

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
SUZANNE MANGOLD ZACHARIUS, Individually :
and Derivatively on Behalf of Kensington Publishing :
Corporation, :
:

Index No.: 652460/2012

Plaintiff, :

AMENDED COMPLAINT

-against- :

KENSINGTON PUBLISHING CORPORATION; :
STEVEN ZACHARIUS; JUDITH ZACHARIUS, :

Defendants. X

Plaintiff, Suzanne Mangold Zacharius (“Plaintiff”), by her attorneys McDermott Will & Emery LLP, pursuant to CPLR 3025(a), alleges for her Amended Complaint against defendants Kensington Publishing Corporation, Steven Zacharius, and Judith Zacharius (collectively, “Defendants”) as follows:

PRELIMINARY STATEMENT

1. Plaintiff is the holder of a majority of the Class A voting stock of Defendant Kensington Publishing Corporation (“Kensington” or the “Company”), ownership of which shares passed to Plaintiff upon the death of her husband Walter Zacharius (“Walter”) in 2011 under the terms of the Walter Zacharius Revocable Trust (the “Trust”). In this action, Plaintiff seeks declaratory judgment relief; and an accounting and damages arising out of certain conduct, described more fully herein, by Defendants Steven Zacharius and Judith Zacharius (the “Individual Defendants”).

2. Specifically, Plaintiff seeks to have this Court declare that a certain document entitled “Voting Agreement” dated December 16, 2005 (the “Purported Voting Agreement”), which is alleged by the Defendants to have been signed by Walter and the Defendants, is not binding on

her as the holder of the shares of Class A Voting stock on one of the following grounds: (1) Walter did not execute the Purported Voting Agreement; (2) if the Court finds that Walter did execute the Purported Voting Agreement, the Purported Voting Agreement is null and void for lack of consideration; (3) if the Court finds that the Purported Voting Agreement is not null and void for lack of consideration, it is null and void as a result of the Individual Defendants' material breach of the Purported Voting Agreement; or (4) if the Court finds that the Purported Voting Agreement is not null and void as a result of its material breach by the Individual Defendants, it has nevertheless been terminated as set forth by the express terms of the Purported Voting Agreement, the Company By-laws, and/or New York law. Further, if the Court finds that the Purported Voting Agreement has not been terminated and *is* binding on the Plaintiff, Plaintiff seeks to have this Court declare that the Purported Voting Agreement will not be binding on any person to whom Plaintiff transfers the shares of Class A Voting stock.

3. In her capacity as a shareholder of Kensington and on behalf of Kensington, Plaintiff also seeks an accounting and damages against, among others, Steven Zacharius, based on his mismanagement of Kensington and his self-dealing and improper use of corporate assets for his personal use. Plaintiff has not made a demand of the Kensington's Board of Directors with respect to these allegations, pursuant to New York State Business Corporation Law § 626(c) because such a demand was (and is) futile.

PARTIES, JURISDICTION, AND VENUE

4. Plaintiff is a resident of the City and State of New York.
5. Defendant Kensington is a New York corporation with its principal place of business at 119 West 40th Street, New York, NY 10018.
6. On information and belief, Defendant Steven Zacharius is a resident of the State of New York and resides at 64 Villas Circle, Melville, New York 11747.

7. On information and belief, Defendant Judith Zacharius is a resident of the State of Alaska and resides at 4704 Glasgow Drive, Fairbanks, Alaska 99709.

8. This Court has jurisdiction over Defendants Kensington and Steven Zacharius because they are citizens of the State of New York and transact business in the State of New York.

9. The Court has jurisdiction over Defendant Judith Zacharius because upon information and belief, the contracts at issue in this case were executed within the State of New York, performance under the contracts occurred within the State, Judith Zacharius transacts business within the State, and breach of the Purported Voting Agreement occurred within the State.

10. Venue is proper pursuant to CPLR § 503 because Defendant Kensington maintains its principal office in New York County and because Plaintiff resides in New York County.

FACTS

11. This controversy arises from conduct undertaken by the Defendants, including their supposed preparation and execution of the Purported Voting Agreement, and improper business practices by Defendant Steven Zacharius, a director of Kensington and its president and chief executive officer, and his sister, Defendant Judith Zacharius, a director of Kensington. This controversy concerns the present validity and scope of the Purported Voting Agreement, and the business practices by Steven and Judith Zacharius that constitute a breach of their fiduciary duties to Kensington and its shareholders.

Background

12. Walter Zacharius was born on October 16, 1923, and died on March 2, 2011, survived by his wife, Plaintiff Suzanne Mangold Zacharius, his children Steven Zacharius and Judith

Zacharius (the Individual Defendants), a stepdaughter, Mariel Mangold, two grandchildren and a great grand-daughter.

13. Walter Zacharius, the decedent, founded Kensington along with Roberta Grossman in 1974.

14. Kensington is an independent U.S. publisher of hardcover, trade paperback and mass market paperback books.

15. Upon information and belief, Kensington's sales of \$70 million make the company the largest independent publisher of mass-market titles in the United States. Kensington releases close to 600 new books per year, has a backlist of more than 3,000 titles, and accounts for about 7% of all mass market paperback sales in the United States.

16. Walter Zacharius served as president and chief executive officer of Kensington until 2005, when Steven Zacharius was named president and CEO, and Walter was named "chairman emeritus."

17. Steven Zacharius is presently the President and Chief Executive Officer of Kensington, and is also a director on the Board of Directors for the Company.

18. Upon information and belief, Judith Zacharius is presently listed as an employee of Kensington, and receives a salary from Kensington, although she provides no actual employment-related services to Kensington. Rather, Judith Zacharius has resided in Fairbanks, Alaska since approximately 2004, and is employed there as an occupational therapist. She is also a director of the Company.

Walter Zacharius' Death and the Distribution of His Shares

19. When Walter died the trustee of the Trust owned 485 Class A Voting Shares of Kensington and 824 Class B Non-Voting Shares (collectively, the "Shares"). Pursuant to the

terms of the trust instrument that established the Trust (*i.e.*, The Walter Zacharius Revocable Trust Agreement (Sixth Amendment and Restatement), dated October 29, 2010 (the “Trust Agreement”)), the trustee of the Trust distributed the Shares on or about February 10, 2012 to Plaintiff.

20. Accordingly, Plaintiff received, *inter alia*, 485 Class A voting shares of Kensington stock and 824 non-voting shares of Kensington stock. The Shares now owned by Plaintiff represent about 59% of all outstanding voting shares of Kensington and about 40% of the total equity of Kensington.

21. Thus, upon her receipt of the Shares, Plaintiff became the principal stockholder of the Company.

22. Upon information and belief, shortly after the terms of the Trust Agreement were made known to all beneficiaries of the Trust, James A. Purdy (“Purdy”), an attorney for the Individual Defendants, presented the Purported Voting Agreement to Ronni G. Davidowitz (“Davidowitz”), the attorney for Alvin Ferleger, the executor of Walter’s estate and the trustee of the Trust (in each capacity, respectively, the “Executor” and the “Trustee”) at that time, and contended that the Purported Voting Agreement extinguished Plaintiff’s voting rights.

23. Upon information and belief, at this same meeting, Purdy, on behalf of the Individual Defendants, offered to purchase Plaintiff’s Shares for \$3 million.

24. Upon information and belief, Purdy justified the low offering price on the expressly stated premise that the Purported Voting Agreement was a valid and binding agreement that significantly diminished the value of Plaintiff’s Shares. Upon information and belief, both Davidowitz and the Trustee assumed, without investigation, that the Purported Voting Agreement was a valid agreement binding on the Trust and, as a result, took no steps prior to the

Trustee's distribution of the Shares to Plaintiff to monitor the manner in which the Individual Defendants were managing the Company.

25. Upon information and belief, Davidowitz, because of her assumption that the Purported Voting Agreement was a valid agreement, binding on the Trust, instructed CBIZ Valuation Group, LLC, ("CBIZ") the firm engaged by the Executor to determine the value of the Shares for purposes of reporting the Shares on Walter's federal estate tax return, that the Shares represented a minority interest in the Company. Based on this instruction, CBIZ's valuation report valued the Company on a minority-interest, freely-traded basis at \$29 million, rather than on the Company's enterprise value, the much higher value that a holder of a voting control could achieve through a sale of the entire Company. The valuation report concluded that the Company's value on a minority interest basis was \$29 million as of the time of Walter Zacharius' death. However, because there is no public market for the shares of the Company and because the holder of a minority interest lacks the power to create such a market through various techniques such as a public offering, the valuation report discounted the \$29 million value by 35% to reflect a lack of marketability. As a result, the valuation report valued the Shares at \$7.7 million, significantly higher than the purchase price offered to the Plaintiff by the Individual Defendants, but significantly lower than the value that would have been assigned to the Shares if CBIZ had valued the Shares without taking into account the effect it assumed that the Purported Voting Agreement had on the Shares.

26. When the Executor filed the federal estate tax and New York estate tax returns for Walter's estate (the "Returns"), he reported the value of the Shares at \$7.7 million. The low value the Executor assigned to the Shares may increase the income taxes imposed on the Plaintiff if she sells the Shares during her lifetime.

27. Plaintiff is presently negotiating the sale of her shares of Kensington stock with a major publishing house. The existence and/or interpretation of the Purported Voting Agreement has arisen as an issue in the sale of Plaintiff's shares of Kensington stock.

The Purported Voting Agreement

28. The Individual Defendants contend that on December 16, 2005, Walter Zacharius, Steven Zacharius, Judith Zacharius (collectively, the "Initial Stockholders") and Kensington entered into the Purported Voting Agreement (attached hereto as Exhibit A).

29. The Purported Voting Agreement addresses the election(s) of members of Kensington's Board of Directors.

30. The Purported Voting Agreement appears to have been duly executed by each of the Initial Stockholders and the Company. Michael Rosamilia, designated in the Voting Agreement as the "V.P. – Treasurer," appears to have signed on behalf of Kensington. (Ex. A, p. 5).

31. However, upon information and belief, Walter did not know of the existence of the Purported Voting Agreement and therefore could not and did not himself sign the Purported Voting Agreement.

32. First, the Purported Voting Agreement was supposedly signed on December 16, 2005, but upon information and belief, neither Walter or Judith Zacharius were present in New York to have signed the agreement on that date. Instead, Judith was in Alaska (she did not arrive in New York until December 30, 2005); and Walter was with Plaintiff in Roxbury, Connecticut, having arrived there the day before (December 15, 2005) to accept delivery of Plaintiff's wedding band in anticipation of the then-planned January 6, 2006 wedding of Walter and Plaintiff.

33. Second, the signature page (ostensibly, page 5 of the Purported Voting Agreement) is not plainly part of the preceding agreement; rather, it appears to have been appended to the foregoing pages of the document. Looking at the preceding page, there is ample room for a signature block to be provided below the last provision on page 4. Notably, the signature page (*i.e.*, page 5) of the Purported Voting Agreement is not notarized.

34. Third, within the Purported Voting Agreement, there are multiple patent flaws. To wit: there are several references to “sections” that do not exist. The Purported Voting Agreement only contains a “Section 1.” However, at page 1 of the Purported Voting Agreement, the “Definition” provision references a “Section 2.1.” At page 3 of the Purported Voting Agreement, the “Notices” provision references a “Section 2.9.” Further down the page, the “No Third-Party Beneficiaries” provision references a “Section 2.11.” Additionally, the “Notices” provision indicates that notice will be provided to a party (and at an address) identified in the “preamble to this Agreement.” No such party or address is identified anywhere in the Purported Voting Agreement. As such, the Purported Voting Agreement does not appear to be the work product of either sophisticated businessmen or their counsel, and, upon information and belief, Walter would never have signed such a flawed business document.

35. Fourth, upon information and belief, Walter’s Shareholder Receivable Account does not reflect a charge by his counsel in 2005 for the preparation of a voting agreement. Conversely, Walter’s Shareholder Receivable Account *was* charged for his attorneys’ preparation of employment contracts prepared in 2005, which were ultimately signed by Walter and Steven. This inconsistency also belies the existence of the Purported Voting Agreement.

36. Fifth, all other relevant circumstances demonstrate that there was no such voting agreement. Apart from the fact that the Purported Voting Agreement is mentioned nowhere in a

2009 Voting Trust Agreement between Steven and Judith Zacharius (discussed below), Walter also never once mentioned the existence of the Purported Voting Agreement to Plaintiff, before or after her June 8, 2006 marriage to Walter. More specifically, Walter did not mention *any* voting agreement in advance of any regular or special meeting of Kensington's Board of Directors to elect new directors; and Walter also did not mention the Purported Voting Agreement during telephone conversations he and Plaintiff had with Judith Zacharius in 2009 (or, upon information and belief, in later conversations solely between Walter and Plaintiff) concerning the Voting Trust Agreement proposed by Steven, which conversation(s) exclusively concerned the same subject matter (*i.e.*, how shareholder votes would be cast). Nor did Judith ever mention the Purported Voting Agreement in conversations with Walter and Plaintiff concerning the 2009 Voting Trust Agreement.

37. Upon information and belief, no communications concerning the election of directors took place between Walter, Steven and/or Judith Zacharius (collectively the "Initial Stockholders" under the Purported Voting Agreement) in advance of any Board meetings from 2005-2010. If the Purported Voting Agreement is legitimate, such communications had to occur, given that the stated purpose of the Purported Voting Agreement was to "severally and not jointly agree[] to vote or act with respect to all shares registered in their respective names or beneficially owned by them" for "such persons *as may be agreed upon by all of the Initial Stockholders.*"

38. Walter also never mentioned to Plaintiff the Purported Voting Agreement or its impact on "voting shares" of Kensington stock despite his several discussions with Plaintiff concerning Walter's intended disposition of such stock upon his death. However, Walter *did* discuss with Plaintiff his fears and concerns that Steven Zacharius planned to force him out of

any management or control of Kensington. For this reason, Walter told both Plaintiff and his estate planning counsel that he did not want voting control of Kensington to *ever* pass to Steven. Again, Walter never mentioned the Purported Voting Agreement in conjunction with this direction.

39. In addition, in 2010, Walter requested of David Marks, his accountant and advisor as to all matters concerning Walter's finances, copies of *all* papers he held in his office concerning Walter, so that Walter could have a complete file. Mr. Marks, who maintained all of Walter's important papers, sent Walter copies of his files with documents dating back as far as 1994, including the 2009 Voting Trust Agreement but *not* the Purported Voting Agreement.

40. Further, upon information and belief, Walter did not receive valuable consideration for his alleged participation in the Purported Voting Agreement.

41. If the Purported Voting Agreement were valid, Walter would have ceded his voting control of the Company for no consideration at all. In the absence of the Purported Voting Agreement, Walter had the power to elect all of the members of the Board of Directors without the consent of any other holder of the shares of the Company. If the Purported Voting Agreement were valid, he could not elect even one member of the Board of Directors without the consent of the Individual Defendants.

The Terms of The Purported Voting Agreement

42. The Purported Voting Agreement provides that the Initial Stockholders would prospectively vote their shares uniformly in any elections of Kensington's Board of Directors (the "Board") with respect to directors on whom they could agree, and that Kensington would take all necessary actions to effectuate the vote(s) of the Initial Stockholders. (Ex. A, p. 1). If

properly effectuated, the Purported Voting Agreement thus vests the power to elect the Board with the Initial Stockholders.

43. In the Purported Voting Agreement, each of the Initial Stockholders appears to have expressly premised his or her entry into the agreement on a “desire[] to agree to vote such party’s shares *in accordance with the provisions of this Agreement.*” (Ex. A, p. 1 (emphasis added)). Deviation from the provisions of the Voting Agreement was not contemplated – strict adherence to the terms of the contract was expressly required.

44. The Purported Voting Agreement reads, in pertinent part, as follows:

WHEREAS, the Initial Stockholders own certain shares of the Class A common stock, par value \$.01 (the “Voting Common Stock”), of the Company; and

WHEREAS, each of the parties hereto desires to agree to vote such party’s shares *in accordance with the provisions of this Agreement;*

NOW, THEREFORE, *in consideration of the foregoing recitals and the mutual promises set forth in this Agreement, the parties hereto, intending to be legally bound, agree as follows:*

Election of Directors

Section 1. Board Representation

At each annual meeting of the stockholders of the Company, or at any special meeting of the stockholders of the Company called for the election of directors, or whenever the stockholders of the Company (or any of them) act by written consent with respect to the election of directors, each Stockholder (as defined below) *severally and not jointly* agrees to vote or act with respect to all shares of Voting Common Stock registered in their respective names or beneficially owned by them (including shares acquired after the date hereof), and the Company shall take all necessary and desirable actions within its control, so as to cause the election to the Board of Directors of the Company (the “Board”) of the following persons, who shall hold office, subject to the By-laws of the Company, until their respective successors shall have been elected and shall have qualified:

Section 2. if, at the time of such meeting or act, all of the Initial Stockholders are alive, such persons as may be agreed upon by all of the Initial Stockholders;

Section 3. if, at the time of the meeting or act, two of the Initial Stockholders are alive, such persons as may be agreed upon by such two living Initial Stockholders; and

Section 4. if, at the time of such meeting or act, one of the Initial Stockholders are [sic] alive, such persons designated by such living Initial Stockholder, provided, however, that if the living Initial Stockholder is Judith Zacharius, then such person(s) as are designated by David Marks (which may include himself).

(Ex. A, p.1 (emphasis added)).

45. The Purported Voting Agreement provides that a “Stockholder” is defined as “each Initial Stockholder and each person deemed a Stockholder in accordance with Section 2.1 by acquiring a share of Voting Common Stock from a Stockholder.” (Ex. A, p. 1).

46. The Purported Voting Agreement further addresses the “status” of persons who acquired shares of Voting Common Stock from a Stockholder, specifying as follows:

Status of Transferees

Any person acquiring any share of Voting Common Stock from a Stockholder, by accepting it, shall be deemed to be a Stockholder, and shall be deemed a party to this Agreement and to agree to be subject to all the terms and conditions of this Agreement as if he signed this Agreement as a Stockholder.

(Ex. A, p. 2).

47. The Purported Voting Agreement further provides the sole manner in which the contract can be modified or amended. Specifically, the Purported Voting Agreement states:

Modification

This Agreement sets forth the entire understanding of the parties with respect to the subject matter hereof, supersedes all existing agreements among them concerning such subject matter,

and may be modified only by a written instrument duly executed by each party.

(Ex. A, p. 3 (emphasis added)).

48. The Purported Voting Agreement provides no other mechanism for the alteration or amendment of the contract.

49. The Purported Voting Agreement also explains that any breach of the contract cannot be waived, except by a writing. Specifically, the contract specifies:

Waiver

Any waiver by any party of a breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of such provision or of any breach of any other provision of this Agreement. The failure of a party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement. Any waiver must be in writing.

(Ex. A, p. 3).

50. The Purported Voting Agreement further emphasizes the import and binding nature of each of the terms therein – including the Modification Clause – by stating the following:

Binding Effect

The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and the respective successors and assigns of the corporate parties hereto and the respective assigns, heirs and personal representatives of the individual parties hereto.

(Ex. A, p. 3).

51. The Purported Voting Agreement further addresses the parties' recourse in the event of a breach of the Agreement:

Availability of Equitable Remedies

Since a breach of the provisions of this Agreement could not adequately be compensated by money damages, any party shall be entitled, *in addition to any other right or remedy available to him*, to an injunction restraining such breach or a threatened breach and to specific performance of any such provision of this Agreement, and in either case no bond or other security shall be required in connection therewith, and the parties hereby consent to such injunction and to the ordering of specific performance.

(Ex. A, p. 3 (emphasis added)).

52. The Purported Voting Agreement also expressly sets forth how it will be terminated:

Termination

Unless sooner terminated, this Agreement shall terminate (a) on the closing of any transaction or series of transactions (including, without limitation, any reorganization, merger, or consolidation) that results in the Company's stockholders immediately prior to such transaction not holding (solely by virtue of Company securities owned immediately prior to such transaction) at least a majority of the voting power of the surviving or continuing entity or (b) by written agreement of all Stockholders.

(Ex. A, p. 2).

53. The Purported Voting Agreement provides that it will be “governed by and construed in accordance with the laws of the State of New York.” (Ex. A, p. 4).

The Purported Voting Agreement And The Effect Of Walter's Transfer Of Shares To The Trust, and The Trust's Subsequent Transfer Of Shares To The Plaintiff

54. Assuming *arguendo* that the Purported Voting Agreement was duly executed by Walter, and for valuable consideration, the express language of the “Termination” provision makes it plain that the Purported Voting Agreement was terminated by a series of transactions that commenced with the transfer by Walter of the Shares to the then trustees of the Trust during his life, and ended with the transfer of the Shares to Plaintiff by the Trustee after Walter's death.

This “series of transactions,” in which ownership of the Shares was twice transferred, resulted in the Company’s stockholders (as constituted just prior to these transactions) not holding “at least a majority of the voting power of the . . . continuing entity.” (Ex. A, p. 2).

55. The transfer to Plaintiff of the Shares after Walter’s death also rendered the Purported Voting Agreement null and void by the terms of the Company’s By-laws. Section 2.10 of Kensington’s By-Laws (the “By-laws,” attached hereto as Exhibit B) establishes that “[u]nless otherwise provided in the Certificate of Incorporation, every stockholder of record shall be entitled at every meeting of stockholders to one vote for each share of capital stock standing in his or her name . . .” (*Id.* at pp. 8-9). The Certificate of Incorporation has never referenced the Purported Voting Agreement, and, upon information and belief, this is because the Certificate of Incorporation was not amended before or upon the transfer of the Shares to Plaintiff.

56. Indeed, no such amendment *could* have taken place without either Walter’s or Plaintiff’s assent, or without other corporate formalities having occurred. Article 8, Sections 803(a) and 804 of the New York State BCL require that a voting shareholder must have the opportunity to vote his/her shares as to any such amendment; and the remainder of Article 8 establishes what the Company was required to do to effect such an amendment (*e.g.*, file a certificate of amendment with the department of state). Upon information and belief, none of this occurred.

57. Because the Purported Voting Agreement violates the “one share, one vote” provisions of the Certificate of Incorporation and the By-laws, it is a nullity.

58. Even if the Purported Voting Agreement is deemed valid, and even if it has not yet been terminated, the “Termination” provision clearly establishes that Plaintiff’s transfer of the Shares to another person *will* terminate the Purported Voting Agreement, as the Company’s

stockholders (including Plaintiff) that exist prior to such a transaction will undoubtedly no longer hold “at least a majority of the voting power of the . . . continuing entity” upon closing of such a transaction. (Ex. A, p. 2).

Material Breach and Repudiation of the Purported Voting Agreement By Improper Modification – The 2009 Voting Trust Agreement

59. On June 24, 2009, the Individual Defendants, Steven and Judith Zacharius – two (but not all) of the Initial Stockholders under the Purported Voting Agreement – without Walter Zacharius’s consent, entered into a separate and new Voting Trust Agreement (the “2009 Voting Trust Agreement,” attached hereto as Exhibit C).

60. Under the 2009 Voting Trust Agreement, Steven Zacharius and Judith Zacharius (collectively identified in the 2009 Voting Trust Agreement as the “Stockholders” or “Shareholders”) agreed to deposit all of their Class A Voting Shares of Kensington stock, and all other Class A shares they might receive during the pendency of the 2009 Voting Trust Agreement, with a trustee who would vote the shares. That trustee was Steven Zacharius. (Ex. C, § 2).

61. Pursuant to the 2009 Voting Trust Agreement, upon deposit of the Class A stock certificates with the trustee, Steven Zacharius, as trustee, was to issue voting trust certificates to himself and his sister in exchange for the stock certificates. The form of these voting trust certificates was specified in the 2009 Voting Trust Agreement (Ex. C, § 3), and the certificates (and the agreement) specified that the trustee – not the Stockholders – would possess all voting rights. Specifically, the certificates stated that the trustee would:

. . . possess all rights and powers of an absolute owner of such Class A Shares of the Company (and any other securities for which he has issued voting trust certificates), including the right to vote thereon for every purpose, and to execute consents in respect thereof for every purpose; it being expressly stipulated that no

voting right passes to the owner or holder of this voting trust certificate, or to his, her or its assigns, under this voting trust certificate or any agreement, expressed or implied.

(Id.)

62. The 2009 Voting Trust Agreement further delineated the trustee's powers:

. . . the [t]rustee shall have the right, subject to the provisions of this paragraph, to exercise, in person or by his nominees or proxies, all shareholders' voting rights and powers in respect of all shares deposited hereunder, and to take part in or consent to any corporate or shareholders' action of any kind whatsoever. The right to vote shall include the right to vote for the election of directors, and in favor of, or against any resolution or proposed action of any character whatsoever, . . .

(Ex. C, § 10(a))

63. This same section of the 2009 Voting Trust Agreement held that the trustee – in his role as director – may be called upon to “approve compensation arrangements for himself and/or for other Stockholders who are parties hereto or for persons who are related to Stockholders.”

(Ex. C, § 10(a)) The only “Stockholders” under the 2009 Voting Trust Agreement are, of course, Steven and Judith Zacharius.

64. The 2009 Voting Trust Agreement also specified that:

All certificates for Class A Shares of the Company transferred and delivered to the [t]rustee by the Stockholders pursuant to this Agreement shall be surrendered by the [t]rustee to the Company; the same shall be cancelled, and new certificates therefore shall be issued to, and held by the [t]rustee in the name of “STEVEN ZACHARIUS as Voting [t]rustee.”

(Ex. C, § 2(b))

65. Accordingly, by the terms of the 2009 Voting Trust Agreement, as of June 24, 2009, each Stockholder specified therein could no longer perform as required under the Purported Voting Agreement because neither he nor she could vote his or her shares “severally;” rather,

those shares could only be voted “jointly” by the trustee. For Steven Zacharius, who was both a Stockholder *and* the trustee under the 2009 Voting Trust Agreement, there was effectively no change to his voting powers, save that he now voted more shares inasmuch as he voted his shares with Judith’s jointly as the trustee. Judith, however, retained no voting power.

66. The 2009 Voting Trust Agreement stated that “each party hereto acknowledges the receipt of good and valuable consideration,” for this agreement, but does not specify what that good and valuable consideration was given to each. Thus, it is unclear from the face of the original 2009 Voting Trust Agreement how Judith Zacharius benefited from placing her shares into trust, upon which she lost her voting rights.

67. The “consideration” to which the 2009 Voting Trust Agreement refers appears to have been furnished by an amendment to that agreement made on September 8, 2009 by Judith and Steven Zacharius. They amended the 2009 Voting Trust Agreement, to add the following subsection “d” to paragraph 10 of the original instrument:

Following the death of Walter Zacharius, the present principal stockholder of the Company, the [t]rustee shall act in his capacity as a stockholder and director of the Company in such a manner that any compensation arrangements for the Company shall provide that Judith Helen Zacharius shall receive compensation for her services for the Company which is not less than 10% of the compensation received by Steven Zacharius. Compensation for such purpose shall include salary, bonuses and any other remuneration or benefits attributable to services for the Company.

(Ex. C).

As such, pursuant to the amended 2009 Voting Trust Agreement, Judith Zacharius was assured that the [t]rustee, Steven Zacharius, who is also a director, the President, and the CEO of Kensington, would, upon the death of her father, approve her compensation “arrangements” so as to pay her no less than the equivalent of 10% of *his* aggregate compensation until at least

June 24, 2019 (after which time the agreement could be extended in successive ten year increments).

68. Upon information and belief, Judith Zacharius continues to work full time as an occupational therapist in Fairbanks, Alaska, and does not perform any duties as an employee of Kensington.

69. The 2009 Voting Trust Agreement contradicts the stated purpose of the Purported Voting Agreement, which contemplated that with respect to the election of directors each Stockholder “severally and not jointly” agreed to prospectively vote or act with respect to all Class shares registered in their respective names. (Ex. A, § 1). The 2009 Voting Trust Agreement establishes that all Class A shares of Kensington stock owned by Steven and Judith (two of the Initial Stockholders under the Purported Voting Agreement) would be voted jointly (not severally) by Steven, as trustee.

70. The 2009 Voting Trust Agreement also contradicts the obvious intent of the Purported Voting Agreement. Implicit in the Purported Voting Agreement was that in the event of an election of the Board, each of the Initial Stockholders would bring their own voice to the vote. The 2009 Voting Trust Agreement effectively removed the voice of one of the Initial Stockholders – Judith Zacharius – and ceded that voice to her brother, in contravention of what was to be the “entire agreement” between the parties to the Purported Voting Agreement.

71. The 2009 Voting Trust Agreement plainly modified the Purported Voting Agreement in a manner that effectively repudiated it. This modification, however, was not “duly executed by each party,” as required by the Modification Clause in the Purported Voting Agreement (*see* Ex. A, p. 3); and, as such, *also* represents a material breach of that contract. Indeed, the parties

to the Purported Voting Agreement expressly stated their intent to be bound by the “provisions,” “recitals and mutual promises” set forth in the Purported Voting Agreement.

72. Viewing the 2009 Voting Trust Agreement together with its amendment, which was effected less than three months after the original agreement was signed, suggests that Judith, in effect sold her voting power to Steven in a transaction that runs contrary to public policy. Shareholder votes may not be purchased for any consideration personal to the stockholder.

73. The Purported Voting Agreement provisions that were ignored via the execution of the 2009 Voting Trust Agreement are not immaterial – a fact that is underscored by the language found in the Voting Agreement’s preamble clauses, as well as the “Modification,” and “Binding Effect” clauses. (Ex. A, pp. 1, 3).

74. These breaches of the Purported Voting Agreement have not been waived, per the terms of the Purported Voting Agreement.

75. Accordingly, even if the Purported Voting Agreement is deemed valid; and even if that agreement was somehow not terminated by Walter’s transfer of the Shares to Plaintiff, it is unavoidable that the Purported Voting Agreement has been materially breached by the actions of the Individual Defendants in entering into the 2009 Voting Trust Agreement.

Breach of Fiduciary Duties By The Individual Defendants

76. Upon information and belief, the Individual Defendants have violated their fiduciary duties to Kensington.

Self-Dealing by a Director – Judith’s “Sale” of Voting Power

77. Upon information and belief, Judith Zacharius is a director of Kensington.

78. As a director of Kensington, Judith owes a fiduciary duty to its shareholders.

79. Upon information and belief, Judith deposited her shares of Class A Voting Common Stock in Kensington with her brother, Steven, as trustee, and relinquished all voting power thereunder, in exchange for an annual compensation “arrangement” to be determined by her brother Steven – as President and CEO – to last until at least 2019.

80. Upon information and belief, Judith performs no work for Kensington.

81. Such a sale of voting power is improper under, and violative of, the Purported Voting Agreement, and is also improper under New York State law.

Self-Dealing by a Director – Steven Zacharius’ Manipulation of the 2005 Voting Agreement and Improper Business “Expenses”

82. Upon information and belief, Steven Zacharius is a director of Kensington.

83. As a director of Kensington, Steven owes a fiduciary duty to its shareholders.

84. Upon information and belief, Steven and Judith deposited their shares of Class A Voting Common Stock in Kensington with Steven, as trustee, thereby vesting all voting power under their combined shares with Steven. In exchange, Steven vowed to effect an annual compensation “arrangement” for Judith (to be determined by Steven as President and CEO) until at least 2019, despite Judith’s failure to perform any business function for Kensington.

85. Such a sale and purchase of voting power is improper under, and violative of, the Purported Voting Agreement, and is also improper under New York State law.

86. Further, Steven, along with Judith, attempted to purchase Plaintiff’s Shares for \$3 million, a price well below the fair market value of the stock, on the stated premise that the Purported Voting Agreement devalued those shares. Thus, Steven and Judith sought to improperly use their positions as directors and the Purported Voting Agreement in tandem to force Plaintiff to sell them her Shares at an artificially depressed price, so that Steven and Judith would profit disproportionately at Plaintiff’s expense.

87. In addition to the foregoing, upon information and belief, since at least September 8, 2009, Steven Zacharius has improperly charged tens of thousands of dollars, or more, of personal expenses to the Company – misconduct which continues today.

88. Upon information and belief, these inappropriately charged so-called “business expenses” include, but are not limited to:

- a) charges for the upkeep of Steven’s residence in Roxbury;
- b) personal travel expenses improperly billed to Company as business travel;
- c) vacations, dinners, hotels stays with no business purpose charged to Company;
- d) car for Steven’s personal use leased by the Company; and
- e) unnecessary limousine travel to and from work each day.

89. Further, through Steven Zacharius’ reliance on (and/or breach of) the Purported Voting Agreement and 2009 purchase of Judith Zacharius’ voting shares, he has positioned himself to continue to sanitize his improper actions. The practical effect of Steven’s manipulation of the Purported Voting Agreement (if valid) is that he is a trustee with voting control over the majority of Class A shares, and thereby controls the election of the Directors of the Board of the Company. This hand-picked Board, upon which both Steven and Judith Zacharius sit, is responsible for approving all “compensation arrangements,” and for the appointment of Company officers – including himself as President and CEO, with ultimate oversight of Company expenses. In this scenario, the Board, of course, is beholden to Steven Zacharius for their continued positions as directors (and/or officers) of Kensington.

90. The Board of Directors and Kensington’s management have remained silent as to these transgressions, and taken no action to correct or discontinue such practices, despite having been apprised of Steven’s improper “business expenses” by Walter before his death.

91. This is just one example of Steven's improper control of Kensington's Board of Directors and Company officers, who have not acted independently and in Kensington's best interests.

92. Steven has used his control of Kensington's Board to self-vote exorbitant salary increases for himself, as President, lining his pockets with millions of dollars at the expense of Kensington and its shareholders. The Board of Directors and Kensington's management have remained silent as to these transgressions, and taken no action to correct or discontinue such practices.

93. Due to Steven's control, the Board of Directors and Kensington's management have also remained silent as to the September 8, 2009 amendment to the Voting Trust Agreement, whereby Judith Zacharius was rewarded with a no-show job for her sale of votes to Steven. Under this agreement, Judith benefits proportionately pursuant to Steven's increased salary, inasmuch as she is to receive no less than the equivalent of 10% of his aggregate compensation until at least June 24, 2019 (after which time the agreement could be extended in successive ten year increments), despite the fact that she performs no work for Kensington.

94. Steven's control of Kensington's directors has manifested itself in other ways as well. Indeed, Kensington's Board – which, upon information and belief, is comprised of relatives to Steven and Judith Zacharius and Kensington employees beholden to Steven – has also not addressed Kensington's apparent failure to properly validate the Purported Voting Agreement, pursuant to Article 8 of the New York State Business Corporation Law. Nevertheless, Defendants are attempting to enforce the provisions of the Purported Voting Agreement against Plaintiff – the majority shareholder in Kensington – despite that the agreement has not been validated according to New York law.

95. Accordingly, it is Plaintiff's true belief that a demand of Steven and Judith Zacharius (both directors) and the remainder of the Kensington Board of Directors to investigate and address their own malfeasance and/or negligent indifference, is futile.

96. Such a demand is particularly futile because Steven, the perpetrator of the subject wrongdoing, purports to hold the majority of shareholder voting power, and thereby the livelihood of the other directors and officers in his hands. This control by a single director, coupled with the past and continuing pattern of Board silence in response to the challenged actions, is the epitome of "futility."

COUNT ONE – DECLARATORY JUDGMENT THAT PURPORTED VOTING AGREEMENT IS VOID BECAUSE IT WAS NOT DULY EXECUTED BY ALL NAMED PARTIES

97. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 96 as though they were fully set forth herein.

98. Plaintiff has standing to bring this claim as the majority shareholder, and as an alleged party to the Purported Voting Agreement.

99. Plaintiff brings this direct claim for relief on her own behalf.

100. Upon information and belief, Walter Zacharius did not duly execute the Purported Voting Agreement.

101. As such, the Purported Voting Agreement does not reflect a "meeting of the minds" between the named parties to that contract, as Walter did not manifest his assent to the agreement.

102. Under New York law, such a purported agreement is null and void.

COUNT TWO – DECLARATORY JUDGMENT THAT PURPORTED VOTING AGREEMENT IS VOID BECAUSE OF A LACK OF CONSIDERATION

103. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 102 as though they were fully set forth herein.

104. Plaintiff has standing to bring this claim as the majority shareholder, and as an alleged party to the Purported Voting Agreement.

105. Plaintiff brings this direct claim for relief on her own behalf.

106. The Purported Voting Agreement was not supported by valuable consideration.

107. Under New York law, a contract is null and void if not supported by valuable consideration.

COUNT THREE – DECLARATORY JUDGMENT THAT PURPORTED VOTING AGREEMENT IS TERMINATED

108. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 107 as though they were fully set forth herein.

109. Plaintiff has standing to bring this claim as the majority shareholder and as an alleged party to the Purported Voting Agreement.

110. Plaintiff brings this direct claim for relief on her own behalf.

111. The transfer of the Shares by Walter to the trustee of the Trust during his lifetime, and then the transfer of the Shares to Plaintiff pursuant to the Trust Agreement, amounted to “the closing of . . . a series of transactions . . . that result[ed] in the Company’s stockholders” (existing just prior to the transactions) “not holding . . . at least a majority of the voting power of the . . . continuing entity.”

112. Therefore, by its own express terms, the Purported Voting Agreement was terminated upon the transfer of the Shares to Plaintiff.

113. Additionally, upon the transfer of the Shares to Plaintiff at Walter's death, Defendants did not amend the Company's Certificate of Incorporation, as is required by the Company's By-laws where a voting agreement would alter the "one share, one vote" rule embodied in the Certificate of Incorporation and the By-laws; or otherwise ratify the Purported Voting Agreement in conformity with New York State law.

114. For these reasons, the Purported Voting Agreement was terminated upon the transfer of Shares to Plaintiff.

COUNT FOUR – DECLARATORY JUDGMENT THAT PURPORTED VOTING AGREEMENT, IF VALID, HAS BEEN MATERIALLY BREACHED

115. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 114 as though they were fully set forth herein.

116. To the extent that the Purported Voting Agreement constituted a binding and enforceable contract between the Initial Stockholders and Kensington, it required the parties to adhere to the provisions and requirements therein, fairly, in good faith, and consistently with the principles set forth in the Purported Voting Agreement and under New York State law.

117. In addition, as with all contracts, implicit in the parties' agreement was the implied covenant of good faith and fair dealing. Pursuant thereto, Defendants were obligated to act fairly in and in good faith, so as neither to frustrate the purpose of the parties' agreement nor deprive shareholders of the intended benefits of such agreement.

118. The Individual Defendants breached these contractual obligations, by, among other things, modifying the terms of the Purported Voting Agreement by entering into the 2009 Voting Trust Agreement without the written consent of all parties to the Purported Voting Agreement.

119. Because of this material breach of the Purported Voting Agreement, it is null and void.

120. To the extent that Plaintiff is deemed a party to the Purported Voting Agreement by virtue of being a Stockholder and Transferee, she has standing to bring this claim.

121. Plaintiff brings this direct claim for relief on her own behalf.

COUNT FIVE – DECLARATORY JUDGMENT THAT PURPORTED VOTING AGREEMENT IS VOID AS TO PURCHASER OF THE SHARES

122. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 121 as though they were fully set forth herein.

123. Plaintiff has standing to bring this claim as the majority shareholder and as an alleged party to the Purported Voting Agreement.

124. Plaintiff's claim is ripe for judicial determination, as her present negotiations with a major publishing house for the sale of her shares of Kensington stock require the resolution of the issues presented in this Complaint.

125. Plaintiff brings this direct claim for relief on her own behalf.

126. A sale by Plaintiff of her Shares to a purchaser would be “the closing of . . . a transaction . . . that results in the Company's stockholders” (existing just prior to the transactions) “not holding . . . at least a majority of the voting power of the . . . continuing entity.”

127. Accordingly, by the express terms of the Purported Voting Agreement, such a transaction would terminate the Purported Voting Agreement, and said agreement would not bind a purchaser of the Shares.

COUNT SIX – BREACH OF FIDUCIARY DUTY AND ACCOUNTING

128. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 127 as though they were fully set forth herein.

129. Defendants Steven and Judith Zacharius – as directors – owe a fiduciary duty to all shareholders, including Plaintiff, in their course of conduct of corporate activities.

130. Plaintiff has standing to bring this claim, as the majority shareholder, in derivative fashion on behalf of Kensington and its shareholders.

131. Plaintiff did not make a demand of Kensington’s Board of Directors to address the misconduct and breach of fiduciary duties by Judith and Steven Zacharius before bringing this Amended Complaint because such a demand was futile, given the degree of control exercised by the Individual Defendants and the continued pattern of silence by the Board of Directors in the face of the Individual Defendants’ misconduct.

132. As demonstrated by the allegations above, Steven and Judith Zacharius are engaging in self-dealing by selling and/or purchasing voting rights, and then using their control of the close corporation to elect directors (including themselves) and “arrange compensation” and other benefits for themselves and others – all at the expense of Kensington and its shareholders – with no meaningful review or input by the shareholders.

133. The activities of Steven and Judith Zacharius clearly violate the terms and spirit of the rule that self-dealing is impermissible. The Defendants’ self-interested 2009 Voting Trust Agreement and its subsequent amendment violate the prior Purported Voting Agreement between the majority shareholders; and Steven’s misappropriation of company assets – masking personal spending as legitimate business expenses – as well as Judith’s sale of her votes for a no-

show job that provides her considerable compensation, all at the expense of the shareholders and the Company, constitute a clear case of self-dealing and breach of fiduciary duty.

134. Accordingly, Plaintiff, who brings this action on behalf of Kensington and its shareholders, is entitled to an accounting and money damages, which relief shall inure to the benefit of Kensington and its shareholders.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Suzanne Mangold Zacharius requests that the Court issue an Order that:

- (a) Declares that the Purported Voting Agreement is null and void;
- (b) Alternatively, declares that the Purported Voting Agreement has been terminated;
- (c) Alternatively, declares that the Purported Voting Agreement does not apply to any Transferee of all of the Shares or such portion of the Shares as consists of a majority of the voting control of the Company;
- (d) Provides Plaintiff with a full accounting and/or audit of Kensington's financial books and records;
- (e) Awards compensatory and punitive damages in an amount to be determined at trial but believed to be in excess of \$250,000; and
- (f) Grants Plaintiff such other, further and different relief as the Court deems just, proper and equitable, together with costs and disbursements of this action.

Dated: New York, New York
February 5, 2013

MCDERMOTT WILL & EMERY LLP

By: /s/Daniel Jocelyn

Daniel Jocelyn
Carlyn McCaffrey
Michael Dillon
340 Madison Avenue
New York, NY 10173-1922
(212) 547-5400

Attorneys for Plaintiff Suzanne Mangold Zacharius

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
SUZANNE MANGOLD ZACHARIUS, Individually :
and Derivatively on Behalf of Kensington Publishing :
Corporation, :
:

Index No.: 652460/2012

Plaintiff, :

VERIFICATION

-against- :

KENSINGTON PUBLISHING CORPORATION; :
STEVEN ZACHARIUS; JUDITH ZACHARIUS, :

Defendants. :
----- X

STATE OF NEW YORK)
CITY OF NEW YORK) ss:
COUNTY OF NEW YORK)

SUZANNE MANGOLD ZACHARIUS, being duly sworn, states that she is the plaintiff in this action and that the foregoing Amended Complaint is true to her own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters she believes it to be true.


Suzanne Mangold Zacharius

Sworn to before me this
5th day of February, 2013


Notary Public

ASHLEY NOEL KING
Notary Public, State of New York
No. 02K16250043
Qualified in New York County
Commission Expires Oct. 17, 2015