To Be Submitted By:
Daniel R. Milstein

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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

REPLY BRIEF FOR PETITIONER-RESPONDENT/ CROSS-APPELLANT

GREENBERG TRAURIG, LLP
Attorneys for Petitioner-Respondent/ Cross-Appellant
200 Park Avenue, 38th Floor
New York, New York 10166
212-801-9200
sinatras@gtlaw.com
milsteind@gtlaw.com
hammerank@gtlaw.com

Of Counsel:
Steven Sinatra
Daniel R. Milstein
Keith Hammeran

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Gurney's[1] respectfully submits this Reply Brief in further support of its cross-appeal from the Decision of the trial court (Ostrager, J.) entered December 21, 2018 and two resulting judgments entered May 13 and June 13, 2019 in this BCL 623 proceeding to determine the "fair value" of Respondents' shares.

PRELIMINARY STATEMENT

The trial court adopted Respondents' $115 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 approximately 20% of room nights previously occupied by non-rent-paying timeshare owners). As demonstrated in Gurney's Opening Brief, the record evidence does not support that conclusion. Indeed, it shows that, through an unnecessary and erroneous revision of the ADR Gurney's rooms *actually earned in 2017*, HVS artificially inflated Gurney's income, which caused a substantial overestimate of total value when incorporated into HVS's income capitalization analysis.

The fundamental, and indisputable, error made by HVS was its assumption that, had the 5,273 room nights occupied by timeshare owners in 2017 instead been

[1] Undefined terms herein have the meanings ascribed to them in Gurney's opening brief in support of its cross-appeal and in opposition to Respondents' appeal ("Gurney's Opening Brief") (NYSCEF #21).

rented to the public that year, their rental price (i.e., ADR) would have been *37% higher than the ADR of 7,085 identical timeshare-owned room nights that were in fact rented to the public that year*. HVS's representative, Mr. Baum, conceded at the hearing that (a) the room nights that were occupied by their timeshare owners in 2017 were economically identical to the timeshare-owned room nights that were rented to the public (i.e., they were physically the same and were *rented during the same times of year*), and (b) there was absolutely no basis to project that room nights occupied by the timeshare owners would have performed any differently from room nights rented by the timeshare owners, had those room nights also been put into the rental pool in 2017.

In opposition to Gurney's arguments on appeal, Respondents do not meaningfully address either the record or the irrationality of HVS's projections. They accuse Gurney's of "distort[ing]" evidence and "put[ting] words in the [c]ourt's mouth," but fail to identify any specific distortion or misrepresentation of the record (which, Gurney's contends, speaks for itself). It is in fact Respondents who distort the record. They (a) omit unfavorable testimony from block quotations in their brief, (b) make demonstrably incorrect statements about the data, and (c) suggest that the trial court discounted the CBRE appraisal for reasons the trial court never expressed and which are nowhere mentioned in its Decision. Gurney's appeal should be granted.

LEGAL STANDARD

The legal standard applicable to this BCL 623 valuation proceeding is discussed in Gurney's Opening Brief (at 18-21). As explained, 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"). Here, the trial court's stated conclusions about HVS's and CBRE's respective appraisals are unsupported (and indeed contradicted by) the documentary evidence and data in the record.

In opposition, Respondents rely on the general principle that a trial court is better positioned than this Court to make credibility determinations. (Resps.' Answering Br. 12-13, 20). That principle is not applicable here, however, insofar as the errors of the trial court are manifest, and the appeal does not require this Court

to overrule assessments of witness credibility. Where, as here, a trial court has ignored "glaring inconsistencies" in testimony and "contradictory documentary evidence" in reaching its conclusions, its decision should be reversed. *Ledwith v. Sears Roebuck & Co.*, 231 A.D.2d 17, 22 (1st Dep't 1997); *cf. Sepulveda v. Aviles*, 308 A.D.2d 1, 8 (1st Dep't 2003) (jury findings can be reversed if they are at odds with a fair interpretation of the evidence); *Annunziata v. Colasanti*, 126 A.D.2d 75, 80 (1st Dep't 1987) ("An appellate court, even without the advantage of having viewed the witnesses, is 'not required to give credence to a story so inherently improbable that we are morally certain it is not true.'") (quoting *Bottalico v. New York*, 281 A.D. 339, 341 (1st Dep't 1953)).

As detailed in Gurney's briefing, many of the trial court's conclusions appear to result from its overly swift acceptance of HVS's testimony characterizing the parties' appraisal reports, rather than the data and text set forth in the reports themselves. Gurney's has demonstrated that HVS's testimony in fact mischaracterized both its methodology and the data in its appraisal, which caused the court to simply miss the obvious flaws therein. The deference afforded trial courts when they weigh competing testimony from adverse appraisers cannot extend to the use of testimony as a substitute for reviewing the underlying documents and data. The court's reasoning and findings must be supported by the record. Here, Gurney's respectfully submits that the trial court's findings are unsupported.

ARGUMENT

POINT I

THE TRIAL COURT OVERLOOKED CLEAR FLAWS IN HVS'S VALUATION, WHICH MADE HVS'S PROJECTIONS OF ADR AND ROOMS REVENUE FAR LESS "REALISTIC" THAN CBRE'S

The record demonstrates that HVS materially and artificially inflated the ADR Gurney's could expect to earn following the termination of timeshare ownership. It did so by (a) engaging in an unreliable and wholly unnecessary effort to "normalize" (i.e., re-calculate) Gurney's actual 2017 performance data, and then (b) using the resulting fictitious data as the basis for an income capitalization model. In attempting to defend HVS's approach, Respondents largely misconstrue or ignore the documentary evidence and mathematical data in the record, and misrepresent the testimony at the hearing.

1. Respondents Mischaracterize Various Categories Of Gurney's Room Nights To Manufacture Differences That Do Not Exist.

In order to appreciate the flaws in HVS's analysis (and in Respondents' defense thereof), it is important to appreciate that, prior to the termination of timeshare ownership, Gurney's room nights fell into three categories:

(1) sponsor-owned room nights rented to the public (13,678 room nights,[2] which HVS calculated rented at an ADR of $554.50 in 2017) (R. 2489, 2482);

(2) timeshare-owned room nights that *were also rented* to the public (7,085 room nights, which HVS conceded rented at an ADR of $728.75 in 2017) (R. 2312-15, 1109); and

(3) timeshare-owned room nights that were *not rented* because they were occupied by their owners in 2017 (5,273 room nights with no ADR in 2017[3]).

It is undisputed that *timeshare-owned* room nights (both the 5,273 occupied by timeshare owners and the 7,085 rented to the public) were more heavily concentrated in the high-value summer months than were the sponsor-owned room nights. (R. 2312-15; Gurney's Opening Br. 8 n.1).[4] Thus, it is logical that the ADR

[2] This figure is calculated by subtracting 5,273 and 7,085 from the total number of Gurney's room nights in 2017, whether occupied by timeshare owners or the public (26,036). (R. 2485).

[3] As discussed further below, although room nights that were occupied by timeshare owners had no reported ADR in 2017 (indeed, the concept of an average daily rent does not apply to rooms that were not in fact rented), HVS's "normalization" process concluded that *had they* been offered for rental that year, they would have rented for $994.52 per night. (R. 2312-15, 2490-91).

[4] For obvious reasons, more summer timeshares were sold than off-season timeshares. Further, because the financial burdens of ownership were the same whether an owner had a week in the summer or a week in the off-season, the owners of off-season weeks were among the first to surrender their shares as maintenance was increased and special assessments imposed during

for timeshare-owned rooms that were rented to the public in 2017 ($728.75) was higher than both (a) the ADR for sponsor-owned room nights that year (calculated by HVS as $554.50), and (b) Gurney's reported 2017 ADR for the resort *as a whole* (approximately $577 [R. 1306]). It also explains why *both* appraisers predicted that the ADR for the resort *as a whole* would increase in 2018, when 5,273 room nights (approximately 20% of Gurney's total occupancy for 2017) previously occupied by timeshare owners would be added to the rental pool.

As discussed below, however, the 5,273 timeshare-owned room nights occupied by the owners themselves in 2017 were identical in all respects (physically and temporally) to the 7,085 timeshare-owned room nights rented to the public that year. Consequently, HVS's opinion that the 5,273 room nights occupied by timeshare owners in 2017 would have earned an annual ADR of $994.52 had they been rented to the public that year simply cannot be credited.

2. HVS's "Normalization" of Gurney's Actual 2017 Performance Data Resulted In An Absurd Opinion That The 5,273 Room Nights Occupied By Timeshare Owners Would, If Rented, Have Performed 37% Better Than 7,085 *Identical* Timeshare-Owned Room Nights *Actually Rented* That Year.

As explained in Gurney's Opening Brief (at 30-37), before projecting the increased future income Gurney's would earn from its ability to rent 100% of its

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Gurney's period of financial distress—i.e., before the MOU and 290 OMA's renovation and repositioning of the resort. (*See* Gurney's Opening Br. 9-12; R. 92).

room nights to the public at market rates, HVS first engaged in a complex effort to "normalize" (i.e., re-calculate) Gurney's actual 2017 performance data. The stated purpose of this re-calculation was to determine the ADR that the 5,273 room nights occupied by non-rent-paying timeshare owners in 2017 would have earned had they hypothetically been rented to the public at market rates that year.

But the complicated and unreliable "normalization" process undertaken by HVS, by which it arrived at a fictitious ADR for rooms that were not rented in 2017, was unnecessary. HVS had available to it the *actual* ADR for *7,085 identical room nights rented by timeshare owners to the public in 2017*. At the hearing, Mr. Baum of HVS admitted 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. (*See* R. 1104-08). HVS did not claim that the room nights occupied by timeshare owners were physically different (i.e., larger or better furnished) than the timeshare-owned room nights that had been put into the rental pool in 2017. Nor did HVS suggest (much less offer any evidence) that the room nights occupied by timeshare owners were more heavily concentrated in the high-value summer months than were the timeshare-owned room nights offered for rental in 2017. (*See id.*). Indeed, the documentary evidence shows that the temporal distribution of timeshare-owned and rented room nights was indistinguishable from the temporal distribution of timeshare-owned and occupied room nights. (*See* R.

2312-15). For each of these two categories, approximately 82% of the room nights fell between the months of May and September 2017, with minimal differences on a month-by-month basis within that period. (*Id.*).

Mr. Baum therefore conceded that there was no basis to believe that the timeshare-owned and occupied room nights would have performed better financially than the timeshare-owned room nights already in the rental pool in 2017. His testimony (as understood and confirmed by the trial court) was that he "would expect that the economic performance of the [approximately] 5,000 rooms that we're assuming would be put on the market in 2017, *would be the same as the [approximately] 7,000 that were already on the market*." (R. 1108).

Mr. Baum not only admitted, but calculated on the witness stand, that the ADR for the 7,085 timeshare-owned and rented room nights was $728.25 in 2017. (R. 1109). Rather than apply this $728.25 ADR to the 5,273 room nights occupied by timeshare owners, as one would expect given Mr. Baum's expectations for their economic performance, HVS engaged in a complex and unnecessary "normalization" process and predicted that those room nights would have earned an absurdly high ADR of $994.52. (*See* R. 2490-91). In other words, HVS opined that if the 5,273 room nights occupied by timeshare owners had instead been rented in 2017, they would have earned a rate 37% higher than the ADR of the 7,085 economically identical room nights *actually* rented that year.

Respondents erroneously assert that the "HVS appraisal used the $994.52 number only for calculating ADR of the timeshare units during the high season …, when the daily rates for July and August are $1,043 to $1,050 per night…." (Resps.' Reply Br. 9-10 [emphasis in original]). This is an utter mischaracterization of the HVS appraisal. HVS's appraisal report clearly lists the $994.52 ADR as an *annual* figure. (R. 2490). Indeed, the report calculates separate ADRs for July and August at $1,390.13 and $1,309.40, respectively. (R. 2490). As noted in Gurney's Opening Brief, these monthly rates are completely untethered to the *actual* ADRs timeshare-owned room nights achieved in the rental market in those months. For example, Mr. Baum himself personally calculated on the stand that the *actual* ADR of timeshare-owned and rented room nights in August 2017 was $978.65. (R. 1109). Thus, the $994.52 *annual* ADR HVS opined would have been earned by rooms nights occupied by timeshare owners in 2017, had they instead been rented, was higher even than the actual, observed ADR of timeshare-owned and rented rooms *in the month in which demand for beach hotel rooms was at its highest that year*.

HVS's inflation of ADR is contrary to both basic logic and the bedrock economic principles of supply and demand. Even HVS conceded that, when you try to sell more of a given product, the price will not increase. At best—and only if demand is already much higher than the supply—the price will remain the same.

In defense of HVS's irrational projections, Respondents first assert that room nights occupied by timeshare owners were more concentrated in the peak summer season than the 13,678 *sponsor-owned* room nights rented at Gurney's. (Resps.' Answering Br. 4, 8-9, 14). But as discussed above, that is not the correct comparison. One must compare the 5,273 timeshare-owned and occupied room nights to the economically identical 7,085 timeshare-owned room nights *that were actually rented to the public that year*, which were *likewise concentrated in the peak summer months*. (R. 2312-15). As discussed above, HVS admitted at the hearing that those two groups of rooms were economically indistinguishable. (R. 1104-08).[5]

Respondents also rely on HVS's opinion (as summarized by the trial court) 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." (R. 1107-08). Mr. Baum offered no evidence for that opinion other than his own *ipse dixit*. Even crediting it (as the trial court did), it provides no rational explanation for HVS's $994.52 ADR. While it is possible (although not supported by record evidence) that timeshare owners would not have

[5] Respondents also mischaracterize Gurney's supply-and-demand argument as "that ADR should *decline* after release of timeshare units into the free rental market." (Resps.' Reply Br. at 12). To reiterate, *both* appraisers testified that the ADR for Gurney's as a whole would increase in 2018 as a result of 5,273 new room nights (concentrated in the summer season) being rented to the public. The supply-and-demand problem arises from misalignment between HVS's opinion of what the 5,273 timeshare-owned and occupied room nights would have rented for, and the ADR of the 7,085 room nights timeshare owners actually rented out during the same periods of 2017.

had to *reduce* the $728.25 average price they charged for their room nights in order to rent an additional 5,273 room nights in 2017, no economic theory supports the prediction that adding thousands of room nights to the market would have caused the public to pay an average of *$266 more per night for those rooms*. To the extent the trial court credited that unsupported and irrational opinion, it clearly exceeded the scope of its permissible discretion.

3. The Trial Court Appears to Have Misunderstood HVS's Methodology.

Respondents point to portions of the hearing transcript as evidence that the trial court understood and agreed with HVS's normalization process. However, the court's record statements demonstrate the exact opposite. The court plainly thought that HVS had projected the economic performance of *sponsor-owned* room nights onto the timeshare-owned and occupied room nights, when, as discussed above, that is not what HVS did.

> THE COURT: Look, I may be missing something, but I understood this witness [HVS] 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.

(Resps.' Reply Br. at 15 [quoting R. 1123] [emphases added by Gurney's]).

To the extent the trial court believed that HVS applied the ADR reported for *sponsor-owned* room nights (i.e., the 13,678 room nights rented to the public by Gurney's or its majority owner) to the 5,273 room nights occupied by timeshare owners, it was indeed "missing something." HVS own report conclusively establishes that that is *not* what HVS did (not even close). According to HVS's report, the 2017 ADR for *sponsor-owned* room nights was $554.50. (R. 2489 [referring to this figure as "Paid Occupancy ADR"], 2482 ["Net Paid ADR"]). The fictional ADR of $994.52 that HVS ultimately attributed to the 5,273 timeshare-owned and occupied room nights was *almost 80% higher* than its calculation of ADR for non-timeshare room nights.

4. 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.

Finally, Respondents do not meaningfully respond to Gurney's argument that 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. (Gurney's Opening Br. 37-38). As previously discussed, Gurney's actual performance data through August 2018 (including the high-value summer months most significant to HVS's normalization) showed that HVS's projection of 2018 ADR was 9% higher than what actually occurred. (*Id.*; R. 2316 [Gurney's performance data for 12-month period ending

August 2018], 2493). HVS received this data shortly before it issued its report in October 2018. Indeed, Respondents demanded it at a discovery conference presumably so it could be incorporated into HVS's analysis. (R. 783). Yet HVS incomprehensibly failed to adjust its projections. For the reasons stated in Gurney's Opening Brief (at 38), this was a violation of the Uniform Standards of Professional Appraisal Practice ("USPAP").

Respondents dispute that HVS "ignored" Gurney's 2018 performance data, but the only testimony they cite is Mr. Baum's conclusory assertion that he "'checked [him]self'" upon receiving the data. (Resps.' Reply Br. 16-17 [quoting R. 1128]). In fact, Mr. Baum testified that although he "considered" the 2018 data, he did not alter his projections because "I thought I did an appraisal as of the date of value" (i.e., as of the date of the Merger), and a buyer wouldn't have had the 2018 data at that time. (R. 1128). But in demanding the post-Merger data in the first place, Respondents conceded its relevance. Moreover, Mr. Baum's testimony effectively concedes that he did not follow USPAP's advice to appraisers to reconsider their analyses and assumptions where, as here, actual data does not comport with projections in a retrospective appraisal. USPAP Advisory Opinion 34. Finally, whether or not a buyer would have had the 2018 data at the time of the Merger, that data certainly refutes the trial court's suggestion that HVS's opinions

were "more realistic" than CBRE's with respect to the base year of their income capitalization models. (R. 17).

POINT II

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

In Point I of its Opening Brief, Gurney's demonstrated that the trial court's conclusion that CBRE "did not appropriately value the potential average daily room rate for units that were subject to time shares in 2017" (R. 17) is unsupported by the record. To the contrary, the record reflects that CBRE (a) expressly considered how the termination of timeshare ownership would affect Gurney's future ADR and rooms revenue, and (b) predicted that both annual ADR and rooms revenue would *increase* in 2018, as Gurney's would thereafter be able to rent the 5,273 room nights previously occupied by timeshare owners to the public at market rates. (*See* Gurney's Opening Br. 25-29). Moreover, CBRE's projection of the *extent* to which ADR would increase in 2018 was within 1.9% of the ADR the resort *actually experienced* in the 12-month period ending in August 2018. That period included the high-value, high-occupancy summer months, in which rooms nights formerly occupied by timeshare owners were heavily concentrated. (*Supra* 6-7). In contrast, as discussed above, HVS's appraisal overestimated 2018 ADR by approximately 9%. (R. 2316, 2493).

Respondents dispute that CBRE valued the resort's "full 109 rooms as free and clear revenue generators." (Resps.' Reply Br. 5). But they offer no support for that dispute. As detailed in Gurney's Opening Brief (at 26-27), CBRE's report unequivocally states that "[Gurney's] 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*." (R. 1257 [emphasis added]). For this reason, CBRE "forecast the property to achieve a better than inflation expectation in revenue" and "5.0% ADR growth in the first two years of the forecast." (R. 1257 [emphasis added], 958-59). CBRE also predicted in its report that "changing over to free market guest stays" from timeshare ownership would result in an "enhanced room rate" moving forward (R. 1283), and 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." (R. 1281).[6] Most importantly, CBRE's income capitalization analysis is clearly based on a 10-year discounted cash flow model of rooms revenue from Gurney's full "109" rooms. (R. 1306-07). Thus, the report expressly accounts for the increased revenue Gurney's would enjoy from receiving 100% of the market rental fees (and the additional resort fees) paid for the room nights that had previously been occupied by timeshare owners.

[6] CBRE's report also specifically and expressly accounts for the loss of maintenance charges paid by timeshare owners. (*Id.*).

In a misplaced attempt to counter the clarity of the foregoing testimony from CBRE, Respondents mischaracterize, misquote, or in fact create from whole cloth, HVS testimony.[7] HVS testified at the hearing that CBRE did not engage in a comparable process to re-calculate Gurney's actual 2017 performance data and predict the income that hypothetically could have been earned by timeshare-owned and occupied room nights that year (which certainly is true—CBRE did not engage in a wholly unnecessary "normalization" of actual 2017 performance data).[8] Respondents, however, mischaracterize that testimony to make it appear that HVS testified that CBRE did not account for the expansion of the revenue pool *beginning in 2018* (the base year of both experts' income capitalization models) *at all*.

The fact that CBRE found it unnecessary to restate Gurney's *prior* performance in order to predict the *future* revenues that would be earned from abandoning timeshare ownership does not mean that CBRE did not in fact predict such an increase. To the contrary, the record evidence demonstrates that CBRE did so far more accurately than did HVS with its normalization process. To the extent

[7] For example, Respondents purport to quote HVS as having testified that "CBRE did not do that" to support their argument that CBRE's report "does not include the full 109 rooms as free and clear revenue generators." (Resps.' Reply Br. 5 [emphasis in original], and 8 [same]). The quotation does not appear within the record pages cited by Respondents, and we cannot locate that phrase anywhere in the hearing transcript. Respondents also assert, *without citation*, that their 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." (Resps.' Reply Br. 14-15). As the lack of any citation suggests, HVS offered no such testimony.

[8] In this regard, HVS testified that the CBRE report does not contain a specific analysis of "timeshare displaced rooms revenue *in 2017*." (R. 1069 [emphasis added]).

the trial court relied on a demonstrably false characterization of CBRE's methodology, rather than on the methodology actually described in CBRE's report, the court's error cannot be seen as a mere "credibility" determination. (*Supra* 3-4).

Respondents also avoid addressing CBRE's hearing testimony. In Gurney's Opening Brief, it quoted in full the following extended colloquy between the trial court and CBRE:

> 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. 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*.

Respondents omit from their opposition everything after CBRE's answer "No," opting to distort the record rather than address testimony that flatly refutes their argument. Respondents also fail to address CBRE's testimony that its ADR predictions for 2018 were based on the "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." (R. 1000).

Finally, Respondents do not seriously dispute that CBRE's projection of the ADR Gurney's would earn in 2018 was within 1.9% of Gurney's *actual* reported ADR for the 12-month period ending in August 2018 (including the high-value summer months, in which room nights formerly occupied by timeshare owners were concentrated). (Gurney's Opening Br. 28-29). Given the commendable accuracy of CBRE's projection, Respondents cannot defend the trial court's conclusion that CBRE failed to "appropriately value the potential average daily room rate for units that were subject to time shares in 2017."[9] (R. 17).

[9] In an attempt to discount the accuracy of CBRE's projection, Respondents state that the "purported match between Gurney's appraiser[']s ADR projections for 2018 and actual ADR 2018 was due to the fact that Gurney's appraiser[] 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." (Resps.' Reply Br. 11). This argument is incomprehensible and pure obfuscation. Neither the discount rate applied to projected income nor the "Panoramic metrics" (i.e., the performance of a neighboring property) had any role in either HVS's or CBRE's projection of ADR for either Gurney's as a whole or the formerly timeshare-owned room nights. (R. 2316 [figures expressly calculated from Gurney's "109" rooms]). Respondents' broader arguments about "discount rates" and Panoramic are discussed in Point III, *infra*, and are meritless.

POINT III

RESPONDENTS' KITCHEN-SINK ARGUMENTS ATTACKING THE CBRE APPRAISAL ON GROUNDS OTHER THAN THOSE IDENTIFIED BY THE TRIAL COURT ARE WITHOUT MERIT

Unable to defend HVS's appraisal or dispute that CBRE did, in fact, accurately value the potential future income to be earned after ending timeshare ownership, Respondents resort to attacking the CBRE appraisal on grounds not referenced by the trial court as bases for its Decision. Each of these attacks is wholly lacking in merit.

1. CBRE's Appraisal is Not "Suspect" Because Of An Alleged Conflict Of Interest and Holding Otherwise Would Require an Impermissible Appellate Credibility Determination.

If ever there was an example of an "appellate strategy … to put words in the Court's mouth, then to characterize the 'made-up words as the Court's 'conclusion'" (Resps.' Reply Br. 3), it is Respondents' claim that the trial court found the CBRE appraisal "suspect" because it was "commissioned by Gurney's majority controlling shareholder." (*Id.* at 2-3).

The Decision contains no suggestion that the trial court discounted CBRE's opinion based on a perceived bias in favor of the majority owner. The Decision states that the court "found the testimony of the Gurney's appraisal 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 [emphasis added]).

It thus appears that the trial court in no way credited Respondents' efforts to discredit CBRE on the basis of an alleged conflict of interest. Whether testimony should be believed or discounted because of a conflict of interest or alleged bias is a credibility determination that is soundly within the trial court's discretion. *See Cohen v. Mills*, 271 A.D.2d 826, 828 (3d Dep't 2000). It is inappropriate for Respondents to ask this Court to make a different credibility determination.

2. CBRE Did Not "Dilute" Its ADR Calculation By Including Data From The Neighboring Panoramic Property.

Respondents next argue that CBRE "diluted [its] ADR calculation by including the financial metrics from a neighboring property, The Panoramic, which is owned by the Majority Owner separately from Gurney's." (Resps.' Reply Br. 4). According to Respondents, Panoramic is "an inferior property with markedly lower room rates and occupancy levels," and inclusion of its data in CBRE's appraisal "was improper and suppressed the value estimates calculated by CBRE." (*Id.*).

The record utterly refutes this argument. First, Respondents' own appraiser testified unequivocally on direct examination that *both HVS and CBRE* excluded Panoramic data from their respective income capitalization analyses:

> Q: … Do you know if in the CBRE report they excluded the Panoramic View?
>
> A: Yes, they did.
>
> Q: Was the way they excluded it the same or different [than] the way you excluded it?

A: The same.

(R. 1050-51).

Second, the assertion that including Panoramic ADR data would have *diluted* (i.e., reduced) Gurney's ADR is unsupportable given that both HVS's and CBRE's appraisal reports show that Panoramic reported a higher ADR than Gurney's in 2017. (*See* R. 1255, 1268 [CBRE report listing $577.04 ADR for Gurney's compared to $655-665 ADR for Panoramic], 2482 [HVS report listing $660.87 ADR for Panoramic (i.e., the "Gurney's Residences")], 2485 [HVS report "normalizing" ADR for Gurney's 109 rooms as $591.55]).[10]

3. In Conducting Its Income Capitalization Analysis, CBRE Selected A Terminal Capitalization Rate That Was Fully Consistent With Industry Practice And Materially Similar To The Rate Selected By HVS.

Respondents also argue that CBRE's appraisal understates Gurney's going-concern value because CBRE applied a "discount rate" that was "almost 100 basis points higher than the 'typical' rate," resulting in a lower valuation. (Resps.' Reply Br. 4). This argument mischaracterizes the record in several respects. Although Respondents' refer to a "discount rate," they in fact appear to be referring to CBRE's *terminal capitalization rate*, which was set at 6.5%. (R. 1188). This rate was *not*

[10] The $554.50 figure that appears on pages 98 and 105 of HVS's report (R. 2482, 2489) is not HVS's calculation of 2017 ADR for Gurney's 109 rooms. It is HVS's calculation of "Net Paid ADR" or "Paid Occupancy ADR." In other words, it supposedly represents the ADR *only for room nights rented to the public.* (*See* R. 2489).

100 points higher than the rate CBRE testified was "typical." Rather, it was 100 basis points higher than CBRE's *going-in capitalization rate* of 5.5%. (*See id.*; R. 992).

CBRE explained in both its report and testimony that, in the past, terminal capitalization rates were typically set only 25 to 50 basis points higher than going-in capitalization rates. (R. 1304, 994). Today, however, the "typical[] … spread is anywhere from 50 to 100 [basis points]." (R. 993, 1304). This broader spread between going-in and terminal capitalization rates is designed to account for today's "very low interest rate environment," which is historically abnormal and likely to change in the future. (R. 993-94). As HVS explained,

> [t]oday we are at a historic low interest rate structure for borrowing funds. Is that going to be the case ten years from now? Likely not. It's likely going to be higher. There's risk associated with that function..

(961-64). In combination with the "risk associated with just the wear and tear of a property such as this, on a beach," CBRE felt that the likely future rise in interest rates warranted setting the terminal capitalization rate 100 basis points above the going-in capitalization rate. (R. 961-63, 993-94).

Furthermore, both CBRE and HVS utilized fairly low terminal capitalization rates (6.5% and 6%, respectively) compared to the industry average. (R. 993-94, 962, 964 [CBRE testimony that a 6.5% terminal capitalization rate "is at the low end

of the industry"], 1304 [CBRE report listing industry averages from 7% to 9.5%], 2517 [HVS report listing industry averages between 7.2% and 8.3%]).[11]

HVS testified at the hearing that the difference between CBRE's 6.5% capitalization rate and its own 6% rate did not have a material effect on their respective valuations. (R. 1061 [HVS: "our two inputs are essentially a wash"]; *see* R. 992). The Court should therefore reject Respondents' contention on appeal that CBRE's valuation was inaccurate because it employed a 0.5% higher rate. (Resps.' Reply Br. 4). As HVS acknowledged, the critical, value-driving difference between HVS's and CBRE's appraisals were their respective projections of future ADR—not the minimal difference in their terminal capitalization rates. (R. 1063).

4. CBRE Fully And Appropriately Accounted For All Of Gurney's "Unique Attributes."

Finally, Respondents contend that CBRE "did not allow its estimate [of Gurney's going-concern value] to reflect Gurney's unique attributes," such as its location and quality. (Resps.' Reply Br. 6-7). Incomprehensibly, Respondents support this theory by citing portions of CBRE's report expressly considering a number of the property's special attributes, as well as portions of the hearing transcript in which CBRE testified that such attributes did, in fact, factor into its

[11] Consequently, the statement in the trial court's Decision that a terminal capitalization rate of 6% "is a percentage that Gurney's own appraisal report essentially conceded to be appropriate" is also inconsistent with the record.

valuation analysis. (*See, e.g.*, R. 1303 [Gurney's status as "Class A" property factored into analysis of appropriate discount and capitalization rates], R. 931-32 [testifying that uniqueness of Gurney's property weighed against using a "cost approach" to valuation], 940 [discussing other strengths of the property]). It is frankly impossible to look at CBRE's report and not recognize that it is replete with analysis of the unique features of Gurney's property.

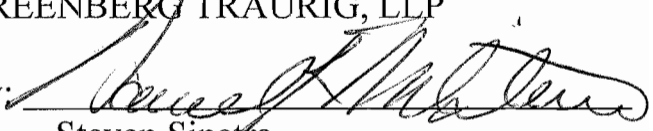
Moreover, the unique strengths of Gurney's logically are reflected in the ADR and rooms revenue it historically has achieved. Both CBRE and HVS adopted the income capitalization approach to valuation. They thus both agree that Gurney's value is most accurately estimated by analyzing its historic performance and projected future income rather than trying to place subjective values on purportedly unique attributes of the property. Those attributes are in fact reflected in the financial performance of the property, and were thus appropriately accounted for in the income capitalization methodology employed by both appraisers.

CONCLUSION

For all of the foregoing reasons, Gurney's respectfully requests that this Court (a) reverse the Decision below, (b) vacate the resulting judgments entered May 13 and June 13, 2019, and (c) direct 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.

Dated: New York, New York
May 18, 2020

GREENBERG TRAURIG, LLP

By: 

Steven Sinatra
Daniel R. Milstein
Keith Hammeran

200 Park Avenue
New York, NY 10166
Tel: (212) 801-9200
Email: sinatras@gtlaw.com
milsteind@gtlaw.com
hammerank@gtlaw.com

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