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ON 7-24 2003  
WESTCHESTER  
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK  
COMMERCIAL DIVISION, WESTCHESTER COUNTY

Present: HON. KENNETH W. RUDOLPH  
Justice.

-----X  
In The Matter of the Application of :

MARGARET LA SALA, Executrix of THE ESTATE  
OF FRANK LA SALA,

DECISION AFTER  
FAIR VALUE HEARING

Holder of One-Third (1/3) of All :  
Outstanding Shares Entitled to Vote in  
an Election of Directors for  
ANDREA LA SALA & SONS, INC., and its  
wholly owned subsidiaries, LA SALA  
BROTHERS, INC., and FRAKEN BUILDERS, INC., :

Index No. 7063/01

Petitioner,

For the Dissolution of ANDREA LA SALA & :  
SONS, INC., and its wholly owned  
subsidiaries, LA SALA BROTHERS, INC.,  
and FRAKEN BUILDERS, INC., All Domestic  
Corporations,

Respondents. :

-----X  
In The Matter of the Application of :

MARGARET LA SALA, Executrix of THE ESTATE  
OF FRANK LA SALA,

Index No. 7282/01

Holder of One-Half (1/2) of All :  
Outstanding Shares Entitled to Vote in  
an Election of Directors for  
S.A.F. LA SALA CORP.,

Petitioner, :

For the Dissolution of S.A.F. LA SALA CORP.,  
a Domestic Corporation,  
Respondent.

-----X

SUPREME COURT: WESTCHESTER COUNTY

-----X  
In The Matter of the Application of :

Index No. 7286/01

MARGARET LA SALA, Executrix of THE ESTATE  
OF FRANK LA SALA,

Holder of One-third (1/3) of All :  
Outstanding Shares Entitled to Vote in :  
an Election of Directors for :  
FRASTE REALTIES, INC., :

Petitioner, :

For the Dissolution of FRASTE REALTIES, INC.  
a Domestic Corporation,

Respondent. :

-----X

Petitioner, Margaret La Sala, Executrix of the Estate of Frank La Sala, commenced separate proceedings on May 3, 2001 pursuant to Business Corporation Law ("BCL") §1104(a) to compel corporate dissolution of Andrea La Sala & Sons, Inc., and its wholly owned subsidiaries La Sala Brothers, Inc.; Fraken Builders, Inc. (collectively "La Sala"); Fraste Realities, Inc. ("Fraste"); and S.A.F. La Sala Corp. (SAF).

Respondents La Sala, Fraste and SAF pursuant to Business Corporation Law ("BCL") §1118 timely filed an election to purchase the shares of petitioner for fair value.

The parties have been unable to agree upon the fair value of petitioner's stock interest in each corporate entity. This Court conducted a fair value hearing of petitioner's stock interest in La Sala, Fraste and SAF pursuant to BCL §1118.

The following constitutes the decision of this Court:

### Stipulated Facts

The parties have stipulated that the valuation date is April 30, 2001. The parties further stipulated that for the purpose of determining "fair value" all shareholder loan accounts and intra-family receivables are deemed fully collectible.

### Fair Value

In each of the matters jointly heard by this Court, the petitioner commenced proceedings pursuant to BCL §1104-a to dissolve the respondent corporations.

The respondent corporations in each proceeding timely elected to purchase the shares owned by petitioner at fair value pursuant to BCL §1118.

At the outset, it is important to briefly review the legislative intent of BCL §1104-a and BCL §1118 (L. 1979,; as amended L. 1986; L. 1990). The statutes are designed and intended to protect minority stockholders in closely held corporations from abuses of those in control of the corporation while at the same time affording the corporate entity, or its other stockholders, a right of election to purchase the petitioner's shares and avoid dissolution. When an election to purchase the petitioner's shares is timely made pursuant to BCL §1118, the petition for dissolution pursuant to BCL §1104-a is stayed to determine the issue of fair value. The oppressive actions complained of by the petitioner are not adjudicated nor further considered by the Court in a fair value hearing.

BCL § 1118, provides in pertinent part:

Purchase of Petitioner's Shares: Valuation

(a) In any proceeding brought pursuant to section eleven hundred four-a.... any other shareholder or shareholders or the corporation may, ...within ninety days after the filing of such petition....elect to purchase the shares owned by the petitioners at their fair value....

(b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court... may stay the proceedings brought pursuant to section 1104-a... and determine the fair value of the petitioner's shares... 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.....

"The statute does not define the term "fair value", and it fails to provide any criteria for determining "fair value"..... (In determining fair value) factors to be considered are... market value, investment value and net asset value (of the corporate entity)... and ..... the weight to be afforded each factor depends upon the circumstances of the particular case". Matter of Blake v. Blake Agency, Inc. (1985), 107 AD2d 139, 146.

"Fair value requires that the dissenting stockholder be paid for his or her proportionate interest in a going concern..... "(see, Matter of Friedman v. Beway Realty (1995) 87 NY2d 161, 167 quoting Matter of Cawley v. SCM Corp., 72 NY2d 465, 474); "...the going concern value of the

corporation...is... what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business rather than a business in the process of liquidation" (Matter of Friedman supra, p. 168 quoting Matter of Pace Photographers, (1988) 71 NY2d 737, 748, and Matter of Blake, supra at 146).

Market value is non-existent in this case because the shares of stock are not traded on the exchange or over-the-counter stock market.

To determine fair value, this Court must consider net asset value, a generally applicable standard in evaluating realty investment companies and/or investment value determined through a capitalization of earnings formula.

Having determined the net asset value and/or investment value of the corporate entity, the Court must next consider a value discount for lack of marketability.

A discount to reflect lack of marketability of petitioner's shares is appropriate upon the principle that "a potential investor would pay less for shares in a close corporation because they could not be liquidated for cash" (see, Matter of Friedman supra at 165 quoting Matter of Seagroatt Floral Co. (1991) 78 NY2d 439, 445-446).

The discount for lack of marketability is to be taken against "the aggregate..... value of the corporation" (Matter of Friedman, supra at 166). It is an adjustment for the "risk associated with

liquidity of the shares" (Matter of Seagroatt, supra at 466).... not just the corporate goodwill (Hall v. King (1998) 265 AD2d 244).

The Court has considered and rejects respondents' claim for a further discount based upon a potential future capital gains tax liability. While potential future corporate tax liability may be a factor in evaluating an appropriate lack of marketability discount, it is not in and of itself a valid and independent discount or adjustment to be considered in arriving at the fair value of petitioner's shares of stock. This conclusion is based upon the principle that the corporation is valued as an operating business rather than a business in the process of liquidation (Matter of Friedman, supra.) Capital gains tax triggers on liquidation which is not a factor to be considered by this Court in determining fair value.

Having considered and determined a discount for lack of marketability, the Court must reduce the award by the value, if any, of petitioner's loan accounts and/or intra-family receivables due from the petitioner.

The Court must next consider interest on the award to be rendered. There is no evidence of bad faith on the part of petitioner. Therefore, interest shall be awarded to petitioner from the date of commencement of these proceedings until the date of payment at the statutory interest of 9% per annum (CPLR §5004).

Finally, and separately the Court may determine method of payment for petitioner's shares of stock pursuant to BCL §1118(a).

LaSala

La Sala's principal asset is a residential apartment complex located at 769-781 Pelham Road, New Rochelle, New York.

The property is a multi-acre parcel of land improved with four six-story apartment buildings consisting of 216 dwelling units and substantial on-site parking.

Richard Whittemore, MAI, SRA principal of The Landmark Appraisal Group Inc. testified for petitioner and presented a documented and detailed appraisal of the apartment complex as of the date of stipulated valuation (April 30, 2001 see Petitioner's Exhibit 9). Mr. Whittemore opined that the fair market value as of April 30, 2001 using the income capitalization approach was Fourteen Million Six Hundred Eighty Thousand (\$14,680,000.). Using the sales comparison approach, Mr. Whittemore concludes the market value to be \$14,500,000.

Richard Anastasio, MAI, principal of Property Appraisal Services, testified for respondent and also presented a documented and detailed appraisal (see respondent, Exhibit C). Mr. Anastasio's appraisal report established a valuation date as of January 25, 2001, and opined a market value of \$13,250,000. At trial Mr. Anastasio supplemented his appraisal opinion and testified that as of April 30, 2001 the fair value of the apartment complex was approximately \$14,000,000. Mr. Anastasio

relied upon a sales comparison and income approach to value. Neither expert relied upon the cost approach as a reliable indicator of value.

The Court has considered the opinions and the expertise of both Mr. Whittemore and Mr. Anastasio, their respective detailed written appraisal reports, as well as all other evidence submitted on the issue of fair market value of this prime piece of income producing residential real estate and settles upon the sales comparison approach finding that the fair market value of 769-781 Pelham Road, New Rochelle, New York as of April 30, 2001 is Fourteen Million Five Hundred Thousand (\$14,500,000.) Dollars.

On the date of valuation exclusive of the real estate market value of La Sala, the exhibits and expert testimony established the assets and liabilities from the corporate balance sheet as follows:

Assets

Cash	\$2,907,927
Cash-investments	683,000
Rent receivable	83,586
Mortgage escrow	80,215
Tenant security	191,218
Due from affiliate companies	872,797
Due from shareholders	1,528,733
Loans & exchanges	10,529
Prepaid expense	<u>168,201</u>
TOTAL	\$6,526,206

Liabilities

Accounts payable	\$ 90,610
Mortgage payable	7,994,354
Security deposits payable	<u>191,218</u>

TOTAL                    \$8,276,182

The market value (\$14,500,000) plus assets (\$6,526,206) less liabilities (\$8,276,182) determines that the net asset value of La Sala is \$12,750,024.

It follows that the petitioner's stock interest (1/3) before lack of marketability discount and deduction of petitioner's shareholder loan balance is valued at \$4,250,008.

Petitioner expert's, Gary M. Karlitz ("CPA"), in presentation of the "fair value" interest report (Petitioner exhibit 15) opines that the La Sala entities are "liquid by definition...calling for no discount for lack of marketability" of petitioner's shares.

This Court rejects this opinion based on the prevailing law previously discussed (see, Matter of Friedman, supra, Matter of Seagroatt supra, et al.). Further, Mr. Karlitz urges this Court that should it be determined that a lack of marketability discount be applied that the same should not exceed 10% of the petitioner's equity interest. Respondent's expert, Jacob P. Roosma (Respondent exhibit B) placing emphasis on what he labels "restricted stock studies" opines that a discount for lack of marketability of 35% is appropriate. The application of an appropriate

discount for lack of marketability is not without difficulty. The expert opinions rendered in this case are at opposite extremes, and unpersuasive.

There is however, ample precedent that a discount of 25% for lack of marketability is appropriate. (see, Matter of Friedman, supra; Matter of Seagroatt, supra; Matter of Blake, supra; Matter of Flischer v. Gift Pax, Inc., 107 AD2d 97).

Upon the trial record before this Court, there is no reason to deviate from such precedent. The petitioner's stock interest is reduced 25% and valued in the sum of \$3,187,506.

Petitioner's shareholder loan balance due La Sala is \$483,187.

Upon the foregoing, the fair value of petitioner's stock in La Sala is valued at \$2,704,319.

#### Fraste

Fraste Realities Corp. is the owner of a two-story commercial building located at 68 East Sanford Boulevard, Mt. Vernon, New York.

The property is leased to an auto body repair shop.

Petitioner's expert, Richard Whittemore, appraised this real property, as of April 30, 2001, and estimated the market value at \$255,000. The certificate of appraisal (Petitioner exhibit 15(s)) prepared by Mr. Whittemore is conclusory and devoid of detailed analysis. Nevertheless, the parties stipulated at trial that the market value of the Fraste real property on the date of valuation is \$255,000.

On the date of valuation exclusive of the real estate market value of Fraste, the parties exhibits and expert testimony established the assets and liabilities from the corporate balance sheet as follows:

Assets

Cash	\$30,492
Rent receivable	2,643
Prepaid expenses	4,892
Security deposit	<u>3,006</u>
TOTAL	\$41,033

Liabilities

Security deposits payable	\$ 3,006
Due to affiliated companies	<u>6,000</u>
TOTAL	\$ 9,006

The market value (\$255,000) plus assets (\$41,033) less liabilities (\$9006) determine that the net asset value of Fraste is \$287,027.

Petitioner's stock interest (1/3) before lack of marketability discount is valued at \$95,676.

The experts (Karlitz and Roosma) are again, as in La Sala, supra, at opposite extremes on the application of a discount for lack of marketability. The Court applies a discount of 25% for lack of marketability consistent with its ruling in La Sala.

Upon the foregoing, the fair value of petitioner's stock in Fraste is valued at \$71,757.

SAF

As of April 30, 2001, SAF La Sala Corp. was an inactive masonry contractor. There are no tangible assets. The parties are in accord that on the date of valuation the assets from the corporate balance sheet are as follows:

<u>Assets</u>	
Cash	\$ 531
Accounts receivable	105350
Prepaid taxes	90
Shareholders loans	
-Andrew La Sala	41200
-Estate of Frank La Sala	20804
Due from affiliated companies	85000
Deposit	625
<b>TOTAL</b>	<b>\$253,600</b>

The parties offer diverse opinions on the only item listed as a corporate liability.

The Court is in agreement with petitioner's expert, Gary Karlitz (CPA) that this non-cash item of \$137,092 listed on the corporate balance sheet as "defined income" is an accounting convention and not deductible from corporate assets for the purpose of determining net asset value. Net asset value of SAF is \$253,600.

Petitioner's stock interest (½) before lack of marketability, and shareholder's loan balance discount is valued at \$126,800.

A 25% discount for lack of marketability is appropriate under all the circumstances and the evidence presented in this case.

Finally, a deduction of \$20,804 representing the petitioner's loan balance, must be calculated in the final award.

Upon the foregoing, the fair value of petitioner's stock in SAF is \$74,196.

#### Interest

Interest is awarded on the fair value of petitioner's stock in La Sala, Fraste, and SAF from the date of commencement of each of these proceedings until the date of payment at the statutory interest of 9% per annum (CPLR §5004).

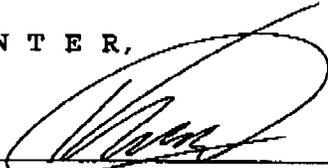
#### BCL §1118(a)

The parties and their attorneys are directed to appear before this Court on January 29, 2003 at 10:00 A.M. in the forenoon of the date for the purpose of determining "terms and conditions" for the payment of this award to the petitioner that shall be incorporated into the judgment.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
January 16, 2003

E N T E R,



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HON. KENNETH W. RUDOLPH  
Justice of the Supreme Court

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