Celauro v 4C Foods Corp.
2016 NY Slip Op 31917(U)
October 12, 2016
Supreme Court, Kings County
Docket Number: 500373/12
Judge: Lawrence Knipel

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of October, 2016.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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NATHAN J. CELAURO, INDIVIDUALLY; NATHAN J. CELAURO AS PRELIMINARY EXECUTOR OF THE ESTATE OF GAETANA CELAURO, THE DECEASED SOLE INCOME BENEFICIARY OF THE SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS VESTED BENEFICIAL OWNER OF THE SHARES OF 4C FOODS CORP. HELD BY THE SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS TRUSTEE AND LINDA CELAURO AS SUCCESSOR CO-TRUSTEE OF THE SALVATORE F. CELAURO CHILDREN'S TRUST F/B/O NATHAN CELAURO A/K/A THE NATHAN J. CELAURO IRREVOCABLE TRUST U/A DATED DECEMBER 26, 1991,

Plaintiffs,

- against -

Index No. 500373/12

4C FOODS CORP., JOHN A. CELAURO; ROSEANN CELAURO, INDIVIDUALLY; WAYNE J. CELAURO, INDIVIDUALLY, DIANE CELAURO CARTER, INDIVIDUALLY; ROSEANN CELAURO, MARCI PLOTKIN, AND MARY FRAGOLA, AS THE TRUSTEES OF THE JAC TRUST, DATED DECEMBER 1, 2003; SALVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE ANGELA DOUGLASS IRREVOCABLE TRUST MADE BY JOSEPH SARATELLA U/A DATED 6/19/92; SALVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE SALVATRICE A. MACCRACKEN IRREVOCABLE TRUST MADE BY JOSEPH SARATELLA U/A DATED 6/19/92; SALVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE SALVATRICE

A. MACCRACKEN IRREVOCABLE TRUST MADE BY SALVATRICE A. MCCRACKEN U/A DATED 6/19/92; DIANE CELAURO CARTER AND WAYNE J CELAURO, AS TRUSTEES OF THE KELLY CELAURO TRUST U/A DATED DECEMBER 31, 1991; DIANE CELAURO CARTER AND WAYNE J. CELAURO, AS TRUSTEES OF THE JILLIAN CELAURO TRUST U/A DATED DECEMBER 31, 1991; WAYNE J. CELAURO, AS A TRUSTEE OF THE WAYNE J. CELAURO IRREVOCABLE TRUST U/A DATED 12/26/91; DIANE CELAURO CARTER AND WAYNE J. CELAURO, AS TRUSTEES OF THE DIANE CELAURO CARTER IRREVOCABLE TRUST U/A DATED 12/26/91; SAVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE ANGELA DOUGLASS IRREVOCABLE TRUST MADE BY SALVATRICE L. SARATELLA U/A DATED 6/19/92; THOMAS J. ABBONDANDOLO AND LORRAINE ROSE EARLE, AS THE TRUSTEES OF THE LORRAINE ROSE EARLE IRREVOCABLE TRUST U/A DATED 12/30/91 AND THOMAS ABBONDANDOLO AND LORRAINE ROSE EARLE, AS THE TRUSTEES OF THE THOMAS JOHN ABBONDANDOLO IRREVOCABLE TRUST U/A DATED 12/30/91,

Defendants.

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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-7
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants 4C Foods Corp. (4C Foods), John Celauro and all other named defendants[1] move for an order: (1) directing plaintiff Nathan J. Celaruo to

[1] Defendant John Celauro is 4C Foods' president and chief executive officer and its majority shareholder. The remaining named defendants hold or control another 20 to 21 percent of 4C Foods' stock, and are controlled by or aligned with John Celauro in how they vote their stock.

comply with the courts decision and order dated November 17, 2014; (2) pursuant to CPLR 5104 and Judiciary Law § 753, holding plaintiff in civil contempt for his failure to comply with the November 17, 2014 order; (3) awarding defendants attorney's fees and costs (motion sequence 7). Plaintiffs cross-move for an order, pursuant to 22 NYCRR 130-1.1 imposing sanctions against defendants and their counsel and awarding plaintiffs the costs, expenses and attorney's fees incurred in connection with defendants' contempt motion (motion sequence 8). Defendants move for an order: (1) pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiffs' second amended verified complaint; (2) making a declaration in defendants' favor with respect to the fourth cause of action; and (3) awarding defendants their attorney's fees, costs and expenses incurred in defending this action (motion sequence 9).

Defendants' motion to dismiss (motion sequence 9) is granted to the extent that, with respect to the fourth cause of action for declaratory judgment, it is declared: (1) that the appraiser selected by plaintiffs (the Second Appraiser) pursuant to Section 8.1 (b) and (c) of the Amended and Restated Shareholders Agreement (Agreement), as subsequently amended, shall be engaged by 4C Foods; (2) that the engagement agreement between the 4C Foods and the Second Appraiser shall allow the Second Appraiser to conduct its Appraisal as provided for in section 8.2 of the Agreement, including the obligation that it conduct its investigation, analysis and valuation provided for in section 8.2 of the Agreement by way of generally accepted appraisal procedures; (3) that the parties' rights with respect to the appraisal process

are those laid out in Section 8.2, 8.3 and 8.4 of the Agreement; and (4) that the parties and their counsel do not have the right or responsibility to direct, control or oversee the appraisal by the Second Appraiser nor do they have a privilege of any kind between them and the Second Appraiser. The portion of defendants' motion to dismiss (motion sequence 9) requesting attorney's fees under section 12.16 of the Agreement is denied with leave to renew at the conclusion of the action. The remainder of the motion to dismiss (motion sequence 9) is otherwise denied. Defendants' motion to hold plaintiff in contempt (motion sequence 7) and plaintiff's cross-motion (motion sequence 8) are also denied.

BACKGROUND

In this action, plaintiffs' primary claim is that the defendant shareholders have improperly used the transfer provisions of the Agreement (Agreement § 4.3) to bar plaintiff Nathan J. Celauro, in his role as executor of the estate of his mother, Gaetana Celauro, from transferring voting shares of 4C Foods stock from his mother's estate to Nathan Celauro pursuant to the terms of his mother's will and that defendants have manipulated the number of non-voting shares to dilute the price 4C Foods must pay to purchase these voting shares from the estate. The present claims arise out of a continuing shareholder dispute between the majority and minority shareholders of 4C Foods, a closely held family corporation.[2] John

[2] The factual background is more fully detailed in this court's prior decisions in this action, which was initially commenced as a special proceeding (*Matter of Celauro v 4C Foods Corp.*, 38 Misc 3d 636 [Sup Ct, Kings County 2012]; *Matter of Celauro v 4C Foods Corp.*, 39 Misc 3d 1234 [A], 2013 NY Slip Op 50875 [U] [Sup Ct, Kings County 2013]; *Celauro v 4C Foods Corp.*, 2014 NY Slip Op 33011 [U] [Sup Ct, Kings County 2014]) and the decisions issued in an earlier Nassau County action (*Celauro v 4C Foods Corp.*, 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *affd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]).

Celauro owns or directly controls approximately 56 percent of 4C Foods' stock and controls or has aligned with him the votes of the shareholders of another 21 percent of 4C Foods stock. As such, John Celauro controls slightly less than 78 percent of the shares of 4C Foods. Prior to December 16, 2011, the minority group was made up of plaintiff, Nathan Celauro, who owned, directly or beneficially, approximately 2 percent of 4C Foods stock, and his mother, Gaetana Celauro, who owned directly, or beneficially, approximately 20 percent of 4C Foods' stock, for a total minority control of slightly more than 22 percent of 4C Foods' stock. 4C Foods' stock includes voting common stock and non-voting common stock and Gaetana Celauro and Nathan Celauro owned the same percentage of non-voting common stock as they owned of voting common stock.

As is relevant here, in August 2007 the shareholders amended the transfer provisions of the Agreement (Fourth Amendment to the Amended and Restated Shareholders Agreement [Fourth Amendment]) to require that any shareholder desiring to transfer shares (transferring shareholder) to a permitted shareholder (i.e. certain family members as defined in the amendments) had to give notice of the intent to transfer the shares to the remaining shareholders and 4C Foods, and allow the holders of the majority of the shares to approve or reject the transfer, or a portion thereof (Agreement § 4.3 [a]). To the extent that the holders of the majority of the shares rejected the transfer, the fourth amendment required that the transferring shareholder sell the shares for which transfer approval has not been granted to 4C Foods (Agreement § 4.3 [b]). Following the adoption of the amendments, Gaetana

Celauro commenced a declaratory judgment action against the 4C Foods and the shareholder defendants requesting a declaration that the amendments to the transfer provisions were illegal and unenforceable on the ground that they constituted an unlawful restraint on transferability of the shares. The court, in an action commenced in Supreme Court, Nassau County, however, rejected Gaetana Celauro's arguments and declared that the amendments are legal and enforceable (*see Celauro v 4C Foods Corp.*, 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *affd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]).

On December 2, 2011, 4C Foods' board of directors unanimously passed a resolution, and shareholders holding over a 75 percent interest in 4C Foods adopted, by written consent, a resolution to amend 4C Foods' certificate of incorporation to increase the number of authorized non-voting shares by four shares for every one non-voting share outstanding, declare a dividend to the holder of each of the non-voting shares by issuing four non-voting shares for every one non-voting share held, and amend the shareholders agreement accordingly.[3] After receiving notice of the amendment, Gaetana Celauro and Nathan

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[3] Plaintiffs allege that before the amendment, there were a total of 14,400 voting shares and 921,600 non-voting shares and that after the amendment, there were a total of 14,400 voting shares and 4,608,000 non-voting shares. The amendments, however, did not change the proportionate percentage of the stock owned or controlled by the individual shareholders. In other words, after the amendments, Nathan Celauro and Gaetana Celauro (who together owned or controlled 3,220 of the 14,400 voting shares and 206,080 of the 921,600 non-voting shares before the amendment and 3,220 of the 14,400 voting shares and 1,030,400 of the 4,608,000 non-voting shares after the amendment) retained the same 22 percent total interest in 4C Foods.

Celauro, pursuant to Business Corporation Law § 623, gave notice to 4C Foods, of their election to dissent from 4C Food's action in amending the certificate of incorporation and demanding payment of the fair value of their shares. 4C Foods replied by denying that the increase in the number of non-voting shares implicated the appraisal rights of Business Corporation Law § 623.

According to the second amended verified complaint, at the time of the action by 4C Foods' board of directors and shareholders altering the number of non-voting shares, Gaetana Celauro was in hospice care, and she died on December 16, 2011 "after a long and public battle with cancer." In her will, Gaetana Celauro named Nathan Celauro as the sole beneficiary of her 4C Foods shares owned or controlled by her and Nathan Celauro has since been named the preliminary executor of her estate and later the executor of her estate.

Nathan Celauro, individually and as preliminary executor of Gaetana Celauro's estate, thereafter commenced a special proceeding in Supreme Court, Kings County, asserting that the amendment altering the number of shares adversely affected their redemption and voting rights under Business Corporation Law § 806 (b) (6) (B) and (D) and entitled them to relief under Business Corporation Law § 623. However, in an order dated December 5, 2012, the court (Schmidt, J.) found that the amendment changing the number of non-voting shares did not constitute an adverse alteration for purposes of Business Corporation Law § 806 (b) (6), and that plaintiffs thus did not have a right to appraisal under Business Corporation Law §

623 (*Matter of Celauro v 4C Foods Corp.*, 38 Misc 3d 636, 644 [Sup Ct, Kings County 2012]).

After Nathan Celauro was appointed executor of Gaetana Celauro's estate, he, by way of the NOTICE dated November 26, 2012, requested, pursuant to section 4.3 of the Agreement, permission to transfer all voting and non-voting shares of 4C Foods formerly held by Gaetana Celauro, or held in trusts under her control, to him. Once defendants received the NOTICE, they responded, as is relevant here, by serving on plaintiffs a document dated January 11, 2013 that they called the "CONSENT" in which they expressly consented to the transfer of the *non-voting* shares to Nathan (CONSENT ¶ 1). Defendants did not consent to the transfer of the *voting* shares at issue (CONSENT ¶ 2). Defendants, however conditioned this denial of consent on the courts' determination of a declaratory judgment action commenced by defendants in Nassau County, and further asserted that they would withdraw their objection to the transfer of the voting shares in the event that the court concluded that defendants did not have the right to deny the transfer of the voting shares (CONSENT ¶¶ 3-5).

Based on defendants' actions, plaintiffs moved to renew their petition for an appraisal pursuant to Business Corporation Law §§ 623 and 806 (b) (6). In an order dated May 28, 2013, the court (Schmidt, J.) denied renewal, but granted plaintiffs leave to replead, finding that the defendants' election to deny the transfer of the voting shares and compel the purchase of those shares by 4C Foods might, in view of the implied covenant of good fair

dealing and/or fiduciary duties owed by the majority shareholders and the board of directors to minority shareholders, enable plaintiffs to state a cause of action (*Matter of Celauro v 4C Foods Corp.*, 39 Misc 3d 1234 [A], 2013 NY Slip Op 50875 *4 [U] [Sup Ct, Kings County 2013]).[4] Nevertheless, given that the CONSENT requiring the sale of the voting shares was conditioned on the determination of its validity in the Nassau County action commenced by defendants, the court found that any potential cause of action based on breach of fiduciary duty and breach of the covenant of good faith and fair dealing was premature prior to the determination in Nassau County (*Celauro*, 2013 NY Slip Op 50875 *5). The court thus conditioned plaintiff's right to replead upon the happening of the following events:

> "(1) Nathan J. Celauro, as the executor of the estate of Gaetana Celauro, is barred from transferring voting shares to Nathan Celauro individually; (2) these voting shares are purchased by [4C Foods], its directors and or its majority shareholders; and (3) such causes of action are not otherwise rendered moot by any determination made in the Nassau County declaratory judgment action (*Celauro v Celauro*, Nassau County Index No. 426/13)" (*Celauro*, 2013 NY Slip Op 50875 *1).

After the court (Driscoll, J.) in Nassau County, by way of an order dated July 31, 2013, consolidated the Nassau Action with this action,[5] plaintiffs, as part of the Action in

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[4] At the same time, the court converted the proceeding from a special proceeding to an action (*Celauro*, 2013 NY Slip Op 50875 *5).

[5] The court notes that the court in Nassau County had declined to issue an injunction tolling 4C Foods time to respond to Nathan Celauro's notice requesting permission to transfer the shares. In addition, the court in Nassau County had not reached any determination on the merits before it "consolidated" the Nassau County action with this action. Whether the declaratory judgment causes of action from the Nassau County action are deemed to be a counterclaim in this action as the result of "organic" consolidation or they are deemed part of a separate action to be

Kings County, sought a declaratory judgment regarding the effect of the CONSENT. The court, in an order dated November 17, 2014 (Schmidt, J) (*Celauro v 4C Foods Corp.*, 2014 NY Slip Op 33011 [U] [Sup Ct, Kings County 2014]), declared, among other things, that the CONSENT allowed the transfer of the non-voting shares, that the CONSENT served, in effect, as an unconditional denial of the transfer of the voting shares from the estate to Nathan Celauro, and that the CONSENT required 4C Foods to purchase the voting shares pursuant to section 4.3 (a) (ii) of the Agreement. In this order, the court also granted plaintiff leave to replead, stating that:

> "the denial of the transfer of the voting shares may implicate a fiduciary duty owed by defendants, as majority shareholders, to plaintiffs as minority shareholders . . . In considering granting leave to replead, the court bears in mind that the transfer denial came not long after a stock split reduced the value of 4C Foods' voting shares . . . and that the transfer denial will eliminate plaintiffs' statutory right to petition for corporate dissolution by bringing their ownership of voting shares below the 20 percent necessary for such a petition" (*Celauro*, 2014 NY Slip Op 33011 *7 [internal citations omitted]).

SECOND AMENDED VERIFIED COMPLAINT

On November 13, 2015, plaintiffs filed the second amended verified complaint (sav complaint) currently at issue. As pled here, the factual basis for plaintiffs' claim is the combined effect of: (1) the amendment to the Agreement allowing 4C Foods' majority shareholders to block a transfer of shares (or any portion thereof) from a the estate of a

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jointly tried, they are still pending, and none of the motions before the court specifically address them.

deceased shareholder to the beneficiary of the estate (Agreement § 4.3) (sav complaint ¶¶ 70-75); (2) the amendment to the certificate of corporation and the Agreement which increased the number of non-voting shares and which diluted the value of the voting shares (sav complaint ¶¶ 76-87); and (3) the majority shareholders using the provisions of section 4.3 of the Agreement to bar the transfer of the voting shares from Gaetana Celauro's estate to Nathan Celauro and force the sale of these voting shares to 4C Foods at the now diluted price for voting shares (sav complaint ¶¶ 88-104).

According to the amended pleading, the defendants knew at the time they approved the amendment increasing the number of non-voting that Gaetana Celauro was on her deathbed, and that Nathan Celauro would receive ownership or control of her shares in 4C Foods as the sole beneficiary of her will (sav complaint ¶¶ 56, 77-78, 80).[6] This amendment diluted the value of the voting shares because, under the Agreement, each voting share and non-voting share is deemed to have the same value (sav complaint ¶ 82-83).[7] Plaintiffs

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[6] Gaetana Celauro's intent to leave the entirety of the shares of stock owned or controlled by her to Nathan Celauro is noted in the Nassau County court's decision upholding the validity of the transfer restrictions (*see Celauro*, 2010 NY Slip Op 52264 *4).

[7] In this regard, section 8.2 (b) (v) (A) of the Agreement (as amended by the Fourth Amendment to the Agreement) provides that, "[t]he Per Share Appraisal Price with respect to the 4C Shares shall equal the 4C Appraisal Price divided by the number of issued and outstanding 4C Shares immediately prior to the closing of such transaction." The definition section of the agreement states that "'4C Shares' 'means the 4C Preferred Stock, the Voting Stock, the 4C Non-Voting Stock and any other shares of capital stock or other equity securities of 4C.'" Although this definition section mentions other forms of stock, Section 2.1 of the Agreement (as amended by the Fifth Amendment to the Agreement and the Seventh Amendment to the Agreement), which addresses the capitalization of 4C Foods, only identifies the existence of voting stock and non-voting stock.

allege, for example, that if the total value of their 22.36 percent interest in 4C Foods is $30,000,000, prior to the amendment, the per share value of their 3,220 voting shares and 209,300 non-voting shares would be $143.33, after the amendment, the per share value of their 3,220 voting shares and 1,033,620 non-voting shares would be $29.02, a 79.75 percent diminution of the per share value (sav complaint ¶ 84).[8] Using these figures, this amendment, coupled with defendants' election to bar the transfer of only the voting shares, allows 4C Foods to purchase the 2920 voting shares owned or controlled by Gaetana Celauro's estate for $84,738.40,[9] rather than the $418,523.60 4C Foods would have had to pay for these shares prior to the amendment. Plaintiffs further emphasize that barring the transfer of the voting shares leaves Nathan Celauro with only the approximately 2.1 percent of the voting shares he already held and prevents him from having the at least 20 percent of 4C Foods' voting shares necessary for him to have standing to commence a dissolution proceeding under Business Corporation Law § 1104-a (sav complaint ¶ 96). Based on these factual allegations, plaintiffs allege that the majority shareholder defendants breached the fiduciary duty and the implied covenant of good faith and fair dealing owed to plaintiffs (first

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[8] Although the $30,000,000 figure may not represent the actual total value of the shares owned or controlled by plaintiffs, the increase in the number of non-voting shares decreases the per-share value by this 79.75 percent figure whatever the appraised value of 4C Foods may be.

[9] The court notes that the $93,444.40 figure noted in the sav complaint appears to be based on the 3220 total of voting shares owned or controlled by plaintiffs, rather than the 2920 voting shares owned or controlled by the estate that are subject to the transfer bar (sav complaint ¶¶ 76, 81, 95).

and second causes of action) and that the board of director defendants breached the fiduciary duty they owed to plaintiffs (third cause of action).

In the fourth cause of action for a declaratory judgment, plaintiffs allege that they have selected their appraiser as part of the Agreement's appraisal process required to set a purchase price for Gaetana Celauro's voting shares for which transfer has been denied, but that disagreements have arisen between plaintiffs and 4C Foods regarding the extent either of them can control the appraiser selected by plaintiffs under the terms of the Agreement (sav complaint ¶¶ 105-117). Plaintiffs thus request a judgment declaring "that 4C Foods' obligation to 'engage' the Plaintiffs' selected appraiser (as set forth in the Shareholders Agreement, as amended) is a ministerial act that is merely tied merely to its obligation to pay for the appraisal services, and that Plaintiffs shall be responsible for directing and overseeing the appraisal by Plaintiffs' selected appraiser" (sav complaint ¶ 145).

MOTION TO DISMISS

Defendants now move to dismiss based on documentary evidence (CPLR 3211 [a] [1]) and for failure to state a cause of action (CPLR 3211 [a] [7]). In considering a motion to dismiss for failing to state a cause of action under CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88

[1995]). Although evidentiary material may be considered in determining the viability of a complaint, the complaint should not be dismissed unless defendant has established "that a material fact alleged by the plaintiff is not a fact at all and that no significant dispute exists regarding it" (*Stewart v New York City Tr. Auth.*, 50 AD3d 1013, 1014 [2d Dept 2008] [internal quotation marks and citations omitted]; *see also Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Nunez v Mohamed*, 104 AD3d 921, 922 [2d Dept 2013]). Similarly, a motion to dismiss pursuant to CPLR 3211 (a) (1) may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Harris v Barbera*, 96 AD3d 904, 905 [2d Dept 2010]). To qualify as documentary evidence, printed materials "must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]; *see Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 808 [2d Dept 2012]).

The directors and majority shareholders of a corporation owe a fiduciary duty to treat all shareholders, majority and minority, fairly and evenly (*see Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 569 [1984]; *Schwartz v Marien*, 37 NY2d 487, 491-492 [1975]; *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 685 [2d Dept 2011]; *Barbour v Knecht*, 296 AD2d 218, 227 [1st Dept 2002]; *Blank v Blank*, 256 AD2d 688, 694-695 [3d Dept 1998]). In view of these fiduciary obligations, courts will closely examine director or majority shareholder actions that upset a minority shareholder's proportionate interest in a corporation (*see*

Katzowitz v Sidler, 24 NY2d 512, 520 [1969]; *see also Schwartz*, 37 NY2d at 492). "Departure from precisely uniform treatment [of shareholders, however,] ... may be justified ... where a bona fide business purpose indicates that the best interests of the corporation would be served by such departure" (*Schwartz*, 37 N.Y.2d at 492; *see also Alpert*, 63 NY2d at 572-573). The implied covenant of good faith and fair dealing imposes similar duties on shareholders bound by the shareholder agreement (*see 21st Century Diamond, LLC, v Allfield Trading, LLC*, 110 AD3d 615, 616 [1st Dept 2013]; *Hirsch v Food Resources, Inc.*, 24 AD3d 293, 296 [1st Dept 2005]).

The above noted concerns regarding majority actions that interfere with a minority shareholders proportionate interest in a corporation do not insure that a shareholder's decedents or the beneficiaries of a shareholder's estate are guaranteed a right to such a proportionate interest. In this respect, courts have commonly upheld share transfer restriction provisions contained in shareholder agreements that allow a corporation to repurchase shares upon a shareholder's death (*see Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 543-544 [1957]; *Matter of Cetta*, 288 AD2d 814, 815 [3d Dept 2001], *lv denied* 97 NY2d 611 [2002]; *Matter of Gusman*, 178 AD2d 597, 598-599 [2d Dept 1991], *lv denied* 80 NY2d 753 [1992]; *Matter of Hesek v 245 S. Main St.*, 170 AD2d 956, 957 [4th Dept 1991]). Such restrictions are particularly compelling in the context of closed corporations, where the corporation has an interest in assuring a succession of shareholders who are most likely to act in harmony with the other shareholders (*see Miller Waste Mills, Inc. v Mackay*, 520 NW2d 490, 494-495

[Minn Ct App 1994]; *Renberg v Zarrow*, 667 P2d 465, 469 [Okla 1983]; *see also Allen*, 2 NY2d at 543; *Celauro*, 88 AD3d at 846-847). While these cases generally hold shareholders to the terms of transfer restrictions contained in shareholder agreements, they do not suggest that majority shareholders can manipulate share ownership to their benefit in applying the terms of the transfer restriction and share repurchase provisions.

Here, the court finds that plaintiffs have stated claims that the defendant shareholders breached the implied covenant of good faith and fair dealing and fiduciary duties and the 4C Foods' directors breached their fiduciary duties in manipulating the number of 4C Foods' non-voting shares in order to allow 4C Foods to purchase the voting shares for which transfer has been denied pursuant to the CONSENT. It is true that when viewed independently, each aspect of plaintiffs' allegations may not give rise to a claim. As discussed above, the transfer restrictions themselves have been found to be legal and enforceable (*see Celauro v 4C Foods Corp.*, 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *affd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]). The amendment increasing the number of non-voting shares applies equally to all shareholders and did not change the percentage of plaintiffs' voting rights, the percentage of plaintiffs ownership interest in 4C Foods, or the overall value of the stock held by plaintiffs, and, for these reasons, the increase in the number of voting shares was found not to constitute an adverse alteration for purposes of Business Corporation Law § 806 (b) (6) implicating the appraisal rights of Business Corporation Law § 623 (*Matter of Celauro*, 38 Misc 3d at 641-644). It also appears that there may be no impropriety in using the transfer restrictions to only bar the transfer of the

voting shares of stock, particularly given that the Agreement provides a fair process for the determination of the value of the voting shares for which transfer has been blocked, and the absence of any allegation that plaintiffs are not getting a return on the non-voting shares for which transfer has been allowed (sav complaint ¶ 104) (*see Allen*, 2 NY2d at 543-544; *Matter of Gusman*, 178 AD2d at 598-599; *Matter of Hesek*, 170 AD2d at 957; *see also Matter of TDA Indus.*, 240 AD2d 262, 262-263 [1st Dept 1997] [amendment to shareholders agreement barring trustees from voting shares held in trust could be used to eliminate trustees' right to commence dissolution proceeding under Business Corporation Law § 1104-a], *lv denied* 91 NY2d 805 [1998]; *Goode v Ryan*, 397 Mass 85, 86, 489 NE2d 1001, 1001-1002 [1986][no obligation on close corporation to purchase shares of a minority shareholder upon the death of the minority shareholder]).[10]

These actions, when considered together, however, allow an inference that defendants approved the amendment increasing the number of non-voting shares in order to purchase the estates' voting shares at a significantly lower price and have actually acted to do so by only electing to purchase the voting shares at issue.[11] Such an inference may be drawn

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[10] Plaintiffs' allegation with respect to dividends is that defendants may decide at some point in the future to not pay dividends on the voting shares, implying that plaintiffs are currently receiving dividends for all of the shares held by them (sav complaint ¶ 104). While not determinative in the context of this motion to dismiss, the court notes that defendant John Celauro, in an affidavit attached as exhibit 2 to defendants' motion to dismiss, asserts that plaintiffs have continued to receive dividends after Gaetana Celauro's death, and that they have received over $750,000 in dividends since it served the CONSENT barring the transfer of the voting shares (motion to dismiss exhibit 2 ¶¶ 37-38) .

[11] Indeed, given that the increase in non-voting shares did not alter plaintiffs' overall stake in 4C Foods, plaintiffs would not have suffered any harm as a result of the alteration if defendants had allowed the transfer of the voting shares, or if defendants had elected to bar the

because there does not appear to be any obvious business purpose associated with altering the number of non-voting shares. 4C Foods received no additional capitalization as a result of the increase in the number of shares, and there is no suggestion that the increase was tied to any benefit to the shareholders, such as increased dividends (*cf. Katzowitz*, 24 NY2d at 518-520). The timing of the amendment to the number of shares is also significant, as plaintiffs' allege that defendants knew that Gaetana Celauro was on her deathbed at that time they approved the amendment, and thus that a transfer of shares from Gaetana Celauro's estate to Nathan Celauro was imminent. Indeed, approval of the amendment increasing the number of non-voting shares with the underlying aim of purchasing the estates voting shares at a reduced rate is also suggested by John Celauro's assertion, made in his affidavit attached as exhibit 2 to the motion to dismiss, that the share transfer restrictions were approved primarily to address what he perceived as threats to the stability of the 4C Foods posed by Gaetana Celauro and Nathan Celauro through their forcing 4C Foods to purchase their shares at market prices (motion to dismiss exhibit 2 ¶¶ 21-25). Thus, although the increase in the number of shares applied equally to all shareholders, an inference can reasonably drawn that the increase only served to depress the purchase price of the voting shares at the expense of plaintiffs for the benefit of the majority shareholders. The court thus concludes that the allegations of the complaint are sufficient to state claims that defendants' actions here

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transfer of the voting and non-voting shares and thus required 4C Foods to purchase the entirety of the estates interest in 4C Foods. Further, the increase in the number of non-voting shares is only relevant now because, as noted above, the Agreement's appraisal process ties the value of the voting shares to that of the non-voting shares (Agreement § 8.2 [b] [v] [A]).

breached fiduciary duties and breached the implied covenant of good faith and fair dealing (*see Alpert*, 63 NY2d at 569; *Schwartz*, 37 NY2d at 487, 491-492; *Katzowitz*, 24 NY2d at 518-520; *Armentano*, 90 AD3d at 685).

Defendants' assertion that plaintiffs' filing of the sav complaint was premature under the conditions of the court's May 28, 2013 order allowing plaintiffs to replead, is misplaced because the court's subsequent order, dated November 17, 2014, granted plaintiffs leave to replead without imposing any conditions on plaintiffs' exercise of that right. Contrary to defendants' argument that nothing changed between May 28, 2013 and the issuance of the November 17, 2014 order that would have eliminated the need to comply with the terms of May 28, 2013 order, plaintiffs' position was fundamentally altered by the court's determination in the November 17, 2014 order that the CONSENT blocked the transfer of the voting shares, which issue had not been determined at the time of the May 28, 2013 order. Thus, although the closing on the transfer of the shares has not been held and Nathan Celauro as executor of Gaetana Celauro still ostensibly holds the shares, such a transfer is essentially a fait accompli and will occur under the terms of the Agreement barring court intervention or 4C Foods' failure to pay the price for the shares required by the appraisal process.

In addition, the court rejects defendants' additional contention that plaintiff's have failed to allege facts from which damages attributable to defendants conduct may be reasonably inferred. Namely, given that the increase in the number of voting shares will have lowered the per share value of the voting shares by the same percentage regardless of the

appraised value of 4C Foods reached during the appraisal process, the allegations sufficiently plead some ascertainable damage in that the estate will receive less for its voting shares than it would have absent the amendment altering the number of non-voting shares (*see Randazzo v Nelson*, 128 AD3d 935, 937 [2d Dept 2015]; *Gibbs v Breed Abbott & Morgan*, 271 AD2d 180, 188-189 [1st Dept 2000]; *Bernstein v Kelso* & Co., 231 AD2d 314, 322 [1st Dept 1997]). At this preliminary stage of the action, the fact that the exact difference in the value of the voting shares and the non-voting shares cannot be determined until the completion of the appraisal process (which should now proceed expeditiously) does not render plaintiffs' claims unduly speculative or premature (*see Polish & Slavic Fed. Cred. Union v Saar*, 39 Misc 3d 850, 854 [Sup Ct, Kings County 2013]; *cf. TSL (USA) Inc. v Oppenheimer Funds, Inc.*, 113 AD3d 410, 410 [1st Dept 2014] [claim dependent on value of loans compared to securities purchased with loans too speculative where securities did not mature until many years after date action was commenced]).

On the other hand, defendants are entitled to a declaration in their favor with respect to the fourth cause of action for a declaratory judgment regarding the parties' rights and obligations regarding the appraiser selected by plaintiffs (Second Appraiser) under the terms of section 8.1, 8.2, and 8.3 of the Agreement. Plaintiffs argue that under these provisions, they are entitled to a declaration that 4C Foods obligation to "engage" the plaintiffs' selected appraiser is a ministerial act that is tied merely to its obligation to pay for the appraisal services, and that plaintiffs shall be responsible for directing and overseeing the appraisal by

plaintiffs' selected appraiser. Plaintiffs argument, however, is not supported by the plain language of the Agreement.

The interpretation of the terms of a shareholder agreement is treated like any other matter of contract interpretation (*see A. Cappione, Inc. v Cappione*, 119 AD3d 1121, 1122-1123 [3d Dept 2014]; *Matter of Matco-Norca, Inc.*, 22 AD3d 495, 496 [2d Dept 2005]; *see also Matter of Penepent Corp.*, 96 NY2d 186, 192 [2001]). A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract (*see e.g. Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 [2008]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms," without reference to extrinsic materials outside the four corners of the document (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "In those instances where the intent of the parties is clear and unambiguous from the language employed on the face of the agreement, the interpretation of the document is a matter of law solely for the court" (*Himmelberger v 40-50 Brighton First Rd. Apts. Corp.*, 94 AD3d 817, 818-819 [2d Dept 2012]; *see RAD Ventures Corp. v Artukmac*, 31 AD3d 412, 412 [2d Dept 2006], *lv denied* 7 NY3d 715 [2006]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

Applying these principles to the terms of the appraisal section of the Agreement, the court finds that plaintiffs' requested declaration is unsupported by the unambiguous language

of the Agreement. In this regard, although Nathan Celauro, as executor of Gaetana Celauro's estate, is entitled to select one of the two appraisers for the appraisal process (Agreement § 8.1 [b]),[12] the Agreement provides that, after notice is given to 4C Foods(Agreement § 8.1 [c]), 4C Foods shall "engage" the Second Appraiser pursuant to the terms of Section 8.2 (a) of the Agreement. Section 8.2 (a) provides, as relevant here, that:

> "The Corporations shall, and the Shareholders shall cause the Corporations to, engage the First Appraiser and the Second Appraiser within twenty (20) days following the Corporations' receipt of the notices regarding such selection.[13] The following shall govern the engagement of the Appraisers and the preparation of the appraisal by the Appraisers:
>
> "(i) The Appraisers shall value each Corporation on a fair market value, going concern basis, with the definition of fair market value being the amount at which all of the Shares of the Corporation would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell, and each having reasonable knowledge of the relevant facts.
>
> "(ii) Each Appraiser shall provide a written report of the valuation of each Corporation to the Corporations and each of the Shareholders entitled to participate in . . . the sale pursuant to Section 4.3 . . . within ninety (90) days after the date such Appraiser has been engaged by the Corporations.

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[12] Section 8.1 of the Agreement provides, as is relevant here, that, "One Appraiser (the "First Appraiser") shall be selected by [defendant John Celauro]. A different Appraiser (the "Second Appraiser") shall be selected as follows: (i) with respect to the purchase of Non-Transferable Shares by the Corporation pursuant to Section 4.3, by the Transferring Shareholder . . ."

[13] As is relevant here, "Corporations" in the agreement refers solely to 4C Foods, as Celauro Sales, Inc., the only other corporation referred to in the Agreement, was dissolved as is noted in the Sixth Amendment to the Agreement dated August 15, 2011.

> "(iii) The Appraisers shall conduct their analysis and investigation of the Corporation in accordance with generally accepted appraisal procedures.
>
> "(iv) The Corporations shall provide, and the Shareholders shall cause the Corporations to provide, the same information relating to the Corporations and their operation to each Appraiser.
>
> "(v) In the event that one Appraiser requests additional information and the Corporations or the Shareholders provide such information to the Appraiser, then the Corporation and the Shareholders shall provide the same information to the other Appraiser.
>
> "(vi) The Appraisers shall take into account in determining the fair market value of the Shares the commitments of the Corporations under all employment agreements to which either Corporation is, or both Corporations are, a party, excluding any employment agreement between the Corporations and any of . . . the Transferring Shareholder[s] . . ."

By using the term "engage," section 8.2 (a) certainly suggests that the Second Appraiser is to be hired or employed by 4C Foods.[14] As such, the use of the term engage in the Agreement is antithetical to any right or obligation of plaintiffs to supervise or control the work of the Second Appraiser. Nor can any right or obligation of plaintiffs to supervise or control the work of the Second Appraiser be gleaned from section 8.2 (a) subdivisions (i) through (vi). These provisions as a whole, and most importantly, subdivision (ii), relating

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[14] A relevant definition of "engage" states, "to arrange to obtain the services of usu[aly] for a wage or fee ⟨she was *engaged* to play the leading role in the new opera⟩ ⟨you will need to [*engage*] a cook and two extra maids if you take that house⟩; *also*: to enter (oneself) into an agreement to serve ⟨he engaged himself with the new company for two years⟩" (Webster's Third New International Dictionary 751 [1993]). Of note, a relevant definition of "employ" states, "to use or engage the services of ⟨[employ] a lawyer to straighten out a legal tangle⟩" (Webster's Third New International Dictionary 743 [1993]).

to the provision of the report by the appraisers to the corporation and, and subdivision (iii), requiring that generally accepted appraisal procedures be followed, suggest that the Second Appraiser, while selected by plaintiffs and engaged by 4C Foods, is to perform its functions pursuant to the terms of section 8.2 (a) independently and without supervision or control from either 4C Foods or plaintiffs. Given that the unambiguous language of the Agreement in no way allows for plaintiffs to supervise or control the work of the Second Appraiser, or provide for the existence of a privilege of some kind between the Second Appraiser and plaintiffs and/or their counsel,[15] the interpretation is a matter of law for the court, and plaintiffs cannot submit parole or extrinsic evidence addressing the issue (*see Greenfield*, 98 NY2d at 569; *Himmelberger*, 94 AD3d at 818-819).

Accordingly, plaintiffs are not entitled to the requested declaration and defendants are entitled to a declaration in their favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]; *Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). Defendants in moving to a declaration in their favor, however, request a declaration stating that "4C [Foods]' obligation to 'engage' the Second Appraiser means that 4C [Foods] shall *negotiate* and enter into an agreement with the Second Appraiser" (emphasis added). The court is not entirely clear what defendants mean by "negotiate" in this context. While some "negotiation" may be necessary for 4C Foods to

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[15] While plaintiffs do not specifically request a declaration regarding the right to a privilege between plaintiffs and/or their counsel and the Second Appraiser, plaintiffs proposed engagement letter with the Second Appraiser provided that the communications between the Second Appraiser and plaintiffs' counsel would be privileged.

reach an agreement with the Second Appraiser to perform the services outlined in sections 8.2 and 8.3 of the Agreement, given the language of section 8.2 quoted above, 4C Foods' obligation to engage the Second Appraiser does not appear to give 4C Foods carte blanche to control the appraisal process. As such, the court declines to include the word "negotiate" as part of the declaration.

The court will thus issue a declaration providing: (1) that the Second Appraiser shall be engaged by 4C Foods; (2) that the engagement agreement between the 4C Foods and the Second Appraiser shall allow the Second Appraiser to conduct its Appraisal as provided for in section 8.2 of the Agreement, including the obligation that Second Appraiser conduct its investigation, analysis and valuation provided for in section 8.2 of the Agreement by way of generally accepted appraisal procedures; (3) that the parties' rights with respect to the appraisal process are those laid out in Section 8.2, 8.3 and 8.4 of the Agreement; and (4) that the parties and their counsel do not have the right or responsibility to direct, control or oversee the appraisal by the Second Appraiser nor do they have a privilege of any kind between them and the Second Appraiser.

Finally, the portion of the motion to dismiss requesting attorney's fees is denied with leave to renew upon the conclusion of the action. Although the favorable determination with respect to the fourth cause of action may be grounds for awarding defendants attorneys fees, costs and expenses (Agreement § 12.16), since the action is continuing with respect to the remainder of plaintiffs' claims, the resolution the attorney's fee issue is more appropriately

addressed at the conclusion of the action, rather than piecemeal based on the outcome of each separate issue in the action (*see Matter of J.P. & Assoc. Prop. Corp. v Krautter*, 128 AD3d 963, 964 [2d Dept 2015]; *Caldwell v American Package Co., Inc.*, 57 AD3d 15, 26 [2d Dept 2008]; *Elkins v Cinera Realty, Inc.*, 61 AD3d 828, 828 [2d Dept 1978).

DEFENDANTS' CONTEMPT MOTION

Defendants' motion to hold Nathan Celauro in contempt based on his failure to comply with the court's November 17, 2013 order is denied. "To sustain a finding of either civil or criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect" (*Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]; *Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; *Gerelli Ins. Agency, Inc. v Gerelli*, 23 AD3d 341, 341 [2d Dept 2005]). The party seeking to hold another in civil contempt bears the burden of proving the contempt by clear and convincing evidence (*see Penavic v Penavic*, 109 AD3d 648, 649-650 [2d Dept 2013]; *Rienzi v Rienzi*, 23 AD3d 447, 448-449 [2d Dept 2005]).

Here, defendants have failed to meet this burden because the November 17, 2014 order contains no clear and unequivocal direction requiring Nathan Celauro, as executor of Gaetana Celauro's estate, to deliver the voting shares at issue to 4C Foods. The November 17, 2014 order merely found that the CONSENT constituted a notice that barred the estate from transferring the voting shares to Nathan Celauro and that required 4C Foods to purchase

those voting shares. As such, the November 17, 2014 order cannot serve as a basis for holding Nathan Celauro in contempt for failing to deliver the shares to the 4C Foods (*see Monaco v Monaco*, 116 AD3d 452, 453 [1st Dept 2014]; *Matter of Formosa v Litt*, 91 AD3d 644, 645 [2d Dept 2012]; *Rienzi*, 23 AD3d at 448-449). Indeed, since the November 17, 2014 order involved a limited declaration regarding the effect of the CONSENT, it does not even provide a basis for defendants' request for an order directing Nathan Celauro "to fully comply with the Court's Decision and Order dated November 17, 2014" as this November 17, 2014 order did not order or direct Nathan Celauro to do anything. Given that the motion for contempt is denied, the portion of defendants' motion requesting attorney's fees and costs must likewise be denied (*see Rosenberg v New York State Off. of Parks, Recreation & Historic Preserv.*, 132 AD3d 684, 685 [2d Dept 2015]).

In so ruling, the court emphasizes that it has made no determination as to whether Nathan Celauro has breached any of the terms of the Agreement relating to the share transfer and appraisal process as that issue is not properly before the court in the context of this motion to hold Nathan Celauro in contempt.

PLAINTIFFS' CROSS-MOTION

Finally, plaintiffs' cross-motion for sanctions pursuant to 22 NYCRR 130-1.1 is denied. While this court finds that defendants' motion seeking to hold Nathan Celauro in contempt must be denied, the court concludes that the motion is not so devoid of merit to warrant sanctioning defendants pursuant to 22 NYCRR 130-1.1 (*see Global Events LLC v*

Manhattan Ctr. Studios, Inc., 123 AD3d 449, 450 [1st Dept 2014]; *Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d 548, 550-551 [2d Dept 2014]).

This constitutes the decision, order and declaratory judgment of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL