SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CANDACE CARMEL BARASCH,

Petitioner,

- against -

WILLIAMS REAL ESTATE CO., INC., WILLIAMS CORPORATE REALTY SERVICES, LTD., WILLIAMS INTERNATIONAL REALTY SERVICES, LTD., WILLIAMS PM, INC., WILLIAMS MANAGEMENT REALTY CORP., WILLIAMS U.S.A. REALTY SERVICES, INC., REALTY PROGRAMS CORPORATION, MICHAEL T. COHEN, ROBERT L. FREEDMAN, ANDREW H. ROOS, FIRSTSERVICE CORPORATION and FS WILLIAMS ACQUISITION CO., LLC,

Respondents.

Index No. 600053/09
E-Filed
Part 60 (Fried, J.)
Mot. Seq. # 005

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT

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Petitioner Candace Carmel Barasch ("Petitioner") respectfully submits this memorandum of law in support of her motion (i) for summary judgment with respect to Petitioner's right to receive fair value for her shares (the "Shares") in Williams Real Estate Co., Inc. ("Williams" or the "Company") and the other Respondents pursuant to BCL Sections 623 and 910 and to recover her legal fees, costs, expenses and interest pursuant to BCL Section 623(h); and (ii) requiring Respondents to make an interim, immediate payment to Petitioner. Petitioner also seeks an order requiring Respondents to provide Petitioner with Williams's financial statements, ledgers and reports on an ongoing basis.

PRELIMINARY STATEMENT

In this proceeding, Petitioner is merely seeking what the law requires, what equity demands and what Respondents previously acknowledged in writing she is entitled to: the fair value for her Shares.

Petitioner was a 10.33% owner of Williams and the other corporate Respondents which were commonly owned affiliates of Williams (the "Satellites"). In October 2008, Respondents entered into a transaction with a subsidiary of FirstService Corporation ("FirstService") in which Respondents (i) transferred substantially all of Williams's assets to a new entity, and then sold a majority interest in that new entity to FirstService; and (ii) merged each of the Satellites into new entities owned by Williams and sold 100% of the surviving entities to FirstService (the "Transaction"). The Transaction was premised upon the parties' agreement that the assets being sold had a value of $42,250,000.

BCL Sections 623 and 910 provide that a disposition of substantially all of a company's assets ("asset disposition") or any plan of merger triggers a shareholder's rights to cease being a shareholder and receive fair value for her shares ("Appraisal Rights").

Respondents and their corporate counsel, Moses & Singer LLP ("M&S"), recognized that the Transaction included both multiple asset dispositions and mergers triggering Petitioner's Appraisal Rights. Respondents sent Petitioner six (6) separate notices, each stating that she had Appraisal Rights and Williams represented the same thing in the Purchase Agreement with FirstService. In an e-mail written the day after Petitioner elected to exercise her Appraisal Rights, Respondents' lead attorney on the Transaction unequivocally advised Respondents of Petitioner's Appraisal Rights:

[redacted]

We could not have said it better or more succinctly. Respondents nevertheless failed to comply with the appraisal procedures required under BCL Section 623, forcing Petitioner to commence this proceeding.

Even in this proceeding, Respondents do not dispute that there was an asset disposition and a merger of each of the Satellites. But they now maintain that Petitioner has no Appraisal Rights because the asset dispositions and merger were part of an internal "restructuring."

As Respondents and their corporate counsel repeatedly recognized at the time of the Transaction, this disingenuous position flies in the face of the express language of the BCL. Under Section 910(a)(1), there are specific exceptions for when an asset disposition or merger does not trigger Appraisal Rights, none of which concern restructuring or apply here. It is a black letter rule of statutory construction that when a statute lists an exception to a general rule, other exceptions are deemed to have been excluded. *Weingarten v. Bd. of Trustees,* 98 N.Y.2d 575, 583 (2002). Further, the rationale for Respondents' unwritten, self-serving exception does not even make sense here; the Transaction did not merely make nominal changes; it diluted Petitioner's interest in Williams, removed her as a director and changed the management of the

new operating company. BCL Sections 623 and 910 was designed to protect a minority shareholder's rights in a situation such as this one -- i.e., where a minority shareholder would otherwise be forced to accept a fundamental corporate change which it does not agree with or wish to participate in. *See, e.g.*, *Anderson v. Int'l Minerals & Chemical Corp.*, 295 N.Y. 343 (1946).

Respondents also are estopped from contesting Petitioner's Appraisal Rights by, *inter alia*, (i) noticing Board of Directors and Shareholder meetings for the express purpose of obtaining approval for the transfer of substantially all of the assets of Williams and merging the Satellites; (ii) notifying Petitioner in the aforementioned notices that she had the right to dissent from the Transaction and to exercise her Appraisal Rights; and (iii) not objecting after Petitioner elected to exercise her Appraisal Rights in reliance upon Respondents' notices. In *In re McKay,* 19 A.D.2d 815 (1st Dep't 1963), *appeal dismissed*, 13 N.Y.2d 1058 (1963) ("*McKay*"), the First Department held that a company is estopped from contesting a petitioner's appraisal rights when its notice of a shareholder's meeting stated that the petitioner had that right. As the Court held in language which applies with equal force here:

> Certainly, the corporation should not be permitted to take one position when it gave notice of the meeting, namely, that non-consenting shareholders, such as petitioners, would be entitled to an appraisal of their stock and then, when it gained its objective, to switch and take the position that the laws did not entitle them to an appraisal.

By repeatedly violating Petitioner's shareholder rights through conduct before, during and after the Transaction, Respondents also waived their right to challenge Petitioner's Appraisal Rights. In addition to notifying Petitioner that she had Appraisal Rights and staying silent when she elected to exercise them, this conduct included (i) not paying her any of the proceeds from the Transaction; (ii) refusing to recognize her rights to participate in the management of the

Company; (iii) breaching the February 17, 1990 Shareholders Agreement (the "Shareholders Agreement") in numerous respects; (iv) retaining the Company stock certificate which Petitioner tendered; and (v) failing to issue her any new ownership interest in any new entities which were created pursuant to the Transaction.

BCL Section 623(e) states that if it is determined that a shareholder does not have Appraisal Rights "he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action…" This is impossible without unwinding the entire Transaction.

The Court should also find that Respondents are liable for Petitioner's attorney's fees, costs and expenses with interest. Pursuant to BCL Section 623(h), the Court may issue such an award if the Court finds any one of the following: "(A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer or required advance payment was made by the corporation; (C) that the corporation failed to institute the special proceeding within the period specified therefore; or (D) that the action of the corporation in complying with the obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith." Not just one, but each of the four possible criteria for awarding costs, expenses and fees is present here – (A) the fair value of Petitioner's Shares materially exceeds what Respondents have been willing to pay, which is nothing; (B) the required offer and 80% advance payment were not made; (C) Respondents failed to institute this proceeding; and (D) as detailed below, Respondents have acted in bad faith.

Win, lose or draw on the issue of Appraisal Rights, Petitioner is also entitled to immediately receive more than $1,000,000 from Respondents. If Respondents prevail in this proceeding, they would still be obligated to pay Ms. Barasch $1,125,446 – her share of the initial proceeds from the Transaction which Respondents are allegedly holding in reserve. If Petitioner

prevails, she will, of course, be entitled to receive the fair value of her Shares. While Petitioner will ultimately show that this amount is at least $4,140,000, based upon Respondents and FirstService's valuation at the time of the Transaction, Petitioner should immediately receive $1,138,000 with interest, which is Respondents' present valuation of the Shares.

STATEMENT OF FACTS

The relevant facts supporting this motion with supporting citations to the record are set forth in full in the accompanying affirmation of John H. Reichman. Those facts are based upon Respondents' own documents and testimony. The following is a brief summary.

On March 6, 2008, Williams entered into a letter of intent ("LOI") with FirstService. Petitioner was not told of the deal with FirstService until August 2008, even though she was a member of Williams's Board of Directors.

Respondents and FirstService did not want Petitioner to remain as a shareholder and Respondents recognized that she could be an "impediment" to the Transaction. Indeed, as described in Point III below, Respondents' conduct and the terms of the Transaction blatantly violated the Shareholders Agreement.

As described below, the Transaction included the disposition of substantially all of the Company's assets and a merger of each of the Satellites, each of which triggered Petitioner's Appraisal Rights. Respondents removed Petitioner as an "impediment" to the Transaction by offering her Appraisal Rights. The notices Respondents sent Petitioner, which are described in detail below, state that Respondents were disposing of substantially all of Respondents' assets and merging the Satellites and specifically advised her that she could elect to exercise her Appraisal Rights.

In reliance upon Respondents' notices and a similar representation in the Purchase

Agreement, Petitioner elected to exercise her Appraisal Rights and not to enforce her rights under the Shareholders Agreement. By written notice dated October 8, 2008, Petitioner notified Respondents of this election, and subsequently tendered back her Williams stock certificate. The following day Respondents' corporate counsel emailed Respondents stating unequivocally that Petitioner had Appraisal Rights. Respondents did not object to Petitioner's election and to this date have kept her stock certificate. Respondents' motion to dismiss in this proceeding was the first time that Respondents stated that they were not going to be honoring the representations they made in their notices and the Purchase Agreement.

After the asset dispositions and merger, FirstService purchased (i) a 65% interest in the new Williams entity; and (ii) 100% of the limited liability companies the Satellites were merged into. In return, FirstService agreed to pay $27,462,000, with $19,223,750 paid at closing and another $8,238,715 in three years if certain earnings targets were met.

ARGUMENT

POINT I

SUMMARY JUDGMENT MUST BE GRANTED WHERE THERE ARE NO MATERIAL FACTS THAT CAN COMPETENTLY BE DISPUTED

Pursuant to CPLR 3212(b), summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." *See Andre v. Pomeroy,* 35 N.Y.2d 361, 364 (1974). A party opposing a motion for summary judgment must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 (1986) (citation omitted). "[C]ompetent evidence" is required. *Id.* at 325; *Indig v. Finkelstein*, 23 N.Y.2d 728, 729-30 (1968). Inferences drawn from facts must be logical, not speculative or

unreasonable. *Listopad v. Sherwood Equities, Inc.,* 52 A.D.3d 300 (1st Dep't 2008).

Here, as set forth in Petitioner's Rule 19-A statement, this motion is based upon Respondents' documents and testimony.

POINT II

THE ASSET DISPOSITIONS AND MERGERS EACH TRIGGERED PETITIONER'S APPRAISAL RIGHTS

The Transaction included the transfer of substantially all of Williams's assets and the merger of the Satellites. As Respondents and their counsel repeatedly recognized prior to this proceeding, they triggered Petitioner's Appraisal Rights pursuant to BCL Sections 623 and 909.

A. The Purpose and Rationale of BCL Section 623

Formerly, major corporate acts required unanimous shareholder approval. In order to ease the burden on majority shareholders, New York law was subsequently changed to permit a corporation to sell its assets upon majority approval, but premised this right on protecting the rights of the minority shareholders by affording them Appraisal Rights. *See* 2 WHITE NEW YORK BUSINESS ENTITIES, ¶B623.01 at p. 6-456 (2008). This statutory accommodation was first adopted by the New York Legislature in 1893 wherein it enacted legislation, currently codified in BCL §623:

> … designed to meet the evils pointed out by the courts by enabling a majority . . . to [take appropriate action] if they deem it was the best policy, and at the same time to protect the minority, if they regarded the [action] as opposed to their interests.

In re Timmis, 200 N.Y. 177, 181 (1910).

The legislative declaration that accompanied the 1982 amendments to the appraisal procedure made it clear that this protection acknowledged the right of a shareholder to receive fair value for his shares:

> A shareholder's right to dissent from certain corporate actions and to receive payment of fair value for his shares is a basic right of share ownership . . . . (Section 1 of L. 1982, ch. 202).

"[T]he premise is that shareholders should be provided an exit and liquidity by having the corporation provide cash if the shareholder wishes to separate from the changed enterprise." O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, §5:30 (2009) ("O'NEAL").

Thus, as this Court previously held, the BCL "protects dissenting shareholders from being forced to sell at unfair values imposed by those dominated the corporation." Ex. 3 at 6, *citing Cawley v. SCM Corp.*, 72 N.Y.2d 465, 471 (1988).[1] Appraisal Rights afford fair and just compensation to dissenting shareholders while allowing the majority to proceed with the merger. *Anderson v. Int'l Minerals & Chem. Corp.*, 295 N.Y. 343 (1946).

"The most visible benefit of appraisal is that it does provide a safety valve through which dissenters' unhappiness can be ventilated without interrupting the acquisition. A more ethereal, but no less important, rationale is that the existence of an appraisal remedy complements other monitoring mechanisms for self-dealing or ineptitude on the part of the board of directors." COX & HAZEN ON CORPORATIONS, §22.24, 1367 (2008).

As summarized in Eisenberg, *The Legal Roles of Shareholders and Management In Modern Corporate Decision Making*, 57 CALIF. L. REV. 1, 80 (1969):

> In short, at least in the context of the privately held corporation, the appraisal right is a mechanism admirably suited to reconcile the need to give the majority members of a normally perpetual organization the right to make drastic changes in the enterprise to meet new conditions as they arise with the need in such an organization to prevent the minority from being involuntarily dragged along into a drastically changed enterprise in which it has no confidence.

[1] References to "Ex." are to the exhibits annexed to the accompanying Affirmation of John H. Reichman, Esq., dated February 24, 2011 ("Reichman Affir."). References to "Tr." are to deposition transcript excerpts which are annexed to the Reichman Affir.

Appraisal Rights are not predicated upon any showing of harm to the shareholder, (although that is clearly the case here), but rather upon their fundamental right to opt out of a restructured company in which they no longer wish to participate:

> [T]he purpose of these provisions has been to give dissenters a simple and direct remedy not only where there is a harmful change in the share contract but also where they simply do not desire to accept shares in a different corporation or shares different from those they purchased. As Professor Lattin put it, the purpose has been "[t]o placate the dissenting minority and, at the same time, to facilitate the carrying out of changes of a desirable and extreme sort." COX & HAZEN ON CORPORATIONS, §22.24, 1368 (2008).

While a minority shareholder does not have to show any harm to exercise its Appraisal Rights, courts have been particularly sensitive to protect minority shareholders whose rights have been diluted or diminished:

> Though the early motivations for the appraisal remedy were to provide both liquidity and a means to exit for shareholders, today the appraisal remedy is the major protection minority shareholders have against acquisitions that involve a substantial conflict of interest on the part of the majority stockholder . . . in practice, as measured by when the remedy is actually exercised, the dominant function of appraisal is that of addressing a conflict of interest problem on the part of the majority stockholder. COX & HAZEN ON CORPORATIONS, §22.24, 1368-9 (2008).

Within the context of a squeeze-out of a minority shareholder, Appraisal Rights have proven the most effective and direct redress for the minority shareholder to secure fair value for his shares:

> Not uncommonly some of the directors or officers of a corporation selling all or substantially all of its assets become officers or key employees of the purchasing company and under advantageous employment contracts; thus minority shareholders may believe, perhaps with considerable reason, that the prospect of favorable employment terms influenced the decision of the selling corporation's officers and directors to cause it to enter into the sale transaction or that the favorable employment contracts were really part of the consideration the purchaser gave for the corporation's assets. O'NEAL, §5:16.

While Petitioner could dissent from the Transaction and elect to exercise her Appraisal Rights for good reason or no reason, she had good reason here. As explained more fully in the accompanying Reichman affirmation, the Transaction is replete with self-dealing. The controlling executives and directors have siphoned millions of dollars of fees off the top, claiming that they were entitled to "closing fees" and "retention bonuses."

B. The Transaction Included Three (3) Separate Asset Transfers Each of Which Triggered Petitioner's Appraisal Rights

As stated in Respondents' Notices and in the Purchase Agreement, the asset dispositions in the Transaction triggered Petitioner's Appraisal Rights.

1. The Disposition of Substantially All Assets Triggers Appraisal Rights

BCL §910(a)(1)(B) grants Appraisal Rights under BCL §623 to all shareholders in connection with any asset disposition with one exception not applicable here. It states:

> (a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such section, in the following cases:
>
> (1) Any shareholder entitled to vote who does not assent to the taking of an action specified in clauses (A), (B) and (C).
>
> * * *
>
> (B) Any sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation which requires shareholder approval under section 909 (Sale, lease, exchange or other disposition of assets) other than a transaction wholly for cash where the shareholders' approval thereof is conditioned upon the dissolution of the corporation and the distribution of substantially all of its net assets to the shareholders in accordance with their respective interests within one year after the date of such transaction.

In determining whether there has been a disposition of substantially all of a company's assets, courts look to the nature of the assets being sold or transferred and whether the transaction is outside the normal course of business. *In re Miglietta*, 287 N.Y. 246, 254 (1942); *Matter of Award*, 5 Misc.2d 817, 821 (Sup. Oneida Co. 1955). Thus, the statute is triggered where the assets essential to the ordinary conduct of a company's business are sold. *Id.* *See also Kaszubowski v. Buffalo Telegram Corp.,* 131 Misc. 563, 227 N.Y.S 435 (Sup. Erie Co. 1928) (the statute prevented the sale of any portion of its core business without shareholder approval); *Borea v. Locust Court Apartments*, 234 A.D. 450 (2d Dep't 1932) (shareholder approval and appraisal rights were required where a corporation apparently had transferred all of its assets other than an apartment building); *In re Drosnes*, 187 A.D. 425 (1st Dep't 1919).

"Substantially all" can therefore be considerably less than 100% of a company's assets, even as little as half or less. *O'Neal & Thompson's Oppression of Minority Shareholders and LLC Members*, §5:15, n. 36 (2009). *See also Katz v. Bregman*, 431 A.2d 1274 (Del. Ch. 1981) (proposed sale of corporation's assets, where such assets constituted over 51 percent of corporation's total assets and generated approximately 45 percent of corporation's net sales, amounted to sale of substantially all of corporation's assets, thus requiring shareholder approval); *Sterman v. Hornbeck*, 156 Wis.2d 556 (Ct. App. 1990) (the sale of two-thirds of a corporation's assets constitutes a sale of substantially all of its assets).

2. <u>Respondents Notify Petitioner That She Has Appraisal Rights</u>

Contemporaneously with the Transaction, Respondents notified Ms. Barasch that there were asset dispositions which triggered Petitioner's Appraisal Rights. By notices dated September 24, 2008, the Company scheduled a Board of Directors meeting for September 29, 2008 to consider the Transaction. Tracking the language of BCL Section 909, Respondents

described the Transaction as involving the "authorization and ratification of the proposed disposition of substantially all of the assets of the Company," and the "merger" of Williams, the Satellites and six other limited liability companies. (Emphasis added). The Board, over Petitioner's dissent, approved the Transaction.

Respondents then sought shareholder approval. On or about September 29, 2008, Petitioner received six (6) separate Notices of a Special Meeting of Shareholders for the Satellites to be held on October 8, 2008 (the "Satellite Notices"). The Satellite Notices again stated that the purpose of the meeting was to authorize "the proposed disposition of substantially all of the assets of the Company" and the merger. Each of the Satellite Notices advised Petitioner of her Appraisal Rights under BCL § 623, a statutory requirement, and invited Petitioner to exercise her Appraisal Rights.

On October 7, 2008, Petitioner received a Notice of Special Meeting of Shareholders for Williams to be held the following day, October 8, 2008. The stated purpose, once again, was to authorize "the proposed disposition of substantially all of the assets of the Company."

Respondents also recognized Petitioner's Appraisal Rights in the Purchase Agreement, a copy of which was delivered to her counsel prior to the shareholders meeting. In Schedule A of the Purchase Agreement, Respondents affirmatively represented that Petitioner "may agree to be redeemed, or may elect to exercise her statutory appraisal rights, in which case she will cease to be a Shareholder of Williams, Inc. . . ." (emphasis added).

Until they submitted their motion to dismiss the Petition, Respondents never denied that Petitioner had Appraisal Rights. Indeed, no one at Williams, including their in-house counsel, Jack Siegel, admitted to making a decision regarding Petitioner's Appraisal Rights prior to the initiation of this proceeding.

3. The Transaction Involved Three Separate Asset Dispositions

Consistent with its notices to Petitioner and representation in the Purchase Agreement, Williams made three (3) separate Asset Dispositions in the course of the Transaction. First, pursuant to an Asset Contribution Agreement, Williams transferred substantially all of its assets into a new operating company, Williams Real Estate Operations Co. LLC ("New Opco"), and received 999 of the 1,000 ownership units of New Opco.

Next, Williams transferred the membership interests which it had received in New Opco to another new entity, Williams Real Estate Management Co., LLC ("New Holdco"), in exchange for units in New Holdco. Since its membership interests in New Opco constituted substantially all of the assets of Williams after the first phase of the Transaction, this asset transfer to New Holdco also triggered Petitioner's Appraisal Rights.

Third, after the sale to FirstService, Williams transferred its entire interest in New Holdco to a new Delaware limited liability company. This constituted a third Asset Disposition.

After the closing of the Transaction, Williams was out of the commercial brokerage business and its only remaining operations were to collect receivables which pre-dated the Transaction with FirstService and pay (improperly) Respondents' legal fees in this proceeding.

The day after Petitioner elected to exercise her Appraisal Rights, Respondents' lead corporate counsel, Howard Herman of M&S, specifically advised Respondents that Ms. Barasch had the right to receive fair value for her shares. In an October 9, 2008 email, Herman wrote the following:

[redacted]

So given their repeated admissions and Respondents' own documents, what is Respondents' defense? In their motion to dismiss, they argued that the statute does not apply because it was part of a "corporate restructuring." This contention flies in the face of the express language of BCL Section 910 (a)(1)(B), cited above, which lists only one situation where an asset disposition does not trigger Appraisal Rights: a cash transaction where the corporation is being dissolved and the assets are being distributed to shareholders within a year.

Corporate "restructuring" is not an exception and cannot be read into the statute. It is a black letter rule of statutory construction that when a statute lists an exception to a general rule, other exceptions are deemed to have been excluded. *Weingarten v. Bd. of Trustees*, 98 N.Y.2d 575, 583 (2002).

Respondents' rationale for writing a new, additional exception into the statue also does not even make any sense here. This is not a situation where there was some nominal change; the entire operations of the Company were being changed with new shareholders, new management and a dilution of Petitioner's interest and management rights. The statute was designed for the very purpose of protecting minority shareholders, such as Petitioner, in situations such as this.

The sparse authority Respondents cited in their motion to dismiss for rewriting the statute is inapposite and even supports Petitioner's position. They argue that two other states have restructuring exceptions in their statutes. But New York has no such provision and the existence of the two other statutes only makes it clear that if the New York legislature wanted to create such an exception, it would have and could have done so.

Respondents also cited *Resnick v. Karmat Camp Corp*., 149 A.D.2d 709 (2d Dep't 1989) for the proposition that the transfer of assets to subsidiaries is not a transaction within the ambit of BCL Sections 909. That misrepresents the facts and holding of *Resnick*. There, the rationale

and underpinning of that decision was that the company did not dispose of substantially all of its assets; it "retained ownership of the corporate land and buildings" and only part of its operations were spun off. *Id*. at 710. Here, all assets in connection with the operation of Williams's business were disposed of and there was a subsequent transfer of control to FirstService.

C. The Merger of the Satellites Triggered Petitioner's Appraisal Rights

Respondents clearly and unequivocally stated in their notices to Petitioner that the Transaction included a merger of the Satellites which triggered Petitioner's Appraisal Rights. In the September 29, 2008 Notice of a Special Meeting of Shareholders to be held on October 8, 2008 with respect to each of the Satellites, Williams sought "approval of the Agreement and Plan of Merger" and specifically stated as follows:

> Each shareholder is hereby advised that the transactions contemplated by the proposed Merger Agreement would constitute a fundamental corporate change in the Company that, under the Business Corporation Law of the State of New York (the "BCL"), gives rise to a shareholder's right to dissent and to receive payment for his or her shares of common stock, no par value per share (the "Common Stock"), of the Company. BCL §623 sets forth the procedure to enforce a shareholder's right to receive payment for shares, a copy of which is attached hereto . . . (emphasis added).

The Notices even attached copies of BCL Section 623 setting forth the procedures which shareholders were required to follow to exercise their Appraisal Rights.

Consistent with Respondents' notices, the Transaction included the merger of each of the Satellites into a corresponding limited liability company owned by Williams. Under BCL §910(a)(1)(A), there are only three specific exceptions for when a merger does not trigger Appraisal Rights. The statute reads as follows:

> (a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such

section, in the following cases:

(1) Any shareholder entitled to vote who does not assent to the taking of an action specified in clauses (A), (B) and (C).

(A) Any plan of merger or consolidation to which the corporation is a party; except that the right to receive payment of the fair value of his shares shall not be available:

(i) To a shareholder of the parent corporation in a merger authorized by section 905 (Merger of parent and subsidiary corporations), or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations); or

(ii) To a shareholder of the surviving corporation in a merger authorized by this article, other than a merger specified in subclause (i), unless such merger effects one or more of the changes specified in subparagraph (b) (6) of section 806 (Provisions as to certain proceedings) in the rights of the shares held by such shareholder; or

(iii) Notwithstanding subclause (ii) of this clause, to a shareholder for the shares of any class or series of stock, which shares or depository receipts in respect thereof, at the record date fixed to determine the shareholders entitled to receive notice of the meeting of shareholders to vote upon the plan of merger or consolidation, were listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.

While not denying that there was a merger, Respondents maintained in their motion to dismiss that the second of the three exceptions in the statute applied – that Petitioner is a shareholder of the surviving corporations. (Respondents Br. at 8).

Respondents' own documents produced during discovery belie this argument. Petitioner and the shareholder individually owned the Satellites prior to the Transaction. As part of the Transaction, the Satellites were merged into the new limited liability companies (the "LLCs") with the LLCs being the surviving entities. The LLCs were owned by Williams and not Petitioner or any of the individual shareholders. Petitioner simply was not a "shareholder of the surviving corporation."

We should also add that if it is wrongly assumed that Petitioner somehow was a surviving shareholder, the subsequent sale of 100% of the Satellites would have triggered her Appraisal

Rights pursuant to BCL §910(9)(1)(B) because there would have been a transfer of all of the assets of the Satellites.

Consistent with the position that Respondents took in their Notices, the merger of the Williams entities triggered Petitioner's Appraisal Rights.

POINT III

RESPONDENTS ARE ESTOPPED FROM CONTESTING PETITIONER'S APPRAISAL RIGHTS

Having invited Petitioner to elect to exercise her Appraisal Right, and to forego exercising her rights under the Shareholders Agreement, Respondents are estopped from now contesting Petitioner's Appraisal Rights.

Where a corporation intends to proceed with an asset disposition outside of the ordinary course of business, shareholder approval is required under BCL §909(a). Recognizing that the Transaction was not, of course, made in the ordinary course of business, Respondents sought the directors' and shareholders' approval and notified Petitioner that she could elect to exercise her Appraisal Rights. In addition to the Notices, Respondent provided Petitioner's counsel with a copy of the Purchase Agreement, which similarly represented that Petitioner "may elect to exercise her statutory appraisal rights." In response to Notices and the representation in the Purchase Agreement, Petitioner submitted her Appraisal Rights election for each entity and tendered back her shares in Williams. Respondents never objected to the election (which they invited) and kept Petitioner's shares.

Under both theories of an estoppel claim, Respondents are now estopped from claiming that Petitioner's Appraisal Rights did not exist. First, the elements of a promissory estoppel claim are established where there was a clear and unambiguous promise, reasonable and foreseeable reliance, and injury. *Braddock v. Braddock*, 60 A.D.3d 84 (1st Dep't 2009).

Second, the elements of an equitable estoppel claim are established where there was (i) conduct which amounts to a false representation; (ii) intent that such conduct will be acted upon by the other party and knowledge of the real facts; (iii) lack of knowledge of the real facts by the party asserting estoppel; (iv) reliance upon the conduct by the party asserting estoppel; and (v) a prejudicial change in position by the party asserting estoppel. *BWA Corp. v. Alltrans Exp. U.S.A., Inc.*, 112 A.D.2d 850 (1st Dep't 1985).

This is best demonstrated in *McKay*, which is the leading case on this issue. There, like here, a company noticed a shareholder's meeting to obtain approval for the sale of assets. *McKay*, 19 A.D.2d at 815. The notice advised shareholders of their Appraisal Rights. *Id.* After the shareholders approved the sale, the company changed its position and argued that the transaction did not constitute a sale of substantially all of its assets (and therefore warrant Appraisal Rights) because the business sold constituted only 7% of the gross revenues of the company. *Id.*

The First Department upheld the shareholders' Appraisal Rights. The Court reasoned that shareholders are entitled to rely upon statements in a notice of meeting. Shareholders who might otherwise oppose the sale may have refrained from so doing in the belief that they had Appraisal Rights. *Id.* Thus, the Court held, the corporation cannot take one position in its meeting notice -- that non-consenting stockholders had Appraisal Rights -- and then, when it gained its objective, switch positions:

> Here, the petitioners, in reliance upon the statements of the corporation in connection with the notice of meeting, appeared at the meeting solely for the purpose of voting against the proposition, took no other proceedings therein except to vote nay, and then proceeded promptly in accordance with the law to obtain an appraisal and have incurred substantial expense in connection therewith. Certainly, the corporation should not be permitted to take one position when it gave notice of the meeting, namely, that non-consenting stockholders, such as petitioners, would be entitled to

> an appraisal of their stock and then, when it gained its objective, to switch and take the position that the law did not entitle them to an appraisal. *Id.*

The *McKay* case is squarely on point and precludes Williams from denying the Appraisal Rights which it had proffered to Petitioner and which Petitioner elected to exercise. This is, in fact, an even more compelling case than *McKay* for finding estoppel. Unlike here where substantially all of Respondents' assets were being disposed of, the company in *McKay* arguably did not need shareholder approval; it was only selling assets which generated 7% of the company's revenues. Yet the Court found that the Company was still estopped from taking a position contrary to that which was in its meeting notices.

Further, unlike in *McKay,* Petitioner gave up her right to block the Transaction because it violated her rights under the Shareholders Agreement. As detailed in the accompanying supporting affirmation, FirstService did not want Petitioner to remain as a shareholder. Respondents were worried that Petitioner would impede if not terminate the Transaction and Respondents' counsel wrote Respondents about provisions in the Shareholders Agreement "that Candace's attorneys may try to utilize to her benefit." Indeed, Respondents' conduct and the Transaction violated the Shareholders Agreement in the following respects among others:

(i) Article 3 provides that Petitioner shall be a member of the Board of Directors or any Executive Committee which performs Board functions. Respondents created an Executive Committee without making Petitioner a member (Ex. 4, p. 4; Ex. 11, Tr. 27; Ex. 9, Tr. 14). The Executive Committee approved the retention of Coady (Ex. 11, Tr. 33) and the LOI with FirstService without a Board meeting (Ex. 9, Tr. 26-29) and took over decision making authority concerning the Transaction. (Ex. 9, Tr. 12).

(ii) Article 8 gave Petitioner the preemptive right to subscribe for her pro rata portion of any new shares or securities exchanged for those shares. Petitioner was not given the right to retain a *pro rata* interest in Colliers. (Ex. 9, Tr. 131-133).

(iii) Article 12.1 prohibited shareholders from "playing any active role directly or indirectly" in any real estate brokerage company unless all shareholders (including the Petitioner) were given the opportunity to subscribe to shares of the new venture pro rata to their existing ownership in Williams. This prohibited the other shareholders from working for Colliers.

(iv) Article 11.2 prohibited the transfer of shares except in compliance with the Shareholders Agreement and Article 13.1 prohibited any amendment of the Shareholders Agreement without unanimous consent of all shareholders. The shareholders of Williams simply affected the Transaction and de facto amended the Shareholders Agreement, flagrantly violating Petitioner's rights.

In addition to giving up her rights under the Shareholders Agreement, Petitioner also gave up her right to block the Transaction because of Respondents' failure to comply with the Company's by-laws and BCL § 605(c), which require that there be at least ten (10) days notice of special shareholder meetings. As Respondents admit, they did not provide Petitioner with a notice of the October 8, 2008 Williams shareholders meeting until the afternoon of October 7th. (Ex. 6, Tr. 124; Exs. 47-48, 26).

In reliance on Respondents' Notices, Petitioner elected to exercise her Appraisal Rights and to receive "fair value" for the shares, and not to enforce her rights under the Shareholders Agreement, the By-laws and the BCL. Respondents are estopped from now claiming that they were only kidding when they represented to Petitioner that she had this right.

POINT IV

RESPONDENTS WAIVED THEIR RIGHT TO CONTEST PETITIONER'S APPRAISAL RIGHTS

By irremediably violating Petitioner's shareholder's rights through their statements, conduct and silence before, during and after the Transaction, Respondents waived their right to now contest Petitioner's Appraisal Rights.

Waiver is the intentional abandonment of a known right. *See Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 184 (1982). There is no need to show prejudice to the other side. *See In re City Bank Farmers Trust Co*., 184 Misc. 674, 682 (Sup. N.Y. Co. 1945). Waiver can be established by statements, omissions or a course of conduct. S*ee Madison Ave. Leasehold LLC v. Madison Bentley Assoc. LLC*, 30 A.D.3d 1, 5 (1st Dep't

2006); *General Motors Acceptance Corp. v. Clifton-Fine Cent. School Dist.*, 85 N.Y.2d 232, 236 (1995). A party may waive either claims or defenses that it has. *See Harris v. Hulbert*, 211 A.D. 301, 307 (1st Dep't 1925).

As previously discussed, Respondents (i) notified Petitioner that she had Appraisal Rights, (ii) did not object after she elected to exercise them, (iii) refused to treat Petitioner as a shareholder or recognize the rights she had under the Shareholders Agreement, (iv) refused to give Petitioner any proceeds from the Transaction, and (v) kept Petitioner's stock certificates which she tendered when she elected to exercise her Appraisal Rights.

This same course of conduct continued after the Transaction closed. Respondents (i) refused to give Petitioner any proceeds from the Transaction and never issued Petitioner any new stock certificates or any documentation reflecting her ownership in any of the new entities created from the Transaction; (ii) have continued to deny her right to participate in the management of Williams, which is being run by Cohen and Roos, without any Board meetings; and (iii) have refused to provide her with any current financial information.

Respondents' irremediable violation of Petitioner's shareholder rights precludes them from now claiming that she must remain a shareholder. BCL Section 623(e) states that if it is determined that a shareholder does not have Appraisal Rights "he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action." That cannot be done here; Humpty Dumpty cannot be put back together again. Short of unwinding the entire Transaction, this Court cannot reinstate the terms of the Shareholders Agreement upon a new entity which has new majority ownership. Petitioner's rights have been irremediably lost. Respondents' course of conduct has led to only one realistic, fair and equitable resolution of this dispute -- to pay Petitioner fair value for her Shares.

POINT V

PETITIONER IS ENTITLED TO RECOVER HER COSTS AND ATTORNEY'S FEES

BCL Section 623(h) provides that the Court may assess the costs, expenses and fees of a dissenting shareholder if the Court finds any one of the following:

> (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer or required advance payment was made by the corporation; (C) that the corporation failed to institute the special proceeding within the period specified therefore; or (D) that the action of the corporation in complying with the obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith. In making any determination as provided in clause (A), the court may consider the dollar amount or the percentage, or both, by which the fair value of the shares as determined exceeds the corporate offer.

Not just one but each of the four possible criteria for awarding costs, expenses and fees is present here – (A) the fair value of Petitioner's Shares materially exceeds what Respondents have been willing to pay, which is nothing; (B) the required offer and 80% advance payment were not made; and (C) Respondents failed to institute this proceeding.

Respondents have also acted in bad faith thereby triggering section (D). Their conduct includes (i) reneging on their representation that Petitioner had Appraisal Rights; (ii) failing to even notify Petitioner of the March 2008 LOI until August 2008; (iii) depriving Petitioner of her management rights; (iv) failing to provide Petitioner with documentation concerning the Transaction; (v) failing to advise Petitioner in writing that the asset transfer and merger had been approved as required by BCL Section 623(b); (vi) failing to tender advance payment equal to 80% of the price offered by the Company as requested by BCL Section 623(g); (vii) failing to initiate a special proceeding after they failed to offer within fifteen (15) days as required by BCL Section 623(h)(2); (viii) breaching the Shareholders Agreement in numerous respects; and (ix) failing to comply with discovery requests and even orders of the Court.

There are virtually no reported cases in which a company has blatantly ignored a shareholders's right of appraisal by failing to either offer the 80% advance payment or commence a special proceeding. Companies simply do not act the way Respondents have acted here. But cases have routinely awarded attorneys' fees and expert fees where the fair value of the shares materially exceeded the amount which the corporation offered to pay for them. *Lipe-Rollway Corp. v. Abrams*, 33 A.D.2d 1094 (4th Dep't 1970) (fair value of $22.50 per share; offer of $19.75 per share; 14% increase over amount offered by corporation); *Dynamics Corp. of Amer. v. Abraham & Co.*, 6 A.D.2d 683 (1st Dep't 1958), *modfg*. 5 Misc.2d 652 (Sup. N.Y. Co. 1956) (increasing allowances for experts where fair value was $19 per share, a 27% increase over offer of $15 per share); *Dorsey v. Stern Bros.*, 31 Misc.2d 747 (Sup. N.Y. Co. 1961) (fair value of $27.50 per share; $24 per share offer; 15% increase over offer amounted to $6,125); *Dimmock v. Reichhold Chem. Inc.*, 41 N.Y.2d 273 (1977) (suggesting that upon remand, Special Term could re-open the question of counsel fees where the differential between the offer of $3.82 and the found fair value of $4.75 (24% increase) totaled nearly $14,000); *Quill v. Cathedral Corp.*, 241 A.D.2d 593 (3rd Dep't 1997) (fair value of $900.25 per share materially exceeded the company's $600 per share offer warranting award of counsel fees).

Based upon the express criteria of BCL §623(h), and the uniform application of case precedent, the Court should find that Petitioner is entitled to recover her attorneys' fees, expert fees, and costs, with interest.

POINT VI

RESPONDENTS MUST MAKE AN IMMEDIATE PAYMENT TO PETITIONER

BCL Sec 623(g) requires that, upon consummation of a transaction, a corporation pay a shareholder holding appraisal rights 80 percent of the amount which the corporation considers to

be the fair amount of the shareholder's interest. This mandatory obligation to make a significant prepayment to the shareholder was designed to create a level playing field:

> The provision for advance payment was new with the 1982 amendments and was intended to assure dissenting shareholders payment on an expedited basis of a substantial portion of the undisputed value of their shares. A difference of opinion, it was felt, should not delay payment of the amount not in dispute. 2 White New York Business Entities, Par B623.05(4) at p. 6-485 (2010).

By not paying Petitioner any advance payment, Respondents have effectively achieved a strategic advantage by making Petitioner advance her own legal costs.

Further, win, lose or draw on the issue of Appraisal Rights, Petitioner is also entitled to immediately receive more than $1,000,000 from the Respondents. If Respondents prevail in this proceeding, they would still be obligated to pay Ms. Barasch $1,125,446, her share of the initial proceeds from the Transaction which Respondents are alleging holding in reserve. If Petitioner prevails, she will, of course, be entitled to receive the fair value of her Shares. While Petitioner will ultimately show that this amount is at least $4,140,000, based upon Respondents and FirstService's valuation at the time of the Transactions, the minimum amount Petitioner should immediately receive is $1,138,000.

Petitioner is also entitled to interest on those amounts. BCL Section 623(h)(6) requires an award of interest from the date of the corporate action with the only exception being if the court finds that the shareholder's refusal to accept the Company's offer under BCL Section 623(g) was "arbitrary, vexatious or not in good faith." *See Miller Bros. Ind., Inc. v. Lazy River*, 272 A.D.2d 166 (1st Dep't 2000). Since the Company never made any offer to Petitioner, this exception does not apply.

In practice, recent court awards of interest under BCL Section 623(h)(6) have varied from 6.5% to 9%. In *Jersey Partners, Inc. v. McCully*, 46 A.D.3d 256 (1st Dep't 2007), the First

Department unanimously affirmed the award by Justice Ramos of $21,393,161 including pre-judgment interest at the rate of 9% compounded monthly, costs and disbursements, plus post-judgment interest at the rate of 9% compounded monthly. In *In re Jamaica Acquisition Inc.*, 2009 WL 3270091 (Sup. Nassau Co. 2009), the Supreme Court, in the face of evidence that the Company's cost of borrowing was 6.5%, awarded 6.5% on the amount owed from the transaction date to the decision date and 9% on the award from the date of the decision to the entry of judgment.

Petitioner requests that the Court award Petitioner interest at the statutory rate of 9% per annum, compounded monthly from October 15, 2008.

CONCLUSION

Petitioner respectfully requests that the Court (i) grant her motion for summary judgment, (ii) order Respondents to make an interim payment to Petitioner; and (iii) order Respondents to provide financial documents.

Dated: New York, New York
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