

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

NEW HAMPSHIRE  
SUPREME COURT  
RECEIVED

Docket No. 2005-0753

2006 MAY -4 P 3:37

Edward J. Burke

v.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke and Bernardine P. Donelson

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MANDATORY APPEAL FROM RULING OF THE HILLSBOROUGH COUNTY SUPERIOR  
COURT (NORTHERN DISTRICT) PURSUANT TO SUPREME COURT RULE 7

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**APPENDIX TO JOINT BRIEF FOR DEFENDANTS-APPELLEES  
THOMAS M. BURKE, MARIE I. BURKE AND BERNARDINE P. DONELSON**

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
NORTHERN DISTRICT

SUPERIOR COURT

Edward J. Burke

v.

Bunny's Superette, Inc.,  
Thomas M. Burke, Marie I. Burke,  
and Bernardine P. Donelson

PETITION FOR INJUNCTION

NOW COMES Edward J. Burke, of 13 Meadowcrest Road, Hooksett, County of Merrimack and State of New Hampshire, and complains against Bunny's Superette, Inc., a New Hampshire corporation, with a principal place of business at 75 Webster Street, Manchester, County of Hillsborough and State of New Hampshire, Thomas M. Burke, of 647 Walnut Street Extension, Manchester, County of Hillsborough and State of New Hampshire, Marie I. Burke, of 121 Arah Street, Manchester, County of Hillsborough and State of New Hampshire, and Bernardine P. Donelson, of 16 Fox Lane, Auburn, County of Rockingham and State of New Hampshire, and state as follows:

1. The Plaintiff and the individual Defendants agreed, in 1971, to transfer the grocery store owned by them and known as Bunny's Superette to a corporation organized in such a manner that the three children would be equally treated with respect to their parents' estates, including, but not limited to, the business, and the land and building on which it was situate.
2. Pursuant to the agreement, and in reliance thereon, the individual Defendants formed a corporation which was chartered on June 30, 1971. A copy of the corporation's charter is appended hereto as EXHIBIT A.

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3. Further, and pursuant to the agreement, and in reliance thereon, the Plaintiff and the individual respondents held an organization meeting on June 28, 1971.

4. At the organization meeting, it was, inter alia

"VOTED - in the consideration of the transfer to the corporation on July 1, 1971 by Marie I. Burke, Bernardine P. Donelson, Edward J. Burke and Thomas M. Burke, of the inventory, equipment, accounts receivable and good will owned by them and doing business as Bunny's Superette, 77 Webster Street, Manchester, New Hampshire, as more particularly shown by a statement of condition of said Bunny's Superette to be filed in the office of the Clerk of the Corporation to which reference may be made, that the corporation presently issue twenty-five (25) shares each to Marie I. Burke, Bernadine P. Donelson, Edward J. Burke and Thomas M. Burke, and to assume all liabilities of said Bunny's Superette as shown on said statement of condition."

5. At the organization meeting, it was further, inter alia

"VOTED - that the capital stock of this corporation as authorized at two hundred (200) shares of stock of equal but without par value shall be designated as common stock and shall be subject to the following restrictions on transfer, a copy of which shall be placed on the certificates of capital stock.

'In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the 'agreed price' (as hereinafter established) and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holdings and the said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder shall be free to sell said stock to any other party, which party shall take subject to this restriction. The 'Agreed price' shall be established initially by the stockholders after the organization meeting, on a price per share basis. The 'agreed price' may be amended at the annual stockholders meeting and when so amended, shall become the new and effective 'agreed price'. Failing such amendment, however, the previous 'agreed price' shall remain in effect.

\* \* \*

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A copy of the Record of Organization and Organization Meeting is appended hereto as EXHIBIT B.

6. The Plaintiff has faithfully complied with all provisions of the original agreement and in reliance thereon, continued to operate and work in the business for nearly twenty-five (25) years. The Plaintiff's efforts resulted in a substantial gain in the value of the business.

7. The individual Defendants, acting in concert, however, have breached the agreement. The Defendants, Marie I. Burke and Bernardine P. Donelson, by letters to the Clerk of the Corporation, David Dunn, Esquire, dated April 1, 2004, purported to "gift" their twenty-five (25%) percent ownership to the Defendant, Thomas M. Burke, without first offering the same to the Corporation at the "agreed price" or repeating the offer "to the other stockholders in proportion to their holdings" (i.e., fifty (50%) percent to the Plaintiff and fifty (50%) percent to the Defendant, Thomas M. Burke). The letters were delivered to Attorney David Dunn on May 5, 2004 as part of a "package" which also contained a letter from the Defendant, Thomas M. Burke, requesting a Special Meeting for the following purposes: to reduce the Directors from four (4) to one (1); elect himself as the sole Director; and to amend and restate the Articles of Incorporation, presumably such that the June 28, 1971 agreement be deleted, the Plaintiff be denied preemptive rights to retain his equal ownership, and the Corporation be required to indemnify Thomas M. Burke for his actions as sole officer and Director.

8. RSA 293-A:16.02 Inspection of Records by Shareholders, provides, in relevant part:

"(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation

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if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least 5 business days before the date on which he wishes to inspect and copy:

\* \* \*

(2) Accounting records of the corporation;

\* \* \*

The Plaintiff requested a full accounting, including all books and records and was not provided with the same or the requisite "accounting records" which are set forth pursuant to RSA 293-A:16.01. See, letter of Attorney Vincent A. Wenners, Jr., Esquire dated May 10, 2004 and Attorney David Dunn's response dated May 25, 2004, copies of which are appended hereto as EXHIBIT C.

9. RSA 293-A:13.21 - Notice of Intent to Demand Payment, provides:

"(a) If proposed corporate action creating dissenters' rights under RSA 293-A:13.02 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights:

(1) Shall deliver to the corporation before the vote is taken written notice of his intent to demand payment for his shares if the proposed action is effectuated; and

(2) Shall not vote his shares in favor of the proposed action.

(b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment for his shares under this subdivision."

The Plaintiff requested that Attorney David Dunn not call the special meeting or, to the extent necessary, consider the letter as the Plaintiff's Notice of Dissenter's Rights and demand for payment of fifty (50%) percent of the value of all stock of the corporation, issued or unissued. Attorney David Dunn declined to not call the meeting and did not respond to the Plaintiff's demand for payment.

10. The Defendants' actions, if consummated, or allowed to continue, will cause the

Plaintiff irreparable harm. In addition, the Defendants have caused the petitioner monetary damages.

WHEREFORE, the Plaintiff prays that this Honorable Court order:

- A. The Defendants, Marie I. Burke and Bernardine P. Donelson, be permanently enjoined from transferring their shares to the Defendant, Thomas M. Burke without first offering the same to the corporation at the agreed price or to the Plaintiff at the agreed price fifty (50%) percent of their ownership;
- B. The Defendant, corporation, be permanently enjoined from calling a Special Meeting to vote on the proposals of the Defendant, Thomas M. Burke, or if the meeting has been held, to set aside the votes as unlawful and in breach of the parties' agreement;
- C. The Defendants be ordered to provide the Plaintiff with all books and records, including financial and accounting records, from 1994 to date; and
- D. The Defendants be ordered to pay the Plaintiff the value of fifty (50%) percent of the corporation's stock, issued or unissued.

THAT PENDING A HEARING ON THE MERITS of this matter, the Plaintiff prays that this Honorable Court order:

- A. The Defendants, Marie I. Burke and Bernardine P. Donelson,  
TEMPORARILY AND PENDING A HEARING ON THE MERITS,  
be enjoined from transferring their shares to the Defendant, Thomas  
M. Burke, without first offering the same to the corporation at the agreed

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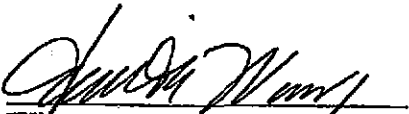
price or to the Plaintiff at the agreed price fifty (50%) percent of their ownership;

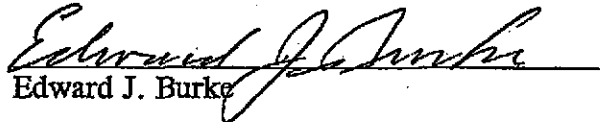
B. The Defendant, corporation, TEMPORARILY AND PENDING A HEARING ON THE MERITS, be temporarily enjoined from calling a Special Meeting to vote on the proposals of the Defendant, Thomas M. Burke, or if the meeting has been held, to set aside the votes as unlawful and in breach of the parties' agreement;

C. The Defendants TEMPORARILY AND PENDING A HEARING ON THE MERITS be ordered to provide the Plaintiff with all books and records, including financial and accounting records, from 1994 to date; and

D. The Defendants TEMPORARILY AND PENDING A HEARING ON THE MERITS be ordered not to make any distribution of the corporation's assets in the nature of dividends or otherwise not in the ordinary course of business.

The Plaintiff also claims monetary damages as the result of the Defendants' actions, which constitute a breach of contract within the minimum and maximum jurisdictions of the Court and DEMANDS A TRIAL BY JURY on his claim for monetary damages.

  
Witness

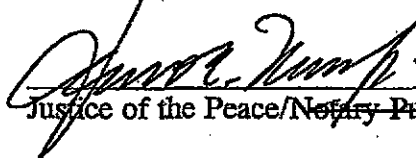
  
Edward J. Burke

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STATE OF NEW HAMPSHIRE  
HILLSBOROUGH, SS.

June 4, 2004

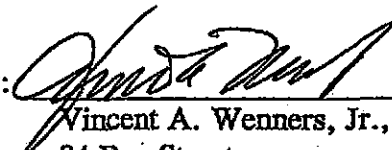
Subscribed and sworn to, before me, this 4 day of June, 2004.

  
Justice of the Peace/Notary Public

VINCENT A. WENERS, JR., Justice of the Peace  
My Commission Expires May 21, 2008

Respectfully submitted,  
Edward J. Burke  
By his attorneys,  
CRAIG, WENERS, CRAIG & CAPUCHINO, P.A.

Dated: June 4, 2004

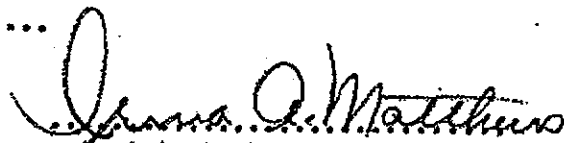
By:   
Vincent A. Weners, Jr., Esquire  
84 Bay Street  
Manchester, NH 03104  
(603) 669-3970

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..... The Record of Organization of .....  
..... BUNNY'S SUPERETTE, INC. ....

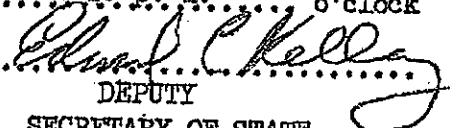
having been submitted to me, I have examined the same and find  
that it conforms to the provisions of the Business Corporation  
Law, and it is hereby approved.

Dated ..... June 30, 1971 .....

  
Assistant Attorney General

STATE OF NEW HAMPSHIRE

Office of the Secretary of State  
Filed for record this ... 30th ...  
day of ... June ....., 19 71 ...  
at ..... 4:10 p. m. .... o'clock

.....  .....  
DEPUTY  
SECRETARY OF STATE

# State of New Hampshire

Be it known that whereas

MARIE I. BURKE, BERNARDINE P. DONELSON, EDWARD J. BURKE,  
 AND THOMAS M. BURKE ALL OF  
 MANCHESTER, NEW HAMPSHIRE  
 have associated themselves with the intention of forming a corporation under the name of  
 BUNNY'S SUPERETTE, INC.

*for the purpose*

To buy, sell, trade and deal in, at wholesale and retail, groceries, meats, fish, seafood products, fruits, vegetables, provisions and food supplies of all kinds, and all other articles and things incidental to a general food supply and provision business; and for other purposes as set forth in the Articles of Agreement.

*with a capital stock consisting of*

200 shares common without par value; 100 shares common without par value authorized to be issued at the present time.

and have complied with the provisions of the statutes of this State in such case made and provided as appears from the record of organization of said corporation duly approved by the ~~attorney-general~~ assistant attorney-general and recorded in this office; now therefore

I, EDWARD C. KELLEY, Deputy Secretary of State of New Hampshire, do hereby certify that said

EXHIBIT B

RECORD OF ORGANIZATION  
OF  
BUNNY'S SUPERETTE, INC.

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We, the undersigned, Edward J. Burke, Treasurer, and Marie I. Burke, Bernardine P. Donelson and Thomas M. Burke, a majority of the Board of Directors elected at the organization meeting of Bunny's Superette, Inc., do hereby certify that the original Articles of Agreement of said Bunny's Superette, Inc. are hereto annexed; that the organization meeting was held on the 28th day of June, 1971; that the names and addresses of the officers and directors of the corporation are:

<u>Officers</u>	<u>Names</u>	<u>Addresses</u>
President	Marie I. Burke	121 Arah Street Manchester, N. H.
Vice President	Bernardine P. Donelson	121 Arah Street Manchester, N. H.
Treasurer	Edward J. Burke	102 No. Adams Street Manchester, N. H.
Assistant Treasurer	Thomas M. Burke	121 Arah Street Manchester, N. H.
Clerk	Charles J. Dunn	95 Market Street Manchester, N. H.
Directors	Marie I. Burke	121 Arah Street Manchester, N. H.
	Bernardine P. Donelson	121 Arah Street Manchester, N. H.