SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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.	Index No. 502127/2013

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT BY PLAINTIFFS AND COUNTERCLAIM-DEFENDANTS

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Dated: July 15, 2013
New York, New York

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Plaintiffs and Counterclaim-Defendants Howard Mintz ("Howard") and Susan Mintz-Bello ("Susan," together with Howard, "Plaintiffs"), 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"),[1] respectfully submit this Memorandum of Law and the accompanying Statement of Undisputed Material Facts Pursuant to Commercial Division Rule 19-a ("Rule 19-a Statement"), the Affidavit of Howard Mintz, sworn to July 15, 2013, and exhibits thereto ("Mintz Aff."), and the Affidavit of Urgency, sworn to July 15, 2013, in support of their motion for partial summary judgment in their favor on the 14th, 15th, 16th and 17th Causes of Action in the Verified Complaint (the "Complaint") and dismissing the First and Second Counterclaims in the Answer with Counterclaims (the "Answer" or the "Counterclaims"), together with such other and further relief as the Court deems just and proper.

PRELIMINARY STATEMEMENT

The Mintz Trusts and defendant/counterclaim-plaintiff Rochelle Pazer ("Pazer") co-own Astoria Holding Corp. ("Astoria" or the "Company"), and Astoria owns the Georgetowne Shopping Center (the "Center"), in Brooklyn, New York. At issue on this motion are Plaintiffs' claims and Pazer's counterclaims to determine the question whether Pazer is obligated to sell her Astoria shares (the "Pazer Shares") to the Mintz Trusts. All parties agree that this determination is urgently needed. The two owner groups, each with equal voting power, are so intractably locked in conflict that the Company is paralyzed and the Center is badly suffering and at risk of truly catastrophic harm. Until the rightful buyer is declared, the Company cannot function.

Plaintiffs are seeking summary judgment on the three causes of action in their Verified Complaint seeking judgment declaring that Pazer is obligated to sell them her interest in Astoria, based on three separate theories, and one cause of action seeking an order directing Pazer to

[1] To the extent Pazer's assertion of the Counterclaims against the Mintz Trusts per se is proper, this motion is also made on behalf of the Mintz Trusts.

specifically perform that obligation. As to these causes of action, there are no disputed issues of fact for trial, and thus summary judgment in Plaintiffs' favor is warranted.

First, Pazer offered to sell the Mintz Trusts all of the Pazer Shares in Astoria at the price determined pursuant to the Company's Shareholders' Agreement, and the Mintz Trusts accepted that offer, giving rise to a binding contract on those terms.

Second, Pazer's email offering to sell the Pazer Shares to the Mintz Trusts constituted a "Notice of Intention to Sell" under to the Company's Shareholders' Agreement, which triggered the Mintz Trusts' "Right of First Offer." The Mintz Trusts exercised that right by responding to Pazer within the prescribed 10-day period with a "Purchase Notice." As a result, Pazer became irrevocably obligated to sell, and the Mintz Trusts became irrevocably obligated to buy, all of the Pazer Shares at the price determined pursuant to the Shareholders' Agreement.

Third, although entirely superfluous in light of the existing buy-sell obligations, the Mintz Trusts attended mediation insisted upon by Pazer based on the Shareholders' Agreement's "Deadlock" provisions, that mediation failed, and the Mintz Trusts immediately thereafter served Pazer with a Purchase Notice. Not only did service of that Purchase Notice create irrevocable obligations for Pazer to sell and the Mintz Trusts to buy, but it also extinguished any right Pazer may have had to purchase the Mintz Trusts' shares. The clear and unambiguous language of the Shareholders' Agreement permits no conclusion other than that only one, and only the first Purchase Notice to be served following failed Deadlock mediation is effective.

Indeed, Pazer just recently enforced the virtually identical Shareholders' Agreement of the parties' other co-owned corporation, Avenue K Corp., to exactly this effect, based on its identical clear and unambiguous terms. Following failed Deadlock mediation of the Avenue K Board of Directors, Pazer beat the Mintz Trusts to the punch and served her Purchase Notice for the Mintz Shares in Avenue K before the Mintz Trusts could serve her with theirs. Pazer had no

problem understanding and asserting the plain meaning of Avenue K's identical provisions then to bar the Mintz Trusts from serving a subsequent Purchase Notice, but now she wants to deprive the Mintz Trusts of the same right to enforce the deal they made with her when they entered into the Astoria Shareholders' Agreement. That's just wrong.

What is even more wrong is the altogether indefensible meaning Pazer now wants to ascribe to the same provision, as set forth in her First Counterclaim. Not only is there absolutely no language in the Shareholders' Agreement to support this construction and thus Pazer's claim for judgment declaring that both shareholder groups may serve Purchase Notices and then the Court must intervene to decide who "wins," but that construction would also squarely contradict the entire purpose of the Deadlock provisions the parties painstakingly drafted to avert precisely such a result. There are no factual disputes precluding dismissal of that counterclaim at this time. Likewise, the Second Counterclaim, which seeks to enjoin the appraisal process for setting the purchase price of the Pazer Shares, should be dismissed in the absence of any likelihood of success or irreparable injury.

THE UNDISPUTED FACTS

Background: the Company, the Center and the Parties to this Action

Astoria is a closely-held corporation located in Brooklyn, New York. Rule 19-a Statement ¶ 7.[2] The Company is a family business that was founded and originally owned by Plaintiffs' father, Max Mintz, who owned approximately 48% of the Company's shares (the "Mintz Shares"), and Pazer's father, Louis Liza Mintz, who owned approximately 52% (the "Pazer Shares"). Id. ¶ 8. Notwithstanding the slight disparity in their equity ownership, Max and Louis shared 50/50 voting power, and this arrangement was memorialized in a 1990 agreement

[2] Evidentiary support for the facts stated herein is referenced in the paragraph(s) of the accompanying Rule 19-a Statement cited therefor, and provided by and annexed to the Mintz Aff..

providing that the Mintz Shares and the Pazer Shares "have equal voting rights (i.e., each of us shall have a 50% vote) in all matters concerning Astoria Holding Corporation." Id.¶ 9.

The Center, comprised of approximately 140,000 square feet of leased and leasable commercial real estate, is now Astoria's sole asset. Id. ¶ 10. Until February 2012, Astoria also owned a company called New Chalet, Inc., which in turn owned a residential development in Lake Mohegan, New York. Id. ¶ 11. Max and Louis – and then the Mintz Trusts and Pazer – previously owned a third company, Avenue K Corp. ("Avenue K"). Id. ¶ 12. Pazer recently bought all of the Mintz Trusts' shares in Avenue K after exercising the "Right of First Offer" that arose under Avenue K's Shareholders' Agreement after mediation to resolve deadlock among the Avenue K Directors failed. Id. ¶ 13.

Max owned the Mintz Shares, was the President and a Director of the Company and managed the day-to-day affairs of the Company and the Center until his death in 2003. Id. ¶ 14. The Mintz Shares passed into the Mintz Trusts for the lifetime benefit of Max's wife, Hilda, and of Howard and Susan as residual beneficiaries. Id. ¶ 15. After Hilda died in February 2011, Howard and Susan became the Mintz Trusts' trustees and sole beneficiaries. Id. ¶ 16.

Based on the 1990 Agreement, when Max died, Pazer became the Company's President and assumed the management of the Center. Id. ¶ 18. What happened next in and to the Company, the Center and the Mintz Trusts' rights and interests is largely disputed, and is the subject of many of the claims and counterclaims herein that are not at issue on this motion. But the only claims now at issue are those concerning Pazer's present obligation to sell the Pazer Shares in Astoria to the Mintz Trusts. As to those claims, the material facts are undisputed.

The 2011 Shareholders' Litigation

Between 2003 and 2011, sharp differences arose between the Mintz Trusts and Pazer concerning the parties' respective rights in the Company and Avenue K and their direction,

management and operation. Id. ¶ 19. These differences gave rise to Pazer's commencement of an action to dissolve the Company and Avenue K in May 2011 (the "2011 Shareholders' Litigation"). Id. ¶ 20. The Mintz Trusts agreed that they and Pazer were hopelessly deadlocked, and that the two companies should be dissolved, id. ¶ 21, but after extensive Court-supervised negotiation, attempting to salvage their family legacy, the Mintz Trusts and Pazer settled by negotiating and entering into certain written, virtually identical, Shareholders' Agreements for the Company and Avenue K (the "Shareholders' Agreements," and each a "Shareholders' Agreement"). Id. ¶ 22. The Shareholders' Agreements among other things set forth detailed procedures that must be followed if a shareholder desires to sell his, her or its shares as well as a detailed, multi-step, buy-out process to be followed in the event of future Board "Deadlock," all clearly designed and intended to avoid further litigation between the parties over terminating their co-ownership.

The Company's Shareholders' Agreement

Article 8 of the Shareholders' Agreements, governing the sale of shares by a shareholder, provides that:

> If a Shareholder (a "Selling Shareholder") desires to sell all or any portion of his or her Shares (an "Intention to Sell"), then other Shareholders shall have an option to purchase all (but not less than all) of such Offered Shares (the "Offered Shares") at the Purchase Price and on the terms and conditions hereinafter defined (the "Option").
>
> (a) The Selling Shareholder shall deliver a written notice (the "Notice") to the other Shareholders of his or her Intention to Sell, offering to sell the Offered Shares to the other Shareholders. The other Shareholders may elect by written notice (the "Purchase Notice") to the Selling Shareholder delivered within thirty (30) calendar days after receipt of the Notice to purchase all or any portion of the Offered Shares ("Purchase Election"); . . . .

> (b) If any Purchasing Shareholders deliver Purchase Notice(s) to purchase some or all of the Offered Shares, then those elections to purchase shall be irrevocable, regardless of the amount of the Purchase Price later determined for the Offered Shares pursuant to subsection (c) below. Both the Selling Shareholder and the purchasing Shareholders shall be irrevocably obligated to sell and buy the Offered Shares at the Purchase Price specified below, regardless of what that Purchase Price is determined to be, and failure to either sell or buy the Offered Shares at the Purchase Price shall be a breach of contract allowing for full breach of contract monetary damages and/or the remedy of specific performance by the non-breaching party(ies).

Id. ¶ 24.

Pursuant to § 8.2(c), the "Purchase Price" of the Offered Shares is to be determined in an appraisal process whereby "Qualified Appraisers" selected by each of the Selling Shareholder and the Purchasing Shareholders determine a Purchase Price; if those determinations differ by 10% or less, the Purchase Price is their average; if the determinations vary by more than 10%, the Qualified Appraisers must appoint a mutually-acceptable third Qualified Appraiser, who "shall be empowered only to select which of the two Determinations is closest to such third Qualified Appraiser's Determination," which becomes "final, binding and conclusive" on the Shareholders as the Purchase Price. Id. ¶ 25.

Section 4.8 of the Shareholders' Agreement relates to "Deadlock," defined as the inability of the Directors to reach unanimous decision as to "Disputed Matter" within a designated timeframe, and prescribes a multi-step process that must be followed if Deadlock is declared. Id. ¶ 26. The Directors must first to attempt to resolve the Deadlock in mediation. Id. ¶ 27. If that fails, § 4.8.3 provides that "the Right of First Offer in accordance with Section 8.2 shall apply in accordance with the procedure set forth in the last sentence of Section 8.2(a)," which provides:

> If any Deadlock exists which has not been resolved pursuant to Section 4.8.2 hereof, then either the Mintz Group or the Pazer Group shall have the right to give the other Shareholder Group a Purchase Notice as to all of the Shares owned by the other Shareholder Group within ten (10) business days after such failure to resolve, in which event the Shareholders shall proceed under section 8.2(b), (c) and (d) below.

Id. ¶ 28. As noted above, pursuant to § 8.2(b), service of a Purchase Notice creates irrevocable and enforceable buy-sell obligations. Id. ¶ 29. Section 4.8.3 provides that "[i]f neither shareholder elects to purchase the Shares of the other in accordance with such procedure, then the [Company] shall diligently take steps to sell its assets (for the best price obtainable, after reasonable marketing), wind up its affairs and dissolve, and distribute the net sales proceeds to the Shareholders pro rata in accordance with their then Percentage Interest(s) in the respective corporation." Id. ¶ 30.

The Shareholders' Agreement expressly provides that it, the Company's Bylaws and the Company's Certificate of Incorporation:

> **constitute the entire agreement of the Shareholders, and supersedes all prior written and oral agreements, understandings and negotiations by or among the Shareholders or the Corporation and/or other prior shareholders of the Corporation**, including without limitation the 1990 Agreement, concerning the ownership of shares of stock in the Corporation and all such other prior agreements are hereby canceled and shall be of no force and effect.

Id. ¶ 31 (emphasis added). And § 2.1.6 provides that:

> Each of the Shareholders agree to take such action(s) as may be necessary to... ensure that the certificate of incorporation and bylaws of the Corporation and New Chalet as in effect immediately following the date hereof **do not, at any time thereafter, conflict in any respect with the provisions of this Agreement. In the event of any conflict between the certificate of incorporation or bylaws of the Corporation or New Chalet and this Agreement, the terms of this Agreement shall govern and control.**

Id. ¶ 32 (emphasis added). Furthermore, "[e]ach Shareholder acknowledges and agrees that they have had the benefit of their own independent counsel in connection with the negotiation and drafting of this Agreement. This Agreement shall be construed without regard to or aid of any presumption, rule or canon requiring construction against the party drawing this Agreement." Id. ¶ 33 .

Pazer's Accepted Offer to Sell the Pazer Shares to the Mintz Trusts

In August 2012, Pazer declared Deadlock and notified the Mintz Trusts that she was willing to forego mediation and proceed directly either to selling the Pazer Shares to the Mintz Trusts or selling the Company on the open market. By email dated August 27, 2012, Pazer advised the Mintz Trusts that:

> It appears that we're at a deadlock on a number of things. We can follow the procedure set forth in our Shareholders' Agreement or expedite that process by agreeing to sell Georgetown now and retaining a mutually acceptable broker to market and sell the property. Of course, if you're prepared to buy me out let me know and we can retain appraisers and proceed that way. Please let me know your thoughts. Suffice it to say, I disagree with your position with respect to distributions particularly since you advised that repairs of approximately $850,000 are required and will more fully respond to your recent email on the subject if you are not prepared either to sell the property or buy my interest in it. Thanks for your consideration of this proposal.

Id. ¶¶ 34-35

The Mintz Trusts accepted Pazer's offer to forego mediation and purchase the Pazer Shares, stating in an email to Pazer on August 29, 2012 that:

> Susan and I [Howard] are definitely prepared to and desire to buy you out of Astoria (that is, buy all your Astoria shares) and proceed to retain appraisers and determine the valuation/buyout price under the Astoria Shareholders' Agreement, as you offer below. We therefore accept your offer to sell us your Astoria shares under the Shareholders

> Agreement due to Deadlock, and to proceed with the appraisal process to determine the purchase price under Shareholder Agreement section 8.2.

Id. ¶¶ 37-38.

Having thus accepted Pazer's offer, the Mintz Trusts asked Pazer to sign an "Acknowledgement and Waiver" memorializing the terms of their agreement in a single document. Id. ¶ 41. Pazer refused and tried to renegotiate (reiterating, notably, her willingness to sell her Company shares to Mintz), but the Mintz Trusts declined, advised that they would stick with the deal they had already made with Pazer, and asked Pazer to identify her Qualified Appraiser. Id. ¶¶ 42-43. Pazer continued to deny the existence of a binding agreement. Id. ¶ 44.

The Mintz Trusts' Purchase Notice After Failed Deadlock Mediation

Reneging on the parties' agreement to "expedite that process [in the Shareholders' Agreement]" and skip directly to retaining appraisers for the valuation of the Pazer Shares, Pazer then insisted on mediation to attempt to resolve Deadlock. Id. ¶45. Explaining that any such mediation was academic and moot in light of the parties' binding agreement for the sale of the Pazer Shares to the Mintz Trusts, the Mintz Trusts agreed to attend, reserving all rights, including their existing right to purchase the Pazer Shares. Id. ¶ 46.

The mediation took place on September 27, 2012, but the Directors were unable to resolve the Deadlock. Id. ¶ 47. Immediately following the conclusion of the failed mediation, the Mintz Trusts served Pazer and all notice parties under the Shareholders' Agreement with a Purchase Notice dated September 27, 2012, advising that:

> this letter serves as notice (the "Purchase Notice") pursuant to sections 4.8.3 and 8.2(a) of the Shareholders' Agreement of the election by the Mintz Group (as defined in the Shareholders' Agreement) to purchase all of the Shares in the Company owned by the Pazer Group (as defined in the Shareholders' Agreement) predicated on the failure to resolve a Deadlock regarding major decisions facing the Company.

Id. ¶ 48. This Purchase Notice was served with a cover statement expressly stating such notice was given without prejudice to, and expressly reserving, the Mintz Trusts' claim that there was already a binding legal agreement for Pazer to sell the Mintz Trusts all of the Pazer Shares. Id. ¶ 49.

Based on the clear terms and operation of the Shareholders' Agreement, the Mintz Trusts' service of the Purchase Notice necessarily extinguished any right Pazer may have had to elect to purchase the Mintz Shares. As Pazer advised the Mintz Trusts of the virtually identical Deadlock/buy-sell provisions in the Avenue K Shareholders' Agreement, after she served a Purchase Notice for the Mintz Trusts' shares in Avenue K following failed Deadlock mediation:

> We do not read the Shareholders' Agreement to afford the Mintz Group an opportunity to purchase the Pazer's stock. As you know after the inability of the directors to resolve a "deadlock" under both paragraphs 4.8.1 and 4.8.2 of the Shareholders' Agreement, Shelley exercised her right to purchase the Mintz Group shares. Under paragraph 8.2.b that election became irrevocable and a process started to determine the price that would be paid.

Id. ¶ 50.

Although they may have wanted to purchase the Pazer shares in Avenue K, the Mintz Trusts ultimately concluded that, under the clear and unambiguous terms of the Avenue K Shareholders' Agreement, their right to elect to purchase the Pazer's shares in Avenue K after failed mediation had been extinguished by Pazer's first service of a Purchase Notice for the Mintz Trusts' Avenue K shares. Id. ¶ 51. Accordingly, the Mintz Trusts did not serve a Purchase Notice for Pazer's Avenue K shares, the Purchase Price of the Mintz Trusts' shares was determined in the appraisal process under the Shareholders' Agreement and the sale of the Mintz Shares in Avenue K to Pazer closed on April 9, 2013. Id. ¶¶ 52-54.

Anomalously, however, Pazer did serve a purported Purchase Notice on the Mintz Trusts for the Mintz Shares in Astoria on or about October 5, 2012. Id. ¶ 55. The Mintz Trusts advised Pazer that this purported Purchase Notice was invalid; not only was Pazer already bound to sell

the Pazer Shares in Astoria to the Mintz Trusts prior to the Deadlock mediation, but furthermore, "once the Mintz Group delivered its Purchase Notice to Pazer on September 27, 2012 after failure of Deadlock mediation and exercised its right to buy Pazer's shares, Pazer had no further right to purchase the Mintz Group's shares, and an irrevocable process for the Mintz Group to purchase Ms. Pazer's shares commenced under the Shareholders' Agreement." Id. ¶¶ 56-57. The Mintz Trusts noted, furthermore, that "Ms. Pazer's purported 'Purchase Notice' is demonstrably disingenuous and should be disregarded entirely, given her multiple written statements of desire and intention to sell her Astoria shares, not purchase the Mintz Group's Astoria shares." Id.¶ 58.

The Relevant Claims and Counterclaims and this Motion

The 14th, 15th and 16th Causes of Action in the Verified Complaint seek judgment declaring that Pazer is obligated to sell the Pazer Shares to the Mintz Trusts based, respectively, on common law contract principles, the provisions of the Shareholders' Agreement governing the sale of Astoria shares by a shareholder and the provisions of the Shareholders' Agreement entitling one (and only one) shareholder group to elect to purchase the shares of the other after failed Deadlock mediation. The 17th Cause of Action seeks an order directing Pazer's specific performance of that obligation to remedy her breach. Because there are no genuine issues of material fact precluding judgment as a matter of law on these causes of action, summary judgment should be awarded thereon in favor of the Mintz Trusts, and the corresponding declaratory judgments sought should be entered.

Plaintiffs also seek summary judgment dismissing the First Counterclaim, in which Pazer seeks judgment declaring that the Shareholders' Agreement unambiguously permits both Shareholder Groups to serve Purchase Notices electing to buy out the shares of the other after failed Deadlock mediation and that, if they do, the Shareholder Group bidding the highest price

gets to buy the other out or the Company must be sold on the open market. The clear and unambiguous terms of the Shareholders' Agreement mandate dismissal of this counterclaim. The Second Counterclaim, seeking to enjoin the continuation of the appraisal process to determine the Purchase Price of the Pazer Shares, also must be dismissed on summary judgment. Pazer cannot prevail on the merits and will suffer no irreparable harm if the injunction is not granted.

ARGUMENT

POINT I

PAZER IS OBLIGATED TO SELL THE PAZER SHARES TO THE MINTZ TRUSTS BASED ON COMMON LAW CONTRACT PRINCIPLES

Pazer is obligated to sell the Pazer Shares to the Mintz Trusts based on common law contract principles. Pazer's August 27, 2012 email to the Mintz Trusts constituted an offer to sell all of the Pazer Shares to the Mintz Trusts at a price determined in the appraisal process provided in the Shareholders' Agreement. The Mintz Trusts' August 29, 2012 email constituted an acceptance of that offer. This offer and acceptance gave rise to a contract. There is no genuine issue of material fact precluding judgment as a matter of law for Plaintiffs' favor on this claim, and therefore pursuant to the well-known legal standard, summary judgment should be awarded to them on the 14th Cause of Action. See, e.g., Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v City of N.Y., 49 N.Y.2d 557, 562 (1980).

A. The Law: A Contract Is Formed by an Offer and Acceptance

"A contract is formed by an offer and acceptance," Matter of Sherry, 222 A.D.2d 681, 682 (2d Dep't 1995), otherwise stated as a manifestation of "mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." In the Matter of Express Indus. & Terminal Corp. v. New York State Dep't of Transp., 93 N.Y.2d 584, 589 (1999). The test is objective; the manifestation of intention to be bound to such material terms, and not the "actual or real intention" controls this determination. See Four Seasons Hotels Ltd.

v. Vinnik, 127 A.D.2d 310 (1st Dep't 1987), quoting 21 N.Y. Jur. 2d, Contracts, § 29; Maxwell v. State Farm Mut. Auto. Ins. Co., 92 A.D.2d 1049, 1050 ("[t]hat defendant may have actually intended something different is of no consequence, for the court must determine 'what is the intention of the parties as derived from the language employed.'") (3d Dep't 1983).

The first step is to determine if there is an "offer" that is sufficiently definite as to the essential material terms "such that its unequivocal acceptance will give rise to an enforceable contract." In the Matter of Express Indus. & Terminal Corp., 93 N.Y.2d at 589; see Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109 (1981). Even if not fixed with absolute certainty, a material term is sufficiently definite if it can be determined by reference to an objective extrinsic standard without the need for new expressions by the parties. Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 74 N.Y.2d 475, 483 (1989) (price term definite where agreement provided price was to be fixed by third person, "without the need for further expressions by the parties"); see Joseph Martin, Jr., Delicatessen, Inc., 52 N.Y.2d at 110.

B. Pazer's August 27 Email Was an Offer

In her August 27 email, Pazer declared that the parties were deadlocked and offered the Mintz Trusts one of three clear, self-contained alternatives: (1) proceed with Deadlock mediation pursuant to "the procedure set forth in our Shareholders' Agreement;" (2) "expedite that process" by proceeding directly to the sale of the entire Company on the open market; or (iii) "expedite that process" by proceeding directly to the Mintz Trusts buying Pazer out, "retain[ing] appraisers and proceed[ing] that way." Unequivocally conveying that any of these options were agreeable to her, Pazer simply asked the Mintz Trusts to "let [her] know." She further advised the Mintz Trusts that she would not respond to the Mintz Trusts' recent email regarding shareholder distributions and needed repairs unless "you are not prepared either to sell the property or buy my interest in it." Rule 19-a Statement ¶ 35.

1. The Material Terms of Pazer's Offer Were Definite

The essential material terms of Pazer's offer to sell the Pazer Shares to the Mintz Trusts – namely, the price and quantity – were definite. The quantity Pazer offered for sale was **all** of the Pazer Shares, as there is simply no other possible meaning for the phrase "buy me out." That the offer was to sell all of the Pazer Shares is confirmed a few lines down where Pazer asks if the Mintz Trusts would "buy my interest in [the Company]." Id.

Pazer's email was also definite with respect to the price of the Pazer Shares. Pazer stated that, if the Mintz Trusts agreed to "expedite" the process in the Shareholders' Agreement and proceed directly to buying her out, then the parties can "retain appraisers and proceed that way." Id. Pazer's reference to retaining appraisers is unequivocally referable to the valuation procedures in the Shareholders' Agreement, because immediately before it, Pazer pronounced Deadlock and stated that the parties could either "follow the procedure set forth in our Shareholders' Agreement" or "expedite that process" by either selling the Company on the open market or by the Mintz Trusts buying her out. "That process" clearly referred "the procedure set forth in our Shareholders' Agreement," and by offering to "expedite that process," rather than some other process, Pazer necessarily adopted it, as expedited to eliminate only the steps leading up to a Mintz buy-out or open market sale.[3] Accordingly, when Pazer said that they could "retain[ing] appraisers and proceed[ing] that way" if the Mintz Trusts wished to buy her out, she was necessarily referring to the appraisal process in the Shareholders' Agreement (a process that had

[3] Pazer's suggestion that the Shareholders' Agreement lacks sufficient definiteness regarding "deadlines or time periods in which to complete the appraisal process," Counterclaims ¶ 73, is without merit because where no time for performance is specified, the law implies a "reasonable" time. See, e.g., UBS AG v. Highland Cap., 2010 N.Y. Slip Op. 52098 (Sup. Ct. N.Y. Co. Dec. 1, 2010); Four Astoria Realty, 2009 N.Y. Slip Op. 50315 (Sup. Ct. Kings Co.. Feb. 26, 2009). There is also no basis for her suggestion that there should be a term for "determining whether a purported purchaser actually has sufficient funds available to complete a purchase of the Offered Shares or what the penalties are if a party fails to complete the purchase of Offered Shares within a year of submitting a Purchase Notice." Counterclaims ¶ 73. In any event, penalties are prescribed. Negating Pazer's entire exercise, the identical provisions of the Avenue K Shareholders' Provisions were just fully performed successfully to consummation.

already been successfully invoked by Pazer for her purchase of the Mintz Trusts shares in Avenue K, and which the parties were then actively engaged in). Because this is an objective mechanism for setting the price term without the need for new expressions by the parties, the price term of Pazer's offer was sufficiently definite. See Cobble Hill Nursing Home, 74 N.Y.2d at 483.

2. Pazer's Email Was *Not* a Preliminary Agreement or an Invitation to Make an Offer or Engage in Dialogue

Seeking to downplay the import of her email, Pazer contends that she was just "reach[ing] out to Howard and Susan . . . hoping to begin a conversation about resolving these conflicts in a mutually satisfactory way." Counterclaims ¶ 158-59. Besides being disingenuous, Pazer's characterizations are flatly belied by what her August 27 email actually says. Pazer did not invite "dialogue" or anything but an answer from the Mintz, pointedly asking them to "let [her] know" which alternative, if any, they accepted. No material terms were left open with respect to any of those alternatives, as might be the case with a non-binding preliminary agreement.

There was also nothing "informal" or "open-ended" about Pazer's email, as might be the case if Pazer had merely been inviting the Mintz Trusts to make an offer. Pazer declared that the parties were Deadlocked and asked the Mintz Trusts to choose among three alternatives, any of which would be determinative of the questions posed and the parties' rights and obligations going forward. Pazer's was so committed to her offer to sell her interest that Pazer advised that she would not even respond to the Mintz Trusts' email regarding distributions and repairs (i.e., she would not act on her obligations as manager and co-owner of the Company) unless they rejected her offer to sell.

C. The Mintz Trusts Accepted Pazer's Offer

In their August 29 email, the Mintz Trusts wrote Pazer that they "accept your offer to sell us your Astoria shares under the Shareholders' Agreement due to Deadlock and to proceed with the appraisal process to determine the purchase price under Shareholders' Agreement section 8.2." This acceptance was definite and on all fours with the material terms offered by Pazer, and Pazer actually admits as much, asserting that the Mintz Trusts:

> attempted to entrap [her] into an agreement to sell her shares to the Mintzes by 'accepting' Shelley's 'offer' to sell her shares. However, Howard actually made a new, independent offer (or, at best, a counter-offer) – that Shelley sell her interest in Astoria to the Mintzes under Section 8.2(a) of the Shareholders' Agreement but *without* the benefit of the mediation procedures set forth in the Shareholders' Agreement.

Counterclaims ¶ 163 (emphasis in original). What Pazer characterizes as a "new, independent offer" precisely mirrors what Pazer did offer in her August 27 email: to skip the mediation and proceed directly to the Mintz Trusts' buyout of the Pazer Shares at a price determined in an appraisal process pursuant to the Shareholders' Agreement. And what Pazer characterizes as "entrap[ment] is just being bound to the terms of the offer she made. Together, the two emails created a binding contract.

Pazer wrongly tries to cast the "Waiver and Acknowledgment" the Mintz Trusts asked her to sign as a "counteroffer." The Mintz Trusts unconditionally accepted Pazer's offer by stating that they: **"accept your offer below to sell us your Astoria shares under the Shareholders Agreement due to Deadlock**, and to proceed with the appraisal process to determine the purchase price under Shareholder Agreement section 8.2" (emphasis in original). Rule 19-a Statement ¶ 38. That acceptance was not conditioned on or made subject to Pazer's acceptance of any new or different terms, including without limitation Pazer's execution of the

Waiver and Acknowledgment. Rather, the Mintz Trusts simply asked Pazer to sign a document memorializing the terms to which they had already agreed in a single document. At the very most, the Waiver and Acknowledgment merely looked to carrying out the agreement the parties had already made, and "[i]f the acceptance of an offer is initially unconditional, the fact that it is accompanied with a direction or a request looking to the carrying out of its provisions, but which does not limit or restrict the contract, does not render it ineffectual or give it the character of a counteroffer." Valashinas v. Koniuto, 283 App. Div. 13, 17, affd. 308 N.Y. 233 (1954).

POINT II

PAZER'S AUGUST 27 EMAIL WAS A "NOTICE OF INTENTION TO SELL" AND THE MINTZ TRUSTS' AUGUST 29 EMAIL WAS A "PURCHASE NOTICE," GIVING RISE TO IRREVOCABLE BUY-SELL OBLIGATIONS

There is also genuine issue of material fact precluding summary judgment in Plaintiffs' favor on their 15th Cause of Action, seeking judgment declaring that Pazer's August 27 email constituted a "Notice of Intention to Sell" and the Mintz Trusts' August 29 email was a "Purchase Notice" under § 8.2(a) of the Shareholders' Agreement, which gave rise to the irrevocable obligations to sell and to buy the Pazer Shares pursuant to § 8.2(b).

Pursuant to § 8.2(a), a shareholder wishing to sell her shares may not offer to sell the shares to anyone else before first "deliver[ing] a written notice (the "Notice") to the other Shareholders offering to sell the Offered Shares to the other Shareholders, and detailing the number of Offered Shares proposed to be sold by such Selling Shareholder." That is exactly what Pazer's August 27 email did.

Pazer's service of her Notice of Intention to Sell triggered the Mintz Trusts' entitlement to "elect by written notice (the "Purchase Notice") to the Selling Shareholder delivered within thirty (30) calendar days after receipt of the notice to purchase all or any portion of the Offered Shares." Id. That is what the Mintz Trusts did in their August 29 email. Pazer and the Mintz

Trusts thus became irrevocably obligated to sell and buy the Pazer Shares at the Purchase Price determined in the appraisal process provided for in § 8.2(c) of the Shareholders' Agreement.

Pazer argues that her August 27 communication was not a "Notice" because it was sent by email rather than a method specified in the Shareholders' Agreement's Notice provision. See Counterclaims ¶ 160. This argument fails. "Strict compliance with contract notice provisions is not required in commercial contracts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation." Iskalo Elec. Tower LLC v. Stantec Consulting Servs., Inc., 79 A.D.3d 1607, 1607 (4th Dep't 2010); see Fortune Limousine Serv., Inc. v. Nextel Comms., 35 A.D.3d 350, 353 (2d Dep't 2006). The Mintz Trusts received actual notice and suffered no prejudice.[4]

POINT III

PAZER IS IRREVOCABLY OBLIGATED TO SELL THE PAZER SHARES TO THE MINTZ TRUSTS BASED ON THE MINTZ TRUSTS' EXERCISE OF THEIR RIGHT OF FIRST OFFER FOLLOWING FAILED MEDIATION

The clear and unambiguous terms of the Shareholders' Agreement mandate the entry of summary judgment for the Mintz Trusts on their 16th Cause of Action, seeking judgment declaring that Pazer is both irrevocably obligated to sell them the Pazer Shares and precluded from purchasing the Mintz Shares. For the same reason, the Mintz Trusts are also entitled to summary judgment dismissing Pazer's First Counterclaim, in which she seeks judgment declaring that the Shareholders' Agreement permits both shareholder groups to serve Purchase Notices after failed Deadlock mediation, and requires the Court to intervene either to conduct a bidding war between the shareholder groups or to direct the sale of the entire Company on the open

[4] Pazer cannot invoke her own failure to strictly comply with the notice provision to save her from the consequences of her actions. Furthermore, email is the form of transmission the parties have routinely and almost exclusively used for notices and approvals for over a year, including for approval of at least 92 expenditures constituting "Major Decisions" requiring unanimous Board consent, all lease decisions concerning the Center, commitments the parties made to the Court and each other in mediation, and otherwise. Rule 19-a Statement ¶ 59.

market.

A. The Basic Rules of Contract Construction

The construction of a written contract is for the Court to determine. W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). Because best evidence of what parties to a written agreement intended is what they put in their writing, Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002), writings that are clear and complete on their face should be enforced according to their terms, W.W.W. Assocs., 77 N.Y.2d at 160. A court "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 474 (2004), quoting, Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199 (2001). Courts apply this rule with even greater force in construing commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople,[5] where they "should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.'" Id. (quotation omitted).

A contract is unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion,'" Greenfield, 98 N.Y.2d at 569 (quotation omitted); Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, 84 N.Y.2d 430, 437 (1994). A contract may be considered ambiguous only if it is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." New York City OTB Corp. v. Safe Factory Outlet, Inc., 28 A.D.3d 175, 177 (1st Dep't 2006) (emphasis added). "However, mere assertion by a party that contract language means something other than what is

[5] Moreover, §11.5 of the Shareholders' Agreement ("Construction") expressly requires the Court to disregard Pazer's extraordinarily improper insinuation throughout her Counterclaims that Plaintiffs' transactional counsel was the "primary drafter" of the Shareholders' Agreement.

clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact." Id. at 177-78 (emphasis added). The Court many not consider extrinsic evidence "as to what was 'really' intended but unstated or misstated" to create an ambiguity in an otherwise unambiguous agreement. W.W.W. Assocs., 77 N.Y.2d at 162-63; Chimart Assoc. v. Paul, 66 N.Y.2d 570, 572-73 (1986).

Furthermore, where a contract contains a general merger or integration clause such as the one in § 11.10 of the Shareholders' Agreement providing that the agreement represents the entire understanding between the parties, see Rule 19-a Statement ¶ 31, the parol evidence rule bars the introduction of extrinsic evidence to vary, contradict or add to the terms of the writing. See In the Matter of Primex Int'l Corp. v. Wal-Mart Stores, Inc., 89 N.Y.2d 594, 599-600 (1997); WWW Assocs., 77 N.Y.2d at 162.

Based on the clear and unambiguous language of the relevant provisions of the entirely integrated Shareholders' Agreement, the service of the first Purchase Notice following failed Deadlock mediation preempts and precludes the later exercise by the other shareholder group of any right it may have had to serve a Purchase Notice. By contrast, Pazer's contention in her First Counterclaim that the Shareholders' Agreement's clear and unambiguous terms permit both shareholders' groups to serve "dueling" Purchase Notices after failed Deadlock mediation, then requiring Court intervention, is completely baseless and contrary to the contract's actual language.

B. "Either . . . or" Means Only *One* Shareholder Group Can Exercise the Right of First Offer

The only construction permitted by § 8.2(a)'s actual words is that, while it may be either one Shareholder Group or the other Shareholder Group, only one of them can exercise the right to purchase the shares of the other Shareholder Group after failed Deadlock mediation, and that occurs by delivering the first Purchase Notice exercising the Right of First Offer. The provision

(entitled "Right of *First* Offer", of which there obviously can be only one "first"), reads:

> [I]f any Deadlock exists which has not been resolved pursuant to Section 4.8.2 hereof, then ***either*** the Mintz Group ***or*** the Pazer Group shall have the right to give the other Shareholder Group ***a*** Purchase Notice as to all of the Shares owned by the other Shareholder Group within ten (10) business days after such failure to resolve, in which event the Shareholders shall proceed under section 8.2(b), (c) and (d) below.

Shareholders' Agreement § 8.2(a) (emphasis added).

The use of the grammatical construct "either. . . or" and the singular "a Purchase Notice" clearly and inescapably denotes that only one of shareholder group can effectively serve a Purchase Notice for the other's shares, and thus exercise the singular Right of First Offer. See www.merriam.webster.com/dictionary/either-or (defining "either-or" as "an unavoidable choice or exclusive division between only two alternatives") (emphasis added); see also Colbert v. International Sec. Bur., 79 A.D.2d 448, 463 (2d Dep't 1981) ("[T]he word "or" is "a disjunctive particle indicating an alternative and it often connects a series of words or propositions presenting a choice of either.").

One need only hold up Pazer's First Counterclaim against § 8.2(a) to see that the Shareholders' Agreement does not say or mean what she claims. For Pazer to be right, altogether different words would have had to be employed. If it was intended that both Shareholders Groups were permitted to serve Purchase Notices after failed mediation, as Pazer contends, § 8.2(a) would have had to provide that "both the Mintz Group and the Pazer Group shall have the right to give each other Purchase Notices as to all of the Shares owned by the other Shareholder Group." However, these are not § 8.2(a)'s words.

Given § 8.2(a)'s actual words and their plain meaning, this provision simply cannot be read to permit the service of "mutual," "reciprocal" or "dueling" Purchase Notices, as "[t]here is

no basis 'to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." 425 Fifth Ave. Realty Assoc. v. Yeshiva Univ., 228 A.D.2d 178 (1996), quoting Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 72 (1978). Thus, Pazer's First Counterclaim seeking a declaration that the Shareholders' Agreement permits dual Purchase Notices, followed by some sort of Court intervention, fails completely and must be dismissed.

Only one Shareholder Group can serve an effective Purchase Notice and, due to the operation of § 8.2(b), which renders the buy-sell obligations irrevocable upon service, that one Shareholder Group by necessity is the first Shareholder Group to serve a Purchase Notice after failed Deadlock mediation, which of course is consistent with the two references in the Shareholders' Agreement to the singular Right of First Offer.

C. The Contract Is Not Reasonably or Fairly Susceptible of Pazer's Suggested Meaning

Furthermore, the relevant, unambiguous provisions are not rendered ambiguous simply because Pazer now[6] purports to claim that they mean something different than what they say on their face. See New York City OTB Corp., 28 A.D.3d at 177-78. Contractual language may be considered ambiguous only if it is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." Id. (emphasis added). The relevant language is not reasonably or fairly susceptible of two or more meanings, including the meaning Pazer advocates.

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[6] In addition to being wrong, Pazer's current position is also disingenuous. Pazer previously successfully argued that the Mintz Trusts were precluded from serving a Purchase Notice for Pazer's shares in Avenue K after Pazer had already served hers for the Mintz Shares. Furthermore, Pazer has no sincere interest in purchasing the Mintz Shares in Astoria; she has consistently made clear that she is a seller. She just does not want to sell to the Mintz Trusts, and does not want the Pazer Shares valued in the baseball arbitration prescribed by the Shareholders' Agreement. Pazer's service of a purported Purchase Notice for the Mintz Shares in Astoria is a mere ruse to get before the Court and try to appeal for an "equitable" result, which for her means a sale of the Company on the open market. This is totally improper. The parties bargained fairly for the terms of the Shareholders' Agreement, the Mintz Trusts have followed them, and they should now be enforced by declaring that Pazer is obligated to sell the Pazer Shares to the Mintz Trusts at the Purchase Price determined in the prescribed appraisal process. The Mintz Trusts do NOT want to sell the Center, a family legacy asset (and suffer resultant economic and tax problems); they only want to buy Pazer's interest in it, just as Pazer recently just bought the Mintz Trusts out of Avenue K.

Critically, the Right of First Offer arises, under the last sentence of § 8.2(a) when the Directors are deadlocked, and only because all efforts to resolve Deadlock have failed. The service of a Purchase Notice is a Deadlock-breaking mechanism which permits the parties to separate, while leaving the Company intact, and avoiding further judicial action and intervention.

By contrast, Deadlock would only be perpetuated if both Shareholder Groups were permitted to serve valid Purchase Notices for the other's shares: the two groups, each irrevocably obligated to sell their own and buy the other's shares, would just swap and end up right where they started, in Deadlock. Indeed, beyond perpetuated, the Deadlock would be rendered unbreakable except by Court intervention, as Pazer admits. See Answer, at Prelim. St. § 11. Such a reading of the contractual language, which leads to a result contrary to the provision's very purpose, is beyond unreasonable – it is absurd and therefore untenable. See Reape v. New York News, Inc., 122 A.D.2d 29 (2d Dep't 1986).

It is not "unfortunate," as Pazer laments, that the Shareholders' Agreement is "silent with respect to what happens when both sides exercise their buy/sell rights under Section 8.2(a) following a failed mediation under the Shareholders' Agreement," see Counterclaims ¶ 176, but rather altogether logical, because the eventuality of *both* sides exercising "their" buy/sell rights cannot occur if the terms of the Shareholders' Agreement are followed and enforced. The deliberate, conscious and painstakingly drafted provisions for breaking Deadlock (and providing a method to terminate co-ownership of the Company without judicial intervention), do not permit the conclusion that the shareholders intended both Shareholder Groups to serve valid Purchase Notices after failed Deadlock mediation and then simply "overlooked" or "failed to address" the possibility by failing to provide a means for resolving the resulting Deadlock. The provisions permit only the conclusion that they did consider the possibility, and expressly disallowed it, by providing specifically in § 8.2(a)—the Right of ***First*** Offer – that "either" one

group "or" the other, could serve "a" Purchase Notice following failed Deadlock mediation. And this is entirely consistent with all parties' fundamental desire, goal and agreement to avoid further judicial intervention to separate the owners if further Deadlock developed between them.

Under no circumstances may the Court imply, as Pazer asks it to, a "tie-breaker" through which either the high bidder wins the right to buy the other's shares or the entire Company or Center must be sold on the open market. Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004) ("'[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'") (quotation omitted). If the parties' intended the Purchase Price of the shares to be set as high as possible, they would not have implemented a "baseball arbitration" appraisal process, but would have had the higher of the two Qualified Appraisers' valuations prevail. As for selling the Company on the open market, the drafters were clear that this "remedy" was to be resorted to only if neither Shareholder Group elected to buy out the other. Providing for open-market sale as a "remedy" for one scenario, but not another, must be read as intentional. See U.S. Fidelity & Guar. Co. v. Annunziata, 67 N.Y.2d 229, 233 (1986); Sterling Investor Servs., Inc. v. 1155 Nobo Assocs., LLC, 30 A.D.3d 579, 581 (2d Dep't 2006).

POINT IV

PAZER SHOULD BE DIRECTED TO SPECIFICALLY PERFORM

As established above, Pazer is in breach of her obligation to sell all of the Pazer Shares to the Mintz Trusts. Pursuant to § 8.2(b) of the Shareholders' Agreement, "failure to either sell or buy the Offered Shares at the Purchase Price shall be a breach of contract allowing for full breach of contract monetary damages and/or the remedy of specific performance by the non-breaching party(ies)." The Court should therefore grant summary judgment on the 17th Cause of Action directing Pazer to specifically perform her obligation to sell the Pazer Shares to the Mintz Trusts.

POINT V

PAZER'S SECOND COUNTERCLAIM SHOULD BE DISMISSED

Pazer's Second Counterclaim, seeking to enjoin the Mintz Trusts from continuing the appraisal process to determine the Purchase Price of the Pazer Shares (and, ostensibly, to relieve Pazer of the obligation to participate in this process), must be dismissed not only because there is no likelihood of Pazer succeeding on the merits, but most importantly because Pazer cannot establish the essential element of irreparable harm in the absence of the injunctions sought. See, e.g., Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990); Icy Splash Food & Bev., Inc., 14 A.D.3d 595 (2d Dep't 2005). Any "injury" that could conceivably be sustained by participating in the appraisal process would be compensable in money damages, and therefore not irreparable. See White Bay Enters., Inc. v. Newsday, Inc., 258 A.D.2d 520 (2d Dep't 1999).

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in the accompanying Rule 19-a Statement, Mintz Affidavit and the exhibits thereto and the Affidavit of Urgency and the exhibits thereto, Plaintiffs and Counterclaim-Defendants respectfully request that the Court grant summary judgment in their favor on the 14th, 15th, 16th and 17th Causes of Action in the Complaint and enter the corresponding declaratory judgments sought; strike the First and Second Counterclaims in the Answer with Counterclaims with prejudice; and award Plaintiffs such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 15, 2013

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