SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM : PART SCP

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HOWARD MINTZ and SUSAN MINTZ-BELLO, as Co-trustees of the Max Mintz QTIP Trust, and SUSAN MINTZ-BELLO, as Trustee of the Susan Mintz-Bello Grantor Retained Annuity Trust dated September 24, 2012 (The "Mintz Trusts")individually and derivatively on behalf of ASTORIA HOLDING CORP.

Plaintiffs

- against -

ROCHELLE PAZER,DINA BASSEN, LISA PAZER and ASTORIA HOLDING CORP.

Defendants

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Index No. 502127/2013

360 Adams Street
Brooklyn, New York
September 30, 2013

B E F O R E :

HONORABLE DAVID SCHMIDT,
Justice

A P P E A R A N C E S:

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DEBRA SMITH,
OFFICIAL COURT REPORTER

1 THE COURT: Ms. Hagemeier?
2 MS. HAGEMEIER: Yes. Good afternoon, Your
3 Honor. Lisa Hagemeier for the Plaintiffs Howard Mintz
4 and Susan Mintz-Bello as co-trustees of what we have
5 called in the paper "The Mintzes Trust," individually
6 and derivatively on behalf of Astoria Holding Corp.,
7 which we call "The company."
8 Today, Your Honor, we have on plaintiff's
9 motion for summary judgment on their three causes of
10 action seeking judgment declaring that Ms. Pazer is
11 obligated to sell them her shares in the company and
12 also the 17th cause of action for specific performance,
13 and Ms. Pazer has made a cross-motion for summary
14 judgment on her first and second counterclaims.
15 The question that is posed by all of these
16 motions is it boils down to one question, whether
17 Ms. Pazer is obligated to sell the Mintzes her shares.
18 Now, there is a very small universe of facts, material
19 facts that are relevant to answer this question.
20 The first is that the directors of the
21 company are deadlocked. The second fact is that on
22 August 27th, Ms. Pazer sent the Mintzes an email
23 offering to sell her shares to them. The third fact is
24 that on August 29th, the Mintzes sent Ms. Pazer an
25 email accepting her offer to buy her out of her shares.

1 The fourth material relevant fact is the
2 shareholders agreement itself because both parties
3 argue that they're entitled to summary judgment based
4 on the unambiguous terms of the shareholders agreement.
5 The fifth relevant material fact is that the Mintzes
6 served Ms. Pazer with the first purchase notice after
7 failed deadlock mediation, which Your Honor presided
8 over. That was on September 27th.
9 Now, I don't know, Your Honor, if you would
10 like to have any background or if you feel familiar
11 enough with --
12 THE COURT: Give me background.
13 MS. HAGEMEIER: Ms. Pazer and the Mintzes are
14 each roughly 50/50 owners of Astoria Holding Company.
15 Before them, their fathers were the owners and it
16 passed to them. Astoria owns the Georgetown shopping
17 center in Brooklyn.
18 In 2003, Ms. Pazer is a shareholder. She
19 also became the manager of the center, and from that
20 time on, very sharp disputes developed between the
21 parties who have 50/50 vetoing power.
22 So, the sharp disputes led in 2011 to a
23 situation in 2011. The sharp disputes developed to the
24 point where Ms. Pazer brought a proceeding to dissolve
25 the company based on deadlock and for some other

1 reasons that she asserted, and that litigation in 2011
2 was settled by the parties entering into a shareholders
3 agreement.
4 Now, based on what brought them to this point
5 in the first place, they were careful to include in the
6 shareholders agreement provisions expressly covering
7 the procedures when a shareholder wants to sell his or
8 her shares and also very explicit detailed provisions
9 for how to deal with a deadlock to avoid coming to the
10 precipice and to a judicial dissolution.
11 Deadlock -- well, the sale of shares by
12 shareholders covered in Article 8 and deadlock is
13 covered in section 4.8. Now, in section 4.8.3 of the
14 shareholders agreement, which if Your Honor has -- do
15 you have the papers, because you could turn to it?
16 It's Exhibit G of the Mintzes affidavit. On Page 9,
17 you'll find section 4.8.3. It's Volume Two.
18 THE COURT: I have it. Go ahead. Page?
19 MS. HAGEMEIER: Page 9. The first line of
20 4.8.3 provides if the directors cannot resolve the
21 deadlock pursuant to section 4.8.2, which is the
22 mediation section, then the right of first offer in
23 accordance with section 8.2 hereof shall apply in
24 accordance with the procedures set forth in the last
25 sentence of section 8.2 (a).

1 If neither shareholder elects to purchase the
2 shares of the other in accordance with such procedures,
3 then the respective corporation shall diligently take
4 steps to sell its assets for the best price attainable
5 after reasonable marketing.
6 If you then go skip ahead to section 8.2 (a),
7 which is the section referenced, and look at the last
8 sentence of 8.2 (a), that says that if there is a
9 deadlock that cannot be resolved in the mediation, then
10 either the Mintzes group or the Pazer group shall have
11 the right to give the other shareholder group a
12 purchase notice as to all of the shares owned by the
13 other shareholder group within ten days after such
14 failure to resolve, in which event the shareholders
15 shall proceed under section 8.2 (b),(c) and (d).
16 That is critical language here because that
17 language is determinative of the motion for summary
18 judgment for the plaintiffs on the 16th cause of action
19 and Ms. Pazer's first counterclaim.
20 Now, these facts are undisputed. On
21 August 27, 2012, Ms. Pazer sent the Mintzes an email,
22 which is at Exhibit 8 -- Exhibit H, I am sorry. She
23 sent this email to the Mintzes. She says it appears
24 we're at a deadlock on a number of things. We can
25 follow the procedures set forth in our shareholders

1 agreement or expedite that process by agreeing to sell
2 Georgetown now and retain a mutually acceptable broker
3 to sell the property. Of course, if you prepared to
4 buy me out, let me know and we can retain appraisers
5 and proceed that way. Please let me know your
6 thoughts. Suffice it to say, I disagree with your
7 position with respect to distributions, particularly
8 since you advised the repairs of, approximately,
9 $850,000 are required, and will more fully respond to
10 your recent email on the subject if you are not
11 prepared either to sell the property or buy my interest
12 in it. Thanks for your consideration of this proposal.
13 Two days later, the Mintzes accepted that
14 offer, and this is in Exhibit I. Mr. Mintz wrote to
15 Ms. Pazer: Susan and I are definitely prepared to and
16 desire to buy you out of Astoria. That is, buy all of
17 your Astoria shares and proceed to retain appraiser and
18 determine the valuation by appraisal under the Astoria
19 shareholders agreement as you offer below.
20 We, therefore, accept your offer to sell us
21 your Astoria shares under the shareholders agreement
22 due to deadlock and to proceed with the appraisal
23 process to determine the purchase price under
24 shareholder agreement section 8.2.
25 Now, Ms. Pazer immediately turned around and

1 denied that she offered to sell her shares. She
2 insisted on deadlock mediation. We said that is
3 futile, that's a waste of time, it's academic, we
4 already bought your shares, we already have a deal to
5 buy your shares, why should we go to deadlock
6 mediation?
7 They wrote to the Court. The Court got
8 involved. He says, okay, we will agree to deadlock
9 mediation, but it's without prejudice to our already
10 existing contract to buy your shares. The mediation
11 was held on September 27th. We failed to resolve the
12 deadlocks.
13 The Mintzes, immediately after the mediation,
14 served a purchase notice on Ms. Pazer. Now, about a
15 week later, they get a purchase notice from Ms. Pazer
16 for their shares.
17 THE COURT: Just explain to me the
18 significance of the purchase offering that the Mintzes
19 did in our office. If I remember correctly --
20 MS. HAGEMEIER: The purchase notice? The
21 purchase notice --
22 THE COURT: This is separate and apart from
23 you made one argument -- just give me a second. You
24 made one argument there was an offer, sort of an
25 acceptance.

1 MS. HAGEMEIER: Yes.
2 THE COURT: Now you are making a new
3 argument, you are saying --
4 MS. HAGEMEIER: That's right.
5 THE COURT: -- pursuant to the deadlock
6 agreement, you can offer to purchase.
7 MS. HAGEMEIER: That's right. That's under
8 the last sentence of 8.2 (a).
9 THE COURT: Okay, so --
10 MS. HAGEMEIER: So, now there are actually
11 three reasons why we're entitled to buy the shares.
12 THE COURT: Hang on. We didn't need the (b)
13 and (c). I don't know what happens if you -- if you
14 actually served the purchase notice.
15 MS. HAGEMEIER: I can tell you what (b) and
16 (c) says. Section (b) says when a purchase notice is
17 served, it creates an irrevocable obligation by the
18 party who served the notice to buy and upon the parties
19 served to sell. Those obligations become irrevocable.
20 That's what (b) says. (c) provides for how the
21 purchase price of the shares will be set, and that is
22 in a baseball arbitration process.
23 Each side retains their own qualified
24 appraiser. They render an appraisal. If they're
25 within ten percent of each other, you just take the

1 average. If they vary by more than ten percent, they
2 appoint a third qualified appraiser, and that third
3 appraiser has to pick one or the other. That's what
4 the rest of the of 8.2 says.
5 Now, where I just left off is after the
6 Mintzes served the first purchase notice after the
7 deadlock mediation, a week later Ms. Pazer served a
8 purchase notice on them, which was strange because just
9 a couple of months earlier, they had had a deadlock
10 mediation on Avenue K, which has an identical
11 shareholders agreement, and Ms. Pazer served the first
12 purchase notice after mediation and she took the
13 position that once the first purchase notice is served,
14 it extinguishes the right of the other party to serve a
15 purchase notice.
16 Now, in that context, we -- because we didn't
17 want that to be the case, we took the other position,
18 and Mr. Shore talks a lot about that in his papers.
19 Mr. Guttenberg sent an email in which he trots out the
20 argument for why at that time he believed there could
21 be more than one purchase notice.
22 Ultimately, the Mintzes didn't stand in
23 position, they didn't serve a purchase notice and they
24 sold their share to Ms. Pazer. The first purchase
25 notice, one in that case she has actually benefited

1 from that interpretation.
2 Now, just an aside on the stuff like
3 Mr. Guttenberg's email, which is really the centerpiece
4 of Ms. Pazer's opposition and her motion, it's
5 extrinsic evidence. Both parties are claiming that the
6 shareholders agreement unambiguously says what they say
7 it is, so extrinsic evidence is irrelevant, really not
8 properly be considered either to create an ambiguity or
9 an aid of interpretation.
10 Furthermore, the fact that we both interpret
11 it differently doesn't mean that it's ambiguous because
12 an ambiguity can only be created if the agreement is
13 reasonably susceptible of more than one meaning.
14 Now, the meaning Ms. Pazer advocates is not
15 reasonably extrapolated from the agreement. In fact,
16 it contravenes the agreement and it contravenes the
17 specific provisions that are at issue. I will tell you
18 why in a minute. First I just want to talk about,
19 again, about the exchange of emails.
20 Now, in the 15th cause of action, we say that
21 Ms. Pazer is obligated to sell us the shares because
22 her August 27 email was a notice of intention to sell
23 under section 8.2 (a), which we didn't look at that
24 yet, but we will now. And the Mintzes August 29 email
25 was a purchase notice.

1 So, to just turn back to Page --
2 THE COURT: 12?
3 MS. HAGEMEIER: Page 12 of Exhibit G. So,
4 8.2 (a) says if -- well, starting at the top, if a
5 shareholder desires to sell all or any portion of his
6 or her shares, an intention to sell, then other
7 shareholders shall have an option to purchase all, but
8 not less than all of such offered shares at the
9 purchase price and on the terms and conditions
10 hereinafter defined.
11 (a) The selling shareholders shall deliver a
12 written notice to the other shareholders of his or her
13 intention to sell, offering to sell the offered shares
14 to the other shareholders and detailing the number of
15 offered shares proposed to be sold by such selling
16 shareholders. That is exactly what Ms. Pazer's
17 August 27th email was.
18 It satisfies all of the requirements of a
19 Notice of Intention to sell. It's in writing. It's
20 delivered to all of the shareholders. It details the
21 number of shares being sold. She says, buy me out,
22 that means all of her shares. There's no other way you
23 can interpret this term.
24 Now, the sole basis on which Ms. Pazer
25 opposes this branch of our motion is to say, no, this

1 wasn't a notice of intention to sell because we didn't
2 serve it in accordance with the notice provision which
3 does not include email among the acceptable means of
4 transmission.
5 That position is not legally tenable because
6 the rule of law in New York is that strict compliance
7 with notice provisions is not required in commercial
8 contracts. We have cited cases to support that in our
9 brief. Ms. Pazer has ignored that completely. In
10 addition, the parties used email about 99 percent of
11 the time to communicate with each other and to send
12 notices and demands.
13 Now, Ms. Pazer, her argument on this is a
14 moving target. First she said, no, you know, email is
15 okay for informal communications, informal notices, but
16 not formal notices and, of course, there's no terms
17 like that in the agreement. Then in her surreply,
18 which I don't think was even permitted, the beginning
19 of her reply brief on her cross-motion, she also -- she
20 addresses this again.
21 She says, well, actually only the notices
22 under 8.2 have to be served in accordance with the
23 notice provision. That's not in the agreement either.
24 And she hypothesizes this is the only section of the
25 agreement that talks about notice, but that's not true.

1 Section 4.6, which talks about the duties of
2 the manager, which Ms. Pazer is, says that as to each
3 proposal requiring board approval, including both major
4 decisions and other decisions of the board, the manager
5 shall notify the directors, shall notify the directors
6 and request the consent of the directors which request
7 for consent shall be accompanied by such backup, blah,
8 blah, blah, blah, blah.
9 Now, if you look at Exhibit S to Mr. Mintzes
10 reply, you will see a host of examples of
11 notifications, notices as to proposals for major
12 decisions from Ms. Pazer to the Mintzes that were sent
13 by email.
14 Finally, I think just as a matter of equity,
15 Ms. Pazer cannot invoke her own noncompliance with a
16 notice provision to say that she wasn't giving notice.
17 Notice provisions are for the protection of the
18 recipients. The recipients here got the notice and are
19 not complaining about it.
20 Now, the 14th cause of action seeks judgment
21 declaring that Ms. Pazer is obligated to sell the
22 Mintzes her shares based only on the principles of
23 honoring acceptance. The August 27th email is an
24 offer, the August 29th email is an acceptance.
25 The August 27th email is definite on all

1 material terms that are necessary to create a binding
2 agreement. Ms. Pazer offered all of the shares by
3 offering to have them buy me out or buy my interest
4 from the company.
5 The price is the price determined in the
6 baseball arbitration under the shareholders agreement.
7 Ms. Pazer argues that she didn't reference the
8 appraisal process in the shareholders agreement but she
9 had just talked about shareholders agreement, she said
10 we can go to mediation under the shareholders agreement
11 or we can expedite that process by either retaining an
12 appraiser and selling it on the market or by retaining
13 separate appraisers and you buy me out.
14 She manifested an intent to be bound if the
15 Mintzes accepted. She even refused to discuss any
16 other issues unless they didn't want to buy her out.
17 Now, in retrospect, she has got seller's remorse. She
18 says she didn't really intend to offer to sell, but
19 that doesn't matter. The subjective intent of the
20 offer is not what's considered in making a
21 determination as to whether there is a binding
22 agreement, it's the objective manifestation of intent.
23 Likewise, it doesn't matter if she now says, well, I
24 never would have agreed to sell unless we closed by
25 December 31st. That time, the time for performance is

1 not a necessary term. The law will fill in a
2 reasonable time for performance.
3 Now, the Mintzes August 29th email was an
4 acceptance. You cannot get much more straightforward
5 than what they said. We accept your offer. They said
6 it. Those are the words, they accepted her offer.
7 They did annex to the email a waiver and
8 acknowledgment form that they asked her to sign but
9 their acceptance was in no way conditioned on that and
10 the waiver and acceptance merely memorialized the terms
11 that had already been agreement to.
12 Now, moving on to the motion for summary
13 judgment on the 16th cause of action, which is where we
14 seek judgment declaring that only the first notice
15 served after deadlock mediation is effective, the words
16 of the agreement support that interpretation, allow
17 only that interpretation, and that interpretation
18 effectuates the purpose and intent of the agreement.
19 As for the plain language of the agreement,
20 the last sentence of section 8.2 (a) says either the
21 Mintzes group or the Pazer group may serve a purchase
22 notice. Either or does not mean both. Ms. Pazer
23 argues this language means that they may both serve
24 purchase notice, dual purchase notices where the
25 shareholders agreement wants to say both, it uses the

1 words and each of dot, dot, dot.
2 THE COURT: Ms. Hagemeier, where were you
3 referring me that says "Either or?"
4 MS. HAGEMEIER: That's the last sentence of
5 section 8.2 (a), Page 12.
6 THE COURT: I have it, but I didn't see it.
7 Either the Mintzes group?
8 MS. HAGEMEIER: Either the Mintzes group.
9 THE COURT: May I have it?
10 MS. HAGEMEIER: So, what I was just saying is
11 where the shareholders agreement means to say both, it
12 uses completely different words, it doesn't use either
13 or. And we have cited seven examples in the
14 shareholders agreement where it uses these other words.
15 Each of the Mintzes group and the Pazer group, the
16 Mintzes group and the Pazer group, both the Mintzes
17 group and Pazer group, okay, you got the pictures.
18 THE COURT: I got the picture, but you are
19 almost done with your argument?
20 MS. HAGEMEIER: I'm almost done.
21 THE COURT: I am not pushing you. I have
22 until 4:30, I want to balance it.
23 MS. HAGEMEIER: I'm almost done.
24 THE COURT: When did we start, do you know?
25 MS. HAGEMEIER: I am almost done.

1 Now, this is the ordinary meaning of either
2 or. It could be either of them, but it's only one of
3 them. Ms. Pazer even uses this construction this way.
4 In her August 27 email: If you don't either wanna buy
5 me out or sell the company, then I'll discuss these
6 other issues with you. It's one or the other.
7 And her former lawyer, Mr. Fish, who put in
8 an affidavit with the reply papers also uses either or
9 that way in Paragraph 6 of his affidavit. Now, the
10 going back to the plain language, again it refers to a
11 purchase notice, either one or the other may serve a
12 purchase notice, singular. They talk in their papers
13 about references to plural purchase notices in 8.2 (b)
14 but that pertains to a totally different situation
15 where shareholders offer to sell her shares to the
16 other shareholders and the other shareholders may serve
17 purchase notices. That's not the situation we have
18 here.
19 Now, the operation of a purchase notice also
20 renders the service second notice impossible. When you
21 serve a purchase notice, it irrevocably obligates the
22 other person to sell and irrevocably obligates you to
23 buy. Let's call it what it is. This is buying the
24 company. You can't serve a purchase notice and buy the
25 company and then the other person serves a purchase

1 notice and buys the company. The company is already
2 bought.
3 That's why I cited a case in the brief which
4 is a little bit off, it's *Solow* case, S-O-L-O-W, where
5 there were some air rights and both the tenant and the
6 owner were entitled to use the air rights. The tenants
7 used the air rights and the owner tried to undo it and
8 the Court said, no, either one of you could have done
9 if but once one of you did it, the other one couldn't
10 do it anymore.
11 Now, the first notice wins. Interpretation
12 is also consistent with and implements the intent of
13 the agreement. This is a deadlock breaking provision.
14 First they have to try to negotiate themselves, then
15 they go to mediation, and then if all else fails,
16 someone can serve a purchase notice.
17 First notice wins serves that purpose, the
18 deadlock is broken, one of them is buying. If another
19 person can serve a purchase notice, they're right back
20 in deadlock, but there's no mechanism in the agreement
21 for breaking the deadlock. Instead, they say the Court
22 should come in and write a section 4.8.4 and decide how
23 to break the deadlock.
24 Now, in an agreement where the parties so
25 deliberately and meticulously provided for how to break

1 a deadlock and avoid having to dissolve and avoid
2 having to come back to court, this is a self-executing
3 mechanism, that is an impossible interpretation of this
4 agreement.
5 This is the last point. They say we're
6 estopped from making this argument because in the
7 context of Avenue K, Mr. Guttenberg took the position
8 that you could serve two purchase notices. He made
9 that argument.
10 THE COURT: Show me where that is in this
11 paperwork.
12 MS. HAGEMEIER: Where the estoppel argument
13 is.
14 THE COURT: Where does Mr. Guttenberg make
15 that argument?
16 MS. HAGEMEIER: Ms. Pazer's affidavit,
17 Exhibit I.
18 MR. SHORE: Your Honor, if it would help,
19 only because of the small print, I had the print
20 enlarged.
21 THE COURT: Let me see if I can find it
22 first.
23 MS. HAGEMEIER: You go to, I believe it
24 starts on the bottom of the fourth page is where that
25 email starts.

1 THE COURT: Exhibit I?
2 MS. HAGEMEIER: I.
3 THE COURT: It's an email?
4 MS. HAGEMEIER: Yes.
5 THE COURT: Is it Dear Allen?
6 MS. HAGEMEIER: Dear Steve at the bottom of
7 the page, Page 4.
8 THE COURT: Oh, Dear Steve, okay.
9 MS. HAGEMEIER: On the basis of this email,
10 Ms. Pazer claims that we're equitably estopped from
11 making this argument that we're making here today, that
12 only the first purchase notice is effective and valid.
13 And she claims that she relied on Mr. Guttenberg's
14 interpretation of the agreement in that she gave the
15 Mintzes ten days in Avenue K and that she didn't try to
16 serve the first purchase notice here in reliance on
17 this.
18 Now, that argument fails for a number of
19 reasons. First of all, Mr. Guttenberg was making a
20 legal argument, he was not making representations or
21 misrepresentations of fact. An equitable estoppel
22 cannot be based on a legal argument. Mr. Guttenberg
23 repeatedly says there is no language in the agreement
24 that says X, there is no language in the agreement that
25 says Y. He is not saying anything as a matter of fact.

1 He doesn't say like this, perhaps, could be
2 an equitable estoppel, I am not going to serve the
3 purchase notice after the mediation and then you do.
4 Maybe that would be an equitable estoppel, but this
5 where he is giving an interpretation of the
6 shareholders agreement is not a basis for an equitable
7 estoppel, it is a pure legal argument that the
8 plaintiffs themselves ultimately abandoned. They did
9 not serve a purchase notice in Avenue K, so for --
10 THE COURT: Counsel, it doesn't mean they
11 abandoned it because they thought that they didn't have
12 that argument.
13 MS. HAGEMEIER: They didn't reply on it.
14 THE COURT: They just -- they elected not to
15 do it, doesn't mean they abandoned the argument. Just,
16 you said something I just --
17 MS. HAGEMEIER: Well, they never pushed
18 forward on the argument. It's not as if they went to
19 court and got a judgment and prevailed on that
20 argument.
21 Furthermore, there is dispositive proof that
22 she didn't --
23 THE COURT: Did they make the
24 counter-argument?
25 MS. HAGEMEIER: Yes, they did. In fact, if

1 you turn back to Page 7, at the bottom of the page you
2 will see Mr. Shore's email to Mr. Guttenberg in which
3 he says we do not read the shareholders agreement to
4 afford the Mintzes group an opportunity to purchase the
5 Pazer stock. It says it. That's -- he's saying that's
6 our interpretation. Alan turned around and gave them
7 the Mintzes interpretation at that time.
8 Now, here is what really matters. Here is
9 why Ms. Pazer's statement that she relied cannot
10 possibly be true. If you turn to the Page 4 of that
11 same exhibit, you will see an email from Mr. Shore
12 towards the top of the page. It's dated June 11th.
13 This is after ten days have passed during which the
14 purchase notice would have been served if they were
15 going to do so, and Mr. Shore says in the second
16 paragraph: Since your clients have elected not to seek
17 to purchase Avenue K, an election that we dispute they
18 could have made, they have stood by their
19 interpretation.
20 Ms. Pazer did not rely on any interpretation
21 that Mr. Guttenberg spun out. It's just not true.
22 Now, Mr. Guttenberg doesn't disallow that statement.
23 In fact, in his reply brief, he says that was just a
24 statement of fact, that was our position. And that
25 fact dispositively disproves the assertion that Ms.

1 Pazer relied. That concludes my argument for now.
2 THE COURT: Thank you very much.
3 MR. SHORE: Good afternoon, Your Honor.
4 THE COURT: I was actually marveling at your
5 patience that you didn't say one word during the whole
6 process.
7 MR. SHORE: We may disagree, but I have great
8 respect for her. I hope it's mutual. You will not be
9 surprised to learn that we have a very different
10 interpretation on the facts. We believe there are
11 pertinent documents that were not described.
12 Dealing with the August 27th letter, that
13 letter -- that email, rather, when you look at it is
14 informal in nature. It's an exploratory email and it
15 says, amongst other things, we can follow procedures
16 set forth in the shareholders agreement or some other
17 procedure. It doesn't say we're evoking the
18 shareholders agreement.
19 In fact, it couldn't invoke the shareholders
20 agreement because there had been no deadlock declared
21 as of that time and there had been no mediation, so it
22 would have been premature to elect to proceed under the
23 shareholders agreement.
24 It also goes on to say: Please let me know
25 your thoughts. It clearly is an informal exploratory

1 invitation. It was sent by email, it wasn't sent to
2 all of the people. And the addresses that the
3 agreement said notice would go to under 11.1, it says
4 you got to send it by Federal Express or by hand and
5 you have to send it to the lawyers. There's all sorts
6 of requirements.
7 It wasn't done that way, it was an informal
8 letter, but what's more important -- and this
9 completely wasn't touched upon -- is that it doesn't
10 say what the procedure is. Is it following the
11 shareholder agreement? Is it expedited process that
12 she refers to? It doesn't talk about the timing, it
13 doesn't talk about the number of shares. She doesn't
14 say how many shares she wanted to sell.
15 She said give me your thoughts, let's discuss
16 this. But what's more important and what wasn't
17 mentioned is that the plaintiff did not accept the
18 offer. The response that was sent was sent with
19 another document and, conveniently, you weren't -- if
20 you look at Exhibit E to our cross-motion, I would like
21 you to read in response because they neglect to state
22 that with the letter they sent or the email they sent
23 on August 29th --
24 THE COURT: 27th.
25 MR. SHORE: No, no Shelley's letter was the

1 27th, they responded on the 29th. In their response on
2 the 29th, they enclosed a document which is called a
3 waiver and acknowledgment purchase notice under
4 shareholders agreement. It's Exhibit O to our
5 cross-motion papers and Exhibit I, I think, on their
6 papers.
7 And what it does is it starts off saying,
8 well, we're gonna buy all of your shares, Shelley did
9 offer all her shares, she didn't say how many shares.
10 Then they say under the shareholders agreement, Shelley
11 talked about an alternative approach, but most
12 important, it then goes on to say -- this wasn't read
13 to you: However, our attorney advises us that we all
14 should address certain procedures otherwise provided by
15 our shareholder agreement regarding such deadlock
16 buyout. Therefore, a purchase, a simple short waiver
17 and acknowledgment agreement for us all to sign, which
18 merely formalizes your agreement to sell us your
19 Astoria shares and our election agreements buy them
20 under the shareholder agreement and waives, waives the
21 procedures that would otherwise apply to our knowledge
22 and agreed deadlines.
23 Then it goes on the next page: We hope your
24 offer below is sincere and, if so, we ask that you and
25 Dina -- Dina wasn't a party to the 27th of August, so

1 now out of the clear blue we're putting Dina into that
2 agreement -- ask you and Dina will sign date and return
3 the attached waiver and acknowledgment to us within two
4 business days so that we can all proceed with the
5 valuation procedures provided Astoria shareholders
6 agreement to determine the purchase price for your
7 Astoria shares. Then goes on to say if you have any
8 comments or questions concerning this, to call Ms.
9 Hagemeier.
10 This document demonstrates that there was not
11 an offer and acceptance because it has different terms.
12 They understood that the procedures in the shareholders
13 agreement couldn't be applied. They're asking for a
14 waiver. They're asking for Dina to be a party to this.
15 This is far more egregious than the situation
16 in Your Honor's decision from last year of Blinds and
17 Carpet Gallery, where it was one party. That was
18 different. Here we have all sorts of different terms
19 and Dina is now in it as a party.
20 In any event, in response to this, I
21 communicated with Ms. Hagemeier and indicated that
22 these -- that her terms weren't acceptable and gave a
23 number of terms that if they wanted to do something, we
24 required it, including a general release and a number
25 of other terms.

1 If you take a look at their papers,
2 Mr. Mintzes, in Paragraph 47, 48, 49, of his affidavit
3 says that they refused to agree to our terms. He
4 acknowledges we refuse to sign his waiver and agree to
5 his terms. And you then have Exhibit J, which is Ms.
6 Hagemeier's letter to me dated September 7th and it
7 goes on to state that all of the terms that we had
8 asked for was unacceptable.
9 She says she can't agree to close by
10 December 31. The tax law was changing. The
11 December 31st deadline, obviously, for tax reasons was
12 very significant. She says we're not going to give you
13 a general release. And we also said we'd like to see
14 proof of ability to pay, we would like to give you
15 that. You can read in her letter, it's very clear.
16 THE COURT: Where's the letter?
17 MR. SHORE: It's Exhibit J to the our
18 cross-motion.
19 THE COURT: A letter from who? Okay, Luisa
20 Hagemeier.
21 MR. SHORE: So, the correspondence exchanged
22 between the parties reflects, one, we submit that the
23 email originally was informal. They responded with a
24 counterproposal with different parties, Dina was
25 included, different terms waiving procedural

1 requirements of the shareholders agreement and we
2 responded immediately that that's not acceptable. And
3 then they responded and they say, well, the things you
4 want aren't acceptable.
5 So, we submit that the documents on their
6 face demonstrate that there was never an agreement
7 reached and there's no dispute that as of that time the
8 deadlock procedures set forth in the agreement had not
9 been followed. Your Honor, had not --
10 THE COURT: What was the deadlock procedure?
11 MR. SHORE: If there is a deadlock, they're
12 supposed to try and work it out for 30 days. If they
13 can't, one party declares deadlock, then they contact
14 you, there is a mediation. It's only after the
15 mediation that the procedure for the 8.2 takes effect.
16 None of that had occurred as of that date.
17 Most importantly, these -- this informal
18 email had not been sent to Ms. Pazer's lawyers, it
19 hadn't been sent by certified mail, you know, all of
20 the safeguards in 11.1 informal notice and --
21 THE COURT: What does it mean, to sell your
22 interest in Astoria to us or to sell us the entire
23 center?
24 MR. SHORE: I am sorry, Your Honor?
25 THE COURT: What does that mean: Dear

1 Shelley -- this is the letter coming from Howard Mintz.
2 Thank you for your email below offering to sell your
3 interest in Astoria to us or to sell the entire center
4 with us. What does that mean, to sell the entire
5 center with us?
6 MR. SHORE: You're asking me what --
7 THE COURT: Ms. Hagemeier, what does it mean?
8 MS. HAGEMEIER: What it means is that --
9 THE COURT: What is the difference between
10 selling stores' interests if you have the rest of the
11 interests or Dina had the interest?
12 MS. HAGEMEIER: Dina is not a shareholder.
13 THE COURT: What does that mean?
14 MS. HAGEMEIER: Ms. Pazer had offered either
15 to sell -- to have us -- to have Mintzes buy her out or
16 to sell the center to a third party, so she owns half,
17 we own half. She offered either to sell us her half or
18 for all of us to sell. We chose to accept her offer to
19 buy her half.
20 THE COURT: I got it. I got it. Thank you.
21 What about his argument that if she
22 offered -- if you claim it's a valid offer, that she
23 said you can follow her procedures set forth in our
24 shareholders agreement? The procedure set forth in the
25 shareholders agreement doesn't contemplate a acceptance

1 immediately, it contemplates mediation and other
2 things. It doesn't contemplate a short-cut in that you
3 can just say I accept it and we're moving forward.
4 MR. SHORE: Your Honor, the waiver agreement.
5 THE COURT: Just parroting his argument to
6 get a response from you.
7 MR. SHORE: The bank lists the things that
8 hadn't been done. They're trying to get us to waive
9 all of those procedures.
10 MS. HAGEMEIER: She offered to waive it. She
11 said we can either go to the mediation or we can
12 expedite it by skipping straight ahead. She offered to
13 waive the deadlock mediation and skip straight ahead.
14 THE COURT: But skip straight ahead was to
15 sell the property not to you?
16 MS. HAGEMEIER: No, was to either have us buy
17 her out or sell the property on the open market.
18 THE COURT: You didn't -- that wasn't what --
19 you accepted?
20 MS. HAGEMEIER: Yes, we did. We offered to
21 buy her --
22 THE COURT: You offered to sell it on the
23 open market?
24 MS. HAGEMEIER: No, we accepted to buy her
25 out.

1 THE COURT: We can follow the procedures set
2 forth in our shareholders agreement, which includes
3 many things or expedite that process and sell it on the
4 open market. You didn't accept it to sell it on the
5 open market, which basically expedited that process.
6 MS. HAGEMEIER: Now go to the next sentence.
7 THE COURT: Okay. If you prepare to buy me
8 out, let me know and we can retain appraisers and
9 proceed that way.
10 Okay, I hear the argument. I heard
11 Ms. Hagemeier's argument and I heard your argument and,
12 actually, my opinion was already made up when I heard
13 this argument at the mediation because, you know,
14 everything I heard today, you know, is sort of the same
15 as we had at the mediation in which Ms. Hagemeier and
16 Mr. Guttenberg felt that this was a offer, firm offer,
17 and you felt it wasn't a firm offer.
18 Okay, what disturbs me a little bit -- I am
19 talking to you, Ms. Hagemeier -- please let me know
20 your thoughts, okay? It doesn't sound like whatever,
21 we hope your offer is sincere and, if so, he's
22 contemplating this is not even an offer himself, you
23 know what I mean? So even he, himself, says it.
24 Then we're talking about your -- you know, so
25 I hear you, but I just wanted to mention those two

1 points. You know, you know, I hear you, okay?
2 MR. SHORE: Your Honor, additional -- We're
3 also adding a party. They now want Dina to sign it --
4 THE COURT: No, no. Listen, I am a little
5 skeptical it's an offer in acceptance. I was skeptical
6 then, I am still skeptical now. I am not shutting my
7 mind on this issue, you know, because, you know, there
8 are different procedures that have to be done, but, you
9 know, interestingly enough, I am just going to
10 probably -- you know, there is a Court of Appeals
11 decision just, you know, about an acknowledgment on
12 a -- when you have a prenuptial, you can't acknowledge
13 later because it's the sincerity.
14 The procedures aren't only to be waived, the
15 procedures show I am sending it certified mail. I am
16 doing this, I am doing this, it's not just a whatever,
17 although to, you know, you know, to argue
18 Ms. Hagemeier's point, I mean, emails have been held to
19 be offers and emails have been held to be acceptances.
20 If you remember that big litigation between
21 the two oil companies, it was on a napkin that it was
22 done, so, you know, maybe argument just as an aside,
23 but there is -- in any case, I am skeptical that this
24 is an offer in acceptance. I was skeptical, then I am
25 skeptical. Now I am going read very carefully -- I am

1 going to have somebody else read through the papers,
2 discuss it with me back and forth.
3 MR. SHORE: The next argument is we now have
4 a deadlock.
5 THE COURT: There is another reason I am
6 skeptical is because this is a very, very hard fought
7 litigation. I would be very skeptical that you would
8 send a offer without going through attorneys, but
9 that's just an aside. Go ahead.
10 MR. SHORE: Next argument is the 4.8.2,
11 argument that the first person to serve.
12 THE COURT: That's a much better argument
13 because -- I am putting you at a disadvantage, but
14 maybe you can answer the questions that are on my mind,
15 okay? So, you may have an advantage or but you may
16 feel you are disadvantaged, okay. The point is as
17 follows.
18 This is a very, very hard fought litigation.
19 I spent countless hours working on this case, okay?
20 Now, you know, so to think after deadlock that, you
21 know, both of them could basically accept and then
22 we're back to square one, you know, I hear and I didn't
23 take the position, -- I hear Ms. Hagemeier's argument,
24 saying, hey, you know, we're trying to make a way out
25 of this, we're just -- if everybody could do it, we're

1 just back in the same place except that, you know, your
2 main argument -- forget the waiver for a moment -- is
3 that Mr. Guttenberg took a totally different position
4 and said there's no rational lawyer alive -- and I am
5 just exaggerating a little bit -- that could ever take
6 your position when you took the other position and that
7 he spoke to some New York lawyers.
8 MR. SHORE: Including Ms. Hagemeier's firm.
9 MS. HAGEMEIER: There is nothing in the
10 papers.
11 MR. SHORE: It says we spoke to New York
12 litigation counsel, which at that time was --
13 THE COURT: What was the Exhibit, J?
14 MR. SHORE: I.
15 THE COURT: Yours was J, I think. This is
16 Dear Steve. Hang on. It's I?
17 MR. SHORE: Your Honor, I believe it's I.
18 THE COURT: Yeah, it is I.
19 MR. SHORE: Your Honor, there's one major
20 difference. If I may have -- I think I can answer your
21 question here. Give me --
22 THE COURT: That's the one that gives me
23 more -- you know, when you guys are fighting like cats
24 and dogs, it wouldn't make sense to have an agreement
25 where we're back to square one.

1 MR. SHORE: Your Honor, what we have here is
2 the following: My email on the Avenue K, I took the
3 opposite position. I said in my email I had read the
4 agreement, I read it that the first person wins, that
5 was the way I read, it because there's nothing in the
6 agreement -- I wasn't the drafter of it, Mr. Guttenberg
7 was the initial drafter. He did all the drafts. Then
8 they were marked up by Mr. Fisch and the other lawyers
9 working on the case.
10 So, I gave my reading and my email says -- I
11 read it this way. Mr. Guttenberg came back with his
12 email and he says in it, I was the drafter, I have all
13 my emails, I know what the party's intent was he says
14 in several places, and I am happy to refer you to them.
15 This is what their intent was.
16 I now have attached an affidavit from
17 Mr. Fisch, who was on the Pazer side, and he says that
18 wasn't the party's intent. We never discussed it. We
19 just never focused on it.
20 THE COURT: Focused on what?
21 MR. SHORE: On what happens.
22 Mr. Guttenberg's position was that both sides had ten
23 days from the time --
24 THE COURT: I will tell you the truth. I
25 have a fairly decent memory, as you know, okay, and I

1 don't remember a discussion, but I wasn't there at
2 every single discussion. It could have been something
3 that you did without me, but I was also not there. I
4 don't believe it was a discussion as to whether or not
5 both sides can exercise that option.
6 MR. SHORE: There wasn't a discussion, Your
7 Honor, that's what Mr. Fisch says.
8 THE COURT: I don't remember, but that
9 doesn't mean anything.
10 MS. HAGEMEIER: I don't like to interrupt,
11 but I also cannot allow false things to be said, and
12 what Mr. Shore just represented is Mr. Guttenberg's
13 email is not in there. He did not say I am the primary
14 drafter. I know what the parties intended, you will
15 look at it and you will see.
16 THE COURT: Give me a second. I know you
17 pretty well and I know Mr. Shore pretty well already
18 because we spent time negotiating. You know, we're not
19 going to use false and stuff like that, okay?
20 MS. HAGEMEIER: Also, Your Honor, this is all
21 completely irrelevant. You cannot look at this email
22 in order to create an ambiguity, you have to look at
23 the agreement.
24 THE COURT: I agree with Ms. Hagemeier at
25 that point. It doesn't mean I agreed with

1 Mr. Guttenberg when he said it. The point is we look
2 to the four corners of the agreement. Is it ambiguous
3 or not ambiguous? So, the only time we get to the
4 intent of the parties, and parol evidence as to the
5 intent of the parties, is only when there is an
6 ambiguity, so you would have to --
7 MR. SHORE: Or a nonstatement.
8 THE COURT: Despite the fact he uses
9 absolutist positive language, says he spoke to -- we
10 have consulted with multiple New York attorneys
11 regarding this contract interpretation issue, including
12 Mintzes New York litigation counsel -- I assume that it
13 means you -- and they confirm the foregoing to it's two
14 and a number results as the most likely results in
15 court under the applicable shareholder agreement and
16 shareholder purchase. Given the absence of any first
17 act wins language, but it doesn't mean I would have
18 bought his argument. Also, I didn't understand this.
19 It says there is no reason a court would interpret the
20 agreement to reward the low bidder.
21 Now, I don't know, it's going to go toward an
22 appraisal process, what does he mean?
23 MR. SHORE: It's a baseball appraisal.
24 THE COURT: Therefore, when you elected, you
25 elected with a number?

1 MR. SHORE: You elect to buy. The other side
2 is now assuming they didn't elect in Avenue K. They go
3 out, they each get an appraisal. If the appraisals are
4 within ten percent, you take the mean of the
5 appraisals.
6 THE COURT: He is saying to reward the low
7 bidder as if it's rewarding the first guy to exercise a
8 provision and somehow he gets low bidder advantages
9 how?
10 MR. SHORE: Because they pick a number and in
11 between -- they don't average them or take a number
12 that the third arbitrator says.
13 THE COURT: It's not rewarding a low bidder,
14 he just bid. Why is it low bidder, because I am just
15 saying, I don't understand what he means?
16 MR. SHORE: I think he is assuming that.
17 THE COURT: In this case, this is, I think,
18 the main fight here, you know what I mean? You know,
19 so, can you point to the -- I didn't read this
20 agreement carefully. I did hear how Ms. Hagemeier read
21 it, I did read with her, okay, but show me the
22 ambiguity.
23 MR. SHORE: Could I just finish my argument?
24 THE COURT: You want to know something, I
25 apologize, okay. I let Ms. Hagemeier speak for, like,

1 40 minutes straight, okay, maybe I should give you the
2 same right, so go ahead.
3 MR. SHORE: Your Honor, just regarding
4 Guttenberg's email, what you have is -- and we will
5 come back to the agreement, I don't think the agreement
6 deals with this issue, that's what Mr. Fisch said, and,
7 indeed, Mr. Guttenberg says it in his email that it
8 didn't deal with it. He goes on to suggest, he says
9 while the agreement is not exactly clear on what
10 happened, if both groups exercised valuable purchase
11 rights, we believe the fair result under the
12 shareholders agreement if such event would be and he
13 says, basically, the person who makes the highest offer
14 gets it or if neither, then the company sells. So,
15 he's conceding that it's not in there. Mr. Fisch
16 says--
17 THE COURT: Where is he conceding? You want
18 to read to me which part of it? I am on Page 5 right
19 now. Where are you?
20 MR. SHORE: If you go to Page 2, the clear
21 language of the shareholders agreement.
22 THE COURT: I don't have a Page 2, I only
23 have a Page 5.
24 MR. SHORE: Do you have the email from
25 Mr. Guttenberg?

1 THE COURT: I do, but for whatever reason, it
2 starts at Page 2.
3 MR. SHORE: You see in the middle of the
4 page, it has one, two, there is an indent. It's five.
5 I have Page five where the key is here it starts off as
6 to the-- If you go down to where it says the clear
7 language paragraph.
8 THE COURT: I got it.
9 MR. SHORE: And then in the middle of this
10 paragraph, four lines down, it says, while the
11 agreement is not exactly clear. Do you see that?
12 THE COURT: Yes.
13 MR. SHORE: On what happens if both groups
14 exercised valuable purchase rights, we believe that
15 their result under the shareholders agreement in such
16 event --
17 THE COURT: I agree that Mr. Mintzes --
18 Mr. Guttenberg's version of it supports you very
19 greatly, now I agree to that, but I don't agree I would
20 have agreed with him then. You see, you know
21 Mr. Guttenberg is, you know, he's a tough negotiator.
22 He takes position that I don't necessarily agree with.
23 MR. SHORE: Your Honor, what you have is,
24 again, I was reading the agreement, he was a drafter or
25 participant. As he says in here, where he says -- I

1 think it's towards the end about how he has all the
2 draft emails and Mr. Fisch indicated that the primary
3 drafts were done by Mr. Guttenberg, so you have
4 Mr. Guttenberg saying, well, I was one of the drafters,
5 I know what the parties' intent was. This was left
6 out. What Mr. Fisch --
7 THE COURT: Can we have, basically, you know,
8 the drafters of the Constitution complain to the
9 Supreme Court justices today saying you are reading it
10 wrong? I mean, it doesn't make a difference what he
11 thought, what he didn't think, it's just a question of
12 the question is what does the agreement say?
13 MR. SHORE: Your Honor, Mr. Guttenberg, who
14 was one of the drafters, and Mr. Fisch, who was the
15 other, said we never discussed this, we didn't think
16 about it, it was left out. That's what they both said.
17 So, when he came time -- if your Honor recalls, when we
18 were at the mediation before you, I said in your
19 Honor's presence as soon as we go outside, they're
20 going to serve us with a notice.
21 Mr. Guttenberg in his email had indicated
22 that was going to happen. We knew it was going to
23 happen. We had actually prepared one. And without
24 waiving the attorney/client privilege because of
25 Mr. Guttenberg, as one of the drafters, and Mr. Fisch's

1 statements we said we have ten days, we don't to have
2 to make a decision now.
3 THE COURT: Just give me one second. You
4 morphed off to the estoppel element.
5 MR. SHORE: I am going to come back to the
6 initial order.
7 THE COURT: You know what, I would have to
8 deal with the estoppel argument, but you morphed off
9 into that. I need you to stick on to this argument.
10 If you know, you have, basically --
11 MR. SHORE: Paragraph 8.2, all right.
12 THE COURT: That's what I need you to do, you
13 got to create an ambiguity, but I have to find 8.2. I
14 think it's Exhibit G.
15 MS. HAGEMEIER: Page 12.
16 MR. SHORE: If you look at 8.2.
17 THE COURT: In addition?
18 MR. SHORE: The part that begins with in
19 addition, it says either or.
20 THE COURT: Let's read it together if you
21 don't mind, okay? I will read it slow and you will let
22 me know where to go.
23 In addition, if any deadlock exists which has
24 not been resolved pursuant to section 4.8.2 hereof,
25 then either the Mintzes group or the Pazer group shall

1 have the right to give the other shareholder group a
2 purchase notice as to all of the shares owned by the
3 other shareholders group within ten business days after
4 such failure to resolve, in which event shareholders
5 shall proceed under section 8.2 section --
6 MR. SHORE: Your Honor, when you just read
7 it, I just want to emphasize that it says the
8 shareholders. It's plural. Then --
9 THE COURT: Give me a second. And what does
10 that say to you?
11 MR. SHORE: Then --
12 THE COURT: Don't move so quick.
13 MR. SHORE: The reason I want to go on to the
14 next sentence because I think the next sentence is key.
15 THE COURT: If it's key, tell me.
16 MR. SHORE: 8.2 (b) the very next sentence
17 says if any purchasing shareholders with a plural S,
18 deliver purchase notices, plural, paren S paren, to
19 purchase some or all of the offered shares then those
20 elections to purchase shall be irrevocable.
21 THE COURT: Give me a second. You know what,
22 go ahead, sorry.
23 MR. SHORE: If they intended that only the
24 first person can do it, then you wouldn't have had
25 shareholders, they certainly wouldn't have had multiple

1 notices, it would been one notice. It also doesn't
2 say --
3 THE COURT: I am trying to understand your
4 argument. So, when you say multiple notices, which of
5 the multiple notices?
6 MR. SHORE: This says in (b) purchase
7 notices, do you see where it says notice, then there is
8 a paren S paren indicating that there could be two
9 notices, now there are only two parties, so the
10 agreement would make no sense if it had S if it didn't
11 mean both people had the right within the ten days. It
12 would say notice by virtue of the use of the plural
13 because there is only two shareholders. If only one
14 shareholder, the first to elect, could buy, it would
15 say purchase notice, it wouldn't be in the plural and
16 what it envisions is they really hadn't thought it out
17 that both sides could make offers and the agreement
18 doesn't say that the first wins, it doesn't say that
19 because there are different ways of making service. It
20 doesn't say what happens. And, again, service has to
21 be made on the lawyers as well as the parties.
22 So, what happened if we walked out of the
23 mediation and handed it to Susan and then Federal
24 Expressed it to Mr. Guttenberg and to Howard? We did
25 that 30 seconds before they handed it to Shelly. Who

1 wins because there's nothing in the agreement given the
2 different forms of service as to what happens. What
3 happens if one person serves it by hand, the other one
4 by Federal Express.
5 There are just multiple things that are left
6 out because the bottom line is, as Mr. Fisch says, they
7 never discussed it, they didn't think about it. As
8 Mr. Guttenberg says, it wasn't something in this
9 heavily negotiated agreement that was discussed or
10 contemplated and to the extent that you look at it, it
11 also where it says notices, seems to imply that both
12 sides had a right to serve notices within the ten days.
13 THE COURT: Let's take I on the bottom one.
14 Maybe it says -- it looks like an I to me, the last
15 paragraph: If pursuant to the foregoing, the offering
16 shareholder's -- now we're talking about one
17 shareholder -- timely receives from the other
18 shareholders written notices, so we're talking about
19 because you know what the problem is and, you know that
20 there is multiple shareholders on the other side.
21 MR. SHORE: Well --
22 THE COURT: There is two, Susan and Howard,
23 so, therefore, we could use the word shareholders. Go
24 ahead.
25 MR. SHORE: As I was saying, it doesn't deal

1 with all sorts of situations. If one person served, as
2 Your Honor knew, you know, we knew they were going to
3 do this.
4 THE COURT: You told me. I remember you
5 telling me.
6 MR. SHORE: So, also we cited in our brief --
7 THE COURT: You see, the problem is that not
8 having enough time to do this because I want to analyze
9 it with you together. But you know something, let's
10 just leave this for a moment because you are going to
11 miss out on the rest of the argument. I may end up
12 doing argument just on this paragraph, but you want to
13 just finish your argument and we can get back to this.
14 If you don't have time, I give you my word, I will hear
15 you out.
16 MR. SHORE: What the agreement does do is
17 with respect to, I mentioned earlier, with respect to
18 formal notices, they all have to be served in official
19 manner. 11.1 Ms. Hagemeier says they did things by
20 email, therefore --
21 THE COURT: Counsel, I am skeptical of that.
22 I told you I was skeptical of that. I was skeptical,
23 the mediation of it. It didn't sound like an official
24 offer, it sounded like, you know, get back to me, let's
25 try to, like, whatever. I think the bigger argument

1 here is this one and, you know, your main argument is
2 one Mr. Guttenberg took the opposite position so
3 forcefully and two --
4 MR. SHORE: As someone who had drafted it.
5 THE COURT: At the end of the day, you know
6 as well as I do, whatever he says doesn't make a
7 difference if it's not ambiguous, so if you find an
8 ambiguity, if I found shareholders and notices to be an
9 ambiguity, okay, then we go into the intent of the
10 drafter, we go into Mr. Fisch, Mr. Guttenberg.
11 MR. SHORE: The agreement doesn't talk about
12 a first person to make the election, it just doesn't
13 address it, and given the fact that it doesn't address
14 it and given the fact that Mr. Fisch and Mr. Guttenberg
15 indicate -- at least Mr. Fisch says it wasn't
16 discussed, Mr. Guttenberg it's not clear, and these
17 were the drafters along with the lawyers at Pryor
18 Cashman and Mr. Guttenberg, contrary to what was said,
19 wasn't opining on a legal issue, he uses the word it
20 was the intention of the parties in talking about the
21 drafting of the shareholders agreement.
22 He's testifying to a fact as one of the
23 drafters and, indeed, as Mr. Fisch says, the initial
24 drafts Mr. Guttenberg did and then, you know, they were
25 negotiated, marked up. And Mr. Guttenberg points out

1 he has kept -- this is the same email, that he has kept
2 all of the drafts. He knows based on his participation
3 that's what it means.
4 THE COURT: If he kept all the drafts, it
5 made a difference, he should have put in these papers.
6 Obviously, it doesn't say that in his drafts, but go
7 ahead. You did mention something about notices. Is
8 that argument exclusively on that email or is that
9 argument on this issue also?
10 MR. SHORE: Well, no. On this one, they
11 served us in conformance with section 11.1.
12 THE COURT: That's therefore -- I already
13 made up my mind on that so that's that argument I
14 already resolved in my mind, okay, so the question --
15 so we're not dealing with the fact it wasn't served
16 properly.
17 Now, the question here is only, so, did you
18 address everything that Ms. Hagemeier spoke about,
19 because --
20 MR. SHORE: I think basically I had.
21 THE COURT: No, no, don't basically. Tell me
22 did you address everything? I don't want you to walk
23 away unhappy, so make sure sit down, look it over.
24 MR. SHORE: The first issue we have, put that
25 aside. Give me one second. Your Honor, you were

1 there. The intent of the parties was that both sides
2 were to be given the opportunity to buy it and if you
3 now change it to the first one, you are taking away one
4 side, that's right.
5 THE COURT: Okay, let me ask you a question.
6 Let's fast forward. I mean, okay, both sides have the
7 right to do it. Hypothetically, how does it work?
8 Now, just bear in mind bad blood heavily fought, good
9 lawyers on both sides, every single paragraph fought
10 and now we have a deadlock, so we're saying if any
11 deadlock exists, either the Mintzes group shall have
12 the right to give the other shareholder group, so the
13 Mintzes group gives notice and the Pazer group gives
14 notice.
15 Now we go into (b) if any purchasing
16 shareholder deliver purchase notices with, parenthesis,
17 S, to purchase some or all of the offered shares, then
18 those elections to purchase shall be irrevocable. So,
19 Mintzes has irrevocable offer and Pazer has irrevocable
20 offer. How does that work?
21 MR. SHORE: Your Honor, as Mr. Guttenberg
22 said in his email, and we agree with him, he says,
23 because this isn't clear --
24 THE COURT: What's not clear about it? How
25 does that work?

1 MS. HAGEMEIER: It doesn't work, Your Honor.
2 It's directly contrary to --
3 MR. SHORE: Excuse me, I didn't interrupt.
4 THE COURT: He's right, Ms. Hagemeier, but
5 the truth is I will give you -- everybody can talk,
6 even if you have to do it on the telephone or you have
7 to come back. Nobody should feel that there is
8 anything in their mind they could not speak about. If
9 you come back here -- you go back to your office, you
10 decide, you know what, I forgot something, you know,
11 you will call me on a conference call and tell me about
12 it, okay, because ultimately I am going to do the right
13 thing, and that's that. So, I don't see how it works.
14 It doesn't work.
15 MR. SHORE: Your Honor, what both Mr. Fisch
16 and Mr. Guttenberg as the drafters said is -- Mr. Fisch
17 said it wasn't discussed, it wasn't contemplated,
18 nobody thought about it. It was done very quickly, as
19 Your Honor knows, and they made a mistake, they didn't
20 think what happens if both sides --
21 THE COURT: You see, the truth is I am
22 pushing you to answer my questions more than I am
23 pushing Ms. Hagemeier because this disturbs me the
24 most, okay, and so I'm -- so and just to add to your
25 argument for a moment, I am sure Ms. Hagemeier will

1 have something to say about it.
2 If any purchase shareholders deliver purchase
3 notices to purchase some or all of the offered shares,
4 then those elections to purchase are irrevocable
5 regardless of the amount of the purchase price later
6 determined.
7 Now, it says those elections, you know, so
8 you know, those elections would favor your argument
9 that this could be two elections, but let's go to the
10 next thing. Both the selling shareholders and
11 purchasing shareholders shall be -- now it's talking
12 about selling shareholder and purchasing shareholder.
13 MR. SHORE: It didn't deal with the first, it
14 just got lost, and I think Mr. Fisch's affidavit is
15 correct and I think Mr. Guttenberg, when he said that,
16 while the drive is not clear, this is what I suggest.
17 THE COURT: Listen, I will read it, but I
18 made a decision on the other one, you know, I am not
19 leaning your way on this issue, but that doesn't
20 mean -- I change my mind pretty quickly because I run
21 with the logic, okay, I go with the logic. Give me a
22 second, but the estoppel argument interests me because
23 I didn't flesh that out.
24 MR. SHORE: Your Honor, as I indicated on the
25 estoppel, Mr. Guttenberg explained to us -- I read it.

1 He says you are reading incorrectly. In my email, I
2 will --
3 THE COURT: Is there any -- is Ms. Hagemeier
4 right that estoppel -- I know you are going to claim
5 it's fact here. Is it only on facts or if he's saying
6 like so unequivocally this is what the agreement means
7 and, therefore, you bought it, there's no law on that
8 directly?
9 MR. SHORE: It's a fact issue, not a law
10 issue. If somebody says the agreement says black, I'm
11 a lawyer, I can read the agreement, I'm stuck with
12 whatever the agreement says, but if the agreement says,
13 if the document says I was a drafter and the intent of
14 the parties was black, I have a right to rely on the
15 representation made by the drafter. That is a fact,
16 not a legal --
17 THE COURT: You don't have a case on
18 something similar, you just have a case in general.
19 MR. SHORE: We have cases that we have cited
20 where we talk about on the estoppel on the fact side.
21 THE COURT: In the general fact side or in
22 this type of a fight where it interprets an agreement,
23 you have a case on that?
24 MR. SHORE: We cited, I believe there is a
25 1930 First Department case.

1 THE COURT: Just after I was born. Go ahead.
2 MR. SHORE: If you look at Page 18 and 19 of
3 our reply brief.
4 THE COURT: See, I didn't read it carefully.
5 Don't think that I made up my mind because I didn't,
6 you know, and I didn't go into what purchases
7 shareholders notices, those elections mean, so I didn't
8 make up my mind in any way, shape or form except that,
9 you know, I just feel that I don't know how it was
10 supposed to work if --
11 MR. SHORE: The answer is they didn't think
12 about it and Mr. Guttenberg suggests because we didn't
13 think about it, it's not in the agreement, then let's
14 do a bidding. Whoever bids or whoever is willing to
15 pay the highest price because one of the concepts in
16 the agreement was it was going to be fair purchase
17 price, that somebody wasn't going to get it at a
18 bargain basement price.
19 THE COURT: Why would they get a bargain
20 basement price going through an appraisal process, what
21 is Mr. Guttenberg talking about?
22 MR. SHORE: He seemed to think if the
23 appraisal process was followed, and we believe it too,
24 that the price will be lower than the market and the
25 real value of the price.

1 THE COURT: But that's if anybody elects. It
2 seems like you get it a lowball advantage if you elect
3 first. That I don't see.
4 MR. SHORE: I am sorry?
5 THE COURT: Where is the lowball advantage to
6 elect first?
7 MR. SHORE: Well, the concept is that because
8 the appraisal process will result in whoever the
9 purchaser in getting it in at a slightly lower price
10 than market, then therefore --
11 THE COURT: I got you. You said 18, 19, I am
12 on it. What's your name?
13 MR. MCCRACKEN: Mr. McCracken.
14 THE COURT: Do you want to tell -- we're on
15 18, 19 on the cross-motion.
16 MR. MCCRACKEN: Yes.
17 THE COURT: I don't see cases.
18 MR. MCCRACKEN: The reply --
19 THE COURT: Hang on.
20 MR. MCCRACKEN: -- submitted last week.
21 THE COURT: I will tell you what it starts
22 out saying. On Page -- there's no page. On Page 1, it
23 starts off pages submitted, this reply memorandum?
24 MR. MCCRACKEN: Yes, Your Honor.
25 THE COURT: 18 19 on it.

1 MR. SHORE: Correct, Your Honor.
2 THE COURT: Don't worry, I will hear from
3 you.
4 MR. SHORE: Your Honor, Your Honor, we all
5 believe, as did Mr. Guttenberg.
6 THE COURT: Show me, show me, show me. I am
7 now on Page 19.
8 MR. SHORE: Starting where it says Nassau
9 Trust on the bottom of Page 18, Nassau Trust versus
10 Montrose, which is one of the cites, it's talking about
11 the --
12 THE COURT: What does it say? What is it
13 about?
14 MR. SHORE: It's talking about equitable
15 estoppel. You see there is a quote from the case.
16 THE COURT: It's talking about -- what's the
17 case about?
18 MR. SHORE: The interest of fairness to
19 prevent --
20 THE COURT: That's general rules. What's the
21 case about?
22 MR. SHORE: The doctrine exists to prevent
23 unfairness, then --
24 THE COURT: Counsel, I understand equity and
25 I know about the document, I know about fairness, I

1 even know about unfairness.
2 MR. SHORE: On the next page, there are
3 additional cases.
4 THE COURT: I need the fact pattern that's
5 similar to yours. That could sort of help me. I don't
6 need the general proposition. I know the general
7 proposition.
8 MR. SHORE: General proposition deals with
9 facts and we argue that the statement that this was the
10 intent by --
11 THE COURT: Let's say he was wrong and --
12 give me a second. Let's say after I read it, okay,
13 because I am not quite sure, I did see -- I did take
14 notice of the point that you made, purchases, notices,
15 even I mentioned those, whatever, you know I did take
16 mention of it.
17 The question is let's say at the end of the
18 day I read it and it's not ambiguous, okay, let's say
19 that happens, okay, which hadn't happened because I
20 don't know, right now I haven't made a decision, I
21 haven't -- what I'm going to do is I'm going to
22 actually copy this and copy Mr. Guttenberg's email and
23 I am going to take it home, I am going to study it for
24 hours to try to figure out --
25 MR. SHORE: Would you like an extra copy?

1 THE COURT: That's what I am going to be
2 doing, then I am going to give it to someone to
3 research. Let's say at the end of the day I find that
4 it's not that, it's not ambiguous, so then what he said
5 is immaterial, he said I drafted the agreement, so, you
6 know he is going to say that anyways. What does it
7 make a difference? Am I correct? Would it be a fact?
8 There is not one thing that's ambiguous, could you have
9 relied on it?
10 MR. SHORE: Your Honor, I think when you read
11 the agreement that --
12 THE COURT: I don't need to come to the
13 estoppel if I find it ambiguous. If I don't find it
14 ambiguous, can I come to estoppel, that's my question?
15 MR. SHORE: Your Honor, I will concede if you
16 find the agreement is clear.
17 THE COURT: I don't need the argument. If I
18 find that it's ambiguous, I don't need estoppel. If I
19 find it's not ambiguous, estoppel won't help, right?
20 MR. SHORE: That's where I disagree. If you
21 find the agreement --
22 THE COURT: Is unambiguous, okay, then it's
23 not relating to a fact, the fact is immaterial, am I
24 not correct?
25 MR. SHORE: I would submit that because

1 Mr. Guttenberg is saying that from a factual --
2 THE COURT: But I do think it's unfair,
3 though, you're relying on his interpretation of the
4 agreement, you know, it's going to be -- you could sit
5 and wait, you know.
6 MR. SHORE: Your Honor, you were there, you
7 heard me say we know they're going to serve when we
8 walk out. It's not as though we hadn't anticipated it
9 and given the fact statements of the intention of the
10 parties, we said, okay, both sides have ten days, we
11 relied on that. I believe we had a right to rely on
12 that and that's why I believe that the estoppel
13 argument is appropriate, particularly since --
14 THE COURT: Are you finished?
15 MR. SHORE: The other part of the equitable
16 argument is that the concept was a fair price was to be
17 arrived at. I think Mr. Guttenberg agreed and we
18 believe that the appraisal process will end up with --
19 THE COURT: What are you suggesting, is there
20 another way to do it?
21 MR. SHORE: I think that the way that both
22 sides get the best price if there is a bidding, if they
23 both --
24 THE COURT: Bidding by who?
25 MR. SHORE: Pazer and Mintzes and whoever

1 bids the most gets the property.
2 THE COURT: Okay, I hear you. I think I gave
3 you enough time, but I am offering to both of you, if
4 you feel when you go home and you're thrashing at night
5 because you could have made an argument, didn't make
6 it, then you could call me on a conference call, I will
7 give you an hour to make it, okay?
8 MS. HAGEMEIER: Your Honor, can I just have
9 two minutes, two little points?
10 THE COURT: But I sat him down so I could
11 talk to you.
12 MS. HAGEMEIER: 8.2 (b) where it talks about
13 purchasing shareholders and purchase notices plural.
14 THE COURT: Could you wait a minute while I
15 get there.
16 MS. HAGEMEIER: Page 12.
17 THE COURT: G.
18 MS. HAGEMEIER: There is -- no ambiguity is
19 presented by the use of the words purchasing
20 shareholders and purchase notices because this
21 provision applies to the entirety of section 8.2 (a)
22 and the beginning of section 8.2 (a) applies to where
23 there is a notice of intention to sell that's delivered
24 to the other shareholders and those other shareholders
25 may serve purchase notice, therefore this provision is

1 not rendered meaningless just because only one purchase
2 notice can be served in a deadlock.
3 THE COURT: He was talking on the phone. Can
4 you start again?
5 MS. HAGEMEIER: 8.2 (b) does not present an
6 ambiguity because it applies, it flows from 8.2 (a),
7 the beginning of which talks about when one shareholder
8 gives notice of selling shares and the other
9 shareholders can serve purchase notice for the offered
10 shares which 8.2 (b) refers to.
11 If any purchasing shareholders deliver
12 purchase notices to purchase some or all of the offered
13 shares. Offered shares is not a concept when you have
14 a deadlock, offered shares is a concept when you have
15 notice of intention to sell, in which situation there
16 could be multiple shareholders serving purchase
17 notices.
18 THE COURT: Don't get to the second point
19 yet, okay? You're referring back to (a) when you're
20 interpreting (b). Which parts of (a)?
21 MS. HAGEMEIER: The beginning of (a).
22 THE COURT: Let me read it, okay. Let's go
23 back to (b). If any purchasing shareholders, referring
24 to --
25 MS. HAGEMEIER: That's referring to the other

1 shareholders that got the notice of intention to sell.
2 THE COURT: Right.
3 MS. HAGEMEIER: Not -- it's not in the
4 deadlock situation. They argued in their brief this
5 provision is rendered meaningless unless you could have
6 multiple purchase notices after deadlock, but that's
7 not true because it applies in the circumstance where
8 there has been a notice of intention to sell also. So,
9 in that situation you do --
10 THE COURT: But it's not entirely correct
11 because it says in addition if any deadlock exists and
12 that basically now we're not dealing with part one of
13 it, and then it says --
14 MS. HAGEMEIER: That's true.
15 THE COURT: You go to the end and it says in
16 which event the shareholders shall proceed under
17 section 8.2 (b) that refers also to the deadlock
18 situation.
19 MS. HAGEMEIER: That's true, but in the
20 deadlock situation, it doesn't mean that you have to
21 have multiple purchasing shareholders, and note that it
22 also says both the selling shareholder, singular and
23 purchasing shareholders plural, shall be irrefutably
24 obligated to sell and buy if it contemplated serving
25 multiple purchase notices after deadlock, it would have

1 had to say selling shareholders also because they would
2 both be selling shareholders and they would both be
3 purchasing shareholders.
4 I know that we're closing and everything, I
5 just have to say on the estoppel point, if anything
6 Mr. Guttenberg said in his email can be regarded as a
7 statement of fact rather than a legal argument, and I
8 dispute that it can be, then it is still not a basis
9 for equitable estoppel because Ms. Pazer had equal
10 access to these facts.
11 She was sitting in at the drafting session
12 too and she could judge for herself what she thought
13 the fact was and she was not entitled to rely on any
14 statement of fact about the drafting of the agreement.
15 She was as involved as anybody else was. She was
16 sitting right there at the table.
17 Now, I mean, Your Honor, you said before that
18 you are gonna take this home, you are gonna take the
19 agreement, and you are going to take Mr. Guttenberg's
20 email and read them. I know you're not going to read
21 them together because I know, you know, you have to
22 read the agreement by itself and that Mr. Guttenberg's
23 email cannot be considered either to create an
24 ambiguity or an aid of interpretation. You have to
25 first determine whether there is an ambiguity in the

1 agreement itself, and I submit that there is no
2 ambiguity.
3 THE COURT: I will agree with you on that,
4 but I will also tell you, basically, you know, just as
5 all the lawyers here are good lawyers, Mr. Guttenberg
6 is also a good lawyer, and I want to see if he creates
7 an ambiguity in his email of the agreement, and that's
8 why I am reading the agreement with that intent to see
9 if he creates an ambiguity in my mind in the agreement
10 because he is taking a very absolutist position in that
11 email. That's all I will read the email for. I think
12 agreed if it's not -- if it's not -- if it's
13 unequivocally unambiguous, I don't think the estoppel
14 argument works. You understand what I am saying?
15 You want to say anything, Ms. Hagemeier?
16 It's the closing.
17 MR. SHORE: Your Honor, I would ask maybe we
18 could set a time where we can finish the argument. You
19 mentioned a phone call.
20 THE COURT: You could if you want to, I have
21 no problem. If you think of an argument that you
22 didn't make because, you know, there's a lot of time
23 pressures when you have to end 4:30 on the button,
24 okay, that you can make it.
25 Yes?

1 MR. MINTZ: If you do have phone call, can
2 Mr. Guttenberg participate then?
3 THE COURT: Yes.
4 MR. SHORE: Listen, not participate.
5 THE COURT: Maybe the only reason --
6 MR. MINTZ: Not just listen, but participate.
7 MR. SHORE: Your Honor, I have a problem with
8 his actively participating in this case without making
9 a motion to be admitted.
10 THE COURT: You know what, I am here at the
11 tail end here and the clerk said I have to leave and
12 the officers and the court reporter, so we won't fight
13 about that. We can talk about it on the phone and if
14 that's how I feel --
15 MS. HAGEMEIER: Your Honor, I don't
16 understand why we have to argue --
17 THE COURT: He doesn't see it and I don't see
18 it and you don't see it.
19 MS. HAGEMEIER: And, meanwhile, the company
20 is paralyzed.
21 THE COURT: Counselor, this is in
22 conjunction -- I am not sitting back and not adjourning
23 the case, I will be working on this case maybe even
24 tonight. I mean, not that I am going to be doing the
25 major heavy lifting reading all of this, but what I am

1 going to be reading is the agreement and Mr. Guttenberg
2 thinks -- and I agree with you Mr. Guttenberg can't
3 create an ambiguity if there isn't any, but he can
4 actually convince me there may be an ambiguity in the
5 contract based on his argument, okay, but, yes, I am
6 not I am doing both.
7 MS. HAGEMEIER: Just procedurally, I am not
8 clear.
9 THE COURT: Procedurally it's called decision
10 reserved. I am done.
11 MR. SHORE: I would like to take advantage of
12 that and I am happy to --
13 THE COURT: Let's not do it now. I don't
14 have the time. You want to call me with Ms. Hagemeier,
15 fine, but I can't do it now.
16 * * * *
17 It is hereby certified that the foregoing is
a true and accurate transcript of the stenographic
18 record.
19 DEBRA SMITH,
20 Official Court Reporter
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