To be Argued by: Julian B. Modesti
Time Requested: 15 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD JUDICIAL DEPARTMENT

A. CAPPIONE, INC., et al.

Plaintiffs-Respondents,

v.

MARC J. CAPPIONE and JOSEPH J. CAPPIONE,

Defendants-Appellants.

DOCKET NOS.:
517481
517800
518007

(St. Lawrence County Index No. 140350)

BRIEF FOR DEFENDANTS-APPELLANTS

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QUESTIONS PRESENTED

1. Did the Shareholders' Agreement provide Plaintiffs an *option* to purchase Defendant's shares in the company, or was Defendant *compelled* to sell his shares to Plaintiffs, upon his termination as an employee of the company?

ANSWER: Despite clear language in the Shareholders' Agreement providing the company the "option" to purchase Defendant's shares, coupled with Plaintiff's sole cause of action for a declaration that the company had the "option" to purchase Defendant's shares and did so properly, Supreme Court held that the Shareholders' Agreement "compelled" Defendant to sell his shares to Plaintiffs.

2. Were Plaintiffs required to purchase Defendant's shares in strict compliance with the notice and time restrictions contained in the Shareholders' Agreement, with which Plaintiffs concededly did not comply?

ANSWER: Supreme Court held that although "[s]everal time limitations in the Shareholders' Agreement were not strictly complied with[,]" Plaintiffs were excused from failing to properly and timely purchase Defendant's shares.

3. Does the Shareholders' Agreement permit Defendant to remain a shareholder, in the event that Plaintiffs fail to timely and properly purchase Defendant's shares?

ANSWER: Supreme Court held that the Shareholders' Agreement did not permit Defendant to remain a shareholder of the company upon his termination as an employee thereof.

4. Was Supreme Court required to designate an officer to receive custody of Defendant's shares, pursuant to CPLR section 5519(a)(4), pending a determination of Defendants' appeals?

ANSWER: Supreme Court refused to designate an officer to receive custody of Defendant's shares pending a determination of Defendants' appeals, and held that Defendants' appeals would not be rendered moot as a result of its Order compelling Defendant to deliver his shares to Plaintiffs prior to a determination of Defendants' appeals.

5. Is Defendants' appeal moot as a result of the transfer of Marc Cappione's shares prior to the appeal, or is an exception (or are exceptions) to mootness applicable?

ANSWER: Defendants' appeal is not moot as it is subject to exceptions to mootness and this Court should otherwise extend the exceptions to mootness to include those exceptions recognized by other states and federal courts, including that the status quo – prior to the share transfer – may be easily restored.

INTRODUCTION

Defendants-Appellants Marc J. Cappione ("Marc Cappione") and Joseph J. Cappione ("collectively Defendants") submit this Brief in support of their appeal from three separate, but related Orders of the Supreme Court, County of St. Lawrence (Hon. David R. Demarest) ("Supreme Court"), the appeals of which were consolidated by this Court's Order dated December 30, 2013 (R. 797A): the Order, dated May 24, 2013 and entered in the St. Lawrence County Clerk's Office ("Clerk's Office") on May 28, 2013

("Order 1") (R. 6-14); the Order dated November 6, 2013 and entered in the Clerk's Office on November 6, 2013 ("Order 2") (R. 214-219); and the Order dated December 4, 2013 and entered in the Clerk's Office on December 4, 2013 ("Order 3") (R. 729-731). Order 1, Order 2 and Order 3 will be referred to collectively as the "Orders".

PRELIMINARY STATEMENT

This appeal seeks to reverse the Orders which condoned a corporation's failure to properly and timely exercise its option, under a Shareholders' Agreement ("Agreement"), to purchase the shares of a terminated employee. The corporation then obtained an order to compel the transfer of shares after Supreme Court refused to acknowledge that the shareholder was entitled to an automatic stay pending appeal.

A. Cappione, Inc. (the "Company") is engaged in the wholesale distribution of alcoholic beverages. The individual Plaintiffs and Defendants (the "Parties") are current and/or former shareholders of the Company. The Parties' relationship is governed by the Agreement.

The Agreement provides the Company and any non-selling shareholder a right of first refusal to purchase a selling shareholder's shares within a defined period of time. The Agreement also provides the Company and its shareholders the "option" to purchase an employee/shareholder's shares upon that shareholder's termination as an employee of the Company.

At the time the Agreement was executed, Plaintiffs John R. Cappione and David P. Cappione and Marc Cappione were each employees and shareholders of the Company. Each shareholder owns an one-third interest.

On December 21, 2010, Marc Cappione was arrested. On February 18, 2011, he pleaded guilty to a felony – first degree attempted dissemination of indecent materials to a minor. Marc Cappione has been incarcerated since April 28, 2011 and is due to be released in September 2014.

Plaintiffs allege that (1) at a July 5, 2011 shareholders' meeting, the Company passed a resolution terminating Marc Cappione's employment, effective retroactively as of March 30, 2011; and (2) the Company passed a resolution authorizing it to purchase Marc Cappione's shares. The Company hired Midtown Valuation Group, which produced a written valuation stating that the Company, on a going-concern basis, had a value of $2,734,000.

When Marc Cappione refused to sell his shares for a price based on the valuation, Plaintiffs commenced this action seeking a declaration that, pursuant to the terms of the Agreement, the Company had the option to buy Marc Cappione's shares and had properly exercised that option.

The Agreement provided the Company only an "option" to purchase Marc Cappione's shares, which option must be exercised within thirty (30) days of Marc Cappione's termination as an employee of the Company. Having made Marc Cappione's termination retroactive to March 30, 2011, more than ninety (90) days prior to the resolution date, the Company effectively prevented its own timely exercise of its option.

Moreover, the Agreement required the Company to close on its option to purchase Marc Cappione's shares within ninety (90) days of his termination as an employee of the Company. However, through no fault of the Defendants, the Company failed to obtain a

valuation of the Company until May 10, 2012. That valuation was not delivered to Marc Cappione or his agent until July 3, 2012, almost one year after the Company's alleged election to purchase his shares. The Company did not offer to close on its option to purchase Marc Cappione's shares until September 12, 2012, and even then, on terms that were contrary to those set forth in the Agreement. No excuse was offered for the Company's repeated delays.

Defendants contended that under New York law, the option provided in the Agreement carries with it an obligation to strictly comply with the procedural and time limitations contained in the option contract. Plaintiffs failed to comply with a single provision of the Agreement related to the Company's purchase option and therefore could not compel Marc Cappione to transfer his shares. Accordingly, Defendants argued, he should remain a shareholder of the Company.

Both parties moved for summary judgment. Supreme Court held that "[s]everal time limitations in the Shareholders' Agreement were not strictly complied with" by the Company because it was "unable" to do so, although no reason was provided why the Company was "unable." Regardless, Supreme Court excused the Company from such failures because, it held, Marc Cappione was "compelled to sell his shares" and time was not of the essence.

After months of negotiations to resolve the dispute, Plaintiffs moved Supreme Court for an Order compelling Marc Cappione to turn over his shares to the Company. Defendants cross-moved to invoke the protections of the automatic stay provided by CPLR section 5519(a)(4) ("CPLR 5519(a)(4)"), and asked Supreme Court to designate an

officer to receive custody of Marc Cappione's shares pending a determination of Defendants' appeal. Supreme Court granted Plaintiffs' motion and denied Defendants' cross-motion, finding specifically that the delivery of Marc Cappione's shares to the Company would not render Defendants' appeal moot.

On Defendants' motion to renew, Supreme Court again refused to designate an officer to receive custody of Marc Cappione's shares pending appeal. This Court then denied Defendants' motion for a stay pending appeal. Pursuant to Supreme Court's Order, Marc Cappione's shares were delivered to Plaintiffs' counsel on November 21, 2013.

The Orders should be reversed and this case should be remitted to Supreme Court for entry of a Judgment declaring that the Company had the option under the Agreement to purchase Marc Cappione's shares; the Company failed to properly and timely exercise that option to purchase Marc Cappione's shares; and Marc Cappione shall remain a shareholder of the Company, subject to the terms of the Agreement.

STATEMENT OF FACTS

A. THE SHAREHOLDERS' AGREEMENT

John R. Cappione, Marc J. Cappione and David P. Cappione each held a one-third (1/3) ownership interest (R. 37). On or about November 17, 2005, the parties entered into the Agreement. The relevant restrictions on the transfer and/or disposition of shares are found under Section Two(D):

> "If a shareholder . . . in the case of a shareholder who is an employee of the company, ceases voluntarily or involuntarily to be an employee of the company for any reason then he or she shall be treated as though he or she

> were selling all of his or her shares under paragraph A of this Section Two, and the company and the other shareholders shall have the options set out in paragraph A to purchase all or any part of the shares which the shareholder owns at the time that event occurs, except that the purchase price shall be determined under Section Four."

(R. 33) (emphasis added).

Paragraph A of Section Two provides the Company thirty (30) days from the date of Defendant's termination to exercise an "option to purchase all or any part of the offered shares on the payment terms specified in Section Four . . . " (R. 33).

The Company was required to provide confirmation of any exercise of its option to all shareholders:

> "The company and any shareholder shall exercise their options to purchase shares by delivering written confirmation to all parties to this agreement, specifying the number of shares to be purchased."

(R. 33) (emphasis added).

Thereafter, the closing on the share transfer was mandated to occur within 90 days after the event giving rise to the obligation to sell – in this case, the termination:

> Any sale of the shares under this agreement shall be closed within Ninety [90] days after the event giving rise to the option or obligation to sell, at a time and place reasonably specified by the purchaser."

(R. 34) (emphasis added).

B. MARC CAPPIONE'S TERMINATION AS AN EMPLOYEE OF THE COMPANY

Marc Cappione was employed by the Company and, from on or about May 18, 2005, was a shareholder of the Company (R. 22).

On February 18, 2011, Marc Cappione pleaded guilty to first degree attempted dissemination of indecent materials to a minor, and was thereafter, and remains, incarcerated (R. 26).

According to the Complaint, Marc Cappione's employment was terminated by resolution dated July 5, 2011, and made effective, retroactively, to March 30, 2011 (R. 26, 30).

C. THE COMPANY'S ATTEMPTED EXERCISE TO PURCHASE MARC CAPPIONE'S SHARES

Plaintiffs allege that, on July 5, 2011, a resolution was passed authorizing the Company to purchase Marc Cappione's shares (R. 26).

Plaintiffs further allege that they obtained an independent valuation, for the purposes of completing any share purchase, on May 10, 2012 (R. 27). Plaintiffs' independent valuation was not delivered to Defendants' counsel until July 3, 2012 (R. 136-137).

By letter dated September 12, 2012, Plaintiffs offered to close on the transaction on the terms set forth in Plaintiffs' counsel's letter dated July 3, 2012 (R. 557-558). Defendants declined due to Plaintiffs' failure to comply with the Agreement.

D. THE COMPLAINT

Plaintiffs sought a judgment, pursuant to CPLR section 3001, declaring that (1) Marc J. Cappione ceased to be an employee of the Company as of March 30, 2011; (2) under paragraph D of Section Two of the Agreement, Marc J. Cappione "shall be treated as though he [] were selling all of his [] shares" and is therefore entitled to all of the

rights set forth in paragraph A of Section Two; (3) that the Company has the *option* under Section Two A of the Agreement to purchase all of Marc Cappione's shares; (4) that the Company has exercised its *option* to purchase Marc J. Cappione's shares; (5) that the purchase price for those shares "shall be determined under Section Four" of the Agreement; and (6) pursuant to Section Four of the Agreement, the parties are bound by the May 10, 2012 independent valuation report prepared by Midtown Valuation Group, LLC and, as such, the value of Marc J. Cappione's 33.33% ownership interest is $911,242.20 (R. 31).

E. ORDER 1 – THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

By a pre-Answer motion to dismiss, which was later converted into a motion for summary judgment on consent (R. 138), Defendants contended that strict compliance with the time limitations and procedural requirements ("Redemption Provisions") was required and the Company indisputably failed to comply with the Redemption Provisions. The Company breached the Agreement and therefore were barred from relying upon it to compel the sale of Marc Cappione's shares (*id.*).

In support of Plaintiffs' cross-motion for summary judgment, Plaintiffs contended that the Redemption Provisions of the Agreement did not constitute an "option"; rather, they claimed the Agreement compelled Marc Cappione to sell his shares to the Company (R. 167-199). Plaintiffs also contended that strict compliance with the Redemption Provisions was contrary to the underlying purpose of the Agreement (*id.*).

Supreme Court held in part:

> "**Several time limitations in the Shareholders' Agreement were not strictly complied with**. Since Marc J. Cappione's termination was not officially accomplished until the shareholders' meeting on July 5, 2011, and made retroactive to March 30, 2011, the company was unable to formally exercise its option to purchase his shares within 30 days of termination. Additionally, due to the delay in obtaining an up-to-date valuation of the company's shares, it was unable to complete the purchase of the shares within 90 days."

(R. 13) (emphasis added).

Notwithstanding such lack of compliance, Supreme Court held that (1) time was not of the essence, thereby excusing Plaintiffs' failure to timely act in strict compliance with the terms of the Agreement; and (2) the Agreement did not provide an option for the Company and its shareholders to purchase Marc Cappione's shares, but rather "compelled" Marc Cappione to sell his shares upon his termination as an employee of the Company (R. 13-13A).

Defendants contend that Supreme Court's Order 1 was in error, and ignores both the express language of the Agreement and common law. Supreme Court's determination rewrites the Agreement, in order to grant Plaintiffs the relief requested, and to deny Marc Cappione the benefit of his contractual rights under the Agreement. Defendants timely appealed Order 1 (R. 2).

F. ORDER 2 – PLAINTIFF'S MOTION TO COMPEL SHARE TRANSFER AND DEFENDANTS' CROSS-MOTION FOR STAY PENDING APPEAL

When settlement negotiations failed, Plaintiffs moved, by Order to Show Cause, to compel Defendants' compliance with Order 1, by compelling Marc Cappione to sell his shares to Plaintiffs prior to a determination of Defendants' appeal of Order 1 (R. 231-251, 328-717).

The principal ground on which Plaintiffs relied for their Motion to Compel was the New York State Division of Alcoholic Beverage Control ("ABC") hearing to be held on November 7, 2013 ("ABC Hearing") and the claimed harm that would result therefrom. Plaintiffs argued before Supreme Court that the Company would *imminently* lose its license to distribute alcoholic beverages due to the ABC Hearing. (R. 334, ¶ 36; R. 348-349, ¶¶ 124-134). This argument was made knowing it was not true.

New York Alcoholic Beverage Control Law section 102(2) provides in part:

> "No person holding any license hereunder . . . shall knowingly employ in connection with his business in any capacity whatsoever, any person, who has been convicted of a felony . . . who has not subsequent to such conviction received . . . the written approval of the state liquor authority permitting such employment[.]"

(ABC Law § 102(2)).

Notably however, section 102 permits ABC to *exercise its discretion* in approving the employment of a felon, and "may make such rules as it deems necessary to carry out the purpose and intent of this subdivision." (ABC Law § 102(2)).

The purpose of the restriction on the employment of convicted felons by licensees is two-fold: (1) to prevent the convicted felon's participation in the operation of the licensee, and (2) to prevent a convicted felon from sharing in the direct proceeds of the sale of alcoholic beverages (R. 738, ¶ 12). Defendants proved that neither of those risks were present in this case as Marc J. Cappione is incarcerated and was not an employee of the Company.

At oral argument, relying upon the opinion of an experienced attorney who routinely practices before ABC (R. 735), Defendants argued that there was no exigency

arising from the ABC Hearing date because the Company had not even requested one adjournment of the ABC Hearing. Plaintiffs' counsel vaguely stated to Supreme Court that such "an adjournment," without specifying what *type* of adjournment, had been requested. However, Defendants' counsel made clear during oral argument that only an adjournment of the initial Notice of Pleading (the administrative complaint) (R. 743, ¶ 11) had been requested, not of the ABC Hearing itself. Plaintiffs' counsel did not rebut this statement and did nothing to correct the vague assertion he made to Supreme Court, that the Company had previously sought an adjournment.

In further response to Plaintiffs' motion, Defendants cross-moved, seeking to invoke the automatic stay provided by CPLR 5519(a)(4), because Marc Cappione's shares are "personal property," subject to the automatic stay under such section; in accordance with CPLR 5519(a)(4), the shares were to be placed:

> "in the custody of an officer designated by the court of original instance to abide by the direction of the court to which the appeal is taken . . .."

(R. 252-327, 719-721).

Defendants argued that although the stay was automatic – like all stays under subsection (a) of CPLR section 5519 – Supreme Court's intervention was ministerial in nature in that Supreme Court merely needed to designate the officer to take custody of the personal property – in this case Marc Cappione's shares.

In response to Defendants' argument before Supreme Court that the interim transfer of Marc Cappione's shares could likely render the appeal from Order 1 moot,

Plaintiffs' counsel expressly offered, at oral argument, to waive any mootness argument on appeal.

Supreme Court ultimately accepted Plaintiffs' argument that the ABC hearing scheduled for November 7, 2013 would cause an imminent suspension or revocation of the Company's license, finding that Defendants were "playing with fire by pressing the SLA [State Liquor Authority]" on the issue of revocation (R. 218). Supreme Court continued:

> "You [Defendants] have your right to appeal, go ahead and take your appeal. If you win, they will transfer the shares back or you will have an opportunity to argue what their value is."

(R. 218) (emphasis added).

By Order 2, Supreme Court granted Plaintiffs' Motion to Compel, and denied Defendants' cross-motion for an automatic stay (R. 214-219). Supreme Court refused to designate an officer to receive custody of Marc Cappione's shares pending a determination of the appeal of Order 1, and thereby denied Defendants the benefit of the automatic stay provided in CPLR 5519(a)(4). Supreme Court compelled the turnover of Marc Cappione's shares within seven (7) days of execution of Order 2.

Defendants contend that Supreme Court erred, as Marc Cappione's shares are "personal property" subject to the automatic stay provided by CPLR 5519(a)(4).

Defendants timely appealed Order 2 (R. 213).

G. DEFENDANTS' MOTION BEFORE THIS COURT FOR A STAY PENDING APPEAL

Following Supreme Court's issuance of Order 2, Defendants moved this Court, by Order to Show Cause with temporary restraining order, for an Order, pursuant to CPLR 5519(c), staying enforcement of Order 1 and Order 2 pending a determination of Defendants' appeals thereof (R. 747, 781).

Justice John C. Egan, Jr. signed the Order to Show Cause on November 7, 2013 (R. 781-782). However, the temporary relief requested by Defendants was stricken, without elaboration, from the Order to Show Cause, and Defendants' motion was set down for a hearing on November 15, 2013, *two days after* the date by which Order 2 compelled Marc Cappione to sell his shares to the Company (by November 13, 2013).

H. ADJOURNMENT OF THE ABC HEARING

By letter to ABC dated November 4, 2013, Defendants requested an adjournment of the November 7, 2013 hearing, bringing to its attention Marc J. Cappione's intent to perfect the appeal from Order 1 and Order 2 and the potential harm that would result if he were compelled to sell his shares based on the incorrect statement by Plaintiffs to Supreme Court that the Company would imminently lose its license at the November 7, 2013 ABC hearing (R. 757-758).

By letter dated (mistakenly) "September 26, 2013" (but faxed November 5, 2013), ABC denied the adjournment request and referred Defendants to the Company (the licensee) and its counsel to secure the adjournment (R. 759). The ABC letter makes it

clear that it had received a communication about the status of the litigation, presumably from Plaintiff (R. 759).

By letter dated November 5, 2013, Defendants immediately notified ABC that (A) contrary to its beliefs, no settlement had been reached and Supreme Court had not yet signed an Order (Order 2 was later signed on November 6, 2013); (B) the Company had represented to Supreme Court that the November 7, 2013 hearing would imminently result in revocation or suspension of the Company's license (which was untrue); (C) an adjournment best served both Marc J. Cappione and the Company; and (D) all Marc J. Cappione was asking for was some time (R. 760-761).

Having received neither a response from ABC nor any communication from Plaintiffs' counsel, on November 7, 2013 at 12:30 p.m., Defendants' counsel appeared at the State Office Building in Syracuse where the ABC Hearing was noticed to be heard, and was informed, for the first time, *that no such hearing was taking place* (R. 745, ¶ 15).

Defendants' later understanding was that the hearing had been adjourned at Plaintiffs' request. However, Plaintiffs' counsel never informed Supreme Court that the allegedly "dire" circumstances which Plaintiffs originally relied upon to compel Marc Cappione to sell his shares under Order 2, no longer existed (R. 745, ¶ 16).

I. ORDER 3 – DEFENDANTS' MOTION TO RENEW ITS MOTION FOR STAY PENDING APPEAL BEFORE SUPREME COURT AND FOLLOW-UP REQUEST TO THIS COURT FOR A TEMPORARY RESTRAINING ORDER

By letter dated November 8, 2013, Defendants requested that Justice Egan reconsider his decision striking the temporary relief requested, in light of the fact that the ABC Hearing was adjourned – *without a new date,* Defendants later learned – and the

fact that compliance with the Order to Compel was directed to take place two days *before* this Court's return date for Defendants' motion for a stay pending appeal (R. 783-785). Plaintiffs opposed this relief. This Court notified counsel by email that no action would be taken on Defendants' request to issue the temporary restraining order as the request was denied.

Simultaneously, Defendants moved before Supreme Court, pursuant to CPLR section 2221(a) and (e), to renew Plaintiffs' Motion to Compel and Defendants' cross-motion for a stay pending appeal, which had resulted in Order 2 ("Defendants' Motion to Renew") (R. 735-787). As Order 2 was based principally upon the representation made by Plaintiffs' counsel that the ABC hearing scheduled for November 7, 2013 would cause an imminent suspension or revocation of the Company's license, and that ground had been eliminated by the adjournment of the ABC hearing, it was logical to seek Supreme Court's reconsideration.

Moreover, a stay was necessary because a transfer of the shares on November 13, 2013 – the deadline established under Order 2 – prior to a determination of the motion before this Court for a stay pending appeal – which was returnable on November 15, 2013 – could cause a change in circumstances that could render Defendants' appeal moot (if not subject to an exception to the mootness doctrine or an extension of those exceptions).

Therefore, Defendants renewed their request for an automatic stay of enforcement, pursuant to CPLR 5519(a)(4), subject only to Supreme Court's designation of an officer to take custody of Marc Cappione's shares and further "abide the direction of the court to

which the appeal is taken" – meaning this Court (*id.*). Defendants contended, again, that while the stay is automatic, Supreme Court's ministerial intervention was required in order to designate the officer to whom custody of the personal property will be placed.

Under Order 3, among other relief, Supreme Court expressly declined, again, to provide Defendants an automatic stay under CPLR 5519(a)(4) and refused to "identify an 'officer designated by the court of original instance' who shall both take custody of Marc Cappione's shares of A. Cappione, Inc. and 'abide the direction of the court to which the appeal is taken," pursuant to CPLR 5519(a)(4) (R. 731). The best Defendants could get was an escrow, by agreement, of Marc Cappione's shares pending a decision of this Court on Defendants' pending motion for a stay pending appeal; but Order 3 made expressly clear that such relief was not being provided under CPLR 5519(a)(4) (R. 730).

Order 3 further clarified Supreme Court's determination in Order 2 that there was no enforceable settlement agreement and Plaintiffs' Motion to Compel on the ground that a settlement had been reached between the parties was specifically denied (R. 730).

Defendants contend that Supreme Court erred in that it, again, incorrectly denied Defendants the absolute right to an automatic stay of enforcement of Order 1 and Order 2, pursuant to CPLR 5519(a)(4), pending a determination of Defendants' appeals therefrom.

Defendants timely appealed Order 3 (R. 722-725).

J. THIS COURT'S DENIAL OF MOTION FOR STAY PENDING APPEAL

By Order decided and entered on November 19, 2014, this Court denied Defendants' motion for a stay pending appeal. Immediately thereafter, the escrow agent transferred Marc Cappione's shares to Plaintiffs' counsel.

The underlying action continues, the next steps being discovery and ultimately a trial with regard to valuation issues related to the transferred shares.

By Order dated December 30, 2013, this Court granted Defendants' motion to consolidate the appeals from the Orders and extended Defendants' time to perfect the appeal from Order 1 (R. 797A).

ARGUMENT

POINT I.

ORDER 1 SHOULD BE REVERSED: PLAINTIFFS WERE OBLIGATED TO STRICTLY COMPLY WITH THE TERMS OF THE OPTION TO PURCHASE MARC CAPPIONE'S SHARES BUT ADMITTEDLY FAILED TO DO SO

Plaintiffs' complaint is based upon Marc Cappione's alleged breach of the Agreement. To succeed on a claim of breach of contract, Plaintiffs must "clearly specif[y] the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant" (*Furia v Furia*, 116 AD2d 694, 695 [1986] (emphasis added)).

Supreme Court found that the Company failed to strictly comply with the Redemption Provisions in the Agreement. Regardless, Supreme Court granted summary

judgment in favor of Plaintiffs, thereby compelling Marc Cappione to sell his shares to the Company. Supreme Court erred by doing so. Order 1 should be reversed.

A. PLAINTIFFS FAILED TO TIMELY AND PROPERLY EXERCISE THE OPTION TO PURCHASE MARC J. CAPPIONE'S SHARES

Supreme Court erred when, even after finding that that the Company did not strictly comply with the deadlines in the Agreement, it held that Marc Cappione was required to transfer his shares to the Company (R. 13-13A).

Generally, a shareholders' agreement that is clear and unambiguous should be interpreted according to its terms, without resort to extrinsic evidence that may add or vary the terms of such agreement (*Walker & Zanger, Ltd. v Zanger*, 241 AD2d 345 [1997]). Courts must enforce shareholder agreements according to their terms (*In re Penepent Corp.*, 96 NY2d 186, 192 [2001] (internal citation omitted]).

The manner in which an option must be exercised is a matter of contract, and parties may specify in their agreement if they wish that an option be exercised by a certain time or in a particular manner (*AJW Partners, LLC v Peak Entertainment Holdings, Inc.*, 11 Misc 3d 1054A [Sup Ct, New York County 2006], citing *Urban Archaeology Ltd. v Dencorp Invs. Inc.*, 12 AD3d 96, 103-04 [2004]).

"New York courts have consistently reaffirmed this principal that an optionee can only exercise an option in strict accordance with its terms" (*Urban Archaeology Ltd.*, 12 AD3d at 104, citing *Willmott v Giarraputo*, 5 NY2d 250, 157 [1959]; *Ittleson v Barnett*, 304 AD2d 526, 528 [2003] (emphasis added)). "Not only is strict adherence to the terms of an option ordinarily required, but it is a broadly accepted principle that time is of the

essence with this type of contractual provision" (*id.*) (internal quotation marks omitted) (emphasis added).

> "*No express provision making time of the essence is required in an option contract for it to be so, since the option by its very terms must be exercised within a specified time and otherwise in accordance with specified conditions*"

(*id.*) (emphasis in original) (internal quotation marks omitted).

Use of the word "shall" in an agreement "suggests a mandatory course of action" (*Seabury Constr. Corp. v Jeffrey Chain Corp.*, 289 F3d 63, 68 [2d Cir. 2002]; *cf Hong Kong & Shanghai Banking Corp. v Suveyke*, 392 F Supp 2d 489, 492 [EDNY 2005] ("the use of the word 'shall' is a clear indication of mandatory, rather than permissive language")).

In this case, the Agreement provided the following option rights to the extent an employee-shareholder was no longer an employee of the Company:

> "If a shareholder[,] . . . in the case of a shareholder who is an employee of the company, ceases voluntarily or involuntarily to be an employee of the company for any reason then he or she shall be treated as though he were selling all of his or her shares under paragraph A of this Section Two, and the company and the other shareholders shall have the options set out in paragraph A to purchase all or any part of the shares which the shareholder owns at the time that the event occurs . . .."

(R. 33 [§ Two(D)] (emphasis added)).

Paragraph A of Section Two, underlined in the paragraph immediately above, mandates that the Company (or the remaining shareholders) exercise its option rights as follows:

> "For a period of thirty [30] days after the notice is delivered, the company shall have an option to purchase all or any part of the offered shares . . .. If

> within this thirty [30] day period the company does not exercise its option to purchase all the shares specified in the notice, then the other shareholders shall have an option for an additional thirty [30] day period to purchase all or any part of the offered shares . . .."

(R. 33 [§ Two(A)] (emphasis added)).

If the Company (or shareholders) exercised its option rights, it was required to notify the shareholders as follows:

> "The company and any shareholder shall exercise their options to purchase shares by delivering written confirmation to all parties to this agreement, specifying the number of shares to be purchased."

(R. 33 [§ Two(B)] (emphasis added)).

Once an option is exercised, the Agreement contained a strict, 90-day closing deadline:

> Any sale of the shares under this agreement shall be closed within Ninety [90] days after the event giving rise to the option or obligation to sell, at a time and place reasonably specified by the purchaser."

(R. 34 [§ Four(B)]) (emphasis added)).

Plaintiffs allege that Marc Cappione was terminated as an employee of the Corporation by a resolution passed on July 5, 2011, and made effective, retroactively, as of March 30, 2011 (R. 27, 30, 39-41).

The Company had thirty (30) days from the date of Marc Cappione's termination to exercise its option to purchase Marc Cappione's shares (R. 33 [§ Two(D), (A)]). Thereafter, a closing was mandated within 90 days of his termination (R. 34 [§ Four(B)]).

By making Marc Cappione's termination retroactive more than ninety (90) days prior to the July 5, 2011 resolution terminating his employment (R. 27), Plaintiffs

effectively prevented their own timely exercise of their options to purchase Marc Cappione's shares. The Company also failed to close in a timely manner. These failures are readily acknowledged by Supreme Court's Order 1:

> "**Several time limitations in the Shareholders' Agreement were not strictly complied with**. Since Marc J. Cappione's termination was not officially accomplished until the shareholders' meeting on July 5, 2011, and made retroactive to March 30, 2011, the company was unable to formally exercise its option to purchase his shares within 30 days of termination. Additionally, due to the delay in obtaining an up-to-date valuation of the company's shares, it was unable to complete the purchase of the shares within 90 days."

(R. 13) (emphasis added).

Supreme Court failed to recognize yet another breach of performance by Plaintiffs: their failure to deliver to all parties the confirmation of the exercise of the option. Section Two[B] of the Agreement is titled "Procedures for Exercising Options[,]" and provides, in part:

> "The company and any shareholder shall exercise their options to purchase shares by delivering written confirmation to all parties to this agreement, specifying the number of shares to be purchased."

(R. 33 [§ Two(B)] (emphasis added)).

Plaintiffs failed to allege or prove that any written notice of the Company's election to purchase Marc Cappione's shares was delivered to Defendants (R. 27 (Plaintiffs have alleged only that A. Cappione, Inc. passed a resolution authorizing the purchase of Marc J. Cappione's shares)) and, despite request, a copy of the written notice required by paragraph B of Section Two was not provided (R. 126-127, 130-133).

The Company failed to close on the sale of Marc Cappione's shares within ninety (90) days of Marc Cappione's termination (R. 34 [§ Four(B)]). In fact, Plaintiffs did not even provide the purchase price for Marc Cappione's shares until July 3, 2012 (R. 136-137, 341), more than 16 months after Marc Cappione's termination (March 30, 2011), and 364 days after the Company allegedly passed the resolution to purchase Marc Cappione's shares (July 5, 2011). Plaintiffs did not offer to close on the transaction until September 12, 2012, and even then, on terms that were not in accordance with the terms of the Agreement (*compare* R. 557-558, *with* R. 34 [§ Four(B)]).

Supreme Court erred by relying on cases which were materially distinguishable and against the weight of the law (R. 13-13A). In *Sidor v Cohen*, the Court compelled specific performance of an option to purchase defendant's shares "'at any time (but not later than June 1, 1987) upon thirty-days written notice', with the closing to take place 30 days following mailing of the notice of election to purchase" (151 AD2d 660 [1989]). However in *Sidor*, unlike in this case, the buyer provided timely notice of the exercise of the option. Moreover, the *Sidor* court expressly stated that its determination was limited to "the circumstances of this case" (*id.* at 660-61). *Sidor* has not been followed by this Court.

In *Rutigliano v Rutigliano*, a motion to dismiss was denied because notice of exercise of the option by the buyers was properly made (again, unlike in this case) and the sellers prevented the buyers' performance by not providing necessary information to calculate the purchase price (the defense of frustration of performance) (10 AD3d 516,

517 [2004]). In this case, no frustration of performance was alleged by Plaintiffs or found.

Supreme Court erred by failing to follow the more widely-followed principles of law that govern this case: strict adherence to the terms of an option is required and "no express provision making time of the essence is required in an option contract for it to be so, since the option by its very terms must be exercised within a specified time and otherwise in accordance with specified conditions" (*Urban Archaeology Ltd.*, 12 AD3d at 104).

The undisputed facts readily show that Plaintiffs failed to comply, in strict compliance, with every provision set forth in the Agreement for the exercise of the option to purchase Marc Cappione's shares. Plaintiffs are therefore barred from compelling Marc Cappione to sell his shares to the Company. That Plaintiffs could be adversely affected by their failure to comply with the terms of the Agreement is not grounds for a deprivation of Marc Cappione's rights under the clear and unambiguous Agreement. Marc Cappione is entitled to the benefits of the Agreement, just as much as every other shareholder of the Company.

For these reasons, Order 1 should be reversed.

B. PLAINTIFFS' COMPLAINT READILY ADMITS THAT THE COMPANY WAS REQUIRED TO EXERCISE THE "OPTIONS"

Plaintiffs are estopped to deny their duty to comply with the terms of the Agreement with regard to the exercise of options because Plaintiffs' very own Complaint

asked Supreme Court to issue a judgment declaring that the Company had such option under the Agreement and exercised same.

Plaintiffs' Complaint alleged the following, in part, in three different paragraphs in the Complaint, including in the "wherefore clause," wherein Plaintiffs "demand[ ] judgment as follows":

> "(3) A. Cappione, Inc. has the option under Section Two A of the Agreement to purchase all of Marc Cappione's shares; (4) that A. Cappione, Inc. has exercised its option to repurchase Marc J. Cappione's shares . . .."

(R. 20-21, ¶2; 30, ¶55; 31[wherefore clause]) (emphasis added).

Nowhere in Plaintiffs' Complaint is the Court asked to excuse Plaintiffs' non-compliance with the Redemption Provisions. Instead, Plaintiffs asked the Court to declare that the option had been exercised; but when Plaintiffs realized they had not legally done so, they opted instead to ignore the words of the Agreement and successfully persuaded Supreme Court to do likewise.

C. Supreme Court's Reasoning under Order 1 is Legally and Factually in Error

1. The Time Limitations in the Agreement were Enforceable Even in the Absence of Either Party Making Time-of-the-Essence

Supreme Court erred by excusing the Company from complying with the time limitations in the Agreement because neither party made time-of-the-essence.

Order 1 provides in part:

> "Although the Agreement does contain specific time limitations, it does not make 'time of the essence' with those or similar words. Thus, where

> neither the parties nor their Shareholder Agreement made time of the essence regarding a closing date, the fact a closing was not consummated within 30 days as specified in the Agreement was not fatal."

(R. 13).

The law implies a reasonable time for performance only where the contract is silent as to the date of performance (*Parker v Booker*, 33 AD3d 602, 603 [2006]), in the absence of a provision that time is of the essence (*Tupper v Wade Lupe Constr. Co.*, 39 Misc 2d 1053, 1056 [Sup Ct Schenectady County 1963]), or where performance within the contract period is waived (*Cross v Frezza*, 161 AD2d 927, 928 [3d Dept 1990]).

In this case, the Agreement was not "silent as to the date of performance" (*Parker*, 33 AD3d at 606) and therefore the time limitations in the Agreement for the Company to exercise its purchase option and to close on the share purchase were binding and enforceable, regardless if either party made time-of-the-essence.

Despite having found that "the Agreement does contain specific time limitations" and "[s]everal time limitations in the Shareholders' Agreement were not strictly complied with[,]" Supreme Court still held, incorrectly, that such time limitations were not binding on the parties in the absence of one of the party's demanding time of the essence (R. 13). Supreme Court's holding is unsupported by the law and therefore Order 1 should be reversed.

2. MARC CAPPIONE WAS NOT "COMPELLED" TO SELL HIS SHARES

Order 1 provides in part:

> "In this case, we are **not** dealing with parties who have decided to **exercise an option** to purchase an interest in a business in order to dissolve a partnership. The owner to be bought out here is not a dissident partner

> who wishes to voluntarily end a business relationship. Marc J. Cappione has no choice under the terms of the Agreement whether to sell his shares. By no longer being employed and being incapable by law of owning an interest in a beer distributorship, he is **compelled** to sell his shares."

(R. 13-13A) (emphasis added).

Supreme Court's interpretation is in error. The Agreement's terms do not "compel[ ]" Marc Cappione to sell his shares; instead, the terms provide that once Marc Cappione is deemed to have offered his shares for sale as a result of his termination, the Company (and/or shareholders) have the "option" to purchase Marc Cappione's shares. To do so, the terms provide that the Company "shall" exercise such "option" within thirty (30) days of, in this case, his termination (R. 33 [§ Two(D), (A)]). The terms of the Agreement then require notice to all shareholders of confirmation of the number of shares to be purchased; then the sale of the shares "shall be closed" within ninety (90) days after Marc Cappione's termination (*id.*).

The Company was required to strictly comply with the following provisions – as indicated by use of the word "shall":

> "The company and any shareholder shall exercise their options to purchase shares by delivering written confirmation to all parties to this agreement, specifying the number of shares to be purchased.
>
> ***
>
> Any sale of the shares under this agreement shall be closed within Ninety [90] days after the event giving rise to the option or obligation to sell, at a time and place reasonably specified by the purchaser."

(R. 33, 34 [§ Two(D), (A)]) (emphasis added).

The Company failed to comply with either mandatory requirement. No written confirmation was provided to the parties and no closing occurred. Moreover, Supreme Court incorrectly cited a 30 day closing requirement instead of the 90 day requirement found in the Agreement (compare R. 13 and 34).

Having indisputably failed to comply with any of the Redemption Provisions, Plaintiffs are unable to satisfy one of the key elements of their breach of contract cause of action, namely performance by the Company. Accordingly, Order 1 should be reversed.

3. SUPREME COURT IGNORED THAT THE AGREEMENT EXPRESSLY PROVIDES THAT MARC CAPPIONE SHALL RETAIN OWNERSHIP OF HIS SHARES IF PLAINTIFFS' PURCHASE OPTIONS ARE NOT EXERCISED

Provisions of a shareholder agreement relating to "options to repurchase shares upon termination also suggest the possibility that a departing employee may continue to hold shares following separation from the company" (*Zentz v Intl. Foreign Exch. Concepts, L.P.*, 33 Misc 3d 1212A [Sup Ct Kings County 2011] (emphasis added)).

Such is the case here. Both sections Two[A] and Two [D] expressly provide Plaintiffs the options to purchase "all or **any part**" of Marc Cappione's shares upon his termination (R. 33 [§ Two(D), (A)]). If only a "part" of Marc Cappione's shares were purchased by the Company, then obviously Marc Cappione would retain ownership of the balance of the shares not purchased.

Section Two(C) governs those scenarios when either an attempted share purchase fails or the seller sells less than all of his or her shares. It expressly provides that, upon

the purchaser's failure to purchase the shares within the time limitation, the sale is void and therefore the seller retains his or her shares:

> "**Procedure if Options not Exercised**. If within these two option periods, neither the company nor the other shareholders have exercised options to purchase all of the shares specified in the notice, then the seller may proceed to transfer the balance of the available shares in accordance with the terms specified in his notice; except that if the seller does not consummate the transfer within sixty [60] days after expiration of these two option periods, **then the authority of the seller to proceed with the sale shall terminate, and the seller shall then be in the same position he or she would have been in if he or she had never taken steps to obtain nor obtained that authority**."

(R. 33 [§ Two(C)] (emphasis added)).

By providing that the "seller shall then be in the same position he or she would have been in" if the sale had never occurred, section Two(C) clearly provides that the seller shall remain a shareholder if transfer of the shares is not consummated.

The clear language of sections Two(A) and Two(D) renders impossible Supreme Court's conclusion that Marc Cappione was "compelled" to sell his shares to the Company. The Company neither properly exercised its option nor completed the purchase of Marc Cappione's shares. Accordingly, Marc Cappione should retain ownership of his shares.

4. SUPREME COURT IMPERMISSIBLY REWROTE THE AGREEMENT FOR THE COMPANY

It is not the function of the courts to save sophisticated parties, represented by counsel, from their own lack of diligent performance. Similarly, courts should not ignore clear contractual provision, and insert provisions never agreed upon by the parties.

The Agreement does not contain a provision to the effect that the Company automatically exercises its option to purchase the shares of a terminated shareholder, meaning the Company need not take any affirmative action once the termination occurs. Supreme Court cannot insert such a provision in the Agreement, by implication or otherwise, in order to protect to the Company from its own rank failure – while represented by counsel – to timely and properly exercise its option to purchase Marc Cappione's shares.

Although Marc Cappione's termination as an employee is treated under the Agreement as an offer by him to sell his shares (R. 33, § Two[D]), the Company (or shareholders) must still exercise their options in a timely manner and pursuant to the specific terms of the Agreement (R. 33 [§ Two(A)]). The termination does not result in the automatic forfeiture of the shareholder's shares. If that was the intent of the Parties at the time the Agreement was entered into, such a provision should have been included in the Agreement. It was not.

For Supreme Court to imply such an automatic forfeiture in the Agreement – a "compelled" sale to use Supreme Court's language – is to inappropriately insert such a term into the unambiguous Agreement. Courts should not rewrite a contract for a party:

> "The Courts 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."

(*Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19-20 [1961]; *see also Fay's Drug Company v Geneva Plaza Associates*, 98 AD2d 978 [1983] ("the court will not remake the parties' contract" by adding a provision which does not exist)).

> If [parties] are dissatisfied with the consequences of their agreement, 'the time to say so [was] at the bargaining table'"

(*Oppenheimer & Co. v Oppenheim,* 86 NY2d 685, 695 [1995] (internal citation omitted)). This is especially the case where Plaintiffs were represented by counsel *during and after Marc Cappione's termination* and therefore could have readily protected themselves.

Supreme Court's rewriting of the Agreement – by deleting or ignoring the contractual deadlines and deleting the word "option" by inserting in its place an automatic forfeiture provision – runs counter to the rules of contractual interpretation (*see Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 196 [1995]) ("It is a well settled principle of contract law that a court should not adopt a construction of a contract 'which will operate to leave a provision of a contract . . . without force and effect. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation.'")).

Accordingly, Order 1 should be reversed.

POINT II.

ORDER 2 AND ORDER 3 SHOULD BE REVERSED: SUPREME COURT ERRED BY DENYING DEFENDANTS THE BENEFIT OF THE AUTOMATIC STAY PROVIDED UNDER CPLR 5519(a)(4)

By Order 2, Supreme Court granted Plaintiffs' Motion to Compel and denied Defendants' Cross-Motion for an Automatic Stay (R. 214-219). By refusing to designate an officer to receive custody of Marc Cappione's shares pending a determination of

Defendants' appeal of Order 1, Order 2 denied Defendants the benefit of the automatic stay provided under CPLR 5519(a)(4).

Under Order 3, among other relief, Supreme Court expressly declined, again, to provide Defendants an automatic stay under CPLR 5519(a)(4) and refused to "identify an 'officer designated by the court of original instance' who shall both take custody of Marc Cappione's shares and 'abide the direction of the court to which the appeal is taken," pursuant to CPLR 5519(a)(4) (R. 731). The best Defendants could get was an escrow, by agreement, of Marc Cappione's shares pending a decision of this Court on Defendants' pending motion for a stay pending appeal (R. 730); but Order 3 made expressly clear that such relief was not being provided under CPLR 5519(a)(4) (R. 731).

Order 3 did, however, compel Defendants to turn over Marc Cappione's shares to a designated escrow agent pending a determination by this Court of Defendants' motion for a stay pending appeal (R. 730). Order 3 directed the escrow agent to turn over Marc Cappione's shares to Plaintiffs' counsel upon an order of this Court denying Defendants' motion (*id.*). By Decision and Order, this Court denied Defendants' Motion for a stay pending appeal. Upon entry and service of this Court's Decision and Order, Marc Cappione's shares were delivered by the escrow agent to Plaintiffs' counsel.

Supreme Court's refusal to designate an officer to receive custody of Marc Cappione's shares pending a determination of Defendants' appeal was in error, as Order 1 directs the delivery of personal property and, therefore, CPLR 5519(a)(4) provides for a stay of enforcement "without court order[,]" frequently referred to as the "automatic stays" under CPLR Article 55.

A. DEFENDANTS HAD AN ABSOLUTE RIGHT TO AN AUTOMATIC STAY OF ENFORCEMENT OF ORDER 1 PENDING A DETERMINATION OF DEFENDANTS' APPEAL

CPLR section 5519 provides in part:

> "(a) **Stay without court order**. "Service upon the adverse party of a notice of appeal . . . stays all proceedings to enforce the judgment or order appealed from pending the appeal . . . where: . . . (4) the judgment or order directs the assignment or delivery of personal property, and the property is placed in the custody of **an officer designated by the court of original instance** to abide the direction of the court to which the appeal is taken . . .."

(NY CPLR § 5519(a)(4)) (emphasis added)).

1. SHARES CONSTITUTE "PERSONAL PROPERTY" PROTECTED BY THE AUTOMATIC STAY UNDER CPLR SECTION 5519(a)(4)

Stock or share certificates are deemed by law to be "personal property":

> "New York follows the majority American rule, which treats shares of stock as the personal property of the shareholders."

(*AFP Imaging Corp. v Ross*, 780 F2d 202, 204 [2d Cir. 1985]; *see also Continental Bank International v New York Dep't of Finance*, 69 NY2d 281, 285 n.2 [1987] ("The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations."); *see also Carrington v Toia*, 67 AD2d 775 [3d Dept 1979] ("He also transferred his interest in certain personal property (stocks, cash and bonds) to his wife"); *see also Matter of Kagan Celauro*, 7 Misc 3d 791 [Sup Ct Dutchess Cnty 2005] ("Stock is personal property"); *see also Kissin v Lawrence Good, MD*, 2008 NY Misc LEXIS 7945, *5-6 [Sup Ct NY Cnty 2008] ("Corporate shares are personal

subject to CPLR Article 52's enforcement procedures")). Plaintiffs never contested this point.

Accordingly, as "personal property," shares of stock may be placed in the custody of an officer of the court in order to effectuate the automatic stay under CPLR 5519(a)(4).

2. SUPREME COURT'S REFUSAL TO DESIGNATE AN OFFICER TO RECEIVE CUSTODY OF MARC CAPPIONE'S SHARES WAS ERROR

While CPLR section 5519(a) provides for a stay of enforcement "without court order" (*Sullivan v Troser Mgt., Inc.*, 30 AD3d 1118, 1118 [2006] (emphasis added); *see also Berle v Buckley*, 19 Misc 3d 1119(A), 2008 NY Misc LEXIS 2102, *5 [Sup Ct Rensselaer County Apr. 11, 2008] (respondent need only comply with the requirements of CPLR 5519(a)(4) to invoke the protections of the automatic stay of enforcement)), Supreme Court's *ministerial* intervention is always required under CPLR 5519(a)(4), in order to designate the officer with whom custody of the personal property is to be placed (NY CPLR § 5519(a)(4)).

The purpose of CPLR 5519(a)(4) is as follows:

> "The thrust of CPLR 5519(a)(4) is to prevent an appellant from suffering an irreparable loss as a result of the appellant's having delivered personal property to the plaintiff as directed by the order of the trial court and then being unable to recover that property from the plaintiff if the trial court's determination is reversed on appeal. CPLR 5519(a)(4) seeks to protect the interests of all parties by having the specified personal property placed with an officer of the court pending the determination of the appeal."

(*Wynyard v Beiny*, 4 Misc 3d 904, 907 [Sup Ct Bronx Cnty 2004] (emphasis added); *see also In re New York State Urban Dev Corp*, 166 Misc 2d 909, 911 [Sup Ct NY Cnty

1995] ("The purpose of CPLR 5519(a) is to protect the possessory interests of an appellant where a judgment or order directs the property to be conveyed or delivered.")).

The automatic nature of the relief under CPLR 5519(a)(4) is made clear by the fact that it is the appellant's option to place the personal property in the custody of a neutral party in order to obtain the benefits of the automatic stay:

> "Under paragraph 4, involving a judgment that directs the delivery of personal property, the **appellant has the option** of placing the property in neutral custody . . . to obey whatever direction the appellate court may ultimately make in respect of the property."

(Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C5519:2, p. 226) (emphasis added). CPLR 5519(a)(4) contemplates that a neutral party will take possession of the personal property pending a determination of the appeal (*Sure-Fit Plastics L.L.C. v C&M Plastics Inc.*, 267 AD2d 761, 761-762 [3d Dept 1999]).

To be clear, CPLR 5519(a)(4) does not require that the personal property be "paid into court"; rather it provides that custody be delivered to "an officer designated by the court of original instance" (NY CPLR § 5519(a)(4)). The language of CPLR 5519(a)(4) provides an appellant with such avenue where, for example, a deposit into Court may "create administrative problems" (WEINSTEIN KORN & MILLER CPLR P 5519.07, citing 2 N.Y. Adv. Comm. Rep. 335 [1958]).

Here, in accordance with CPLR 5519(a)(4), by Notice of Cross-Motion, Defendants elected to place Marc Cappione's shares in the custody of an officer designated by Supreme Court, and requested that Supreme Court effectuate that election by designating an officer to receive custody of Marc Cappione's shares pending a

determination of Defendants' appeal (R. 252-327, 719). Supreme Court erred when it denied Defendants the protection of the automatic stay.

Accordingly, Defendants respectfully request that Order 2 and Order 3 be reversed; that Plaintiffs be directed to return Marc Cappione's shares to him; and Defendants be directed to return any funds delivered to them as compensation or consideration for the sale of Marc Cappione's shares to the Company.

B. ORDER 2 WAS BASED UPON THE FALSE CLAIM OF PLAINTIFFS THAT THE COMPANY WOULD IMMINENTLY LOSE ITS LIQUOR LICENSE ABSENT AN ORDER COMPELLING COMPLIANCE WITH ORDER 1

The principle ground on which Plaintiffs relied for their Motion to Compel was the ABC Hearing to be held on November 7, 2013 and the claimed harm that would result therefrom. Plaintiffs claimed that it was imperative that Marc Cappione's shares be transferred on or before November 7, 2013, or the Company would lose its liquor license.

In granting Plaintiffs' Motion to Compel, and denying Defendants' Cross-Motion for a stay pending appeal, Supreme Court stated:

> "Marc Cappione's playing with fire here pressing the [State Liquor Authority]. I just don't feel that that's appropriate in the situation."

(R. 218). Supreme Court was referring to Plaintiffs' claim that the situation was "dire" (R. 237), based upon ABC setting a hearing date for the suspension, cancelation or revocation of the Company's liquor license (R. 334).

Plaintiffs most assuredly exaggerated the significance of the November 7 hearing date. The hearing was only a fact-finding hearing before a hearing officer that does not have the authority to make any ruling on the revocation or suspension of the Company's

liquor license (R. 737). The hearing officer drafts a report and recommendation to be delivered to ABC (after notice to the Company and an opportunity to challenge the contents thereof) for further proceedings, such proceedings taking an additional two months to complete (R. 737). The Company was not in imminent danger of losing its liquor license if Marc Cappione's shares were not delivered to the Company before the November 7, 2013 hearing.

In any event, the best evidence of the false state of actual risk and prejudice to the Company, as alleged by Plaintiffs before the Supreme Court, is the fact that Plaintiffs refused to request an adjournment of the November 7, 2013 hearing. The Notice of Hearing states (without emphasis):

> **"NOTE: PLEASE SEE ATTACHED REGARDING ADJOURNMENTS, NO CONTEST PLEAS AND TRANSLATOR SERVICES.**
>
> ***
>
> All requests for hearing adjournments must be made in writing and received by the Authority at least three business days prior to the hearing date. If you request an adjournment please clearly state the reason for your request and include a phone number where you can be reached. Adjournments will be granted for good cause only."

(R. 426-427) (emphasis in original). In fact, requests for adjournments are routinely granted (R. 737-738).

When Defendants' counsel raised the clear absence of such an adjournment request (by Plaintiffs) during oral argument on the motion which resulted in Order 2, Plaintiffs' counsel referenced only an adjournment related to ABC's initial Notice of Pleading (an administrative complaint), dated March 19, 2013. Plaintiffs' counsel was

very careful not to represent to Supreme Court that Plaintiffs had requested an adjournment of the ABC hearing (R. 743).

Further evidence that Plaintiffs' claim of a "dire" situation was false or overstated was the fact that Plaintiffs' counsel failed to submit the proposed Order 2 to Supreme Court until November 4, 2013, six days after Defendants' counsel consented to the form thereof (R. 746). Having failed to submit the proposed Order 2 until November 4, 2013 (which required compliance within seven (7) days of its execution (R. 216)) to the Court, Plaintiffs implicitly acknowledge that no prejudice actually existed based upon the failure to transfer the shares by the original November 7, 2013 hearing date.

Defendants' counsel, having received no indication of whether Plaintiffs had requested an adjournment of the November 7, 2013 hearing, wrote to ABC on November 4, 2013 to request an adjournment of the hearing (R. 744, 757-758). ABC responded by referring Defendants' counsel to the Company and its counsel, recognizing that only "the licensee" (the Company) could make such a request (R. 744, 759). Defendants' counsel again wrote to ABC on November 5, 2013, with a copy to Plaintiffs' counsel, and, having received no response, appeared on November 7, 2013 at the State Office Building in Syracuse where the ABC hearing was noticed to be heard (R. 745). In fact, the hearing had been adjourned (*id.*).

What is clear from Plaintiffs' conduct is that there was never any imminent harm, perceived or otherwise, in connection with the ABC hearing. Plaintiffs at all times could have requested an adjournment of the ABC Hearing. The hearing officer did not have the authority to suspend or revoke the license (R. 737). Plaintiffs waited until they had

received a decision on Plaintiffs' Motion to Compel before they requested an adjournment of the ABC Hearing. Plaintiffs failed to alert Defendants' counsel and Supreme Court of that request in order to secure Order 2, compel Defendants to turn over Marc Cappione's shares, and avoid a determination of Defendants' appeal of Order 1 on the merits.

These facts were presented to Supreme Court on Defendants' Motion to Renew (R. 735-779), yet Supreme Court still refused, incorrectly, to designate an officer to receive custody of Marc Cappione's shares pending a determination of Defendants' appeals (R. 731).

C. SUPREME COURT'S ORDER 2 IS BASED UPON AN ERROR OF LAW

In granting Plaintiffs' Motion to Compel, and ordering Defendants to deliver Marc Cappione's shares to Plaintiffs, and Plaintiffs to make payment to Marc Cappione in accordance with the terms of the Agreement, Supreme Court misstates fundamental law. The transcript from Order 2 provides:

> "You have your right to appeal, go ahead and take your appeal. If you win, they will transfer the shares back or you will have an opportunity to argue what their value is."

(R. 218). Supreme Court clearly did not recognize that in the absence of a stay pending appeal, the compelled sale of Marc Cappione's shares could render Defendants' appeal moot, to the extent not subject to a mootness exception (*Divito v Farrell*, 50 AD3d 405 [2008]), thereby affecting this Court's subject matter jurisdiction (*Matter of State of New York v Daniel Oo*, 88 AD3d 212, 217-218 [3d Dept 2011]).

Supreme Court's Order 2 is based upon an error of law. Accordingly, Defendants contend that Order 2 must be reversed, and Plaintiffs should be ordered to redeliver Marc Cappione's shares to Defendants.

D. THE COURT SHOULD GRANT DEFENDANTS AN EXCEPTION TO THE MOOTNESS DOCTRINE OR RECOGNIZE NEW EXCEPTIONS

Plaintiffs raised a mootness argument in their opposition to Defendants' motion to consolidate the appeals and extend the perfection deadline. In anticipation of such argument, Defendants shall address it now.

"In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

Mootness has prevented the disposition of appeals on their merits in cases involving the transfer of stock (*see Divito v Farrell*, 50 AD3d 405 [2008] (where plaintiff's appeal was dismissed as moot because plaintiff failed to obtain a stay to prevent the closing that resulted in the transfer of shares to the company); *Kamin v Am. Express Co.*, 86 Misc 2d 809, 811-812 [Sup Ct New York County 1976] (plaintiffs' claim deemed moot to extent it sought distribution of certain shares because plaintiff never moved for temporary injunctive relief, and shares were distributed)).

Acknowledging the general applicability of the mootness doctrine, and that compliance with Order 1 and Order 2 may – if not subject to an exception – render Defendants' appeals moot, Defendants cross-moved before Supreme Court to invoke the

automatic stay provided by CPLR 5519(a)(4). When that motion was denied, Defendants moved this Court, by Order to Show Cause with Temporary Restraining Order, for a discretionary stay of enforcement of Order 1 and Order 2, pursuant to CPLR 5519(c). Defendants also asked this Court to recognize that Supreme Court should have provided an automatic stay under CPLR 5519(a)(4). This Court struck the temporary relief requested by Defendants, thereby forcing Defendants to again return to the Supreme Court for additional relief, which was again denied (*see* R. 734-779). Order 3 made expressly clear that no relief was being provided under CPLR 5519(a)(4) (R. 730).

Upon this Court's subsequent denial of Defendants' Motion for a stay pending appeal, Order 3 compelled the escrow agent to deliver Marc Cappione's shares to Plaintiffs' counsel. Marc Cappione's shares were delivered to Plaintiffs' counsel on or about November 21, 2013.

In addition to the three recognized exceptions to the mootness doctrine, Federal and state courts across the country have recognized exceptions to the mootness doctrine which have apparently not been considered or accepted by the courts of the State of New York. These exceptions, if applied to the instant case, would avoid application of the mootness doctrine, and restore the Court's subject matter jurisdiction over Defendants' appeal. The exceptions should be applied here.

1. AUTHORITATIVE GUIDANCE BY THIS COURT ON THE MANDATORY NATURE OF CPLR SECTION 5519(a)(4) IS NECESSARY

The circumstances of this case compel the application of the exceptions to the mootness doctrine recognized by the courts of the State of New York:

> "[T]he cases in which our court has found an exception to the [mootness] doctrine discloses three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues."

(*Hearst Corp.*, 50 NY2d at 714-715). Each of these exceptions should be readily invoked in this case.

CPLR 5519(a) generally provides for a stay of enforcement "without court order" – known more commonly as an "automatic stay" (NY CPLR § 5519(a)) – but subsection (4) still requires ministerial court intervention to designate an officer to receive that personal property. Supreme Court's denial of Defendants' motion to invoke the automatic stay illustrates an important question: whether the trial court has discretion to deny appellant's right to a stay pending appeal by refusing to designate the officer. The question of whether that ministerial intervention is a mandatory, statutory obligation or a discretionary power is a matter that has apparently never been addressed by the courts (or at least not in a reported decision).

It is not surprising that the courts have not reported on the mandatory/discretionary nature of the ministerial act required by CPLR 5519(a)(4). If a court operates under the interpretation that the stay is mandatory, the issue of mootness never arises because a stay would be in place pending a decision on appeal. But if the court determines that it has the discretion to refuse to designate an officer – or merely refuses to exercise its mandatory, statutory obligation – the appellant is then compelled to turn over the personal property that is the subject of the appeal, thereby rendering the appeal moot. In

this case, Supreme Court did not explain why it refused – in response to two motions – to designate an officer to retain custody of Marc Cappione's shares pending appeal.

A plain reading of CPLR 5519(a)(4) and leading secondary authority make clear the legislature's intention that the stay be mandatory, and at the sole election of the appellant (*see* Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C5519:2, p. 226 ("Under paragraph 4 . . . the appellant has the option of placing the property in neutral custody . . . to obey whatever direction the appellate court may ultimately make in respect of the property.") (emphasis added)).

If trial courts may refuse to designate an officer to take custody of the personal property, thus preventing the imposition of the automatic stay, *the turnover of any personal property would deny every appellant the opportunity for appellate review due to mootness, in the absence of an exception.* Stripped of its subject matter jurisdiction, appellate courts would never be in a position to make a determination on the issue at hand – whether the automatic stay provided by CPLR 5519(a)(4) is mandatory or discretionary. The three *exceptions* to mootness – a likelihood of repetition, a phenomenon typically evading review and the showing of a significant issue not previously passed on – are each satisfied under this scenario (*see Hearst*, 50 NY2d at 714-715).

The clear intent of CPLR 5519(a)(4) is to prevent the appellant from suffering any harm, *including the application of mootness*, from the forced transfer of its personal property pending appeal:

> "The thrust of CPLR 5519(a)(4) is to prevent an appellant from suffering an irreparable loss as a result of the appellant's having delivered personal property to the plaintiff as directed by the order of the trial court **and then being unable to recover that property from the plaintiff if the trial court's determination is reversed on appeal**. CPLR 5519(a)(4) seeks to protect the interests of all parties by having the specified personal property placed with an officer of the court **pending the determination of the appeal**."

(*Wynyard v Beiny*, 4 Misc 3d 904, 907 [Sup Ct Bronx Cnty 2004] (emphasis added); *see also In re New York State Urban Dev Corp*, 166 Misc 2d 909, 911 [Sup Ct NY Cnty 1995] ("The purpose of CPLR 5519(a) is to protect the possessory interests of an appellant where a judgment or order directs the property to be conveyed or delivered.") (emphasis added)).

The paucity of case law under CPLR 5519(a)(4), and particularly regarding a court's mandatory obligation to designate an officer when so requested by an appellant compels this Court to provide guidance on this issue (*see, e.g., State v Kiese*, 126 Haw 494, 509 [Sup Ct 2012] (recognizing a "public interest exception to the mootness doctrine" based upon "the desirability of an authoritative determination for future guidance of public officers"); *State v Schulpius (In re Commitment of Schulpius)*, 2006 WI 1, P15 [Sup Ct 2006] (recognizing an exception to the mootness doctrine where "a definitive decision is necessary to guide circuit courts")). New York courts need guidance on this issue, as made plainly evident by the fact that Marc Cappione has been harmed by Supreme Court's incorrect interpretation of CPLR 5519(a)(4).

Marc Cappione had an absolute, statutory right to an automatic stay of enforcement of Order 1, upon satisfaction of the conditions provided in CPLR

5519(a)(4), which were satisfied. Supreme Court was asked not once, but twice, to designate an officer, but refused without explanation (*see* R. 252-327, 734-779). Notwithstanding Marc Cappione's diligent efforts, he was denied the benefit of the automatic stay of enforcement of Order 1 and was compelled to turn over his shares to Plaintiffs. On this appeal, Marc Cappione should not be punished for Supreme Court's deprivation of his statutory rights by a determination that his appeal has been rendered moot by compliance with the Orders. Accordingly, Order 2 and Order 3 should be reversed.

2. FEDERAL COURTS RECOGNIZE AN EXCEPTION TO THE MOOTNESS DOCTRINE "WHERE A COURT CAN FEASIBLY *RESTORE THE STATUS QUO*"

This Court should expand the exceptions to the mootness doctrine by recognizing the "restoration of the status quo" exception. The Second Circuit has recognized an exception to the mootness doctrine in cases "where a court can feasibly *restore* the status quo" (*see Moore v Consol. Edison Co. of NY, Inc.*, 409 F3d 506, 509 [2005] (applying exception to permit appeal of order denying motion for preliminary injunction preventing defendant from terminating plaintiff's employment, because the court could reinstate employment); *Pope v County of Albany*, 687 F3d 565, 569 [2012] (challenge to redistricting map could go forward on theory that, if movants prevailed, the contested elections could be invalidated); *Aladdin Capital Holdings LLC v Donoyan*, 438 Fed Appx 14, 15 [2011] (where the court recognized the exception, but held that it did not apply where there could be no continuing violation of an expired non-compete)).

In recognizing this exception to mootness, the Second Circuit reasoned that, where the status quo can be restored, "the typical concerns requiring a dismissal on mootness grounds do not apply" (*Moore*, 409 F3d at 510), referring to the concern set forth in *United States v Ciccone* (312 F3d 535 [2002]), where an appeal was dismissed as moot because "it would be 'impossible' for us to grant 'any effectual relief whatever to' the Government were it to prevail on its appeal" (*id.* at 544).

Here, the transaction that caused the application of the mootness doctrine can be easily undone as the underlying action is pending; discovery is still to be conducted and a final judgment issued as to the value of Marc Cappione's shares. The Company need merely to return Marc Cappione's shares to him, and the payment(s) and related promissory notes from the sale shall be returned to Plaintiffs or voided. The status quo can be easily restored.

CONCLUSION

By reason of the foregoing, Defendants respectfully request that Order 1, Order 2 and Order 3 be reversed to the extent argued herein, and Plaintiffs be directed to deliver Marc Cappione's shares to Defendants immediately upon service of this Court's Order with Notice of Entry. In that this is a declaratory judgment action, and using Plaintiffs' Complaint as a guide (R. 31), this action should be remitted to Supreme Court for a Judgment providing: (1) Defendant Marc J. Cappione has ceased to be an employee of the Company; (2) Defendant Marc J. Cappione "shall be treated as though he . . . were selling all of his . . . shares under paragraph A of this Section Two" of the Agreement; (3) the Company had the option under Section Two of the Agreement to purchase Defendant

Marc J. Cappione's shares; (4) the Company failed to properly and timely exercise that option to purchase Defendant Marc J. Cappione's shares; and (5) Defendant Marc J. Cappione shall remain a shareholder of the Company, subject to the terms of the Agreement.

Defendants also respectfully request such other and further relief which the Court deems just and proper.

Dated: January 13, 2014

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