NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OR NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

ESTATE OF CLAUDIA L. COHEN

Plaintiff

v.

BOOTH COMPUTERS and
JAMES COHEN

Defendants.

DOCKET NO. BER-C-135-08

CIVIL ACTION

Tried: July 13-15, 20-22, 2009

Decided: August 4, 2009

Honorable Robert P. Contillo, J.S.C.

Michael R. Griffinger, Esq., Guy V. Amoresano, Esq., and Lan Hoang, Esq. (Gibbons, P.C.) appearing for plaintiff Estate of Claudia L. Cohen;

Russell J. Passamano, Esq., Benjamin Clark, Esq., and Frank Huttle, III, Esq. (DeCotiis, Fitzpatrick, Cole & Wisler, L.L.P.) appearing for defendants Booth Computers and James Cohen.

This matter was tried by the court, sitting without a jury, on July 13, 14, 15, 20, 21 and 22, 2009. Post-trial submissions were received on July 31, 2009.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, the Estate of Claudia L. Cohen (the "Estate"), by its Executor, Ronald O. Perelman, filed a Complaint on April 7, 2008. The defendants are Booth Computers, a family partnership in which the Estate claims an interest, and James Cohen, the brother of the decedent Claudia L. Cohen.

On January 30, 1978, the three children of Robert and Harriet Cohen – Claudia L. Cohen, Michael Cohen and James Cohen – entered into a Partnership Agreement to form Booth Computers as a partnership under the laws of the State of New Jersey. The children were ages 27, 21 and 19, respectively, at the time they entered into the Booth Partnership Agreement.

Michael Cohen passed away on June 30, 1997. He is survived by his wife, Marla, and their one child, Michael Spencer. Upon Michael's death James and Claudia became the sole remaining partners, with each having a 50% interest in Booth.

Claudia married Ronald O. Perelman in 1985. One child was born of the marriage of Claudia Cohen and Ronald Perelman, to wit, Samantha, presently a minor. Claudia and Ronald divorced on June 29, 1994. Claudia remained a partner of Booth, notwithstanding a provision of the Partnership Agreement mandating buy-out of a partner's interest in the event of the partner's death or divorce.

Claudia died on June 15, 2007. Her former spouse, Mr. Perelman, is the Executor under Claudia's Last Will and Testament. James, as the sole remaining sibling and partner, sought to buy out Claudia's interest in Booth by tendering to her Estate the sum of $177,808.50. That sum was derived, says James, by applying the formula mandated by the Partnership Agreement, which provides that the

> "… full and true value of the Partnership is equal to its net worth plus the sum of FIFTY THOUSAND ($50,000.00) DOLLARS. The term 'net worth' has been determined to be net book value as shown on the most recent Partnership financial statement at the end of the month ending with or immediately preceding the date of valuation…".

(Paragraph 16 of the Partnership Agreement).

The Estate rejected the tendered $177,808.50, and contends that the fair market value of its one-half interest in the partnership is worth in excess of $10 million. This suit followed.

In <u>Count One</u> of its Complaint, the Estate seeks declaratory relief, declaring that Paragraphs 15 and 16 of the Booth Partnership Agreement are null and void by reason of unconscionability, voluntary elimination and/or waiver. Alternatively, the Estate contends that application of the buy-out formula contained in the Partnership Agreement yields a buy-out value of $10 million. The Estate also seeks to compel James Cohen to purchase the Estate's interest for fair value, pursuant to N.J.S.A. 42:1A-34, the Uniform Partnership Law. In addition, the Estate seeks costs and disbursements of the action, including reasonable attorney's fees.

In Count Two, the Estate alleges that James breached his fiduciary duty to the Partnership and to Claudia, by failing to insist on rental payments from HCMJ Realty, Ltd. ("HCMJ"), a New Jersey limited partnership which holds a warranty deed on the Cohen family property in Palm Beach County, Florida – said to be the Estate's principal asset. Compensatory and punitive damages are sought.

In Count Three, the Estate seeks dissolution of the partnership.

The defendants Booth Computers and James Cohen filed their Answer, Affirmative Defenses and Counterclaim on May 22, 2008. The defendants defend the enforceability of the Partnership Agreement. They seek via the counterclaim to specifically enforce the agreement, by compelling the Estate of Claudia Cohen to accept the $177,808.50 as the mandated buy-out price, and for imposition of a constructive trust, compensatory damages, and costs of suit, including reasonable attorney's fees.

Plaintiff Answered defendants' Counterclaim on June 26, 2008, denying the material allegations therein.

A Case Management Order was entered on July 10, 2008, setting a discovery timetable and a trial date of April 20, 2009.

By Consent Order entered on December 3, 2008, the discovery timetable was adjusted.

The trial date was rescheduled to July 13, 2009, and remaining discovery issues were addressed, by Letter Order dated May 20, 2009.

Substantively, two Orders were entered during the pre-trial phase of the litigation. By one order, the court declined to permit the Estate to amend its pleading to include recent transactions involving Booth Computers and HCMJ. A separate suit making those allegations was apparently then filed, but subsequently voluntarily dismissed, without prejudice. Secondly, by Order entered May 12, 2009, the court granted partial summary judgment in favor of the defendants, dismissing the Second Count of the Complaint (Breach of Fiduciary Duty) and the Third Count (Dissolution). As to the First Count, the court granted defendant James Cohen's summary judgment motion in part, and denied it in part. Extinguished from the case as a result of the decision on that motion was any claim that there had been a waiver of Paragraph 15 or 16 of the Booth Partnership Agreement, as well as any claim of procedural unconscionability as it relates to the Booth Partnership Agreement. Also determined was that there was no viable claim that defendant James Cohen breached any fiduciary duty to Claudia or to Booth Computers by failing to perform the required annual audit of the books and records of Booth Computers.

The fundamental issues reserved for trial include questions as to the meaning of the buy-out provisions in the Booth Partnership Agreement, whether the buy-out price can actually be ascertained, and whether or not, if ascertainable, it is substantively unconscionable.

Trial was had on July 13, 14, 15, 20, 21 and 22, 2009. The Estate's case was presented by Michael R. Griffinger, Esq., Guy V. Amoresano, Esq. and Lan Hoang, Esq. of Gibbons, P.C. The defendants' case was presented by Russell J. Passamano, Esq., Benjamin Clarke, Esq. and Frank Huttle, III, Esq., of DeCotiis, Fitzpatrick, Cole & Wisler, LLP.

The following witness testified on behalf of plaintiff Estate of Claudia Cohen:

1. Ronald O. Perelman, Executor of the Estate of Claudia Cohen.
2. Michael Slade, plaintiff expert real estate appraiser.
3. Dennis Kremer, plaintiff's expert in accounting and business valuation.

The following witnesses testified on behalf of the defense:

1. Defendant James Cohen.
2. Catherine Oberg, CFO of Hudson Media, regarding the finances of various Cohen family enterprises.
3. Michael Cannon, defendant's expert real estate appraiser, specializing in the luxury market.
4. Samuel Rosenfarb, CPA, the defendant's expert in accounting and business valuation.
5. David Colston, defendant's structural engineer expert, on the necessity for substantial structural repairs to the Palm Beach home.

In addition, the court viewed video deposition testimony of the following individuals:

1. Defendant James Cohen.
2. Catherine Oberg, CFO of Hudson Media, regarding the finances of various Cohen family enterprises.
3. Howard Joroff, predecessor CFO to Hudson Media.
4. Cyril Hemello, CPA, longtime accountant to Robert Cohen and various Cohen family enterprises.
5. Elizabeth Fry, Esq., an attorney who represented the Estate of Michael Cohen.
6. Dean Vegosen, Esq., a Florida Real Estate attorney who represented Robert Cohen in connection with the September 1, 1998 acquisition of the Palm Beach property by HCMJ from the Cohen company Periodical Distributors, and in registering HCMJ, the New Jersey partnership, to do business in Florida.
7. Alan Dlugash, CPA, an accountant who rendered accounting services to Claudia Cohen.
8. Robert Kochman, Esq., an attorney who tendered the $177,808.50 buy out offer to the Estate of Claudia Cohen.

Numerous exhibits were received into evidence.

II. ADDITIONAL FINDINGS OF FACT AND CONCLUSION OF LAW

Robert and Harriet Cohen are the parents of Claudia, Michael and James Cohen. Robert has achieved substantial financial success in various media distribution ventures “Hudson Media”.

Robert determined to form a venture named Booth Computers, back in 1978. Booth Computers was to be, as its name suggests, a computer-related company, though that aspect of the company never materialized. The other purposes of the company – the purposes which did come to bear fruit, richly – were to provide a mechanism for Robert and Harriet Cohen to provide income to and for their three children, and to shift assets, for tax and estate planning purposes, from Robert and Harriet Cohen, to their three children.

To these ends, Booth Computers was organized as a partnership under the laws of the State of New Jersey, on January 30, 1978. Claudia, Michael and James, then ages 27, 21 and 19, respectively, were the three partners of the partnership.

It does not appear from the record at trial that three siblings/partners negotiated or created the terms of the Partnership Agreement (J-4). Rather, and quite naturally, the partnership and the Partnership Agreement were the brainchild and creature of the parents, Robert and Harriet Cohen, prepared at their direction by one of Robert Cohen's lawyers.

According to the Partnership Agreement, the start-up capital of the Partnership was $3,000, cash, said to have been contributed by each of the three siblings in the amount of $1,000. (Para. 5). Profits of the Partnership are to be shared equally by the partners, as are losses (Para. 7). No partner shall receive any salary for services rendered to the Partnership. (Para. 8).

The heart of the present dispute is the manner in which the Partnership Agreement handles the buy-out of the interest of a partner, in the event of that partner's death. In that regard, Paragraphs 11, 13, 15 and 16 are controlling.

> 11. The Partnership shall maintain books and records setting forth its financial operations and said books and records shall reveal all monies received and expended on behalf of the Partnership. Such books shall be kept on a calendar year basis and shall be closed and balanced at the end of each year. An audit shall be made at the end of each year, or more often, as desired by the Partners.
>
> 13. Each of the Partners recognizes and agrees that one of the reasons he has entered into this Partnership is the personal and family relationship which exists among all Partners and that none of the Partners wishes to enter into a partnership with non-family members. In furtherance of the foregoing, each of the Partners covenants and agrees that during his lifetime he shall not sell, assign, transfer, mortgage, pledge, encumber or otherwise dispose of all or any part of his

interest in the Partnership, except upon the terms and conditions and subject to the limitations as hereinafter set forth in Paragraphs 14 and 15 of this Agreement.

Paragraph 14 is not strictly germane to this case. It provides that a partner who desires to sell his interest must sell to a partner and must sell at the value set forth in Paragraph 16.

15. In the event of the divorce or separation of any Partner who is married, and upon the death of any Partner, the remaining or surviving Partners shall be obligated to purchase, in equal shares, and the divorced Partner or Partner whose marriage is being terminated, or the estate of a deceased Partner, as the case may be, shall be obligated to sell the entire interest in the Partnership theretofore owned by such Partner at the price and upon the terms and conditions hereinafter set forth in this Paragraph 15.

(A) The price at which such Partnership interest shall be sold shall be the value thereof, determined in accordance with the provisions of Paragraph 16;

• • •

Paragraph 16 of the Booth Partnership Agreement is the site of key disputes:

16. The purchase price of any part or all of a Partner's interest in the Partnership shall be its value determined as follows:

(A) Each of the Partners has considered the various factors entering into the valuation of the Partnership and has considered the value of its tangible and intangible assets and the value of any goodwill which may be present. With the foregoing in mind, each of the Partners has determined that **the full and true value** of the Partnership is equal to its **net worth** plus the sum of FIFTY THOUSAND ($50,000.00) DOLLARS. The term **"net worth"** has been determined to be **net book value** as shown on the most recent Partnership financial statement at the end of the month ending with or immediately preceding the date of valuation;

(Emphasis added).

As aforesaid, Booth Computers, a New Jersey General Partnership, was formed on January 30, 1978. Later that same year, on May 26, 1978, an entity called HCMJ Realty LTD ("HCMJ"), a New Jersey limited partnership, was created. (J-38). According to the filed certificate, the General Partners of HCMJ are the parents, Robert and Harriet Cohen, while the Limited Partner is Booth Computers.

The amounts of cash contributed by the Limited Partner Booth Computers is reflected in the filed certificate of HCMJ, J-38, as $90,000, for which Booth received a 45% interest in HCMJ.

There is an improved ocean front estate in Florida at 691 North Country Road, Palm Beach. It is the vacation home of the Cohen family. At the time of the formation of Booth Computers and HCMJ, it was owned by Periodical Distributors of Florida, Inc., a Robert Cohen entity. By deed dated September 1, 1978 (J-39), Periodical Distributors conveyed title to HCMJ, for "$10.00 and other good and valuable consideration".

As a result of these transactions, then, Booth Computers, owned equally by the three Cohen children, owned a 45% interest in HCMJ, which in turn owned 100% of the Palm Beach estate.

Thereafter, in 1980 and 1984 respectively, Booth acquired two commercial warehouse buildings located a 8 Canale drive and 10 Canale Drive, in Egg Harbor, New Jersey (the "South Jersey warehouses"). (Stipulation # 21). At the time of Claudia's death on June 15, 2007, the primary assets of the Booth Partnership were these two warehouses, and Booth's 45% limited partnership interest in HCMJ. (Stipulation # 22). The fair market value of the warehouse and real property at 8 Canale Drive at the time of Claudia's death is $1.23 million, and the fair market value of the warehouse and real property at 10 Canale Drive is $1.525 million. (Stipulation # 23).

The parties do not agree on the fair market value of the Palm Beach property as of the date of Claudia's death. Claudia's Estate asserts that the property was worth $45 million at Claudia's death (at which time she was a 50/50 partner with James Cohen in Booth Computers, Michael Cohen having passed away suddenly in 1997). James Cohen asserts that the Palm Beach property was worth closer to $30 million at the time of his sister's death. James Cohen further asserts that the fair market value of each of these assets is irrelevant, as the Booth Partnership pegs the buy out price payable to the estate of a deceased partner to book value, not fair market value, or fair value, and because, in any event, Booth owns a minority interest in the entity that owns the Florida property, and has no direct interest in the property itself. Hence the defendants' proffer of $177,808.50 to the Estate, to satisfy Claudia Cohen's interest in Booth Computers. The Estate, by contrast, argues that fair market value, or fair value, is the appropriate yardstick, either because (a) that is how the buy out language in the Booth Partnership should be interpreted, or (b) because the lack of audits of Booth's books and records over the years renders the book value unascertainable, or (c) because enforcing the $177,808.50 figure is unconscionable, since the fair market value of that interest is closer to $11.5 million.

III. VALUATION

The parties are in agreement that the appropriate date for valuing the Estate's interest in Booth Computers is June 30, 2007 – Claudia's date of death. It is agreed that as of that date, Booth had $168,058 cash on hand, and liabilities of $120,735. They have also stipulated that the two South Jersey warehouse properties had a combined value of $2,755,000.

They disagree as to one asset: Booth's 45% interest in HCMJ. There was a battle of the experts as to the fair market value of the sole asset held by HCMJ – the Palm Beach estate. The Estate put the value of the property at $45M, and the defendants value it at $30M – a swing of $15M. I found the valuation testimony of the Estate's valuation expert to be very credible. He has extensive experience localized to the unique real market in Palm Beach Florida, including, in particular, the strip known as "Billionaires' Row", where the Cohen family home is situated. It is true that Mr. Slade relied in part upon some values that were not tied to the consideration recited in deeds, nor confirmed by him with reference to actual, examined contracts. But I found the witness's testimony ringing true that actual consideration paid is sometimes not reflected in Florida deeds, and that the specific deeds he used as part of his analysis understated the actual consideration, and that Mr. Slade's sources reliably revealed the actual consideration.

The defense expert appraiser, Mr. Cannon, was, by comparison lacking in first hand experience in the Palm Beach market. I found his comparable sales approach methodology to be superficial – he compared but two sales prices, without adjusting for significant differences. The cost approach, as employed by the expert, relied on a gross calculation of the extent of repairs – replacing 36,000 sf of improvement – that is simply unreliable and not verifiable by the court, because it was not verified by the expert. Much reliance was placed upon the conclusions of the defendants' structural engineer, who opined that the aging Cohen home – a landmark structure built in the early 1900's - is in need of substantial repair and renovation, owing, largely, to corrosion and deterioration to the concrete and supporting rebar throughout the main home and other structures.

I found the structural engineer Mr. Colston to be an honest witness whose testimony, though, does not assist the court in valuing the cost of repairs. There were substantial errors in Mr. Colston's initial report, some of which he himself corrected, and some of which he did not. And his reliance on the client-procured roof repair estimate – nearly a million dollars – can't be evaluated and could not be said by Mr. Colston to be reasonable or necessary.

In sum then, while it is clearly the case that the aging Cohen estate is in need of some repairs, I can not confidently quantify them because Mr. Colston did not credibly establish even a basic floor of repair costs. I credit as reasonable and true Mr. Colston's claim that the actual extent of corrosive damage can not be ascertained until destructive probing is undertaken as part of the actual rehabilitation work itself. As a result, I have no reliable projection of actual costs, but also no credible minimum estimate, and therefore am disabled from putting a price tag on the cost of any repairs, or on how any such cost would affect the price the Cohen estate could reasonably be expected to command on the market.

It will be recalled that at the time of Claudia Cohen's death on June 15, 2007, Booth owned 45% of HCMJ – the entity which held title to the Palm Beach estate – while the other 55% of HCMJ was owned by the parents, Robert and Harriet Cohen. In a net worth statement of Robert Cohen's dated June 3, 2008, Robert valued his 55% interest in the dwelling and contents at $22M. If one views for the moment a 55% interest in the property and contents as being synonymous with a 55% interest in the entity that owns the home and contents (HCMJ), then that 55% interest translates into a 100% interest value of $40M, yielding, on a pro rata basis, a $18M value of Booth's 45% interest. That

$40M value of the real estate, as of December 31, 2007, is at least somewhat supportive of the Estate's valuation of $45M.

In sum, I find that the fair market value of the Cohen family home as of the date of death of Claudia Cohen is the $45,000 price established through the testimony of the Estate's expert, Mr. Slade.

It is the position of the Estate that Booth's 45% in HCMJ should be treated as a direct 45% interest in HCMJ's sole asset, the Palm Beach Estate. I can not ignore the historical existence of HCMJ. HCMJ is a limited partnership, organized and existing under the laws of the State of New Jersey. That its license to do business in New Jersey was revoked for several years, and that its license to do business in Florida was revoked several times for failure to meet filing requirements (and may be revoked, in Florida, even now) is owing to lax oversight by HCMJ's agents, explainable by the fact that HCMJ's sole purpose and function has been to retain title to the Cohen estate in Florida, a non-incoming producing asset that serves the sole and exclusive function of holding title to the vacation home of the Cohen family.

IV. THE BUY-OUT FORMULA

The court is asked to interpret the buy-out provision in the Booth Partnership Agreement (J-4) which provides that upon the death or divorce of a partner, that partner's interest is to be bought out at "net worth", defined as the "not book value as shown on the most recent Partnership financial statement at the end of the month ending with or immediately preceding the date of valuation…", plus $50,000. The disputed provision, in full, reads in full:

> "16. The purchase price of any part or all of a Partner's interest in the Partnership shall be its value determined as follows:
>
> > (a) Each of the Partners has considered the various factors entering into the valuation of the Partnership and has considered the value of its tangible and intangible assets and the value of any goodwill which may be present. With the foregoing in mind, each of the Partners has determined that **the full and true value** of the Partnership is equal to its **net worth** plus the sum of FIFTY THOUSAND ($50,000.00) DOLLARS. The term **"net worth"** has been determined to be **net book value** as

> shown on the most recent Partnership financial statement at the end of the month ending with or immediately preceding the date of valuation;"

• • •

What was meant by the language used in the buyout provision of the 1978 Booth Partnership Agreement was not illuminated by the testimony of any of the signatories. Claudia and Michael are deceased, and James – age 19 at the time – has no recollection or insights into what the parties might have specifically intended, way back when. It is likely that the buy-out provision, like the Partnership Agreement as a whole, was the creation of the father, Robert Cohen, and his lawyers, who fashioned this means of allowing Robert and Harriet to provide income to their children, to shift assets for estate and tax purposes. Robert Cohen is alive but aged and in failing health. He did not testify at the trial. And the scrivened of the document – presumed to be one of Robert Cohen's lawyers – was not identified.

I am left then with the text, always the starting point for analysis, together with the history of how the parties themselves, Claudia, Michael and James, have acted during the existence of the Agreement.

I note that buy out provision does not contain the phrase "fair market value". What it does say is that the partners have determined that the "full and true value of the partnership" will be determined in a particular way, in the event of a buy out. The "full and true value of the partnership" in the event of a buy out "is equal to its net worth", plus $50,000. The term "net worth" is then determined to be "net book value" as shown on the most recent Partnership financial statement at the end of the month ending with or immediately preceding the date of valuation. (J-4, Para. 16A).

It was the opinion of the Estate's accounting and business valuation expert, Dr. Dennis Kremer, that the partners intended to compensate the bought out partner, or his or her estate, with "full and true" value. That, to me, gets it exactly backwards. Rather, the plain language of the provision, given its natural reading, tells us that the "full and true value" of the partnership, in the event of a buy out, is to be determined by a specific, clear formula. Dr. Kremer's trial testimony is that the phrases "net worth" and particularly "net book value" add nothing to the analysis, because the partners simply intended to buy out the other(s) at full and true value. And full and true value is, under his reading, closely aligned, perhaps identical, to actual value, whether defined as market value, or fair value.

The term "net worth" could certainly mean the market value of one's assets, less the amount of one's liabilities. That is what my banker meant by net worth when I applied for the mortgage on my home. But the buyout provision here defines "net worth" is a distinctly different fashion: "the term 'net worth' has been determined to be net book value…" as shown on the most recent Partnership financial statement. (J-4, Para. 16A).

Had the partners – or their parents – intended to provide for the buyout of a deceased or divorcing partner's interest at fair market value, they could easily have said so. They plainly did not provide for a buy out at fair market value.

The financial statements of Booth – the tax returns and the books and records of the Partnership – have never reflected the market value approach to net worth, but rather have only reflected a cost approach.

For example: the two South Jersey warehouse properties, owned outright by Booth. Booth has never sought to reflect the actual market value of these assets on its books and records, leading me to conclude that market value is not a measure of the value of these assets that has ever been used or relied upon by Booth or its partners.

The value of Booth's interest in HCMJ has never been reflected on the books and records of Booth, or of HCMJ, with any reference at all to the underlying, shifting actual or fair market value of HCMJ's sole asset – the Palm Beach property. Rather, the tax returns of Booth, 1992-2007,[*] list the book value of Booth's interest in HCMJ as a negative value, without reference to any market value. (See J-19 through J-37, particularly the Schedule L's thereof).

The K-1 Schedules issued by HCMJ to Booth document the book value of Booth's investment in HCMJ. (D-2).

The way the tax returns and books and records of Booth reflect value is devoid of any reference to market value or fair market value or fair value or actual value: what is consistently reflected in the extant historical record is that the value of the Partnership as

[*] The 1992 and 1995 returns were not produced. No negative inference was suggested or is taken from the failure to produce these tax returns.

reflected in the books and records – including – fundamentally – its tax returns – is a cost value, less distributions, plus contributions – without regard to actual value.

I am aware that the term "book value" has no one fixed meaning and, rather, that the meaning of the phrase "book value" "…depends upon the construction of the specific language used in the particular instrument wherein that term is stated." Hollister v. Fielder, 22 N.J. Super. 439, 447 (App. Div. 1952). Book value has no single meaning, and the intent of the parties must always govern. Lambert v. Fishermen's Dock, 61 N.J. 596, 604-605 (1972). In the instant case, I find that the phrase net worth – the specific buy out standard – was not defined as full and true value, but rather that full and true value was defined, specifically, to be book value. And the books and records and tax returns of Booth, and the corresponding K-1's from HCMJ, invariably reflect book value predicated on cost, less distribution, plus any additional contributions, with no reference whatsoever to actual or fair market value.

I found informative, useful, and reliable the testimony of the defendants' expert in accounting and business valuation, Samuel Rosenfarb. His testimony and the underlying documentation reflects that Booth carried on its books its investment in HCMJ at cost ($90,000), less pass through losses and distributions, and upward for capital contributions. This was not out of some long term plan to cheat one or more of the siblings, or their estates, but rather the bookkeeping was in accordance with the way the overwhelming number and types of businesses carry assets, and liabilities, on their books.

The negative value of the Booth interest in HCMJ is a necessary, documented function of the fact that there was an initial contribution of $90,000, plus capital contributions, and, owing to HCMJ being a single non-incoming producing asset, losses, together with withdrawals. This structure yielded by 1989 a capital account of Booth with HCMJ at positive $61,965. (D-2).

As aforesaid, HCMJ generated no income. There were no subsequent capital contributions by Booth. HCMJ passed through its losses (expense payments for taxes, mortgage and insurance) to Booth, decreasing the net book value of Booth's interest in HCMJ to, eventually, a negative: - $97,547.

Why the records reveal no further capital contributions from Booth to HCMJ, after 1989, and why Booth stopped receiving pass-through losses from HCMJ – is not reflected in the evidence, except via speculation about changes in the tax code. But – the important point is that the records do continue to perpetrate the reasonably substantiated negative $97,547, on the books and records of the company, each and every year after 1989. And that negative value is the book value properly used in determining the buy-out of the Estate's interest in Booth.

I find that the actual historical treatment of value by Booth over the years comports with the plain language of the buyout provisions: no reference to actual, market value, but rather consistent reference to standard business practices applicable to this business and most business - value begged to book value, which, in turn, reflects costs, does not reflect increases or decreases in asset values, but does change depending upon whether additional contributions are made and/or withdrawals or distributions taken.

The record establishes that when the brother Michael Cohen died in 1997, his interest was bought out, leaving Claudia and James the sole remaining partners of Booth. Michael's interest in Booth was bought out at a figure not remotely reflective of the actual value of the Palm Beach property. Rather, Michael's Estate was paid $34,503.08. for his one-third interest in Booth. (J-40, page JC 00160). Michael's Estate's Form 706 reflects it, as do the checks drawn to satisfy that interest, being two checks from Booth and one from James. (J-41).

It was credibly established at trial that Michael's Estate's buy-out price was set by application of the buy-out formula spelled out in the Partnership Agreement, as interpreted by the defendants in the instant case, and as accepted by the court as true, accurate and consistent. (D-1, J-43). The record does not reflect active participation by Claudia in the buy out of her deceased's brother's interest (nor as to any other aspects of the operations of Booth or HCMJ). I find that she was aware that her brother's interest was bought out at his death, and she knew that as a result of that buy out, she and her surviving brother Michael now owned Booth 50/50. Her K-1, received by her at the end of that year, reflected it (J-22, page JC 878) as did her tax records every year thereafter. There is no question but that she received the benefit of a buy-out calculated in the exact same manner that the defendants have utilized in calculating the pay out to Claudia's Estate.

Michael died suddenly, and Claudia died young, after a diagnosis of her terminable illness. The formula that was applied when Michael died, and that is being sought to be applied now as to Claudia's interest, could just as likely have been applied to James' estate, should he have succumbed prior to his siblings, or either of his siblings. I will revisit this fact when considering the Estate's unconscionability argument. For now, I note only that the formula called for in the Agreement was applied in the case of the death of Michael; that both James and Claudia were the beneficiaries of that application; and that the formula – so consistent with the language of the agreement as well as standard business practices – is being applied in the exact same manner, in the instant buy-out.

When in 1994 Claudia and Ronald Perelman divorced, there was no buy-out of Claudia's interest by her siblings Michael and James. This was at the direction of the non-partner, *pater familias*, Robert Cohen. There apparently was not a big debate about the non-exercise of the buy out. The reason for the buy-out provision, in the event of divorce, is to shield the family partnership and assets from involvement in divorce proceedings. That was not an issue in the Cohen/Perelman divorce, owing to a pre-nuptial agreement that shielded Claudia's interest in Booth from any claim by her spouse. So it was determined not to force the buy-out of Claudia's interest.

I have previously ruled that the non-exercise of the buy-out at Claudia's divorce is not indicative that the Agreement was void, or inoperative, or that the partners had abandoned it, or waived its future application. Rather, it is explained as above, and there never was any waiver of its application except in that discrete, consensual instance.

Paragraph 11 of the Partnership Agreement mandates annual audits. It provides, in full, as follows:

> "11. The Partnership shall maintain books and records setting forth its financial operations and said books and records shall reveal all monies received and expended on behalf of the Partnership. Such books shall be kept on a

calendar year basis and shall be closed and balanced at the end of each year. An audit shall be made at the end of each year, or more often, as desired by the Partners".

No audits were ever done. No partner – James, Michael or Claudia, ever insisted that audits be done. This is unsurprising: Booth was a simple, family partnership that owned 2 warehouses, plus a share in a family limited partnership. Like many small family business constructs, it was run informally, and was not 100% scrupulous in its bookkeeping protocols. But it always filed annual tax returns. And those tax returns always reflected the income of the partnership, and its expenses, and the value of the interest in the limited partnership, HCMJ, and the state of the partners' capital accounts. Everything needed to ascertain the book value of Booth at any particular time was readily available from the books and records, including tax returns, of the company. The failure to audit the company books on an annual basis – or ever – does not trigger a nullification of the buy-out provision of the Partnership Agreement because no partner ever requested it and because the buy out price – pegged as it is to book value, as opposed to fair value, or market value – can be readily ascertained when the need arises from the company's records. The need arose when Michael died in 1997. The formula was applied, and the buy-price of $34,503.08 thus fix. Now, as Claudia too has passed away, there is the need to again apply the formula. It has been applied. The buy out price is $177,808.50.

This brings the Court to the Estate's argument of unconscionability.* I will accept, for purposes of this analysis, that the fair value of the Estate's interest in Booth is the appropriate yardstick, that Booth's 45% interest in HCMJ translates dollar for dollar into a 45% interest in the Palm Beach property, that no discounts of marketability or control apply to valuing the Estate's interest in Booth (or in valuing Booth's interest in HCMJ). And I will accept, as I have, the $45M value attributable by the Estate as the overall value of the Palm Beach property.

This is to state the Estate's case in its starkest terms: applying defendant's formula – the Partnership Formula – yields a buy-out price of $177,808.50. On the other

* I have previously ruled that there is no procedural unconscionability. The three children, then ages 27 (Claudia), 21 (Michael) and James (19) were given the Partnership to sign by their father and mother. None were represented by counsel. Robert Cohen, not his children, staked the initial investment, and he and his advisers ran it, and then James and Michael got involved. No one was victimized by any procedural unconscionability in the process.

hand, applying the Estate values, predicated on the above assumptions, yields a pay-out to the Estate of Claudia Cohen of $11.5M.

As indicated to counsel in one of our conferences, that disparity offends my inner scale. Having now weighed all the evidence at the trial, however, I find that enforcement of the buy-out does not rise to the level of unconscionable. This is a court of equity. Equity follows the law. The Partnership Agreement – like the entity itself – was a gift by Robert and Harriet Cohen, to their three children. The terms and conditions of the Agreement, handed down by the parents, crafted by their counsel, were equally applicable, to each child.

The book value buy out formula was properly applied when Michael died. It resulted in a buy-out of Michael's share for $34,503.08, not remotely related to market value, fair value, or actual value. As a result, Claudia and James acquired Michael's one-third interest. Applying the formula dictated by the Agreement to the Estate of a previous beneficiary of application of the exact same mandated formula weighs strongly in favor of not vitiating the formula now.

And there is nothing inherently offensive in the specified buy-out procedure. I find that in fact many small, family businesses have the same or similar formulas – book value, based fundamentally on cost, for easily and quickly buying out the interest of a decreased family member. Pegging the value to "fair value" or market value invites exactly the sort of disruptive litigation (from the family's perspective) occurring here. Setting the pay out, rather, at the more formulaic book value, is artificial but easily ascertainable, readily applicable to the estate of whichever family member may have passed away, or divorced. It shields the family partnership from destruction through the avenue of intra-family litigation.

After Michael died, Claudia and James were 50/50 owners of Booth. Both knew that. The record is devoid of any evidence that either sibling sought to modify the Partnership buy out provisions, previously, or ever. It is not for a court to rewrite a plain, common formula, particularly one that has already been applied to an earlier deceased family member, to the benefit of the survivors, Claudia and James.

Can the enforcement of the agreement against the Estate of Claudia be viewed as unconscionable simply because of the extraordinary appreciation in value of the Palm

Beach estate during the time between the acquisition of the property by HCMJ (1978) and Claudia's death (2007)? I have no authority for that proposition. When, exactly, did the value appreciate to the point that enforcement of the Agreement became unconscionable. If James had pre-deceased Claudia, would the enforcement of the Agreement against James' estate been unconscionable?

Under the totality of the circumstances, the Estate has failed to prove that enforcement of the Agreement is unconscionable. The fair and equal origin of the terms of the agreement mitigate against such a finding. The prior, proper application of the formula with respect to the Estate of the deceased brother Michael – and the un-fair market value thereby yielded – weigh heavily against a present finding of present unconscionability. The fact that the formula could have left any one of the children – Claudia, Michael or James – in sole ownership of the Partnership, with the others' interests satisfied for radically below fair market rates – also weighs heavily against a finding of unconscionability.

A fairer, more even-handed buy-out provision, or result, might occur to the court, or to the reader of this opinion. One might choose to arrange one's affairs differently. Or, perhaps, wish that one's parents had arranged them differently. But it is not the court's function or prerogative to simply re-write agreements. A court can not simply step in or write a better or different contract than the parties themselves have made or inherited. Only where enforcement is so egregious that it literally shocks the conscience, will a court of equity step in to mitigate the unconscionable effect. See, e.g., Muhammad v. County Bank of Rehoboth Beach, 379 N.J. Super. 222, 237 (App. Div. 2005), rev'd on other grounds, 189 N.J. (2006). The court's conscience is not shocked by the enforcement here under all the circumstances hereinabove related.

Certainly, the agreement was not unconscionable when entered into. This was a gift, to all three children, equally, by their parents. Only because of the extraordinary appreciation in value of one of the assets, of one of the assets, (sic) of Booth, does the gross disparity between book value and actual market value raise the unfairness issue. But I am disinclined and, I think, unauthorized, to engage in such hindsight unconscionability. Restatement (Second) of Contracts, § 208, comment a.

If, in determining unconscionability, the value of what one gets out is to be compared to the value of what one has put in, then clearly unconscionability taints no aspect of this buy out. There is no actual evidence that any of the children ever put any of their money into Booth. This was a gift, from loving parents to grateful children. All the children received very substantial income and benefits therefrom, for years. That one of the three children would end up sole owner of Booth was a feature built into the foundation document, by its creator. That is not unconscionable. And the fact that the last person standing happens to be the person actually involved in the running of the family business does not, to this court, bespeak unconscionability.

In their Trial Brief, the defendants chose to emphasize that Mr. Perelman, Claudia's ex-spouse, current Executor, and father of the minor child, Samantha, is a man of considerable wealth. The purpose of this observation was to suggest that the $177,000 pay-out from Booth to Claudia's estate will cause no hardship to Claudia's Estate, nor to her only child, Samantha. I have been provided no authority for the proposition that I should delve into the financial wherewithal of those advocating a strict book value buy-out versus those advocating a market or fair value buy out, and so I decline to consider the wealth of the Executor, or the wealth of the surviving sibling, for that matter, as a factor in my analysis.

ADDITIONAL FINDINGS

1. The Estate's reliance on Hollister I and II, is misplaced. Obviously, book value that entirely omits an asset is not a proper basis for ascertaining book value. By contrast, Booth valued each of few assets on its books. It did so, not on fair market but on the common business method of cost, plus contributions, less withdrawals/disbursement. I reject a reading of Hollister that would suggest that all companies must carry assets on their books at fair market value! Hollister v. Fielder, 22 N.J. Super. 439 (App. Div. 1952).
2. The Estate asks what became of the entity Jacobs, Jacobs, Cohen and Booth? I agree that the full origin and fate of this entity was not illuminated at the trial. But that is smoke, not fire. It appears that Booth did have an interest in this entity before 1997, and that this entity, together with the HCMJ investment, was reported as part of a combined number, with the "Jacobs"

investment listed in line 8, as “other investments” on the Schedule L of Booth’s tax returns. (J-19, page JC-793). Starting back in 1997, “Jacobs” is no longer carried on the books, and apparently no longer exists, and HCMJ is ever after Booth’s only “other investment”. How and why “Jacobs” ended is indeed unexplained, but that uncertainty is not shown to be material to any aspect of the case. It is not plausibly contended by any representative of the Estate, nor by any of its experts or witnesses, that “Jacobs” was anything of significant value, or that its disappearance 12 years ago is a reason to distrust the books and records of Booth, or to abandon the buy-out formula, or to construe it any differently.

3. I do not believe any discounts for control or marketability should apply to any analysis of the value of HCMJ or the value of Booth. I was not provided credible substantive expert testimony on the subject, and it was not proven that any discounts ought to apply to either family entity. The more recent family transactions involving these assets support, not undermine, this conclusion. (P-9; Stipulation of Facts Regarding Palm Beach Property para. 1, 2, 5; P-6).

Defense counsel shall submit a form of Judgment under the Five Day Rule. Once the Judgment is executed, I would ask that counsel retrieve their exhibits.

____

ROBERT P. CONTILLO, J.S.C.