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Via LexisNexis File & Serve
and First Class Mail

Mr. Peter Klamka
1905 Pauline, Suite 1
Ann Arbor, MI 48103

Re: Klamka v. OneSource Technologies, Inc.
C.A. No. 3639-VCN
Date Submitted: August 8, 2008

Dear Mr. Klamka:

Plaintiff Peter Klamka ("Klamka") brings this action, under 8 *Del. C.* § 226(a)(3), for the appointment of a custodian for OneSource Technologies, Inc., ("OneSource") a Delaware corporation. Klamka, a shareholder of OneSource, claims that the officers and directors of the corporation have abandoned it and have failed to comply with any statutory corporate obligations since 2006.[1] He has moved for a default judgment in accordance with Court of Chancery Rule 55 which provides in part:

[1] Compl. ¶¶ 5, 10. Klamka alleges that there has been no effort to dissolve or liquidate OneSource. *Id.* ¶ 18.

> When a party against whom a judgment for affirmative relief is sought, has failed to appear, plead or otherwise defend as provided by these Rules, and that fact is made to appear, judgment by default *may* be entered . . . .[2]

Entry of a default judgment is permissive, and the Court has discretion to decide whether or not to enter a default judgment "based on the particular set of facts before it."[3]

Klamka seeks the appointment of a "trusted co-worker" as custodian of OneSource.[4] Following that appointment, Klamka (through this designated custodian) intends to bring current all applicable Delaware taxes and fees, revive the corporation, and find a merger partner.[5] In Klamka's opinion, the business operations of OneSource cannot be resurrected and any potential value from rousing the corporation can be found only in its listed stock symbol and open account with Pink Sheets.[6] Acquiring these two "assets" independent of a OneSource revival would require less time and expense than forming a new venture, which would need both a

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[2] Ct. Ch. R. 55(b) (emphasis added).
[3] *Greystone Digital Tech., Inc. v. Alvarez*, 2007 WL 2088859, at *1 (Del. Ch. Jul. 20, 2007).
[4] *Id.* at Prayer for Relief A.
[5] Tr. of Oral Arg. (Aug. 8, 2008) at 4-5
[6] *Id.* Pink Sheets is private entity reporting real-time market quotes for client companies. *See* http://www.pinksheets.com.

new incorporation effort and a new application and registration process with, at least, Pink Sheets.[7]

Section 226(a)(3) of the Delaware General Corporation Law provides that this Court "may," upon application of any stockholder, appoint a custodian for a Delaware corporation when "[t]he corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets."[8] Klamka has established standing as a shareholder and has shown that OneSource abandoned[9] its business in 2006 without subsequent dissolution or liquidation of the corporation.[10] Therefore, whether a custodian will be appointed again turns on the exercise of the sound discretion of this Court.[11]

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[7] Tr. of Oral Arg. (Aug. 8, 2008) at 4

[8] 8 *Del. C.* § 226(a)(3).

[9] *See generally Apple Computer, Inc. v. Exponential Tech., Inc.*, 1999 WL 39547, at *8-10 (Del. Ch. Jan. 21, 1999).

[10] Compl. ¶¶ 9-10. No one has appeared in opposition to this application. Efforts to serve OneSource at its last known place of business were unsuccessful.

The Complaint does not allege that OneSource is insolvent. OneSource's insolvency, when one considers its abandoned status, is likely and, if so, the question perhaps should be whether a receiver, as contrasted with a custodian, should be appointed. If the corporation is insolvent, then 8 *Del. C.* § 291 might offer the more desirable framework.

[11] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 239 (Del. 1982) (emphasizing the flexible, case-by-case approach to be employed by the Court in deciding whether to appoint a custodian).

The Court addressed a situation similar to the one before it today in *Clabault v. Caribbean Select, Inc.*[12] Although invoking a different procedural mechanism,[13] the *Caribbean Select* plaintiffs sought the revival of an abandoned, but undissolved, publicly listed Delaware corporation for the purpose of merging it with another entity, thereby securing the benefits of a publicly traded company "more quickly (and with less expense)" than normal procedures would have allowed.[14] The Court denied the *Caribbean Select* plaintiffs' petition out of a reluctance to assist in the avoidance of the normal order and process of federal securities regulation. That reluctance is instructive here.

On this record, Klamka has shown no useful purpose for the revival of OneSource; his objective can be easily and properly be accomplished through new corporate and other appropriate filings. Indeed, he appears to view OneSource as a vehicle of convenience. Presumably, his expectation is that an entity, which is not publicly traded, could merge with OneSource and reach the public market more

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[12] 805 A.2d 913 (Del. Ch. 2002), *opinion on remand*, 2003 WL 22038362 (Del. Ch. Aug. 28, 2003) *aff'd*, 846 A.2d 237 (Del. 2003) (TABLE).

[13] The plaintiffs in *Caribbean Select* looked to 8 *Del. C.* § 211 and its remedy for failure to hold an annual stockholders meeting to activate the moribund entity.

[14] *Caribbean Select, Inc.*, 805 A.2d at 915. The *Caribbean Select* Court was concerned that one benefit sought by the plaintiffs would be the circumvention of certain requirements of the federal security laws. *Id.* at 918.

cheaply and more easily than if the private entity "went public" on its own. Although the reasons for which a person chooses to organize a corporation, assuming lawful ones, are generally not relevant for perfunctory corporate registration purposes, those reasons may become important in informing the Court's discretion as to whether to appoint a receiver or a custodian.

Although the Court does not find that Klamka personally harbors any fraudulent, or otherwise improper, motives for pursuing the proposed "short cut,"[15] the Court nevertheless denies his motion for default judgment. The potential for untoward results—such as might flow from Klamka's avowed intention to avoid the regular Pink Sheet initial process—when coupled with the absence of any apparent or expressed material purpose other than simply taking advantage of an existing corporate form, a trading symbol, and a Pink Sheet's listing, persuades the Court that its discretion would not fairly and properly be exercised if it were to appoint a custodian in these circumstances.[16] Compliance with ordinary procedures to establish

[15] Such a finding, within the framework provided by a motion for a default judgment, cannot be made on this record.

[16] Put to the side is the question of whether Klamka's stated purposes are appropriate for a custodian who might be appointed under 8 *Del. C.* § 226(a)(3). One could argue—and the Court does not need to address the argument—that the purpose of such a custodian generally should be for the dissolution or liquidation of the corporation, not a search for a merger partner to take advantage of a trading symbol. See 8 *Del. C.* § 226(b), which states: "A custodian appointed under this section

a business entity is preferable to reviving an essentially defunct entity without any objectively useful business purpose. The Court declines to assist in their bypass here through the revival of the abandoned OneSource absent some demonstrated need or purpose. No such need or purpose has been demonstrated.

For the foregoing reasons, the motion for a default judgment is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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shall have all the powers and title of a receiver appointed under § 291 of this title, but the authority of the custodian is to continue the business of the corporation and not to liquidate its affairs and distribute its assets, . . . except in cases arising under paragraph (3) of subsection (a) of this section . . . ." *See also* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 8.09[c][3], at 8-192 (2008).