

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

IN RE VBR AGENCY, LLC                    )            C.A. No. 2022-0328-JTL

**OPINION**

Date Submitted: April 13, 2022

Date Decided: April 20, 2022

Eric D. Schwartz, Thomas W. Briggs, Jr., Joseph C. Barsalona II, Sabrina M. Hendershot, MORRIS NICHOLS ARSHT & TUNNEL LLP, Wilmington, Delaware; Nader A. Amer, CARLTON FIELDS, P.A., Miami, Florida; *Attorneys for Petitioner.*

**LASTER, V.C**

VBR Agency, LLC, is a defunct Delaware entity (the “Defunct Company”). Petitioner Clement Dwyer, Jr., alleges that he is a former manager and director of VBR Holdings LLC, which is also a defunct Delaware entity (the “Defunct Manager”). Dwyer alleges that the Defunct Manager was a member and the sole manager of the Defunct Company. Dwyer asks the court to appoint him as the receiver for the Defunct Company for the purpose of addressing claims that the Insurance Commissioner of the Commonwealth of Pennsylvania (the “Pennsylvania Commissioner”) has asserted against the Defunct Company, as well as any related proceedings that may arise. *See* Dkt. 1 (the “Petition”).

Dwyer’s submissions provide the court with virtually no information about him, other than his status as a former manager and director of the Defunct Manager. He is not a regular practitioner in the Court of Chancery. He is evidently not a Delawarean, as he states in a short affidavit that he resides in New Hampshire. The Petition provides no reason to doubt Dwyer’s bona fides. The problem is not negative information, but rather the absence of information.

In recent years, the members of the court have been forced to address actions taken by custodians or receivers who obtained appointments on similarly scant records. In some of those situations, the custodian or receiver has taken action that caused the court to question whether the appointment should have been made, or the court has learned information which might have caused the court to decline to make the appointment in the first instance.

One way to address these problems is to obtain additional information up front. Dwyer has retained estimable counsel, who are well positioned to help the court. In this decision, the court identifies information that Dwyer must provide before the court can give meaningful consideration to the Petition. Counsel can assist the court by identifying other information that is material to the Petition. Given the status of the Defunct Company, it seems likely that the Petition will be considered ex parte, and in that setting, the court is even more reliant on counsel's assistance.

Dwyer has leave to supplement the record with the additional information that this decision requests and with any other material that counsel believes should be brought to the court's attention. Once that process is complete, counsel shall request a conference so that the court can consider next steps.

## **I. FACTUAL BACKGROUND**

The facts are drawn from submissions in the case.

### **A. The Defunct Company**

The Defunct Company traces its origins to the incorporation of its corporate predecessor, Sharebridge Private Equity Consolidated, Inc., on July 6, 2005. Effective December 30, 2013, the Defunct Company converted to a limited liability company and changed its name to Vanbridge LLC. The Petition alleges that the Defunct Company acted as an insurance and reinsurance broker and advisor. It provides no other information about the Defunct Company's business or activities.

The Petition does not provide any meaningful information about the Defunct Manager. All the Petition discloses is that the Defunct Manager was formerly known as

Vanbridge Holdings LLC and that it served as a member and the sole manager of the Defunct Company.

The Petition states that at all relevant times, Dwyer served as a member of the board of managers of the Defunct Manager. The Petition says nothing else about Dwyer or his relationship to the Defunct Manager or the Defunct Company.

The Petition provides no other information about the internal governance of the Defunct Manager or the Defunct Company. One can infer that the Defunct Manager's board of managers had other members in addition to Dwyer. One can infer that the Defunct Company had other members besides the Defunct Manager. It is not possible to glean more than that.

The Petition alleges that on August 24, 2018, the Defunct Manager and the Defunct Company sold all of their assets to EPIC Holdings, Inc., an affiliate of Edgewood Partners Insurance Center, Inc. The Petition does not provide any information about the transaction.

The Petition alleges that after the sale, the Defunct Manager and the Defunct Company changed their names to their current appellations and dissolved. The Petition does not provide any information about the dissolution.

The Petition attaches the certificates that canceled the certificates of formation for the Defunct Manager and the Defunct Company. It shows that their existence as jural entities ceased on December 29, 2020.

## **B. The SHIP Litigation**

On January 28, 2022, the Pennsylvania Commissioner filed a lawsuit in the Commonwealth Court of Pennsylvania against the Defunct Company (the "SHIP

Litigation”). The Pennsylvania Commissioner filed the SHIP Litigation in her capacity as the statutory rehabilitator of Senior Health Insurance Company of Pennsylvania (“SHIP”), an insolvent Pennsylvania insurer.

The Pennsylvania complaint alleges that the Defunct Company structured a transaction for SHIP with Roebling Re Ltd., a newly formed entity (the “New Reinsurer”). At the Defunct Company’s urging, SHIP (1) ceded 49% of most of its policy liabilities for long-term care insurance to the New Reinsurer and (2) paid the New Reinsurer a reinsurance premium substantially equal to the value placed on the ceded liabilities on SHIP’s financial statements. The Pennsylvania Commissioner asserts that the book value of the ceded liabilities was excessive, causing the premium payment to be excessive. The Pennsylvania Commissioner also asserts that although the New Reinsurer appeared to accept financial responsibility for the liabilities, it had no assets to satisfy the liabilities other than what it received from SHIP. The transaction therefore did not involve a meaningful transfer of risk. The Pennsylvania Commissioner alleges that in addition, the New Reinsurer was permitted to withdraw \$100 million from the ceded premium and exchange the cash for unrated securities of dubious value.

Just over a year later, the New Reinsurer was no longer able to meet its reserve obligations, and some of the substituted securities were valueless. Within fifteen months, nearly all of the New Reinsurer’s assets were exhausted. SHIP was left holding the bag.

For brokering the transaction, the Defunct Company received a fee of \$3 million. The Pennsylvania complaint alleges that by structuring and recommending these

transactions, the Defunct Company breached its contractual obligations and its fiduciary duties, conspired with other defendants, and failed to act with appropriate care.

Dwyer contends that the Pennsylvania Commissioner never properly served the complaint on the Defunct Company. He asserts that other former members of the Defunct Company learned of the complaint from a fellow defendant. That statement is the only reference in the Petition to the Defunct Company having other members.

### **C. The Filing Of This Litigation**

Dwyer commenced this action by filing his Petition on April 13, 2022. He simultaneously filed a motion for expedited treatment. Dkt. 2. He also simultaneously filed a motion for appointment of receiver with a proposed form of order. Dkt. 3 (the “Motion”).

Dwyer argues that because the Defunct Company was dissolved and its certificate of formation canceled, no person or entity has the power to respond to the complaint in the SHIP Litigation. Dwyer seeks to be appointed as the receiver for the Defunct Company for the limited purpose of addressing the SHIP Litigation and any other ancillary or supplemental proceedings or litigation arising therefrom on the Defunct Company’s behalf. The Petition does not specify whether Dwyer believes he would have the authority to pursue offensive litigation or whether he intends to do so.

## **II. LEGAL ANALYSIS**

The Delaware Limited Liability Company Act empowers the court to appoint a receiver to take all actions necessary to settle the unfinished business of a limited liability company. Section 18-805 states:

When the certificate of formation of any limited liability company formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to § 18-203 of this title, the Court of Chancery, on application of any creditor, member or manager of the limited liability company, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the managers of the limited liability company to be trustees, or appoint 1 or more persons to be receivers, of and for the limited liability company, to take charge of the limited liability company's property, and to collect the debts and property due and belonging to the limited liability company, with the power to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the limited liability company, if in being, that may be necessary for the final settlement of the unfinished business of the limited liability company. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

6 *Del. C.* § 18-805.

Dwyer asserts that good cause exists to appoint a receiver for the Defunct Company so that the Defunct Company can address “through formal or informal means” the SHIP Litigation and any ancillary or supplemental proceedings or litigation. Petition ¶ 15. As noted, the Petition does not elaborate on what ancillary or supplemental proceedings might be involved. The Petition does not elaborate on what informal means Dwyer might envision using. The Motion does not shed light on these issues either.

Dwyer's proposed receivership does not plainly fall within the statutory authority to take charge of the limited liability company's property, and to collect the debts and property due and belonging to the limited liability company, with the power to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid.

6 *Del. C.* § 18-805. One might, however, view the receivership as falling within the statutory authority “to do all other acts which might be done by the limited liability

company, if in being, that may be necessary for the final settlement of the unfinished business of the limited liability company.” *Id.* There are authorities that appear pertinent to that issue, but Dwyer’s submissions do not cite them.

The more significant problem is that the court has virtually no basis to evaluate whether to appoint *Dwyer* as the receiver for the Defunct Company. The fact that Dwyer previously had roles with the Defunct Manager is one factor in his favor. So is the fact that Dwyer has hired reputable counsel to seek his appointment. Other than that, the court has no information on which to make a decision.

Delaware has a significant interest in ensuring that questionable individuals do not use judicial proceedings to gain control over Delaware entities. Delaware likewise has an interest in ensuring that its entities are not used as vehicles for improper schemes. In light of these interests, a party wishing to revive a defunct Delaware entity should submit information sufficient to establish that the application is bona fide.

**A. Information About Dwyer And His Affiliates And Associates**

To ensure that the court has a sufficient informational base on which to rule, Dwyer must provide an affidavit that describes his background and attaches a current curriculum vitae. In addition, the affidavit will contain three categories of information.

The first category of issues relates to any interactions between Dwyer or his current and former affiliates and associates (each, a “Covered Person”) and any regulatory agency or authority, including but not limited to any insurance regulator, any other state regulatory agency, any federal regulatory agency, any foreign financial regulatory authority, or any



self-regulatory organization or commodities exchange (generally, a “Regulator”). Dwyer’s affidavit will identify and explain any instance in which a Regulator

- (a) Found that a Covered Person made a false statement or omission.
- (b) Found that a Covered Person was involved in a violation of its regulations or statutes.
- (c) Found that a Covered Person had its authorization to do business denied, suspended, revoked, or restricted.
- (d) Entered an order sanctioning the Covered Person.
- (e) Imposed a civil money penalty on the Covered Person or ordered the Covered Person to cease and desist from any activity.
- (f) Named the Covered Person as a subject of an investigation or proceeding.

The second category of issues relates to any interactions that a Covered Person has had with the criminal and civil justice systems. Dwyer’s affidavit will disclose and explain any instance in which any Covered Person has been

- (a) Charged with, convicted of, or pled guilty or nolo contendere (“no contest”) in a domestic, foreign or military court to any felony.
- (b) Charged with, convicted of, or pled guilty or nolo contendere in a domestic, foreign, or military court to a misdemeanor involving fraud or dishonesty.
- (c) Sanctioned by any domestic or foreign court.

The third category of issues relates to any conflicts of interest that a Covered Person may have pertaining to the proposed receivership. Dwyer will identify any member of the Defunct Company and any other stakeholder in the Defunct Company that is likely to be affected by the receivership. Dwyer will disclose (i) whether any Covered Person has received or will receive any payments for reviving the Defunct Company, and if so, the amount of such payments and (ii) whether any Covered Person will receive any

compensation for acting as receiver for or directing the Defunct Company's actions in connection with the SHIP Litigation. Dwyer also will explain how the Defunct Company anticipates paying for counsel in the SHIP Litigation.

The court is not asking for this information because it suspects that Dwyer or any other Covered Person is a fraudster or would use the Defunct Company for a fraudulent purpose. The disclosures represent an important prophylactic step to protect the integrity of Delaware's role as a chartering jurisdiction.

These questions are not intended to be exclusive. Counsel may identify other topics to address. The court welcomes counsel's assistance.

**B. Information About Dwyer And His Plans For The Defunct Company**

To ensure that the court has a sufficient informational base on which to rule, Dwyer also must provide information in an affidavit about his plans for the receivership. Dwyer has stated generally that he intends to represent the Defunct Company in the SHIP Litigation. He seems to plan to contend that the complaint was not validly served and is "baseless," but he also refers to addressing the complaint "formally or informally" and to the possibility of "other ancillary or supplemental proceedings or litigation." Petition ¶¶ 10, 12.

Dwyer will explain what he is talking about and what he has in mind. It is not immediately clear why Dwyer would want to revive the Defunct Company for purposes of the SHIP Litigation. A defunct entity cannot be sued. Before the Pennsylvania Commissioner could proceed against the Defunct Company, the Pennsylvania Commissioner (or some other interested party) would have to petition this court to revive

it. Dwyer appears to be helping the Pennsylvania Commissioner advance the litigation, which seems counterintuitive.

Counsel is in the best position to help the court understand how the Petition fits into the larger picture. The court welcomes the explanation.

### **C. Ongoing Reporting**

Dwyer asks to be empowered as a representative of the court, acting under the court's imprimatur, with authority to address the proceedings taking place in Pennsylvania and to take any other action on behalf of the Defunct Company "associated therewith." Dwyer requests a receivership under which he would have no obligation to report to the court about what he is doing. His proposed form of order exempts his receivership from the coverage of Court of Chancery Rules 149 through 168. He has not offered to provide the court with any form of periodic reporting on his activities. He merely proposes that either "prior to the Termination Date or within thirty (30) days thereafter," he will "file with this Court a report advising the Court of the Termination Date and describing the actions taken by the Receiver pursuant to this Order." That is insufficient.

A receiver or custodian must provide periodic reports on a schedule that enables the court to oversee the appointment. Counsel will propose a schedule. Pending further guidance from counsel, it would seem appropriate for the court to receive a report on a quarterly basis. If any material events take place that warrant a more timely report, the court would expect an interim submission.

The reports must provide sufficient detail so that the court can understand what its appointed representative is doing. At a minimum, the receiver must describe the activities

that he has undertaken and the status of his efforts. Because the reports are likely to constitute ex parte submissions, counsel will need to provide guidance to ensure that the court receives all material information.

**D. An Agent For Service Of Process**

The Petition includes a barebones affidavit in which Dwyer “consent[ed] to the personal jurisdiction of the courts of Delaware over any claims arising out of [his] service as a receiver for [the Defunct Company].” Dkt. 1, Affidavit ¶ 6. Dwyer did not appoint an agent for service of process or provide any contact information where he might be found. He identified himself as a resident of New Hampshire, but provided no other information.

Any order appointing a receiver must identify an agent in the State of Delaware for the service of process. Alternatively, the receiver must agree to a straightforward method for service and provide the necessary contact information.

**E. The Request For Relief From Rule 150**

Court of Chancery Rule 150 provides that “[n]o person shall be appointed sole receiver who does not at the time of appointment reside in the State of Delaware.” Ct. Ch. R. 150. As a resident of New Hampshire, Dwyer cannot satisfy that requirement.

The Petition did not mention Rule 150, and the Motion did not cite it. The only reference to Rule 150 in Dwyer’s papers appears in his proposed form of order, which provides that “Rules 149 through 168 shall not be applicable to this proceeding.”

Court of Chancery Rule 148 authorizes the court to “relieve the receiver[] . . . from complying with all or any of the duties and proceedings set forth in Rules 149 through 168.” *Id.* R. 148. It is thus possible to obtain relief from Rule 150. But the Petition or the

Motion—and ideally both—should identify the baseline rule and request relief. This court has previously directed a petitioner who failed to identify Rule 150 in his petition to amend the petition and address the rule. *Tratado de Libre Comercio, LLC v. Splitcast Tech., LLC*, 2019 WL 1057976, at \*3 (Del. Ch. Mar. 6, 2019).

Both the Petition and the Motion should have identified Rule 150 specifically and explained why an exemption was warranted. Before being appointed as a receiver, Dwyer must address this issue.

#### **F. Service Of Process**

This court has held that a party cannot serve a canceled entity through its registered agent; rather, service must be effected through publication. *Id.* at \*1. The court has held that an application under Section 18-805 “may not be considered by the Court until service has been perfected upon the dissolved entity.” *Id.* at \*3 (citing *Mathias v. Angola Neck Park Prop. Owners Ass’n, Inc.*, 2014 WL 6478844, at \*1–2 (Del. Ch. Nov. 20, 2014), *report adopted by* 2014 WL 6847893 (Del. Ch. Dec. 4, 2014)).

Dwyer sought expedited treatment, and he filed the Motion in which he sought appointment as a receiver, but he did not file a motion seeking an order providing for service by publication, nor did his papers flag the issue. It would have been all too easy for the court to take up the application without considering the idiosyncrasies of achieving service of process on a defunct entity.

As a predicate to further consideration of his application, Dwyer shall file a motion addressing service of process.

## **G. Identifying Adverse Authority And Providing Information To The Court**

A lawyer has an obligation “to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” Del. Lawyers’ R. Prof’l Conduct 3.3(a)(2). When a lawyer makes an ex parte application, a lawyer has an obligation to “inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” *Id.* R. 3.3(d).

Common law adjudication is a cooperative exercise between counsel and the court. Failing to bring relevant authority to the court’s attention risks generating rulings that diverge or even conflict with the main body of the law. Future cases may cite the divergent ruling, without engaging in the archeological digging necessary to determine what the court issuing the prior ruling did or did not consider.

The court understands that busy counsel are not perfect. No one is. It is therefore understandable that from time to time, counsel may overlook pertinent authority or fail to flag an important issue. With each passing year, the legal industry generates more and more authorities, making counsel’s task of finding the pertinent authorities all the more challenging. And counsel operates in an environment in which the goal is to obtain a result for a client, which may make counsel hesitant to identify adverse authority or, if the client is cost-conscious, reluctant to expend the time necessary to vet an issue fully.

Notwithstanding these real-world considerations, lawyers must make a diligent effort to identify and present the authorities that the court needs to render a just and correct decision. “A lawyer is not required to make a disinterested exposition of the law, but must

recognize the existence of pertinent legal authorities. . . . The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.” Del. Lawyers’ R. Prof’l Conduct 3.3 cmt. 4. As the Delaware Supreme Court has explained, a lawyer’s “responsibility to the Court takes precedence over the interests of the client” because as officers of the court, lawyers must represent their clients “*within* the bounds of both the positive law and the rules of ethics.” *In re Abbott*, 925 A.2d 482, 487–88 (Del. 2007) (cleaned up).

Chancellor McCormick recently identified a problem of this sort in *In re Jeremy Paradise Dynasty Trust*, 2022 WL 840074 (Del. Ch. Mar. 22, 2022). The parties disputed whether the petitioner had standing to object to third-party discovery requests. The parties did not cite Rule 26(c), which addressed the issue. Chancellor McCormick reasoned through the rulings that the parties submitted and reached an outcome consistent with Rule 26(c). She subsequently issued a supplemental letter decision noting that the parties had not called Rule 26(c) to her attention and that, as a result, her decision “failed to address controlling authority directly on point but consistent with the ruling.” *In re Jeremy Paradise Dynasty Trust*, C.A. No. 2021-0354-KSJM, at 1 (Del. Ch. Mar. 31, 2022). She asked counsel to “take greater care in the future to find and address controlling authorities when presenting your arguments.” *Id.* at 2.

Echoing the Chancellor’s statements, counsel are asked to take greater care to find and address controlling authorities. Counsel are also requested to give careful consideration when making an application that is likely to be considered *ex parte* to the information that the court should have when rendering its decision.

### **III. CONCLUSION**

The Petition seeks an order appointing Dwyer as a receiver for the Defunct Company. Dwyer did not provide sufficient information on which the court could rule. Counsel may supplement the record to address the issues identified in this decision and any other matters that they believe should be brought to the court's attention. Once this has occurred, counsel shall seek a conference with the court to discuss next steps.