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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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David J. Teklits, Esquire
Brendan W. Sullivan, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, DE 19801

Robert A. Penza, Esquire
Christopher M. Coggins, Esquire
Polsinelli P.C.
222 Delaware Avenue, Suite 1101
Wilmington, DE 19801

Re: *Meyer Natural Foods LLC v. Duff*
C.A. No. 9703-VCN
Date Submitted: February 3, 2015

Dear Counsel:

Petitioner, citing an inability to continue the business "in conformity with the parties' original agreement,"[1] seeks judicial dissolution of a Delaware limited liability company ("LLC") it owns with Respondents. Respondents oppose dissolution because of concerns about prejudice in litigation ongoing in another forum and assert that the business, measured by the LLC Agreement's stated purpose, remains reasonably practicable.

[1] Pet'r's Opening Br. in Supp. of Its Mot. for Partial Summ. J. ("POB") 1.

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Petitioner Meyer Natural Foods LLC ("Meyer") is managing member and owner of a 51% capital interest of Premium Natural Beef LLC ("PNB" or the "Company"). Respondents Kirk Duff, Todd Duff (collectively, the "Duffs"), and C.R. Freeman ("Freeman") own 12%, 12%, and 25% capital interests, respectively, of PNB.[2] Meyer asks for judicial dissolution of PNB pursuant to Section 18-802 of the Delaware Limited Liability Company Act (the "LLC Act")[3] and Section 10.1(a) of PNB's operating agreement.

Respondents formed PNB in 2008 and began discussions with Meyer in 2010 to join efforts to sell all-natural beef to a certain national grocery chain. The parties formalized their business relationship on May 19, 2011, through three agreements: the Purchase Agreement by and among Meyer Natural Foods LLC, Premium Natural Beef LLC, and the Members of Premium Natural Beef LLC (the

[2] Resp'ts Kirk Duff, Todd Duff, and C.R. Freeman's Answer to Pet'r Meyer Natural Foods, LLC's Verified Pet. for Judicial Dissolution ("Answer") ¶¶ 2-5.
[3] 6 *Del. C.* § 18-802.

"Purchase Agreement");[4] the Amended and Restated Limited Liability Company Agreement of Premium Natural Beef LLC (the "LLC Agreement");[5] and the Output and Supply Agreement.[6] The Purchase Agreement focused on the Respondents' sale of PNB's units to Meyer. The LLC Agreement set out the details of PNB's business, with Meyer as the managing member. Finally, under the Output and Supply Agreement, Power Plus Feeders, LLC ("PPF"), owned by the Duffs, and Premium Beef Feeders, LLC ("PBF"), owned by Freeman, were to supply qualifying cattle to Meyer and its subsidiaries to sell.

Relevant to this dispute are clauses dealing with PNB's purpose, PNB's dissolution, and the various non-compete obligations of the parties. Specifically,

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[4] Transmittal Aff. of Brendan W. Sullivan in Supp. Pet'r's Opening Br. in Supp. of Its Mot. for Partial Summ. J., Dated Oct. 21, 2014 ("Sullivan Aff.") Ex. 2 ("Purchase Agreement").

[5] Resp'ts Kirk Duff, Todd Duff and C.R. Freeman's Answering Br. in Opp'n to Pet'r's Mot. for Partial Summ. J. ("RAB") Ex. A ("Freeman Aff.") Ex. 2 ("LLC Agreement").

[6] Sullivan Aff. Ex. 3 ("Output and Supply Agreement"). For convenience, the Court does not always distinguish between the actions of Respondents and their entities.

Only the LLC Agreement selects Delaware law as its governing law. The Court looks at the plain language of the other agreements in determining PNB's purpose but does not claim to interpret those agreements in deciding this motion.

the LLC Agreement stated that "[t]he purpose and business of the Company shall be limited to engaging in the PNB Business and related activities,"[7] which in turn "mean[t] the business of marketing, distributing and selling natural Angus beef and beef products under the 'Premium Natural Beef' brand name to the Existing PNB Customers . . . and to new customers of the Company from time to time."[8] Meyer, as managing member, was required to "manage[] exclusively" the business, property, and affairs of PNB.[9] However, some actions were constrained—absent prior written consent of a majority of the interests held by the other members, the managing member could not "cause the Company to undertake or engage in . . . the dissolution of the Company."[10] Section 10.1 clarified that dissolution is mandatory upon "(a) the entry of a decree of judicial dissolution pursuant to the [LLC] Act; (b) the determination of the Managing Member and a Majority in Interest of the other Members at any time to dissolve the Company; or (c) the Sale of the

[7] LLC Agreement § 2.6.
[8] *Id.* § 1.1.
[9] *Id.* § 4.1.
[10] *Id.* § 4.2(o).

Company."[11] The LLC Agreement contained an integration clause,[12] but the Output and Supply Agreement stated that it was "being made and entered into in connection with, and as a condition to, that certain Purchase Agreement . . . and the Amended and Restated Limited Liability Company Agreement."[13]

All three agreements addressed competitive activities. The Purchase Agreement specified, among other things, that Respondents could not own or operate a competing business.[14] The Purchase Agreement's restrictive covenants were identified as "essential to protect the Business and the goodwill of [the] Company."[15] The restrictive covenants in that agreement were to terminate immediately, however, if Respondents terminated the Output and Supply Agreement or the LLC Agreement.[16] The Output and Supply Agreement secured exclusive rights for Meyer and its subsidiaries to purchase qualifying cattle from

[11] *Id.* § 10.1.
[12] *Id.* § 12.1.
[13] Output and Supply Agreement 1.
[14] Purchase Agreement § 7.4(a)(i).
[15] *Id.* § 7.4.
[16] *Id.* § 7.4(f).

PPF and PBF.[17] Its non-solicitation provision was written to terminate with that overall agreement.[18] Finally, the LLC Agreement required Meyer, generally speaking, "to use commercially reasonable efforts to promote and expand the PNB Business in the [four relevant states] for the benefit of t[h]e Company and in the mutual best interests of all the Members."[19] It also subjected the parties' rights to engage in other activities to the restrictive covenants in the Purchase Agreement.[20]

Respondents and their entities purported to terminate the Output and Supply Agreement in July 2012 and filed suits against Meyer and PNB in an Oklahoma state court on August 3, 2012 (the "Oklahoma Litigation"). They alleged, among other claims, breaches of contractual and fiduciary duties. The Oklahoma Litigation sought remedies such as rescission of the Purchase Agreement and the LLC Agreement, a declaratory judgment about restrictive covenants, and damages. The Oklahoma court has ordered termination of the exclusive supply and purchase obligations of the parties under the Output and Supply Agreement as of March 31,

[17] Output and Supply Agreement § 2.1.
[18] *Id.* § 15.2.
[19] LLC Agreement § 4.9(d).
[20] *Id.* § 4.9(c).

2013.[21] The order states that it "does not affect any rights which [the parties] may thereafter have against each other based on any non-compete or similar provisions in the [Output and Supply] Agreement or other contracts . . . as to any live cattle other than the second quarter cattle or hold over cattle in the third quarter of 2013."[22] Respondents, relatedly, submit that they are no longer bound by restrictive covenants in the Output and Supply Agreement and the Purchase Agreement.[23] In late 2014, the Oklahoma court granted partial summary judgment in one suit in favor of Respondents' Interpretation of Offal Items, Bones, and Fat.[24] Meyer filed its Verified Petition for Judicial Dissolution in this Court on May 28, 2014, primarily seeking judicial dissolution of PNB. Meyer has now moved for

[21] Freeman Aff. Ex. 13.
[22] *Id.* at 2.
[23] Answer ¶¶ 17, 22, 29.
[24] The order granting the motion did not provide a background on the arguments made, *see* RAB Ex. B, but Respondents contend here that Meyer "designat[ed] red meat items as 'offal items, bones and fat' and thereafter pass[ed] the profits from those impermissibly retained items to Meyer." Freeman Aff. ¶ 15. They cite this preliminary success as supporting their various claims against Meyer and weighing against dissolution. RAB 24. The Court discusses the Oklahoma Litigation largely to provide context for Respondents' concerns about prejudicing existing litigation, not to draw any conclusions on the merits.

partial summary judgment on the issue of dissolution pursuant to 6 *Del. C.* § 18-802 and LLC Agreement § 10.1(a).

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Meyer argues that there are two grounds supporting its motion for partial summary judgment: that continued operation is not reasonably practicable and that Respondents have sought rescission, effectively consenting to dissolution.[25] In support of the first ground, Meyer reads the parties' agreements together to conclude that PNB's purpose was not only to sell natural beef but also to partner exclusively with Respondents in a "joint venture business"[26] to do so. Because the Output and Supply Agreement is no longer effective and Respondents believe that they are free to compete against Meyer, it would follow that PNB's business is no longer practicable. Meyer emphasizes the unfairness of requiring it to serve as managing member of a business that the parties no longer want to continue and to

[25] Meyer states that Respondents have since attempted to withdraw their request for rescission. Pet'r Meyer Natural Foods LLC's Response to Resp'ts' Mot. to Supplement R. 2 n.1. This does not change the pending analysis. The Court decides the motion on the first ground, although it touches upon concerns about dissolution (as opposed to rescission) in its discussion of the equities.
[26] Pet'r's Mot. for Partial Summ. J. Tr. ("Summ. J. Tr.") 14.

which Respondents no longer have critical obligations. Dissolution is argued to be the first step of an orderly process that will not have material consequences for Respondents' ultimate recovery, if any, in Oklahoma.

Respondents, on the other hand, submit that dissolution at this stage is inappropriate because of material factual disputes, PNB's continued operations, and the possibility of inequitable conduct. Cited among the facts in dispute are PNB's purpose, whether PNB is profitable, whether non-compete provisions remain viable, and whether Meyer has been fulfilling its duties as managing member.[27] Respondents point to authority that judicial dissolution of PNB is only proper if it is no longer reasonably practicable to operate according to its original purpose, which they take from the broad language in the LLC Agreement. They agree that the parties no longer want to be business partners but disagree that they support dissolution, pointing to a contractual mechanism they could have used if they had wanted dissolution. Finally, they raise equitable factors that could counsel against the discretionary remedy of dissolution. They caution against

[27] *E.g.*, RAB 13-16, 21-22.

prejudicing recovery in the Oklahoma Litigation and awarding an equitable remedy to one who allegedly has engaged (or is engaging) in inequitable conduct.

Meyer, in reply, emphasizes the narrowness of the pending motion and the lack of material disputes. It notes that Respondents' attempt to distinguish rescission is unavailing because the outcome would not differ substantively and the contractual option for dissolution is meaningless because Respondents continue to block it. Meyer stands by its interpretation of PNB's business purpose and points out that the Court can decide this motion without relying on (or materially affecting) the Oklahoma Litigation.

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The Court grants summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[28] The moving party bears the burden of establishing that there is no genuine issue of material fact, and inferences are

[28] Ct. Ch. R. 56(c).

drawn from the record "in the light most favorable to the nonmoving party."[29] Respondents argue that the Court should not grant Meyer's motion for summary judgment because Meyer is in control of the information that Respondents need to make their case.[30] While the Court does not disagree with using caution in granting summary judgment, the Court earlier denied Respondents' Rule 56(f) motion for discovery[31] and has no reason to believe that Respondents lacked access to material information.

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The LLC Act permits judicial dissolution "[o]n application by or for a member or manager . . . whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."[32] Judicial

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[29] *Blaustein v. Lord Baltimore Capital Corp.*, 2013 WL 1810956, at *6 (Del. Ch. Apr. 30, 2013), *aff'd*, 84 A.3d 954 (Del. 2014).
[30] *See* RAB 13 (citing *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 426 n.9 (Del. Ch. 2007)).
[31] *Meyer Natural Foods LLC v. Duff*, C.A. No. 9703, at 19-21 (Nov. 24, 2014) (TRANSCRIPT).
[32] 6 *Del. C.* § 18-802. The Court can draw on analogous authority relating to limited partnerships. *E.g.*, *In re Seneca Invs. LLC*, 970 A.2d 259, 262 (Del. Ch. 2008).

dissolution of an LLC is a discretionary remedy[33] and is "grant[ed] sparingly."[34] Nonetheless, it has been granted "in situations where there was 'deadlock' that prevented the [entity] from operating and where the defined purpose of the entity was fulfilled or impossible to carry out."[35] Deadlock refers to the inability to make decisions and take action, such as when an LLC agreement requires an unattainable voting threshold.[36] When analyzing purpose, the Court looks to the parties' foundational contractual agreement and asks whether it is reasonably practicable to carry on the business in line with that purpose, not whether "the purpose . . . has been completely frustrated."[37]

To begin, operational deadlock is not an issue because of the authority granted to Meyer as managing member. Thus, the dispute is over purpose. Respondents argue for a broad characterization of PNB's purpose, implementing

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[33] *E.g.*, *In re Mobilactive Media, LLC*, 2013 WL 297950, at *33 (Del. Ch. Jan. 25, 2013).
[34] *Wiggs v. Summit Midstream P'rs, LLC*, 2013 WL 1286180, at *12 (Del. Ch. Mar. 28, 2013).
[35] *Seneca*, 970 A.2d at 262-63 (footnote omitted).
[36] *See, e.g.*, *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *4-5 (Del. Ch. Jan. 13, 2009), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE); *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10-11 (Del. Ch. Aug. 18, 2005).
[37] *Fisk*, 2009 WL 73957, at *4 (internal quotation marks omitted).

the plain language of Section 2.6 of the LLC Agreement. Meyer wants a contextual interpretation based on the various non-compete and mutual obligations in the Purchase Agreement, the LLC Agreement, and the Output and Supply Agreement. There is authority that limits analysis of an LLC's purpose to the purpose clause in an organizational document,[38] but other authority suggests that additional evidence might inform the analysis. In *Cincinnati Bell Cellular Systems Co. v. Ameritech Mobile Phone Service of Cincinnati, Inc.*, for example, the Court rejected an argument that the purpose of the limited partnership was to provide services that did not compete with its limited partners' businesses, noting that the plaintiff "executed the Partnership Agreement that does not contain a non-compete clause; nor did it ever seek an amendment to the Partnership Agreement."[39] A sensible interpretation of precedent is that the purpose clause is of primary

[38] *See, e.g.*, *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682, at *1 (Del. Ch. Apr. 23, 2009) ("[T]his court must look to the operating agreement of the LLC to determine the purpose for which it was formed, and not to an initial business plan that any rational businessperson would expect to evolve over time."); *Seneca*, 970 A.2d at 263-64 ("This Court will also not attempt to divine some other business purpose by interpreting provisions of the governing documents other than the purpose clause.").

[39] 1996 WL 506906, at *7 (Del. Ch. Sept. 3, 1996), *aff'd*, 692 A.2d 411 (Del. 1997) (TABLE).

importance, but other evidence of purpose may be helpful as long as the Court is not asked to engage in speculation.

Starting with the purpose clause in the LLC Agreement, PNB's stated purpose was essentially to market, distribute, and sell natural beef. This language is not ambiguous. However, Meyer's argument to look beyond the purpose clause of the LLC Agreement is persuasive.[40] The Output and Supply Agreement stated that it was a "condition to" the LLC Agreement,[41] and the LLC Agreement was not inconsistent with an understanding of collaboration with PPF and PBF. The non-compete covenants in the Purchase Agreement (and as referenced in the LLC Agreement) underscored the importance of the parties' supply arrangement. Despite the integration clause in the LLC Agreement, the entirety of the parties' agreement on May 19, 2011, demonstrated that PNB was not intended to be a business where Meyer ran all of the operations and distributed profits to Respondents as passive members with an incidental supply contract. *Cincinnati*

[40] *See Comerica Bank v. Global Payments Direct, Inc.*, 2014 WL 3567610, at *7 & n.52 (Del. Ch. July 21, 2014) (collecting authority and applying "the rule that contemporaneous contracts between the same parties concerning the same subject matter should be read together as one contract").
[41] Output and Supply Agreement 1.

Bell noted a lack of "some indication that had the parties considered it *ex ante*, they would have included such a [non-competition] provision in the Partnership Agreement,"[42] but the indication here is plain. Limiting the analysis to the purpose clause of the LLC Agreement would resolve the dispute on a technicality. Even Respondents have admitted, albeit in a different context, that "[t]he purchase agreement and operating agreement and output agreement were all done on the same day, and essentially, under Oklahoma law . . . , you're going to tie all these agreements together and look at them at one time."[43]

The next question is whether operating PNB in accordance with the above purpose is no longer reasonably practicable. Meyer argues that the collaborative venture no longer operates as intended because the Output and Supply Agreement has been terminated and Respondents feel free to compete. Respondents, in line with their broad interpretation of purpose, focus on their minority interest and contend that there is at least a material dispute about PNB's profitability. Fundamentally, the Court looks at the match between the company's purpose and

[42] 1996 WL 506906, at *7.
[43] Oral Arg. Resp'ts' Mot. to Dismiss or Stay Tr. 5.

its reasonable current and future activities. The Court ordered dissolution in *Silver Leaf* because (in addition to a voting deadlock) the company was formed to market a product but the sales and marketing agreement for that product had been terminated.[44] "[S]everal convincing factual circumstances have pervaded the case law: (1) the members' vote is deadlocked at the Board level; (2) the operating agreement gives no means of navigating around the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate."[45]

Given that the purpose of PNB was to market and sell natural beef supplied by PPF and PBF according to Meyer's specifications, the Court concludes that it is no longer reasonably practicable to operate PNB in line with this vision. It is true that there is no operational deadlock and that PNB earned profits in 2014.[46] It is

[44] 2005 WL 2045641, at *11.
[45] *Fisk*, 2009 WL 73957, at *4.
[46] Respondents have moved to supplement the record with audited financial statements showing that PNB's 2014 net income was $663,039. Resp'ts Kirk Duff, Todd Duff and C.R. Freeman's Mot. to Supplement . . . R. Ex. A, at 4. Revenues increased from approximately $65 million in 2013 to approximately $90 million in 2014. The Court grants the motion to the extent of acknowledging the 2014 financials.

That said, financial viability does not preclude dissolution. *See Haley v. Talcott*, 864 A.2d 86, 96 (Del. Ch. 2004). Moreover, as Meyer argues, it makes little sense

also true that the Court does not order dissolution for just any breach of fiduciary duty.[47] Nonetheless, PNB cannot achieve its purpose when Respondents do not believe restrictive covenants apply to them and the Output and Supply Agreement has been terminated. The Court has determined that the purpose of PNB was to operate a "joint venture business" based on a supply and distribution arrangement, but Respondents' entities no longer provide PNB with cattle. At the same time, all parties believe that the LLC Agreement continues to bind Meyer. These discrete facts are not in dispute, regardless of the many issues being litigated in Oklahoma. Meyer, therefore, has made a prima facie case for dissolution.

The parties seem to discuss the contractual dissolution mechanism for different purposes, and it bears some mention although it does not affect the Court's conclusion. Respondents cite the dissolution provision as evidence that they have not consented to dissolution as Meyer alleges in its opening brief. Meyer cites it to rebut a claim that private ordering precludes judicial

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to force it to run PNB into the ground just to satisfy the Court that PNB is not financially viable. PNB appears to be a profitable enterprise, but Meyer's main argument for dissolution involves lopsided contractual obligations that go to the heart of the business, which is the determining factor for the Court's decision.

[47] *See Arrow Inv.*, 2009 WL 1101682, at *1, *4-5.

intervention.[48] The Court is satisfied that Respondents have not agreed to dissolution. The more interesting issue is whether the LLC Agreement forbade Meyer from filing an action for dissolution. Section 4.2 of the LLC Agreement provided that, absent prior written consent of a majority of the interests held by the other members, "the Managing Member shall have no authority . . . to cause the Company to undertake or engage in . . . the dissolution of the Company."[49] Section 10.1 required dissolution upon, as relevant, "entry of a decree of judicial dissolution" or "the determination of the Managing Member and a Majority in Interest of the other Members."[50] Meyer submits that the contract could not trump the LLC Act and interprets the LLC Agreement as allowing Meyer to petition the Court for judicial dissolution but not to directly take steps to dissolve PNB or to cause PNB to take its own steps toward dissolution.[51] The Court accepts that

[48] Meyer argues that the option for dissolution by agreement of the parties is not realistically available, and although operations can continue through unilateral efforts, there is no real exit mechanism.
[49] LLC Agreement § 4.2(o).
[50] *Id.* § 10.1.
[51] A contrary reading would lead to an undesirable result: Section 10.1(a) would only exist for a non-managing, admittedly "passive," Summ. J. Tr. 26, member to

reading and recognizes some authority counseling against strict interpretation of an LLC agreement where the result would be inequitable.[52] The Court's intervention and exercise of its discretion to dissolve PNB, further, mitigates the danger of unfair dissolution by the managing member.

Finally, dissolution is a discretionary remedy, and the Court is satisfied that the equities weigh in its favor. Of primary concern, the Oklahoma Litigation will not suffer material prejudice from PNB's dissolution. Of course, ordering dissolution here would moot claims for rescission. However, Respondents have made allegations that PNB's assets are worthless;[53] issues about ownership and misconduct can wait until the winding-up stage;[54] and Meyer observes that Respondents can purchase PNB's assets in a liquidation sale. There also is nothing

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petition the Court for dissolution (assuming that the conditions for Section 10.1(b) were not met).

[52] *See Haley*, 864 A.2d at 96-98 (observing that "the presence of a reasonable exit mechanism bears on the propriety of ordering dissolution under 6 *Del. C.* § 18-802" and declining to require plaintiff LLC member to use a contractual exit mechanism that would produce an inequitable result).

[53] Sullivan Aff. Ex. 7 ¶ 13. These allegations were made in October 2013 as part of the Oklahoma Litigation. Meyer has also represented that "PNB has no contracts." POB 21 n.7.

[54] The Court acknowledges that overseeing any winding up process will require consideration of the Oklahoma Litigation.

in the record to suggest that dissolution would affect Respondents' ability to collect damages from Meyer; the Oklahoma Litigation names Meyer in all counts requesting damages or an accounting.[55] Another objection is that dissolution is inappropriate because of a specter of bad faith surrounding Meyer's conduct, bolstered by a grant of summary judgment in Oklahoma. While the Court is careful to do equity, Respondents do not provide support for their allegation that "Meyer prematurely initiated this action as a litigation tactic"[56] or their concern that they will not be fully compensated in the Oklahoma Litigation, if necessary. Thus, the equities, in combination with the foundational requirement of

[55] *See* Sullivan Aff. Ex. 4, at 4, 7, 8, 9, 10, 13; Ex. 5, at 7.

[56] RAB 4. In an action for dissolution of a corporation, this Court has found additional support to grant a stay of litigation (and to refrain from promptly ordering dissolution) based on equitable considerations: "[W]hen the other party can point to uncontested facts which raise a specter of bad faith conduct by the party seeking dissolution, the Court of Chancery's inherent equitable discretion should not stand idle." *Xpress Mgmt., Inc. v. Hot Wings Int'l, Inc.*, 2007 WL 1660741, at *6 (Del. Ch. May 30, 2007). In that case, there were *ex parte* bankruptcy proceedings and "a blatant and inexcusable factual misrepresentation," among other causes for concern. *Id.* The allegations of litigation abuse are not similarly serious and supported in this action.

impracticability of continuing with its business, weigh in favor of dissolving PNB.[57]

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For the reasons above, Meyer's Motion for Partial Summary Judgment is hereby granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[57] Respondents' remaining contentions about factual disputes are not material to summary judgment on the issue of dissolution. A number of these relate to matters at the heart of the Oklahoma Litigation, such as alleged violations of fiduciary duties and whether the Purchase Agreement's non-competition provisions apply. The relevant issues here are (1) PNB's purpose and (2) whether it is practicable to comply with that purpose. While courts have declined to order dissolution where the entities were profitable, *see Cincinnati Bell*, 1996 WL 506906, at *5-6, or where dissolution could prevent collection of damages, *see Mobilactive Media*, 2013 WL 297950, at *33, the decisions were discretionary and necessarily fact-specific. The operative facts here are that PNB's business depended on the integrated supply and distribution of natural beef, the Output and Supply Agreement is no longer effective, Respondents no longer believe that non-compete obligations apply, and no one wants to remain in the business as originally structured.