EXHIBIT D

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

Diane M. Straka,

Petitioner,

v.

Arcara Zucarelli Lenda & Associates CPAs, P.C.,

Respondents.

PETITIONER'S POST-HEARING BRIEF OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Index No: 807308/2017

Petitioner, Diane M. Straka ("Straka"), by counsel, for her post-hearing brief regarding findings of fact and conclusions of law, states:

I. STRAKA HAS ESTABLISHED ENTITLEMENT TO RELIEF UNDER BCL § 1104-a.

Under New York law, a minority shareholder may petition the Court for dissolution of the corporation in which she owns at least 20% of the outstanding shares and where the directors, or those otherwise in control of the business, have acted illegally, fraudulently, or oppressively. *See* N.Y. Bus. Corp. Law § 1104-a(a)(1). Accordingly, to establish entitlement to dissolution or alternative remedy the court may order, a petitioner must establish (1) that she owns at least 20% of the outstanding shares of the subject-corporation and (2) that the directors and/or majority shareholders of the subject-corporation acted (or failed to act) in an illegal, oppressive, or fraudulent manner. Straka has established her right to relief.

A. Straka has standing to commence this proceeding.

1. Straka owns 25% of the outstanding shares in the Corporation.

This Court rejected Respondents' pre-answer motion to dismiss for lack of standing, but Petitioner's standing as a shareholder of Arcara Zucarelli Lenda & Associates CPAs, P.C. (the

"Corporation") was also established in multiple ways at the hearing. Significantly, Respondents admitted Straka's 25% shareholder status in the Corporation's 2016 tax return [Pet. Exh. 1; T-1/16/18 (Straka) at 6-9[1]; T-1/17/18 (Arcara) at 35-36]. Respondents are estopped from taking a contrary position. The Court of Appeals has stated unequivocally that, "[a] party to litigation may not take a position contrary to a position taken in an income tax return." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009) (emphasis added) (internal citations omitted); *see also*, *Matter of Tehan*, 144 A.D.3d 1530, 1532 (4th Dept. 2016).

The hearing testimony established that Petitioner was awarded a 25% ownership interest at the time the Corporation was formed [*id*. at 5]. The testimony was similarly clear that Straka has not tendered or redeemed her shares [T-1/17/18 (Arcara) 35-36] and remains personally liable for Corporation debts and obligations, including the line of credit and potential payroll issues [T-1/16/18 (Straka) at 65-66, 73-74; T-2/9/18 (Zucarelli) at 33].

Although the 2/22/17 notice ("2/22/17 Notice") of special shareholder's meeting did not notify Straka as to the issue of Paul Eusanio having been voted a shareholder of the Corporation by the Majority or that he was eligible to be made a director, the fact that Respondents sent the 2/22/17 Notice to Straka in 2017 [Pet. Exh. 16; T-1/17/18 (Arcara) at 62-63] is further proof that Respondents knew and expressly acknowledged that Straka was still a shareholder.

Despite Respondents' attempt to dilute Straka's shareholder percentage by issuing shares to Eusanio, the action taken to add a new shareholder is null and void, as Straka was never provided notice or given an opportunity to vote. [T-1/16/18 (Straka) at 47-48; T-1/17/18 (Arcara) 40, 61-63, 65; T-2/9/18 (Zucarelli) at 36-38.] *See Lehman v Piontkowski*, 93 AD2d 809 (2d Dep't 1983). Eusanio's shareholder status or eligibility as a shareholder to become a director was not stated as a purpose of the meeting in the 2/22/17 Notice, nor did his name appear

[1] The hearing transcripts are cited by "T-" and the date of testimony.

anywhere on the notice – not as a shareholder, not as an addressee, not as a person receiving a courtesy copy. [Pet. Exh. 16.] The 2/22/17 Notice provided only that the purpose of the March 7, 2017 special shareholder's meeting 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." [*Id.*] The 2/22/17 Notice did not provide any notice to Straka that Eusanio was a shareholder or being considered for director. [*Id.*] As set forth in detail below, Respondents testified that Eusanio was made a shareholder (and possibly a director) in January 2017, prior to the March 7, 2017 meeting that was subject of the 2/22/17 Notice, without notice, input, or voting by Straka.

Any special action taken at a shareholder's meeting, such as the issuance of shares or possible dilution of another shareholder's percentage of ownership in the corporation or ratification of same that is not expressly stated in a notice to shareholders, is null and void. *Lehman*, 93 AD2d at 813. Therefore, Respondents' attempts to add a shareholder and dilute Straka's percentage of ownership are null and void and Straka is still a 25% shareholder in the Corporation.

But, for argument's sake, even if Respondents had added Eusanio as a shareholder upon proper notice, which they did not, Straka would still have standing to bring this BCL § 1104-a proceeding as at least a 20% shareholder.

2. Straka does not lose her standing simply because she is no longer an employee of the corporation.

There is no authority to support Respondent's argument that because Straka no longer works for the corporation that she somehow loses her standing to bring this lawsuit. Business Corporation Law section 1104-a does not list employment as an element of standing. Such cases often involve shareholders who do not or are no longer working with the corporation, and even

the estates of shareholders. *See, e.g., Matter of Clever Innovations, Inc.*, 94 AD3d 1174 (3d Dep't 2012).

B. Straka has been oppressed by the Majority.

Establishment of oppressive conduct depends on the totality of the circumstances, and the nature of small, closely held corporations must be taken into account. *See Topper v Park Sheraton*, 107 Misc.2d 25, 30-35 (Sup. Ct. NY Co. 1980) (providing a thorough analysis of the legislative history and authority analogizing relationships of stockholders in closely held corporations to the inherently similar relationship between business partners, and finding that "oppression of the 'rights and interests' of minority shareholders in a close corporation is an abuse of corporate power").

> [Section] 1104-a of the Business Corporation Law determines that oppression of the 'rights and interests' of minority shareholders in a close corporation is an abuse of corporate power. These rights and interests derive from the expectations of the parties and special circumstances that underlie the formation of close corporations. The court may determine the understanding of the parties as to the role the complaining shareholder is expected to play from agreements and evidence submitted. The court can then decide whether the controlling shareholders have acted contrary to that understanding, or in the language of the statute 'have been guilty of…oppressive actions toward the complaining shareholders.'

Matter of Topper, 107 Misc.2d at 34.

New York courts generally find that a corporation's majority shareholders or directors have acted oppressively when their behavior substantially defeats the minority shareholder's expectations held at the time the minority shareholder acquired stock in the company and were central to the decision to join. *See Matter of Kemp & Beatley*, 64 NY2d 63, 73 (1980); *In Re Gould Erectors & Rigging, Inc.*, 146 A.D.3d 1128, 1129 (3d Dept.); *Matter of Parveen*, 259

A.D.2d 389, 390 (1st Dept. 1999); *Matter of Upstate Medical Associates, P.C.*, 292 A.D.2d 732 (3d Dept. 2002). Such "reasonable expectations constitute the bargain of the parties in light of which subsequent conduct must be appraised." *Matter of Topper*, 107 Misc.2d at 34. Here, Straka's expectations for the new corporation and her reasons for becoming a shareholder were not only objectively reasonable, but were expressed in discussions with the other three shareholders, Dave Arcara, Jon Zucarelli and Don Lenda (sometimes referred to as the "Majority") and known by them prior to the start of the new venture. [T-1/16/18 (Straka) 177-178; T-1/17/18 (Arcara) 23-24.] Yet, despite their knowledge and stated agreement, the Majority caused and enabled the continued frustration of Straka's expectations.

1. The Majority frustrated Straka's expectation to be treated with equal dignity and respect as the male shareholders forming the Majority.

It should go without saying in this day and age that no woman expects to be subjected to sexual harassment or treated unequally to her male counterparts. Straka certainly had a reasonable expectation that she would be treated with respect and as an equal to the other three male shareholders. She held the same percentage of ownership of each of the other three (each of the four shareholders held 25%). She was an officer and director of the Corporation, just as the male Majority shareholders. Straka has 18 years of experience in the accounting profession, 16 years as a CPA, and an excellent professional reputation. Straka had the second highest billings in the firm and brought in $500,000 of client revenue annually. [T-1/16/18 (Straka) at 9-11.] It was important to Straka to have a good, positive firm culture [*id.* (Straka) at 17; T-1/17/18 (Arcara) at 14-15;].

However, the male Majority treated the Corporation as a boys' club, permitting the open and unabashed harassment of Straka by a male employee – with their knowledge and without

penalty – and marginalized Straka in every manner they could. The hearing testimony established that:

- Arcara admitted that Straka expressed to him her frustration at being treated like a glorified employee rather than an officer, director and shareholder [T-1/17/18 (Arcara) at 58-60].
- Despite Straka's credentials and client base, the Majority initially didn't want to include her name on the firm and ultimately listed it last [T-1/16/18 (Straka) at 11], even though Straka had the second highest billings of the shareholders [*id*. at 10-11];
- The Majority named her Secretary, the traditionally female role [*id*. at 11-12];
- Straka was disrespected in front of staff by Jon Zucarelli, one of the three male Majority shareholders [T-1/16/18 (Straka) at 37-38];
- Straka was not even permitted to use the office of her choice, unlike the male Majority shareholders [*id*. at 38-40; T-2/9/18 (Arcara) at 142-143.];
- But most egregiously, the Majority allowed male employee Tom Urbanek to sexually harass, disrespect, and demean Straka without penalty. Despite Straka being a shareholder and officer, Urbanek made demeaning comments to her such as, "Are you the one who makes me coffee?" [T-1/16/18 (Straka) at 19] and "Can I sit on your lap, Diane?" [*id*. at 24.] Don Lenda, another of the male Majority was in the room when Urbanek asked to sit on Straka's lap and just smirked. [*id*.] Although Lenda recalled the words to be different, he admitted that Urbanek's statement to Straka was inappropriate and that "maybe I did smirk at him." [T-1/17/18 (Lenda) at 130-131.]
- Urbanek posted a cartoon disparaging women on his office door and prodded Straka to read it. [T-1/16/18 (Straka) at 19-20.]

- Urbanek's behavior was disruptive and insulting to the other women in the office. He was permitted to make belittling comments about women and the female staff and to treat a professional female accountant as an administrative support person, requiring her to serve as his typist. Urbanek's behavior caused female employees to avoid the lunchroom while he was in it and was one of the reasons that a number of female employees left the Corporation. [T-1/16/18 (Straka) at 25-26, 28-31, 42-43; T-1/17/18 (Arcara) at 51-56.]
- Arcara admitted that he would not want his wife to be treated the way Straka was treated [Pet. Exh. 6; T-1/16/18 (Straka) at 58; T-1/17/18 (Arcara) at 25-26] but nothing changed. [T-1/17/18 (Arcara) at 27-28.]
- Although Zucarelli purported to have one casual conversation with Urbanek regarding his bad behavior, Zucarelli took so little interest in the issue that he could not recall any specifics whatsoever about his conversation with Urbanek, did not make notes to Urbanek's personnel file, did not recall ever following up with Urbanek and did not follow up with the human resources director. [T-2/9/18 (Zucarelli) at 10-12, 15-16, 56-57.] Zucarelli's lack of seriousness over this issue was further demonstrated by his flippant demeanor at the hearing.
- The Majority failed to take effective steps to discourage or correct Urbanek's bad behavior. Urbanek continued his bad behavior and still was not fired even after Urbanek adamantly stated to Arcara, who served as the human resources director, that he would not change. [T-1/16/18 (Straka) at 40-43; T-1/17/18 (Arcara) at 26-29, 50-55; (Zucarelli) 115, 116-118; T-2/9/18 (Arcara) 75.]

Allowing Urbanek's harassing behavior to continue potentially subjected the Corporation, including Petitioner, to liability. Allowing Urbanek's harassing behavior to continue frustrated her reasonable expectation to be treated with the same dignity and respect as the male Majority.

2. The Majority frustrated Straka's reasonable expectations of actively participating in the operation and management of the Corporation.

The Court of Appeals' decision in *Matter of Kemp & Beatley*, 64 NY2d 63 (1980) is still the controlling authority on section 1104-a of the Business Corporation Law. Where, as here, under the totality of the circumstances, the majority's conduct substantially defeats the petitioner's expectations that were central to joining the venture, oppressive conduct will be found. *Id*. at 73.

As is common with minority shareholders in small corporations, Straka reasonably expected to participate in the operation and management of the Corporation and to be compensated fairly for the work she did and the clients she brought with her. She not only expected to so participate, but expressly discussed these issues as important to her decision to join in the venture. [T-1/16/18 (Straka) at 9-18; T-1/17/18 (Arcara) 6-7, 12-17, 23-25.] But these reasonable and express expectations were repeatedly frustrated by the other shareholders. The hearing testimony established that:

a. The Majority frustrated Straka's express expectation that the new venture be technologically integrated and efficient.

- Straka oversaw the IT department at her prior, modernized paperless firm, Arcara & Borcynski LLP. At the time of forming the Corporation, Straka expressed that she was unwilling to "go backwards" technologically and that having an integrated software suite computer system was an important factor in Straka's decision to become a shareholder in

the Corporation.[2] [T-1/16/18 (Straka) at 12-15; T-1/17/18 (Arcara) at 12-13, 23-24; T-2/9/18 (Zucarelli) at 19-20.] The technology issues were discussed among the shareholders before forming the Corporation, and it was agreed that the Corporation would adopt such a software suite system, which, among other features, automatically populated updates to fields and information across platforms and permitted the accountants to work and access all necessary documents and information remotely. [T-1/16/18 (Straka) at 13-15.] Such a system was more efficient and profitable. [T-1/16/18 (Straka) at 13-15; T-1/17/18 (Lenda) at 139-140; T-2/9/18 (Zucarelli) at 20.]

- Yet, Straka's efforts to move the Corporation to a modern software suite or to address other IT issues were ignored or undermined. For example, Straka sent an e-mail on January 20, 2015 setting forth the intention to scan the tax returns currently used in the old Lacerte software by Zucarelli, Lenda, Urbanek and Weiss into the new software suite purchased by the Corporation [Resp. Exh. G; T-2/9/18 (Zucarelli) at 18-21]. The very next day, Lenda and Zucarelli renewed their old Lacerte software at a cost of $8,316.54 [Pet. Exh. 3; T-2/9/18 (Zucarelli) at 21-23]. Lenda and Zucarelli did not have their client's tax returns converted into the new UltraTax program, even though the deadline on a great many of those tax returns were extended to October 2015 [T-2/9/18 (Zucarelli) at 23, 25-26]. On June 4, 2015, Straka sent another e-mail with a plan to get the tax return conversion completed by the end of 2015. [Resp. Exh. H; T-2/9/18 (Zucarelli) at 23-25.] Five days later, for the second time, Zucarelli and Lenda renewed the Lacerte software, this time for the 2015 tax returns that would have to be filed by April 2016, even though

[2] Straka and Arcara were former partners at Arcara & Borcynski LLP, a paperless firm that used an integrated software suite, Creative Solutions, which included the UltraTax program. Zucarelli and Lenda came from Brody, Weiss, Zucarelli & Urbane, CPAs, P.C., which had not yet upgraded to an integrated system and used a stand-alone tax program called Lacerte. At the time of forming the new Corporation, the shareholders agreed to use the Creative Solutions software suite. [T-1/16/18 (Straka) 16, 32;

there were 10 months still left to convert the remaining tax returns to the new integrated software. [Pet. Exh. 4; T-1/16/18 (Straka) at 30-37, 43-44, 168-169; T-2/9/18 (Zucarelli) at 23-28; 57-59]. Straka received numerous questions and complaints from staff who had been advised that the returns were not going to be converted. [T-1/16/18 (Straka) at 168-169.]

b. The Majority frustrated Straka's expectations that the new corporation would be collaborative and more efficient with regard to sharing of information and staff.

The hearing testimony established that:

- Before becoming a shareholder, Straka expressed her expectation that forming the Corporation would allow her to effectively utilize the Corporation staff to support her practice, and that the practitioners would all share knowledge with and among each other [T-1/16/18 (Straka) at 15-16; T-1/17/18 (Arcara) at 16]. Tax work and audit work tend to cluster in different parts of the calendar year, and it was agreed that staff and resources would be available to work on both tax and audits. [T-1/16/18 (Straka) at 16, 29-30; T-2/9/18 (Zucarelli) at 5-8.]
- But Straka was frustrated from utilizing staff. Instead, the Majority allowed Urbanek to not use a computer at all, making him inefficient, resulting in his monopolizing the very professional staff that was promised to be, and should have been, available to Straka [*id.* at 29-31].
- Zucarelli and Lenda resisted and delayed the conversion of the tax work to the more efficient UltraTax integrated system, resulting in excessive and unprecedented tax return extensions and dragging the tax work out through the summer and beyond, [T-2/9/18

(Zucarelli) at 8] and made the Corporation incur additional costs of purchasing old, limited software to use for their 2014 and 2015 tax work.

- When Straka proposed making a qualified female CPA with audit experience a partner in the firm to relieve some of the backlog and pressure on the audit practice and relieve staff costs, the male Majority rejected her proposal and preferred promoting a male employee instead [*id.* at 45-47].

c. The Majority frustrated Straka's expectation that compensation among the shareholders would be fair.

It was expressed and expected that Straka would receive fair compensation, that the compensation would be fair among the four shareholders. [T-1/16/18 (Straka) at 48; T-1/17/18 (Arcara) at 16-17.] But Straka was denied fair compensation while other of the Majority shareholders benefitted by manipulating the way costs and revenues were allocated in an earnings matrix that was forced upon Straka, despite her protests. [T-1/16/18 (Straka) at 48-55; Pet. Exh. 5.] The hearing testimony established:

- Even though it was agreed that Straka and Arcara would raise their 2015 rates to $150/hour and fixed price quotations and contracts with existing audit customers were in place at said rates, in late January-early February, Zucarelli and Lenda insisted on increasing Straka's and Arcara's billable hour rate to $200/hour. This increase caused a gap between their new billable rate ($200/hour) and the rate that was actually charged to clients under the originally agreed upon rate of $150/hour. [T-1/16/18 (Straka) at 50-51]
- Zucarelli and Lenda already charged $200/hour to their tax clients and were unaffected by this change. But this late change in Straka's "rate" created an artificial disconnect between Straka and Arcara's fixed price audit billings and the Majority's application of the new rate to the exiting fixed price audits, through the earnings matrix, resulting in

artificial write-downs charged against Straka's billings that unfairly lowered her compensation. [T-1/16/18 (Straka) at 49-51.]

- As another example, Thomas Urbanek and Sid Weiss, former partners of Lenda and Zucarelli at their prior firm, were not shareholders in the Corporation[3]. Yet, Lenda and Zucarelli insisted that Urbanek and Weiss receive certain partner perks such as automobile allowances. In the earnings matrix, Lenda and Zucarelli credited to only themselves, 50-50 all of the billings, collections and receivables generated by Urbanek and Weiss, yet allocated Urbanek and Weiss's costs and expenses across all shareholders, assessing 25% of Urbanek and Weiss's costs and expenses against Straka's compensation but credited their billings, collections and receivables only to Zucarelli and Lenda. [T-1/16/18 (Straka) at 52-53.]
- After the Majority's tortured and inequitable applications of revenues and expenses, Zucarelli and Lenda calculated Straka's end of first full year earnings to be in the negative, -$17,880, while calculating positive earnings to each of the Majority in 2015. [T-1/16/18 (Straka) at 53-54; Pet. Exh. 5.]
- In 2016, Straka had the second highest billings and revenue [T-2/9/18 (Arcara) at 144], yet under the matrix system utilized by the Majority, she received the lowest amount of compensation in 2016. [Exh. 1; T-2/9/18 (Arcara) at 35-37.]
- Zucarelli raised the idea of paying dividends in 2016. [T-2/9/18 (Zucarelli) at 28-30; Resp. Exh. J.]
- As an S-Corp, dividends would have to be paid in the same amount to all shareholders. [T-2/9/18 (Zucarelli) at 32.]

[3] The terms "shareholder" and "partner" were often used interchangeably by the four shareholders of the Corporation.

- Although the Corporation would have been capable of paying dividends to the shareholders in 2016, the Majority instead opted to only pay wages based on their matrix, which had the effect of excluding Straka from sharing in the profits. [T-2/9/18 (Zucarelli) at 29-32.]
- As evidenced by the 2016 matrix, the Majority treated Straka differently than the Majority shareholders. Some of the revenues generated by Straka in 2016 were credited to Arcara in the matrix instead of Straka. [T-1/17/18 at 37-39]. In 2016, Straka was paid $60,000, whereas the Majority were all paid six-figure salaries, with Arcara being paid $194,000, Zucarelli $170,500 and Lenda $134,500 [*id.*; Exh. 1].
- The Majority withdrew all equity in the Corporation at year end 2016, leaving no operating capital. [Zucarelli at 31.]
- Straka was given no say in the compensation or Corporation after August 12, 2016. [T-1/17/18 (Arcara) at 40.]

Taking *de facto* distributions as salary or bonuses paid to the majority to the exclusion of a minority shareholder, is evidence of oppression. *Matter of Kemp & Beatley*, 64, NY2d 63, 67, (1984). As set forth in Section II below, when the Majority is preventing a minority shareholder from realizing the benefit of being a shareholder, and drains the corporation of its cash or other assets while maintaining debt thereby keeping the dissolution value worthless, it is proper to order a forced buy-out for fair value.

3. The Majority tried to dilute Straka's share percentage by voting in a new shareholder without proper notice to Straka.

As set forth above, the Majority's attempt to add a new stockholder in advance of the March 7, 2017 meeting is null and void as a matter of law because no notice was provided to Straka, nor was she given opportunity to vote on issuance of shares to Paul Eusanio. Rather, the

Majority shareholders discussed it only among themselves and voted to add Eusanio as a shareholder with no notice to Straka. [T-1/16/18 (Straka) at 47-48, 163; T-1/17/18 (Arcara) at 61-63, 65; T-2/9/18 (Zucarelli) at 36-38.]

The Majority's attempt to dilute Straka's interest without prior notice amounts to oppressive conduct by the Majority. *See also*, *Twin Bay v. Kasian*, 153 A.D.3d 998, 1002 (3d Dep't 2017) (a vote to issue additional shares without affording the minority shareholders an opportunity to buy additional shares was evidence of oppression). *See Matter of Quail Aero Service, Inc.*, 300 A.D.2d 800, 802, (3d Dep't 2002) ("[D]ilution of the value of the minority shareholder's stock will not amount to oppressive conduct when the minority shareholder is given an opportunity to supply capital and thereby maintain its percentage interest in the corporation.").

At the hearing, it was established that:

- Eusanio was made a shareholder in January 2017, prior to the meeting noticed in the 2/22/17 Notice. [T-1/17/18 (Arcara) at 40; T-2/918 (Zucarelli) at 36.]
- Straka was not asked her opinion about adding Eusanio as a shareholder, was not given notice that Eusanio was being considered to be added as a shareholder, and was not asked to vote whether or not to issue shares to Eusanio. [T-1/16/18 (Straka) at 47-48, 163; T-1/17/18 (Arcara) at 61-63, 65; T-2/9/18 (Zucarelli) at 36-38.]
- In fact, the Majority shareholders discussed Eusanio being added as a shareholder among themselves and did not discuss it with Straka. [T-2/9/17 (Zucarelli) at 36-37.]
- Nor did the 2/22/17 Notice regarding the 3/7/17 meeting to vote on directors provide any notice to Straka that any new shareholder had been added or that Eusanio would be

eligible to become a director. [Pet. Exh. 16; T-1/17/18 (Arcara) at 62-63, 65; T-2/9/17 (Zucarelli) at 37-38.]

- The testimony indicated that Eusanio was elected a director even before the 3/7/17 meeting. Arcara testified he was made a director in January 2017 [T-1/17/18 (Arcara) at 40], and Straka first learned that Eusanio was voted a shareholder and director when she read the Corporation's public announcement in an online Business First announcement. [Resp. Exh. A (Verified Petition) at ¶71 and Exh. A thereto.]

4. Additional evidence adds to the totality of the circumstances showing that the Majority oppressed and marginalized Straka.

Straka put into the Corporation extensive hours, effort, time, money and assets. [T-1/16/18 (Straka) at 18, 48-49, 54; T-1/17/18 (Arcara) 45-49, 60-61; T-2/9/18 (Arcara) at 44.] By spring of 2016, Straka hit the breaking point of being marginalized, mistreated and frustrated from realizing her reasonable expectations for her entering the venture. She gave formal verbal notice in June 2016 that she wanted to leave the firm and continued to provide professional services to clients through the end of day on August 12, 2016, the date she proffered her written resignation. [T-1/16/18 (Straka) at 60, 72-73.]

The Majority at first indicated that they would negotiate a redemption of her shares and details of her separation, but then never negotiated it at all, let alone in good faith. [T-1/16/18 (Straka) at 73.] Instead, the Majority continued to benefit themselves at Straka's expense. They paid themselves de facto dividends in 2016 by paying out all profits via W-2 compensation. They structured the compensation in this manner so that no dividends were paid to Straka. They even diverted revenues, including those generated by Straka, in the matrix that should have been used to calculate Straka's share of profits, that were instead credited to Arcara, increasing his compensation.

The hearing testimony established that:

- Straka discovered in July 2016 that the Majority blocked her access to the Corporation's financial books and records. [T-1/16/18 (Straka) at 61-62.] It was only after Straka e-mailed Zucarelli and his attorney that she regained access. [Exh. 7; T-1/16/18 (Straka) at 62-63.]
- After regaining access to the Corporation's financials, Straka learned that in July 2016 the Majority caused the Corporation to pay $30,000 to their attorneys for fees related to their dispute with Straka, yet assessed 25% of the liability for the attorney's fees to Straka. [T-1/16/18 (Straka) at 64-65; T-2/9/18 (Zucarelli) at 33-34; Pet. Exh. 8.]
- Straka also learned that the Majority withdrew $120,000 from a previously paid-off line of credit. Straka had no knowledge of the draw, nor gave authorization, but Straka had, and has, personal liability via a personal guaranty on the line of credit that has never been removed, without any personal benefit to Straka. [T-1/16/18 (Straka) at 64-66; T-2/9/18 (Zucarelli) at 33; Pet. Exh. 8.]
- Since August 2016, Straka has had no say in the Corporation [T-1/17/18 (Arcara) 40] but remains liable on certain corporate debts and obligations. [T-1/16/18 (Straka) 73-74.]

Continually marginalized, mistreated and frustrated from realizing her express and reasonable expectations for entering into the venture, on August 12, 2016, Straka gave written notice to the Majority that she was leaving the firm. Straka was, and is, willing to redeem her shares for a fair value [T-1/16/18 (Straka) 9; 93-94], but the Majority has continued to refuse to pay her a fair value, has refused to negotiate in good faith, has continued to act to oppress Straka and has continued to ensure that Straka is denied any relief if the Corporation is dissolved and liquidated. Although Arcara negotiated with Straka on the debt the two still owe on their

purchase of their former firm Arcara & Borcynski LLP, there has been no good faith negotiation made to buy out Straka's shares in the Corporation. [T-1/16/18 (Straka) 67-68; 88-91.]

II. A FORCED BUY-OUT OF STRAKA'S SHARES FOR FAIR VALUE IS PROPER UNDER THE TOTALITY OF THE CIRCUMSTANCES.

Where, as here, a petitioner has demonstrated entitlement to dissolution pursuant to BCL section 1104-a, "'a court has broad latitude to fashion alternative relief.'" *Matter of Clever Innovations, Inc.*, 94 AD3d 1174, 1177 (3d Dep't 2012) (quoting *Matter of Kemp & Beatley*, 64 NY2d at 74). It has long been recognized that an order of forced buy-out is an appropriate remedy under BCL section 1104-a. *Matter of Kemp & Beatley*, 64 NY2d at 75. Indeed, "upon a finding of oppressive conduct, 'consideration must be given to the totality of circumstances . . . to determine whether some remedy short of or other than dissolution constitutes a feasible means' of resolving the dispute." *Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 AD2d 81, 84-85 (3d Dep't 1985) (quoting *Matter of Kemp & Beatley*, 64 NY2d at 73).

Here, the Court has been presented with evidence demonstrating that, if the Corporation is dissolved, the Majority will continue to avoid paying Straka fair value for her shares while personally continuing to profit by continuing to operate the firm's business through a new corporation. By his own testimony, Zucarelli admitted that the outcome of this hearing will not affect his professional practice going forward, that Zucarelli, Lenda, Arcara and Eusanio will continue practicing together. [T-2/9/17 (Zucarelli) at 38-39.]

In such circumstances, an order forcing a buy-out for fair value, rather than liquidation, is appropriate. *See Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 AD2d at 85 (holding that a forced buy-out, rather than a liquidation, accommodates the interests of all shareholders by assuring that the oppressed shareholder receives full credit for his ownership interest while the

respondents will be free to voluntarily dissolve the corporation after compensating the petitioner, should they so choose); *Matter of Clever Innovations, Inc.*, 94 AD3d at 1177 (finding a forced buy-out to be appropriate because the oppressing party sought to "avoid paying fair value" for the oppressed party's shares "while personally continuing to profit by operating the company's business either individually or through a new corporation" after dissolution) (citing *Matter of Kemp & Beatley*, 64 NY2d at 75).

Straka's case falls squarely within this precedent. In a service based business such as the accounting firm Corporation here, the value is not in the physical assets of the corporation, particularly where Respondents continue to reap the benefits of the accounts receivable, physical plant, staff, and the line of credit and other debt incurred, while holding Straka hostage to the potential liabilities under the personal guarantees and employer fiduciary liabilities. Respondents refused to bargain in good faith for the redemption of Ms. Straka's shares and have strategically chosen not to elect to buy out her shares because they would then have to pay a fair value. Respondents would benefit from a dissolution at Straka's expense, because dissolution based on a sale of assets would not result in payment to Straka – she would be burdened with the Corporation's debt via personal guarantees. Meanwhile, Respondents would continue to profit further by operating the Corporation's business under a new entity.

As Respondents only stand to gain from a dissolution rather than a buy-out of Straka, it is fully within this Court's discretion and appropriate to order a forced buy-out of Straka's shares for fair value.

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