COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: August 21, 2007
Decided: August 23, 2007

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RE: The Follieri Group, LLC v. Follieri/Yucaipa Investments, LLC, et al.
C.A. No. 3015-VCL

Dear Counsel:

This action arises out of a petition to dissolve Follieri/Yucaipa Investments, LLC ("LLC"), brought pursuant to Section 18-802 of the Delaware Limited Liability Company Act.[1] The parties to this action are The Follieri Group ("FG"), a New York limited liability company; Follieri/Yucaipa Investments, LLC, the

[1]Section 18-802 reads as follows: "On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."

entity sought to be dissolved; and Yucaipa Corporate Initiatives Fund, I LP ("Yucaipa Member"), a Delaware limited partnership.

Direct Airway, Inc., a putative general creditor of the LLC, has moved to intervene. Direct relies in its motion alternatively on either Rule 24(a) ("Intervention of right") or Rule 24(b) ("Permissive intervention") of the Court of Chancery Rules. Direct asserts that it is entitled to intervene because the present litigation could adversely affect its ability to collect its debt from the LLC. Although not discussed in its moving papers, Direct has also filed in the United States District Court for the District of New Jersey an action on its alleged debt against all of the parties to this action as well as several other related persons. In that action, Direct seeks to recover damages in the sum of $458,852 plus interest, attorneys fees, and costs.

Yucaipa Member opposes the motion to intervene. FG does not oppose the motion "provided the federal action brought by Direct . . . is stayed pending the outcome of this matter."

Having reviewed the moving papers and the relevant authority, I am persuaded that the motion to intervene must be denied. Direct has no right to intervene under Rule 24(a) because (1) there is no statute that confers on it an unconditional right to intervene, and (2) it has no interest in "the property or

transaction that is the subject of th[is] action." Direct does not dispute the first conclusion, and the second is incontrovertible. The subject of this dispute, according to Section 18-802, is whether or not "it is reasonably practicable to carry on the business [of LLC] in conformity with the limited liability company agreement." As a mere putative creditor, Direct has no interest relating to this subject. Nor is Direct possibly threatened with any adverse effect from whatever judgment is ultimately reached on that subject. Even if the court should order a judicial dissolution, the winding up and distribution of assets would be governed by Sections 18-803 ("Winding up") and 18-804 ("Distribution of assets"), pursuant to which the interests of creditors such as Direct are fully protected. In particular, Section 18-804(b)(2) provides that a limited liability company that has dissolved must make reasonable provision to pay any claim which is the subject of a pending action, such as the pending federal debt action, before any distribution of assets to members is made. Merely having a claim for payment of money allegedly owed does not give Direct an interest in the LLC itself or in an action to dissolve the LLC.

Rule 24(b) is of even less help to Direct's motion. To start with, there is no statute that confers even a conditional right to intervene. Thus, Direct's entire argument rests on the argument that its "claim or defense" (i.e. its claim for

payment) and the dissolution action "have a question of law or fact in common." But this is simply not so, as the dissolution action has nothing to do with Direct's claimed indebtedness. The question in the dissolution action, as already mentioned, is whether or not it is reasonably practicable to carry on the business of LLC in conformity with its limited liability company agreement. The litigation of that issue has nothing to do with Direct's claim.

Finally, the cases Direct cites for the proposition that "Delaware courts have routinely permitted creditors to intervene in actions in which they have an interest" do not support the motion to intervene in this statutory dissolution action. *Solomon v. Duggan*[2] involved a motion by a judgment creditor to intervene in a foreclosure action brought by another secured creditor and to stay a pending sheriff's sale. In that case, both the interest of the proposed intervenor in the subject property and the inability of the existing parties adequately to protect its interest were patent. To a similar effect is *Wilmington Trust Company v. Lucks*,[3] in which the proposed intervenor sought to set aside a sheriff's sale of certain real property in which it had a substantial interest. The court in that case allowed the intervention pursuant to Rule 24(b)(2), finding that the existing parties could not adequately protect the

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[2] 2004 WL 692903 (Del. Super. Mar. 11, 2004).
[3] 1999 WL 743255 (Del. Super. June 18, 1999).

intervenor's interests. Neither of these cases provide any support for the proposition that a putative creditor should be permitted to intervene in a statutory dissolution action.

For the foregoing reasons, the motion to intervene filed by Direct Airway, Inc. is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor