STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of

DIANE M. STRAKA,

Petitioner,

ORDER
Index No: 807308/2017

VS.

ARCARA ZUCARELLI LENDA
& ASSOCIATES CPAS, P.C.

Respondent,

ON THE PETITION OF DIANE M. STRAKA
FOR DISSOLUTION OF SUCH COMPANY
PURSUANT TO BUSINESS CORPORATION
LAW § 1104-a,

Petitioner, Diane Straka, petitioned this Court by Order to Show Cause, granted June 15, 2017, and a Verified Petition, verified May 22, 2018, for an Order seeking relief pursuant to New York Business Corporation Law §1104-a (a) as set forth in the Verified Petition and Order to Show Cause.

Respondent, Arcara Zucarelli Lenda & Associates CPAs, P.C., moved to dismiss the Petition by Notice of Motion dated July 12, 2017. The Court denied Respondent's motion to dismiss, in an Order entered August 15, 2017. Respondent then served a Verified Answer with Objections and Counterclaims, dated August 23, 2017. Petitioner served a Verified Reply to the Counterclaims, dated September 5, 2017.

The Court scheduled a hearing, held January 16, 2018, January 17, 2018, and

February 9, 2018, limited to the issues of whether Petitioner Diane Straka has proven oppressive conduct, pursuant to Business Corporation Law §1104-a(a)(1) and Petitioner's standing. Hurwitz & Fine, P.C., Andrea Schillaci of counsel, appeared on behalf of Petitioner; and Zdarsky, Sawicki & Agostinelli LLP, Gerald T. Walsh, Esq. of counsel, appeared on behalf of Respondent, Arcara, Zucarelli, Lenda & Associated, CPAs, P.C.

NOW, THEREFORE, upon the testimony of Diane Straka, David Arcara, James Segarra, Joseph Falbo, Jr., Donald Lenda, and Jon Zucarelli; and upon the Court's acceptance into evidence and review of certain exhibits; the Court's review of the parties' proposed findings of fact and conclusions of law; and the Petitioner's post-hearing submission of a CPLR 2221 motion to renew, by Order to Show Cause granted October 1, 2018, considered by the Court as a motion to reopen the hearing to consider new evidence, to wit, the Affidavit of Diane Straka, sworn to on September 27, 2018 and exhibits thereto and for relief requested ; and upon due deliberation, the Court issued and filed a Decision, dated January 9, 2019, making Findings of Fact and Conclusions of Law, a copy of which is annexed hereto, it is hereby

ORDERED that the Court finds that Petitioner did not relinquish her shares in the Respondent corporation in an August 12, 2016 letter; and it is further

ORDERED that Petitioner's motion to reopen the hearing to consider new evidence is granted: and it is further

ORDERED, that Petitioner Diane Straka has proven oppressive conduct and is entitled to relief under Business Corporation Law §1104-a(a)(1); and it is further

ORDERED, that considering the totality of circumstances, including the size and nature of the business of the Respondent Corporation, in the light of the Court's broad latitude to fashion alternative relief, short of or other than dissolution, the Court finds that a buyout of

Petitioner's shares of Respondent Corporation would satisfy her expectations and the rights of the remaining shareholders, and will conduct further proceedings to that end; and it is further

ORDERED that counsel for the parties shall appear before the Court for a conference on February 4, 2019 at 11:00 a.m.

DATED: Buffalo, New York
January 17, 2019

Hon. Henry J. Nowak, J.S.C.

ENTER:

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of

DIANE M. STRAKA,

Petitioner,

vs.

ARCARA ZUCARELLI LENDA & ASSOCIATES CPAS, P.C.,

Respondent,

DECISION

INDEX NO. 807308-2017

ON THE PETITION OF DIANE M. STRAKA FOR DISSOLUTION OF SUCH COMPANY PURSUANT TO BUSINESS CORPORATION LAW § 1104-A.

HON. HENRY J. NOWAK, J.S.C.
Justice Presiding

This case raises the question of whether disrespectful and unfairly disproportionate treatment of a female shareholder by the male majority in a closely held corporation constitutes corporate oppression pursuant to Business Corporation Law § 1104-a (a) (1). This court finds that the answer is yes, and based upon the evidence presented, petitioner Diane Straka has proven oppressive conduct and is entitled to relief under that section.

Straka, an experienced certified public accountant, seeks dissolution of respondent Arcara Zucarelli Lenda & Associates CPAs, P.C. (the corporation). The corporation moved to dismiss Straka's petition for lack of standing in 2017, claiming that she resigned as a shareholder on

August 12, 2016, when she left the corporation to join another accounting firm. This court denied the motion and scheduled a hearing on that issue as well as on the issue of oppression. The hearing was held over three non-consecutive days, and after the hearing, the parties submitted proposed findings of fact and conclusions of law. Straka later, while this decision was pending, moved to renew pursuant to CPLR 2221, requesting the court to consider an August 30, 2018 letter from the corporation and an enclosed Form 1120S, Schedule K-1 for the 2017 tax year. The corporation opposes the motion to renew, claiming it to be a procedural nullity insofar as the court has not ruled on the issues presented at the hearing. The court considers Straka's motion to renew as a motion to reopen the hearing to consider new evidence. Pursuant to *Kay Found. v S & F Towing Serv. of Staten Is., Inc.*, 31 AD3d 499, 501 (2d Dept 2006), the court grants the motion to permit the submission of the requested documents, finding that Straka has provided a sufficient offer of proof and that the corporation will not be unduly prejudiced.

Findings of Fact

On July 10, 2014, Straka formed the corporation along with David A. Arcara, Jon V. Zucarelli, and Donald J. Lenda. Each was an officer, director and 25 % shareholder in the new venture, originally named "Arcara, Zucarelli, Lenda & Straka CPAs, P.C.." Arcara served as President, with Zucarelli as Vice President, Lenda as Treasurer and Straka as Secretary. Arcara and Straka previously owned Arcara & Borczynski, LLP (A&B), and Zucarelli and Lenda previously owned Brody, Weiss, Zucarelli, & Urbanek, CPAs, P.C. (Brody Weiss), along with Sidney Weiss and Thomas Urbanek. Weiss and Urbanek joined the corporation as employees, but they had no ownership interest.

The creation of the corporation balanced the practices of the prior firms; A&B's practice was approximately 75 % audit work and 25 % tax work, and Brody Weiss was the opposite. Each group appreciated the benefits of doing so, as tax work tended to be more lucrative on an hourly basis, but audit work was spread more evenly throughout the year. Also, the Brody Weiss partners appreciated that the employees coming from A&B were younger and more comfortable with technology. For example, A&B had completed a "paperless project," to minimize the need to print and store documents.

Straka, Arcara, Zucarelli, and Lenda each made a $ 100.00 capital contribution to the corporation. They agreed to a compensation plan called the "earnings matrix," a formula used at Brody Weiss that allocated client revenues and firm expenses. Also, on behalf of Arcara and Straka, the corporation made periodic payments to the founders of A&B, pursuant to an earlier agreement Arcara and Straka had made with them. In addition to professional accounting services, each of the shareholders assumed specific administrative duties: Arcara handled human resources issues, Zucarelli handled day to day accounting operations, Lenda handled quality assurance and compliance issues, and Straka handled information technology (IT).

The shareholders explored but never executed a written shareholders' agreement. The bylaws of the corporation do not provide for the redemption of shares for a shareholder, except upon the death of a shareholder or the shareholder's disqualification to practice the accounting profession.

Straka's expectations for the new corporation included that (1) she be treated with equal dignity and respect as the male shareholders forming the majority; (2) she would actively participate in the operation and management of the company; (3) the new corporation would be

collaborative and more efficient in regard to sharing of information and staff; and (4) compensation among the shareholders would be fair. Prior to forming the corporation, Straka specifically expressed the importance of using an integrated software suite computer program, as she oversaw the IT department at A&B and was instrumental in that firm's transition to paperless accounting.

Shortly after moving into the new office in January 2015, Straka met Urbanek and introduced herself. Knowing that she was a partner of the corporation, Urbanek said, "Oh, are you the one who makes me coffee?" Soon thereafter, he told her to look at a cartoon he posted on his office door that was demeaning to women. Straka received complaints that Urbanek made unsolicited, demeaning remarks to other female employees as well. Straka and those women elected not to eat in the corporate lunch room as Urbanek's comments made them uncomfortable.

Straka raised the issue of Urbanek's demeaning comments to women at the office at a partnership meeting. Zucarelli volunteered to speak with Urbanek because he had worked with him the longest. At the hearing, Zucarelli testified that he went to Urbanek's office and "just said, you know, your – whatever it is, it's like, Tom, you can't do this stuff, you got to tone it down. I don't know exactly what I told him. I didn't get any resistance, he was like, okay." Zucarelli could provide no additional details of this impromptu meeting.[1] He made no notes before, during or after the meeting, never followed up with Urbanek, and never followed up with Arcara, even though Arcara was in charge of human resources.

[1] At the hearing, the court did not find Zucarelli's testimony that he requested Urbanek to stop making demeaning comments to women in the office to be credible. In fact, when first asked about Straka's complaints, Zucarelli refused to acknowledge that Urbanek said or did anything improper, stating that Straka simply "didn't like" or "didn't care for" Urbanek.

Straka also demonstrated that she was undermined in her role as the head of IT. Straka wished to use an integrated software suite called UltraTax for paperless audit and tax work at the corporation. Brody Weiss had used Lacerte tax preparation software, and its individual and business tax returns had to be converted from Lacerte to UltraTax. At a May 2015 meeting to discuss the conversion, Zucarelli talked down to Straka in front of other staff members, indicating that she did not know how to run a tax practice. On June 4, 2015, Straka sent an email message to all shareholders and staff at the corporation outlining priorities for the software conversion, with the hope that it would be completed by the end of the year. Several days later and without consulting with Straka, Lenda approved the payment of a June 9 2015 invoice for Lacerte tax preparation software for the following year.

When the corporation was formed, Straka was advised that former Brody Weiss staff would be available for audit work over the summer. However in the summer of 2015, Straka found that Urbanek continued to monopolize the professional staff for his tax files because he would not use a computer. This left insufficient staff to complete audit work, causing additional friction in the office.

On June 17, 2015, Straka sent a message to Arcara that focused on her problems with Urbanek but also expressed concerns about a lack of respect toward her from the other former Brody Weiss partners. Another incident occurred later in October 2015, when Straka and Lenda sat in the office conference room before a meeting. Urbanek entered and asked where he should sit. When Straka told him he could sit anywhere, Urbanek asked, "Can I sit on your lap, Diane?" Lenda smirked, and Straka told Urbanek that he could sit on Lenda's lap.

Arcara recognized Urbanek's inappropriate behavior and tried to address Straka's complaints on at least two occasions. At the second meeting, Urbanek told Arcara that he would not change his behavior. The majority shareholders ultimately relocated Urbanek's office away from the corporation staff and hired external human resource contractors to provide sexual harassment seminars to the corporation staff and shareholders, beginning in June 2016.

That same month, Straka gave formal verbal notice that she would be leaving the corporation. On August 12, 2016, Straka resigned in a letter confirming her "resignation as a shareholder, director and officer," effective that day. Straka demonstrated that her resignation as shareholder was made in reliance upon future redemption of her shares, which she has never tendered. The corporation issued Straka a Schedule K-1 statement for 2016 reflecting her 25 % ownership as of the end of that year, and both Straka and Zucarelli testified that Straka remains personally liable for corporate debts and obligations.

The earning matrix utilized by the majority resulted in Straka receiving the lowest amount of compensation despite having the second highest billing and revenue in 2016. Part of the reason for this discrepancy was the fact that the corporation had advanced funds to A&B for Straka's monthly shares of payments owed to A&B's founding partners. These payments were then reflected as amounts due to the corporation from Straka.

However, Straka also demonstrated that under the earning matrix, the costs and expenses of Urbanek and Weiss were borne equally by all four shareholders, but only Zucarelli and Lenda were credited with the billings, collections and receivables Urbanek and Weiss generated. Furthermore, the expenses of Urbanek and Weiss were higher than those of other employees, as they received automobile allowances and other perks given only to the shareholders. Straka also

showed that the corporation was capable of paying shareholder dividends in 2016, but the majority opted to pay only wages based upon the earnings matrix, thereby excluding Straka from sharing in the profits.

In January 2017, unbeknownst to Straka, the majority added Paul Eusanio as an equal shareholder, thereby diluting her interest in the corporation from 25 % to 20 %. On February 2, 2017, the corporation sent Straka notice of a special meeting on March 7, 2017, the stated purpose of which was "1. To elect Directors of the Corporation [and] 2. To act upon such other business as may properly come before the meeting or any adjournment thereof." Straka did not attend the March 7, 2017 meeting, and Arcara, Zucarelli and Lenda elected Eusanio as a new director.

Straka has not received notice of any shareholder meetings since that time. On August 30, 2018, the corporation sent her a schedule K-1 form for 2017 and correspondence addressed to her as "Shareholder" and reflecting that this is "your final year of ownership" in the corporation.

Conclusions of Law

The corporation's 2016 tax return reflected Straka's 25 % shareholder status. "A party to litigation may not take a position contrary to a position taken in an income tax return" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *In re Tehan [Tehan's Catalog Showrooms, Inc]*, 144 AD3d 1530, 1532 [4th Dept 2016] ["respondent is estopped from taking a position in this proceeding contrary to the position taken in its tax returns that decedent's estate owned a 20% interest in respondent"]). Based upon that tax return, the notice of the shareholder meeting provided to Straka on February 2, 2017, and the August 30, 2018 correspondence and Schedule

K-1 form, this court finds that Straka did not relinquish her shares in the corporation in an August 12, 2016 resignation letter.

A minority shareholder may petition the Court for dissolution of the corporation in which he or she owns at least 20 % of the outstanding shares, and where the majority shareholders have engaged in illegal, fraudulent, or oppressive actions towards the petitioning shareholder (Business Corporation Law § 1104-a [a] [1]). The term "oppressive" has not been statutorily defined, but "[d]isappointment alone should not necessarily be equated with oppression" (*Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 73 [1984]). Instead, the Court of Appeals has held that "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture" (*id.*). "A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise" (*id.*).

This court finds that Arcara, Zucarelli and Lenda, and indeed, any shareholder of any corporation, should know that a female shareholder reasonably expects to be treated with equal dignity and respect as male shareholders forming the majority. Straka has demonstrated that she was not. The shareholders' slow and inadequate response to Urbanek's demeaning behavior marginalized Straka, as did the lack of respect provided to her as the head of IT at the corporation. Furthermore, Zucarelli and Lenda promised but failed to foster collaboration by the former staff members of Brody Weiss.

This court also finds that Straka's reasonable expectation for fair compensation was frustrated by the use of the earnings matrix, particularly by allocating expenses of Weiss and

Urbanek to all four shareholders while allocating their revenues only to Zucarelli and Lenda. Also, Straka demonstrated that the earnings matrix was used to allocate corporate profits as salaries to the remaining shareholders as opposed to dividends. "When the majority shareholders of a close corporation award *de facto* dividends to all shareholders except a class of minority shareholders, such a policy may constitute 'oppressive actions' and serve as a basis for an order made pursuant to section 1104-a of the Business Corporation Law dissolving the corporation" (*Kemp & Beatley*, 64 NY2d at 67).

Finally, the action taken to add Paul Eusanio as a shareholder in January 2017, without notice to Straka, constituted oppressive conduct by adversely affecting Straka's share in the corporation without her knowledge or consent (*see Twin Bay v Kasian*, 153 AD3d 998, 1003 [3d Dept 2017], *lv to appeal denied sub nom. Matter of Dissolution of Twin Bay Vil., Inc.*, 31 NY3d 902 [2018]). The corporation had initially alleged that Eusanio was made a shareholder at the March 7, 2017 shareholders meeting that Straka failed to attend. The testimony at the hearing contradicted that claim, but even if true, the February 22, 2017 notice provided to Straka was sufficient only to elect Eusanio as a director, not to add him as a shareholder and dilute Straka's interest in the corporation (*see* Business Corporation Law §§ 602 [c], 605). Dilution of a minority shareholder's interest is permissible only when the shareholder is "given an opportunity to supply capital and thereby maintain [her] percentage interest in the corporation" (*Matter of Quail Aero Serv.*, 300 AD2d 800, 802 [3d Dept 2002]). Any special action taken at a shareholders meeting, such as the issuance of shares or possible dilution of another shareholder's percentage of ownership in the corporation, that is not expressly stated in a notice to all shareholders, is null and void (*Lehman v Piontkowski*, 93 AD2d 809, 813 [2d Dept 1983]).

Conclusion

The Court of Appeals has held:

> "once oppressive conduct is found, consideration must be given to the totality of circumstances surrounding the current state of corporate affairs and relations to determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner's expectations and the rights and interests of any other substantial group of shareholders."

(*Kemp & Beatley*, 64 NY2d at 73). "A court has broad latitude in fashioning alternative relief" (*id.* at 74; *In re Dissolution of Clever Innovations, Inc.*, 94 AD3d 1174, 1177 [3d Dept 2012]). Considering the size and nature of the business of the corporation, the court finds that a buyout of Straka's shares would satisfy her expectations and the rights of the remaining shareholders. The court will schedule further proceedings to that end. Submit order.

Dated: January 9, 2019

HON. HENRY J. NOWAK, J.S.C.