SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: JEREMY R. FEINBERG, PART 84R
SPECIAL REFEREE

138-140 WEST 32ND STREET ASSOCIATES,

LLC, Index No.: 152064/2013

Plaintiff,

-v-

138-140 WEST 32ND STREET ASSOCIATES, A

NEW YORK GENERAL PARTNERSHIP,

JOSEPH SIMHON, and DAVID SIMHON,

Defendants.

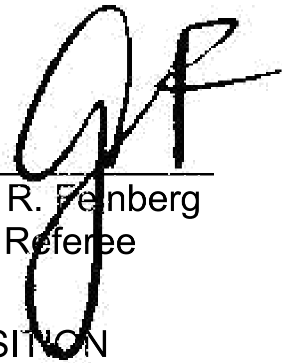
The following papers, numbered 1 to _____ were read on this motion to/for _______________

	Papers Numbered
Notice of Motion/Order to Show Cause –Affidavits-Exhibits.....	________________
Answering Affidavits - Exhibits	________________
Replying Affidavits	________________

Cross-Motion: [ ] Yes [ ] No

This reference from the Hon. Gerald Lebovits, dated November 3, 2021, referring the matter to the Special Referee Part for a referee to Hear and Report on damages due to Plaintiff, having been converted to a Hear and Determine by stipulation dated February 23, 2024 (NYSCEF Dkt. No. 216), is resolved in accordance with the accompanying Decision and Order.

Dated: November 8, 2024



Jeremy R. Feinberg
Special Referee

Check one: [x] FINAL DISPOSITION [] NON-FINAL DISPOSITION

[] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 84R

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138-140 WEST 32ND STREET ASSOCIATES, LLC,
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Plaintiff,

- v -

138-140 WEST 32ND STREET ASSOCIATES, A NEW YORK GENERAL PARTNERSHIP, JOSEPH SIMHON, and DAVID SIMHON,

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INDEX NO. 152064/2013

REFEREE DECISION AND ORDER

JEREMY R. FEINBERG, SPECIAL REFEREE:

By order dated November 3, 2021, the Honorable Gerald Lebovits referred this matter to the Special Referee Part, seeking a referee to hear and report on damages due to Plaintiff (the "November 2021 Order"). The matter was first assigned to Special Referee John Owens, and then re-assigned to me on June 8, 2023, because of Referee Owens' impending departure from the Court. I contacted counsel and set a virtual conference date of June 15, 2023.

At the conference and thereafter, Plaintiff was represented by Kevin J. Nash, Esq. and J. Ted Donovan, Esq., of Goldberg Weprin Finkel Goldstein, LLP. Defendants were represented by Evan Weintraub, Esq. of Wachtel Missry LLP. At the conference I set down initial hearing dates of July 18 and July 20, 2023.[1] The matter later continued on July 25, September 11, September 18, and September 20. On the first day of the hearing, I noted on the record that there had been some proceedings before Referee Owens, but that, given his departure, there was also

[1] References to the hearing transcript will be in the form of "July 18 Tr. __." The September 11 transcript was divided into two sessions and will be referred to as "Sept. 11 am" and "Sept. 11 pm" respectively.

administrative direction that the hearing should start over before me (Jul. 18 Tr. 4-5). The hearing progressed on that basis without objection from either side.

At the conclusion of the hearing, I set December 1, 2023 as the date for the parties' post-hearing submissions. This was extended on consent to December 15, 2023, a deadline the parties met. After reviewing the parties' submissions, however, I concluded that there were issues that seemed as if they would benefit from further briefing. In a virtual conference on January 9, 2024, I advised the parties of this concern and gave them the opportunity to confer about whether they would each like to supplement their papers. I also asked them to consider whether they would like to convert the reference from a "Hear and Report" to a "Hear and Determine."

Counsel ultimately agreed to do both things; submitting a stipulation to convert the reference to Hear and Determine on February 23, 2024 (NYSCEF Dkt. No. 216) and separately agreeing to submit their supplemental papers on March 29, 2024. Receipt of the parties' additional papers on that latter date fully submitted the matter before me. In addition to the testimony and exhibits, where appropriate, I have taken judicial notice of the uncontroverted matters that are contained in the county clerk file and the court's computerized records (*Leary v. Bendow*, 161 AD3d 420, 421 [1st Dept 2018]).

BACKGROUND

This action was commenced by Summons and Complaint dated March 6, 2013, alleging multiple causes of action for failure to consummate the sale of property at 138-142 West 32nd Street (the "Subject Property"). Defendants moved to dismiss the action less than a month later (NYSCEF Dkt. No. 6). Following full briefing, Justice Paul Wooten, then assigned the case, issued an order dated April 11, 2014, that granted the motion in part, dismissing Plaintiff's

claims for specific performance and for declaratory judgment, and cancelling a Notice of Pendency that was in effect at the time (the "April 2014 Order," NYSCEF Dkt. No. 31).

Before the case could proceed further, Plaintiff sought reargument of the portion of the April 2014 Order that had cancelled the Notice of Pendency first by Order to Show Cause ("OSC") and then again by notice of motion. In response to the latter, Defendants cross-moved for reargument as to the portions of that Order which had denied the motion to dismiss certain remaining causes of action (NYSCEF Dkt. Nos. 33, 38, 42, 51). Plaintiff appealed the April 2014 Order (NYSCEF Dkt. No. 41).

By Order dated May 30, 2014, Justice Wooten denied Plaintiff's motion to reargue, and again reiterated that holding in a subsequent Order dated October 20, 2014. That latter Order also dismissed Plaintiff's third cause of action for an injunction as moot, but otherwise denied the cross-motions to reargue (NYSCEF Dkt. No. 66). Defendants then answered the Complaint (NYSCEF Dkt. No. 67) and discovery proceeded, but on May 19, 2015, the Appellate Division, First Department, reversed the April 2014 Order, and denied Defendants' motion to dismiss the Complaint.

On remittitur, Defendants amended their Answer (NYSCEF Dkt. No. 73), and Plaintiff moved to amend the Complaint (NYSCEF Dkt. No. 74). Following briefing on the motion, Justice Lebovits, now assigned to the matter, granted the motion to amend on March 30, 2016 (NYSCEF Dkt. No. 88). After Defendants answered (NYSCEF Dkt. No. 91), discovery resumed and continued for some time until the COVID-19 Pandemic (the "Pandemic") significantly altered Court operations in March 2020.

As Court operations resumed, the parties completed discovery, and, on July 30, 2021, Defendants moved for summary judgment dismissing the case (NYSCEF Dkt. No. 136).

Plaintiff cross-moved for summary judgment on its claim for breach of contract (NYSCEF Dkt. No. 154). By Order dated October 27, 2021, later amended by the November 2021 Order establishing this reference, the Court granted summary judgment on liability to Plaintiff (NYSCEF Dkt. No. 183, 186). This reference then followed.[2]

THE HEARING

Following opening statements (July 18 Tr. 5-11 [Plaintiff], 11- 15 [Defendants]), Each side presented both lay and expert testimony on its case and cross-examined the other's witnesses. In setting forth the hearing testimony below, I have grouped each type of witness together even though they appeared in a different order.

1. Lay Witnesses

    a. David Moinian (July 20 Tr. 130-148; July 25 Tr. 4-83)

Mr. Moinian testified that he is President and Owner of Plaintiff, as well as the sole member. Plaintiff was organized in January 2013 for the purpose of purchasing the Subject Property, which he learned of through brokers named John Goldin and Dan Altrich. They represented, and introduced Mr. Moinian to, the sellers, Joseph Simhon ("Joseph") and David Simhon ("David").

Mr. Moinian testified that he made an offer of $6.5 million for the Subject Property to the two brokers. He identified an October 2012 email he received from Joseph and another broker representing the Simhons named Daren Hebold indicating that Mr. Moinian had made his final offer of $6.5 million and set up a meeting on October 16, 2012, to show the Subject Property and

[2] There was a subsequent motion for reargument by Defendants (NYSCEF Dkt. No. 194) which was denied on February 28, 2022 (NYSCEF Dkt. No. 208). Defendants also appealed the November 2021 Order, and the Appellate Division, First Department affirmed on April 14, 2022 (NYSCEF Dkt. No. 209; *138-140 W. 32nd St. Assoc. LLC v. 138-140 W. 32nd St. Assoc.,* 204 AD3d 489 [1st Dept 2022]).

discuss its financials (Pl. Ex. 12, the "October 12 Email"). Mr. Moinian explained he later met with Joseph at the Subject Property and received information verbally about its financials.

While at the Subject Property, Mr. Moinian said he visited each of the tenants, including three which will be referred to herein as the "Nail Salon," "Eyebrow Express," and the "Deli." He specifically noted hearing from the Deli owner that he was "ready to hand in the keys." Mr. Moinian testified that he verified the financial information he was given, and that he and Joseph came to an agreement for purchase at an all-cash price Mr. Monian had offered ($6,250,000).

Mr. Moinian testified that the parties continued their discussions after the October 2012 Email, and eventually signed a letter of intent in October or November 2012 with an expiry date of November 14, 2012 (Def. Ex. A, the "Letter of Intent"). The Letter of Intent was addressed to both Simhons, who Mr. Moinian identified as the sellers in the transaction, and it proposed a purchase price of $6.5 million. Among other terms, the Letter of Intent stated that Mr. Moinian's counsel would draft and transmit a formal agreement and that closing would take place thirty days following due diligence. The Letter of Intent, he explained, also specifically identified Messrs. Goldin and Hebold of Lux Realty as seller's brokers. The Simhons did not sign the Letter of Intent.

Mr. Moinian said that Joseph requested that the payment change from all cash to $3.6 million in cash, together with a $2,650,000 loan, which would not be paid back. Mr. Moinian testified that Joseph told him this was to minimize his tax obligations and Mr. Moinian indicated that he did not ask any further questions of Joseph about this as it was not his business.[3] Mr.

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[3] While I was ruling on a hearsay objection during Mr. Moinian's testimony, Mr. Weintraub noted that Mr. Moinian was consulting notes that were in front of him on the table. His counsel promptly removed the notes, and, in the moment, I emphasized the importance of credibility of witnesses and the (negative) effect that reviewing notes during testimony could have (July 20 Tr. 140-141). Later on re-cross, he explained that the notes contained the precise dollar amount to be paid to Joseph which Mr. Moinian said he could not otherwise remember. The episode

Moinian identified the Purchase and Sale Agreement ("PSA," Pl. Ex. 3) for the Subject Property, which was signed approximately two months after the Letter of Intent and was drafted by his own counsel, Larry Drath, Esq., although he did not recall when Mr. Drath did so. Mr. Moinian noted both his and Joseph's signatures on the PSA and that it contained the financial terms about which he had testified, including a decrease in the purchase price contained in the PSA to $3.6 million (Pl. Ex. 3 § 4.1). He said that the deposit of $400,000 required by the PSA was not given at the time of the signing. He viewed the $2,650,000 loan to be a part of the purchase price even though the PSA did not refer to that consideration. He conceded that despite having engaged in many other real estate transactions, he did not think he had ever seen a deal where the full consideration was not reflected in the underlying agreement between the parties.

Mr. Moinian described the terms of the loan requiring him to provide it within a couple of weeks after he purchased the Subject Property, making clear that he viewed the loan as contingent upon the purchase. He clarified that signing the PSA on January 9, 2013 was not purchasing the Subject Property, and that there was a closing scheduled for March 22, 2013 pursuant to its terms, and if there were no closing, there would be no sale and therefore no loan (Pl. Ex. 3 § 6.1).

He identified a letter attaching a promissory note, dated January 9, 2013 addressing the $2,650,000 loan, and pursuant to which he understood that he personally would loan the money to Mr. Simhon out of his existing funds (Pl. Ex. 7; *see also* Def. Ex. C [letter without attachment] and Def. Ex. D [attachment]).[4] Mr. Moinian testified that Joseph would only sign the PSA after

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of reviewing notes during testimony was not the only credibility concern Mr. Moinian presented – his counsel asked him extensive leading questions, only a small number of which were objected to, thus leaving the impression that counsel was testifying almost as much as the witness.

[4] Plaintiff combined the Letter of Intent with the draft Note described below in one exhibit (Pl. Ex. 7). Defendants broke these documents into two exhibits (Def. Ex. C, D).

Mr. Moinian signed the Letter of Intent; so the two documents were executed contemporaneously.

The letter spoke to the timing of loan, indicating that while the agreement to provide the loan was not contingent on obtaining refinancing for the Subject Property, the loan should be funded within 15 days of said refinancing, or December 31, 2013, whichever came first. Mr. Moinian acknowledged that he could not refinance the Subject Property without owning it, however.

Mr. Moinian also briefly discussed what he called a draft promissory note (Pl. Ex. 7 at 2; Def. Ex. D) that was attached to the Letter of Intent. He explained that this draft, which he said was prepared by Joseph, was only intended as the proposed form of a promissory note, not the actual note to be used in buying the Subject Property. He evidenced this by detailing how, unlike the Letter of Intent, the promissory note was unsigned and undated, and contained some errors, including listing the principal of the loan as only $3,750 in one place, and $3,750,000 in another, rather than the correct dollar figures for the loan. It also listed Mr. Moinian as the borrower, rather than Joseph, and referenced a property in Kingston, New York, rather than the Subject Property.

Mr. Moinian testified that there were further discussions between himself and Joseph – with the latter requesting that he stay in the deal until he was fully paid with the amount of the loan described above. Mr. Moinian said that he agreed to this additional term as well. Mr. Moinian explained that a separate Guaranty required payment of $14,395.58 for each month that Joseph remained an investor member (Def. Ex. E at 1, the “Guaranty”). He characterized these payments as “interest” against the loan due to Joseph, paid until the amount of the loan was covered, but Mr. Moinian acknowledged that the document itself did not mention interest,

termination of Joseph's rights as a member upon payoff, or the underlying loan. None of these payments ever happened, Mr. Moinian stated, because the deal did not close.[5]

Mr. Moinian identified Plaintiff's LLC operating agreement (Def. Ex. EE, the "Operating Agreement"). Mr. Moinian claimed that since the deal did not close, the Operating Agreement never became effective, but conceded that the Operating Agreement did not say that it was contingent on the closing of the purchase of the Subject Property. He contended that this was understood between the parties. He added that LLC's purpose was a set forth in Section 3.1 of the Operating Agreement; namely to own and run the Subject Property, and that if there was no purchase of the Subject Property, there was no business purpose (Def. Ex. EE at 8).

Mr. Moinian stated that he had instructed his attorney to create the LLC after Joseph had signed the contract, and Mr. Drath did so with an effective date of January 1, 2013 (Def. Ex. EE § 1.21). Mr. Moinian had utilized an LLC to acquire a property multiple times in the past, was familiar with LLC operating agreements, and was not aware of any action taken to amend the Operating Agreement or dissolve or terminate Plaintiff in this case.

Mr. Moinian added that as demonstrated by the definitions and signature blocks of the Operating Agreement, Joseph (with 48% ownership) and two others collectively would have been investor members in the LLC, each without any management rights, while he, Mr. Moinian, would have remained the managing member of the entity with 50% ownership (Def. Ex. EE at 4, 24-25). Mr. Moinian stated that Joseph told him that he believed he was a member of the entity all along, even without a closing. He also confirmed that neither he nor Mr. Drath had ever sent correspondence Mr. Simhon indicating that Joseph was no longer a member of the LLC. Joseph,

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[5] Mr. Moinian was shown, for impeachment purposes, transcripts from his two-day deposition taken in 2017. The testimony indicated Mr. Moinian's understanding of the more than $3 million to be paid by him to Jospeh under the Guaranty as part of the transaction (Def. Ex. X, Y [each ID only]).

however, had never taken any action as a member of the LLC after the deal failed to close, nor had he ever asserted a claim in this litigation that he was a member.

Mr. Moinian testified that the Operating Agreement required Joseph to make a $100 initial capital contribution, which he said was never paid. The Operating Agreement also contained a "put" option, that would require Joseph to sell back his shares to Mr. Moinian after a certain period of time with written notice and upon repayment of the $100 and providing him with the $2,650,000 loan he had testified to earlier (Def. Ex. EE at 19, 25). As of the time of his testimony, Mr. Moinian had not exercised that put option.

Mr. Moinian reiterated that the $2,650,000 loan, and the $3.6 million purchase price, were the complete consideration for the purchase of the Subject Property. He said there was no basis to make a loan, pay a fixed sum to Joseph per month, or execute a promissory note, if the transaction did not close.

b. Joseph Simhon (Sept. 20 Tr. 6-64)

Joseph testified that he and his brother David owned the Subject Property, having bought it in two parts in 1981 and 1984, and having sought to sell it since 2012. He retained John Golden of the Lux Realty Group as the broker for the transaction. He received an offer of around $6.5 million from Mr. Moinian for the Subject Property backed up by a letter of intent (Def. Ex. A). He acknowledged that he signed a contract with at $3.6 million purchase price (Pl. Ex. 3). He stated that there was also additional consideration, separate from the contract, in the form of a loan that Mr. Moinian offered to him. He has not sought to enforce the loan at any time since 2012, because the sale did not take place.

Joseph testified that he received at least one letter from Mr. Moinian regarding the loan setting its amount at $2.65 million (Def. Ex. C). He did not recall how that specific amount was

derived or the circumstances regarding the loan. He testified that it was obvious that the loan was contingent on Mr. Moinian acquiring the Subject Property and added that without a refinancing of the Subject Property, the contingency regarding the loan would not come into existence. But he otherwise did not recall the details of the expected repayment. Shown a copy of a purported note tied to the loan (Def. Ex. D), Joseph testified that he received it but had not requested it, did not understand how it was created, and it was vague and contained multiple errors. He did not know if it were ever finalized. He also agreed that a note for any loan could only become effective if the Subject Property had been sold to Mr. Moinian.

He also confirmed that he had discussions with Mr. Moinian about staying in the deal after the closing, for a time. He described the structure of the deal as beneficial for tax reasons but admitted that there had to be a closing of the deal for him to remain involved, and that never happened. Had he stayed in the deal as a member of the LLC, he stated that he was expecting payments of over $14,000 per month, but he did not know how to characterize those payments which he did not ask for. He did not ever receive any of these payments, nor did he demand them. He did not know if these amounts were to be paid for an indefinite time other than that he had to remain a member of the LLC. He added that the relevant provision of the PSA (Pl. Ex. 3 § 8.5) did not refer to that amount due to him as interest.

Joseph attempted to demonstrate what the cash flow generated by these more than $14,000 per month payments would be over time. He offered calculations generated by an Excel spreadsheet showing capitalization of the income stream at various capitalization rates between five and seven percent. Joseph testified that he generated that spreadsheet based on well settled valuation principles that he had learned of while studying math in college and in his work experience. Counsel also attempted to qualify Joseph as an expert to aid admission of the

document. I upheld Plaintiff's objections to this evidence on a provisional basis, allowing post-hearing submissions (Sept. 20 Tr. 53-54; Def. Ex. HH).

He explained that he did not draft the deal documents (including the PSA, the Note, the Guaranty, and the Operating Agreement) and stated that Mr. Moinian or his lawyers had done so. The deal documents were put in front of him as drafted, including the Guaranty and the Operating Agreement (Def. Ex. E, EE). Joseph stated that these too did not come into effect because the deal did not close and he did not remain in the deal. He contended, however, that even though the deal did not close, he was made a member of the LLC, which he asserted was an acquiring entity, and thus could continue to exist even without the acquisition happening.

He also acknowledged the existence of the put option in the PSA. Eventually he also admitted that his only capital contribution was $100, and that the put option was designed to allow him to remain in the LLC pending a refinancing, and then he could be bought out. He disagreed the buyout would be for the $100, which he noted he paid in cash while having a drink with Mr. Moinian. As of the date of his testimony, he had never received any notice from Mr. Moinian or his representatives that the put option was being exercised or that he was no longer a member of the LLC.

c. David Simhon (Sept. 20 Tr. 65-116)

David testified that he works part of the time out of a loft on the third floor of the Subject Property. Until 2012, he had previously worked out of a retail store on the same street for many years. He did not run an active business out of the third-floor space and asserted that he did not need a lease for the space because he was the landlord. He later partially contradicted himself by stating that he was a licensed real estate broker and ran his brokerage out of the third-floor space, but did not tell this to his expert, Mr. Haims, because he was not asked. He claimed to have told

Mr. Haims that there was no tenant for that location and admitted that there was nothing visible from street level reflecting that he had an office in that space.

David stated that the demolition of the Hotel Pennsylvania, across the street from the Subject Property, affected the foot traffic in the area, particularly once scaffolding was erected around that location between 2010-2015. He noted that many of the retail stores on the ground floor of the Hotel Pennsylvania saw reduced foot traffic and then closed in that time frame. Speaking to the foot traffic generally, David commented that there are ebbs and flows throughout the day, with more people travelling up and down the block in the morning and evening during commuting times, but less throughout the remainder of the day.

David also testified to construction work on the 32nd Street entrance to Penn Station in approximately the same 2010-2015 time period, which had the effect of closing retail establishments on either side of that entrance. It also substantially decreased the foot traffic coming in and out of Penn Station on 32nd Street in favor of the surrounding blocks. He testified that the loss of foot traffic impacted the Subject Property's tenants' sales and ability to meet their rental payments. Complaints he received from the tenants led him to offer concessions to their lease obligations, something he stated he understood because his own retail operations were affected for the same reason. In this regard, he noted that the tenants always paid their rent; it was other obligations under the leases that fell behind.

David further explained that around 2013, the tenant at the Subject Property known as "Café 32," which he later explained was the same tenant as the Deli, fell behind on its obligations to pay a portion of the real estate taxes and water bills. This was a deficiency that David stated had happened before and when it did the tenant made up for it over time. When the situation was normal, he as landlord would pay the real estate taxes and would be reimbursed for

portions of it by the tenants. But when the tenants did not pay their share, he absorbed those portions of the payments instead. He added that he had a good relationship with all his tenants and experienced some of the same "pain" that the tenants did. For this reason, he did not ever plan to default any of the tenants and was willing to accept delays. He later conceded that he was not seeking to redevelop the Subject Property and that allowed him more flexibility.

David identified several bank statements at the Chase Bank account used to collect rent and other obligations of the tenants from December 2012 (Def. Ex. II, JJ, KK). They reflected checks that the tenants either sent or handed to David, who managed the Subject Property. He testified that these checks showed that the tenants were paying down their arrears. He noted that he was responsible for preparing financial statements for the Subject Property every three months, and having done so for the 2013 time period, he stated that the tenants' arrears were not large.

On cross-examination, David admitted providing financial information about the Subject Property to Mr. Haims, his expert, including about the tenants, their leases, and arrears. He confirmed that he was the source for certain passages in Mr. Haims' report, including that the Deli was approximately $165,000 in arrears as of 2013. He attempted to harmonize his testimony that the Deli was not in arrears by asserting that the Deli was paying this amount down monthly as were the Eyebrow Express and another tenant. The arrearages were reduced but still existed. He acknowledged however, that there was no written agreement or amendment to the lease regarding the arrears and the checks reflected in the bank statements he reviewed were only partial payments towards the arrears. David asserted that he was less concerned about the payments towards real estate taxes and water bills than he was receiving the rent to ensure there was sufficient cash flow at the Subject Property.

David was also questioned about results of a lien search against the Deli (Pl. Ex. 6). He acknowledged that there were liens against the Deli starting in 2006 and admitted that he had never spoken with this tenant about those encumbrances.

2. Expert Witnesses

a. Marc J. Nakleh (July 18 Tr. 35-144; July 20 Tr. 1-129; Sept. 18 Tr. 27-150)

Mr. Nakleh testified to his background and experience.[6] He is an Executive Director in the Valuation Advisory Group of Cushman & Wakefield ("C&W"), serving in the day-to-day role of a commercial real estate appraiser. He has been with C&W for 17 years and currently leads a team of three. He has a degree in business from Binghamton University and a real estate degree from the University of Florida. He holds a general appraisers license in New York as well as a designation from the Appraisal Institute. His professional work includes both providing testimony as an expert witness and serving as a private arbitrator to set value, sometimes as a neutral and sometimes as a party arbitrator. He stated that 30-40 percent of his work involved land valuation, mostly in Manhattan. Five to ten percent of his business was as a neutral arbitrator.

Mr. Nakleh explained that he was retained in May 2022 to opine on the market value of the Subject Property. He characterized the Subject Property as a 2,940 square foot rectangular site (sixty feet of frontage and approximately 50 feet of depth) on the South side of West 32nd Street between Sixth and Seventh Avenues, in the Penn Plaza District of Midtown Manhattan. He indicated that the property was abutted by a church and a mixed-use building housing a cancer center and residential units.

[6] There was no objection to Mr. Nakleh's qualification as an expert (July 18 Tr. 21).

He noted that the site is zoned by New York City as commercial allowing both commercial and residential uses. The applicable zoning allows square footage of up to 12 times the lot area (known as the Floor Area Ratio [“FAR”]). Multiplying the FAR by the square footage for the Subject Property revealed that there was a maximum of 35,280 square feet to be developed. He explained that the existing development on the Subject Property’s site only utilized approximately 5,880 feet for various commercial uses, and, recognizing that New York is a “vertical city” in which much development comes from building upwards, he viewed the site as significantly under-built.

Valuation dates were also an issue in Mr. Nakleh’s expert analysis. He explained that he picked two alternate dates – January 9, 2013, which he described as the contract date, and January 29, 2015, which he understood was the date the Subject Property was sold to Vornado. As to the former date, his expert opinion was that the Subject Property should be valued at $11.7 million, a figure that was subject to an expert report he prepared (Pl. Ex. 4). The latter date was the subject of a subsequent valuation report discussed below (Pl. Ex. 5, 11).

Mr. Nakleh testified about his report based on the 2013 valuation date (the “2013 Valuation”), noting that it contained a photograph of the Subject Property he took in January 2023 (Pl. Ex. 4 at 2). His report opined that the highest and best use of the Subject Property, as vacant, would be a mix of commercial and residential use up to the maximum square footage allowed. Until the property was vacant, however, he opined that the highest and best use as currently improved would be the temporary leasing of the space as it then existed. He explained that to determine these highest and best uses, he considered (i) what is legally permissible; (ii) what is physically possible; (iii) what is financially feasible; and (iv) what is maximally productive. He noted that both he and Mr. Haims concluded that the Subject Property was

under-utilized and that a typical purchaser would attempt to take advantage of the maximum building area permitted once any existing leases had expired. He added that the applicable zoning regulations allowed a developer to use the Subject Property for commercial or residential uses.

Mr. Nakleh discussed alternative valuation approaches available to him. He explained he made use of a combination of the Sales Comparison approach, to quantify the bundle of land value rights at the Subject Property and the Income Capitalization approach, to assess the value of the existing leases involved at the Subject Property until they had all expired in 2022 and permitted development to move forward. A third method, the Cost Approach, was not useful here because of the under-utilization of the site at the Subject Property.

(1) Sales Comparison Approach

Mr. Nakleh described the process he used to research recent sales that were analogous to the Subject Property, which would allow him to pursue the sales comparison approach. This included consulting public records, examining C&W's internal database, attempting to interview parties to the underlying transactions and studying relevant zoning regulations. He sought sales that had occurred a reasonable time before the valuation date, with similar zoning, physical and locational characteristics.

He selected six properties that he believed met the criteria above and were ripe for development. He displayed them in his report both in tabular format and on a map (Pl. Ex. 4 at 40, 41). He noted that Mr. Haims had also identified three of his six properties as potential comparable sales in his own report. Mr. Nakleh said he did not expect to find perfect matches, as one might posit in an academic exercise, but he believed that six comparable properties was sufficient to provide a cross-section of available possibilities. The data presented in Mr.

Nakleh's report was obtained from public records and other available sources such as C&W's internal databases and a third-party provider called COSTAR.

He admitted focusing on how geographically close the comparables were to the Subject Property, rather than if they were also intended for the same highest and best use - five of the six properties were proposed for use as a hotel and the sixth was a proposed residential condominium. He also noted that the comparable properties all had sale dates (as set forth in public records) between June 2011 and May 2013, given his need for a 2013 valuation.

Mr. Nakleh explained that after reviewing the available data for each comparable, the goal was to generate a single baseline data point – the price per square foot of zoning floor area ("ZFA"), which he described as the maximum amount that can be built on a particular site. That figure is then adjusted based on differences between the comparable property and the Subject Property. He explained how he used the data in his chart (Pl. Ex. 4 at 40) to derive the ZFA per square foot. He listed the maximum FAR for each comparable as well as the Subject Property and multiplied the square footage by the FAR to get the ZFA.

The FAR, set by the Department of City Planning, ranged from a low of 10 for properties zoned for manufacturing (with less permissible uses) to a high of 15. He admitted that there was a scrivener's error in listing the FAR for the Subject Property at 10 in the chart (it should have been 12), which in turn led to a lower, erroneous, ZFA figure. He stated that he FAR figure for the Subject Property was correct everywhere else in the report. He clarified that he did not consider, in calculating the baseline ZFA figure, any bonuses that a property might receive under the zoning laws, and instead used that information, where applicable, in adjustments to the relevant comparable property made later in the process.

The ZFA per square foot could be found in the right-hand column of his table and is found for each property by dividing the sales price by the ZFA (Pl. Ex. 4 at 40). His analysis revealed ZFA per square foot figures between $284 and $353, with an average of $328. He also admitted that most of the comparable properties he found had substantially larger ZFAs and underlying site footprints than the Subject Property, which could potentially make development easier.

Mr. Nakleh explained that he next applied adjustments to each of the comparable properties based on their differences from the Subject Property in certain categories. These included market conditions (using historical data tied to the valuation date), zoning, location, and physical attributes, among others, and were described in detail, for each comparable property, within Mr. Nakleh's report (Pl. Ex. 4 at 42-44). He characterized each of these categories of adjustment as typical in the appraisal industry.

He elaborated that absent finding a perfect comparable property, there would usually be some adjustments applied to allow for a fair comparison. He added that appraisers apply a level of professional judgment based on the characteristics of the properties and provide reasons for their adjustments and have backup for them. He acknowledged that excluding one adjustment for 10.3 percent, all his remaining adjustments were for ten percent or less and that adjustments of fifteen percent or more were not typical.

Mr. Nakleh explained how he made market adjustments. After the Great Recession in 2008, the property market regained its footing by 2011, and then experienced rapid growth between 2011 and 2013, before even greater growth in 2015. He accounted for that by adjusting the properties whose sales occurred earlier (when the market was weaker) more than later ones. He did not adjust the first comparable, whose sale also occurred in 2013, even though it was four

months earlier than the valuation date of the Subject Property, acknowledging that he could have deducted 2.5 percent and remained true to the rest of his model (Pl. Ex. 4 at 45).

As to zoning, he adjusted upwards for more stringent zoning restrictions. Mr. Nakleh agreed that his last three comparables had inferior zoning in that they were designated for manufacturing which precluded residential uses. He noted, however, that each property was ultimately developed as a hotel, and received an upward adjustment of ten percent when compared to the Subject Property. Mr. Nakleh also described the location adjustments he made, downgrading the value of a comparable property found in what he deemed a better location such as near Bryant Park or Times Square, but making no adjustment for those properties he believed to be in an equivalent location (Pl. Ex. 4 at 45).

In making location adjustments, Mr. Nakleh testified that he believed the Subject Property was in a central location close to shopping and near the busiest transportation hub in North America. He later elaborated that the Subject Property drew some of its location value from being near Penn Station and the foot traffic it brought, but there were other factors as well. In response to a question from me, he explained that there are many drivers in a neighborhood that could affect a comparable property positively or negatively; he agreed that if public records revealed that a garbage dump would be built close to a comparable property, it would require a location adjustment.

Mr. Nakleh also made size adjustments for the comparable properties, explaining that larger properties tend to sell at a "bulk discount" for their ZFA (i.e., larger properties sell for less per unit than smaller ones). Therefore, Mr. Nakleh would upwardly adjust the value of those properties when compared to the Subject Property, between five and ten percent, depending on the difference in size.

His final adjustment was for "Utility" reflecting the physical attributes of the comparable that would affect the difficulty of development. These included the frontage, width and depth of the site. He explained that although the Subject Property could be developed, it was small (with half the normal depth of properties in New York) and therefore more challenging. Properties that had better utility, including most of the comparables selected here, were adjusted downward. Mr. Nakleh explained repeatedly that the utility adjustment was where he addressed the atypical 50-foot depth of the Subject Property, and that both he and Mr. Haims concluded that it could be redeveloped despite that factor.

Finally, Mr. Nakleh described how he accounted for the need to demolish existing improvements on four comparable properties to allow a new owner to develop as intended from a vacant state. He used a flat $25 per square foot cost to demolish any existing structure, and then divided the result by the comparable's ZFA to create an adjustment factor for demolition. He acknowledged, however, that Mr. Haims had used a slightly lower demolition cost of $20, which he also described as within the range that appraisers typically apply. He noted that demolition companies tend to charge the same regardless of where the property is located or what the underlying zoning is.

Mr. Nakleh then described how he took the figures from his original comparison chart (Pl. Ex. 4 at 40) and applied the applicable adjustments to each, tallying the total adjustment across all factors (some of which could be positive and others negative) before deriving a final adjusted ZFA per square foot for each. He noted that some standard adjustments, such as those for financing difficulties or sale conditions were not applicable to these comparables, so there were no adjustments listed for them on those grounds. His adjustments chart contained a subtotal for any economic adjustments reflected in the first four columns and then continued to

property characteristic adjustments. The property characteristics, such as location, size and utility, were then summed and applied to the subtotal figure from the economic adjustments, resulting an adjusted ZFA per square foot, which Mr. Nakleh testified were between $340 and $369, with an average of $355. He then applied the demolition costs applicable to four of the six comparable properties to reach a final range of $348 to $378 with an average of $362 (Pl. Ex. 4 at 45 [last column]).

Mr. Nakleh ultimately applied his findings as to the comparable range to the Subject Property, setting an adjusted range of $350 - $375 to its existing ZFA. Applying each of the high and low figures to the Subject Property's ZFA, he derived rounded values of $12,200,000 and $13,100,00. He selected $12,750,00 for a land value as of January 9, 2013, which would lead to a value of $361 per square foot of ZFA. This conclusion was based on his professional judgment – below the average of the range but close to the midpoint, and one he believed was reasonable. He noted that Mr. Haims concluded that the land value, using the sales comparison approach was slightly higher - $13 million dollars.

Mr. Nakleh explained that this did not end the inquiry. The Subject Property would not actually be ready for development as of January 9, 2013, because of the existing leases encumbering it. Assuming no buyout of the leases, he first used a five-percent growth rate per year for the 9.25-year duration of the Deli's lease to determine what the land value would be as of the middle of 2022, timing which he characterized as a worst-case scenario as to the length of the leases (Pl. Ex. 4 at 53).

He derived a five-percent growth rate using his professional judgment, based in part on the large increases he was seeing in the real estate market in dollar volume and the number of transactions. In doing so, he acknowledged that no one would have predicted a 25-percent year-

over-year growth rate going forward from 2013 (as the data showed the growth was from 2012-2014) and he did not think it would be double-digit growth through 2022 either. At the same time, the standard two- or 2.5-percent growth rate that an appraiser might otherwise use was far too low in his opinion given that the market was recovering from a recession and was in an above-average growth period. He viewed a five percent growth rate as what a buyer of the Subject Property would forecast for the time frame.

He elaborated on cross-examination that he had used certain frequently published and widely used metrics from C&W showing market growth from 2009 to 2015. He explained that he used data from after 2013 to confirm the trend he had observed up to that point, a use that was permissible for appraisers under Uniform Standards of Professional Appraisal Practice ("USPAP") guidelines. He conceded that the C&W development data was not broken down by type of property, only geographical location.

He did not factor any unusual size dimensions of the Subject Property into the growth rate, instead building that into his assessment of its value. He also rejected the notion that he could have considered, at the time he wrote his report, a quarterly report from C&W reflecting that the price per square foot for development had dropped considerably below the figure he had assigned to the Subject Property as of 2022, reiterating that a market participant in 2013 would not have had the benefit of that information (Def. Ex. CC at 7 [third bullet point]). Put differently on re-direct, Mr. Nakleh emphasized that it was an *ex ante* analysis, and that USPAP's guiding principles indicated that an appraiser could only use data after the date of valuation to confirm trends as he had done in considering market adjustments. Thus, he did not consider the actual sale value of the Subject Property in 2015, either.

Applying the five-percent growth rate over the relevant period, he derived a future value of the land (as of 2022) of $19,073,026. From this amount, he deducted what he described as a standard cost of sale of four percent (inclusive of transfer taxes and commissions), leaving $18,310,105 which he characterized as the future amount a property owner could expect to receive in March 2022. Mr. Nakleh noted, however, that this figure must be discounted to present value for 2013, and to do so, he selected an 8.5 discount rate. He explained that applying that rate would mean that every 2022 dollar is worth 0.4702 in 2013. He multiplied the $18,310,105 by this discount factor leaving $8,602,600, which he rounded down to $8,600,000 (Pl. Ex. 4 at 53).

He testified that a higher discount rate would have suggested more applicable risk and led to lower value for the Subject Property. Discussing his choice of an 8.5 percent discount rate, Mr. Nakleh acknowledged that there were not much data supporting discount rates for land, given that land itself is typically not bought and held for a future use. As such, there were limited surveys and market information he could rely upon to select a rate. He noted that all appraisers must apply their professional judgment to the data available, as he did here. He also noted that because of the strength of the New York market generally, there was higher demand, and therefore greater price and lower risk for the real estate on the market. This too led to his choice of a lower discount rate. He also considered risk of a further downturn in the economy in his discount rate because of the cyclical nature of the market.[7]

He set forth in his report a series of surveys that he believed were helpful, noting specifically a PricewaterhouseCoopers ("PWC") report on office space in Manhattan, as well as

[7] On cross-examination, he testified that he picked a discount rate for the land 100 basis points higher than the discount rate he had applied to the income stream he calculated in his analysis of the Income Capitalization approach (discussed below) because he viewed the residual land value as somewhat riskier.

PWC surveys on power centers, the apartment market, and strip shopping centers nationally. He acknowledged that all these surveys, on which both he and Mr. Haims relied, were for improved properties, and noted that he considered that, as well as the potential final use of the Subject Property in deriving his discount rate. He admitted that the Subject Property was not itself one of the property types in the listed reports and opined that it was most analogous to a strip mall. The survey as to strip malls showed a range of discount rates from 6.5 – 12.5 percent with an average of 8.42. He also presented several notable financial metrics upon which he relied, including the Prime Rate, LIBOR and US Treasury Bill rates of varying durations (Pl. Ex. 4 at 52). He conceded that C&W did not generate any discount rate surveys of the type used here.

(2) Income Capitalization Approach

Mr. Nakleh then described the process he used in his report to identify the rental income that would be earned at the Subject Property from existing leases or projected rent income from currently vacant spaces, until such time as all leases expired in 2022 and the property could be developed. He made use of the Income Capitalization approach, based on the assumption that a prudent seller would extract as much income as possible from the Subject Property while they were waiting for it to become saleable. He also noted that this potential income stream would be reduced by the annual operating expenses and capital costs needed for the Subject Property in that same time frame. He also asserted that it would be easier to perform this analysis using available data, than it would be to guess the amount that the tenants would accept as a buyout to leave their leases at a time close to the valuation date.

Mr. Nakleh identified the tenants in place as of 2013; the Deli on the first floor was the primary tenant. There was also a T-Mobile telecommunications store that was on a month-to-month lease, the Nail Salon, and Eyebrows Unlimited which he said was not paying rent and was

essentially considered empty. He noted that both he and Mr. Haims viewed the third floor as empty and subject to market (projected) rents for a putative tenant. Mr. Nakleh stated that most of his information about the tenants came from the PSA, which contained an abstract of leases (Pl. Ex. 3 [Schedule C]) with some additional data that he took from Mr. Haims' report. He never received actual copies of the underlying leases.

Mr. Nakleh concluded that the Deli and Nail Salon leases could be used as is in assessing rental income, and that the other spaces should be viewed as subject to market rents. He looked past some of the other leases in place because of his understanding that the tenants were not adhering to their terms, and acknowledged that to each space, a decision had to be made as to whether the existing lease or market rents should be applied. He explained that it would be typical to assume that a month-to-month tenant would be kicked out and a full lease with a longer return would be brought in to replace it – this was the basis to look at market rents that both he and Mr. Haims used.

To find market rents for the spaces other than the Deli and Nail Salon, Mr. Nakleh consulted comparable market rents both for properties on the ground floor of a building and for those on higher floors (Pl. Ex. 4 at 49). He explained that he looked for properties that were within a short distance from the Subject Property, ranging from West 28th Street to East 45th Street, and generally within the area impacted by foot traffic from Penn Station, and looked to their leases for comparable rents. He indicated that he avoided properties with only short-term leases and attempted to find locations with similar square footage to the Subject Property.

He testified that although he found a range of comparable rents from $120 to $195 per square foot, with an average of $156 per square foot, he believed that one comparable property stood out – 409 Eighth Avenue – which had a ground floor rent of $160 per square foot. He

believed that even though this property was on an avenue rather than a side street, and thus was able to command a higher rent, it was otherwise a very relevant comparable. That property had a 10-year lease and was 900 square feet, and it benefited from the same foot traffic that the Subject Property did. Acknowledging that only four of his six comparables were on side streets, Mr. Nakleh explained that there were a finite number of options to select from and, in his judgment, two of the avenue-based properties were better fits for this comparison. After several follow-up questions, he eventually admitted that there were some other comparables on side streets that he could have used.

Based on a further calculation of dividing the total annual rent by the square footage and assigning 980 square feet and 1,000 square feet to the two first-floor spaces other than the Deli at the Subject Property, Mr. Nakleh derived a market rent of $150 per square foot for them after also considering location and the likely foot traffic. He noted in this regard that the Deli's actual rent was $146 per square foot, which tracked with his proposed market rate.

He also performed a similar exercise for the rentable spaces at the Subject Property that were not on the ground floor, otherwise known as "off grade." He noted that these rents were typically less than those on the ground floor because they were not as easy to access from the street. He selected comparable properties that were also off grade, ranging from the second to fifth floors of buildings, approximately within a year of his valuation date, and derived a range of values between $41 and $50 per square foot. These figures led him to conclude that $45 per square foot was a reasonable rent for vacant second floor spaces and $35 per square foot was reasonable for the third floor at the Subject Property, particularly because of what he described as uncertainty as to that latter space's condition. He noted that the actual rent in the lease for the Nail Salon was $41 per square foot.

He also acknowledged that three of the five properties he used as comparable for off-grade rents were on avenues rather than side streets, as the Subject Property is, but added that frontage is less important for spaces not on the ground floor. He also admitted that the comparable properties were much larger than the Subject Property but countered that the relevant data point is instead the size of the tenant space available for rent within the building.

Armed with market rent rates, he then performed a cash flow projection by using an industry-standard third-party computer program called ARGUS. He explained that generally this would be revenue for the Subject Property less expenses. He began the process by inputting the tenant rent rolls for the Deli and the Nail Salon together with projections for new rents for vacant spaces, and then deducted a standard five percent allowance for vacancy and collection loss. He assumed that each of the spaces would be rented at market rates by the start of year two of his analysis, and that there would be leasing and capital costs to rent those spaces. He based his selection of these expenses on items and values contained in the PSA, and added some standard expenses, such as a management fee, if they were not already included (Pl. Ex. 3 at Tab C).

He explained that once all the data was entered, ARGUS generated a projected cash flow for the Subject Property, for the ensuing nine and one quarter years (i.e., until such time as the Deli's lease expired in 2022) (Pl. Ex. 4 at 51). Mr. Nakleh's model increased the total rent revenue (after these deductions) over time to account for contractual rent increases, allowing for a standard three percent growth rate for the market rents he derived, leading to an eventual rental income of $710,997 in year 9 (Pl. Ex. 4 at 51 [second column from right]). He also pro-rated the income for the part of 2022 in which the Deli's lease would be in effect and provided an aggregate running total of the rental income over the entire time period.

This did not complete his analysis of revenue. Mr. Nakleh also deducted the five percent vacancy and credit loss factor he had previously explained. And he added back that portion of the building's expenses that tenants were expected to cover – noting that the Deli was responsible for 50 percent of the applicable property taxes and the remaining tenants would also bear some responsibility as well. After these adjustments, the resulting figure is the effective gross revenue for the Subject Property, which is also aggregated in the right-most column for the 9.25-year period at $5,769,860.

Mr. Nakleh then offset this revenue with the building's yearly expenses, which he estimated averaging approximately $100,000 as of the valuation date. He listed the types of expenses he considered, including real estate taxes (which were the largest expense), utilities, repairs and maintenance, insurance, legal and professional, and miscellaneous. He described these categories as those typically underwritten for commercial properties and explained that he used the actual taxes the Subject Property paid together with expense information available in the PSA. He set forth his conclusions as to expenses in his report as well, noting that the building was not expected to last past 2022 and so repairs and maintenance were low, and tenants had their own utility expenses so that would be low as well (Pl. Ex. 4 at 50).[8] He grew this total expense figure over the same 9.25 year period and concluded that there was a total of $1,053,767 in expenses across these categories in total (Pl. Ex. 4 at 51 [rightmost column]).

He deducted both the expenses, as totaled, and one-time charges for lease and capital expenditures from effective gross revenue to obtain the cash flow before debt service ("CFBDS"), which he concluded was $4,584,287 over the same time period (Pl. Ex. 4 at 51 [rightmost column]). He ultimately calculated and used the year-by-year CFBDS amounts as

[8] Mr. Nakleh clarified that the legal expense he allotted to the cash flow analysis was for the Subject Property's day-to-day operations, not the extensive fees involved in this litigation.

they better reflected the time value of money and he shared his calculations in the chart (Pl. Ex. 4 at 51), for the next step in his analysis.

Using an Excel spreadsheet, Mr. Nakleh applied the discount rate he selected on a year-by-year basis, reflecting that there was greater risk as time passed and a dollar further in the future is worth less today. For each year, he would multiply the CFBDS that Argus determined by the discount factor for the year derived from the Excel formula he used. Adding up the discounted revenue figures for each of the 9.25 years, he concluded that the present value of the Subject Property's income in that time frame was $3.1 million (rounded) (Pl. Ex. 4 at 53).

He conceded that this was a different, lower discount rate than he used for the land the Subject Property was on; he did so because he believed the income stream was less risky, particularly given that there were two leases already in place. Because the discount rate was lower, it would lead to a higher value for the Subject Property. He testified that to choose his 7.5 percent discount rate, he relied on the same PWC surveys and financial metrics he had used for the 8.5 percent discount rate he had applied to the land (Pl. Ex. 4 at 52). He based his pick of 7.5 percent largely because of location (rather than the size), emphasizing the amount of foot traffic that passed the Subject Property and the relative safety of the New York real estate market. He testified that Mr. Haims had picked an eight percent discount rate for the income stream, but later was challenged as to whether Mr. Haims had selected nine percent.

He rejected the argument that because both the Deli and another tenant were behind on their rent obligations, the Subject Property must be a riskier investment. He viewed it as a positive if the Deli terminated its lease and left the premises – it would allow development of the Subject Property six years earlier when the Nail Salon's lease ended. But, instead, he looked to

what he referred to as the "worst case scenario" of the Deli completing its lease as signed and staying until 2022.

(3) Conclusions

Armed with the rounded figures of $3.1 million for the cash flow, and $8.6 million for the land value, each on a present value basis, Mr. Nakleh added the two numbers, to reach a total value of $11.7 million. He testified that he also concluded that the highest and best use of the Subject Property was as a mixed use commercial and residential building, after such time that the existing leases expire, and it could be redeveloped in that regard. He clarified that he viewed a hotel as a commercial rather than residential use of the space and it would be within the realm of redevelopment options that he proposed. He also concluded that an office tower would not be an efficient use of the space because of the Subject Property's small footprint (Pl. Ex. 4 at 36-37).

(4) Prior Version of Nakleh Report

Mr. Nakleh conceded that the 2013 valuation report he testified about was a supplemental report, addressing the effect that leases for the Deli and the Nail Salon had on the land value. He was cross-examined about his preliminary report, which had been issued on January 23, 2023 (Def. Ex. DD) and explained that in the preliminary report he did not consider the incomes stream from the Deli and Nail Salon leases and limited his analysis to a sales comparison approach of the land.[9] The earlier report also made the extraordinary assumption that the existing leases would not inhibit immediate redevelopment of the Subject Property. He based this on understanding that the leases were in arrears and the tenants were considering leaving the Subject Property. Making such an assumption, he said, was not unusual, but it was necessary to

[9] Mr. Nakleh was unsure if he had ever issued a supplemental report in another case he testified as an expert but was certain that he had supplemented reports he had issued before. He added that this case was the only time he could recall supplementing a report to respond to something a colleague (the expert on the other side of the case) did or did not do.

disclose it in the report. He acknowledged that he did not have information about the leases at the time other than what was contained in PSA's lease abstract.

Instead, when he received Mr. Haims' report, he considered how Mr. Haims treated the income stream from the leases, and concluded in consultation with his clients, that it would be appropriate to test the effect of the leases on the property valuation. As such, he updated his own report to make use of the information from the PSA which largely tracked what was in Mr. Haims' submission. This lowered his initial conclusion as to the land value from $12,750,000 to $11,700,000, but also considered the income stream from the leases as noted herein. He testified that in his work as a neutral arbitrator, he recalled seeing changes to the parties' evidence during the hearing, either through demonstratives or additional exhibits. He did not recall seeing a supplemental report, however.

(5) Similarities and Differences with the Haims Report

Mr. Nakleh outlined a series of assumptions and facts that both his and Mr. Haims' report shared. These included the size, zoning and nature of the existing improvements at the Subject Property. He also stated that the two agreed that upon expiry of the existing leases they viewed the site as intended for ground-up redevelopment. He characterized Mr. Haims as agreeing with him as to the methodology on how to calculate value, only disagreeing on some of the inputs to the methodology. He acknowledged, however, that those different inputs resulted in a change of between 10-15 percent in the overall valuation, even though Mr. Nakleh and found slightly less value for the unencumbered land ($12,750,000) than Mr. Haims did ($13,000,000).

Mr. Nakleh then noted the three main areas in which they disagreed. First, Mr. Nakleh acknowledged that for a growth rate for the land at the Subject Property, he used five percent while Mr. Haims used 2.5 percent. He critiqued Mr. Haims' choice for only looking at a

baseline growth rate, rather than considering the robust growth of the market at the time, and, as Mr. Nakleh believed he had done, selecting a reasonable but higher rate because of that. He testified that Mr. Haims also relied on a 2021 report to justify the growth rate he had selected, making use of information a 2013 market participant could not have known at that time. Mr. Nakleh explained that the willing buyer, assumed to be available on the date of valuation, does not have a crystal ball which can be used to look into the future of the market. This principle would not, for example, allow an appraiser to consider the effect the Pandemic had on the market in 2020 and beyond. Any such risks would, at most, be considered as part of the overall discount rate, not specifically relied on as a basis to pick that rate.

Second, Mr. Nakleh noted that he and Mr. Haims had slightly different rents for the tenants at the Subject Property. He had set a ground-floor rate for market rents of $150 per square foot, while Mr. Haims picked $135 for that same metric. Mr. Nakleh noted that this had the effect of making the Deli an above-market rent which would increase the chance that it would be more of a "flight risk." He elaborated that Mr. Haims had selected an outlier comparable property in deriving market rent for ground floor properties, whose $70 per month figure was far below the other comparables and skewed the data. With that one property removed, Mr. Haims' findings, according to Mr. Nakleh, would be much more in line with his own. For the upper floors, he also noted what he described as a $5-$10 difference per square foot, with Mr. Haims coming in slightly higher than he did.

Third, and finally, he also flagged a 50-basis point differential in the discount rates that the two men had applied. He noted that he had selected his rates based on the strength of the market, but also conceded that 50 basis points was not that big a difference.

(6) The 2015 Valuation

Mr. Nakleh also explained the decision to prepare a second report based on a different valuation date, January 29, 2015, the date he was told the Subject Property was sold to an affiliate of Vornado Realty Trust (Pl. Ex. 5, the "2015 Valuation"). He noted that this was also the result of conversations with the client, and recognition that there were at least two different potential trigger dates, and that it would be sensible to look at both. He testified that this was not the only case in which he testified where he provided valuation reports set for different dates.

He acknowledged on cross-examination that he had prepared the 2015 Valuation (and a letter that accompanied it) first. He then prepared his initial 2013 report which did not consider the income stream from the leases at the Subject Property. Later, he prepared the revised 2013 report (Pl. Ex. 4), and a supplement to the 2015 valuation (Pl. Ex. 11), to consider the effect of the leases. He explained that he was doing what he was asked by counsel to cover both dates of potential valuation of the Subject Property. He added that preparing four separate valuations of the same property was unusual, but not unprecedented in his appraisal practice. Preparing alternative reports did not cause him any concern.

In the 2015 Valuation, rather than rely on the $18.8 million dollars that served as the purchase price for the actual transaction, Mr. Nakleh performed his own analysis using the same Sales Comparison approach that formed part of the analysis in his earlier appraisal. He concluded that the land value of the Subject Property was $17 million. But as he had done with his 2013 valuation, Mr. Nakleh then supplemented the analysis with an appraisal that also considered the income capitalization of the cash flow that would result from the tenants with existing leases staying in place until the end of the Deli's lease in 2022 (Pl. Ex. 11). The value

of the leased fee interest, according to Mr. Nakleh's supplemental work, was less than the land alone - $16.3 million.

Mr. Nakleh described the process he used for the Sales Comparison approach in the 2015 Valuation which was the same as what he had done in the 2013 Valuation. He noted that the physical characteristics and zoning requirements remained the same as well. He selected five comparable properties, resulting in a range of $411-$566 per square foot of ZFA and an average of $458 (Pl. Ex. 5 at 42). He then performed the same types of adjustments to his comparable properties (Pl. Ex. 5 at 46-47). He flagged the need to adjust for location for some comparables that were North and West of the Subject Property and to downwardly adjust certain properties with better physical footprints than the Subject Property. He arrived at a revised range of prices per ZFA between $474 - $557 with an average of $507 per square foot.

Mr. Nakleh testified that he selected a figure at the lower end of the range ($485) because he viewed one of his comparables to be an outlier (Pl. Ex. 5 at 48). He then multiplied this by the unbonused ZFA for the Subject Property and then deducted the expected $25 per square foot cost of demolition, to arrive at a rounded land value of $17 million. He acknowledged this was higher than the conclusion of his 2013 Valuation, something he attributed to the very hot real estate market between 2013-2015.

In the supplement to the 2015 Valuation (Pl. Ex. 11), Mr. Nakleh then used the Income Capitalization Approach to assess the cash flow from the Subject Property until the Deli's lease expired in 2022. He testified that although there was now a shorter time period of 7.17 years starting in 2015, he utilized the same steps in his analysis as he did in the 2013 Valuation. The supplement first analyzed the present value of the land, assuming the same five percent growth rate over the 7.17-year period, a four percent cost of sale, and an eight percent discount rate,

concluding that the land value was $13.2 million. (Pl. Ex. 11 at 1, 7). He justified the eight percent discount rate by again relying on the PWC strip mall survey, which showed a range of 6.5 – 11 percent rates, and an average of 8.09 percent (Pl. Ex. 11 at 6).

He then examined the cash flow at the Subject Property over the 7.17 years until the Deli's lease expired, using the same methodology he had for the 2013 Valuation. He derived market rents for the spaces within the Subject Property without existing leases, selecting market rental rates of $200 for grade level spaces, $47.50 for second floor spaces, and $35 for third floor locations (Pl. Ex. 11 at 3).

He then used ARGUS to model the expected CFBDS on a yearly basis, and applied a 6.5 percent discount rate, generating a net cash flow over the 7.17 years of $3.1 million as rounded (Pl. Ex. 11 at 7). Mr. Nakleh acknowledged that the 6.5 percent discount rate he used for the 2015 Valuation was 100 basis points lower than the rate he had used in the 2013 Valuation, but justified it by the strength and security of the Subject Property being in midtown Manhattan.

The 2015 Valuation ultimately added the land value to the cash flow value and concluded that the Subject Property was worth $16.3 million. He acknowledged that this was less than the price that Vornado paid in 2015, and he opined that Vornado may have had incentive to pay an "assemblage premium" to further enhance its portfolio of properties in the neighborhood. He did not have first-hand knowledge of Vornado's motivations, however.

b. Eric Haims (July 25 Tr. 85-142; Sept. 11 Tr. 3-128; Sept. 18 Tr. 2-26)[10]

Mr. Haims briefly discussed his educational and work background, including an undergraduate degree from the University of Wisconsin, and his 27-year career at Jerome Haims

[10] Before commencing his testimony, counsel stipulated that Mr. Haims was qualified as an expert and to the admissibility of his expert report (Def. Ex. H). The parties also stipulated that Mr. Haims' testimony could be taken out of order, while Plaintiff's case was still ongoing (July 25 Tr. 84).

Realty, his father's real estate, consulting and appraisal company ("JHR"). He left JHR to become a managing director in the New York Office at BBG in 2018, a national real estate valuation and assessment company, where he had served for four and a half years as of the time of his testimony. At BBG, he is a managing director, and leads a team of four appraisers, which handles litigation appraisals and arbitration work.

Mr. Haims has also obtained general real estate appraisal licenses in multiple states, including New York. He holds multiple professional designations from the Appraisal Institute, a national appraisal organization with 15,000 members. He is also a member of the Real Estate Board of New York. He testified that he had prepared thousands of appraisals, a large percentage of which were based on the New York City. He has served as an expert witness and testified more than 25 times previously.

He explained that he was retained in late 2021 or early 2022 to perform a retrospective market value appraisal the Subject Property as of March 22, 2013. He understood that date was relevant to the breach of contract claims in this action but admitted that it was the only date given to him by Defendant's counsel. He testified that he is being paid for his work, but that the payment is not contingent upon the outcome. He identified the report he prepared in this matter (Def. Ex. H).

He wrote the report assisted by a colleague named Andrew Sikiric, a senior appraiser at BBG, whose qualifications and experience he described, noting on re-direct that the two had worked with each other for approximately 20 years on many appraisal reports. Mr. Haims stated he frequently works with other appraisers on reports and there was nothing unusual about Mr. Sikiric's involvement on this project. Mr. Haims described Mr. Sikiric as having given a "good amount of help" with the front half of the report: research of the land sales, neighborhood, and

demographics. He added that he and Mr. Sikiric had selected the highest and best use of the Subject Property as a hotel together, derived a growth rate for the land at the Subject Property together, and fixed the discount rates for both the land and the income stream at the Subject Property together. The two also visited the Subject Property together, sometime in 2022. He later added that they also had selected the comparable properties described below together. He had reviewed Mr. Sikiric's work and found it acceptable, noting that Mr. Sikiric was very competent and one of his best appraisers. He noted that by signing and certifying the report, he was taking responsibility for all of it (Def. Ex. H at 72).

He explained the scope of his work to prepare his report, including inspecting the Subject Property and its neighborhood in early 2022; consulting various publicly available records from the Department of Finance, the New York City Business Department, and zoning records; and, determining the highest and best use of the Subject Property. By this, he meant the reasonable, probable use that would result in the highest value. He did not make any extraordinary assumptions in his report.

He noted that he was already familiar with the Subject Property's location, having worked nearby, and visited both Madison Square Garden and nearby Koreatown, many times. He took pictures of the Subject Property on his visit and he described its physical characteristics and tenants, including the Nail Salon, T-Mobile Store, and Eyebrows Unlimited. He included a photo of the Subject Property from July 2012, taken from Google's street view function. On cross-examination he acknowledged that the picture revealed that there was, as of that photo, an apartment building adjacent to the Subject Property that was advertising the availability of apartments.

He noted that physically, the Subject Property appeared as he described in a letter at the outset of his report (Def. Ex. H at 1). There, he said the Subject Property was rectangular, with 60 feet of frontage on the South side of West 32nd Street and with 49 feet of depth, which he noted was not very deep for New York standards. He also noted that there was 2,940 square feet at the Subject Property. He described the Subject Property as being zoned for commercial use within the Special Midtown District, with a maximum floor to area ratio of 12 for development. This would mean that a developer could build 12 times the available square footage (2,940) for a total of 35,280 square feet. He described the Subject Property's zoning district as allowing office, hotel, retail and residential apartments and being good for development. He said the Subject Property is in the North part of the Chelsea neighborhood, which he referred to in his report as a desirable residential area, although later he attempted in his testimony to limit Chelsea to 14th Street through 28th Street and exclude the Subject Property.

Mr. Haims addressed the highest and best use, stating that there could be different results for a property that is currently improved, such as the Subject Property, or a vacant property which could simply be developed anew. He described four different tests: legal permissibility, physical possibility, financial feasibility and maximum productivity, that appraisers typically use to determine highest and best use. He explained how he collected relevant data and analyzed it to apply each of the four tests to the Subject Property and concluded that if the Subject Property were vacant, the highest and best use would be to build a hotel, and, as currently improved, the highest and best use would be to use the Subject Property as is until the leases (which he was given and reviewed) expire in April 2022, and then demolish the site and build a hotel.

He elaborated that he was generally limited to the knowledge and information that a willing buyer would have had as of his valuation date, March 22, 2013. He conceded that he did

not consider the presence of a new residential apartment building adjacent to the Subject Property in deciding on a highest and best use, and that it could possibly have affected his analysis. He also explained that the marked growth of the tourism industry in New York City was a driver behind his selection of a hotel as the highest and best use of the Subject Property once re-developed.

Once he knew his highest and best use for the Subject Property, Mr. Haims considered multiple approaches to valuing it, describing each of them, and explaining that he ultimately used the Income Capitalization and the Sales Comparison approaches to derive the value here.

(1) Income Capitalization

Mr. Haims explained that he used a variant of the Income Capitalization approach known as yield capitalization, or discounted cash flow analysis, which made sense to the extent that there were multiple leases in place at the Subject Property with different expiry dates. To do this, he obtained the leases for the tenants at the Subject Property from Mr. Weintraub, analyzed them, and constructed a rent roll, inclusive of base rent and other expenses covered by the tenants monthly, and deriving, among other things, the rent per square foot for each tenant (Def. Ex. H at 38). He recalled reviewing the leases for the Deli, the Nail Salon and the T-Mobile store in preparing his rent roll and treated each of those leases as valid and remaining in place.

He also generated market rents for the remaining spaces at the Subject Property (both ground floor and upper floors) after considering several comparable properties (Def. Ex. H at 36). He was challenged for using one comparable ground floor property whose rent was $70 per square foot, which was considerably lower than all the other comparables (Def. Ex. H at 36 [comparable 2]). He acknowledged that it was an outlier and that without including it in his data

set his market rental rate would be higher but asserted that the final ground floor market rent he derived, $135 per square foot, was nowhere near that rental rate for that comparable.

He aggregated the two data sets for existing and market rate tenants, and his rent roll reflected a total annual rent of $468,032 for the entire Subject Property across all leases. He added in certain rent escalations to grow the base rent per year to $478,959 (Def. Ex. H at 38-39).

On cross-examination, Mr. Haims was extensively questioned about his treatment of the existing tenants on his rent roll. He acknowledged that both the Deli and the Eyebrow Express tenants had significant rental arrears but as to the Deli he did not consider it an extraordinary assumption that the tenant would stay in place, believing based on his own experience with a different deli who was his tenant, that it could catch up. Therefore, unlike the Eyebrow Express, which he deemed not to be adhering to its lease (Def. Ex. H at 35), he expressed no such view as to the Deli. Nonetheless, he also admitted that a putative buyer of the land in 2013 might wish to buy out or evict tenants who were behind in rent. He added that he found the market rent to be $135 per square foot for ground floor leases which was less than the Deli was paying ($145), and that might make it a more likely candidate to leave or be bought out of its lease. He reflected the risk of tenants owing rent in his selection of the discount rate applicable to the income stream.

With his rent roll generated, as a next step, Mr. Haims added in the real estate tax reimbursement income the tenants were required to pay under the leases and then applied a five percent vacancy and collection loss to that total. He calculated the former figure by looking at publicly available tax rate information for 2013 and 2014 and concluded that it was $19,905. He also calculated the vacancy and collection loss to be $24,943. So, adding the former number and

subtracting the latter from the total annual rent, Mr. Haims concluded that the effective gross income for the Subject Property was $473,921.

The next step, according to Mr. Haims, was to estimate the Subject Property's annual operating expenses. To do that, he examined the Subject Property's historical expenses for 2010-2012, the three years prior to the valuation date. He also selected five operating expense comparables to further bolster his estimation of the Subject Property's figures (Def. Ex. H at 40 [top chart]). He sought buildings that were low-rises constructed around the same time as the Subject Property, with a similar amount of square footage. The expenses he considered and estimated included real estate taxes, utilities, repairs and maintenance, management fee, insurance, legal and professional fees, and miscellaneous. He generated his estimate of these figures for March 22, 2013 – March 21, 2014, concluding that they were $99,999 in the aggregate (Def. Ex. H at 40 [bottom chart]). He then subtracted this figure from the effective gross income, to determine net operating income, or $373,922.

He then considered the costs of leasing and of having vacant space during the time in which an owner would be waiting for the Deli's lease to expire. He concluded that there should be leasing costs in years one, four and five, going forward, representing times when leases would expire, and new tenants would need to be brought into the Subject Property. As set forth in his report, Mr. Haims applied different leasing costs for each of these years ranging from $38,695 in year four, $134,507 in year five, and $181,480 in year one, depending on which lease(s) were up for renewal. The components of those costs included leasing commissions, free months of rent to allow a tenant to renovate, and some months of no rent due to downtime in having a tenant in the space.

Mr. Haims then deducted the year one expenses figure from the net operating income he had previously derived, leaving what he described as net cash flow of $192,442 (Def. Ex. H at 42). This was, in his view, the figure to use in year one of the discounted cash flow analysis that he performed in his report (Def. Ex. H at 66). He applied his calculations of operating expenses (with a three-percent growth rate) on a yearly basis against net operating income. He then deducted the leasing costs (where applicable) from net operating income to obtain net cash flow.

Mr. Haims selected a discount rate for this analysis, after considering PWC surveys, national investor surveys and other metrics, all within the 2013 time frame. Like Mr. Nakleh, he considered the strip mall survey from PWC, noting that it was the best available choice (Def. Ex. H at 43). Applying his professional judgment guided by his review of those surveys and source materials, Mr. Haims selected an eight percent discount rate for the income stream. In picking that rate, he noted that the Subject Property should be on the lower end of the range of discount rates that had appeared in the strip mall survey, which cataloged rates from 6.5 – 12.5 percent with an average of 8.42. But he also asserted that because of the arrearages on some of the existing leases, it was appropriate to pick a slightly riskier discount rate, as he did, not far from the national average.

Mr. Haims then applied the discount factor for each year in the relevant time period to the net cash flow including the portion of 2022 (through April) covered by the Deli's lease. Aggregating the discounted cash flow over the period, he concluded that the present value of the cash flow for the income stream was $2,358,188.

(2) Sales Comparison Approach

Mr. Haims also analyzed the present value of the property reversion at the end of Deli's lease. He posited that there would be a sale at that time based on the value he derived, from

which the owner would have to pay the costs of demolishing the structures on site so that the Subject Property could be redeveloped. He used the Sales Comparison approach to derive the land's value during the intervening time, which he called the holding period, based on comparable land sales that had sold prior to his valuation date.

To find comparable sales, Mr. Haims looked on COSTAR for properties in a similar location, between 30th Street to the South, Madison Avenue to the East, 46th Street to the North, and Eighth Avenue to the West. He conceded that although he aimed to select sales of similar size, it was difficult to find properties as small as the Subject Property. He also searched for similar zoning, and a FAR of between 10-12, at a minimum. It was also important to select sale dates before his valuation date to present information that a willing buyer of the Subject Property might know of the time of purchase. Like Mr. Nakleh, he displayed the six comparables he selected on a map, as well as in a table with relevant data such as their address, sale date and price and square footage (Def. Ex. H at 46-47). He described six comparables as a good representative sample of market transactions.

Using the information he had on each comparable, he calculated the price per square foot of FAR, as Mr. Nakleh had. After determining the figure for each of his comparable properties, he then noted the range (from $259 to $415) with a median of $325 and an average of $326. Rather than use these figures, however, Mr. Haims then engaged in an adjustment process for each of his comparables, as Mr. Nakleh had, based on their differences as to various characteristics from the Subject Property.

Mr. Haims explained that he set forth the types of adjustments he made in his report before applying them to his comparable properties (Def. Ex. H at 60). The adjustments included financing, conditions of sale, changes in market condition, possession, location, size,

configuration, zoning, access and demolition. As was true of Mr. Nakleh's analysis, Mr. Haims also adjusted upwards when the comparable sale had an inferior characteristic when compared to the Subject Property, and adjusted downwards when the opposite was true. He reflected the adjustments he made in a grid that was separately displayed in his report (Def. Ex. H at 63). In response to a question from me, he explained that if he had to make relatively few adjustments, that was a sign that the comparables chosen were good selections and gave him more confidence in the data.

Mr. Haims acknowledged that there were some categories for which there were no adjustments needed for any of the comparable properties he selected. These included access, financing, possession, configuration, location and conditions of sale. He claimed that he was fortunate to find comparable sales so near the Subject Property and could avoid location adjustments. He also clarified that access adjustments examined whether a property had mid-block locations or instead had beneficial corner or similar setups that would give beneficial exposure to air and light. No such properties were present in his set, however. He declined to apply any adjustment for the lack of depth of the Subject Property, as Mr. Nakleh had in his "Utility" column. Mr. Haims asserted that the property could be redeveloped into a hotel, as he proposed, despite that lack of depth.

He testified that he made a consistent market adjustment of one percent per month to all the comparable land sales because they pre-dated the valuation date. The resulting modifications ranged from 1.6% to 21.8%. He acknowledged that the market for land was improving between the dates of the comparables' sales and the valuation date, which is why he had to adjust upwards for each after engaging in what he called a paired data analysis (looking at sales and resales of the same property at two different times) of three comparable land sales that occurred in

Manhattan. He testified that four of his six comparables were larger than the Subject Property, and that he adjusted them downward by between ten and fifteen percent as a result.

Mr. Haims testified that two of his six comparables had less flexible zoning that the Subject Property, so he adjusted them upwards by ten percent. He clarified that because the zoning regulations were less desirable to a developer, the value of the property would be lower too, absent an adjustment. Finally, unlike Mr. Nakleh, he treated demolition costs as an adjustment, applying upward adjustments in a range of $4.62 to $10.45 per square foot for the three properties he had identified that were already improved and would require demolition before development. He later clarified that he used a uniform $20 per square foot demolition cost (Mr. Nakleh had used $25) and multiplied it by the total square footage of the comparable. He then divided the result by the developable area of the comparable to find his adjustment.

After testifying all the adjustments to each comparable, he explained that he put the most weight on his first and second selections, 16-18 East 30th Street and 30 West 46th Street, which had adjusted unit prices of $364.06 and $375.33 respectively (Def. Ex. H at 63 [rows 1-2]). He focused on them because they were the most recent sales and required the fewest adjustments. Relying on them, he concluded that the Subject Property would have a land value prior to demolition of $370 per square foot. Multiplying this by the developable area of 35,280 square feet, he concluded that the value would be 13,053,600. He then deducted the cost of demolition (at $20 per square foot) for the existing 5,875 square feet of building at the Subject Property, or $117,500, leaving a rounded figure of $12,940,000 as of March 22, 2013.[11] This, he acknowledged, was not much different than the $12,750,000 figure Mr. Nakleh had derived.

[11] Mr. Haims was also questioned at length about minute differences in each of the analyses that he and Mr. Nakleh did of the same comparables. In some instances, this led to meaningful differences in the valuation of those individual comparables. One difference noted between the two appraisers was the change of valuation date between January and March 2011. This, Mr. Haims acknowledged, could affect the need for market conditions adjustments.

Mr. Haims explained the value he derived was not yet attainable because of the existence of the leases whose income stream he had analyzed in the income capitalization calculation he performed. He testified that, as Mr. Nakleh did, he needed to apply a growth rate to the end of the Deli's lease's term, as that was the longest lease in place, ending on April 1, 2022. Mr. Haims testified that to select a growth rate he considered a C&W property sale report in Manhattan that showed growth in the price of development properties from $446 per square foot to $701 per square foot in the period between 2013 and 2016, and then a decline from there to $422 per square foot in 2021. He stated that it was appropriate to use this data to establish a trend under USPAP Advisory Opinion 34 (Pl. Ex. 13). Mr. Haims understood the Advisory Opinion to require an appraiser to select a logical cutoff point for data but allow consideration of data past that point only for trending purposes.

Mr. Haims could not recall what cutoff date he had selected for his data but testified that it went out two or three years after his valuation date. He agreed that setting a cutoff date eight years out (i.e., to 2020) would be inappropriate under the Advisory Opinion, even though he acknowledged citing to 2021 data in setting his growth rate (Def. Ex. H at 64). He conceded however, that while he did not give much weight to the 2021 information, his report did not say that and could have been written better. Later, he tried to explain the use of the 2021 information as demonstrating the cyclical nature of the real estate market.

He did not, however, consider the subsequent sale of the Subject Property in 2015, because he was looking at land purchases, not small, under-developed buildings.[12] Considering both the trend and the cyclical nature of real estate, particularly in Manhattan, Mr. Haims

[12] Mr. Haims testified that he was not told about the subsequent sale and could not have considered it for purposes of his March 2013 valuation date, in any event.

concluded that a growth rate of 2.5 percent per year from March 2013 going forward, using what he considered a more conservative projection for the growth between 2013-2022.

Mr. Haims was also extensively cross-examined about a reference to an ongoing "land rush" in Manhattan described in an article he had cited in his report (Def. Ex. H at 60). He conceded that such a land rush, optimism in the market, and growth in the market was ongoing as of 2013 but asserted that it was not going to last long-term. He disagreed that the analysis should stop at what a buyer would have thought in 2013, precisely because they had to consider holding the property to the expiration of the existing leases. He also admitted that he had written in the report that interest rates and inflation were both in a good place as of 2013, and there was growth in the construction industry, each a sign of a robust economy (Def. Ex. H at 14, 16). He did not consider the excellent and desirable location of the Subject Property to affect the growth rate; limiting its effect to the overall value.

He noted, however, that the strength of the City's economy was not the same thing as the strength of the market for land. On this same issue he also acknowledged that he had adjusted some of his comparable properties that sold before 2013 to account for market differences, adjusting them upwards to reflect that the 2013 market was more robust than when they sold. Ultimately, he conceded that his report applied a one percent per month adjustment rate for properties sold before March 2013, and then pivoted to a 2.5 percent annual growth rate as of that same date, going forward, even though, he conceded, the growth of the market in 2013 was still quite robust.

Mr. Haims applied the 2.5 percent growth rate for 9.04 years (the length of the Deli's lease) to the $12,940,000 value he had derived, to compute the future land value as of April 1,

2022, resulting in the figure of $16,172,262 (Def. Ex. H at 66).[13] He then deducted expected costs of sale such as legal, professional and brokers' fees, which he estimated to be four percent, or $646,890. He explained that the resulting amount, $15,525,372, needed to be discounted back to the present, meaning March 2013, for which he used a nine percent discount rate. He opined that after discounting, the present value of the land was $7,129,856 (Def. Ex. H at 66).

He explained that he selected a nine percent discount rate after again looking at the PWC survey covering strip malls, and working with its range of discount rates, spanning 6.5 to 12.5 percent with an average of 8.42 percent. He described the PWC survey he looked at as standard for this asset class, noting that there were different standard options if an appraiser was looking into residential or hotel properties. He conceded that it might have been appropriate to use a survey evaluating hotel discount rates given that his proposed highest and best use of the Subject Property was a hotel, but he did not do so. He also considered what he called competitive rates of return, and the fact that the reversion that would make use of the discount rate would not occur for nine years, making it somewhat riskier. He added that the shallow nature of the Subject Property's site could add some additional risk element to the development, even though the Subject Property was one that could be developed. He also noted that there were always risks in the real estate market, from development risk to financing risk, to collection risk, to name several – and the discount rate was meant to estimate all of these.

In summarizing his work in comparison to Mr. Nakleh's, he stated that the two agreed on most of the methodology, including use of many of the same comparables and adjustments to the comparables, but disagreeing most significantly on the discount rate and growth rate as used in the process.

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[13] Although Mr. Haims testified to applying the growth rate for 9.04 years, the calculations in his report reflect a duration of 9.03 years. The conclusion he testified to is consistent with the report, however (Def. Ex. H at 66).

(3) Conclusions

As a final step, Mr. Haims computed the total value of the Subject Property as of March 22, 2013, by adding the two figures he derived in the Income Capitalization analysis and the Sales Comparison Approach, resulting in a total of $9,488,043, which he rounded up to $9,500,000 (Def. Ex. H at 66).

(4) Critique of Mr. Nakleh's Report

Mr. Haims testified to the similarities in methodology between his report and Mr. Nakleh's and flagged the selection of discount rates as one point of difference between the two analyses. He noted that for each of the land (8.5%) and the income stream (7.5%), Mr. Nakleh had selected a discount rate 50 basis points lower than Mr. Haims did. He also flagged a difference in the yearly growth rates for the land value they had selected – Mr. Nakleh chose five percent while, as noted above, Mr. Haims selected 2.5 percent. Mr. Haims testified that Mr. Nakleh selected market rents for the Subject Property's tenants that were $5 to $15 higher per square foot than he had. Mr. Haims explained that each of these differences led to a higher value for the property in Mr. Nakleh's report. Finally, he noted that Mr. Nakleh had not engaged in any independent analysis of the Subject Property's historical expenses or comparables to same, and instead chose data that was close or identical to the numbers that Mr. Haims used.

DISCUSSION

1. Evidentiary Issues

a. Credibility

Both Simhon brothers and Mr. Moinian were interested witnesses in this proceeding – each had good reason to testify in a way that would affect their desired outcome as to valuation

of the Subject Property. This, standing alone, would not be a basis to discount any of their testimony, only view it with a more wary and skeptical eye (*Gass v. Gass*, 42 AD3d 393, 394 [1st Dept 2007] [appropriate to look to motives in evaluating credibility]). I did have additional concerns about these witnesses however. Mr. Moinian was caught looking at notes while testifying, and although his subsequent explanation that he wanted to be sure to get a precise dollar figure correct in his testimony is plausible, it is still troubling that he would behave in such a manner. Moreover, as noted, there were instances where he was asked leading questions by counsel that were not objected to, which had the effect of generating more "testimony" from counsel than the witness for extended periods of questioning. Both issues lead me to diminish the weight given to Mr. Moinian's testimony.

I also have a concern about Joseph, who despite repeated instructions and warnings, continued throughout his testimony to cut off counsel and even the Court. Aside from making a choppy record, this also gave me the concern that he was either overly nervous, overly combative, or both. In all events, I cannot give his testimony full weight because of his demeanor and the way he testified (*Winopa Intl. Ltd. v. Woori Am. Bank,* 59 AD3d 203 [1st Dept 2009] [referee best positioned to weigh evidence and determine credibility]).

For different reasons, I have concerns about David's testimony. His brief time as a witness contained inconsistencies about relatively straightforward matters that should have been easy to recount without mistake or distortion. Yet in his testimony about the rent arrearages of certain tenants at the Subject Property and the nature of his "tenancy" on the third floor of the Subject Property, he was unnecessarily contradictory. He had to backtrack and clarify more than should have been needed. These unforced errors give me concern and prevent me from giving David's testimony substantial weight.

I have no concerns about either expert witness. Each testified clearly, directly, and forthrightly, and each was patient with both counsel and the Court to the extent their methodology or terminology required additional repeated explanations. I also found each expert to be impeccably credentialed, and especially given the stipulations that each was appropriately qualified to give expert testimony, I see no reason whatsoever to discount their respective testimony on such bases, either.

b. Documentary Evidence

As noted, there were several exhibits as to which I made provisional rulings. As to one of these exhibits, Defendants' Exhibit HH, counsel submitted further argument in their post-hearing, and later, supplemental, briefing.

During the hearing, Defendants attempted to submit a printout of a spreadsheet Joseph had prepared, purportedly demonstrating the value of certain payments due to him under a Guaranty over time (Def. Ex. HH). I provisionally rejected Defendants' attempts to admit this exhibit, for the primary reason that they were attempting to use a lay witness to provide expert testimony. I gave both sides the opportunity to submit further briefing on this issue in their supplemental letters, and I now conclude, after considering those additional arguments, that the exhibit should be admitted.

Defendants have persuasively argued (Def. Supp. Br. 2-3) that where a lay witness has relevant knowledge, they may testify as to valuation (*North Main St. Bagel Corp. v. Duncan*, 37 AD3d 785, 787 [2d Dept 2007] [Plaintiff's principal could give lay testimony about value of equipment he purchased]; *Tulin v. Bostic*, 152 AD2d 887, 888 [3d Dept 1989] [lay witnesses with sufficient knowledge of property could testify as to its value]). I am satisfied from Joseph's testimony about his background, education and experience, that he had a sufficient basis to be

able to prepare and submit an exhibit demonstrating the value of a stream of money over time, as Defendant's Exhibit HH does.

Contrary to Plaintiff's arguments (Pl. Br. 36-40; Pl. Supp. Br. 3-4), no expert testimony was required to establish the *bona fides* of Joseph's calculations, only sufficient knowledge of how to use Excel and the relevant mathematical concepts which Joseph had. This is arguably less "expertise" than was required of the witnesses who testified as to value in the above-cited cases. And as such, I do not see the arguments that Plaintiff has asserted as to the failures of Defendants to meet the procedural requirements and qualifications for expert testimony as a basis to exclude the exhibit.

c. Valuation of the Subject Property

Despite the areas of disagreement between the parties, they do appear to agree on the relevant legal standard for the measure of damages relevant to a breach of contract for sale of real property (Pl. Br. 2, 43; Def. Br. 23-24; Def. Supp. Br. 1). As the Court of Appeals held in the context of a seller's damages for a buyer's breach, but equally applicable here, that measure is "the difference, if any, between the contract price and the fair market value of the property at the time of the breach" (*White v. Farrell*, 20 NY3d 487, 489 [2013]). The parties have joined issue on each portion of that measure, and I evaluate their arguments one at a time, below.

(1) What is the Contract Price?

The issue of how much the parties had agreed upon as a contract price was one of the most complex at the hearing. There were a few areas of agreement and the documentation involved was far from clear or precise. That said, there does not appear to be any dispute that a portion of the price was the figure listed in the PSA, $3.6 million (Pl. Ex. 3 ¶ 4). Defendants have contended, and Mr. Moinian admitted at the hearing, that there was additional consideration

in the form of a $2.65 million dollar loan from Mr. Moinian to Joseph, with the expectation that it would not be repaid. I credit the testimony of both parties to the loan that it was structured to afford an additional (but undefined) tax benefit to Joseph. This portion of the price is further supported by the PSA and the Letter of Intent and does not appear to be in serious dispute (Pl. Ex. 3; Pl. Ex. 7; Def. Ex. C). Plaintiff, relying on these two components of consideration only, concludes that the contract price was $6.25 million.

Defendants, however, urge that there two other components to the contract price – the amount reflected in a Note between the parties (Def. Ex. D, Pl. Ex. 7 at 2) and the stream of income that was guaranteed to Joseph for his participation in the deal, working out to $14,395.58 per month (Def. Ex. E).

The first of these contentions, purportedly adding an additional $3.75 million to the sales price, must be rejected (Def. Br. 25-26). The Note in the form submitted into evidence is unsigned and very clearly a draft, with many terms left out, mistaken, or internally contradictory. That it would identify the wrong property and reverse the buyer and seller alone is enough for me to give it no weight and find it completely unreliable. This is to say nothing of the document listing the amount of the Note as $3,750 in one place and $3,750,000 in another. Even Joseph, in his own testimony, found the Note to be vague and admitted he did not know if it were ever finalized. Thus, I conclude that the amounts Defendants claim are established by the Note are not part of the contract price for the Subject Property.

Defendants also assert that the amount addressed in the Guaranty Mr. Moinian signed, namely payments to Joseph in the amount of $14,395.58 per month, were neither interest nor related to the loan between the parties, and as such, should be treated as a separate component of the contract price. In support of their position, Defendants cite to prior statements Mr. Moinian

made in his pre-trial deposition in which he admitted that the Guaranty was to "pay three million dollars and change to [Joseph], as part of the purchase price" (Def. Ex. X at 55) and his confirmation, later in the deposition that Joseph was to be paid the fixed sum of $14,395.85 per month (Def. Ex. Y at 93). Mr. Moinian confirmed each of these deposition statements in his testimony at the hearing (July 25 Tr. 59-60, 62-63). This deposition testimony is an informal judicial admission that provides some evidence in support of Defendants' position (*Addo v. Melnick* 61 AD3d 453 [1st Dept 2009] [deposition testimony a classic example of informal judicial admission]).[14] This is not the only basis to include this cash flow in the contract price.

Although his testimony was somewhat uneven, and his recollection imperfect, I nonetheless credit Joseph's testimony that he was expecting these payments over time once he was made an investor member of the Plaintiff. I conclude that he remains in that role, and there has never been an attempt to buy him out using the put option contained in the Operating Agreement. Indeed, the language of both the Guaranty and the Operating Agreement better support Defendants' position than Plaintiff's, particularly to the extent that the Guaranty enumerates the precise payments (Def. Ex. E) and the Operating Agreement contains no limiting language or otherwise contradicts that Joseph was an investor member entitled to these payments regardless of the closing of the transaction (Def. Ex. EE § 8.5[a]).

Finally, even if I were to set aside his contrary deposition testimony cited above, I cannot credit Mr. Moinian's hearing testimony. For the reasons stated above, I find him to be less credible than Joseph, who, despite his combativeness and inability to recall certain details

[14] I do not view the "admission" in a prior affidavit of Mr. Moinian, cited by Defendants, to be probative on this issue (NYSCEF Dkt. No. 155, Def. Br. 25). At most, this demonstrated that a Note and other documents were shared between the parties; not that the draft Note described herein was the operative document between them.

precisely, presented as a more believable witness. For all these reasons, I conclude that the payments under the Guaranty are part of the sales price.

This does not fully resolve the issue, however, because these were contemplated payments over time, rather than a fixed sum. Here, having admitted Defendant's Exhibit HH based on the supplemental arguments contained in the parties' briefing, I have before me the calculations that Joseph performed for payments over time, from January 9, 2013 to the present, at capitalization rates between five and seven percent. Defendants offer that the five percent capitalization rate, which would result in the highest value for the income stream ($3,454,939.20) should be used. Although they do not suggest a basis for that rate as opposed to the others, and simply posit that I should select the five percent figure, I note that in his testimony, Joseph compared the range of rates to that of a ten-year treasury bond, which he stated was 4.3 percent (Sept. 20 Tr. 41). Plaintiff, more focused on the arguments I have rejected above as to the exhibit's admissibility, do not offer a view on the proper capitalization rate.

On balance, I conclude that a higher, six percent capitalization rate, is appropriate here. That rate, which is the midpoint of the five options presented by Joseph in his calculations, results in a future income flow of $2,879,116, rather than the $3,454,939.20 sought by Defendants. I conclude that it is appropriate to use this rate because there is a risk, not sufficiently considered by the five-percent capitalization rate, that at some point Plaintiff might have exercised the put option contained in the Operating Agreement, thereby ending the stream of income to Joseph. It is true that even to this date, that put option has not been exercised, but there is no dispute that the option exists and could have been exercised. The higher capitalization rate, in my view, more fairly encompasses that possibility.

To be sure, there is much testimony and argument based on the premise that the deal between the parties never closed, and therefore, the provisions of the Guaranty and Operating Agreement never took effect (*e.g.,* Pl. Br. 34-35). I view this as a "red herring" and conclude that the failure of the deal to close does not exclude this a part of the contract price. The goal of this contractual damages assessment is to put the Plaintiff in the position that they would have been in, but for the breach (*MBIA Ins. Corp. v. Credit Suisse Sec. [USA] LLC*, 165 AD3d 108, 114 [1st Dept 2018] ["Contract damages are meant to restore the nonbreaching party to as good a position as it would have been in had the contract been performed"]). The goal is <u>not</u> to grant a windfall to Plaintiff, allowing it to escape an obligation that lay ahead if the contract had not been breached. Including the stream of income contemplated in the Guaranty and Operating Agreement better comports with this principle, as well as fairness and the parties' agreements.

Accordingly, I conclude that the contract price for the Subject Property is $9,129,116 ($3,600,000 [PSA] + $2,650,000 [Loan] + $2,879,116 [Income Stream] = $9,129,116).

(2) What is the Proper Valuation Date

To set the fair market value of the Subject Property, it is necessary to first establish the correct date of valuation. The parties have essentially offered two possibilities – Plaintiff urges that Mr. Nakleh's 2015 valuation, which went unrebutted at the hearing, should be used, while Defendants counter that 2013 is the proper time for valuation.[15]

Plaintiff asserts that under the PSA, it did not have a viable claim for damages until after the sale of the Subject Property to Vornado in 2015, and, as such, it would be inappropriate to assess damages before that time. Indeed, Plaintiff focuses on the amendment to the Complaint in

[15] Despite two opportunities to elaborate on their argument, Defendants appear to rest on the proposition that a 2015 valuation is too far remote in time from a 2013 breach to be probative of damages. They do not offer any meaningful guidance as to why the Court should find that breach to have occurred in 2013, however (Def. Br. 30-32; Def. Supp. Br. 1-2).

2015, after the sale occurred, which first stated a claim for money damages (NYSCEF Dkt. No. 77 at 5-6; NYSCEF Dkt. No. 88). Plaintiff further relies on language from the PSA limiting Plaintiff's remedies to specific performance and stating that "[p]urchaser hereby waives and relinquishes any other right or remedy available to it at law or equity or otherwise, including, but not limited to, the right to obtain money damages unless specific performance is not available" (Pl. Ex. 3 § 15.2).

Plaintiff also cites to the First Department's decision in *Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 AD2d 262 (1st Dept 1995). There, the Court held that a breach of a brokerage agreement occurred only at the closing of a building sale and the broker was not paid, rather than at the earlier time that the agreement for the sale was executed. I conclude that this case is distinguishable, for a reason Plaintiff itself cites: unlike the broker there, Plaintiff here chose to sue for a variety of remedies based on an anticipatory breach of the PSA in 2013. The original complaint itself relies on that anticipatory breach to interpose the claim for specific performance (NYSCEF Dkt. No. 1 ¶¶ 24 ["[p]ursuant to the terms of the Contract, in the event of a breach by the Seller, Plaintiff is entitled to the remedy of specific performance"]).

It is because of Plaintiff's reliance on that very breach that I reject the contention that 2015 is the proper year to value the Subject Property. The available remedies may have changed in 2015 with the sale to Vornado, but the breach that denied Plaintiff the deal and afforded Plaintiff a basis to bring this lawsuit in 2013, did not. Thus, I turn to the competing valuations of Messrs. Nakleh and Haims for the 2013 time period to determine the value of the property.[16]

(3) Valuation of the Subject Property

As is to be expected, the parties differ as to the Subject Property's value, even if the

[16] Even if Plaintiff does not obtain damages premised on the higher valuation of the Subject Property, this "loss" is amply mitigated by two extra years of statutory interest at nine percent (CPLR 5001), discussed further below.

valuation date is approximately the same for each. Plaintiff relies on the conclusions of Mr. Nakleh's 2013 Valuation and asserts that the Subject Property is worth $11.7 million dollars as of January 9, 2013 (Pl. Ex. 4). Defendants, in turn, rely on Mr. Haims' alternate conclusions set forth in his report (Def. Ex. H) that the Subject Property's value was $9.5 million dollars as of March 22, 2013.

There is general agreement between the parties that both a Sales Comparison approach (to determine value of the land) and an Income Capitalization approach (to determine the value of the income stream at the Subject Property until it is available for development) are the appropriate valuation tools. And, for the most part, as they credibly explained in their testimony, each expert followed the same steps in assessing the Subject Property using these components. Nonetheless, each side devotes substantial space in their briefing challenging the other side's expert's conclusions and bolstering their own (*e.g.*, Pl. Br. 47-52; Def. Br. 33-35). Ultimately, for the reasons described below, I find that while each side has presented an expert opinion that is not perfect, Mr. Nakleh's 2013 Valuation is better founded and more reliable. As such, I conclude that the Subject Property is worth at $11.7 million dollars as of January 9, 2013.

Defendants attack the 2013 Valuation through a variety of arguments. At the outset, I reject their contention that because Mr. Nakleh submitted multiple reports, any or all of them should be deemed unreliable (Def. Br. 32, Def. Supp. Br. 2). Unlike Defendants, I do not view Mr. Nakleh's multiple reports as conflicting or inconsistent statements, but rather analyses of alternate factual scenarios, each of which could stand alone, and some of which benefit from additional data points that were not available to Mr. Nakleh when other analyses were prepared. Indeed, I credit Mr. Nakleh's testimony that he was instructed to assume a variety of dates and circumstances, and prepared multiple iterations of his analysis to adapt to each of the scenarios

presented and additional facts that became available to him. He was clear about what each of his reports did and did not cover. This proved to be helpful to the Court, even to the extent that most of that work is not necessary to the conclusions herein. It is far better to have reports tailored to specific circumstances, and using all available data, than to have to stretch and contort one report that does not address all those different variables.

I also reject the contention advanced by Plaintiff during the hearing, although not as much in the post-hearing briefing (Pl. Br. 26), that Mr. Haims' report should be viewed less favorably because a colleague, Mr. Sikiric, performed substantial work on that report as well. I find it completely understandable that an experienced appraiser might involve a colleague in an assignment of this nature. Nothing in the record suggests that Mr. Sikiric's work was substandard – indeed, Mr. Haims praised the quality of his efforts and analysis. I credit Mr. Haims' testimony that particularly where the testifying expert certified the report and adopted it in its entirety, there is no cause for concern on this front.

The growth rate applied to the land at the Subject Property, however, is an issue where the experts' disagreement proves to separate their reliability and is outcome determinative here. Mr. Nakleh concluded that the growth rate should be five percent, noting that although the actual growth rate in Manhattan was much higher at the time of valuation, the real estate market could not sustain such hyperbolic growth, and, as such a more restrained figure of five percent year, well below the double-digit growth demonstrated by the market in 2013, was appropriate. Defendants criticize this rate for being too high, arguing that the survey data Mr. Nakleh relied upon was for too broad a range of properties (covering anything sold in Manhattan intended for development) and that the rate that Mr. Nakleh applied proved to be far higher than the actual rate of growth as demonstrated by a later, 2022 survey (Def. Br. 34).

Mr. Haims, on the other hand, selected a 2.5 percent growth rate, relying on data from as late as 2022. He rejected the five-percent rate that Mr. Nakleh chose as being inconsistent with the cyclical nature of the real estate market. Plaintiff criticizes Mr. Haims' selection on several grounds. Primarily, it accuses Mr. Haims of improper use of data too far into the future from the valuation date, in violation of USPAP Advisory Opinion 34 (Pl. Ex. 13). That Opinion states:

> Data subsequent to the effective date may be considered in developing a retrospective value as confirmation of trends that would reasonably be considered by a buyer or seller as of that date. The appraiser should determine a logical cut-off for the data to be used in the analysis because at some point distant from the effective date, the subsequent data will no longer provide an accurate representation of market conditions as of the effective date. This is a difficult determination to make. Studying market conditions as of the date of the appraisal assists the appraiser in judging where to make this cut-off. With market evidence that data subsequent to the effective date was consistent with market expectations as of the effective date, the subsequent data should be used. In the absence of such evidence, the effective date should be used as the cut-off date for data considered by the appraiser.

(Pl. Ex. 13 at 1-2).

Rather than follow Advisory Opinion 34, Mr. Haims does not appear to have specified in his report, and could not testify to, other than in general terms, the cutoff date he was relying upon in his work. Moreover, his analysis appears to have considered rental declines caused by the Pandemic, well after both potential valuation dates and any reasonable cutoff date for his data, forcing him to concede at the hearing that his report could have been better worded on this subject (Sept. 20 Tr. 55).[17] By contrast, Mr. Nakleh, consistent with Advisory Opinion 34, made use of data from 2009-2015 to confirm the trends that he was relying upon in his analysis. And even if it were appropriate to look at data well after 2013, contrary to Advisory Opinion 34, Mr.

[17] It would be fair to reject Defendants' criticism of Mr. Nakleh for not considering how his growth rate varied from the actual growth shown in a 2022 survey, for these same reasons.

Haims is selective in this regard, ignoring the actual sales price offered by Vornado in 2015, which would have implied a much higher growth rate.

This was not the only flaw or inconsistency with Mr. Haims' proposed growth rate. As Plaintiff notes (Pl. Br. 27-28), Mr. Haims picked a rate that followed the consumer price index (2.5%) rather than considering what a willing seller and buyer would consider for the property as of the date of value. This relatively low growth rate is also inconsistent with the one-percent per month increase Mr. Haims applied to his sales comparables that were involved in pre-2013 transactions, leading to adjustments of between 1.6 and 21.6 percent for them (Def. Ex. H at 69). He offered no reason for such an abrupt change in approach. Further, Mr. Haims' proposed rate is contradicted by a Crain's article prominently cited in his report referring to the "Land Rush" that was ongoing around the time of valuation suggesting a conservative growth rate at the time was inappropriate (Def. Ex. H at 60; Sept. 20 Tr. 57-58).

Defendants clearly believe that Plaintiff did not properly account for the cyclical nature of the real estate market in adopting Mr. Nakleh's five-percent growth rate (Def. Br. 16, 31). That analysis does not win the day, however. I am satisfied from his credible and reliable testimony that Mr. Nakleh appropriately built that market factor into his choice of discount rate for the land's value. Moreover, he tempered the growth rate he selected to something far below what the data showed for 2012-2014 to the five percent rate that he selected, admitting that no one was expecting yearly double-digit increases going forward (July 18 Tr. 84-86).

To be sure, each side also challenges data points on comparable properties and discount rates that the other's appraiser selected. (*e.g.*, Pl. Br. 26, 30-31; Def. Br. 33-35). I conclude that although each has made some valid points, and there is room to disagree, these are matters that, unlike the growth rate, are not as material to the analysis, and, as importantly, are the types of

issue that squarely fall within the professional judgment of an appraiser.[18] I do not see any basis to enhance or diminish the standing of either expert's conclusions from these challenges.

Accordingly, I conclude that the value of the Subject Property is as set forth in Mr. Nakleh's 2013 Valuation: $11,700,000.

d. Summary of Damages Award

Plaintiff's damages can thus be calculated using the value immediately above, $11,700,000, less the contract price I have derived above, $9,129,116. This leaves damages for Plaintiff in the amount of $2,570,884 ($11,700,000 – $9,129,116 = $2,570,884). Plaintiff is also entitled to statutory interest at the rate of nine percent per annum, running from the date Mr. Nakleh used for his 2013 Valuation, January 9, 2013 (CPLR 5001, 5004).[19]

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Plaintiff is entitled to $2,570,884 in damages from Defendants; and it is further

ORDERED that Plaintiff is entitled to prejudgment interest at the statutory rate, running from the date of January 9, 2013; and it is further

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[18] To the extent that Defendants attempt to undermine Mr. Nakleh's reliance on foot traffic on the block of the Subject Property in assigning it value (Def. Br. 35), I reject that argument. David's testimony, upon which that challenge is based, is not something I can fully credit, given his interest in the matter and inconsistencies in his hearing testimony. Moreover, I am satisfied that both experts found that flow of people throughout the neighborhood was a meaningful and positive influence on the value of the Subject Property.

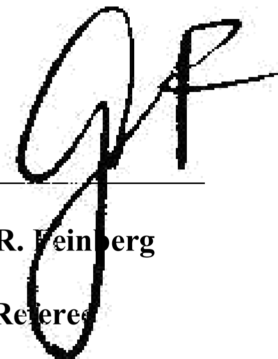
[19] Plaintiff invites me to apply the damages figure Mr. Nakleh derived to a date two months later than his valuation (i.e., March 22, 2013, the date Mr. Haims used). For the first time in a footnote at the end of its submission (Pl. Ex. 49 n.5), Plaintiff asserts that the difference between the two months is immaterial, and, although it is only implicit, it appears to be willing to forego two months of statutory interest in offering that later date. I decline Plaintiff's invitation; I have relied on Mr. Nakleh's 2013 Valuation dated as of January 9, 2013 (Pl. Ex. 4 at 1). I have no data backing up what the Subject Property would be worth two months later, and Plaintiff's footnote does not fill that gap. I note parenthetically that Defendants have also used a January 9, 2013 date throughout their brief, including in the analysis of payments due to Joseph under the Guaranty (Def. Ex. HH) upon which I have relied.

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Plaintiffs will serve a copy of this Decision and Order on all Defendants, together with notice of entry, within twenty days of said entry and file proof of said service with the Clerk.

This constitutes the Decision and Order of the Special Referee.

DATED: November 8, 2024



Jeremy R. Feinberg

Special Referee