SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In the Matter of the Application of
PATRICK K. YU,

Petitioner,

For the Judicial Dissolution of

MOKLAM ENTERPRISES, INC.,

Pursuant to Section 1104-a of the Business Corporation Law

- against -

BONG YU, MAY YU, RAYMOND YU, and CATHERINE YU,

Respondents.

Index No. 656611/2016
IAS Part 39
Hon. Saliann Scarpulla
Motion Seq. No. 001

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' CROSS-MOTION TO DISMISS THE PETITION

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Petitioner Patrick K. Yu ("Patrick" or "Petitioner"), by and through his attorneys, Kobre & Kim LLP, respectfully submits this memorandum of law in opposition to Respondents Bong Yu, May Yu, Raymond Yu, and Catherine Yu's Cross-Motion to Dismiss the Verified Petition for Dissolution of Moklam Enterprises, Inc. ("Moklam") (Dkt. No. 41) ("Motion to Dismiss" or "Mot.").[1]

INTRODUCTION

The petition filed in this case set forth in detail a coordinated campaign of oppression directed at Patrick Yu by the other members of his family for the purpose of coercing him into selling his interest in family-owned business entities at a price far below its fair value and to punish him as part of a personal vendetta against him. (*See, e.g.*, Verified Petition for Dissolution of Moklam Enterprises, Inc. ("Petition") (Dkt. No. 1), ¶¶ 4-5.) In brief, this scheme included:

- Cutting Patrick off from any income from family businesses;
- Seeking to impose millions of dollars of liability on Patrick through lawsuits and capital calls; and
- Refusing to provide Patrick with any meaningful information regarding the apparent diversion of assets from businesses in which he is a minority shareholder to both businesses in which he has no interest and other members of his family.

Instead of meaningfully engaging with the facts set forth in the Petition, Respondents press a series of arguments that: (1) ignore the bulk of the actions described in the Petition; (2) mischaracterize the actions that they do address and urge the Court to view each of these actions separately and in a vacuum; and (3) present a competing factual narrative that is not only dubious on its face, but, at best, merely demonstrates why additional factual development is warranted in this case. But the law is not so myopic as Respondents would wish. Because the Petition describes

[1] Capitalized terms not defined herein have the meaning ascribed to them in the Petition or the Motion to Dismiss.

a series of actions which warrants dissolution under any applicable legal standard, Respondents' motion should be denied.

Respondents' Motion to Dismiss presents two broad arguments: (1) that Patrick lacks standing to bring the Petition; and (2) that, even if he has standing, Patrick has failed to identify grounds for dissolution under either the statutory or common law standards. For the reasons explained below, both arguments are meritless.

Standing

Respondents assert that, because Patrick temporarily pledged his shares—worth tens of millions of dollars—to Moklam as security on a $150,000 loan, he no longer has standing to seek statutory dissolution of the corporation of which he is a 26% owner. Respondents are wrong for three independent reasons.

First, they misread the dissolution statute's threshold requirement that a minority shareholder must have 20% of the *shares* entitled to vote to instead imply that the share*holder* must presently be entitled to vote those shares. This is incorrect. The relevant distinction is between voting and non-voting shares; the standing inquiry does not turn on whether the voting rights concomitant with the shares have temporarily been pledged as security.

Second, with respect to the pledge itself, the documentation that Respondents have proffered establishes that Patrick's voting rights were not validly pledged with respect to the one outstanding loan for which the pledge is still relevant. Consequently, Patrick maintains his voting rights with respect to his shares in Moklam.

Third, Respondents' interpretation of the legal effect of the Stock Pledge Agreement is contrary to public policy. For that reason, courts in New York have consistently found that agreements to abrogate a minority shareholder's right to seek judicial dissolution are void.

Finally, and in any event, even if Respondents are correct that Patrick lacks standing to bring a dissolution petition under the BCL (which they are not), ***they do not challenge his standing to do so under the common law***.

Statutory and Common Law Dissolution

Respondents' argument that the Petition has failed to establish a claim for statutory dissolution proceeds in three stages: first, they grant themselves license to ignore much of the oppressive conduct described in the Petition simply because those actions were nominally taken by persons and entities that are related to Moklam rather than formally by Moklam itself. Second, they mischaracterize the Petition as asserting only four distinct and individual oppressive acts, rather than presenting a comprehensive and coordinated scheme designed to pressure and punish Patrick. Third, they attempt to explain why these four acts do not constitute oppression, primarily by using a combination of cherry-picked case law and self-serving (and disputed) evidence. But nowhere do they address the actual substance of the oppressive scheme outlined in the Petition.

The same is true of Respondents' arguments regarding common-law dissolution. Beginning with an overly narrow definition of the applicable legal standard, Respondents ignore the actual substance of the Petition in favor of a narrative more suitable to their fancy. But they cannot simply wish away the well-pleaded facts, supported by ample evidence, found in the Petition.

Accordingly, and as explained in detail below, Respondents' motion to dismiss should be denied.

ARGUMENT

I. Patrick has Standing to Bring the Petition

A. Petitioner Satisfies The Standing Requirement Of BCL § 1104-a Because He Is Holder Of At Least 20% Of Voting Shares

Respondents' contention that Patrick lacks standing to bring a petition for statutory dissolution is based upon a misreading of BCL § 1104-a. Pursuant to Section 1104-a, "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . entitled to vote in an election of directors may present a petition of dissolution." Conceding that "Petitioner holds more than 20% of the outstanding shares," Moklam argues that because "Petitioner pledged his shares to Moklam . . . [and] agreed that he shall not be entitled to exercise any voting and/or consensual rights and powers . . . Petitioner does not have standing under BCL § 1104-a." (*See* Mot. at 17-18 (citing Affirmation of Philip A. Geraci (Dkt. No. 43) ("Geraci Aff."), Ex. 7 at 9 (the "Stock Pledge Agreement").)

However, Section 1104-a does not require that the shareholder be entitled to vote, but rather only that the *shares* at issue be voting as opposed to non-voting shares. *See, e.g.*, *Ferolito v. Vultaggio*, 99 A.D.3d 19, 25 (1st Dep't 2012) ("[BCL] § 1104–a gives holders of 20% or more of the outstanding **voting shares** of a close corporation the right to petition for judicial dissolution as a remedy for illegal, fraudulent or oppressive conduct.") (emphasis added); *In re Parveen*, 259 A.D.2d 389, 391 (1st Dep't 1999) (BCL 1104-a allows "the holders of 20% of the **voting shares** of a non-public, non-investment company [to] petition for dissolution[.]") (emphasis added); *In re Solorin v. Santo Domingo Car Service Inc.*, No. 4592/2012, 2012 WL 6838118 (Sup. Ct. Oct. 3, 2012) (BCL 1104-a "authorizes a dissolution petition to be brought by the holders of 20% or more of the **voting shares** of stock of a corporation[.]") (emphasis added); *In re Maybaum*, 800 N.Y.S.2d 349, at *2 (Sup. Ct. 2005) ("Business Corporation Law §1104-a permits the court to dissolve a

corporation whose shares are not publicly traded upon the application of the holders of shares representing at least 20% of the **shares entitled to vote**.") (emphasis added). Thus, whether or not a shareholder may currently exercise the right to vote in an election of directors is irrelevant to a determination of standing under BCL § 1104-a.[2]

The cases to which Moklam cites to the contrary are inapposite. (*See* Mot. at 17 (citing *Fromcheck v. Brentwood Pain & Medical Services, P.C.*, 254 A.D.2d 485 (2d Dep't 1998); *Bernfield v. Kurilenko*, 2010 WL 11475537 (N.Y. Sup. Ct. Dec. 15, 2010). In both *Fromcheck* and *Bernfield*, petitioners were seeking the dissolution of a professional services corporation. The establishment and management of professional service corporations is governed by Article 15 of the BCL, including BCL § 1511, which governs the transfer of shares in such a company. That statute provides that shareholders in a professional services corporation may not transfer their shares "except to another individual who is eligible to have shares issued to him by such corporation"—i.e., a licensed member of that profession. The statute further provides that "[n]o transferee of shares by operation of law or court decree may vote the shares for any purpose whatsoever". *Id.* Thus, BCL § 1511 provides that shares in a professional services corporation become permanently non-voting shares when they are transferred by operation of law (such as through probate, as was the case in *Bernfield*), and in that context the cases cited by Respondents decided that the petitioners lacked standing under BCL 1104-a. But that is a far cry from the

[2] The legislative history of Section 1104-a further buttresses the conclusion that it is the shares, not the holder that matters. Prior to 1998, the preamble to Section 1104-a provided: "The holders of twenty percent or more of ***the votes of*** all outstanding shares of a corporation . . . ***who are*** entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds . . ." 1997 Sess. Law News of N.Y. Ch. 449 (S. 476–B). In 1998, the statute was amended to the current language: "The holders of ***shares representing*** twenty percent or more of the votes of all outstanding shares of a corporation . . . entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds . . ." 1998 Sess. Law News of N.Y. Ch. 17 (A. 8994, S. 6056). The imposition of "shares representing" between "holders" and "votes", as well as the removal of the personal pronoun "who", clearly indicates the legislature's intention that the necessary voting rights run to the shares, not the holders.

situation here, where Patrick's shares are subject only to a temporary encumbrance, nobody denies that they are voting shares, and none of the statutory proscriptions found in BCL Article 15 are implicated.

Similarly, Moklam erroneously relies upon *Matter of TDA Industries, Inc.* to argue that "shares pledged and unable to vote . . . cannot be used to satisfy the 20% standing requirement." (*See* Mot. at 16 (citing *Matter of TDA*, 240 A.D.2d 262 (1st Dep't 1997).) There, the share plan in question was specifically amended to eliminate its "pass through" voting rights. *Matter of TDA* 240 A.D.2d at 262. Here, while the Stock Pledge Agreement may have stated that Petitioner was not "entitled to exercise any voting and/or consensual rights and powers," it did not eliminate the voting rights of the shares themselves.

Because it is uncontested that Petitioner remains holder of at least 20% of the voting shares in Moklam, the standing requirements of BCL §1104-a are satisfied.

B. The Amendment To The Stock Pledge Agreement Was Not Validly Executed Pursuant To The Moklam Shareholder Agreement

Under the Moklam Shareholder Agreement,"[n]o Shareholder shall sell, assign, transfer, pledge, give, bequeath or otherwise in any manner encumber or dispose of, directly or indirectly, any Stock (or any interest therein) . . . except that Stock (or any interest therein) owned by Shareholder may be . . . transferred as may be specifically permitted by this Agreement or as may be consented to in writing by the holders of not less than sixty-six (66%) percent of the total number of outstanding shares." (Affirmation of Jonathan D. Cogan (Dkt. No. 3) ("Cogan Aff.), Exhibit A at § 3.1 ("Moklam Shareholder Agreement").)[3]

[3] As Respondents note, a subsequent amendment to the Moklam Shareholder Agreement in 2003 lowered this threshold to 51%. (Mot. at 9 fn. 3.)

There is no question that Section 3(a) of the Stock Pledge Agreement, which purportedly temporarily pledges Patrick's Moklam voting rights to the company, is one such "encumbrance" or "transfer" as contemplated by the Shareholder Agreement. And in compliance with the terms of the Shareholder Agreement, the Stock Pledge Agreement was signed as "hereby consented to" by Patrick Yu, Raymond Yu, Catherine Yu, Bong Yu, and May Yu, *i.e.*, holders of not less than 51% of the total number of outstanding shares, in their individual capacity as shareholders. (*See* Affirmation of Philip A. Geraci (Dkt. No. 43) ("Geraci Aff."), Ex. 7 at 9.) Notably, Raymond Yu signed the Stock Pledge Agreement twice—once in his capacity as President of Moklam, and separately as an individual shareholder consenting to the terms of the agreement. (*Id.*)

As Respondents acknowledge, the principal, interest, and collection charges for the loan that prompted the parties to enter into the Stock Pledge Agreement in 2005 (the "Original Loan") have now been paid back.[4] (Mot. at 18.) Thus, Respondents point to a subsequent loan made by Moklam to Petitioner and to an Amendment to the Stock Pledge Agreement, which purported to extend the terms of the Stock Pledge Agreement to that subsequent loan that remains outstanding. (*Id.*) The problem for Respondents, however, is that this Amendment, unlike the Stock Pledge Agreement itself, was not executed in accordance with the requirements set forth in the Moklam Shareholder Agreement. In fact, the only signatories to the Amendment to the Stock Pledge Agreement were Patrick Yu, in his capacity as a shareholder, and Raymond Yu—on behalf of Moklam. (*See* Geraci Aff. Ex. 10.) Notably, and unlike the Stock Pledge Agreement, no individual shareholder other than Patrick expressly consented in writing to the terms of the Amendment to

[4] Respondents correctly point out that there remains a dispute regarding attorney's fees purportedly outstanding under the original note. (Mot. at 18.) However, Petitioner does not concede that these attorney's fees must be paid in order for the Stock Pledge Agreement to be terminated with respect to the Original Note. Moreover, all parties have agreed to submit this attorney's fee dispute to a special referee and expect it to be resolved imminently.

the Stock Pledge Agreement. As Patrick holds only 26% of the total outstanding shares of Moklam, the Amendment was not "consented to in writing by the holders of not less than [fifty-one (51%)] percent of the total number of outstanding shares." Consequently, the Amendment is invalid, the Stock Pledge Agreement is not applicable to the remaining outstanding note, and Patrick's shares are not encumbered.

C. The Stock Pledge Agreement Violates Public Policy And Is Unenforceable

It is widely recognized that a contractual provision which "purports to prohibit judicial dissolution of a corporation violates public policy as expressed by the Legislature and under the common law." *Schimel v. Berkun*, 696 N.Y.S.2d 49, 52 (Sup. Ct. 1999) "Indeed, such public policy is especially compelling [] where the parties, as shareholders in a close corporation . . . owe each other a high degree of fidelity and good faith." *Matter of Validation Review*, 646 N.Y.S.2d 149, 151 (2d Dep't 1996).

As interpreted by Respondents, the effect of the Stock Pledge Agreement is to abrogate Patrick's right to seek judicial dissolution. A principal restriction imposed by the Stock Pledge Agreement is Section 3(a), which mandates that "Pledgor shall not be entitled to exercise any voting and/or consensual rights and powers relating or pertaining to the Pledged Collateral or any part thereof for any purpose." (*See* Geraci Aff., Exhibit 7 at § 3(a).) According to Respondents, this provision effectively cuts off Patrick's right to seek dissolution. Where the effect of such a contractual provision "is to vitiate the parties' statutory right to seek a judicial dissolution . . . [s]uch a provision violates the public policy for the protection of shareholders." *Matter of Validation*, 646 N.Y.S.2d at 151; *see also Ferolito*, 99 A.D.3d at 26 ("Statutory dissolution and election rights may be restricted but not nullified by contract."). Therefore, the restrictions

imposed by the Stock Pledge Agreement are in direct violation of public policy, and the Court should hold as such.

D. Respondents Do Not Dispute That Patrick Has Standing To Seek Common Law Dissolution

While Respondents attack Patrick's standing to seek dissolution under BCL § 1104-a, they do not contest his standing to seek dissolution under the common law of New York State. (*See* Petition ¶¶ 42, 55.) "While the Legislature supplemented th[e] principle of judicially ordered equitable dissolution of a corporation by passing BCL § 1104–a, it does not appear that it intended BCL § 1104–a to be the exclusive remedy for aggrieved shareholders, and the courts continue to recognize the common-law cause of action." *Ferolito*, 99 A.D.3d at 28; *see also Cortes v. 3A N. Park Ave Rest Corp.*, 998 N.Y.S.2d 797, 819 (Sup. Ct. 2014) ("[Common law] grounds parallel, to some degree, the statutory grounds for judicial dissolution set forth in BCL § 1104–a, which is unavailable to [petitioner] because he does not reach the threshold criteria of owning at least 20% of the corporation. However, the equitable remedy of judicial dissolution at common law remains available[.]"); *Lewis v. Jones*, 107 A.D.2d, 931 (3d Dep't 1985) ("[W]ere we to hold, as defendants urge, that plaintiff is proscribed from presenting a common-law dissolution action, his lack of standing to commence an action for that remedy pursuant to section 1104–a of the Business Corporation Law would leave him without an adequate remedy, a circumstance abhorrent to the common law.").

Consequently, regardless of Respondents' standing arguments related to statutory dissolution, Petitioner still has standing to seek common law dissolution.

II. The Petition Satisfies The Statutory Standard For Dissolution

Respondents argue that, even if Patrick has standing, the Court should nonetheless grant their motion to dismiss because the allegations set forth in the Petition do not meet the standard

for statutory dissolution. In making this argument, Respondents (1) ignore much of their most problematic conduct described in the Petition; (2) mischaracterize the substance of the Petition by framing the conduct that they do address as independent events that should be viewed in a vacuum; and (3) present a competing factual narrative that, at most, merely shows why further factual development and an evidentiary hearing are necessary.

A. Legal Standard For Statutory Dissolution

Section 1104-a of the Business Corporation Law reflects the New York Legislature's "special solicitude toward the rights of minority shareholders of closely held corporations." *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 70 (1984). It provides minority shareholders with a powerful tool to employ when they are subject to ill-treatment at the hands of the majority owners: those minority shareholders have the right to seek judicial dissolution of the corporation.[5] The statute enumerates two particular circumstances that warrant dissolution: when "those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders"; and when "[t]he property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation." BCL § 1104-a(1), (2).

While the term "oppressive" is not defined in the statute, its meaning has been discussed at length by numerous courts in New York. Under the most common formulation, "utilizing a complaining shareholder's 'reasonable expectations' as a means of identifying and measuring conduct alleged to be oppressive is appropriate." *Beatley*, 64 N.Y.2d at 70. According to this

[5] Importantly, the statute also gives the majority shareholders the absolute right to buy out the minority shareholders at fair value provided they elect to do so within 90 days of the filing of the petition for dissolution. BCL § 1118. Thus, Respondents' contention that Patrick is attempting to "destroy [their] life's work unless they pay him a price he demands" (Mot. at 18) is baseless. Respondents themselves have full control over Moklam's fate—if they make their buyout election, dissolution is off the table and an independent party—the Court—will be in charge of determining a fair price for Patrick's shares.

"reasonable expectations" test, "[o]ppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment." *In re Maybaum*, 800 N.Y.S.2d 349 at *3.

In addition to the "reasonable expectations" standard, courts in New York—as well as in other jurisdictions with substantially similar dissolution statutes—have also recognized a cause of action for dissolution based on oppressive conduct where the majority shareholders' conduct "was inherently oppressive", measured as "conduct which fair-minded people would find objectionable." *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1019 (Sup. Ct. 1984); *see also Matter of Rosen*, 102 A.D.2d 855, 855 (2nd Dep't 1984) (same); *Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56, 64 (S.D. 2002); *Redstone v. National Amusements, Inc.*, No. 24-C-06-001493, 2006 WL 4476415 (Md. Cir. Ct. Aug. 7, 2006). That standard is particularly applicable where, as here, the outstanding stock of a closely-held corporation is held by individuals who received their ownership stake by gift or bequest. That is because the "reasonable expectations" test implies "an examination into the spoken and unspoken understanding upon which the founders relied when entering into the venture," and thus is of questionable relevance where the shares were acquired by a second generation. *Gimpel*, 477 N.Y.S.2d at 1019; *see also Redstone*, 2006 WL 4476415 (applying *Gimpel* as the appropriate standard "for gifted shareholders".)

B. Respondents' Motion Wrongly Ignores Much Of The Oppressive And Objectionable Conduct Described In The Petition

Throughout their motion to dismiss, Respondents ignore many of the allegations in the Petition, in particular those relating to the various lawsuits and other coercive tactics Respondents

have directed at Patrick through entities other than Moklam. Citing no authority, they contend that anything in the Petition relating to other Yu Family entities is "irrelevant to [Patrick's] status as a shareholder of Moklam" and "need not be addressed here." (Mot. at 18.) Respondents' position has no support in law or logic, as it would leave Respondents free to engage in almost any conduct directed at forcing Patrick to relinquish his ownership of Moklam without fear of triggering BCL § 1104-a, provided that it was not carried out in the name of Moklam. Clearly, this cannot be the appropriate lens through which to view the dissolution inquiry. *Cf. In re Maybaum*, 800 N.Y.S.2d 349 at *3. ("In reaching a determination of whether the majority's actions are oppressive, the court must consider all of the facts and circumstances of the case.")

C. Respondents Erroneously Treat The Conduct Described In The Petition As Independent Events Rather Than The Components Of An Oppressive Scheme Motivated By Personal Animus

Rather than seriously engage with the Petition, Respondents first ignore much of its substance, and next mischaracterize the largely undisputed facts therein as alleging a series of independent actions. They then proceed to offer arguments as to why each of those actions—considered individually and in a vacuum—is insufficient to state a claim for dissolution. (*See generally* Mot. at 18-22.) But Respondents miss the forest for the trees.

The point of the Petition is not that any one of Respondents' oppressive and/or bad faith acts constitutes oppression, but rather that their actions—taken together—constitute an oppressive *scheme* designed to force Patrick to sell his interest in Moklam (as well as other Yu Family entities) at a bargain-basement price, and thereby deprive him of *any* benefit from his substantial ownership interest. Moreover, Respondents undertook this course of action not for any legitimate reason, but solely due to personal animus against Patrick. Fortunately, the law is not so myopic as to ignore circumstances and motivations when evaluating oppressive conduct. *See, e.g.*, *In re Solorin*, 2012

WL 6838118 (denying motion to dismiss where petition alleged "an oppressive course of conduct towards [petitioner] designed to freeze him out of all the affairs of, participation in, and income from" the corporation); *Matter of Wiedy's Furniture Clearance Ctr. Co., Inc.*, 108 A.D.2d 81, 84 (1985) ("Simply stated, petitioner has been 'frozen out' or 'squeezed out' of the corporation for no legitimate reason other than family animosity. This is precisely the type of situation that section 1104–a(a)(1) was designed to alleviate."); *Wenger v. L.A. Wenger Contracting Co.*, 958 N.Y.S.2d 649 (Sup. Ct. 2010) (majority shareholders acted oppressively in retaliating against minority shareholders for seeking information and attempting to force minority shareholder to sell a $10 million interest for $10); *cf. In re Piekos*, 957 N.Y.S.2d 638 (Sup. Ct. 2010) ("[I]n cases involving oppressive conduct or corporate waste or looting, the majority may be encouraged to continue abusing the minority if the majority realizes the minority must either tolerate that behavior or else be forced to sell to the majority at a heavily discounted price on unfavorable terms.").[6]

Here, the Petition establishes a clear case of oppression. It describes—and substantiates—in great detail how Respondents went about implementing their scheme. Specifically, when a personal dispute between Patrick and his family arose, Respondents took a series of actions

[6] Even accepting Respondents' view of the dissolution theory contained in the Petition, their arguments do not warrant dismissal of the Petition. As a matter of law, each of the four actions Respondents deign to address in their Motion—that they terminated Patrick's employment, cut off his dividends, excluded him from participation in Moklam's operations, and refused to provide him information about the company—can form the basis for an oppression claim. *See, e.g.*, *In re Maybaum*, 800 N.Y.S.2d 349 at *3 ("Oppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment."). And to the extent Respondents' arguments are based on their view of the facts, there is at a minimum a series of disputed questions that cannot be resolved on the record here. *Compare, e.g.*, Mot. at 19-20 (arguing that Petitioner could not have reasonably expected to participate in the management of Moklam) *with* Petition ¶ 17 (noting that Patrick obtained a master's degree in real estate development and investment before joining Moklam); Mot. at 20-21 (arguing that Patrick had no reasonable expectation of employment or dividends from Moklam) *with* Petition ¶¶ 25-26 (stating that Respondents only cut off Patrick's access to employment and dividends from Moklam as a result of personal animus).

designed to impose enormous financial and emotional pressure on Patrick, with the aim of forcing Patrick to relinquish his shares in Moklam and other family entities for a fraction of their fair value. These actions included:

- Demanding that he sell his interest in all family businesses back to the family for a small fraction of their fair value (Petition ¶ 23);
- Cutting off all of his legal work from family businesses (including Moklam), which constituted the bulk of his legal practice (*id.* ¶ 25);
- Cutting off all dividends from Moklam, even when the company's profits left him with a substantial tax bill reflecting "phantom income" he never received and disqualified him from (1) financial aid for his children's education and (2) government subsidized affordable rental housing (*id.* ¶ 26);
- Demanding repayment of over $600,000 in loans from Moklam after assuring him that he would not have to repay them and sticking to that pledge for over four years (*id.* ¶ 29);
- Improperly demanding repayment of over $100,000 in wedding and other expenses purportedly lent to Patrick by another family entity over 10 years earlier (*id.* ¶ 30);
- Improperly demanding all profits earned by Patrick from the sale of his house (approximately $750,000) (*id.* ¶ 31);
- Removing him as a managing member from two family business entities in which he had a substantial ownership stake (*id.* ¶ 32);
- Instituting capital call procedures at these entities and demanding approximately $600,000 in capital contributions from Patrick in retaliation for Patrick's requests to examine books and records of entities he owns, including Moklam (*id.* ¶¶ 36-37, 40);
- Filing three lawsuits against him seeking, in aggregate, over $1.3 million (*id.* ¶ 35);
- Refusing to meaningfully respond to his requests for books and records of the entities in which he is a shareholder despite at least four requests for such information over the past 10 months (*id.* ¶¶ 28-34; 40; 43-44);
- Refusing to provide access to *his own* files stored in a building owned by Moklam (*id.* ¶ 50); and

- Potentially diverting assets from companies partially owned by Patrick to either family businesses in which Patrick has no interest or directly to family members (*id.* ¶ 46).

Whether framed as upending Patrick's "reasonable expectations" or amounting to "inherently oppressive" conduct, Respondents actions—as outlined above and detailed in his Petition—meet the applicable legal standard. By any objective standard, the owner of 26% of a corporation likely worth tens if not hundreds of millions of dollars has a reasonable expectation to derive some economic benefit from that interest. Indeed, Respondents essentially concede that point by (1) admitting in their Motion that transfer of shares from Bong and May Yu to their children was an estate planning tool (Mot. at 8); and (2) asserting that Moklam is an "ongoing, profitable business" that, as of the time they filed their motion to dismiss, is "more profitable than ever." (*Id*. at 3, 7.) And, as explained in more detail in Section III below, there is also reason to believe that Respondents have intentionally diverted Moklam assets to other family businesses in which Patrick has no stake, as part and parcel of their plan to pressure him as much as possible.

For the same reasons, it is readily apparent that Respondents' conduct was of a type that "fair-minded people would find objectionable". There should be little dispute that imposing crippling economic pressure on a minority shareholder, in an effort to induce him to sell his shares for a fraction of their fair value, falls well outside the bounds of fairness.

D. Respondents' Offer a Competing Factual Narrative That Shows, at Most, That Further Factual Development Is Warranted.

While Respondents' legal arguments do not respond to the Petition's allegations of an oppressive scheme, Respondents do present a hodgepodge of factual assertions attempting to (1) provide justification for some of the actions described in the Petition; and (2) undermine the extent of Patrick's reasonable expectations as a Moklam shareholder. But, even on the limited record currently before the Court, it is evident that many of these assertions are merely post-hoc attempts

to justify oppressive conduct. At most, they raise credibility issues that cannot be decided without the benefit of further factual development, including granting Petitioner access to Moklam's books and records, allowing the parties to conduct discovery, and holding an evidentiary hearing. *See In re WTB Properties, Inc.*, 291 A.D.2d 566, 567 (2d Dep't 2002) (where "there are questions of fact regarding the merits of the petition[,]" the appropriate course of action is for the Court to hold an evidentiary hearing.); *see also Matter of Mintz*, 113 A.D.2d 803, 809 (2d Dep't 1985) ("[A] determination of whether petitioner has been the victim of oppressive conduct can only be made upon a full development of the facts after an opportunity for discovery . . . not upon acrimonious affidavits.")

1. Respondents' Justifications for their Conduct Do Not Withstand Scrutiny

The Petition describes how Respondents took increasingly punitive steps to apply economic pressure on Patrick in an effort to get him to sell them his shares at a depressed price and to punish him as part of a personal family dispute. (*See* Petition ¶¶ 29-40.) These steps included, among numerous other things, (1) serving Patrick with three demand letters, dated on the same day, seeking to enforce over $1.3 million worth of obligations that Patrick purportedly owed to his family; and (2) filing three lawsuits against Patrick in a three-week period pursuant to these demands.

With respect to the demand letters, Respondents, focusing only on the one of the three letters that sought money allegedly due to Moklam, state that due to an "influx of capital from his new job and the improper sale of his home, respondents decided that it was time for [Patrick] to repay some of the debts he owed." (Mot. at 12.) In other words, according to Respondents, the repayment demand on this note was not part of an oppressive scheme but was merely made due to

the fact that they figured that Patrick now had money and could afford to pay it back. To say the least, there are serious reasons to question the veracity of this contention. Among them:

- On its face, the demand for repayment makes no reference to his new job or a subjective belief that the Yu Family held that Patrick had an "influx of capital" that made him able to afford to repay the amount outstanding;

- The demand letter was made on the ***very same day*** they also sent Patrick two other formal demand letters, bringing their total demand to over $1.3 million;

- Also on the ***very same day***, Respondents amended the operating agreements (neither of which had previously been amended for over 10 years) for two other family entities in which Patrick was a minority owner to remove him as a managing member and institute capital call procedures;

- The demand was made without warning and in contravention of an agreement between Patrick and his father that payment on the loans Moklam had issued him would be forgiven or deferred;

- Respondents took all of these actions less than 6 weeks after Patrick, in the wake of his father's attempt to force him to accept an unfair buyout, sought books and records to help him establish the value of his stake in the family business; and

- Curiously, at the same time they demanded repayment of $1.3 million of purported loans and other obligations, Respondents chose <u>not</u> to demand repayment of a final loan of $150,000. This was not some oversight or act of generosity. Rather, as Respondents now make clear in their motion to dismiss, (1) that loan contains a "no prepayment" clause, which provides that Patrick is not permitted to pay off the loan until 2036; and (2) while that loan remains outstanding, Patrick supposedly lacks standing to seek dissolution under the Amendment to the Stock Pledge Agreement.

What emerges from the foregoing is not the benign picture Respondents try to paint in their motion to dismiss. To the contrary, it is apparent that the Yu Family has pursued a carefully crafted and premeditated plan to pressure Patrick to relinquish his interests in the family businesses for a fraction of their worth, while tactically holding off on calling the final outstanding note so as to allow themselves to argue that Patrick lacks standing to seek dissolution.

Similarly, with respect to the lawsuits, Respondents claim that their decision to file multiple suits against Patrick seeking an aggregate $1.3 million dollars was motivated solely by Patrick's

filing a summons with notice directed at them in earlier 2016. (Mot. at 13.) But Respondents say nothing to account for the fact that legal bills Respondents have produced in connection with an attorneys' fee dispute in one of the cases they filed against Patrick demonstrate that Respondents had been preparing a litigation strategy for at least a month before the summons with notice was filed, and had begun drafting their pleadings weeks in advance of receiving the summons. (*See* Second Affirmation of Jonathan D. Cogan ("Second Cogan Aff."), Exhibit A (Kaye Scholer Dec. 2015 Invoice).)

2. Respondents' Assertions Regarding Patrick's Reasonable Expectation to Receive Economic Benefits Are Legally and Factually Wrong

Respondents contend that, because Patrick received his Moklam shares as a gift and because he was not technically an employee of Moklam, he should have had no expectation to receive anything in consequence of his shares. (Mot. at 8.) While Patrick disputes that Respondents' description of his contributions to Moklam is factually accurate, it matters little—case law establishes that a minority shareholder has a reasonable expectation of receiving an economic benefit from his or her holdings regardless of any role in the company or whether the shares were a gift. *See Quazzo v. 9 Charlton Street Corp.*, No. 652282/2010, 2014 WL 978322, at *1 (Sup. Ct. March 11, 2014) ("[T]he facts that [a minority shareholder] 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 corporations."); *see also Digeser v. Flach*, 29 N.Y.S.3d 846 (Sup. Ct. 2015) (recognizing that a minority shareholder has a "reasonable expectation of deriving at least some economic benefit from his stock ownership"); *Ford v. Ford*, 878 A.2d 894, 904 (Pa. Super. Ct. 2005) (Minority shareholders who received shares as a gift and had minimal involvement in the business "have a reasonable expectation to derive some benefit from their ownership interest in a

corporation, particularly when a corporation is profitable"); *Bonavita v. Corbo*, 692 A.2d 119, 126 (N.J. Super. Ct. Ch. Div. 1996) (minority shareholder who received shares as a gift and had no role in the company was oppressed where "defendants' conduct has destroyed any reasonable expectation that plaintiff may have enjoyed respecting her stock interests.").[7] In attempting to coerce Patrick to give up his ownership interest, Respondents have frustrated that expectation and consequently oppressed Patrick.

Respondents further contend that, despite the fact that Respondent Raymond Yu informed Patrick that his stake in the family business was worth approximately $60 million, Patrick had no expectation of receiving any economic benefit from his interests based on the "right of first refusal" provision in the Moklam Shareholder Agreement. (Mot. at 21 fn. 7.) But, as Respondents themselves acknowledge, that provision was not intended to value Patrick's shares—rather, it was intended as a deterrent to Moklam shareholders selling their stake to a third party. (Mot. at 9.) This fact says nothing about whether Patrick had a reasonable expectation to derive an economic benefit from his stake in Moklam, whether through sale of his shares or any one of the other myriad ways in which the owners of a close corporation benefit from their ownership (i.e., through dividends, salary, benefits, etc.). More importantly, Respondents' argument also fails because the provisions of the Shareholders agreement that purport to restrict Patrick's right to sell his shares are unenforceable under New York law as unreasonable restraints on alienation. *See, e.g.*, *Rafe v. Hindin*, 29 A.D.2d 481, 484 (2d Dep't 1968) *aff'd*, 23 N.Y.2d 759 (1968); *Lam v. Li*, 222 A.D.2d 290, 290 (1st Dep't 1995).

[7] Moreover, Respondents argument here ignores the *Gimpel* line of cases set forth above, which Respondents themselves acknowledge as an appropriate standard (*see* Mot. at 19) and which do not depend on a reasonable expectations standard.

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In sum, Respondents' position on the facts of this case is encapsulated in their ironic accusation that *Patrick* is attempting to rewrite the terms of the parties' relationship. (Mot. at 18.) In reality, it is *Respondents* who are doing that. Having granted him a 26% interest in Moklam, Respondents have over the course of the past two years attempted to recapture that valuable property with no regard for the rights that Patrick received with it or their own fiduciary obligations towards Patrick as a minority shareholder. While they may resent Patrick's status as a significant shareholder in Moklam, they cannot simply erase it, or their obligations to him, by reimagining their economic and emotional coercion as something else.

III. <u>The Petition Satisfies the Common Law Standard for Dissolution</u>

A. Legal Standards for Common Law Dissolution

Common law dissolution is warranted where the majority shareholders of a closely-held corporation "have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute." *Leibert v. Clapp*, 13 N.Y.2d 313, 317 (1963); *see also Lewis*, 107 A.D.2d at 932 ("the Court of Appeals has recognized a common-law right to dissolution of a corporation by a minority shareholder where the officers or directors of the corporation are engaged in conduct which is violative of their fiduciary duty to shareholders.")

While the Court of Appeals has never spoken definitively on exactly what circumstances warrant common law dissolution, lower courts have found grounds where:

> the directors or those in control of the corporation are looting the corporate assets to enrich themselves at the expense of the minority shareholders; continuing the corporation solely to benefit those in control; or that the actions of the directors or those in control has been calculated to depress the capital of the corporation in order to coerce the minority shareholders to sell their stock at a depressed price.

Shapiro v. Rockville Country Club, Inc., 784 N.Y.S.2d 924 (Sup. Ct. 2004); *see also Ferolito*, 99 A.D.3d at 28 ("A claim for common-law dissolution is properly stated where it is alleged with sufficient factual detail that the shareholders in control . . . have sought to force and coerce [the minority shareholders] to sell and sacrifice their holdings to those in control.")

B. Respondents Common Law Arguments Suffer the Same Defects as Their Statutory Arguments

For all the reasons explained in Section II.B, above, the Petition satisfies this common law standard because Respondents actions have been directly aimed at coercing Patrick to sell his stake in Moklam at an artificially depressed price. Indeed, the lowball offer for Patrick's interests in the family businesses conveyed to him in 2014 itself likely constitutes a breach of fiduciary duty sufficient to trigger common law dissolution, to say nothing of the subsequent actions directed at him after he refused that offer. *Cf. Federico v. Brancato*, 993 N.Y.S.2d 644 (Sup. Ct. 2014) ("[I]n negotiating with minority shareholders to buy out their interests, a majority shareholder is under a fiduciary duty to deal fairly with the minority shareholders and to offer them a fair price.") In addressing common law dissolution, Respondents once again choose to ignore the substance of the Petition, mischaracterize the allegations they do engage with, and present a competing—and questionable—factual narrative.

Respondents' first failure is their focus on only the "looting" aspect of the common-law standard. (Mot. at 23.) This argument is deficient because it does not even address the range of behavior sufficient to trigger a minority shareholder's right to common-law dissolution based on a breach of fiduciary duty. It also ignores the very real allegations that Respondents are in fact looting and/or running Moklam solely for their own benefit and at Patrick's expense. (*See* Petition ¶ 46 (the more than $18 million in "loans to related companies" on Moklam's balance sheet "gives rise to a reasonable inference that the Yu Family is actively managing Moklam to ensure that none

of the profits generated by the company make their way to Patrick by withholding dividends and diverting Moklam assets to entities in which other family members, but not Patrick, have an interest.").) Respondents are also wrong that their refusal to give Patrick any information about these loans in response to his repeated requests somehow gives them cover because it prevents him from identifying any such activities specifically. In fact, courts have held that a company's stonewalling a minority shareholder from examining such information itself constitutes a breach of fiduciary duty. *See Cortes*, 998 N.Y.S.2d at 803 ("The Court infers, from the pattern of delay and obfuscation in responding to the numerous requests for records, that the individual defendants deliberately frustrated plaintiff's efforts and, in failing to disclose . . . breached their fiduciary duty to him.").[8]

Finally, Respondents again present a factually suspect justification for the very real issues raised by the Petition with respect to their financial management of Moklam. Regarding the tens of millions of dollars of intra-company loans present on Moklam's balance sheet, Respondents

[8] In addition to the instances of stonewalling and obfuscation with respect to books and records detailed in the Petition (*see* Petition ¶¶ 42-51), Respondents have additionally violated their statutory duty to open their books to Patrick within 30 days of the filing of the Petition, despite Patrick's attempts to enforce this right. *See* BCL 1104-a(c); Second Cogan Aff. Exhibit B. Respondents justify their violation of the statute by arguing that: (1) BCL 1104-a(c) should be read co-extensively with BCL 624, and that therefore they have already produced everything to which Patrick is entitled pursuant to his prior requests for books and records; and (2) due to the fact that this case is a special proceeding under Title 4 of the CPLR, they have no obligation to engage in discovery absent a court order. *See* Second Cogan Aff. Exhibit C. Both arguments are baseless. The plain language of the two statutes clearly demonstrates that BCL 1104-a(c) is far broader than BCL 624. *Compare* BCL 1104-a(c) (requiring corporation subject to dissolution to make available "the corporate financial books and records for the three preceding years" *with* BCL 624 (requiring corporation to provide shareholders with "an annual balance sheet and profit and loss statement for the preceding fiscal year.") And the case cited by Respondents for the proposition that they need not engage in discovery actually states that "leave of court is required to obtain disclosure in a dissolution proceeding ***beyond that authorized by BCL article 11 (see CPLR 408; see also BCL § 1104–a [c]*** ['corporate financial books and records for the three preceding years'])." *Digeser v. Flach*, 7 N.Y.S.3d 241 (Sup. Ct. 2015) (emphasis added). In other words, the case Respondents cite proves the exact opposite point of what they cite it for. Respondents' pre-textual reasons for refusing to carry out their obligations under BCL 1104-a(c) are just additional examples of their "pattern of delay and obfuscation" and only serve to provide more evidence why their motion must be denied.

state only that "Moklam also made arm's length, interest-bearing loans to other family-owned entities as well as to petitioner." (Mot. at 7.) But Respondents say nothing about the actual terms of these loans or whether they were ever repaid.[9] Indeed, despite including lengthy affidavits from the President and Vice-President of Moklam along with their Motion, Respondents do not even bother to provide a sworn statement that their description of these loans is accurate—the only citations they provide are to affidavits attesting that Moklam made loans to *Patrick*. (Geraci Aff. Ex. 2 ¶ 22; Ex. 3 ¶ 23.) This omission speaks volumes, and because of its absence the Motion in no way addresses the question of whether, as the Petition states, Respondents are deliberately "diverting Moklam assets to entities in which other family members, but not Patrick, have an interest." (Petition ¶ 46.) Similarly, Respondents' contention that Moklam has been "building its cash reserve" in order to purchase another commercial building (Mot. at 8) is equally suspect considering that its financial statements show that its cash position has actually *decreased* by over a million dollars since 2013. (Cogan Aff., Exhibits W, X.)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court deny Respondents' Cross-Motion to Dismiss the Petition and grants the relief sought in the Petition and the Order to Show Cause, or, in the alternative, orders the parties to engage in discovery in preparation for an evidentiary hearing; and grant such other relief as the Court deems just and proper.

[9] Additionally, the financial statements provided by Respondents appear to belie the notion that loans to other family-owned entities were equivalent to Moklam's loans to Patrick, given that the two appear in different parts of the company's balance sheet. *See* Cogan Aff., Exhibits W, X (Moklam Financial Statements for 2013 and 2015).

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