

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

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ROBERT M. LEVINE, AS TRUSTEE OF THE	:
MARION LEVINE REVOCABLE TRUST,	:
	:
Petitioner,	:
	:
-against-	:
	:
SEVEN PINES ASSOCIATES LIMITED	:
PARTNERSHIP,	:
	:
Respondent.	:
	:
----- X	

Index No. 151958/2014

Motion Seq. No. 001

**SEVEN PINES ASSOCIATES LIMITED PARTNERSHIP'S
MEMORANDUM OF LAW IN OPPOSITION TO PETITION**

KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
Phone: (212) 940-8800
Fax: (212) 940-8776

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Respondent Seven Pines Associates Limited Partnership (“Seven Pines”) submits this memorandum of law in opposition to the petition in the instant special proceeding (the “Petition”) filed by Robert M. Levine, as trustee of the Marion Levine Revocable Trust (“Petitioner” or “Levine Trust”), to fix the fair value of a dissenting limited partnership interest pursuant to N.Y. B.C.L. §§ 623(h)-(k), and in support of the relief requested in Seven Pines’ answer with affirmative defenses, dated April 18, 2014 (the “Answer”). For the reasons set forth below, and in the accompanying Answer, the affidavit of Jon Halpern (the “Seven Pines Aff.”), and the exhibits attached thereto, and the affidavit of Bruce Schwartz (the “BCS Aff.”), and the appraisal report attached thereto, Seven Pines respectfully requests that the Court (i) reject Petitioner’s inflated and unfounded estimate of the value of his one-half limited partnership interest unit in Seven Pines (the “Levine Interest”)¹ and fix the fair value of the Levine Interest at \$324,611, based on the Property value set forth in the accompanying BCS Appraisal and Seven Pines 2013 financial statements; (ii) reject Petitioner’s request for attorney’s fees, costs, and expenses related to this proceeding, and order Petitioner to pay such attorney’s fees, costs, and expenses to Seven Pines; and (iii) grant such and other relief as the Court deems appropriate.

PRELIMINARY STATEMENT

In 1972, Petitioner’s predecessor George Levine paid \$61,250 to obtain the Levine Interest, which was equal to one half of a single limited partnership unit in Seven Pines, a limited partnership whose single asset was a 304-unit apartment building located in Yonkers, New York (the “Property”) (Seven Pines Aff. ¶ 5). On November 12, 2013, after Seven Pines underwent a merger and related reorganization, Petitioner was offered the option of shifting his investment

¹ At the time Petitioner dissented from the merger that precipitated this special proceeding, there were a total of 12 limited partnership units in Seven Pines. (Seven Pines Aff. ¶ 5). Petitioner owned half of one of these units. (*Id.*)

into the successor entity or, alternatively, accepting a cash payment of \$325,000 for the Levine Interest. Despite receiving this reasonable offer, which was accepted by every limited partner other than Petitioner, Petitioner now makes the outrageous and insupportable claim that he is entitled to receive \$1,573,000 for the Levine Interest (the “Levine Demand Amount”).

As shown below, the Court should reject Petitioner’s unreasonable and grossly overstated demand -- which is approximately 500% higher than the amount accepted by the other limited partners for their unit interests in the partnership -- because it is based solely upon an unauthenticated and inadmissible appraisal of the Property that was prepared at the request of a third party lender in 2012 (over a year prior to the merger), isolated figures taken from partnership financial statements for the year 2013, and certain income projections for 2014. Indeed, aside from the outdated third-party appraisal, Petitioner fails to provide any documentation in support of his Petition, nor does Petitioner provide his own calculations or his own appraisal of the Property. Accordingly, Petitioner’s unfounded and inflated valuation of his partnership interest should be rejected out of hand.

Contrary to Petitioner’s assertion, the Court should rule that the value of the Levine Interest is \$324,611. As set forth below, this number is amply supported by the evidence, including a BCS Valuations Inc. (“BCS”) appraisal of the Property dated as of November 11, 2013 (the “BCS Appraisal”), the day prior to the authorization of Seven Pines’ merger (the “Valuation Date”) as required by N.Y. B.C.L. 623(h)(4). In view of the illiquid and unmarketable nature of the Levine Interest, this valuation incorporates a conservative marketability discount of 25%, which courts have routinely held applies to valuation proceedings involving sales of limited partnership interests. However, even without that appropriate

discount, the value of the Levine Interest would be only \$432,815, an amount far lower than demanded by Petitioner here.

Based on the above described bona fide valuations, there is absolutely no basis for Petitioner's contention that Seven Pines acted unreasonably when it offered Petitioner \$325,000 as compensation for the Levine Interest (the "Limited Partnership Offer"). The Limited Partnership Offer clearly reflected a reasonable, good-faith attempt to fully compensate dissenting limited partners, as it was based on the most up-to-date financial statements at the time. Indeed, Petitioner was the only limited partner who decided to reject the Limited Partnership Offer (or an investment in the surviving entity) and dissent. Moreover, despite the fact that Seven Pines provided Petitioner with an explanation of the components of the Limited Partnership Offer and supporting documentation, Petitioner has steadfastly refused to provide a detailed explanation for his position that he is somehow entitled to the Levine Demand Amount, which is belied by the record evidence and contrary to the provisions of the Seven Pines organizational documents governing distributions to the limited partners.

BACKGROUND FACTS

A. Seven Pines' Formation, The Property, And The Terms Of The Partnership Agreement.

Seven Pines was formed as a New York general partnership on October 12, 1972, and converted to a limited partnership on January 1, 1973, upon the execution of the Seven Pines Associates Amended and Restated Agreement of Limited Partnership (originally and as amended from time to time, the "Partnership Agreement") (Seven Pines Aff. ¶ 3 and Exh. 1). The sole asset of the partnership is a 304-unit apartment building located at 1 Glenwood Avenue, Yonkers, New York 10701. At the time it was constructed by Seven Pines, the Property operated as a "Mitchell Lama housing project" pursuant to Article II of the Private Housing Finance Law and received the benefit of a mortgage subsidized under Section 236 of the

National Housing Act, whereby tenancy was restricted to households earning less than 80 percent of area median income (Seven Pines Aff. ¶ 3). On December 11, 2008, Seven Pines withdrew from the Mitchell Lama program and prepaid the existing subsidized mortgage, but many tenants continue to receive other rental assistance from the federal government and the landlord (Seven Pines Aff. ¶ 3).

The Partnership Agreement clearly sets forth the pecuniary interests of the general and limited partners. Section 10.2(C) states that distributions “other than Cash Flow such as from a Mortgage refinancing or a sale or disposition of any or all of the Property, or from any other transaction the proceeds of which do not constitute Cash Flow,” would be paid, after the payment of certain obligations, “fifty-five percent (55%) to the Limited Partners, forty percent (40%) to the Managing General Partner, and five percent (5%) to [a then general partner]” (Seven Pines Aff. ¶ 4 and Exh. 1). Thus, under the clear and unambiguous language of the Partnership Agreement, a distribution that arises from a merger and reorganization must be split fifty-five percent (55%) to the limited partners, forty percent (40%) to the Managing General partner and five percent (5%) to a then-general partner because it is a distribution that is made from a transaction that is “other than Cash Flow.”

Under the Partnership Agreement, limited partners were required to make an initial \$122,500 capital contribution to acquire a full Unit Interest (Seven Pines Aff. ¶ 5 and Exh. 1 at Section 5.1(A)). However, Petitioner’s predecessor made a \$61,250 contribution, and thus obtained only half of a Unit Interest (out of a total of 12 Unit Interests) in the partnership (the “Levine Interest”) (Seven Pines Aff. ¶ 5). From time to time, certain limited partners withdrew from Seven Pines and were paid the value of their partnership interest (Seven Pines Aff. ¶ 5).

For example, on October 14, 2005, a limited partner withdrew from Seven Pines and received a payment equivalent to \$400,000 per Unit Interest (Seven Pines Aff. ¶ 5).

Finally, the Partnership Agreement provides that Seven Pines is governed by New York's Revised Limited Partnership Act (Seven Pines Aff. ¶ 6 and Exh. 3 at ¶ 2).

B. The Merger And The Limited Partnership Offer.

In or about October of 2013, Halpern-Stillman Development Company, Seven Pines' general partner ("General Partner"), decided to pursue a merger with Seven Pines Holdings Merger Sub Limited Partnership (the "Merger"), the surviving entity of which would be a re-structured Seven Pines (Seven Pines Aff. ¶ 7). On November 5, 2013, the General Partner consented to the Merger (Seven Pines Aff. ¶ 7 and Exh. 4). One week later, on November 12, 2013, Seven Pines advised that 77.778 percent of limited partnership interests had consented to the Merger (Seven Pines Aff. ¶ 7 and Exhs. 5 and 6).

Under the terms of the Merger, a Seven Pines' limited partner who was also an accredited investor could make a contribution of \$10,000 and acquire a membership interest in the new limited partner of a re-organized Seven Pines (Seven Pines Aff. ¶ 8 and Exh. 5). Alternatively, any Seven Pines limited partner could receive compensation equivalent to \$650,000 per Unit Interest and exit the partnership (the "Limited Partnership Offer") (Seven Pines Aff. ¶ 8 and Exh. 5).

The components of the Limited Partnership Offer were derived from Seven Pines Associates Financial Statements December 31, 2012 (the "2012 Financials"), which was the most up-to-date information regarding the value of the partnership at the time, and are summarized in Exhibit B to the Petition. Specifically:

- Total income from the Property was \$4,014,321 (Seven Pines Aff. ¶ 9 and Exh. 7 at p. 7).

- Total expenses were \$3,194,317 (Seven Pines Aff. ¶ 9 and Exh. 7 at p. 7 (note that the total expenses figure used in the Limited Partnership Offer excluded mortgage interest)).
- Total net income was thus \$820,004 (*id.*).

Seven Pines rounded the Limited Partnership Offer up from \$644,944 to \$650,000 (Seven Pines Aff. ¶ 10). Indeed, as Seven Pines advised the limited partners, the fair value of a limited partnership interest may be less than the amount of the Limited Partnership Offer, as Seven Pines used a capitalization rate of 4.9 percent to determine the value of the Property (Seven Pines Aff. ¶ 10, Exh. 8 and Petition at Exh. B). Notably, Seven Pines elected to use the 4.9 capitalization rate, even though a less favorable rate of 7.5 percent was used in a prior appraisal commissioned by a third party in August of 2012 (the “2012 Appraisal”) (attached as Exh. A to the Petition); if the 7.5 rate had been used for the Limited Partnership Offer, the value of the Property would have been reduced to \$10,933,387 (Seven Pines Aff. ¶ 10). It was only by using the more favorable 4.9 percent rate that Seven Pines determined the Property’s value as \$16,734,776 (Petition at Exh. B). Last, as stated in the Seven Pines Aff., interest in real estate holding companies are generally subject to a marketability discount of generally 25 to 35 percent, and sometimes higher (Seven Pines Aff. ¶ 10). However, such a discount was not applied to the Limited Partnership Offer.

C. Petitioner Dissents And The Merger Is Consummated.

Of the eight limited partners, Petitioner was the only limited partner who dissented to the Merger and rejected the Limited Partnership Offer (Seven Pines Aff. ¶ 11 and Petition Exhs. C and D). Indeed, Petitioner was eligible to become a member in the limited partner of the surviving entity, but chose not to participate (Seven Pines Aff. ¶ 11). On January 8, 2014, the Merger was consummated (Seven Pines Aff. ¶ 11). On January 24, 2014, Seven Pines, through counsel, again offered Petitioner a cash payment of \$325,000, which represented the fair value of

the Levine Interest, which was only a half of a Unit Interest in the company (Seven Pines Aff. ¶ 11 at Exh. 9). Petitioner did not accept the offer and, in subsequent correspondence, demanded \$1,573,000, an unsupported and greatly inflated value that Seven Pines could not accept (Seven Pines Aff. ¶ 11). Petitioner subsequently filed his Petition to commence the instant special proceeding.

D. The BCS Appraisal And The BCS Interest Value.

In order to provide the Court with all of the information necessary to determine the value of the Levine Interest, Seven Pines' counsel, Katten Muchin Rosenman LLP ("Katten"), retained BCS to conduct an independent appraisal of the Property as of November 11, 2013, and as of January 8, 2014 (BCS Aff. ¶ 12). According to the appraisal report dated April 16, 2014 (the "BCS Appraisal"), the Property was worth \$20,873,891 on the Valuation Date (the "BCS Value") (BCS Aff. Exh. 1 at p. 62). The BCS Appraisal included an analysis, among other things, of Seven Pines 2013 Financials, Seven Pines Associates Financial Statements December 31, 2013 (the "2013 Financials"), rent rolls from November of 2013 and January of 2014, and relevant tax bills for the Property (Seven Pines Aff. ¶ 12 and Exhs. 7, 10-13). Using the BCS Value for the Property, the Levine Interest can be calculated by incorporating other inputs from the 2013 Financials. This calculation yields a fair value of \$324,611 (the "BCS Interest Value"),² if a modest 25 percent marketability discount is considered, or \$432,815 (well over \$1 million less than the Levine Demand Amount), if it is not. (*Id.*) The result is nearly identical even if the statutorily improper date of January 8, 2014 utilized by Petitioner, is used for the valuation. (Seven Pines Aff. ¶ 12 and Exh. 14). Under that scenario, the Levine Interest had a

² This term refers to the calculations of the Levine Interest based on the BCS Appraisal. These calculations were made by Seven Pines, not made by BCS, who merely authored the BCS Appraisal.

value of \$329,002 with the marketability discount, and \$438,670 without it (Seven Pines Aff. ¶ 12 and Exh. 14).

A spreadsheet of the calculations used to arrive at these figures is attached to the Seven Pines Aff. as Exhibit 14. The inputs are taken directly from the 2013 Financials, including assets other than the Property of \$4,310,783 (*see* Seven Pines Aff. Exh. 10 at p. 5), other liabilities of \$7,501,408 (*id.* at p. 6), and other factors such as a return of the original capital contributions and a fifty-five percent share of the a disposition from a non-cash-flow transaction (Seven Pines Aff. Exh. 14).

Finally, Petitioner seeks to premise its demand for additional compensation on the fact that, in August of 2012, Signature Bank retained Withers Engelke & Associates Inc. (“Withers Engelke”) to appraise the Property (the “2012 Appraisal”) as part of a refinancing (Seven Pines Aff. ¶ 15). However, aside from the fact that there is no foundation or other evidentiary basis for admission of the 2012 Appraisal, it is irrelevant because Seven Pines did not retain Withers Engelke, nor did Seven Pines prepare the calculations that resulted in the determined value of \$33,000,000 (Seven Pines Aff. ¶ 15 and Petition at Exh. A). In fact, the 2012 Appraisal contained numerous material flaws that greatly inflated the estimated value, including but not limited to the following:

- The appraisal utilized national averages to identify the Property’s overall expenses as totaling \$1,815,655, while actual total expenses for the Property for 2012, as stated in Seven Pines Associates Financial Statements December 31 2012 (the “2012 Financials”), were \$3,448,324. (Seven Pines Aff. ¶ 15 and Exh. 7, p.7; Petition at Exh. A, p. 36).
- The 2012 Appraisal estimated total maintenance and repairs to be \$186,320, when the actual figure was \$933,695. (Seven Pines Aff. ¶ 15 and Exh. 7, p.7; Petition at Exh. A, p. 35).
- The 2012 Appraisal estimated the Property’s net operating income as \$2,529,695, while the actual net operating income as shown in the 2012 Financials was \$820,004. (Seven Pines Aff. ¶ 15 and Exh. 7, p.8; Petition at Exh. A, p. 36).

A summary sheet identifying all of the discrepancies between the 2012 Appraisal and the 2012 Financials is attached to the Seven Pines Aff. as Exhibit 15. The failure of the 2012 Appraisal to properly account for these figures resulted in an overinflated and incorrect valuation. Notably, Seven Pines advised the limited partners of the existence of the 2012 Appraisal in its merger proposal, but also explained the valuation errors contained therein (Seven Pines Aff. ¶ 15 and Exh. 8). In view of the foregoing, the Court should clearly reject any attempt by Petitioner to rely on the 2012 Appraisal.

ARGUMENT

A. The Valuation Date Of The Levine Interest Is November 11, 2013.

N.Y. Partnership Law § 121-1105(b) provides that where, as here, “a former limited partner and the surviving or resulting limited partnership fail to agree on the price to be paid for the former limited partner's partnership interest” following a merger, “the procedure provided for in paragraphs (h)-(k) of section six hundred twenty-three of the business corporation law shall apply” to determine the amount owed the former limited partner. Under N.Y. B.C.L. § 623(h)(4), the Court is authorized “to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders’ authorization date.” *See also Appleton Acquisition, LLC v. Nat’l Housing P’ship*, 10 N.Y.3d 250, 257, 856 N.Y.S.2d 522, 527-528 (2008) (stating that under N.Y. Partnership Law § 121-1105 the court is obliged to determine “the fair value of a limited partner’s interest as of the close of business on the day prior to the merger’s authorization date”) (citation and edits omitted). Under N.Y. Partnership Law § 121-1102, a merger agreement is authorized upon approval by at least a majority of the general partners and by “limited partners representing a majority in interest of each class of limited partners.”

Here, the General Partner consented to the merger on November 5, 2013, and the consent of 77.7778 percent of all limited partner interests occurred November 12, 2013. (Seven Pines Aff. ¶ 7, Exhs. 4-6). Accordingly, the Court’s task is to determine the fair value of the Levine Interest as of November 11, 2013, which is “the day prior to the merger’s authorization date.” *Appleton Acquisition*, 10 N.Y.3d at 257, 856 N.Y.S.2d at 528, *supra*. The Petition duly invokes N.Y.B.C.L. § 623 to commence the instant special proceeding, but improperly asks the Court to determine the value of the Levine Interest “as of January 8, 2014.” (Petition p. 8.) Although N.Y. Partnership Law § 121-1102 provides that a dissenting limited partner is entitled to the “fair value” of its interest “as of the close of business of the day prior to the effective date of the merger” (which, here, would be January 7, 2014 (Petition ¶ 23)), that provision does not govern disputes over fair value. N.Y. Partnership Law § 121-1105 governs such disputes and, as construed by the Court of Appeals, identifies the valuation date as of the day before authorization of the merger (*i.e.*, November 11, 2013).

B. The Value Of The Levine Interest Is Governed By Section 10.2(C) Of The Partnership Agreement.

It is well-settled that “where the language [of a contract] is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language,” and that “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” *R/S Assocs. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 32, 744 N.Y.S.2d 358, 360 (2002) (*citing Springsteen v. Samson*, 32 N.Y. 703, 706 (1865), and *Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 198, 738 N.Y.S.2d 658 (2001)) (quotation marks omitted). Here, Section 10.2(C) of the Partnership Agreement clearly provides that distributions “other than Cash Flow such as from ... a sale or disposition of any or all of the Property, or from any other transaction the proceeds of which do not constitute Cash Flow,”

would be paid, after the payment of certain obligations, “fifty-five percent (55%) to the Limited Partners, forty percent (40%) to the Managing General Partner, and five percent (5%) to [a then general partner]” (Seven Pines Aff. ¶ 4 and Exh. 1 (emphasis added)). Limited partners received 95 percent of partnership distributions only if those distributions were derived from the partnership’s cash flow, which was of course not the case with respect to the payments made as a result of the merger and reorganization. (Seven Pines Aff. Exh. 1 at Section 10.2(A)). These provisions are unambiguous, and clearly identify the amounts that limited partners would receive from specific transactions. The Merger at issue here is clearly not a cash flow transaction. Cash flow is distributed on a regular basis to limited partners when there are sufficient revenues available from the operations of a project, whereas “other than Cash flow” includes any other transaction, “such as ... a sale or disposition of any or all of the Property, or from any other transaction the proceeds of which do not constitute Cash Flow.” The Merger is such another transaction, much more akin to the disposition of the Property than the regular distribution of operational income. Accordingly, any valuation of a Unit Interest based on the Merger is subject to the 55 percent distribution rate.

C. The BCS Levine Value Represents The Fair Value Of A Limited Partnership Interest In Seven Pines.

The Court should affirm the Limited Partnership Offer as the fair value of the Limited Partnership Interest because it is based on a comprehensive analysis of the value of the Property when the Merger was authorized. “The three major elements of fair value are net asset value, investment value and market value. The particular facts and circumstances will dictate which element predominates, and not all three elements must influence the result.” *In re Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 167, 638 N.Y.S.2d 399, 403 (1995). “Net asset value is generally the standard applicable in evaluating ... real estate ... holding companies.” *In re Blake*

v. Blake Agency, Inc., 107 A.D.2d 139, 146, 486 N.Y.S.2d 341, 347 (2d Dep't 1985); *see also In re Tudor City Fifth Unit Inc.*, 17 A.D.2d 794, 232 N.Y.S.2d 758, 761 (1st Dep't 1962) (courts will "give predominant weight to net asset value" when valuing real estate holding companies); *In re Carolina Gardens Inc. v. Menowitz*, No. 112637/93, 1996 WL 34573714, at *10-11 (Sup. Ct. N.Y. County Jan. 26, 1996) (basing valuations of real estate holding companies on net asset values).

Additionally, the value of a limited partnership interest should be discounted for its lack of marketability, especially where, as here, the only asset owned by the partnership is real property. *See In re Giaimo v. Vitale*, 101 A.D.3d 523, 524, 956 N.Y.S.2d 41, 43 (1st Dep't 2012) ("the method of valuing a closely held corporation should include any risk associated with the illiquidity of the shares"). While courts may consider projections of future value, such projections cannot be "the product of speculation," but must have been ascertainable as of the day the value of the interest was determined. *In re Miller Bros. Indus., Inc. v. Lazy River Inv. Co.*, 272 A.D.2d 166, 168, 709 N.Y.S.2d 162, 164 (1st Dep't 2000); *In re Estate of Mandelbaum v. Five Ivy Corp.*, 72 A.D.3d 574, 574-75, 898 N.Y.S.2d 844 (1st Dep't 2010) (denying request for production of documents created after "the close of business on the day prior to the shareholders' authorization date").

The BCS Levine Value accurately assessed the value of the Levine Interest as of November 11, 2013. As shown above, this amount is based on an actual appraisal of the Property using an Income Capitalization Approach as of the Valuation Date, at \$20,873,988, and does not contain any of the material errors that mar the 2012 Appraisal. *See 41 Kew Gardens Road Assocs. v. Tyburski*, 70 N.Y.2d 325, 331, 520 N.Y.S.2d 544, 546 (1987) ("[t]he income capitalization approach is generally regarded as the preferred method for determining the value

of income-producing property, which is what is at issue in this case”); *see also In re Pyramid Crossgates Co. v. Bd. of Assessors of Town of Guilderland*, 302 A.D.2d 826, 828, 756 N.Y.S.2d 316, 319 (3d Dep’t 2003) (“Crossgates Mall is an income-producing property, for which the income approach is indisputably ... the preferred method of valuation”) (internal quotation marks omitted).³ Further, the BCS Levine Value incorporates all of the pertinent amounts from the 2013 Financials, including the value of assets aside from the Property and the related expenses. (*See Seven Pines Aff. Exh. 14*). The BCS Levine Value also is based on a very modest marketability discount, which is appropriate for non-public real estate holding companies. *See In re Giaimo v. Vitale*, 101 A.D.3d at 524, 956 N.Y.S.2d at 43 *supra*. Using such a discount is particularly appropriate where, as here, a party was not forced out of the partnership, but voluntarily decided not to become a member of the successor entity (*Seven Pines Aff.* ¶ 11). Last, even if no marketability discount is applied, the BCS Levine Value is \$432,815, more than \$1 million less than the Levine Demand Amount. These numbers barely change if one considers the improper January 8, 2014 valuation date, as the fair value would be \$329,002 without a marketability discount and \$438,670 with one. (*Seven Pines Aff. Exh. 14*).

Petitioner utterly fails to support his conclusory assertion that his interest in Seven Pines is worth \$1,573,000. Although the Petition references isolated figures from the 2013 Financials, and from a rent roll from January 2014, these documents are not attached to the Petition, nor does the Petitioner explain how these materials substantiate his valuation. (Petition ¶¶ 29-43.)

Accordingly, the Court should not consider these figures to determine the value of the Levine

³ The 2012 Appraisal is unreliable and should be rejected because it was based, in part, upon a sales comparison approach, which is inappropriate when valuing an income producing property. *See Retail Prop. Trust v. Bd. of Assessors of Nassau County*, 872 N.Y.S.2d 693 (Table), 2008 WL 2937821, at *4 (Sup. Ct. Nassau County July 25, 2008) (rejecting the sales comparison approach in the appraisal of the Roosevelt Field Mall because income producing properties should be appraised using the income capitalization approach).

Interest here. *See In re Carolina Gardens Inc. v. Menowitz*, 1996 WL 34573714, at *2, *supra* (observing that the respondent dissenter submitted appraisals to support valuation claim).

Further, reliance on these documents is improper, as fair value can only be assessed based on information at hand the day before the valuation date. *See In re Estate of Mandelbaum v. Five Ivy Corp.*, 72 A.D.3d at 574-75, 898 N.Y.S.2d at 844, *supra*. Seven Pines could not have used the January 2014 rent roll, when it assessed fair value of the limited partnership shares on November 11, 2013, and thus these materials cannot be used to fix the value of the Levine Interest.

Last, Petitioner's apparent reliance on the unauthenticated and inadmissible 2012 Appraisal (Petition ¶¶ 8-9, 15), is entirely improper. First, the 2012 Appraisal was commissioned by Signature Bank, not the General Partner (*see* Petition at Exh. A), and Seven Pines neither authorized nor confirmed its result. Second, as shown above, the 2012 Appraisal was rife with errors, including understating operating expenses by \$418,879, understating maintenance and repair costs by \$747,375, and overstating operating income by \$1,709,691 (Seven Pines Aff. Exh. 15). Moreover, the 2012 Appraisal was based, in part, upon a sales comparison approach, which is not appropriate in valuing income producing properties. *See Retail Prop. Trust v. Bd. of Assessors of Nassau County*, 2008 WL 2937821, at *4, *supra*. Accordingly, the only documents provided by Petitioner are dated and materially inaccurate and should be disregarded.

Petitioner, in his correspondence with Seven Pines, provided certain calculations that purportedly supported the Levine Demand Amount (Seven Pines Aff. ¶ 11). However, Petitioner provided neither an appraisal or other backup material, nor did Petitioner explain why he was entitled to such substantial compensation (Seven Pines Aff. ¶ 11). In its own assessment of the

Levine Demand Amount, Seven Pines concluded that Petitioner had improperly based his request on the Property being fully occupied, and with a capitalization rate far in excess of the one used in the 2012 Appraisal, which Petitioner apparently contends accurately valued the Property (Seven Pines Aff. ¶ 11). Further, Petitioner apparently allocated 95 percent of the net asset value of the Property to the limited partners, which would violate Section 10.2(C) of the Partnership Agreement, and apparently applied no marketability discount to the Levine Demand Amount (Seven Pines Aff. ¶ 11). Accordingly, the Court should grant no weight to this inflated and highly specious valuation.

D. The Limited Partnership Offer Reflected The Fair Value Of A Limited Partnership Interest In Seven Pines Based On Available Information.

Petitioner's claim that "the Partnership has offered inadequate valuations of the Property based on arbitrary selected valuation numbers that change depending on the value the Partnership is trying to back into" (Petition ¶ 39), is patently false. As thoroughly shown above, the Limited Partnership Offer was based on the 2012 Financials, the most up-to-date financial statements Seven Pines had at the time. (*See* Seven Pines Aff. ¶ 9 and Exh. 7). Seven Pines used a very favorable capitalization rate, and applied no marketability discount, when determining that offer. Moreover, even under the most favorable scenario, the Levine Demand Amount is more than \$1 million more than the fair value of the Levine Interest as based on the independent BCS Appraisal. The Limited Partnership Offer is in line with BCS's valuation, and shows that Seven Pines made a good faith effort to compensate dissenting limited partners upon authorization of the Merger.

E. Petitioner Is Not Entitled To Expenses Including Attorney's Fees.

Petitioner's request for attorney's fees in matter is clearly unfounded. As shown above, Seven Pines offered Petitioner \$325,000 for its interest in Seven Pines based on a thorough

analysis of the most-recent financial statements and an unrealistically favorable capitalization rate of 4.9. Petitioner's rejection of that offer, and bad faith insistence that his shares be valued based on materials that were unavailable on the Valuation Date, and that were also speculative and incomplete, has caused Seven Pines to incur substantial litigation costs. Accordingly, under N.Y. BCL § 623(h)(7), Petitioner, not Seven Pines, should bear the expenses associated with this proceeding, including attorney's fees.

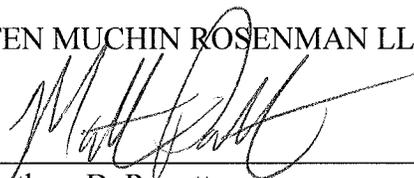
CONCLUSION

For all of the above reasons, Seven Pines respectfully requests that the Court reject the claim asserted in the Petition and grant Seven Pines the relief requested herein and in its accompanying Answer.

Dated: April 18, 2014
New York, New York

KATTEN MUCHIN ROSENMAN LLP

By: _____


Matthew D. Parrott
m.parrott@kattenlaw.com
Gregory C. Johnson
gjohnson@kattenlaw.com

575 Madison Avenue
New York, New York 10022
Phone: (212) 940-8800
Fax: (212) 940-8776

*Attorneys for Respondent Seven Pines
Associates Limited Partnership*