

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

PFT TECHNOLOGY LLC,

Plaintiff Counterclaim-Defendant,

-against-

ROBERT WIESER,

Defendant Counterclaim-Plaintiff,

-and-

PATRICK KEELAN, THOMAS SMITH and
FRANK CASTELLANO,

Counterclaim-Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 8679/12

MOTION DATE: May 5, 2014
Motion Sequence # 005,006

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affidavit/Affirmation in Support.....	X
Affidavit in Opposition.....	XXX
Reply Affirmation.....	XX
Memorandum of Law.....	X
Reply Memorandum of Law.....	X

Motion by defendant Robert Wieser to compel discovery is **granted** to the extent indicated below. Cross-motion by plaintiff PFT Technology, LLC for an order referring the case to mediation, setting a valuation date, and compelling the return of equipment is **granted** and **denied** to the extent indicated below.

This is a special proceeding for judicial dissolution of a limited liability company. Plaintiff PFT Technology, LLC is engaged in the business of detecting gas and fluid leaks in power networks for public utilities. Defendant Robert Wieser is a founder and managing member of PFT. Wieser also claims to have designed and built the highly specialized instruments used by PFT. Counterclaim defendants Patrick Keelan, Thomas Smith, and Frank Castellano are the other managing members of the company.

Section 6.05(a) of PFT's operating agreement provides that any of the managing members may be removed for "cause." Section 6.05(b) defines "cause" as i) conviction of fraud, embezzlement, or financial dishonesty against the company, or ii) willful and material neglect by the managing member of his normal and reasonable duties as a managing member of the company. Section 6.05(a) provides that removal of a managing member for cause requires a "supermajority-in-interest" of the members, excluding the member who is to be removed. The operating agreement defines "supermajority-in-interest" as an interest in excess of 75 %. The operating agreement is silent as to how the member's interest is to valued, whether upon removal for cause or voluntary resignation.

During 2011, a dispute arose between Wieser and the other members of PFT concerning his salary and equity distributions as compared to those of the other members. The majority members initially tried to remove Wisier for cause and then offered to buy out his interest. On July 10, 2012, PFT commenced this proceeding seeking dissolution of the company.

In its first cause of action, PFT seeks a declaratory judgment that Wieser breached his fiduciary obligation to the company. PFT alleges that Wieser used his company credit card for personal expenses, abandoned his responsibilities to PFT, and rendered certain of the company's instruments non-operational. In its second cause of action, PFT seeks damages for Wieser's alleged breach of fiduciary duty. In its third cause of action, PFT seeks judicial dissolution of the company.

In his answer, Wieser denies that dissolution of PFT is necessary. Nevertheless, Wieser requests a "fair valuation" of his membership interest in the company. Additionally, Wieser asserts various counterclaims against PFT and the other members of the company. In his first counterclaim, Wieser alleges that the individual defendants breached PFT's operating agreement by paying themselves unauthorized salaries and failing to pay him his share of the income distributions. In his second counterclaim, Wieser alleges that the individual defendants converted the "intellectual property"

associated with machinery and equipment which Wieser fabricated for the company. Wieser's third counterclaim is for an accounting with respect to PFT's property.

In his fourth counterclaim, Wieser seeks advancement and indemnity for legal fees incurred in defending the present action pursuant an indemnity provision in PFT's operating agreement. By order dated February 20, 2014, the court granted Wieser an advancement for legal fees in the amount of \$100,000, in connection with the issue of valuation of his interest in the company. In his fifth counterclaim, Wieser asserts a claim for breach of fiduciary duty against the majority members.

Defendant Wieser moves to compel production of several categories of documents as well as to compel counter-claim defendants Smith and Castellano to appear for depositions. Among the documents requested are i) communications among the majority members concerning Wieser, ii) communications among the majority members concerning management issues, including member compensation and valuation of the company, iii) financial records, including those for activity subsequent to the commencement of the proceeding, and iv) customer contracts and agreements.

PFT cross moves for an order setting a valuation date for Wieser's interest, referring the matter to mediation, and for the return of company property. PFT argues that the valuation date is the date upon which the dissolution action was commenced. Although Wieser does not appear to argue for a later valuation date, he seeks discovery of the financial condition of the company after the dissolution proceeding was filed.

§ 702 of the Limited Liability Company Law provides that "On application by or for a member, the Supreme Court... may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." In order to establish that it is not "reasonably practicable" to carry on the business, the member seeking dissolution must establish that 1) management is unable or unwilling to reasonably permit or promote the stated purpose of the company to be realized or achieved, or 2) continuing the company is financially unfeasible (*Matter of 1545 Ocean Ave*, 72 AD3d 121, 131 [2d Dept 2010]). Where members holding a clear majority in interest seek dissolution, it is clear that management is unwilling to promote the purpose of the company as it is presently constituted.

The Limited Liability Company Law does not expressly authorize a buy-out in a dissolution proceeding (*Mizrahi v Cohen*, 104 AD3d 917, 920 [2d Dept 2013]).

Nevertheless, in certain circumstances, a buy-out may be an appropriate equitable remedy upon the dissolution of an LLC (Id). Where members holding a clear majority in interest seek dissolution, a buy-out of the minority member may be a particularly appropriate remedy.

The Limited Liability Company Law is silent as to how the membership interest of the member who is to be bought out is to be valued and the valuation date. Nevertheless, in a proceeding to dissolve a corporation on the ground of oppressive conduct, the interest of the petitioning shareholder is to be valued as of the date prior to the date on which the petition was filed (Business Corporation Law § 1118[b]). Value is to be determined on the basis of what a willing purchaser, in an arm's length transaction, would offer for the company as an operating business, rather than a business in the process of liquidation (*Pace Photographers, Ltd. v Rosen*, 71 NY2d 737, 748 [1988]). The three major elements of value are net asset value, investment value, and market value (*Friedman v Beway Realty Corp.*, 87 NY2d 161, 167 [1995]). The particular facts and circumstances will dictate which element predominates, and not all three elements must influence the result (Id). Fair value determinations should take into account the subsequent economic impact on value of the event giving rise to the buyout or dissolution of the company (Id). Finally, valuation may adjusted upwards or downwards, depending upon the resolution of the parties' breach of fiduciary duty claims (Business Corporation Law § 1118[b]).

In the present case, Wieser suggests that his knowledge and expertise were critical to the profitability of PFT Technology, at least when the company was formed. In view of Wieser's anticipated departure, the extent to which his knowledge and expertise are now shared by the other managing members may well effect future income and the investment value of the company. With these observations in mind, the court will proceed to the issues of discovery.

Communications concerning Wieser are relevant to the extent that they tend to show whether the other members share Wieser's technological expertise. Thus, statements to the effect of, "How will we get along without Wieser?" or "We won't miss him for a moment!" are equally discoverable. On the other hand, statements of a purely personal nature, such as "I never liked Wieser, anyway!" are irrelevant to the value of the company and not discoverable. Defendant's motion to compel discovery is granted to the extent that plaintiff shall produce all communications concerning Wieser that bear on the valuation of the company.

One of the major reasons for investing in a close corporation is to obtain income

and employment (*In re Kemp & Beatty, Inc.*, 64 NY2d 63, 71 [1984]). Thus, communications concerning management issues may be relevant to valuation, particularly if they concern manager compensation. Defendant's motion to compel discovery is further **granted** to the extent that plaintiff shall produce all communications concerning management issues that may effect the valuation of the company.

The investment value of the company will depend, to some extent, upon the present discounted value of the expected future income stream of PFT, as of the valuation date. It follows that financial records of the company, covering a reasonable period of time subsequent to the valuation date, will be relevant to the expected income stream. Accordingly, defendant's motion to compel discovery is further **granted** to the extent that plaintiff shall produce financial records of PFT, including customer contracts and agreements, up to and including July 9, 2015.

Attorney's fees incurred in a dissolution proceeding, including a proceeding which terminates in the buyout of the dissenting member's interest, are a proper expense of carrying on the business of the limited liability company. The company's attorney's fees are relevant to the investment value of the company, only to the extent that the gross amount of attorney's fees will effect the future income stream. Accordingly, defendant's motion to compel discovery is further **granted**, only to the extent that plaintiff shall produce data showing total attorney fees incurred in the present action, on a continuing basis up to and including July 9, 2015. Plaintiff shall produce the above documents within 30 days of the date of this order.

Plaintiff's cross-motion to set a valuation date is **granted** to the extent of declaring that the valuation date is July 9, 2012. Plaintiff further seeks the return of "spare parts and supporting equipment," including several different types of valves, cartridge heaters, and relays. Plaintiff's cross-motion for an order directing the return of the parts and equipment is **denied**, with leave to renew upon an affidavit identifying the parts and equipment in more specific detail and the value of each category of parts and equipment or the aggregate value of all of the material (See CPLR § 7102[c]).

Finally, plaintiff's cross-motion for an order referring the matter to mediation is **denied**, with leave to renew upon the conclusion of discovery. In the interim, the parties are free to proceed to mediation on a voluntary basis.

So ordered.

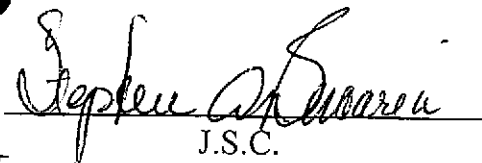
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MAY 21 2014

MAY 27 2014

Dated _____

NASSAU COUNTY
COUNTY CLERK'S OFFICE


J.S.C.