DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	
Petitioner: **THE QUIZNO'S CORPORATION**, a Colorado corporation Respondents: **WILLIAM S. FAGAN**, *et al.*	▲ COURT USE ONLY ▲ Case Number: **02 CV 2598** **Courtroom 1**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT

THIS MATTER was heard over all or part of 24 days beginning on May 5, 2003 and ending on January 7, 2004. Petitioner was represented by Paul F. Lewis and Chesley Key Culp III of Moye/Giles LLP and by Frederick A. Cohen of Piper Rudnick LLP. Petitioner will be referred to herein as "Quizno's". The Fagan respondents were represented by Jay S. Horowitz of Horowitz, Wake and Forbes. The Sandstone respondents were represented by Jeffrey A. Chase and N. Ried Neurieter of Jacobs Chase Frick Klienhopf & Kelley, P.C. The Sturkie/Crooms respondents were represented by Edward H. Wasmuth of Smith, Gambrell & Russell. These respondent groups may be collectively referred to as "dissenters." Various reporters reported the proceedings; the record of closing arguments on January 6, 2004 and the reading of this order on January 7, 2004 were kept on the digital recording device.

I have considered the testimony of the many witnesses, all of the approximately 165 exhibits admitted into evidence, and the arguments of counsel. I have read and reviewed the applicable case and statute law as well as various law review articles and learned treatises referenced by counsel and the witnesses. I make the following findings of fact and conclusions of law and enter the following orders and judgments.

PRELIMINARY MATTERS

1. It should be clearly understood that all findings of fact and conclusions of law made herein are based on what I find to be a preponderance of the admissible, credible, persuasive evidence.

2. Since I sat as the fact finder on this case, in assessing credibility I have applied the same standards that jurors are required or permitted to apply as set forth in CJI 4th 3:16, including:

> . . . means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of . . . testimony; the consistency or lack of consistency in . . . testimony; . . . motives; whether . . . testimony has been contradicted or supported by other evidence; . . . bias, prejudice or interest, if any; . . . manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

As permitted by CJI 4th 3:16, I have applied these same standards to the testimony of experts

3. There is a question here as to which -- if any -- party has the burden of proof. There has been tension about this issue even since the first day of trial when there was discussion and argument concerning which party got to talk first and in what order the parties should present their evidence. Because this is a civil proceeding, the overall standard of proof is "preponderance of the evidence," as noted above. I am persuaded, based on the arguments of counsel and cases cited, as well as implications in the language of the pertinent statute, that no party to this proceeding has "the" burden of proof, in the traditional sense. As was succinctly stated in *Cavalier Oil Corp. v. Harnett*, 1988 WL 15816, affirmed 564 A.2d 1137 (Del. 1989):

> In an ordinary litigation, the matter might be resolved by applying traditional burden of proof rules. If the Court has found that neither side has adequately established a . . . value . . ., it could rule against the party having the burden of proof. However that approach is not permissible in a [statutory] appraisal. The statute directs that the Court "shall appraise" the fair value of the dissenting shareholder shares.

4. The foregoing is consistent with what occurs in this kind of case: an independent determination by the finder of fact of the "fair value" of the shares of stock held by the dissenting shareholders, starting at zero. Each party has a position to advance, but a court's determination is its own. Thus, while it could be said that each party has a burden of persuasion, it is also accurate to say that no party has a "burden of proof."

STATUTORY FRAMEWORK

5. As previously noted, this is a "dissenters' rights" case and is governed by a statutory scheme found at C.R.S. 1973 §7-13-101, *et seq*. The part of the statutory scheme

dealing with judicial appraisal of shares is found at C.R.S. 1973 §7-13-301. The remedy outlined in the Act is fundamentally equitable.

6. As was stated in *Pueblo Bank Corporation v. Lindoe, Inc.*, 63 P.3d 353 (Colo. 2003):

> . . . The modern dissenters' rights statute exists to protect minority shareholders from oppressive conduct by the majority. . . . The dissenters' rights statute serves as the primary assurance that minority shareholders will be properly compensated for the involuntary loss of their investments. . . . The purpose of the dissenters' rights statute would best be fulfilled through an interpretation of "fair value" which ensures minority shareholders are compensated for what they have lost, that is, *their proportionate ownership interest in a going concern.* (Emphasis supplied.) (Citations omitted.)

7. As noted, I am required to determine "fair value," defined in C.R.S. 1973 §7-13-101(4) as:

> . . . The value of the shares immediately before the effective date of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action except to the extent that exclusion would be inequitable.

8. Approximately a year ago the Colorado Supreme Court gave factfinders guidance in application of the term "fair value." In *Pueblo Bank Corporation v. Lindoe, Inc.*, *supra*, Justice Rice wrote for the majority:

> We hold that the term "fair value," for the purpose of Colorado's dissenters' statute, means the dissenting shareholders' proportionate interest in the corporation valued as a going concern. The trial court must determine the value of the corporate entity and allocate the dissenting shareholder his proportionate ownership interest of that value, without applying a marketability discount at the shareholder level.

9. What does this mean? I would analogize to a movie. The life of the corporation is the entire film from title to end credits. A determination of "fair value". however, requires me to take a still photograph of one instant in the movie here, a snapshot as of December 21, 2001, the date the merger was completed. That still photograph must be from the actual film itself, and not some posed publicity shot.

10. What *Lindoe* did not do is tell me as a factfinder how to go about making my determination of "fair value". Other than minority discount, *Lindoe* does not tell me what factors I may use -- or not use -- in making my determination, and how I should weigh them. It seems clear that I must exercise discretion, weighing all of the conflicting evidence and considering multiple factors in making my decision.

11. In reviewing the case law I found that my dilemma was not a new one. I was struck by an opinion that is now more than 50 years old cited as authority in a case referred to by one of the parties in an earlier brief in this case. That case is *Austin v. City Stores Company (No. 1)*, 89 Pa. D. & C. 57 (Phil. Ct. of Comm. Pleas, 1953). In that opinion Judge Alessandroni wrote, in talking about computation of fair value and the difficulties in computing it:

> [The difficulty] is emphasized by the differences in the testimony of eminent experts in security analysis made during the lengthy proceedings now before the court for determination.
>
> Another pertinent observation deals with the weight of value judgments in matters of this type. No mathematical computation or arithmetic value can be ascribed to any particular element but when added to others may properly be said to constitute the fair value of any given security. Hence, we must consider all the essential elements that might affect the security at issue and arrive at a conclusion based on such consideration.
>
> Some of the factors that must be considered in rendering an intelligent decision are: asset value; market value; market prices of comparable companies; market price and earnings ratio; management and its policies; earnings; dividends; valuation of assets; reserves for various contingencies; tax liabilities; future earnings; predictions of future business events, and et cetera. The list seems interminable and yet all factors must be considered and given their proper weight in order that a just result might be attained.
>
> We must define the term "fair value" in its present context, so that we may know what it is that we seek. That is to say, what is to be valued? Generally speaking the dissenting shareholders being forced to give up his share of a going concern.

See also O'Connor Appeal, 304 A.2d 394 (Pa. 1973).

12. The above discussion of "essential elements" that should be considered to establish "fair value" is consistent with Colorado law. In *Pueblo Bank Corporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988), Judge Metzger wrote, for the court:

> . . . A proper determination of fair value depends upon the particular circumstances of the corporation involved. The court must consider all relevant value factors including market value, investment or earnings value, and net asset value. [Citations omitted.] A judicial determination of fair value is not susceptible to analysis by any precise mathematical formula. [Citation omitted.] Certain approaches to valuation may not present a reliable measure of value in a particular case. [Citation omitted.] The weight to be assigned to each value factor depends upon the facts and circumstances of each case, and the court may properly decide to assign little or no weight to a factor it determines to be unreliable. [Citation omitted.]

ANALYSIS AND DETERMINATION OF VALUE

13. As noted in Quizno's Position Statement, valuation is an art, not a science. I start my analysis by saying that I am not going to outline any specific calculations I made to arrive at my results. Nor am I going to necessarily reference specific exhibits or testimony. With a tip of my hat to the attorneys for Sandstone and Sturkie/Crooms groups, I do not need to do so. My findings and conclusions, as noted above, are based on my review of all the evidence properly submitted in this case, including the different methodologies and different assumptions of the experts, except as noted below. I have also considered and taken into account my determination of the credibility of the witnesses and the weight to be given all evidence submitted at trial. *See M Life Insurance Company v. Sapers & Wallack Insurance Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

14. The *Lindoe* court remarked that case before it was a "classic battle of experts." To quote Al Jolson, "They ain't seen nothin' yet." As was discussed during closing arguments, while there is something authority -- albeit thin -- that suggest a judge in my situation should just decide which expert's opinion he likes the best and go with it, I reject that approach as antithetical to what I am supposed to do here.

15. Moreover, and more importantly, in this case I find flaws in all of the experts' opinions, to a greater or lesser extent. As a consequence, even if I wanted to just accept one expert's analysis, I could not do so in good conscience. In any event, the credibility of expert witnesses in this type of proceeding is for the factfinder to determine. *W.C.M. Industries, Inc. v. Trustees of Wilson*, 948 P.2d 36 (Colo. App. 1997); *M Life Insurance Company v. Sapers & Wallack Insurance Agency, Inc.*, *supra*.

16. This leads to an examination of the opinions of the three principal experts:

A. ***Mr. Prokupek***. In his closing argument, counsel for Sandstone used the term "conflicted and contingent" to describe the relationship between Quizno's, Tucker Anthony and Mr. Prokupek. I concur with that description, although I might have used the word "incestuous." Whatever

patina of regularity might have attached to the $8.50 per share valuation is completely obviated by the bias and motivation demonstrated in the formulating of the Tucker Anthony valuation for Quizno's -- or more accurately for the Schadens who were pursuing this cash out merger. Similar questions arise as to the actions and activities of Mr. Bromberg and the Special Committee. For the most part, I found Mr. Prokupek's testimony, and the evidence of Tucker Anthony's valuation, not credible.

B. ***Mr. Hoffman and Mr. Cordes***. Having said that, I also find substantial flaws in the analysis of both Mr. Hoffman and Mr. Cordes, especially their selection of "comparable companies," (which I do not believe were comparable), and their computation of EBITDA multiples, which I find to have been too high. While generally I found the testimony of Mr. Hoffman and Mr. Cordes to be more persuasive and credible than that of Mr. Prokupek, I do not accept either of their opinions without reservation either.

17. I also have not included in my analysis any factor for the Amaresco, Levine Leichtman or Tucker Anthony loans or debt in arriving at my conclusions on value. While those loans were technically made to Quizno's as a corporation, they functionally were personal loans to Richard Schaden and his group to fund this cash out merger. They also had the effect of artificially and inequitably depressing the potential value of Quizno's stock in the time period before the effective merger date.

18. I have placed substantial emphasis on the pre-merger "kick ass" growth anticipated for Quizno's, at least anticipated by the Schadens. The actual number of stores opened as of December 21, 2001, the projected cash generating engine of AFD, the decision to advertise aggressively, including advertising on the Super Bowl broadcast -- all these decisions were made or at least discussed at a high level before December 21, 2001. What occurred thereafter simply confirms these understood but undisclosed growth factors.

19. There may be a question of whether I have considered post-merger growth in making my decision. In the first place, I believe I can consider how Quizno's grew after the merger in evaluating conflicting testimony and particularly in determining the credibility of witnesses -- or lack of it, in Mr. Schaden's case. In any event, post-merger information can be considered to verify or disprove projections of value or growth. *See, Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357 (Del. 1997); *Hogle v. Zinetics Medical, Inc.*, 63 P.3d 80 (Utah 2002).

20. Having considered all of the evidence, having weighed that evidence where it is in conflict and having applied the proper evidentiary standard as well as relying on that evidence which I find most persuasive and credible, I find that the value of Quizno's as a going concern as of December 21, 2001 was **$104,000,000**. Assuming 3.2 million shares of stock, the "fair value" of each share on the date of the merger was thus **$32.50**. To paraphrase counsel for the Sturkie/Crooms group, that is where I find reality to be.

FEES AND COSTS

21. I next turn to questions of fees and costs as contemplated by C.R.S. 1973 §7-113-302. That statute says that I "shall" assess costs against the corporation in a case such as this. I specifically find that none of the dissenters acted arbitrarily, vexatiously or not in good faith so as to bar them from recouping their costs.

22. With regard to attorney fees, I specifically find that Quizno's acted in bad faith in its insistence that $8.50 a share was "fair value" under all the facts and circumstances. I here distinguish, as suggested by counsel for the Fagan group between Quizno's proposing $8.50 as the buy-out price for the legitimate purpose of effectuating the merger and using that number to calculate fair value in a dissenters' rights case. I have previously commented on the relationship between Tucker Anthony, Mr. Prokupek and the Schadens. The "true status" of Quizno's as a company on the verge of a growth explosion was obviously known to the Schadens, but they told other shareholders little, if anything, of substance concerning that potential growth explosion: they did not tell the other shareholders the actual number of stores opened, they were not candid about their plans for AFD, they were not forthcoming with regard to their plans for more aggressive advertising, including advertising on the Super Bowl broadcast, etc. As an example, during his cross examination Mr. Meyers, Quizno's corporate counsel, admitted that Quizno's had the ability on the day before the merger, the day of the merger and the day after the merger to determine *exactly* how many stores were actually open. The evidence demonstrates a great disparity between that "real" number and the "projected" number contained in Quizno's corporate documents and referenced in the proxy statement. I find the proxy statement to have been an exercise in obfuscation.

23. Taken as a whole, and based on a preponderance of the credible, admissible, persuasive evidence, Quizno's actions were not in good faith, and the dissenters are thus entitled to attorney fees.

MISCELLANEOUS MATTERS

24. With regard to pleadings on attorney's fees and costs, dissenters shall have 45 days from the date of this order to submit a bill of costs and a statement for attorney fees. Quizno's shall have 30 days thereafter to respond. Dissenters will have 20 days thereafter to reply. If any party wishes to have a hearing on any issue of attorney's fees or costs they should make that request in their submissions.

25. Any hearings on such issues will occur in Courtroom 11, where I am moving on January 13, 2004. All further pleadings in this case should continue to use the same caption, but all courtroom copies should be filed in Courtroom 11. Any telephone inquiries made after January 13, 2004 should be directed to Courtroom 11, 720-865-9065.

26. Counsel are granted an extension of time until 30 days after I enter an order and judgment regarding attorney fees and costs for the purpose of filing post-trial motions.

27. Counsel for dissenters shall prepare and submit a proposed form order for entry of judgment. Such order for entry of judgment shall be submitted within 30 days from the date of this order, and shall be approved as to form by counsel for all parties. Such order shall include interest as permitted by law, as well as attorney's fees and costs.

28. With regard to exhibits, it is **ORDERED** that all exhibits are released to trial counsel, who shall pick them up no later than *January 12, 2004*. Exhibits shall be maintained as follows: Each party shall keep its admitted exhibits and offered-but-not admitted exhibits. All exhibits shall be maintained in their present condition; however, oversized exhibits may be photographed or reduced to 8½ x 11 inch size. All exhibits shall be delivered to the clerk, the transcriber or any retained court reporter at their request and shall be available for inspection by any attorney of record. Exhibits may be disposed of 120 days after entry of judgment unless an appeal is filed or other post-trial relief is granted which affects the exhibits.

29. I want to specifically note that my findings regarding Quizno's actions in this case are not in any way directed to Quizno's counsel. I want to make it clear that all attorneys in this case have acted professionally and appropriate in the zealous representation of their clients. This was a quality trial presented by quality lawyers. I apologize for any outbursts of temper or inappropriate levity that I may have injected into the case or any delays occasioned by my schedule.

30. Finally, I want to express on the record and in this order my undying thanks to two people who had as much to do as anyone with getting this trial done in a reasonable way and with keeping the train on the tracks, Ms. Eileen Healy and Ms. Mary Sherwood. Ms. Healy and Ms. Sherwood were legal assistants for competing counsel in this case. However, after the trial began, I dragooned them into keeping a running list of admitted exhibits, referenced exhibits and offered-but-not-admitted exhibits, which they did with perfect cooperation. Each day the lawyers and I were given an up-to-date list of what exhibits had been admitted, referenced and/or not admitted. After the presentation of evidence was concluded, Ms. Healy and Ms. Sherwood put together exhibits notebooks for my use which consisted of only of the admitted trial exhibits. This made my review of this matter and my preparation of this order much, much easier.

Done this 8th day of January, 2004, *nunc pro tunc* January 7, 2004.

BY THE COURT:

Robert L. McGahey, Jr.
District Court Judge

cc: All counsel of record (by FAX and regular mail).