

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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November 29, 2012

*Via LexisNexis File & Serve
and First Class Mail*

Gary W. Lipkin, Esquire
Duane Morris LLP
222 Delaware Avenue, Suite 1600
Wilmington, DE 19801

Mr. Lee M. Gills
Vice President
Excel Marketing Solutions, Inc.
11441 Apple Valley Drive
Frisco, TX 75034

Re: *New Growth Capital, LLC v. Excel Marketing Solutions, Inc.*
C.A. No. 6067-VCN
Date Submitted: August 9, 2012

Dear Mr. Gills and Mr. Lipkin:

Defendant Excel Marketing Solutions, Inc. (“Excel”), through its Vice President, has moved to compel compliance with the Court’s Order and Decree of Judicial Dissolution of Open Channel Interactive, LLC (the “Order”).¹

¹ That Order was entered as a default judgment. Excel opposed entry of the Order, but, despite having been warned, it did not retain counsel. Artificial entities, such as Excel, must be represented by counsel. *See, e.g., Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 2006 WL 903578, at *2 n.4 (Del. Ch. Apr. 3, 2006). Even when it sought to enforce its rights under the Order, Excel still did not retain counsel. That failure would have justified summarily denying Excel’s motion, but because Excel has questioned the integrity of the dissolution process, a review of its objections is, in this instance, appropriate.

The gist of Excel’s motion is that the Liquidator of Nominal Defendant Open Channel Interactive, LLC (“Open Channel”) did not provide the information which the Order required him to deliver to the members of Open Channel, including Excel.² The Order required the Liquidator to provide specific documentation. The Liquidator substantially complied with those duties. Excel seeks information beyond the scope of the Order, but it has not demonstrated that it is entitled to such information.

The Order directed the Liquidator to provide Open Channel’s members with “a proper accounting of the assets, liabilities, and operations of [Open Channel]”³ and a schedule of all assets and liabilities of [Open Channel], with supporting documentation that he may possess or have under his control.”⁴ Excel requested

² Excel also complains that the Plaintiffs—New Growth Capital, LLC and Open Integrity Solutions, Inc.—misled the Court by representing in their Complaint that Open Channel had no assets when, in fact, it had some software. The existence of the software was disclosed to the Court (Transcript (May 26, 2011) at 4), and Excel has offered no fair reason to conclude that the software had any material value. For that matter, Excel has offered no fair reason to doubt that Open Channel’s liabilities far exceeded the value of its assets. The chances that the most successful liquidation would have resulted in payment of all liabilities were, based upon any credible information provided to the Court, less than nil.

³ Order ¶ 11.

⁴ *Id.*

this information by letter, dated June 4, 2011.⁵ On July 22, the Liquidator responded to Excel's request.⁶ He listed the assets (computers, software licenses for servers, and social media software) and their book values and sale amounts.⁷ He described the sale process and reported liabilities owed to one of the Plaintiffs in excess of \$200,000.

Excel may not be happy with the information that it received, but the Liquidator generally provided the information that the Order required. The additional information sought by Excel was not specified by the Order. For example, Excel requested "the date [the social media software] was sold and a copy of the documents regarding the sale, including but not limited to correspondence to/from OIX2/Paolo Narciso regarding the sale of the software, a bill of sale and canceled check."⁸ Requests of this nature—and there are several—are simply beyond the scope of the Order.⁹

⁵ This letter was addressed to the Court.

⁶ Plaintiffs' response to Defendant Excel Marketing Solutions, Inc.'s Mot. to Compel Compliance with Court Order (the "Motion"), Ex. B.

⁷ The total of book values was \$10,220.31, and the total of sale amounts was \$6,750.

⁸ Motion, Ex. 4.

⁹ The schedule of assets and liabilities, required by paragraph 11 of the Order, was explicit in terms of its minimum requirements. "The schedule shall include, without limitation: 1) a true

It may be that Excel was not satisfied with the Liquidator's effort to maximize asset value. That effort, although complained about in Excel's papers, was not directly challenged by Excel in the Motion. The Liquidator's explanation for not pursuing a more robust sale process—eBay listing attracted no enhanced bids and the social media software was not readily marketable—is reasonable, and Excel has offered no grounds for doubting it.

Accordingly, Excel's Motion to Compel Compliance with Court Order is denied.

and complete schedule of all assets of [Open Channel]; 2) a true and complete schedule of all liabilities of [Open Channel], including without limitation the names and last-known addresses of each of the creditors and the specific amounts owed; 3) the most recently prepared financial statements and state and federal income tax returns of [Open Channel]; 4) documents reflecting the Book Value of the assets; and 5) the most recent available Capital Account balances of each Members [sic] of [Open Channel].” Perhaps Excel is also troubled that the limited sales effort may have taken place before it had obtained all of the information to which it was entitled. It has not sought relief on that ground, and it has offered no reason to believe that any other steps that might have been taken by the Liquidator would have made any difference, especially in light of the gross disparity between assets and liabilities.

The Order imposed no reporting requirements with regard to the sale processes. Nevertheless, the Liquidator did describe the sales process. The computers and software licenses were listed on eBay. No bids were received in excess of what one firm had offered to pay. With respect to the social media software, it was highly specialized and required interconnection with another firm in order for it to function effectively. The Liquidator concluded that it was not marketable to third persons under these circumstances.

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IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K