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
IAS Commercial Part 2
Hon. David I. Schmidt

MEMORANDUM OF LAW IN OPPOSITION TO THE MINTZES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF THE PAZERS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Pazers[1] respectfully submit this memorandum of law in opposition to the Mintzes' motion for partial summary judgment on the Fourteenth, Fifteenth, Sixteenth, and Seventeenth Causes of Action of the Mintzes' Verified Complaint and dismissing Shelley's First and Second Counterclaims, and in support of Shelley's cross-motion for partial summary judgment on her First Counterclaim, declaring and determining, *inter alia*, that Shelley submitted a valid Purchase Notice to purchase the interests of the Mintzes under the terms of the Shareholders' Agreement of Astoria Holding Corp. (the "Company" or "Astoria"), and that, accordingly, the Court should direct either a bidding process to determine which Shareholder group is entitled to buy out the other group, or alternatively, a sale of the Company's property on the open market. Accompanying this Memorandum of Law are the Affidavits of Rochelle Pazer (the "Pazer Aff.") and Steven J. Shore (the "Shore Aff."), and a Rule 19-a Statement of Material Facts.

PRELIMINARY STATEMENT

The issues raised in these summary judgment motions present straightforward legal questions, but they have enormous practical consequences for both the Pazers and the Mintzes. The Pazers and the Mintzes are locked in a bitter dispute over the chief remaining legacy of their respective fathers' lifelong business partnership: ownership of the Company and its sole significant asset, the Georgetowne Shopping Center in Brooklyn, New York (the "Shopping Center").

Two years ago, the parties' disputes resulted in a litigation that was provisionally resolved with the Court's assistance by, among other things, a Shareholders' Agreement dated July 31, 2011 (the "Shareholders' Agreement") (along with the forced sale of a different family legacy asset, New Chalet Corp., at the insistence of the Mintzes). In entering into the Shareholders' Agreement, the

[1] The "Pazers" are Defendant-Counterclaim Plaintiff Rochelle Pazer ("Shelley") and Defendants, Dina Bassen ("Dina") and Lisa Pazer ("Lisa"). The "Mintzes" are Plaintiffs-Counterclaim Defendants, Howard Mintz ("Howard") and Susan Mintz-Bello ("Susan"), as Co-Trustees of the Max Mintz QTIP Trust, and Susan as Trustee of the Susan Mintz-Bello Grantor Retained Annuity Trust dated Sept. 24, 2012 (the "Mintz Trusts").

Pazers and Mintzes anticipated further disputes and deadlocks, and attempted to craft provisions that would (a) allow the Company, if the parties so desired, to remain a family legacy asset, and in any event, (b) required that a fair price be paid in any sale of the Company's assets. It was the clear intention of both sides as expressed in the Shareholders' Agreement that if the Company were not to be maintained under combined Pazer/Mintz ownership, then **either** Shareholder group (Shelley on the one side, and the Mintz Trusts on the other) would have a fair opportunity to purchase the Shopping Center when the Pazers and Mintzes went their separate ways.

The Mintzes' summary judgment motion represents a blatant attempt by the Mintzes to deny Shelley a fair opportunity to purchase the Company and pass on the family legacy to her daughters Dina and Lisa. Shelley is willing to pay the fair market value of the Shopping Center, which she believes is as much as $55 million, as evidenced by multiple bona fide offers from third party investors that she has received. (*See* Pazer Aff. ¶¶ 60-61)

However, upon information and belief, the Mintzes are not prepared to pay fair market value for the Shopping Center and thus are making efforts to secure the Company for themselves at a distress price. As more fully described in the accompanying Pazer and Shore Affidavits, the Mintzes have tried to devalue the Company by, among other things, sending lengthy, unsolicited communications to the Company's lender with the obvious intent of inducing the lender to call the Company's mortgage. In addition, the Mintzes have purported to withdraw their consent for the Company to retain legal, accounting, engineering, and other professionals, or to pay the Company's office staff, in order to paralyze the Company and prevent it from functioning properly. The Mintzes have also exacerbated existing problems at the Shopping Center by refusing to perform their duties to the Company and obstructing the Pazers' efforts to perform their duties to the Company.

Allowing Shelley to bid on the Shopping Center, or alternatively, selling the Shopping Center on the open market, would block the Mintzes' apparent effort to purchase the Shopping Center at a below-market price. In an improper effort to eliminate these obstacles to the Mintzes' control of the Shopping Center, the Mintzes have brought this summary judgment motion predicated on legal positions that, as discussed below, are meritless on their face and that the Mintzes themselves derided as "erroneous, . . . inexplicable and unsupportable."

<u>The August 2012 E-mails and the Proposed Waiver Agreement</u>

As discussed in Point I of the Argument, *infra*, the Mintzes have tried to manufacture an obligation for Shelley to involuntarily sell her interest in the Company out of an innocuous e-mail that Shelley sent to Howard and Susan on August 27, 2012. Shelley's e-mail reads, in relevant part, as follows:

> 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.

(Pazer Aff. Ex. "D"). The e-mail also discusses a wide variety of other matters relating to the family business, but contains none of the formality that would be associated with a binding offer to sell an asset valued as much as $55 million dollars. (*See* Pazer Aff. ¶ 29) It is obvious from the face of this e-mail that Shelley was not making a binding offer to sell her interest in the Company. Instead, the e-mail's tone was general and exploratory. It lacks necessary material terms that would be found in a contractual offer to sell. It was not sent in a formal manner as required by the Shareholders' Agreement. It merely asked the Mintzes to "[p]lease let me know your thoughts."

However, instead of engaging in that discussion, the Mintzes on August 29, 2012 attempted to create a binding agreement by "accepting" Shelley's purported "offer," even though they knew that Shelley's e-mail was not actually a binding offer that could be accepted. Thus, the Mintzes tried to firm up the "agreement" by simultaneously proposing, and providing a form of, a new Waiver and Acknowledgement Agreement (the "Waiver Agreement"), predicated on additional terms that they proposed, to be signed by Shelley as well as by Dina (who was not even named in Shelley's August 27, 2012 e-mail). (Pazer Aff. ¶ 8 & Ex. "D") As a matter of law, such a conditional "acceptance" constitutes a rejection of the original purported offer (to the extent there was any such offer to begin with) and a counter-offer that would need to be independently accepted by the other party to form a binding contract.

Upon receipt of the Mintzes' purported "acceptance" and Waiver Agreement, the Pazers promptly advised the Mintzes on August 30, 2012 (*i.e.*, the following day) that the Mintzes had misunderstood Shelley's e-mail and that there was no contract. (*Id.* ¶ 30) Neither Shelley nor Dina ever signed the Waiver Agreement, and no contract was ever entered into for the sale of Shelley's shares. (*Id.* ¶ 39) The Mintzes then waited nearly eleven months before moving in their summary judgment motion for specific performance of the supposed, but clearly non-existent, contract requiring Shelley to sell her interest to the Mintzes.

<u>The Failed Mediation and the Parties' Service of Purchase Notices</u>

As discussed in Point II, *infra*, the Mintzes have also attempted to deny Shelley a fair opportunity to purchase the Shopping Center pursuant to the deadlock resolution provisions of the Shareholders' Agreement. In September 2012, the Pazers declared the Company to be in deadlock and scheduled a mediation, which was held on September 27, 2012. That mediation was unsuccessful, and afterwards both the Pazers and the Mintzes submitted notices to purchase the shares of the other. The Mintzes submitted their Purchase Notice first, but both parties submitted their purchase notices within the ten business days specified in the Agreement.

The Mintzes now claim that because they submitted their Purchase Notice first, at that moment they won the right to buy out Shelley, and that as a result, Shelley's right to submit a Purchase Notice was extinguished – even if Shelley was willing to pay substantially more for the Mintzes' interests than the Mintzes are prepared to pay for Shelley's interest. However, by using plural terms, the Shareholders' Agreement **explicitly contemplates** that there may well be **two** (rather than one) "Purchase Notice(s)" and two "elections to purchase". The temporal order of Purchase Notice submission is immaterial to the question of who has the right to buy out the other, so long as both Purchase Notices are submitted within ten business days of the mediation.

Earlier in 2012, the Pazers and Mintzes had gone through a similar deadlock process with respect to Avenue K Corp., a sister entity to Astoria governed by a shareholder agreement containing identical dispute-resolution terms. In that case, the Pazers served their Purchase Notice following a failed mediation before the Mintzes had decided whether to serve one. In response, the Mintzes' transaction counsel, Allan B. Guttenberg, Esq. (who was the primary drafter of the Agreement), explained in detail why a "first notice wins" interpretation of the Shareholders' Agreement was not consistent with the words of the Agreement or with the intent of the parties when they prepared and entered into it:

> Under the express language of section 8.2(a), EITHER one of the Mintz Group or the Pazer Group can elect to buy the other group's shares by giving a "Purchase Notice" within the stated 10 business days. Pazer has made her irrevocable election to buy the Mintz shares, *and Mintz still has the full 10 business days to make its irrevocable election to buy the Pazer shares.*
>
> There is absolutely NO language to support an interpretation that the "first" group to give a Purchase Notice somehow deprives the other group of its valuable rights to buy the other group out, nor is any such interpretation reasonable or consistent with the intention of the parties under the Shareholders Agreement. The intention

was obviously to give EACH group purchase rights, and to treat the parties equally as to purchase rights, and NOT favor one shareholder group over the other. An interpretation of the "first notice wins" would deprive the other group of its purchase right (without any such language in the agreement), would certainly not withstand judicial scrutiny, . . . and would result in an unseemly and untoward race to kill the mediation and deliver the "first notice." . . .

The clear language of the Shareholders Agreement and intention of the parties was to give EITHER group the right to buy the other one out, by giving a Purchase Notice within 10 business days, and NOT to favor either shareholder group over the other, regardless who acts first. *Thus the Mintz Group has until June 11 to deliver its irrevocable election to buy all the Pazer Group shares, whether or not the Pazer Group has also given a Purchase Notice.*

* * *

There is no reason a Court would interpret the agreement to "reward" the low bidder, just because it acted first. Doubtless, you have a contrary and erroneous legal view, that will fail in Court, as have and would your other inexplicable and unsupportable legal positions.

* * *

Obviously, the same *"shareholder Purchase Notice provisions" apply to both Avenue K and Astoria in the event of failed mediation after Deadlock . . . .*

(Shore Aff. Ex. "I") (bold emphasis added; other emphasis in original).

The Pazers understood from Mr. Guttenberg's e-mail that the Mintzes believed that any "first notice wins" interpretation of Section 8.2(a) would be "erroneous, . . . inexplicable and unsupportable." (Pazer Aff. ¶ 48) The Pazers reviewed this analysis by Mr. Guttenberg, who, after all, was the primary drafter of the Shareholders' Agreement, and (although unhappy with its characteristically strident and argumentative tone and some factually false allegations contained in it concerning what had occurred at the Avenue K mediation), they concluded that his explanation of the meaning of the Agreement was a reasonable and acceptable one. (*Id.*) In reliance on Mr. Guttenberg's e-mail, written on behalf of his clients the Mintzes, Shelley did not try to enforce a "first notice wins" interpretation, and instead waited to learn whether the Mintzes intended to submit a Purchase Notice for Avenue K. Later, Shelley reasonably relied on Mr. Guttenberg's assurance that the same analysis applied to both Avenue K and Astoria (which had been negotiated at the same time and had identical substantive provisions) in deciding when to serve her Purchase Notice for Astoria. (Pazer Aff. ¶ 50)

Having lured Shelley into not serving her Purchase Notice immediately after Astoria's failed mediation, the Mintzes opportunistically abandoned their prior position and have argued that what they previously described emphatically as an "erroneous, . . . inexplicable and unsupportable" interpretation now turns out to be correct after all (and so clearly correct that they are supposedly entitled to summary judgment). Although the Court is not required to adopt either party's position as to the proper meaning of contract language, the Court can and should find that the Mintzes are estopped from asserting that their Purchase Notice was served "first", so that Shelley is not penalized for relying on the Mintzes' prior representations.

<u>The Court Should Order a Bidding Process To Determine the Purchaser of the Company</u>

Finally, as discussed in Point III, *infra*, where both Shareholder groups have submitted valid Purchase Notices, as has occurred here, the fair result, consistent with the Shareholders' Agreement, would be that (1) the Shareholder group offering the highest purchase price through a bidding process "wins" and gets to buy the other group out, or alternatively as a last resort, that (2) the Company sell its assets on the open market (which would be the likely result under New York Business Corporation Law § 1104(a)(3) in the event of an irresolvable deadlock not governed by the Shareholders' Agreement). In fact, this is exactly the result that the Mintzes asserted was required in Mr. Guttenberg's June 8, 2012 e-mail:

> While the Agreement is not exactly clear on what happens if both groups exercise their valuable purchase rights, we believe the fair result under the Shareholders Agreements in such event would be:

> (1) the shareholder group offering the highest purchase price through its Qualified Appraiser "wins" and gets to buy the other group out (i.e., whoever values the asset more highly prevails . . . ; or
>
> (2) If both shareholder groups elect to buy, neither shareholder group may exercise its purchase right (since the Agreement does not expressly address what happens when both sides elect to buy), and instead the Company must sell its assets on the open market and liquidate.
>
> We have consulted with multiple NY attorneys regarding this contract interpretation issue, including Mintz NY litigation counsel, and they confirm the foregoing 2 results as the most likely results in Court under the applicable Shareholder Agreement "shareholder Purchase Notice" provisions, given the absence of any "first to act wins" language and other relevant factors.

(Shore Aff. Ex. "I")

The Mintzes now appear to have abandoned their prior position and argue that a bidding process should not take place. However, where the Shareholders' Agreement admittedly is not entirely clear as to the appropriate procedure to follow, the Court should construe the Agreement in such a way as to give effect to the parties' intentions in entering into the Agreement, which was to ensure that the Company remained a family legacy asset if at all possible and that a fair price be paid in any sale of the Company's assets. Any other result would unfairly deny Shelley the opportunity to bid for and potentially acquire the Shopping Center at a fair price.

As long as the ultimate buyer is uncertain, the Company remains paralyzed and dysfunctional. Accordingly, Shelley submits that the Court should direct the bidding process proposed by the Mintzes – preferably a bidding process between the Pazers and Mintzes. The current state of affairs, in which neither side knows who will be the ultimate purchaser, requires prompt resolution. For all of these reasons, the Pazers respectfully request that the Court deny the Mintzes' motion for partial summary judgment, and grant the Pazers' cross-motion for partial summary judgment.

STATEMENT OF FACTS

The facts pertinent to this motion and cross-motion are detailed in the Pazer and Shore Affidavits and in the Verified Answer and Counterclaims, particularly ¶¶ 105-179, discussing the relevant provisions of the Shareholders' Agreement and the events leading up to and immediately following the September 2012 mediation, to which the Court is respectfully referred.

ARGUMENT

There are no material issues of fact that preclude denying the Mintzes' motion for summary judgment and granting of summary judgment in Shelley's favor. *See Chabla v. 72 Greenpoint, LLC*, 101 A.D.3d 928, 957 N.Y.S.2d 226 (2d Dep't 2012); *accord Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986).[2]

POINT I

THE MINTZES' MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE WAS NO CONTRACT BETWEEN THE PARTIES FOR THE SALE OF SHELLEY'S SHARES IN THE COMPANY

The Mintzes seek declaratory relief (their Fourteenth and Fifteenth Causes of Action) predicated on the assertion that Shelley made an "offer", either pursuant to Section 8.2 of the Shareholders' Agreement or under common-law principles, to sell her shares in the Company to the Mintzes in her August 27, 2012 "Selling Georgetown Proposal" e-mail, and that they accepted such purported offer in their August 29, 2012 e-mail, thus creating a binding contract of sale. (*See* Mintz Mem. 12) "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93

[2] Even if the Court were to find that there are genuine disputes of material fact precluding summary judgment, the Pazers agree with the Mintzes that issues regarding prospective ownership of the Company need to be resolved as promptly as possible. Accordingly, the Pazers would request that any denial of summary judgment on this basis be without prejudice to renew once discovery on the limited issues presented herein is completed, or alternatively, that a prompt hearing be scheduled on the disputed issues pursuant to CPLR 3212(c), (e), and/or (g).

N.Y.2d 584, 589-90, 693 N.Y.S.2d 857, 860 (1999). A primary concern for courts in reviewing purported agreements such as this one is to "avoid trapping parties in surprise contractual obligations that they never intended." *Brown v. Cara*, 420 F.3d 148, 156-57 (2d Cir. 2005); *see also Carmon v. Soleh Boneh Ltd.*, 206 A.D.2d 450, 451, 614 N.Y.S.2d 555, 556 (2d Dep't 1994). As a matter of law, there was no contract requiring Shelley to sell her interest in the Company.

A. Shelley's August 27, 2012 E-mail Was Not a Binding Offer to Sell Her Shares in the Company

To create a binding contract upon acceptance, a purported offer must evidence the offering party's intent to be bound. In the absence of such intent, a purported offer is nothing more than a non-binding invitation to a future agreement. *Express Indus.*, 93 N.Y.2d at 590, 693 N.Y.S.2d at 860; *accord Minelli Const. Co., Inc. v. Volmar Constr., Inc.*, 82 A.D.3d 720, 722, 917 N.Y.S.2d 687, 689 (2d Dep't 2011); *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 104, 890 N.Y.S.2d 16, 27 (1st Dep't 2010). Shelley's August 27, 2012 e-mail did not constitute an offer.

1. The August 27th E-mail Was Only a Non-Binding, Exploratory Invitation To Offer

Viewed in context, it is clear that Shelley's August 27, 2012 e-mail (Pazer Aff. Ex. "D", excerpted *supra* at 3) was never meant to be a binding offer and could not properly be interpreted as one. Shelley is raising in general terms potential resolutions to resolve the parties' deadlocks, but is **not** unequivocally stating that the sale of her shares is the path that she wants to follow. *See Concilla v. May*, 214 A.D.2d 848, 849-50, 625 N.Y.S.2d 346, 348 (3d Dep't 1995) (purported offer "lacks the definiteness and certainty required of an offer as its tone is **informational and exploratory**") (emphasis added); *Weldon v. 210 East 73rd Owners Corp.*, 15 Misc. 3d 1125(A), 841 N.Y.S.2d 222, at *1 (Sup. Ct. N.Y. Co. Apr. 19, 2007) (finding no offer where "[t]here is no language . . . evincing an intent or mutual understanding that the first e-mail was a final settlement offer capable of acceptance . . . ."). The exploratory nature of the August 27, 2012 e-mail is further evidenced by Shelley's request that the Mintzes "**[p]lease let me know your thoughts**." (Emphasis added.) Notably, Shelley was not asking for the Mintzes' "acceptance", but rather their "thoughts", thereby inviting further discussion as to what the Mintzes felt was the best way to proceed.[3] This cannot be construed as a binding offer.

2. The August 27, 2012 E-mail Was Indefinite as to Material Terms

Nor is the purported offer definite as to material terms of a sale, including the price, the number of shares to be sold, or the time frame for performance. "[I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Martin Deli v. Schumacher*, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 249 (1981). This "rule applies all the more, and not the less, when, as here, the extraordinary remedy of specific performance is sought." *Id.* Further, the need for definiteness is increased where, as here, the contract is subject to the Statute of Frauds, requiring the complete contract to be in writing signed by the party to be charged, because the Company's primary asset is real property. *See, e.g., Yenom Corp. v. 155 Wooster Street, Inc.*, 33 A.D.3d 67, 818 N.Y.S.2d 210 (1st Dep't 2006) (contract for sale of corporation whose sole asset is real property is within the Statute of Frauds governing real property transactions).

Shelley's August 27, 2012 e-mail is vague as to how the shares would be priced. While the Mintzes argue that the reference to "retaining appraisers" invokes the valuation procedures

[3] Confronted with this equivocal request, "**Please let me know your thoughts**", the Mintzes simply try to make these words say something else, quoting them as "let [her] know" which of three "options" (a word not appearing in the e-mail) the Mintzes would "accept" (also not a word appearing in the e-mail). (Mintz Mem. 13). The lengths that the Mintzes go to distort Shelley's words confirm that her e-mail, considered in context, was not an offer. (*See* Pazer Aff. ¶ 29)

set forth in the Agreement, this is not stated in, much less unequivocally evident from, the e-mail. *See Danton Const. Corp. v. Bonner*, 173 A.D.2d 759, 760, 571 N.Y.S.2d 299, 300 (2d Dep't 1991) (finding that offer was not "sufficiently certain and specific [to be] ascertainable" from "vague" language contained in letter). This omission is notable given that elsewhere in the e-mail, Shelley clearly stated that she would be willing to depart from the terms of the Agreement to expedite a sale. Accordingly, the method for determining the price of the shares in Shelley's August 27, 2012 e-mail is far too indefinite. *See, e.g., Teutul v. Teutul*, 79 A.D.3d 851, 852, 912 N.Y.S.2d 664, 665 (2d Dep't 2010) (where the price term is left open there is "no legally enforceable contract").

Further, the August 27, 2012 e-mail does not set forth a time frame for completing any proposed transaction. This would have been a highly material term because Shelley would not have agreed to any sale of the Shopping Center that did not close before the end of the year 2012. (Pazer Aff. ¶ 30)[4] *See MP Innovations, Inc. v. Atlantic Horizon Int'l., Inc.*, 72 A.D.3d 571, 572, 899 N.Y.S.2d 213, 214 (1st Dep't 2010) (e-mail proposal was not an offer where it failed to "identify a number of material terms", including the "time frame" for performance).

3. The August 27, 2012 E-mail Did Not Comply With the Requirements for an Offer of Sale as Set Forth in the Shareholders' Agreement

Even assuming *arguendo* that the August 27, 2012 e-mail were viewed as invoking the Shareholders' Agreement (which Shelley denies), the e-mail still cannot be construed as a binding offer. Section 8.2 of the Shareholders' Agreement provides a formal mechanism for a Shareholder to sell his or her shares in the Company, should a Shareholder choose to do so:

> 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

[4] Indeed, the appraisal process set forth in the Shareholders' Agreement **contains no time limit** for completing the process, meaning that further negotiations would have been necessary regarding the time for performance.

> to purchase all (but not less than all) of such Offered Shares (the "Offered Shares") at the Purchase Price and on the terms and condition 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, and detailing the number of Offered Shares proposed to be sold by such Selling Shareholder. . . .

(Pazer Aff., Ex. "C") Shelley's August 27, 2012 e-mail was not a formal "Notice" as defined by the Shareholders' Agreement. As discussed above, among other things, it does not declare her "Intention to Sell", nor does it "detail" the number of Offered Shares proposed to be sold.

Moreover, the August 27, 2012 e-mail was not served in accordance with Section 11.1 of the Shareholders' Agreement, which governs any offer to sell a party's shares made under the Shareholders' Agreement "or otherwise", because it was not served by "(i) hand delivery, (ii) recognized overnight delivery courier service, (iii) mailing the same by postage prepaid certified mail, return receipt requested or (iv) facsimile transmission". In addition, the August 27, 2011 e-mail was not sent to all of the parties required to receive notice under Section 11.1.1 – none of the attorneys for the Pazers or the Mintzes were copied on Shelley's August 27, 2012 e-mail.

Section 11.1 imposes a level of formality for Notices that is above and beyond typical everyday communications between business partners. Such an enhanced level of formality is deliberately required in contractual notice provisions such as those contained in the Shareholders' Agreement. *See, e.g., D.A.D. Restaurant, Ltd. v. Anthony Operating Corp.*, 139 A.D.2d 485, 486, 526 N.Y.S.2d 590, 590-91 (2d Dep't 1988). Section 11.1 ensures not only that all necessary parties receive a Notice, but also that there is no doubt as to the intention behind providing such Notice. The Mintzes' attempt to characterize Shelley's informal e-mail as a formal Notice relating to the most important possible matter governed by the Settlement Agreement is inconsistent with the public policy that parties should not be involuntarily trapped into being bound by a "contract" that they had no intention of entering into. *See T. I. P. Holding No. 2 Corp. v. Wicks*, 63 A.D.2d 263, 270, 407 N.Y.S.2d 709, 713 (2d Dep't 1978) (to validly exercise an option to purchase real property, the party must strictly adhere to the terms and conditions of the agreement); *Brown*, 420 F.3d at 156-57.

Since the parties entered into the Shareholders' Agreements, whenever they have sent formal "Notices" thereunder (*e.g.*, the Purchase Notices discussed herein, the Mintzes' purported Waiver Agreement, the designation of appraisers for Avenue K under Section 8.2 of the Agreement, and Shareholder and Director annual meeting notices), they have complied with the service requirements in Section 11.1, by sending the Notices to the other side by hand, certified mail, fax, and/or overnight delivery. (*See* Pazer Aff. ¶ 20 & Ex. "G") These formal Notices constitute a much more appropriate benchmark for determining the parties' expectations here than the purported waivers of notice requirements regarding run-of-the-mill business decisions decided by e-mail and referred to in the Mintzes' papers (*see* Mintz. Mem. at 18). These "Major Decisions", as referred to in the Mintzes' brief, actually include ordinary everyday business decisions such as those involving any expenditures over $500. (*See* Shareholders' Agreement, ¶ 4.5.6). The Company simply could not function if the parties were bound to serve formal Notices involving every $500 transaction, which would be unreasonable and absurd..[5]

By contrast, it is not unreasonable for the parties to be required to serve formal Notices before they become bound to the single most important decision either Shareholder could make under the Shareholders' Agreement. In fact, the Mintzes in sending their e-mail and Waiver

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[5] In any event, Section 11.8 of the Agreement contains a standard no-waiver provision stating that "No failure or delay of any Shareholder in the exercise of any right given to such Shareholder hereunder or the waiver by any Shareholder of any condition hereunder for its benefit . . . shall constitute a waiver of any other or further right." *See, e.g., DeCapua v. Dine-A-Mate, Inc.*, 292 A.D.2d 489, 492, 744 N.Y.S.2d 417, 420 (2d Dep't 2002) (enforcing "no waiver" clause).

Agreement, attempted to comply with Section 11.1 by sending a hard copy by "overnight delivery courier service" to the Pazers' (current and former) counsel. (Pazer Aff. ¶ 38). Doing so was a tacit admission by the Mintzes that simply sending an e-mail did not constitute "Notice" under the Agreement.

4. The August 29, 2012 E-mail Reflects That the Mintzes Did Not View the August 27, 2012 E-mail as a Binding Offer

Moreover, the Mintzes' own communication objectively reveals that they did not view the August 27, 2012 e-mail as a binding offer. Specifically, the Mintzes' August 29, 2012 e-mail states, in relevant part: "We hope your offer below is sincere, and if so, we ask that you and Dina will sign, date and return the attached Waiver and Acknowledgement to us within two business days." (Pazer Aff. Ex. "E") Shelley then promptly confirmed the very next day that it was **not** her intent to sell her shares in the Company under the terms and conditions proposed by the Mintzes. (*Id.* ¶ 34) Given the Mintzes' clearly expressed doubt as to the "sincerity" of Shelley's intent to sell, the Mintzes cannot now argue that they always viewed Shelley's August 27, 2012 e-mail as a binding offer of sale.[6]

B. The Mintzes Never Unequivocally Accepted Shelley's Purported Offer, But Rather, Made an Offer (or Counter-Offer) That Shelley Rejected

Even assuming *arguendo* that Shelley's August 27, 2012 e-mail constituted a binding offer to sell her shares, which Shelley in no way concedes, still no contract was formed between the parties because the Mintzes' August 29, 2012 e-mail constituted a counter-offer at best, which Shelley never accepted, and thus a rejection of any original offer.

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[6] In addition, the Mintzes asked Dina, **who is not even mentioned** in the August 27, 2012 e-mail, and thus **could not be bound by it**, to sign the Waiver Agreement as a condition of their going forward, thereby evidencing their belief that Dina was a necessary party to any transaction to sell Shelley's interests under the Shareholders' Agreement (or at least that they conditioned their participation on Dina's signature, as discussed below). (*See* Pazer Aff. ¶ 37)

"It is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer." *Blinds & Carpet Gallery, Inc. v. EEM Realty, Inc.*, 34 Misc. 3d 1228(A), 951 N.Y.S.2d 85, at *3 (Sup. Ct. Kings Co. Feb. 1, 2012) (Schmidt, J.) ("whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection and termination of – and substitution for – the initially offered terms") (citing cases). Even though the Mintzes' August 29, 2012 e-mail purports to "accept [Shelley's] offer," such acceptance is actually conditioned upon Shelley and Dina signing the Waiver Agreement within two days "so that we can all proceed with the valuation procedures provided under the Astoria Shareholders Agreement . . . ." (Pazer Aff. Ex. "E") Shelley promptly advised the Mintzes that she was not accepting the Mintzes' counter-proposal. (Pazer Aff. ¶ 34) Neither Shelley nor Dina agreed to or signed the Waiver Agreement within two days or at any time.

The Mintzes' form of Waiver Agreement contains additional demands for new consideration. For example, Paragraph 2 waives Shelley's and Dina's rights under Sections 4.8.3, 8.2(a), and 4.8.2 of the Agreement, which goes far beyond anything contained in Shelley's e-mail. Paragraph 3 demands that Shelley and Dina sign the Waiver Agreement to "conclusively and irrevocably" demonstrate the making of a contract for the sale of Shelley's shares, demonstrating that the e-mails between Shelley and Howard were not themselves sufficient evidence of a binding offer and acceptance, and that the Mintzes understood this fact.[7] Finally, the Mintzes' August 29, 2012 e-mail and Waiver Agreement attempt to invoke the valuation procedures of the Agreement, which, as explained above, constitutes yet another new term. As a matter of law, no contract for the sale of Shelley's shares to the Mintzes was ever formed.

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[7] Moreover, the language in paragraph 3 confirms that by asking for Shelley and Dina's **acceptance**, the Mintzes made a new **offer**. That could not possibly be the case if the contract had already been formed, as the Mintzes now contend, when they "accepted" Shelley's purported "offer" to sell her shares. (*See* Pazer Aff. ¶ 37)

POINT II

SHELLEY'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER SECTION 8.2(a) OF THE SHAREHOLDERS' AGREEMENT SHOULD BE GRANTED AND THE MINTZES' MOTION DENIED

There are likewise no genuine disputes of material fact or law precluding the granting of partial summary judgment in Shelley's favor (on Shelley's First Counterclaim) and denying the Mintzes' motion for partial summary judgment (on the Mintzes' Sixteenth Cause of Action) with respect to the proper interpretation of Section 8.2(a) of the Shareholders' Agreement.

A. There Is No Genuine Dispute of Material Fact that the Shareholders' Agreement Allows Both Shareholder Groups the Opportunity To Submit Purchase Notices Within Ten Business Days of a Failed Mediation.

The parties agree that the basic principles of contract interpretation should guide the Court in determining whether both Shareholder groups are provided an opportunity to submit purchase notices within ten business days following a failed mediation. Thus, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162-63, 565 N.Y.S.2d 440, 443 (1990); *Etzion v. Etzion*, 84 A.D.3d 1015, 924 N.Y.S.2d 438 (2d Dep't 2011).

However, the Mintzes fail to discuss an equally fundamental principle of contract interpretation that controls the disposition of these motions: **"The goal of the court is to interpret the language of the contract in a practical manner such that the parties' reasonable expectations will be realized."** *Gillman v. O'Connell*, 176 A.D.2d 305, 307, 574 N.Y.S.2d 573, 575 (2d Dep't 1991) (emphasis added). A contract "**should not be interpreted** to produce a result that is **absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.**" *ERC 16W Ltd. Partnership v. Xanadu Mezz Holdings LLC*, 95 A.D.3d 498, 503, 943 N.Y.S.2d 493, 498 (1st Dep't 2012) (emphasis added) (rejecting interpretation that would leave "one party at the mercy of the other" and finding that "[i]n the absence of express language compelling such a harsh result, we find this construction untenable as a matter of law"); *accord Hsieh v. Pudge Corp.*, 122 A.D.2d 198, 199, 505 N.Y.S.2d 163, 164 (2d Dep't 1986) ("a construction of a contract which produces unreasonable results should be avoided, if possible, and . . . a more reasonable construction should be sought").

Here, the parties have proposed two opposing interpretations of Section 8.2(a) of the Shareholders' Agreement. That subsection provides, in relevant part:

> [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.

(Pazer Aff. Ex. "C").

The Pazers' interpretation of Section 8.2(a) is that it provides **either** the Mintz Group **or** the Pazer Group the right to give the other a Purchase Notice within ten business days of a failure to resolve the parties' disputes at a mediation, with both sides enjoying the right to act in a considered and deliberate fashion in making a decision involving the potential expenditure of tens of millions of dollars. The other interpretation, urged by the Mintzes in their summary judgment motion (but directly contradicting their previous position, as discussed *infra*, pp. 23-26), is that "[t]he clear and unambiguous language of the Shareholders' Agreement permits no conclusion <u>other</u> than that only <u>one</u>, and only the <u>first</u> Purchase Notice to be served following failed Deadlock mediation is effective." (Mintz. Mem. 2) (emphasis in original) This is the so-called "first notice wins" interpretation of the Shareholders' Agreement. For the reasons set forth below, the Pazers' interpretation of Section 8.2(a) is the only reasonable construction of the provision, while the Mintzes' interpretation should be rejected.

1. **Providing Both Shareholder Groups the Opportunity To Serve Purchase Notices Within Ten Business Days of a Failed Mediation Is Consistent with the Language of the Shareholders' Agreement and Is Fair and Reasonable**

Contrary to the Mintzes' current position, the plain language of Section 8.2(a) specifically provides that "**either** the Mintz Group **or** the Pazer Group" may submit a Purchase Notice "**within ten (10) business days**" after an unsuccessful mediation. (Emphasis added.) Those words must be given effect. *See DeWitt v DeWitt*, 62 A.D.3d 744, 745, 879 N.Y.S.2d 516, 517 (2d Dep't 2009). Allowing each Shareholder Group an equal and fair opportunity to purchase the interest of the other maximizes the chance that the Shopping Center, a family legacy asset of both the Mintzes and the Pazers, stays in the family. In ordinary circumstances, a corporate deadlock would frequently result in the company's affairs being wound up and the assets sold on the open market. However, the Shareholders' Agreement expresses a clear preference that the Company survive as a legacy asset, by providing either Shareholder group a first option to purchase the Company.[8] Thus, the Pazers' proposed interpretation, under which both Shareholder groups retain an opportunity to purchase the Company, is to be preferred.

Moreover, the Shareholders' Agreement in Section 8.2(b) explicitly provides that the "**Purchasing Shareholders**", in the plural, may serve "**Purchase Notice(s)**", also in the plural:

> 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 . . . . Both the Selling Shareholder and the purchasing Shareholders shall be irrevocably obligated to sell and buy the Offered Shares . . . .

(Emphasis added). Section 8.2(b) contemplates the possibility of that there may well be **two** (rather than one) "Purchase Notice(s)" and two "elections to purchase". It is a cardinal rule of

[8] For example, Section 4.8.3 contemplates a sale to a third party only if "**neither** shareholder elects to purchase the Shares of the other." (Emphasis added) Further, Section 8.2(d) provides that even if a Selling Shareholder has the right to sell his or her shares on the open market, if such shares are not sold within twelve months, the parties' preferential rights under Section 8.2 are **restored** as to any subsequent attempt to sell.

contract construction that a court "should construe an agreement so as to give full meaning and effect to the material provisions." *Seruya v. Seruya*, 107 A.D.3d 972, 968 N.Y.S.2d 173, 174 (2d Dep't 2013). Thus, both Shareholder groups may submit Purchase Notices to purchase the shares of the other.

2. The Mintzes' "First Notice Wins" Interpretation Is Not Supported by the Language of the Shareholders' Agreement and is Absurd and Unreasonable

The Mintzes' current "first notice wins" interpretation of the Shareholders' Agreement is not supported by the language of the agreement itself, is contrary to the intent of the parties as expressed in the agreement, and would produce absurd and unreasonable results.

The Shareholders' Agreement does not provide that "only one, and only the first Purchase Notice to be served following failed Deadlock mediation" is effective. (Mintz Mem. 2) If that were what the parties intended, they would have stated as much. As the Mintzes acknowledge (*see id.* at 22), "there is no basis to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Civil Service Employees Ass'n, Inc. v. Plainedge Union Free School Dist.*, 12 A.D.3d 395, 396786 N.Y.S.2d 59, 61 (2d Dep't 2004).

The Mintzes are able to muster only two pieces of alleged evidence in support of their position. First, the Mintzes propose a highly tendentious construction of the words "either" and "or" appearing in Section 8.2(a), arguing that these words must mean that "only one" shareholder group may serve a Purchase Notice. The Mintzes' heavy reliance on the words "either" and "or" is strained and inconsistent with ordinary usage. *See, e.g., Richied v. D.H. Blair & Co.*, 272 A.D.2d 170, 171, 643 N.Y.S.2d 542, 543 (1st Dep't 2000) (rejecting "strained" contract interpretation that would yield "an unexpected and unreasonable result"). It is clear in context that the "either . . . or" construction of Section 8.2(a) is not meant to be exclusive and permits both Shareholder groups to submit Purchase Notices within ten business days.

In support of their reading, the Mintzes cite Merriam Webster Dictionary's definition, not of the word "either" or of the word "or," but of the compound word "either-or", a word that **does not appear** in the Shareholders' Agreement. (Mintz Mem. 21) On the other hand, the same dictionary's definition of "either", when used in the conjunctive sense as it is in the Shareholders' Agreement, does not support the Mintzes' current position. It states that "either" is "used as a function word before two or more coordinate words, phrases, or clauses joined usually by *or* to indicate that what immediately follows is the first of two or more alternatives." *See www.merriam.webster.com/dictionary/either*. *Compare* Black's Law Dictionary 463 (5th ed. 1979) (defining "Either" as "**Each of two; the one and the other**") (emphasis added). Thus, as used in the Shareholders' Agreement, the words "either" and "or" simply mean that **either** the Pazers **or** the Mintzes may serve Purchase Notices, not that "only" one of them may. *See Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336, 342, 670 N.Y.S.2d 393, 397 (1998).

The Agreement's use of the term "Right of First Offer" likewise does not support the Mintzes' interpretation of Section 8.2(a).[9] The phrase "right of first offer", like "right of first refusal" or "right of first negotiation", is a generic term of art understood to refer to an option to purchase the shares **first, before** the Company's assets are offered **on the open market** (*i.e.*, the selling shareholder will **first offer** his or her shares to the purchasing shareholder before selling the shares to a third party). *See, e.g., Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 604 (S.D.N.Y. 2011) ("if Belnovo failed to exercise its ROFO [right of first offer] after receiving notice that Pali desired to sell its interest, Pali was given the authority to approve a sale

[9] The Mintzes cite (at 23) Section 8.2's heading, "Right of First Offer," in support of their argument that only the "first" Purchase Notice is effective. This argument is also without merit for multiple reasons. At the outset, Section 11.6 of the Shareholders' Agreement explicitly states that "[t]he article and paragraph headings in this Agreement have been inserted for convenient reference only and shall not have the effect of modifying or amending the express terms and provisions of this Agreement." Such a provision is enforceable. Thus, the Mintzes are precluded from relying on this section heading to construe the language of the Agreement itself.

of 100% of the membership interests"); *Bill Signs Trucking, LLC v. Signs Family Ltd. Partnership*, 69 Cal. Rptr. 3d 589, 595 (2007) (defining "right of first offer" under which seller, upon deciding to market property, must first make offer to grantee, and if grantee does not accept offer, seller is then free to sell to anyone else on rejected or better terms).[10]

In addition, as discussed above, the "first notice wins" interpretation would render meaningless the terms set forth in Section 8.2(b) – which that there may well be **two** (rather than one) "Purchase Notice(s)" and two "elections to purchase" – and therefore cannot be accepted. *See Givati v. Air Techniques, Inc.*, 104 A.D.3d 644, 645, 960 N.Y.S.2d 196, 198 (2d Dep't 2013) ("a court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous").

The Mintzes have also argued that their "first notice wins" interpretation serves the interests of finality and avoids "further judicial intervention." (Mintz Mem. 24) However, the "first notice wins" interpretation would create its own inherent problems and lead to absurd results. For example, how would the parties decide which of the Shareholder Groups served their Purchase Notice "first", if they were served **simultaneously**? The Agreement does not say. As discussed above, Section 11.1.2 provides that notices are deemed given at different times depending on the method of delivery used. It would be absurd if a Purchase Notice sent by one Shareholder group by certified mail on the day of a failed mediation were deemed to be "given" **after** a Purchase Notice sent by the other Shareholder group by hand delivery two days later. If both Purchase Notices were sent by overnight mail, it would be impossible to determine which Purchase Notice was given first, without resort to arbitrary or absurd metrics such as which courier dropped off the delivery first.

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[10] *See also* Section 8.2(d), which discusses the so-called "right of first offer" in terms of a "preferential right of any Shareholder(s) to buy" (using once again the plural construction) and an "Option" to purchase, exactly how a "right of first offer" is commonly understood.

Moreover, this "first notice wins" construction would incentivize the Shareholder Groups to avoid appearing in person at a mediation session (just as Howard did not appear at the September 2012 mediation session), because it would be more difficult to serve a Purchase Notice on a shareholder who is absent. A "first notice wins" interpretation also would undermine the mediation process itself by incentivizing the parties to end the mediation process and race to deliver the "first" Purchase Notice.

These issues are not merely hypothetical. As Shelley explains in her affidavit, the Pazers had prepared a Purchase Notice before attending the September 27, 2012 mediation session and would have "served" it on the Mintzes if the Shareholders' Agreement provided that the "first notice wins." (Pazer Aff. ¶ 43) However, because (according to the Mintzes themselves) the Shareholders' Agreement allowed each side ten business days to deliberate on a course of action, Shelley decided to refrain from serving a Purchase Notice on the Mintzes immediately. (Pazer Aff. ¶ 44) It would be absurd, inequitable, and contrary to the parties' intent to penalize the Pazers for not serving their Purchase Notice "first" under these circumstances. *See Cole v. Macklowe*, 99 A.D.3d 595, 596, 953 N.Y.S.2d 21, 23 (1st Dep't 2012).

3. The Mintzes Previously Described Their Current Interpretation of the Shareholders' Agreement as <u>Being "Erroneous, . . . Inexplicable and Unsupportable"</u>

Although the Court is not bound to accept any of the parties' (current or former) interpretations of a contract provision, *see Suffolk County Water Auth. v. Village of Greenport*, 21 A.D.3d 947, 948, 800 N.Y.S.2d 767, 768 (2d Dep't 2005), it is worth comparing what the Mintzes said on June 8, 2012, about the "first notice wins" interpretation of the Agreement, which they now aver is "[t]he <u>only</u> construction permitted by §8.2(a)":

> Under the express language of section 8.2(a), EITHER one of the Mintz Group or the Pazer Group can elect to buy the other group's shares by giving a "Purchase Notice" within the stated 10 business days. . . .
>
> There is absolutely NO language to support an interpretation that the "first" group to give a Purchase Notice somehow deprives the other group of its valuable rights to buy the other group out, nor is any such interpretation reasonable or consistent with the intention of the parties under the Shareholders Agreement.[11] The intention was obviously to give EACH group purchase rights, and to treat the parties equally as to purchase rights, and NOT favor one shareholder group over the other. An interpretation of the "first notice wins" would deprive the other group of its purchase right (without any such language in the agreement), would certainly not withstand judicial scrutiny, . . . and would result in an unseemly and untoward race to kill the mediation and deliver the "first notice." . . .
>
> **The clear language of the Shareholders Agreement and intention of the parties was to give EITHER group the right to buy the other one out, by giving a Purchase Notice within 10 business days, and NOT to favor either shareholder group over the other, regardless who acts first.**

(Shore Aff. Ex. "I") (bold emphasis added; other emphasis in original).[12]

The Court here is presented with a choice between a commercially reasonable and fair interpretation of the Shareholders' Agreement (allowing either Shareholder group to submit a Purchase Notice within ten business days) and an unreasonable and absurd one (the "first notice wins" interpretation). There is no basis for this Court to accept – even as a possibility – the interpretation that the Mintzes and their counsel have previously derided as "erroneous, . . . inexplicable and unsupportable."

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11 The Mintzes' counsel mischaracterizes the Pazers' position with respect to the Avenue K purchase notice. (*See* Mintz Mem. at 10) Rather than assert conclusively that the "first notice wins" interpretation was absolutely correct, or that the Mintzes' purchase rights had been "extinguished", the Pazers' counsel simply asked Mr. Guttenberg, as the primary drafter of the Shareholders' Agreement, to "[p]lease explain the basis for your contention that the Mintz Group has a right to purchase Shelley's stock and not sell its stock. Thanks." (Shore Aff. Ex. "I") Mr. Guttenberg's June 8, 2012 e-mail excerpted above was in response to this request.

12 The June 8, 2012 e-mail from the Mintzes' counsel also contradicts their assertion that their rights to purchase Avenue K had been "extinguished" by the Pazers' service of a Purchase Notice. (*See* Mintz Aff. ¶ 56) The Mintzes' **actual** position was that they had an absolute right to submit a Purchase Notice within ten business days. Further, the Pazers did not take any action to "extinguish" the Mintzes' rights. In any event, on June 11, 2012, the Mintzes "allowed" the Pazer Group to purchase the Mintzes' shares, stating that "the Mintz Group has elected not to exercise its Purchase Option," which mooted the issue with respect to Avenue K. (Pazer Aff. ¶¶ 45-49)

4. The Mintzes Are Estopped From Asserting That Their Submission of the "First" Purchase Notice Eliminated Shelley's Right to Submit a Purchase Notice

Even if the Court were to find that the "first notice wins" interpretation of the Shareholders' Agreement might otherwise be the correct interpretation of Section 8.2(a), the Mintzes are estopped from asserting that their Purchase Notice was served "first". Estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 184, 185, 451 N.Y.S.2d 663, 668 (1982).

Here, there is no question that the Mintzes misled the Pazers (innocently or not) with respect to their position regarding the parties' rights to submit Purchase Notices. As discussed above, the Mintzes through their counsel[13] took an absolute position that **both** sides had **ten business days** to submit Purchase Notices, and that any contrary interpretation would be "erroneous, . . . inexplicable and unsupportable." The Mintzes also asserted that their analysis would apply equally to Astoria's Shareholders' Agreement since it was virtually identical to the Avenue K agreement. (Shore Aff. Ex. "I") ("Obviously, the same *'shareholder Purchase Notice provisions' apply to both Avenue K and Astoria in the event of failed mediation after Deadlock* . . . .") (emphasis in original).

[13] The Mintzes protest that the principle of *contra proferentum* should not apply against them, yet it is the Mintzes' own counsel who in the June 8, 2012 e-mail represented himself as the principal draftsman with better knowledge of the parties' intentions than the Pazers' counsel (who had not participated in drafting the Agreement): "And there are no "mistakes" in the heavily negotiated Shareholders Agreements . . . . I have retained all redlines of the many, many versions of the Shareholders Agreements exchanged among counsel, which clearly demonstrate the parties' negotiated agreement(s) and intentions." (*See* Shore Aff. Ex. "I")

Shelley reasonably relied on these representations made on the Mintzes' behalf. (Pazer Aff. ¶ 50) Prior to the September 27, 2012 mediation session, Shelley had prepared a Purchase Notice to submit at the close of the mediation if it proved unsuccessful. However, relying on the Mintzes' vehement stance with respect to Section 8.2(a), Shelley decided prior to the mediation to deliberate with her daughters over the course of the ten business days following the mediation to decide whether she wished to submit her Purchase Notice. (*Id.*) Absent the Mintzes' (mis)representations, she would have served her Purchase Notice at the same time (or even prior to) the Mintzes serving their Notice. (*Id.*)

By their actions, the Mintzes are unfairly attempting to eliminate Shelley's prospective right to bid for the Company and at the same time securing Shelley's interests at a lower price than they might otherwise be obligated to pay if they successfully outbid Shelley. *See Jones v. Jones*, 82 A.D.2d 674, 675, 582 N.Y.S.2d 266, 267 (2d Dep't 1992) ("[F]aced with prospective buyers who might pay more for the property, he seeks to disavow his earlier offer.... We... find that he is estopped from asserting such a claim"). Under these circumstances, the Mintzes are estopped from asserting that their Purchase Notice was served "first." *See 335 Second Street Housing Corp. v. Fridal Enterprises, Inc.*, 36 A.D.3d 608, 609, 830 N.Y.S.2d 173, 174 (2d Dep't 2007).

POINT III

THE COURT SHOULD DIRECT A BIDDING PROCESS BETWEEN THE PAZERS AND MINTZES TO DETERMINE WHICH FAMILY IS ENTITLED TO PURCHASE THE SHOPPING CENTER

Both the Pazers (in Shelley's First Counterclaim for declaratory relief) and the Mintzes (in their Seventeenth Cause of Action for specific performance) invoke the Court's equitable powers to fashion an appropriate remedy where both parties have served what they assert are valid Purchase Notices.[14] The Pazers submit that the appropriate remedy, as previously suggested by the Mintzes, would be for the Court to direct that a bidding process take place between the Pazers and the Mintzes for the right to purchase the Company, and the Shareholder group offering the highest purchase price "wins" and gets to buy the other group out.

Although the Shareholders' Agreement clearly provides both the Mintzes and the Pazers the right to submit Purchase Notices within ten business days of a failed mediation, the Agreement does not address what occurs when both sides exercise their purchase rights. Under these circumstances, the Court is empowered to construe the Agreement in a practical manner, consistent with the parties' intentions. "[C]ourts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear." *See Essex Ins. Co. v. Pingley*, 41 A.D.3d 774, 777, 839 N.Y.S.2d 208, 210 (2d Dep't 2007) (citing *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 634 N.Y.S.2d 669 (1995)). As discussed above, the Pazers and Mintzes through the Shareholders' Agreement expressed a clear preference that (a) the Shopping Center remain a family legacy asset, and that (b) in any sale of the Company's assets, a fair price be paid. In the event that both sides submit Purchase Notices, a bidding process satisfies both preferences. *See, e.g., Matter of Friedman*, 64 A.D.2d 70, 82, 407 N.Y.S.2d 999, 1006 (2d Dep't 1978) ("courts will endeavor to give the construction most equitable to both parties instead of one which will give one of the parties an unfair or unreasonable advantage over the other").

These preferences are reflected in the provisions of the Shareholders' Agreement governing what occurs when **only one** side submits a Purchase Notice, and what occurs when

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[14] The Mintzes also seek summary judgment dismissing Shelley's First Counterclaim, seeking declaratory relief directing a bidding process, and Second Counterclaim, seeking to enjoin the appraisal process as superfluous in the event that a bidding is directed, primarily on the grounds that the Court should not direct that a bidding take place. For the reasons discussed herein, the Court should also deny that aspect of the Mintzes' motion.

neither side submits a Purchase Notice. When only one side submits a Purchase Notice, Section 8.2(c) provides that the purchase price is determined through "baseball" type arbitration. This process is necessary only because the selling and buying shareholders have different incentives – the seller will want the highest price (and is incentivized to value the Company at a high number), and the buyer will want the lowest price (and is incentivized to value the Company at a low number). When **both** sides seek to be the buyer, there is no need to artificially incentivize them, since each side will bid up to the amount it is willing to pay to acquire the other side's interest, and the side that is able and willing to pay more earns the right to do so. More importantly, baseball arbitration cannot settle **who is entitled to be the buyer**, which a bidding *can* accomplish. In addition, a bidding process (or alternatively, a sale on the open market), ensures that both Shareholder groups receive fair value for their shares. As more fully discussed in the Pazer Affidavit (*see* ¶¶ 60-61), Shelley has received bona fide offers for the Shopping Center from third parties for as much as $55 million. Unlike a baseball arbitration, a bidding process (or alternatively, a sale on the open market) can be structured ensure that the purchase price for the Shopping Center meets or exceeds that $55 million value. For the same reasons, the Pazers' Second Counterclaim, which seeks to enjoin the appraisal process associated with baseball arbitration as superfluous, should not be dismissed. Baseball arbitration is simply not appropriate in the event that both Shareholder groups serve valid Purchase Notices to buy out the interests of the other.

When neither side chooses to buy out the other, Section 4.8.3 provides that the Company shall sell its assets on the open market "for the best price obtainable, after reasonable marketing." In this case, to the extent that the Court deems that the parties' Purchase Notices effectively cancel each other out, the Court could find that **neither** side has submitted a valid Purchase

Notice and direct the Company to be sold pursuant to Section 4.8.3.[15] However, since the parties prefer to have the Company remain a family asset (*see, e.g.*, Articles 4 and 8 of the Agreement), liquidation should be directed only as a last resort. (Pazer Aff. ¶ 27)

As discussed above, the Mintzes came to the same conclusion:

> While the Agreement is not exactly clear on what happens if both groups exercise their valuable purchase rights, we believe the fair result under the Shareholders Agreements in such event would be:
>
> (1) the shareholder group offering the highest purchase price through its Qualified Appraiser "wins" and gets to buy the other group out (i.e., whoever values the asset more highly prevails . . . .); or
>
> (2) If <u>both</u> shareholder groups elect to buy, <u>neither</u> shareholder group may exercise its purchase right (since the Agreement does not expressly address what happens when <u>both</u> sides elect to buy), <u>and instead the Company must sell its assets on the open market and liquidate</u>.

(Shore Aff. Ex. "I") There is no reason, short of pure opportunism, for the Mintzes to have abandoned their prior position set forth above, which they confidently asserted was the "most likely result[] in Court under the applicable Shareholder Agreement 'shareholder Purchase Notice' provisions . . . ." (*Id.*)

For all of the reasons discussed herein, the Court should also deny the Mintzes' claim for specific performance, which in Mr. Guttenberg's words would have the effect of "reward[ing] the <u>low</u> bidder, just because it acted first." (*See* Pazer Aff., Ex. "I") In addition, the Court should deny the Mintzes' request for specific performance because, as a matter of equity, they have not demonstrated that they are entitled to such relief. First of all, the Mintzes sat on their purported rights for nearly a year, significantly prejudicing the Pazers, who are responsible for 50% of the Company's ongoing expenses, and paralyzing the Company. *Richardson v. Vajiradhammapadip Temple*, 24 A.D.3d 649, 649-50, 807 N.Y.S.2d 392, 392-93 (2d Dep't 2005) (dismissing

[15] This would also likely be the result if the deadlocks were resolved in accordance with New York Business Corporation Law § 1104(a)(3). *See, e.g., Greer v. Greer*, 124 A.D.2d 707, 508 N.Y.S.2d 217 (2d Dep't 1986).

complaint "based upon the plaintiff's unwarranted and prejudicial delay in failing to commence this lawsuit [for specific performance] . . . during which time the defendant continued to maintain the property at its expense"); Pazer Aff. ¶ 40. Second, the Mintzes have not demonstrated in their pleadings or affidavits that they have the ability to perform should the Court grant specific performance on their behalf The Mintzes should be required under any resolution of the disputes in this action to demonstrate that they have the ability to complete the purchase of the Pazer's shares should they ultimately secure the right to do so. *See New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.*, 35 Misc. 3d 1206(A), 951 N.Y.S.2d 87), at *13 (Sup. Ct. Kings Co. Feb. 22, 2012) (Schmidt, J.) ("Specific performance may be granted only where the holder of the right of first refusal is shown to be ready, willing, and able to purchase the property . . . .") (citing *Cipriano v. Glen Cove Lodge No. 1458*, 1 N.Y.3d 53, 769 N.Y.S.2d 168 (2003).

CONCLUSION

For all the foregoing reasons, the Court should grant Shelley's cross-motion for partial summary judgment and should deny the Mintzes' motion for summary judgment.

Dated: New York, New York
August 20, 2013

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