To Be Argued By:
JOSEPH P. SULLIVAN

New York County Clerk's Index Nos. 110474/07 and 110445/07

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

Index No.: 110474/07

Application of ROBERT T. GIAIMO, individually and as Co-Executor of the Will of EDWARD P. GIAIMO, JR., Deceased, for the Judicial Dissolution of EGA ASSOCIATES, INC.,

Petitioner-Respondent/Cross-Appellant,

—against—

JANET GIAIMO VITALE,

Respondent-Appellant/Cross-Respondent.

Index No.: 110445/07

Application of ROBERT T. GIAIMO, individually and as Co-Executor of the Will of EDWARD P. GIAIMO, JR., Deceased, for the Judicial Dissolution of FIRST AVENUE VILLAGE CORP.,

Petitioner-Respondent/Cross-Appellant,

—against—

JANET GIAIMO VITALE,

Respondent-Appellant/Cross-Respondent.

BRIEF FOR RESPONDENT-APPELLANT/CROSS-RESPONDENT

JOSEPH P. SULLIVAN, ESQ.
MITCHELL J. GELLER, ESQ.
ROBERT J. BURNS, ESQ.
HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, New York 10019
(212) 513-3200
mitchell.geller@hklaw.com

Attorneys for Respondent-Appellant/ Cross-Respondent Janet Giaimo Vitale

REPRODUCED ON RECYCLED PAPER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

QUESTIONS PRESENTED 1

NATURE OF THE CASE 3

A. The Supreme Court's Failure to Apply A Discount For Lack Of Marketability 4

B. The Supreme Court's Failure To Follow The Valuation Principles In *Wechsler v. Wechsler* 7

C. The Supreme Court's Improper Valuation Of EGA's And FAV's Contingent "Choses In Action" Claims Against The Estate Of Their Former President And Co-Owner 9

STATEMENT OF FACTS 10

A. The Parties 10

B. EGA 10

C. FAV 11

D. Management of EGA And FAV Up To March 26, 2007 11

E. Ownership Of EGA And FAV As Of The July 31, 2007 Valuation Date 12

F. The Petitions In The Dissolution Proceedings And Janet Vitale's Election To Purchase Robert Giaimo's Shares in EGA and FAV 13

G. The State Of The Real Estate Market As Of July 31, 2007 13

H. The Estate Tax Return Of The Edward Jr. Estate 14

I. Prior Proceedings 15

(1) Appointment of Special Referee to Hear And Report 15

(2) The Court's Denial of Petitioner's Motions To Compel Respondent To Post A Bond 15

(3) The Hearing On Fair Value Of EGA's And FAV's Shares 15

(4) Special Referee's Report and Recommendations 16

(5) Decision/Order Of The Supreme Court On Motions To Confirm/Reject The Report 16

POINT I THE STANDARD OF REVIEW ON THE SUPREME COURT'S DETERMINATION OF A MOTION TO CONFIRM OR REJECT A SPECIAL REFEREE'S REPORT 17

POINT II KEY ISSUES IN VALUATION PROCEEDINGS UNDER BCL § 1118 19

A. Fair Value Under BCL § 1118 19

(1) Fair Value Is Identical To Fair Market Value Except For The Lack Of A Minority Interest Discount 20

(2) Expert Opinion 21

(3) Discount For Lack of Marketability ("DLOM") 22

(4) Deduction For Built-In Capital Gains Tax Liability 22

(5) Neither Party Has The Burden Of Proof On The "Fair Value" Of The Shares 23

(6) The Court Cannot Consider Events Subsequent To The Valuation Date Of July 31, 2007 23

(7) The Court Must Approve the Terms and Conditions Of Respondent's Purchase Of Petitioner's Shares 23

POINT III THE SUPREME COURT ERRED BY FAILING TO INCLUDE A DISCOUNT FOR LACK OF MARKETABILITY IN VALUING THE SHARES OF EGA AND FAV 24

A. The Referee Did Not Make A Factual Finding That The EGA and FAV Shares Are "Marketable" 25

B. Respondent's and Petitioner's Business Valuation Experts Opined That The EGA and FAV Shares Were Not "Marketable" And Could Not Be Readily Liquidated For Cash 28

C. The Supreme Court's Failure To Include A DLOM Violates Well Settled Principles Of "Fair Value" Valuation And The Nature Of A Close Corporation 31

D. This Court Should Apply A 20% DLOM In Valuing The EGA and FAV Shares 34

(1) A 20% DLOM Is Well Within the Range Of DLOMS Accepted By Appellate Courts 35

(2) The Record Amply Demonstrates That A 20% DLOM Is Reasonable And Warranted 35

(a) Restricted Stock Studies 36

(b) Acquisition Discounts 37

(c) Merger Arbitrage 38

(d) The "Build-Up" Method 38

(e) Mr. Baliban's DLOM Conclusion 39

POINT IV THE COURT BELOW FAILED TO FOLLOW *WECHSLER* AND DEDUCT 100% OF THE BUILT-IN CAPITAL GAINS TAX LIABILITY IN VALUING THE STOCK OF EGA AND FAV 41

A. *Wechsler* Requires A Deduction Of 100% Of The BIG 44

B. In Adopting The "Present Value" Approach To the BIG, The Supreme Court Erroneously Treated The Respondent As The "Willing Purchaser" 47

C. The Supreme Court's Acceptance of the Referee's Finding That There Are No Readily Available Substitutes "Outside The Corporate Wrapper" Is Not Supported By The Evidence 49

POINT V THE SUPREME COURT INCORRECTLY DETERMINED THE VALUE OF EGA'S AND FAV'S "CHOSES IN ACTION" 54

POINT VI THIS COURT SHOULD DIRECT RESTITUTION OF MONIES RESPONDENT PAID TO PETITIONER BY REASON OF THE SUPREME COURT'S OVERVALUATION OF THE "FAIR VALUE" OF EGA'S AND FAV'S SHARES 57

CONCLUSION 61

TABLE OF AUTHORITIES

Page(s)

CASES

5303 Realty Corp. v. O&Y Equity Corp.,
64 N.Y.2d 313 (1984) 31, n.12

Amodio v. Amodio,
70 N.Y.2d 5 (1987) 46, 46, n.21

Borenstein v. Rochel Properties, Inc.,
216 A.D.2d 34 (1st Dep't 1995) 18

Capizola v. Vantage Int'l, Ltd.,
2 A.D.3d 843 (2d Dep't 2003) 19, 53

Cawley v. SCM Corp.,
72 N.Y.2d 465 (1988) 23

Chock Full O'Nuts Corp. v. NRP LLC I,
47 A.D.3d 189 (1st Dep't 2007) 19, 53, 58

Cooper v. Cooper,
84 A.D.3d 854 (2d Dep't 2011) 35

Eisenberg v. C.I.R.,
155 F.3d 50 (2d Cir. 1998) 23

Estate of Dunn v. C.I.R.,
301 F.3d 339 (5th Cir. 2002) 44, 45, 46

Estate of Jelke v. C.I.R.,
507 F.3d 1317 (11th Cir. 2007), *cert. denied*, 555 U.S. 826 (2008) 44-45, 46

Felt v. Olson,
74 A.D.2d 722, (4th Dep't), *aff'd*, 51 N.Y.2d 977 (1980) 21-22

Friedman v. Beway Realty Corp.,
87 N.Y.2d 161 (1995) .... passim

Greek Peak, Inc. v. Armstrong,
265 A.D.2d 760 (3d Dep't 1999) 34

Hall v. King,
177 Misc. 2d 126 (Sup. Ct. New York Co. 1998), *aff'd*, 265 A.D.2d 244 (1st Dep't 1999) 22, 35

Hall v. King,
265 A.D.2d 244 (1st Dep't 1999) 22, 32, n.15, 35, 41

Jacynicz v. 73 Seaman Assocs.,
270 A.D.2d 83 (1st Dep't 2000) 18

Jossel v. Filicori,
235 A.D.2d 205 (1st Dep't 1997) 19, 53

Lehman v. Piontkowski,
203 A.D.2d 257 (2d Dep't 1994) 34, 35

Matter of Blake v. Blake Agency, Inc.,
107 A.D.2d 139 (2d Dep't 1985) .... passim

Matter of Cohen,
168 Misc.2d 91 (Sup. Ct. New York Co. 1995), *aff'd*, 240 A.D.2d 225 (1st Dep't 1997) 23

Matter of DeAngelis v. AVC Services, Inc.,
57 A.D.3d 989 (2d Dep't 2008) 22

Matter of Funplex, Inc.,
252 A.D.2d 923 (3d Dep't 1998) 35

Matter of Karl,
266 A.D.2d 392 (2d Dep't 1999) 56, n.30

Matter of Pace Photographers, Ltd.,
71 N.Y.2d 737 (1988) 46

Matter of Penepent Corp., Inc.,
96 N.Y.2d 186 (2001) 20

Matter of Rateau,
59 A.D.3d 1037 (4th Dep't 2009) 18, 34, 46

Matter of Seagroatt Floral Co.,
78 N.Y.2d 439 (1991) .... passim

Matter of Vetco, Inc.,
292 A.D.2d 391 (2d Dep't 2002) 35

Murphy v. U.S. Dredging Corp.,
74 A.D.3d 815 (2d Dep't 2010), *lv. to appeal denied*, 18 N.Y.3d 953 (2012) .... passim

Murphy v. U.S. Dredging Corp.,
Index No. 2640/06, 2008 WL 2401230 (Sup. Ct. Nassau Co. May 19, 2008), reversed in part, 74 A.D.3d 815 (2d Dep't 2010) 33

Northern Westchester Professional Park Associates v. Town of Bedford,
60 N.Y.2d 492 (1983) 18, 58

Palmer v. WSC Riverside Drive, LLC,
61 A.D.3d 589 (1st Dep't 2009) 18

Polipo v. Sanders,
245 A.D.2d 2 (1st Dep't 1997) 58

Popowich v. Korman,
73 A.D.3d 515 (1st Dep't 2010) 59

Raskin v. Walter Karl, Inc.,
129 A.D.2d 642 (2d Dep't 1987) 22, 33, 34

Sage Realty Corp. v. Proskauer Rose LLP,
288 A.D.2d 14 (1st Dep't 2001) 18

Shultis v. Woodstock Land Dev. Assocs.,
195 A.D.2d 677 (3d Dep't 1993) 18

Trefoil Capital Corp. v. Creed Taylor, Inc.,
121 A.D.2d 874 (1st Dep't 1986) 59

Wechsler v. Wechsler,
58 A.D.3d 62 (1st Dep't 2008), *app. dism.*, 12 N.Y.3d 883 (2009) .... passim

Young v. Scully,
214 A.D.2d 905 (3d Dep't 1995) 59

STATUTES AND REGULATIONS

Business Corporation Law ("BCL") § 1118 .... passim

BCL § 1118(a) 19, 23, 54, n.29

BCL § 1118(b) 10, n.3, 23

BCL § 623(h) 32

CPLR § 4403 17

CPLR § 5523 58

SCPA § 1811(1) 56, n.30

Treasury Reg. § 20.2031-1(b), 20 C.F.R. §20.2031-1(b) 21, n.6

OTHER AUTHORITIES

Black's Law Dictionary, p. 930 (6th ed. 1990) 28

1A *Fletcher Cyc. Corp.* § 70.10 (2012) 30

Shannon P. Pratt, *Valuing a Business* (5th ed. 2008) 30, 33, n.16, 36

Respondent Janet Giaimo Vitale ("Respondent" or "Janet Vitale") submits this brief in support of her appeal from the Judgments entered on August 26, 2011 and September 13, 2011 in the proceedings on the "fair value" of the shares of EGA Associates, Inc. ("EGA") and First Ave. Village Corp. ("FAV"), respectively, held by Petitioner Robert T. Giaimo ("Petitioner" or "Robert Giaimo"). (A.10-15; A.60-64). The Judgments are based on the Decision/Order, dated April 25, 2011, of the Honorable Marcy Friedman, J.S.C., entered on April 26, 2011. (A.65-92).

QUESTIONS PRESENTED

(1) In determining the "fair value" of the shares of closely held C corporations, not publicly traded, on a net asset value basis under Business Corporation Law ("BCL") § 1118, which corporations, in addition to being closely held, have a troubled history, substantial undetermined tax liabilities, and are required to file amended federal and state income tax returns as a result of the substantial underreporting of income by prior management for many years, is the court required to take into account any and all risks associated with the illiquidity of such shares and apply a discount for lack of marketability because such shares cannot be readily liquidated for cash?

The Supreme Court answered this question in the negative. (A.71-74)

(2) In determining the "fair value" of the shares of closely held C corporations on a net asset value basis under BCL § 1118, where the primary assets

of such C corporations are real properties that have appreciated substantially in value and have a nominal cost basis for income tax purposes, is the court required to reduce the value of the closely held corporations' assets by the full amount (100% or dollar for dollar) of the embedded or built-in capital gains taxes that would be payable as a result of the assumed sale of such assets?

The Supreme Court answered this question in the negative. (A.74-76)

(3) In determining the "fair value" of the shares of closely held C corporations on a net asset value basis under BCL § 1118, can the court value at their full value (as if they were cash) contingent "choses in action" claims of these corporations against the estate of the former president and co-owner arising from his diversion of monies from such corporations: (a) where the values given to these "choses in action" on a six-year basis prior to the Valuation Date failed to credit the full amount paid by such estate pursuant to the Disclosure Statement of the Co-Executors in the Federal Estate Tax Return to the closely held corporations, regardless of the statute of limitations; and (b) where the estate owes in excess of $12 million of federal and New York State estate taxes and administrative claims have priority over the closely held corporations' "choses in action" claims?

The Supreme Court answered this question in the affirmative. (A.80-81)

NATURE OF THE CASE

These appeals concern the valuation of an interest in the shares of two closely held C corporations where a shareholder, pursuant to BCL §§ 1104(a) and 1104-a, commenced proceedings to dissolve the corporations and the other shareholder elected, pursuant to BCL § 1118, to purchase the shares of that shareholder at "fair value." The main issue on the consolidated appeals and cross-appeals is whether the Supreme Court erred in valuing Petitioner's 49.9975% interest and 49.70% interest, respectively, in EGA and FAV.[1]

BCL § 1118 does not define the term "fair value." The ultimate objective in calculating "fair value" in a BCL § 1118 proceeding "is to determine what a willing purchaser in an arm's length transaction would offer for petitioners' interest in the company as an operating business." *Matter of Seagroatt Floral Co.*, 78 N.Y.2d 439, 445 (1991) ("*Seagroatt*"). The "willing purchaser" under "fair value" is hypothetical, under no compulsion to buy, and reasonably knowledgeable of the relevant facts regarding the underlying assets and shares of EGA and FAV as well as the general market for such assets and shares.

Central to the issue of "fair value" is the application of legal and business valuation principles to the underlying assets and shares of EGA and FAV. EGA's and FAV's primary assets are eighteen and one-half (18 1/2) "old law tenement

[1] The Supreme Court referred the issue of the "fair value" of the EGA and FAV shares to a Special Referee to "hear and report with recommendations." (A.67; A.137).

buildings" of six stories or less that were purchased decades ago, have substantially appreciated in value and have a nominal cost basis for income tax purposes.

Although the Supreme Court recognized the applicable standard in determining "fair value" under BCL § 1118, it made fundamental errors of law and fact in applying this standard, which resulted in the overvaluation of Petitioner's EGA and FAV shares by millions of dollars.

A. The Supreme Court's Failure to Apply A Discount For Lack Of Marketability

First, the Supreme Court erred, as a matter of law, in failing to apply a discount for lack of marketability ("DLOM") in valuing the EGA and FAV shares. (*See* Point III, *infra,* at pp. 24-41). In *Seagroatt,* 78 N.Y.2d at 445-446, the Court of Appeals recognized that "shareholders in closely held corporations, as contrasted with shareholders in public companies, are unlikely to find prospective buyers for their shares" and that "whatever the method of valuing an interest in such an enterprise, it *should include consideration of any risk associated with illiquidity of the shares."* (Emphasis added).

Furthermore, in *Friedman v. Beway Realty Corp.,* 87 N.Y.2d 161, 165 (1995) ("*Beway*"), the Court held that New York law requires a DLOM in valuing the stock of a close corporation whose primary assets were real estate, stating that the DLOM is a "discount to reflect the illiquidity of petitioners' shares, i.e., that a *potential investor would pay less for shares of a close corporation because they*

could not readily be liquidated for cash." (Emphasis added). *See also Murphy v. U.S. Dredging Corp.*, 74 A.D.3d 815, 817-819 (2d Dep't 2010) ("*Murphy*"), *lv. to appeal denied*, 18 N.Y.3d 953 (2012) (Appellate Division, in a BCL § 1118 case involving the shares of a closely held real estate holding company, held that "the Supreme Court properly applied a lack of marketability discount of 15%, on the *ground that the Corporation was a close corporation.*" [Emphasis added]).

Justice Friedman's exclusion of a DLOM based on a "finding of the marketability of the corporations' shares" (A.73-74) is contrary to the nature and character of a closely held corporation, violates well settled "fair value" valuation principles mandated in *Seagroatt*, *Beway* and other controlling authority, and is contrary to the evidence adduced at the fair value hearing.

The Referee did not make a factual finding that the EGA and FAV shares are "marketable" or that they could be readily liquidated for cash. Nor could the Referee make such a finding because no evidence was presented at the hearing to support such a "finding." In fact, the evidence was to the contrary. The record amply demonstrates that the shares of EGA and FAV, two family-owned closely held corporations, are not "marketable" because they do not trade on any publicly traded exchange and cannot be readily liquidated for cash.

Justice Friedman erroneously applied the Referee's factual finding concerning the limited "availability of similar properties [to EGA's and FAV's

properties] on the open market" to exclude a DLOM. (A.73). However, this factual finding relates solely to the enormous built-in capital gains tax liability (the "BIG") that would be triggered upon a sale of any of the underlying real properties of EGA and FAV and has no bearing whatsoever on the "illiquidity" of EGA's and FAV's shares. (A.302-303, ¶¶ 153, 155). The Supreme Court's application of this factual finding to the DLOM misconstrues the BIG -- an adjustment to the net asset value of the underlying *assets* -- and the DLOM -- a discount to reflect the "illiquidity" of the *shares* of EGA and FAV, not the liquidity or marketability of the underlying assets of these closely held corporations. Thus, the Supreme Court's exclusion of the DLOM based on the "marketability of the corporations' shares" constitutes reversible error.

Moreover, in addition to the general legal and business reasons requiring a DLOM in the valuation of the shares of *any* closely held corporation, the "willing purchaser" would demand a DLOM due to the particular facts relating to the troubled history of EGA and FAV. Notably, Justice Friedman held (A.86)

> [t]he court notes that prior to issuance of the TRO on August 3, 2007, and prior to respondent Vitale's assumption of the management of EGA and FAV in April 2007, *these corporations were run by petitioner's and respondent's now deceased brother, Edward Giaimo, Jr. It is undisputed that he ran the corporations without respect for corporate formalities, and committed serious financial improprieties, if not crimes, including maintaining two sets of books for each of the corporations* – one false and one showing actual assets;

> *skimmed rents, which were not reflected in the false books, from the properties owned by the corporations; accumulated over 10 million dollars in cash* from the skimming which was hidden in bags in his or his mother's homes; and *filed false federal, state, and city tax returns.* (Emphasis added).

It cannot be disputed that the "willing purchaser" would consider these very "serious financial improprieties, if not crimes," in the price he or she "in an arm's length transaction would offer for petitioner's interest" in EGA and FAV. Undoubtedly, the "willing purchaser" would be rightly concerned about (a) EGA's and FAV's substantial underreporting of income for years; (b) the amended tax returns EGA and FAV were required to file as a result of Edward P. Giaimo, Jr.'s "skimming" of millions of dollars from EGA and FAV; (c) the "two sets of books;" and (d) the lack of internal financial controls.[2] Yet, the Supreme Court ignored its own critical conclusions and the controlling law on "fair value" under BCL § 1118 when it excluded a DLOM, thereby impermissibly treating the EGA and FAV shares the same as cash.

B. The Supreme Court's Failure To Follow The Valuation Principles In *Wechsler v. Wechsler*

Second, the Supreme Court committed legal and factual errors by not following *Wechsler v. Wechsler,* 58 A.D.3d 62, 65 (1st Dep't 2008), *app. dism.,* 12 N.Y.3d 883 (2009) ("*Wechsler*"), in determining the deduction for the enormous

[2] Significantly, in *Beway* and *Murphy*, a DLOM was applied to value the stock of closely held real estate holding companies, just like EGA and FAV, which had no issue of "serious financial improprieties, if not crimes," underreporting of income or amended tax returns.

embedded or built-in capital gains tax liabilities (the "BIG") that would be triggered on the assumed sale of any of the underlying real properties of EGA and FAV. As in *Wechsler*, this Court is required to determine the extent to which the value on a "net asset basis" of EGA and FAV, two real estate holding companies, should be reduced to reflect the federal and state capital gains taxes (BIG) embedded in the real estate owned by EGA and FAV that has substantially appreciated in value. Instead of following *Wechsler*, the Supreme Court applied the "present value" approach of *Murphy* in deducting the BIG. (A.74-76). (*See* Point IV, *infra,* at pp. 41-53).

Moreover, the Supreme Court's determination (A.75), based on the Referee's findings, that there are no "readily available substitutes" for the EGA and FAV real properties "out of the corporate wrapper" and that "the hypothetical buyer cannot avoid the BIG by purchasing the properties on the open market rather than through the 'corporate wrapper,'" is not supported by the evidence. (*See* Point IV, *infra,* at pp. 49-53). The 100% (dollar for dollar) BIG deduction also is required as a matter of valuation principles if, as the evidence showed and Respondent's valuation experts opined, there were readily available properties similar to the EGA and FAV real properties "outside the corporate wrapper" that the hypothetical "willing purchaser" could purchase. (*See* Point IV, *infra,* at pp. 49-53).

C. The Supreme Court's Improper Valuation Of EGA's And FAV's Contingent "Choses In Action" Claims Against The Estate Of Their Former President And Co-Owner

Third, the Supreme Court improperly valued EGA's and FAV's contingent "choses in action" claims against Edward P. Giaimo, Jr. ("Edward Jr."), their former president and co-owner, at their full value. (*See* Point V, *infra*, at pp. 54-57). These "choses in action" arise from the conceded "skimming" of millions of dollars by Edward Jr. from EGA's and FAV's rental income. However, the hypothetical "willing purchaser" would not value these contingent "choses in action" claims at their full value ($5,688,635), and would not be willing to place approximately $2.8 million in escrow pending the determination of these claims and collection, which could take years, if collectable at all, which appears doubtful.

Moreover, the Supreme Court failed to reduce the "choses in action" by the actual amount the Estate of Edward P. Giaimo, Jr. (the "Edward Jr. Estate") paid to EGA and FAV. The Disclosure Statement of Co-Executors (Petitioner and Respondent) annexed to the Estate Tax Return (A.626-628; A.3839) allocated $4,294,931 of discovered cash to EGA and $1,164,456 to FAV, regardless of any statute of limitations that could apply to EGA's and FAV's "choses in action" claims against the Edward Jr. Estate. The Supreme Court, however, accepted the Referee's determination that the "choses in action" claims should be reduced only by the amount of discovered cash attributable to the six-year period prior to the

July 31, 2007 Valuation Date even though the actual payment made by the Estate to EGA and FAV from the discovered cash was millions of dollars greater than the sum credited and not limited to the six-year period. (A.80-81). (*See* Point V, *infra*, at pp. 54-57).

STATEMENT OF FACTS

A. The Parties

Petitioner Robert Giaimo, as of the July 31, 2007 Valuation Date,[3] was a director and shareholder of EGA and FAV and Co-Executor of the Edward Jr. Estate. Respondent Janet Vitale, as of July 31, 2007, was the acting President, a director and shareholder of EGA and FAV and Co-Executor of the Edward Jr. Estate. By reason of Respondent's payments on September 22, 2011 in the amount of $33,520,597.90 and $15,091,840.38, respectively, to satisfy the EGA and FAV Judgments, Respondent became the sole shareholder of EGA and FAV and Petitioner resigned as a director of EGA and FAV on that same date.

B. EGA

EGA is a New York closely held C corporation incorporated in 1961, the business of which is the ownership, operation and management of fourteen apartment buildings in New York City. (A.4157; A.4983; A.5001; A.4955). Each

[3] The Valuation Date under Business Corporation Law § 1118(b) is "as of the day prior to the date on which such petition [for dissolution] was filed." Accordingly, the Valuation Date is July 31, 2007, the day prior to the filing of the Petitions for the dissolution of EGA and FAV. (A.12; A.62).

of these buildings, which are six stories or less, is a walk-up apartment building classified by New York City as a "Class C" building and described as an "old law tenement building." (A.3323; A.1572). Significantly, these properties are not unique in New York City. (A.3323; A.2128; A.2981; A.4169).

C. FAV

FAV is a New York closely held C corporation incorporated in 1969, the business of which is the ownership, operation, and management of four and one-half (4 1/2) apartment buildings, with six stories or less, in New York City, described as "old law tenement buildings." (A.4983; A.4955; A.5039; A.1572).[4] Four of these buildings are walk-up apartment building classified by New York City as a "Class C" building and one of the properties is an elevator building classified by New York City as a "Class D" building. (A.3322-3323). Significantly, these properties are not unique in New York City. (A.3323; A.2128; A.2891; A.4225).

D. Management of EGA And FAV Up To March 26, 2007

Edward Jr. was EGA's and FAV's President and Chief Executive Officer since the death on December 26, 2004 of Edward Giaimo, Sr., father of Edward Jr., Janet Vitale and Robert Giaimo. (A.86; A.3176-3177). Prior to December 26, 2004, Edward Jr. was EGA's and FAV's Vice-President.

[4] FAV has a 50% interest in 1057 First Avenue. (A.3858; A.4213; A.5042). Petitioner and Respondent's cousin, who owned the other 50% interest, managed the property.

It is undisputed that during Edward Jr.'s management EGA and FAV maintained "two sets of books," failed to report substantial amounts of their rental income and "filed false federal, state and city income tax returns." (A.86; A.3176-3177). As a result, EGA and FAV, as of the July 31, 2007 Valuation Date, were required to file amended federal, state and city income tax returns. (A.86-87; A.4299-4300). It is also undisputed that Edward Jr. diverted millions of dollars from the rental income of properties owned by, *inter alia*, EGA and FAV. (A.86; A.307, ¶171). These facts led the Supreme Court to find that Edward Jr. "committed serious financial improprieties, if not crimes" in his management of EGA and FAV up to his death on March 26, 2007. (A.86).

E. Ownership Of EGA And FAV As Of The July 31, 2007 Valuation Date

Pursuant to Edward Jr.'s Will, his EGA and FAV shares were bequeathed evenly between Petitioner and Respondent. (A.3802-3803; A.77-78).

The Supreme Court held that, as of the July 31, 2007 Valuation Date, "petitioner now owns 99.995 shares or 49.9975% of the total EGA shares" and "84.495 shares or 49.70% of the total FAV shares" and that "respondent now owns 100.005 shares or 50.0025% of the total EGA shares" and "85.505 shares or 50.30% of the total FAV shares." (A.77-78).

F. The Petitions In The Dissolution Proceedings And Janet Vitale's Election To Purchase Robert Giaimo's Shares in EGA and FAV

On August 1, 2007, Petitioner commenced separate proceedings under BCL §§ 1104(a) and 1104-a to dissolve EGA and FAV. (A.2; A.46; A.52; A.95). On August 29, 2007, Janet Vitale, pursuant to BCL § 1118, elected to purchase Robert Giaimo's shares in EGA and FAV, including the shares he inherited under Edward Jr.'s Will. (A.67; A.5236-5243).

G. The State Of The Real Estate Market As Of July 31, 2007

The real estate market for walk-up apartment buildings in Manhattan in July 2007 was "very, very active" with a "large volume of transactions." (A.3384; A.3391-3392). During the first half of 2007, there were 178 sales of walk-up apartment buildings (Class C) in Manhattan, 88 sales of mixed-use buildings in Manhattan, and 37 sales of elevator apartment buildings (Class D) in Manhattan. (A.4379-4382; A.3391-3392). The turnover rate during the first half of 2007 indicated a "healthy, active market." (A.3385-3387; A.3391-3392).

Although the market was active, a "credit crisis" began on July 1, 2007 that had a pronounced effect on capitalization rates. (A.3384-3385; A.3539-3541). Based on the testimony of Petitioner's and Respondent's rebuttal real estate experts, the Referee found that 30% was the appropriate appreciation rate for income producing properties over a ten-year holding period. (A.276-281, ¶¶ 54-56, 61, 63, 66, 68-69, 71, 73, 76; A.2180-2182; A.2206; A.2211-2212; A.2218).

H. The Estate Tax Return Of The Edward Jr. Estate

The Federal Estate Tax Return (Form 706) of the Edward Jr. Estate filed on June 26, 2008 was signed by Petitioner and Respondent, as Co-Executors, under penalties of perjury. (A.857-858; A.3620-3621; A.3832). The Estate Tax Return contained a "Disclosure Statement of Co-Executors" that allocated $7,991,301 of the $10,426,492 discovered cash to Edward Jr., EGA and FAV as follows (A.626-628; A.3620-3621; A.3826; A.3829):

> During inspection of the Decedent's residence and real estate business office, one of the Co-Executors, Janet Giaimo Vitale, found cash in the aggregate sum of $10,426,492. Based on documents found with the cash, the Co-Executors have allocated the following sums to Decedent and to the corporations (EGA and FAV) in which Decedent had an interest:
>
> | Person/Entity | Amount | Form 706 |
> | --- | --- | --- |
> | Decedent | $2,531,914 | Schedule C
Item 4 |
> | EGA | $4,294,931 | Schedule B
Item Exhibit B-1 |
> | FAV | $1,164,456 | Schedule B
Item Exhibit B-2 |

By reason of the Disclosure Statement, the discovered cash allocated to EGA and FAV was treated as assets of EGA and FAV as of July 31, 2007. (A.628; A.3829)

Moreover, the Estate Tax Return showed that the Edward Jr. Estate made an election under § 6166 of the Internal Revenue Code and § 962(f) of the New York State Tax Law pursuant to which the Edward Jr. Estate deferred its estate tax

payments over the next 15 years. (A.741-752; A.3818-3825; A.3836-3837). As a result of these elections, the Edward Jr. Estate is liable for taxes exceeding $12 million to the United States government and New York State. (A.741-752; A.3818-3825; A.3836-3837).

I. Prior Proceedings

(1) Appointment of Special Referee to Hear And Report

By Orders dated December 20, 2007, Justice Marcy Friedman directed, *inter alia*, "an expedited hearing before a Special Referee to establish the fair value of the shares of stock of the corporations" and that "the Special Referee shall hear and report with recommendations." (A.137).

(2) The Court's Denial of Petitioner's Motions To Compel Respondent To Post A Bond

By Decision/Orders, each dated December 18, 2008 and entered on January 5, 2009, the Supreme Court denied Petitioner's motions to compel Respondent to post a bond in connection with her election to purchase Petitioner's shares in EGA and FAV. (A.321-325). In reaching her conclusion, Justice Friedman held that "petitioner fails to submit evidence, or even to allege, that respondent has engaged in waste or mismanagement of the corporations." (A.324).

(3) The Hearing On Fair Value Of EGA's And FAV's Shares

The hearing on the fair value of EGA and FAV shares before Special Referee Louis Crespo commenced on January 5 and concluded on March 2, 2009.

The first phase of the hearing related to the valuation of the real estate for which EGA and FAV are record owners. The second and more important phase for purposes of this appeal was the valuation of the EGA and FAV shares and the examination of any adjustments, deductions or discounts arising from the fact that EGA and FAV are closely held C corporations, the shares of which cannot be readily liquidated for cash.

(4) Special Referee's Report and Recommendations

The Special Referee issued his Report and Recommendations, dated June 30, 2010 (the "Report"), on the value of the underlying assets and liabilities of EGA and FAV and the ultimate value of the shares, together with the terms and conditions of payment for the shares. (A.137-320).

(5) Decision/Order Of The Supreme Court On Motions To Confirm/Reject The Report

By a Decision/Order, dated April 25, 2011 and entered on April 26, 2011 (the "April 25, 2011 Decision"), the Supreme Court confirmed in part and rejected in part the Report. (A.65-92). Specifically, the Supreme Court confirmed: (a) the Referee's valuation of EGA's and FAV's real properties[5] (A.68); (b) the Referee's disallowance of a DLOM, albeit on grounds not articulated by the Referee (A.69-

[5] Petitioner's cross-appeal on the real estate valuation challenges only the Referee's use of a 30% appreciation rate over the ten-year holding period in the valuation of these real properties. Significantly, James Levy, Petitioner's real estate rebuttal expert, and Howard Gelbtuch, Respondent's rebuttal real estate expert, opined that 30% was the appropriate appreciation rate. (A.166-169, ¶¶ 89, 95, 97, 99-100; A.2180-2182; A.2203-2204; A.2206; A.2211-2212; A.2217).

74); (c) the Referee's valuation of the BIG on a "present value" basis. (A.69-70; A.74-76); (d) the Referee's valuation of the "choses in action" (A.80-81); and (e) the Referee's recommendation that interest be awarded at 4% per annum. (A. 82-83). The Supreme Court rejected the Referee's finding that "petitioner and respondent are each 50% shareholders of both EGA and FAV." (A.76-78).

By the April 25, 2011 Decision, the Supreme Court also denied Petitioner's motion to hold Respondent in contempt of a August 3, 2007 Temporary Restraining Order, for the appointment of a temporary receiver and for "unfettered access" to the books and records of EGA and FAV. (A.83-90). Furthermore, the April 25, 2011 Decision denied Petitioner's second motion to hold Respondent in contempt for allegedly "concealing certain 'Management Fee Receivables'" in connection with the "fair value" hearings and denied Respondent's cross-motion to include certain additional taxes, interest and professional fees in the "fair value" of the EGA and FAV shares in the event the court re-opened the record to include these "receivables." (A.90-91).

POINT I

THE STANDARD OF REVIEW ON THE SUPREME COURT'S DETERMINATION OF A MOTION TO CONFIRM OR REJECT A SPECIAL REFEREE'S REPORT

Under CPLR 4403, the Supreme Court is "vested with broad power to accept or reject the Special Referee's report, including the power to make its own

findings." *Sage Realty Corp. v. Proskauer Rose LLP,* 288 A.D.2d 14, 15 (1st Dep't 2001). Where the reference is to hear and report, the "Referee's findings and recommendations are advisory only...; they have no binding effect" on the court. *Shultis v. Woodstock Land Dev. Assocs.*, 195 A.D.2d 677, 678 (3d Dep't 1993).

While deference is given to the credibility findings of the Referee who heard the witnesses, the Supreme Court is free to reject in whole or in part the Referee's findings when they are not supported by the record. *See Borenstein v. Rochel Properties, Inc.*, 216 A.D.2d 34 (1st Dep't 1995); *Jacynicz v. 73 Seaman Assocs.*, 270 A.D.2d 83, 86 (1st Dep't 2000).

The Appellate Division reviews *de novo* questions of law as well as questions of fact. *See, e.g., Matter of Rateau*, 59 A.D.3d 1037, 1037-1038 (4th Dep't 2009) ("court erred in failing to apply a discount for the lack of marketability of petitioner's shares in DAPACom," a close corporation, valued under BCL § 1118 using the "net asset valuation method"). The authority of this Court to review findings of fact is as broad as that of the trial court. *Palmer v. WSC Riverside Drive, LLC*, 61 A.D.3d 589 (1st Dep't 2009).

That being so, the Appellate Division can reject the Supreme Court's factual findings, based on the Referee's findings, as not supported by the evidence and "render the judgment it finds warranted by the facts." *Northern Westchester Professional Park Associates v. Town of Bedford,* 60 N.Y.2d 492, 499 (1983);

Chock Full O'Nuts Corp. v. NRP LLC I, 47 A.D.3d 189, 195-196 (1st Dep't 2007); *Murphy,* 74 A.D.3d at 817-819; *Jossel v. Filicori,* 235 A.D.2d 205 (1st Dep't 1997); *Capizola v. Vantage Int'l, Ltd.*, 2 A.D.3d 843, 844 (2d Dep't 2003).

POINT II

KEY ISSUES IN VALUATION PROCEEDINGS UNDER BCL § 1118

Before proceeding to an examination of the errors committed by the Supreme Court in its valuation of the EGA and FAV stock, we set forth the legal principles governing the valuation of the shares of a closely held corporation under BCL § 1118.

A. Fair Value Under BCL § 1118

BCL § 1118(a) provides that "in any proceeding under" Section 1104-a, "any other shareholder or shareholders of the corporation or the corporation may, ...elect to purchase the shares owned by the petitioners at their *fair value and upon such terms and conditions as may be approved by the court.*" (Emphasis added).

BCL § 1118 "does not define the term 'fair value,' and ... fails to provide any criteria for determining 'fair value.'" *Matter of Blake v. Blake Agency, Inc.*, 107 A.D.2d 139, 146 (2d Dep't 1985) ("*Blake*"). "Valuing a closely held corporation is not an exact science." *Seagroatt,* 78 N.Y.2d at 445. The determination of "fair value" will depend on the particular factual circumstances of each case. *Id.* The ultimate objective in calculating "fair value" in a BCL § 1118

proceeding "is to determine what a willing purchaser in an arm's length transaction would offer for petitioners' interest in the company as an operating business." *Id.*

The three methodologies to determine "fair value" are "net asset value, investment value and market value." *Beway,* 87 N.Y.2d at 167. Net asset value is the proper method to determine the fair value of the stock of a real estate holding company such as EGA and FAV. *Id.* at 164-165; *Blake,* 107 A.D.2d at 146. Respondent's and Petitioner's experts used the net asset value methodology to value the EGA and FAV shares. (A.68; A.224, ¶ 295; A.245, ¶ 371).

New York law holds that no discount can be applied for a minority interest in determining "fair value" under BCL § 1118(a), *see Beway,* 87 N.Y.2d at 169-170, because it "would deprive minority shareholders of their proportionate interest in the corporation as a going concern" and "would result in shares of the same class being treated unequally." *Matter of Penepent Corp., Inc.*, 96 N.Y.2d 186, 194 (2001) ("*Penepent*").

(1) Fair Value Is Identical To Fair Market Value Except For The Lack Of A Minority Interest Discount

"Fair value" under New York law is virtually identical to the "fair market value" test under estate tax or gift tax valuation standards, except for the lack of a minority discount and the seller's status as an "unwilling seller" rather than a

"hypothetical willing seller." (A.2453-2455).[6] New York courts generally use the concepts of "fair value" and "fair market value" interchangeably. *See Seagroatt*, 78 N.Y.2d at 445 ("Business Corporation Law § 1118 offers no definition of *fair value* . . . . Rather, *fair market value,* being a question of fact, will depend upon the circumstances of each case.") (emphasis added); *Murphy*, 74 A.D.3d at 817 ("the terms 'fair value' and 'fair market value' are used interchangeably.").

The "willing purchaser" under "fair value" is identical to the "willing purchaser" under a "fair market value" standard. The "willing purchaser" is hypothetical, is under no compulsion to buy, and has reasonable knowledge of the relevant facts regarding the potential investment and the market. (A.4158-4162; A.4214-4218; A.4108-4110; A.4115-4117; A.2850-2852). Accordingly, the fair value of Petitioner's shares must be analyzed from the viewpoint of what a "hypothetical willing buyer," whose goal is to maximize his advantage, would offer Petitioner for his shares in EGA and FAV. (A.2305-2316; A.2454-2456).

(2) Expert Opinion

Expert opinion is of particular importance in a BCL § 1118 proceeding given the absence of a statutory definition of "fair value." The court is free to accept or reject all or part of any expert's valuation, methodology, reasoning or conclusions. *See, e.g., Felt v. Olson*, 74 A.D.2d 722, 723 (4th Dep't), *aff'd*, 51

[6] "Fair market value" under Treasury Reg. § 20.2031-1(b), 26 C.F.R. §20.2031-1(b), presumes "a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts."

N.Y.2d 977 (1980). However, the "method of valuation eventually adopted [must be] 'based upon recognized criteria and the facts of the case.'" *Matter of DeAngelis v. AVC Services, Inc.*, 57 A.D.3d 989, 991 (2d Dep't 2008).

(3) <u>Discount For Lack of Marketability ("DLOM")</u>

As noted, New York law requires a DLOM in valuing the stock of a closely held corporation because "a potential investor would pay less for shares of a close corporation because they could not readily be liquidated for cash." *Beway,* 87 N.Y.2d at 165 (citing *Seagroatt*). The DLOM applies to <u>all</u> of the assets of the corporation and is separate and distinct from a minority interest discount. *Beway,* 87 N.Y.2d at 171; *Hall v. King*, 177 Misc. 2d 126, 134 (Sup. Ct. New York Co. 1998), *aff'd*, 265 A.D.2d 244, 245 (1st Dep't 1999); *Blake Agency*, 107 A.D.2d at 149 ("Such a discount [the DLOM] bears no relation to the fact that the petitioner's shares in the corporation represent a minority interest").

Moreover, a DLOM applies whether the shares being purchased constitute a minority of the shares (as here) or a majority of the shares. *Raskin v. Walter Karl, Inc.*, 129 A.D.2d 642, 644 (2d Dep't 1987) ("*Raskin*") ("However, a discount for lack of marketability accurately reflects the lesser value of shares that cannot be freely traded, *whether they be a minority or a majority of the shares*, and as such is an appropriate adjustment.") (Emphasis added).

(4) <u>Deduction For Built-In Capital Gains Tax Liability</u>

Since 1998, the courts have ruled consistently that "built-in" capital gains tax liabilities (BIG) must be taken into account in determining the value of stock of C corporations holding appreciated assets. *See Wechsler,* 58 A.D.3d at 65-72; *Murphy,* 74 A.D.3d at 817; *Eisenberg v. C.I.R.,* 155 F.3d 50, 52 (2d Cir. 1998).

(5) Neither Party Has The Burden Of Proof On The "Fair Value" Of The Shares

Neither Petitioner nor Respondent has the burden of proof on the value of the shares of EGA or FAV. *See Matter of Cohen,* 168 Misc.2d 91, 95 (Sup. Ct. New York Co. 1995), *aff'd,* 240 A.D.2d 225 (1st Dep't 1997).

(6) The Court Cannot Consider Events Subsequent To The Valuation Date Of July 31, 2007

In valuing Petitioner's stock in EGA and FAV, the court cannot consider post valuation events, but can consider "elements of future value...which are known or susceptible of proof as of the [Valuation Date] and not the product of speculation." *Cawley v. SCM Corp.*, 72 N.Y.2d 465, 472 (1988).

(7) The Court Must Approve the Terms and Conditions Of Respondent's Purchase Of Petitioner's Shares

BCL § 1118(a) provides that the purchase of Petitioner's shares shall be at "fair value and upon such terms and conditions as may be approved by the court." BCL § 1118(b) provides that "in determining the fair value of the petitioner's shares, the court in its discretion, *may* award interest from the date the petition is

filed to the date of the payment for the petitioner's shares at an *equitable rate* upon judicially determined fair value of his shares." (Emphasis added).

POINT III

THE SUPREME COURT ERRED BY FAILING TO INCLUDE A DISCOUNT FOR LACK OF MARKETABILITY IN VALUING THE SHARES OF EGA AND FAV

On the motions to confirm/reject the Referee's Report, the Supreme Court, citing *Seagroatt*, recognized that the valuation of an interest in a closely held corporation must "include consideration of any risk associated with illiquidity of the shares." (A.71). The Supreme Court also held that the Court of Appeals' decision in *Beway*, which upheld an "unmarketability discount" in the case of valuing shares in close corporations that owned real estate, was controlling on the "fair value" of the stock of EGA and FAV. (A.71-72). And, significantly, the Supreme Court rejected all of the reasons given by the Referee to disallow a DLOM. (A.72-73).[7]

Notwithstanding the dispositive effect of *Seagroatt* and *Beway* and the rejection of the Referee's "articulated reasons," Justice Friedman held that no DLOM should be applied in valuing the EGA and FAV shares. "While the court

7 The Supreme Court rejected the Referee's following "articulated" reasons for declining to apply a DLOM (A.72-73): (1) *Beway* is distinguishable because EGA and FAV "only holds residential real property and cash" and the properties in *Beway* "had mortgages;" (2) "[a] DLOM should only be applied to the portion of the value of the corporation that is attributable to goodwill;" (3) "applying a DLOM to this form of transaction is merely converting a financial control level of value into an 'illiquid minority interest value;'" and (4) a DLOM is a "disguised minority interest discount." (A.291-294, ¶¶ 118, 124, 120-121).

rejects the Referee's *articulated reasons* for declining to apply a DLOM," the Supreme Court found that the "decision not to apply a DLOM is appropriate on this record" for the following reason (A.73-74, emphasis added):

> [I]n determining the built-in gains tax issue, the Referee specifically made a *finding of fact*, which is amply supported by the record, *that the availability of similar properties on the open market is limited and that a buyer would accordingly buy the properties that EGA and FAV own through the corporations*. (See infra at 10). *This finding of the marketability of the corporations' shares* is as relevant to the determination as to whether to apply a discount for lack of marketability as it is to whether to reduce the value of the corporations by embedded taxes. (Emphasis added)

Thus, the Supreme Court's sole basis for rejecting a DLOM is a reason that the Referee did not "articulate" in his Report -- a reason on which the Referee did not rely or even discuss.

The Supreme Court's failure to apply a DLOM constitutes reversible error. By disallowing a DLOM, Justice Friedman, in essence, implicitly found that the EGA and FAV shares -- shares in two closely held corporations -- could be readily liquidated for cash. The Supreme Court's ruling to exclude a DLOM is not supported by the Referee's factual findings or any other evidence in the record and is contrary to controlling law and to sound valuation principles.

A. The Referee Did Not Make A Factual Finding That The EGA and FAV Shares Are "Marketable"

The Referee did not make a factual finding that the EGA and FAV shares are "marketable." Moreover, the Referee did not find that the EGA and FAV shares could be readily liquidated for cash. Nor could the Referee make such a finding because no such evidence was presented at the hearing. In fact, the evidence was to the contrary.

The "limited supply of available properties" relates solely to the issue of the BIG inherent in the underlying real properties of EGA and FAV. The Referee, following *Murphy's* "present-value" approach to the BIG,[8] found that the "limited availability of properties" would require the "willing purchaser" and the seller to negotiate the BIG (A.302-303, ¶¶ 153, 155):

> I find Murphy instructive. Here, there is proof of no readily available substitute or asset out of the corporate wrapper, such as EGA and FAV. Thus, the willing seller would not agree to accept a 100% B.I.G., and willing buyer would not demand a 100% B.I.G. Rather than walk away from the purchase, the willing buyer would offer to negotiate the B.I.G. ... It is reasonable to infer under the circumstances with the B.I.G. representing a large percentage of the corporate assets, that the willing buyer and the seller would agree to deduct a portion of the B.I.G. from the purchase price (see, *Murphy, supra*). . .
>
> Thus, it appears from the proof that the willing buyer and seller would negotiate the B.I.G. at its present value rather than full value. It is also reasonable to infer that

[8] Significantly, *Murphy,* 74 A.D.3d at 818, a BCL § 1118 "fair value" proceeding, affirmed the Supreme Court's determination of a 15% DLOM to the shares of a closely held real estate holding C corporation on the "ground that the Corporation was a close corporation."

the willing seller and buyer would not negotiate a 100% of the B.I.G. (*Murphy, supra*).[9]

Justice Friedman erroneously applied a factual finding concerning the enormous potential tax liability (the BIG) of the *underlying real properties* of EGA and FAV to the EGA and FAV *shares*. The Supreme Court's application of the Referee's factual findings concerning the "limited" "availability of the properties on the open market" misperceives and misconstrues the difference between the BIG and the DLOM and the underlying purpose of the DLOM. The BIG is an adjustment to the net asset value of the underlying *assets* arising from the "built-in" or "embedded" capital gains tax liability that accrues upon the sale of the underlying properties.[10] In short, the BIG has nothing to do with the "illiquidity" of the *shares* of EGA and FAV.

In sharp contrast, the DLOM is a "discount to reflect the *illiquidity of petitioners' shares, i.e., that a potential investor would pay less for shares of a close corporation because they could not readily be liquidated for cash.*" *Beway,* 87 N.Y.2d at 165 (emphasis added). Thus, as noted, the DLOM has nothing to do

[9] In refusing to apply a DLOM, the Referee distinguished *Murphy* (which did apply a DLOM) in the following respects, *inter alia*: (a) the corporate entity in *Murphy* "was a corporation incorporated in 1934;" (b) it "had more than 4.0 million shares issued and outstanding;" and (c), it "held several out-of-state properties." (A.291-292, ¶ 118). However, the Second Department's decision to apply a DLOM was based on the sole "ground that the Corporation was a close corporation." *Murphy*, 74 A.D.3d at 818. None of the Referee's "distinctions" had anything to do with the allowance of a 15% DLOM in *Murphy*.

[10] Mr. Mercer's expert report states that "[b]ased on this analysis, we will utilize an adjustment factor of 40% of the BIG liability as a reduction of net asset value in this determination of net asset value." (A.4995).

with the nature of the underlying assets of the close corporations; rather, it arises from the settled legal and valuation principles that the stock of a close corporation is not freely tradeable and cannot be "readily liquidated for cash."

In sum, the record is clear that the Referee made no "finding of the marketability of the corporations' shares." The Supreme Court's ruling that the EGA and FAV shares were "marketable," therefore, is not supported by the Referee's factual findings. Justice Friedman, in effect, confused the "marketability" of the underlying properties of EGA and FAV arising from their "limited availability" with the "marketability" of EGA's and FAV's shares. Thus, the Supreme Court's exclusion of the DLOM based on the Referee's ill conceived factual findings of the "limited supply of available properties" constitutes reversible error.

B. Respondent's and Petitioner's Business Valuation Experts Opined That The EGA and FAV Shares Were Not "Marketable" And Could Not Be Readily Liquidated For Cash

Moreover, both Respondent's and Petitioner's business valuation experts testified that the EGA and FAV shares were not "marketable" and could not be readily liquidated for cash. (A.2317-2319; A.2486-2489). Black's Law Dictionary, p. 930 (6th ed. 1990) defines "liquid assets" as "cash or assets readily convertible to cash." EGA's and FAV's *shares*, by definition, cannot constitute "liquid assets."

The testimony of Jeffrey Baliban and Dr. Joan Lipton, Respondent's business valuation reports, and their expert reports demonstrated the clear distinction between the assets and stock of a close corporation and the various reasons why the shares of EGA and FAV are not readily marketable.[11] (*See* A.4158-4162; A.4166-4183; A.4214-4218; A.4222-4239; A.4108-4132; A.2301-2302; A.2449-2452).

Mr. Mercer, Petitioner's expert, conceded that the EGA and FAV shares are not "liquid assets." His testimony is crystal clear (A.2856-2857):

> *Q In your professional opinion, are the shares of EGA and FAV liquid assets?*
>
> A *No.*
>
> * * *
>
> Q What I'm asking you is whether it is your view that the shares of EGA and FAV, even at a hundred percent, are liquid assets.
>
> * * *
>
> A *The shares of a significant [closely held] corporation are not liquid in the sense that the shares of a publically-traded [publicly-traded] company on the New York Stock Exchange are liquid because the definition of liquidity, in that case, is cash in three days. No one expects a corporation to be able to be sold in three days.*

[11] The Referee accepted Mr. Baliban and Dr. Lipton as experts in the field of business valuation. (A.2290-2292; A.2434). The Referee's Report states that "Respondent's experts, Lipton and Baliban, are qualified in their fields of expertise and their testimony reveal familiarity with the underlying real estate assets held by FAV and EGA and that the willing buyer is purchasing EGA and FAV as an ongoing concern." (A.289-290, ¶ 113). (*See* also A.216, ¶ 263; A.223; ¶¶ 289-290; A.4093-4098; A.4148-4153).

> *So it's -- in my view, it's improper to compare the "Liquidity" of a hundred percent of a company with "liquidity" of a hundred shares of IBM.* (Emphasis added).

Thus, Respondent's and Petitioner's experts never opined that the EGA and FAV shares are "marketable" or that the shares can "readily be liquidated for cash."

Moreover, Justice Friedman's "determination" of the "marketability of the corporations' shares" is at odds with the nature and character of a closely held corporation. As *Seagroatt* stated (78 N.Y.2d at 445):

> Valuing a closely held corporation [under BCL § 1118] is not an exact science. Accordingly, courts in such proceedings confront a variety of evidence and methods aimed at determining the price of minority interests in *closely held corporations -- legal entities that by their nature contradict the concept of a "market" value.* (Emphasis added).

See also 1A *Fletcher Cyc. Corp.* § 70.10 (2012) ("One of the dominant characteristics of a close corporation is the lack of a ready public market for the sale of shares of the corporation's stock"). Further, business valuation treatises universally recognize that "[a]n ownership interest in a business is worth less if it is not readily marketable" and that "ownership interests in closely held businesses—even substantial closely held businesses--are illiquid relative to many other types of investments." Shannon P. Pratt, *Valuing a Business* (5th ed. 2008) ("*Pratt*"), p. 416.

Suffice it to say, shares that are "illiquid" are not readily marketable, cannot be readily liquidated for cash, and thus are valued at less than shares of corporations that are freely tradable and can be readily liquidated for cash. Thus, the evidence refutes the Supreme Court's "determination" that the EGA and FAV shares are "marketable," and its exclusion of the DLOM based on the "marketability of the corporations' shares" is error.[12]

C. The Supreme Court's Failure To Include A DLOM Violates Well Settled Principles Of "Fair Value" Valuation And The Nature Of A Close Corporation

The law is clear that a DLOM must be applied in valuing shares of closely held corporations such as EGA and FAV. The Court of Appeals recognized in *Seagroatt* that "shareholders in closely held corporations...are unlikely to find prospective buyers for their shares" and that "fair value" under BCL § 1118 must "include consideration of any risk associated with illiquidity of the shares" (78 N.Y.2d at 445-446).

In *Beway*, 87 N.Y.2d at 165, the Court of Appeals held that New York law requires a DLOM in valuing the stock of a close corporation, stating that the DLOM is a "discount to reflect the illiquidity of petitioners' shares, i.e., that a

[12] By not applying a DLOM, the Supreme Court treated the EGA and FAV shares the same as the underlying assets of such corporations. However, it is axiomatic that an interest in stock is distinct from an ownership interest in the underlying assets. *See 5303 Realty Corp. v. O&Y Equity Corp.*, 64 N.Y.2d 313, 323 (1984) ("ownership of capital stock is by no means identical with or equivalent to ownership of corporate property.").

potential investor would pay less for shares of a close corporation because they could not readily be liquidated for cash." (Emphasis added).

Beway involved a judicial determination of the "fair value" of the petitioner's shares under BCL § 623(h).[13] Like the close corporations at issue here, the close corporations in *Beway* were "nine family owned close corporations, each of which had as its sole asset a parcel of income-producing office, commercial or residential real estate in New York City." *Id.* at 164.[14] The First Department affirmed the Supreme Court's 21% DLOM against each petitioner's proportionate share of the aggregate net asset value of the corporations. *Id.* at 166.

On appeal, the Court of Appeals held that a DLOM must be applied to all of the assets of the close corporations, but found that the Supreme Court "erred in removing a nonexistent minority discount element from the reduction in the value of petitioners' shares." *Id.* at 171. The Court remitted the matter "for a new determination of the appropriate discount for unmarketability of petitioners' shares and a recalculation of fair value when that *discount is applied to the proportionate net asset value of petitioners' stockholdings.*" (*Id.*, emphasis added).[15]

---

[13] The Court in *Beway* held that "there is no difference in analysis between stock fair value determinations" under BCL § 623 and fair value determinations under BCL § 1118. *Id.* at 168.

[14] The close corporations in *Beway* (like EGA and FAV) also had "cash on hand" of $9,052,683. (A.349-350, ¶ 8; A.545-546).

[15] This Court, following *Beway*, has held that the DLOM under BCL § 1118 applies to all of the assets of the corporation. *See Hall v. King*, *supra*, 265 A.D.2d at 245.

Similarly, the Second Department in *Murphy,* 74 A.D.3d at 818, a BCL § 1118 "fair value" proceeding, held that "the Supreme Court properly applied a lack of marketability discount of 15% on the *ground that the Corporation was a close corporation.*" (Emphasis added). The principal assets of the corporation in *Murphy*, like EGA and FAV, were real estate and "cash and market[able] securities" of $16,154,000. *See Murphy v. U.S. Dredging Corp.*, Index No. 2640/06, 2008 WL 2401230, p. 14 (Sup. Ct. Nassau Co. May 19, 2008).

Moreover, as noted, the DLOM is separate and distinct from the impermissible discount for a minority interest in a BCL § 1118 proceeding. *Blake Agency*, 107 A.D.2d at 149. Furthermore, a DLOM applies whether the shares being purchased constitute a minority of the shares (as here) or a majority of the shares. *See Raskin*, 129 A.D.2d at 644 ("However, a discount for lack of marketability accurately reflects the lesser value of shares that cannot be freely traded, *whether they be a minority or a majority of the shares*, and as such is an appropriate adjustment.") (Emphasis added).[16]

Thus, New York law requires that a DLOM be applied to value the stock of a close corporation, regardless of the nature of the assets held by such close corporation. Specifically, in *Beway* and *Murphy*, a DLOM was applied to value the stock of closely held real estate holding companies, just like EGA and FAV.

[16] *See Pratt*, p. 416, quoted on p. 30, *supra*.

The same result must apply to EGA's and FAV's shares that were valued by Respondent's and Petitioner's experts using the "net asset valuation method." (A.68).

In short, the Supreme Court's failure to apply a DLOM to value the EGA and FAV stock is reversible error. *See Matter of Rateau*, 59 A.D.3d at 1037 ("court erred in failing to apply a discount for the lack of marketability of petitioner's shares in DAPACom," valued under BCL § 1118 using the "net asset valuation method"); *Lehman v. Piontkowski*, 203 A.D.2d 257, 259 (2d Dep't 1994); *Greek Peak, Inc. v. Armstrong*, 265 A.D.2d 760, 762 (3d Dep't 1999); *Raskin,* 129 A.D.2d at 644.

D. **This Court Should Apply A 20% DLOM <u>In Valuing The EGA and FAV Shares</u>**

Mr. Baliban, Respondent's expert, opined that a 20% DLOM should be used to value EGA and FAV stock.[17] In light of the Supreme Court's exclusion of the DLOM based on a reason not "articulated" in the Referee's Report, it did not pass on the percentage of the DLOM to be applied. We show below that Mr. Baliban's 20% DLOM is well within the range of appropriate DLOMs accepted by appellate

[17] Significantly, Mr. Mercer, Petitioner's expert, expressed <u>no opinion</u> as to the <u>amount of the DLOM</u>. He opined that no DLOM was appropriate based on his personal view: (a) that a DLOM cannot be applied to the valuation of a "controlling interest;" (b) that a DLOM is a "disguised minority interest discount;" and (c) *Beway* "got it wrong." (A.4987-4988; A.4991; A.2873). The Supreme Court correctly rejected these reasons. (A.72-73). As noted above, Mr. Mercer's reasons (which the Referee accepted) violate New York law and are inconsistent with valuation principles.

courts and that the record amply demonstrates that a 20% DLOM is reasonable and warranted.

(1) A 20% DLOM Is Well Within the Range Of DLOMS Accepted By Appellate Courts

A 20% DLOM is well within the range of DLOMs accepted by appellate courts. *See Beway* (21% DLOM); *Murphy* (15% DLOM); *Hall v. King* (25% DLOM); *Cooper v. Cooper*, 84 A.D.3d 854, 857 (2d Dep't 2011) (25% DLOM); *Matter of Vetco, Inc.*, 292 A.D.2d 391, 392 (2d Dep't 2002) (25% DLOM); *Matter of Funplex, Inc.*, 252 A.D.2d 923, 925 (3d Dep't 1998) (25% DLOM); *Lehman v. Piontkowski, supra*, 203 A.D.2d at 259 (25% DLOM).

Significantly, the 21% DLOM in *Beway* and the 15% DLOM in *Murphy* involved close corporations, like EGA and FAV, whose primary assets were real estate.

(2) The Record Amply Demonstrates That A 20% DLOM Is Reasonable And Warranted

Mr. Baliban noted that many approaches to quantifying an appropriate DLOM contain blended-in minority discounts that are inappropriate in "fair value" cases such as this. (A.4176-4177; A.4232-4233). However, Mr. Baliban applied three approaches that exclude, or control for, any blended-in minority impact, thereby reflecting the pure impact of diminished liquidity: restricted stock studies, acquisition discounts, and merger arbitrage studies. *Id.* His analysis also pointed

out that EGA's and FAV's historical underreporting of income, their unknown tax liabilities as of the valuation date, the lack of audits or reliable financial records, and the due diligence delays required for a buyer to work through all of these issues would increase the DLOM demanded by a hypothetical willing buyer. (A.2487-2489; A.3051-3052; A.4182; A.4238). He noted that even reconstruction of accurate records of revenues from operation of the corporations' properties would not completely resolve the hypothetical willing buyer's concerns as to issues relating to the operations of the corporations themselves. (A.2616-2617; A.2618-2620).

(a) Restricted Stock Studies

The restricted stock studies cited by Mr. Baliban compare the value of publicly traded stock to the value of restricted (*i.e.*, not freely tradable) but otherwise identical stock in the same company. (A.2491). These studies indicate that, due to the diminished liquidity of the restricted stock, their prices generally are 29.3% (mean) or 31.0% (median) lower than those of their freely tradable counterparts. (A.4177-4179) (restricted stock studies as enumerated in *Pratt*). As Mr. Baliban testified – and as the Referee failed to address – these studies are relevant to a "fair value" case because only the pure marketability effect is reflected: "the minority interest impact is controlled for, in that you are looking at the minority interest of the value of a share that is readily marketable and a

minority interest that is not readily marketable." (A.2491; A.3052-3053; A.3064; A.2362-2363).

Mr. Baliban's approach is fully consistent with *Beway*, which – while rejecting the application of a minority discount in BCL § 1118 cases – validated an expert DLOM analysis that compared two classes of minority interests, thereby controlling for minority impact. *Beway*, 87 N.Y.2d at 171 (because expert's analysis "compared the prices of a marketable set of minority shares to the prices of a set of minority shares when the same stock was unmarketable, the difference in prices of the shares did not contain any additional minority discount element, and the discount was solely attributable to the difference in the marketability of the shares in the same stock").

(b) <u>Acquisition Discounts</u>

As a second method of quantification of an appropriate DLOM, Mr. Baliban relied on a study of acquisition discounts by Micah Officer, published in the Journal of Financial Economics in 2006 (A.5204-5231; A.2492). Mr. Baliban explained that Mr. Officer's study revealed that acquirers of the less liquid unlisted corporations paid 15-30% less than they paid for their more liquid publicly traded counterparts. (A.4180; A.4236). He concluded that Mr. Officer's study reflects no improper "minority interest" diminution and reflects the pure entity-level value effect of diminished liquidity. (A.3598-3599).

(c) **Merger Arbitrage**

Mr. Baliban also looked to "merger arbitrage spreads" as assessed in a published paper to quantify the DLOM. These merger arbitrage studies assess the relative liquidity of controlling interests in public versus private companies, with the arbitrage spreads reflecting time horizon risks, price risks, and risks of non-completion of the merger. (A.4180-4181; A.4236-4237; A.2492-2493). Mr. Baliban noted that the 4-9% liquidity differential between merger arbitrage spreads for public- versus private-company mergers was based upon a 9-12 month assumption of selling time, an assumption that, in Mr. Baliban's opinion, understated the likely selling time for EGA and FAV. (A.4182; A.4238) (noting lack of reliable financial information, lack of internal controls, discovered cash, and underreporting of income, all of which would increase selling time for these companies above the private company average). Assuming an 18-24 month selling time for EGA and FAV, Mr. Baliban opined that the merger arbitrage studies indicate an 8-18% DLOM. (A.4181; A.4237)

(d) **The "Build-Up" Method**

In addition to the three methods referred to above, Mr. Baliban used a "build up" method, which estimates the degree of illiquidity in shares of EGA and FAV based upon estimated transaction costs and estimated time (and attendant "time value of money") to finalize a sale of stock of these corporations. (A.4181-4182;

A.4237-4238). Here again, while the real estate appraisals assume sale of the underlying properties as of the valuation date, what is at issue here is the valuation of *shares* of corporations holding these properties, and the relative illiquidity of said *shares* in said corporations. This method yielded a DLOM estimate of 16%. (A.4182; A.4208; A.4238; A.4267).

(e) **Mr. Baliban's DLOM Conclusion**

Based on the three methods (indicating discounts ranging from 8-32%), along with the "build-up" method (indicating a discount of 16%), Mr. Baliban opined that a 20% DLOM is appropriate to value the EGA and FAV stock. (A.4183; A.4239). Mr. Baliban expressed his ultimate DLOM opinion as follows (A.2493):

> And in my judgment, based on these studies, a 20 percent rate is a reasonable rate to assume, especially given the other unknowns and uncertainties and risks that I believe exist in this corporation . . . dealing with capital gains issues, potential unpaid income taxes, potential interest and penalties, lack of a formal reliable accounting system, lack of verifiable, historical information, issues of that nature that might require a buyer to incur . . . a greater cost of due diligence certainly would delay the amount of time it will take to sell these shares and thereby increase the discount.

Notably, Mr. Baliban's opinion mirrored the Supreme Court's critical conclusion regarding the "serious financial improprieties, if not crimes," arising

from Edward Jr.'s management of EGA and FAV up to his death on March 26, 2007 (A.86).

Undoubtedly, as Mr. Baliban opined, a hypothetical willing purchaser would be rightly concerned about purchasing the shares of two corporations that (a) maintained two sets of books, (b) filed false tax returns and (c) was required to file amended tax returns as a result of the skimming of millions of dollars of rent from EGA and FAV by Edward Jr., EGA's and FAV's President, until his death on March 26, 2007.[18] Yet, Justice Friedman ignored her own conclusions of the "serious financial improprieties, if not crimes," "two sets of books" and "skimming" of "over $10 million" when she excluded a DLOM in valuing the EGA and FAV shares.

[18] Mr. Mercer's Report also notes the serious issues arising from the "skimming" and false tax returns. For example, his Report states that "we do not rely on the financial statements summarized from the Company's income tax returns" and that "based on our understanding of the magnitude of unreported income in recent years, the financial statements are not reflective of historical performance." (*See* A.5004). As to the amended tax returns, Mr. Mercer's Report states (*see* A.5008):

> For many years, EGA has filed tax returns that failed to include all taxable income. We understand that the Company is making voluntary disclosures to the IRS, and has entered into discussions seeking agreements as to their tax liabilities that would include interest. *We are advised that based on a preliminary discussion with an IRS agent, EGA hopes to limit the liability to three years of underreported income based on voluntary disclosure, although the IRS could require a longer adjustment period.*" (Emphasis added).

Mr. Mercer's Report contains similar language as to FAV. (*See* A.5044).

More to the point, Justice Friedman ignored the standard of "fair value" -- "what a willing purchaser in an arm's length transaction would offer for petitioners' interest in the company as an operating business."

In conclusion, the Supreme Court erred as a matter of law by failing to apply a DLOM in valuing EGA's and FAV's stock, and by rejecting the 20% DLOM contained in Mr. Baliban's Reports and testimony. The 20% DLOM must be applied against all of EGA's and FAV's assets. *See Beway*, 87 N.Y.2d at 171; *Hall v. King*, *supra*, 265 A.D.2d at 245.

POINT IV

THE COURT BELOW FAILED TO FOLLOW *WECHSLER* AND DEDUCT 100% OF THE BUILT-IN CAPITAL GAINS TAX LIABILITY IN VALUING THE STOCK OF EGA AND FAV

Respondent's and Petitioner's business valuation experts both concluded that a hypothetical willing buyer, without any compulsion to enter into the transaction, must take into account "built-in" capital gains tax liabilities (the BIG) in determining the value of the EGA and FAV stock. (A.218-219; A.229; A.4170-4172; A.4226-4228; A.2301-2302; A.2308-2316; A.2907-2908). The BIG arises from the fact that EGA and FAV are C corporations,[19] whose primary assets are many real estate properties purchased decades ago that have appreciated

[19] A C corporation, for tax purposes, is independent of its shareholders as distinguished from "pass-through entities", such as partnerships, Subchapter S corporations or limited liability corporations, where tax liabilities flow to shareholders or partners. (A.2300-2301; A.2449).

substantially, have been almost fully depreciated over time, and have only a nominal cost basis for income tax purposes. (A.2299-2300; A.2476; A.4122-4127; A.4170-4171; A.4202; A.4226-4228). Thus, the sale of any of the underlying real estate properties would trigger a significant corporate capital gains tax liability (*i.e.,* the BIG). (A.2308-2314; A.4170-4172; A.4226-4228).

Mr. Baliban and Dr. Lipton, Respondent's experts, opined that the BIG must be deducted dollar for dollar or 100% while Mr. Mercer, Petitioner's expert, opined that the BIG should be computed on a "present value" approach and limited to 40%. (A.218-219, ¶¶ 271-273; A.229, ¶¶ 312-313; A.238, ¶ 344). Significantly, Respondent's and Petitioner's experts agreed that adjusting the net asset value of EGA's and FAV's assets for the BIG values each of EGA and FAV on a "going concern" basis. (A.4166; A.4222; A.4982).

The Referee, following the Second Department's decision in *Murphy*, 74 A.D.3d at 817, determined that the BIG should be computed on a "present value" basis as follows: increase the value of EGA's and FAV's real properties at a growth rate of 3% per year (30% over a 10-year period), deduct the cost basis from the future value, calculate the BIG at a 45.87% tax rate, and then apply a 10% discount rate. (A.303, ¶ 157). This recommendation was based on his factual finding that "there is proof of no readily available substitute or asset out of the corporate wrapper" and "[t]hus, the willing seller would not agree to accept a 100% B.I.G.,

and willing buyer would not demand a 100% B.I.G." (A.302, ¶ 153). This "present value" approach resulted in a deduction of 50.2% of the BIG. (A.754; A.760).

The Supreme Court confirmed the Referee's "present value" approach of the BIG, stating (A.75):

> Given the lack of precedent in this Department on the issue of whether the BIG should be reduced to present value, the support for that approach in the Second Department, and the factual support in the record for the 10 year projection, the Court does not find that the Special Referee committed legal error in following the present value approach.

In reaching this holding, Justice Friedman noted that "EGA and FAV are both corporations with a history of never having sold any of their real properties" and that "there is no evidence in the record that they have any financial reason to sell properties in the foreseeable future." (A.75). Justice Friedman also rejected Petitioner's contention (based on out-of-state cases) that no BIG should be deducted. (A.75-76). Relying on *Wechsler*, 58 A.D.3d at 73, Justice Friedman held that "New York follows the contrary view that it is irrelevant whether the corporation will actually liquidate its assets, and that the court, in valuing a close corporation, should assume that the liquidation will occur." (A.76).

The Supreme Court's discounting the BIG to "present value" is error for three reasons. *First*, it is contrary to the 100% BIG deduction in *Wechsler*.

Second, the Supreme Court's rejection of 100%, in essence, improperly treats Respondent, who made the election under BCL § 1118, as the "willing purchaser." *Third,* the Supreme Court's determination, based on the Referee's findings, that there are "no readily available substitutes outside of the corporate wrapper" and that "the hypothetical buyer cannot avoid the BIG by purchasing the properties on the open market rather than through the 'corporate wrapper'" is not supported by the evidence.

A. ***Wechsler* Requires A Deduction Of 100% Of The BIG**

In *Wechsler,* this Court considered the issue of the valuation on a "net asset basis" of the stock of a closely held C corporation holding assets that have substantially appreciated (58 A.D.3d at 65):

> The principal issue on this appeal, apparently one of first impression in this state, is the extent to which the value of a holding company, Wechsler & Co., Inc. (WCI), *a Subchapter C corporation,* all the shares of which are owned by the husband, *should be reduced to reflect the federal and state taxes embedded in the securities owned by WCI securities* [the BIG] that constitute virtually all of its assets, *due to the unrealized appreciation of those securities*. (Emphasis added).

That is the precise issue here. The *Wechsler* Court held that the Supreme Court should have deducted 100% of the BIG ($21,778,708) to arrive at the fair market value of the stock of the close corporation pursuant to *Estate of Dunn v. C.I.R.*, 301 F.3d 339 (5th Cir. 2002) ("*Dunn*"), and *Estate of Jelke v. C.I.R.*, 507

F.3d 1317 (11th Cir. 2007) ("*Jelke*"), *cert. denied*, 555 U.S. 826 (2008). *Id.* at 66-74.

Wechsler is controlling authority on the issue of the BIG in a BCL §1118 "fair value" context for the following reasons.

First, as in *Wechsler*, this Court is required to determine the extent to which the value on a "net asset basis" of EGA and FAV, two real estate holding companies, should be reduced to reflect the federal and state capital gains taxes embedded in the real estate owned by EGA and FAV that constitute virtually all of its assets, due to the unrealized appreciation of that real estate.

Second, the *Wechsler* Court's 100% BIG deduction was based on the holdings and rationale of *Dunn* and *Jelke*. *Id.* at 66-74. The Court concluded that a 100% BIG deduction is a sound and rational approach because it, *inter alia,* avoids the court's involvement in "complex prognostications" as to when assets will be sold for "which the judiciary is ill suited," "conserves judicial resources as it 'has the virtue of simplicity' ([*Jelke*] *id.* at 1333), is consistent with the basic premise of valuing a corporation on a net asset basis, ...and has much else to recommend it." *Id.* at 68 and 68, n. 4. Significantly, the *Wechsler* Court, citing *Jelke,* also held that whether the C corporation will, in fact, liquidate its assets is irrelevant to the valuation issue. *Id.* at 73-74 ("It is more logical and appropriate to

value the shares of [the investment holding company]...based upon an *assumption* that a liquidation has occurred, without resort to present value or prophecies.").

Third, the BIG issue in this case, just as it was in *Wechsler*, *Jelke* and *Dunn*, is valuation, pure and simple. Principles of proper valuation are the same, whether the procedural context is a matrimonial case, a gift case, a tax case or a "fair value" case under BCL §1118. Indeed, the *Wechsler* Court could not have been clearer: "the validity of the net asset valuation methodology adopted in *Jelke* and *Dunn* does not depend upon whether it is applied in an estate tax case, another type of tax case or a matrimonial action." *Wechsler*, 58 A.D.3d at 72.[20]

Fourth, matrimonial cases, such as *Wechsler*, involving the valuation of stock of a closely held C corporation apply the very same standards used in a "fair value" proceeding under BCL § 1118. *Amodio v. Amodio*, 70 N.Y.2d 5 (1987), a "matrimonial case," has been cited in a number of "fair value" cases arising under BCL § 1118, including *Matter of Pace Photographers, Ltd.*, 71 N.Y.2d 737, 748 (1988), and *Matter of Rateau, supra*, 59 A.D.3d at 1037.[21]

Fifth, as noted, "fair value" under New York law is virtually identical to the "fair market value" test under estate tax or gift tax valuation standards, except for the lack of a minority discount and that the seller is an "unwilling seller" rather

[20] Even the dissent in *Wechsler* recognized that "although *Dunn* and *Jelke* are not matrimonial cases, the principles of taxation, capital gains and valuation are the same" *Id.* at 72, n.7.

[21] In *Amodio* the Court of Appeals referred to the IRS's "fair market value" formulation of valuing stock of a close corporation and to *Blake,* a BCL § 1118 case.

than a "hypothetical willing seller." (A.2453-2454). New York courts generally use the concepts of "fair value" and "fair market value" interchangeably. *See Seagroatt*, 78 N.Y.2d at 445; *Murphy*, 74 A.D.3d at 817 ("the terms 'fair value' and 'fair market value' are used interchangeably.").

In short, the Supreme Court committed legal error by not following *Wechsler* and deducting 100% of the BIG in valuing the EGA and FAV stock.

B. In Adopting The "Present Value" Approach To the BIG, The Supreme Court Erroneously Treated The Respondent As The "Willing Purchaser"

In rejecting the 100% BIG deduction applied in *Wechsler,* Justice Friedman relied on EGA's and FAV's "history" of not selling properties and that "there is no evidence in the record that they have any financial reason to sell properties in the foreseeable future." (A.75). This conclusion was based on the Referee's "finding" that Respondent Janet Vitale would not have to liquidate assets (*i.e.*, sell properties) to pay the judgment (A.303, ¶ 156).[22]

In essence, Justice Friedman treated Respondent Janet Vitale as the "willing purchaser." This is error. *Seagroatt* and its progeny hold that "fair value" is based

[22] The Referee's "finding" that "the record reveals that the respondent has sufficient cash (lots of cash!) or assets or financing to pay the judgment without liquidating any of the assets to which the built-in gains tax is applied" has no factual support in the record. (A.303, ¶ 156). The record does not reveal that the Respondent has "sufficient cash" or "assets" to pay the judgment without liquidating assets. In fact, no evidence on the subject of "respondent's cash or assets" was offered or received in evidence at the trial on "fair value." Thus, the Referee's "finding" that the "respondent has sufficient cash (lots of cash!) or assets" to pay the judgment "without liquidating any of the assets" is contrary to the record. (A.303, ¶ 156). The very reason why Respondent sought financing to pay the judgment is that she did not have cash or other assets to pay the judgments.

on "what a *willing purchaser* in an arm's length transaction would offer for petitioners' interest in the company as an operating business." (Emphasis added).[23]

The party (Respondent) electing to buy the stock, as a matter of law, cannot be the hypothetical "willing purchaser." EGA's and FAV's "history" and whether Respondent has "any financial reason" to sell the properties is irrelevant to what a hypothetical "willing purchaser in an arm's length transaction" would do.[24]

The BIG discount, as articulated in the case law and in the expert opinions of Respondent's business valuation experts, reflects the economic reality that, because C corporations are stand-alone entities subject to enormous capital gains liabilities, C corporations holding appreciated assets are necessarily worth less than the same assets held outright or in pass-through entities. (A.4171-4172; A.4227-4228). Accordingly, "[t]he value of a closely-held C Corporation's shares must be adjusted or discounted to reflect the fact that a willing buyer would require that a willing seller take this built-in gains tax liability into account in arriving at a purchase price for the stock." (A.4118; A.4119-4124).

Mr. Baliban opined that "the value of shares in a private, closely-held real estate corporation is the fair market value of the net assets of the corporation on the

[23] In any event, there is <u>no evidence</u> in the record that Respondent intends to hold the properties of EGA and FAV for "a lengthy period of time." In fact, there was <u>no testimony</u> on this subject.

[24] *Murphy* affirmed the trial court's "present value" analysis of the BIG on the ground that the "Corporation's intention was to hold its real property for a lengthy period of time." *Murphy*, 74 A.D.3d at 817. That statement improperly treated the "Corporation," which made the election under BCL § 1118, as the "willing purchaser."

valuation date less the potential income taxes [the BIG] payable on the sale of the assets." (A.4172; A.4228). Dr. Lipton expressed the same opinion. (A.2309-2316; A.4117-4126).

C. The Supreme Court's Acceptance of the Referee's Finding That There Are No Readily Available Substitutes "Outside The Corporate Wrapper" Is Not Supported By The Evidence

EGA's and FAV's properties are not "unique." (A.3323; A.2128; A.2891; A.4169; A.4225). Rather, they are the sort of multi-family, walk-up tenement apartment buildings that abound in New York City. (A.3323; A.2128; A.2891; A.4169; A.4225).

Respondent's experts opined that the principle of substitutability compels a 100% BIG discount. (A.2474-2477; A.4125-4126; A.4169-4172; A.4225-4228). Dr. Lipton and Mr. Baliban testified that a hypothetical, willing, non-strategic buyer would not be willing to shoulder any of the BIG liabilities resulting from the fact that the real estate of EGA and FAV happens to reside in C corporation wrappers, when that same hypothetical, willing, non-strategic buyer could simply avoid BIG liabilities altogether by buying similar properties outright or via pass-through holding entities. (A.2399-2401; A.2606-2607).

Moreover, Mr. Mercer (Petitioner's expert),[25] Dr. Lipton and Mr. Baliban all agreed that, if substitute investments were available outside the "C corporation

[25] Mr. Mercer's 2005 article on embedded capital gains states that "a rational willing buyer will pay no more than a price for shares of a C corporation asset holding company that *recognizes*

wrapper" (for which, accordingly, there would be no issue of the BIG), a rational, non-strategic hypothetical purchaser of EGA's and FAV's stock would demand a deduction of the full amount (100%) of the BIG to reflect the unrealized capital gains tax that encumbers the value of the underlying assets of EGA and FAV and the real potential BIG that cannot be eliminated. (A.229, ¶ 312; A.240, ¶¶ 349-350; A.2892; A.2907-2908). Accordingly, there is no dispute that a deduction of 100% of the BIG would be appropriate if there were "readily available substitutes" for the real properties of EGA and FAV. (A.240, ¶¶ 349-350)

However, the Referee recommended the *Murphy* "present value" approach because he found that there were "no readily available substitutes" (A.299, ¶¶ 142-144):

> The credible proof supports the finding that there is a limited supply of similar properties in New York during the relevant period....Indeed, respondent's expert, Lipton, noted the study of 182 sales of properties in a six-month period from a pool of 17,000 properties, which is less than 2% of such properties....I find 2% of the pool available for sale indeed demonstrates that similar properties as that of EGA and FAV are not readily available. Thus, it follows the willing purchaser has no advantage in the negotiation to demand a 100% discount of the B.I.G.

100% of the embedded gain tax liability in that C corporation" and that "[r]ational negotiations between hypothetical willing buyers and sellers should lead to a *full recognition of embedded capital gains tax liabilities* in the determination of the price to be paid for the C corporation's shares." (A.5152, emphasis added). Mr. Mercer conceded that "full" recognition means 100% of the BIG. (A.2907-2908).

This factual finding, which Justice Friedman accepted, is not supported by the evidence. The evidence demonstrated that there were many properties in 2007 held in "pass-through" entities such as partnerships or limited liability companies that a "willing purchaser" could have purchased in lieu of purchasing the 18 1/2 properties of EGA and FAV that carried the enormous BIG. The real estate market for walk-up apartment buildings in Manhattan in July 2007 was "very, very active" with a "large volume of transactions." (A.3384). The first half of 2007 was a very "healthy" market with an active turnover rate. (A.3385-3387; A.3391-3392).

In fact, the New York City Income Property Market Report for the first half of 2007 prepared by Massey Knakal indicated robust turnover in Manhattan walkup and mixed-use buildings in the six-month period prior to the appraisal date. Specifically, in the first half of 2007, there were sales of 178 Manhattan walk-up apartment buildings (reflecting 1.8% turnover during that six-month period, or 3.6% annualized turnover), 88 Manhattan mixed-use buildings (reflecting 1.9% turnover during that six-month period, or 3.8% annualized turnover), and 37 elevator apartment buildings in Manhattan. (A.4379-4382; A.3384; A.3385-3387; A.3391-3392). The Massey Knakal report indicates that these sales were a sharp increase over the number of sales reported for such buildings during the second half of 2006; indeed "Manhattan saw twice as many walk ups sold in the first six

months of 2007 compared to the second half of 2006." (A.4379).[26] Significantly, these figures reflect only completed sales during the relevant periods, which is lower than the total number of properties listed for sale.

Respondent's experts, assessing the degree of available substitutes as of July 31, 2007, testified that this sale and turnover data indicate a ready supply of real estate investments "outside the corporate wrapper." (A.4324; A.4380; A.2396-2401; A.2606-2607). Mr. Baliban testified (A.3039-3040):

> *Based on these reports* [the Massey-Knakal reports], *there's a sufficient number of actual sales that tells me that a willing hypothetical purchaser would have had alternatives*....I think that these other buildings that actually sold during that time is the minimum of buildings that would be available.. Those reports don't reflect buildings that may have been on the market that didn't sell that may have been available. *So if you have clear evidence that there were literally ten times the number of buildings you're selling that had sold over a several month-period before and after, that, to me, is sufficient evidence to say that there are other buildings for sale.* (Emphasis added).

Accordingly, the Referee's factual findings (which the Supreme Court adopted) that "there are few alternative properties that exist in the market" and

[26] Moreover, the real estate appraisals, which contained a Sales Comparison Approach based on sales of comparable properties, also belie a "tight market" and "very few sales." (A.3959-3967; A.4061-4068; A.4558-4577; A.4817-4836).

"there is proof of no readily available substitute or asset out of the corporate wrapper" (A.298, ¶ 140; A.302, ¶ 153) are contrary to the credible evidence.[27]

This Court can reject these factual findings as not supported by the evidence and "render the judgment it finds warranted by the facts." *Chock Full O'Nuts Corp. v. NRP LLC I, supra*, 47 A.D.3d at 195-196; *Murphy*, 74 A.D.3d at 817, 819; *Jossel v. Filicori, supra*, 235 A.D.2d at 205; *Capizola v. Vantage Int'l, Ltd., supra*, 2 A.D.3d at 844. Accordingly, this Court should find that there were readily available properties similar to the EGA and FAV properties "outside the corporate wrapper" and thus the "willing purchaser" would have insisted on a 100% deduction for the BIG.

In sum, Respondent submits that – per *Wechsler* – the Supreme Court's ruling to "present value" the BIG should be rejected and that 100% of the BIG should be used.[28] Application of the BIG discount recognizes that the potential tax liability is of material concern to the "willing purchaser" and that the hypothetical willing buyer would insist on a 100% deduction for the very real BIG liabilities inherent in EGA's and FAV's assets.

---

[27] The Referee's finding on this factual issue is not based on the credibility of a witness. Thus, no deference should be given to the Referee's finding.

[28] Alternatively, if the Court finds that *Wechsler* is not controlling or that there were "no readily available substitutes," the Court, following *Murphy*, should "present value" the BIG taking into account the additional corporate taxes incurred because EGA and FAV are C corporations. (*See* A.755).

POINT V

THE SUPREME COURT INCORRECTLY DETERMINED THE VALUE OF EGA'S AND FAV'S "CHOSES IN ACTION"

The Supreme Court confirmed the Referee's valuation of EGA's and FAV's contingent "choses in action" claims against the Edward Jr. Estate for "rents skimmed by him [Edward Jr.] during his management of the corporations" at $2,548,266 and $3,140,369, respectively, and that the "the percentage of total value of equity attributable to the choses in action should be placed in escrow pending disposition of a separate action to be brought against the estate to recover on the choses." (A.80; A.308, ¶ 175; A.310, n. 31; A.311, ¶ 189).[29]

This ruling is based on the Referee's finding that the "choses in action" are "contingent assets" arising from Edward Jr.'s "skimming" of monies from EGA's and FAV's properties and that "there is ample evidence in the record that the Estate of Edward P. Giaimo, Jr. is not judgment proof and has sufficient assets." (A.80-81; A.306-311, ¶¶ 170-173, 188).

[29] The Supreme Court correctly provided in the Judgments that the monies representing the "choses in action" in escrow will be released fully or *pro tanto* only upon the entry of a judgment against the Edward Jr. Estate and the payment of such judgment or any portion thereof to EGA and FAV. (A.13-14; A.63-64). Pursuant to BCL § 1118(a), the Supreme Court determines the "fair value" of Petitioner's shares "upon such terms and conditions as may be approved by the court." The foregoing conditions ensure that Petitioner receives his proportionate share of the contingent EGA and FAV "choses in action" only if the Edward Jr. Estate actually pays monies to EGA and FAV in satisfaction of such judgments. Indeed, Mr. Mercer, Petitioner's expert, testified that "placing the proceeds in escrow pending final disposition of the dispute would be the most reasonable alternative." (*See* A.242, ¶ 359; A.308, ¶ 175; A.310, n. 31).

Here again, the critical issue is the amount a "willing buyer" with full knowledge of the facts would pay for this concededly "contingent asset." The Supreme Court accepted the Referee's determination, based on Mr. Mercer's opinion that "rather than sue themselves, the [Petitioner and Respondent] would resolve the dispute," that the "dispute is easily resolvable by the parties as they were very familiar with the intra-familial dispute" and that "a willing purchaser would pay 100% for the claims, but likely place the amount in escrow and having some agreement on legal fees and expenses incurred in connection with the escrow." (A.241-242, ¶¶ 356-358).

The Supreme Court accepted the Referee's determination that the "choses in action" claims would be reduced only by the amount of discovered cash attributable to the six (6) year statute of limitations period prior to the July 31, 2007 Valuation Date even though the payment made by the Estate to EGA and FAV from the discovered cash was millions of dollars greater than the sum credited and not limited to the six year period. (A.80-81). The Supreme Court's valuation of the "choses in action" is in error.

First, the Supreme Court failed to credit the full amount of the discovered cash attributed to and paid to EGA and FAV from the "skim" against the "choses in action" pursuant to the express agreement of the Co-Executors Robert Giaimo and Janet Vitale. The Disclosure Statement of Co-Executors annexed to the Estate Tax

Return allocated $4,294,931 of discovered cash to EGA and $1,164,456 to FAV. (A.626-628; A.3839). The Co-Executors allocated all of this discovered cash to EGA and FAV, regardless of any statute of limitations that could apply to claims by these corporations to recover monies "skimmed" from the Edward Jr. Estate. The Referee, however, improperly allocated only $2,901.960 (68%) of the money allocated to and ultimately paid to EGA, and only $753,613 (65%) of the money allocated to and ultimately paid to FAV. (A.308, ¶ 175; A.311, ¶ 189). The "choses in action" should be reduced by the full amounts of discovered cash attributed to and paid by mutual agreement of the Co-Executors (Petitioner and Respondent) to EGA and FAV.

Second, the evidence does not support the Supreme Court's conclusion that no "competent evidence was presented to the Referee that the claims will be uncollectible from the estate." (A.81). In fact, the evidence amply demonstrated that there are serious issues regarding "collectability" of any claims against the Edward Jr. Estate, which undercut the Supreme Court's determination that the "choses in action" should be valued at 100% -- that is, as the equivalent of cash. Specifically, the Edward Jr. Estate is liable for taxes exceeding $12 million to the federal and state governments. (A.741-752; A.3818-3825; A.3836).[30]

[30] Administration expenses, such as attorneys' fees, have priority over estate taxes, claims and other items under SCPA § 1811(1). *See Matter of Karl*, 266 A.D.2d 392 (2d Dep't 1999). Such administration expenses *a fortiori* would have priority over any "choses in action" by EGA and

In sum, the foregoing shows that the hypothetical "willing buyer" would not value these "choses in action" at their full value ($5,688,635), and would not be willing to place approximately $2.8 million in escrow pending the determination of these claims that could take years to collect, if they can be collected at all. The Supreme Court's failure to reduce the "choses in action" by the actual amount of cash received by EGA and FAV pursuant to the Disclosure Statement of Co-Executors, and its valuing of such "choses in action" at their full value notwithstanding the serious collectability issues, is error.

Accordingly, the Court should value EGA's and FAV's "choses in action" at no more than $1,155,995 and $2,729,526, respectively, which reduces the "choses in action" claims by the amounts the Edward Jr. Estate paid to EGA and FAV from the discovered cash.

POINT VI

THIS COURT SHOULD DIRECT RESTITUTION OF MONIES RESPONDENT PAID TO PETITIONER BY REASON OF THE SUPREME COURT'S OVERVALUATION OF THE "FAIR VALUE" OF EGA'S AND FAV'S SHARES

On September 22, 2011, Respondent paid $33,520,597.90 and $15,091,840.30, respectively, to Petitioner in full satisfaction of the Judgments in

FAV. This further undercuts the Supreme Court's inclusion of these "choses in action" at their full value.

the EGA and FAV "fair value" proceedings. In Points III, IV and V, we demonstrated that the Supreme Court erred in determining the "fair value" of EGA's and FAV's shares. As a result of the Supreme Court's errors, Respondent overpaid Robert Giaimo monies ranging from approximately $10 million to $20 million. (*See* p. 61, *infra*).

CPLR § 5523, in pertinent part, provides that "a court reversing or modifying a final judgment or order...may order restitution of property or rights lost by the judgment or order." This Court has the power to direct restitution of monies paid pursuant to a judgment that is set aside or modified on appeal. *See Seagroatt*, 78 N.Y.2d at 448, n. 4 ("court reversing judgment may order restitution"); *Polipo v. Sanders*, 245 A.D.2d 2 (1st Dep't 1997).

Respondent respectfully submits that this Court should direct restitution of any monies Respondent paid to Petitioner arising from the Supreme Court's errors in the valuation of the EGA and FAV shares. This Court, under CPLR § 5523 and its inherent powers, should direct restitution of such monies in its Order determining these appeals and cross-appeals. The Appellate Division can "render the judgment it finds warranted by the facts," *Northern Westchester Professional Park Associates v. Town of Bedford, supra*, 60 N.Y.2d at 499, and is not required to remand the proceedings to the Supreme Court for a hearing on the proper amount of the restitution. *See Chock Full O'Nuts Corp. v. NRP LLC I, supra*, 47

A.D.3d at 195-196; *Young v. Scully*, 214 A.D.2d 905, 907 (3d Dep't 1995) (remittal was not required "because we can make the factual findings that should have been made by the trial court").

Significantly, this Court has held that a remand or remittitur is not necessary where there has been protracted litigation and a remand would only add substantial time and expense to an already costly and protracted litigation. In *Wechsler*, 58 A.D.3d at 77, this Court decided certain issues and did not remand the proceeding to the Supreme Court "given the passage of more than seven years since the commencement of the action and the enormous litigation costs incurred by the parties." *See also Popowich v. Korman*, 73 A.D.3d 515, 519 (1st Dep't 2010) (Appellate Division adjusted the judgment and directed the Clerk "to enter an amended judgment" in "this already costly and protracted litigation"); *Trefoil Capital Corp. v. Creed Taylor, Inc.*, 121 A.D.2d 874, 878 (1st Dep't 1986) ("Rather than require further wasteful proceedings to recover these monies, to which CMNY is clearly entitled, CPLR 5523 contemplates that this court grant relief when it can be done forthwith").

A like result should obtain here. The dissolution proceedings, which were changed to "fair value" proceedings upon Respondent's election to purchase the shares under BCL § 1118, were commenced in August of 2007. The parties have been engaged in very costly and protracted litigation for almost five (5) years.

Under these circumstances, this Court should enter an Order directing that Petitioner pay as restitution to Respondent the amounts by which the Supreme Court overvalued the EGA and FAV shares.

In this connection, we note that the amounts of the restitution are easy to compute. As an aid to the Court, we set forth below the monies that would be the subject of the order of restitution based on the following scenarios:

(1) The BIG remains the same per *Murphy*, 20% DLOM, and reduction of "choses in action" by fully crediting amount Edward Jr. Estate paid to EGA and FAV from the discovered cash; and

(2) The BIG at 100% per *Wechsler*, 20% DLOM, and reduction of "choses in action" by fully crediting amount Edward Jr. Estate paid to EGA and FAV from the discovered cash.

These scenarios also reflect the reduction of the prejudgment interest at 4% from July 31, 2007 [the Valuation Date] to the date of entry of the Judgments (A.12; A.62; A.82-83)[31] and the post-judgment interest at 9% from entry of the Judgments to September 22, 2011, the date Respondent paid the EGA and FAV Judgments.

---

[31] As noted, the Supreme Court confirmed the Referee's recommendation that interest be awarded at the "equitable rate" of 4% per annum from July 31, 2007 to the date of entry of the Judgments. (A.82-83; A.315, ¶¶ 203-206).

SCENARIOS OF MODIFICATIONS TO "FAIR VALUE"
OF EGA AND FAV SHARES

	EGA	FAV	Total
Judgment	$ 33,298,090	$ 15,058,423	$ 48,357,332
Post-judgment interest	221,689	33,417	255,106
Total Paid	$ 33,520,598	$ 15,091,840	$ 48,612,438
BIG per Murphy with 20% DLOM and Reduction in Choses in Action			
Judgment and Interest	$ 33,520,598	$ 15,091,840	$ 48,612,438
Fair Value and Interest	26,164,538	11,882,757	38,047,295
Difference	$ 7,356,060	$ 3,209,083	$ 10,565,144
100% BIG per Wechsler with 20% DLOM and Reduction in Choses in Action			
Judgment and Interest	$ 33520,598	$ 15,091,840	$ 48,612,438
Fair Value and Interest	19,898,358	9,066,901	28,965,259
Difference	$ 13,622,240	$ 6,024,940	$ 19,647,180

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court:

(a) direct that the "fair value" determination of the EGA and FAV shares, as reflected in the Judgments entered on August 26, 2011 and September 13, 2011, respectively, be modified as follows: (1) a 20% DLOM be applied to all of EGA's and FAV's net assets; (2) 100% of the BIG be deducted from the net asset value of EGA and FAV; (3) EGA's and FAV's contingent "choses in action" claims be reduced to $1,155,995 and $2,729,526, respectively; and (4) prejudgment interest at 4% from July 31, 2007 to the date of entry of judgment and postjudgment interest at 9% to September 22, 2011 (Respondent's date of payment and

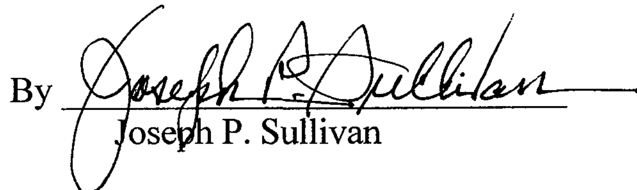
satisfaction of the Judgments) be assessed on the foregoing revised values;

(b) order that Petitioner Robert T. Giaimo pay as restitution to Respondent Janet Vitale the amounts resulting from the foregoing reductions in the "fair value" of the EGA and FAV shares; and

(c) affirm the Judgments entered on August 26, 2011 and September 13, 2011, based on the Supreme Court's April 25, 2011 Decision, in all other respects.

Dated: New York, New York
June 1, 2012

HOLLAND & KNIGHT LLP
Attorneys for Respondent-Appellant-Cross-Respondent Janet Giaimo Vitale

By 
Joseph P. Sullivan

31 West 52nd Street
New York, New York 10019
Tel: (212) 513-3200

Of Counsel:

Joseph P. Sullivan
Mitchell J. Geller
Robert J. Burns

#11254850_v1

PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO § 600.10.(d) (1)(v)

This brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman
Point Size: 14
Line Spacing: Double

Word Count: The total number of words in this brief, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 15,345.

The Appellate Division, First Department, on May 25, 2012, granted Respondent-Appellant's application to file an oversize brief.

Dated: New York, New York
June 1, 2012

HOLLAND & KNIGHT LLP
Attorneys for Respondent-Appellant-Cross Respondent Janet Giaimo Vitale

By [signature]
Mitchell J. Geller

31 West 52nd Street
New York, New York 10019
Tel: (212) 513-3200

#11261157_v1