

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Application of

BELARDI-OSTROY LTD.,

Petitioner,

-against-

AMERICAN LIST COUNSEL, INC.,

Respondent,

For an Order Pursuant to Limited Liability Company Law §
702 Dissolving

BELARDI/OSTROY ALC, LLC.

Index No.

VERIFIED PETITION

Petitioner Belardi-Ostroy Ltd. (“B & O”), by its attorney, Spencer L. Schneider, Esq., respectfully shows to this Honorable Court as follows:

Parties

1. Petitioner B & O is a corporation existing under the laws of the State of New York.
2. Respondent American List Counsel, Inc. (“ALC”) is a corporation existing under the law of the State of New York.
3. Belardi/Ostroy ALC, LLC (“BO/ALC” or the “Company”) is a limited liability Company existing under the laws of the State of New York with its office located in New York County. Venue is proper in this Court under Limited Liability Corporation Law § 702.

Facts

The Direct Marketing List Business

4. BO/ALC was formed in 1997 as a direct marketing customer list management and

brokerage advertising agency. Most of BO/ALC's clients are in the catalog advertising business. Primarily BO/ALC helps them rent out their customer lists to other firms to solicit them by mail for non-competitive products; on the brokerage side, BO/ALC also helps clients rent other firm's customer lists so that they can mail catalogs to those customers.

5. In 1997, BO/ALC had over two dozen competitors. Presently, it has about half a dozen. This is due directly to the advent of the internet and the fact that clients spend more and more of their advertising dollars on on-line advertising, while spending less on catalog advertising (the core of the business).

6. Over the years BO/ALC has been able to survive in this industry by providing "best-in-class" service, being creative, and keeping its expenses to a minimum. But BO/ALC can only do this for so long – in order to exist, BO/ALC must provide a product which people want to buy and not be a Kodak film store in an iPhone world.

BO/ALC's Formation

7. BO/ALC has two members that each own 50%. B & O is owned by Ms. Belardi and Mr. Ostroy. ALC is a direct marketing list management and brokerage company based in New Jersey. ALC's principals are Donn and Susan Rappaport.

8. BO/ALC's Operating Agreement was entered into on December 19, 1997. (Ex. A.) The purpose of BO/ALC is listed in the Operating Agreement as any "lawful purpose," however, the members formed and conduct the business with the purpose of being a direct marketing list management and brokerage company.

9. The Operating Agreement provides that "all management powers over the business and affairs of BO/ALC shall be exclusively vested in the Board of Directors and, subject to the direction of the Board of Directors, the Officers, who shall collectively constitute "*managers*" of BO/ALC." (*Id.* at ¶ 5.1.) The authority and functions of the Board and the Officers are deemed

to be identical to those established by the New York Business Corporation Law. (*Id.*)

10. At all relevant times, Mr. Ostroy has been the CEO and Chairman of the Board of BO/ALC. Ms. Belardi, at all relevant times, has been President of BO/ALC.

11. The Operating Agreement provides for a board of five persons who serve until their successors are elected. The initial board consisted of Mr. Ostroy and Ms. Belardi (for B & O's 50%), Mr. Rappaport and Robert Tomlinson (for ALC's 50%), and "an individual mutually agreed to by ALC and [B & O]." (*Id.* at ¶ 5.2(a).) The fifth member was Bill Dean, but he was succeeded by Darryl Ross who resigned in 2003 and was never replaced. The Operating Agreement does not provide any mechanism for dealing with a deadlock for selecting a fifth director or any other issue. The current Board consists of Ms. Belardi and Mr. Ostroy, for petitioner, and Donn and Susan Rappaport, for respondent. The Operating Agreement provides that BO/ALC can be dissolved only by written consent of all members or by the entry of a decree of judicial dissolution. (*Id.* at ¶ 7.2.)

12. On December 19, 1997, the members entered into a Member Agreement. (Ex. B.) It similarly provides for a board consisting of five persons, two elected by each member and "ALC and B & O shall agree upon" the fifth director." (*Id.* at ¶ 1.01.) And, similarly, it does not provide any mechanism for dealing with a deadlock for selecting a fifth director or for any other issue.

The Support Services Agreement

13. The Member Agreement also contains a support services agreement (the "SSA") whereby, with no time limit, ALC "agrees that it will supply BO/ALC with the following services:

back-end support for list research, accounting/invoices, credit and collections, personnel administration, computer systems, purchasing, information technology, interactive media and general data processing services. In rendering the support set forth above, the Company's offices will be linked to ALC's corporate computer

network for order processing, usage and sales reports, datacards and other related date/information. (Id. at ¶ 3.01.)

14. For this ALC is paid 15% of BO/ALC's commission income. Later the fee was decreased to 13.5%. From 1999 through April 30, 2012, ALC received more than \$10.2 million from BO/ALC through the SSA, representing a substantial portion of BO/ALC's total revenue.

15. The SSA does not explicitly require ALC to update its technology in conformance with changing industry technological standards. It also does not explicitly adjust ALC's commission in the event that its services fall behind common technological advances/improvements. Despite this harmful situation, ALC has refused to improve its services and/or adjust its commission to correspond with the fair value of its services. And the fair value of its services is far less than half of what BO/ALC is paying (to one of its members). Even though BO/ALC has been extremely diligent in keeping its costs low, it has no ability to control the costs it pays to ALC under the SSA. ALC is unwilling to change the deal, a deal which is hamstringing BO/ALC, and making its continuation impossible.

16. BO/ALC is at a cross-road -- an existential crisis which requires not only a non-fractionous management, but additional revenues to make the shift from the print age to one that significantly centers on the on-line/digital advertising age.

Company Dysfunction and Futility of its Existence

17. On December 6, 2011, at a Company Board meeting, Mr. Ostroy attempted to address the issue of the SSA and, for all the reasons above, sought approval to terminate it. In response to this and a notice of termination, ALC pre-emptively filed a federal lawsuit against Mr. Ostroy, BO/ALC, and B & O in New Jersey seeking to prevent termination of the SSA. That case was later dismissed. Since 2012, ALC, Mr. Rappaport, Ms. Belardi, and Mr. Ostroy have been parties to claims and counterclaims in a suit in New Jersey state court seeking, among other

things, a declaratory judgment terminating the SSA. After three years, deposition discovery in the case has just commenced and no trial date has even been set. It is not known when the case will get to trial.

18. After the lawsuits were commenced, on July 10, 2012, a Board meeting was held. It was contentious. The Rappaports disrupted it by raising inappropriate issues and fighting with Ms. Belardi and Mr. Ostroy. As Chairman, seeing that nothing would come from this toxic situation, Mr. Ostroy exercised his authority to adjourn it and it ended. But, after the meeting ended, the two Rappaports staged a sham “vote,” by themselves, to “fire” Mr. Ostroy as CEO, appoint Mr. Rappaport as Chairman, and expand the board by three seats. Although the Rappaports’ tactic was patently invalid and a nullity, the Rappaports, to this day, contend that Mr. Ostroy was terminated and that Mr. Rappaport is BO/ALC’s Chairman.

19. On September 13, 2012, Mr. Rappaport, attempted to terminate BO/ALC’s key-man insurance and sought to have Mr. Ostroy removed from BO/ALC’s payroll and benefit lists as of July 11, 2012. Mr. Rappaport and ALC engaged in a number of other wrongful actions disrupting the management and conduct of BO/ALC, failing to pay certain BO/ALC bills (*i.e.* American Express) and attempting to terminate a vendor agreement (ADP).

20. On December 2, 2015, on ALC’s motion, the Judge in the New Jersey case ordered that an individual handpicked by ALC be appointed as the fifth member of the board. The New Jersey Judge admitted he had no legal authority to appoint a director to the board of a New York limited liability company, and petitioner’s New Jersey lawyers are moving for reconsideration of the order. As ALC’s hand-picked nominee, there is a significant risk that the judicially appointed director may just (improperly) attempt to rubber-stamp ALC’s previous *ultra vires* actions and vote to continue the SSA. This would just further weaken the Company, frustrate its ability to address its existential crisis, and quicken its potential demise.

21. Moreover, the unprecedented and forced appointment of an ALC selected director (by a New Jersey Judge), over the protest of petitioner, violates the explicit terms of the Operating and Member Agreements which require that the fifth director must be “mutually agreed to by ALC and B & O.” The appointment of ALC’s director is the straw that may break the Company’s back.

CAUSE OF ACTION FOR DISSOLUTION

22. Petitioner repeats and reallages the foregoing allegations here.

23. Limited Liability Company Law § 702 (Judicial Dissolution) provides in part that “the Court may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.”

24. It is not reasonably practicable for BO/ALC to carry on its business in conformity with the articles of organization or operating agreement.

25. Therefore, BO/ALC should be dissolved.

CAUSE OF ACTION FOR BUYOUT

26. Petitioner repeats and reallages the foregoing allegations here.

27. The Limited Liability Company Law does not expressly authorize buy-outs in dissolution proceedings, this Court may order one on equitable grounds. *See Matter of Superior Vending, LLC*, 71 A.D.3d 1153, 1154 (2nd Dep’t 2010.)

28. It would equitable for petitioner to be granted the right to purchase respondent’s interest.

29. Unlike respondent, petitioner’s members are Company officers exclusively responsible for the day-to-day operations of BO/ALC, oversee the employees, and deal directly with the clients.

WHEREFORE, petitioner prays for an order, pursuant to Limited Liability Company Law § 702, dissolving Belardi/Ostroy ALC, LLC, or granting petitioner the authority to purchase respondent's interest in Belardi/Ostroy ALC, LLC, together with such other and further relief as this Court may deem just and proper, including granting petitioner's attorneys' fees and costs.

Dated: New York, New York
December 21, 2015

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