

Celauro v 4C Foods Corp.

2017 NY Slip Op 32371(U)

November 9, 2017

Supreme Court, Kings County

Docket Number: 500373/12

Judge: Lawrence S. Knipel

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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of November, 2017.

P R E S E N T:

HON. LAWRENCE S. KNIPEL,
Justice.

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

Plaintiffs,

- against -

Index No. 500373/12

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

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

Defendants.

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The following papers numbered 1 to 7 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3, 4-6
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	7
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Nathan Celauro, individually, and as executor of the estate of Gaetana Celauro and as beneficiary and trustee of various trusts, moves, by way of an order to show cause, for an order: (1) pursuant to CPLR 3124, directing defendants 4C

Foods Corp. (4C Foods), John Celauro and other named defendants¹ to produce documents requested by Jaime d'Almeida, an appraiser employed by Duff & Phelps, LLC (the company retained as the second appraiser), and to produce documents related to cash sales as required by this court's October 12, 2016 and March 6, 2017 orders; (2) pursuant to CPLR § 2004, extending the time for Duff & Phelps, LLC, to complete its appraisal of 4C Foods until 45 days after 4C Foods produces the above-referenced materials; (3) holding defendants 4C Foods in contempt for violating the court's October 12, 2016 and March 6, 2017 orders; (4) and awarding plaintiffs' attorney's fees and costs. Defendants cross-move for an order directing Duff & Phelps, LLC, to issue its valuation report, or, in the alternative, directing Duff & Phelps, LLC, and defendants' selected appraiser, Coady Diemar, to select a third independent appraiser in accordance with section 8.2 (b) (iv) of 4C Foods' Shareholders Agreement, to determine the value of 4C Foods.

Plaintiffs' motion is granted to the extent that (1) defendants are directed to provide Jaime d'Almeida of Duff & Phelps, LLC, with copies of the documents requested in his May 5, 2017 letter addressed to John A. Celauro with the exception of items 1 (c), 2 (a), 2 (g), 2 (h), 2 (i), 4 (u), and 4 (v), which items defendants do not have to disclose, within 30 days of service upon them of a copy of this order with notice of entry, and (2) the time of Duff &

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

Phelps, LLC, and Coady Diemer Partners, LLC, to submit their respective written valuation reports to 4C Foods is extended to 30 after the documents directed to be disclosed are provided to Duff & Phelps, LLC, and Coady Diemer Partners, LLC, despite the CPLR 3214 (b) stay. Plaintiffs' motion is otherwise denied. Defendants' cross motion is denied.

Plaintiffs seek the production of documents to be used by the appraiser selected by them as part of the appraisal process of the value of the shares of 4C Foods. 4C Foods is a closely held family corporation and the present issues arise out of a continuing and contentious dispute between 4C Foods' majority shareholders, who include John A. Celauro, the president of 4C Foods, and Nathan Celauro in his individual and representative capacities.² As is relevant here, defendants have exercised their option to bar the transfer of the voting shares held or controlled by the estate of Gaetana Celauro from the estate of Gaetana Celauro to Nathan Celauro, Gaetana Celauro's beneficiary under her will, and defendants are thus required to purchase the shares under section 4.3 (a) (ii) of 4C Foods Shareholder Agreement (Agreement).

² The factual background is more fully detailed in this court's prior decisions in this action, which was initially commenced as a special proceeding (*Matter of Celauro v 4C Foods Corp.*, 38 Misc 3d 636 [Sup Ct, Kings County 2012, Schmidt, J.]; *Matter of Celauro v 4C Foods Corp.*, 39 Misc 3d 1234 [A], 2013 NY Slip Op 50875 [U] [Sup Ct, Kings County 2013, Schmidt, J.]; *Celauro v 4C Foods Corp.*, 2014 NY Slip Op 33011 [U] [Sup Ct, Kings County 2014, Schmidt, J.]; *Celauro v 4C Foods Corp.*, 2016 NY Slip Op 31917 [U] [Sup Ct, Kings County 2016, Knipel, J.]) and the decisions issued in an earlier Nassau County action (*Celauro v 4C Foods Corp.*, 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *affd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]).

Sections 8.1, 8.2, and 8.3 of the Agreement provide for an appraisal process to be conducted to determine the purchase price of the shares from the estate of Gaetana Celauro. These provisions entitle defendants and Nathan Celauro, as executor of Gaetana Celauro's estate, to each select an appraiser, who would each thereafter be "engaged" by 4C Foods (Agreement § 8.1 [b], 8.2 [a]).³ With respect to the appraisal process after the selection and engagement of the appraisers, section 8.2 (a) of the agreement provides that:

"(i) The Appraisers shall value each Corporation [⁴] on a fair market value, going concern basis, with the definition of fair market value being the amount at which all of the Shares of the Corporation would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell, and each having reasonable knowledge of the relevant facts.

"(ii) Each Appraiser shall provide a written report of the valuation of each Corporation to the Corporations and each of the Shareholders entitled to participate in . . . the sale pursuant to Section 4.3 . . . within ninety (90) days after the date such Appraiser has been engaged by the Corporations.

"(iii) The Appraisers shall conduct their analysis and investigation of the Corporation in accordance with generally accepted appraisal procedures.

³ Section 8.1 of the Agreement provides, as is relevant here, that, "One Appraiser (the "First Appraiser") shall be selected by [defendant John Celauro]. A different Appraiser (the "Second Appraiser") shall be selected as follows: (i) with respect to the purchase of Non-Transferable Shares by the Corporation pursuant to Section 4.3, by the Transferring Shareholder . . ."

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

“(iv) The Corporations shall provide, and the Shareholders shall cause the Corporations to provide, the same information relating to the Corporations and their operation to each Appraiser.

“(v) In the event that one Appraiser requests additional information and the Corporations or the Shareholders provide such information to the Appraiser, then the Corporation and the Shareholders shall provide the same information to the other Appraiser.

“(vi) The Appraisers shall take into account in determining the fair market value of the Shares the commitments of the Corporations under all employment agreements to which either Corporation is, or both Corporations are, a party, excluding any employment agreement between the Corporations and any of . . . the Transferring Shareholder[s] . . .”

In addressing a dispute between the parties regarding the parties’ rights and obligations with respect to the appraisal process under the shareholder agreement, this court, in its October 12, 2016 order, issued a judgment declaring:

“(1) that the appraiser selected by plaintiffs (the Second Appraiser) pursuant to Section 8.1 (b) and (c) of the Amended and Restated Shareholders Agreement (Agreement), as subsequently amended, shall be engaged by 4C Foods; (2) that the engagement agreement between 4C Foods and the Second Appraiser shall allow the Second Appraiser to conduct its Appraisal as provided for in section 8.2 of the Agreement, including the obligation that it conduct its investigation, analysis and valuation provided for in section 8.2 of the Agreement by way of generally accepted appraisal procedures; (3) that the parties’ rights with respect to the appraisal process are those laid out in Section 8.2, 8.3 and 8.4 of the Agreement; and (4) that the parties and their counsel do not have the right or responsibility to direct, control or oversee the appraisal by the Second Appraiser nor do they have a privilege of any kind between them and the Second Appraiser.”

Following the issuance of this order, Nathan Celauro selected Duff & Phelps, LLC (Duff & Phelps), as the appraiser for the estate of Gaetana Celauro and 4C Foods selected Coady Diemar Partners, LLC (Coady Diemar). By way of a letter agreement dated December 14, 2016, 4C Foods engaged Duff & Phelps. The letter agreement engages Duff & Phelps for an initial six month term (letter agreement § 1), requires Duff & Phelps to provide the valuation report within 90 days of the letter agreement (letter agreement § 1), contains a confidentiality agreement (letter agreement § 4), and provides that the terms of the letter agreement are only for the benefit of the parties to the letter agreement (letter agreement § 10). With respect to the valuation, the letter agreement provides that the valuation date is November 27, 2012 and requires Duff & Phelps to perform a fair market valuation pursuant to generally accepted appraisal procedures under the same definition of fair market value as that contained in the shareholder agreement (letter agreement § 1).

Regarding the information to be used for the valuation, the letter agreement provides that:

“The Company⁵ will furnish D&P⁶ with such information necessary to perform the Valuation as is reasonably requested by D&P. The Company will promptly notify D&P if it learns of any material misstatement in, or material omission from, any information previously delivered to D&P. D&P may rely, without independent verification, on the accuracy and completeness of all information furnished by the Company. The

⁵ The Company is 4C Foods.

⁶ D&P is Duff & Phelps.

Company understands that D&P will not be responsible for independently verifying the accuracy of such information, and shall not be liable for any inaccuracies therein. In the event D&P receives information from the Transferring Shareholder or any other third party, D&P will advise the Company of the information provided and will immediately provide such information to the Company so that the information can be provided to the appraiser selected by the Company” (letter agreement § 3).

In December 2016, Jaime d’Almeida of Duff & Phelps sent 4C Foods an information request in which he asked for a range of documents relating to 4C Foods’ history, sales, marketing, financials, customers, suppliers, competitors, facilities, and technology from the years 2008 to 2012. Without explaining its reasons for declining to provide certain documents, 4C Foods responded on January 4, 2017 by sending an e-mail attachment consisting of a marked-up copy of d’Almeida’s information request on which 4C Foods indicated the documents it intended to provide. This marked-up list generally limited the documents 4C Foods would provide to the years 2010 to 2012; indicated that, for many of the requests, 4C Foods would provide information by discussing it with Duff & Phelps rather than by providing the requested documents; limited a request for monthly financial information that included balance sheets income statements and cash flow statements to year end financial statements; limited requests for information on customers and supply contracts; and rejected, in entirety, requests for, among other things, the production of documents relating to amounts of dividend distributions, inventory statements, check ledgers, copies of

checks and invoices relating to suppliers and common carriers, and bills of lading relating to in house deliveries or pick-ups at 4C Foods' facilities.

During this period after the engagement of Duff & Phelps, plaintiffs served subpoenas duces tecums on 4C Foods' customers requesting certain information from them. 4C Foods moved to quash these subpoenas, and the court, in an order dated March 6, 2017, granted 4C Foods' motion upon the condition that 4C Foods provide plaintiffs' appraiser with documents and information relating to cash sales previously requested by plaintiffs' selected appraiser. The court expressly noted that the denial of such subpoenaed records was without prejudice to plaintiffs' right to take further party and nonparty discovery. Following the March 6, 2017 order, the parties entered into so-ordered stipulations that extended the deadline for submitting the appraisals until May 19, 2017.

After 4C Foods' initial response to Duff & Phelps' information request, there were meetings between d'Almeida and 4C Foods representatives regarding the provision of the requested information and there appears to have been some back and forth regarding the documents to be provided. Defendants assert that d'Almeida substantially agreed to 4C Foods limitations on the documents provided, but d'Almeida disputes this assertion in his affidavits submitted in support of plaintiffs' motion. In follow-up letters dated February 15, 2017, February 22, 2017, and March 10, 2017 that are addressed or cc'd to John Celauro, d'Almeida, while not repeating his demand for all of the documents initially requested, did request many of the documents not previously provided and did not concede that he had

acceded to 4C Foods' limitations on his initial request. In a letter dated March 1, 2017, Sally McCracken, 4C Foods' senior vice president and chief financial officer, provided Duff and Phelps with some additional documents not previously provided. Finally, in a May 5, 2017 letter addressed to John Celauro, d'Almeida repeated his demand for the majority of the documents requested in the initial request that were not provided and requested a few additional documents or categories of documents. In a letter dated May 12, 2017, John Celauro responded to this May 5, 2017 letter primarily by asserting that 4C Foods had provided the information and documents needed to perform an appraisal, that d'Almeida had essentially acceded that the documents provided were sufficient, and that the repeated requests contained in the May 5, 2017 letter were driven as part of plaintiffs' attempt to engage in frivolous litigation.

It is in the context of this factual background that plaintiffs' have made their instant motion requesting that 4C Foods produce the documents requested by d'Almeida in his May 5, 2017 letter and defendants have cross-moved to require Duff & Phelps to issue its valuation report. The court notes that the defendants, in addressing plaintiffs' motion, have raised no procedural objection to plaintiffs seeking the documents under CPLR 3124. Rather, defendants essentially repeat John Celauro's objections to providing the documents raised in his May 12, 2017 letter that are focused on the merits of the request, rather than the propriety of the procedure used by plaintiffs to request them.

In any event, regardless of whether plaintiffs can obtain the documents under the discovery provisions of the CPLR, the court notes that plaintiffs, as shareholders, have statutory and common-law rights to inspect corporate books and records (*see Matter of Dwyer v Di Nardo & Metschl, P.C.*, 41 AD3d 1177, 1178 [4th Dept 2007]; Business Corporation Law § 624). Shareholder inspections of financial books and records have generally been approved in support of valuations (*see Herencia v Centercut Rest. Corp.*, 92 AD3d 485, 486 [1st Dept 2012]; *Matter of Dwyer*, 41 AD3d at 1178; *Berkowitz v Astro Moving & Stor. Co.*, 240 AD2d 450, 451-452 [2d Dept 1997]; *Matter of Glassman v Louis Shiffman, Inc.*, 56 AD2d 824, 824 [1st Dept 1977]), except when the shareholder agreement itself renders viewing the corporate financials irrelevant, such as by limiting the shareholder to the valuation as found by the company's accountant (*see Lapley v Sorfin Intl., Ltd.*, 43 AD3d 1113, 1113-1114 [2d Dept 2007], *lv denied* 10 NY3d 702 [2008]). Given that defendants have not addressed or challenged plaintiffs' procedural right to seek the material in the context of the motion, the court has not examined whether the plaintiffs have established the procedural requirements for inspecting books and records under the common law or Business Corporation Law § 624 (*see JAS Family Trust v Oceana Holding Corp.*, 109 AD3d 639, 642-643 [2d Dept 2013]). In addition, aside from the rights provided under section 624, it would also appear that, given the scope of the appraisal process provided in the Agreement, that plaintiffs, by necessary implication, would have a right to see that its selected appraiser had reasonable access to the 4C Foods' financial records in order to

perform his or her valuation (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 271 [1st Dept 2009] [finding implied covenant based on nature of terms of the lease]; *cf. Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978] [implied covenant may be enforced if implicit in an agreement viewed as a whole]).

The scope of the documents needed to conduct the appraisal turns on the nature of the appraisal process here. The Agreement itself, while requiring that the corporation and the shareholder must insure that each appraiser has the same information, does not explicitly address the scope of the documents to be provided to the appraisers. As outlined above, the Agreement provides that the appraisers are to value the shares “on a fair market value, going concern basis, with the definition of fair market value being the amount at which all of the Shares of the Corporation would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell, and each having reasonable knowledge of the relevant facts” (Agreement at § 8.2 [a] [i]), which is the same standard court’s have applied in the context of valuation proceedings conducted under the Business Corporation Law (*Matter of Blake v Blake Agency*, 107 AD2d 139, 146 [2d Dept 1985], *lv denied* 65 NY2d 609 [1985]).⁷ The Agreement also provides that the appraisal is to be conducted with generally accepted appraisal procedures (Agreement at § 8.2 [a] [iii]). In view of these

⁷ As the definition of fair market value is the same as that under statutory appraisal proceedings, there does not appear to be any basis for defendants’ assertion that the scope of the appraisal to be conducted is narrower than that conducted as part of a statutory appraisal proceeding.

provisions, the Agreement contemplates a fairly involved investigation of 4C Foods' financial position as of the valuation date. Indeed, any willing buyer and seller would have to conduct such an investigation of 4C Foods' financials to obtain "reasonable knowledge of the facts" since, as a closely held corporation whose shares are not traded on the open market, the market price for 4C Foods cannot be easily be determined (*see Amodio v Amodio*, 70 NY2d 5, 7 [1987]; *Matter of Blake*, 107 AD2d at 146-147).⁸ While perhaps not the equivalent of a full audit, which contemplates a verification and reconciliation of a company's books, the proper determination of market value may involve an effort to determine the correctness and completeness of the entries in the books (*see Aron v Gillman*, 309 NY 157, 160-161 [1955]; *Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 918-919 [3d Dept 1991]; *cf. Matter of Kaufmann, Alsberg & Co.*, 15 AD2d 468, 468-469 [1st Dept 1961]).

In addressing the need to obtain the information from 4C Foods that was not provided by the company, plaintiffs have submitted an affidavit from d'Almeida in which he states that, based on the documents provided by 4C Foods, he does not have the documents

⁸ While noting that there is no uniform rule for valuing stock in closely held corporations, the Court of Appeals has pointed to the factors used by the Internal Revenue Services in valuing stock for tax purposes as one appropriate method (*see Amodio*, 70 NY2d at 7). These factors, as stated by the Court of Appeals, "include (1) the nature and history of the business, (2) its particular economic outlook and that of its industry generally, (3) the book value of the stock and the financial condition of the business, (4) the company's earning capacity, (5) its dividend paying capacity, (6) its goodwill and other intangible assets, (7) other sales of the corporation's stock, and (8) the market price of stock of comparable corporations (Rev Rul 59-60, IRS Cum Bull 1959-1, at 237)" (*Amodio*, 70 NY2d at 7).

necessary to value 4C Foods under the fair market standard pursuant to generally accepted valuation principles. d'Almeida, in this affidavit, states he has requested the categories of documents for the reasons stated in his May 5, 2017 letter, wherein he explains that categories of documents are requested to evaluate, among other things, the cost structure and nature of 4C Foods business, to evaluate "normalizing adjustments," and to evaluate whether 4C Foods engages in cash sales. Although d'Almeida acknowledges that John Celauro denied that 4C Foods engaged in unreported cash sales after 2006 or 2007, d'Almeida asserts that a conceded past history of cash sales warrants some investigation to verify the assertion that no such sales occurred during the time relevant to valuation.

Although in some instances courts have held that a hearing is required to determine the scope of an inspection of a companies books (*see e.g. Matter of Dwyer*, 41 AD3d at 1179), the court finds that the majority of the documents requested by Duff & Phelps in its initial request in December 2016 and reiterated by d'Almeida in his May 5, 2017 letter are comparable to the kinds of material of which courts have directed disclosure or allowed to be inspected (*see Matter of Quandt*, 175 AD2d 433, 434-435 [3d Dept 1991][corporate balance sheets, profit and loss statements, income tax statements, and buy/sell agreements along with working papers showing calculations]; *Matter of Gerzof v Coons*, 168 AD2d 619, 620 [2d Dept 1990]; *Maxon v Mirror Show Mgt., Inc.*, 7 Misc 3d 1015 [A], 2005 NY Slip Op 50601, *4 [U] [Sup Ct, Monroe County 2005]; *Application of Pearson*, 223 NYS2d 15, 16-17 [Sup Ct, Nassau County 1961]; *see also Novikov v Oceana Holdings Corp.*, 46 Misc

3d 561, 570 [Sup Ct, Kings County 2014]) and that the time-frame of the initial request for records from 2008 to 2012 was not unreasonable (*Matter of Quandt*, 175 AD2d at 435; *Matter of Gerzof*, 168 AD2d at 620).⁹

Additionally, in considering the scope of the requested documents, the court views as relevant plaintiffs' allegations that defendants, by increasing the number of non-voting shares (to which the value of the voting shares are tied) shortly before Gaetana Celauro's death, attempted to diminish the amount that 4C Foods would have to pay to the estate of Gaetana Celauro upon the forced sale of her shares following her death.¹⁰ While such allegations do not necessarily show that 4C Foods' financial records have been manipulated to undervalue the corporation, they do warrant some additional leeway in obtaining records to determine the accuracy of 4C Foods' books and records (*see Matter of Quandt*, 175 AD2d at 434-435).

Defendants, in opposing plaintiffs' motion, point to the Appellate Division, First Department's decision in *Matter of Marcus (Macy & Co., Inc.)* (273 App Div 725 [1st Dept 1948], *lv denied* 274 App Div 822 [1948]) as supporting the limited nature of material to be considered in appraising a company's value. *Matter of Marcus*, however, is readily

⁹ Of note, d'Almeida has limited the time frame for some requests to the years 2010-2012 and defendants, in complying with this order, must only provide documents relating to those years where d'Almeida has so limited his request.

¹⁰ The court notes that defendants assert in their summary judgment motion (which has not been submitted for determination as of this date) that 4C Foods has since amended the Agreement to provide that the value of the voting shares held by the estate of Gaetana Celauro shall be evaluated as if the four to one stock split changing the number of non-voting shares did not occur.

distinguishable from the facts here in that the shares of the corporation there at issue, Macy & Co., Inc., were publically traded on a broad basis and thus provided a potent means of determining the market price of the shares (*id.* at 727-729). While defendants also point to language in *Matter of Marcus* in which the court stated that petitioner's holding of only 50 shares of the 1,650,000 outstanding shares should not be wholly ignored in evaluating her claim (*id.* at 729), that language would seem to have little bearing on a proceeding relating to a forced sale of shares that, while they only constitute a small percentage of 4C Foods' overall shares, constitute nearly 20 percent of the voting shares of 4C Foods.

Defendants also submit an affidavit from Craig Stephanson, a certified public accountant who performs valuations of privately held companies. Stephanson's affidavit does not show that the information requested by d'Almeida to be unreasonable. Stephanson asserts that generally accepted appraiser procedures do not require an appraiser performing an evaluation to verify the veracity or completeness of a company's financial information and that no such verification was required by the letter agreement Duff & Phelps entered into with 4C Foods. Notably, however, while the appraisal standards cited by Stephanson, as well as the terms of the letter agreement, may allow an appraiser to rely upon the information provided by the company by qualifying the appraisal, they also do not preclude the appraiser from obtaining records to verify the information.

Ultimately, defendants' conclusory assertions that d'Almeida's requests are unreasonable fail to show that the requests are improper or unduly burdensome under the

terms of the shareholder agreement, under the terms of the letter agreement engaging Duff & Phelps, and pursuant to generally accepted appraisal procedures. Moreover, d'Almeida's contacting plaintiffs and obtaining their assistance in requesting the material here does not show plaintiffs' to be directing or controlling the appraisal process in violation of this court's October 12, 2016 order, which also stated there were no privileges between the appraiser and the parties and/or counsel.

Accordingly, the court finds that d'Almeida/Duff & Phelps are entitled to production of the majority of documents requested in d'Almeida's May 5, 2017 letter. However, the Agreement and letter agreement engaging Duff & Phelps contemplate that the valuation report was to be provided fairly expeditiously, and, to the extent that d'Almeida requested material for the first time in the May 5, 2017 letter,¹¹ the court declines to require 4C Foods to produce such documents.¹² The court also declines to require production of documents relating to 4C Foods' financial condition after the valuation date, as d'Ameida has failed to identify why such documents would be relevant to the valuation. The court thus directs

¹¹ Contrary to defendants' contentions, upon comparing the Duff & Phelps initial request with the May 5, 2017 letter, the court finds that the large majority of the material requested in the May 5, 2017 letter were requested in the initial document request.

¹² The court also notes that although item 1 (j) in the May 5, 2017 letter requesting an opportunity to interview the individuals Brian Mullen (who is an appraiser with Coady Diemer) has spoken with at 4C Foods was not specifically requested in the prior letter, it is simply a reminder that under the Agreement and letter agreement Duff & Phelps is entitled to the same information that is provided to Coady Deimer, the appraiser selected by 4C Foods. To the extent that d'Almeida has already interviewed the individuals who met with Brian Mullen, he is not entitled to an additional interview with them.

defendants to provide d'Almeida of Duff & Phelps, LLC, copies of the documents requested in d'Almeida's May 5, 2017 letter addressed to John A. Celauro with the exception of items 1 (c), 2 (a), 2 (g), 2 (h), 2 (i), 4 (u), and 4 (v), which items defendants do not have to disclose, within 30 days of service upon them of a copy of this order with notice of entry. To the extent that 4C Foods does not possess or no longer possesses any of the documents requested, it is to so indicate in an affidavit from a person with knowledge of 4C Foods records and record retention policies. Given the potential volume of documents requested, 4C Foods may elect to produce the documents in an readily accessible electronic/digital form if such production is less burdensome than providing paper copies.

As the court finds that it was reasonable for d'Almeida to request the documents at issue, the court will also extend the time of Duff & Phelps and Coady Diemer to submit their respective written valuation reports to 4C Foods to 30 after the documents directed to be disclosed are provided to Duff & Phelps and Cody Deimer in order to provide them with a reasonable time to complete the report following the production of documents.¹³

The portion of plaintiffs' motion requesting that 4C Foods be held in contempt for violating the October 12, 2016 and March 6, 2017 orders is denied. "To sustain a finding of either civil or criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was

¹³ By way of a so-ordered stipulation dated May 17, 2017, the parties have agreed to extend the deadline for the completion of the valuation reports until 20 days after a copy of the decision on the motion is served with notice of entry.

in effect” (*Matter of Department of Env'tl. Protection of City of N.Y. v Department of Env'tl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]; *see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; *Gerelli Ins. Agency, Inc. v Gerelli*, 23 AD3d 341, 341 [2d Dept 2005]). The party seeking to hold another in civil contempt bears the burden of proving the contempt by clear and convincing evidence (*see Penavic v Penavic*, 109 AD3d 648, 649-650 [2d Dept 2013]; *Rienzi v Rienzi*, 23 AD3d 447, 448-449 [2d Dept 2005]).

While defendants have disagreed with the scope of d’Almeida’s document requests, and declined to provide certain material requested by him, such actions cannot be seen as clear and convincing proof of a violation of this court’s directions contained in the October 12, 2016 order relating to the conduct of the appraisal under the Agreement since that order contained no unequivocal direction with respect to the production of material to the appraisers. Similarly, defendants responded to the direction contained in the March 6, 2017 order to provide material with respect to cash sales by providing material relating to the limited cash sales it concedes to have occurred and a letter stating that it has no other such sales.¹⁴ Since the March 6, 2017 order does not unequivocally identify the case sale requests

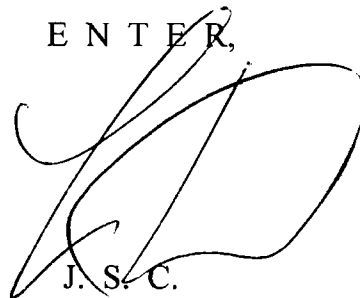
¹⁴ Moreover, to the extent that the direction in the March 6, 2017 order is seen as being made under the discovery sections of the CPLR, contempt is generally not available as a sanction for non-compliance with discovery orders (Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3126:4). Finally, if plaintiffs’ motion is deemed a request for sanctions under CPLR 3126, plaintiffs have failed to demonstrate that defendants are guilty of willful or contumacious conduct warranting sanction (*see Mew v Civitano*, 151 AD3d 840, 841 [2d Dept 2017]).

made by the appraiser that are intended to be encompassed in the order, defendants response cannot be seen as a violation of that order.

Defendants' cross motion is denied because the court finds that it was reasonable for Duff & Phelps to hold off on providing the valuation report pending the production of the requested material.

This constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, appearing to be 'L. Knipel', written over the text 'J. S. C.'.

J. S. C.

HON. LAWRENCE KNIPEL