

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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In the Matter of the Application of

INDEX NO. 154466/2018

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

MOTION DATE N/A

Petitioner,

MOTION SEQ. NO. 001

- v -

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 CARBOONE IRREVOCABLE TRUST, MARCIA RUSKIN, JAY SCANSAROLI, JANICE SCANSAROLI, JOSEPH SCOGNAMIGLIO, ALAN SPARKS, SYSTEMATIC CONTROL CORP., and VITO VITRANO

DECISION AND ORDER

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.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 44, 45, 65

were read on this motion to/for MISC. SPECIAL PROCEEDINGS

HON. BARRY R. OSTRAGER:

On December 3 and 5, 2018, the Court held an appraisal hearing pursuant to Section 623 of the Business Corporation Law to determine the fair value of the common shares held by the various respondents in petitioner Gurney's Inn Resort & Spa, Ltd. ("Gurney's"). The sole testimony adduced at the hearing was the testimony of appraisers for each party to this dispute.

It is undisputed that Gurney's is an iconic property which each appraiser recognized to be either a "trophy property" or, at a minimum, the most desirable luxury hotel property on the east end of Long Island. The value of the property arises from the fact that it was built before zoning

regulations made it impossible to replicate this luxury resort on the ocean in anything like its present configuration. And, because Gurney's was separately able to acquire an adjacent group of units from the Panoramic Hotel, which units are far less commodious but nevertheless command impressive average daily room rates, the Court views the testimony of the appraiser for the dissenting respondent shareholders to be more realistic than the testimony of Gurney's appraiser. The Court also 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.

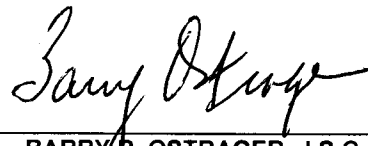
Both appraisers issued their valuation opinions primarily utilizing a discounted cash flow analysis. The Court accepts that a discounted cash flow analysis is the appropriate manner of determining fair value utilizing an internal rate of return of 8 percent and a terminal cap rate of 6 percent. The terminal cap rate of 6 percent is a percentage that Gurney's own appraisal report essentially conceded to be appropriate.

The transaction at issue arises out of a buy-out by the majority owner of minority shareholders, some, most, or all of whom were former time share owners who relinquished their time share rights in exchange for certain cash consideration but rejected an offer for their shares of \$118.81 per share in favor of this Section 623 appraisal proceeding. As such, the dissenting shareholders are limited to the "fair value" standard of Section 623.

After considering all the testimony and voluminous documents admitted into evidence, as well as extensive briefing of the parties, the Court concludes that the consideration offered by Gurney's to the dissenting shareholders (\$84 million or \$118.81 per share) does not reflect the fair value of the shares at issue. Rather, the Court holds that using the discounted cash flow model, the value of Gurney's land and operations would be \$115 million (which the Court

calculates to be \$142.05 per share). The Court declines to assign any value to the speculative, post hoc claim for the value of Gurney’s trademark rights. Finally, under settled principles, the dissenting shareholders are entitled to interest from March 28, 2018 pursuant to BCL §623(h)(6) at the rate of 6 percent per annum, which approximates the rate which Gurney’s must pay for capital. The Court awards no other sums to the dissenting shareholders. The Court will separately determine the amount of any attorneys’ fees due counsel for the dissenting shareholders. Counsel may submit an affirmation and invoices by January 15, 2019, and Gurney’s may comment by January 31, 2019.

12/20/2018
DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED GRANTED IN PART SUBMIT ORDER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN