SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

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In the Matter of the Application of Leo Balk :

Petitioner, : DECISION AND ORDER

For the dissolution of 125 West 92nd Street Corporation pursuant to Section 1104-a of the BCL : Index Number 100439/04

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Hon. Lewis Bart Stone, J

This is a special proceeding commenced by Order to Show Cause (the "Order") issued on January 16, 2004 and returnable in March, 2004, by Leo Balk ("Balk") a tenant shareholder of the four unit cooperative apartment building at 125 West 92nd Street, New York, N.Y. (the "Building") seeking *inter alia,* to dissolve 125 West 92nd Street Corporation (the "Corporation"), the New York Business Corporation which owns the building, pursuant to Business Corporation Law ("BCL") §1104-a. By reason of his ownership of shares of the Corporation, constituting 30.75% of the Corporation's outstanding shares (the "Shares") and the proprietary lease related thereto, Balk effectively "owns" Apartment 3 ("The Apartment") of the Building as a coop apartment. Although the Order and its caption related solely to the dissolution of the Corporation and the furnishing of schedules in connection therewith, the Verified Petition (the "Petition") attached

to the Order alleged six additional causes of action (the "Six Causes of Action")[1] and refers to "Petitioners and Plaintiffs, Leo Balk and Francois Avenais (hereinafter collectively "Petitioners or Plaintiffs or Petitioner/ Plaintiffs"), and later refers to Avenais as a "Plaintiff." In the Petition, Balk further sought damages under the Six Causes of Action, against both the other shareholders and the Corporation for breach of contract, breach of common law duty of good faith and fair dealing, breach of fiduciary obligations, for discrimination on the basis of gender and national origin, and for discrimination on the basis of sexual orientation and national origin. A separate cause of action (the Fifth) also sought a receiver for the Corporation. The Petition, but not the caption, also names as defendants the other shareholders of the Corporation. Each of such shareholders were served with a copy of the Notice of Petition.

On March 2, 2004, the Corporation responded to the Order by serving notice of its election, pursuant to BCL §1118, to purchase the Shares,[2] and its answer to the petition. The Corporation also on such date cross moved for summary judgment, pursuant to Section 3212 of the Civil Practice Law and Rules

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[1] Counts First, Second, Third, Sixth and Seventh.

[2] Balk's interest in the apartment is evidenced by both the Shares and by a long term "proprietary lease" of which he is the tenant, such interests jointly constitute the collective indicia of ownership of a cooperative apartment.

("CPLR") to dismiss the Petition on the grounds that (1) the Corporation had elected to buy Balk's shares under BCL §1118, (2) the Six Causes of Action could not, under CPLR §103(b), be joined with this special proceeding, and (3) the other shareholders were not named as defendants or respondents. The Corporation also requested that the Court retain jurisdiction to carry out the parties' respective rights under BCL §1118.

Balk, on March 5, 2004, submitted his response to the Corporation's answer and motion and reiterated his request for a receiver for the Corporation.

The parties' allegations confirm that the relationship between Balk and the other tenant-shareholders of the Building is at the least, fractious and unpleasant.[3] Counsel have indicated that such relationship is unlikely to be restored to the level necessary for the level of harmony needed for the four tenant-owners of the self-managed brownstone cooperative to continue as successful tenant-cooperators. As the parties could agree to no resolution, they have submitted the matter to the Court.

Initially, the Court dismissed the Six Causes of Action as improperly joined to the Special Proceeding. The Six Causes of Action, whatever their merits,

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[3] Whether the acts of Balk's antagonists were also actionable is a separate issue, and is one not before this Court at this time. See the discussion of the Plenary Action, infra.

cannot properly be a part of an application for the dissolution of a corporation. While certain of the allegations may have supported or provided grounds for Balk's petition to dissolve the Corporation under BCL §1104, they are improperly joined as causes of action in this proceeding. CPLR §103(a) requires "all civil judicial proceedings to be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized." No special proceeding is authorized under the CPLR to resolve the claims set forth in the Six Causes of Action.

Although in the body of the Petition, claims are asserted against the Corporation and the other shareholders individually, the caption does not name the shareholders as defendants or respondents. It is thus questionable whether jurisdiction has been acquired over such shareholders as they had faulty notice under the caption, even though they may have received the Petition. The Six Causes of Action were dismissed by this Court without prejudice to Balk commencing a separate action against such shareholders and/or the Corporation on such (or any other) causes of action.

Following the dismissal of the Six Causes of Action, Balk and Avenais commenced an action in Supreme Court, New York County, under Index Number 107014/04 against the Corporation and its remaining shareholders (hereafter the

"Plenary Action").[4] In the Plenary Action, Balk again asserted the Six Causes of Action and added three new causes of action against the defendants therein for negligence, gross negligence and intentional infliction of emotional distress. The defendants in the Plenary Action responded by moving on June 10, 2004, pursuant to CPLR §2214(b), to dismiss all causes of action therein, for the failure to state any viable cause of action. Such motion is sub judice before the Honorable Bernard Fried, Supreme Court, New York County.

The Corporation's election pursuant to BCL §1118 to purchase Balk's shares was initially opposed by Balk on the grounds that such election would foreclose Balk's Six Causes of Action, as well as any claim in a derivative action. However, as the dismissal of the Six Causes of Action was not on the merits, and was without prejudice to Balk's reassertion of such causes of action in a separate action and as the Plenary Action replaced the Six Causes of Action, this objection is without merit and is denied.

The buyout right under BCL §1118, exercisable in response to a petition for dissolution under the BCL §1104. See, e.g., Sakow v. 633 Seafood Restaurant, Inc, 297 AD2d 229 (1st Dept. 2002). It is designed to balance the right of a

[4] Leo Balk and Francois Avenais v. 125 West 92nd Street Corporation, Gail Cohen, William Cohen, Felice Firestone, Donald Firestone and Edward Boyle.

shareholder to have his investments in a corporation protected against the risk to the corporation and its other shareholders of being faced with an expensive lawsuit and disruption by a minority shareholder whose complaints may be without merit. This statutory right is an irrevocable right of the corporation and may not be challenged by the complaining shareholder, so as to resolve the dispute in the most efficient manner. The result is akin to no-fault divorce where the division of marital assets becomes the sole question once the marriage has failed.[5]

BCL §1118 was adopted in its original form by the legislature in 1979 (Laws 1979, c.217) as a statutory compromise expressly to deal with shareholder disputes in close corporations. This statutory compromise may be, as many compromises are, imperfect in its application in a particular case, but it is the rule. By purchasing shares of the Corporation, which is a New York business corporation, Balk and each other shareholder of the Corporation elected to be governed, protected and bound by all provisions of the BCL together with all attendant benefits and burdens, including those relating to dissolution and the buy-out election under BCL §1118.

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[5] To secure relief under BCL §1104, a petitioner must establish facts constituting improper acts and oppression under the standards of §1104. No such facts are in issue if a §1118 election has been made.

BCL §1118 was designed to prevent a majority shareholder or group shareholders from improperly freezing out a significant minority shareholder in a close corporation, where such minority shareholder had no practical ability to sell his stock, recognizing that there is generally no market for minority interests in a close corporation. (See the discussion in Corporate Dissolution in New York, Liberalizing the Rights of Minority Shareholders, 56 St. John's L. Rev. 24 (1981)). However, this theory is somewhat anomalous in the case of a "minority" tenant shareholder of a New York cooperative, such as the Corporation, as there is a regular market for cooperative apartments in small coops in Manhattan such as the Apartment. BCL §1114, however, makes no distinction and does not authorize a Court to make a distinction between close corporations, corporations organized to be a housing cooperative or other corporations. Thus notwithstanding that a procedure under BCL §1114 is unnecessary here to carry out the original legislative purpose of the BCL because Balk may easily recover his investment by selling his shares in a significantly deep market, the Court must proceed under BCL §1114 in the absence of a settlement by the parties. Under BCL §1114, the Court must determine the fair value of the Shares, and fix the appropriate terms and conditions for their purchase. As the election has been made, dissolution of the Corporation is moot, and Balk's motion for an order to

dissolve the Corporation is denied.

Balk has also requested the appointment of a receiver of the Corporation's property in his Petition, and reiterated such request by Order to Show Cause issued by the Court on February 17, 2003. Following the return of such order, this Court held a hearing on Balk's request for a receiver and following such hearing, denied such request. While a receiver could be appropriate where there was a material danger that the Corporation's property would be lost or removed from the jurisdiction of the Court or materially injured or destroyed, rendering Balk without recourse to collect the share price fixed by the Court, such are not facts here. There is no possibility of the removal of the Building the Corporation's principle asset from the jurisdiction of the Court and no showing and little likelihood of its intentional[6] destruction or damage. There is no basis to believe the other shareholders will be attempting to damage the Apartment or any other portion of the Building. To the extent the Corporation has funds which might be misappropriated, such risk is speculative, and the amount of such funds, when compared to the value of the Building, unencumbered by a mortgage, is minimal. Balk's motion to appoint a receiver was and is therefore denied.

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[6] There has been no showing that the Building is not insured for unintentional damage. To the contrary, the dispute of the parties relating to the propriety of an assessment to pay for casualty insurance (see the discussion infra) indicates that the Building is insured.

The value of the Shares is to be set at their "fair value...as of the day prior to the date on which such Petition was filed, exclusive of any element of value arising from such filing, but giving effect to any adjustment or surcharge found to be appropriate in this proceeding under Section 1104(a)." BCL §1118(a). Such fair value may in the case of shares evincing ownership of a cooperative apartment, be initially determined by reference to market sales data for similar apartments. The terms and conditions of the sale of such shares which include the timing of Balk's surrender of possession, the condition of his apartment at the time of surrender and other related matters are, under BCL §1118(a), to be set by the Court.

To determine the price and terms and conditions for the re-purchase of the Shares, the Court advised the parties that they should try to agree on both, and that failing that, the Court would hold a valuation hearing and consider any remaining differences on the parties view as to the terms and conditions of sale. In the latter context, the Court proposed that, in considering the terms and conditions of sale, the parties should begin with the template of the "Blumberg Form 123, Contract of Sale of Cooperative Apartment, 7-01", (the "123 Form"). The 123 Form, prepared by the Committee on Condominiums and Cooperatives of the Real Property Section of the New York State Bar Association, is almost universally used in New

York City for the resale of conventional cooperative apartments[7] such as the Apartment. The parties adopted this approach, but were unable to fully agree and submitted their proposed departures, which have been considered by the Court. As the parties also could not agree on a value of the Apartment, the Court conducted an evidentiary hearing as to the fair value of the Shares. Under BCL §1118(b), the evaluation date is "as of the date prior to the date on which such petition was filed." As the petition was filed on January 16, 2004, the proper evaluation date for the Shares is January 15, 2004.

At the hearing, each party submitted written appraisals for the Apartment which were admitted into evidence[8], and qualified such appraisers as experts. Each appraiser offered his opinion on the value of the Apartment and the reasons

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[7] Publicly aided cooperatives and initial cooperative offerings often use different contract forms. The State Bar Committee designed the 123 Form, revising an earlier form, to provide a common ground for documentation of resales transactions of conventional cooperative apartments. Because of this convention, the market for cooperative apartments assumes that the documentation for sale will not significantly deviate from this common ground. Setting the terms and conditions of the transaction for the repurchase of Balk's shares with significant reference to the 123 Form minimizes any effect the terms and conditions of sale will "materially effect the valuation of the Apartment in the market, thus supporting the validity of the appraisal method of determining value.

[8] Balk's appraisal recited it was made as of January 16, 2004 and the Corporation's appraisal was made as of January 15, 2004. Although Balk's appraisal was made as of one day later that the evaluation date required by BCL §1118, the Corporation did not challenge such appraisal on such ground. Because there was no challenge and as Court finds, as a matter of fact, that the difference of a day is under these circumstances not material, both appraisals have been accepted into evidence and were considered by this Court in reaching its determination of fair value.

therefor. Balk's appraiser initially opined that the value of the apartment was $860,000, but after one factual assumption[9] was corrected during cross examination, reduced this amount to $835,000. The Corporation's appraiser opined that the Apartment was worth $800,000. This Court finds both appraisers generally credible, and as the difference between their opinion of value was only about 4%, the Court finds neither to be out of line. In making its finding of value as a matter of fact, the Court reviewed the appraisal assumptions and methodology of both appraisers. Both approached their evaluation task by using the comparable sales method. The Court finds such to be the appropriate appraisal paradigm.

Because brownstone apartments in Manhattan are rarely exactly comparable, in a proper appraisal, each "comparable" sale must be adjusted by the appraiser. However, the choice of "comparables" and the reason for adjustments and the amounts thereof are not an exact science. Further, the appraisal process involves a semi-subjective analysis of factors which, although meaningful, may not be of easy quantification. Among these factors suggested by the experts were issues as streetscape view, location of other uses in the vicinity, and variations in room size or configuration, and the quality of the Apartment and the age of the

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[9] He had assumed that the terrace adjacent to the Apartment was for the sole use of the Apartment. When both parties conceded that it was not but was available to all tenant shareholders, he reduced his opinion of the value of the Apartment by $25,000.

kitchen. Further, as both parties acknowledge, there has been a rising market, sales of "comparable" units must be adjusted for the time they were contracted to be sold. Balk's appraiser, in this context, did not, following FIRREA appraisal guidelines, include comparable sales subsequent, but near in time, to the valuation date.[10] Each party questioned the techniques used by the other party's appraiser on various grounds to urge that the opposing appraiser over or undervalued the apartment, as the case may be.

After the hearing was closed, Balk attempted to submit additional material including additional pictures of the streetscape relating to the comparables as well as a letter from a broker indicating a higher current value for the Apartment. This material was not considered as the hearing had closed and Balk did not reserve an opportunity additional to present evidence. Further, the photographs had not been appropriately introduced into evidence or subjected to testimonial scrutiny. In addition, an opinion of a broker is not the opinion of a qualified expert, and therefore is not admissible. Based on the testimonial evidence and exhibits

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[10] A common method for a adjusting values as of a date certain uses comparable sales before and after the valuation date and interpolates the value on the valuation date from such data. FIRREA, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 USC §1821[e][i], which establishes standards for appraisals for financial institutions is principally concerned with appraisals made in connection with loan financings which are generally made on a current basis. Although the FIRREA rule which excludes subsequent sales may therefore be a sensible rule for FIRREA purposes, is not necessarily a sensible rule for a retrospective appraisal as is required here.

received into evidence, this Court has determined that, as a matter of fact, the fair market value of the Apartment is $825,000.

The Corporation contends that the existence of Balk's Six Causes of Action themselves, initially as a part of the Petition, and later as a part of the Plenary Action, should impact on the determination of the fair value of the shares, and the fair value of the Shares should be the fair market value of the Apartment as adjusted by such impact. To support this position, the Corporation referred to the testimony of both appraisers who conceded that their respective appraisers did not include consideration of the impact on the Plenary Action value, and that the existence of a material contingent liability of the Corporation, not yet reflected in maintenance charges, should reduce the market value of the Apartment. This is hardly surprising as a "willing purchaser" of the Apartment would, in effect, be purchasing a portion of such liability which would either be reflected in a future assessment or higher maintenance costs if funded by a new or increased mortgage.

The contingent liability claimed would arise from both litigation costs to the Corporation of this proceeding and the Plenary Action, to any liability of the Corporation should it be found liable in the Plenary Action, and to any indemnity liability of the Corporation, should its officers or directors (which in this case are the other shareholders) be found liable in the Plenary Action, which indemnity is

not covered by the Corporation's insurance.

While this argument may set forth valid considerations as to the "fair market value" of the Apartment today, §1118 requires the Court to find the "fair value," and find it as of a specific date, i.e. January 15, 2004. On that date the Petition was not pending and the Six Causes of Action had not asserted . Further, BCL §1114 expressly excludes from the Court's consideration "any element of value arising from such filing."

Accordingly, no possible contingent liability arising out of this litigation or the Six Causes of Action, or a fortiori, the Plenary Action may be considered by this Court in setting the fair market value of the Shares. The Corporation's contention that it should, is rejected.

The Corporation also contends that in fixing the fair value of the Shares, the Court should consider the concept of minority discount, and reduce such value accordingly.

Minority discount is a concept commonly used in the fair market value appraisal of minority share interests of closely held entities and may be considered in an appropriate case in a proceeding to fix fair value under BCL §1118. It reflects the fact that a buyer of a minority interest in an enterprise would pay less for them than an aliquot portion of the fair market value of the entire enterprise.

Minority discount analysis, however, may be used only where there is no effective market for the shares to be evaluated. For example, the case of a public corporation, where its shares are readily and regularly tradeable, such concept is not appropriate. It is similarly inapposite in considering the sale of shares representing a Coop where a regular market exists, as is true here. Using a "minority discount" analysis is especially inapposite in the case of a viable New York City conventional cooperative, when the aggregate value of the apartments generally exceed the value of the building as a rental building. This result arises significantly from tax benefits available to owners of cooperative apartments unavailable to renters. In fact, if an evaluation were to have begun with the building not as a cooperative, a factor of a "minority premium" would have to be applied to fix the fair value of an individual apartment. The Corporation's request that the Court apply (and in addition, estimate and fix sua sponte) a minority discount, is therefore denied.

The parties recognize that BCL §1118 requires the court to adjust the market value by the adjustment provided in BCL §1104(a)(d). Such adjustment which is to be made upon a finding of "willful or reckless dissipation or transfer of assets without just or adequate compensation therefor" is not apposite here. Here, the sole transfer prior to the evaluation date at issue in this case was for the initial

retention of counsel, a purpose hardly improper, as the Corporation faced an action for both dissolution and damages.[11] Certainly, the amount of the retainer was not unreasonable, and it cannot be said, after reviewing the extensive papers submitted by counsel to the corporation, that the payment was without substantial consideration.

Faced with scant reserves, and the need to use available cash to return counsel to oppose the assertion of the Six Causes of Action, the Corporation, exercising its business judgment, assessed all shareholders (as authorized in the proprietary lease) to enable the corporation to pay its insurance premium. Such payment was not a dissipation of corporate assets, and full value was received from the Corporation's carrier for the payment. In any event, the concept of "willful or reckless dissipation or transfer" as set forth in the statute is designed to reach transfers intended to strip the corporation of assets, so as to cheat the minority shareholders. Whatever the merits of the contested expenditures of the Corporation, they weren't designed to dissipate assets and the corporation received value therefor.

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[11] Unnecessary to be decided is the question whether if the petition merely sought dissolution, use of corporate funds to defend against such a petition would require an adjustment. Here Balk elected to sue the corporation, and the retention of counsel to have such counts dismissed was hardly improper, as the additional counts were in fact dismissed.

Accordingly, this Court finds no basis to adjust to the fair value of the Shares as found by the Court and such fair value is hereby ordered to be the purchase price for the Shares, subject only to closing adjustments set forth in the Terms of Sale, infra. Consideration of interest and counsel fees are further discussed below.

TERMS OF SALE

The parties, have submitted their proposed terms of sale using the 123 Form as a template . Consistent with their disagreeing on most issues in this controversy, they also disagreed on many of the terms of sale, leaving to this Court the necessity of fixing such terms. In fixing certain of such terms, the Court will adopt and incorporate by reference certain printed terms of the 123 Form in its order. Some of these terms have been agreed to by the parties, and others which the Court finds appropriate. The Court also has fixed other terms as appropriate to carry out the intent of BCL §1118.

It is hereby Ordered that the following shall be the terms and conditions of the sale of the Shares to the Corporation.

1. The transfer (hereafter the "Closing") shall take place on the date sixty days after the service by either party of Notice of Entry of this Order, or if not a business day, the next business day.

2. Closing adjustments shall include unpaid assessments made prior to January 16, 2004 and maintenance to 11:59 p.m on the day preceding the Closing plus interest thereon, at the legal rate from the date originally payable, and any State or other tax exemption on the real property of the Corporation.

3. Taxes, including transfer, income, sales or other, shall be payable by the party upon whom such taxes are imposed by law.

4. Balk shall, at Closing, deliver (i) the Shares endorsed by him in blank for transfer, free and clear of all liens, mortgages, claims or charges, other than claims of the Corporation, (ii) his copy of his proprietary lease,[12] which shall be deemed surrendered, and (iii) all keys to all locks in the Apartment, the Building or the mail boxes, in Balk's possession or control.

5. The Corporation shall pay Balk at the Closing, the purchase price as adjusted, as provided in this Order, by cash (not to exceed $1,000), unendorsed Certified or Bank Check, or checks drawn against New York Clearing House Funds immediately available, and shall deliver to Balk or release of his obligations under the proprietary lease being surrendered.

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[12] This will obviate burdening the Corporation with any claims against the lease by any third party. The Corporation is of course free to issue a new proprietary lease to any subsequent purchaser of the Apartment.

6. The following provisions of the 123 Form shall be terms and conditions as if set forth here in full. Section 3.3, Section 9, Section 10.3, Section 15.2, Section 21, Section 24 and Section 25.

7. The sale shall include those items described in Section 1.11 of the 123 Form except floor to ceiling bookcases, curtain rods in upstairs bedrooms and all curtains and draperies. Included items shall be in good working order at the Closing.

8. Balk shall maintain those portions of the Apartment in good repair as are to be maintained by him under the proprietary lease, through the Closing.

9. At the Closing Balk shall deliver possession of the Apartment, broom clean and free and clear of all personalty not included under paragraph 7, supra, and all tenancies, licensees or occupants.

10. No failure of Balk to comply with any term relating to the physical condition of the Apartment at the Closing, shall excuse performance by the Corporation, but the Corporation may in such event, as its sole remedy, apply to this Court for an order fixing compensation for such default. All other non-compliance by either party to these terms shall, unless waived in writing by the other party, constitute a violation of the order of this Court. Any party aggrieved by such violation may apply to this Court upon ten (10 days) on notice to the other

party, to sanction the defaulting party.

LEGAL FEES

Both parties to this dispute have sought to have some or all of their legal fees allocated to the other party, either directly, by taking into account the Corporation's assessment of its tenant shareholders to fund legal fees or by requiring that the purchase price adjustment include such fees. The general New York rule is that, absent a statute or special situation, legal fees incurred by a party are for that party's account.[13] Thus, ab initio, each party has the burden to show how their legal fees are to be shifted to the other in this case, before the Court may even address the propriety of the amounts, or in the case of the Corporation, the allocation of such legal expenses between the Corporation and the shareholders other than Balk.

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[13] Such rule is not necessarily the only way a reasonable legal system may be organized. Under the English rule for example, the losing party is responsible for the winner's legal costs. There are policy arguments for both systems. However, these policy arguments were resolved in New York in the first half of the 19th century with the legislative adoption of the so-called Field Code which codified the former common law of civil procedure. This Code, following Benthamite conceptions of Utilitarianism, struck a balance by imposing fixed awards in lieu of fees to the successful party, under the rubric of "costs". In as true Benthamite approach, the amounts for each portion of a proceeding were fixed, so as to avoid the litigation expense of determining a "fair" fee and to balance concerns that the retention of a particularly expensive lawyer could bludgeon a less deep-pocketed adversary into an unfair surrender. A review of the dollar amounts of the costs so set at the time indicates that the legislature set them at about one-half of the average fee for the portion of the case to which they related. As such dollar amounts have not been changed for over 150 years, inflation has eroded this compromise system to where a litigant's cost of taxing and collecting "costs" regularly exceeds the "costs" themselves.

BCL §1118 requires or implies no deviation from the general New York rule. In the initial phase, Balk sought a dissolution, which dissolution was countered by the Corporation's election to purchase his shares. At about that time, Balk resigned as an officer and director of the Corporation, as the Court proceeded to the evaluation process under BCL §1118. Such section, by fixing the fair "value" of the Shares "as of the day prior to the date on which such petition was filed," implies that litigation expenses incurred by either party thereafter are not to be considered by this Court. While BCL §1118(b) does recognize the impact of delay on a petitioner by authorizing the Court, "in its discretion...to award interest from the date the petition is filed to the date of payment for the petitioner's share, at an equitable rate, upon judicially determined fair value of his shares," it does not provide for any shifting of the obligations for attorneys' fees or other litigation expenses incurred by parties after the filing of the Petition.

This statutory approach is consistent with the legislative history and purpose of BCL §1118, which was to create a "no fault" divorce for disputes between shareholders of a close corporation. As the essence of the legislative solution was to avoid the need, in the proceeding, to assess and allocate fault, it is consistent with such public policy to relegate the parties to their own litigation costs.

Accordingly, this Court has not considered legal fees as an adjustment to the fair value of the Apartment in this proceeding. As the Court has not considered such expenses in determining "fair value," their proper allocation as between the other shareholders and the Corporation is not and need not be addressed.

INTEREST - USE AND OCCUPANCY

BCL §1118(b) provides:

"In determining the fair value of petitioner's shares, the Court in its discretion, may award interest from the date the petition is filed to the date the payment for the petitioner's sale [sic] at an equitable rate upon judicially determined fair value of his shares." This provision recognizes that under a §1118(b) election, the petitioner is to be paid for the fair value of his Shares as of day before the petition date, yet he must await the completion of Court procedures, before he can receive his money and can reinvest it. This section has been construed to require the payment of interest. See, e.g.: In Re Blake v. Blake Agency, Inc., 107 AD2d 139 (2nd Dept. 1985); In Re F.P.D Realty Corp. v. Tru-Way Private Taxi Corp., 267 AD2d 111 (1st Dept. 1999); Hall v. King, 177 M.2d 126 (Sup. Ct., N.Y. Co., 1988). The rate, however, is not necessarily the

"statutory rate,"[14] but at a rate which is found to be equitable by the Court.

The Corporation, on the other hand, seeks compensation from Balk for Use and Occupancy of the Apartment, on the theory that from the petition date, which fixed the Corporation's obligation to Balk, Balk has been able to use and occupy the Apartment, and should reimburse the Corporation for the value of such benefit. The Corporation submitted evidence through its appraiser that fair market rental for the Apartment was "at least $3000 per month." As an unregulated fair market rental is a reasonable indicia of the Use and Occupancy value of an apartment, such amount, if established by competent evidence would be an indicia of a proper use and occupancy amount. However, the evidence presented by the Corporation is that the fair market rent is "at least" $3000 per month, the only evidence before this Court is useful only to establish a minimum Use and Occupancy.

Since January 16, 2004 Balk has both, not had his money for the Shares, on one hand and has been enjoying the Use and Occupancy of the Apartment on the other. This state of facts will continue until the Closing. During such period the Corporation cannot rent or effectively sell the Apartment. Thus, the Corporation cannot be deemed to have "profited" from the delay of paying Balk for the Shares.

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[14] In Re Blake v. Blake Agency, Inc., supra, the Court elected to apply the statutory rate.

While the Corporation has not submitted sufficient competent evidence to establish what the exact Use and Occupancy allowance should be, Balk has also not submitted any evidence to indicate what an appropriate interest rate would be.

To resolve these issues, this Court has determined, as equitable matter, under the circumstance, that the amount of Use and Occupancy in excess of the maintenance rate (which maintenance covers Balk's aliquot portion of the operating costs of the Building) to which the Corporation is entitled as a closing adjustment, is to be offset by the amount of interest to which Balk is entitled upon his Shares from and after the filing of the Petition. Accordingly, while both Use and Occupancy and Interest are hereby ordered to be payable, they will be in such amounts as to fully offset each other, except for the maintenance, which will be for Balk's account. Payment will be accomplished through closing adjustments,

OTHER MOTIONS

During the course of this litigation, each party filed additional motions to complain of and halt allegedly improper actions by the other party. In each case, the Court issued instructions and Orders and brokered effective interim cease fire compromises between the parties. As the resolution of these motions will no longer be relevant upon the Closing, they are dismissed, effective upon the

To the extent that this Decision and Order conflicts in any way with any interim order of this Court issued during the pendency of this proceeding, such prior interim orders are hereby modified to be consistent with this Decision and Order.

This is the Decision and Order of the Court.

DATED: AUGUST 11, 2004
NEW YORK, NEW YORK

Hon. Lewis Bart Stone
Justice of the Supreme Court