

## Chancery Appoints Liquidating Trustee to Assist With Windup

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In *Comerica Bank v. Global Payments Direct*, C.A. No. 9707-CB (Del. Ch. Aug. 1, 2014), the Delaware Court of Chancery appointed a liquidating trustee to assist with and oversee the winding up of Global Payments Comerica Alliance LLC pursuant to Section 18-803(a) of the Delaware Limited Liability Company Act. Alliance was the entity through which Global Payments Direct Inc. processed credit and debit card transactions for Comerica Bank. The parties and sole members of Alliance, Comerica Bank and Global Direct disagreed on how to wind up Alliance. Comerica Bank claimed that Global Direct was intentionally delaying and inhibiting Alliance's winding up for its sole gain and as retribution for Comerica Bank's termination of its service agreement with Global Direct. Following a two-day trial, the court determined that Alliance had been properly dissolved and that the parties' exclusivity and noncompetition obligations regarding Alliance had ended. The court also agreed with Comerica Bank that Alliance could not be wound up without appointment of a liquidating trustee.

Section 18-803(a) of the LLC Act permits the Court of Chancery to "wind up [a] limited liability company" upon application and a showing of "cause" by any member of a limited liability company. Because the term "cause" is undefined in the LLC Act, here, the court looked to precedent, including *Spellman v. Katz*, C.A. No. 1838-VCN (Del. Ch. Feb. 6, 2009), and *Phillips v. Hove*, C.A. No. 3644-VCL (Del. Ch. Sept. 22, 2011). In *Spellman*, the court determined that the requisite cause to appoint a liquidating trustee was established by the members' inability, unwillingness and contractual obligation to implement the wind-up process following dissolution. Two years later, in *Phillips*, the court again appointed a liquidating trustee after finding that the members' history of large and small disputes effectively created a deadlock with regard to winding up the LLC. Relying on these analyses, the court found in *Comerica* that cause exists to appoint a liquidating trustee when "the history of the parties suggest[s] they would be unable or unwilling to undergo a wind-up process in an orderly or timely manner."

Global Direct maintained that the appointment of a liquidating trustee was unnecessary and improper, as no "deadlock" could exist between the parties since Global Direct held 51 percent of Alliance's interests and controlled three of its five representatives, effectively giving it the power to control Alliance's winding up. Rejecting Global Direct's argument, the court declined to take such a "limited" view of its power under Section 18-803(a), particularly where the party with the power to control the winding-up process had acted "poorly or faithlessly" in performing its duties. The court instead read Section 18-803(a) as giving it the power to appoint a liquidating trustee under a simple "cause" standard, which meant that it had the discretion to determine the "advisability of intervening to wind up a Delaware LLC" on a case-by-case basis.

In determining that the appointment of a liquidating trustee was warranted, the court considered the parties' interactions since 2013 and concluded that the record "amply demonstrate[d]" that the parties were deeply divided over how to wind up Alliance, and that Global Direct had "taken a confrontational approach antithetical to [its] obligation to wind up Alliance promptly." Global Direct's approach included an alleged tripling of its fees, stalling

regarding a split of Alliance's merchant portfolio of customers between Global Direct and Comerica Bank, and refusing Comerica Bank's request for Alliance's merchant information to begin its transition away from Alliance to a new processor. The court also considered Comerica Bank's delay in notifying Global Direct about the details of its information request, but noted that this delay "pale[d] in comparison" to Global Direct's efforts to "string out the wind-up process as long as possible to Comerica's detriment."

Moreover, the court noted that managers of an LLC owe default fiduciary duties. While these duties may be different after the LLC's dissolution, the court held that they still encompass the "obligation to distribute the assets of the company promptly consistent with maximizing their value" in connection with the winding up. The fact that one party had acted in its own self-interest by delaying Alliance's winding up only added to the court's determination that "ample cause" existed for appointment of a liquidating trustee.

While there are still very few instances in which the Court of Chancery has appointed a liquidating trustee, the *Comerica* decision confirms that the court will take a broad and practical view of what constitutes "cause" under Section 18-803(a) of the LLC Act when determining whether to intervene in a winding-up process and appoint a liquidating trustee. Such cause will not necessarily require a complete deadlock between the parties, nor will it be determined by the fact that one party has the authority or power to control the wind-up process. Instead, the court will analyze petitions under Section 18-803(a) on a case-by-case basis, taking into consideration whether the parties lack the ability or have otherwise failed in discharging their duties to conduct a windup in a timely, orderly and appropriate manner.

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