SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROBERT M. LEVINE, AS TRUSTEE OF THE MARION LEVINE REVOCABLE TRUST, Petitioner, -against- SEVEN PINES ASSOCIATES LIMITED PARTNERSHIP, Respondent.	INDEX NO.151958/2014

REPLY IN SUPPORT OF REQUEST TO SET A DATE FOR SPECIAL PROCEEDING

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On March 5, 2014, The Marion Levine Revocable Trust (the "Levine Trust") moved this Court **to set a date for a special proceeding** pursuant to §§ 1102 and 1105 of the New York Revised Limited Partnership Act (the "Partnership Act") and § 623 of the New York Business Corporation Law (the "Corporation Law") to fix the fair value of the Levine Trust's dissenting limited partnership interest. Seven Pines Associates Limited Partnership (the "Partnership") agrees that the Levine Trust is entitled to such a special proceeding. (*See* NYSCEF Doc. No. 34; Seven Pines Associates Limited Partnership's Memorandum of Law in Opposition to Petition ("Opposition")). Accordingly, the Levine Trust's motion should be granted and a special proceeding should be calendared.

Without opposing the motion before the Court, the Partnership apparently decided to take this opportunity to ask the Court to render summary judgment "against" the Levine Trust. It submitted a sixteen page memorandum "in opposition to petition" disputing the value for the Levine Trust's partnership interest, declaring that the Levine Trust has failed to "prove" its entitlement to fair value, and asking the Court to adopt the Partnership's recently obtained and never-before-disclosed appraisal and calculation of value without the benefit of discovery, expert testimony or a trial as anticipated by the statute. The Partnership's effort is simply one more example of its history of failing to comply with statutory requirements. It should be rejected. The Court should calendar a date for the special proceeding and allow the process of pretrial discovery to begin.

FACTUAL BACKGROUND

The Partnership's Opposition contains a significant amount of argumentative hyperbole and factual misstatements. The Levine Trust does not intend to address every factual inaccuracy. The time for addressing all of the misstatements is at trial. Instead, the Levine Trust provides the following factual background to clarify the current record for the Court.

A. The Partnership

The Partnership was formed in 1972 and converted to a limited partnership on January 1, 1973 pursuant to an Amended and Restated Agreement of Limited Partnership ("Partnership Agreement"). (NYSCEF Doc. No. 17.) The Partnership is organized under the laws of New York. (*Id.*) It owns a 305-unit apartment building located at 1 Glenwood Avenue in Yonkers, New York. (NYSCEF Doc. No. 16, ¶ 3.)

The Partnership included 12 limited partnership units ("LP Units"). One LP Unit represented 8.33% of the Partnership. (NYSCEF Doc. No. 1, ¶ 7; Petition at ¶ 7.) Prior to the merger, which took place on January 8, 2014, the Levine Trust was a limited partner in the Partnership owning 4.165%, or one half of one LP Unit. (See Affidavit of Robert M. Levine ("Levine Aff."), ¶ 3.) Robert M. Levine has been the acting Trustee for the Levine Trust since January 2009. (Levine Aff., ¶2.)

B. The Proposed Merger and The Levine Trust's Dissent.

On November 12, 2013, the Partnership sent a Merger Proposal and related appendices to the disinterested limited partners, including the Levine Trust. (Levine Aff. Ex. 1.) According to the Merger Proposal, the General Partner – who together with affiliates of Equity Resources, Inc. ("ERI") owned at least 77% of the LP Units – was joining forces with ERI to buy out the remaining LP Units in the Partnership. (*Id.*) In the transaction, the disinterested limited partners had two choices. First, under what was termed "option one," the limited partner would receive a cash payment of $650,000 per LP Unit. Under "option two," the disinterested limited partner could buy into the successor entity for $10,000 per LP Unit. (Levine Aff. Ex. 1 at 1.) The

"General Partner [recommended] that [the limited partner] vote in favor of the Merger" "no later than December 12, 2013." (Levine Aff. Ex. 1 at 2.)[1]

After receiving the Merger Proposal, the Levine Trust requested a number of documents, including financial statements for the Partnership as well as a copy of the Appraisal referenced in the Merger Proposal ("2012 Appraisal") and an explanation of how the Partnership calculated a value for the LP Units ("Merger Calculation"). (Levine Aff. ¶ 5 Ex. 2.) In response, the Partnership provided the 2012 Appraisal and the Merger Calculation, as well as a list of the limited partners of the Partnership. (*See* Levine Aff. ¶ 6, Exs. 3-5.) It did not provide financial statements. (Levine Aff. ¶ 7.)

Comparing the documents received from the Partnership with the proposed options for merger consideration, the Levine Trust was concerned with a number of discrepancies in the Partnership's valuation of its interest. In particular, the Partnership had completely ignored a $33 million dollar appraisal of the Partnership property from September 2012. (Levine Aff. ¶ 8.) Based on those facts, the Levine Trust elected to exercise its statutory dissenter's rights pursuant to the Partnership Act and sent the Partnership notice of its intent to dissent. (Levine Aff. Exs. 9-10.)

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[1] The Partnership now tells the Court that it "underwent a merger and related reorganization on November 12, 2013." (NYSCEF Doc. No. 34 at 1; Opposition at 1.) That is patently false. The Merger Proposal indicated that the General Partner and related affiliates had "indicated that it *will vote* in favor of the Merger and therefore the plan of Merger and Merger *will be* approved." (Levine Aff. Ex. 1 at 2 (emphasis added).) But it also explained that Merger will not likely close until December and asked the limited partners to vote as a part of the approval process. Indeed, Partnership counsel (the same firm representing the Partnership in this proceeding) has confirmed that the merger was not completed until January 8, 2014. (NYSCEF Doc. No. 25; Halpern Aff. Ex. 9)

C. The Partnership's Failure To Comply With The Statute And The Resulting Petition.

After providing its dissent, the Levine Trust continued to try to communicate with the Partnership to no avail. Robert Levine's calls were not returned. (Levine Aff., ¶ 7.) The Levine Trust sent two emails to the Partnership's accountant requesting financial statements for the Partnership, but the emails were ignored until after this litigation commenced. (Levine Aff., ¶ 8, Exs. 6-7.) The Levine Trust requested current financial information regarding vacancy distributions and the timing of the merger, but the Partnership did not respond prior to the merger. (Levine Aff ¶ 9, Ex. 8.)

The timing of the merger was crucial for the Levine Trust because under New York law, the Partnership had ten days from the date of the merger to make the Levine Trust an offer. N.Y P'ship Law § 1105. If the Partnership failed to make an offer within ten days, then under the statute, the Partnership had 20 days to start an action to fix the fair value of the Levine Trust's dissenting partnership interest. N.Y. Bus. Corp. Law § 623(h)(2). If the Partnership failed to institute the action as required, then under the statute, the Levine Trust had 30 days to start an action to fix the fair value of its interest. N.Y. Bus. Corp. Law § 623(h)(3).

Given the Partnership's complete failure to respond to the Levine Trust's inquiries, the Levine Trust was concerned with the Partnership's willingness to comply with the statute. As it turns out, that concern was well-founded. The Partnership did not make an offer for the Levine Trust's interest within the statutorily-required time period of ten days after the merger. (Levine Aff. ¶ 12.) Instead, on January 24, 2014 – fourteen days post-merger – counsel for the Partnership wrote to counsel for the Levine Trust to advise that the merger had been completed on January 8 and to make an offer for the Levine Trust's interest of $325,000 – the same amount as option one of the merger consideration. (NYSCEF Doc. No. 25; Halpern Aff. Ex. 9.)

Partnership's counsel told the Levine Trust that pursuant to the statute, the parties now had 90 days to negotiate the value of the interest. (*Id.*) That statement was legally incorrect. Because the Partnership had failed to comply with the statute, it either needed to start the action to fix the value of the partnership interest by February 8, 2014 or the Levine Trust would be required to do so by March 9, 2014. *See* N.Y. Bus. Corp. Law § 623 (h)(1)-(3).

Given that legal reality, the Levine Trust agreed to negotiate in good faith until March 1. (Levine Aff. Ex. 13.) From January 24 to March 1, the parties exchanged information and attempted to negotiate a value of the Levine Trust's Partnership Interest. (*Id.* ¶ 11, 14, Exs. 11-13.) The Partnership provided the 2013 financials as well as rent rolls for the first part of 2014. (Levine Aff. ¶ 14, Ex. 11-12.) By March 1, however, the parties had not reached an agreement. Accordingly, as anticipated by the statute, the Levine Trust filed the instant action and asked the Court to set a date. (*See* NYSCEF Doc. Nos. 1, 6; Petition, Notice of Petition).

ARGUMENT

As a threshold matter, there is no legitimate reason for the Partnership's Opposition brief. The Levine Trust made a **motion asking the Court to set a date** for a special proceeding. The Partnership does not oppose that request. Yet, the Partnership filed a brief "opposing" the Petition, arguing that the Levine Trust has somehow failed to prove its entitlement to fair value, and asking the Court to fix a value for the Levine Trust's interest based on a newly-commissioned and previously-undisclosed appraisal and the Partnership's own self-serving affidavit. Because the Partnership has misstated the procedure for special proceedings and has improperly argued for "summary judgment," the Levine Trust offers this response. In doing so, however, the Levine Trust does not waive its rights to pretrial discovery or a trial on the special proceeding as contemplated by the statute. *See* N.Y. Bus. Corp. Law § 623(h).

I. Contrary To The Partnership's Arguments, The Levine Trust Is Not Required To *Prove* The Fair Value Of Its Interest.

Contrary to the Partnership's repeated arguments that the Levine Trust has failed to support its petition or prove an entitlement to its value, when this matter proceeds to trial, the Levine Trust does not have the "burden" to prove anything. *See* N.Y. Bus. Corp. Law § 623(h). Courts have explained that in these valuation proceedings, the Court "has a responsibility to 'determine the fair value of petitioner's shares . . . .' This formulation defies application of a burden-of-proof approach." *See Matter of Cohen*, 636 N.Y.S.2d 994, 997 (Sup. Ct. 1995) *aff'd*, 659 N.Y.S.2d 735 (1997) (interpreting N.Y. Bus. Corp. Law § 1118, for which the court noted the same analysis applies as for N.Y. Bus. Corp. Law § 623).

In fact, if anyone has the burden to act under the Corporation Law it is the Partnership, not the Levine Trust. When a dissent is made, the statute looks to the partnership, from which the dissenting partner has dissented, to make an offer. N.Y. P'ship Law § 1105. If the partnership fails to do so, the statute requires the partnership to start an action to fix the fair value of the dissenting partner's interest. N.Y. P'ship Law § 1105; N.Y. Bus. Corp. Law § 623(h)(1)-(3) . Only when a partnership *fails* to both make and offer and start and action– as the Partnership did here – does the dissenting partner have the burden to do anything. *See id.* The legislature's unambiguous intent to force the Partnership to act is illustrated by Section 623(h)(7) which allows a dissenting partner to recover attorneys' fees from a partnership based on either a partnership's failure to make an offer *or* a partnership's failure to start the action. N.Y. Bus. Corp. Law § 623(h)(7). The Partnership in the instant matter failed to both make and offer and commence the action required by the statute.

The Levine Trust has no "burden" to act or to "prove" fair value. This is reinforced, where, as here, the Levine Trust has not moved to "fix" the value of its interest or for any legal

or factual findings. Either the Partnership misunderstood the Levine Trust's clear request to calendar a date or it is trying to shift the focus from its blatant failure to comply with the statute with an unnecessary "opposition brief" and deprive the Levine Trust and the Court of the benefit of discovery or a hearing. Regardless, the Partnership's approach is procedurally inappropriate and inconsistent with the law. It should be rejected.

II. Findings Related To Valuation Are To Be Made By The Court With The Benefit Of Discovery, Expert Testimony, And A Trial.

In its Opposition, Partnership asks the Court to reject the Petition, reject the "Petitioner's value," ignore other valuations of the Partnership, and adopt the Partnership's newly commissioned appraisal. The Partnership seeks this relief in violation of the statute and without giving the Levine Trust the benefit of discovery, expert testimony or a trial. The Partnership's approach is improper in that it seeks to deprive the Court and the Levine Trust of the procedure contemplated by the statute. *See* N.Y. Bus. Corp. Law § 623(h) (discussing a trial, pretrial discovery and expert testimony); *see also Friedman v. Beway Realty Corp.*, 661 N.E.2d 972, 974 (N.Y. 1995) (discussing valuation proceeding under N.Y. Bus.Corp. Law § 623, which involved a bifurcated trial and expert testimony); *In re Carolina Gardens Inc. v. Menowitz*, No.112637/93, 1996 WL 34573714 (N.Y. Sup. Ct. Jan. 26, 1996) (trial order in valuation proceeding under N.Y. Bus. Corp. Law § 623 describing testimony of numerous witnesses including experts, architect and management witnesses). The Partnership's approach is also improper in that it tries to prevent the Court from considering a number of factors for fair value. N.Y. Bus. Corp. Law § 623(h)(4).

A. The Court Should Consider All of the Relevant Factors in Deciding Fair Value.

In deciding fair value, courts should not refer the issue to an appraiser. N.Y. Bus. Corp. Law § 623(h)(4). Instead, the statute instructs that courts should consider the nature of the

transaction giving rise to the dissenter's rights, the effect that the transaction has on the dissenter, the concepts and methods then customary in the relevant financial markets for determining fair value of other partnership interests in the market and "all other relevant factors." *Id.* The Partnership ignores all of those factors and tells the Court to simply adopt its recently-commissioned appraisal. For obvious reasons, the Partnership's suggested approach is unacceptable.

The transaction at issue here is an interested party merger transaction. (Levine Aff. Ex. 1 at 1, 2, 10.) There has been no "sale" of the Partnership or its property. The General Partner and certain affiliates of ERI – who collectively owned 75% of the LP Units – joined forces with ERI to squeeze out the other five disinterested limited partners. (*Id.*) The effect of that decision on the disinterested limited partners, including the Levine Trust, was the termination of those partners LP Units as they then existed. (*Id.* at 1.) In contrast, the General Partner and ERI continue to participate in the Partnership with a more significant ownership interest and even greater benefits. (*Id.* Ex. 1 at 10.) And they continue to do so having made only a modest payment.[2] The Court can consider all of these facts when deciding the fair value of the Levine Trust's interest.

More importantly, the Court is not required to accept the Partnership's current calculation of fair value or the valuation of its self-selected appraiser. Nor should it. N.Y. Bus. Corp. Law

[2] The Partnership has not been candid about which of the five disinterested limited partners accepted option one and which bought back into the Partnership under option two. The Levine Trust is aware of at least one other disinterested limited partner who bought back into the Partnership. But even if all of the remaining disinterested partners took option one, the payout for the General Partner and ERI would only have been approximately $1.75 million. (Levine Aff. Ex. 5 (identifying the disinterested limited partners as owning less than 3 outstanding LP Units)).

§ 623(h)(4). The Court can and should consider all of the valuations associated with the Partnership that were performed at and around the date of the interested party transaction.

1. The 2012 Appraisal

First, in 2012, Signature Bank commissioned an appraisal by Withers Engelke & Associates, Inc. ("Withers Engelke") in connection with the Partnership's request for refinancing ("2012 Appraisal"). (Levine Aff. Ex. 3.) Withers Engelke determined that the property was worth $33 million and supported that value with both an income capitalization approach and a sales comparison approach. (*Id.*) The Partnership accepted the valuation and used it to obtain its requested financing.

The Partnership now tried to distance itself from the 2012 Appraisal, arguing that it is "irrelevant" because the Partnership did not commission it. (NYSCEF Doc. No. 34 at 8; Opposition at 8.) That argument is illogical. The 2012 Appraisal determined an estimated market value of the Partnership property, which the Partnership relied upon and used to obtain new financing. It is relevant. The Partnership then tells the Court to disregard the 2012 Appraisal because it is "rife with errors." (NYSCEF Doc. No. 34 at 14; Opposition at 14.) Significantly, even if the Court were to accept the Partnership's claims of "error," there is no evidence in the record (nor has any been provided to the Levine Trust) to show that the Partnership disputed Withers Engelke's valuation in 2012 or that it informed Withers Engelke or Signature Bank of these now-identified egregious "errors."

2. The Merger Calculation

The Partnership could have commissioned an appraisal in 2013 to support the Merger Calculation. It chose not to do so. Instead, the Partnership performed its own income capitalization calculation to determine the value of the Partnership property and the merger consideration. In the Merger Calculation, the Partnership used a capitalization rate ("cap rate")

of 4.9% and ran its calculation on the 2012 Net Operating Income ("NOI") of $825,000 for a value of approximately $16 million. (NYSCEF Doc. No. 2; Petition, Ex. B.)

In the Merger Proposal, apparently in an effort to escape the impact of the 2012 Appraisal which valued the Partnership property at $33 million, the Partnership stated to the disinterested limited partners that the value of the Partnership property was closer to $10 million. The Partnership now suggests that though the Partnership property was only worth $10 million on the 2012 NOI and a 7.5% cap rate, it chose to use a 4.9% cap rate and a $16 million valuation for the Merger Calculation out of the supposed goodness of its heart. (NYSCEF Doc. No. 34 at 6; Opposition at 6.) That argument should be rejected out of hand. The Partnership represented to the disinterested limited partners that it used a reasonable and well-supported cap rate in November 2013 to determine the merger consideration. Cap rates do not change in a matter of months. The Partnership's effort to re-characterize and change the cap rate, as described below, is further evidence that the Partnership is without boundaries on what it is willing to say in an effort justify its sub-market valuation.

The Partnership developed, relied upon, used, and benefitted from the 4.9% cap rate that it used in the Merger Calculation. It represented to the disinterested limited partners that its cap rate was appropriate and reasonable and it encouraged the disinterested limited partners to accept the options for merger consideration based on a value determined by that cap rate. Indeed, using that cap rate in its calculation, the Partnership boasts in its dissent that it was able to convince all but one of its disinterested limited partners *not* to dissent.

Yet, the Partnership now tries desperately to convince the Court to abandon the very cap rate that afforded the Partnership such a significant benefit. The Partnership's desperation begs the question: why would the Partnership so quickly abandon cap rate that had been so beneficial

only a couple months before? There are two reasons. First, the Partnership knows that it used an inaccurate and artificially depressed NOI from 2012 with its 4.9% cap rate to calculate the merger consideration to create the impression that the Partnership was not doing as well as it was. The 2012 NOI that the Partnership used was low and unreliable because at the time, the property was in the midst of a major renovation project and vacancies were unusually high. (Levine Aff, Ex. 3.) Not surprisingly, in the Merger Proposal and Merger Calculation, the Partnership did not tell the limited partners about the vacancy rate or the renovation (it likewise fails to tell the Court here).

The Partnership claims that it performed its Merger Calculation using the 2012 NOI because that information was the most accurate financial information that it had at the time of the Merger Proposal. (NYSCEF Doc. No. 34 at 15; Opposition at 15.) That is not true. As of November 2013, the Partnership had financial statements through September 2013 showing a NOI of over a $1 million for the first nine months on 2013 – a number that could easily be projected out for the year. (Levine Aff. Ex. 11.) The Partnership had accurate numbers in November 2013; it simply chose not to use them. And, of course, it never told the disinterested limited partners that the NOI for calendar year 2013 would likely be (and was) at least $500,000 more than the $825,000 that the Partnership used in the Merger Calculation. (Levine Aff. Exs. 1 13.)

The second, and perhaps more telling, reason for the Partnership's abandonment of its cap rate was the effect that the 4.9% cap rate has on the value of the Partnership when it is used with the accurate financial information for 2013. The Partnership knows that the accurate financial information for 2013 with a 4.9% cap rate puts the value of the property somewhere close to $37million. The 2012 Appraisal and the Partnership's previously used and relied upon

cap rate of 4.9% are relevant factors affecting the value of the Levine Trust's interest that can and should be considered as the Court evaluates the fair value of the Levine Trust's interest at trial. N.Y. Bus. Corp. Law § 623(h)(4).

B. The BCS Appraisal Should Be Given Limited To No Weight.

The Partnership knows that it used an artificially depressed NOI in its Merger Calculation; it knows that the merger consideration options were inconsistent with the 2012 Appraisal and with the actual 2013 financial statements; but the Partnership thought it could slip those issues past the disinterested limited partners. The Levine Trust called the Partnership's bluff.

In response, in the last three weeks, the Partnership has commissioned an entirely new appraisal from BCS Valuations, Inc. ("BCS") and claims that this "comprehensive" appraisal "amply" supports the Partnership's offer. (NYSCEF Doc. No. 34 at 2; Opposition at 2.) The Partnership apparently reached its value through its own "expertise" as it offered no expert testimony on the matter.[3] Regardless, the BCS Appraisal is nothing but the latest effort by the Partnership to manipulate the numbers and force a sub-market value. It should be given limited to no weight in this proceeding.

The BCS Appraisal values the Partnership on two different dates, November 11, 2013 and January 8, 2014. It does so, the Partnership claims, because the Levine trust asked for a valuation on a statutorily "improper" date of January 8, 2014, the day of the Merger. (NYSCEF

[3] The Partnership's argument related to Section 10 of the Amended Partnership Agreement is premature. By its plain language, Section 10 does not apply to the interested-party transaction forming the basis for the Levine Trust's dissent. As the Partnership has not properly brought a motion for a legal conclusion on this issue, however, the Levine Trust declines to debate it in this reply. The application of Section 10 is an issue for the Court and should be reserved until the Court has heard any relevant testimony and properly evaluated the documents.

Doc. No. 34 at 7; Opposition at 7.) The valuation date is determined by the Court not by the Partnership, but in any event, the Partnership is wrong. The Partnership Act specifically states that a dissenting partner is entitled to the "fair value" of its interest as of the date before the effective date of the Merger. N.Y. P'ship Law § 1102. The Partnership attaches significance to a sentence in the Corporation Law indicating that for dissenting **shareholders**, the value is determined as of the date of "**shareholder approval**." (NYSCEF Doc. 34 at 9; Opposition at 9.) That sentence, however, is a substantive portion of the Corporation Law. It is not procedural and therefore, does not apply to this case. *See* N.Y P'ship Law § 1105 (adopting § 623 for procedure only); *see also* 1 N.Y. Prac., New York Limited Liab. Companies and Partnerships § 11:18 (interpreting the analogous limited liability company statute (where Section 1002(f) is the equivalent to Section 1002(c) of the partnership statute) and noting that "where Section 623(h) of the NYBCL conflicts with Section 1002(f) on the substance of valuation issues . . . Section 1002(f) should prevail because Section 1005 of the Act incorporates only the procedural provisions of 623(h) of the NYBCL"); *see also* 27APT1 West's McKinney's Forms Partnership Law IV: Introduction ("limited partners who object to the merger or consolidation have dissenter's appraisal rights with respect to receiving a cash payment for the fair value of their interests as of the close of business on the day immediately preceding the effective day . . . ."). In the end, the valuation date is immaterial as the valuations for both dates are similar. The value proposed by the BCS Appraisal on the statutorily appropriate date of January 8, 2014, however, is higher.

The BCS Appraisal has a number of issues in addition to the valuation date and the fact that it has never been seen before. The appraiser's calculations of NOI are too low considering the actual 2013 financial statements. (*Compare* NYSCEF Doc. No. 33 (Schwartz Aff. Ex. 1); *to*

Levine Aff. Ex. 11.) The balance sheet numbers are identical for November 2013 and January 2014. BCS used an entirely new cap rate without any explanation for why the cap rate has changed from the Partnership's previous selection. The sales comparison approach fails to account for any of the properties considered in the 2012 Appraisal and instead compares dissimilar (and several smaller) properties. (*Compare* Levine Aff. Ex. 3 *with* NYSCEF Doc. No. 33; Schwartz Aff. Ex. 1.) In addition, the BCS Appraisal uses a 10% vacancy rate which is not accurate, does not reflect the actual vacancy rate of the Partnership property which is currently at 5% and falling, and does not take into account the likely increases in rent that will result from the removal of HUD status. Any one of these issues discredits the BCS Appraisal. As a whole, the deficiencies are fatal.

The Court should compare the deficiencies in the BCS Appraisal and the inconsistencies in the Partnership's ever-changing value with the relative stability of the $33 million value in the 2012 Appraisal and $37 million value calculated using the formula from the Merger Calculation with the 2013 actual financial information to determine the "fair value" of the Partnership property and accordingly, the fair value of the Levine Trust's partnership interest. The Partnership's attempt to deprive the Court of that ability should be denied.

In view of the Partnership's latest conduct it is not unreasonable to note that the question of whether the General Partner acted fraudulently in its dealings with the disinterested limited partners has surfaced. Whether the General Partner has been engaged in fraudulent conduct is one of the issues that may come before the trier of fact at the time of trial. There certainly appears to have been enough misleading and deceptive conduct that the existence of fraud is one with which the Court may be concerned.

III. The Statute Allows the Dissenting Partner to Recover Attorneys' Fees In Situations Like the One At Bar.

The Partnership brazenly states that the Levine Trust's request for attorney's fees is "clearly unfounded." (NYSCEF Doc. No. 34 at 15; Opposition at 15.) Once again, the Partnership misunderstands the language of the statute. Under the Corporation Law, a court may award a dissenting partner, such as the Levine Trust, with attorney's fees if the court finds either: (1) the fair value of the interest materially exceeds the amount that the Partnership offered to pay; (2) that no offer was made by the Partnership; (3) that the Partnership failed to institute the special proceeding during the time period specified therefore; and (4) that the action of the Partnership in complying with this section was arbitrary, vexatious or otherwise not in good faith. *See* N.Y. Bus. Corp. Law §623 (h)(7). Every single one of those factors exists here. Accordingly, the Levine Trust's request for attorney's fees is appropriate and the Levine Trust will demonstrate its entitlement to those fees at trial.

In contrast, the Partnership's claim for attorneys' fees from the Levine Trust is ludicrous. The Court may only award fees to the Partnership if the Levine Trust's refusal to accept the Partnership's initial offer was arbitrary, vexatious, or otherwise not in good faith. N.Y. Bus. Corp. Law § 623(h)(7). Given that the Partnership failed to make an offer within the appropriate statutory time, and that someone cannot arbitrarily or vexatiously reject an offer that was never made, this provision should not apply to the Partnership's benefit. But even if it could apply, there is no evidence to suggest that the Levine Trust acted arbitrarily, vexatiously, or in bad faith in refusing the Partnership's untimely $325,000 offer. At the time that the Partnerships made its untimely offer of the same amount as offered in the Merger Proposal, the Levine Trust had an appraisal for $33 million, the Merger Calculation reflecting a value of $16 million and a well-founded (and ultimately accurate) belief that the NOI being used for the $16 million value was

inaccurate. It is hard to imagine a situation where the refusal to accept an offer could be any less arbitrary or vexatious.

CONCLUSION

For the foregoing reasons, the Levine Trust respectfully requests that the Court deny the Partnership's procedurally and statutorily improper request for summary judgment and grant its unopposed request for a date to hold a special proceeding.

Dated: New York, New York
April 28, 2014

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