DECISION DATED AUGUST 16, 2007

STATE OF NEW YORK

SUPREME COURT : COUNTY OF CATTARAUGUS

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In the Matter of the Application of Nathalie Rateau,
Mirielle Rateau and Michel Rateau,

Petitioners,

vs.

Index No. 70626

For the Judicial Dissolution of
Dapa Communications, Inc. Pursuant to
NY BCL 1104-a et seq.

Respondents

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For Petitioners

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For Dapa

HIMELEIN, J.

**DECISION**

Dapa Communications, Inc. (Dapa) is a closely held private company that manufactures and installs tower and antenna systems. The company was founded by petitioners Nathalie Rateau and her parents in 1989. Sixty-six percent of the company was owned by a French company called Dapa Systems, which went into bankruptcy in 2003. Other entities acquired the 66% of Dapa Communications through the bankruptcy court and Ms. Rateau was terminated from her position as company president in 2005.

Ms. Rateau and her parents, who together own 34% of Dapa Communications,

commenced a special proceeding seeking a dissolution of the company pursuant to Business Corporation Law (BCL) § 1104-a. Dapa then elected to purchase petitioners' share as provided for in BCL 1118. When the parties could not agree on the value of these shares, a trial was held on May 3, 2007 and May 8, 2007. Both sides have submitted post-hearing memorandums.

The first issue is how petitioners' shares should be valued. In a pretrial memorandum, petitioners argued that their shares' worth should be determined on the basis of their value in a going concern. This appears to be consistent with pronouncements from the Court of Appeals on how to value a business for BCL 1118 purposes (*see Matter of Pace Photographers, Ltd.*, 71 NY2d 737, 530 NYS2d 67 [1998]) [value "should be determined on the basis of 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"], *quoting Matter of Blake v. Blake Agency*, 107 AD2d 139, 146, 486 NYS2d 341 [2d Dept. 1985], *lv denied* 65 NY2d 609, 494 NYS2d 1028 [1985]; *Matter of Seagroatt Floral Co., Inc.*, 78 NY2d 439, 445, 576 NYS2d 831 [1991] ["In that the valuation proceeding avoids dissolution and allows the continuation of an operating business, the value to be ascertained is that of an interest in a going concern rather than a share of a business in the throes of liquidation"]; *In re Dissolution of Penepent Corp., Inc.*, 96 NY2d 186, 726 NYS2d 345 [2001]; *Friedman v. Beway Realty Corp.*, 87 NY2d 161, 638 NYS2d 399 [1995]; *see also Miller Bros. Indus., Inc. v. Lazy River Inv. Co.*, 272 AD2d 166, 709 NYS2d 162 [1st Dept 2000], *lv denied* 95 NY2d 761, 714 NYS2d 711 [2000]; *Matter of Walt's Submarine Sandwiches, Inc.*, 173 AD2d 980, 569 NYS2d 492 [3d Dept 1991], *appeal denied* 78 NY2d 860, 576 NYS2d 218 [1991]; *Gerzof v. Coons*, 168 AD2d 619, 563 NYS2d 458 [2d Dept 1990]; *but see Hall v. King*, 265 AD2d 244, 697 NYS2d 19 [1st Dept 1999] [approving use of net asset method "[u]nder the facts of this case"]).

However, at the trial and in their post-trial memorandum, petitioners contended that the net asset value, or what could be realized if the company's assets were sold, should be utilized to determine the value of the company. At the trial, petitioners' expert, Charles Kohler, a CPA with the firm of Clark and Kohler in West Seneca, testified to a liquidation value of between $728,000 and $755,000 for the entire company, of which petitioners' share would be 34%.

Respondents argue that petitioners initial approach was correct and the company should be valued as an ongoing concern. Their expert, Darren Graff, a CPA with the Phoenix Consulting Group on Grand Island, testified that, as a going concern, the company is worth zero dollars. Alternatively, Mr. Graff opined that, using liquidation value, petitioners' shares in the company are worth $26,136.

The factors to be considered in determining a company's worth a going concern include market value, investment or income value, and net asset value (*see Matter of Blake v. Blake Agency*, 107 AD2d 139, 486 NYS2d 341 [2d Dept 1985], *lv denied* 65 NY2d 609, 494 NYS2d 1028 [1985]). The weight given to each factor depends on the facts and circumstances of each case and equal weight need not be given to each factor (*Quill v. Cathedral Corp.*, 215 AD2d 960, 627 NYS2d 157 [3d Dept 1995]). Valuation is fact-specific and dependent on the circumstances of each case and may include evidence of attempts to sell the business or offers to buy the business (*see Matter of Walt's Submarine Sandwiches, Inc.*, 173 AD2d 980, 569 NYS2d 492 [3d Dept 1991], *lv denied* 78 NY2d 860, 576 NYS2d 218; *Gerzov v. Coons*, 168 AD2d 619, 563 NYS2d 458 [2d Dept 1990]). In cases where the business continues to operate, the investment or income approach is generally used (*see Quill*, 215 AD2d 960, 627 NYS2d 159 [3d Dept 1995]; *Seagroatt Floral*, 78 NY2d 439, 576 NYS2d 831 [1991]).

The company earned $125,000 in 2001 but in succeeding years sustained losses of

$768,000, $639,000, $302,000 and $216,000. While the company continues to operate, the evaluators are apparently not sure it will be successful. That may be why one evaluator did not value Dapa as a going concern and the other valued it at zero or below. The court does not agree with the zero figure; if the business were truly worth nothing, it would not continue to operate. Therefore, based on the information provided, the court has no choice but to ascertain the company's net asset value.

Another issue is whether the value of petitioners' stock in the company should be discounted for either their minority status or its lack of marketability. Petitioners correctly note that their stock should not be discounted because of their minority status (*see Penepent*, 96 NY2d 186, 726 NYS2d 345 [2001] and *Friedman*, 87 NY2d 161, 638 NYS2d 399 [1995]). However, a lack of marketability discount is generally appropriate when a company's stock is not easily sold (*see Seagrott*, 78 NY2d 439, 576 NYS2d 831 [1991]; *In re Brooklyn Home Dialysis Training Center, Inc.*, 293 AD2d 747, 741 NYS2d 280 [2d Dept 2002]; *In re Vetco, Inc.*, 292 AD2d 391, 738 NYS2d 599 [2d Dept 2002]; *Hall v. King*, 265 AD2d 244, 697 NYS2d 19 [1st Dept 1999]; *Dissolution of Funplex, Inc.*, 252 AD2d 923, 676 NYS2d 321 [3d Dept 1998]; *Lehman v. Piontowski*, 203 AD2d 257, 609 NYS2d 339 [2d Dept 1994]).

Respondent's expert applied a 25% minority discount to his figure, which is inappropriate (*Penepent*, 96 NY2d 186, 726 NYS2d 345 [2001]; *Friedman*, 87 NY2d 161, 638 NYS2d 399 [1995]). He also applied a 30% lack of marketability discount, which is appropriate for an operating business (*Seagroatt*, 78 NY2d 439, 573 NYS2d 831 [1991]). However, a lack of marketability discount may or may not be appropriate when talking about selling hard assets. On the other hand, there would be significant costs involved in selling off the equipment, i.e., advertising, auctioneers and the like. Therefore, whether deemed a lack of marketability

discount or a cost of sale discount, the court will apply a discount of thirty percent.

The parties differ primarily on the value of the equipment and inventory. Ms. Rateau has not seen the inventory in several years and has an interest in assigning it a higher value. Further, her values were from 2007, rather than 2005, as the statute requires. Mr. Czoch has much more recent familiarity with the inventory and the court credits his testimony that much of the inventory is made up of incomplete parts and has languished on warehouse shelves for several years. Mr. Czoch also testified that Ms. Rateau and another employee she had hired made payments of over one million dollars to their own company called Dapa Enterprises, removed and sold company furniture, and did some mass shredding before they left. Thus, the court believes that Mr. Czoch's testimony about the equipment is far more reliable than that of Ms. Rateau.

Petitioners' value of the equipment, particularly the largest item, is based, at least in part, on advertised prices on the internet without any indication of what the actual selling prices of the items were. The court has reviewed the testimony and the exhibits and concludes that the liquidation value of the company is $180,000. To that must be applied a 30% discount, bringing the total to $126,000, of which petitioners' 34% is $42,840. Interest at 9% per annum shall be added from the date the company indicated it would purchase the shares.

Submit order or judgment on notice.

Dated: Little Valley, New York
August 16, 2007

Larry M Himelein
HON. LARRY M. HIMELEIN