SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF WARREN

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In the Matter of the Application of VLADIMIR CHOMIAK, LEON CHOMIAK and LEONORA CHOMIAK RHODEN, as holders of 48% of all of the legally-issued outstanding shares of TWIN BAY VILLAGE, INC.,

Index No. 59703/2014

Petitioners,

for the dissolution of TWIN BAY VILLAGE, INC., a New York Corporation, pursuant to Section 1104-a of the Business Corporation Law,

Conclusions of Law

v.

TATIANA CHOMIAK KASIAN a/k/a TANYA CHOMIAK KASIAN, TAMARA L. CHOMIAK, LARISSA CHOMIAK, TAMARA L. CHOMIAK as the Representative of the Estate of LEO CHOMIAK, and TAMARA L. CHOMIAK and TATIANA CHOMIAK KASIAN a/k/a TANYA CHOMIAK KASIAN as Trustees under the LEO CHOMIAK Inter Vivos Deed of Trust dated April 16, 2011, as holders of the remaining 52% of all of the legally-issued outstanding shares of TWIN BAY VILLAGE, INC.

Respondents.

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CONCLUSIONS OF LAW

This case involves a family owned incorporated business which operates a resort business and owns the valuable lakefront real property on Lake George in Bolton

Landing, New York, upon which the resort operates. The name of the Corporation is Twin Bay Village, Inc.. Since the mid-1980's the Petitioners have been passive shareholders in the Corporation. They have contributed no funds, time or efforts to the operation of the business since the mid-1980's. The Petitioners neglected or failed to make inquiries into the business operations of the Corporation and neglected or failed to request accountings and reports of management decisions until sometime after June 2009. Respondents on the other hand have literally devoted their lives to the business and it is and has been their full-time occupation. That Respondents believed their "sweat equity" entitled them to certain financial benefits superior to those of the passive shareholders/family members was evident throughout the hearing of this matter. Whether the Respondents are correct or not about their entitlement to a superior financial position by reason of their sweat equity is not germaine to the issues in this dissolution proceeding. The means by which and the extent to which the Respondents sought to gain a position of financial superiority to the detriment of Petitioners is the focus of this report. The passivity of Petitioners, the minority shareholders, and the lifetime devotion of the Respondents, the majority shareholders, is not a legal justification for a breach or abandonment of the fiduciary obligations of the Respondents to the minority in their capacity as Officers and Directors of Twin Bay Village. The disparity in the investment of personal time is likewise not a justification for failing to meet the obligations of disclosure and fair dealing that is imposed upon the Respondents as officers of the Corporation. The record in this matter is devoid of any showing whatsoever as to why the Respondents failed to pursue their objectives financial compensation through the lawful corporate procedures of proper meeting notices, full and fair disclosure and fair dealings. As Justice O'Connor said, "the rule of law is fundamental to the existence of a free society. To maintain the value of law, accountability for transgressions against the law is essential". Here, the record is clear that the Respondents did what was right in their own eyes without regard to their lawful obligations to the Petitioners.

Petitioners brought this proceeding pursuant to N.Y. Business Corporation Law Section 1104-a seeking, among other items of relief, the involuntary dissolution of Twin Bay Village, Inc. (The Corporation).

N.Y. Business Corporation Law §1104-a permits the involuntary dissolution of a corporation under two circumstances: when those in control have (1) engaged in illegal, fraudulent, or oppressive actions towards the petitioning shareholders, or (2) looted, wasted, or diverted corporate assets for non-corporate purposes. To bring an action for corporate dissolution under this provision, the Petitioners must represent at least 20% of the votes of all outstanding shares of the corporation. N.Y. B.C.L. § 1104-a(a). Judge Muller, presiding over this action in the Supreme Court of Warren County, determined that Petitioners in this action have such standing, but reserved judgment as to the existing number and specific apportionment of corporate shares among the parties. See Decision and Order, Vladimir Chomiak et al. v. Tamara Chomiak Kasian, et al., Index No. 59703, RJI No. 56-1-2014-0019 (Jul. 16, 2014).

OPPRESSIVE CONDUCT

Majority shareholders engage in oppressive conduct when their actions substantially defeat the "'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." Kemp v. Beatley, 64 N.Y.2d 63, 72

(N.Y. 1984) (citations omitted). These expectations, when viewed objectively, must be both "reasonable under the circumstances" and "central to the petitioner's decision to join the venture." Id. at 73. Vital to this inquiry is "what the majority shareholders knew, or should have known, to be the petitioner[s'] expectations." Id. Mere disappointment based upon unfulfilled "subjective hopes and desires" does not rise to the level necessary level to deem the majority's conduct oppressive. Id. While oppression is often found in situations where a minority shareholder has been excluded from participating in corporate affairs or management, or where an employee-shareholder is discharged without cause, it is also found in cases where the majority has changed corporate policies "to prevent the minority [ ] from receiving a reasonable return on their investment." Pappas v. Fotinos, 28 Misc. 3d 1212(A), (Sup. Ct., Kings County, July 23, 2010) (citations omitted). This standard applies equally to situations like this case where a shareholder's stock interest was a gift, and/or where the shareholder is merely a passive investor. See In re Schlachter, 546 N.Y.S.2d 891, 892 (2d Dep't 1989); see also Gunzberg v. Art-Lloyd Metal Products Corp., 112 A.D.2d 423, 426 (2d Dep't 1985) (shareholders "are entitled to have their interests protected, regardless of whether or not th[eir] shares were received as gifts"); Quazzo v. 9 Charlton St. Corp., 2014 N.Y. Misc. LEXIS 1093, 2014 NY Slip Op 30625(U), at *11 (Sup. Ct., New York County, Mar. 11, 2014) ("the fact that [petitioner] did not invest capital, but rather allegedly was gifted the shares, and was not involved in management do not preclude her claim that she had reasonable expectations of economic benefit as a result of ownership of shares in the corporation[]"); but cf. Brickman v. Brickman Estate at the Point, Inc., 253 A.D.2d 812 (2d Dep't 1998).

Petitioners have freely admitted that after they stopped working summers at the resort, they became passive shareholders and had no active involvement in the running or management of the Corporation. Each of them stopped attending annual shareholders meetings in the 1980s when they were no longer employed by the Corporation, and whether their non-attendance was due to work conflicts, lack of notification, lack of interest, or the inconvenience of residing in Florida when the meetings occurred in New York, they did not request that Respondents provide them with updates on the business or copies of the minutes of the annual shareholders meetings. Respondents should not have treated this lack of involvement, however, as an indication that Petitioners had no expectations whatsoever regarding the making of major corporate decisions, particularly those that would have a material effect on Petitioners' ownership interests in the company. Petitioners trusted Respondents to manage the Corporation honestly and act in good faith. In fact, Vladimir essentially handed his brother Leo control over the Corporation in 1981 when, in disposing of his 30 shares, he transferred two to Leo, making him and his daughters majority owners of 52% of the Corporation. Leo also served as trustee over the 14 shares that Vladimir transferred to each of his own children. Leon and Leonora, despite their status as passive shareholders, reasonably expected that Respondents would run the Corporation in accordance with its bylaws, fulfill their fiduciary duties to the minority shareholders, and protect the interests of all shareholders of the Corporation equally. Petitioners further expected that, if and when the Corporation was sold, they would receive proceeds from that sale proportionate to their ownership interests, which they understood to be 48% of the company. These expectations were objectively reasonable, and Respondents, as majority shareholders, should have kept them in mind when making the major corporate decisions which lie at the center of this action.

Respondents thwarted Petitioners' reasonable expectations by making numerous major corporate decisions outside Petitioners' knowledge, and by intentionally cloaking the actions they took pursuant to these decisions. It was reasonable for Petitioners to expect that:

- They would be given notice of an annual shareholders meeting at which 100 new shares of corporate stock were issued and apportioned amongst the majority shareholders.
- They would be given an opportunity to purchase any additional shares that the Corporation issued.
- They would be informed if additional shares were issued and purchased by the majority shareholders at a price unrelated to the business's fair market value, thereby diluting their ownership interest in the Corporation by 50%.
- They would be advised by Respondents of their decision to award themselves $80,000 in annual bonuses for the foreseeable future, given that the Corporation had not paid out any dividends since 1996.
- They would be told if the Corporation was being burdened with significant debt, and if Respondents themselves were loaning the Corporation large amounts of money, they would be asked if they themselves wanted to loan money to the Corporation.
- They would be informed that the resort property had been subdivided, and if so, for what purpose.

- They would told if a portion of the property was serving as collateral for loans Respondents had made to the Corporation, or if it was Respondent's long-term plan to sell most of the property, but retain the villa parcel for their personal retirement.
- They would be notified if Respondents were making plans (and spending large amounts of money in the process) to make significant developments to the resort property that would potentially have a major impact on the value of the business.
- They would not be forced to sell their shares to the majority shareholders at a price unrelated to, and likely much lower than, the fair market value of the business.
- That upon sale of the Corporation, they would receive the proceeds of their proportionate ownership interests without such proceeds being drastically diminished or eliminated by the prioritization of corporate debts owed to Respondents for unpaid loans, unpaid salaries, and unpaid bonuses.

These expectations were substantially defeated by Respondents' actions, which constitute oppressive conduct within the meaning of N.Y. B.C.L. § 1104-a(1).

The grant of standing to minority shareholders to seek judicial dissolution of a corporation is "[p]redicated on the majority shareholders fiduciary obligation to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with scrupulous good faith." Kemp, 64 N.Y.2d at 70 (citations omitted). Respondents assert that these obligations were met because Vladimir was made aware of "everything going on with the business," and that he, not Leon and Leonora, is the owner of 48 of the Corporation's shares. Firstly, despite his twice-monthly phone conversations with Leo between 2000 and 2008, in which the two discussed the business climate for the resort in general terms, Respondents did not provide any proof that Vladimir was apprised of significant business decisions or how the Corporation was actually being run. Secondly, according to the stock certificates and ledger, until Leo's death on September 3, 2011, Leo held 28 shares in trust for Leon and Leonora. As their trustee, Leo had an independent fiduciary duty to Leon and Leonora, one that would not be fulfilled by his speaking only to Vladimir about major corporate decisions when Leon and Leonora were legal adults. Moreover, Respondents over the last 40 years have in various ways treated Leon and Leonora as shareholders in their own right:

- From 1981 to 1986, and again in 1997, the shareholder meeting minutes state that Leon and Leonora each own 24 shares, without denoting that those shares were held in trust or custody for them.
- From 1987 to 1995, the shareholder meeting minutes indicate that dividend checks were sent directly to Leon and Leonora.
- Notice of the 1997 special meeting of the shareholders was sent directly to Leon and Leonora.
- The minutes of the 2004 meeting reflect that Leon and Leonora each own 24 shares without specifying that those shares were held in trust or custody for them.
- Notice of the 2009 annual meeting, June 30, 2009 buy-out letter, notice of the 2010 special meeting, and notice of the 2014 special meeting were all sent directly to Leon and Leonora.

Respondents behaved, at least in some respects, as if they did in fact owe a fiduciary obligation to Leon and Leonora, whether or not they were shareholders of record or the beneficial owners of corporate shares. In both scenarios, whether by Leo as trustee or by Respondents as majority shareholders, a fiduciary duty was owed to Leon and Leonora, and that duty was ignored.

Respondents' attempt in 2009 to force Petitioners to sell all of their shares to the majority was a flagrant breach of the standard of fair dealing to which a fiduciary is held. For this particular annual shareholders meeting Petitioners were actually given written notice, which was out of the ordinary for Respondents. The notice letter was dated June 5, but was likely received by Petitioners some days later in the mail, and the meeting was to be held on June 16. Petitioners, residing in Florida, were thus given a little over one week notice to attend the meeting in New York. Not surprisingly, Petitioners did not attend the meeting – it was too short notice for Leon and Leonora, Leon had work conflicts, and Vladimir's position was that he was no longer a shareholder, so there was no reason for him to attend. To Respondents' credit, the letter clearly stated that the Corporation's bylaws were going to be amended at the meeting to adopt provisions "for the sale and purchase of shares of stock in the event of a shareholder's death, retirement or cessation of involvement in the business affairs of the Corporation, in which event such shareholder be [sic] entitled to payment for his shares." While Leon and Leonora believed that the purpose behind this amendment was to facilitate estate planning for Leo, who was apparently ill at the time, this is no excuse as to why they completely ignored the letter, given its reference to shareholders who have ceased to be involved in the business.

As the notice letter indicated, the Corporation's bylaws were amended at the June 16 meeting, adding provisions concerning the "death of shareholder" and "termination of shareholder." The termination provision provided that in the event a shareholder "ceases for any reason to be actively involved in the business operation and affairs of the Corporation . . . such retired or withdrawing Shareholder shall be obligated to sell[] all of his or her stock then owned in the Corporation." The purchase price of the shares was set to be their book value. Not surprisingly, Tatiana, Tamara and Leo, those present at the meeting, unanimously voted that because Vladimir, Leon and Leonora had not been involved with the business for many years, the Corporation was "authorized and directed to purchase . . . all shares of stock owned by" Petitioners. The Corporation's accountant determined that book value as of October 31, 2008 was $1,139.89 per share, which was based on the business's tax information as provided to the accountant by Tamara. No explanation was provided in the meeting minutes as to why book value was chosen. The evidence proffered by Petitioners with regard to valuation of the Corporation is as follows:

- At a special meeting of the shareholders held in 1997, both Petitioners and Respondents decided to place the Corporation's real estate on the market at a purchase price of $4,750,000
- In 1999 the property was appraised as an ongoing basis at $1,200,000
- In 2003 the property was listed for sale for $4,600,000
- The Corporation's 2004 and 2006 income tax returns report that the Corporation's real property and marketable securities had a year-end fair market value of $1,500,000 and $1,800,000 respectively

- In 2006 the property was listed for sale at an asking price of $5,500,000
- In June 2012 the property was listed for sale at an asking price of $3,890,000, and was still on the market for this price in June 2013
- As of November 2013 Petitioner's expert appraised the property at $3,230,000

There is much disparity in these numbers, and it is clear that the value reflected on the two tax returns, as well as the 1999 appraisal, is much lower than the other valuations. As discussed more fully below, there is reason to believe that the numbers reported on the corporate tax returns likely do not reflect the actual yearly earnings of the Corporation, and are artificially low. Based on these numbers, as well as the fact that Respondents set the purchase price of the 2004 newly issued shares at $3,000 per share, the book value presented to Petitioners in 2009 as the price they were required to sell their shares at appears to be considerably less than their fair market value. It is clear that the purpose behind the amendment of the bylaws was for Respondents to forcibly appropriate Petitioners' ownership rights in the Corporation at a patently unfair price, which constitutes blatantly oppressive conduct. Petitioners had a reasonable expectation that Respondent officers and majority shareholders, who owed a fiduciary duty to Petitioners as minority shareholders, would not attempt to force them to relinquish their shares in the Corporation at a manufactured low price. It would have been reasonable for Petitioners to expect that if Respondents wanted them out of the company, they would have offered to buy Petitioners shares at a fair price, not forced them to sell at an unfair price. See Blank v. Blank, 256 A.D.2d 688, 694-95 (3d Dep't 1998) (finding defendant-officer of corporation breached fiduciary duty to plaintiffshareholder where defendant acted in self-interest by modifying corporate purchase agreement to allow defendant to purchase another shareholder's shares in order to gain controlling interest).

Respondents selectively chose not to follow these same bylaw amendments made in 2009 upon the death of Leo in 2011. Under the Corporation's Pre-incorporation Agreement, upon the death of any of the stockholders named in the agreement (Stephan, Eleonora, Leo, and Vladimir) the survivors shall have the option to purchase all of the decedent's shares. Further, under the 2009 amendments to the bylaws, upon a shareholder's death first the Corporation, and then the remaining shareholders, shall have the option to purchase the decedent's shares. Neither Vladimir, Leon, nor Leonora were given the opportunity to purchase Leo's shares upon his death; they were not even informed he had died until almost 6 months after the fact. Tamara and Tatiana claim that Leo's shares were not offered for purchase because the shares were placed into a trust in 2001. This is simply not true. At the time it was created in 2001, Leo's trust was funded with the sum of $1.00. In January 2012 an Assignment Separate from Certificate transferred Leo's shares into the trust, after he had died. The stock certificates, however, remain in Leo's name, and the stock ledger does not reflect this share transfer. Neither the Pre-incorporation Agreement nor the newly amended bylaws were followed in disposing of Leo's shares, evidencing that Tamara and Tatiana chose to follow the bylaws they themselves crafted only when it suited their self-interested purposes.

Where a petitioner has "set forth a prima facie case of oppressive conduct, it should be incumbent upon the parties seeking to forestall dissolution to demonstrate to the court the existence of an adequate, alternative remedy." Kemp, 64 NY2d at 73-74. Unfortunately, Respondents here have offered no alternative solution that would serve to protect Petitioners' original ownership interests in the family business, interests that have long since been distorted and diluted by Respondents' actions. While "[a] court has broad latitude in fashioning alternative relief, when fulfillment of the oppressed petitioner's expectations by these means is doubtful, such as when there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution." Id. at 74. A more accurate description of the instant situation could scarcely be formulated. However, as is every order of dissolution, this one should be subject to the option of any corporate shareholder to elect to purchase the petitioning shareholders' stock at fair value, which, if cannot be agreed upon by the petitioners and the purchasing party, shall be determined by the Court. N.Y. B.C.L. § 1118.

LOOTING OF CORPORATE ASSETS

Petitioners offered substantial documentary evidence, largely unrefuted, that at minimum raises serious questions regarding Respondents handling of corporate assets. Respondents claim they have loaned the Corporation upwards of $800,000 from their personal savings and accounts – coupled with the $300,000 they claim to have paid the Corporation for the 100 shares that were issued in 2004, this totals $1,100,000 in funds Respondents have put into the business in the last 11 years. It is impossible not to question where such a large sum came from.

Respondents' main (and in most cases only) source of income was their salaries from working at the resort. Based upon their federal income tax returns: (1) from 1992 to 2010 Tatiana's approximate average annual total income was $24,557; (2) from 1986 to 2010 Tamara's approximate average annual total income was $17,330; and (3) from 1985 to 2010 Leo and Larissa's approximate average annual combined total income was $53,042. Tamara, who reportedly loaned the Corporation between $400,000 and $500,000 of her own money, does not own a home, real estate, or a car in her name, and yet, a sampling of spending activity on her personal credit card between 2006 and 2011 shows over $20,000 spent on cruises, vacations and luxury items. From 2006 to at least 2010, none of the Respondents has cashed a paycheck from working at the resort – during these years, Respondents had no earned income whatsoever coming into their personal accounts, and yet, Tatiana and Tamara reported and paid taxes on said income that they were not actually receiving. Tamara and Tatiana also reported and paid taxes on interest income from loans they made to the Corporation, which they were not, in fact, actually receiving. Apparently, the purpose of this practice was to decrease the likelihood of government suspicion. While the four Respondents awarded themselves a total of $80,000 in perpetual yearly bonuses in 2001 – though the Corporation had not paid out any dividends since 1996 – none of them have ever actually received that bonus money.

Tatiana and Tamara formed a company together, HRH Staging, in 2009, which reportedly earned a total of $1,200 since its inception. However, the account held in the company's name received a total of approximately $9,000 in cash deposits between 2009 and 2012. Tatiana's husband Myron was paid in checks, not cash, by his employer from the late 1990s until 2014 (when he ceased working there), and yet between 2003 and 2009 he deposited approximately $23,500 in cash into joint accounts he maintained with Tatiana. Tamara maintains joint accounts with Tatiana, Larissa, her

Aunt Hanna, and Leo's estate. Tatiana has maintained checking, savings, money market, and high yield checking accounts, as well as certificates of deposit at four different banks since 2000, with various co-signors, and does not even know how many she currently has open. One account held jointly by Tamara and Tatiana at Beneficial Savings Bank showed approximately $17,500 of deposits in cash made between 2005, when it was opened, and 2008. Tatiana and Tamara also opened two certificates of deposits in 2005, one for $25,000 and one for $5,000. A savings account held by Tatiana at Beneficial showed $14,800 in cash deposits made between 2005 and 2007. In 2005, Tatiana had approximately $100,000 in personal savings, the source of which we are to believe is her earnings from working at the resort, and she reportedly maintained a Treasury Direct investment account containing over $100,000 as well. Yet, Tatiana testified that the highest weekly salary she ever made while working at the resort for the summer season was $1,200. Notably, much of this suspect banking activity involving large amounts of cash began in 2005, around the same time Respondents began loaning the Corporation hundreds of thousands of dollars from their personal savings accounts.

In response to the documentary evidence Petitioners provided, Respondents explained that in addition to the salaries they earned from the resort, they had generous family members who gifted them with money from time to time, and who at times made deposits directly into their various bank accounts (which may or may not explain why many of the bank deposit slips examined at the hearing were, according to Tamara and Tatiana, not made out in handwriting that they recognized). Tamara explained that her Aunt, Hanna Kricka, made charges on her credit card, and also paid for some of

Tamara's charges as gifts. Tamara also testified that Hanna gave her a $77,000 interest-free personal loan. The loan was undocumented and constituted simply a verbal exchange, and the money for the loan came out of a bank account held jointly by Tamara and Hanna – apparently one of several. Tatiana explained that in 2009 she took out an $80,000 mortgage on her home, that the money was loaned to the Corporation, and that the mortgage was then repaid in full from Tatiana and Myron's savings. These explanations are thin and vague at best, and fail to account, for example, for the frequency and regularity with which cash deposits were made into the sisters various bank accounts over the years. Respondents provided no concrete evidence explaining how they came up with $1,100,000 to put into the Corporation, considering their reported income (or for years, lack thereof).

The only documentation memorializing the $800,000 in loans is a spreadsheet and a remarkably bare promissory note. The spreadsheet was prepared by the Corporation's accountant based solely on information provided to him by Tamara, and only accounts for loans made through October 2012. The promissory note does not specify the amount of any loan made, the date on which any loan was made, interest rates to be paid on the loans, the source of funds for the loans, the loans' maturity dates, or consideration given for, or collateral securing, any of the loans.

According to its reported annual taxable income, the Corporation has lost an average of approximately $34,366 a year from 1986 to 2011. Its last reported profit was in 1999 – $13,643, and from 2008 to 2011 the business reported losses of over $100,000 a year. These corporate tax returns were made based upon information and documents provided to the accountant solely by Tamara, without independent verification or audit of any kind. The Corporation was appraised in 1999 in conjunction with efforts to sell the property, and was valued as an ongoing basis at $1,200,000. The appraisal report noted that the current income reported on the company's financials was well below the standard of most comparable properties at that time, and therefore projected an increase in gross income of approximately 50%, in line with comparable properties in the area. The Corporation's real estate was also appraised by Petitioners' expert in 2013, at a minimum value of $3,230,000. This appraiser also noted that the Corporation's reported income on its tax returns "made no sense" and were wholly inconsistent with what competing properties in the market were making. Given that at the hearing Tamara and Tatiana were shown to have been entirely dishonest about a number of things during the hearings, it is not at all outside the realm of possibility that they were dishonest in reporting the Corporation's income on its tax returns as well.

The most logical conclusion here is that the Corporation's tax returns and financial statements do not reflect its actual earnings, and that Respondents were looting those unreported corporate revenues, diverting those funds into Respondents' personal bank accounts, then cycling the money out by loaning that money back to the Corporation, with the intent of burdening the Corporation with fake debt. The result of such debt, coupled with the money owed to Respondents' in unpaid salaries and bonuses, would be that upon sale of the Corporation's assets Respondents would receive virtually all of the proceeds, and/or that the value of Petitioners' stock would be lowered in the event Respondents could force its sale. Respondents failed to produce credible evidence that this was not the case.

THE 2004 ISSUANCE OF 100 CORPORATE SHARES, THE $800,000 PLUS IN PURPORTED LOANS, BONUSES AND SALARIES MUST BE SET ASIDE

A corporation's board of directors "owe[s] a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly." Armentano v. Paraco Gas Corp., 90 A.D.3d 683, 685 (2d Dep't 2011) (citations omitted). "Directors, being fiduciaries of the corporation, must, in issuing new stock, treat existing shareholders fairly." Katzowitz v. Sidler, 24 N.Y.2d 512, 518 (N.Y. 1969). Directors may not breach their fiduciary obligations by "(a) increasing their voice in the control of the corporation through the secret purchase of such stock, or (b) increasing their proportionate share in the surplus in that manner, or (c) obtaining the stock at an inadequate price." Armentano, 90 A.D.3d at 685. However, a "[d]eparture from precisely uniform treatment of stockholders may be justified . . . where a bona fide business purpose indicates that the best interests of the corporation would be served by such departure." Schwartz v. Marien, 37 N.Y.2d 487, 492 (N.Y. 1975). "Through there is very little statutory control over the price which a corporation must receive for new shares[,] the power to determine price much [sic] be exercised for the benefit of the corporation and in the interest of all the stockholders." Katzowitz, 24 N.Y.2d at 518 (citations omitted). "[W]hen it appears that members of the board of directors favored themselves individually over the complaining shareholder," particularly in the case of a family-owned closely held corporation, the board must demonstrate that their actions were justified, by showing "that such objective could not have been accomplished substantially as effectively by other means which would not have disturbed proportionate stock ownership." Id.

The 2004 stock issuance constituted a secret issuance of underpriced stock that diluted Petitioners' ownership interests by half, and as such was a clear breach of Respondents' fiduciary duties to Petitioners as minority shareholders. The issuance was improper and inequitable for the following reasons:

- Notice of the 2004 annual shareholders meeting, at which the 100 new shares were issued, was not given to any of the Petitioners, as required by the Corporation's by laws.
- Because it was held on August 18, 2004, the meeting did not comport with the bylaws.
- Petitioners were not informed of the issuance before or after its occurrence, nor were they offered the opportunity to purchase any of the additional shares.
- While the bona fide business objective as put forth by Respondents may have been to renovate motel rooms on the resort property, they did not justify their inequitable actions by showing that this objective could not be reached by any other means that would not have disturbed proportionate stock ownership in such a drastic manner.
- The shares were vastly underpriced at $3,000 per share, a price apparently not tied to the fair market value of the business in any way but based solely on the cost of the renovations Respondents wanted to make, and/or upon the value of the Corporation's shares in the 1970s and 1980s.
- Respondents did not pay the $300,000 purchase price to the Corporation in consideration for the 100 newly-issued shares.

Petitioners collectively own 48 shares of the corporation, with Vladimir serving as both custodian and trustee for the 24 shares each beneficially owned by Leon and Leonora.

The proportionate ownership of 48 shares for Petitioners and 52 shares for Respondents should be maintained buy this court. Likewise Petitioners should receive 48% of the net proceeds of a sale of the Corporation and its assets. Net proceeds to be defined as the proceeds after adjustments for property taxes, transfer tax, fuel, title and tax searches, attorneys fees, brokers commissions and expenses normally associated with the sale of commercial business and property. Net proceed does not include repayment of the over $800,00.00 in outstanding loans, unpaid bonuses and unpaid salaries. I.e Petitioners 48% of the net proceeds should not be reduced by repayment of over $800,000.00 in outstanding loans, unpaid bonuses and unpaid salaries.

THE 2014 MORTGAGE

Under N.Y. B.C.L. § 1114, "[a] sale, mortgage, conveyance or other transfer of, or the creation of a security interest in, any property of a corporation made, without prior approval of the court, after service upon the corporation of a summons in an action, or of an order to show cause in a special proceeding, under this article in payment of or as security for an existing or prior debt or for any other or for no consideration . . . shall be void as against such persons and to such extent, if any, as the court shall determine." <u>See</u>, <u>e.g.</u> <u>Matter of Musano (Sisto Funeral Home, Inc.)</u>, 28 A.D.3d 349 (1st Dep't 2006) (issuance of stock during pendency of dissolution proceeding constituted impermissible transfer of property); <u>In re Rappaport</u>, 110 A.D.2d 639 (2d Dep't 1985) (issuance of one share of stock in obvious attempt to deprive petitioner of one-half ownership, subsequent to filing of dissolution petition, was null and void as violation of § 1114). Despite the provision's inclusion of mandatory language ("shall be void"), the use of the further clause "as against such persons and to such an extent, if any, as the court shall determine" empowers the court to determine the issue according to its discretion. In re Schramm, 107 Misc. 2d 393 (Sup. Ct., New York County, Dec. 15, 1980). See also Matter of Shau Chung Hu v. Lowbet Realty Corp., 38 Misc. 3d 589, 2012 N.Y. Misc. LEXIS 5129, 2012 NY Slip Op 22314 (Sup. Ct., Kings County, Nov. 2, 2012) (section 1114 does not render sale of property void *ab initio*, but makes it voidable at court's discretion).

Under the circumstances of this case it would be a proper exercise of this court's discretion to void the 2014 mortgage between Tamara L. Chomiak and he Corporation dated March 31, 2014 and filed in the Warren County Clerk's Office on April 22, 2014, well after the Petition in this matter was filed on January 13, 2014.

LIQUIDATION

Under BCL § 1104-a(b), a court, in determining whether to proceed with involuntary dissolution, shall take into account (i) whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment, and (ii) whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners. BCL § 1104-a(b).

The hearing testimony and evidence has shown that, if the Court does not grant the requested relief, the remaining members of the Control Group will most likely (i) continue to loot, waste and divert the property and assets of the Corporation for their own benefit, to the point where the value of Petitioners' interest in the Corporation will be non-existent, and (ii) continue their illegal, fraudulent and oppressive actions, to the point where Petitioners will have no interest whatsoever in the Corporation.

At the hearing, Tatiana made it quite clear that she believes that she and Tamara (i) *deserve* the Mountainside Parcel, and have a *greater right* to the Mountainside Parcel than Petitioners, and (ii) *deserve* the Property, and have a *greater right* to the Property than Petitioners, because she and Tamara have been working at the Resort, whereas Petitioners have not worked at the Resort since the 1980s. Clearly, Tamara and Tatiana will continue to do whatever it takes to gain control over what they believe is rightfully theirs. By way of examples and not as exhaustive list:

- Example 1: the Respondents and their counsel did not inform Petitioners' counsel that Leo had died until six months after his death in order to thwart Vladimir's right, under the pre-incorporation agreement, to purchase all of Leo's stock by serving written notice on the executor or administrator within 90 days after such executor or administrator was appointed. The Control Group then did not enforce the improperly amended by-laws upon Leo's death because doing so would have reduced their interests in the Corporation (FoF at ¶¶ 639-662).
- Example 2: in 2010, the Respondents attempted to defraud a federally insured bank by misrepresenting the amount of their assets. The Respondents goal was to improve their chances of obtaining a mortgage, the proceeds of which would go directly to the Management Group as repayment for the purported loans, unpaid bonuses and back payroll, while saddling the Corporation with additional debt (FoF at ¶¶ 594-629).

- Example 3: in 2014, Tatiana called a special meeting of the shareholders, indicating that the purpose of the meeting was to discuss taxes, outstanding debt, sale of the property and other business matters. Petitioners' counsel responded to the notice by asking Tatiana to confirm that specified business matters would only be "discussed" and that no action or vote to take any action would take place. Petitioners' counsel also asked Tatiana whether there were any specific items or issues that might be put to a vote, or whether the Corporation might be authorized to take any action at the meeting. In response, Tatiana refused to provide any further detail regarding her and Tamara's true intentions for the 2014 special meeting of the shareholders (FoF at ¶¶ 667-671).

There has been a complete breakdown in the legal and family relations between Petitioners and Respondents. Tatiana and Tamara did not even tell Petitioners that Leo had died and, during the 2009 Visit, the Respondents did not tell Vladimir or Leonora that (i) the Corporation no longer owned a particular boat, despite the fact that Vladimir and Leonora had asked Tamara why that boat was not at the Resort, and (ii) the Corporation had been making efforts to develop the Property, despite the fact that Vladimir and Leonora had asked why there were survey points and flags in the ground. Nor did Tatiana and Tamara Control Group tell Vladimir or Leonora during the 2009 Visit what had happened at the 2009 Meeting, even though the 2009 Visit took place *four days* after the 2009 Meeting.

There can be no doubt that liquidation of the Corporation is the only feasible means whereby Petitioners may reasonably expect to obtain their interest in the

Corporation, and that liquidation of the Corporation is reasonably necessary for the protection of the rights and interests of Petitioners. "[W]hen there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution." *Kemp*, 64 N.Y.2d at 74.

The Order of Dissolution should be conditioned upon affording any shareholder of the Corporation an opportunity to purchase the complaining shareholders' stock at fair value. Kemp, id. At 74.

SURCHARGE

New York Business Corporation Law § 1104-a(d) provides that "[t]he court may order stock valuations be adjusted and may provide for a surcharge upon the directors or those in control of the corporation upon a finding of willful or reckless dissipation or transfer of assets or corporate property without just or adequate compensation therefor." Petitioners rightfully request that the court place the parties in the positions they would have been in had Respondents never engaged in any wrongful conduct, i.e., Petitioners should receive 48% of the proceeds upon sale of the Corporation, and said proceeds not be reduced by prioritizing the repayment of over $800,000 in outstanding loans, unpaid bonuses, and unpaid salaries. In addition, Petitioners have requested $796, 914.27 in attorney's fees, or the amount that it cost them to "investigate, uncover and prosecute Respondent's wrongful conduct." Petitioners offer no case law to support their position that it is appropriate to include the payment of attorney's fees, particularly on such a grand level, as a surcharge under this provision of the B.C.L. "Even if the possibility of adjustment or surcharge is deemed a necessary incident of a dissolution proceeding pursuant to § 1104-a(d), the provision by its express terms is limited to 'stock valuations." Pappas v. Fotinos, 28 Misc. 3d 1212(a) (N.Y. Sup. Ct., Kings County, 2010). Share valuation is not currently before the Court, e.g., under B.C.L. § 1118, as Respondents have not expressed a willingness to purchase Petitioners shares at their fair value. If Respondents were willing to purchase Petitioners' shares, and a fair value could not be decided upon amongst the parties, the Court, upon application of Respondents or Petitioners, may stay the proceedings brought pursuant to § 1104-a and "determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed." N.Y. B.C.L. § 1118. This determination of value would "giv[e] effect to any adjustment or surcharge found to be appropriate in the proceeding under § 1104-a[(d)]." B.C.L. § 1118[1]. If the Court were to address such fair valuation in the future, it would be appropriate at that time to determine whether a surcharge is warranted, and whether attorney's fees are a suitable measure or consideration in determining the cost of the surcharge.

Dated:July 31, 2015

STANCLIFT, LUDEMANN, SILVESTRI
& McMORRIS, P.C.

JOHN M. SILVESTRI, ESQ.

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[1] Business Corporation Law 1118 is a corollary to 1104-a. It grants non-petitioning shareholders, as well as the corporation itself, the right to avoid dissolution by timely electing to purchase the petitioning shareholder's shares at their fair value. Section 1118©(1) provides that "if such election is made beyond ninety days after the filing of the petition, and the court allows such petition, the court, in its discretion, may award the petitioner his reasonable expenses incurred in the proceeding prior to such election, **including reasonable attorney's fees.**