MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

In the Matter of the Application of PATRICK QUADROZZI, X	INDEX NO. 16299/05
Petitioner,	BY: GRAYS, J.
- against -	DATED: February 10, 2011
being a holder of at least Twenty-Five (25%) of all of the OUTSTANDING shares of	
QUADROZZI CONCRETE CORP., QUADROZZI EQUIPMENT LEASING CORP., ATLANTIC CONCRETE CORP., BAY 32ND PLACE DEVELOPMENT CORP., BEACH CHANNEL DRIVE LAND ENTERPRISES, INC., AMSTEL RECYCLING AND CONCRETE CORP., QUADROZZI, INC., d/b/a NYCEMCO, QUADROZZI REALTY CORPORATION, QUALITY ASSURANCE CONCRETE CORP., QUALITY CONCRETE OF NEW YORK, INC.,	
For the Dissolution of the abovenamed domestic corporations. X	

This is a valuation hearing concerning Quadrozzi Concrete Corp. (QCC), Quadrozzi Equipment Leasing Corp. (QEL), and Amstel Recycling and Concrete Corp. (Amstel) (collectively the electing companies) which began on April 19, 2006 and concluded on May 19, 2010.

I. Litigation History

On or about July 26, 2005, petitioner Patrick Quadrozzi (PQ) began the instant proceeding (*Quadrozzi v Quadrozzi Concrete Corp.*, Index No. 16299/05) pursuant to Business Corporation Law § 1104-a for the judicial dissolution of the respondent corporations. By memorandum and order dated October 26, 2005, this court granted the petition to the extent of directing a hearing concerning, inter alia, whether Patrick Quadrozzi had an interest in the respondent corporations and whether judicial dissolution of the corporations was warranted pursuant to BCL § 1104-a. However, on or about October 20, 2005, the respondents elected to purchase the petitioner's interest in QCC, QEL, and Amstel, thus converting the dissolution proceeding into a valuation proceeding in regard to those corporations.

On December 6, 2005, PQ also began a derivative action in the New York State Supreme Court, County of Queens in the names of, inter alia, QCC, QEL, and Amstel, claiming, inter alia, that companies known or once known as Transit Mix Company, Certified Concrete Company, and Gowanus Industrial Park, Inc. are assets of QCC. (*Quadrozzi v The Estate of John Quadrozzi*, Index No. 26125/05.) PQ alleged in the derivative action, inter alia, that in or about 1993, John Quadrozzi, Sr. used the assets of QCC to acquire the Certified Concrete Company and Transit Mix Company and that in or about 1997, John Quadrozzi, Sr. used the assets of QCC to acquire the assets of Gowanus Industrial Park, Inc. (Certified Concrete Company, Transit Mix Company, and Gowanus Industrial Park, Inc. and/or their successors are referred to hereinafter as "the disputed corporations.") PQ further alleged that Theresa Quadrozzi, the executrix of the estate of John Quadrozzi, breached an agreement made by the decedent that shares of the disputed corporations would be issued to PQ personally or to the derivative companies.

The hearing in the valuation proceeding began on April 19, 2006. At the hearing, the parties stipulated that the petitioner has a 25% interest in (1) QCC (2) QEL (3) Bay 32nd Place Development Corp., (4) Beach Channel Drive Land Enterprises, (5) Amstel, (6) Quadrozzi, Inc., (7) Quadrozzi Realty Corp., (8) Quality Assurance Concrete Corp., (9) Quality Concrete of New York, Inc., and (10) Quadrozzi Enterprise, Inc. (Tr., 3-4.) The petitioner withdrew his petition for the dissolution of all of the companies except QCC, QEL, and Amstel. Atlantic Concrete Corp. is in dissolution, and the dissolution was not at issue during the hearing. The hearing was limited to the valuation of QCC, QEL, and Amstel. (Tr., 21.)

During the course of the valuation proceeding, PQ contended that the value of the disputed corporations must be added to the value of the electing companies in order for the value of the electing companies to be determined. However, this court determined that the derivative action was the proper vehicle for establishing the ownership interest, if any, of PQ and/or QCC, and a long delay in this valuation proceeding ensued while PQ prosecuted the derivative action.

This court conducted a bench trial of the derivative action on October 23, 24, 27, 30, 31 and November 3, 5, 6, and 7 of 2008. Pursuant to a decision dated June 10, 2009, this court awarded PQ an interlocutory judgment, inter alia, (1) imposing a constructive trust in his favor individually over enterprises designated as the Certified Acquisition Companies to the extent of a 25% ownership interest and (2) imposing a constructive trust over Gowanus, Inc. in his favor individually to the extent of a 25% ownership interest with a $2,000,000 credit for the estate of John Quadrozzi, Sr. or his heirs against the value of that interest. The court signed the interlocutory judgment on June 23, 2010, and the defendants filed a notice of appeal on or about December 16, 2010.

Pursuant to a decision and order dated September 29, 2006, which was rendered in the valuation proceeding, this court directed the appointment of an independent appraiser from a list to be submitted to the court by the parties. (*See*, *Matter of Cohen*, 215 AD2d 341.)

II. The resumption of the valuation proceeding on May 19, 2010

The valuation proceeding resumed on May 19, 2010, and the court first heard testimony from Thomas F. Giordano of Empire Valuation Consultants, LLC, the company which performed the independent appraisal. The parties stipulated that Giordano, who was called to the stand by the respondents, qualified as an expert witness, and the court admitted the report of the independent appraiser into evidence.

Giordano's direct testimony largely concerned matters dealt with in the independent appraisal report, and the court will summarize these matters more fully in the section of this memorandum which deals with the report itself. Briefly, Giordano testified that the process of evaluation involved several steps including arriving at an understanding of the business, interviewing management, communicating with others, reviewing financial statements, making a site visit, and asking questions. The independent appraiser selected the income approach in making the valuation which essentially involves determining the annual earnings of a business and then applying a chosen capitalization rate. Various adjustments are then made to the initial value. Giordano referred to exhibits which concerned the construction industry and the economic climate at the relevant time. Giordano also referred to other exhibits which basically concerned the income statements of the electing companies. The witness explained the necessity of taking into account the financial performance of two other Quadrozzi companies (Red Hook Concrete Loading Corp. and Maspeth Concrete Loading Corp.) because of their close interrelationship to the electing companies. Giordano explained: " Almost all the production of Maspeth and Red Hook was being resold through Quadrozzi Concrete. So this was another indication that it made sense to combine them and [sic] in order to understand the financial performance of the base three companies." (Tr. 10-11.)

On cross examination, Giordano testified that as of April 2007, the time Empire completed the preparation of its first appraisal report, he had received the tax returns for the electing companies for the years 1999 through 2003 and through 2002 for Maspeth and Red Hook. This was short of the valuation date of July 26, 2005. Giordano admitted that Empire did not do an audit of the figures provided to it by the electing companies and that it did not verify the information received.

The petitioner called Eric J. Barr, a partner in ParenteBeard, to testify as his expert witness. The court admitted the report of ParenteBeard into evidence. Barr testified that in his opinion the expenses stated by the electing companies on their tax returns and used by the independent appraiser were inaccurate. He “utilized an approach whereby industry data reflecting expenses as a percentage of revenues for companies like these three were assumed and plugged those expenses into the model utilized by Mr. Giordano.” (Tr., 34.) Like Giordano, Barr accepted data compiled by RMA Associates from financial statements submitted by banks nationwide as reliable, and Barr used RMA data, which he checked against another source of industry data (Integra), in preparing ParenteBeard’s report. Barr testified that he “just replaced the actual expense information that he [Giordano] had with the expenses indicated by the industry data,” but other than that he “applied the same capitalization rate, S corporation premium. Same weighting of the two methodologies. I used income approach as he did. I did not use a market approach. I used an average approach. I used the same number of years that he used. I used the same revenue numbers.” (Tr., 35.) Barr concluded that PQ’s share in the electing companies had a value of $2,832,000. On cross-examination, Barr admitted that expenses in New York City can be high relative to other parts of the country, but he denied knowing about HUD permits required by the municipality for commercial vehicles. The witness denied knowing if QEL employed union labor, and he admitted that RMA and Integrity data does not distinguish between union and non-union companies. The respondents’ attorney asked, “Does the RMA study accurately reflect the profitability of a concrete company located in New York City, yes or no?" Barr responded, "I cannot answer that question because I don't know the location of the different companies." (Tr., 42.) Barr admitted knowing that the RMA study showed different profit margins for companies earning less than $25,000,000 or more than $25,000,000 and that the average company in the RMA study in the latter category generated $85,000,000 in annual revenues. He admitted knowing that the electing companies collectively generated revenues in the $20,000,000 to $30,000,000 range, but he still chose the more than $25,000,000 category to generate his report. None of the electing companies separately had annual gross revenues greater than $25,000,000.

The ParenteBeard report admitted into evidence noted certain matters and documents which "indicate[d] that the Companies' books and records were not properly maintained; that the results of operations were being 'managed' to derive a desired income tax result; that transactions with related parties were not recorded on an arm's-length basis; and that intercompany balances did not reconcile." The report of the petitioner's expert criticizes Empire for accepting financial information "even though it should have performed sufficient due diligence to detect that the financial information reported on the Companies' tax returns was unreliable . . . ." The ParenteBeard report criticizes Empire for applying a marketability discount of 33% and determined that a significantly lower discount would be appropriate. Utilizing RMA data instead of figures derived from the tax returns of the electing companies, the ParenteBeard report concludes that the value of PQ's interest in the electing companies amounts to $2,856,000 applying 0% as the discount for lack of marketability, $2,571,000 applying 10% as the discount for lack of marketability, $2,285,000 applying 20% as the discount for lack of marketability, and $1,999,000 applying 30% as the discount for lack of marketability.

The court heard the testimony of Joseph Agiato, the respondent's appraiser, on an earlier hearing date. Agiato testified that the fair value of QCC, QEL, and Amstel amounted to $400,000, $125,000, and $20,000 respectively.

III. Legal Principles

QCC, QEL, and Amstel elected to exercise their statutory buy-out option. (*See, Matter* of *Seagroatt Floral Co., Inc.*, 78 NY2d 439; *In re Hung Yuk Ong*, 299 AD2d 173; *Matter of Musilli*, 134 AD2d 15.) BCL § 1118(a) gives the non-petitioning shareholders in a BCL § 1104-a dissolution proceeding or the corporation itself "an absolute right to avoid the dissolution proceedings and any possibility of the company's liquidation by electing to purchase petitioner's shares at their fair value and upon terms and conditions approved by the court . . . ." (*Matter of Pace Photographers [Rosen*], 71 NY2d 737, 744-745; *see, Fedele v Seybert*, 250 AD2d 519.) Because the respondents have elected to exercise their statutory buy-out option, this court is concerned with valuation under BCL § 1118, not liquidation under BCL § 1104-a. (*See, Matter of Pace Photographers, Ltd., supra*.)

"Section 1118(b) directs that, when petitioner and the corporation cannot agree upon fair value, the court upon application of either party shall stay the 1104-a proceedings and determine fair value as of the day prior to the date on which the petition was filed." (*Matter of Pace Photographers, Ltd., supra,* 748.) "Value 'should be determined on the basis of what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business, rather than as a business in the process of liquidation.'" (*Matter of Pace Photographers, Ltd.*, *supra*, 748, quoting *Blake v Blake Agency*, 107 AD2d 139, 146; *In re Dissolution of Penepent Corp., Inc*., 96 NY2d 186; *Matter of Seagroatt Floral Co., Inc., supra*.) BCL § 1118 does not define "fair value" and does not set forth criteria for the determination of price or other terms of the buy-out. (*See*, *In re Dissolution of Penepent Corp., Inc*., *supra*.) "Rather, fair market value, being a question of fact, will depend upon the circumstances of each case; there is no single formula for mechanical application . . . ." (*Matter of Seagroatt Floral Co., Inc., supra*, 445; *see, In re Dissolution of Penepent Corp., Inc., supra*.) However, "[t]he three major elements of fair value are net asset value, investment value and market value. The particular facts and circumstances will dictate which element predominates, and not all three elements must influence the result . . . ." (*Friedman v Beway Realty Corp*., 87 NY2d 161, 167; *see, Blake v Blake Agency, Inc*., *supra*; *Matter of Cohen*, 168 Misc 2d 91, *affd* 240 AD2d 225; *Taines v Gene Barry One Hour Photo Process, Inc*., 123 Misc 2d 529, *affd* 108 AD2d 630.)

IV. The Report of the Independent Appraiser

The court will refer to documents received into evidence as Exhibit A and Exhibit B on May 19, 2010 individually or collectively as the valuation report of the independent appraiser. The independent appraiser prepared a valuation report dated April 20, 2007 (Exhibit B), which explains the analysis made in a step-by-step fashion, and the independent appraiser also prepared an updated valuation analysis dated October 25, 2007 (Exhibit A) which largely consists of financial statements and tables without explaining methodology. For the sake of clarity, the court at this point will follow Exhibit B and then will make the "bottom line" adjustment required by the later dated Exhibit A.

The object of the report is the determination of the "fair value" of the electing companies. The report defines "fair value" as "the price, on an enterprise basis, at which the enterprise's equity would change hands between a willing buyer and a willing seller," which is consistent with the law of New York State. (*See, Matter of Pace Photographers, Ltd.*, *supra*.)

The report gives a brief description of the operations of the electing companies: QCC operates concrete batching plants and also purchases ready-mix concrete from Red Hook and Maspeth, two other Quadrozzi companies. QEL transports ready-mix concrete and bulk aggregates between concrete plants owned and/or operated by QCC. Amstel owns, operates, and leases trucks used in residential, commercial, and industrial construction work. The report notes that the operations and finances of the electing companies are "intertwined amongst each other and with other companies managed and operated by the Quadrozzi families." (More background concerning the history of and relationships among the Quadrozzi companies are given in this court's decision dated June 10, 2009 rendered after the trial of the derivative action.)

The report assessed the value of the shares that PQ held in QCC, QEL, and Amstel as of July 26, 2005, and the independent appraiser determined that value according to, inter alia, guidelines established and appraisal practices promulgated by the Uniform Standards of Professional Appraisal Practice (USPAP). The report states: “we were provided with financial data that we analyzed and accepted as fairly reflecting the companies’ business operations. However, we did not perform any tests or other audit procedures to verify this information and we do not express any opinion concerning this information. A major basis of the analysis included copies of U.S. Income Tax Returns for the years 1999 through 2003 of [QCC, QEL, and Amstel.” The report takes into account the fact that the electing companies have all chosen to be treated as Subchapter S corporations for state and federal income tax purposes.

The report took into account, inter alia, the fixed assets held by the electing companies, the loans receivable from Quadrozzi companies, “general economic factors prevailing on the valuation date,” economic reports and forecasts, and various economic indexes “related to the construction industry that may assist in estimating the financial performance of the Companies for the periods where financial information was not available.”

The independent appraiser performed an income statement analysis in the course of determining the fair value of the corporations. The income statement analysis revealed, inter alia, that for the period under review: (1) “QCC’s revenues increased from $11.8 million in 1999 to $19.2 million in 2002 before decreasing to $16.9 in 2003";

(2) “QEL’s revenues increased from $3.4 million in 1999 to $6.5 million in 2002, before decreasing to $5.8 million in 2003"; (3) Amstel’s “[r]evenues ranged from a high of $7.1 million in 1999 to a low of $2.7 million in 2002 and were $2.9 million in 2003.” Noting, inter alia, that from 2000 through 2002 QCC purchased almost all of the concrete produced by Red Hook and Maspeth, the independent appraiser also prepared an income statement that combines figures for the electing companies and the other two companies. The combined income statement showed less of a variation in gross profit from year to year. The independent appraiser found: “The Combined Companies operating profit as a pecentage of revenues was comparable to their peers reported in the RMA sample.”

The independent appraiser chose an “income approach” as its method of arriving at the fair market value of the electing companies, and the independent appraiser gave its reasons for not using the “market approach,” and the “asset-based approach.” According to the report: “The income approach is defined as a general way of determining a value indication of a business, business ownership interest, or security using one or more methods wherein a value is determined by converting anticipated future benefits to their present value. When using the income approach, future benefits of a company are determined in terms of earnings or cash flow. The future benefits are then discounted based on timing and risk to calculate a present value, which is an estimate of the enterprise’s value.” The independent appraiser applied a form of the income approach known as the “capitalization of income method.” “The capitalization of income method utilizes historical results to determine the value of a company’s owners’ capital. An income base is first derived, and then divided (i.e., capitalized) by a separately computed required rate of return, or capitalization ('cap') rate." The income base can be established from a company's adjusted earnings or cash flows, or dividends, but because of a lack of financial information for 2004 and 2005, the independent appraiser used certain "proxies" (e.g., producer price indexes) to estimate the electing companies' earnings as of the valuation date.

The independent appraiser established a net income basis of $329,280 for QCC, a net income basis of $67,689 for QEL, a net income basis of $101,052 for Amstel, and a net income basis of $588,894 for the combined companies (the electing companies plus Red Hook and Maspeth). After giving a general explanation of how investors and analysts derive a capitalization rate, the independent appraiser established a capitalization rate of 20% (or a multiple of 5) for the electing companies.

By dividing the tax adjusted net income from operations by the capitalization rate, the independent appraiser arrived at the following pre-adjustment valuations: QCC - <u>$1,646,400</u> ($329,280/.20 = $1,646,400). QEL - <u>$338,445</u> ($67,689/.20 = $338,445). Amstel – $505,260 ($$101,052/.20 = $505,2600. The combined companies - <u>$2,944,470</u> ($588,894/.20 = $2,944,470).

The independent appraiser then made an S-Corp adjustment to the preliminary valuations. Explaining the nature of an adjustment made because of S-Corp status and identifying the factors taken into consideration in the body of its report and in an addendum, the independent appraiser arrived at an S-Corp adjustment premium of 20% for the electing companies. Applying that premium, the independent appraiser arrived at the following valuations: QCC – $1,975,680 ($ 1,646, 400 x 1.20 = $1,975,680). QEL – $406,134 ($338,445 x 1.20 = $406,134. Amstel – $606,312 ($505,260 x 1.20 = $606,312). The combined companies – $3,533,364 ($2,944,470 x 1.20 = $3,553,364).

The independent appraiser next took into account the value of any non-operating assets or liabilities of the electing companies which would include the amount of loans made by them and amounts shown on due to/due from accounts. By starting with the business enterprise value of each electing company (and of the combined companies), adding the value of its outstanding loans, and adding the value of its net intercompany accounts, the independent appraiser arrived at the Aggregate Equity Value for the company (and for the combined companies). For QCC, the Aggregate Equity Value was $7,191,726 ($1,975,680 + $1,000,000 + $4,216,046 = $7,191,726. For QEL, the Aggregate Equity Value was $542,676 ($406,134 + $40,000 + $96,542 = $542,676). For Amstel, the Aggregate Equity Value was $614,032 ($606,312 +$0 + $7,720 = $614,032). For the combined companies, the Aggregate Equity Value was $8,893,672 ($3,533,364 + $1,040,000 + $4,320,308 = $8,893,672.)

At this stage of the appraisal, PQ’s 25% interest in the Aggregate Equity Values would be $1,797,931 for QCC, $135,669 for QEL, $153, 508 for Amstel, and $2,223,418 for the combined companies.

The independent appraiser next determined that the application of a discount for the lack of marketability of PQ’s shares (*see,.e.g, Murphy v United States Dredging Corporation*, 74 AD3d 815) would be proper. (Shares in a closely held corporation cannot be marketed as easily as shares in publicly traded companies, and the former have less value because of the lack of liquidity.) The independent appraiser determined that the application of a 33% discount to PQ's shares would be appropriate based on, inter alia, studies that reviewed the price differentials between restricted and nonrestricted stock. Taking other factors into consideration, the independent appraiser noted: "Regarding the companies themselves, the combined group may seem attractive for acquisition based on the long history of operations, its reputation in the industry and favorable geographic location. However, the lack of current financial information (all of the companies are years behind in filing tax returns) and the companies' policy of sharing resources, transfer pricing, and allocation of costs amongst the companies being valued and other Quadrozzi managed companies, would result in heavy scrutiny from a potential purchaser." Applying the 33% discount to PQ's 25% interests in the Aggregate Equity Values, the lack of marketability discount amounts to \$593,317 as to QCC (\$1,797,931 x .33 = \$593,317), \$44,771 as to QEL (\$135,669 x .33 = \$44,771), \$50,658 as to Amstel (\$153,508 x .33 = \$50,658), and \$733,728 as to the Combined Companies (\$2,223,418 x 33 = \$733,728).

After making the lack of marketability discount, the independent appraiser established the fair value of PQ's interest in QCC at <u>\$1,204,614</u>, in QEL at <u>\$90,898</u>, in Amstel at <u>\$102, 850</u>, and in the Combined Companies at <u>\$1,489,690</u>. After making the lack of marketability discount, the sum of the fair value of PQ's interests in the electing companies (QCC, QEL, and Amstel) amounted to <u>\$1,393,362</u>.

The independent appraiser then made a final adjustment that gave weights to the value of a 25% interest in the electing companies ($1,393,362) and the value of a 25% interest in the Combined Companies ($1,489,690) "based on the relevance of their economic results." The independent appraiser concluded finally in Exhibit B that the fair value of PQ's interest in the electing companies amounted to <u>$1,453,000</u> as of July 26, 2005.

The independent appraiser concluded finally in Exhibit A, the up-dated valuation analysis, that the fair value of PQ's interest in the electing companies amounted to <u>$1,495,000</u> as of July 26, 2005.

<u>V. Discussion</u>

In the case at bar, the valuation of PQ's interest in QCC, QEL, and Amstel rests primarily on the credibility of the appraisers and the reliability of their valuation methods. (*See, In re USA Nutritionals, Inc*., 306 AD2d 490; *Johnson v Johnson*, 277 AD2d 923; *Davis v Alpha Packaging Industries Inc*. 267 AD2d 384; *In re Dissolution of F.P.D. Realty Corp*., 267 AD2d 111; *Matter of Dissolution of Penepent Corp., Inc.*, 198 AD2d 782; *McSpedon v North Star Contracting Corp.*, 174 AD2d 373.)

This court has the power to appoint an independent appraiser in a BCL § 1118 proceeding for the purpose of ascertaining the fair value of a corporation. (*See*, *Cohen v Four Way Features, Inc.,* 240 AD2d 225; *Matter of Cohen*, 215 AD2d 341; *Matter of Wiedy's Furniture Clearance Center Co., Inc.,* 108 AD2d 81*; Matter of Dissolution of Gift Pax, Inc*., 123 Misc 2d 830, *affd sub nom Matter of Fleischer*, 107 AD2d 97.) The appointment of an independent appraiser in a valuation proceeding presents significant advantages over the reliance upon partisan experts. (*See*, Using Impartial Experts in Valuations: A Forum-Specific Approach, 35 William & Mary Law Review 1241; 11 NY Prac, New York Law of Domestic Relations § 14:87 "Valuation dates and proof-Court-appointed experts.") As in the case at bar, where parties hire their own experts, their opinions often diverge greatly, leaving the court with little meaningful guidance about an accurate valuation. The opinions of experts hired by the parties are of course suspect for reasons of bias, and a "battle of partisan experts" often serves only to cloud the issues.

Although a "court is not required to follow the recommendation of an expert it has appointed" (*Forzano v Scuderi*, 224 AD2d 385, 386; *In re Donald W.*, 17 AD3d 728), where "there is an absence of any evidence to the contrary, the experts' opinions are entitled to some weight, and should not be readily set aside." (*In re Donald W.*, *supra*, 729.) In making the valuation, Empire selected an income approach which is proper under New York law and, in the opinion of the independent appraiser, the most suitable approach for the electing companies. (*See*, *Friedman v Beway Realty Corp.*, *supra*; *Blake v Blake Agency, Inc., supra*.) In the case at bar, the petitioner did not submit evidence from his expert disputing the independent appraiser's selection of the income valuation approach and the capitalization rate of .20.

The weight to be given to expert testimony is a matter to be determined by the trier of fact (*see*, *Topel v Long Island Jewish Medical Center*, 76 AD2d 862), and the extent of the witness's qualifications has a bearing on the weight to be given to his testimony. (*See*, *Kwasny v Feinberg*, 157 AD2d 396; Richardson on Evidence [11th Ed.] § 7-304.)

In the case at bar, the testimony from Giordano and the report of the independent appraiser are credible and reliable. Giordano, the managing director of Empire Valuation Consultants, has twenty years of experience as a business valuation consultant, and he has been certified as an Accredited Senior Appraiser in business valuation by the American Society of Appraisers. Empire's consultants have prepared or managed the preparation of over 7,500 appraisals. (See addendum 6-2 to the report.) Giordano conducted a thorough process of evaluation for the electing companies which involved several steps including, inter alia, making a site visit, arriving at an understanding of the business, learning about the industry, taking into account the state of the economy, interviewing management, communicating with others, asking questions, carefully selecting an evaluation approach, reviewing financial statements, making comparisons based on professional studies, and carefully selecting evaluation factors such as the capitalization rate. He methodically chose such critical factors in the evaluation process as the capitalization rate and lack of marketability discount based on studies in the evaluation field. Giordano also showed that he had knowledge of New York law relevant to valuations, e.g., that, in making the valuation, PQ's shares would not be subject to a "minority discount," but would be subject to a "lack of marketability discount." (*See*, *Murphy v U.S. Dredging Corp.*, *supra*.) In sum, the court finds that Empire's valuation report is clear, thorough, professional, and reliable.

The independent appraiser did make some attempt to check the accuracy of figures given to him by the Quadrozzi companies. Although the inquiry may have been limited, the independent appraiser found that, where checked, items in the general ledgers agreed with items shown in the tax returns. Giordano testified: “By the way, in looking at these normalization factors, we did interview management about the financial statements and the tax returns and did review the trial balances and tried to find items in the general ledger that at least track with what we saw in the tax returns. I will say that the general ledgers did not have much in terms of description, *but at least numbers tracked where we could find them.*” (Tr., 13 [emphasis added].) The independent appraiser also found: “The Combined Companies operating profit as a percentage of revenues was comparable to their peers reported in the RMA sample.”

In view of these findings of the independent appraiser, the court places diminished weight on the testimony of the petitioner’s expert concerning the unreliability of figures taken from the tax returns. In any event, the court places little weight on the testimony and report of the petitioner’s appraiser for the reasons so effectively brought out in the cross examination of Barr at the hearing.

In sum, the court finds that the value of PQ’s 25% interest in QCC, QEL, and Amstel collectively amounted to <u>$1,495, 000</u> as of July 26, 2005.

<u>VI. Remaining Issues</u>

BCL § 1118(b) provides in regard to interest: "In determining the fair value of the petitioner's shares, the court, in its discretion, may award interest from the date the petition is filed to the date of payment for the petitioner's share at an equitable rate upon judicially determined fair value of his shares." (*See*, *Murphy v U.S. Dredging Corp*., 74 AD3d 815; *Lund v Krass Snow & Schmutter, P.C.,* 62 AD3d 551; *In re Dissolution of F.P.D. Realty Corp*., 267 AD2d 111.) The court may, but need not, apply the statutory rate of 9% established by CPLR 5004. (*See*, *Murphy v U.S. Dredging Corp*, *supra*.) The respondents have urged the court to fix the interest rate at less than 9% because rates have been at historically low levels and the construction industry has seen hard times. The court will not alter the statutory rate. First, the statutory rate of 9% is presumed to be reasonable (*see*, *Abir v Malky, Inc*., 59 AD3d 646), and the Legislature has not changed it despite the economic climate of the last few years. Second, the respondents' suggestion that the court look to the federal post judgment interest rate, which, according to the respondents, is based on a one year treasury yield would result in the application of an abnormally low interest rate (the respondents give the rate in effect at the time of the submission of their post-trial memorandum as .36%). Fixing the interest rate too low would remove the respondents' incentive to complete the buy-out. Third, the statutory rate of 9% does not appear to be clearly excessive even today when compared to the interest rate currently paid on debt instruments such as municipal bonds. For example, as this is being written, twenty year municipal bonds, presumably tax free, are yielding an average of 4.74%. (Source: Bloomberg.com.) Third, taking into account the long delay in the valuation award arising from the futile contesting of PQ's interest in the disputed corporations, a reduction in interest rates is not warranted. The court notes that interest runs from the valuation date (July 26, 2005) until the date of payment. (BCL § 1118[b]; *Blake v Blake Agency*, 107 AD2d 139.)

Although the court has the discretion to establish payment terms (*see*, *Matter of Dissolution of Seagroatt Floral Co., Inc.*, 167 AD2d 586), an extended payout period is not warranted in view of the time that this valuation proceeding has been pending and the time that the respondents have had to allocate funds for payment.

This court may, in a valuation proceeding arising under BCL § 1118, impose terms and conditions upon the seller (*see*, BCL § 1118[a]), and, in the opinion of this court, this statutory grant of power allows the imposition of a restrictive covenant upon PQ. Giordano testified that his valuation of the electing companies included good will. (*Compare, Matter of Fleischer,* 107 AD2d 97.) "It is settled law that one who sells a business, including its good will, to another has a legal duty to refrain from soliciting the customers of that business . . . ." (*Johnson v Morganti*, 174 AD2d 987, 987; *Hyde Park Products Corp. v Maximilian Lerner Corp.*, 65 NY2d 316.) The respondents are entitled to the imposition of an appropriate restrictive covenant upon PQ barring him from competing with the electing companies for two years after the buy-out (the term requested by the respondents), though not barring him from participating in Quadrozzi companies in which he has an interest or in which the court has found that he has an interest.

Concerning an award of costs and attorney's fees to the petitioner, his attorney states in his post-trial memorandum, "It is respectfully submitted that this Court in its discretion should award Petitioner *either* his attorneys fees *or* award him an interest factor which begins to make him partially whole from this devastating experience." (Italics added.) The award of interest at the rate of 9% per annum should leave no room for discontent on the petitioner's part. Nevertheless, the court will discuss the issue of costs. BCL § 1118 provides in relevant part: "(c) In connection with any election to purchase pursuant to this section: (1) *If such election is made beyond ninety days after the filing of the petition*, and the court allows such petition, the court, in its discretion, may award the petitioner his reasonable expenses incurred in the proceeding prior to such election, including reasonable attorneys' fees . . . ." The petitioner began this proceeding on July 26, 2005, and the respondents elected to purchase the petitioner's interest in QCC, QEL, and Amstel, on or about October 20, 2005, which is less than the ninety day statutory period whose expiration would have allowed an award of costs and attorney's fees. The statute is otherwise silent about an award of costs, and presumably the Legislature intended to authorize no other award. Moreover, the petitioner's post-trial memorandum does not sufficiently address the factors that must be taken into consideration in awarding attorney's fees. (*See*, *Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282; *Jordan v Freeman*, 40 AD2d 656; 4 NY Prac, Com. Litig. in New York State Courts § 52:7 [3d ed].)

VI. Disposition

The electing companies shall pay to PQ the sum of $1,495, 000 plus interest at the statutory rate from July 26, 2005 within ninety days after the service of a copy of the judgment to be entered hereon with notice of entry. The respondents are entitled to a restrictive covenant to the extent indicated herein.

Settle judgment.

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J.S.C.