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COUNTERSTATEMENT OF QUESTIONS PRESENTED

QUESTION 1. Under New York law, 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. The doctrine is typically invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy. Where a party has tried, and failed, to obtain a temporary restraining order or injunction to prevent the court-ordered sale of their shares in a company, their subsequent appeal from that original order has been deemed moot and dismissed. Marc Cappione has been ordered to, and has, sold his shares in A. Cappione, Inc. back to the company. Is Defendants-Appellants' (hereinafter "Defendants") appeal moot?

ANSWER BELOW. The question was not answered below.

QUESTION 2. Shareholders' Agreements, like all contracts, are to be interpreted according to their plain meaning and to fulfill the intentions of the parties. The parties entered into a Shareholders' Agreement that provides for the disposition of an employee/shareholders' shares in A. Cappione, Inc. in the event they are no longer employed by the company. Did Plaintiffs- Respondents (hereinafter "Plaintiffs") comply with the plain meaning and intent of the Shareholders' Agreement when they terminated Defendant Marc Cappione retroactively to his date of incarceration and then proceeded to obtain a valuation of his shares as of that date, which resulted in his shares being worth more than two times as much from the prior valuation?

ANSWER BELOW. Yes.

QUESTION 3. New York law provides that the interpretation of a contract should not produce an inequitable result. When an optionee has not exercised its option rights in technical compliance with a contract, equity will intervene where the optionee's failure to

exercise the option was excusable, refusal recognize the option would result in a substantial forfeiture, and the optionor would not suffer prejudice. Marc Cappione's continued ownership of shares in A. Cappione, Inc. as a convicted felon caused the New York Alcohol Beverage Control to initiate license revocation proceedings against A. Cappione, Inc. A. Cappione, Inc. needs the license in order to operate. Without a license, the company is worthless and so are the shares owned by Plaintiffs and Defendants. Does equity dictate that under the circumstances, even if Plaintiffs did not technically exercise their option correctly, the Plaintiffs would be deemed to have complied with the option?

ANSWER BELOW. Yes.

QUESTION 4. New York Civil Practice Law and Rules § 5519(c) vests a court with broad discretion to grant a limited stay or vacate, limit or modify a stay imposed by § 5519(a). The Trial Court exercised its discretion by denying Defendants' cross-motion for a stay pending their appeal from the Trial Court's May 2013 summary judgment decision. Did the Trial Court properly exercise its discretion by denying Defendants' cross-motion for stay under the circumstances then before the Court?

ANSWER BELOW. Yes.

QUESTION 5. New York Civil Practice Law and Rules § 5519(c) vests a court with broad discretion to grant a limited stay or vacate, limit or modify a stay imposed by § 5519(a). The Trial Court exercised its discretion by granting Defendants' motion to renew their cross-motion for stay of enforcement pending the outcome of this Court's decision on Defendants' motion for a stay. Did the Trial Court properly exercise its discretion by granting

Defendants' motion to renew and, upon renewal, imposing a limited stay of enforcement of its summary judgment decision pending this Court's decision on Defendants' motion for a stay?

ANSWER BELOW. Yes.

FACTUAL BACKGROUND

The Shareholders Agreement

This action seeks a declaration of the parties' rights and obligations under a certain Shareholders' Agreement made on November 17, 2005. (R. 32-38; 177, ¶ 2) The Agreement states upfront what the purpose of the document is: "The shareholders desire to establish a market value for their shares, to effectively control the management of the company for their mutual best interests, and to protect against divisive relationships which would arise if outsiders with incompatible management philosophies gained interests in the company." (R. 32, Recitals, ¶ B) In addition, the shareholders agreed that "[t]he company is dependent upon and derives substantial benefit from the continued active interest and participation of those shareholders who participate in management of the company." (R. 32, Recitals, ¶ C) Each shareholder who executed the agreement, including Marc Cappione, acknowledged that it was in the best interests of the company and fair to each shareholder: "The company and the shareholders desire to enter into this agreement knowing that it is in the best interests of the company and fair to each of the shareholders." (R. 32, Recitals, ¶ D).

Under the Shareholders' Agreement, if one of the shareholders—defined as Marc, Dave, or John Cappione—ceases to be employed by A. Cappione, Inc., they shall be treated as a seller of their shares under Paragraph A, Section Two of the agreement, except that the value of shares will be determined by the procedures set forth in Section Four. (R. 33, Section Two, ¶ D)

According to Paragraph A, Section Two of the agreement, if one of the shareholder desires to sell his shares, the company has the right of first refusal to purchase those shares. (R. 32, Section Two, ¶ A) Paragraph A, Section Two does not provide for the non-employee seller to retain his shares. (*Id.*)

Section Four of the Shareholders' Agreement provides a straightforward formula for determining the value of the departing shareholders' shares by using an independent valuation firm. (R. 34-35, Section Four) The determination by the independent valuation firm is binding on the seller. (*Id.*)

Marc Cappione's Arrest and Guilty Plea

On December 21, 2010, Marc Cappione was arrested. (R. 181, ¶ 17) On February 18, 2011, he pleaded guilty to a Class E-Felony for first degree attempted dissemination of indecent materials to a minor. (R. 181, ¶ 18) On or about April 28, 2011, he began his sentence at the Riverview Correctional facility. (R. 181, ¶ 19) As a convicted felon, Marc Cappione is barred under New York law from maintaining an ownership interest in a wholesale beer distributorship. (R. 198-99)[1] Marc Cappione's earliest release date is September 2014. (R. 181, ¶ 20)

Marc Cappione's Termination from A. Cappione, Inc. and the Company's Exercise of its Right to Purchase his Shares

On April 14, 2011, Marc Cappione executed and delivered to A. Cappione, Inc., through its attorneys, a proxy statement designating his father, Joseph Cappione, to act on his behalf for all matters relating to A. Cappione, Inc. (R. 188-89) On June 15, 2011, David Cappione noticed a Special Meeting of the Shareholders of A. Cappione, Inc. for June 24, 2011.

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[1] *See* New York Alcohol and Beverage Control Law § 126 (McKinney's 2014) ("The following are forbidden to traffic in alcoholic beverages: a person who has been convicted of a felony . . . .").

(R. 182, ¶ 22) On June 24, 2011, A. Cappione, Inc. received a letter from Hancock Easterbrook, L.P. objecting to the notice on behalf of Joseph and Marc Cappione. (R. 182, ¶ 23) Accordingly, a new notice was sent out scheduling the Special Meeting of the Shareholders of A. Cappione, Inc. for July 5, 2011 at 9:00 a.m. (R. 182, ¶ 24; 190) The notice was hand-delivered to Joseph Cappione and he attended the meeting on behalf of Marc Cappione. (R. 182, ¶¶ 25, 29; 192-93) As stated in the notice for the Special Meeting, one of the purposes was "[t]o ratify and approve the repurchase of the voting common stock owned by Marc Cappione." (R. 182, ¶ 26; 190, ¶ 4)

The shareholders' meeting went forward on July 5, 2011 without objection. (R. 182, ¶¶ 27-28) The meeting was attended by John Cappione, Joseph Cappione, David Cappione, and Jeffrey Tyo. (R. 182, ¶ 29; 191-93) During the shareholders meeting, a resolution was passed authorizing the corporation to repurchase Marc Cappione's shares pursuant to the Shareholders' Agreement. (R. 182, ¶ 30; 191-93) A copy of the minutes from the July 5, 2011, shareholder meeting were provided to Joseph Cappione at or about the time of the meeting. (R. 183, ¶ 31)

Immediately following the shareholder meeting, A. Cappione, Inc. held a Board of Directors meeting. (R. 183, ¶ 32, 194-96) At the Board meeting, in addition to authorizing the corporation to repurchase Marc Cappione's shares, the Board terminated his employment retroactively effective as of March 30, 2011. (R. 183, ¶ 33; 195) A copy of the minutes from the July 5, 2011 Board of Directors meeting were provided to Joseph Cappione at or about the time of the meeting. (R. 183, ¶ 34)

Midtown Valuation Group, LLC's Valuations of A. Cappione, Inc.

Midtown Valuation Group, LLC performed a valuation of A. Cappione, Inc. in 2004. (R. 38; 69-121; 173-76) Midtown Valuation Group determined that a non-marketable, non-voting, minority interest in A. Cappione, Inc. was worth $1,472.79 per-share. (R. 38; 75; 174, ¶ 3-4) That value was then incorporated into the Agreement. (R. 38)

In May 2012, Midtown Valuation Group performed a new valuation of A. Cappione, Inc. as of Marc Cappione's final day with the company—March 30, 2011. (R. 69-121) Again, Midtown Valuation Group determined that that a non-marketable, minority interest in A. Cappione, Inc. was worth $27,340 per 1% interest in the company. (R. 69; 176, ¶ 16) A copy of the Midtown Valuation Group report was provided to Marc Cappione's counsel. (R. 136-37)

Marc Cappione's Failure to Abide by the Shareholders' Agreement Endangers the Very Existence of A. Cappione, Inc.

The parties attempted to resolve the ownership of Marc Cappione's shares in the Fall of 2012. (R. 341-42, ¶¶ 78-83) After lengthy negotiations, and indications from Marc Cappione's counsel that an agreement had been reached; on November 12, 2012 Defendants' counsel stated that his clients were not going to execute the Redemption Agreement that had been prepared and negotiated. (R. 342, ¶ 84; 564) Marc Cappione's refusal to abide by the Shareholders' Agreement and insistence that he retain an ownership interest in A. Cappione, Inc. threatened the very existence of the company. Accordingly, Plaintiffs were forced to commence this declaratory judgment action to force him to abide by the contract he signed.

The Alcohol Beverage Control Proceedings

On March 21, 2013, while this action was proceeding, A. Cappione, Inc. received a pleading from the State of New York Division of Alcohol Beverage Control ("ABC") stating

that it was going to cancel or revoke the company's license. (R. 198-99) The notice states: "That on February 18, 2011, the licensee is a person forbidden to traffic in alcoholic beverages pursuant to subdivision 4 of section 126 of the Alcoholic Beverage Control Law, in that Marc Cappione, the licensee's Secretary has been convicted of a felony. On that date, a Judgment of Conviction was entered in the Albany County Court, convicting Marc Cappione of attempted dissemination of indecent material to minors, a violation of Section 110, as defined in Sections 130.91(t) and 235.22 of the Penal Law of the State of New York." (*Id.*) Without the license, A. Cappione, Inc. is worthless. (R. 186, ¶ 54; 426-27)

While Plaintiffs were successful in getting the original ABC hearing scheduled for April 5, 2013, adjourned based on the pending summary judgment motions and subsequent decision on those motions; Defendants were repeatedly informed that their failure to turn over Marc Cappione's shares in accordance with the Trial Court's May 2013 summary judgment decision was causing the ABC to grow impatient. (R. 346, ¶ 114; 425; 502; 639; 717) When the shares were not transferred, the ABC rescheduled the license revocation hearing for November 7, 2013. (R. 426) The ABC would only agree to adjourn the November 7, 2013 hearing after Plaintiffs had the decision on their motion to enforce in hand, which did not occur until November 6, 2013. (R. 214)

PROCEDURAL HISTORY

On December 24, 2012, Plaintiffs commenced this declaratory judgment action seeking a declaration that Marc Cappione must turn over his shares in A. Cappione, Inc. in exchange for the $911,240.20 value placed on them by Midtown Valuation Group. (R. 18-31) Initially, Defendants made a motion to dismiss the complaint. (R. 342, ¶ 88) On March 6, 2013,

the Trial Court, upon the request of both Plaintiffs and Defendants, converted Defendants' motion to dismiss to one for summary judgment. (R. 138) Plaintiffs then cross-moved for summary judgment. (R. 167-68)

On May 24, 2013, the Honorable David Demarest, J.S.C. granted summary judgment to Plaintiffs and declared that: (1) Marc Cappione ceased to be an employee of A. Cappione, Inc. as of March 30, 2011; (2) under such circumstances, and pursuant to Section Two D of the Shareholders' Agreement, Marc Cappione "shall be treated as though he [] were selling all of his [] shares under paragraph A of this Section Two"; (3) that A. Cappione, Inc., has the option under Section Two A of the Shareholders' Agreement to purchase all of Marc Cappione's shares; (4) that A. Cappione, Inc. has exercised its option to purchase Marc Cappione's shares; (5) that the purchase price for those shares "shall be determined under Section Four" of the Shareholders Agreement; and (6) pursuant to Section Four of the Shareholders' Agreement, the parties are bound by the May 10, 2012 independent valuation report prepared by Midtown Valuation Group, LLC, unless Defendants can establish "the valuators did not use 'generally accepted accounting principles on a consistent basis' as provided in Exhibit "A" of the Agreement." (R. 6-18) Plaintiffs notified Defendants that they were ready, willing, and able to start making the buy-out payments for Marc Cappione's shares. (R. 568) Defendants responded by filing a Notice of Appeal from the May 24, 2013 order and seeking a stay of enforcement pending that appeal. (R. 343, ¶¶ 96-97)

Defendants then proceeded, under the guise of settlement discussions, to adjourn the motion to stay from June 26, 2013 to August 16, 2013, only to then withdraw the motion without prejudice. (R. 343-44, ¶ 98-112) On September 13, 2013, with no settlement reached and

increasing pressure from the ABC to get the shares out of Marc Cappione's control, Plaintiffs filed a motion for Follow-Up Relief seeking to enforce the Court's May 2013 summary judgment order. (R. 231-32) The motion for Follow-Up Relief was adjourned at Defendants' request because, as Defendants stated to Judge Demarest in writing, settlement was "imminent" and Marc Cappione had agreed to sign the Stock Redemption and Settlement Agreement Plaintiffs had provided to them on September 5, 2013. (R. 329, ¶¶ 5-6; 352-54) When Defendants did not execute the agreement as promised, Plaintiffs' motion was set down for argument on October 25, 2013. (R. 335, ¶ 41) On October 22, 2013, Defendants filed a cross-motion seeking a stay of enforcement pending their appeal from the summary judgment decision. (R. 252-53)

In addition to the motion for Follow-Up Relief, on September 13, 2013, Plaintiffs also filed a motion with this Court to dismiss Defendants' appeal for failing to timely perfect it. (R. 329, ¶ 3) On October 10, 2013, the Court dismissed Defendants' appeal if the record on appeal and brief were not filed on or before December 9, 2013. (R. 327) Defendants subsequently moved, on December 9, for an extension of time perfect their appeal and consolidate it with their subsequent appeals. (R. 797-A)

On October 25, the Trial Court heard oral argument on Plaintiffs' motion for Follow-Up Relief and Defendants' cross-motion for a stay. The Trial Court ordered Marc Cappione to turn over his shares in accordance with the May 2013 decision, within seven days, and denied Defendants' cross-motion for a stay. (R. 214-19) On Friday, November 1, Plaintiffs' counsel received a copy of the transcript from the October 25 argument—which Judge Demarest directed Plaintiffs to attach to the Order—and on Monday November 4, Plaintiffs' counsel provided a copy of the proposed order to Judge Demarest for execution. (R. 767-73) On

November 6, Judge Demarest signed the Order and sent it by facsimile to all counsel. (R. 214-19) The Order was served with Notice of Entry on November 6, 2013. (R. 774-75)

On November 7, 2013, Defendants filed an Order to Show Cause with this Court seeking a temporary restraining order and a stay of enforcement of the Trial Court's summary judgment decision, pending the outcome of their appeal, based on their belief that they were entitled to an automatic stay pursuant to CPLR § 5519(a). (R. 781-82) Defendants made essentially the same argument to this Court that they had unsuccessfully made to the Trial Court on their cross-motion for a stay. Justice Egan struck the temporary restraining order language in Defendants' proposed order and set the return date for the motion as November 15, 2013. (R. 781). Unhappy with Justice Egan's Order, on November 8, Defendants then engaged in a letter writing campaign with the Court in an effort to reargue their Order to Show Cause. (R. 783-85) Plaintiffs responded to Defendants' letter on Monday, November 11. (R. 786-87) On November 12, the Court notified the parties by email that there would be no modification to the Order to Show Cause that was signed. (R. 789) Subsequently, this Court considered Defendants' fully briefed Order to Show Cause seeking a stay of enforcement and denied the motion.

On the evening of November 11, which was a Federal and State holiday, and while its Order to Show Cause for a stay was pending before this Court, Defendants made a motion to renew their motion for a stay before the Trial Court based on the same arguments it was presenting to this Court on its pending Order to Show Cause. (R. 729-31) On November 12, the Trial Court scheduled oral argument on the motion for November 13, 2013 at 10:00 a.m. (R. 788) Plaintiffs were not provided an opportunity to submit any papers on the motion. (R. 730) Defendants' motion to renew was granted to the limited extent of holding that Marc Cappione's

shares be put in escrow pending this Court's determination on Defendants' pending Order to Show Cause for a stay. (R. 729-31) When this Court denied Defendants' Order to Show Cause, the shares were transferred to Plaintiffs in accordance with the Trial Court's order. (*Id.*)

PRELIMINARY STATEMENT

Defendants are engaged in an extortion scheme. They are trying to get the ownership of the shares back into Marc Cappione's hands—which would have to be reported to the ABC, potentially reigniting the license revocation proceeding—so that they can then negotiate a buyout on terms that are significantly different from the terms set forth in the Agreement. The parties entered into a Shareholders' Agreement to avoid this situation.

As a threshold matter, Defendants' appeal should be dismissed as moot. Repeatedly throughout the motion practice before both the Trial Court and this Court, Defendants argued that a stay was necessary because their appeal would be rendered moot if Marc Cappione was forced to turn over his shares to A. Cappione, Inc. Marc Cappione has now turned over his shares to A. Cappione, Inc. Based on Defendants' own arguments and case law, this appeal is moot and should be dismissed.

Notwithstanding that threshold issue, the Trial Court properly held that Marc Cappione was obligated to turn over his shares in exchange for $911,242.22. The parties to this dispute negotiated a Shareholder's Agreement to address the disposition of their shares in A. Cappione, Inc. in the event one of them ceased to be an employee of the company. It is undisputed that Marc Cappione pleaded guilty to an E-Felony in February 2011 and is no longer an employee of A. Cappione, Inc. When A. Cappione, Inc. attempted to buy-out Marc Cappione's interest in the business, he refused to abide by the terms of the Shareholder's

Agreement. Because Marc Cappione's actions endangered the ability of A. Cappione, Inc. to maintain its license to operate as a wholesale beer distributor, A. Cappione, Inc. was forced to bring this action for declaratory relief.

Defendants actions put A. Cappione, Inc. in grave danger. The ABC issued a notice that it intended to revoke A. Cappione, Inc.'s wholesale beer distributor license because Marc Cappione, after his felony plea, continued to have an ownership interest in the company. Plaintiffs properly exercised their rights under the parties' Shareholder Agreement to buy-back Marc Cappione's shares and moot the ABC proceeding. Marc Cappione's designated proxy, his father Joseph Cappione, received notice of the shareholders' meeting, attended the shareholders meeting where Marc Cappione's employment was terminated and the company decided to exercise its right to purchase Marc Cappione's interest in the company, and received a copy of the resolution confirming same. Plaintiffs complied with the Shareholder Agreement.

The Trial Court correctly granted summary judgment to Plaintiffs. The Trial Court then properly granted Plaintiffs' motion to enforce the May 24, 2013 summary judgment decision and exercised its discretion to deny Defendants' cross-motion for a stay. Finally, the Trial Court properly exercised its discretion by granting Defendants motion to renew to the extent that Marc Cappione's were put into escrow pending this Court's decision on Defendants' Order to Show Cause for a stay of enforcement pending their appeal. Defendants have not challenged or sought to reargue Justice Egan's decision on the Order to Show Cause where he denied Defendants' motion for a stay. The Trial Court's decisions should be affirmed in their entirety.

POINT I.

DEFENDANTS' APPEAL IS MOOT FOR THE VERY REASONS THEY REPEATEDLY TOLD THE TRIAL COURT, AND THIS COURT, ON THEIR MULTIPLE EFFORTS TO AVOID ENFORCEMENT OF THE MAY 2013 SUMMARY JUDGMENT DECISION

Defendants repeatedly represented to the Trial Court, and this Court, that they needed a stay of enforcement of the Trial Court's summary judgment decision because if it was enforced, their appeal would be rendered moot. (R. 748-49; 783) The summary judgment decision has been enforced, Marc Cappione's shares have been turned over to A. Cappione, Inc. Accordingly, based on Defendants' own representations to the Trial Court and this Court, their appeal is moot because the Court does not have subject matter jurisdiction over it.

"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."[2] "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy."[3] In *Divito v. Farrell*,[4] the plaintiff sought a declaratory judgment to bar termination of his rights in a company. Plaintiff's appeal was dismissed as moot because he tried, and failed, to obtain a stay to prevent the closing, which resulted in the transfer of his stock in the company prior to his appeal.[5] Mootness is "an issue that affects [the Court's] subject matter

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2 *Wisholek v. Douglas*, 97 N.Y.2d 740, 742 (2002).

3 *Dreikausen v. Zoning Board of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172 (2002).

4 50 A.D.3d 405, 857 N.Y.S.2d 61 (1st Dep't 2008).

5 *Id.*, 50 A.D.3d at 406, 857 N.Y.S.2d at 62; *see also Reznik v. Silverstein, Gitlin Dental Office, P.C.*, 2009 NY Misc. LEXIS 4998, * 6 (New York County Nov. 18, 2009) ("Plaintiffs claims are based on his position as a shareholder of the company. Because he did not reply, the defendants' request in the counterclaims that the individual defendants be deemed to be sole shareholders of the company has been granted (Ford Affirmation Ex E PP

jurisdiction and, thus, may be considered *sua sponte*."[6] Mootness cannot be waived, as Defendants' correctly informed the Trial Court.[7] The Trial Court's decisions have been complied with and, therefore, as Defendants have repeatedly argued, the appeal is now moot. The federal case law cited by Defendants to create an exception to the mootness doctrine, are not applicable to the situation before this Court. None of those cases involves the transfer of shares in a corporation. The *Divito* decision is on point and applicable to this situation. Defendants' appeal should be dismissed as moot.

POINT II.

THE TRIAL COURT PROPERLY HELD THAT A. CAPPIONE, INC. PROPERLY EXERCISED ITS BUYOUT RIGHTS FOLLOWING MARC CAPPIONE'S GUILTY PLEA

Plaintiffs' properly exercised their rights under the parties Shareholders' Agreement to repurchase the shares of Marc Cappione following his felony guilty plea. Marc Cappione's proxy was given written notice of the shareholders' meeting where the decision to repurchase his shares was made, his proxy attended the meeting, and he received written notice

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42-44). Therefore, plaintiffs' claims based on his position as a shareholder, are rendered moot."); *Kamin v. American Express Co.*, 86 Misc.2d 809, 811-12, 383 N.Y.S.2d 807, 810 (New York County 1976), *aff'd*, 54 A.D.2d 654, 387 N.Y.S.2d 993 (1st Dep't 1976) ("Plaintiffs never moved for temporary injunctive relief, and did nothing to bar the actual distribution of the DLJ shares. The dividend was in fact paid on October 31, 1975. Accordingly, that portion of the complaint seeking a direction not to distribute the shares is deemed to be moot….").

6 *Matter of State of New York v. Daniel Oo*, 88 A.D.3d 212, 217-18, 928 N.Y.S.2d 787, 791 (3d Dep't 2011)

7 *See Sec. Pac. Nat'l Bank v. Evans*, 31 A.D.3d 278, 283-84, 820 N.Y.S.2d 2, 7 (1st Dep't 2006) (Justice Catterson in dissent) ("the defendant cannot waive her right to assert this defense because when a plaintiff lacks standing to sue, the court lacks subject matter jurisdiction over the matter. (citing *Lacks v Lacks*, 41 N.Y.2d 71, 74([1976) ("questions of mootness and standing of parties characterized as raising questions of subject matter jurisdiction")).

of the shareholders' decision. Defendants attempt to re-write the Agreement to impose deadlines on Plaintiffs that are simply not applicable to the situation before this Court—an employee/shareholder's termination due to their criminal conduct. Under the Agreement, Marc Cappione was not entitled to retain his shares when his employment ceased. Moreover, as the Trial Court correctly held, Marc Cappione's continued ownership interest in the business was prohibited by both New York law and the company's contracts with their brewers. As Plaintiffs correctly exercised their rights, and there is no dispute that the price formula that is part of the Agreement is enforceable, the May 10, 2012 valuation is binding on the parties.

And finally, even if Plaintiffs' had not strictly complied with the terms of the Shareholders' Agreement—which they did—equity required a declaration that Marc Cappione must sell his shares back to the company immediately because his failure to do so put the company's license to sell alcoholic beverages at risk, rendering the company worthless if it is revoked and putting a number of people out of work. Accordingly, Defendants' motion for summary judgment was properly denied and Plaintiffs' cross-motion was properly granted.

A. A. Cappione, Inc. Properly Exercised its Right to Repurchase Marc Cappione's Shares Pursuant to the Parties' Shareholder Agreement

This is a straightforward declaratory judgment action seeking a determination of the parties' rights and obligations under a Shareholders' Agreement. "The shareholders' agreement frequently has paramount importance in the governance of close corporations. It avoids costly, lengthy litigation and promotes reliance, predictability and definitiveness in relationships among shareholders."[8] "One of the most important functions of a shareholder's

[8] 1-6 NY Practice Guide: Business and Commercial § 6.11 (2012) (citing *Trio Asbestos Removal Corp. v. Marinelli*, 22 A.D.3d 746, 804 N.Y.S.2d 370 (2d Dep't 2005)).

agreement is to restrict the transfer of shares."[9] It is not unusual in a closely held corporation to have provisions in a shareholders' agreement that require an employee/shareholder to sell his or her shares back to the company or remaining shareholders upon termination of their employment.[10] In fact, the Court of Appeals has specifically discussed the intent behind such provisions and endorsed them: "These provisions, which require an employee shareholder to sell back stock upon severance from corporate employment, are designed to ensure that ownership of all of the stock, especially of a close corporation, stays within the control of the remaining corporate owners-employees; that is, those who will continue to contribute to its successes or failures."[11]

Restrictions on stock transfers, particularly in closely held corporations, are routinely upheld as long as they are "reasonable, in accordance with public policy, and effectuate[] a lawful purpose."[12] Restrictions on stock transfers in closely held corporations effectively protect day-to-day corporate operations and are reasonable where they do not prohibit all transfers, "'but merely limit the group to whom the share can be transferred.'"[13] Similarly, the

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9 *Id.*

10 *See Gallagher v. Benjamin*, 74 N.Y.2d 562, 567, 549 N.Y.S.2d 945, 946 (1989) (noting that the shareholder's request for a higher buy-out price than provided for in the shareholders' agreement cannot be divorced from the other provisions of the shareholders' agreement that require a buyout when a shareholder is no longer an employee of the company).

11 *Id.*, 74 N.Y.2d at 567, 549 N.Y.S.2d at 946 (citations omitted).

12 *Ferolito v. Vultaggio*, 78 A.D.3d 529, 529, 911 N.Y.S.2d 323, 324 (1st Dep't 2010) (citations omitted).

13 *Id.*, 78 A.D.3d at 530, 911 N.Y.S.2d at 325 (quoting *Matter of Gusman*, 178 A.D.2d 597, 577 N.Y.S.2d 664 (2d Dep't 1991)).

courts of New York routinely uphold the valuation process articulated in a shareholders' agreement.[14]

When evaluating any contract, "'[t]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.'"[15] A court may "interpret a contract to carry out its intention, and 'words may be transposed, rejected, or supplied, to make its meaning more clear.'"[16]

The Shareholders' Agreement specifically identifies three reasons why the parties entered into it:

> B. The shareholders desire to establish a market value for their shares, to effectively control the management of the company for their mutual best interests, and to protect against divisive relationships which would arise if outsiders with incompatible management philosophies gained interests in the company.
>
> C. The company is dependent upon and derives substantial benefit from the continued active interest and participation of those shareholders who participate in the management of the company.

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[14] *See Sitler v. Saratoga Associates Landscape Architects, Enginners, and Planners, P.C.*, 101 A.D.3d 1451, 956 N.Y.S.2d 339 (3d Dep't 2012) (applying the share valuation formula set forth in the subject shareholders' agreement); *Stern v. Birnbaum*, 206 A.D.2d 514, 515, 615 N.Y.S.2d 62, 63 (2d Dep't 1994) ("As a result, and in accordance with the 1959 [shareholders'] agreement, the corporate accountant's determination of book value was final and binding upon the parties….") (citations omitted).

[15] *Currier, McCabe & Associates, Inc. v. Maher*, 75 A.D.3d 889, 890-91, 906 N.Y.S.2d 129, 131 (3d Dep't 2010) (citations omitted).

[16] *Tougher Heating & Plumbing Co., Inc. v. State of New York*, 73 A.D.2d 732, 423 N.Y.S.2d 289 (3d Dep't 1979) (quoting *Castellano v. State of New York*, 43 N.Y.2d 909, 911 (1978)).

> D. The company and the shareholders desire to enter into this agreement knowing that it is in the best interests of the company and fair to each of the shareholders. (R. 32, Recitals B-D)

Those three paragraphs set forth the parties' intent and the rest of the agreement must be interpreted to effectuate that intent.[17]

Section Two of the Shareholders' Agreement sets forth the disposition of the shareholder's shares during their lifetime. Section Two D specifically addresses the situation where a shareholder is no longer an employee of A. Cappione, Inc.:

> D. Bankruptcy, Incompetency, Disability, etc. 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, Section Two, ¶ D)

The provision only references Paragraph A of Section Two in terms of identifying the company and remaining shareholders' options, it does not reference Paragraphs B or C, which are the provisions relied upon by Defendants. (Defendants' Brief, pp. 21, 28) Paragraph A states:

> A. Lifetime Transfers. If, during a shareholder's lifetime, a shareholder (the "seller") intends to sell, exchange, give away, or otherwise transfer any of his or her shares to anyone other than a family member, the seller shall first send a written notice to the company and the other shareholders specifying the number of shares to be transferred (the "offered shares"), the proposed purchase price and payment terms, the identity of the transferee, and any other material terms of the transfer. For a period of thirty [30] days after the notice is delivered, the company shall have an

[17] *See Currier, McCabe & Associates, Inc.*, 75 A.D.3d at 890-91, 906 N.Y.S.2d at 131.

> option to purchase all or any part of the offered shares on the payment terms specified in Section Four and either at the price established in Section Four or, if the proposed transfer is for consideration of readily ascertainable value, at the price specified in the offer, whichever the company chooses. If within this thirty [30] day period the company does not exercise its option to purchase all of 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 not purchased by the company (the "available shares") at the same purchase price and upon the same terms and conditions. (R. 32-33)

There is no mention in Paragraph A of the departing employee/seller retaining his or her shares; rendering Defendants' argument to the contrary unsupportable based on a plain reading of the contract. Quite the contrary, the Shareholders' Agreement expressly states that "the company is dependent upon and derives substantial benefit from the continued active interest and participation of those shareholders who participate in the management of the company." (R. 32, Recital C) The Shareholder Agreement specifically contemplates that the shareholders will be employees of the A. Cappione, Inc. (R. 32, Recital C) Moreover, A. Cappione, Inc.'s agreements with its beer suppliers prohibits the company from being owned by people who are not actively involved in its day-to-day management. (R. 180, ¶ 11) The Shareholders' Agreement was intended to effectuate the intent of the parties and requirements of the company's suppliers. (R. 180,¶ 12) Defendants' proposed interpretation of the agreement does not do that as it would allow a non-employee to be a shareholder, put the company in violation of New York law, and put the company in violation of the very contracts it relies on to exist.

A. Cappione, Inc. properly exercised its rights under the Shareholders' Agreement. In April 2011, Marc Cappione executed a proxy statement authorizing his father to exercise his shares in A. Cappione, Inc. (R. 181, ¶ 21; 188-89) On June 24, 2011, David Cappione issued a Notice of a Special Meeting of the Shareholders of A. Cappione, Inc. (R. 182,

¶ 24; 190) The notice was hand delivered to Joseph Cappione. (R. 182, ¶ 25) The notice stated that one of the purposes of the meeting was "to ratify and approve the repurchase of the voting common stock owned by Marc Cappione." (R. 182, ¶ 26; 190) The shareholders' meeting was held on the noticed date and time—July 5, 2011 at 9:00 a.m. (R. 182, ¶ 28; 191-93) As memorialized in the meeting minutes, and admitted to by him, Joseph Cappione attended the shareholders' meeting. (R. 163, ¶ 5; 182, ¶ 29; 191-93) At the meeting, a resolution was passed authorizing A. Cappione, Inc. to repurchase the shares of the voting common stock of Marc Cappione pursuant to the terms and conditions of the Shareholders' Agreement, dated November 17, 2005. (R. 182, ¶ 30; 191-93) The meeting minutes from the shareholders' meeting were provided to Marc Cappione's proxy—Joseph Cappione—at or about the time of the meeting. (R. 183, ¶ 31) Accordingly, A. Cappione, Inc. provided written notice of its intent to exercise its rights under the Shareholders' Agreement within thirty days of the event giving rise to that right—in this case, the company's decision to terminate Marc Cappione's employment.[18]

Immediately following the shareholders' meeting on July 5, 2011, A. Cappione, Inc. held a Board of Directors meeting. (R. 183, ¶ 32; 194-96) At the Board of Directors meeting, the Board authorized the repurchase of Marc Cappione's shares. (R. 183, ¶ 33; 194-96) In

[18] Even if Plaintiffs had not provided timely, written notice of its election to repurchase Marc Cappione's shares, its failure to timely object to the written notice requirement acted as a waiver of that purported requirement. *See Kenyon & Kenyon v. Logany, LLC*, 33 A.D.3d 538, 538-39, 823 N.Y.S.2d 72, 74 (1st Dep't 2006) ("Despite defendant's failure to provide the required written notice that the remainder of the sixth floor plaintiff wanted for expansion was available, plaintiff orally confirmed to defendant that it was nonetheless ready to exercise its option to lease the entire additional sixth floor space. Defendant did not receive written notice to this effect, but its failure to insist on such notice for nearly 10 months after receiving plaintiff's oral notification, while acting as if it had accepted the oral exercise of the option, knowing plaintiff's action in reliance on defendant's conduct, constituted a waiver of any right to insist on written notice.") (citations omitted).

addition, the Board passed a resolution terminating his employment, retroactively effective to March 30, 2011. (*Id.*) The minutes from the July 5, 2011, Board of Directors meeting were provided to Joseph Cappione at or about the time of the meeting. (R. 183, ¶ 34) Again, A. Cappione, Inc. properly exercised its rights under the parties' Shareholders' Agreement.

Defendants argue that paragraphs B and C of Section Two must also be complied with in the situation where an employee/shareholder is terminated and required to sell back his or her shares to the company. First, Defendants argument is belied by the plain language in the Shareholders' Agreement addressing such a circumstance—Section Two, paragraph D—because that section only cross-references Section Two paragraph A. (R. 33) Second, Defendants argue that paragraphs B and C must be read in conjunction with a terminated employee situation because otherwise they would never apply. Again, the language of the Shareholders' Agreement makes it clear that paragraphs B and C apply when an existing shareholder intends to sell or transfer some or all of his or her shares to someone outside the family. (R. 33) Those paragraphs would apply in that situation. The Shareholders' Agreement does not incorporate those paragraphs when discussing the disposition of shares by a shareholder who is an employee with the company and his employment is terminated. (R. 33, Section Two, ¶ D) The presumption is that the document was intentionally drafted in that manner and that intention should be given effect. The only reasonable interpretation of the Shareholders' Agreement is that the parties did not want to permit a terminated employee/shareholder from retaining any ownership interest in the company. Defendants' efforts to re-write the Shareholders' Agreement are belied by the statement of intent in the Recitals and the plain language of the document.

Defendants' argument that the option was not properly exercised because the closing did not happen within 90 days of the July 5, 2011 meetings is, again, belied by the plain language of the Shareholders' Agreement. The Agreement states, when a shareholder's employment with the company is terminated, and the company exercises its option to purchase his shares pursuant to Section Two (A), "the purchase price shall be determined under Section Four…." (R. 33, Section Two, ¶ D) The Agreement does not say the purchase price ***and*** payment terms shall be determined under Section Four, it simply references the purchase price. This is important because the Defendants have placed all of their proverbial eggs in the payment terms basket, which is not applicable to this situation. The transaction was not required to close within 90 days of the company exercising its rights. Again, Defendants are reading something into the Agreement that does not exist.

Section Four provides that "[t]he purchase price of each share to be purchased under this agreement at the price specified in this Section Four shall be determined in accordance with the formula set out in Exhibit A." (R. 33, Section Two, ¶ D) Exhibit A then provides as follows:

Exhibit "A"

Determination of Purchase Price

> The purchase price per shall be determined periodically by an independent third party evaluator who shall determine the price per share of stock based upon the fair market value of the company as a going concern. The company contracted with Midtown Valuation Group, LLC of Fairport, New York for a determination of fair market value in 2004. Based upon the work performed by Midtown Valuation Group, LLC, the agreed upon value per share is currently established at $1,472.79 per share of stock.
>
> The company shall contract with an independent valuation firm every three years, but in no event more than five (5) years from the

> previous valuation date. The price per share shall be revalued at least every five (5) years in accordance with this section. It is agreed that the determination by such independent valuators, when made, certified, and delivered, shall be binding on all parties to this agreement, provided that such independent valuators shall have used generally accepted accounting principles applied on a consistent basis. (R. 38)

Based on the valuation report reflected in the Shareholders' Agreement, Marc Cappione's one-third ownership interest was worth $392,748.91 ($1,472.79 per share x 266 2/3 shares) in November 2005. (R. 37-38) Because the valuation had not been updated since 2004, and to be fair to Marc Cappione, A. Cappione, Inc. wanted to get an updated valuation of the business done for purposes of determining the value of his shares as of the effective date of his termination. (R. 184, ¶ 38) Accordingly, the same valuation company that performed the valuation identified in Exhibit A to the Shareholders' Agreement—Midtown Valuation Group—did an updated valuation that determined the value of the company as of March 30, 2011. (R. 38; 69-122;173-76; 184, ¶ 39) According to the updated valuation of the business, as of his termination date, Marc Cappione's one-third ownership interest in the business was now worth $911,324.22. (R. 69; 176, ¶ 16) Both valuations were done based on a non-marketable, minority interest basis. (R. 174, ¶¶ 5, 16) When the Shareholders' Agreement was executed, everyone agreed that the agreement was "in the best interests of the company and fair to each of the shareholders." (R. 32, Recital D) It was also agreed that that "the determination by such independent valuators, when made, certified, and delivered, shall be binding on all parties to this agreement…." (R. 38) Midtown Valuation Group, LLC has made, certified, and delivered the May 10, 2012 valuation report for A. Cappione, Inc. (R. 173-76) A. Cappione, Inc. has issued the documentation and payments called for in the Shareholders' Agreement and in accordance with the Trial Court's May 2013 summary judgment decision. (Defendants' Brief, p. 36)

B. Equity Dictates that the Shareholders' Agreement be Enforced

Even if Defendants were correct that that the Shareholders' Agreement was not strictly complied with, the Agreement is silent on the consequences, if any, for failure to strictly comply with its terms. The law is well-settled that where there is doubt as to the interpretation of a contract, a fair and equitable result will be preferred over one which leads to harsh or unreasonable results.[19] An interpretation that will produce an inequitable result should be avoided.[20]

For example, New York courts recognize that equitable considerations may require a departure from strict compliance with notice requirements in forfeiture cases. In those cases, equity will intervene to relieve an optionee of the consequences of a failure to exercise an option in accordance with its terms where: (1) the optionee's failure to properly exercise the option resulted from an honest mistake or inadvertence, (2) refusal to recognize the exercise of the option would result in a substantial forfeiture by the optionee, and (3) the optionor would not suffer prejudice as a result.[21] Courts have also recognized that equity may intervene to protect against the forfeiture of the substantial and valuable asset of a business's good will.[22]

Likewise, here, equitable considerations would require a departure from strict compliance with the terms of the Shareholders' Agreement to the extent the 90 closing provision were applicable. First, the Plaintiffs alleged failure to strictly comply with the 90 closing

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19 *See, e.g.,* 11 Williston on Contracts § 32:11 at 758-59 (4th ed. 2012)*; Aldrich v. New York Life Insurance Company,* 235 N.Y. 214, 224 (1923).

20 *Id.*

21 *See, e.g., Pacific Dean Realty, LLC v. Specific Street, LLC,* 105 A.D.3d 827, 828-29, 963 N.Y.S.2d 291, 291-92 (2d Dep't 2013); *135 East 75th Street LLC v. Daffy's Inc.*, 91 A.D.3d 1, 4, 934 N.Y.S.2d 112, 115 (1st Dep't 2011).

22 *135 East 75th Street LLC,* 91 A.D.3d at 6, 934 N.Y.S.2d at 117.

requirement, if it were deemed applicable to this situation, was inadvertent, and they used their best efforts to rectify any delay. Plaintiffs began the process as soon as Marc Cappione was terminated from the company. Moreover, Marc Cappione was equally at fault for the delay — he was an officer, director, and shareholder of the company during the time period when the valuation allegedly should have been updated; he was aware that the valuation was not updated; and he did nothing about it. Marc Cappione cannot now complain that the valuation was not timely updated, when he is equally to blame for the delay.

Second, if this Court were to adopt Marc Cappione's interpretation of the Shareholders' Agreement and allow him to retain his membership interest, the Plaintiffs (and Defendants) would suffer extreme prejudice — indeed, the company could cease to exist. According to the New York Alcohol and Beverage Control Law, a convicted felon cannot maintain an ownership interest in a company that sells alcohol.[23] The ABC began the process of revoking the company's license in March 2013 and, after an adjournment of that hearing, re-scheduled the revocation hearing for November 7, 2013. (R. 198-99; 426) Defendants do not contend that there is a defense to the action; they only offer speculation as to what the ABC might do following the hearing. Defendants also do not explicitly state what would happen if their guess is wrong, but we all know what it is—revocation of the company's license. The Trial Court properly found that Marc Cappione was "playing with fire by pressing the SLA [ABC]." (R. 218) In contrast, Marc Cappione did not suffer any prejudice when the sale was required in

[23] New York Alcohol and Beverage Control Law § 126 (McKinney's 2014) ("The following are forbidden to traffic in alcoholic beverages: a person who has been convicted of a felony . . .").

accordance with the May 10, 2012 Midtown Valuation Group report; his ownership interest more than doubled in value since the last valuation in 2004.

Accordingly, to the extent the Court finds that Plaintiffs did not strictly comply with the terms of the Shareholders' Agreement, the facts here require equity to intervene to relieve strict compliance with the time limitations set forth in the Shareholders' Agreement.[24] The alternative is to create a situation where Marc Cappione is given back possession of his shares, which could trigger another ABC inquiry, and he proceeds with his scheme to extort more money from the remaining shareholders than he would be entitled to under the Shareholders Agreement. That is exactly what the parties were trying to avoid by entering into the Agreement in the first place.

POINT III.

THE TRIAL COURT PROPERLY GRANTED PLAINTIFFS' MOTION TO ENFORCE THE MAY 2013 SUMMARY JUDGMENT DECISION AND DENIED DEFENDANTS' MOTIONS TO STAY ENFORCEMENT PENDING THEIR APPEALS

The Trial Court had broad discretion to consider Plaintiffs' motion for Follow-Up Relief and the corollary motions by Defendants for a stay pending the outcome of their appeals. Under the circumstances facing the Trial Court, it properly exercised its discretion by granting Plaintiffs' motion and denying Defendants' motion for a stay and then motion to renew same.

A. The Trial Court Properly Granted Plaintiffs' Motion for Follow-Up Relief

In May 2013, the Trial Court properly declared that Marc Cappione must sell his shares back to the company pursuant to the parties' November 2005 Shareholders' Agreement.

[24] *See, e.g., 135 East 75th Street LLC*, 91 A.D.3d at 7 ("By its nature equitable relief must always depend on the facts of the particular case and not on hypotheticals").

In November 2013, the Trial Court considered, and granted, Plaintiffs' motion to enforce that order by requiring Marc Cappione to sell his shares back to A. Cappione, Inc. pursuant to that Agreement.

In *Auer v. Dyson*,[25] the court addressed "a motion to enforce a prior judgment of [the] court from a declaratory judgment action."[26] The court held that such a motion is appropriate and the prevailing party in the declaratory judgment action did not have to commence a plenary action in order to enforce the declaratory judgment decision:

> Professor David Siegel, while noting the older cases, has nevertheless advocated a simple motion as "a more facile procedure". The Court of Appeals has at least impliedly accepted Siegel's view. In *Berlitz Pub. v Berlitz (37 NY2d 878*), the court reached the merits of just such a motion without comment as to its procedural validity. "The fact that it reached the merits is indication that the Court finds the motion practice acceptable and is willing to spare the plaintiff the burden of a second action".

The *Auer* Court went on to find that the defendant was in violation of the declaratory judgment order and required compliance with the prior order within 30 days.[27]

In addition, the New York Civil Practice Law and Rules provide for the Court-order sale of personal property that may substantially decrease in value during the litigation. CPLR § 2702 provides as follows:

> On motion of any party, the court may order the sale, in such manner and on such terms as it deems proper, of any personal property capable of delivery which is the subject of the action if it shall appear likely that its value will be substantially decreased during the pendency of the action. Any party to the action may

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[25] 125 Misc.2d 274, 479 N.Y.S.2d 102 (Oneida County), *aff'd*, 112 A.D.2d 803, 491 N.Y.S.2d 1022 (4th Dep't 1985).

[26] *Id.*, 125 Misc.2d at 274, 479 N.Y.S.2d at 103.

[27] *See id.*, 125 Misc.2d at 277, 479 N.Y.S.2d at 105.

> purchase such property at a judicially-directed sale held pursuant to this section without prejudice to his claim.

In addition to this statutory authority, the Trial Court also had the inherent authority, under proper circumstances, to order the sale of that property.[28] "The Court's power to order the sale is discretionary."[29] The potential decrease in value of the property is the only criterion; "it is immaterial whether or not the property has been or could be taken into the custody of the court under . . . [CPLR 2701]."[30]

On May 24, 2013, the Court granted Plaintiffs' cross-motion for summary judgment. Shortly after the Court's order, Plaintiffs informed Defendants that they were ready, willing, and able to start making the payments called for under the Shareholders' Agreement and pursuant to the Court's order. (R. 251) Despite Plaintiffs' efforts, Defendants failed and refused to comply with the Court's order. (R. 237, ¶ 22) While Defendants initially filed a motion for a stay of enforcement, that motion was eventually withdrawn, after months of adjournments, on August 15, 2013. (R. 236, ¶ 15; 249-50) Until Tuesday, October 22, 2013, Defendants had not re-filed or renewed their motion for a stay. (R. 337, ¶ 57) Nor had Defendants perfected their appeal. In fact, Defendants had not even presented a proposed table of contents for the record on appeal until Monday, October 21, 2013. (R. 350, ¶ 136) In short, Defendants did nothing to stave

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[28] Weinstein, Korn & Miller, New York Civil Practice: CPLR P 2702.06 (David L. Ferstendig ed., LexisNexis Matthew Bender 2d Ed.) (citing *Ballantine v. Ferretti*, 255 A.D.606, 609, 8 N.Y.S.2d 436, 439 (1st Dep't 1938) ("The court in an equity suit has inherent power under proper circumstance, pending the trial, to order the sale of chattels"). The "chattels" at issue in *Ballantine* were shares in a corporation.

[29] Weinstein, Korn & Miller, New York Civil Practice: CPLR P 2702.01 (David L. Ferstendig ed., LexisNexis Matthew Bender 2d Ed.).

[30] Weinstein, Korn & Miller, New York Civil Practice: CPLR P 2702.02 (David L. Ferstendig ed., LexisNexis Matthew Bender 2d Ed.) (quoting 5 N.Y. Adv. Comm. Rep. A-412 (Advance Draft 1961); 1961 Sen. Fin. Comm. Rep. 413).

off enforcement of the Trial Court's May 24, 2013 decision and order for the four-and-a-half months between when it was issued and the return date on Plaintiffs' motion to enforce it.

In the matter at hand, it is beyond dispute that Marc Cappione's stock in A. Cappione Inc., and that of Plaintiffs, was in danger of being rendered worthless if he did not immediately sell his shares back to the company. Marc Cappione is a convicted felon. The New York Alcohol and Beverage Control Law prohibits convicted felons from owning an interest in a wholesale beer distributorship such as A. Cappione Inc.[31] The ABC commenced an administrative proceeding to revoke the company's license based on Marc Cappione's conviction and, after Plaintiffs had obtained an adjournment of the initial proceeding, re-scheduled the hearing for November 7, 2013 at 12:30 p.m. (R. 426) If the company's license were revoked it would be worthless, which means that Marc Cappione's shares, and those of Plaintiffs, would also worthless. In short, if Marc Cappione continued to own shares in A. Cappoine Inc., the value of those shares could substantially decrease during the pendency of the action.

Defendants have, repeatedly, attacked Plaintiffs and their counsel claiming that the import of the ABC hearing was overstated or lied about. Nothing could be further from the truth. Defendants try to argue that the determination of the Administrative Law Judge who would have conducted the ABC hearing would not be final and could be appealed. The right of appeal is scant comfort to those facing the loss of their life's work and source of employment. Again, Defendants do not identify any viable defense to the charges that were lodged against A. Cappione Inc. based on Marc Cappione's situation. They merely offer an attorney's speculation

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[31] New York Alcohol and Beverage Control Law § 126 (McKinney's 2014) ("The following are forbidden to traffic in alcoholic beverages: a person who has been convicted of a felony . . . .").

as to what the ABC might have done under the circumstances. A hope-and-a prayer is not a viable gamble when the downside is that the company loses its license and goes out of business, destroying the shareholder equity of everyone (Plaintiffs and Defendants) in the process, and putting a number of employees out of work. The Trial Court properly exercised its discretion by granting Plaintiffs' motion for Follow-Up Relief.

The Court's May 24, 2013 decision and order is in accord with the parties' November 2005 Shareholders' Agreement and New York Law. The Trial Court properly enforced its order and directed: (1) Marc Cappione to comply with the Court's May 24, 2013 Order by turning over all of his shares in A. Cappione, Inc. to Plaintiffs' counsel within seven (7) days of the Court's order on the motion; and (2) Plaintiffs to comply with the payment schedule set forth in the Shareholders' Agreement upon receipt of Marc Cappione's shares in A. Cappione, Inc. (R. 214-16)

B. The Trial Court Properly Exercised its Discretion in Denying Defendants Cross-Motion for a Stay of Enforcement

Defendants claim that they were entitled to an automatic stay of enforcement pursuant to CPLR § 5519(a)(4) and that any stay pursuant to § 5519(a) must be automatically granted. Defendants are wrong on both accounts. First, Defendants did not comply with the requirements necessary to invoke the automatic stay provisions of § 5519(a)(4) because they did not provide the Trial Court with the personal property (the A. Cappione Inc. share certificates held by Marc Cappione) that is the subject of the action. Second, the Trial Court had broad discretion under CPLR § 5519(c) to vacate an automatic stay under § 5519(a), impose conditions on any stay, or to limit the stay. CPLR § 5519(c) specifically states that "[t]he court from … which an appeal is taken … "may grant a limited stay or may vacate, limit or modify any stay

imposed by subdivision (a) . . . ."[32] Simply put, Defendants' argument that the Trial Court was obligated to grant it a stay under § 5519(a), ignores the plain language of § 5519(c) wherein the court retains discretion to vacate, limit, or modify any such stay.

Accordingly, even assuming that Defendants eventually satisfied the requirements to obtain an automatic stay pursuant to CPLR § 5519(a)(4)—which they did not— the question becomes, did the Trial Court abuse its discretion under the circumstances? In light of the inherent prejudice that could inure to all parties if Marc Cappione were permitted to continue owning shares of A. Cappione, Inc., the Trial Court properly exercised its discretion and denied Defendants' motion for a stay. Marc Cappione's continued ownership of the subject shares endangered the entire company, including the value of the shares he was holding.

The Trial Court issued its first stay decision on November 6, 2013. (R. 214-16) At that time, the Trial Court was aware that on March 21, 2013, A. Cappione, Inc. received a pleading from the ABC stating that it was going to cancel or revoke the company's license because of Marc Cappione's felony conviction and continued ownership interest in the company. (R. 198-99) Plaintiffs obtained an adjournment of that hearing. On October 7, 2013, Plaintiffs received a notice that the hearing was re-scheduled for November 7, 2013. (R. 426) Without the license, A. Cappione, Inc. is worthless. (R. 186, ¶ 54)

The Trial Court was also aware of Defendants' conduct between the date of the original summary judgment decision and October 22, 2013 when they filed their cross-motion for a stay. Specifically, the Trial Court was aware that Defendants had filed, adjourned, and

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[32] *See also* Weinstein, Korn & Miller, New York Civil Practice: CPLR P 5519.13 (David L. Ferstendig ed., LexisNexis Matthew Bender 2d Ed.) ("The grant or denial of a stay or vacating or limiting stays pursuant to CPLR 5519(c) rests largely in the courts' discretion, and considerable flexibility is available in fashioning appropriate terms.").

eventually withdrew their original motion to stay. The Trial Court was aware that Defendants had represented to it, this Court, and Plaintiffs' counsel, that settlement was imminent, only to then refuse to sign the settlement papers that had been agreed upon. And finally, the Trial Court was aware that Defendants had waited until October 22—two weeks after the ABC had rescheduled the license revocation hearing—and just three days before Plaintiffs' motion for Follow-Up relief was scheduled to be heard (even though it was served on September 13 and adjourned repeatedly at Defendants' request) to file their cross-motion for a stay.

Under the circumstances, the prejudice to Plaintiffs (and Defendants) by imposing a stay and imperiling the value of the entire business, far outweighed the potential prejudice to Defendants of requiring them to immediately turn over the shares to A. Cappione, Inc. in exchange for the buyout payments identified in the Shareholders' Agreement, as the Court ordered on May 24, 2013. The Trial Court properly exercised its discretion and denied Defendants' request for a stay.

C. The Trial Court Properly Limited Defendants' Motion to Renew their Motion for a Stay

Defendants flurry of motions continued in early November 2013. First they filed an Order to Show Cause with this Court seeking a stay of enforcement of the May 2013 summary judgment decision and the November 6, 2013 Follow-Up Relief decision. Once again, like they did on their cross-motion for a stay to the Trial Court, Defendants argued that they were entitled to an automatic stay under § 5519(a) and that the Trial Court did not have any discretion to vacate, limit, or modify it. When they were unhappy with Justice Egan's decision to strike out the temporary restraining order language and scheduling of the return date, Defendants submitted a number of supplemental letters to the Court. (R. 747, ¶ 27; 783-85) Defendants complained

about the redacted provisions in their proposed order, the return date, and notified the Court that the ABC hearing had been adjourned. (*Id.*) Before receiving a response from this Court, Defendants filed their motion to renew with the Trial Court, advising that court of the developments since November 6, 2013.

The primary relief requested in Defendants' motion to renew was actually granted. Defendants requested: "upon the renewal of the Motion, the entry of an Order modifying the Order to Compel to delete therefrom so much thereof as requires Defendant Marc J. Cappione to sell his shares in Plaintiff A. Cappione, Inc. to Plaintiff A. Cappione, Inc. within seven (7) days of this Court's execution, on November 6, 2013, of the Order to Compel (**the seven day deadline being Wednesday, November 13, 2013**) and inserting in its place the requirement that Plaintiffs' enforcement of both the Decision and Order and Order to Compel is stayed pending a determination by the Appellate Division, Third Department of Defendants' motion to stay enforcement of both such Orders, which are returnable before that Court on **November 15, 2013**, and for such other and further relief as this Court may deem just and appropriate." (R. 741, ¶ 2) (emphasis in original) That is exactly what the Trial Court did in its December 4, 2013 order. (R. 730) The order states: "ORDERED, that Defendants' Motion to Renew is GRANTED to the extent that Plaintiffs' enforcement of Order 1 and Order 2 is stayed pending a determination by the Appellate Division, Third Department of Defendants' pending motion to stay enforcement of Order 1 and Order 2 pending an Order on Defendants' appeals from Order 1 and Order 2…." (*Id.*) Defendants were not aggrieved by the Court's December 4, 2013 decision; in fact, they got exactly what they requested. What Defendants are unhappy about is that this Court subsequently denied their motion for a stay and, therefore, they were required to

turn over Marc Cappione's shares to Plaintiffs. Defendants have not challenged this Court's decision.

Despite the fact that Defendants' appeal of Order 3 is improper, the Trial Court properly exercised its discretion on that motion, under the circumstances. As discussed above, CPLR § 5519(c) grants the court discretion to vacate, limit, or modify an automatic stay under § 5519(a). The parties had recently briefed and argued almost the exact same issue before Judge Demarest. The only change in circumstances was that Plaintiffs had obtained an adjournment of the ABC hearing because they had both a summary judgment decision and a decision on their motion to enforce that decision, in hand. The hearing was not cancelled and the charges were not resolved as of November 7, 2013. Accordingly, Plaintiffs were still subject to the license revocation proceeding. Once again, Defendants have not articulated any viable defense that could be offered at the ABC hearing, rather they recommend that the company throw itself on the mercy of the tribunal and hope that only a fine would be levied. That is the same argument that Defendants made to this Court, which was ultimately found to be insufficient to grant their motion for a stay. The Trial Court, however, did grant Defendants a temporary reprieve from enforcement pending this Court's decision on the motion to stay. It is difficult to see how Defendants could get what they wanted, but still question the Trial Court's exercise of its discretion. The Trial Court properly exercised its discretion when it granted Defendants a limited stay pending this Court's decision on Defendants' other motion for a stay.

CONCLUSION

The Trial Court's decisions should be affirmed. As a threshold matter, Defendants' appeal should be dismissed as moot because, as they argued to the Trial Court and this Court on their motions for a stay, Marc Cappione has transferred his shares to the company.

Notwithstanding that threshold issue, the Trial Court properly interpreted and applied the parties' Shareholders' Agreement. Furthermore, even if Plaintiffs' did not technically comply with the terms of the Shareholders' Agreement, equity would intervene in this instance to enforce the agreement because failing to do so could result in a substantial forfeiture for both Plaintiffs and Defendants—the revocation of the company's license to sell alcohol and, therefore, the loss of all shareholder equity. And finally, the Trial Court properly exercised its discretion under the circumstances when it granted Plaintiffs' motion to enforce the summary judgment decision and to deny Defendants' motions for a stay.

Dated: March 17, 2014

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