To be Argued by:
LARRY KERMAN
(Time Requested: 15 Minutes)

Docket No. CA 08-00574

Cattaraugus County Clerk's Index No. 70626/2005

# *NEW YORK SUPREME COURT*

## *APPELLATE DIVISION — FOURTH DEPARTMENT*

IN THE MATTER OF THE APPLICATION OF NATHALIE RATEAU, MIREILLE RATEAU, AND MICHEL RATEAU,

Petitioners-Respondents,

v.

FOR THE JUDICIAL DISSOLUTION OF DAPA COMMUNICATIONS, INC.,

Respondent-Appellant.

# BRIEF OF PETITIONERS-RESPONDENTS

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court commit reversible error by not applying a lack of marketability discount to Petitioners' shares where goodwill was not part of either expert's valuation of such shares?

ANSWER OF THE COURT BELOW:

The trial court correctly held that it was not required to apply a lack of marketability discount to Petitioners' shares.

2. Did the trial court commit reversible error by not valuing the corporation as an on-going concern where neither side's expert did so either?

ANSWER OF THE COURT BELOW:

The trial court correctly used the valuation method used by both sides' experts.

3. Was the trial court's valuation of Petitioners' shares arbitrary and capricious?

ANSWER OF THE COURT BELOW:

The trial court properly based its valuation of Petitioners' shares on the proof adduced at trial, using the valuation methods employed by both sides' experts, and reached a value, logically, that was between the two values determined by the respective experts.

## PRELIMINARY STATEMENT

This is Petitioners' response to Respondent's appeal from an Order and Judgment with Bill of Costs (one document), entered on December 28, 2007. (R. 7-9). The Order and Judgment (hereinafter "Judgment") followed a trial on the issue of the value of Petitioners' 34% ownership interest in DAPA Communications, Inc. ("DAPA").

By Petition filed on July 13, 2005, Petitioners commenced a special proceeding seeking the dissolution of DAPA pursuant to Section 1104-a of the Business Corporation Law. (R. 22-30). The factual basis for the Petition is briefly explained in the "Facts" section of this Brief, but it is not directly relevant to the issues on appeal since Respondent elected to purchase Petitioners' shares, resulting in the trial on value.

By letter dated October 11, 2005 (the last possible day to do so), Respondent's counsel advised Petitioners' counsel of such election. (R. 47, 423). The October 11, 2005 letter enclosed a letter dated August 5, 2005 (which had never actually been sent) which claimed that the fair value of Petitioners' shares as of July 12, 2005 (the Valuation Date) was "ZERO dollars or less." (R. 48, 424). This was before Respondent ever engaged its expert to value such shares; Respondent's expert, Mr. Graff, testified he was first contacted in January 2007. (R. 252). However, Respondent continues to argue that Petitioners' shares are worth nothing, even though its own expert admitted they were worth $26,000 (after improperly applying a minority discount of 25%). (R. 226, 545). As compared with that valuation, Petitioners' expert, Mr. Koller, valued Petitioners' shares at between $247,520 and $256,700. (R. 77, 116, 446).

At trial, in addition to the two experts, the other witnesses who testified were: for Petitioners, Michelle Cranston, former Human Resources Director of DAPA (R. 66); Louis Proto, the accountant for DAPA at all relevant times; and Petitioner Nathalie Rateau, former

President of DAPA (R. 367, 370); and for Respondent, only Stanley Czock, currently (under the new ownership) the Operation Manager of DAPA, and formerly (when Petitioners owned 34% of DAPA and ran DAPA) the production manager/director of manufacturing operations. (R. 280, 371).

Neither expert performed an audit or a review of DAPA (R. 85-87), nor did Mr. Proto. (R. 149-151, 167, 194-195, 199). Rather, each performed a mere compilation, accepting and using the unaudited financial information supplied to him by DAPA. (R. 77-78, 87, 128-129, 445, 530). Both experts used the Company's net asset value and rejected other possible valuation methods as inappropriate. (R. 84-85, 92-93, 121-123, 229-230, 242, 445, 530).

After trial, the court below issued a written Decision dated August 16, 2007. (R. 10-14). In this Decision, Justice Himelein valued Petitioners' shares of DAPA at $42,840. Petitioners thereafter moved, pursuant to CPLR 4404(b), for an Order making new findings of fact and/or conclusions of law and rendering a new Decision. (R. 552-553). As a result of such motion, the court below issued a second written Decision dated December 4, 2007. (R. 15-18). In the new Decision, Justice Himelein modified his earlier valuation of Petitioners' shares, increasing same to $61,200. (R. 18). The trial court did so in recognition of its agreement with Petitioners' contention that Respondent had submitted no proof of any costs that would be associated with a sale of "hard" assets and thus the court recognized that it should not have applied "a cost of sale discount." (R. 17, 18).

Respondent claims (Brief, p. 9) that the court "realized at oral argument on a later post-trial motion ... that it had in fact misapplied the marketability discount." This claim is unsupported by any Record citation since the Record does not include a transcript of oral argument of such motion. Thus, this claim must be rejected since it is based on material de hors

the Record. Similarly, the first two paragraphs of Respondent's statement of "Facts" (Brief, pp. 2-3) are unsupported by Record citations. This Court should therefore ignore Respondent's false and unsupported claims that Petitioners "thwarted" their attempt to examine the books and records of the company, or that Petitioner Nathalie Rateau and Michelle Cranston are "life partner[s]." Of course, such allegations are entirely irrelevant in any event but Respondent should not be allowed to libel Petitioners, and to do so without any support in the Record whatsoever.

Even with the court's increase in value to $61,200, that amount is still less than 25% of the value found by Petitioners' expert. Conversely, it is only slightly higher than the value found by Respondent's expert ($26,000, but $37,337 before a "lack of marketability" discount and $49,782 before that discount and a "minority" discount). (R. 545). Nevertheless, Petitioners have not appealed (nor cross-appealed) from the Judgment.

Petitioners, having been displaced from ownership in DAPA (and Petitioner Nathalie Rateau having been terminated from her employment with DAPA), simply want to conclude this now nearly three-year-old litigation so as to finally receive the relatively small sum awarded to them. Undoubtedly Respondent -- having postured from the outset that Petitioners shares are worth "ZERO dollars or less," even though contradicted by its own expert -- would have challenged by appeal virtually any value determined by the trial court.

For the following reasons, this Court should affirm the Judgment appealed from in all resects.

## STATEMENT OF FACTS

Petitioners, Nathalie Rateau and her parents, Mireille and Michel Rateau, founded DAPA as a New York Corporation in 1989. (R. 22). At all times, Petitioners collectively owned 34% of the shares of DAPA. (Id.). In 2005, the remaining 66% of the shares of DAPA were acquired by DAPA Technology, SAS from DAPA systemes, SA, as a result of the latter company's French bankruptcy filing. (R. 22-23). Almost immediately thereafter, Petitioner Nathalie Rateau was fired as President (a position she had held for 16 years) and terminated as an employee of DAPA, without any reason offered to her. (R. 25).

The Petition for dissolution was filed on July 13, 2005. (R. 22). As a result of Respondent electing to purchase Petitioners' shares, the valuation date is July 12, 2005 (the day prior to the filing of the Petition), pursuant to Section 1118(b) of the Business Corporation Law.

Respondent produced to Petitioners income statements for the period ending June 30, 2005 and July 31, 2005, which were the months ending just prior to and just after the valuation date. (R. 425-433, 434-442, 482-490, 491-499). These showed total shareholders' equity of $621,828.21 and $595,452.80, respectively. (R. 433, 442, 490, 499; see R. 154, 158-159). Mr. Graff, like Mr. Proto, acknowledged that using the figures for the month ending prior to, and the month ending just after, the valuation date was appropriate. (R. 246).

Not surprisingly, these income statements showed the exact same value for shareholder equity as did similar statements for the same periods that were in the possession of DAPA's accountant. (R. 490, 499). In fact, the Company-produced documents (Exhs. 3 and 4) had "run dates" of "11/15/05" for both (R. 425, 434), which was more than four months after the valuation date.

Petitioners' expert used these dollar amounts as the "Net Book Value" of DAPA on the respective dates. (R. 445, see R. 77-84). He then added to those figures $133,000 for specific equipment. (R. 445, 447). That resulted in a total value, on the adjusted net value approach, of between $728,453 and $754,828 for the entire Company. (R. 445). At trial (as in his Report), he made clear that Petitioners' 34% share of DAPA was equivalent to 34% of these amounts (approximately $728,000 to $755,000), so approximately $247,520-$256,700. (R. 77, 116, 446).

Mr. Koller explained in his valuation report why he used the "net asset value approach" as follows:

> Adjusted net asset value approach is a method that focuses primarily on the balance sheet, which assumes the company's value will be realized by the hypothetical sale of its assets as part of a going concern. It requires restatement of the company's assets and liabilities in order to reflect their fair market values. Application of this method is most useful in determining a fully marketable controlling value. (R. 445).

In addition, he explained in his trial testimony why he added $133,000 for certain specific equipment:

> Q Okay. The equipment you valued, sir, you said the client gave you information and you referred to a 15 page list of equipment?
>
> A I believe it's 15 or 16 pages long, that's correct.
>
> Q And out of that, do you know how much equipment was valued individually?
>
> A The original list had no amounts on it. The books, if you want to call it that, the financial statements, had a little under 500,000 of total cost which was written down to somewhere in the low $50,000 range, but I have no way of knowing as to how much percentage that would consist of in the ten or 15 items that we were able to selectively choose and determine a value for.
>
> Q In fact, does it refresh your recollection that you valued 11 specific items?
>
> A It would be somewhere in that ballpark, yes.

Q And did your client suggest which were the big ticket items, so to speak, or did you make that determination?

A The client was able to provide me with e-Bay, with information from vendors in regards to what values would be on the used market for certain select pieces of equipment, and there are many items on there which could consist of lockers, desks, chairs, computers, etcetera, that it would have been too voluminous under the time constraints to ascertain the value at this moment.

Q And you did value and you made a determination of value based on that information?

A Yes, I did.

Q And that's included in your report as $133,000 approximately?

A That was the additional items, fair market value over book.

(R. 88-89; see, also, Trial Exhibit 6, R. 447). After valuing only certain selected "big-ticket" items of equipment, he then "left the value that sat on the company books for the remaining items." (R. 90; see R. 448-463; see, also, R. 135, et seq. [Ms. Cranston's testimony as to the value of the "big ticket" items]). Ms. Cranston confirmed that the hundreds of other items of equipment, including numerous pieces of furniture, were worth at least the amounts used by Mr. Koller. (R. 142-144).

Respondent's sole admitted exhibit was the valuation report of its expert. Mr. Graff used the same June 30, 2005 balance sheet as did Mr. Koller. (R. 540). He acknowledged that stockholders' equity was $621,828 as of that date. (Id.). However, he also purported to calculate the same figure as of the July 12, 2005 valuation date (R. 545) even though there exists no balance sheet as of that specific date. In doing so, he relied upon a "compilation" prepared by Mr. Proto in March, 2006. (R. 221). However, all that Mr. Proto's compiled balance sheet as of