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Transaction ID 65789409
Case No. 12825-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In Re: GR BURGR, LLC	:	
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	:	
ROWEN SEIBEL,	:	
	:	
Respondent and Counterclaim Plaintiff,	:	
	:	
v.	:	C.A. No. 12825-VCS
	:	
GR US LICENSING, LP,	:	
	:	
Petitioner and Counterclaim Defendant,	:	
	:	
and	:	
	:	
GR BURGR, LLC,	:	
	:	
Nominal Defendant.	:	
_____	:	

SUPPLEMENTAL SUBMISSION IN SUPPORT OF RECEIVER'S REPORT AND PROPOSED LIQUIDATION PLAN FOR GR BURGR, LLC

INTRODUCTION

Pursuant to the Court's request during the June 26, 2020 hearing in this matter, this Supplemental Submission addresses authorities regarding assignments and auctions of derivative claims.[1] After inquiring from both "business divorce" and

[1] The transcript of the June 26, 2020 hearing on my Report and Recommendation for the Liquidation of GR Burgr, LLC (the "6/26/20 Tr.") is attached as Ex. A hereto.

bankruptcy colleagues around the country as well as counsel for the parties in this action, and conducting independent research, I was unable to locate guidance, whether in the form of opinions, treatises or law review articles, that directly addresses the Court's inquiry, which was "[what] approaches the Court might take to deal with derivative claims as assets of a dissolved entity in the course of winding down . . . authority that either in a scholarly way or in deciding a case says . . . here[are] some options that are laid out that the Court might take." (6/26/20 Tr. at 20).

The foregoing notwithstanding, my research did reveal that assignments of choses in action take place in the contexts of both state court dissolution proceedings and federal bankruptcy cases, and auctions of choses in action take place in bankruptcy cases—although the commentary in the applicable cases is sparse. The results of my research regarding (i) assignments and (ii) auctions is set forth below.

I. Assignments

Courts have generally held that, in dissolving and winding up an entity, the power to sell and dispose of an entity's property and assets permits the sale or assignment of choses in action owned by the entity. *E.g.*, *Stanton v. Lewis*, 26 Conn. 444, 449 (Conn. 1857);[2] *Wright v. Rogers*, 26 Ind. 218, 219 (Ind. 1866); *Jasin v. Wolfgang Doerschlag Architects, Ltd., Inc.*, 1984 WL 3691, at *4 (Ohio Ct. App.) ("the assets of a dissolved corporation, including choses in action, may

[2] Cases cited in this letter are included in the Compendium of Authorities filed herewith.

be distributed to the shareholders"). In *Stanton*, the court held that the trustee who was charged with winding up the affairs of the subject "copartnership" had the power either to pursue the entity's claims or sell or assign them. 26 Conn. at 449-50.

Delaware has likewise recognized that a chose in action may be sold or assigned (albeit not in the dissolution context). *See, e.g.*, *Garford Motor Truck Co. v. Buckson*, 143 A. 410, 411 (Del. Super. Ct. 1927); *Kent Gen. Hosp., Inc. v. Blue Cross & Blue Shield of DE, Inc.*, 442 A.2d 1368, 1371 (Del. 1982) ("Originally choses in action were not assignable at all but the right to assign a contract was later generally recognized, first in equity and then at law.") (citing *Garford*, 143 A. at 411).

Additionally, while not directly addressing the issue of assignment, a line of authority in Delaware holds that the direct-versus-derivative distinction is less important in the context of dissolution, and that claims in such a context may be considered direct claims.[3] *E.g.*, *Fischer v. Fischer*, 1999 WL 1032768 (Del. Ch.). As noted by the Court in *In re Cencom Cable Income Partners, L.P. Litig.*, this is particularly the case under circumstances similar to those here:

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[3] This exception to the standard direct-versus-derivative analysis was termed the "Liquidation Exception" in an article co-authored by the Receiver. Kurt M. Heyman & Patricia L. Enerio, *The Disappearing Distinction Between Derivative and Direct Actions*, 4 DEL. L. REV. 155 (2001). This article has been cited favorably by this Court. A manuscript of this article is included in the Compendium submitted herewith.

> (1) A business association consists of only two parties in interest, one a putative class of injured plaintiffs and the other the defendant party that controls the business association; and, (2) the business association is effectively ended, but for the winding up of its affairs; and, (3) the two sides oppose each other in the final dispute over the liquidation of that association; then a claim brought in that context is direct.

2000 WL 130629, *1 (Del. Ch.). Thus, in a case such as this, the party who was wronged arguably may seek relief from the court directly, even without assignment of the claim. Assigning GR Burgr, LLC's claims to its members so that they can bring them individually would be consistent with this authority.

Finally, the power to sell or assign a chose in action is also recognized in bankruptcy law. *In re Nicole Energy Servs., Inc*., 2008 WL 928011, *230 (Bankr. S.D. Ohio) (a chose in action may be sold); *In re Fry*, 2007 WL 7023829, *7 (Bankr. S.D. Ga.) ("In collecting assets for the bankruptcy estate, the Trustee has the authority to contract with the Debtor to assign her chose in action to the Trustee for the benefit of her creditors."). This most frequently occurs in the context of the assignment of causes of action to a litigation trust for the benefit of creditors, under which a trustee may either litigate the claims or further assign them to creditors in satisfaction of outstanding debts. *See, e.g.*, *In re Lomas Fin. Corp*., 1999 WL 33495524, *1 (Bankr. D. Del.); *In re Magnatrax Corp*., 2003 WL 22807541, *12 (Bankr. D. Del.).

II. Auctions

The only courts that appear to have confronted the question of whether an auction of litigation claims should take place have done so in the bankruptcy context. In rejecting a compromise of claims belonging to a debtor's estate, the Ninth Circuit Court of Appeals held in *In re Mickey Thompson Entertainment Group, Inc.* that, under applicable bankruptcy procedure, a bankruptcy court "is obliged to consider, as part of the 'fair and equitable' analysis, whether any property of the estate that would be disposed of in connection with the settlement might draw a higher price through a competitive process. . . ." 292 B.R. 415, 421-22 (9th Cir. 2003). The Fifth Circuit Court of Appeals concurred in *In re Moore*, 608 F.3d 253, 264 (5th Cir. 2010), observing that an auction was particularly appropriate where the estate had no assets other than unliquidated choses in action. *Id.* at 266.

The bankruptcy opinions favoring an auction of claims generally involved situations in which a third party (*i.e.*, not an owner of the bankrupt entity or party to the claim) was willing to bid on the chose in action. For example, in *Mickey Thompson*, the court held that the trustee had failed to demonstrate that a proposed settlement was fair and equitable because a third party was willing to overbid the settlement amount by $5,000, and determined that "the interests of creditors would be better served by allowing interested parties to offer bids. . . ." *In re Mickey Thompson*, 292 B.R. at 420-21. Similarly, the court in *In re Moore* noted that "if other parties indicate that they are willing to pay more for the claim, or if it is

otherwise shown that a bidding procedure would be appropriate, then the trustee must proceed [with an auction]." 608 F.3d at 264-65.

On the other hand, the Tenth Circuit Court of Appeals struck a cautionary note about the fairness of auctions, reversing the lower court's approval of an auction of a chose of action held by the bankruptcy estate where the only bidders were the debtor and the defendant in the lawsuit:

> Here the bidders were the only persons, except the creditors, who could have been interested in the price paid for the chose in action. The bidders were each interested in receiving the chose for the lowest possible amount, whereas, the unrepresented creditors were interested in obtaining the greatest possible amount for their benefit at the time of distribution of assets.

Mason v. Ashback, 383 F.2d 779, 780 (10th Cir. 1967) (superseded by statute on other grounds as stated in *In re Sweetwater,* 884 F.2d 1323, 1328 (10th Cir. 1989)).

The court in *In re Silver Bros. Co., Inc.* concurred with this analysis, observing that "the mere existence of competing bids for an asset does not inevitably result in an 'auction' sale." 179 B.R. 986, 1009 (D.N.H. 1995) (citing *In re Abbotts Dairies of Pennsylvania, Inc*., 788 F.2d 143, 149 (3d Cir. 1986) (Seitz, J.)). The *Silver Bros.* court expanded upon *Mason*'s observations regarding auctions of choses in action where one of the bidders is a party to the lawsuit as follows:

> It is of course true that bidders at auctions are generally hopeful of acquiring the asset being sold at the lowest possible bid that will top all other bids. But when there are only two competing bidders for a chose in action, where one of the bidders is the defendant being sued in the

> pending lawsuit, the competing bids do not involve a true auction in which *both* bidders are seeking to acquire the chose in action for the purpose of ultimately pursuing the cause to realize its maximum value in litigation. In such a "bidding contest" between a party seeking to acquire a trustee's rights in a lawsuit, and the defendant in lawsuit, only the former is bidding in terms of what might be realized from pursuit of the lawsuit. The defendant will only bid a lower amount that represents the value to the defendant of acquiring the lawsuit against itself only to secure its dismissal.

Id. at 1009 n.13. In this vein, it should be also noted that the auction that took place on remand in *In re Moore* resulted in only $4,000 more consideration to the bankruptcy estate than had been contemplated by the settlement that was rejected in favor of an auction. *In re Moore*, 470 B.R. 414, 430-31 (N.D. Tex. 2012) ("A marvelous result? Hardly.").

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Receiver for GR BURGR, LLC

Dated: July 22, 2020

CERTIFICATE OF SERVICE

Kurt M. Heyman, Esquire, hereby certifies that on July 22, 2020, copies of the foregoing Compendium of Authorities Cited in Correspondence from Kurt M. Heyman Dated July 22, 2020 were served electronically upon the following counsel:

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