SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

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JOHN VAN HORNE, LEE SANDERS, ALLEN GREENE,

Plaintiffs,

- v -

ZOHAR BEN-DOV, CHRISTY MARTIN, 74-84 THIRD AVENUE MERGER CORP., 74-84 THIRD AVENUE CORP.

Defendants.

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INDEX NO. 652444/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION & ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2-34

were read on this motion for PRELIMINARY INJUNCTION.

Upon the foregoing documents, it is ORDERED that plaintiffs' motion for a preliminary injunction halting the contemplated freeze-out merger is GRANTED.

Freeze-out mergers of New York corporations are not difficult to effectuate and are preferable to the self-help mechanisms sometimes employed by majority controllers. So long as the corporation can articulate any valid business purpose for the freeze-out, the court will defer to its business judgment and permit it (*see Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 573 [1984] ["The benefit need not be great, but it must be for the corporation"]). Freeze-out mergers inherently have a disparate impact on a minority shareholder (*see id.*) and courts have been liberal in permitting them (*see Zelouf v Zelouf*, 2013 WL 4734873 [Sup Ct, NY County Aug. 30, 2013] [permitting merger to avoid jury trial]). There must, however, be a valid exercise of business judgment and a corporate purpose. A freeze-out merger that merely seeks "to increase the individual wealth of the remaining shareholders" is not permitted (*Alpert*, 63 NY2d at 573). In sum, it doesn't take much for a proper freeze out. But rank pretext will not do.

Here, Greene, a former shareholder who transferred his minority stake in the corporation to a trust, and Ben-Dov, who through his trust controls a majority stake, had a falling-out. Ben-Dov wants to rid himself of Greene. If there was a bona fide corporate benefit to be obtained by the freeze-out, that would be fine. The court would defer to management's business judgment and deny a preliminary injunction, knowing that a fair value proceeding under BCL § 623(e) can provide a sufficient remedy.

That's not this case though. A single purpose holding company that owns real estate with a long-term commercial lease gains nothing from expelling a passive shareholder where,

as here, the purported corporate benefit is the avoidance of entanglement in the minority shareholder's divorce proceedings that have no reasonable prospect of adversely affecting the corporation. There has been no showing that the trust that owns the shares is subject to invalidation and even if somehow the soon-to-be-ex-wife becomes a shareholder, that should not materially affect the corporation, since her minority, non-controlling stake could hardly be projected to impact anything about the corporation's operations--collecting rent. To be sure, if the court was convinced that the corporation would be injected into bitter divorce proceedings and a freeze-out would be a silver bullet to avoid that headache, including the substantial attorneys' fees that would be incurred, that would be enough of a business purpose to justify the freeze-out. It is not convinced. The divorce proceedings have been pending since 2018 and are on the eve of trial; if entanglement in discovery was a true concern the freeze-out would have occurred long ago. It also is not clear that Ben-Dov, his trust, or the corporation are subject to jurisdiction in the divorce proceedings. In any event, Ben-Dov himself was subpoenaed, not the corporation; and only for Greene's trust's records, not records of the corporation (*see* Dkt. 24). The subpoena, perhaps, was served because Ben-Dov is a former trustee.

On this record, there is no credible evidence at all that the corporation is involved in the divorce proceedings or that the results of those proceedings would have an adverse effect on the corporation if the freeze-out did not occur. It is "duly noted" that the purported risk of corporate entanglement in the divorce proceedings was raised for the first time in opposition to this motion by counsel and appears to be an after-the-fact justification to paper over Ben-Dov's failure to actually consider the corporate benefit requirement at the time he decided to proceed with a freeze-out merger (*see generally* Dkt. 10).

No actual corporate benefit has been stated and there is no evidence that proper business judgment was exercised either.

Plaintiffs have demonstrated a likelihood of success on the merits that the merger has no corporate benefit, that the loss of equity is an irreparable harm and that an injunction is permitted by BCL § 623(k) (*see Norte & Co. v New York & Harlem R.R. Co.*, 222 AD2d 357, 358 [1st Dept 1995] [§ 623(k) is an "exception to the exclusivity rule"]). The balance of the equities, moreover, favors plaintiffs. There is no imminent need for a freeze-out merger given the nature of the business and, if it turns out that a permanent injunction should not be issued, the parties will end up in the very same place -- a valuation proceeding under § 623(e).

If these circumstances do not warrant an injunction, it is hard to imagine when one would ever be issued. After all, if an injunction were not permitted and the only remedy was to receive fair value under § 623(e), the business-purpose requirement would be entirely meaningless (*see Loengard v Santa Fe Indus., Inc.*, 70 NY2d 262, 266 [1987] [recognizing that equitable relief is available to remedy an improper freeze-out]).

Finally, at the conclusion of the divorce proceedings, even the purported corporate benefit will be gone. The justification for continued litigation will be eliminated. That should be considered in assessing whether substantial discovery is warranted. After all, the remainder of the case merely seeks a discreet and uncomplicated accounting to determine if there were any distributions made recently for which plaintiffs did not receive their pro rata share.

Accordingly, it is ORDERED that during the pendency of this action, defendants are enjoined from conducting a freeze-out merger that would deprive plaintiffs of their interest in the corporation unless the court orders otherwise and modifies or lifts this preliminary injunction; and it is further

ORDERED that plaintiffs must post an undertaking of $1,000; and it is further

ORDERED that a telephonic preliminary conference will be held on August 11, 2020 at 3:00, plaintiffs' counsel shall circulate a dial-in number 30 minutes before the call, and the parties shall e-file and email the court (mrand@nycourts.gov) their joint letter at least one week beforehand.

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7/13/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

	CASE DISPOSED			X	NON-FINAL DISPOSITION		
X	GRANTED		DENIED		GRANTED IN PART		OTHER