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PREDICTIX, LLC, ORDER AND FINAL JUDGMENT ON BUSINESS VALUATION PROCEEDING PURSUANT TO O.C.G.A. § 14-11-1011

Elizabeth E. Long
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PREDICTIX, LLC,	)	
	)	
Petitioner,	)	
	)	**Civil Action File No.**
v.	)	**2015CV259346**
	)	
EMRE SENER,	)	
	)	
Respondent.	)	

ORDER AND FINAL JUDGMENT ON BUSINESS VALUATION PROCEEDING PURSUANT TO O.C.G.A. § 14-11-1011

The Court held a dissenter's rights equitable valuation hearing on November 17-18, 2015, pursuant to O.C.G.A. § 14-11-1011(b) to determine the fair value of Respondent Emre Sener's membership interest in Petitioner Predictix, LLC ("Predictix"). Having considered the evidence before the Court, the Court finds as follows:

FINDINGS OF FACT

Predictix was co-founded by Molham Aref and Hatem Sellami in 2005. Predictix provided a retail software application providing supply chain analytics for large retailers such as Harrods, Toys-R-Us, Home Depot, and Walgreens. Predictix's software operated exclusively on a platform owned by LogicBlox, Inc. ("LogicBlox"). Predictix had a license agreement for the use of LogicBlox's platform at a price of $250,000 per month. Mr. Aref, who was also a co-founder of LogicBlox, testified that 90% of LogicBlox's revenues were a result of the license with Predictix. Thus, the evidence showed that the financial fate of both companies was closely linked. At no point since its founding in 2005 has Predictix generated a profit.

By November, 2014, Predictix's financial condition was dire. Predictix had been unable to make payments to LogicBlox under the license agreement. In 2011, Predictix borrowed $2

million from LogicBlox which was secured by all of Predictix's assets. When Predictix's independent auditors, BDO, issued the Consolidated Financial Statements for the years ending December 31, 2012, and 2013, it noted that Predictix's negative working capital and liabilities raise "substantial doubt about the ability of the Company to continue as a going concern." New management members who had been put in place in 2013 were terminated. LogicBlox was threatening to pursue remedies for nonpayment of license fees, including restricting future use of the LogicBlox platform. Silicon Valley Bank revoked a $2 million line of credit. Predictix reduced its U.S. workforce by 20%; other key employees left Predictix. LogicBlox was threatening to foreclose on and sell the assets of Predictix held as security for the $2 million loan. Consultants were threatening to sue for nonpayment of fees. In October, 2014, Predictix's cash account was down to $35,000. Home Depot was expressing concern and was considering pursuing a "plan B." Home Depot had prepaid several millions of dollars for multiple years of service, and had only received a portion of that service. The evidence showed that the money pre-paid had already been spent.

There were attempts to save Predictix. In April, 2014, the Lanier Family Foundation loaned LogicBlox $1 million secured by the $2 million Predictix note and LogicBlox assets. This loan, while not directly benefiting Predictix, allowed Predictix to make only partial payments to LogicBlox for the platform. Predictix's management had sought potential investors. At least 22 potential investors that were approached before 2014 declined to invest. In 2014, following the termination of management, the new management decided to pursue investors interested in a combined investment in Predictix and LogicBlox. The first six potential investors in a combined deal declined.

Finally, a group of investors led by Marlin Equity Partners ("Marlin") were interested.

Marlin hired Habif, Arogeti, & Wynne, LLP ("HAW") who determined that the fair value per unit of Predictix as of September 30, 2014, was $0.1822 per unit. The prospective investors formed a company called LogicBlox-Predictix Holdings, Inc. ("Holding Company") to purchase both Predictix and LogicBlox. Holding Company offered Predictix members $0.1860 per unit. The transaction closed on November 20, 2014. At the time of the transaction, there were 24,492,404 membership units in Predictix, pre-conversion of some debt. The deal extinguished the $2 million debt that Predictix owed LogicBlox and provided working capital. Mr. Aref first received 3,647,570 units in Predictix, LLC in exchange for the note and interest on his loans to Predictix, and then he exchanged his Predictix units for stock in Holding Company. Mr. Sellami was paid in full for his loan to Predictix with interest. He received $0.1860 per unit for his units. He also entered into a consulting agreement with Holding Company in which he received quarterly payments totaling $1.4 million in exchange for a non-compete provision and a requirement to consult as needed.

On January, 2015, after Mr. Sener dissented to the transaction, Predictix offered him a price of $0.1822 for his units which was based on HAW's valuation. Mr. Sener countered that the fair value per unit was $0.5779.

Because the parties could not agree, Predictix sought court intervention under O.C.G.A. § 14-11-1011. At the November, 2015, hearing, in addition to evidence establishing the facts as set forth above, both parties provided expert testimony as to the value of Predictix's membership interest on the date of the transaction. Both experts' reports which describe their methodologies in detail were tendered into evidence. Curtis Kimball, Mr. Sener's expert, concluded that the fair value of Predictix's membership interest was $0.38 per unit. Ian Ratner, Predictix's expert, concluded that the fair value of Predictix's membership interest was $0.1971 per unit.

CONCLUSIONS OF LAW

Under Georgia law, a LLC member may dissent from a plan of merger or conversion and demand payment at fair value for his membership interest plus interest. O.C.G.A. § 14-11-1002. If the dissenter is dissatisfied with the offer of payment from the LLC, and the LLC disagrees with the dissenter's computation of fair value, the LLC is to commence a nonjury equitable valuation proceeding and the Court must determine the fair value of the membership interest and accrued interest. O.C.G.A. § 14-11-1011. The statute defines "fair value" as "the value of the membership interest immediately before the effectuation of the limited liability company action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of such action." O.C.G.A. § 14-11-1001(3). The statute does not require application of a particular methodology and the appropriate methodology must be based on the facts particular to the case at hand. *See Atl. States Const., Inc. v. Beavers*, 169 Ga. App. 584, 586 (1984) (physical precedent only) (citing *In Matter of Endicott Johnson Corp. v. Bade*, 37 N.Y.2d 585, 588 (1975)). The initial burden of proof as to fair value rests with the LLC. *Id.* at 587 (citing *Multitex Corp. v. Dickinson*, 683 F.2d 1325 (11th Cir. 1982)).

The Court has carefully considered all the facts of this case, including the experts' reports and their testimony, and the testimony of Mr. Aref, Mr. Sellami, and John Elmore.

There are cases which support the proposition that in some situations the actual negotiated price may be the best indicator of value. *See, eg., Union Ill. 1995 Inv. Ltd. Partnership v. Union Fin. Group, Ltd,* 847 A.2d 340, 357 (Del Ch. 2003) ("The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair. ") (citations omitted); *Merion Capital LP v. BMC Software, Inc.,* No. CV 8900-

VCG, 2015 WL 6164771, at *14 (Del. Ch. Oct. 21, 2015) judgment entered, (Del. Ch. Nov. 3, 2015) (*citing Huff Fund Investment Partnership v. CKx, Inc.*, 2015 WL 631586 (Del. Feb. 12, 2015), aff'g 2013 WL 5878807 (Del. Ch. Nov. 1, 2013)) ("where the sales process is thorough, effective, and free from any spectre of self-interest or disloyalty, the deal price is a relevant measure of fair value."). Although these cases do not reflect a fact pattern comparable to that in this case, surely a case with facts such as those existing here present a strong case for giving great weight to the actual negotiated price at the time and under the circumstances of the transaction. As set forth in the Findings of Fact, Predictix was in dire financial condition. It was in default under loans, consulting agreements, and service agreements. Lenders, consultants, and customers were threatening legal and other actions. Management had sought new investors for Predictix and not one of 22 potential investors had agreed to invest. When it was determined that Predictix might have more luck with a combined deal of Predictix and LogicBlox, six potential investors passed. Finally, Marlin showed up with an offer of $0.1860 per unit, slightly above the unit value its expert HAW had suggested of $0.1822 per unit. Under these dark facts, it is difficult for a court to conclude that the fair value was virtually twice the negotiated price, as suggested by Mr. Sener's expert. It seems correct, as Mr. Aref testified, "If I could have a half million more, I would have done it… To me it was like the only valuation that mattered was a valuation that someone was actually willing to pay for the company."

In any event, the Court also has the expert opinions to consider. Mr. Kimball, Mr. Sener's expert testified that the fair value of a unit of Predictix was $0.38. He used the DCF method, although Predictix was clearly in dire financial condition and had never produced a profit. He based his analysis, in part, on projected revenues for 2013-2015 made by the management which had failed to perform and had been terminated. And, in fact, these

projections were not met by actual revenues in 2013 or 2014. Mr. Kimball used these projections to forecast overly optimistic revenues for 10 years into the future. This method produced a higher value than the market approach he used. Although he only weighted it at 10%, he did give it some weight.

Mr. Kimball relied more heavily on the guideline merged and acquired company method, which is one of the market approaches. He selected 22 guideline companies which had recently been merged or acquired and that are in a line of business which Mr. Kimball believed to be similar to that of Predictix. Of course, the selection of companies to be used as comparables is quite subjective—very much a matter of judgment. Based on the comparables he chose, Mr. Kimball determined that the last 12 months ("LTM") revenues should be multiplied by 0.8, yielding a value for this method of $12,266,000, a number very close to that arrived at by using the DCF method. It is surprising that the transaction method produced a value so close to that of the DCF method which under the facts here was a very questionable method to use. Mr. Kimball weighted the transaction method resulting at 90%.

Mr. Ratner, Predictix's expert, did not use the DCF method. Instead he used the market approach as had Mr. Kimball. He began the transaction method by selecting 20 transactions involving companies in similar industries. As one might expect, however, he did not select all the same companies used by Mr. Kimball. Again, this selection process is largely a matter of judgment. In addition, he did not use the company with highest value or the company with the lowest value. His analysis produced a multiple of 0.59 to be used against LTM to reach the value. However, in addition to the transaction method, he also used the domestic public guideline company method and the foreign public guideline company method. Mr. Ratner's consideration of the public company methods produced an even lower valuation. Mr. Ratner

then weighted the result of the transaction method at 60% and the result of each of the other two methods at 20% each, again, very much a matter of judgment. With some adjustments later made by him, his final figure per unit rose from $0.1820 to $0.971.[1]

Although the Court finds that the actual price obtained in this transaction to be almost compelling, the Court does not need, or wish, to rely on that fact alone. And so the Court has carefully examined the testimony and reports of the parties' experts. What we have here is a classic case of directly conflicting evidence, and it is the responsibility of the trier of fact to resolve that conflict. "Findings of fact made by a trial court in non-jury cases are given the same weight as a verdict in jury cases, and will not be set aside on appeal unless they are shown to be clearly erroneous or wholly unsupported by the evidence." *Atl. States Const., Inc.*, 169 Ga. App. at 590 (1984) (physical precedent only) (quoting *Hanna Creative Enterprises v. Alterman Foods*, 156 Ga. App. 376, 377 (1980)); O.C.G.A. § 9–11–52).

The Court finds the testimony and opinions of Mr. Ratner to be the more convincing of the two. First, the Court believes that Mr. Kimball's partial use of the DCF method was inappropriate here, considering the historically troubled financial condition of Predictix. Second, the last minute confusion about the identity of Mr. Sener's expert, first Mr. Elmore and then Mr. Kimball, with major differences in their analyses[2] does not create great confidence in the company, Willamette Management Associates, which was actually the one engaged here, or its representatives. Also, Mr. Kimball's failure to consider the publicly traded company method

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[1] Mr. Ratner slightly increased his ultimate opinion as to the fair value before issuing his final conclusion. The bases for these adjustments were fully explained over the course of his testimony and the Court has determined that the adjustments do not impinge of the credibility of Mr. Ratner's final opinion or the reliability of his methodology.

[2] Mr. Kimball replaced his Willamette Management Associates colleague, John Elmore, as Mr. Sener's expert shortly before the hearing. Mr. Elmore had proffered opinions before the substitution that the fair value of Predictix's membership interest was a high as $0.58 per unit, obviously a valuation which even Mr. Kimball rejected.

because, he said, there was a lack of comparable companies is inconsistent with Mr. Ratner's report which did, in fact, find public companies, which he considered comparable. The Court finds that Mr. Ratner's report, as supplemented by his testimony was more thorough, more complete, and more credible than that of Mr. Kimball. He avoided the DCF method, but used three of the market approaches. In the transaction method when judgment was called for in selecting the comparable companies and determining the applicable multiple to apply against LTM, his report and testimony was more convincing than that of Mr. Kimball.

Mr. Kimball has suggested that Mr. Sellami actually received more for his units than the $0.1860 he was paid since he also received a $1.4 million consulting agreement as well. Instead, Mr. Kimball placed a $200,000 to $400,000 value on the agreement even though there was no evidence introduced to support these figures. Although the testimony at the hearing was that he had not been asked to consult often, the 2-year period of the agreement has not run. Moreover, the non-compete and the non-solicitation provisions of the agreement appear to have substantial value since Mr. Sellami was a co-founder and CEO of Predictix and had valuable contacts. In 2015, he was required to change his website because Holding Company believed that it appeared to be in conflict with the non-compete and the non-solicitation provisions of the agreement. On cross examination, Mr. Kimball admitted that he was not an expert on employment contracts.

Mr. Kimball also implied that Mr. Aref may have had a conflict of interest in that he received stock in Holding Company rather than payment for his units. However, this criticism was not developed sufficiently for the Court to consider it seriously.

In conclusion, it is the Court's decision that the fair value of Mr. Sener's units is the price Mr. Ratner testified to, namely, $0.1971 per unit, together with accrued interest thereon as provided by law. The Court finds that there is no just reason for delay in entering a final

judgment. The Court, therefore, directs the entry of a Final Judgment on Count 1 for judicial appraisal under O.C.G.A. § 9-11-54(b).

SO ORDERED this 1 day of November, 2015.

Judge John J. Goger on behalf of
SENIOR JUDGE ELIZABETH LONG
Fulton County Superior Court – Business Case Division
Atlanta Judicial Circuit

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