**2x**

**To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties**

**SUPREME COURT OF THE STATE of NEW YORK**
**COUNTY OF ORANGE**

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PAUL TEUTUL,

Plaintiff(s),

-against -

PAUL M. TEUTUL, ORANGE COUNTY CHOPPERS HOLDINGS, INC. and ORANGE COUNTY CHOPPERS, INC.,

Defendant(s).

----------X

**DECISION/ORDER**

Index No. 13782-2009

Motion Date:3/10/10

Motion Seqs: 1 & 2

**LUBELL, J.**

The following papers were considered in connection with this application by defendant Paul M. Teutul made by way of order to show cause for an Order[1] pursuant to CPLR §6301 et seq., enjoining and restraining plaintiff Paul Teutul and all persons and entities associated with or acting and working in concert or combination with him, pending the final determination of this action, from transacting any unauthorized business and from exercising any corporate powers, except by permission of the Court, and from collecting or receiving any debt or other property of defendant Orange County Choppers Holdings, Inc., and from paying out or otherwise transferring or delivering any property of defendant Orange County Choppers Holdings, Inc., or, in the alternative, pursuant to CPLR §6301 et seq., enjoining and restraining plaintiff Paul Teutul and all persons and entities associated with or acting and working in concert or combination with him, from wrongfully diverting, removing, wasting, assigning, transferring or otherwise disposing of any of the assets of Orange County Choppers Holdings,

[1] That aspect of Paul M. Teutul's motion pursuant to Business Corporation Law §§1202(a)(3) and 1203, CPLR §6401 seeking the appointment of a temporary receiver for defendant Orange County Choppers Holdings, Inc. to manage its affairs, safeguard and preserve the corporations assets and prevent corporate waste has been withdrawn.

Inc. and directing plaintiff Paul Teutul and defendant Orange County Choppers Holdings, Inc., pending the final determination of this action, to (i) provide defendant Paul M. Teutul with a weekly accounting of all expenditures and receipts by defendant Orange County Choppers Holdings, Inc., (ii) provide defendant Paul M. Teutul and his agents with timely and direct access, upon reasonable advance notice, to the defendant Orange County Choppers Holdings, Inc.'s accountant, and (iii) forward to defendant Paul M. Teutul all mail, e-mail, and telephone messages directed to him at defendant Orange County Choppers Holdings, Inc., and (D) granting such other and further relief as the Court deems just and proper and the **Cross-Motion** by Paul Teutul for an ORDER pursuant to CPLR §§2215, 6301, 6311, 3001 and 3212(e) granting plaintiff partial summary judgment (a) declaring that the option agreement referenced in the complaint is a binding, legally valid and enforceable obligation, (b) declaring that Paul Teutul validly exercised his rights under the aforesaid option agreement, (c) declaring and directing the appointment of an independent third-party appraiser to value the shares of stock held by defendant Paul M. Teutul in the corporate defendant in order to effectuate performance of the aforesaid option agreement, (d) directing Paul M. Teutul to perform the aforesaid option agreement now and upon receipt of the independent third-party appraisal, and (e) otherwise declaring the rights and relations of the parties under CPLR §3001 and granting such other and further relief deemed just and proper:

| **PAPERS** | **NUMBERED** |
|---|---|
| Order to Show Cause/Affirmation/Exhibits A-B | 1 |
| Cross-Motion/Affirmation/Exhibits A-D/ Affidavit in Opposition/Exhibits A-F | 2 |
| Affirmation in Opposition & Reply Affirmation/ Affidavits/Exhibits A-E/A-D/A-I | 3 |
| Reply Affidavits/Reply Affirmation/Exhibits A-B | 4A-4C |

Plaintiff Paul Teutul ("Paul Sr.") is the Chief Executive Officer, managing director and majority shareholder of defendant Orange County Choppers Holdings, Inc. ("OCCHI"). Among other business activities, OCCHI is engaged in the manufacturing of custom motorcycles. Founded by Paul Sr. and his son, defendant Paul M. Teutul ("Paul Jr."), in or around 1999, OCCHI is situated in Newburgh, New York.

Paul Jr. is a director of OCCHI and, with twenty percent of the outstanding stock, is its sole minority shareholder. Paul Jr. came to own his share of the business when, in 2007, Paul Sr. offered Paul Jr. a minority interest in OCCHI to retain Paul Jr.'s highly regarded, valuable and creative services. Thereafter, Paul Jr. and Orange County Choppers, Inc. entered into an employment

agreement dated January 16, 2008 (the "2008 Letter Agreement"). Before the close of 2008, however, Paul Jr.'s employment with OCCHI would be terminated. Nonetheless, Paul Jr. still maintains his twenty percent stake in OCCHI and his directorship position.

Upon Paul Jr.'s critically acclaimed design of OCCHI's first "theme bike", the "Spider Man Bike", OCCHI attracted the attention of the Discovery Television Network ("Discovery") which, in 2002, led to the creation of the television reality show called *American Chopper*. *American Chopper* depicts the planning, design, engineering and fabrication of custom motorcycles and the professional and personal interactions between various OCCHI employees, most noteworthy, Paul Sr. and Paul Jr. This lawsuit is the unfortunate yet not uncommon evolution of the strained and challenging relationship between a father and son/majority and minority shareholders.

In response to Paul Jr.'s termination, Discovery advised the parties that they were in breach of contract with Discovery. In order to resolve that issue, as well as others, Paul Sr. and Paul Jr. entered into a letter agreement dated January 21, 2009 (the "2009 Letter Agreement"). Among other things, the 2009 Letter Agreement superceded and modified a good part of the parties's 2008 Letter Agreement including the modification of a non-competition clause. The 2009 Letter Agreement also defined Paul Jr.'s association with OCCHI as that of an independent contractor. In addition, and most relevant to the issues now before the Court, the 2009 Letter Agreement provides the following at paragraph "9" [the "Option"]:

> [Paul Jr.] shall extend to [Paul] Sr., upon [Paul Sr.'s] request, an option to purchase all of his shares in Orange County Choppers Holdings, Inc. for fair market value as determined by a procedure to be agreed to by the parties as soon as practicable.

By way of a November 19, 2009 letter, through counsel, Paul Sr. sought to exercise the Option as follows:

> [T]his letter will constitute a formal exercise of the option provided for in the Letter Agreement dated January 21, 2009, effective immediately, November 19, 2009, at the current fair market value.

Continuing, the November 19, 2009 letter provides:

> It is now left to the parties to determine the logistics of agreeing upon or ascertaining the fair market value of Paul Jr.'s stock interests. Please contact the undersigned directly so that we can discuss the procedure moving forward . . .

Through this action, Paul Sr. advances various causes of action against Paul Jr. including specific performance, breach of contract, and declaratory judgment all of which deal with the Option in connection with which Paul Sr. seeks to compel Paul Jr. to sell his minority stake in OCCHI.

By way of counterclaim, Paul Jr. alleges that Paul Sr. has breached his fiduciary duty to OCCHI by engaging in self-dealing and by wasting the corporate assets of and mismanaging OCCHI. As such, Paul Jr. seeks, among other things, injunctive relief and timely, unfettered, and complete access to all of the financial records of OCCHI, an accounting, and a turnover of alleged misappropriated corporate distributions.

The principal and driving issue in this ligation, however, is whether paragraph "9" of the 2009 Letter Agreement, the Option, constitutes a valid and enforceable option under New York Law and, if so, whether Paul Sr. properly exercised that option. The Court answers the question in the affirmative.

As relied upon and quoted in Kaplan v. Lippman (75 N.Y.2d 320, 325 [1990]):

> "An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date" (Leonard v. Ickovic, 79 AD2d 603, aff'd 55 NY2d 727; see also, 1 Williston, Contracts §61B [3d ed 1957]; Restatement [Second] of Contracts § 25).

This unilateral right ripens into a fully enforceable bilateral contract merely upon the optionee's notice of intent to exercise the option in accordance with the terms of the agreement (Kaplan v. Lippman, supra, Cochran v. Taylor, 273 N.Y. 172, 183 [1937]; Bullock v. Cutting, 155 A.D. 825, 828 [3d Dept., 1913]). Just as an option may not be unilaterally withdrawn, revoked or rescinded by the optionor (id.), the optionee, although not bound to exercise the option, can only exercise same according to its terms (Hall v Mutual Life Ins. Co., 282 A.D.2d 203 [1st Dept., 1953], aff'd 306 N.Y. 909 [1954]).

> Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract . . . [U]nless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy . . . This is particularly significant where specific performance is sought. Second, the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement (*see*, Restatement [Second] of Contracts § 33 [3] [1981]).

(Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., 74 N.Y.2d 475, 482 [1989]. On the other hand, it is equally well-recognized that the "proper application" of the definiteness requirement can be "elusive" because it "cannot be reduced to a precise, universal measurement . . . (id., at 483). As such, the "standard is necessarily flexible, varying for example with the subject of the agreement, its complexity, the purpose for which the contract was made, the circumstances under which it was made, and the relation of the parties [citations omitted]" (id.).

Correspondingly, the lower courts have been instructed:

> Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear (1 Williston, Contracts §47, at 153-156 [3d ed 1957]). The conclusion that a party's promise should be ignored as meaningless "is at best a last resort" [citation omitted].

(Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., supra, at 483).

The "variety of evidence and methods aimed at determining the price of minority interests in closely held corporations" are expressly recognized in Matter of Seagroatt Floral Co., Inc. (78 N.Y.2d 439 [1991]). Among other things,

> . . . shareholders in closely held corporations, as contrasted with shareholders in public companies, are unlikely to find prospective buyers for their shares (see, Sweet and Mallis, Standing to Petition for the Judicial Dissolution Under the New York Business Corporation Law: A Needed Change, contained in Bill Jacket, L 1979, ch 217) . . . [W]hatever the method of valuing an interest in such an enterprise, it should include consideration of any risk associated with illiquidity of the shares (*see* generally, Haynsworth, Valuation of Business Interests, 33 Mercer L Rev 457 [1982]; 2 O'Neal and Thompson, O'Neal's Close Corporations § 9.34, at 162-163 [3d ed]).

Nonetheless, the courts have upheld option agreements where "the option manifests the parties' unmistakable intent that the price was to be fixed by a third person - the Department of Health - . . . without the need for further expression by the parties" Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., supra), the option provides that "a third party, an arbitrator, is to determine the price term in the event they are unable to reach an agreement on their own" (166 Mamaroneck Avenue Corp. v. 155 East Post Road Corp, 78 N.Y.2d 88, 91 [1991]), and where the option provided "the purchase price was to be either the sum offered by a bona fide third-party purchaser, or, in the alternative, the price fixed by three appraisers . . . [where] the option also set forth the manner in which the appraisers were to be selected" (Tonkery v. Martina, 78 N.Y.2d 893 [1991]).

Upon holding that the option in Tonkery v. Martina, supra, was not void for indefiniteness, the Court noted that the option clearly indicated that the parties agreed to commit the calculation of price to a third-party and to be bound thereby; "never agreed to agree on a purchase price in the future, but instead tied the price of the parcel to an extrinsic event - either the price offered by a bona fide purchaser or that set by appraisal - and, additionally, provided the method for selection of appraisers" (Tonkery v. Martina, supra, at 895).

Here, although the parties did not expressly state their intention to "commit the calculation of price to a third-party", the Court finds that their intention to agree upon a "procedure" is sufficiently the legal equivalent of same in that it is a manifestation of their intention to have fair market value

determined in a matter that falls outside of what their individual subjective beliefs might be and to be bound thereby. As in Tonkery v Martina, supra, the Teutuls did not agree to agree on a purchase price in the future. Instead, they set the price at "fair market value".

While the Court in Tonkery v. Martina, supra, upheld an option wherein the exercise price would be set at the amount offered by a bona fide purchaser or that determined by appraisal where the parties had agreed upon a method for the selection of the appraiser, the Court in Marder's Nurseries, Inc. v. Hopping (171 A.D.2d 63 [2d Dept., 1991]) went even further. In Marder's Nurseries, Inc. v. Hopping , supra, the Court upheld an option even though the agreed upon method to determine fair market value was deemed "seriously flawed".

The parties in Marder's Nurseries, Inc. v. Hopping , supra, agreed to fix a fair market value as would be determined by two out of three appraisers, a process the Court characterized as "analogous" yet distinguishable from Cobble Hill Nursing Home v. Henry & Warren Corp. (74 N.Y.2d 475, supra [purchase price to be determined upon referral to third party for application of formula found in the Public Health Law and applicable rules and regulations]) and Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp. (78 N.Y.2d 88, supra [rent to be paid in lease renewal option to be determined "by arbitration as provided for by the Civil Practice Act of the State of New York"). The problem in Marder's Nurseries, Inc. v. Hopping , supra, however, was that there was "no guarantee that the first two appraisers would agree, or that, in the event of their disagreement, they would be able to agree as to the identity of the third appraiser [, and further] . . . there is no guarantee that the third appraiser, if he or she agreed to the appointment, would concur with either one of the original two."

Nonetheless, the Court concluded that the option agreement was not so indefinite as to require cancellation of the contract. Upon doing so, the Court stated:

> [T]he parties agreed to a purchase price that would reflect the "fair market value" of the property . . . That the procedure by which the "fair market value "is to be determined lends itself to stalemate is not a fatal defect since, as expressly noted by the Fourth Department in the Tonkery case (supra), and as implicitly sanctioned by the Court of Appeals in its affirmance, a court may break any

> stalemate by determining fair market value itself [citation omitted].
>
> The potential need for judicial intervention should not, in other words, be considered fatal to the parties' agreement . . .
>
> The problematic nature of the method designed by the parties for arriving at " fair market value", therefore, should not require cancellation of the contract, since this does not . . . make out only an agreement to agree (cf., Martin Delicatessen v. Schumacher, 52 N.Y.2d 105, 110 . . . ).

(Marder's Nurseries, Inc. v. Hopping, supra at pp. 72 -73).

Most noteworthy, the Court continues, ". . . the Supreme Court may . . . entertain applications for the appointment of a third appraiser, or fix the fair market value after a hearing on the issue" (id. at 73)

This Court sees no distinguishable difference between the authority of this Court to select an appraiser, upon application, or to "*fix the fair market value after a hearing*" where, as in Marder's Nurseries, Inc. v. Hopping, supra, the option contains a "seriously flawed" method with which to determine fair market value and where, as here, the parties have never come to terms on the method to be used to determine fair market value. The authority of the Court recognized in Marder's Nurseries, Inc. v. Hopping, supra, to resolve the parties' stalemate is no less intrusive on the contractual rights of the parties than where, as here, the parties have yet to define the procedure to be employed to determine fair market value on the option exercise date. In fact, an argument can be made that the latter is less so.

The open question as to whether Paul Sr. validly exercised that option is answered in the affirmative, there being no viable argument to the contrary.

For the reasons hereinabove stated, the Court hereby grants Paul Sr.'s motion for partial summary judgment on the validity of the Option and his valid exercise of same on November 19, 2009. Having so ruled, the question then is whether to now entertain that aspect of Paul Sr.'s motion for the appointment of a third-party appraiser to value the subject shares. The Court answers the

question in the negative.

During oral argument on the instant applications, both parties argued that a determination on the viability of the Option might very well be determinative of many issues. With that in mind, the Court will call this matter in before scheduling a hearing on the issue of fair market value. The purpose of the conference is to determine whether the parties can come to terms on the appointment of a neutral appraiser and, if not, to solicit the names of possible appointees. Assuming that the parties do not agree to be bound by the determination of the neutral appraiser and that his or her determination will be subject to challenge at the valuation hearing, the Court will determine the amount of time to allow the parties for preparation of same.

Those aspects of Paul Jr.'s motion pursuant to CPLR §6301 seeking injunctive relief is mutually granted as against both parties to the extent that both parities and all persons and entities associated with or acting and working in concert or combination with them, pending the final determination of this action, are hereby enjoined and restrained from transacting any unauthorized business and from exercising any corporate powers except in the ordinary course of business or by permission of the Court, and both parties and all persons and entities associated with or acting and working in concert or combination with then are hereby restrained and enjoined from wrongfully diverting, removing, wasting, assigning, transferring or otherwise disposing of any of the assets of OCCHI pending the final determination of this action.

Paul Jr.'s further application for an Order directing Paul Sr. to provide defendant Paul Jr. with a weekly accounting of all expenditures and receipts by defendant OCCHI is referred to and shall be determined in connection with any pre-trial/pre-hearing disclosure issues that may properly be placed before the Court. In the meantime, the Court's most recent on-the-record determinations shall remain in place.

Paul Jr.'s application for his and his agent's timely and direct access, upon reasonable advance notice, to the defendant OCCHI's accountant is granted or denied to the extent earlier indicated on the record as may be modified following the Court's Decision & Order on subsequently filed Motion Sequences "3" and "4".

That aspect of Paul Jr.'s motion seeking to direct Paul Sr. to forward to Paul Jr. all mail, e-mail, and telephone messages directed to him at defendant OCCHI is granted to the extent that same relates to personal matters. This is without prejudice to any

determinations which may be handed down in regard to Motion Sequences "3" and "4".

To the extent not addressed herein, the motion and cross-motion are deemed denied and/or referred to the yet to be fully submitted Motion Sequences "3" and "4" to the extent therein raised.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Goshen, New York
April 21, 2010

S/ _____
**HON. LEWIS J. LUBELL, J.S.C.**

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