



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

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: January 24, 2012
Date Decided: February 14, 2012

Brian M. Rostocki, Esq.
Reed Smith LLP
1201 North Market Street, Suite 1500
Wilmington, DE 19801-1163

Joseph J. Bodnar, Esq.
Law Offices of Joseph J. Bodnar
2101 N. Harrison St., P.O. Box 1022
Wilmington, DE 19899-1022

Silicon Valley Innovation Company, LLC
c/o National Registered Agents
160 Greentree Drive
Dover, DE 19901

Re: *Jagodzinski v. Silicon Valley Innovation Company, LLC*
Civil Action No. 6203-VCP

Dear Counsel and Registered Agent:

This case is before me on a Motion for Contempt and for a Receiver arising out of this Court's Order entered on August 9, 2011 (the "August Order") directing Defendant, Silicon Valley Innovation Company, LLC ("SVIC"), to provide Plaintiff, Christian Jagodzinski, with access to books and records pursuant to 6 *Del. C.* § 18-305 and SVIC's limited liability company agreement. Based on the alleged contempt, Jagodzinski seeks the appointment of a receiver and an award of attorneys' fees. For the reasons stated in

this Letter Opinion, I grant the Motion for Contempt and for a Receiver in part and deny it in part.

I. Is SVIC Liable for Contempt?

On October 20, 2011, this Court granted in part and denied in part Plaintiff's Motion for Contempt and Plaintiff's Supplemental Motion for Contempt (collectively, the "First Motions") for failure to comply with the August Order (the "October Order"). In the October Order, the Court again directed SVIC to provide Jagodzinski with access to SVIC's books and records. On November 21, 2011, Plaintiff filed the pending Motion for Contempt and for a Receiver (the "Second Motion"), requesting that the Court hold SVIC in contempt of the Court's October Order and, as a consequence, appoint a receiver for SVIC. On November 28, 2011, the Court ordered SVIC to file any opposition to the Second Motion no later than December 12, 2011 and, for the third time, directed SVIC to make the production called for in the August Order (the "November Order").

To date, SVIC has not filed any brief or memorandum in opposition to the Second Motion. Furthermore, the record indicates that Defendant has not produced all of the documents called for in the August, October, and November Orders.

According to a document entitled "Plaintiff's Response in Opposition to SVIC's Motion to Extend Time to Respond to Plaintiff's Second Motion," on January 4, 2012, SVIC purported to move for an extension of time to respond to Plaintiff's Second Motion

(“Motion to Extend Time”). No such Motion to Extend Time, however, was ever properly filed with this Court.¹ Therefore, the Court need not consider or decide Defendant’s aborted Motion to Extend Time.

Moreover, even if SVIC properly had filed the Motion to Extend Time, it would not have been granted. Under Court of Chancery Rule 6(b), the Court may extend time only when “the failure to act was the result of excusable neglect,”² *i.e.*, “neglect which might have been the act of a reasonably prudent person under the circumstances.”³ SVIC cannot show that its failure to act resulted from excusable neglect. First, although SVIC has had over three months to obtain substitute Delaware counsel and to reply to the Second Motion, as directed in the November Order, it has not done so. Second, the Court specifically warned SVIC in the November Order that if “it fails to provide . . . discovery on or before December 12, 2011, it does so at its peril.” Third, SVIC repeatedly has missed deadlines and neglected to respond to this Court’s Orders. Thus, there is no basis

¹ Jagodzinski submitted a copy of SVIC’s purported Motion to Extend Time as an exhibit to his response to that motion. Plaintiff’s response stated that he received the purported Motion to Extend via a LexisNexis File & Serve Notification of Service on January 4, 2012.

² Ct. Ch. R. 6(b)(2).

³ *Encite LLC v. Soni*, 2011 WL 1565181, at * 2 (Del. Ch. Apr. 12, 2011) (internal citations omitted) (quoting *Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998)).

in the record from which the Court could conclude that Defendant's conduct constituted excusable neglect, even if the purported Motion to Extend Time were before the Court.

Under Rule 70(b), the Court may find a party in contempt when it fails to obey or to perform any order of which it has knowledge. That SVIC knew of its obligations under the Orders is evidenced by its partial compliance with the October and November Orders, when SVIC made Riverson Leonard, SVIC's Secretary and sole employee, available for deposition. It is equally clear that SVIC violated essential terms of those Orders in several ways. For example, SVIC has failed to deliver or make available all of the documents this Court ordered it to produce in the August, October, and November Orders. As the Second Motion persuasively argues, SVIC still has not complied fully with those orders. In addition, the November Order directed SVIC to obtain Delaware counsel. Although Defendant appeared to be represented when Leonard was deposed on December 21, 2011, SVIC's counsel later withdrew his appearance and no substitute Delaware counsel has entered an appearance for the Company. Accordingly, I find SVIC liable for contempt.

II. The Appropriate Remedy for SVIC's Contempt

Because SVIC has failed to comply with Orders of this Court on three separate occasions, Plaintiff is entitled to an order holding SVIC in contempt and imposing an appropriate remedy. This Court has broad discretion in formulating a remedy for violations of its orders.⁴

Plaintiff's Second Motion seeks an order (1) directing SVIC to make available immediately the documents at issue, (2) awarding him his reasonable attorneys' fees and costs in connection with his First and Second Motions for contempt, and (3) appointing a receiver for SVIC with broad powers over the Company, its operations, and management, including the power to "(i) investigate and pursue claims and causes of action belonging to the Company and to bring suit thereon to the extent the claims are against third parties, and (ii) defend against third party claims."⁵ As previously noted, SVIC has not responded to the Second Motion.

⁴ See, e.g., *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 176 (Del. 2002) ("[T]he Court of Chancery's 'powers are complete to fashion any form of equitable and monetary relief as may be appropriate.'" (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983))); *Weinberger*, 457 A.2d at 715 (noting "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate").

⁵ Second Mot. ¶ 8.

Based on the record before me, Jagodzinski is entitled to an order requiring SVIC to produce the documents in issue. In addition, the circumstances surrounding the prosecution of Plaintiffs' First and Second Motions for contempt, including SVIC's failure to respond to the Second Motion, warrant awarding Jagodzinski his reasonable attorneys' fees and costs in connection with those Motions. Because SVIC partially complied with the October and November Orders, however, I have decided to limit the award of such fees and costs to a maximum of \$10,000.00.

The third aspect of the relief Plaintiff seeks, the appointment of a receiver, requires closer examination. Except where the certificate of formation has been cancelled,⁶ Delaware law is silent on the appointment of a receiver for a limited liability company.⁷ Where, as here, the LLC operating agreement does not address the issue, the relevant statutory provision is § 18-1104, which provides that "[i]n any case not provided for in this chapter, the rules of law and equity . . . shall govern."⁸ This Court has the

⁶ 6 *Del. C.* § 18-805.

⁷ *Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2010 WL 3448227, at *5 (Del. Ch. Sept. 2, 2010).

⁸ 6 *Del. C.* § 18-1104; *see also* *Ross Hldg. & Mgmt. Co.*, 2010 WL 3448227, at *6 (holding that absent a relevant provision in the operating agreement or the LLC Act, "the only basis for appointing a receiver is by way of the Court's general equity powers").

inherent equitable power to appoint a receiver.⁹ The appointment of a receiver, however, is an “extraordinary remedy.”¹⁰ Therefore, a court of equity will exercise the power to appoint a receiver cautiously and only as necessitated by the exigencies of the case before it.¹¹ An important factor in that regard is whether “some real beneficial purpose will be served thereby.”¹²

Based on the circumstances of this case, I find that the appointment of a receiver to cure the contempt is warranted. It appears from the record that SVIC has not produced all the books and records called for in the August Order, despite having had numerous opportunities to comply.¹³ Further, the evidence demonstrates that the Company’s sole employee, Leonard, cannot be relied upon to produce all the documents required under the August Order. I also note, however, that the Company has limited (or no) resources

⁹ Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 8.11[d][3], at 8-283 & n.348 (2010).

¹⁰ *Roth v. Laurus U.S. Fund, L.P.*, 2011 WL 808953, at *5 (Del. Ch. Feb. 25, 2011).

¹¹ *See Ross Hldg. & Mgmt. Co.*, 2010 WL 3448227, at *5 (citing *Thoroughgood v. Georgetown Water Co.*, 77 A. 720, 723 (Del. Ch. 1910)).

¹² *Drob v. Nat’l Mem’l Park*, 41 A.2d 589, 597 (Del. Ch. 1945).

¹³ *See Carlson v. Hallinan*, 925 A.2d 506, 543 (Del. Ch. 2006) (finding that the appointment of a receiver was appropriate where the parties breached their duties repeatedly and would have continued to breach those duties without the appointment of a receiver).

and may not be able to pay a receiver out of current funds. With that in mind, I further accept Jagodzinski's recommendation that the Court appoint his agent, Bram Portnoy, who appears to have the necessary skill set, to serve as the receiver and thereby minimize financial strain on the Company.

At the same time, however, I find that the record before me on the pending motion for contempt supports the appointment of a receiver only to the extent necessary to cure the contempt by effecting the production ordered under 6 *Del. C.* § 18-305. Therefore, the powers of the receiver shall be limited to retrieving and producing the documents this Court ordered SVIC to produce in the underlying books and records litigation and to actions reasonably related to that purpose. In particular, I deny Jagodzinski's request for appointment of a receiver with the authority to conduct all of SVIC's business, including the power to pursue *any* claims belonging to the Company. That aspect of the requested relief exceeds the scope of the contempt that gave rise to the Second Motion. The receiver may collect, review, and produce documents in Defendant's files and storage facilities. Additionally, the Receiver may attempt to obtain the documents at issue from third parties where SVIC reasonably can claim to have control over such documents. Once the Receiver has completed his efforts to collect and produce the books and records specified in the August Order, he will be discharged.

Jagodzinski v. Silicon Valley Innovation Company, LLC
Civil Action No. 6203
February 14, 2012
Page 9

III. Conclusion

For the reasons stated, Plaintiff's Second Motion is granted in part and denied in part to the extent indicated. An Order reflecting the rulings made herein is being entered concurrently with this Letter Opinion, but it is without prejudice to Jagodzinski's ability to seek a receiver with greater powers in any later action asserting a claim on the merits.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp