

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

February 22, 2010

Edmond D. Johnson, Esquire
Pepper Hamilton LLP
1313 Market Street, Suite 5100
P.O. Box 1709
Wilmington, DE 19899-1709

Kurt M. Heyman, Esquire
Proctor Heyman LLP
1116 N. West Street
Wilmington, DE 19801

Re: The Homer C. Gutchess 1998 Irrevocable Trust v.
Gutchess Companies, LLC
C.A. No. 4916-VCN
Date Submitted: February 16, 2010

Dear Counsel:

I write to amplify my bench ruling with respect to *Haley*¹ and *Arrow Investment*,² both of which involved efforts to dissolve a limited liability company.

In *Haley*, the Court looked to 8 *Del. C.* § 273 for guidance; that provision governs the dissolution of a joint venture corporation having two stockholders. The Court held that § 273 essentially sets forth three pre-requisites for dissolution: 1) the

¹ *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004).

² *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682 (Del. Ch. Apr. 23, 2009).

*The Homer C. Gutchess 1998 Irrevocable Trust v.
Gutchess Companies, LLC*
C.A. No. 4916-VCN
February 22, 2010
Page 2

corporation must have two 50% stockholders; 2) those stockholders must be engaged in a joint venture, and 3) they must be unable to agree upon whether to discontinue the business or how to dispose of the assets. All three factors existed in *Haley*, and, in ordering dissolution, the Court found it “most important[]” that the petitioner “never agreed to be a passive investor to the LLC who would be subject to [the respondent’s] unilateral dominion.”

The Trust argues that the critical issue in *Haley* was not deadlock “since the business was operating as it had been for some time and there was no necessity for management to make a decision except that one of the two members was unhappy with the *status quo* and wanted to dissolve the company.”³ Instead, the Trust argues that the *Haley* Court looked beyond the fact that there was not, in the Trust’s words, “real and present” deadlock and, instead, ordered dissolution on equitable grounds. This argument overlooks critical elements supporting the Court’s analysis. In *Haley*, the Court was very much concerned with the fact that the company’s

³ Pet’r’s Answering Br. at 26.

founders envisioned co-equal management, and that one of the members was unable to influence the path upon which the company was traveling.

Here, Mr. Gutchess envisioned that the limited liability company would be subject either to his domination or that of his designated successors. He retained 100% voting control, and later transferred this absolute authority to his wife, who then transferred it to their son. That the Trust disagrees with how their son is running the company is of little moment; the entity was never intended to be a joint venture: equity and voting power were separated. *Haley* is especially applicable when the company's founder or founders imagine some form of cooperative management—here, that is hardly the case.

This is not to say that the *Haley* opinion was not based, in part, upon equitable considerations. The Court held that the existence of a dissolution remedy within the company's operating agreement did not provide a reasonably practicable means for the parties to resolve their dispute within the confines of their agreement. It found instead that exercise of this dissolution provision would leave the petitioner with a considerable risk of future liability. The Court therefore concluded that the exit

mechanism failed as an adequate remedy “because it [did] not equitably effect the separation of the parties.”

In *Arrow Investment*, the Court suggested that in unusual circumstances, its equitable powers may be invoked even in the absence of deadlock, and despite a broadly defined business purpose.⁴ Thus, the Court reasoned that dissolution remained a possibility if the petitioner made a “convincing showing” that the entity’s continued existence would be “obviously futile and would not result in business success.” The Court, however, prefaced this caveat by emphasizing the extreme nature of judicial dissolution, which it further described as a “limited remedy that [it] grants sparingly.” The Court reiterated that judicial dissolution is reserved only for those situations when a company’s management has grown dysfunctional, or its business purpose so frustrated, that its “defined purpose” has “become impossible to fulfill.”

⁴ *Arrow Inv.*, 2009 WL 1101682, at *3 (“Dissolution of an entity chartered for a broad business purpose remains possible upon a strong showing that a confluence of situationally specific adverse financial, market, product, managerial, or corporate governance circumstances make it nihilistic for the entity to continue.”).

Critically, the Court in *Arrow Investment* held that, where judicial dissolution is requested because of alleged breaches of fiduciary duty, the petition fails to state a claim unless such breaches have 1) been proven in a plenary action; and 2) there exists some basis for a dissolution remedy notwithstanding whatever relief was granted in that plenary action. Here, if the Trust had asserted a valid breach of fiduciary duty claim, the Court could have granted appropriate relief for that claim. Whether the manager is breaching any fiduciary duties owed to the Trust, however, says little about whether the Company is carrying out the broad business purposes for which it was organized. As the Court in *Arrow Investment* made clear, alleged breaches of fiduciary duty, by themselves, are insufficient to withstand a motion to dismiss a petition for dissolution.

Moreover, the Trust has not alleged the type of absolute frustration or futility required in the absence of unachievable business purpose and/or deadlock. Its petition does not suggest that its grievances (most of which appear remediable through the assertion of fiduciary duty claims) cannot, at least for now, be resolved (assuming, of course, that relief is appropriate) through the deployment of less

*The Homer C. Gutchess 1998 Irrevocable Trust v.
Gutchess Companies, LLC*
C.A. No. 4916-VCN
February 22, 2010
Page 6

extreme judicial remedies. Indeed, other potential remedies are at issue in related litigation in New York.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K