To Be Argued By:
LEE SQUITIERI
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New York County Clerk's Index No. 154466/18

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

GURNEY'S INN RESORT & SPA, LTD., a New York corporation,

Petitioner-Respondent/Cross-Appellant,

—against—

NANCY ARZANIPOUR, PAUL ARZANIPOUR, LORRAINE FERRETTI, PATRICIA FRANK-JANEWICZ, GEORGE ROSENFELD INC., MICHAEL GIORDANO, JANICE KATZ, CHRISTINE LAURIA, MARCIA RUSKIN, JAY SCANSAROLI, JANICE SCANSAROLI, JOSEPH SCOGNAMIGLIO, ALAN SPARKS, and VITO VITRANO,

Respondents-Appellants/Cross-Respondents,

ANTHONY CARBONE, NEIL CARBONE, KEVIN COTTER, DOLLY WANDER IRREVOCABLE TRUST, NEIL CARBOONE IRREVOCABLE TRUST, SYSTEMATIC CONTROL CORP.,

Respondents,

To Determine the Fair Value of the common Shares of Gurney's Inn Resort & Spa, Ltd. Held by Respondents Pursuant to Section 623 of the New York, Business Corporation Law.

CASE NOS.
2019-4738
2019-4841
2019-5068

BRIEF FOR RESPONDENTS-APPELLANTS/CROSS-RESPONDENTS

LEE SQUITIERI
SQUITIERI & FEARON, LLP
32 East 57th Street
New York, New York 10022
(212) 421-6492
lee@sfclasslaw.com

Attorneys for Respondents-Appellants/ Cross-Respondents

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I.

PRELIMINARY STATEMENT OF RESPONDENTS-APPELLANTS/CROSS-RESPONDENTS[1]

Respondents-Appellants are former Class A common stockholders of Gurney's, Inc. ("Gurney's") a luxury seaside resort in Montauk, New York. In 2018, Gurney's controlling majority shareholder, 290 Old Montauk, Inc., entered into an agreement to acquire all of Gurney's outstanding Class A common stock. That agreement was presented for a shareholder vote. (R-364-370). The merger was approved by majority vote and Respondents-Appellants exercised their dissenters' rights under BCL § 623. *Id.* The appraisal proceeding wound its way to a trial before Honorable Justice Barry R. Ostrager on December 3rd and 5th, 2018. (R-884-1026).

After a two day bench trial at which the only witnesses allowed to testify were the parties' respective appraisers (R-909, TR 884; R-1035, TR-1026), the Court concluded that "the consideration offered by Gurney's to the dissenting shareholders ($84 million or $118.81 per share) does not reflect the fair value of the shares at issue." (R-52). The Court called Gurney's appraiser's estimate "suspect" (R-52) and held that Respondents-Appellants appraiser's estimate of fair

[1] Nancy Arzanipour, Paul Arzanipour, Lorraine Ferretti, Patricia Frank-Janewicz, George Rosenfeld Inc., Michael Giordano, Janice Katz, Christine Lauria, Marcia Ruskin, Jay Scansaroli, Janice Scansaroli, Joseph Scognamiglo, Alan Sparks, and Vito Vitrano ("Respondents-Appellants").

value for the land and business and furniture and fixtures of $115 million constituted fair value.[2] (R-52). Obviously, Respondents-Appellants have no objection to that portion of the Trial Court's ruling.

However, Respondents-Appellants contend that the Trial Court was in error on several rulings which shortchanged Respondents-Appellants on "fair value." First, the Court refused to consider the value of several of Gurney's assets (which were not included in either party's going concern appraisers valuations), such as the value of "cash" and "net operating losses" ("NOLs") carried on Gurney's financial statements admitted into evidence. Second, the Trial Court refused to award any amount for the fair value of Gurneys "brand" despite abundant credible evidence of its value admitted into evidence. The Trial Court held that the evidence of the value of the Gurney's brand was too "speculative" to be counted even though Gurney's itself valued the brand at $5,000,000 on its audited financial statements and Respondents-Appellants' appraiser provided a detailed analysis admitted into evidence which relied on Gurney's own financial statements for the inputs into the estimate of the brand's value. The Trial Court also erred in refusing to allow Respondents-Appellants to testify to the value of their own units.

[2] "This payment operates as a floor on valuation." *Rand v. 610 Smith St. Corp.*, 992 NYS 2d 609, 44 Misc. 3d 783 (New York City Supreme Court, 2014) (J. Sherwood) (holding further that there is no support for contention that value can be reduced below amount already paid). *Id*. at *612.

Third, additional errors occurred in a ruling on allocation of the "fair value" to the dissenters' shares. The Trial Court solicited the parties' submissions on the proper method of allocating the $115 million "fair value" number among the Respondents-Appellants. (R-2655-2661). The parties duly complied. (R-2656; 2664; 2659-6). The Court chose Petitioner-Respondent's allocation formula even though the facts Petitioner-Respondent used to support that allocation formula were nowhere in the record, in admissible evidentiary form or otherwise. (R-2659-2662). Concomitantly, without any explanation or rationale, the Trial Court rejected Respondents-Appellants' formula for allocation of fair value among shares (R-2665) despite the fact that Respondents-Appellants formula for allocation of the $115 million fair value amount should be done according to the same allocation formula used for non-dissenting Class A shareholders and which Gurney's used to make their "fair value" offer of $118.81 per share to dissenters in April 2018. The Court's errors on this aspect of its ruling were in accepting Petitioner-Respondent's allocation formula which, because it differed from the formula used to allocate the $184 million among non-disserting Gurney's minority shareholders, violated the BCL § 501 requirement that all shares in the same class be treated alike. Furthermore, Petitioner-Respondent's formula should have been rejected because it was based upon a theory not asserted in the pleadings or at trial and it relied upon input data which had not been admitted into evidence.

II.

QUESTIONS PRESENTED

Respondents-Appellants are appealing the following rulings in the Decision and Order dated December 20, 2018, State of New York County (Ostrager, J.), upon which the Judgment was based that:

(i) declined to assign any value to Gurney's trademark rights and brand;

(ii) declined to assign any value to Gurney's "net operating losses" or "cash" on its audited financial statements' balance sheet as of the merger date;

(iii) accepted Gurney's "formula" to arrive at the $142.05 per share allocation of the $115 million aggregate fair market value determination by the Court;

(iv) rejected Respondents-Appellants formulation for an allocation per share of $191.13 per share which Respondents-Appellants sought to have awarded based upon the doctrine of equal treatment of all shares in the same class in a New York corporation; and

(v) declined to allow Respondents-Appellants to testify to the value of their shares.

The foregoing Trial Court rulings present an appeal on the following questions:

1. Did the Court err in holding that Petitioner-Respondent's trademark rights and brand could not be valued because Respondents-Appellants appraiser's estimate was "speculative?"

2. Did the Court err in refusing to add to the fair value of Gurney's the value of "cash" and net operating losses "carried in Gurney's audited financial statements" admitted into evidence?

3. Did the Court err in refusing to allow Respondents-Appellants to testify to the value of their shares?

4. Did the Court err in accepting Petitioner-Respondent's "formula" for allocation of the $115 million award despite the fact that is was based on facts not admitted into evidence and its application resulted in disparate treatment of the same class of shares in violation of BCL § 501?

5. Did the Court err in refusing to accept Respondents-Appellants' formula for allocation even though that formula was in evidence and its inputs were not disputed by either party and its application was consistent with BCL § 501?

III.

STATEMENT OF FACTS

Petitioners were Class A common stockholders of Gurney, Inc. a luxury seaside resort in Montauk, New York. Their Class A common stock shares represented equity ownership in Gurney's. Gurney's is a 110 units, Atlantic oceanfront resort, health and beauty spa, restaurant, and conference center located in Montauk, New York. It is controlled by the purchaser in the merger, 290 Old Montauk Associates, LLC, comprised of two New York City private equity real estate investors. (R-364-392).

In December 2017, Gurney's Majority owner 290 Old Montauk, called a shareholder vote to approve the sale of Gurney's. (R-395). By virtue of the majority owners overwhelming super majority control stake, it was able to win the vote for approval. *Id.* According to the terms of that shareholder vote, Gurney's would be marketed for sale and the proceeds split according to a certain formula. *Id.* Under those terms if a bona fide buyer did not emerge, then Gurney's majority owners could purchase the minority stockholdings for a price per share based on an "independent appraisers" estimate of Gurney's "fair value." (R-171). Gurney's majority owner hired the independent appraiser CBRE and CBRE arrived at an $84 million "fair value" for Gurney's "land and improvement" only, *id.*, which the Trial Court described as "suspect." (R-52). The majority owner manipulated the

sale process to suppress Gurney's fair value and discourage competing bidders. CBRE was unaware of "any listings" to sell Gurney's. (R-988, TR 105). HVS testified that Gurney's marketing was insufficient and the offering memo was "cursory." (R-1002, TR 119). Based upon an intentionally flawed appraisal by CBRE the appraised estimated value of Gurney's was $84 million. The Court called the CBRE estimate "suspect." (R-52). And the evidence demonstrated that CBRE was soliciting new business from Gurney's even as it was working on the "independent" appraisal of Gurney's. (R-981, TR 98).

Even CBRE agreed that Gurney's was an exceptional property. CBRE appraiser said: Gurney's is a "unique property" (R-932, Tr. 48:18, 20) (*see also* (R-1179 at GURN0002); that it was considered a Class A property in terms of asset and investment potential (R-938, Tr. 54:11-12) ; that Gurney's "outperformed competitors," by a wide margin (R-1251, at GURN0074 and 0126) and was the "best property out in the East End"; garnering the "highest rates" (R-940, Tr. 56) and that Gurney is at the "top of the market," (R-944, Tr. 60:20-21); whose "positive attributes significantly outweighed negative attributes." (R-962, Tr. 78:15-18). CBRE appraiser agreed that positive attributes significantly out weight the negative attributes. Tr. 78:15-18. CBRE also estimated that occupancy will remain above long term averages. (R-1231, at GURN0054).

Gurney's entered into an Agreement and Plan of Merger with an affiliate of its majority owner, 290 Old Montauk Associates, Inc. ("290"). On or about March 19, 2018, Respondents-Appellants received a "Notice of Shareholders Meeting and Information Statement." (R-171). The Information Statement included a representation that CBRE had only appraised Gurney's "land and improvements" at $84 million. *Id.* Respondents-Appellants' Answer alleged that Gurney's appraisal did not value other assets of Gurney's such as cash, trademarks and the brand, or net operating losses. (R-364). The $84 million value was allocated to the minority shareholders by a formula imposed by Gurney's. (R-171). CBRE testified that "as is value allocation includes entire value of the property's fee simple interest in the asset" and the "value of the furniture and fixtures." (R-922, Tr. at 38).

On April 9, 2018, Gurney's in purported compliance with Subdivision (b) of Section 623 of the Business Corporation Law, served upon petitioners by overnight and certified mail a written offer to pay for their shares the sum of $118.81 per share. (R-291, *et seq.*). All Petitioners timely declined the written offer and tendered their share certificates or lost share declarations as required by law. (R-265-288).

Gurney's made an offer to Respondents-Appellants of $118.81 per share based on a "total value of $79,800,00.00" (R-171 at Information Statement at page

4). According to the Information Statement, CBRE appraised the "Property" (R-171 at Information Statement page 3 as including only "the land and improvements at 290 Old Montauk Highway, Montauk, New York").

IV.

SUMMARY OF ARGUMENT

1. The Trial Court erred in refusing to add to fair value the value of Gurney's "cash" and "net operating losses" which were described and valued on Gurney's audited financial statements admitted into evidence and whose value was not disputed.

2. The Trial Court erred in holding that the evidence of the value of Gurney's brand/trademarks was too "speculative" to allow the court to make any award of fair value on that asset; Gurney's audited financial statements in evidence valued Gurney's brand at $5 million and Respondents-Appellants' expert appraisal of the brand value of $5 million to $12 million was supported by credible reliable evidence.

3. Because there was no basis in Gurney's pleading or the record for application of Petitioner-Respondent's ad-hoc allocation formula, the Trial Court erred in accepting and applying it.

4. The Trial Court's rejection or Respondents-Appellants allocation formula was erroneous and contravened BCL § 501 because the allocation formula proffered by Respondents-Appellants was the same formula used to allocate value to non-dissenters shares in the merger.

V.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT CONSIDERING ALL ASSETS AND TAX CREDITS OF GURNEY'S IN ARRIVING AT FAIR VALUE

BCL § 623 gives shareholders who are subject to corporate action such as a cash out merger (BCL § 907) the right to dissent and demand "payment of the fair value of his shares." BCL § 623(a). [Emphasis supplied]. In 1982, the statute was amended to give courts discretion to consider value arising from post-merger events and factors, as follows:

> "In fixing the fair value of the shares, the Court shall consider the nature of the transaction giving rise to the shareholders' right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and other relevant factors." BCL 623(h). [Emphasis supplied].

New York Court of Appeals, in considering the 1982 amendment to BCL 623, explained that it was:

> ". . . intended to permit courts to supplement [the established valuation] approaches by also considering elements of future value arising from the accomplishment or expectation of the merger which are known or susceptible of proof as of the date of the merger and not the product of speculation."

Matter of Cawley v. SCM Corp., 72 N.Y.2d 465, 472 (N.Y. 1988) (citing *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 571 (N.Y. 1984), *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983)).; The value of tax loss carry funds and other assets should have been considered. *See also Matter of Jamaica Acquisition, Inc. v. Shea*, No. 009278/2007, 2009 WL 3270091, at *15 (Sup. Ct. Nassau Cnty Sept. 29, 2009) (applying BCL 623(h)(4) to admonish an appraiser who failed to consider the economic and financial effects of conversion to a REIT where the conversion was a result of the merger. *Id*. at *15).

"There is no uniform rule for valuing stock in closing held corporations." *Amodio v. Amodio*, 70 N.Y.2d 5, 7 (1987).

POINT II

THE COURT'S FAIR VALUE DETERMINATION ERRONEOUSLY IGNORED RELIABLE ADMITTED EVIDENCE OF THE VALUE OF GURNEY'S "CASH" AND "NET OPERATING LOSSES" AS REFLECTED ON GURNEY'S AUDITED FINANCIAL STATEMENTS ADMITTED INTO EVIDENCE

Various assets not included in CBRE's appraisal should have been added to the $115 million fair value appraisal of Gurney's land and operations. Gurney's "net operating losses" value were not included in CBRE's appraisal (R-178-1355) but should have been considered. (*See* R-2597-2600) (noting $2.80 million NOL value in balance sheets). *In Matter of Cawley*, the New York Court of Appeals

held in a BCL 623 appraisal proceeding: "We hold dissenting shareholders are entitled to receive fair value for their securities as determined by a consideration of all relevant factors, including prospective, non-speculative tax benefits . . ." 72 N.Y. 2d at 467 (remanding case to Trial Court to consider the effect of tax benefits accruing to the corporation); *see also Matter of Endicott-Johnson*, 37 N.Y. 2d 585, 590 (N.Y. 1985) (New York Court of Appeals leaving undisturbed on appeal the lower court's valuation of "investment credit and tax-loss carry forward" in appraisal). In *In re Jamaica Acquisition, Inc.*, the Court held the appraiser erred when it failed to consider the elimination of the 45% tax burden as a result of conversion to a REIT. 2009 WL 3270091, at *15. Gurney's "cash" holdings should also have been given a value since neither appraisers valuation estimate included the "cash" in their respective fair value estimates. (R-1178-1355; 2597).

POINT III

THE COURT ERRONEOUSLY HELD THAT RESPONDENTS-APPELLANTS ADMITTED EVIDENCE OF THE VALUE OF GURNEY'S BRAND/TRADEMARK INTANGIBLE ASSETS WAS "SPECULATIVE" AND ERRONEOUSLY REFUSED TO ASSIGN ANY VALUE TO THOSE ASSETS

Gurney's brand and trademark assets should have been valued by the Court in the appraisal. New York's Appellate Division has approved the application of factors considered by the Internal Revenue Service in valuing stock, including: "the company's earning capacity" . . . "it's goodwill and other intangible assets."

Matter of Blake v. Blake Agency, *Inc.*, 107 A.D. 2d 139, 146 (2nd Dept. 1985) (emphasis supplied). Gurney's other intangible asset is its "brand," carried on its books at $5 million and valued by HVS at a midpoint of $8.5 million. (*See* R-2597).[3] Generally accepted appraisal standards, pursuant to which both appraisals were to have been conducted, require an appraiser to identify any personal property . . . and intangibles, such as "brands." (R-1078-79, TR 173-174). HVS testified that Gurney's brand value was $5-$12 million, (R-1080-85, TR at 175-180) and that such value was not reflected in the $115 million appraisal real estate values. (R-1145, TR-240).

Petitioner-Respondent submitted evidence of the value of Gurney's brands in the form of Gurney's own financial statement valuation of $5 million (R-2593) and Respondents-Appellants' appraisers analysis and estimated range of $5 million to $12 million (R-2583) and his testimony that a midpoint fair value was $8.5 billion. (R-2385).

[3] Respondents-Appellants' appraiser testified that including an appraisal of the brand was consistent with applicable standards (R-1080, Tr. 175:14-17) and that the reason it was not done by CBRE was that Gurney's did not ask CBRE to appraise the asset. (R-1079, Tr. 174:23-175).

POINT IV

THE COURT'S REJECTION OF RESPONDENTS-APPELLANTS ALLOCATION FORMULA WAS ERROR BECAUSE BCL § 501(C) REQUIRES ALL SHARES BE TREATED EQUALLY AND THEREFORE IN DETERMINING THE ALLOCATION OF THE $115 MILLION FAIR VALUE TO THE RESPONDENTS-APPELLANTS' SHARES THE COURT WAS REQUIRED TO USE THE SAME FORMULA USED BY GURNEY'S IN CALCULATING OTHER CLASS A SHARES' ALLOCABLE PER SHARE AMOUNT

BCL § 501(c) states: "subject to the designations, relative rights, preferences and limitations applicable to separate series, each share shall be equal to every other share of the same class." The Court of Appeals has expressly held: "Determination of the fair value of a dissenter's shares are governed by the statutory provisions of the business corporation law that require equal treatment of all shares of the same class of stock. *Matter of Selma K. Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 168 (N.Y. 1995). Such doctrine has been repeatedly applied by the New York Court of Appeals in *Fe Bland v. Two Trees Mgt. Co.*, 66 N.Y.2d 556 (N.Y. 1985) to tenant shareholder corporations and three years later in *Matter of Cawley*, the New York Court of Appeals held once again ". . . each share of stock within a given class must be treated equally." 72 N.Y.2d at 467; *see also Katzowitz v. Sidler*, 24 N.Y.2d 512, 518 (N.Y. 1969) (same)..

Here the Court explained its per share allocation only in conclusory fashion. "Rather, the Court holds that using the discounted cash flow model, the value of

Gurney's land and operations would be $115 million (which the Court calculates to be $142.05 per share"). The Court did not explain the method of calculation it used to arrive at the $142.05 per share, nor did the Court cite to, or make reference to any evidence in the record to support the Court's calculation. *Id*.

The $142.07 number appears to have been accepted by the Court based on the calculation of Gurney's presented to the Court in Gurney's December 18, 2018 letter. (R-2656). But that calculation utilizes a formula for allocation and is driven by inputs which are nowhere to be found in the record evidence from the appraisal hearing.[4]

The $142.05 number is inconsistent with the number ($191.13 per share)[5] that would have resulted if the Respondents-Appellants' per share fair value were calculated in the same manner as non-dissenting Class A shareholders per share Merger Consideration was calculated by Gurney's. The $142.07 number is also inconsistent with a pro-rata allocation of the $115 million fair value among the

[4] During the limited discovery process, Gurney's attorneys constantly argued that the only issue for the Court to decide was the fair value of Gurney's, not the method for computing dissenters' per share allocation. In their Petition, Gurney's did not seek a specific determination as to the method of determining the "value of the shares held by Respondents." During the hearing Gurney's failed to offer any evidence of any allocation formula different than the allocation formula it had offered in the Merger to the minority who did not dissent.

[5] Gurney's has admitted in its post-hearing December 19, 2018 letter to the Court (R-2664) that if the formula which was used to determine the Merger consideration for non-dissenting shares is applied to the $115 million fair value determination then dissenters' per share fair value would have been $191.13. (R-2664). That formula is part of the record since it is attached to the Verified Petition as Exhibit E. (R-171).

657,900 share of Class A stock allegedly outstanding at the time of the Merger. Such number, by simple arithmetic, would be $174.798 per share.

Here, the Court in accepting Gurney's formula and inputs overlooked and misapprehended the fact that the calculation formula offered by Gurney's and inputs had no evidentiary support. The formula offered by Gurney's in its December 18, 2008 letter uses a formula for allocation nowhere found in the record and for which there is no evidentiary support. Gurney's own appraiser, CBRE, has not testified that deduction of "principal balance of mortgage encumbering Gurney's" from the discounted cash flow valuation is proper or accepted methodology. (NYSCEF 99). In providing testimony on the DCF methodology, neither appraiser testified that Gurney's mortgage principal should be deducted from the DCF valuation. (R-884-1177). In fact, none of the analyses relied upon by Gurney's appraiser included a deduction from fair value of any debt or financial obligation such as leases, etc., (R-1178-1355), Gurney's Hearing Exhibit 1. Furthermore neither the deduction of "$21,543.851 (principal balance of mortgage encumbering Gurney's)" had no support of Gurney's expert appraiser and neither the "$21,543.861" number nor the alleged "principal balance of mortgage" liability can be found in the only financial statement Gurney's introduced into evidence. *See* (R-2593-2616 at GURN000404-427), ("Gurney's

Inn Resort & Spa, Ltd. Financial Statement For The Years Ended December 31, 2016 and 2017.")

To treat all Class A shareholders equally, the Court must use, or compel Gurney's to use, the same formula used for the minority holders and used for the $118.01 per share to dissenters and apply that formula to the $115 million fair value determined by the Court.

In arriving at the post-merger "fair value" offer of $118.81 to dissenters which they rejected. In so doing, Gurney's used the same formula that was used to cash out over 203,500 non-dissenting minority shares after the majority owner voted its shares to approve the sale of Gurney's to itself. Since it used such formula for those shares, it is stuck using that formula for the Respondents-Appellants shares.

That formula is as follows: start with the $115 million fair value, reduce it by 5% of that total, the first $50 million is divided by the total number of shares outstanding as of the merger date (*i.e.* 697,500) that amount is then added to the number yielded by the following formula (fair value in excess of $50 million is reduced by $20 million mortgages and divided by 203,550 minority shares as of the merger date. (R-171).

Thus, the Order and Decision of the Court dated December 21, 2018 that the per share fair value of dissenters' shares is $142.07 per share is in error because it

is not supported by any record evidence and relied upon information provided by Gurney's that was not admitted as evidence during the appraisal hearing or after.

Had the Court correctly applied New York Business Corporation Law Section § 501 which requires equal treatment for all shareholders of the same class, the allocation of the $115 million fair value would have resulted in a per share allocation of $191.13 (as calculated by Gurney's in their submission. (R-2656, 2664). The allocation of the $115 million fair value determination should have been allocated among the Respondents-Appellants dissenters using the same formula for allocation that was used in the merger which Petitioner-Appellant has admitted would calculate out to $191.13 per dissenter share.

POINT V

THE COURT ERRED IN REFUSING TO ALLOW RESPONDENTS-APPELLANTS TO TESTIFY TO THE VALUE OF THEIR CLASS A COMMON SHARES

At trial, Respondents-Appellants sought to testify as to the value of their own shares. (R-1152-53, Tr. 248-249). The Court refused to allow such testimony holding that no "lay witnesses" could testify. That ruling was contrary to longstanding law succinctly explained in *Tulin v. Bostic*, 152 A.D. 2d 887, 888 (3rd Dept. 1989):

> . . . it has been recognized that the owner of property can testify as to its value regardless of any showing

> of special knowledge as to the property's value. (*See Fisch*, New York Evidence § 372, at 89 [2d Ed., (1988-1989 Supp.], 58 N.Y. Jur. 2d Evidence and Witnesses § 705, at 355). Plaintiff was the owner of the property at issue and therefore may be competent to testify in this case (*see, Park W. Mgt. Corp. v. Mitchell*, 47 N.Y. 2d 316, 329-330, *cert. denied* 444 U.S. 992 [both landlord and tenant competent to give diminution in value of premises caused by breach of warranty of habitability]).

That ruling was in error.

CONCLUSION

Respondents-Appellants respectfully submit that the matter should be remanded to the Trial Court for further proceedings to determine the value of Gurney's "cash," "net operating losses" and "brand/trademarks" to be added to the $115 million fair value estate and that the Trial Court's per share allocation of $142.05 be vacated and the per share allocation of the $115 billion fair value be set at $191.13 plus a per share allocation of the fair value of Gurney's cash, NOLs and brand/trademarks.

Dated: New York, New York
January 28, 2020

SQUITIERI & FEARON, LLP

Olimpio Lee Squitieri
32 East 57th Street
12th Floor
New York, New York 10022
Tel: (212) 421-6492
Fax: (212) 421-6553
lee@sfclasslaw.com

Attorneys for Respondents-Appellants/Cross-Respondents

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

In the Matter of the Application of: GURNEY'S INN RESORT & SPA, LTD., a New York corporation, *Petitioner-Respondent/Cross-Appellant*, and NANCY ARZANIPOUR, PAUL ARZANIPOUR, ANTHONY CARBONE, NEIL CARBONE, KEVIN COTTER, DOLLY WANDER IRREVOCABLE TRUST, LORRAINE FERRETTI, PATRICIA FRANK-JANEWICZ, GEORGE ROSENFELD INC., MICHAEL GIORDANO, JANICE KATZ, CHRISTINE LAURIA, NEIL CARBONE REVOCABLE TRUST, MARCIA RUSKIN, JAY SCANSAROLI, JANICE SCANSAROLI, JOSEPH SCOGNAMIGLIO, ALAN SPARKS, SYSTEMATIC CONTROL CORP. and VITO VITRANO *Respondents-Appellants/Cross-Respondents*, To Determine the Fair Value of the Common Shares of Gurney's Inn Resort & Spa, Ltd. Held by Respondents Pursuant to Section 623 of the New York Business Corporation Law.	App. Div. Nos.: 2019-4738, 2019-4841, 2019-5068 Sup. Ct. No.: 154466/2018 (Hon. Barry R. Ostrager) **STATEMENT PURSUANT TO CPLR 5531**

1. The index number in the trial court was 154466/2018.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on May 11, 2018 by service of petition and verified petition pursuant to N.Y. Bus Corp. Law 623; the answer of Defendant was served on May 25, 2018.

5. The nature and object of the proceeding is for a judicial determination of the fair value of respondents' shares in petitioner Gurney's Inn Resort & Spa, Ltd.

6. These appeals are from a decision and order dated December 20, 2018 and entered December 21, 2018, a judgment entered on May 13, 2019, and a judgment entered on June 13, 2019.

7. The appeal is on a full reproduced joint record.