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Case No. 7140-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DAVID H. WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 7140-VCL
	)	
CALYPSO WIRELESS, INC., a Delaware Corporation, and CARLO DI COLLOREDO-MELS,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 1, 2012
Date Decided: February 8, 2012

James S. Yoder, WHITE & WILLIAMS LLP, Wilmington, Delaware; *Attorney for Plaintiff*.

Theodore A. Kittila, Jonathan M. Stemerman, ELLIOTT GREENLEAF, Wilmington, Delaware; *Attorneys for Defendants*.

LASTER, Vice Chancellor.

Plaintiff David H. Williams brought this summary proceeding to challenge his removal as a director of Calypso Wireless, Inc. ("Calypso" or the "Company"). Shortly after filing the litigation, Williams moved for the appointment of a receiver. In light of Calypso's protracted failure to comply with an order of this Court, its glaring violations of the federal securities laws, and the absence of any credible plan to bring the Company into compliance, I appoint a receiver to dissolve the corporation and wind up its affairs. This ruling moots the need to consider whether Williams was validly removed.

I. FACTUAL BACKGROUND

This case was tried on February 1, 2012. My factual findings follow.

A. Calypso

In October 2002, a privately held, developmental-stage Florida corporation named Calypso Wireless, Inc. accessed the public securities markets by merging with a wholly owned subsidiary of Kleer-Vu Industries, Inc., a defunct but still publicly listed Delaware corporation. Kleer-Vu changed its name to Calypso Wireless, Inc.[1]

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[1] Although not at issue in this case, using a defunct Delaware corporation that happens to retain a public listing to evade the regulatory regime established by the federal securities laws is contrary to Delaware public policy. *See In re Native Am. Energy Gp., Inc.*, 2011 WL 1900142, at *7 (Del. Ch. May 19, 2011) ("Delaware has no interest in facilitating reverse mergers with defunct but still publicly registered shell corporations as a means to circumvent the regulatory protections provided by the federal securities laws."); *Klamka v. OneSource Techs., Inc.*, 2008 WL 5330541, at *2 (Del. Ch. Dec. 15, 2008) (declining to appoint custodian that would allow Delaware corporation to be used for reverse merger to bypass traditional public registration process); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 918 (Del. Ch. 2002) (declining to order annual meeting pursuant to 8 *Del. C.* § 211(c) where order would allow Delaware corporation to be used to bypass traditional public registration process), *aff'd*, 846 A.2d 237 (Del. 2003).

Since 2002, Calypso has never held an annual meeting of stockholders. During that time, at least twelve individuals have served on its board of directors. Not one was elected by the stockholders.

Although nominally a public issuer, Calypso has not filed an annual report on Form 10-K or a quarterly report on Form 10-Q in nearly four years. Calypso's most recent annual report on Form 10-K was filed on August 29, 2007, for the year ended December 31, 2006. Calypso's most recent quarterly report on Form 10-Q was filed on February 21, 2008 for the period ended September 30, 2007 (the "September 2007 10-Q"). Since the September 2007 10-Q, Calypso's public filings have consisted of intermittent reports on Form 8-K. Calypso maintains a snazzy website that describes the Company in glowing terms, but the site provides no information about the company's finances or governance.

Despite a profound absence of public disclosure, Calypso's stock continues to trade with 198 million shares issued and outstanding. On January 31, 2012, the day before trial, the stock closed at $0.02 per share, giving the Company a market capitalization of approximately $4 million. Not surprisingly for a thinly traded issuer for which no meaningful public information is available, the stock price has gapped up and down repeatedly during the past 52 weeks.

The vast majority of the publicly available information about Calypso hales from anonymous internet postings. The online stock message board service at InvestorsHub.com, commonly referred to as "iHub," hosts a particularly active community. Calypso's officers and directors have used anonymous posts on iHub to spread

information about the Company, either by posting themselves or by using family members or associates as proxies. While serving as a director, Williams posted anonymously on iHub under the alias "Ben Lurkin." He intentionally disseminated *false* information from time to time to conceal his identity. He even made false posts about large trades, claiming on one occasion that he "picked up another 50K." JX 49. Such a post would have market-moving implications for a stock with an average daily trading volume of approximately 40,000 shares.

It is impossible to know Calypso's current financial position because Calypso does not have audited or unaudited financial statements, just bank statements for its checking account. As of September 30, 2007, Calypso disclosed cumulative net losses since inception of $37,494,698. Over the past four years, Calypso's losses only increased. The Company has not paid its CEO, Cristian Turrini, in four years, and he claims to be owed $1 million plus interest. The Company likewise has not paid its part-time CFO, Kyle Pierce. Since 2009, Calypso has funded its operations with short-term demand loans from approximately a dozen individuals. The total amount of principal and interest currently due is approximately $352,000. Calypso also owes money to third parties such as its intellectual property and securities counsel, who recently withdrew because of non-payment. None of these obligations have been disclosed publicly.

Calypso has no income and has never generated any revenues. In terms of assets, Turrini estimated at trial that Calypso currently has "[l]ess than $5,000" in cash. Tr. 218. Pierce was more direct: "we're a company with no money." *Id.* at 247. Calypso's only significant asset is U.S. Patent No. 6,680,923 (the "Patent"), which relates to the ability of a

mobile device, such as a cell phone or laptop, to switch automatically and seamlessly between cell phone towers and Wi-Fi networks. Calypso also holds a portfolio primarily comprising foreign patents and technology for which patent applications are pending. The portfolio is a cash drain that costs Calypso at least $20,000 per year.

The value of the Patent is contingent and uncertain. Calypso has sued T-Mobile for infringement, but the case remains at a preliminary stage, and the parties have not yet obtained a ruling on claim construction. Calypso management believes that if the Patent were upheld and enforced, it could be worth several hundred million dollars. As a result of a settlement, however, Calypso no longer stands to receive 100% of the Patent's contingent value. From 2004 until December 2011, Calypso was embroiled in litigation with Drago Daic in Texas state court. In 2006, Daic obtained a default judgment against Calypso for approximately $117 million. After filing a bill of review to attack the default judgment collaterally, Calypso settled with Daic in April 2008. Calypso subsequently failed to perform under the settlement agreement, and Daic reinstated the judgment and sought to foreclose on the Patent. Calypso responded with a new lawsuit challenging the foreclosure and the enforceability of an amended settlement agreement allegedly executed in April 2009.

In August 2011, Calypso's board approved a global settlement with Daic by a vote of 3-1. Williams dissented. Under the terms of the settlement, as memorialized in an agreement dated November 30, 2011, Calypso assigned to Daic and his attorney 28% of the gross recovery in the lawsuit against T-Mobile (less $150,000 and Calypso's attorneys' fees and expenses), 7 million freely tradable shares of Calypso common stock, and exclusive

ownership of all of Calypso's patents, technical development rights, and other intellectual property outside of the United States. In return, Daic vacated the default judgment and released any claim to the Patent or Calypso's other intellectual property in the United States.

B. The Meeting Order

As noted, Calypso has not held an annual meeting of stockholders since the reverse merger in 2002. On March 7, 2008, Williams petitioned this Court pursuant to 8 *Del. C.* § 211(c) for an order compelling Calypso to hold an annual meeting (the "Meeting Action"). At the time Williams filed suit, the members of the Calypso board were Julietta J. Moran, Antonio Zapata, and Cheryl L. Dotson.

During the pendency of the litigation, the composition of the Calypso board changed dramatically. On April 10, 2008, the board added Richard S. Pattin as a fourth director. Four days later, Moran, Zapata, and Dotson resigned, leaving Pattin as the board's sole member. On May 12, Pattin added Turrini to the board, and Turrini assumed the role of Chairman. On June 12, Pattin and Turrini appointed Kathy Daic, the wife of Drago Daic, as a director.

By order dated November 5, 2008, Chancellor Chandler entered a final order in the Meeting Action. It provided as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the request for relief sought in the Verified Complaint is GRANTED and the following relief is awarded:
>
> Calypso Wireless, Inc. through its current board of directors is hereby directed to hold an annual meeting of shareholders with notice to all shareholders and satisfaction of the requirements set forth in 8 Del. C. § 211, within 45 days of the entry of this order.

Williams v. Calypso Wireless, Inc., C.A. No. 3605-CC (Del. Ch. Nov. 5, 2008) (ORDER) (the "Meeting Order"). Calypso did not appeal.

After obtaining the Meeting Order, Williams pressed to have Calypso comply. His efforts prompted another board shake-up. On April 3, 2009, Kathy Daic resigned, and on April 29, Pattin and Turrini filled the resulting vacancy with Williams. On July 29, the board added Pierce and Edward J. Walsh, Jr. as additional directors. In December, Pattin resigned. Since then, the board has consisted of Williams, Walsh, Turrini, and Pierce. In April 2011, Pierce was named interim CFO. She holds the position on a part-time basis while working full time as a senior manager in the U.S. office of a Korean bank.

C. Dysfunction And Deadlock

Once seated on the board, Williams pushed for the Company to hold its annual meeting, but Calypso's counsel advised that Calypso could not do so under the federal securities laws unless it first provided its stockholders with audited financial statements.[2]

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[2] For Delaware decisions addressing this recurring issue, *see, e.g., Esopus Creek Value LP v. Hauf*, 913 A.2d 593, 606 (Del. Ch. 2006) (ordering Delaware corporation to hold annual meeting and noting that "there is reason to suppose that the SEC will duly consider a request for exemptive relief by [the defendant company] for the purpose of allowing it to convene a meeting of stockholders in accordance with this court's order"); *Newcastle P'rs, L.P. v. Vesta Ins. Gp., Inc.*, 887 A.2d 975, 981 (Del. Ch. 2005) ("Nothing in [Section 14(c) of the Securities Exchange Act of 1934 or associated regulations] suggests any purpose to interfere with the power of state courts to require that stockholder meetings be held in accordance with the requirements of state corporation law in situations where the registrant corporation is delinquent in its SEC filing obligations and, thus, is unable to comply with the literal terms of the SEC proxy rules."), *aff'd*, 906 A.2d 807 (Del. 2005); *Walsh v. Search Exploration, Inc.*, 1990 WL 126664, at *4 (Del. Ch. Aug. 31, 1990) (Allen, C.) ("While audited financial statements may be

Williams raised the SEC's then-newly adopted mechanism for granting a discretionary waiver so that a corporation could hold a court-ordered meeting without disseminating audited financial statements. *See* 17 C.F.R. § 200.30-1. Calypso's counsel had not been aware of this procedure, and the Company made no effort to pursue it.

Williams next attempted to remove the impediments to a meeting by gathering the Company's books and records so that audited financial statements and disclosure documents could be prepared. This task proved onerous, because the Company's books and records were scattered and in disarray. After investing significant time and resources, Williams amassed approximately 150,000 pages of documents.

During 2009 and 2010, Williams largely financed Calypso with short-term loans totaling $223,989. The bulk of the funds went to pay the Company's lawyers in the Daic litigation, and Williams became heavily involved in that proceeding. Turrini and Pierce let Williams take the lead. Turrini was frequently absent from the Company attending to personal business or traveling abroad, and Pierce prioritized her day job.

In late 2010, however, Williams's relationship with Turrini and Pierce deteriorated. After identifying large and unexplained wire transfers and withdrawals of

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important and in some contexts crucial to shareholders, in the context of this contest for control, the need for audited financials is not such in my opinion, as would justify delaying the company's annual meeting an additional five months."); *Meredith v. Security Am. Corp.*, 1981 WL 7634, at *2 (Del. Ch. Nov. 18, 1981) (holding that lack of financial information needed to solicit proxies under SEC regulations is no defense to action to compel stockholder meeting). *See generally* J. Travis Laster & Michelle D. Morris, *How to Avoid A Collision Between the Delaware Annual Meeting Requirement and the Federal Proxy Rules*, 10 Del. L. Rev. 213 (2008).

cash from the Company's bank account, Williams began to investigate whether Turrini was embezzling funds. Williams also suspected that Turrini had used Company funds to pay his lawyer in a personal matter. Through his investigation, Williams came to distrust Turrini, and their interactions became hostile.

Williams's relationship with Pierce also headed downhill. What first piqued Williams's ire was his belief that Pierce's husband was disclosing confidential board information on iHub. Ironically, what bothered Williams was not the fact of the postings (because Williams was posting himself) but rather that Pierce's husband was not doing enough to keep his identity secret. Williams, by contrast, posted anonymously under the alias "Ben Lurkin" and consciously attempted to conceal his identity by posting false information. He even lied about being "Ben Lurkin" when other board members suspected the truth and questioned him about "Ben Lurkin's" posts. Williams only admitted using the alias during this litigation.

From his glass house, Williams threw stones at Pierce. His criticisms expanded to include attacks on Pierce's competence and her purported failures to bring the Company's public filings up to date. These exchanges metastasized into a lengthy and contentious debate over the status of the Company's books and records, which were still in Williams's possession. Turrini and Pierce demanded that Williams return the records to the Company. Williams did not trust Turrini and Pierce to maintain the records, made copies, and conditioned his willingness to return the originals on the Company reimbursing him for the $7,000 he incurred for copying and storage. Calypso did not

have $7,000, and the ensuing impasse generated much bickering and accusations about legal obligations and fiduciary duties.

An extensive body of email correspondence documents these disputes and serves as a case study on board dysfunction. Many of the emails, particularly those authored by Williams, are laced with profanity and unprofessional language. On substantive issues, the board consistently deadlocked 2-2, with Turrini and Pierce on one side and Williams on the other. The second independent director, Walsh, made periodic attempts at compromise but regularly voted with Williams.

D. The Special Meeting

Understandably frustrated by the deadlock, Turrini and Peirce sought to remove Williams from the board. Under Article III, Section 2 of the Company's Bylaws, Turrini had the authority in his capacity as President to call a special meeting of stockholders. On November 3, 2011, Turrini called a special meeting to be held on December 15, 2011 for the purpose of seeking Williams's removal. The Company's transfer agent, Continental Stock Transfer and Trust Co., distributed the meeting notice and materials in late November. The Company did not distribute a proxy statement pursuant to Rule 14a-3, notwithstanding Turrini's professed view that the Company could not hold a meeting without one.

Lacking a proxy statement and without board authorization, management solicited proxies on behalf of the Company. The proxy card misleadingly stated that the board recommended that stockholders vote in favor of Williams's removal.

The meeting was held on December 15, 2011. On the record date for the meeting, Calypso had 198,996,576 shares outstanding. There were 113,582,980 shares represented at the meeting in person or by proxy, constituting a quorum. Of those shares represented, 76,318,985 voted in favor of removing Williams, 36,981,673 voted against, and another 282,322 abstained. Although the affirmative votes represented a majority of the quorum (indeed a two-thirds supermajority), the affirmative votes fell short of a majority of those shares entitled to vote on the issue.

E. Williams Files This Litigation.

Turrini and Pierce claimed that the meeting result validly removed Williams as a director. They called a board meeting and appointed defendant Carlo di Colloredo-Mels to fill what they believed to be the resulting vacancy.

Williams challenged his removal, taking the position (correctly) that as a matter of Delaware law, a director can only be removed by the affirmative vote of a majority of those shares entitled to vote on the issue, in this case a majority of the outstanding stock. *See* 8 *Del. C.* § 141(k). In response, Pierce represented to Williams that they had received advice from Delaware counsel stating that Williams had been validly removed by the vote of a majority of the quorum.

Williams then filed this action pursuant to 8 *Del. C.* § 225(a) to determine the effectiveness of his removal and Colloredo-Mels's appointment. Turrini and Pierce both participated in the initial scheduling teleconference. Neither could identify the Delaware lawyer who purportedly opined that a director could be removed by the vote of a majority of a quorum. At the conclusion of the hearing, I scheduled the case for an expedited trial

and entered a *status quo* order requiring that the Company operate only in the ordinary course of business pending a determination of its lawful board of directors (the "Status Quo Order").

On January 10, 2012, Williams moved to hold the defendants in contempt of the Meeting Order. Williams also contended that the defendants violated the Status Quo Order by implementing the settlement of the Daic litigation. Among other remedies, Williams sought the appointment of a receiver pursuant to 8 *Del. C.* § 322 and an order requiring Turrini, Pierce, and the Company to bear his fees and costs. Because the contempt motion turned on disputed issues of fact that overlapped with the issues to be resolved in the summary proceeding, I advised the parties that I would address the contempt motion in conjunction with the merits of the case.

At trial, Turrini and Pierce still could not identify the Delaware lawyer who purportedly opined that a director could be removed by the vote of a majority of a quorum. The evidence at trial did not support the claimed violation of the Status Quo Order but rather established that management and their counsel appropriately carried out the August 2011 board decision approving the settlement. Because there was no underlying violation of the Status Quo Order, I do not address that issue further.

II. LEGAL ANALYSIS

This Court entered the Meeting Order on November 5, 2008. That order directed Calypso to hold an annual meeting of stockholders within 45 days. To comply with the Meeting Order, Calypso was required to hold its annual meeting on or before December 22, 2008. Over three years have passed, and Calypso has not complied.

Calypso never asked the Court to modify the Meeting Order, approve Calypso's non-compliance, or otherwise grant Calypso relief from its requirements. The record at trial demonstrates that Calypso never took meaningful steps to comply with the Meeting Order. Calypso knew about the SEC's procedure for granting a discretionary exception to the requirement that an issuer have audited financial statements before holding an annual meeting of stockholders, but Calypso never sought an exception.

Section 322 of the General Corporation Law provides as follows:

> Whenever any corporation shall refuse, fail or neglect to obey any order or decree of any court of this State within the time fixed by the court for its observance, such refusal, failure or neglect shall be sufficient ground for the appointment of a receiver of the corporation by the Court of Chancery.

8 *Del. C.* § 322. The powers that can be granted to and exercised by a receiver appointed under Section 322 are co-extensive with those powers that can be granted to and exercised by a receiver appointed under Section 291. *See Esopus Creek*, 913 A.2d at 607. Such a receiver may be appointed

> to take charge of [the corporation's] assets, estate, effects, business and affairs, and to collect the outstanding debts, claims, and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by the corporation and which may be necessary or proper. The powers of the receivers shall be such and shall continue so long as the Court shall deem necessary.

8 *Del. C.* § 291.

This Court previously has appointed a receiver for a corporation that failed to comply with an order directing the corporation to hold an annual meeting of stockholders. *See Judy v. Preferred Commc'n Sys., Inc.*, C.A. No. 4662-CC, at 50-54 (Del. Ch. Dec. 4, 2009) (TRANSCRIPT); *Judy v. Preferred Commc'n Sys. Inc.*, C.A. No. 4662-CC (Del. Ch. Dec. 23, 2009) (ORDER). The natural assignment for such a receiver would be to conduct the meeting of stockholders and seat the newly elected board. This case calls for a receiver with a broader charge.

Calypso currently lacks the resources to hold an annual meeting and has no credible plan to obtain them. As Pierce testified, the Company has no money. It generates no revenues and cannot pay its bills as they come due. Calypso is thus insolvent on a cash flow basis and could well be insolvent on a balance sheet basis as well. There is no realistic prospect that Calypso could comply with the Meeting Order, even under the direction of a receiver.

Equally important, Calypso is grievously non-compliant with its obligations under the federal securities laws. Calypso has not filed annual or quarterly reports since 2008. Its public filings since then consist of sporadic reports on Form 8-K. Given its financial situation and the state of its records, there is no realistic prospect that Calypso can fix its disclosure problems.

Most troubling, despite its profound difficulties, Calypso maintains a website describing the Company in glowing terms, and both the Company and its fiduciaries have profited from selling shares. Calypso recently raised $60,000-80,000 in a private placement, and Turrini suggested the Company might seek to double its authorized shares

from 200 million to 400 million to facilitate further issuances. Williams and Walsh have traded actively in Calypso's stock since joining the board. Williams has purchased over 1.6 million shares at prices ranging from $0.015 to $0.035 per share and sold nearly 600,000 shares at prices of $0.08 per share or higher. As noted, Williams's anonymous posts on iHub could easily have distorted the stock price. *See* JX 49 (Williams claiming falsely under the alias "Ben Lurkin" that he "picked up another 50K"). Walsh appears to have timed a significant purchase to precede the anticipated announcement of a debt financing, which ultimately fell through. In a message to the board, Williams reassured his fellow directors that he had educated Walsh on how to spin the purchase:

> Just a heads up…apparently Ed has used the $25K he offered for BK to buy shares in the last few days. I had advised him not to, but just found out he did. Not a big problem but he is CLUELESS. He actually told me that he had to buy them before the announcement of the loan and the resulting share price increase. After a "discussion" with me he realizes that he bought them SOLELY because he had some money on his hands and he had been wanting to buy for a long time.

JX 94 at 3. Under the circumstances, there is a significant risk of ongoing harm to innocent investors who are buying and selling Calypso's stock without adequate disclosure.

"Although the federal government has an obvious interest in enforcing the disclosure scheme established by the [federal securities laws], Delaware has a powerful interest of its own in preventing the entities that it charters from being used as vehicles for fraud. Delaware's legitimacy as a chartering jurisdiction depends on it." *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 26 (Del. Ch. 2009). This Court has used its equitable powers to

address fraudulent and illegal conduct by Delaware corporations.[3] Under the circumstances, the receiver I appoint will be charged with dissolving Calypso and winding up its affairs. The receiver will marshal and sell the Company's assets, including the Patent, discharge Calypso's debts, and distribute any remaining amounts to its stockholders. The receiver shall have all of the authority contemplated by 8 *Del. C.* § 291, including the power to prosecute and defend all claims and suits in the name of the corporation. As an initial task upon appointment, the receiver shall determine whether steps should be taken to halt public trading in Calypso's shares. In evaluating what steps should be taken, the receiver shall consult with appropriate officials at the SEC. A reasonable award for the receiver's compensation and expenses will be paid out of the corporation's assets before any distribution to creditors or stockholders. *See* 8 *Del. C.* § 298.

In granting this remedy, I have given particular consideration to its potential effect on innocent stockholders. For the typical business, appointing a receiver to dissolve the entity and wind up its affairs would be a drastic step. But Calypso is not an operating business in the traditional sense. It is effectively a holding company for its only significant

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[3] *See, e.g.*, *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *13 (Del. Ch. Aug. 18, 2005) (dissolving limited liability company without appointing a receiver where "[a]fter reviewing all of the evidence, the court is led inexorably to a conclusion that Tasty Fries is in the business of issuing stock and not making vending machines. Therefore, neither party is entitled to the remedies that they seek. Instead, the court fashions a remedy that serves the interest of justice by putting an end to this dispute once and for all."); *AJW P'rs, LLC v. Cirillo*, C.A. No. 4063-VCL (Del. Ch. Oct. 31, 2011) (ORDER) (revoking charter of defunct but still publicly listed Delaware shell corporation where company counsel conceded that entity had no business purpose other than its potential use as a vehicle to access the public markets and bypass the traditional public registration process).

asset: the Patent. It has no employees (other than its CEO and part-time CFO), no factories or stores, no goodwill in the marketplace, and no going-concern value that would be sacrificed in liquidation. The Patent is readily salable, and there are at least three natural bidders: T-Mobile, Daic, and current Calypso investors. T-Mobile can moot Calypso's lawsuit by acquiring the Patent. Daic demonstrated his interest in the Patent during the prolonged and vigorously contested state court litigation in Texas and by taking an economic interest in the Patent in the eventual settlement. Calypso's current investors, particularly the insiders and others who made short term loans to the Company, may believe in the Patent's value. Other wireless industry players may participate as well. Although the ultimate value of the Patent is uncertain and contingent, optimistic purchasers can bid today to capture its upside. Through an appropriate sale process, the receiver can deliver the present value of the Patent to Calypso for the benefit of its creditors and ultimately its equity holders.

III. CONCLUSION

For the reasons set forth herein, a receiver will be appointed by separate order to take charge of Calypso, dissolve the entity, and wind up its affairs. Each side will bear its own fees and costs.