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Matter of Piekos (Home Studio Inc.)
2010 NY Slip Op 51408(U)
Decided on August 3, 2010
Supreme Court, Westchester County
Scheinkman, J.
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Supreme Court, Westchester County

In the Matter of the Application of Richard Piekos, Holder of Twenty Percent or More of All Issued and Outstanding Shares of HOME STUDIOS INC., Petitioner, DECISION AND ORDER AFTER For the Judicial Dissolution of HEARING HOME STUDIO INC., Pursuant to BCL §1104-a.

12542/10

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Alan D. Scheinkman, J.

Petitioner Richard Piekos ("Petitioner" or "Piekos") commenced this proceeding for the judicial dissolution, under Business Corporation Law Section 1104-a, of Home Studio Inc., a New York corporation ("Home Studio" or the "Corporation") by the filing of a Verified [*2]Petition on May 7, 2010. This Court issued an Order to Show Cause on that date and, thereafter, the Respondent Corporation, on June 10, 2010, interposed a Verified Answer. Respondent's Verified Answer denied the material allegations of the Petition, set forth a number of defenses, and alleged a counterclaim. The counterclaim generally alleged that Petitioner breached a Shareholder's Agreement by failing to properly perform his duties and that, "at most", Petitioner was entitled to a buyout under the terms of the Shareholder's Agreement. Petitioner is opposed to such a buyout; his opposition is not to a buyout *per se* but to the terms of a buyout. Under the Shareholder's Agreement, a buyout would be on the basis of the book value of the Corporation's shares, rather than at fair value.

On the return date of the Order to Show Cause, June 11, 2010, the Court, after hearing counsel, directed that a hearing be held as to whether the buyout provisions of the Shareholder's Agreement were applicable. The Court gave this direction in the interest of conserving the resources of the parties and those of the Court.

As will be developed more fully *infra*, the Shareholder's Agreement contains provisions

for the buyout of a shareholder which are triggered in three circumstances: (a) a desire by a shareholder to sell; (b) termination of the employment of a shareholder; or (c) the occurrence of an event that would bring about a succession to a third person or entity by operation of law or court order of all or part of a shareholder's shares.

At the inception of the matter, the Court understood that the Corporation's contentions were that the buyout provisions of the Shareholder's Agreement were triggered because: (1) Petitioner had, prior to the commencement of litigation, expressed a desire to sell his shares; and (2) the commencement of this proceeding would cause the issuance of a court order bringing about a succession of Petitioner's shares to a third person. Just prior to the commencement of the hearing, the Corporation added a third string to its bow by purporting to terminate Piekos' "employment" with the Corporation, termination of employment being another triggering event for a book value-based buyout.

The termination of Piekos' "employment" is claimed to have occurred just the day before the start of the hearing , and because the Shareholder's Agreement contains procedural provisions for notices to be sent regarding a buyout, those provisions could not have been fully implemented until some time after the hearing date. Nevertheless, the Court took cognizance of this claim, without objection from the parties. The Court had scheduled a hearing for the purpose of deciding whether the buyout provision of the Shareholder's Agreement applies and delaying a resolution of the hearing would not have promoted the interests of the parties in having this question resolved. It was clear that Petitioner disputed that he was an employee subject to termination and was opposed to be forced to a buyout under the Shareholder's Agreement in all events. Thus, the provisions for giving notice would not have led to anything other than a delay. Notably, Petitioner did not object to the consideration of the "termination" issue and did not request any delay.

The hearing commenced on June 23, 2010, continued on June 24, 2010 and concluded on June 25, 2010. Counsel made closing arguments on June 25, 2010 and submitted [*3] post-hearing briefs.[FN1]

Based on upon the testimony and exhibits received at the hearing, the Court will now address the issues presented. The Court notes that Respondent contends that Petitioner was terminated for cause, though the buyout provision would apply, assuming Petitioner was an employee, whether his termination was for cause or not. In response to the argument that he

was terminated for cause, Petitioner contends that his termination, if such there was, was part of an effort by his fellow shareholders to oppress him. The Court need not decide, and does not decide, whether Piekos was terminated for cause; it need only decide whether he was an "employee" who was effectively terminated.

That said, as will be developed further *infra*, at one point, Piekos transmitted an e-mail to his fellow shareholders that Respondent cites as expressing a desire on the part of Piekos to sell his shares, an event which, if Respondent's argument is credited, would be a triggering event for a book value buyout. In order to decide whether the e-mail gives rise to a triggering event, the Court must consider the events leading up to the e-mail in order to place the e-mail in proper context and in evaluate in the perspective of the conduct of the parties at the time it was sent. It is for that purpose, and that purpose only, that such events are considered. The Court expressly informed the parties that it would not consider whether Petitioner had been oppressed, a contention that forms the basis for Petitioner's request to dissolve the Corporation pursuant to Section 1104-a.

RELEVANT BACKGROUND

Petitioner Piekos is a location manager who works with directors and producers to find locations suitable for their projects and on the logistics of filming at locations. David Fitzgerald is also a location manager. John Maher is also a location manager and is a member of the Directors Guild of America. The Corporation was formed for the purpose of developing and managing a studio to serve as a location for the filming and photographing of commercials. The studio has sets which can be depicted as home locations, such as a kitchen and living room.

Maher had long held the concept of going into the studio business and eventually began working on finding a suitable location, doing an analysis of competing studios, and looking for partners. In 2004, Piekos, Fitzgerald and Maher joined together to create Home Studios. Each of three contributed $90,000 and each became a holder of one-third of the stock in [*4] the Corporation. In addition, each had responsibility for certain tasks, at least at the inception of the business. Piekos was the designer and his task was to oversee the look of the studio; Fitzgerald handled the financial matters; and Maher was responsible for day-to-day operations, principally working with clients, promoting the business, and working with the studio manager. All three of the principals did not work for the Corporation exclusively;

each continued to do other work on their own accounts.

The Court, having had the opportunity to evaluate all three principals during their testimony and in the courtroom, finds that Maher is a very assertive, if not arrogant, and controlling individual. He clearly values his own efforts and contributions very highly and deals with others dismissively and high-handedly. He views his fellow shareholders as less than equal partners. Maher viewed the studio as entirely his creation and sought partners only because of the capital that they would bring to the table and the assistance they could provide to him. He values their work only so long as they adhere to his direction and control. Fitzgerald is completely dominated by Maher and subservient to him. Piekos is less dominated by Maher.

In 2004, the Corporation reported an ordinary business loss of $51,228 on its tax return. In 2005, the Corporation reported an ordinary business loss of $62,031. But in 2006, the Corporation reported ordinary business income of $166,830 and, in 2007, the Corporation reported ordinary business income of $220,468. In 2008, the Corporation reported ordinary business income $125,081 and in 2009, the Corporation reported ordinary business income of $51,480. In response to the decline in business in 2009, the Corporation let its studio manager go. Business improved in 2010 and a studio manager was hired.

At the outset of studio operations there was insufficient money for the Corporation to employ a studio manager. Maher acted as such and received payment for that work. In 2006, the threesome began to pay themselves back for their investments. All three began to receive payments from the Corporation, both in the form of salary reflected on W-2 forms and as profits reflected on K-1 forms. According to Fitzgerald, the idea of paying salaries was partly based on the idea they would be able to open IRAs and put money into them. Once the program was instituted, each of the three received a set monthly figure, the withholding for the IRAs was separate, and profit sharing occurred when there was enough money in the bank.

The Corporation's 2004 tax return reflects no payments on Line 7 for compensation of officers and no payments on Line 8 for salaries and wages and, as noted above, a $51,228 loss, allocated essentially equally between the three principals.[FN2] The 2005 tax return is the same, with a loss of $62,031, allocated essentially equally between the three.

The Corporation's 2006 tax return reflects $25,000 on Line 7 for compensation of [*5] officers and $47,222 in salaries and wages on Line 8 and business income of $166,380. The $166,380 in income was allocated essentially equally between the principals.

The 2007 corporate tax return reflects $108,000 on Line 7 for compensation of officers and $71,623 on Line 8 for salaries and wages and business income of $220,468. The profit was allocated between the three principals roughly equally.

The 2008 tax return of the corporation reflects $109,680 on Line 7 for compensation of officers and $75,787 on Line 8 for salaries and wages and business income of $125,081. The profit was allocated between the three principals roughly equally.

The 2009 corporate tax return shows $39,977 on Line 7 for compensation of officers and $22,111 on Line 8 for wages and salaries and business income of $51,480, with the profit divided roughly equally.

According to Robert Nicolai, a certified public accountant who prepared the tax returns for the corporation, Line 7 on the corporate return is used to report the compensation of officers and Line 8 is used to report the compensation of non-officers. Nicolai testified that, for all three officers, he reported their compensation on Line 7 and prepared K-1 forms to reflect their profit distributions. When asked why all of the payments to officers were not shown on K-1 forms, Nicolai testified that base salaries were set up for each officer "in order to avoid hassle with the IRS of not taking any compensation subject to Social Security tax." Distributions are not subject to payroll tax. In addition, at some point, a simple IRA plan was set up and some monies were put into retirement accounts, amounts which could only be based on Social Security-based wages. Thus, the reason why wages were paid was because it was beneficial to do so for tax and retirement account purposes.

Nicolai explained that the IRS would assert that the officers were performing services, not just reaping profits. Nicolai testified that, from a tax point of view at least, the fact that a person is the president of an entity does not mean that such person is an employee. According to Nicolai, the payroll was a set amount. Each of the three were receiving $3,000 per month (when money was available), except for odd days they worked, and any other amounts paid to them were distributions.

The Court views Nicolai as being a credible and knowledgeable witness and accepts his

testimony.

During the period from 2008 and 2009 when business was down, the principals agreed that, if one of them covered the studio, that person would be paid $250 per day of coverage.

When the Corporation reached profitability in 2006, Maher began to complain that he was doing more work than the others and asserted that he should be compensated for this additional work. Piekos, on the other hand, viewed his contribution as primarily being his input of capital and his work in bringing the studio to life. Fitzgerald supported Maher in his [*6]complaints that Maher was doing too much without compensation and that Piekos was doing to little to merit compensation. As a consequence, the parties sought to define their respective roles in a formal writing and consulted with counsel, Arthur Richenthal, Esq.

THE SHAREHOLDER'S AGREEMENT

While the parties have tendered only a unsigned, undated copy of the written Shareholder's Agreement, it is undisputed that the Shareholder's Agreement was executed by all three principals in 2006.

1.Management

In Paragraph 7 of the Shareholders' Agreement, the shareholders agreed that, for as long as they continue to own shares, they would be the exclusive members of the Corporation's Board of Directors and the exclusive officers of the Corporation. Further, each pledged to "irrevocably vote exclusive for the election of the Shareholders as the members of the Corporation's board of directors."

Moreover, each agreed that, in their respective capacities as members of the board of directors to "irrevocably vote exclusively for the election of the following persons as the following officers of the Corporation so long as each Individual Shareholder continues to own any Shares:

OfficeName of Person

PresidentMaher

TreasurerFitzgerald

SecretaryPiekos"

The Shareholder's Agreement defined the role of these offices. The President, Maher, was to furnish estimates in respect of potential clients and studio construction and interact with clients, studio staff, and the studio's landlord. The Treasurer, Fitzgerald, was to maintain the financial books and records and interact with the professionals and institutions in connection with the books and records. The Secretary, Piekos, was responsible for "design and building services, and maintenance of studio fixtures, upgrades, and special orders respecting clients."

The provision requiring each of the three shareholders to vote as a board member for the election of officers as indicated is buttressed by a requirement that in the even an individual shareholder is "unable to vote as aforesaid," he is deemed to give his irrevocable proxy to the other two shareholders to vote in accordance with the provisions of the Agreement.

None of the provisions relating to the scope of the duties to be performed by the officers contains any specification as to the amount of time to be devoted by the officers; none [*7]contains any restriction on the officers' abilities to pursue private interests; none provides any specified remedy in the event that an officer fails to perform his duties.

2.Buyout

The Shareholder's Agreement restricts the individual shareholders from selling, transferring or pledging their shares except in compliance with the terms of the Agreement.

The Agreement requires that, in certain circumstances, an individual shareholder is required, during his lifetime, to sell his shares to the Corporation, or to the other shareholders, for book value as reflected on the Corporation's balance sheet prepared by the accountant for the Corporation for the end of the fiscal year immediately preceding the event that requires a sale.[FN3] The balance sheet is "binding and conclusive on the parties as to the purchase price, with no value being assigned to good will or similar intangibles."[FN4]

Paragraph 2 (a) of the Shareholder's Agreement provides for the events which would obligate a sale by an individual shareholder. It states that a sale is triggered:

[i]n the event that during the lifetime of the Individual Shareholders(i) an Individual Shareholder desires to sell any of his Shares, or (ii) if the Individual Shareholder is employed by the Corporation and such employment is terminated for any reason and with or without cause; or (iii) if any event occurs, such as bankruptcy of, or appointment of a committee for, or a divorce by an Individual Shareholder which would bring about a succession to a third person by operation of law or a court order of all or part of the Individual Shareholder's Shares, or the right in anyone other than the Individual Shareholder to control or vote any such Shares....

Paragraph 2 (a) provides a procedure under which, in the event of the occurrence of one of the three triggering events, the individual shareholder is required to give formal notice of the occurrence of the event (within 10 days) and offer to sell the shares to the Corporation or, in the event that the Corporation is not legally able to purchase the shares due to insufficient surplus or decides not do so, to the other shareholders. Even if no such written offer is made, the offer is deemed to have been made. The Corporation, or the other shareholders, then have the right to purchase all of the shares by giving thirty (30) days written notice. In the event that the shareholder whose shares are in issue fails to give written notice as required, the Corporation or the other shareholders may, within ninety (90) days of receipt of actual knowledge of the triggering event, demand the individual shareholder sell his shares. [*8]

Petitioner has not given written notice of the occurrence of a triggering event, undoubtedly because he believes that no such event occurred. On the other hand, the Corporation did not issue a demand to Petitioner for a sale, other than through its counterclaim in this proceeding.

Petitioner has not asserted that the Corporation's effort to force him to sell his shares under the terms of the Shareholder's Agreement is premature due to the absence of the demand required by the Agreement. But it is clear both that: (a) such a demand would be futile; and (b) such a demand could readily have been timely made, as to all three grounds asserted by the Corporation, prior to the commencement of the hearing. Because it is in the interest of all parties to resolve this issue, neither side has raised the procedural issue, and there is no indication that the positions of the parties would be any different if a formal demand was made, the Court will deem the parties to have waived any objections based upon any failure to give notices otherwise required by Paragraph 2 (a) and proceed to the

merits.

THE RELEVANT EVENTS

On January 16, 2010, Piekos sent an e-mail to Fitzgerald, copied to Maher, seeking to reach a meeting of the minds with respect to business matters for the new year. In that e-mail, Piekos alluded to a recent conversation he had with Fitzgerald in which Fitzgerald pointed out that Piekos had made the most money for covering the studio in 2009. Piekos wrote that this had occurred because, even though all three had been offered an equal chance, he took more of the opportunities because the other two had declined opportunities offered to them and Piekos was more available because his other business activities had slowed down.

Piekos referred to an extant proposal for Fitzgerald to receive $3,000 for the accounting work he was doing. Piekos objected to this and expressed confusion as to an effort to "make the compensation' equal." He also expressed the view that Fitzgerald and Maher had forgotten the original agreement. Piekos offered to have a discussion about the issues. However, nothing seems to have happened for several months.

On April 5, 2010, Maher, Fitzgerald and Piekos met at the offices of Craig Avedisian, Esq. — the attorney who represented Maher and Fitzgerald at the initial stages of this proceeding and at the hearing.[FN5] At the meeting, Maher and Fitzgerald complained that Piekos was not doing his share of the work and that they were doing [*9]more than their share. While Fitzgerald claimed to have a specific proposal for him and Maher to receive compensation, he also claimed that this proposal was not mentioned until a later meeting, but he acknowledged, grudgingly, that the subject of his and Maher's receiving compensation, as a solution to the perceived imbalanced workload, was discussed. Likewise, Maher insisted that the specific proposal for him and Fitzgerald was not discussed at the April 5, 2010 meeting.

Respondent's answer, which was verified by Maher on June 10, 2010, contains a very specific version of the meeting of April 5, 2010:

> the parties discussed that Petitioner was not performing work for the Corporation anywhere near the level of Mr. Maher and Mr. Fitzgerald...[,] Petitioner was asked what services he performed for the corporation in 2006, 2007 and 2008

> [and] *Petitioner refused to answer the question* as Petitioner performed little or no services for the Corporation during those years... [and] Petitioner, Mr. Maher and Mr. Fitzgerald discussed that Mr. Maher and Mr. Fitzgerald believed that they were entitled to compensation of $8,500 per month and after substantial discussion on the topic, during which Petitioner stated that he did not expect to receive payments in the nature of royalties, asked Petitioner to make a counter-proposal and everyone agreed that a second meeting would take place next week so as to give Petitioner time to think about and propose an alternative.... (emphasis in original).

Despite being confronted, on cross-examination, with his prior sworn statement, Maher insisted that the proposal to pay him and Fitzgerald $8,500 per month was not made at the April 5, 2010 meeting. He contended, as did Fitzgerald, that the proposal for Maher and Fitzgerald to receive $8,500 per month did not come up until April 27, 2010.

According to Piekos, Avedisian was present at the April 5, 2010 meeting. Piekos testified that, at the April 5, 2010 meeting, Maher and Fitzgerald started talking about getting salaries and proposed that they take $8500 a month for the work they were doing. Piekos stated that he was in shock and was rendered speechless. He asked the others: "[w] hat about me? What is the issue why I wouldn't get anything?" According to Piekos, Maher told him that the studio was going in a different direction and "we don't really need your help now." Piekos offered to increase his workload in order to get a salary but Maher and Fitzgerald rejected his offer: "We are going in a new direction and we don't really need you, you know, your input anymore". Piekos testified that Avedisian suggested that the three talk it over some more and then meet at his office again. [*10]

The Court accepts Piekos' version of the April 5, 2010 and rejects the contrary testimony of Maher and Fitzgerald. Piekos' version is supported, not only by his own answer, but by Respondent's own answer, which constitutes an admission (*see generally* 58 NY Jur. 2d Evidence and Witnesses § 324). In addition, the minutes of the April 27, 2010 meeting reflect that, prior to the April 27, 2010 meeting, there had been a prior informal discussion of the salary proposal — a reference to the April 5, 2010 meeting.

It is undisputed that, notwithstanding the disagreement as to what was discussed at the April 5 meeting, there was an agreement to meet again and that this further meeting was scheduled for at least two weeks later. It is also undisputed that Piekos cancelled the meeting because he was still trying to figure out what he should do about the situation.

There was good cause for Pieko's concern. While Maher and Fitzgerald claimed that they broached the idea of paying themselves salaries with Piekos later than they actually did, they both acknowledged that their proposed salary arrangement would gain each of them $100,00 per year, for a total of $200,000 per year. They proposed this despite their knowledge that in 2008, each of the three received around $80,000 for the year [FN6] and even less in 2009, around $20,000 each. Their theory was that 2010 would be a better year, that they hoped to have a gross of approximately $260,000, of which Maher and Fitzgerald would each receive $100,000, leaving them to share the remaining $60,000 with Piekos. Thus, Piekos would receive $20,000 and Maher and Fitzgerald would each receive $120,000.

Fitzgerald acknowledged that he and Maher were essentially asking Piekos to the risk that he would not get anything unless it was a very good year, while he and Maher would get all of the first $200,000.

On April 19, 2010, Fitzgerald sent an e-mail to Piekos, copies of which were sent to Maher and Avedisian. The e-mail contained a notice of a board meeting to be held on April 27, 2010 at Avedisian's office for the purpose of determining the compensation of the officers of the Corporation. In the e-mail, Fitzgerald invited Piekos to submit his own proposal regarding officer compensation.

It is evident that Fitzgerald and Maher, having not heard from Piekos, decided to force his hand by simply using their majority voting power to put their proposal into effect.

On April 25, 2010, Piekos sent an e-mail to Maher, copied to Fitzgerald. That email states, in pertinent part: [*11]

In this situation, I think the fair thing to do is to buy me out at fair market value. I propose you purchase [my] shares in Home Studios at fair market value. I'm available afternoon as we discussed Friday.

This e-mail led to a discussion among the three principals, at the April 27, 2010 meeting, as to what fair market value would be. The meeting was held at Avedisian's office and it appears that he attended it.

In his testimony, Fitzgerald conceded that he did not know that Piekos' e-mail would

give rise to forcing Piekos to sell at book value and neither he nor Maher told Piekos that. Instead, they proposed paying Piekos $50,000 for his shares, payable over two years. The Court notes that, under this proposal, Piekos would have gotten only slightly more than he would have gotten by staying a shareholder under the Maher/Fitzgerald compensation proposal (under the same optimistic revenue assumption they were making) for the same two year period.

Maher claimed that the $50,000 buyout proposal was based on the 2009 profit and what Piekos had already gotten over the years. Maher did not consider that Piekos' shares were worth the same as his; "I thought more about the work that went into it."

Fitzgerald conceded that he did not expect Piekos to take the number, that he, Fitzgerald, would not have taken it, and that he viewed the proposal as simply a starting point in negotiations. Maher stated he would have taken the offer would have sold his shares to Piekos for $50,000, provided he also received $320,000 for his labor over the years. But Maher, like Fitzgerald, viewed the $50,000 offer as an opening bid and expected further negotiations.

Maher and Fitzgerald continued their effort to pressure Piekos by moving, and adopting, a resolution to pay themselves $8500 each per month, making this arrangement retroactive to the beginning of the month. Piekos voted against the resolution; Maher and Fitzgerald voted for it.

Fitzgerald testified that there had not been any distribution of profits from January to April 2010, partly because there was no money at the beginning of the year and partly because the situation was "in flux". By April, 2010, there was about $30,000 in the bank. Since there were bills to pay, once the $17,000 in salary payments left, there was no money for distribution. (According to Maher and Fitzgerald, the salary proposal was not made by them until the April 27, 2010 meeting and they did not inform Piekos of it in advance because Piekos would not have agreed to anything they proposed along those lines. As noted, the Court does not accept this testimony but the Court notes that, according to Maher's and Fitzgerald's version of events, the specific salary proposal would have taken Piekos by surprise).

According to Piekos, at the April 27, 2010 meeting, he protested that Maher and

Fitzgerald were looting the company of profits. When Maher and Fitzgerald proposed a $50,000 buyout, Piekos responded that he wanted fair market value for his shares. He denied ever expressing a desire to be bought out at book value. Piekos also testified that Avedisian told him: [*12]

> John has been the president and the company has been run successfully over the past five years or so and the Court will look at this as John running the company successfully and it's going to be looked upon as just another good business decision.

The Court credits Piekos' testimony and, in particular, agrees that Avedisian was acting as counsel to Maher and Fitzgerald. There is no indication that Avedisian advised Piekos that he, Piekos, should retain his own separate counsel.

On May 17, 2010, Piekos commenced the present proceeding for the dissolution of the Corporation. On June 22, 2010, Maher sent, by e-mail, a letter to Piekos, a copy of which was sent to Fitzgerald. The letter states:

> This letter is to terminate your employment at Home Studios Inc. for cause, including the failure to perform work, poor performance of work and incomplete performance of work. In addition, your negotiation tactic of bringing the lawsuit to dissolve the company — based in part on statement that have already been proven false in the Answer filed by the corporation — you have obviously make it impossible to work with you.

According to Fitzgerald, he and Maher had several telephone discussions and made the decision to terminate Piekos' employment in consultation with "our" lawyer. Fitzgerald acknowledged that he and Maher viewed the termination as a good litigation strategy. Acknowledging that no board meeting was held with respect to the decision to terminate Piekos, Fitzgerald testified that he believed that Maher had the authority, as President, to terminate Piekos, provided Maher approved. Maher acknowledged that Piekos' lawsuit, rather than being a negotiation tactic (as claimed in his letter), could also be viewed as a response to a negotiation tactic.

In response to a question from the Court as to whether he expected Piekos to tolerate the new situation created by the implementation of the salary proposal indefinitely, Maher stated that he did not expect to tolerate Piekos' lack of commitment to the business.

Maher acknowledged that, notwithstanding his termination of Piekos, Piekos remained the secretary of the corporation and, further, that Piekos still had the keys to the studio and that Maher would let him into the premises and permit him to do work. As for compensation, Maher stated that Piekos would be limited to a percentage of the profits after expenses (including his and Fitzgerald's salaries), which, would likely mean that Piekos would receive relatively little and Maher and Fitzgerald would receive the lion's share.

LEGAL ANALYSIS

The Court now turns to whether any of three events that, by the terms of the [*13] Shareholder's Agreement would trigger a book value-based buyout of Piekos, have occurred.

A. *Termination of Employment*

The Shareholder's Agreement provides that a book valued-based buyout is required "if the Individual Shareholder is employed by the Corporation and such employment is terminated for any reason and with or without cause."

The Shareholder's Agreement provides that each of the three principals are to serve as corporate officers, with each having certain stated duties. Each of the shareholders is obligated, by the Shareholder's Agreement, to vote for the others for the offices designated. Thus, the Agreement contemplates that each of the three shareholders was to remain in their corporate offices and could not be ousted, or terminated therefrom, by the others.

The Shareholder's Agreement must construed in accordance with its terms and read as a whole. Individual provisions cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. Further, in construing the agreement, the Court may not rewrite it and may not distort its meaning or construe the language in a manner that would render one or more of provisions meaningless (*see, e.g., J.W. Mays, Inc. v. Snyder Fulton Street, LLC*, 69 AD3d 572 [2d Dept 2010]).

Bearing these principles in mind, it is clear that the use of the phrase "if the Individual Shareholder is employed by the Corporation" refers to employment of an officer by the Corporation, separate and apart from the shareholder's duties, as defined elsewhere in the

Shareholder's Agreement, as an officer. While corporate officers may, but not need, also be corporate employees (2 Fletcher, Cyclopedia of the Law of Corporations §266; *see Ebinsky v Betty Court Garage, Inc.*, 259 NY 15 [1932]; *Skouitschi v Chic Cloak & Suit Co.*, 230 NY 296 [1921]; *Staganovic v Dinolfo*, 92 AD2d 729 [4th Dept 1983]), the Shareholder's Agreement expressly recognized that all three principals would be officers with defined duties and they each would serve without prospect of removal or termination. On the other hand, the buyout trigger provision explicitly provides that it comes into play only if the individual shareholder is employed by the Corporation.

The language making the buyout trigger applicable "if" a shareholder is employed by the Corporation is conditional, meaning it comes into play only in the event that a shareholder is employed by the Corporation The duties given to the three principals in connection with their corporate officers are broader than the traditional view of those offices. In particular, Piekos was named corporate secretary, an office which normally is associated with such tasks as keeping the meeting minutes and corporate records. Piekos' defined tasks, however, included responsibility for "design and building services, and maintenance of studio fixtures, upgrades, and special orders respecting clients." These duties are beyond those normally undertaken by the corporate secretary and may be viewed as duties undertaken by an employee.

That said, the phrase "if an Individual Shareholder is employed by the Corporation." and the language assigning Piekos' duties in his capacity as an officer, would be [*14] rendered entirely meaningless if the duties assigned to Piekos or the other shareholders, were viewed as duties of employees, as opposed to duties of corporate officers. If these duties had been viewed by the parties as duties of employees, there would have been no need to provide for what would happen "if" a shareholder was an employee, as each of the three would have already been employees as of the time of the Agreement Consequently, the Agreement must be read as providing that termination of a shareholder as an employee could come about only if an officer became an employee by reason of the assumption of additional duties after the making of the Agreement.

There was no evidence that, following the making of the Agreement, any of the shareholders entered into a written employment agreement with the Corporation. Nor was there any evidence that, following the making of the Agreement, there was any oral agreement for any of the shareholders to be employed by the Corporation. While the

evidence indicates that, in 2008 and 2009, the shareholders "covered" the studio during photo shoots in the absence of an employed studio manager, and that Piekos did this more than the others, this work could reasonably be viewed as embraced within his duties to deal with special orders respecting clients. Further, this additional work was done on a *per diem* basis, not on a salaried basis. Additionally, there was no showing that any of the three shareholders had set hours of work, none were required to devote substantially all of their time to the Corporation's business, none were restricted from working for others, and all three were investors in the business. There is no evidence that a shareholder, in doing any work, was supervised or directed by any of the other shareholders. Putting aside that Piekos was an owner of the business, his services in covering the studio during the period when there was no employed studio manager seem closer to those of an independent contractor, as distinguished from those of an employee (*see Shapiro v Robinson*, 102 AD2d 822 [2d Dept 1984], *affd* 63 NY2d 896 [1986]; 1A PJI 2:255).

It is evident that none of the shareholders viewed themselves as "employees." When Maher and Fitzgerald called for the meeting for April 27, 2010, they framed the issue to be discussed as "compensation of officers," not compensation of employees. Further, the Corporation's accountant testified, and the corporate tax returns reflect, that the compensation of the principals was reported as either: (a) compensation of officers (not of employees); or (b) as profits. The accountant testified that salaries were reported only for the purposes of avoiding any dispute with the taxing authorities with respect to obligations for payroll taxes and to permit the shareholders to establish retirement accounts.

Accordingly, the Court holds that the Corporation failed to establish that Piekos was an employee of the Corporation. Since the Corporation failed to prove that Piekos was an employee, it necessarily follows that the Corporation failed to prove that provisions of the Agreement which trigger a buyout upon termination of employment

B. .Commencement of this Proceeding

Paragraph 2 (a) of the Shareholder's Agreement provides, in clause (iii), that a book value-based buyout is triggered by the occurrence of any event that "would bring about a succession to a third person by operation of law or a court order of all or part of the Individual [*15]Shareholder's Shares, or the right in anyone other than the Individual Shareholder to control or vote any such Shares...." The Agreement gives, as examples of the

contemplated type of events, bankruptcy of a shareholder, the appointment of a committee for a shareholder, or divorce by a shareholder.

In *Matter of Pace Photographers, Ltd.* (71 NY2d 737 [1988]), the Court of Appeals held that, in a close corporation, the terms of a shareholders' agreement governing a voluntary sale of stock by a shareholder to the corporation do not dictate the "fair value" of a minority interest under Section 1118 of the Business Corporation Law. In that case, there was a shareholders' agreement which precluded any of the five shareholders from selling or disposing of shares without written consent of all parties for a five year period. However, the agreement also provided that, if a shareholder desired to sell within the five year period, the shareholder could so, provided that the sale was to the other shareholders and only at a deep discount. Barely three years after the shareholders' agreement was signed, a deep rift developed, culminating in petitioner's offer to buy out the other shareholders. When this offer was rejected, petitioner brought a proceeding for judicial dissolution under Business Corporation Law Section1104-a. In response, the corporation gave notice of an election to either buy the shares under the terms of the agreement or buy the shares for "fair value" pursuant to Business Corporation Law Section 1118. As the litigation evolved, the courts, including the Court of Appeals, viewed the corporation's election as being for a buyout under Section 1118.

The Court of Appeals held that the corporation's Section 1118 election made it unnecessary to decide whether a shareholder's agreement fixing value in and of itself precludes relief under Section 1104-a. Turning to the impact of the shareholders' agreement on the valuation question, the Court stated that "it may well be that shareholders can agree in advance that a 1104-a dissolution proceeding will be deemed to be a voluntary offer to sell, or fix fair value' in the event of judicial dissolution, and that their agreement would be enforced" (71 NY2d at 747). The Court observed that participants in business ventures are free to express their understandings in signed agreements and such agreements are generally upheld by the courts (*id)*. But, ruled the Court, "in the absence of explicit agreement a shareholder's agreement fixing the terms of a sale voluntarily sought and desire by a shareholder does not equally control when the sale is the result of claimed majority oppression or other wrongdoing, in effect, a forced buyout" (*id*). The Court noted that, in the case before it, the shareholder's agreement neither provided that a Section 1104-a dissolution proceeding would be deemed a voluntary offer to sell, nor fixed fair value in the event of an

1118 election. The agreement limited buyout to a desire to sell or to the death of a shareholder. Accordingly, the Court ruled that buyout price set forth in the shareholder's agreement did not dictate the "fair value" of the shares, though the Court, in deciding fair value, may take the provisions of the agreement into account (71 NY2d at 718).

Since the Court of Appeals has recognized that shareholders may agree in advance that commencement of a proceeding under Section 1104-a may be deemed an offer to sell or may agree to what fair value would be (or a formula by which fair value would be determined) in the event of judicial dissolution (or a buyout under Section 1118), the question is whether the Shareholder's Agreement in this case constitutes such an agreement. [*16]

The Second Department dealt with these issues in *Matter of Doniger v Rye Psychiatric Hosp. Ctr.* (122 AD2d 873 [1986], *lv denied* 68 NY2d 611 [1986]). In *Doniger,* a group of shareholders brought a proceeding seeking the dissolution of a corporation pursuant to Section 1104. The respondents argued that the commencement of the proceeding for dissolution constituted a proposed "passage or disposition of shares" within the meaning of a shareholders' agreement and that the petitioners were thus required to make an offer of their shares to the other shareholders. Since the petitioners had not done so, the respondents considered the commencement of the proceeding as an offer by the petitioners to sell their shares. The Second Department agreed with the respondents.

The *Doniger* agreement prohibited the shares in the corporation from passing or being disposed of "in any matter whatsoever" to anyone without first being offered to the other living shareholders. The agreement further required that the shares be offered following "any proposed passage or disposition of shares whatsoever, including but not limited to ... sale, delivery, assignment, gift, exchange, transfer [or] distribution" (122 AD2d at 876). The Second Department ruled that the language employed in the agreement negated any inference that the parties intended to exclude any possible method whereby their ownership interests would be affected, including a proceeding for judicial dissolution. The examples following the quoted language were viewed as illustrative only and as not limiting the broad scope of the terms employed (122 AD2d at 877).

Doniger was followed by the Appellate Division, First Department, in Matter of Johnsen v ACP Distribution, Inc. (31 AD3d 172 [1st Dept 2006]). There, the shareholder

prohibited the shareholders from donating, pledging, transferring or otherwise disposing of stock "in any manner whatsoever" without first offering it to the company and, in the event a shareholder did offer stock for sale to a third party. The court, relying upon *Doniger*, stated that the parties had chosen the expansive language "in any manner whatsoever" in defining the circumstances that would trigger a sale of shares under the terms of the stockholders agreement and, thus, clearly intended to cover the broadest spectrum of events that would trigger the buyout provisions of their agreement. Accordingly, the court ruled that commencement of a Section 1104 proceeding triggered the buyout provisions of the agreement

Two cases decided by the Appellate Division, Fourth Department, are also instructive.

In *Matter of El-Roh Realty Corp.* (48 AD3d 1190 [4th Dept 2008]), the Appellate Division held that, under the terms of the shareholders' agreement in question, the commencement of a Section 1104 proceeding triggered a buyout using the valuation methodology set forth in the agreement. In that case, the agreement prohibited the transfer of any shares "including, without limitations, transfers that are voluntary, involuntary, by operation of law or with or without valuable consideration". The agreement further provided that, if any shareholder attempted to transfer shares in violation of the restriction, the shareholder would "automatically be deemed to have offered for sale" all of the corporate stock owned by the shareholder, with the price to be determined as set forth in the agreement. The Appellate Division held that, under this language, the commencement of the Section 1104 proceeding [*17]triggered the mandatory buyout provisions of the agreement.

On the other hand, in *Matter of Terry L. Stevens v Allied Builders, Inc.* (74 AD3d 1757 [4th Dept 2010]), the Appellate Division held that the commencement of a 1104-a proceeding did not trigger a buyout under a shareholders' agreement Section 7 of the agreement in that case provided that petitioner was prohibited from selling, transferring or assigning any of his shares "whether voluntarily or through any bankruptcy or other insolvency proceedings, adjudication of insanity, death or otherwise....." The other shareholders were given an option to purchase, under terms set forth in the agreement, if a prohibited transfer occurred. Section 8 of the agreement stated that the shareholders would have an option to purchase at the same price upon termination of petitioner from the corporation for any reason within the 10 years from the date of the agreement. This option

provision expressly provided that the option arrangement would apply to dissolution proceedings under Section 1104-a.

The Appellate Division held that the commencement of a dissolution proceeding did not constitute a triggering event under Section 7, as that would render Section 8 meaningless. Further, Section 7 was not so broad as to include dissolution proceedings. The court distinguished *El-Roh Realty*, ruling that, while a dissolution proceeding under Section 1104-a is an involuntary transfer, the language of Section 7 did not prohibit voluntary transfers except as explicitly listed, *e.g.*, through bankruptcy.

In this case, the shareholders are prohibited, by Paragraph 1 of the Shareholder's Agreement, from selling, transferring, pledging, encumbering or otherwise disposing of any of their shares, including by assignment or by transfer of voting or other rights, except as permitted by the Agreement. However, this restriction applies to voluntary acts. Paragraph 2 a) (iii), which triggers a mandatory book value-based buyout, applies to events "which would bring about a succession to a third person or entity by operation of law or court order" of a shareholder's shares or which would bring about "the right in anyone other than the Individual Shareholder to control or vote any such Shares."

Thus, the essential question is whether the commencement of a Section 1104-a proceeding would "bring about a succession to a third person or entity by operation of law or court order". Examples of situations which do give rise to "succession to a third person or entity by operation of law or court order, as given in the Agreement, are bankruptcy, appointment of a committee for an incompetent shareholder, or divorce. As in *Doniger*, these examples are illustrative and not exclusive, as reflected by the use of the term "such as" in introducing the examples. The phrase "such as" clearly indicates that the events described immediately thereafter are typical of the category of events referred to and that the listed events are not the only events intended to be covered. On the other hand, the Agreement here does not, as did the agreement in *Doniger*, embrace "any proposed passage or disposition of shares whatsover" nor does it embrace, as did the agreement in *Johnsen*, any transfer or disposition "in any manner whatsoever". The parties provided that only events that would bring about a succession to a third person or entity by operation of law or court order are triggering events.

The examples of such events identified by the parties in the Agreement are useful.

[*18]In bankruptcy, the court would order the sale of the assets of the bankrupt, putting the shares in the hands of a third party and displacing a bankrupt shareholder. If a committee was appointed for an incompetent shareholder, the committee would be responsible for exercising the rights of the shareholder, including the right to control or vote the shares. By including divorce, the parties were concerned that a shareholder's former spouse would obtain, by court directive, ownership, or the right to vote, of the shareholder's shares or, at least, some of them. Indeed, in divorce cases, the court could issue a restraining order limiting the shareholder's ability to vote or take other actions with respect to the shares.

It cannot be denied that, in a dissolution proceeding, the court would have broad powers. It could, even prior to determining whether dissolution be granted, appoint a receiver to preserve the property and carry on the business of the corporation and the receiver could be a third party, not a shareholder, officer or director (Business Corporation Law, §1113). By law, sales, mortgages, conveyances or other transfers of, or the creation of a security interest in, any property of a corporation made, without court approval during the pendency of the proceeding, may be void (Business Corporation Law, §1114). The court is empowered to issue injunctions restraining the corporation, its directors and officers from certain acts (Business Corporation Law, §1115). Upon dissolution, the winding up of business and disposition of the assets and liabilities of the corporation takes place under judicial supervision (Business Corporation Law, §1008).

Given the broad powers to supplant the authority of the majority interest that come into being with the commencement of a judicial dissolution proceeding, the Court concludes the commencement of a dissolution proceeding is an event which would bring about a succession to a third person or entity by operation of law or court order, if only because it brings about succession of effective control over all of the shareholders to the court. As the Appellate Division, Fourth Department, recognized in *El-Roh Realty*, the commencement of a dissolution proceeding under Section 1104-a is an involuntary transfer. While it may be true that the court might deny dissolution, as where the grounds for same are not established, it remains that, at least during the pendency of the proceeding, the general authority of shareholders to run their business as they determine is disrupted and ultimate decision-making authority is transferred to the court.

So viewed, the commencement of a judicial dissolution proceeding is no different than a bankruptcy, an circumstance specifically cited by the parties as a succession event that

would trigger a buyout. While a bankruptcy proceeding may be dismissed, the bankruptcy court, like a dissolution court, would have broad powers of ultimate control during the pendency of the proceeding.

This, however, does not end the matter. As noted above, in *Matter of Pace Photographers, Inc., supra* , the Court of Appeals was confronted with claims by the petitioner that he was being oppressed and claims by respondents that it was petitioner was doing the oppressing and that petitioner was attempting to use the Section 1104-a dissolution proceeding as a means for circumventing the buyout terms set forth in the shareholders' agreement. Since the respondents in *Pace Photographers* elected to buy petitioner out in accordance with Section [*19]1118, it was not necessary for the Court of Appeals to decide whether a shareholders' agreement fixing value in and of itself precludes relief under Section 1104-a. Notably, *Doniger*, *Johnsen*, and *El-Roh Realty*, the cases in which commencement of a dissolution proceeding was found to trigger the application of buyout provisions, were each dissolutions brought under Section 1104, rather than Section 1104-a. While *Matter of Terry L. Stevens v Allied Builders, Inc., supra* , involved a Section 1104-a proceeding, the court held that the commencement of the proceeding did not trigger the buyout provision of the shareholder's agreement.

There is, of course, a crucial distinction between proceedings under Section 1104 and proceedings under Section 1104-a.

Dissolution may be sought under Section 1104 where there is corporate deadlock. The underlying reason for the dissension is of no moment; it is not at all relevant to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs (*Matter of Dream Weaver Realty, Inc.*, 70 AD3d 941 [2d Dept 2010]).

In contrast, Section 1104-a was adopted in order to provide a remedy to minority shareholders who have suffered abuse at the hands of the majority and lacked a means for salvaging the value of their investments. Section 1104-a permits a minority shareholder to seek dissolution upon a showing that those in control have been guilty of illegal, fraudulent or oppressive actions towards to the complainants or that the property or assets of the corporation are being looted, wasted or diverted for non-corporate purposes by those in control (*Matter of Pace Photographers, Inc.,* 71 NY2d 737, 744 [1988]). But the Legislature

also provided a defensive mechanism for the other shareholders and the corporation, giving them, in Section 1118, the absolute right to avoid the dissolution and any possibility of liquidation by electing to purchase the petitioner's shares at "fair value" (*id.* at 744-745). In this manner, the corporation and the majority of the shareholders may avoid the expense and risk of dissolution proceedings by simply offering to buy out the minority interest; the minority is protected by a court-approved determination of fair value and other terms of the purchase (*id.* at 745).

The present case presents the interplay between the rights of the shareholders under Sections 1104-a and 1118 and a shareholders' agreement providing its own terms for a buyout. In one sense, where a shareholders' agreement creates a mechanism under which the minority interest may obtain a buyout, the minority has a means for salvaging the value of its investment (*see Matter of Harris*, 118 AD2d 646 [2d Dept 1986] [dissolution proceeding under Section 1104-a denied where petitioner may obtain a fair return on his investment pursuant to the buy-out provisions of the shareholder agreement]). To the extent that the minority finds that the agreed-upon valuation methodology set forth in the shareholders' agreement will not provide a sufficient return, that grievance, no matter how well founded it may be, flows from the minority's assent to the agreement. That a party no longer finds the provisions of a contract to its satisfaction is hardly a basis for avoiding the consequences of a voluntary business decision to enter into the contract. On the other hand, in cases involving oppressive conduct or corporate waste or looting, the majority may be encouraged to continue abusing the minority if the majority realizes the minority must either tolerate that behavior or else be forced to sell to the [*20]majority at a heavily discounted price on unfavorable terms (*see* Mahler and Schoenberg, Outside Counsel: Dissolution Petition Can Unwittingly Trigger Stock Buyback, *NYLJ*, July 21, 2006 at 4, col 4). Conversely, the minority may be deterred from seeking judicial redress by the prospect that the mere act of seeking relief from a court will mandate that the minority sell out at a heavily discounted price. Forcing a buyout on unfavorable agreement terms is particularly troublesome where the parties' agreement does not in specific words spell out that the buyout will be triggered by the commencement of a Section 1104-a proceeding. Where that result is made clear, the minority knows the consequences of its agreement in advance. Here, while the language employed is sufficient, under the case precedents binding upon this Court, for a buyout to be triggered by the commencement of this proceeding, the minority was not specifically warned, in advance, that this would be the result.

To be sure, where the parties have in effect agreed on a price formula which suited them, courts will generally hold them to their agreement; to avoid the agreement, more than mere disparity between the contract price and current value of the stock must be shown (*Allen v. Biltmore Tissue Corp.*, 2 NY2d 534, 543 [1957]; *see Matter of Pace Photographers, Ltd.*, 71 NY2d 737, 747, [1988]). Further, the courts must also be sensitive to the prospect that the minority is claiming oppression, without real basis in fact, as a ruse or stratagem for circumventing the consequences of its valid agreement.

The Court of Appeals has, in *Pace Photographers*, recognized the prospect that the existence of a shareholders' agreement fixing value might not itself preclude relief under Section 1104-a, though it did not have to reach and resolve that issue.

The Court has not heard evidence as to the substance of the negotiations that led to the shareholder's agreement. Specifically, the Court has not heard whether Piekos had a meaningful choice as to whether to sign the agreement, bearing in mind the business sophistication of the parties, whether the negotiations were arms-length, whether there was a disparity of bargaining power, and whether pressure tactics were used, among other factors. Further, it seems, at least plausible that the agreement may be construed as containing at least an implied agreement by the parties to refrain from oppressive, unjust or unreasonable acts that would deprive a party of the benefits of the bargain struck. It may well be that it is unconscionable to permit the majority to oppress a minority into signing a shareholders' agreement that would trigger a unfavorable buyout, thereafter oppress the minority to such an extent that it is compelled to seek judicial relief, and then assert that the oppressed minority must sell out under unfavorable terms (*see Day Op of North Nassau, Inc. v Viola*, 16 Misc 3d 1122[A], 2007 WL 2305035 [Sup Ct Nassau County 2007]).

Where it appears from the record before the court that unconscionability may exist, and the issue is not free from doubt, the court must hold a hearing where the parties may present evidence with regard to the circumstances of the signing of the contract, and the disputed terms' setting, purpose and effect (*State v Wolowitz*, 96 AD2d 47, 68-69 [2d Dept 1983]).

Additionally, the amount of discrepancy between the book value-based price formula and "fair value" as determined y the court would be relevant. [*21]

For these reasons, the Court will hold a full hearing on both Petitioner Piekos' petition

for dissolution and on the Corporation's counterclaim for enforcement of its right to buyout Piekos under Paragraph 2 a) (iii) of the Shareholder's Agreement.

C.A Desire for A Sale of Shares

The remaining buyout trigger to consider is whether "an Individual Shareholder desires to sell any of his Shares." Respondent argues that Piekos' e-mail of April 25, 2010 reflects such a desire. In that e-mail, Piekos, responded to the Maher/Fitzgerald proposal to pay themselves $8500 per month each in salary, by stating:

> In this situation, I think the fair thing to do is to buy me out at fair market value. I propose you purchase [my] shares in Home Studios at fair market value. I'm available afternoon as we discussed Friday.

It is evident that Piekos' e-mail was a response, specifically invited by Maher and Fitzgerald, to the proposal by Maher and Fitzgerald to pay themselves a salary that would, in all events, significantly reduce and, likely all but eliminate, Piekos' profit participation. This was not a voluntary, unsolicited proposal to sell and was not regarded as such by Maher and Fitzgerald. By its own express terms, Piekos did not express a desire to sell; rather, he simply proposed, as a means of resolving the conflict between the parties, that the other two buy him out. He did not indicate a absolute commitment to sell or even indicated that he would want to sell if his proposal was rejected.

At the time, Maher and Fitzgerald did not view Piekos' e-mail as a voluntary expression on Piekos' part of a desire to sell his shares. Rather, they viewed it at the time, as does the Court now, as a proposal to resolve serious disagreements between Piekos, on the one hand, and Maher and Fitzgerald, on the other, as well as to avoid the drastic consequences that Piekos would sustain if Maher and Fitzgerald implemented their salary proposal. Piekos recognized that Maher and Fitzgerald had the votes to implement their proposal and, thus, strip him of all, or virtually all, of the income that he had been deriving from his ownership of his shares in the Corporation.

Peikos was forced into recognizing that his interest in the Corporation might be rendered worthless as a result of the Maher/Fitzgerald salary proposal which they could implement by majority vote. Even from a book value point of view, the $200,000 in salaries would create substantial expenses and prevent the accumulation of any assets and, to the

extent that there were insufficient monies to pay the salaries, actually accumulate significant book liabilities.

In common parlance, a:"desire" for something to occur is the need or wish for that event to occur. A desire to sell means a voluntary act, covering an offer to sell (*see Draper v Gochman*, 400 SW2d 545, 547 [Texas Sup Ct 1966]). It requires an expression of present purpose, as opposed to an indication of some possible contemplated future action (*see Sessions v [*22]Skelton*, 163 Ohio St 409, 410 [Ohio Sup Ct 1955]). Piekos' e-mail did not reflect a present purpose to sell under any and all circumstances; rather, it reflected a proposal to resolve a particular situation, allegedly created by the oppression of the majority. Further, his proposal was dependent entirely upon agreement from Maher and Fitzgerald to buy him out and further negotiation as to the price.

Rather than have Maher and Fitzgerald grant themselves salaries which would deprive him of much, if not all, of his share of the profits of the Corporation, Piekos proposed that they buy him out at fair market value. This was not an expression of a blanket desire to sell his shares. His proposal was simply offered as a means for resolving the dispute between the parties. It was specifically tied to: a) payment at fair market value; and b) further discussions on the subject between the parties. The evidence shows that Maher and Fitzgerald regarded the e-mail in exactly this manner. They responded with their opening proposal which was to what fair market value would be and expected a further negotiation. They did not regard the e-mail as indicative of a "desire" of Piekos to sell; rather, if anything, it reflected his "desire" to find an amicable means of resolving a particular "situation." As was conceded by Fitzgerald in his testimony, it never occurred to him that Piekos' e-mail gave rise to a enforceable commitment by Piekos to sell out under the terms of the Shareholder's Agreement. The Corporation took that position only in response to Piekos' dissolution petition.

The Court finds that the Corporation failed to prove that Piekos voluntarily "desired" to sell his shares. However, even if the Court agreed with the Corporation, it would also find, for essentially the same reasons as set forth in relation to the triggering event of commencement of dissolution proceedings, that a hearing is necessary to determine whether any such "desire" was the result of, and a reaction to, oppressive or wrongful conduct of Maher and Fitzgerald within the ambit of Section 1104-a.

CONCLUSION

The Court notes that the Corporation has the ability to obviate the need for the hearing on the petition for dissolution and on the counterclaim for enforcement of the Shareholder's Agreement by electing to purchase Piekos' shares under Section 1118. The Court is advised that the time within which the Corporation may make such an election will shortly expire. In order to afford the Corporation a reasonable time within which to decide whether to make such an election, the Court will exercise its authority under Section 1118(a) and extend the Corporation's time to make an election under Section 1118 to, and including, September 9, 2010.

Accordingly, for the reasons stated, and based upon the evidence adduced at the hearing, it is hereby

ORDERED that the counterclaim of Respondent Home Studios Inc., to the extent that it seeks a buyout of the shares of Petitioner Richard Piekos pursuant to Section 2 (a) (i) and (ii) of the Shareholder's Agreement, is denied; and it is further [*23]

ORDERED that the counterclaim of Respondent Home Studios Inc., to the extent that it seeks a buyout of the shares of Petitioner Richard Piekos pursuant to Section 2 (a) (iii), is referred for hearing; and it is further

ORDERED that the time within which Respondent Home Studios Inc. may make an election to purchase the shares of Petitioner Richard Piekos pursuant to Section 1118 of the Business Corporation Law shall be, and is hereby, extended and enlarged to and including September 9, 2010; and it is further

ORDERED that counsel for the parties shall appear before this Court for the purpose of scheduling further proceedings in this matter on September 10, 2010 at 9:30 a.m., which date may be adjourned only with the prior, written approval of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

August, 2010

E N T E R :

Alan D. Scheinkman

Justice of the Supreme Court

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Footnotes

Footnote 1: Petitioner also submitted a pre-hearing brief. While Respondent's counsel indicated that he would be submitting a brief during the hearing, he did not do so. However, Respondent certainly had every opportunity to do so and, further, had the opportunity to address the arguments made in Petitioner's pre-hearing brief in its own post-hearing brief.

Footnote 2: The tax return indicates that Maher owned 33.34% of the stock, while Fitzgerald and Piekos owned 33.33% of the stock each. This accounts for an immaterial difference between Maher's allocation of profits and losses and the allocations to Fitzgerald and Piekos.

Footnote 3: The Agreement also provides for an obligatory sale and purchase upon the death of an individual shareholder at the greater of the amount of life insurance owned by the Corporation on the life of the deceased shareholder or book value.

Footnote 4: No adjustment is to be made for corporate operations from the end of the fiscal year to the date of the event which gave rise to the sale.

Footnote 5: On July 16, 2010, about two weeks after Avedisian submitted Respondent's post-hearing brief and the matter was fully submitted, Respondent executed a Consent to Change Attorney, replacing Avedisian with the firm of Collier, Halpern, Newberg, Nolletti & Bock, LLP.

Footnote 6: This was Fitzgerald's number. While the tax return would suggest that the amount was actually less, this could be explained by Fitzgerald's testimony that his calculations included car payments.

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