

At an IAS Part 53 of the
Supreme Court of the State
of New York, held in and
for the County of New York
at 60 Centre Street, on
the ___ day of August, 2009

P R E S E N T :

Hon.

Justice

ESTATE OF PHILIP MANDELBAUM, :

Petitioner, :

-against- :

FIVE IVY CORP., :

Respondent. :

ORDER TO SHOW CAUSE

601059/08
Index No. ~~60105708~~

Upon reading and filing the annexed Affirmation of Samuel Feldman, dated August ^{6th}, 2009, and the Verified Petition wherein it appears that Petitioner is entitled to receive the fair value of its shares in respondent, it is

ORDERED, that respondent show cause before this Court at IAS Part 53 thereof to be held at the Courthouse located at 60 Centre Street, New York, New York, on the ___ day of ^{September} ~~August~~, 2009, at 9:30 a.m., why an Order not be issued pursuant to BCL Section 623(h)(4) directing respondent to provide the following information to Petitioner within ten (10) days: (1) a complete copy of any share/business appraisal on

which respondent intends to rely at the trial of this proceeding; (2) a complete copy of 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 respondent, its corporate predecessor or any parent corporation of those entities in 2008 or in 2009; and (4) complete copies of all Federal and New York State income tax returns filed by respondent, its predecessor or any parent corporation of those entities in 2008 and 2009; and it is further

ORDERED, that service of a copy of this Order, together with copies of the papers upon which it is granted, on the respondent's counsel in this proceeding together with a summons and complaint; on or before the ____ day of August, 2009, shall be good and sufficient service thereof.

ENTER

, J.S.C.

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

ESTATE OF PHILIP MANDELBAUM,	:	Part 53
	:	601050
Petitioner,	:	Index No. 60105/08
	:	
-against-	:	AFFIRMATION OF
	:	<u>SAMUEL FELDMAN</u>
FIVE IVY CORP.,	:	
	:	
Respondent.	:	

SAMUEL FELDMAN, of full age, affirms as follows:

1. I am an attorney admitted to practice law in the State of New York. I am a member of the firm of Orloff, Lowenbach, Stifelman & Siegel, P.A., attorneys for petitioner the Estate of Philip Mandelbaum (the "Estate"). I make this affirmation in support of the Estate's application pursuant to Business Corporation Law 623(h)(4) for an order permitting it to conduct limited discovery in this matter.

Background¹

2. The Estate that came into being on June 30, 2004. The decedent, Philip Mandelbaum, at the time of his death on June 30, 2004 was a shareholder of Five Ivy Corp. ("Old Five Ivy"), a New York corporation incorporated on December 14, 1959.

3. On or about December 28, 2007, Old Five Ivy was authorized to issue 400 shares of a class of common stock designated as Class A Common Stock no par

¹ The facts set forth in Paragraphs 2-12 in the Background portion of this Affirmation are derived from the Verified Petition filed by the Estate.

value ("Class A Stock"), 334.2 of which were issued and outstanding and 400 shares of common stock designated as Class B Common Stock no par value.

4. Old Five Ivy was a real estate holding corp., owning substantial real estate in Newark, New Jersey. The Estate was the holder and owner of 13.97 shares of Class A Stock of Old Five Ivy.

5. Respondent Five Ivy Corp. ("New Five Ivy") is a foreign corporation incorporated on December 3, 2007 under the laws of the State of Delaware. It was originally incorporated under the name "Five Ivy Owners Inc."

6. The Board of Directors of New Five Ivy and Old Five Ivy passed a resolution adopting a plan for the exchange of stock pursuant to §913 of the Business Corporation Law with the Class A Stock being cancelled (except for such stock already owned by New Five Ivy) and converted automatically into the right to receive cash (the "Plan of Exchange").

7. The Estate, after being given notice of the Plan of Exchange caused the notice to be filed with Old Five Ivy objecting to the action proposed to be taken and demanding payment of the fair value of its shares.

8. On January 29, 2008, a certificate of exchange of shares was filed by respondent with the New York Department of State to formally effect the Plan of Exchange.

9. Simultaneously, respondent filed a Certificate of Ownership with the Delaware Secretary of State and a Certificate of Merger with the New York Department of State merging Old Five Ivy into New Five Ivy. In connection with the merger, New Five Ivy changed its name to that of the respondent.

10. On February 12, 2008, respondent in purport of compliance with §(b) of §623 of the Business Corporation Law served upon the Estate a written offer to pay for its shares the sum of \$32,465.59 per share representing \$453,544.29 for all the Estate's shares. That offer was accompanied by a check representing approximately 80 percent of the total offer amount as required under the BCL.

11. In response, the Estate advised that it could not agree to accept such offer on the ground that there was insufficient information provided to evaluate the offer.

12. Because respondent failed to institute a special proceeding to determine the rights of the Estate and to fix the value of its shares, the Estate did so.

13. Following the joinder of issue, the parties informally exchanged certain appraisals generated by their experts and the Estate was given access to some of the books and records of respondent in order to facilitate the development of an appraisal and a potential settlement.

14. Earlier this year, the parties had a face to face meeting at the respondent's New York City headquarters with experts and counsel in attendance. Additionally, as directed by the Court, counsel participated in mediation extending over two separate sessions. However, the matter has not settled and at the present it appears that the matter will proceed to trial. The Court has scheduled a conference in this matter for September 14, 2009.

The Discovery Requested

15. Initially, Five Ivy submitted appraisals dated as of March 30, 2007 which as a matter of law is the incorrect valuation date (the correct valuation date is the date before the corporate action was enacted, here, December 27, 2007). This business

appraisal, utilizing both minority (which the Estate asserts is contrary to New York law) and marketability discounts arrived at a value of \$453,530 for the Estate's Class A shares.

16. By way of report dated November 24, 2008, Five Ivy submitted a business appraisal concluding that the fair value of the Estate's shares as of December 27, 2007 was \$367,100 (utilizing a minority interest discount as well as a marketability discount) and \$871,800 (taking only a marketability discount).

17. To the extent that Five Ivy seeks to supplement or modify the contents of its November 24, 2008 business appraisal (or any of the information on which it is based), the Estate requests that a complete copy be provided to it as well as copies of Five Ivy's expert reports that were prepared but not intended for use at trial.²

18. The Estate also seeks discovery of all documents relating to any "Subchapter S" election made by respondent or its predecessor.³ The basis for this request relates to a substantial issue in this matter -- whether, or to what extent, there should be a discount applied to the value of the Estate's shares to reflect unrealized built-in capital gains taxes with respect to the assets owned by the respondent. Attached hereto as Exhibit A is a copy of the opinions in Murphy v. U.S. Dredging, rendered by the Supreme Court, Nassau County (Warshawsky, J.). That case dealt with the built-in capital gains issue in the same context as exists in this proceeding. In a nutshell, that case held that based upon the history of asset sales of the corporation, it was appropriate to

² BCL §623(h)(4) authorizes the Court to 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 subdivision (d) of §3101 of the Civil Practice Law and Rules.

³ It is possible that a Subchapter S election may have been made by an ultimate parent corporation of respondent or its predecessor; *i.e.*, a corporation which owns, directly or indirectly through other entities, 100% of the stock of the corporation which owns the real estate formerly owned by Old Five Ivy. If that is the case, the Estate's request for discovery extends to all documents relating to the Subchapter S election made by such ultimate parent corporation.

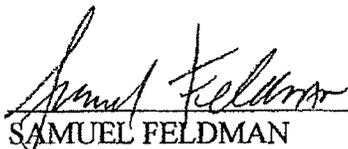
calculate a present value of the unrealized built-in gains tax by assuming a 19-year holding period for the corporation's properties. Therefore, the Court rejected a 100% discount the corporation sought which would have the effect of assuming that the corporation was going to liquidate its assets immediately.⁴ Where a corporation has made a Subchapter S election, and holds corporate property owned at the time of the election for at least 10 years, the corporation is not liable for capital gains taxes with respect to sales of such property after expiration of the 10-year period.⁵ Accordingly, the existence of a Subchapter S election bears directly on the issue of the valuation discount, if any, to reflect built-in capital gains taxes⁶

19. Finally, the Estate seeks disclosure of all of Federal and State income tax returns filed for respondent or its predecessor in 2009. This request ties into the Subchapter S election issue because under most circumstance the corporation that is converting to Subchapter S status must file a final tax return at the time of conversion.

20. For the foregoing reasons, petitioner respectfully request that the relief requested in the order to show cause be granted.

21. No prior request for the relief requested has been made.

Dated: Roseland, New Jersey
August 6, 2009



SAMUEL FELDMAN

⁴ As will be addressed at trial, the standard of valuation applicable in appraisal proceedings under BCL §623 is "fair value" on a "going concern" basis.

⁵ See Int. Rev. Code §1374.

⁶ The appraisal issued by Five Ivy does not indicate that Five Ivy Corp. sold any assets since its incorporation in 1959.