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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,

and

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

BRIEF FOR PETITIONER-RESPONDENT/ CROSS-APPELLANT

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Petitioner-Respondent/Cross-Appellant Gurney's Inn Resort & Spa, Ltd. ("Gurney's") respectfully submits this brief (a) in support of its appeal from the Decision of the Supreme Court of the State of New York, New York County, entered December 21, 2018, and two resulting Judgments, entered May 13 and June 13, 2019, and (b) in opposition to the appeal of 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 Scognamiglio, Alan Sparks, and Vito Vitrano (collectively, "Respondents") from the same Decision and Judgments.

PRELIMINARY STATEMENT

This statutory valuation proceeding was brought, pursuant to Section 623 of New York's Business Corporation Law ("BCL"), following the conversion of the Gurney's beach resort on Long Island from timeshare cooperative status to private ownership (so-called "de-cooping"). Its function was to determine whether or not Respondents (former timeshare owners of the resort) were offered fair value for their shares in the merger effectuating the de-cooping in March 2018 (the "Merger"). The Decision and Judgments on appeal determined that the fair value of Gurney's shares was $142.05 per share, which value was based on an expert appraisal proffered by Respondents at the valuation hearing. Gurneys has appealed on the ground that the trial court's adoption of Respondents' appraisal overlooked clear factual, conceptual, and mathematical errors in that appraisal. In contrast, Respondents inexplicably appeal from a Decision and Judgments that adopted their expert's valuation in its entirety.

As detailed more fully below, Gurney's de-cooping was set in motion during the winter of 2012-2013, when after four decades of recurring financial issues, numerous timeshare owners began to abandon their shares and interval proprietary leases (entitling them each to a one-week stay at the resort) and walk away from their investments. In April 2013, by an overwhelming supermajority vote, the remaining timeshare owners ratified a Memorandum of Understanding ("MOU") with a "white knight" investor, 290 Old Montauk Associates LLC ("290 OMA"), pursuant to which 290 OMA agreed to (a) assume majority ownership and management of Gurney's, (b) guaranty no further increases in maintenance fees or special assessments on timeshare owners, and (c) invest tens of millions to renovate the aging resort. In return, the timeshare owners agreed that Gurney's would, after five years, cease operating as a timeshare cooperative. Following the termination of their interval proprietary leases at the end of 2017, timeshare owners' shares in Gurney's would be sold, either to a third-party purchaser, or to 290 OMA itself at a price based on an independent appraisal of the resort as a going concern.

The 2018 Merger concluded this long-contemplated de-cooping process. In implementation of the MOU (and with the approval of the timeshare owners' representative on the board of directors), Gurney's commissioned CBRE, Inc. ("CBRE") to appraise Gurney's. Utilizing primarily the income capitalization method of valuation and a discounted cash flow model, CBRE determined that Gurney's had an unencumbered fair market value of $84 million. Gurney's then applied the MOU allocation formula to offer the remaining timeshare owners approximately $119 per share (the "Tender Offer").[1]

Respondents herein represent less than 1% of the ownership of Gurney's at the time of the Merger (they collectively held 4,650 Class A shares, compared to the 657,900 Class A shares issued and outstanding at the time of the Merger). While most timeshare owners were content to receive the contractual consideration agreed to in 2013 (after having reaped the financial fruits of that agreement over the preceding five years), Respondents rejected the MOU-calculated Merger price, demanding instead to have the "fair value" of their shares judicially determined under BCL 623. Following the commencement of this proceeding, they commissioned an appraisal from HVS Consulting & Valuation ("HVS") which concluded that Gurney's had an unencumbered value of $115 million.

[1] As discussed *infra*, the MOU allocation formula afforded timeshare owners a premium over the pro-rata value of their shares to the extent the sale price exceeded $50 million.

On December 21, 2018, the trial court (Ostrager, J.) issued a decision adopting HVS's appraisal (the "Decision"). After subtracting Gurney's $21.5 million mortgage from HVS's $115 million valuation, the court allocated the resulting net value pro rata among all 657,900 issued Class A shares to reach a "fair value" determination of $142.05 per share.

The trial court adopted HVS's $115 million valuation of Gurney's based on its conclusion that HVS more "realistically" or "appropriately" projected the increased average daily rates ("ADRs") and revenues the resort would earn following the termination of timeshare ownership (as a consequence of its ability to rent out the room nights[2] previously occupied by non-rent-paying timeshare owners). That conclusion is wholly unsupported (and in fact refuted) by the record evidence. The unrebutted record evidence shows that (a) CBRE *accurately* predicted the future ADRs and revenues the resort would earn following the termination of timeshare ownership, whereas (b) HVS, through an unnecessary "normalization" process, re-calculated the ADRs Gurney's *actually achieved* in

[2] In the hospitality industry, a "room night" is a measure of occupancy. One "room night" is one hotel room occupied for one night. In 2017, the year before the termination of timeshare ownership: (a) 5,273 room nights at Gurney's were occupied by timeshare owners (i.e., not rented), and (b) 7,085 room nights were rented by timeshare owners to the public. (R. 2312-15). The remainder of Gurney's reported room nights that year were rented by Gurney's management or majority owner from the significant stock of room nights abandoned by or never sold to timeshare owners. The room nights and weeks owned by timeshare owners were more concentrated in the peak summer months (and thus more valuable) than those owned and rented out by Gurney's management or majority owner.

2017, and used that re-calculation to artificially inflate its projections of future ADRs and rooms revenue.

Specifically, although timeshare owners had occupied their own rooms at Gurney's for only 20% of the resort's total room nights in 2017 (the other 80% of room nights having been rented to the public by timeshare owners or management at market rates), in estimating the impact of adding this 20% to the market rental pool, HVS determined that these rooms would have rented for a price that was significantly (37%) higher than the rooms timeshare owners had *actually rented out* to the public in 2017—even though HVS conceded that the two groups of rooms were, in every respect, economically indistinguishable. HVS further predicted that (a) adding these rooms to the rental inventory in 2018 would somehow lead to a *21% increase in the rental price of all resort rooms*, even though HVS conceded that this prediction ran counter to basic economic principles of supply and demand; and (b) rental rooms revenue would increase by approximately 50% and Gurney's net income would almost triple in 2018.

HVS's predictions of how growing the rental pool by the 20% of room nights previously occupied by timeshare owners would affect Gurney's bottom line were so illogical that the trial court should have had serious doubts about the reliability of HVS's valuation. Those doubts should have been confirmed when the court learned that, contrary to the Uniform Standards of Professional Appraisal Practice

("USPAP"), HVS declined to reconsider its methods or conclusions even after it had received Gurney's actual performance data for 2018 (i.e., when the resort was entirely free of timeshare ownership) and learned that the predictions—on which its valuation depended—were significantly off base. Indeed, the unrebutted record evidence shows that whereas CBRE's prediction of Gurney's ADR in 2018 was only 1.9% off from Gurney's actual performance, HVS overestimated 2018 ADR by 9%.

In contrast, Respondents' arguments for an increased award are wholly without merit. Respondents contend that the trial court was required to augment the valuation of their own expert appraiser by (a) adding items not included in (and inconsistent with) their appraiser's methodology, based on eleventh-hour "lay opinion," (b) attributing a fictitious value to Gurney's as a brand, notwithstanding that no unaffiliated party has ever paid one cent to use Gurney's name, (c) affording Respondents the MOU's premium over and above pro-rata "fair value" *even though Respondents rejected the MOU in the first place*, (d) pretending that Gurney's value was not encumbered by a $21.5 million mortgage loan, and (e) allowing Respondents to claim additional value based on their personal opinions of share value. For the reasons detailed below, the trial court did not abuse its discretion in any of these respects.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. In a proceeding brought pursuant to BCL 623 to determine the fair value of shares in a former timeshare resort, does a petitioner's appraiser "appropriately value" the potential rental rates of hotel rooms previously occupied by non-rent-paying timeshare owners (which following the termination of timeshare ownership can be rented to the public at market rates) where the appraiser not only expressly considers, but *accurately predicts* the extent to which the resort's average rental rates and resulting revenue will increase?

Despite evidence that (a) Gurney's appraiser considered and accounted for the increased revenue and rental rates that would follow the termination of timeshare ownership, and (b) actual performance data demonstrating that such predictions were within 1.9% of what actually occurred, the trial court held that Gurney's appraiser failed to "appropriately value" the potential rates that could be charged for the 20% of room nights added to the rental market following the termination of timeshare ownership.

2. Where an appraiser's projections of increased hotel room revenue (a) are based on artificially-inflated and fictitious data, (b) require the Court to make absurd assumptions, including that increasing the supply of identical room nights available for rental will result in a 37% *increase* in average room rates, and (c) are

belied by actual performance data, is the appraiser's valuation supported by sufficient evidence?

Despite the admission of Respondents' appraiser that basic rules of supply and demand predict no increase in price when the supply of identical rooms rises, and his failure to offer any explanation for predicting a 37% increase in average room rental rates following the addition of 5,273 room nights to the rental market, which was both illogical and contrary to the actual performance data, the trial court adopted the appraiser's artificially inflated and fictitious re-calculation of rooms revenue and the valuation of Gurney's that was based thereon.

3. Does a trial court abuse its discretion under BCL 623 where it:

(i) declines to augment a party's expert appraisal with add-ons inconsistent with that appraisal and based solely on lay testimony from persons lacking personal knowledge;

(ii) declines to adopt a party's valuation of a corporate "brand" that is based on fictitious or unreliable data;

(iii) allocates a corporation's net or equity value (calculated as the value of its assets minus its liabilities) to shareholders according to their ownership interests; or

(iv) precludes dissenting shareholders from offering lay testimony that contradicts their expert appraisal or otherwise is duplicative, undisputed, or irrelevant?

In each of the above-identified instances, the trial court appropriately exercised its discretion by rejecting evidence and argument that was (a) beyond the scope of the parties' expert discovery, (b) based on unsupported projections or fictitious data, (c) contrary to basic accounting principles and case law, and/or (d) which would have resulted in Respondents being awarded a windfall over the fair value of their shares.

RELEVANT BACKGROUND

A. The De-Conversion of Gurney's From Timeshare Cooperative Status

The primary issue in this proceeding, and on this appeal, is the fair value of Respondents' shares in Gurney's. Given that the Merger triggering this proceeding has its roots in events and agreements that occurred several years ago, however, the following historical background is offered to help orient the Court and provide context for the valuation issue.

Gurney's was formed in 1981 to own and operate an existing and well-known spa/resort in Montauk on a cooperative timeshare basis. (R. 91, 897). The resort is comprised of 109 rooms, situated on approximately 10 acres of land on the Atlantic ocean, and also includes food and beverage outlets, a spa, and various additional resort amenities. (R. 917, 1187).

Unfortunately, the timeshare structure and business plan were poorly conceived and executed. By 2013, Gurney's was on the brink of filing its second petition for bankruptcy protection (the first having been filed almost two decades earlier). (R. 91). Many of the timeshare units that were originally available for sale by the cooperative sponsor remained unsold over the years, primarily because the shareholders who owned a weekly unit in the off-season were required to pay the same maintenance fees as shareholders whose weeks were during the sought-after summer season. (*Id.*). Faced with increasing maintenance charges, some shareholders abandoned their timeshare units, leaving the remaining shareholders with an even greater financial burden. (R. 92).

As increasing numbers of off-season cooperative shareholders abandoned their units, Gurney's was left without the financial resources needed to properly maintain the resort. (*Id.*). Both the financial condition of the corporation and the physical condition of the resort were in an accelerating downward spiral. (R. 92, 897). By the Winter of 2012-2013, Gurney's was facing imminent bankruptcy. (R. 92). It was then that representatives of the timeshare owners turned to George Filopoulos, an investor with a proven track record rehabilitating distressed cooperative apartment corporations, for assistance. (*Id.*).

Mr. Filopoulos and his company 290 OMA agreed to buy out the interests of the successor sponsor and majority owner of Gurney's, take over the operation of the resort, and invest the tens of millions of dollars necessary to save the iconic property, on terms expressly designed to phase out cooperative ownership after five years. (R. 92). Specifically, the MOU negotiated by Mr. Filopoulos gave remaining timeshare owners the following three options:

1. Sell their shares to 290 OMA immediately, pursuant to a price schedule set forth in the MOU;

2. Surrender their shares to 290 OMA immediately, but continue to use their timeshare rooms each year, without the obligation to pay maintenance fees, until January 1, 2018, when all interval proprietary leases would be terminated; or

3. Retain their shares and pay maintenance charges at significantly reduced rates up to the termination of all interval proprietary leases on January 1, 2018, and thereafter exchange their shares for a contractual distribution of the net proceeds from the sale of Gurney's.

(R. 92, 110 [MOU ¶ 5(j)], 897-98).

For those timeshare owners who elected the third option, Mr. Filopoulos agreed to reduce maintenance fees by 20%, and to guaranty that such fees would not increase during the five-year period in which Gurney's would continue as a timeshare before the termination of the interval proprietary leases at the end of 2017 (i.e., 290 OMA would bear the costs of operations that exceeded the reduced maintenance being collected). (R. 92-93, 108-10 [MOU ¶ 5(g)-(h), (j)]). Mr. Filopoulos also guaranteed that no shareholders would have to make capital contributions to renovate the facilities (that burden, too, would be borne by 290 OMA). (R. 93, 109-10 [MOU ¶ 5(h), (j)]). The MOU afforded 290 OMA the right to purchase the property at the end of the five-year period, provided that it offered the highest price and that such price was at least 95% of the appraised value of Gurney's as a going concern. (R. 94, 111 [MOU ¶ 5(k)(1) n.3]).

The MOU and the transactions and investments contemplated by it were conditioned upon ratification by timeshare owners and approval by Gurney's board of directors. (*See* R. 94, 106-07 [MOU ¶ 4(b)-(c)]). Thus, the agreement was presented to timeshare owners for ratification or rejection at a special shareholders' meeting held in April 2013. (R. 94). While only a simple majority vote of the timeshare owners was needed to approve the MOU, ultimately timeshare owners holding almost 85% of the Class A shares ratified the agreement. (*Id.*). Thus, on May 29, 2013, following both board and shareholder approval of the MOU, 290 OMA (a) closed on the acquisition of the successor sponsor's interests in Gurney's, (b) bought or acquired the shares of timeshare owners who chose to immediately sell or surrender their shares, pursuant to the first and second MOU options discussed above,[3] and (c) assumed control of the company. (*Id.*).

[3] As prescribed by the MOU, 290 OMA bought 42.59% of the outstanding Class A shares of Gurney's from timeshare owners who elected to sell their shares immediately, pursuant to the first option discussed above, at a cost of $6,231,023.24. (R. 94). In addition, holders of another 9.6% of the outstanding shares of Gurney's surrendered their shares to the company in exchange for the right to use their timeshare units through the end of 2017 without paying maintenance charges, pursuant to the second option discussed above. (*Id.*)

Over the course of the next five years, 290 OMA fulfilled the terms and conditions of the MOU. (R. 95). 290 OMA invested in excess of $30 million in Gurney's by providing the resort with operating funds as necessary and by rehabilitating and refurbishing most of the 109 rooms, including installing new windows, facades, siding, roofing, mechanical systems, carpet, bathrooms, furniture and fixtures. (R. 94-95). In addition, all restaurants and food venues were repositioned and other common area improvements were made, including a new lobby, new banquet rooms, kitchen upgrades and the resurfacing of the salt water pool and replacement of its mechanical systems. (*Id.*).

The approximately $30 million invested by 290 OMA to renovate and operate the facilities resulted in increased occupancy rates, as well as increased profitability of the spa, restaurant and catering facilities. (R. 95). 290 OMA also honored its commitment to reduce and freeze maintenance fees, and allowed the remaining shareholders to continue using the renovated premises on a timeshare basis. (*See id.*). 290 OMA's investments increased the value of Gurney's to the benefit of all its owners, including the timeshare owners who had elected to remain until the end of the five-year transition period, pursuant to the third option discussed above. (*Id.*; *supra* 11). Gurney's broke even for the first time in decades in 2016, and realized a profit in 2017. (R. 95).

As originally contemplated and provided for in the MOU, the timeshare owners' interval proprietary leases were terminated effective January 1, 2018. (*Id.*). Moreover, at a duly noticed annual meeting of the shareholders held on December 8, 2017, the shareholders voted to re-affirm their commitment to the terms of the MOU providing for the sale of Gurney's, by a margin of 118,800 shares (99%) in favor and 1,200 shares (1%) against. (R. 95-96).[4]

Despite efforts to market Gurney's property starting in December 2017, no bona fide offers from qualified buyers were received by March 16, 2018. (R. 96, 898). Thus, 290 OMA fulfilled its contractual obligation to the remaining Class A shareholders by acquiring their shares in a Merger.[5] (R. 96-97). The selection of CBRE as Gurney's appraiser was approved by Gurney's board of directors, including the director elected to represent the timeshare owners. (R. 898, 915). CBRE performed an appraisal of Gurney's in early 2018, valuing the resort at $84 million, including its restaurant and spa operations and personal property. (R. 898, 915, 921-22, 1187-88).

[4] The interval proprietary lease, which had been in use by Gurney's since 1981, expressly provided that the shareholders of Gurney's had the authority, by majority vote, to terminate all interval proprietary leases and "sell the building and liquidate the assets" of Gurney's. (R. 96, 167 [Interval Proprietary Lease ¶ 37]).

[5] If 290 OMA had not voluntarily purchased the remaining timeshare owners' shares by April 1, 2018, the remaining timeshare owners could have exercised their absolute right to compel 290 OMA to purchase those shares at the full appraised value. (R. 97).

On March 29, 2018, at a duly noticed special meeting of Gurney's shareholders, a vote was held to approve the Merger. The owners of 558,900 shares (representing 99.35% of all votes cast) voted in favor of the Merger, whereas the owners of only 3,700 shares (0.65% of all votes cast) voted against the Merger, either in person or by proxy. (R. 99).

Respondents are among those timeshare owners who chose to remain shareholders of Gurney's until the resort ceased operating as a timeshare cooperative. Prior to the March 29, 2018 special shareholders' meeting at which the Merger was approved, Respondents duly noticed their dissent pursuant to Section 623 of the BCL. (R. 98; *see also* R. 91 [listing Respondents and the number of shares owned by each individual Respondent]). Pursuant to BCL Section 623, a shareholder who formally dissents from a squeeze-out merger has the right to seek a judicial determination of the fair value of his or her shares.

On April 9, 2018, Gurney's duly notified Respondents that the Merger had occurred. On a pro rata basis, after payment of Gurney's mortgage debt in the approximate amount of $21.5 million, each shareholder would have been entitled to receive $97.28 per share based on the $84 million valuation established by CBRE. The MOU, however, afforded timeshare owners a premium above their proportionate ownership interest in Gurney's. Consistent with the MOU allocation formula, 290 OMA offered $118.81 per share to all remaining shareholders. (R. 99).

Respondents, representing less than 1% of the ownership of Gurney's, rejected that offer. Consequently, as required by Section 623 of the BCL, Gurney's commenced this special proceeding for a judicial determination of the fair value of Respondents' shares.

B. <u>The Underlying Special Proceeding</u>

Following Gurney's commencement of this special proceeding on May 11, 2018, Respondents commissioned an appraisal of Gurney's from HVS. HVS was provided with all the documentation that had been made available to CBRE. In addition, Gurney's provided HVS with the resort's operational data for the post-Merger period through August 2018, which had not been available when CBRE performed its appraisal in February 2018. (*See* R. 783). On or about October 19, 2018, HVS issued an appraisal report concluding that the Gurney's resort had an unencumbered market value of $115 million as of March 28, 2018. (R. 2395).

On December 3 and 5, 2018, the trial court (Ostrager, J.) held an evidentiary hearing to determine the fair value of Respondents' shares. The only witnesses called at the hearing were the parties' respective appraisers, each of whom offered expert testimony concerning the value of Gurney's as a going concern on a fee simple basis as of March 28, 2018 (i.e., one day before the Merger), based on their prior appraisals. (R. 916, 919, 921-22, 1046, 1142). Both appraisers' reports were also admitted into evidence by stipulation of the parties. (R. 809, 950, 1041-43).

Each of the appraisers' valuations was based primarily on the income capitalization approach, utilizing a discounted cash flow model. (R. 17-18 [Decision], 922-24, 935, 1051, 1060; *see also infra* at 22-25 [discussing the income capitalization approach]).[6]

On December 21, 2018, the trial court issued its Decision determining the value of Gurney's and, consequently, of Respondents' shares. The court "accept[d] that a discounted cash flow analysis [under the income capitalized approach] is the appropriate manner of determining fair value…." (R. 17). The court, however, accepted HVS's income projections and capitalization rate, holding that "using the discounted cash flow model, the value of Gurney's land and operations would be $115 million (which the Court calculated to be $142.05 per share)."[7] (R. 17-18). In support of its determination, the court reasoned, in part, that it "found the testimony of the Gurney's appraiser suspect because Gurney's appraiser did not appropriately value the potential average daily room rate for units that were subject to time shares in 2017." (R. 17). The trial court also stated that it considered HVS's testimony concerning the average daily rates that would be earned by Gurney's post-Merger

[6] Although HVS (whose testimony followed CBRE's at the hearing) offered extensive testimony in rebuttal to the testimony and evidence presented by Gurney's in its case-in-chief, the trial court denied a request by Gurney's for leave to recall CBRE to rebut HVS's testimony. (R. 1154-56).

[7] The trial court "decline[d] to assign any value to [Respondents'] speculative, post hoc claim for the value of Gurney's trademark rights." (R. 18).

"more realistic" than CBRE's. (*Id.*). For the reasons discussed below, Gurney's respectfully submits that the trial court abused its discretion in rejecting CBRE's valuation in favor of HVS's artificially inflated projections.

LEGAL STANDARD

Pursuant to BCL 623(h)(4), when a shareholder who dissents from a squeeze-out merger has properly invoked his or her rights, the Court

> shall proceed 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. In fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's 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 all other relevant factors.

BCL 623(h)(4).

In a statutory valuation proceeding brought pursuant to BCL 623, neither party bears a formal burden of proof. Insofar as "it is the Court that has the obligation to establish fair value [in either a BCL 623 or BCL 1118 valuation proceeding] . . . there is no occasion to approach the problem by analyzing who has the burden of proof and finding against that party if she or it fails to carry this burden." *Matter of Cohen (Four Way Features)*, 168 Misc.2d 91, 94-95 (Sup. Ct. N.Y. Cnty. 1995) (noting that "the court at bar has a responsibility to determine the fair value of petitioner's shares . . . . This formulation defies application of a burden-of-proof approach."), *aff'd sub nom. Cohen v. Four Way Features, Inc.*, 240 A.D.2d 225, 225 (1st Dep't 1997); *accord Zelouf Int'l Corp. v. Zelouf*, 2014 NY Slip Op 51462(U) (Sup. Ct. N.Y. Cnty. Oct. 6, 2014), *rearg. granted in part on other grounds* 47 Misc. 3d 346 (Sup. Ct. N.Y. Cnty. Dec. 22, 2014).

To arrive at the statutory "fair value," the corporation is valued as a whole (on a going concern rather than a liquidation basis), and then the dissenting shareholders are allocated a portion of that value based on their *pro rata* ownership interest. *See Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 167 (1995) ("[f]air value requires that the dissenting stockholder be paid for his *proportionate* interest in a going concern, that is, the intrinsic value of the shareholder's economic interest in the corporate enterprise."); *Matter of the Dissolution of Seagroatt Floral Company, Inc.*, 78 N.Y.2d 439, 443 (1991) (fair value process ascribed value to company and then divided by "the total number of common shares . . . to obtain a per-share value").[8]

While various aspects of value or methods of valuation may be considered in valuing a corporation as a going concern, the "particular facts and circumstances" will dictate which aspects of methods should predominate. *See Friedman*, 87 N.Y.2d at 167; *Miller Bros. Indus., Inc. v. Lazy River Investment Co.*, 272 A.D.2d

[8] As discussed at greater length in Point V-A, *infra*, valuation methodologies set forth in a shareholder agreement are inapplicable in statutory valuation proceedings unless the agreement expressly provides that it is to apply. *Matter of Pace Photographers, Ltd.*, 71 N.Y.2d 737, 748 (1988); *see also Matter of Penapent Corp.*, 96 N.Y.2d 186 (2001); *Matter of Sands Point Land Co. v. Rossmoore*, 43 Misc.2d 368, 371 (Sup. Ct. Nassau Cnty. 1964). The MOU does not contain any such provision. (*See* R. 803-04, 863-64).

166, 167 (1st Dep't 2000) (holding that tender offer based on appraised market value of company, considering its poor financial performance, was conclusive as to fair value of dissenter's shares); *Matter of the Dissolution of Seagroatt Floral Company, Inc.*, 78 N.Y.2d at 445-46 (in accepting "capitalization of earnings" method of appraising corporation under dissolution provision of BCL 1104, court noted that proper valuations under both BCL 1104 and BCL 623 "will depend upon the circumstances of the case; there is no single formula for mechanical application").

At the hearing in this case, however, both Gurney's and Respondents presented evidence from expert appraisers (CBRE and HVS, respectively), who valued Gurney's primarily utilizing the income capitalization approach and a discounted cash flow model. (*Supra* 17). Both appraisers agreed that the income capitalization approach was the most appropriate method for valuing a resort like Gurney's. (R. 935 [CBRE testimony], 1051 [HVS testimony]).

A trial court abuses its discretion under the BCL where its findings are not "within the range of testimony presented" or are otherwise unsupported by the record. *See Matter of Penepent Corp.*, 198 A.D.2d 782, 783 (4th Dep't 1993). *See also Matter of Seagroatt Floral Co*., 167 A.D.2d 586, 588 (3d Dep't 1990) (modifying referee's valuation of closely held corporation pursuant to BCL 1118 as unsupported by record), *aff'd* 78 N.Y.2d 439, 447 (1991) (agreeing that Appellate Division's findings "more closely comport[ed] with the weight of the evidence" than did referee's); *cf. Wechsler v. Wechsler*, 58 A.D.3d 62, 72 (1st Dep't 2008) (reversing Supreme Court's election between two "competing methodologies advanced by the parties at trial" for valuating a holding company, noting that "our authority in this regard is as broad as that of Supreme Court").

ARGUMENT IN SUPPORT OF GURNEY'S CROSS-APPEAL

POINT I

THE TRIAL COURT'S CONCLUSION THAT CBRE DID NOT APPROPRIATELY PREDICT HOW TERMINATING TIMESHARE OWNERSHIP WOULD AFFECT GURNEY'S RENTAL RATES AND REVENUE IS REFUTED BY THE RECORD

The trial court based its Decision to adopt HVS's $115 million valuation, in part, on its view that "Gurney's appraiser did not appropriately value the potential average daily room rate for units that were subject to time shares in 2017." (R. 17). Gurney's respectfully submits that this finding is without support in the record. The 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 that such rooms would earn, and the ADR that the entire resort would experience in 2018, have proved to be extremely accurate (and, most importantly, far more accurate than HVS's predictions). The trial court's holding to the contrary was thus an abuse of discretion.

A. **The Income Capitalization Approach to Hotel Valuation**

At the hearing, Gurney's relied upon the report and testimony of CBRE to support its $84 million valuation of Gurney's. Edward Eschmann, MAI, MRICS, a Director of CBRE's Valuation and Advisory Group and head of its Hospitality Division for the New York/New Jersey/Connecticut region, performed the CBRE appraisal and testified at the hearing.[9] (R. 909, 1351). As previously noted, Mr. Eschmann primarily utilized the income capitalization approach and a discounted cash flow model in performing his appraisal. (R. 898, 923, 935; *see* R. 17).

Income capitalization is a valuation method commonly used by real estate appraisers and investors to estimate the value of income-producing real estate. As explained by Mr. Eschmann at the hearing, because a hotel is an income-producing property, the income capitalization approach "is the primary approach" used in the industry to assess the value of such a business. (R. 935 [noting that "[i]nvestors … look[] at it [a hotel investment] based upon the income it can generate."], 1051 [HVS testimony that "[i]t's broadly accepted in hotel appraisal for properties of this sort that the income approach is the most important…."]).[10]

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[9] Mr. Eschmann has 34 years of valuation experience, and has specialized in valuing urban and suburban, luxury, full-service boutique independent and franchised hotels. (R. 909, 911-12, 1351).

[10] The Court of Appeals has agreed. *See 41 Kew Gardens Rd. Assocs. v. Tyburski*, 70 N.Y.2d 325, 331 (1987) ("The income capitalization approach is generally regarded as the preferred method for determining the value of income-producing property.").

Stated generally, the income capitalization approach values property based on the net income an investor can expect to generate from the property. The approach requires the appraiser to accumulate and analyze such data as the actual income and operating expenses of the subject property. *See 41 Kew Gardens Rd. Assocs. v. Tyburski*, 70 N.Y.2d 325, 331 (1987); *Matter of Poe Ctr.*, 250 A.D.2d 304, 306 (1st Dept. 1998). Using a "discounted cash flow model," the appraiser then projects the future income of the property over a specified period of time, and divides that future income by appropriate capitalization and discount rates to reach a valuation. *See Matter of Hempstead Country Club v. Bd. of Assessors*, 112 A.D.3d 123, 136 (2d Dep't 2013); *New Cobleskill Assocs. L.P. v. Assessors of the Town of Cobleskill*, 280 A.D.2d 745, 746 n.* (3d Dep't 2001). The discount rates account for the time value of money, whereas the capitalization rate is designed to account for the level of risk involved in an investment. (*See* R. 961-63, 965-66). *See also Matter of Hempstead Country Club v. Bd. of Assessors*, 112 A.D.3d at 136 (citations omitted).

One of the most important considerations in valuing a hotel is accurately projecting the average daily rate ("ADR") the hotel will be able to charge guests for room rentals. (R. 943, 1255). An accurate estimate of ADR is important under the income capitalization approach, as the income a hotel will derive from room rentals is dependent on the rates the hotel is able to charge its guests for such rentals. (R. 943).

Consistent with the foregoing, the first step in Mr. Eschmann's application of the income capitalization approach was to review and analyze Gurney's historical ADR, revenue and expenses through the end of 2017. (R. 1268-99). Based on that historical performance data, Gurney's own projected budget for 2018, and other appropriate economic considerations, including published data from comparable hotels and trends in the global and local hospitality markets, Mr. Eschmann then projected Gurney's future annual ADR, revenue and expenses over a ten-year period. (R. 1299-1300, 1306-07; *see* R. 937-49). Specifically, he predicted that Gurney's net income ("EBITDA") from hotel room revenue, food and beverage sales, spa services, and all other sources would be approximately \$4.5 million in the base year of the Merger (February 2018 to February 2019),[11] and would grow at a rate of three percent per year over the following nine years, resulting in an EBITDA of approximately \$6.2 million in the tenth year following the Merger (2028), and a "reversionary" EBITDA in the eleventh year of approximately \$6.5 million. (R. 1300, 1306-07; *see* R. 924-27, 935, 958-59). Mr. Eschmann then discounted these values and applied a 6.5 percent terminal capitalization rate to reach a present-day valuation of \$84 million. (R. 1301-05; *see* R. 929-30, 959-66).

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[11] In contrast, Gurney's reported net income in 2017 (the year before the Merger) was approximately \$2.3 million. (R. 1306).

B. The Trial Court Erred in Determining That CBRE Failed to "Appropriately Value" the Increased ADR and Net Income that Would Result from Gurney's Timeshare Room Nights Being Added <u>to the Rental Pool in 2018</u>.

There was no dispute at the hearing that the income capitalization approach was the proper method for valuing a resort like Gurney's. (*See* R. 17). The trial court, however, found CBRE's projections of Gurney's future revenues "suspect" because CBRE purportedly "did not appropriately value the potential average daily room rate for units that were subject to time shares in 2017." (*Id.*).

The trial court's determination that CBRE did not appropriately value the potential future ADR for former timeshare units is wholly without support in the record, and constitutes an abuse of discretion. Indeed, the unrebutted record evidence shows that Mr. Eschmann absolutely (and accurately) accounted for the anticipated increase in ADR and income that would be earned in 2018 by abandoning timeshare ownership at the end of 2017 and placing all timeshare owned rooms on the rental market. In fact, Mr. Eschmann predicted that ADR would increase in 2018 specifically because timeshare ownership had been terminated:

> According to local hotel professionals and rental agencies, ADR trends for the area are anticipated to increase for 2018 by an inflationary level. *The subject, however, as it has excused itself from obligation of timeshare membership and is free market in 100% of the facility for the first time in a long history, we forecast the property to achieve a better than inflation expectation in revenue* forecasting 5.0% ADR growth in the first two years of the forecast.

(R. 1257 [emphasis added]; *see also* 958-59). Mr. Eschmann therefore predicted that ADR for the entire resort would increase significantly, from approximately $577 in 2017 to almost $606 in 2018. (R. 1256-58).

Mr. Eschmann also appropriately accounted for how ending timeshare ownership, increasing ADR, and boosting rental revenue would impact Gurney's net income. Specifically, Mr. Eschmann accounted for (a) the loss of maintenance charges paid by timeshare owners, and (b) the increased revenue Gurney's would enjoy from receiving 100% of the market rental fees and the additional resort fees paid for the rooms that had previously been occupied by timeshare owners. (*See* R. 1281 [noting that "time share member common area charge fees and resort fees," which in 2017 were "paid by owners of weeks/units as opposed to paying a room rate," would be "reduced" going forward, but that "free market resort service fees will go higher given the loss of time shares and increase in free market use and resort fees charged"], 1283 [projecting that "changing over to free market guest stays" from timeshare ownership would result in Gurney's overall occupancy becoming less stable, but also result in an "enhanced room rate" going forward]).

In predicting Gurney's 2018 net income, Mr. Eschmann specifically factored in the anticipated increases in ADR and rooms revenue. (R. 1299-1300, 1306). Indeed, that was the basis for CBRE's prediction that the resort's net income would approximately *double* from less than $2.3 million in 2017 to more than $4.5 million in 2018. (*See* R. 1306).

Mr. Eschmann's testimony at the hearing confirmed that he had expressly anticipated and accurately predicted the increase in net income that would result from ending timeshare ownership and transitioning to 100% market rentals in 2018. The trial court asked Mr. Eschmann specifically to address this subject, and he did so as follows:

> 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 certain value?
>
> THE WITNESS: No. We assumed that the timeshares have been vacated. They no longer exist. As of [the] end of 2017, there was an agreement that the timeshares had been terminated and *we were analyzing the property as a fully 100% fee interest, unencumbered going forward. We – as if we just got rid of timeshares, they never existed as of February, this appraisal report considers 109 rooms, which that's what exists at the property, 365 days a year, which gives you full revenue potential of that property*.
>
> THE COURT: Including food and beverage –
>
> THE WITNESS: Food and beverage and spa services and everything. Yes, we have completely – I'm not going to say we disregard the timeshares, but for a fee interest appraisal, we're looking at this as unencumbered. We take into consideration historical operation. Sure, there were lost revenue potential in 2017, because there were timeshares using those units. But in 2017, that ended. So *in 2018, as of the date of this appraisal, they don't exist. There are 109 rooms in this*

> *property. 109 rooms are free market rents to gain market revenue from those for the whole year.*

(R. 927-28).

Mr. Eschmann also testified about the rental income that was anticipated to be earned by placing 5,273 room nights previously occupied by timeshare owners on the rental market as of January 1, 2018. (*See* R. 951-53, 2315 [showing that 5,273 room nights were occupied by timeshare owners in 2017]). Mr. Eschmann testified that, in predicting Gurney's future income and ADR, he made sure that he removed all effects of timeshare ownership. (*See* R. 1000 [explaining that his ADR predictions for 2018 were based on "average daily rate from units that were rented free market . . . that's what we're trying to get at, is free market rental room rates for these units." "We extracted the timeshares out of there."]).

In sum, there is no record support for the trial court's finding that CBRE did not appropriately account for the fact that Gurney's ADR and net income would increase following the termination of timeshare ownership at the end of 2017. The unrebutted record evidence is solely to the contrary.

C. Gurney's Actual Performance Data from the First Eight Months of 2018 Confirms the Accuracy and "Appropriateness" of CBRE's <u>Projections Concerning ADR and Net Income</u>.

The record evidence also indisputably shows that Mr. Eschmann's projections of the *extent* to which ADR and net income would increase following the termination of timeshare ownership were accurate. Mr. Eschmann testified at the hearing that he was quite pleased to learn that, after he prepared his appraisal, data for Gurney's *actual performance* during the first eight months of 2018 confirmed the accuracy of the ADR predictions he made without the benefit of such data. (R. 953, 2316 [Gurney's actual performance data from twelve-month period ending August 2018]). Indeed, actual ADR for the 12-month period ending in August 2018 — a period that included the high value, high occupancy summer months, during which all of Gurney's rooms were available for market rental — was approximately $618. (R. 1000, 2316). Mr. Eschmann's prediction that ADR would rise to $606 in 2018 was therefore only 1.9% off. By contrast, HVS predicted that ADR for the entire resort would exceed $673 in 2018 (R. 2511) — i.e., *an overestimate of approximately 9%.*

In other words, despite the fact that HVS (unlike CBRE) had access to Gurney's actual data for the 12-month period ending in August 2018 when it prepared its appraisal, the ADR estimated by HVS was almost *five times* more inaccurate than that estimated by CBRE. This fact, too, demonstrates that the trial court's determination that CBRE did not "appropriately value" the ADR that could be charged for former timeshare rooms is without support in the record.

POINT II

THE TRIAL COURT OVERLOOKED CLEAR FACTUAL, CONCEPTUAL, AND MATHEMATICAL ERRORS IN HVS'S VALUATION, WHICH MADE HVS'S PROJECTIONS FAR LESS "REALISTIC" THAN CBRE'S

Contrary to the trial court's Decision, it was HVS that failed to "appropriately value" the potential ADR for Gurney's room nights occupied by timeshare owners in 2017. (*See* R. 17). Like CBRE, HVS relied primarily on the income capitalization approach and a discounted cash flow model to conduct its appraisal. (R. 1051-52, 1059-61; *see* R. 17). In contrast to CBRE's appraisal, however, HVS's projections and calculations of Gurney's future income and present value were infected by multiple factual, conceptual, and mathematical errors.

A. HVS' Unnecessary "Normalization" of Gurney's Actual 2017 Performance Data Resulted in Fictitious Data and Absurd Projections.

One of the HVS appraisers who prepared Respondents' expert report, Erich Baum, confirmed at the hearing that the primary value-driving difference between the CBRE and HVS appraisals was their respective projections of rooms revenue and ADR, and specifically the increases in revenue and ADR that were expected to result from Gurney's ability to rent out 5,273 room nights that, in 2017, had been occupied by non-rent-paying timeshare owners.[12] (*See* R. 1059, 1063). Those 5,273

[12] Mr. Baum conceded that: (a) HVS and CBRE used "virtually identical" methodologies (R. 1058) and (b) there was no meaningful difference between the capitalization and discount rates chosen by HVS and CBRE. (R. 1060-63).

room nights represented approximately 20% of Gurney's total occupied room nights in 2017. (*See* R. 2482[13]).

Mr. Baum testified that to project this additional income, he first had to "normalize" (i.e., re-calculate) Gurney's *actual* 2017 performance data, and in particular its reported 2017 ADR. According to Mr. Baum, "normalization" was necessary because the ADR reported by Gurney's for 2017 included room nights occupied by timeshare owners and timeshare maintenance fees. HVS's complex re-calculation process was designed to "scrub" the reported 2017 ADR of these purported "impacts" of timeshare ownership. (*See* R. 2484 [stating that Gurney's reported ADR levels "include occupancy associated with timeshare unit owners occupying their own units and the average rate levels include the timeshare maintenance fees," and concluding that it was therefore appropriate "to scrub the monthly 2017 results of all timeshare-related impacts"]).

The Court plainly understood that this normalization exercise should be straightforward, as it attempted to confirm that Mr. Baum "just applied the same revenue that was generated from the non-timeshare units to the timeshare units; correct?" (R. 1064-65). Although Mr. Baum seemed to confirm the Court's observation (R. 1065), that is *not* in fact what the HVS appraisal accomplishes (not

[13] The number of room nights occupied by timeshare owners in 2017 (5,273) divided by Gurney's total occupied room nights for its 109 rooms in 2017 (26,036) equals 20.25%.

by a long shot). Rather, in re-calculating Gurney's actual 2017 performance statistics, HVS simply attributed a fictional, highly inflated annual ADR of $994.52[14] to the 5,273 room nights that were occupied by timeshare owners in 2017. (*See* R. 2484-91). As explained further below, that fictional ADR was significantly *higher* than the actual ADR for 7,085 *identical* room nights that *actually were rented* by timeshare owners to the public in 2017, rendering HVS' estimates incorrect and its conclusions highly misleading. (*Compare* R. 2490 [$994.52 "normalized" annual ADR for room nights occupied by timeshare owners], *with* R. 2312-15 [as confirmed by Mr. Baum at the hearing (R. 1109), actual ADR for room nights rented by timeshare owners to the public in 2017 was $728.75]).

Although ignored by HVS, the following simple adjustments would have fully accounted for the impact that abandoning timeshare ownership would have had on gross rooms revenue in 2017:

First: Determine the rooms revenue actually earned by Gurney's from all sources in 2017, namely (i) maintenance and other revenue received from all timeshare owners, (ii) rental income received

[14] Based on this inflated ADR for the room nights occupied by timeshare owners in 2017, HVS re-calculated the ADR for the resort *as a whole* in 2017 as $635 per night. (R. 2491). HVS then predicted that Gurney's annual ADR for the entire resort would increase to $675 in 2018, the base year of its income capitalization model. (R. 2492; *see supra* at 28-29 [noting that HVS's prediction of a $675 ADR for 2018 was 9% higher than the ADR actually experienced during the first eight months of 2018 ($618), including the high-revenue summer months, whereas CBRE's prediction was only 1.9% off]).

from the rental of *sponsor*-owned room nights,[15] and (iii) rental income received from rental of timeshare owned units;

Second: Deduct from that number the maintenance payments received in 2017 (as they would not have been paid if Gurney's was not a cooperative);

Third: Add in the projected revenue from renting the 5,273 room nights previously occupied by timeshare owners at the same ADR as the 7,085 identical room nights (approximately 60% of all timeshare room nights) *actually rented* by timeshare owners.

As demonstrated during the hearing, applying this simple methodology, and utilizing actual ADRs rather than HVS's fictitious "normalized" numbers, had Gurney's not been a cooperative in 2017, it would have *lost* approximately $3.5 million in maintenance and other timeshare revenue (R. 2483; *see* R. 1451), *gained* approximately $3.8 million by adding 5,273 room nights to its rental pool at an ADR of $728.75, and earned a total of $15,357,000 in rooms revenue in 2017. (R. 1116-18). Notably, CBRE conducted an analysis of the actual performance of Gurney's for the 12-month period ending in August 2018[16] that showed actual rooms revenue for that period was $15,769,591, only 2.7% higher than the revenue which could be

[15] As previously explained, in 2017, 5,273 room nights were occupied by timeshare owners, and 7,085 room nights were rented by timeshare owners to the public. The remaining 13,678 room nights were rented by Gurney's management or majority owner from the pool of room nights forfeited by or never sold to timeshare owners prior to 2017.

[16] *See* R. 2316, 952.

expected based on the foregoing simple math (inflationary growth of about 3% was consistent with expectations).

Mr. Baum admitted that this simple methodology and the specific calculations used to implement it were sound. He testified, for example, that Gurney's total rooms revenue in 2017 for its 109 rooms ($15,023,904) was comprised of revenue from rentals and maintenance fees. (*See* R. 1102, 1114-15, 1450-51 [Gurney's financial statements for 2017]). He acknowledged that revenues from room nights occupied by timeshare owners, including maintenance fees, totaled approximately $3.5 million in 2017. (R. 1114-15, 2487). And he acknowledged that the 5,273 room nights occupied by timeshare owners in 2017 were identical in all economic respects to the 7,085 room nights *rented* by timeshare owners to the public that year, and should have performed the same economically. (R. 1104-08[17]). Mr. Baum not only admitted, but calculated on the witness stand, that the ADR for the 7,085 room nights rented by timeshare owners to the public in 2017 was $728.75 (and that even at the height of the rental season, monthly ADR for such rooms was $978.65).[18] (R.

[17] As confirmed by the trial court, Mr. Baum testified that he "would expect that the economic performance of the 5,000 rooms that we're assuming would be put on the market in 2017, would be the same as the 7,000 that were already on the market." (R. 1108).

[18] The ADR for the 7,085 room nights rented by timeshare owners to the public in 2017 ($728.75) was greater than the ADR for the entire resort that year ($558) because the weeks owned by timeshare owners were more heavily concentrated in the peak summer season (and thus more valuable) than rooms owned and rented out by Gurney's management or majority owner. As explained above, HVS inflated the 2017 ADR for those rooms to $994.52, which had the effect of inflating the 2017 ADR for the entire resort to $635 (which he then predicted would increase *further*, to $675 per night, in 2018). (*See* R. 2481-92).

1109). Mr. Baum was asked if he could find a flaw in the foregoing methodology, and, unable to do so, conceded that "[i]t probably is" correct. (R. 1114).

In contrast, HVS's normalization process led it to conclude that (a) the 5,273 room nights occupied by timeshare owners in 2017 would have rented at an annual overall ADR of $994.52 (*see* R. 2490-91), *37% higher than the $728.75 ADR actually experienced by the 7,085 identical room nights <u>actually rented</u> by timeshare owners to the public in 2017*, and (b) de-cooping would have added $4.6 million (as opposed to the $3.8 million predicted by management) to Gurney's rooms revenue in 2017. (*See* R. 2493 ["Overall, the budget implies the capture of $3.754 million in revenue previously lost to unpaid timeshare occupancy. In comparison, our analysis indicates that approximately $4.635 million was foregone."]).

Mr. Baum was unable to offer any rationale for his determination that by increasing the supply of Gurney's hotel rooms on the market, the average price for such rooms would dramatically *increase*. (*See* R. 1108 [reflecting the trial court's understanding that Mr. Baum testified he "would expect that the economic performance of the 5,000 rooms that we're assuming would be put on the market in 2017, would be the same as the 7,000 that were already on the market"]). It is entirely irrational to assume that hotel guests who paid, on average, $729.75 per room would somehow be willing to pay $266 *more* per night to rent concededly *identical* rooms.[19]

The most cogent illustration of the flaws in HVS's unnecessary re-calculation of 2017 ADR and rooms revenue is the firm's $1,309 "normalized" ADR for August 2017. (*See* R. 2490). Mr. Baum personally calculated on the stand that the actual 2017 ADR of timeshare-owned and rented room nights for that month was $978.65. (R. 1109). Thus, during the height of the summer season, when demand for beach hotel rooms was at its highest, Mr. Baum's "normalized" ADR for timeshare-owned rooms exceeded the actual, observed performance of those rooms by 34%.[20]

HVS compounded its artificial inflation of room revenues and ADR projections by applying a 6% growth rate to project an aggressive $17.1 million in rooms revenue in base year 2018 (*see* R. 2511) — i.e., more than $2 million above

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[19] Hypothetically, demand for summer hotel rooms in Montauk might have been so significant that Gurney's would not have had to *reduce* the price to rent an additional 5,273 room nights in 2017. (*See* R. 1107-08 [the trial court characterized HVS's testimony as follows: "for an iconic beach front property in the Hamptons, Montauk area, during the months of July and August, the demand for these rooms is basically not affected by the law of supply and demand"]). But no economic theory justifies HVS's prediction that increasing the number of available rooms would somehow *increase* the average rental price Gurney's was able to charge by $266 (37%) per night.

[20] HVS's artificial inflation of room revenues and ADR is the result of unreasonable assumptions and incorrect "normalization" or made-up math. For example, HVS began its normalization process by multiplying Gurney's reported 2017 ADR by *all* 26,036 occupied room nights, including the 5,273 room nights that were occupied by non-rent-paying timeshare owners in 2017, resulting in a revenue figure significantly above Gurney's actual reported rooms revenue ($15,401,584 compared to $15,023,904). (R. 2485; *see* R. 1450-51 [Gurney's 2017 financial statements]). To arrive at an adjusted ADR, however, HVS divided the resulting inflated revenue figure by *only those rooms that had been rented* to paying guests. (*See* R. 2489).

the actual rooms revenue in 2017, and more than $1.8 million higher than management's prediction for 2018. (*See* R. 1276). HVS also projected that annual ADR would rise from $578 in 2017 to $673.10 in 2018, far higher than the ADRs of comparable hotels on eastern Long Island. (R. 1268, 2493, 2511).[21] As 2018 was the base year for HVS's income capitalization calculations, the firm's unreasonably inflated net income prediction for that year infected its 10-year projection of revenue and, thus, its entire valuation.

B. HVS Improperly Refused to Re-Evaluate its Illogical Projections When Gurney's Actual Performance in the First Eight Months Following the Termination of Timeshare Ownership Showed Them to be Completely Off-Base.

In performing its appraisal, HVS (unlike CBRE) had access to Gurney's actual performance data through August 2018 (i.e., including the summer months that it contended were most significant to its normalization). That data showed that its projections were seriously flawed, whereas those of CBRE (and Gurney's management) were remarkably accurate. Rooms revenue for the trailing 12-month period ending on August 31, 2018 was $15,769,591 (within 3.3% of management's prediction and 3.8% of CBRE's projection for 2018) and ADR for that period was $618.32 (within 2% of CBRE's projection of $605.90 for 2018). (*Compare* R. 2316 [Gurney's performance data for 12-month period ending August 2018], *with* R.

[21] The annual ADR for Gurney's and its main competitors in 2017 averaged $465.49. (R. 1268).

1300, 1306). HVS's projections of both ADR, by contrast, were 9% higher than actual performance in the base year.

The Uniform Standards of Professional Appraisal Practice ("USPAP") warn that because the discounted cash flow model is "dependent on the analysis of uncertain future events, it is vulnerable to misuse or misapplication." USPAP Advisory Opinion 33. "[E]ven slight input errors can be magnified and can produce unreasonable results." *Id.* Thus, "it is the responsibility of the appraiser to ensure that the controlling input is consistent with market evidence . . . [and] to make rational and supportable assumptions." *Id.* "The results of DCF analysis should be tested and checked for errors and reasonableness." *Id.* More particularly, USPAP advises appraisers to reconsider their analyses and assumptions where, as here, actual data does not comport with projections in a retrospective appraisal. *See* USPAP Advisory Opinion 34. Rather than check its projections against Gurney's actual 2018 data, HVS simply ignored the large disparity between actual performance and its projections.

In sum, in concluding that HVS's appraisal of Gurney's was more "realistic" than CBRE's, the trial court overlooked numerous material errors in HVS's methodology and patent absurdities in its projections, rendering the court's determination to adopt that $115 valuation an abuse of discretion.

<u>ARGUMENT IN OPPOSITION TO RESPONDENTS' APPEAL</u>

POINT III

THE TRIAL COURT CORRECTLY REFUSED TO AUGMENT RESPONDENTS' APPRAISAL BASED ON ELEVENTH-HOUR LAY TESTIMONY CONCERNING THE PURPORTED VALUE <u>OF GURNEY'S NET OPERATING LOSSES AND CASH</u>

In Points I-II of their brief, Respondents argue that the trial court should have augmented their expert's valuation of Gurney's based on "assets" HVS did not include in its analysis, such as (a) the tax benefits associated with net operating losses carried on Gurney's books ("NOLs"), and (b) unspecified "cash holdings" of Gurney's. The trial court correctly declined to incorporate such add-ons into its determination of "fair value" because they were (a) inconsistent with HVS's methodology, (b) untimely presented, and (c) unsupported by any competent evidence (i.e., a witness with personal knowledge).

First, although NOLs may be used to reduce a corporation's future income tax liability, adding that value to HVS's appraisal would have been inconsistent with the methodology underlying its appraisal. As previously explained (at 20-21), both experts appraised Gurney's utilizing an income capitalization approach, which they testified was the most appropriate method to value an income-producing property like a hotel. (R. 935, 1051). *See also 41 Kew Gardens Rd. Assocs. v. Tyburski*, 70 N.Y.2d 325, 331 (1987) ("The income capitalization approach is generally regarded as the preferred method for determining the value of income-producing property").

Under that approach, either (a) the valuation analysis is done on the basis of pre-tax net operating *income* (i.e., EBITDA), in which case, the existence of net operating *losses* that could potentially reduce tax obligations is irrelevant, or (b) the analysis is done on the basis of post-tax income, in which case the total tax liability must be taken into account, and the appropriate post-tax capitalization and discount rates must be chosen. (R. 902, 801-82).

Here, both sides' experts utilized a pre-tax valuation approach. (*See* R. 1298-99, 1306 [CBRE], 2503, 2511-12 [HVS]). Unsurprisingly, nowhere in HVS's appraisal is any value attributed to NOLs. Nor did Respondents proffer any other expert evidence of NOL value. Whether out of fear of how HVS would testify, or in recognition that NOLs were outside the scope of its report, Respondents made no attempt to elicit any testimony from HVS concerning NOL value.

Instead, Respondents proposed to offer *lay testimony* from individuals with no personal knowledge of Gurney's NOLs. (*See* R. 785-87, 834-48). But as the trial court correctly recognized, the propriety of attributing value to future NOL deductions within an income capitalization valuation of a hotel, and the quantification of such value, are subjects for expert testimony. *See De Long v. Cty. of Erie*, 60 N.Y.2d 296, 307 (1983) ("The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge."). (R. 895-96, 908 [the Court: "that's what you have an appraiser for, to … opine on the appraised value based on the empirical data."], 1004 ["I'm not interested in lay testimony."], 1031 [same]). Moreover, even had Respondents been qualified to give expert testimony on NOLs, they did not propose to do so until the eve of the hearing, long after the deadline for disclosure of expert opinions. (*See* Stipulation, No. 154466/2018, NYSCEF 59).

Respondents' argument that the trial court should have added Gurney's "cash holdings" to HVS's valuation is equally meritless. Respondents do not specifically identity what, if any, "cash holdings" the court purportedly should have added, or explain how doing so would have been consistent with HVS's income capitalization valuation. HVS's appraisal should have encompassed all relevant elements of Gurney's value. Respondents were appropriately precluded from supplementing that appraisal at the hearing with previously undisclosed valuation theories. Insofar as there was no expert evidence to support Respondents' purported add-ons, and they were inconsistent with HVS's appraisal, the trial court did not abuse its discretion in declining to factor them into its analysis.

POINT IV

THE TRIAL COURT PROPERLY DECLINED TO ADOPT RESPONDENTS' SPECULATIVE VALUATION OF GURNEY'S BRAND

Respondents next argue that the trial court erred by refusing to ascribe value to Gurney's brand. But the trial court appropriately "decline[d] to assign any value to [Respondents'] speculative, post hoc claim for the value of Gurney's trademark rights" (R. 54) because there was no evidence that Gurney's brand had any value whatsoever.

HVS appraised Gurney's at $115 million, attributing zero value to Gurney's "intangible property." (R. 2395, 1079). In an uncertified addendum to its report, however, HVS speculated on amounts Gurney's might earn in the future were it to license its name. (R. 2546-49). In acknowledgment of the lack of "actual data" to support this "complicated" assessment, HVS offered a "valuation matrix" rather than a specific figure. (R. 1082-83, 2549). At the hearing, Erich Baum of HVS asserted that he "imagine[d]" the center value in this matrix ($8.5 million) was the "most reasonable number" for Gurney's brand value. (R. 1083).

Putting aside the lack of certification, HVS's speculation regarding future licensing income was based on three potential income streams, *two of which did not actually exist, and one of which was a fee paid by an affiliate.* Almost 70% of the brand value projected by HVS was attributable to a licensing fee (1% of Gurney's revenues) purportedly paid by the corporation to itself. (*See* R. 1135, 2546, 2548 ["Gurney's Montauk Resort" fee]). Yet Mr. Baum conceded at the hearing that (a) Gurney's does not in fact pay itself any licensing fee, and (b) if it did, the net value of that income would be zero, insofar as such income would be offset by an equal expense. (R. 1135-36).

The second fictitious income stream was a *one-time* licensing fee (0.5% of revenues) paid by a Gurney's *affiliate* to use the Gurney's name in the sale of 20 townhomes owned by that affiliate. (R. 1136-37, 2547-48 ["Gurney's Residences" fee]). Mr. Baum conceded at the hearing that no ongoing licensing agreement with the affiliate exists. (R. 1136-37). HVS nonetheless speculated that Gurney's *could* charge that affiliate a fee of 1-2% of its revenues to use the Gurney's name to market hotel rooms. Respondents offered no evidence that Gurneys had ever contemplated licensing its name to third parties, or that any disinterested third party would be willing to pay to use Gurney's name.

The third income stream is a licensing fee (1% of room revenue) paid by a Gurney's affiliate that owns property in Rhode Island. (R. 1137-39, 2548 ["Gurney's Newport" fee]). However, a licensing arrangement between affiliates is generally not a reasonable indicator of brand value.[22] More importantly, Mr. Baum admitted at the hearing that he had no actual data from which to estimate the arrangement's value to Gurney's.[23] (R. 1139). Furthermore, the value of this income to Gurney's was already factored into HVS's income capitalization analysis, which

[22] *The Appraisal of Real Estate* (13th ed. 2008, at 304) warns that transactions "that are not arm's length market transactions … should be identified and rarely, if ever, used" in the sales comparison method of valuation.

[23] Notably, Mr. Baum's lowest projection of licensing fee income ($625,000) greatly exceeded all reported licensing fees actually received by Gurney's from this source. (R. 1140, 2548).

considered all actual sources of income reported by Gurney's. (*See* R.1040-41, 2503).

Because Respondents' brand valuation was unsupported by actual data, the trial court appropriately treated it as speculative. Indeed, the unrebutted record evidence establishes that no unaffiliated third party has ever paid anything to use Gurney's name.

POINT V

THE TRIAL COURT APPROPRIATELY ALLOCATED GURNEY'S UNENCUMBERED VALUE TO ALL CLASS A SHAREHOLDERS PRO RATA AFTER DEDUCTING GURNEY'S MORTGAGE DEBT

In Point IV of their brief, Respondents argue that the trial court's calculation of $142.05 per share "fair value" from HVS's $115 million valuation of Gurney's (a) was "driven by inputs which are nowhere to be found in the record evidence," and (b) resulted in the unequal treatment of Class A shareholders. Both of these assertions are meritless.

Respondents are aware of how the trial court's "fair value" of $142.05 per share was calculated: the court simply (a) adopted Respondents' appraisal of the *unencumbered* value of Gurney's ($115 million), (b) subtracted the outstanding mortgage debt encumbering Gurney's (approximately $21.5 million), and (c) divided the resulting figure by the Class A shares outstanding at the time of the Merger (657,900). (R. 2657). According to Respondents, however, the court should have (a) substituted the *unequal* allocation formula *in the MOU, disavowed by Respondents,* for the pro-rata allocation mandated in BCL valuation proceedings, and (b) ignored Gurney's $21.5 million mortgage debt. (*See* Resps.' Br. 17-18). For the reasons stated below, the trial court did not err in rejecting those arguments.

A. <u>BCL 623 Mandates Pro-Rata Allocation of Value</u>

It is well-settled that the fair value of a dissenting shareholder's shares is its pro-rata allocation of the corporation's total value. *See Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 168-69 (1995) ("fair value [is] calculated on the basis of the petitioners' proportionate share of all outstanding corporate stock"); *Matter of Seagroatt Floral Company, Inc.*, 78 N.Y.2d 439, 443 (1991) (fair value process ascribed value to company and then divided by "the total number of common shares … to obtain a per-share value"). This follows from the maxim that "[d]eterminations of the fair value of a dissenter's shares … require equal treatment of all shares of the same class of stock." *Friedman*, 87 N.Y.2d at 168. Equal treatment is *by definition* what a pro-rata allocation achieves. Thus, the trial court correctly applied the law when it allocated what it determined to be the going-concern value of Gurney's pro rata among all Class A shares, regardless of who owned the shares.

Respondents contend that they were entitled to reject the MOU-calculated Tender Offer while simultaneously *retaining* the contractual MOU allocation formula, which afforded timeshare owners a significant premium above the pro-rata value of their shares.[24] The trial court necessarily and correctly rejected that argument both in its Decision and on reargument. (R. 803-04, 863-64, 880-81, 2675-76, 2698-2701). Not only did Respondents disavow the MOU by invoking their statutory rights under BCL 623, but, as the Court of Appeals has held, the parties' private contractual valuation methodology has no application in this BCL 623 proceeding, the purpose of which is to determine the *objective* fair value of Respondents' shares. *See Matter of Pace Photographers, Ltd.*, 71 N.Y.2d 737, 747-48 (1988); *see also Matter of Penapent Corp.*, 96 N.Y.2d 186, 192-93 (2001);[25] *Matter of Sands Point Land Co. v. Rossmoore*, 43 Misc.2d 368, 371-73 (Sup. Ct. Nassau Cnty. 1964) (under BCL 623, fair value rather than contract value is the benchmark; to hold otherwise "would nullify the provisions of section 623"). Unless expressly made applicable in statutory proceedings, valuation methodologies in shareholder agreements are inapplicable in BCL valuation proceedings. The MOU neither expressly, nor impliedly, indicates that its disproportionate allocation formula applies in this statutory "fair value" proceeding. This proceeding cannot be used to reform the MOU by allowing Respondents to reject those provisions they

[24] The MOU provided that, to the extent that the sale (or, in this case, Merger) price of Gurney's exceeded $50 million, minority-owned Class A shares would be allocated a greater percentage of the excess than Class A shares purchased by Gurney's majority owner. (R. 111 [§5(k)]).

[25] Although *Pace* and *Penapent* are BCL 1118 cases, "there is no difference in analysis between stock fair value determinations under Business Corporation Law § 623, and fair value determinations under Business Corporation Law § 1118." *Friedman*, 87 N.Y.2d at 168.

dislike (e.g., CBRE's independent appraisal) while retaining those they like (i.e., a disproportionate allocation methodology).

While acknowledging that the BCL requires all Class A shares to be treated alike, Respondents distort the law by contending that, because the Tender Offer accepted by *non-dissenting* minority shareholders was based on the MOU, the MOU formula must be applied here to achieve equality. But BCL 623 does not require equal treatment of *dissenting and non-dissenting shareholders*. Indeed, the sole purpose of such a proceeding is to obtain supplemental compensation only for those shareholders who timely dissent. *Friedman* simply requires that the court—after making its own assessment of total company value—allocate that value equally among all shares within the same class, whether those shares are held by *minority or majority shareholders*. 87 N.Y.2d at 169-70 (refusing to discount share value based on minority status or special restrictions on transfer). Here, all of Gurney's Class A shareholders are treated equally when the net value of Gurney's is divided *equally* among all 657,900 shares.

In contrast, were the court to apply the MOU formula and value each of the 203,550 minority-owned shares at $174.798, as Respondents demand (Resps.' Br. 17), then the remaining 454,450 sponsor-owned but identical shares would, as a matter of mathematical certainty, have a value of only $127.38.[26] It is precisely *because* the BCL requires equal treatment that an allocation that values Respondents' Class A shares 37% higher than majority-owned Class A shares would be unlawful.

B. The Trial Court Appropriately Deducted Gurney's Mortgage Debt From The Unencumbered Value Of Its Assets

As a threshold matter, although Gurney's made clear its position that the $21.5 million mortgage debt needed to be deducted from the corporation's unencumbered value in its pre-hearing memorandum (R. 802-03), its post-hearing memorandum (R. 864 n.6), *and* its response to the trial court's December 18, 2018 request for information about the calculation of share value (R. 2657), Respondents did not object to the deduction of the mortgage debt until their post-Decision motion to reargue. Having failed to raise the matter before the Decision, they cannot now pursue it on appeal, as "[a] contention in support of reargument cannot form the basis for an appellate attack" on an order or judgment. *Gaspard v. Am. Transit Ins. Co.*, 157 A.D.2d 543, 544 (1st Dep't 1990).

In any event, Respondents cite no authority in support of their position that the trial court should have ignored Gurney's $21.5 million mortgage and allocated

[26] $115 million minus Gurney's $21,543,861 mortgage is $93,456,139. If 203,550 minority-owned shares are worth $174.798 each ($35,580,132.90 collectively), then only $57,876,006.10 is available for allocation to the other 454,350 shares. $57,876,006.1÷454,350=$127.38.

the *unencumbered* value of Gurney's among its shareholders. It is a basic principle of finance that shareholder equity is the difference between a corporation's assets and its liabilities. *See, e.g.* Ronald S. Longhofer, Business Valuation § 8.01 ("Subtracting the fair market value of all liabilities from the fair market value of assets yields the fair market value of equity."); Financial Accounting Standards Board, *Statement of Financial Accounting Concepts No. 6*, ¶¶ 49-50 (2008) ("Equity or net assets is the residual interest in the assets of an entity that remains after deducting its liabilities…."), *available at* https://www.fasb.org/pdf/aop_CON6.pdf; *accord Hallmark v. Cohen & Slamowitz, LLP*, No. 11-CV-842W(F), 2016 U.S. Dist. LEXIS 37952, at *23-24 (W.D.N.Y. Mar. 23, 2016); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 286 (4th Cir. 1983). Common sense dictates that a calculation of shareholder equity which *ignores* debt on the corporation's primary asset would result in an overstated valuation of that equity.

Consequently, courts routinely determine shareholder equity with reference to the net value of the corporation. *See, e.g. Friedman*, 87 N.Y.2d at 164 (in BCL 623 proceeding, calculating fair value of dissenters' shares from the "net value" of corporations' real estate interests); *Wright v. Phillips*, No. 11536-VCG, 2017 Del. Ch. LEXIS 857, at *2, 10, 13 (Ch. Dec. 21, 2017) (determining fair value of parties' interests in real estate holding company by (a) "[s]ubtracting the mortgage amount" from the judicially-accepted appraisal of the company's property, and (b) dividing the resulting "net" value, after certain adjustments, pro rata); *Sieger v. Sieger*, No. 6975/1998, 2005 N.Y. Misc. LEXIS 1808, *105 (Sup. Ct. Kings Cnty. June 29, 2005) (accepting appraiser's report that had been updated to "take the mortgage into account, so that the mortgage would have to be subtracted from her valuations to obtain the equity").

Deduction of Gurney's mortgage debt is also consistent with the Court of Appeals' characterization of what equity value is supposed to represent—i.e., the amount "'a willing purchaser, in an arm's length transaction, would offer for the *corporation* as an operating business.'" *Friedman*, 87 N.Y.2d at 168 (emphasis in original). No purchaser would pay *unencumbered* value for a resort in fact encumbered by over $21.5 million in mortgage debt. Either the purchase price would be reduced to induce the buyer to assume the debt, or the mortgage would be repaid from the sale proceeds at the title closing, reducing the funds available for allocation to shareholders.

Contrary to Respondents' contention, deduction of the $21.5 million mortgage was also fully consistent with both sides' appraisals. Both appraisers testified that they were asked to value Gurney's assets as if *unencumbered*. (R. 921, 927-28 [testimony of CBRE], 2542 [HVS: "[a]ll mortgages, liens, encumbrances, leases, and servitudes have been disregarded unless specified otherwise"]). The necessity of subtracting the mortgage debt from that unencumbered value was assumed by both sides, and required no expert guidance. For the reasons stated above, *as a matter of basic accounting and logic*, only net value is properly allocated among shareholders.[27]

Respondents also argue that the existence and/or amount of the mortgage debt is not reflected in the record. But Respondents themselves attached Gurney's 2017 unaudited financial statement as an exhibit to their Answer. (R. 735-36). That document on its face evidences that there was an end-of-year mortgage balance of $21,543,861.03. (R. 736). The MOU also acknowledged the existence of significant mortgage debt, and required that the debt be subtracted from the appraisal value of Gurney's before allocation to shareholders. (R. 107-08).

POINT VI

THE TRIAL COURT PROPERLY PRECLUDED RESPONDENTS' LAY TESTIMONY ON UNDISPUTED, DUPLICATIVE, AND IRRELEVANT ISSUES

Respondents' final argument is that the trial court should have heard lay testimony from individual Respondents about the subjective value each placed on owning a timeshare vacation week at Gurney's, and other irrelevant or undisputed issues. The trial court properly precluded such testimony, holding that the valuation

[27] Failing to deduct the mortgage debt would place the entire burden of that debt on majority-owned Class A shares, violating *Friedman*'s equality principle. (*Supra* 45-48).

of Respondents' proportionate interests in Gurney's was a matter for expert, not lay, testimony. (*See* 895-96, 908, 1004, 1031; *see also* R. 834-48).

The focus in a BCL 623 proceeding is on the company's financial data, not the subjective value a shareholder attaches to its shares. *See Friedman*, 87 N.Y.2d at 167 (BCL 623 focuses on the "'value of [a dissenter's] stock *for sale or its value for investment*'") (emphasis partially in original). (*See also supra* 45).

The valuation of a resort plainly is not within the knowledge of lay persons like Respondents. *Adelstein v. Finest Food Distributing Co. N.Y. Inc.*, No. 7162/10, 2011 N.Y. Misc. LEXIS 5956, at *17 (Sup. Ct. Queens Cnty. Nov. 03, 2011) ("[T]he valuation of [petitioner's] interest in Finest rests primarily on the credibility of the appraisers and the reliability of their valuation methods"), *aff'd* 116 A.D.3d 850, 850–51 (2d Dep't 2014) ("'[I]f [the determined fair value] is within the range of testimony presented, [it] will not be disturbed on appeal where the valuation rests primarily on the credibility of the expert witnesses and their valuation techniques.'"); *Nexbank v. Soffer*, No. 652072/2013, 2018 N.Y. Misc. LEXIS 1923, *4 (Sup. Ct. N.Y. Cnty. May 18, 2018) ("'New York case law is clear that expert appraisal evidence is the method for proving the value of real property in litigation.'"). Respondents have no personal knowledge of Gurney's finances, and thus can have no competent opinion on Gurney's financial value. Indeed, Respondents never *offered* to give expert opinion on valuation; their pre-hearing witness list identified the subjects of their proposed testimony solely as "Fact" and/or "Lay Opinion." (R. 785-87).

Moreover, the "Fact" testimony proffered by Respondents was irrelevant, undisputed, and/or duplicative. *See People v. Martin*, 42 N.Y.2d 882, 883 (1977) ("[T]he trial court may, in its discretion, limit repetitious or clearly irrelevant testimony."); *accord Matter of Erica D. v. Maria D.*, 80 A.D.3d 423, 424 (1st Dep't 2011). For example, Respondents proposed to testify that they held Class A shares and were up-to-date on maintenance payments, which Gurney's has never disputed. (R. 786). They proposed to identify the rental ("rack") rates of their rooms, although both experts gave extensive testimony about such rates. (*Id.*). Finally, they proposed to testify as to how they used their intervals and their reasons for dissenting—subjects that are irrelevant to the value of Gurney's.[28] Moreover, any determination of fair value that distinguished between shareholders based on their uses of their corporate interests would violate the *Friedman* equality principle (*supra* 45-48) and dramatically expand the scope of BCL 623 proceedings, which as special proceedings are intended to be summary. Finally, to the extent that any Respondent would have testified that the value of his or her shares was *greater* than the value

[28] To the extent Respondents intended to testify about alleged wrongdoing by management, "once the corporation has elected to buy the petitioning stockholders' shares at fair value, 'the issue of majority wrongdoing is superfluous….'" *Friedman*, 87 N.Y.2d at 168 (alterations omitted).

attributed to them by the Respondents' own expert, the trial court properly excluded such contradictory and untimely testimony.

CONCLUSION

For all of the foregoing reasons, Gurney's respectfully requests that this Court issue an order (a) reversing the Decision below, (b) vacating the Judgments entered on May 13 and June 13, 2019, and (c) directing the trial court to enter a judgment finding that the value of Respondents' shares was $97.28 per share as of March 28, 2018, consistent with CBRE's appraisal of Gurney's.

Dated: New York, New York
March 23, 2020

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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 5513**

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.