

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

In the Matter of the Application of
DIANE HUDSON and STUART HUDSON,
holders of fifty (50%) percent of all shares of
PURE LIME USA, INC.,

INDEX No. 600127/16

MOTION DATE: May 19, 2016
Motion Sequence #003

Petitioners,

-against-

For the Dissolution of
PURE LIME USA, INC., a Domestic
Corporation,

Respondent.

The following papers read on this motion:

Notice of Motion.....	X
Affirmation in Support.....	X
Affirmation in Opposition.....	XX
Supplemental Affirmation in Support.....	X
Reply Affirmation.....	XX
Memorandum of Law.....	XX
Reply Memorandum of Law.....	X

Motion by respondent Pure Lime USA, Inc. for leave to reargue its motion to dismiss the petition for a defense founded upon documentary evidence and failure to state a cause of action is **granted**. Upon reargument, respondent's motion to dismiss the petition is **granted**

with leave to file an amended petition seeking dissolution of Pure Lime USA on the ground of oppressive conduct pursuant to BCL § 1104-a.

This is a petition for the judicial dissolution of a closely held corporation on the ground of deadlock. Petitioners Diane and Stuart Hudson jointly hold 50% of the shares of respondent Pure Lime USA, Inc. The other 50% of the stock is held by a Danish limited liability company, Pure Lime APS. Pure Lime APS designs and manufactures active and fitness clothing for women and girls, which was marketed by Pure Lime USA in the United States.

Pursuant to a shareholder's agreement dated November 29, 2009, Stuart Hudson was the president and treasurer of Pure Lime USA, and Diane Hudson was the vice president and secretary. The agreement provides that Stuart and Diane were to receive reasonable compensation in salary and benefits commensurate with their contribution to the success of the corporation.

The shareholder agreement provides that Pure Lime USA shall be managed by a board of directors comprised of Christian Friis Olesen, who is aligned with Pure Lime APS, as chairman, Diane and Stuart Hudson, and a fourth person designated by Pure Lime APS. Section 2.2 of the shareholder agreement provides that a quorum consists of the full board and, in case of a tie, the Chairman shall cast the deciding vote.

Section 1.3 of the shareholder agreement provides that if Stuart or Diane Hudson's employment with Pure Lime USA ceases for any reason whatsoever, the corporation may, at its option, elect to purchase all of the stock of either shareholder at book value, within "fifteen (60) days" of termination of employment. "Book value" is defined as "total assets, minus liabilities and intangible assets, including good will, divided by the current number of shares outstanding (Docket # 6). Additionally, Section 1.6 of the agreement gives the corporation a right of first refusal, if a shareholder desires to sell all or any part of his shares.

Petitioners alleges that between 2009 and 2014 the Danish company diverted approximately \$1,349,949 from Pure Lime USA, avoiding distribution to the shareholders. Various other disputes arose between the Hudsons and Pure Lime APS, including the Danish company's markup on the merchandise, a \$142,000 credit for defective merchandise, and a \$121,620 credit for "export disbursements." Petitioners allege that after a board of directors meeting on October 1, 2015 the directors aligned with Pure Lime APS excluded them from the business.

On September 28, 2015, Diane and Stuart Hudson commenced a derivative action on behalf of Pure Lime USA against Pure Lime APS and its aligned directors (Index No. 606262/15). Plaintiffs alleged that Olesen, Bengtsen, and Pure Lime APS breached their fiduciary duties to Stuart, Diane, and Pure Lime USA by charging a 40 % markup, failing to pay the defective merchandise and export disbursement credits, failing to pay Pure Lime USA's salaries and creditors, and otherwise diverting the profit of Pure Lime USA to Pure Lime APS. By order dated January 19, 2016, the court granted defendants' motion to dismiss the complaint. Plaintiffs were granted leave to serve an amended complaint, asserting derivative claims for breach of fiduciary duty, based upon non-payment of the defective merchandise and export disbursements credits, as well as the non-payment of salaries and creditors, as allegedly agreed to at the October 1, 2015 board of directors meeting, within 15 days of the e-filing of the order.

On February 3, 2016, plaintiffs served an amended complaint in the derivative action, purporting to comply with the court's January 19, 2016 order. However, in the first cause of action, plaintiffs asserted a fourth breach of fiduciary duty claim for allegedly "freezing" Pure Lime USA's corporate bank accounts and changing the password on the electronic billing system without the consent of plaintiffs. Plaintiffs also asserted a second cause of action for breach of fiduciary duty by failing to pay plaintiff Stuart Hudson \$54,286 in outstanding gross salary.

On April 21, 2016, plaintiff filed a supplemental summons and second amended complaint. In the first cause of action, the second amended complaint purports to assert a fifth breach of fiduciary duty claim for allegedly causing a new corporation, Purelime, Inc., to amend Pure Lime USA's purchase orders to divert money from Pure Lime USA and otherwise competing with Pure Lime. Plaintiffs also purported to assert a third cause of action against defendant Peter Hessellund-Jansen for allegedly aiding and abetting a breach of fiduciary duty by defendants Olesen, Bengtsen, and Pure Lime Denmark. Hessellund-Jansen is the attorney who incorporated the new Pure Lime corporation on September 2, 2015. Plaintiffs also purported to assert a fourth cause of action against defendant Pure Lime for tortious interference with contract.

By order dated June 7, 2016, the court granted defendant Hessellund-Jansen's motion to dismiss the second amended complaint as asserted against him for failure to state a cause of action. There was no allegation that defendant Hessellund-Jansen provided substantial assistance to any of the breach of fiduciary duty claims permitted to be asserted in the amended complaint pursuant to the court's order of January 19, 2016. On the court's court's own motion, parts d, e, and f of paragraph 70, as well as the second, third, and fourth causes

of action in the second amended complaint were also stricken as not in compliance with the court's January 19, 2016 order.

Meanwhile, by order to show cause dated January 11, 2016, petitioners commenced the present proceeding for the judicial dissolution of Pure Lime USA on the ground of deadlock. In the order to show cause, the court issued a temporary restraining order prohibiting the directors of Pure Lime USA from transferring the assets of the company, except by permission of the court. By order dated April 11, 2016, the court granted the petition for judicial dissolution only to the extent of ordering a hearing to be conducted on a later date. Although the tie-break provision in the shareholder agreement avoided "deadlock," it did not expressly limit a shareholder's right to bring a dissolution proceeding. The court was reluctant to limit petitioners' rights to seek judicial dissolution by implication. The court noted that, because the proceeding was brought pursuant to BCL § 1104 on the ground of deadlock, respondents did not have the right to elect to buy petitioner's shares at fair value pursuant to BCL § 1118 (See, Sakow v Seafood Restaurant, 297 AD2d 229 [1st Dept 2002]).

By notice of motion dated May 3, 2016, respondent Pure Lime USA moves for leave to reargue its motion to dismiss the petition for failure to state a cause of action. Respondent argues that because the tie break provision in the shareholder agreement makes "deadlock" impossible, deadlock is not available as a basis for judicial dissolution of Pure Lime USA. Nevertheless, respondent concedes that the shareholder agreement does not preclude judicial dissolution under "special circumstances," such as oppressive action toward petitioners, pursuant to BCL § 1104-a. Respondent argues that petitioners have brought their dissolution proceeding under BCL § 1104, rather than BCL § 1104-a, in an apparent attempt to thwart respondents' statutory buy-out rights. Alternatively, respondent argues that petitioners' commencement of the judicial dissolution proceeding on the ground of deadlock triggered the buy-out provision in the shareholders agreement.

In opposition, petitioners suggest that they may be entitled to common law dissolution on the ground that the directors aligned with Pure Lime APS breached their fiduciary duty to petitioners (See, Leibert v Clapp, 13 NY2d 313 [1963]; Fedele v Seybert, 250 AD2d 519, 521 [1st Dept 1998]). Additionally, petitioners argue that the buy-out provision in the shareholder agreement was not triggered by the commencement of the judicial dissolution proceeding, and in any event respondents did not timely elect to purchase petitioners' shares.

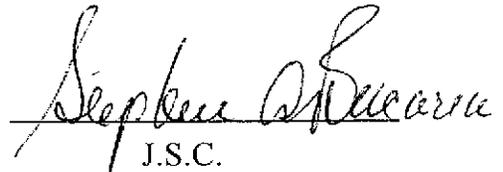
Statutory dissolution and buy-out rights may be restricted, but not nullified, in the shareholder agreement (Ferolito v Vultaggio, 99 AD3d 19, 26 [1st Dept 2012]). Thus, the

shareholders may agree in advance that a petition for dissolution on the ground of oppressive conduct shall be deemed a voluntary offer to sell (Id). Additionally, the shareholders may fix a "fair value" of the shares, or agree upon a valuation formula, in the event that the respondent shareholders elect to purchase the shares of the complaining shareholders pursuant to BCL § 1118 (Id). However, in the absence of an explicit provision in the shareholder agreement, a provision governing a voluntary sale, such as a first refusal provision, does not limit the respondent shareholders' rights to avoid dissolution by way of a BCL § 1118 statutory buy-out election (Id). Moreover, the commencement of a dissolution proceeding on the ground of deadlock may trigger a broad gauge buy-out provision, if the shareholders so intend (*Johnsen v ACP Distribution*, 31 AD3d 172, 177 [1st Dept 2006]). Where no true deadlock or oppression is alleged, the minority shareholders may not use a judicial dissolution petition as a "coercive tool" to avoid an unfavorable valuation formula in the shareholder agreement (Id at 178-79).

Because the Chairman of the Pure Lime USA board has the power to break ties, by the express terms of Pure Lime USA's shareholder agreement, there cannot be a deadlock. Moreover, while the petition alleges various acts of oppression of shareholders Diane and Stuart Hudson, it does not allege a deadlock on the board of directors with respect to any particular action. Accordingly, leave to reargue respondent's motion to dismiss the dissolution petition for failure to state a cause of action is **granted**. Upon reargument, respondent's motion to dismiss the petition is **granted** with leave to file an amended petition seeking dissolution of Pure Lime USA on the ground of oppressive conduct pursuant to BCL § 1104-a. The temporary restraining order issued by the court on January 11, 2016 is **vacated**.

So ordered.

Dated JUN 16 2016


 J.S.C.

ENTERED

JUN 20 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE