To Be Argued By:
LEE SQUITIERI
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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

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.

REPLY BRIEF FOR RESPONDENTS-APPELLANTS/ CROSS-RESPONDENTS

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RESPONDENTS-APPELLANTS'/CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO OPENING BRIEF OF PETITIONER-RESPONDENT/CROSS-APPELLANT

Respondents-Appellants/Cross-Respondents 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, representing 2,350 dissenting Class A shares (collectively "Dissenters"), submit this opposition to Petitioner-Respondent/Cross-Appellant's Opening Brief (hereinafter sometimes referred to as Gurney's, Inc.).

I.

THE PROCEEDINGS BELOW

A. INTRODUCTION

A special proceeding under New York Business Corporation Law (BCL) Section 623 was held on Monday, December 3, 2018 and Wednesday, December 5th to determine the fair value of Gurney's, Inc. shares of common stock. (R-7). Gurney's appraiser was CBRE. (R-175). Dissenters' appraiser was HVS. (R-2385). Each side's appraiser was examined, cross-examined and re-examined. (R-884-1178). The Court itself actively interrogated both parties' appraisers at trial. (R-924-928; 932-936; 948; 952; 954-955; 962; 964; 971-974; 1047; 1062; 1063; 1064-1065). The appraisals prepared by each appraiser were supported by

voluminous documentation (R-1178-2315 and R-2385-2616), and all that documentation was available to all litigants, appraisers and the Court. *See e.g.*, R-1178 *et.* seq. and R-2385 *et seq.* Despite a well-developed record and days of examinations of expert appraisers, Gurney's argues that the Court was so hopelessly confused by, and inattentive to, the evidence that the Court's fair value determination (and express rejection of CBRE's fair value estimate (R-17)) must be considered an "abuse of discretion" and therefore reversed and this Court should, on appeal, hold that CBRE's estimate should be deemed Gurney's fair value. Nothing in the record could support a reversal.

The Court had ample reason to refer to the testimony of Gurney's appraiser as "suspect." (R-17). After the majority owner of Gurney's squeezed out the minority (among whom were the Dissenters) in a squeeze-out merger on March 28, 2018 (R-173-176), the Dissenters sought appraisal of their shares (R-84-101) because they correctly surmised that the $84 million appraised value of Gurney's (which valuation was used to derive each shareholders' per share amount in the merger) was not indicative of the fair value of Gurney's assets and business. The CBRE appraisal was commissioned by Gurney's majority controlling shareholder to set the price at which the controlling shareholder would buy out the minority shareholders' stake. (R-175; R-987). The Majority Owner stepped into the opportunity to buy out the minority when, according to the Majority Owner, no one

stepped forward to even bid on Gurney's after a December 2017 – mid-February 2018 "marketing" period. (R-175). The marketing effort was controlled by the Majority Owner. The lackluster marketing effort, which served the purposes of the Majority Owner, was obvious to both side's appraisers neither of whom could help but note it in their respective reports and testimony. (R-987-989; R-1052-1055; R-1089-1090). But since evidence of majority owner misconduct was outside the scope of appraisal issues allowed by the Court (R-1053, L 14-25), those issues were never explored further.

Gurney's appellate strategy is to put words in the Court's mouth, then to characterize the "made-up" words as the Court's "conclusions," and then argue that the Court's so-called "conclusions" were erroneous. On appeal, Gurney's raises the same flawed arguments it used to support its failed Cross Motion for Leave to reargue motion for reargument. (R-2584-2711).

Gurney's appraisal had such obvious flaws that the Court was able to discern them from the bench even though Justice Ostrager had only received the appraisers' reports two business days prior to the hearing. *See* R-948; 954-955; 962; 985; 994-995. The trial exposed several critical flaws in Gurney's appraiser's estimate: (1) Gurney's appraiser failed to properly include the increased economic value to Gurney's of owning the valuable peak season rooms "free and clear" as of the March 28, 2018 valuation date (R-1063-1065; 1069, L 16 to 1070, L4). The

Court understood and agreed that since the new room inventory was for the valuable summer months, it would not result in reduced Average Daily Rate ("ADR") (R-1107-1108); (2) Gurney's appraiser diluted the ADR calculation by including the financial metrics from a neighboring property, The Panoramic, which is owned by the Majority Owner separately from Gurney's; inclusion of Panoramic metrics (an inferior property with markedly lower room rates and occupancy levels) was improper and suppressed the value estimates calculated by CBRE (R-1072-1075, L 13); and (3) in arriving at the $84 million[1] valuation Gurney's appraiser used a discount rate that was almost 100 basis points higher than the "typical" rate noted by the Gurney's appraisers themselves (R-994-995), thus resulting in a materially lower fair value estimate, which the Trial Court noted (R-17).

Gurney's opposition brief ("Gurney's Br. at __") wrongly states the law, ignores relevant Court of Appeals authority, refuses to recognize the significance of its own admissions of value in its financial statements and disingenuously conflates "income approach" and "net asset value" methodologies to blend the two for its advantage. As demonstrated herein, Gurney's arguments in opposition to

[1] "This payment operates as a floor on valuation." *Rand v. 610 Smith St. Corp.*, 992 N.Y.S.2d 609, 612 (Sup. Ct. N.Y. Cnty. 2014) (J. Sherwood) (holding further that there is not support for contention that value can be reduced below amount already paid). *Id.* at *612.

Respondent's appeal for a modification of the Decision and Order below should be rejected.

B. THE RECORD EVIDENCE

The evidence at the hearing clearly demonstrated that HVS' appraisal of Gurney's properly appraised Gurney's as it existed on the date of valuation at March 28, 2018 by modeling all 109 of the resort's rooms as full revenue producers, free of timeshare owner units. Pre-2018 such time share units did not contribute to Gurney's revenue stream save for a relatively minor single, annual maintenance payment. Dissenters' appraiser explained the importance of "normalizing" Gurney's for the elimination of timeshares: "you are going to have this additional capacity at this property in 2018 that you didn't have in 2017, it's going to make a big impact." R-1178 at Tr. 163:11-13. The uncontradicted testimony of Respondents' expert Erich Baum also clearly shows that Gurney's appraisers' report does not include the full 109 rooms as free and clear revenue generators. Dissenters' appraiser testified (and was not contradicted on cross-examination) "CBRE did not do that." R-1178 at Tr. 154:19 – 165:5.

Dissenters' appraiser concisely explained a separate and distinct method employed by Gurney's appraiser to suppress valuation: inclusion of the Panoramic rooms adjacent to Gurney's which Gurney's markets with its own rooms but do not belong to Gurney's and thus were to be excluded from the appraisal calculations.

HVS' expert called it "scrubbing out the impact of the –what's the so-called Panoramic view rooms . . . the 37 rooms . . . and then we used the owner provided data for the adjustments." "So we take out the room revenue that they're allocating for the 37 rooms. (R-1072, L 17; R-1073, L 1). I think everyone here would probably agree they're considered inferior room. (R-1073, L 7-8). You can see this allocation process can be made to inflate the value of these residences, which are not the subject of this appraisal, at the expense of the main resort." (R-1075, L 11-13). Dissenters' appraiser called Gurney's appraisers' methods and calculations "illogical." R-1026 at Tr. 170:2-6. As a result, CBRE calculated an average daily room rate that was artificially low and which was one of the factors which led to the low ball valuation.[2]

Aside from the flaws exposed at trial, the testimony of Gurney's appraiser shows that its appraisal of Gurney's did not allow its estimate to reflect Gurney's unique attributes. CBRE agreed that Gurney's was an exceptional property. CBRE appraiser said: Gurney's is a "unique property" (R-884 at Tr. 48:18, 20) (*see also* R-1178 at GURN0002); that it was considered a Class A property in terms of asset and investment potential (R-884 at Tr. 54:11-12); that Gurney's

[2] Gurney's appraisal adopted in total without revision, modification, or verification, Gurney's management's 2018 budget and hence the Gurney's appraisal assumed minimal growth in occupancy or ADR. R-1178 *et seq*. at GURN 00074. (In fact 2018 actual results were above Gurney's budget. R-1178 at Tr. 238:3-13).

"outperformed competitors," by a wide margin (R-1178 at GURN0126) and was the "best property out in the East End"; garnering the "highest rates" (R-884 at Tr. 56) and that Gurney is at the "top of the market," (R-884 at Tr. 60:20-21); whose "positive attributes significantly outweigh negative attributes." (R-884 at Tr. 78:15-18). CBRE agreed that Gurney's positive attributes significantly outweigh the negative attributes. (R-884 at Tr. 78:15-18). CBRE also estimated that occupancy will remain above long term averages. (R-1178 at Tr. Ex. 1, GURN0054). Gurney's appraiser testified that Gurney's ADR was growing and occupancy was improving (R-884 at Tr. 58:4-7) and that Gurney's will "outperform competitors by a wide margin." (R-1178 at GURN0074).

Both appraisers opined on the marketability of the property. Gurney's appraisal report states: ". . . there are still plenty of national and international investors who are eager to place capital into well-established and emerging markets." (R-1178 at Tr. Ex. 1 at GURN0054). "Market participants indicate that there is much continued interest in investment assets in Montauk." (R-1178 at GURN0089). Dissenters' appraiser testified that Gurney's assets were "irreplaceable" (R-1026 at Tr. 151:21-152:5) and that he would expect "substantial interest" from investors (R-1026 at Tr. 150:1-11) and as a consequence the price of Gurney's in a sale would get "bid up." (R-1026 at Tr. 153:1-2).

Here, Gurney's appraiser, CBRE, failed, improperly, to consider the additional value of timeshare owners units being returned to Gurney's inventory which allowed Gurney's to keep 100% of the rental income on these units for the first time. The evidence at the hearing clearly demonstrated that CBRE did not adequately consider the new revenue from timeshares but HVS' appraisal of Gurney's properly included those new revenues. Pre-2018 such time share units did not contribute to Gurney's revenue stream save for a relatively minor single, annual maintenance payment. Dissenters' appraiser explained the importance of "normalizing" Gurney's for the elimination of timeshares: "you are going to have this additional capacity at this property in 2018 that you didn't have in 2017, it's going to make a big impact." (R-1025 at Tr. 163:11-13). The uncontradicted testimony of Respondents' expert Erich Baum also clearly shows that Gurney's appraisers' (CBRE) report does not include the full 109 rooms as free and clear revenue generators. Dissenters' appraiser testified (and was not contradicted on cross examination) "CBRE did not do that." (R-1026 at Tr. 154:19 - 165:5).

Gurney's attempts to make a supply-demand argument to criticize HVS for not reducing ADR estimates to account for more supply. Upon cross examination, shareholders' expert HVS, explained that "most of the timeshare owner occupancy occurs in the peak season." (R-1103, L 6-12). Gurney's attorney agrees "YES . . . the biggest concentration is in July and August." *Id*. L 16-18. The Court

understood the significance of the testimony and almost immediately thereafter in ruling on an objection (R-1107, Tr. L 21-24) the Court stated:

> His testimony is that for an iconic beach front property in the Hamptons, Montauk area during the months of July and August, the demand for those rooms is basically not affected by the law of supply and demand. That's what I understood his testimony to be.

(R-1107, Tr. L 25 to R-1108, Tr. L 4). Counsel for Gurney's did not disagree. *Id.* L 60.

The "unrebutted record evidence" referred to, and relied upon by Gurney's to attack the Court's conclusion is the same tactic tried at trial.

The Court discerned that it was <u>not</u> the shareholders' appraiser who was confounded, or used inappropriate input or comparisons, but it was Gurney's attorney who was promoting inapt comparisons to try to undermine HVS estimates:

> The Court: The witness is trying to do apples to apples.
>
> Mr. Milstein: Right.
>
> The Court: And if I understand your question it is apples to pears.

(R-1125, Tr. L 20-24).

Gurney's distorts the record by accusing HVS of improperly using an ADR of $994.52 for 2017, (Br. at 32), when Gurney's knows that HVS appraisal used

the $994.52 number only for calculating ADR of the timeshare units during the high season (R-2490-91), when daily rates for July and August are $1,043 to $1,050 per night and occupancy is 92.7% to 96.5%. (R-2485).

The final distortion of Gurney's estimate to dissenters' disadvantage was Gurney's appraisers' failure to set the cap rate "typically" at 25-50 basis points above the going cap rate, (R-1178 at Tr. 111:1-12:8), thus suppressing Gurney's value. *See also* R-994-995.

II.

ARGUMENT IN SUPPORT OF RESPONDENTS-APPELLANTS-CROSS-RESPONDENTS OPPOSITION TO GURNEY'S CROSS APPEAL

A. GURNEY'S ARGUMENTS OF ERROR ARE MERITLESS

Gurney's contends that "the trial court misconstrued and/or overlooked unrebutted record evidence." Br. at 7. It argues that there is no support in the record for the Court's conclusion (at R-17) that "Gurney's appraiser did not appropriately value the potential daily room rate for units that were subject to the shares in 2017." Br. at 22. Gurney's argues that unrebutted record evidence demonstrates not only that CBRE expressly considered the increased revenues Gurney's would experience from the removal of timeshare ownership at the end of 2017 but that "its prediction of the increased ADR . . . have proved to be extremely accurate." *Id.* The record previously cited reveals the fallacy of this argument.

Gurney's further argues that since its appraiser's projections for 2018 room rental revenue were closer to actual results (through August 2018) than shareholders' appraisers' estimates that proves that the Court erred in not accepting Gurney's $84 million estimate. Br. at 29-30. But the purported match between Gurney's appraisers ADR projections for 2018 and actual ADR for 2018 was due to the fact that Gurney's appraisers used the same flawed projections of Gurney's ADR average, the same flawed discount rates and the same dilution of averages due to inclusion of Panoramic metrics.

While Gurney's strenuously argues that the Court "concluded" that Gurney's appraiser had not accounted for increased revenues from the reversion to Gurney's to timeshare ownership eliminated before the 2018 season, the transcript of the hearing April 5, 2019 on Gurney's motion to reargue the Court's fair value determination hearing belies that assertion and demonstrates that the basis of the Court's decision was Gurney's appraiser's lack of credibility.

Gurney's Counsel:

> I do want to hit the high points.
>
> Your Honor noted that abandoning timeshare ownership as of the end of 2017 would generate increased revenue for Gurney's, and came to the conclusion that HVS accounted for it and CBRE didn't. Now to understand . . .

> THE COURT: I think I found one was more credible[3] than the other.

(R-2727, Tr. 8:19-25).

After hearing further argument, the Court ruled:

> THE COURT: I based my decision on the testimony that I heard from the witness stand, from the appraisers. I followed the testimony very closely. I asked questions of each of the appraisers. I don't believe I overlooked or misapprehended anything with respect to the Plaintiff's [Gurney's] motion to rehear and reargue. That motion is also denied. That's the disposition of both motions to reargue.

(R-2727, Tr. 17:7-15).

One of Gurney's main arguments as to why HVS estimates are "illogical" and therefore unreliable is Gurney's theory that ADR should decline after release of timeshare units into the free rental market, but Gurney argues, HVS illogically estimated and increase in ADR for 2018. Gurney's argues that shareholders' appraiser failed "to offer any explanation . . . for predicting a 36% increase in average room rental rates following the addition of 5,273 room nights to the rental market." Br. at 3. This issue was not overlooked by either the Court or shareholders' expert, HVS. In fact it was addressed in opening statements by Gurney's counsel (R-901) and shareholders' counsel (R-906-907) and by HVS appraiser's testimony. (R-1107-1108).

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[3] The Court's determination on credibility of fact witnesses are entitled to deference on appeal. *See e.g.* Argument, Point II, *infra*.

Gurney's argues that the Court "misunderstood" Gurney's appraiser's testimony. Gurney's cites one vague generalized paragraph from Gurney's appraisal that addresses room rates in general and talks of Gurney's growth in room rates, not incremental revenues from previously unavailable minority owners; timeshare units. *See* Gurney's Mem. at 13, quoting "Appraisal at 67." Furthermore, the testimony of Gurney's appraiser upon specific questioning by the Court yielded the following direct answers which demonstrate that the Court correctly understood the evidence:

THE COURT: And in 2017, there were people who were using timeshares correct?

THE WITNESS: That is correct.

THE COURT: And for purposes of your analysis, you assumed that the timeshares had a certain value?

THE WITNESS: No.

Gurney's can offer no specific testimony of the appraiser to demonstrate proper application of newly available timeshare units. By contrast, Respondents' appraiser clearly demonstrated by calculations and specific estimates that CBRE failed to include the newly available, extremely valuable timeshare units confiscated from the minority owners.

Gurney's also argues that Dissenters' appraisal is full of errors of math, logic and facts. Gurney's Mem. at 15-19. Gurney's argues that the Court erred in

finding the shareholders' appraisal testimony "more realistic." Br. at 2. The basis for Gurney's argument is that shareholders' appraiser used "artificially inflated and fictitious data" and the Court made "absurd assumptions including that increasing the supply of identical room nights available for rental will result in a 36% increase in average room rates." Br. at 2. The unrebutted testimony that justifies the increase in ADR even after the new supply of rooms came on-line is the nature of the new supply of rooms available for rent: the new supply was in "the high season months . . . which have almost double and sometimes triple the ADR for low season months." (R-906).

Gurney's also complains that HVS improperly inflated per room rates for the newly released timeshare units and that resulted in inflated ADR. The Court too was interested in this issue and thus it interjected itself into Plaintiff's counsel direct examination of HVS and asked HVS appraiser:

> The Court: So basically what you did was to assume, for purposed of your calculation, Room X, which was a timeshare, would generate the same tariff as Room Y, which wasn't a timeshare, actually generated?
>
> The Witness [HVs appraiser for shareholders]: That's exactly right.
>
> The Court: Okay.

(R-1047-1048, Tr. 1047, L 24 to Tr. 1048, L 1-4). The point Gurney's is trying to make in its brief fails, just as it failed at trial. The following exchange among Gurney's counsel and the Court illustrates Gurney's argument's flaw:

> The Court: Look, I may be missing something, but I understood this witness [HVS appraiser] to testify clearly and unambiguously that he attributed the same revenue per room that were sponsor owned rooms to timeshare rooms, and that's what all his figures and analyses are based on.
>
> So if there were less than 109 sponsor owned rooms, he assumed, for purposes of his calculations, that all of the rooms had the same average daily rate. That's what he assumed.
>
> Mr. Milstein: Yes, your Honor, even did assume that all of the rooms had the same average daily rate, but the –
>
> The Court: And your position is that that is erroneous.
>
> Mr. Milstein: Well, it's the ADR that is erroneous. Because it's not an ADR that was actually reported. It's an ADR that he calculated through flawed calculations that wound up with an ADR for the year – excuse me, for that period that was $270 per room inflated over what actual performance was, and what ownership reported.
>
> It's those adjustments that resulted –
>
> The Court: That's your argument.
>
> Mr. Milstein: I'm trying to –
>
> The Court: He has his testimony. We've gone through this for any hour. He doesn't seem to be confused. I don't seem to be confused.

Gurney's final argument is that shareholders appraiser HVS "simply ignored the large disparity between actual performance and its projections." Br. at 38. This, Gurney's argues, is contrary to Uniform Standards of Professional Appraisal Practice which require an appraiser to cross check estimates with actual results where available. *Id*. Gurney's argues that HVS "ignored" the actual results. Tellingly, Gurney's does not argue that HVS' analysis of actual results of 2018 and the way HVS factored 2018 actual results into estimates was flawed. Gurney's states its argument on the erroneous factual premise that the 2018 actual results were "ignored." Because they were "ignored," Gurney's argues, there were "Patent absurdities" in HVS projections which "the trial court overlooked" thus "rendering the Court's determination to adopt that $115 valuation on abuse of discretion." The record however reveals that HVS appraiser did not ignore the 2018 actual results. (R-1120, L 1-32; L 20-25). HVS appraiser was asked point blank:

> Q: When you saw those differences, when you compared 2018 actual performance to what you projected, did you go back and take a look at what you had done and consider it again, consider whether you had done everything appropriately.
>
> A: Yes I thought about it . . . I did you know I checked myself.

(R-1128, L 1-5, 9). Gurney's highlights the difference between 2018's 8 month actual ADR results and HVS' estimated ADR for 2018 as evidence that HVS'

analysis was flawed but Gurney's ignores the fact that Gurney's estimated 12 month revenue totals for 2018 of $19,456,399 (R-2316) are actually higher than HVS estimate of $17.1 million.

B. ARGUMENT

1. POINT I

THE APPRAISAL STATUTE: BCL 623

In 1982, BCL 632 (at 623(h)(7)) was amended to give courts discretion to consider value arising from post-merger events and factors. *Matter of Cawley*, 72 N.Y.2d at 472 (citing *Alpert*, 63 N.Y.2d at 571; *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983) *See generally Cawley v. SCM Corp.*, 72 N.Y.2d 465 (1988); *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 558 (1984). By contrast, Gurney's appraiser, who completed its appraisal before closing of the merger did not properly account for the incremental revenues from timeshare eliminations after the (wrongful) elimination of timeshares in December 2017. Hence Gurney's estimate was properly rejected.

2. POINT II

APPRAISAL VALUATION STANDARDS AND APPELLATE REVIEW STANDARDS

Except for 623(h), the BCL "offers no definition of fair value and no criteria by which a court is to determine price on other terms. . ." *Matter of Seagroatt Floral Co., Inc.*, 78 N.Y.2d 439, 445 (1991). The three major elements of fair

value are net asset value, investment value and market value." *Matter of Cawley*, 72 N.Y.2d at 478; *Matter of Friedman v. Beway Realty Grp.*, 87 N.Y.2d 161, 167 (1995).

A court's appraisal of dissenting shareholders' interests "to the extent that it is confined to issues of fact, rests largely within the discretion of the lower courts." *Matter of Cauley*, 72 N.Y.2d at 468 (citing *Matter of Endicott Johnson Corp. v. Bade*, 37 N.Y.2d 585, 588 (1975). A valuation will not be disturbed, if the valuation was within the range of testimony presented and rested primarily on the credibility of expert witnesses and their valuation techniques." *In re Dissolution of F.P.D. Realty Corp.*, 267 A.D.2d 111, 113 (1st Dept. 1999), (citing *Matter of Penepent Corp.*, 198 A.D. 2d 782, 783 (4th Dep't 1993)).

Thus, the Court below in deciding that shareholders' appraisers estimate was the "most realistic" engaged in "a fair interpretation of the evidence" and as such is entitled to be deference on appeal. *In re Application of Miller Bros. Indus., Inc.*, 272 A.D. 2d 166, 167 (1st Dept. 2000) (citing *Thoreson v. Penthouse Int'l*, 80 N.Y.2d 490, 495 (1993); *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983).

III.

REPLY ARGUMENT IN FURTHER SUPPORT OF RESPONDENTS-APPELLANTS/CROSS-RESPONDENTS APPEAL

ARGUMENT

POINT I

THERE IS WELL ESTABLISHED LAW HOLDING THAT ALL ASSETS MUST BE VALUED IN AN APPRAISAL AND THAT FINANCIAL STATEMENTS PREPARED IN THE ORDINARY COURSE OF THE BUSINESS ARE TO BE ADMITTED FOR THE TRUTH OF THE MATTERS STATED THEREIN, THUS THE TRIAL COURT ERRED IN REFUSING TO EVEN CONSIDER WHETHER GURNEY'S BALANCE SHEET ASSETS OF "CASH" AND "NOLs" SHOULD HAVE BEEN ADDED TO THE FAIR VALUE AND FURTHER ERRED IN DECIDING THAT THE GURNEY'S BRAND SHOULD NOT BE GIVEN ANY VALUE BECAUSE THE APPRAISER'S ESTIMATE WAS SPECULATIVE

A. IN A BCL 623 APPRAISAL ALL ASSETS MUST BE VALUED AND GURNEY'S FINANCIAL STATEMENT PROVIDE RELIABLE EVIDENCE OF SUCH ASSET VALUES

It has been repeatedly affirmed and reaffirmed by the Court of Appeals that in an appraisal everything must be valued. In *Wilcox v. Stern*, 18 N.Y. 2d 195 (1966) the Court of Appeals held:

> Appraisal proceedings determine the full value of stock prior to the action against which a stockholder dissents, including every item of value that can be established such as corporate causes of action which might have accrued [citations omitted].

Id. at 204. *See also Beloff v. Consolidated Edison Co. of New York*, 300 N.Y. 11 (1949) (. . . we say again, as in *Matter of Fulton* and in *Anderson v. International*

Minerals & Chemical Corp., 295 N.Y. *supra* at page 350, 67 N.E. 2d 573, 577, that every right of a dissenting shareholder is to be appraised and paid for. . .); *see also Blumenthal v. Roosevelt Hotel, Inc.*, 202 Misc. 988, 991 115 N.Y.S. 2d 52, 56 (N.Y. Cty. Sup. Ct. 1952) (". . . in an appraisal proceeding the stockholder is entitled to the full value of the stock . . . and including every item of value that can be established.")

As to the value of those assets, Gurney's financial statements provide competent evidentiary proof thereof. As the record reflects, valuations of the "cash," "NOLs" and Gurney's "brand" appear in Gurney's own audited financial statements (R-364) which were admitted into evidence at the appraisal hearing. The Trial Court's conclusions (and Gurney's arguments), that there was no evidentiary support in the records for the value of these assets, is therefore patently incorrect. Financial statements of a company, properly identified, are business records and thus self-authenticating and admissible under CPLR 4518(a). *Elkaim v. Elkaim*, 176 A.D.2d 116, 117 (1st Dep't 1991); *Niagara Frontier Transit Metro System, Inc. v. County of Erie*, 212 A.D.2d 1027, 1028 (4th Dept. 1995) (citing *People v. Kennedy*, 68 N.Y.2d 569, 577, n.4 (1986); Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:2 at 108).

Financial statements, (even unaudited) if prepared in the regular course of business are admissible as business records under CPLR 4518 and "as proof of the

facts contained therein." *International Systems, a Div. of Interdec (U.S.A.) Inc. v. DelCrete Corp.*, 103 A.D. 2d 1008, 1009 (4th Dept. 1984). A party's own financial disclosures of valuation have been held to be "informal judicial admissions constituting competent evidence of value . . . ." *Fassett v. Fassett,* 101 A.D.2d 604, 605 (3d Dep't 1984) (citing *Matter of City of New York*, 73 A.D.2d 932 (2d Dep't 1980).

B. GURNEY'S INCORRECTLY ARGUES THAT THE NOL VALUE REQUIRED EXPERT OPINION EVIDENCE DESPITE THE FACT THAT GURNEY'S OWN AUDITED FINANCIAL STATEMENTS (ADMITTED INTO EVIDENCE) VALUE THE NOLS AT $2.8 MILLION

Gurney's argues that under the income capitalization approach, Gurney's $2.8 million Net Operating Loss asset carried in its financial statements (R-2597-2600) is "irrelevant." Br. at 5. Based on the testimony cited by Gurney's to support its argument, Gurney's obviously can mean only that NOLs are irrelevant to the income capitalization approach. *See* R-902, 801-802 cited at Gurney's Br. at 5. That is both true and irrelevant to the issue of whether Gurney's NOL's (categorized as an "asset" on Gurney's audited financial statements (R-2597-2600) and whose valuation was audited by Gurney's CPA firm who certified the financial statements as being presented in accordance with GAAP, (*Id.*) should have been included in the fair value calculation. The answer is indisputably yes. *In Matter of Cawley*, 534 N.Y.S.2d 344 (1988), the New York Court of Appeals held, in a BCL

623 appraisal proceeding, that "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[.]" *Id.* at 467 (remanding case to Trial Court to consider the effect of tax benefits accruing to the corporation); *see also In Matter of Endicott-Johnson*, 37 N.Y.2d 585, 590 (1985) (the New York Court of Appeals left undisturbed the lower court's valuation of "investment credit and tax-loss carry forward" in appraisal). In *In re Jamaica Acquisition, Inc.*, No. 009278/2007, 2009 WL 3270091 (N.Y. Sup. Ct. Queens Cnty. Sept. 29, 2009), the Court held the appraiser erred when it failed to consider the elimination of the 45% tax burden as a result of conversion to REIT. 2009 WL 3270091, at *15.

Gurney's also argues that "the trial court correctly declined to incorporate such add-ons into its determination of "fair value" because they were inconsistent with HVS' methodology, untimely proposed and unsupported by any competent evidence (*i.e.* witness with personal knowledge)." Br. at 4. But Gurney's has failed to cite to any record pages of the trial transcript, or Decision or post-trial hearing transcripts which indicate any such rulings. In fact the Decision and Order is completely silent on the issue of valuation of cash and NOLs. (R-52). As to the brand, the Decision and Order describe the evidence (erroneously) as "speculative." (R-52).

C. GURNEY'S AND THE TRIAL COURT ERRONEOUSLY IGNORED THE BALANCE SHEET VALUE OF GURNEY'S "CASH" IN DETERMINING FAIR VALUE

The Trial Court's refusal to value Gurney's "cash" on its balance is not only contrary to New York Court of Appeals authority that holds every asset is to be valued in an appraisal, but also files in the fact of the common sense observation that "cash . . . viewed through the prison of a reasonable and objective observer, would enhance the value of a closely-held corporation." *Markman v. Exterior Delite, Inc.*, 831 N.Y.S.2d 656, 661 (N.Y. Sup. Ct. Bx. Cnty. 2006). Competent admissible evidence of the "cash" asset owned by Gurney's was found in Gurney's financial statements (R-2597-2600) which was admitted into evidence. Neither appraiser included it in their "income approach" valuations therefore it is not being double counted. (R-1178-1355, 2597).

D. THE GURNEY'S "BRAND" WAS VALUED ON GURNEY'S AUDITED FINANCIAL STATEMENTS ADMITTED INTO EVIDENCE AND THE VALUE WAS THEREFORE NOT "SPECULATIVE"

Gurney's brand assets should have been valued by the Court in the appraisal and added to the fair value which value was ONLY for "land and improvement" (R-171), not all assets. New York's Appellate Division has approved the application of the following factors in valuing stock, including: "the company's earning capacity" [essentially the income approach] . . . "its 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 "brand," is carried on its books at $5 million the value estimated by HVS as the low end. (*See* R-2597).[4]

Gurney's defends the Trial Court's ruling in its Decision and Order that: "The Court declines to assign any value to the speculative, post hoc claim for the value of Gurney's trademark rights" (R-52) and argue it was not an abuse of discretion (Br. at 7). 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).

But even if the appraiser's opinion is disregarded there is ample evidence of brand value. 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' appraiser's analysis that the minimum value is $5 million. (R-2385-2583). Whatever weight is accorded the appraisal range of the brand, the minimum valuation thereof, $5 million, is unassailable as it is an admission in Gurney's own financial statements.

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[4] Gurney's 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).

Despite Gurney's own admission in its audited financial statements that its brand is worth $5 million, Gurney's insists on arguing that ". . . there was no evidence that Gurney's brand had any value whatsoever." Gurney's own admission of the value constitutes unassailable evidence of the value.

POINT II

THE COURT ERRED IN REDUCING THE $115 MILLION FAIR VALUE DETERMINATION BY THE AMOUNT OF GURNEY'S OUTSTANDING MORTGAGE

A. THE COURT'S FAILURE TO USE THE SAME FORMULA TO ARRIVE AT DISSENTERS PER SHARE ALLOCATION AS GURNEY'S USED TO DETERMINE EACH NON-DISSENTER'S PER SHARE ALLOCATION VIOLATED NY BCL 501(C) AND LONG ESTABLISHED PRECEDENT THAT ALL SHAREHOLDERS SHOULD BE TREATRED EQUALLY

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 is 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); *see also Fe Bland v. Two Trees Mgt. Co.*, 66 N.Y.2d 556 (N.Y. 1985). Gurney's argues that because dissenting shareholders have dissented they can be treated differently than other same class shareholders.

But that self-serving unsupported declaration purporting to be the law, is contrary to the express holding in *Cawley*. *Cawley supra* confirms that BCL 501(c) applies to assure that dissenters' shares and non-dissenters shares with the same rights are treated equally in a merger. The Court of Appeals held:

> This conflict is resolved however by Business Corporation Law 501(c) which provides that "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." Because the record indicates [dissenters'] shares were identical in all respects to SCM stock held by the investment public, Section 501(c) mandates that [dissenters'] be treated no differently from other SCM common stockholders. Citing *FeBland v. Two Trees Mgt. Co.*, 66 N.Y. 2d 556, 568, 569, 498 N.Y.S. 2d 336, 489 N.E. 2d 223.

Here the Court explained it's 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 $142.05 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.[5]

The $142.05 number is inconsistent with the number ($191.13 per share)[6] 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. (*See* R-171). The $142.07 number is also inconsistent with a pro-rata allocation of the $115 million fair value among the 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.

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[5] 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.

[6] 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 (*See* R-171) 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).

B. THE COURT'S REDUCTION OF THE "FAIR VALUE" BY GURNEY'S ENTIRE MORTGAGE DEBT WAS UNSUPPORTED BY ANY APPRAISAL OPINION, METHOLOGY OR EVIDENCE AND THAT SUCH REDUCTION IS INCONSISTENT WITH THE "NET INCOME APPROACH" FORMULA USED BY BOTH APPRAISERS WHICH DOES NOT ALLOW DEDUCTION FOR DEBT

The Court of Appeals and numerous courts have held that the three major elements of fair value are "net asset value, investment value and market value." "Investment value" is "ascertained through a capitalization of earnings and then fair value was calculated on the basis of the petitioners' propionate share of all outstanding corporate stock." *Friedman* at 168-169. Using the net income approach a/k/a investment value approach to fix fair value means capitalizing the earnings of the entity and calculating the fair value on the basis of petitioners' proportionate share of all outstanding corporate stock. *Matter of Seagrott Floral Co.*, 78 N.Y.2d 439, 446 (1991). The net income approach, as a matter of methodology and as a matter of prior definition by the Court of Appeals in the cases above does not get reduced by the outstanding debt. The "investment value" approach described in *Friedman* and *Seagrott* is the approach utilized by both appraiser here. (R-884-1177; 1178-1355). Consistent with that approach, neither appraiser deducted mortgage debt in arriving at "fair value."

"Net asset value" (as now urged by Gurney's in its opposition brief to justify the Court's adoption of Gurney's ad hoc formula) is commonly defined to be "the

difference between the assets and liabilities" and is known as the net assets or the net worth or the capital of the company. *See* Investopedia, What Is Net Asset Value?, https://www.investopedia.com/term/n/nay.asp # what-is-net-asset-value-NAV last accessed March 13, 2020 at 3:00 p.m. This was not the basis of either appraisers' approach and has no record support.

C. REDUCTION OF THE FAIR VALUE BY THE AMOUNT OF THE MORTGAGE DEBT TO ARRIVE AT EACH DISSENTERS' PER SHARE FAIR VALUE ALLOWED GURNEY'S TO HAVE THE FAVORABLE TERMS OF THE MOU APPLIED FOR ITS BENEFIT WHILE RELIEVING GURNEY'S OF THE MOU TERMS WHICH FAVORED DISSENTERS

When Gurney's allocated the $84 million CBRE appraiser value among all shareholders to arrive at the $118 merger price it utilized the MOU formula which while using a deducted for mortgage debt was to the advantage of the minority shareholders in other ways. (R-171). Here, Gurney's urged the Court below to relieve Gurney's of the aspects of the MOU formula that would have made dissenters' allocation formula equal to non-dissenters and at the same time urged the Court to allow Gurney's the advantage of the mortgage deduction as reflected in the MOU. But that methodology was nowhere in the record and neither appraiser endorsed it nor even mentioned any reduction to fair value for any debt. (R-1178-1355). Thus, not only is Gurney's ad hoc formula unsupported by the

record, it is intentionally departing from the appraisers' income approach valuation and constitutes disparate treatment of the same class of shareholders.

POINT III

A PROPERTY OWNER IS ALWAYS DEEMED COMPETENT TO TESTIFY AS TO THE VALUE OF HIS/HER OWN PROPERTY THUS THE COURT'S DECISION TO PRECLUDE DISSENTERS' TESTIMONY AS TO THE VALUE OF THEIR STOCK AND APARTMENT UNITS RIGHTS EMBEED IN THE STOCK WAS IN ERROR BECAUSE SUCH TESTIMONY WAS RELEVANT AND ADMISSIBLE

At trial, Respondents-Appellants sought to testify as to the value of their own shares and the occupancy rights to their vacation timeshares embedded in these shares. (R-1152-53, Tr. 248-249). The Court refused to allow such testimony holding that no "lay witnesses" could testify. In *Park West Management Corp. v. Mitchell*, 47 N.Y. 2d 316, 317-318 (1979), the New York Court of Appeals held: "[s]ince both sides [landlord and tenant] will ordinarily be intimately familiar with the condition of the premises both before and after the breach they are competent to give their opinion as to the diminution in value occasioned by the breach" (citing *Teerpenning v. Conn Exchange Ins. Co.*, 43 N.Y. 278, 282 (1871); Richardson, Evidence (10th Ed.), s 364, subd. n.)). The longstanding law was succinctly explained relatively recently 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).

Accordingly, the ruling of the Trial Court precluding dissenters from testifying was in error. Had dissenters been allowed to testify to the value of their stock and their rights to summer time share ocean-side units, the Court would have had to take such value into account and determine what compensation was due from Gurney's to the dissenters for appropriation of the occupancy and lease right by the majority owner in the merger.

CONCLUSION

For all the foregoing reasons, dissenting shareholders appeal should be granted and Gurney's prayer for vacating the Court's appraisal award should be denied.

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