

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Ramos

PART 3m

Justice

Estate of J.H.P. Mandelbaum

INDEX NO.

601050/08

- v -

RECEIVED

MOTION DATE

NOV 23 2009

MOTION SEQ. NO.

002

Five Ivy Corp

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with
accompanying memorandum decision and order.

FILED
Nov 23 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/19/09

[Signature]
HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MDAI

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----X
ESTATE OF PHILIP MANDELBAUM,

Petitioner,

Index No. 601050/08

-against-

FIVE IVY CORP.,

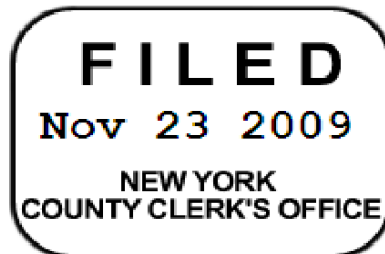
Respondent.
-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 002, the petitioner the Estate of Philip Mandelbaum (the "Estate") moves by order to show cause pursuant to BCL § 623(h)(4) to compel the respondent Five Ivy Corp. ("Five Ivy") to produce: (1) a complete copy of any share or business appraisal on which Five Ivy intends to rely on during trial (the "Appraisals"), (2) a complete copy of the Five Ivy's experts' reports that were prepared, but not intended for use at trial (the "Expert Reports"), (3) all documents relating to any "Subchapter S" election made by Five Ivy, its corporate predecessor or any parent corporation of the entities in 2008 or 2009 (the "Subchapter S Documents"), and (4) complete copies of all Federal and New York State income tax returns filed by Five Ivy, its corporate predecessor or any parent corporation of these entities in 2008 or 2009 (the "Tax Returns").

Background

David Mandelbaum was appointed the co-executor by the Essex County Surrogate Court on July 16, 2004. The Estate owns 13.97 shares of Class A stock (the "Shares") of Five Ivy Corp. ("Old Five Ivy").



Old Five Ivy was a New York corporation incorporated on December 14, 1959. The defendant Five Ivy is a Delaware corporation incorporated on December 3, 2007.

Old Five Ivy and Five Ivy adopted a plan for the exchange of stock pursuant to Section 913 of the Business Corporation Law, whereby, all shares of Class A stock not owned by Five Ivy would be cancelled and converted into the right to receive cash (the "Plan of Exchange"). On December 31, 2007, the Estate received notice of the Plan of Exchange.

On January 10, 2008, the Estate filed a notice of dissent with Old Five Ivy, objecting to the Plan for Exchange and demanding payment of the fair value of the Shares. The Estate's certificates of the Shares were duly noted with its objections.

On January 29, 2008, Five Ivy filed the certificates of exchange of shares with the New York State Department of State to effectuate the Plan of Exchange. Simultaneously, it filed a certificate of ownership with the Delaware Secretary of State and a certificate of merger with the New York State Department of State, thereby merging Old Five Ivy into Five Ivy¹.

On February 12, 2008, Five Ivy II served upon the Estate an offer to purchase the Shares for \$453,544.29 (the "Offer"). On February 21, 2008, the Estate rejected the Offer on the basis that there was insufficient information provided to evaluate the the value of the Shares.

¹ Five Ivy was originally incorporated as "Five Ivy Owners Inc.", but adopted the name Five Ivy Corp. after the merger with Old Five Ivy.

On April 9, 2008, the Estate commenced this special proceeding pursuant to BCL § 623(h)(2) to determine the rights of the dissenting shareholders and fix the fair value of the Shares after Five Ivy failed to do so within the statutory time period as set forth in BCL § 623(h)(1).

In connection with the special proceeding, the Estate now moves for limited discovery from Old Five Ivy and Five Ivy.

Discussion

The Estate argues that the production of the Appraisals, the Expert Reports, and the Tax Returns is necessary because the Estate has insufficient information to evaluate the Offer.

Five Ivy counters that the Estate has been provided all the required documentation including tax returns and appraisals. Additionally, Five Ivy has agreed to produce to the Estate any amended or revised appraisals and the final tax returns for Five Ivy upon filing.

Furthermore, the Estate seeks the Subchapter S Documents on the basis that the existence of a Subchapter S election bears directly on how the built-in capital gains tax is applied during the valuation.

Five Ivy objects to the production of the Subchapter S Documents on the basis that the Shares are valued on the valuation date, December 27, 2007, and all corporate actions subsequent to the valuation date are irrelevant.

The BCL provides that "the court may, in its discretion, permit pretrial disclosure, including, but not limited to,

disclosure of any expert's reports relating to the fair value of the shares whether or not intended for use at the trial in the proceeding and notwithstanding [CPLR 3103(d)]" (BCL § 623 [h] [4]). Thus, Five Ivy must produce the Appraisals and the Expert Reports.

However, the statute also provides that the value of the Shares "shall be the fair value as of the close of business on the day prior to the shareholder's authorization date" (*id.*). The shareholder's authorization date refers to "the date on which the shareholder's vote authorizing such action was taken, or the date on which consent without meeting was obtained from the requisite shareholders..." (BCL § 623 [b]). Both parties agree that the day prior to the shareholder's authorization date is December 27, 2007, which is also the valuation date.

Consequently, the Estate's request for discovery, while permissible, is statutorily limited to documents that predate the shareholder's authorization date. Therefore, the possibility of a Subchapter S election will not be considered in the valuation of the Shares, unless a basis to do so is substantiated by other discovery.

Accordingly, it is

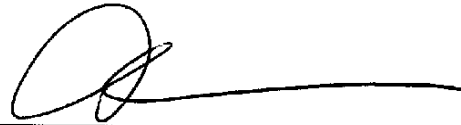
ORDERED that the respondent Five Ivy Corp. shall produce to the petitioner, the Estate of Philip Mandelbaum, to the extent that the documents have not been previously produced and to the extent that the documents predate December 28, 2007: (1) a complete copy of any share or business appraisal on which the

respondent intends to rely on during trial, (2) a complete copy of the respondent's experts' reports that were prepared, but not intended for use at trial, (3) all documents relating to any "Subchapter S" election made by the respondent, its corporate predecessor or any parent corporation of this entities, and (4) complete copies of all Federal and New York State income tax returns filed by the respondent, its corporate predecessor or any parent corporation of this entities, within thirty (30) days of service of this order with notice of entry, and it is further

ORDERED that the parties shall contact Part 53 on or before February 26, 2010 to schedule a status conference with the Court.

This constitutes the decision and order of the Court.

Dated: November 19, 2009



J.S.C.

HON. CHARLES E. RAMOS

