licensed to sell alcohol.[1] JMACK has three shareholders: Jeff McKay who owns 51 percent of JMACK, and Robert Weir and Jennifer Blood who each own 24.5 percent of JMACK. Crerand has been continuously operating since early 2004. Weir joined the enterprise with the primary purpose of running Crerand's kitchen, and McKay has been Crerand's general manager since its inception.[2]

As so often occurs among partners in the world of small business, McKay and Weir clashed amidst mutual allegations of mismanagement and improper conduct, allegations that lead to Weir's disillusionment with the business and his eventual departure. Both parties accused the other of making improper cash payments to employees and failing to adequately maintain corporate financial records. Over the years, McKay has paid his kitchen employees in cash and deducted those payments as casual labor expenses without proper withholding. McKay alleges that Weir not only knew of this practice while he still operated Crerand's kitchen, but also made similar cash payments to his employees. Since August 8, 2008, JMACK has ceased its practice of making improper cash payments to its employees. JMACK is not currently nor has it ever been under investigation by the Internal Revenue Service. No tax lien or judgment has ever been filed against it.[3]

Additionally, as a restaurant, Crerand is in the business of serving alcohol. Although neither party has provided the specific ratio of alcohol to food served at Crerand, it is safe for this Court to assume that large amounts of alcohol are consumed by Crerand's patrons with their food. Weir alleges that Crerand's food to alcohol ratio violates the standards set by the Alcoholic Beverage Control Commission ("ABCC") and that such violation puts JMACK at risk for regulatory penalties and possible revocation of its license to serve alcohol.[4]

JMACK is a solvent corporation that is not currently threatened by legal claims or regulatory investigations. JMACK is financially in the midst of its best year and expects to be profitable in 2008.[5]

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[1] Defs.' Br. Summ. J. 4-5.
[2] *Id.* at 4.
[3] *Id.* at 4-11.
[4] Pl.'s Br. Summ. J. 2-5.
[5] Defs.' Br. Summ. J. 7.

In considering a motion for summary judgment, the Court must view the facts "in the manner most favorable to the nonmoving party with all factual inferences taken against the moving party and in favor of the nonmoving party."[6] To prevail, the moving party must show that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law."[7] In the interests of judicial economy, the Court reserves the right to grant summary judgment *sua sponte* against a party seeking summary judgment.[8] The Court recognizes in doing so that the state of the record must be such that the nonmoving party is "clearly entitled to relief."[9] I conclude the record adequately supports the decision to grant summary judgment in favor of respondents.

Plaintiff seeks summary judgment to appoint a receiver and allow equitable dissolution of JMACK. It is well settled that this Court, as a court of equity, has the power to order the dissolution of a solvent company and appoint a receiver to administer the winding up of those assets. [10] The Court will only grant this remedy when there exists "gross mismanagement, positive misconduct by corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented."[11] "Appointing a receiver for a solvent corporation is a radical remedy and should only be taken when the petitioning party has 'rather plainly shown his entitlement to it.'"[12]

Here, the Court declines to extend its extreme powers of corporate dissolution to a case of relatively minor regulatory misconduct. Petitioner failed to provide either statutory or case law precedent to justify his position that respondents actions of regulatory misconduct are sufficient to result in "extreme circumstances showing imminent danger of great loss to the corporation."[13]

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[6] *Tanser v. Int'l Gen. Indus., Inc*., 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Delaware Trust Co*., 378 A.2d 624, 632 (Del, 1977)).
[7] Ct. Ch. R. 56(c), vol.1 (2006).
[8] *See Stroud v. Grace*, 606 A.2d 75 (Del. 1992).
[9] *Id.* at 81 (citing Ct. Ch. R. 56(c)).
[10] *See* 8 *Del. C.* §226 (granting the Court the power to appoint a receiver and order dissolution under specific circumstances). In his brief, petitioner stated that "there [was] no statutory remedy for the dissolution of Crerand" and solely sought dissolution as an equitable remedy. Thus, I will not address any possible relief under a § 226 theory.
[11] *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006).
[12] *In re Seneca Investments, LLC*, _ A.2d _ (Del. Ch. Sept. 22, 2008) (citing *Giancarlo v. OG Corp.,* C.A. No. 10669, 1989 WL 72022, at *3 (Del. Ch. June 23, 1989)).
[13] *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006).

Petitioner's citation to a news article where ABCC's commissioner commented that a certain food to alcohol ratio was a "close call," does not evidence that Crerand was threatened with imminent ABCC prosecution.[14] Petitioner also does not provide evidence that even if such prosecution were to occur that Crerand would ultimately suffer extreme and irreparable penalties due to its inability to defend itself against those charges.

Additionally, petitioner failed to provide sufficient factual allegations that respondents' related tax misconduct will result in extreme and imminent harm to JMACK. JMACK has ceased paying its employees in cash and is not under any current IRS investigation. Petitioner has not alleged any threat of imminent IRS investigation and any future investigation is not certain to yield imminent negative consequences to JMACK. Petitioner has not shown that any potential tax penalty will result in a catastrophic or extreme outcome to JMACK.

Additionally, petitioner has failed to show how any threatened loss to JMACK, resulting from the misconduct, cannot otherwise be prevented. JMACK is a solvent company that is in the midst of its most successful year as an organization. JMACK has ceased its tax misconduct, and petitioner has failed to show that JMACK faces any serious or imminent threat from the ABCC. Therefore, the radical remedy of dissolution would be inappropriately applied in this case.

Further, respondents argue that petitioner does not come before the Court with clean hands. It is a fundamental principle of equity that "[he] who comes into equity must do so with clean hands."[15] Thus, a "litigant who engages in reprehensible conduct in relation to the matter in controversy . . . forfeits his right to have the court hear his claim, regardless of its merit."[16] Although I find that petitioner's ultimate argument in this case is unavailing, petitioner's actions of misrepresenting his qualifications to operate Crerand's kitchen and subsequent mismanagement of that kitchen did not effect the question of whether JMACK should be dissolved. It is not petitioner's misconduct that bars him from obtaining the equitable relief he now seeks; rather, it is his claim's relative modesty and lack

[14] Pl.'s Br. Summ. J. 4 (citing Rachel Kipp, *Nightspot's Party Crowd Proves a Fatal Flaw. City Restrictions Force Shaggy's Out of Business*, Delaware Online (Jan. 17, 2008)).
[15] *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 791-92 (Del. Ch. 1998) (citing *Kousi v. Sugahara,* Del. Ch., C.A. No. 11556, at *3, 1991 WL 248408 (Del. Ch. Nov. 21, 1991)).
[16] *Id.* (citing *In re Enstar Corp.,* Del.Ch., 593 A.2d 543, 553 (1991)).

of imminence. In short, petitioner's claims of misconduct in this case are not sufficiently extreme to warrant dissolution.

Though I am cognizant of petitioners' concerns about potential financial harms that could result from future investigations into JMACK's misconduct, I refuse to venture down the path of granting dissolution as an equitable remedy when the law and the facts simply do not warrant it. I therefore deny petitioner's motion for summary judgment to appoint a receiver and force dissolution of JMACK, and grant *sua sponte* summary judgment in favor of the respondents. Accordingly, this case is DISMISSED without prejudice.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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