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Order on Defendants' Motion Seeking Clarification (MIRKO DI GIACOMANTONIO AND ROSA INC.)

Alice D. Bonner
Superior Court of Fulton County

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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MIRKO DI GIACOMANTONIO and ROSA INC.,

Plaintiff,

v.

SANDRO ROMAGNOLI, ET AL.,

Defendants,

Civil Action File No. : 2007CV133477

ORDER ON DEFENDANTS' MOTION SEEKING CLARIFICATION

This case is before the Court on Defendants' Motion for Clarification, filed on November 14, 2008. After reviewing the briefs of the parties and the record of the case, the Court finds as follows:

After ruling on the parties' motions for summary judgment, this case was set for trial in April, 2008. Before the trial began, however, the parties reached a stipulated settlement agreement where the parties agreed to abide by the withdrawal and valuation provisions of the Operating Agreements of Figo Pasta, LLC, Certo, LLC, and Spiga LLC, as well as the entities formed underneath these holding companies (hereinafter collectively referred to herein as "Figo").

Defendants seek the Court's clarification regarding the valuation provisions described in Sections 6.3.4.3 and 6.5 of the Figo Operating Agreements, which contained uniform valuation/withdrawal provisions. The Operating Agreements provide different valuation procedures depending upon the event that triggered the involuntary withdrawal. In the event of a non-divorce/support involuntary withdrawal (as is the

applicable to the instant case), the withdrawing member (Plaintiff) and the remaining members (Defendants) each select an appraiser "to determine the undiscounted 'going concern' value of the Company." If the two appraisers cannot agree upon a valuation, then the appraisers shall select a third appraiser to perform the final valuation. The initial appraisals, however, set the ceiling (high) and floor (low) of the range for the third valuation. Defendants petition the Court to strike certain aspects of Plaintiffs' appraisal, as well as to set guidelines for the third appraisal.

Defendants seek clarification from the Court regarding the proper scope of the appraisals. Defendants challenge Plaintiffs' appraisal report because it includes the projected profits of twenty-eight future Figo restaurants in its valuation of the various Figo entities. In addition, Defendants challenge Plaintiffs' appraisal report because it treats the various Figo entities as a "chain" and not as separate companies as defined in each Figo Operating Agreement. Plaintiffs argue that their appraisal report is reasonable in light of Figo's performance during its five year history (opened five restaurants in five years) and its business plans at the time that Plaintiffs were forced out of the Figo entities. In addition, Plaintiffs argue that the terms of the Operating Agreement neither define, nor limit "going concern," therefore it is subject to the reasonable interpretation of each appraiser utilizing commonly accepted methodology.

Going-concern value means "[t]he value of a commercial enterprise's assets or the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or its assets. Going-concern value includes, for example, goodwill." Black's Law Dictionary 1549 (7th ed. 1999). While the courts have not widely discussed the definition of "going concern" appraisals in settlement contexts,

it has been fully addressed in the context of dissenting shareholder appraisal rights to value stock after a corporate action was taken. Courts have described the "potentially endless list of factors" contributing to such a valuation. In re Glosser Brothers, Inc., 555 A.2d 129, 133 (Pa. Supr. 1989) (citing Tri-Continental Corp. v. Battye, 74 A.2d 71, 76 (Del. 1950)). "[T]he appraiser and the courts must take into consideration all factors and elements which might reasonably enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise, and any other facts which were known or which could be ascertained...and which could throw any light on future prospects....are..pertinent... ." Id. The Court finds the analysis of "going concern" in the context of dissenting shareholder appraisal to be analogous to the task contemplated in Section 6.5 of the Figo Operating Agreements.

Accordingly, the Court finds that good will and future earnings are relevant factors to the valuation contemplated under Section 6.5. In addition, the Court finds that plans for future locations as well as prior history may be factors that could inform the ultimate appraisal provided however, that such factors ***reasonably*** inform future value. Current economic conditions may influence negatively the future value of current Figo entities. Whether Plaintiffs' appraisal expert's valuation which included the creation of twenty-eight restaurants in the next five years is reasonable seems unlikely, but that is not the question before the Court. Instead, the narrow question that this Court has been asked to rule upon is whether future locations are prohibited from an appraisal performed under Section 6.5. The Court finds that the answer to this question is no. The Court also finds, however, that any such appraisal, and its factors included therein must be reasonable.

A similar, related, question before the Court is whether the entities must be valued independently of one another as if the other entities did not exist, as Defendants appear to propose, or to view all of the entities as a cohesive business as the Plaintiffs propose. The answer lies in the definition of going-concern, which includes goodwill. While Defendants are correct in that Plaintiffs' interest in each entity must be calculated individually, the thrust of their argument ignores that goodwill is a component of "going-concern" value. Goodwill is defined as "a business's reputation, patronage and other intangible assets that are considered when appraising the business." Black's Law Dictionary 703 (7th ed. 1999). Thus, the value that the entities derive from their association and coordination with the other entities (e.g., the value of the central commissary Spiga is directly related to the existence of the Figo restaurants and the stability of that relationship) may be considered among the many factors in order to constitute the "going-concern" of the Figo entities. The appraisal is required, however, to calculate such intangibles in a manner that can be attributable to each separate entity. For example, the appraiser could determine the overall, combined value of such intangibles, but must be able to apportion such amount among the various entities so that it is reflected in the value of Plaintiffs' interest in each Figo entity.

The parties have additionally requested that the Court assist them in scheduling the remainder of the settlement/valuation process. Therefore, the following deadlines shall apply:

- The parties' appraisers shall identify a third appraiser by **December 8, 2008**. In the event that the parties' appraisers are unable to agree upon a third appraiser, the parties shall each submit the names of two

recommended appraisers and their biographical materials to the Court by 5:00 p.m. on December 8, 2008. In such event, the Court shall select the third appraiser.

- As stated in the Operating Agreement, the costs and expenses of the third appraiser shall be split equally among the parties.
- The third appraiser shall be considered an officer of the Court and shall have the ability to request documents and information from the parties. An ancillary complaint of Defendants is that Plaintiffs' appraiser based his future restaurant projections on information obtained solely by Mr. Di Giacomantonio and his counsel. For all information to be included in the third appraisal beyond financial information (i.e., financial statements, accounts, etc.) held by parties, and information obtained by the appraiser during the course of his appraisal (i.e., observational data, general market research, etc.), the parties must provide such information in a documented form to the appraiser. For example, Plaintiffs' expert report bases its prediction that twenty-eight new restaurants will open in the next five years on information provided by Mr. Di Giacomantonio through his legal counsel. In order for such information to be considered by the third appraiser, Plaintiffs would have to provide documentation (i.e., contemporaneous business plans, an affidavit, etc.) to the third appraiser.
- The third appraisal report shall be submitted to the Court on **February 2, 2009**. The parties shall report to the Court via email by **January 15,**

2009, regarding the status of the third appraisal. The parties may, if necessary, request an extension for the third appraisal at that time.

SO ORDERED this 21 day of November, 2008.

Alice D. Bonner
ALICE D. BONNER, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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