IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BORAAM TANYOUS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 2947-VCN**
	:	
HAPPY CHILD WORLD, INC., a Delaware corporation,	:	
	:	
Defendant,	:	
	:	
and	:	
	:	
MEDHAT BANOUB,	:	
	:	
Defendant/Counterclaimant.	:	

MEMORANDUM OPINION

Date Submitted: May 22, 2008
Date Decided: July 17, 2008

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NOBLE, Vice Chancellor

I. INTRODUCTION

This case began as a routine action to inspect corporate books and records under 8 *Del. C.* § 220; by the time of trial, it had taken a detour. Plaintiff Boraam Tanyous ("Tanyous") purports to be the owner of 55% of the stock of defendant Happy Child World, Inc. ("HCW" or the "Company"), a Delaware corporation. He acknowledges that the remaining 45% of HCW is owned by Defendant Medhat Banoub ("Medhat")[1] and his wife, Mariam Banoub ("Mariam") (collectively, the "Banoubs").[2] The Banoubs, however, claim an entitlement to all of the equity of HCW.

Despite its benign name, all is not happy at HCW. The Banoubs serve as the Company's board of directors[3] and corporate officers and run the day-to-day operations. Tanyous suspects that the Banoubs have mismanaged the Company by skimming his capital contributions out of the Company's accounts for their own personal use in various other business ventures. The Banoubs vigorously deny the allegations of mismanagement and contend that suspicious-looking activity in the corporate bank accounts is just that—suspicious-looking, but not improper. Nevertheless, the Banoubs more or less concede that the unfortunate state of the

[1] For clarity, the Court will occasionally refer to certain individuals by their first names.
[2] The Banoubs own their 45% interest as joint tenants with right of survivorship.
[3] The Company's bylaws specify that the board of directors must have at least three members. Plaintiff's Exhibit ("PX") 10. At the first stockholders' meeting, however, only the Banoubs were elected to the board. PX 11. Tanyous appears on subsequent meeting minutes as a director of the Company, but there is no evidence of his election to the board.

Company's books is largely of Medhat's own doing, and they do not contest Tanyous's purpose in seeking an inspection or even its scope. Instead, battle has been joined over the more fundamental question of whether Tanyous is a shareholder of HCW at all.

The Court conducted a trial in October 2007, and the testimony focused primarily on Tanyous's status vis-à-vis HCW. Tanyous contends that he is (and always has been) an equity investor and shareholder in the Company; indeed, the documentary evidence indisputably bears out that status. Tanyous's apparent shareholdings notwithstanding, however, the Banoubs maintain that Tanyous loaned them the startup capital needed to launch HCW and, thus, he is not a shareholder of HCW but, instead, a lender; the reason why he was given 55% of HCW's stock, they explain, was to serve as collateral for the loan.[4] In support of

[4] There is a potential inconsistency in Medhat's loan theory with regard to his basis for demanding that Tanyous surrender his HCW shares in exchange for payment in full under the purported promissory note documenting the "loan." First, it could be that Medhat contemplated owning 100% of HCW from the outset and, thus, in his view, he pledged 55% of his ownership interest to Tanyous as collateral for the purported promissory note. For example, the promissory note states, "[Tanyous] will return the all [sic] stocks or the remain [sic] back to Mr. Banoub when he gets his payment in full." Defendant's Exhibit ("DX") 1. Alternatively, it could be that Tanyous's shares of HCW stock are treasury shares issued in exchange for a capital contribution, but that the purported oral loan contract between Medhat and Tanyous gives Medhat the right to force a return of those shares to the Company upon payment in full under the promissory note, thereby leaving Medhat as the owner of 100% of the then-outstanding shares of the Company. For example, the minutes of the Company's first board meeting indicate that Tanyous was issued 55 shares of HCW in exchange for a capital contribution of $5,500. PX 10. The Court does not need to explore or resolve the basis for Medhat's alleged authority to reclaim Tanyous's shares of HCW, however, because it concludes that Tanyous is in fact an equity investor and the owner of an unrestricted 55% interest in the Company.

their position, the Banoubs offer a promissory note and "participation agreement," both written in English (Tanyous speaks Arabic and does not speak English) and signed only by the Banoubs.

After trial, Tanyous amended his pleadings to add a declaratory judgment claim and to join Medhat as a defendant in order to place the question of Tanyous's status in the Company and the validity of the purported promissory note directly before the Court.[5] This memorandum opinion sets forth the Court's findings of fact and conclusions of law and focuses primarily on resolving the loan versus equity investment issue.

Three indisputable points impel the Court to conclude that Tanyous is the controlling shareholder of HCW, and not a lender. First, there is no disagreement that when Tanyous and Medhat discussed forming a business in 2001, Tanyous was seeking a particular immigration visa that required him both to make an equity investment and to have a controlling interest in a United States company. Second, consistent with the first point, when HCW was formed in 2002, the corporate documents all identify Tanyous as an equity investor and confirm his status as the majority shareholder. Third, the only evidence of a loan arrangement, other than the Banoubs' testimony, is a highly-suspect promissory note and participation

[5] Medhat filed a counterclaim on the same issue. The Court also permitted the parties to conduct additional discovery to supplement the trial record.

agreement prepared by Medhat; after discounting that self-serving and unreliable evidence, the Banoubs fall well short of establishing an oral loan agreement contrary to the governing corporate documents, even under a more favorable preponderance of the evidence standard.

Thus, for the reasons set forth below, the Court finds that Tanyous is the owner of 55% of the stock and, therefore, the controlling shareholder of HCW. He also has established a proper purpose to inspect the Company's books and records pursuant to 8 *Del. C.* § 220 based upon the numerous funds transfers between HCW accounts and the Banoubs' personal bank accounts;[6] accordingly, the Court will enter judgment in favor of Tanyous and against Medhat and HCW on all claims.

II. FINDINGS OF FACT

Tanyous is an Egyptian citizen and international businessman, working primarily in the field of large-scale construction contracting. In 1991, Tanyous was working in Kuwait when he was forced to return to Egypt by the invasion of Sadaam Hussein's army and the first Gulf War. While in Egypt, Tanyous met Medhat through mutual business acquaintances, and the two became fast friends.

[6] A comprehensive resolution of the parties' dispute ultimately may require substantial investigation of the Banoubs' personal bank records (to the extent they have not already been provided to Tanyous); such records are beyond the proper scope of a Section 220 action, however, and their production will not now be ordered.

At the conclusion of the war, Tanyous returned to Kuwait and Medhat moved to the United States, eventually settling in Delaware and becoming a United States citizen. Despite the distance, the friends continued to be in touch from time to time through letters and telephone calls.

In 1999, Tanyous was engaged in projects in Guam and Saipan when his friend Medhat invited him to visit Delaware on his travels between the Middle East and the Pacific. At the time, Medhat was newly married and his wife, Mariam, had recently moved from Egypt to join him in the United States. Medhat also had recently completed a business degree at Wilmington College, and the newlyweds both were working very hard to establish themselves and their family. During his visit, Tanyous asked Medhat why he did not purchase a business for himself and his wife, instead of working for others. Medhat explained that it was Mariam's dream to own a daycare center, but, for the time being, they could not afford to do so. Tanyous offered to provide the capital to start such a business, but Medhat declined.

Tanyous visited the Banoubs several more times between 1999 and 2001 and continued to press the subject of starting a business.[7] In the late 1990s, he had

[7] Tanyous contends that Medhat was the driving force; which party was the principal impetus behind the business idea is immaterial.

learned about the E-2 Treaty Investor visa[8] (the "Investor Visa") that would enable him to move his family to the United States if he made a substantial investment

[8] The E-2 visa is authorized under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and:

> [P]rovides nonimmigrant visa status for a national of a country with which the United States maintains a treaty of commerce and navigation who is coming to the United States to carry on substantial trade, including trade in services or technology, principally between the United States and the treaty country, or to develop and direct the operations of an enterprise in which the national has invested, or is in the process of investing a substantial amount of capital.

U.S. Dep't of State, http://www.travel.state.gov/visa/temp/types/types_1273.html (last visited July 15, 2008).

An E-2 visa has the following requirements:

> The investor, either a real or corporate person, must be a national of a treaty country;
>
> The investment must be substantial. It must be sufficient to ensure the successful operation of the enterprise. The percentage of investment for a low-cost business enterprise must be higher than the percentage of investment in a high-cost enterprise;
>
> The investment must be a real operating enterprise. Speculative or idle investment does not qualify. Uncommitted funds in a bank account or similar security are not considered an investment;
>
> The investment may not be marginal. It must generate significantly more income than just to provide a living to the investor and family, or it must have a significant economic impact in the United States;
>
> The investor must have control of the funds, and the investment must be at risk in the commercial sense. Loans secured with assets of the investment enterprise are not allowed; and
>
> The investor must be coming to the U.S. to develop and direct the enterprise. If the applicant is not the principal investor, he or she must be employed in a supervisory, executive, or highly specialized skill capacity. Ordinary skilled and unskilled workers do not qualify.

Id.

and assumed a majority interest in a United States company. Tanyous wanted to obtain such a visa so that his children could be educated in the United States,[9] and, thus, he viewed his friend Medhat as a strategic partner for accomplishing that goal.

In 2001, the business idea finally gained traction with the Banoubs. Medhat told Tanyous that in order to purchase a facility for the daycare, he would require $100,000 cash as a down payment; Tanyous agreed to front the startup capital. Tanyous also told Medhat about his desire to move his family to the United States; Medhat agreed to help his friend secure an Investor Visa. Tanyous then wired $20,000 to the Banoubs' personal bank account in the spring of 2001 and brought a check for an additional $80,000 on his next visit to Delaware in June 2001 to provide the startup capital requested by Medhat.

During that visit, Medhat arranged for a meeting with one of his former business professors, Dr. William Dadson, who he thought could help them start their business venture. Dr. Dadson was highly regarded by his former student and also had considerable experience running daycare businesses similar to the one envisioned by the Banoubs. Medhat and Tanyous told Dr. Dadson about their business idea and Tanyous's desire to secure a visa to bring his family to the United States. The three prospective business partners then visited a lawyer in

[9] Tr. 17; 35.

Lancaster, Pennsylvania who confirmed the requirements for Tanyous to obtain an Investor Visa.[10] Consistent with those requirements, Tanyous, Medhat, and Dr. Dadson ultimately developed a business plan whereby Tanyous would own 70% of the company in exchange for his capital contributions up to $1,000,000 and Medhat and Dr. Dadson each would own 15% of the company in exchange for their efforts to operate the business.[11] Also, at Dr. Dadson's suggestion, Tanyous executed a power of attorney authorizing Medhat to act on his behalf with respect to the business venture because he was rarely in the United States, and, as the majority owner, his signature and approval would be required from time to time.[12] Tanyous then departed the country, leaving $100,000 and his power of attorney with Medhat to purchase or start a suitable business with Dr. Dadson.

Dr. Dadson suggested to Medhat that they could purchase and operate a daycare business through Diamond Communications, Inc., a Delaware corporation he had formed in the mid-1990s to facilitate his academic endeavors, but never had used.[13] Medhat and Dr. Dadson proceeded to open a corporate bank account at First Union Bank into which they deposited Tanyous's $100,000 capital contribution. In June 2002, Medhat and Dr. Dadson finally located a suitable

[10] Tr. 212-13.
[11] Tr. 19.
[12] PX 6.
[13] Tr. 211. The Banoubs wanted the company to be called "Happy Child World," but they agreed initially to use the business name, Diamond Communications, doing business as Happy Child World, to expedite the process of starting the business. *Id.*

daycare business in Newark, Delaware,[14] and they executed an option to purchase the business and property for $647,000. The Banoubs and the Dadsons attended classes to obtain the necessary licenses to operate a daycare facility, and they also applied for a loan from the Small Business Administration to finance the business purchase price.

Shortly after signing the option to purchase the HCW facilities, the Banoubs and the Dadsons had a falling out. According to Medhat, Dr. Dadson was demanding unreasonable compensation for his efforts in locating a business property and also exorbitant salaries for himself and his wife for what Medhat believed would be minimal efforts on the part of the Dadsons in operating the business.[15] Medhat called Tanyous to discuss the problem with Dr. Dadson. Tanyous told Medhat to reach an agreement with Dr. Dadson, but, for reasons that are unclear, he was unable to do so, and Dr. Dadson withdrew from the venture.[16]

Medhat removed Tanyous's $100,000 capital contribution from Diamond Communication's First Union bank account and transferred it to his personal bank account at Wilmington Trust Company.[17] With the loss of Dr. Dadson, Medhat was prepared to abandon the business plan, but Mariam encouraged him to press

[14] Mariam and Dr. Dadson's wife also were involved in the search for a business.
[15] Tr. 223.
[16] Tr. 101-02.
[17] Tr. 225.

forward. Medhat called Tanyous to inform him that Dr. Dadson had dropped out of the business, but that he nonetheless planned to proceed without him.[18] Tanyous agreed and assumed that he and Medhat would split Dr. Dadson's 15% interest,[19] but the friends did not explicitly address that issue.

In September 2002, the Banoubs retained Ralph Estep, an accountant, to assist them in forming a corporation to operate the daycare business.[20] At a meeting on September 13, 2002, Medhat instructed Mr. Estep to incorporate HCW with 55% of the stock owned by Tanyous and 45% by the Banoubs. Upon learning that Tanyous was going to own a controlling interest in HCW, Mariam was surprised and upset.[21] She protested brusquely to Medhat in Arabic because she believed the original arrangement to have been a 50-50 partnership with the Dadsons, and, thus, without them, she had assumed that she and Medhat would own 100% of the Company. Medhat told Mariam that he would fully explain the situation to her after the meeting with Mr. Estep. According to the Banoubs, later that evening, Medhat explained that Tanyous was loaning them $100,000 to start

[18] Tr. 225.
[19] Tr. 24-25.
[20] Mr. Estep has gained some notoriety for having been ordered by the Delaware Supreme Court to cease and desist from engaging in the unauthorized practice of law. *In re Estep*, 931 A.2d 1006, 2006 WL 3062763 (Del. 2006) (TABLE). Mr. Estep was later sanctioned for violating that order, *In re Estep*, 933 A.2d 763 (Del. 2007), and his compatriot, an attorney who was licensed in Pennsylvania, but not in Delaware, was recently disbarred from the practice of law in Delaware. *In re Kingsley*, --- A.2d ---, 2008 WL 2310289 (Del. June 4, 2008) (TABLE).
[21] Tr. 227, 229 (Medhat); 184 (Mariam)

HCW and that they were giving Tanyous 55% of the Company as collateral until the loan was repaid.[22] Medhat also showed Mariam a promissory note purporting to document the loan obligation.[23] Mariam was nervous about the arrangement and ceding control of the Company (even temporarily) to Tanyous, but she trusted her husband's judgment. Medhat never informed Mr. Estep about the alleged loan arrangement, however, and, thus, when the Banoubs returned to Mr. Estep's office on September 16, HCW was officially incorporated with Tanyous's owning an unrestricted 55% of the Company.[24] Shortly after incorporating HCW, Medhat

[22] Tr. 229-30 (Medhat); 182-85 (Mariam). Tanyous categorically denies such an arrangement.

[23] DX 1. The note is dated September 15, 2002, two days after the Banoubs claim Medhat showed it to Mariam. Setting aside that minor inconsistency, a larger credibility problem for the purported promissory note is that Medhat claims to have received the model for it from Tanyous's immigration attorneys in New York, Tr. 230; the New York attorneys, however, have no record of meeting Medhat and Tanyous before July 2003. Medhat offers no details for how he obtained the form promissory note other than to say that he asked someone in the immigration law firm for it and that person gave it to him, which, if not impossible, is improbable. Thus, either Medhat received the form promissory note from some other source altogether in or before September 2002 (or he simply crafted it himself) or, perhaps more likely, the document was prepared at some later date to facilitate his efforts to oust Tanyous from the Company and was inartfully attributed to the New York attorneys to lend an air of credibility to the document. Moreover, the document is drafted in English and is signed only by Medhat, and there is no evidence that Medhat prepared an Arabic translation of the document for Tanyous. Without Tanyous's signature on the document, and with Medhat's offering nothing more than his own testimony about the loan arrangement and the validity of the promissory note, there is no objective evidence that Tanyous manifested his assent to the loan terms contained therein, even if he knew about it.

[24] PX 10; 12. Medhat advances an entirely different version of the events leading up to the incorporation of HCW: in his view, Tanyous never sought to own a majority of HCW but, instead, simply wished to help his friends start their own business. Thus, in June 2001, he generously parked $100,000 in the Banoubs' personal bank account, with no discussion of repayment terms or an interest rate, so that they would have the funds at their disposal if and when they found a suitable business. Medhat concedes that Tanyous was present at a meeting with Dr. Dadson in June 2001, but at no point did they discuss Tanyous's owning any interest in the daycare business; instead, the arrangement was for the Banoubs and the Dadsons to form a 50-50 partnership to operate a daycare. According to Medhat, Tanyous was providing moral

transferred Tanyous's $100,000 capital contribution from his personal Wilmington Trust account to HCW's corporate accounts at Commerce Bank.[25]

The Banoubs proceeded to operate HCW, and the business flourished. In January 2003, Medhat sent copies of the corporate documents to Tanyous. Notably absent from the packet were any documents relating to the purported loan arrangement.[26] When Tanyous received his shares of HCW stock, he noticed that Medhat had reduced his interest in the Company to 55% from an anticipated 77.5%

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support and guidance as the Banoubs embarked on their business venture with the Dadsons. Eventually, in September 2002, when they were ready to incorporate HCW without the Dadsons, Medhat called Tanyous in the evening before the meeting with Mr. Estep—over a year after receiving the $100,000 "loan"—to determine the terms of the "loan" arrangement. During that phone call, Tanyous, who has been portrayed by the Banoubs as a "hardnosed businessman," nonchalantly agreed to repayment terms of $150,000 over the ensuing five years with 55% of HCW to be given as collateral. Moreover, despite the seven hour time difference between Delaware and Kuwait and the seemingly unexpected nature of the phone call, Tanyous had at the ready—in the middle of the night local time—the names of banks and bank account numbers for his various associates to whom he wished Medhat to make payments on the loan.

In further support of their loan theory, the Banoubs point to a shareholder "participation agreement" purportedly prepared by Medhat in December 2002 to memorialize the parties' understanding of Tanyous's lender relationship to HCW. DX 3. The Banoubs executed the participation agreement on their own behalf, and Medhat signed the agreement on Tanyous's behalf as his attorney-in-fact. In many respects, the participation agreement is even more self-serving and incredible than the promissory note. First, Medhat seeks to demonstrate Tanyous's assent to the participation agreement through *his* (Medhat's) signature on the agreement as Tanyous's attorney-in-fact. Moreover, as with the promissory note, the participation agreement is drafted in English and there is no evidence that Medhat ever provided Tanyous with an Arabic translation of the document. Medhat attempts to explain away the latter deficiency for both the promissory note and the participation agreement by saying that Tanyous was not interested in the details of these arrangements, which, frankly, seems rather uncharacteristic for a "hardnosed businessman."

In short, the Banoubs' version of events, coupled with the unreliable documentary evidence of a loan arrangement, requires too many unlikely inferences to be believed, particularly when contrasted against the relatively logical string of inferences required to conclude that Tanyous is, and always has been, an equity investor in HCW.

[25] Tr. 304

[26] I.e., the "promissory note" and the "participation agreement." Tr. 232-34.

(including his portion of Dr. Dadson's interest), or, at the very least, 70% pursuant to the original business plan.[27] Tanyous immediately contacted Medhat regarding the discrepancy in his ownership percentage. Medhat explained that he and Mariam were putting forth a substantial effort to operate HCW and they believed they should own a larger share of the Company. Tanyous was incensed by Medhat's unilateral actions, and he complained to his and Medhat's mutual friend, Samir Aknoukh. Mr. Aknoukh mediated the problem by persuading Tanyous that the Banoubs were undertaking a considerable task to operate the Company and that he nonetheless still owned a majority of HCW, which satisfied the requirements of the Investor Visa. Thus, Tanyous relented and resigned himself to owning 55% of HCW.[28]

[27] Tr. 26-27.

[28] It bears noting that Mr. Aknoukh's deposition testimony does not necessarily corroborate Tanyous's recollection of these events. *See generally* PX 4. *But see* Tr. 294-96 (Medhat's testimony suggesting that Mr. Aknoukh assisted Tanyous in his business dealings from time to time). Regardless of whether these events unfolded exactly as Tanyous recounts them, however, the better inference is that, despite being upset initially about a reduction in his ownership of the Company, Tanyous ultimately accepted the reduced ownership position because it still accomplished his objective of owning a majority position that would satisfy the requirements of the Investor Visa and would enable him to achieve his goal of moving his family to the United States. The Banoubs urge the Court to infer that Tanyous was content to accept a reduced ownership interest because his share of HCW was nothing more than collateral for the loan. If Tanyous is in fact the "hardnosed businessman" the Banoubs paint him to be, however, that inference is even less plausible—to the contrary, one would assume, if that were the case, that Tanyous would not accept any reduction in the collateral for his loan.

Consistent with the original business plan and the requirements of the Investor Visa, Tanyous continued to invest in HCW throughout 2003.[29] For example, in the spring, he wired approximately $70,000 to HCW for additional improvements to the daycare facilities.[30] Medhat does not deny that Tanyous sent funds to HCW in 2003, but he contends that he never requested money for improvements because the Company had sufficient cash flow to handle such expenses by that time. Medhat also admits that he transferred Tanyous's investment funds from HCW's accounts to his personal bank accounts to use in a separate house-flipping business venture.[31] According to Medhat, Tanyous was apprised of this alternative use of his investment money and approved.[32] Tanyous also wired an additional $73,685.75 to HCW in August 2003,[33] and Medhat again

[29] At this point in time, the parties appear to have been engaged in several different business ventures, the details of which are not important, and none of which is well-documented. Indeed, the web of wire transfers relating to and resulting from these various ventures is so complex that even Medhat admits that the assistance of an accountant is required to reconcile the various accounts and transactions. *See generally* Tr. 305-51. The Court does not purport to resolve the accounting issues between the parties in this memorandum opinion. Some mention of certain electronic funds transfers is necessary, however, to give the reader a flavor of the convoluted business dealings between Medhat and Tanyous and also because Medhat claims that certain wire transfers were made as "payments" on the promissory note.

[30] Tr. 28-29. Tanyous also contributed his time and manual labor to the refurbishment of HCW's facility. Tr. 33. If true, such efforts are atypical for a lender.

[31] *E.g.*, Tr. 248-50.

[32] Tanyous hoped that Medhat would turn HCW into something of a large parent corporation with its daycare operation as just one of its many lines of business. Thus, although the daycare business may not have required additional funding, Tanyous continued to invest in order to grow the Company with his and Medhat's various other business ventures, all of which he had assumed was occurring under the HCW umbrella.

[33] Tr. 317. These funds were wired at Tanyous's direction from a law firm in Guam which had collected the funds as payment for one of Tanyous's construction projects.

shifted the funds to his personal accounts for alternative uses not specifically related to HCW. Nevertheless, throughout the year, Medhat continually updated Tanyous on the progress at HCW and mailed him numerous photographs documenting the many improvements made to its facilities.[34]

In July 2003, Tanyous and Medhat met with and retained an immigration attorney in New York, Emre Ozgu, to assist with Tanyous's visa application. Mr. Ozgu explained the requirements of the Investor Visa, and Medhat agreed to work as Tanyous's liaison in preparing the application materials. Throughout the fall of 2003,[35] Medhat provided Mr. Ozgu with numerous documents supporting Tanyous's shareholder status in HCW and wrote several emails confirming the same; Medhat also represented to Mr. Ozgu that Tanyous had "invested" in excess of $250,000 in HCW; moreover, throughout the application process, Medhat never mentioned any loan arrangement to Mr. Ozgu. Mr. Ozgu raised concerns with Medhat about the haphazard documentation of Tanyous's investment in HCW,

[34] If Tanyous was in fact a lender of HCW, as the Banoubs contend, it is curious that Medhat would feel compelled to provide Tanyous with continuous updates and photographs of the progress at HCW.

[35] As an aside, also in the fall of 2003, Medhat wired $25,000 to Talaat Shaker, who is one of Tanyous's cousins in Kuwait. PX 25. Medhat claims that this was his first payment on the promissory note. Tanyous contends that it was an investment in a separate project he and Medhat were pursuing in Egypt, but it does not appear that the Egyptian project was underway until at least late 2004 or, more likely, 2005. In any event, Medhat offered no objective documentary evidence or testimony from Mr. Shaker to support the *purpose* of the payment, nor is there any evidence that the payment to Mr. Shaker was a payment to Tanyous, other than the fact the Mr. Shaker is identified as a possible payee in Medhat's self-serving promissory note.

and, eventually, in early 2004, Tanyous's visa application was denied for that reason. At that point, Medhat confessed to Mr. Ozgu that Tanyous was a lender of HCW, which, he explained, accounted for the poor documentation of Tanyous's investment in the Company. Mr. Ozgu, understandably, was not pleased to learn about Medhat's (and perhaps Tanyous's) apparent deception.[36]

Medhat wished then to avoid the mischief he had caused with Tanyous's visa bid through HCW, and he formed another Delaware corporation, Abraam, Inc. ("Abraam"), to accomplish that in early 2004.[37] Once again, Medhat engaged in a series of funds transfers among various banks and accounts and he claims that he transferred Tanyous's 2003 HCW investments (which he had previously moved from the HCW accounts to his personal accounts) into the Abraam bank accounts. Medhat conducted some limited business transactions through Abraam, but, for

[36] In essence, Medhat's theory of this case rests upon a finding that he and Tanyous conspired to defraud the United States Department of State in connection with Tanyous's visa application. In other words, despite the fact that Tanyous was loaning Medhat the startup capital for HCW, the two would paper the deal as an equity investment and pass it off to the government as such in order to secure the Investor Visa; then, once Tanyous had his visa, Medhat would repay the loan and Tanyous would have nothing further to do with HCW. Such a scheme, in addition to being patently offensive, is not supported by the record. Moreover, the Court is not persuaded that Tanyous had any ulterior incentive to participate in such a plan—he had sufficient resources and the ability to comply with the law, and, accordingly, the Court is satisfied that he intended to comply.

[37] Tr. 276-77. One can readily surmise from the formation of Abraam and the dubious promissory note and participation agreement that Medhat perhaps found himself caught between the demands of a business deal he had made with Tanyous and his wife's desire to own HCW without other partners. Thus, the formation of Abraam would appear to be the culmination of a plan whereby Medhat hoped that he could pull off a "bait and switch" to satisfy both Tanyous's desire to secure an Investor Visa and Mariam's desire to own HCW without Tanyous. Unfortunately for Medhat, that plan, if it existed, did not succeed.

reasons that are not clear from the record, he abandoned that company (and his renewed visa efforts on Tanyous's behalf) by late 2004 or early 2005.[38]

In 2005, Tanyous asked Medhat to hire his niece Amira Abdel Malek ("Amira") to work at HCW. Medhat agreed, but Amira soon proved to be a troublesome employee. According to the Banoubs, Amira made several insensitive remarks about the ethnicity of various children in her care and one child's mother threatened to file a lawsuit against HCW. Without consulting Tanyous, the Banoubs fired Amira. Tanyous, evidently, was not pleased to learn of this development because, in his view, he controlled the Company and, therefore, should also control the personnel decisions.[39]

In December 2005, Tanyous received a copy of HCW's 2004 tax return. The return stated the Banoubs' ownership interest in HCW at 80% and Tanyous's at 20%. Tanyous was furious with Medhat upon seeing the tax return and he immediately flew from Kuwait to the United States to address the problem. Mr. Aknoukh met Tanyous in New York, and the two drove to Delaware to confront Medhat. That meeting was not pleasant and harsh words were exchanged between Tanyous and Medhat. Medhat explained that he had reduced Tanyous's interest in

[38] Tanyous's friend, Mr. Aknoukh, appears to have made some effort to assist Tanyous in obtaining an Investor Visa around this same time; perhaps that is one plausible explanation for the abandonment of Abraam.

[39] Tr. 32.

the Company to obtain more favorable terms on a refinancing of the Small Business Administration loan. Tanyous was not interested in Medhat's explanations, however, and he demanded that the tax return be amended to reflect their proper ownership interests in the Company. Medhat agreed and instructed HCW's accountant to prepare an amended tax return reflecting Tanyous's 55% interest and the Banoubs' 45% interest in HCW. That was accomplished on December 15, 2005. As a result of Medhat's actions, Tanyous no longer trusted his friend, and he severely curtailed the authority previously conferred upon Medhat by the 2001 power of attorney.[40]

Despite their problems relating to HCW, Tanyous and Medhat continued to do business with each other. The Banoubs continued to operate HCW following the December 2005 confrontation with Tanyous. In addition, in late 2005 and early 2006, Tanyous and Medhat invested in an apartment construction project in Egypt. Tanyous contributed the land and both he and Medhat made capital contributions for the project. Tanyous's cousin, Nasrey Tanyous ("Nasrey"), was managing the project for Tanyous. Between December 2005 and April 2006,

[40] PX 18. Once again, the Banoubs paint a vastly different picture of this series of events. In their view, the breakdown in the parties' relationship stemmed not from Medhat's unilateral change in their putative ownership interests in HCW, but rather from their firing of Amira, which they contend caused Tanyous considerable embarrassment with his family. Although the firing of Amira probably colored the backdrop of the parties' contentious meeting in December 2005, it is more plausible that Tanyous flew half way around the world to protect his business interests (and hopes of acquiring an Investor Visa).

Medhat transferred approximately $50,000 to Nasrey in connection with the Egyptian apartment project.[41] Tanyous also invested an additional $100,000 in HCW, which Medhat again proceeded to transfer out of HCW. According to an email Medhat sent to Mr. Aknoukh in February 2006, he used $45,000 of that particular capital investment, as well as Tanyous's "55% of the center profit for 2005," for another house-flipping project.[42] The balance of $55,000, according to Medhat's email, remained in an unspecified savings account.

Also in the spring of 2006, the Banoubs formed yet another Delaware corporation, Happy Kids Academy, Inc. ("HKA"), to purchase a competing daycare facility in Newark, Delaware. For reasons that have not been explained, it appears that Medhat may have transferred funds from HCW bank accounts to HKA bank accounts.[43] Tanyous further contends that since the Banoubs formed HKA, they have neglected HCW and, consequently, the business and his investment are suffering.

[41] DX 7-9. Medhat claims that these funds transfers were payments on the promissory note. There is no evidence, other than Medhat's testimony, that the purpose of these payments was to repay the promissory note. In light of the fact that the Egyptian apartment project was in full swing at that time, it is more likely that the payments to Nasrey related to that venture.
[42] PX 4 (Exhibit 1 to Aknoukh Deposition); *see also* Tr. 270. One can infer that "center profits" refers to HCW; it also is interesting to note Medhat's reference to Tanyous's share of HCW profits, if Tanyous is merely a creditor of HCW.
[43] Tr. 348-51.

In 2007, Tanyous retained Delaware counsel to request an inspection of HCW's books and records pursuant to 8 *Del. C.* § 220. The Banoubs countered that Tanyous had made them a personal loan and was not a shareholder of HCW; accordingly, they tendered a check for $45,000 along with a copy of the promissory note, purporting to repay the loan in full.[44] Tanyous denied the existence of any loan arrangement with respect to HCW and refused the Banoubs' tender of $45,000 in satisfaction of the purported debt. This action followed.

III. ANALYSIS

A. *The Loan versus Equity Investment Issue*

Tanyous and Medhat agree that at some point before the incorporation of HCW they reached an agreement with respect to Tanyous's relationship to the Company. That agreement was for either an equity investment (Tanyous's theory) or a loan arrangement with the Company stock serving as collateral (Medhat's theory). The Court finds itself in an unusual position. It is not called upon to determine, in the first instance, *if* an agreement was reached with respect to HCW; rather, it is essentially asked to determine the nature of a seemingly ambiguous oral

[44] Various other payment credits were claimed through the October 2003 payment of $25,000 to Mr. Shaker and the payments to Nasrey in connection with the Egyptian apartment project.

agreement. Its overarching goal, therefore, as with interpreting ambiguous language in a written contract, is to ascertain the shared intent of the parties.[45]

The question of which party bears the burden of proof in this case is somewhat confounding; what that burden should be (i.e., preponderance[46] or clear and convincing[47]) is even more perplexing. The Court, therefore, will assume that the burden rested on each individual party to prove his theory of the agreement by a preponderance of the facts. Based upon the Court's findings of fact *supra* in Part II, and for its countervailing reasons for rejecting Medhat's position as explained in the footnotes, the Court concludes as a matter of fact, based upon the

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[45] *Cf.*, *West Willow Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007).

[46] *E.g.*, *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007) (In order to prove breach of contract claim, plaintiff must first prove existence of express or implied contract by a preponderance of the evidence.); *Facchina v. Malley*, 2006 WL 2328228, at *3 (Del. Ch. Aug. 1, 2006) (Defendants failed to approve by a preponderance of the evidence that a shareholders agreement was reached between the parties.); *cf. United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007) ("The burden of persuasion with respect to the existence of a contractual right is a 'preponderance of the evidence standard.'" (citations omitted)).

[47] *E.g.*, *Deene v. Peterman*, 2007 WL 2162570, at *5 (Del. Ch. July 12, 2007) (Where plaintiff seeks specific performance of an oral contract, "[t]he validity of the [Plaintiff's] alleged oral contract with the [Defendant] . . . as well as the [Plaintiff's] partial performance thereof must be established by clear and convincing evidence."); *Street v. McIlvaine*, 1995 WL 214350, at *4 (Del. Ch. Mar. 23, 1995) ("The Court may enforce an alleged oral contract, by an order for specific performance, when evidence of actual partial performance of the oral agreement exists. . . . However, the party attempting to prove the existence of the oral contract must establish the existence and terms of the contract by clear and convincing evidence."); *cf. United Rentals*, 937 A.2d at 834 n.112 ("The burden of persuasion with respect to the entitlement to specific performance is by a 'clear and convincing evidence' standard." (citation omitted)).

evidence presented, that Tanyous is a shareholder of HCW and the owner of 55% of its stock.[48]

[48] The obvious corollary to this conclusion is that Medhat has failed, even under a preponderance standard, to establish a loan agreement. Of course, one could argue that the objective corporate documents showing Tanyous as the owner of an unrestricted 55% of HCW are, in fact, the best evidence of the agreement reached by the parties. If one were to adopt that baseline assumption, then arguably Medhat bore the burden of establishing the loan/collateral agreement by clear and convincing evidence because, in essence, he sought to establish an oral agreement varying the unambiguous "terms" of a contract expressed by the parties through the objective documents. *See, e.g.*, *Reserves Dev., LLC v. Severn Sav. Bank, FSB*, 2007 WL 4054231, at *8 (Del. Ch. Nov. 9, 2007) (heightened evidentiary burden to establish oral modification of written contract). It should go without saying that his evidence is woefully short of that heightened mark.

Similarly, if Tanyous were held to a clear and convincing evidence standard, the Court concludes that he would have satisfied that burden as well. The objective corporate documents indisputably establish an unrestricted ownership interest in the Company. In addition, there is no dispute that at the time the parties reached their agreement to form a business in 2001 or 2002, Tanyous was seeking an Investor Visa that required him to make an equity investment and to hold a majority ownership position in a United States company. Medhat was aware of that fact and agreed to help Tanyous secure the visa. To that end, in 2003, Medhat made extensive efforts to assist Tanyous in his visa application and he consistently represented to Tanyous's immigration attorney that Tanyous was an investor in HCW. It was not until after Tanyous's visa application was denied on the basis of Medhat's haphazard corporate records relating to Tanyous's investment in HCW that Medhat "confessed" to a loan arrangement; one senses, however, as explained in the footnotes above, that Medhat may have had ulterior motives for playing fast and loose with Tanyous's investments in HCW as it suited his needs. Finally, in 2005, when Medhat "adjusted" their respective ownership percentages on the corporate tax return, Tanyous reacted promptly and aggressively to have the return amended to reflect their 55-45 ownership arrangement. In light of the evidence and its findings of fact, the Court is satisfied that even under a heightened clear and convincing evidence standard Tanyous has carried his burden of establishing an equity investment, and, therefore, it concludes that he is a shareholder of HCW.

In short, regardless of which party bears the burden of persuasion in this case or whether the appropriate burden of proof is by a preponderance or clear and convincing evidence, the Court concludes Tanyous clearly made an equity investment and is, in fact, a shareholder and the owner of 55% of the stock of HCW; conversely, Medhat has failed to establish, even under a more lenient preponderance standard, his theory of a loan agreement.

B. *The Books and Records*[49]

Turning thus to the original reason Tanyous filed this action, the Court also concludes that Tanyous is entitled to inspect HCW's books and records. Tanyous seeks to inspect various categories of corporate documents as set forth in his demand on the Company, dated February 2, 2007.[50] Medhat and HCW have not sponsored any defense or reason to circumscribe the scope of Tanyous's demand.[51]

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[49] Given that Tanyous is the controlling shareholder of HCW, one wonders whether he even needs the Section 220 inspection to achieve his objective.

[50] Specifically, the requested categories of documents include:

> (1) All financial documents, including but not limited to the Company's tax returns, financial statement, detailed general ledgers, bank statements, original checks, invoices to customers, customer statements, accounts receivable records, deposit slips, payroll registers, depreciation records, covering the period from September 23, 2002 through the present;
>
> (2) All minutes, notes or other records of meetings of the Company's Board of Directors or any meeting of any other Company subcommittee or ad hoc committee comprising any directors of the Company relating to the Company's proposed acquisition of an additional day care facility;
>
> (3) Any other documents relating to the Company's proposed acquisition of an additional day care facility;
>
> (4) Correspondence file with Citizens Bank including all emails, letters, reports, etc.;
>
> (5) Personnel files for Medhat and Mariam Banoub; and
>
> (6) Work Paper files for Rinso Accounting and Tax Services for preparation of 2002-2005 corporate income tax returns.

Am. Compl. Ex. A.

[51] No scope-based objection was interposed as to the personnel files.

The stockholders of a Delaware corporation have the right to inspect the corporation's books and records for any proper purpose.[52] It is well settled that one such proper purpose is to investigate possible corporate mismanagement or wrongdoing.[53] A shareholder, however, may not merely speculate that corporate malfeasance is afoot; instead, he must adduce "*some evidence*" that warrants further investigation of the matter.[54] In this case, as demonstrated by Medhat's trial testimony, the books and records of HCW are in a shambles. Even Medhat concedes that the services of an accountant are required to straighten out the numerous wire transfers conducted through HCW's bank accounts. Moreover, there is evidence that Medhat transferred funds from the HCW accounts to his personal bank accounts and that he may have moved certain funds from HCW to HKA (the newer business he operates with Mariam). As such, Tanyous has more than satisfied *Seinfeld*'s requirements, and, accordingly, he is entitled to inspect the books and records of HCW.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Tanyous is a shareholder of HCW, as well as the owner of 55% of HCW's stock. In addition, Tanyous has satisfied the requirements of 8 *Del. C.* § 220 and is entitled to inspect the

[52] 8 *Del. C.* § 220(b). Medhat has not challenged Tanyous's compliance with the technical requirements of Section 220.
[53] *E.g.*, *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 (Del. Ch. 2007).
[54] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006).

Company's books and records as set forth in his demand of February 2, 2007. Accordingly, judgment will be entered in favor of Tanyous and against HCW on all of the claims under 8 *Del. C.* § 220. Judgment also will be entered in favor of Tanyous and against Medhat as to the ownership of stock framed by the declaratory judgment request and the counterclaim. Finally, costs will be awarded to Tanyous as the prevailing party under Court of Chancery Rule 54(d).

Counsel shall confer and submit an implementing order within ten days.