SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: STONE
HON. LEWIS BART STONE *Justice*

PART 505

GALORIE MICHEL GIRARD
-v-

INDEX NO. 114349/06

MOTION DATE

MOTION SEQ. NO. 2

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion ~~is determined~~ denied in accordance with the annexed Decision and Order

FILED
AUG 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/3/07

HON. LEWIS BART STONE J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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The application of eurl Galerie Michel Giraud, holder of fifty percent of all outstanding shares of Vos, De Vos & Giraud, Ind.,

Petitioner,

For the dissolution of De Vos & Giraud, Inc., Pursuant to Section 1104/1104 of the BCL

: DECISION AND ORDER

: Index Number 114349/06

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Hon. Lewis Bart Stone, J

This special proceeding was commenced by Order to Show Cause (the "Order") issued on October 18, 2006 and returnable on November 24, 2006, by eurl Galerie Michel Giraud ("Giraud") a 50% shareholder of DeVos & Giraud, Inc., a New York Corporation (the "Corporation"), which had been incorporated in 2004 to dissolve the Corporation pursuant to Business Corporation Law ("BCL") §1104-a as a result of alleged improper acts of persons in control of the Corporation, i.e. its other principal shareholder, Galerie Jacques DeVos and its principal, Jacques DeVos (collectively "DeVos").

DeVos responded by electing on December 4, 2006, pursuant to BCL §1118, to purchase the shares of the Corporation owned by Giraud (the "Shares").

A buyout right under BCL §1118 is exercisable as of right in response to a petition for dissolution under BCL §1104-a. See, e.g., Sakow v. 633 Seafood Restaurant, Inc, 297 AD2d 229 (1st Dept. 2002). It is designed to balance the right of a shareholder to have his investments in a corporation protected, against the risk to the corporation and its other shareholders of being faced with an expensive lawsuit and disruption by another shareholder whose complaints may be without merit. To resolve corporate disputes in the most efficient manner, this statutory right is an irrevocable right and may not be challenged or set aside by the complaining shareholder. The result is akin to no-fault divorce where the division of marital assets becomes the sole question once the marriage has failed.[1]

BCL §1118 was adopted by the State Legislature in 1979 (Laws 1979, c.217) as a statutory compromise expressly to deal with shareholder disputes in close corporations. This statutory compromise may be, as many compromises are, imperfect in its application in a particular case, but it is the rule. By forming a New York business corporation in 2004, after BCL §1118 was enacted, the parties elected to be governed, protected and bound by such section.

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

Under BCL §1118, the Court must determine the fair value of the Shares "as the day prior to the date on which such [BCL §1104-a] petition was filed." BCL §1118(b). As Giraud's petition was filed on October 18, 2006, the proper evaluation date for the Shares is October 17, 2006. As the election has been made, all issues relating to prior disputes and disagreements, including any showing of fault by one shareholder or the other become moot. Thus all allegations of DeVos' wrongdoing asserted in Giraud's petition may not be considered by the Court, except only to the extent the Court finds that corporate assets were willfully or recklessly dissipated before such date or that asserts were transferred without adequate considerations. As this case involved no such allegations of misappropriation or transfer, Giraud's allegations of wrongdoing become irrelevant.

During the process toward the evaluation of the Shares under BCL §1118, Giraud brought several Orders to Show Cause seeking interim relief. An initial Order to Show Cause, issued on October 31, 2006, sought to restrain DeVos from removing property or any corporate asserts from the corporate premises. A Temporary Restraining Order was also issued with this order. The parties subsequently reached accord by stipulation on the Temporary Restraining Order. Two more Orders to Show Cause, issued on January 3, 2007 sought respectively the removal of the name Giraud from the Corporate name and an independent audit and requested a stay of the

proceedings. A final Order to Show Cause, issued on May 15, 2007, sought to attach the lease security deposit made by the Corporation to its landlord and the proceeds of customs bonds and to accept as conclusory for the valuation proceeding the value of certain merchandise as set forth in custom declarations. The Court deferred the determination of these motions until the evaluation hearing.

Prior to such hearing, DeVos sought to preclude Giraud from introducing evidence as to any matter which would have been set forth as responses to DeVos' interrogatories, which had been served on Giraud earlier and not responded to by Giraud, as required by Order of this Court. Because Giraud had resisted discovery sought by DeVos, including failing to respond to a Demand made in January, 2007, for a Bill of Particulars, the Court, when it on June 1, 2007, set aside other matters and set a hearing date for June 26 and 27 and 28, and Giraud asserted that he needed further specificity to provide a Bill of Particulars, the Court, with the acquiescence of the parties, in lieu of the Bill of Particulars sought, established a schedule for the service by DeVos and answer by Giraud to interrogatories so that discovery could be completed sufficiently before the June 26, 27, and 28 hearing to enable the parties to present their respective cases at the hearing. In compliance with the schedule fixed by the Court, DeVos served such interrogatories on June 7th. The Court ordered schedule required Giraud's response in seven days after service to enable DeVos to

prepare for the hearing. Although on June 20th, counsel for DeVos reminded Giraud's counsel that no responses had been received, Giraud failed to respond prior to the hearing. Giraud's counsel's excuse was that he did not receive the interrogatories until June 11. Counsel for DeVos disputed this assertion, claiming the interrogatories were faxed on June 7 and submitted a fax transmittal sheet to prove such transmission. Giraud's sole response that the responses were almost completed and were at his office. As this Court found that Giraud had failed to comply with the scheduling order of this Court, thus impairing DeVos' ability to consider such responses before the hearing as was contemplated by the Court and the parties, and finding that Giraud made no timely motion to change the schedule, the Court precluded Giraud from submitting evidence that might have been set forth in the answers to interrogatories.

Two of Giraud's Orders to Show Cause seek to attach assets of the Corporation. While protecting such assets might be appropriate where a material danger existed that corporate assets could be lost or removed from the jurisdiction of the Court or materially injured or destroyed, such facts are not present here. Almost all of the corporate inventory was on consignment and were therefore not corporate assets. Further, as discussed below, the Shares have no value and the bulk of the obligations of the Corporation are to DeVos, Giraud has only a negligible interest in

the assets sought to be attached to protect payment for the Shares. This Court further finds that such spate of motions was sought to create pressure on DeVos perhaps in connection with other litigation pending in France rather than to protect Giraud's rights. This Court will not be a party to such an approach. All such motions for temporary relief are therefore denied.

Giraud also moved to remove his name from the corporate name of the Corporation. This motion is denied. To the extent the "Giraud" name has any value, it is a corporate asset of the Corporation. Giraud, DeVos and the Corporation have not made any agreement to change the Corporation's name or not to use the name Giraud in the event of a purchase of shares under BCL §1118.

As the parties could not agree as to the value of the Shares, the Court conducted an evidentiary hearing to determine the fair value pursuant to BCL §1118(a).

At the hearing, DeVos submitted into evidence a written appraisal of the Shares made by Lazar Lipton Valuation Services, LLC, an appraiser of businesses, and the oral testimony of Zafar Bin Basher, ("Bin Basher") a director and member of such firm. Bin Basher was qualified as an expert. At the hearing, Giraud proffered no appraiser or appraisal evidence although the preclusion order would not have prevented Giraud from doing so. Bin Basher testified as to his opinion of the value

of the Shares and the reasons therefor. In his appraisal, Bin Basher considered the Corporation's assets, its income stream and its future prospects. Bin Basher's opinion was that because of the extent of the obligations of the Corporation, its continuing losses, and the short remaining term of its lease, the Shares had no positive value as of the evaluation date. This Court finds the appraiser and the appraisal credible. The Court also considered and reviewed Bin Basher's assumptions, and his methodology, testimony and his cross examination and finds Bin Basher's method to be the appropriate appraisal paradigm.

After considering such testimony and the other testimony and exhibits presented, and considering the credibility of all who testified, this Court finds that the value of the Shares is $1.00, and that upon the tender of such amount, Giraud shall forthwith deliver the Shares, endorsed in blank, to DeVos, together with proof of payment of any applicable stock transfer taxes. Upon such tender, Giraud shall have no further rights as a shareholder of the corporation.

This is the Decision and Order of the Court.

DATED: AUGUST 3, 2007
NEW YORK, NEW YORK

Hon. Lewis Bart Stone
Justice of the Supreme Court