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 ACQUISITIONCO, LLC.,

Respondents.

Index No. 600053/09
I.A.S. Part 60
(Fried, J.)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF WILLIAMS REAL ESTATE CO., INC.'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to CPLR § 3212, Respondents hereby respectfully oppose the motion for partial summary judgment submitted by Petitioner Candace Carmel Barasch ("Barasch"), and Respondent Williams Real Estate Co., Inc. ("Williams Oldco") hereby respectfully cross-moves for summary judgment dismissing Barasch's Petition (the "Petition")[1] against it on the ground that Barasch does not have a right to seek appraisal of her shares in Williams Oldco.[2]

PRELIMINARY STATEMENT

In this special proceeding, Barasch claims entitlement to the appraisal of her shares in Williams Oldco and six other Respondents on the basis of a series of transactions in 2008 that ultimately resulted in FirstService Corporation ("FirstService") owning a 65% interest in Respondents' business. Barasch brought her Petition seeking summary determination of her entitlement to appraisal rights, and Respondents moved to dismiss on the basis that neither the disposition of assets to subsidiaries nor FirstService's investment in Williams Oldco's business, triggered appraisal rights. In its Order of October 28, 2009, the Court rejected Barasch's argument and ruled that her claim to appraisal rights raised factual issues that required discovery. See Wang Aff. Ex. 3 at 11. Discovery is now complete, yet Barasch has failed to identify a ***single new fact*** about the nature of the transactions that would compel the Court to reverse its decision. Instead, she has submitted what amounts to a wildly untimely motion for reargument, recycling the same arguments deemed insufficient earlier. Neither time nor discovery has made them any more attractive. To the contrary, they remain entirely meritless.

Indeed, as shown herein, to the extent that her claim relates to her ownership in Williams Oldco, it is appropriately dismissed on summary judgment, for three simple reasons: (i) Barasch's claim to appraisal rights in Williams Oldco requires a finding that certain specified

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[1] Copies of the Petition and Respondents' Answer are annexed to the accompanying Affirmation of Peter N. Wang (the "Wang Aff.") as Exhibits 1 and 2, respectively.

[2] Although Barasch's claim to appraisal rights in the remaining Respondents is ultimately meritless, those Respondents have not moved for summary judgment and intend to contest her rights at trial.

transactions resulted in a disposition of "all or substantially all" of Williams Oldco's assets sufficient to trigger statutory appraisal rights; (ii) the law could not be more clear that a disposition of "all or substantially all" of a corporation's assets, for purposes of appraisal rights, only occurs when a transfer of assets effectively results in the dissolution or liquidation of the transferor's business; and (iii) the undisputed facts in this case demonstrate that, far from effectively dissolving or liquidating Williams Oldco's pre-transaction business, Williams Oldco, post-transaction, continued to operate, now through subsidiaries, the exact same business, with the exact same assets, managed by the exact same officers, with the exact same employees, and for the exact same clients. Indeed, it is no exaggeration to say that, as a practical matter, the only differences between Williams Oldco's business before and after the transactions are that, post-transactions, Williams Oldco is now in a stronger position to compete in the New York market and has changed the name on the door of its offices.

As shown herein, under these circumstances, Williams Oldco is conclusively entitled to summary judgment dismissing Barasch's Petition.

STATEMENT OF UNDISPUTED FACTS

1. The Parties

As discussed in greater detail in Section 2, infra, Respondent Williams Oldco is a full-service commercial real estate firm that, for decades, conducted its business directly and through the other Respondents. See Affidavit of Michael Cohen in Support of Motion for Summary Judgment (the "Cohen SJ Aff."), ¶ 2. Affidavit of Michael Cohen dated December 7, 2009 (the "Cohen Aff."), ¶ 2.[3]

Barasch was a shareholder in Williams Oldco and its affiliates. But, where each of the other shareholders were and had been active contributors to Williams Oldco's business,

[3] A copy of the Cohen Aff. is annexed to the Wang Aff. as Exhibit 4.

whether as brokers or (in the case of retired brokers Edwin Roos and Jerome Cohen) as business generators, Barasch was a mere passive shareholder. See Answer, ¶ 7-8. In 1997, Barasch inherited her shares from her father, who had been one of Williams Oldco's key brokers. Id., ¶ 6. Since that time, Barasch had long complained that Williams Oldco's profits were reinvested in its brokers, rather than distributed to shareholders as dividends. Id., ¶¶ 4-8. Thus, as discussed in greater detail in Section 4, infra, although Barasch was happy to have the opportunity to sell her shares she wanted to negotiate a better deal for herself than her fellow shareholders were getting as a way of recovering for imagined past slights. It is that conduct that has led to this litigation.

2. Williams Oldco: Pre-Transaction

Prior to the transactions at issue in this case, Williams Oldco operated for decades as a full service commercial real estate firm. That is, Williams Oldco represented tenants and landlords in acquiring and negotiating leases, and managed the operations of buildings. Cohen SJ Aff. ¶ 2. Williams Oldco conducted this business both directly and through certain subsidiaries and affiliates (collectively, with Williams Oldco, "Williams"). Specifically:

- **Six "Satellite" Corporations** - Realty Programs Corporation (a disbursement agent for Williams' buildings and operations' payroll), Williams U.S.A. Realty Services, Inc. (which served as the managing agent for buildings managed by Williams), Williams PM, Inc. (a payroll entity that was the legal employer of non-union employees for buildings Williams managed but did not own), Williams Corporate Realty Services, Ltd. (an entity that performed brokerage and consulting services for Williams' corporate clients), Williams Management Realty Corp. (a payroll entity that was the legal employer of union employees for buildings Williams managed but did not own) (collectively, the "Satellite Entities"), and Williams International Realty Services, Ltd. (an entity that held Williams' membership in the GVA Worldwide network of brokerage firms). Each of these satellites was owned, in the same percentages, by the same six shareholders: Michael Cohen (50.54%), Andrew Roos (21.19%), Jerome Cohen (10.44%), Barasch (10.33%), Robert Freedman (6.5%) and Edwin Roos (1%). See Cohen Aff., ¶ 2; Affirmation of Jack Siegel (the "Siegel Aff."), ¶ 4;

- **(8-12) Five wholly owned subsidiaries of Williams Oldco** – WS E-Com LLC (a subsidiary established to handle e-commerce), WREMA LLC (a holding company for Williams' interest in a Massachusetts real estate brokerage firm), Williams Licensing Co. LLC (an entity created to license a potential subsidiary to use the GVA mark as part of a deal that never closed), Williams Project Management LLC (an entity that oversaw filings, scheduling and compliance on construction projects) and WRECT, LLC ("Connecticut Holdco", a holding company for Williams' interest in a Connecticut brokerage firm). Cohen Aff. ¶ 2; Siegel Aff. ¶ 5; and

- **(13-16) Four partially owned subsidiaries** – Williams of Massachusetts LLC (a Massachusetts brokerage firm 43% owned by WREMA LLC), Williams Real Estate of Connecticut LLC ("Connecticut Opco," a Connecticut operating company 50% owned by WRECT LLC), WRENJ LLC ("NJ Holdco," a New Jersey holding company 41.67% owned by Williams Oldco), and Williams Real Estate Ownership Services ("NJ Opco," a New Jersey operating company wholly owned by WRENJ LLC). Cohen Aff. ¶ 2; Siegel Aff. ¶ 6.

Managing this entire complex network of corporations, pre-transaction, was an executive committee comprised of Michael Cohen, Andrew Roos, Robert Freedman, Brian Given, Mark Jaccom, and Jack Siegel. Deposition of Mark Jaccom (the "Jaccom Dep.") at 26:24-28:17; Deposition of Michael Cohen (the "Cohen Dep.") at 9:17-10:3, 11:23-12:20.[4] This executive committee oversaw Williams' day to day operations and was responsible for making strategic decisions about how Williams could better position, market and grow itself to compete in the New York market. Cohen SJ Aff. ¶ 3. The committee's most important and challenging responsibility, however, was to manage Williams' major asset – its brokers. Cohen SJ Aff. ¶ 4. Like all service companies, the most significant asset left in the elevators at the end of each day; without its brokers, Williams was just office space and furniture. Ibid.

It was that responsibility that ultimately precipitated the transactions at issue in this case. Although Williams' business had been successful over the prior 80 years as a family-run boutique, by early 2007 Williams' growth was being impeded by its inability to compete for the best brokers with bigger competitors that had more financial resources and broader

geographic footprint. As William Barrett explained, "[we] were not able to get talent. People would come in the door, either they wanted free agency payment of, you know, millions of dollars to come aboard, or they would go elsewhere and they would take less elsewhere." Deposition of William Barrett (the "Barrett Dep.") at 37:10-14.[5] Accordingly, in early 2007, the executive committee decided to explore the possibility of affiliating with an established international real estate firm that could provide a capital source to help grow Williams and expand its prestige and geographic reach. Cohen Dep. at 16:2-7 (testifying that Williams was looking for a "capital source to help [] grow the firm"); Barrett Dep. at 36:12 – 38:2. At that time, although confidentiality was obviously critical, Williams specifically informed Barasch that the firm was talking to potential investors and that a future transaction might take place. Deposition of Candace Carmel Barasch (the "Barasch Dep.") at 53:3 – 53:18; 84:6 – 90:11.[6]

3. <u>The Structure of the First Service Transaction</u>

In early 2008, Williams began discussions with FirstService, an established Canadian real estate brokerage firm with deep pockets and access to the widely recognized Colliers brand, both of which would directly address the strategic impediments to Williams' growth identified by the executive committee. <u>See</u> Barrett Dep. at 55:20-56:2. By March 2008 the discussions had progressed sufficiently that FirstService and Williams entered into a letter of intent providing for FirstService to invest in Williams. Wang Aff. Ex. 9. The Letter of Intent described the transaction as "the purchase by FirstService ... of 65% of the shares of Williams Real Estate Co., Inc." <u>Ibid.</u> Over the next several months, Williams and FirstService negotiated

[4] Copies of relevant pages from the Jaccom Dep. and Cohen Dep. are annexed to the Wang Aff. as Exhibits 5 and 6, respectively.

[5] Copies of relevant pages from the Barrett Dep. are annexed to the Wang Aff. as Exhibit 7.

[6] Copies of relevant pages from the Barasch Dep. are annexed to the Wang Aff. as Exhibit 8.

the precise structure of that investment. See Barrett Dep. at 66:10-67:6, 77:20-79:7. It was as follows.

A. The Restructuring

In order to facilitate FirstService's investment in Williams, Williams would first need to simplify its structure, while taking care not to fundamentally alter the interests of Williams' shareholders or the business of the firm. See Cohen Aff. ¶¶ 4-5. Under the negotiated structure, it would do so in five basic steps. Ibid.

First, Williams Oldco would establish a series of wholly owned subsidiaries (the "MergeCos"), into which the Satellite Entities would be merged. See Cohen Aff. ¶¶ 6-8. As a result of these transactions, each of the Satellite Entities would become a wholly owned subsidiary of Williams Oldco. Because each of the Williams Oldco Shareholders owned the Satellite Entities and Williams Oldco in identical percentages, the shareholders would receive additional Williams Oldco shares, pro rata, as compensation for the merger. See Cohen Aff. ¶ 9.

Second, Williams Oldco would drop a number of its assets (the "Williams Oldco Contributed Assets") into a newly-formed subsidiary ("Williams New Opco"). The assets not contributed would be: (a) Williams' Oldco's 100% interest in each of the Satellite Entities, WS E-Com LLC and WREMA LLC; and (b) WREMA LLC's 43% interest in Williams of Massachusetts LLC (collectively, the "Williams New Opco Excluded Assets"). See Cohen Aff. ¶¶ 10-13. In exchange for the Williams Oldco Contributed Assets, Williams Oldco would receive all 1,000 of the issued and outstanding units of Williams New Opco. Ibid.[7]

Third, Williams Oldco would then drop 999 of its 1,000 Units of Williams New Opco, representing a 99.9% interest in Williams New Opco, into another newly-formed

[7] As a result of this transaction (the "Williams New Opco Contribution"), Williams New Opco would become a wholly owned subsidiary of Williams Oldco, and Williams New Opco would hold the Williams Oldco Contributed Assets (including entities numbered 9-12 and 14-15 on the charts included in Mr. Cohen's affidavit). Williams Oldco thus would continue to own, through Williams New Opco, each and every asset it had prior to the Restructuring. See Cohen Aff. ¶¶ 10-13.

subsidiary ("Williams New Holdco") in exchange for 149.85 Class A Units of Williams New Holdco, making Williams New Holdco a wholly owned subsidiary of Williams Oldco. See Cohen Aff. ¶¶ 14-16.[8]

Fourth, Williams New Holdco, which already held a 50% interest in Connecticut Opco (through Connecticut Holdco, ownership of which would have been transferred to Williams New Opco as a Williams Oldco Contributed Asset) and a 41.67% interest in NJ Opco (through NJ Holdco, ownership of which would have been transferred to Williams New Opco as a Williams Oldco Contributed Asset), would engage in a series of transactions designed to provide Williams New Holdco with a 100% interest in Connecticut Opco and NJ Opco (collectively, the "Subsidiary Roll-up"). See Cohen Aff. ¶¶ 17-22.

To accomplish the Subsidiary Roll-up, Williams New Holdco would enter into contribution agreements with Corey Grubner ("Grubner," 50% owner of Connecticut Opco), Associated Realty, Inc. (36.33% owner of NJ Opco), David Simson (19% owner of NJ Opco) and Jeffery Schotz (3% owner of NJ Opco) (collectively, the "Non-Williams NJ Shareholders" and, collectively with Grubner, the "Non-Williams Shareholders"). Ibid. Pursuant to the contribution agreements: (1) Grubner would contribute his 50% interest in Connecticut Opco to Williams New Holdco in exchange for 20 newly issued Class A Units of Williams New Holdco; and (2) the Non-Williams New Jersey Shareholders would contribute their combined 58.33% interest in NJ Holdco to Williams New Holdco in exchange for 30 newly issued Class A units of Williams New Holdco. Williams New Holdco would then enter into contribution agreements

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[8] Since, following this transaction, Williams Oldco would remain the 100% owner of Williams New Opco – via Williams Oldco's direct .1% interest in Williams New Opco and Williams Oldco's 100% interest in Williams New Holdco (holder of the remaining 99.9% interest in Williams New Opco) – this transaction, too, would effect no changes in Williams Oldco's ownership of the assets: it would continue to own each and every asset it had owned before the corporate restructuring. Ibid.

with Williams New Opco, NJ Holdco and NJ Opco, as a result of which NJ Opco and Connecticut Opco would become wholly owned subsidiaries of Williams New Opco. Ibid.[9]

Finally, after the Restructuring was completed, and in order to free up shares in Williams to be used for broker retention and incentives, Williams would redeem the shares of Jerome Cohen and Edwin Roos. See Cohen Aff. ¶ 23; Deposition of Jack Siegel (the "Siegel Dep.") at 37:4-12.[10]

B. The FirstService Investment

So simplified, FirstService would then complete its investment in Williams pursuant to the Amended and Restated Purchase Agreement dated September 15, 2008, by: (i) acquiring 100% of the Satellite Entities from Williams Oldco; and (ii) acquiring from Williams New Holdco 650 units of Williams New Opco, representing a 65% interest in Williams New Opco. Answer, ¶ 21; Wang Aff. Ex. 11 (the "Purchase Agreement"), 12.[11]

C. The Taxco Transaction

Finally, after the completion of the FirstService investment, Williams would engage in another disposition of assets, purely as an accounting tool, to allow the three active Williams Oldco shareholders (Michael Cohen, Robert Freedman, and Andrew Roos) to equally divide among themselves their collective share of Williams' profits.[12] Cohen Aff. ¶ 36-41. To accomplish this goal, Williams Oldco would contribute its interests in Williams New Holdco to a

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[9] As a result of these transactions, Williams Oldco would hold a 75% interest in Williams New Holdco, and, through Williams New Opco, a 75% interest in CT Opco and NJ Opco. These transactions would actually *increase* the assets of Williams New Holdco by increasing Williams' Oldco's interest in CT Opco and NJ Opco, while merely diluting (not selling) Williams Oldco's interest in the Williams Oldco Contributed Assets. Ibid.

[10] Copies of relevant pages from the Siegel Dep. are annexed to the Wang Aff. as Ex. 10.

[11] As a result of these transactions, Williams Oldco would retain 100% of its pre-transaction interest in the Williams New Opco Excluded Assets and 35% of its interests in the Williams New Opco Contributed Assets, and FirstService would obtain a 65% interest in the Williams New Opco Contributed Assets.

[12] Absent the Taxco transaction, that collective share would have been divided based upon Cohen, Freedman and Roos' percent ownership in Williams, with Cohen getting the largest chunk, Roos a smaller piece, and Freedman the smallest piece of all.

new Delaware subsidiary ("Taxco") in which Williams Oldco would be the sole voting shareholder. Ibid. Freedman and Roos would receive non-voting shares in Taxco, and Taxco's operating documents would be written to allow Cohen, Freedman and Roos' combined share of the profits from Williams Oldco's business to be divided equally between the three of them. Ibid. This transaction would have no effect on Williams Oldco's business, or on Barasch.[13]

4. Barasch's Notice; Barasch's Purported Dissent; and the Transactions

With the foregoing structure negotiated, Williams, in or about August 2008, informed Barasch and her husband that the firm was close to signing a deal with FirstService and provided them with information about the structure of the transactions and the net proceeds the shareholders could expect to receive. Barasch Dep. at 140:13-141:16; 188:20-190:12. As a result of her lingering unhappiness over the fact that, as a passive shareholder (and non-broker), Barasch had not enjoyed benefits that broker-shareholders had over the years, Barasch and her husband expressed disappointment with their proportionate share of the net proceeds of the transaction, and, by e-mail dated August 19, 2008, asked Williams to "sweeten" its offer to her. See Wang Aff. Ex. 15. As her Petition makes clear, Barasch believed that she had been treated unfairly over the years, see Petition at 4, n.1, ¶ 23, Answer, ¶¶ 7-9, and was looking to be "made whole" by receiving an increased portion of the transaction's proceeds. Deposition of Michael Barasch (the "M. Barasch Dep.") at 121:10-13.[14] At no point, however, did Barasch want to stop, or even consider stopping, the transaction altogether. Barasch Dep. at 212:14-23. Rather,

[13] At the time this transaction actually occurred, Williams was uncertain whether Barasch had appraisal rights or not. As such, Williams drafted the Taxco operating documents to take into account both possibilities: (1) the Taxco operating agreement, dated October 16, 2008, provides that profits from the assets placed in Taxco will be split between Williams Oldco, Roos and Freedman as necessary to ensure an equal split of those profits between Cohen, Roos and Freedman, Wang Aff. Ex. 13; and (2) by side-letter dated October 15, 2008, Williams Oldco, Roos, and Freedman agreed that, notwithstanding the provisions of the Taxco operating agreement, to the extent that Barasch did not have appraisal rights and remained a shareholder, Barasch would receive her proportionate share of the profits, with only the remaining 90% of those profits to be split as provided for under the Taxco operating agreement. Wang Aff. Ex. 14.

[14] Copies of the relevant pages of the M. Barasch Dep. are annexed to the Wang Aff. as Exhibit 16.

it was in her interest to have the deal proceed. Ibid. Indeed, Barasch testified that she was "perfectly happy" to realize a return on her interest in Williams as a result of the FirstService investment, Barasch Dep. at 173:17-174:12, and considered the transaction "a good deal for the company" (ibid. at 174:13-22). Her only concern was the amount of money allocable to her for her interest in Williams.

By notice dated September 24, 2008, Williams informed Barasch of a September 29, 2008, meeting of the board of directors of Williams Oldco for purposes of authorizing certain steps in the transaction. By notice dated September 29, 2008 (the "Williams Oldco Notice"), Williams informed Barasch of a Special Meeting of the Shareholders of Williams Oldco to be held on October 8, 2008, for purposes of authorizing those same transactions. Wang Aff. Ex. 17. By notices also dated September 29, 2008 (the "Satellite Notices"), each of the Satellite Entities informed Barasch of Special Meetings of the Shareholders of those entities to be held on October 8, 2008 for purposes of authorizing the merger of the Satellite Entities. Wang Aff. Ex. 18.

At the October 8, 2008 meetings, each of the shareholders, other than Barasch, voted to approve the transactions. Answer, ¶ 29. Barasch voted against the transactions and, by written notice to Williams prior to the meetings, purported to exercise a right to dissent from the transactions and demanded payment of what she considered to be the fair value of her shares. Ibid. Having been approved by Williams' board of directors and shareholders, the transactions described above closed on October 16, 2008. Answer, ¶ 22.

5. Williams' Uncertainty as to Barasch's Right to an Appraisal

The documents generated in the period leading up to and after Barasch's dissent reveal that Williams was, at best, uncertain as to whether Barasch would have appraisal rights in Williams Oldco. Even Howard Herman, the senior partner on the transaction at Williams' transaction counsel, Moses & Singer LLP, was uncertain, noting that Williams might object to

any future assertion by Barasch of such rights. See Wang Aff. Ex. 19.[15] Thus, although the ***Satellite Notices*** contained language indicating that a shareholder dissenting from the mergers would be entitled to an appraisal of his shares, and enclosed a copy of the dissenter's rights statute as required by the B.C.L., the ***Williams Oldco Notice*** did not contain any such language and did not include a copy of the statute. See Wang Aff. Ex. 17, 18; Petition, ¶ 31. Significantly, this difference did not go unnoticed by Barasch; indeed, her counsel, Steven Greenes, specifically commented on the difference in an e-mail dated October 7, 2008. Wang Aff., Ex. 20. Similarly, as noted in note 14, supra, the Taxco Operating Agreement and side letter reveal Williams' uncertainty about Barasch's status and rights. Wang Aff. Exs. 13, 14.

Indeed, at no point during this period did Williams ever inform Barasch that she would have appraisal rights in Williams Oldco. Rather, the only "communication" from Williams that Barasch identifies in her motion as "informing her" that she would have appraisal rights in Williams Oldco is a single line reference in the appendix to the Purchase Agreement, which she alleges was "communicated" to her when Williams forwarded her the Purchase Agreement to review. See Petitioner's Memorandum of Law (the "Moving Brief" or "MB") at 17.

6. Williams Oldco's Post-Transaction Business

Regardless of Williams' beliefs and conflicting conduct at the time with respect to whether Barasch had appraisal rights in Williams Oldco, the fact is that she had no such rights. As set forth in Respondents' argument, below, the dispositive factor in determining whether Barasch has the appraisal rights she claims is whether the transactions complained of so altered

[15] Williams has appealed the Court's ruling that communications between Williams and Moses & Singer are not privileged as against Barasch, and references such documents only to provide proper context to the cherry-picked communications from Moses & Singer submitted by Barasch in support of her motion. Williams continues to maintain that no such documents ought to be considered by the Court.

Williams Oldco's business that the transactions were, in effect, a dissolution of Williams Oldco. They were not.

Indeed, it is incontrovertible that, other than the name on the door, Williams Oldco's business did not change after the transactions described above. Cohen Aff. ¶ 29; Cohen SJ Aff. ¶ 9; Jaccom Dep. at 59:24-60:5 (testifying that he remained CEO and that his duties did not change after the transaction):

- Prior to the transactions, Williams Oldco provided a full range of real estate brokerage services to its clients, including the representation of tenants and landlords in acquiring and negotiating leases, and management of building operations. Today, Williams Oldco, now through subsidiaries, provides a full range of real estate brokerage services to its clients, including the representation of tenants and landlords in acquiring and negotiating leases, and management of building operations. Cohen SJ Aff. ¶¶ 2, 5;

- Prior to the transactions, Williams Oldco's client base was Fortune 100 companies and local businesses, and included Pfizer, The Salvation Army, Colgate-Palmolive, Aetna, SONY USA, and Bertelsmann, among many others. Today, Williams Oldco's client base is Fortune 100 companies and local businesses, and includes Pfizer, The Salvation Army, Colgate-Palmolive, Aetna, SONY USA, and Bertelsmann, among many others. Ibid., ¶ 6.

- Prior to the transactions, Williams Oldco's top producing brokers included Alex Jinishian, Harry Blair, Brian Given, Leon Manoff, Mark Friedman, Mark Jaccom, Martin Meyer, Michael Joseph, Robert Getreu and Robert Tunis. Today, Williams Oldco's top producing brokers include Alex Jinishian, Harry Blair, Brian Given, Leon Manoff, Mark Friedman, Mark Jaccom, Martin Meyer, Michael Joseph, Robert Getreu and Robert Tunis. Ibid., ¶ 7;

- Prior to the transaction, Williams Oldco managed buildings, including 136 Madison, 655 Madison, 57 West 57th, 28-40 West 23rd, 11 Park Place, and others. Today, Williams Oldco manages buildings, including 136 Madison, 655 Madison, 57 West 57th, 28-40 West 23rd, 11 Park Place, and others. Ibid., ¶ 8; and

- Prior to the transactions, Williams' day to day business was managed by an executive committee composed of Michael Cohen, Andrew Roos, Robert Freedman, Brian Given, Mark Jaccom, and Jack Siegel. Jaccom Dep. at 26:24-28:17; Cohen Dep. at 9:17-10:3, 11:23-12:20. Today, Williams' day to day business is managed by an executive committee composed of Messers. Cohen, Roos, Freedman, Given, Jaccom, and Siegel. Jaccom Dep. at 60:20-61:10.

As the above makes clear, in all relevant respects, Williams Oldco's business today is essentially identical to Williams Oldco's business prior to the transactions. The only

distinctions of note are the brand under which Williams Oldco's business now operates and the resources now available to it. Cohen SJ Aff. ¶ 8.

7. **The Petition and Motion to Dismiss**

Despite that fact, on January 8, 2009, Barasch filed her Petition seeking a summary adjudication of what she claimed was the fair value of her shares in the Respondent entities. Wang Aff. Ex. 1, ¶¶ 71-79. In response, Williams Oldco and the other Respondents moved to dismiss the Petition, arguing that the transactions at issue did not trigger appraisal rights. The Court denied Petitioner's request for summary determination, granted Respondents' motion to the extent of dismissing FirstService and several other improperly named individual Respondents, and held that the question of whether Barasch had any appraisal rights at all in the Respondent entities depended on "factual issues which [could not] be determined on [a] pre-discovery motion." Wang Aff. Ex. 3 at 11. Discovery has now been completed, and, as shown herein, has entirely confirmed that Petitioner has no appraisal rights – and obviously so with respect to Williams Oldco. Accordingly, Petitioner's motion for summary judgment on liability should be denied in its entirety, and Williams Oldco's cross-motion for summary judgment dismissing the Petition should be granted.

ARGUMENT

POINT I

STANDARD ON A MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment, the movant's burden is to establish "that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 306 (1st Dept 2007), citing Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Once the movant has met that burden, to avoid summary judgment the party opposing summary judgment must come forward with "evidentiary proof in admissible form sufficient to require trial of material

questions of fact." People v. Grasso, 50 A.D.3d 535, 545 (1st Dep't 2008), quoting Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

There can be no question that summary judgment in Williams Oldco's favor, and denial of Barasch's motion with respect to Williams Oldco and the other Respondents, is appropriate. The parties dispute neither the facts of the transactions in issue nor that Williams Oldco, today, continues to engage in precisely the business it conducted prior to those transactions. As demonstrated below, these facts establish Williams Oldco's entitlement to judgment as a matter of law, and the cross-motion should be granted. Additionally, for the reasons set forth below, Barasch's motion should also be denied with respect to the Satellites.

POINT II

BARASCH HAS NO RIGHT TO AN APPRAISAL OF HER SHARES IN WILLIAMS OLDCO

Although Barasch contends that certain of the steps involved in the above described transactions amount to a disposition of assets sufficient to trigger appraisal rights in Williams Oldco, that is simply not the case. On the contrary, Williams Oldco is entitled to summary judgment dismissing her claim to appraisal rights.

A. The Law of Appraisal Rights

The right of a dissenting shareholder to obtain the fair value of her shares upon the disposition of all or substantially of a corporation's assets derives from statute. BCL § 910(a)(1)(B) provides that "[a] shareholder of a domestic corporation shall, subject to and by complying with section 623 … have the right to receive payment of the fair value of his shares and other rights and benefits provided by such section" upon her dissent from "[a]ny sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation which requires shareholder approval under section 909 …" N.Y. BCL § 910(a)(1)(B) (2011). BCL § 909(a), in turn, provides that shareholder approval is necessary for "[a] sale, lease, exchange or

other disposition of all or substantially all of the assets of a corporation, if not made in the usual or regular course of the business actually conducted by such corporation ..." N.Y. BCL § 909(a) (2011). The two part test articulated by BCL § 909(a) is *conjunctive*: in order for a dissenting shareholder to get appraisal rights, the triggering transaction must be *both* a "sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation" *and* "not made in the usual or regular course of the business actually conducted by such corporation." As a result, an inability to demonstrate either of the foregoing requirements fully disposes of a claim for appraisal rights.

That is the case here. Simply put, Barasch cannot demonstrate that Williams Oldco engaged in a "sale, lease, exchange or other disposition of all or substantially all" of its assets.

In this regard, the key defect on which Petitioner's case founders was first articulated in In re Timmis, 200 N.Y. 177 (1910), a case analyzing whether the sale of a calendar business fell within scope of BCL § 909's predecessor statute — which, unlike the current statute, afforded appraisal rights to shareholders dissenting from sales of "*any part of*" (rather than just substantially all of) a corporation's assets. Even under that broader standard, the Court of Appeals held that the critical issue was whether the sale:

> would result in complete paralysis of every power required to conduct a calendar department, and to this extent it would go out of business. Such a sale would therefore be corporate suicide to a certain extent, and to that extent a sale or abandonment of the charter.

200 N.Y. at 183.

Now that the statute has been narrowed to afford appraisal rights only to shareholders dissenting from sales of "all or substantially all" of a corporation's assets, courts continue to apply the same test. But now, the question is whether the sale resulted in the "paralysis,"

"suicide," "sale," or "abandonment" of the ***entirety*** of the corporation's business – not just a part thereof. For example:

- Posner v. Post Road Dev. Equity L.L.C., 678 N.Y.S.2d 350 (2d Dep't 1998) (sale of a parcel of land appraised at between 62% and 93% of corporation's total assets not a sale of "all or substantially all" of corporation's assets where "the conveyance did not result in a dissolution or a liquidation of the corporate assets [internal citations omitted] since the corporation retained a valuable leasehold interest in a second parcel of land of comparable size and location");

- Soho Gold, Inc. v. 33 Rector Street Ltd., 642 N.Y.S.2d 684 (1st Dep't 1996) (sale of building not a sale of "all or substantial all" of corporation's assets where the corporation retained other valuable property and the sale would not change the nature of the company's business);

- Resnick v. Karmax Camp Corp., 540 N.Y.S.2d 503 (2d Dep't 1989) (transfer of camp operations and buses to two newly formed wholly owned subsidiaries is not a sale of "all or substantially all" of transferor's assets: "The reason, quite simply, is that these transactions did not result in a liquidation, in whole or in part, of the camp business operated by the respondent which retained ownership of the corporate land and buildings");

- Dukas v. Davis Aircraft Prods. Co., Inc., 516 N.Y.S.2d 781 (2d Dep't 1987) (sale of building not a sale of "all or substantially all" of corporation's assets where, post-sale, selling corporation engaged in the same business as it had prior to the exchange, and "[t]hus, the transaction did not result in a liquidation, in whole or in part, of Davis Aircraft's business");

- Story v. Kennecott Copper Corp., 394 N.Y.S.2d 353 (Sup. Ct., Bronx County 1977) (sale of shares in a subsidiary that held 55% of the assets of the corporation not a sale of "all or substantially all of the assets" within BCL § 909).

Under this standard, and given the facts demonstrating the lack of change in Williams Oldco's business, there is no way that Barasch has appraisal rights in Williams Oldco.

One basis for her claim to the contrary is easily dismissed. Barasch claims she has appraisal rights by virtue of the Williams New Opco Contribution and the subsequent Williams New Holdco Contribution. Even without engaging in a comparison of Williams Oldco's business before and after these transactions, the law is clear that a transfer of assets to a subsidiary (as occurred with respect to the Williams New Opco and Williams New Holdco Contributions) will not constitute a disposition sufficient to trigger appraisal rights. See Resnick, 540 N.Y.S.2d at 504 (disposition of camp and bus operations to newly formed wholly-owned

subsidiaries did not trigger appraisal rights); In re Levental, 271 N.Y.S. 493, 497-498 (1st Dep't 1934) (disposition of key asset to newly formed, partially-owned subsidiary did not trigger appraisal rights even under broader terms of predecessor statute).[16]

The other transactions at issue fare no better as triggers of appraisal rights. Indeed, even the ultimate sale of a 65% interest in the assets to FirstService fails to do so, for the simple reason that, as noted above, there is and can be no dispute that Williams Oldco, now through subsidiaries, has continued to engage in the very same business it always has – the brokerage and management of real estate, and tenant representation – under the same management, for the same clients, with the same brokers. Cohen SJ Aff. ¶¶ 2, 5-8; Barasch Dep. at 212:24-213:8. As such, Timmis and its progeny control.[17]

Barasch's response to these authorities and facts, in her summary judgment brief, is to change the subject and cite to vague language in treatises, a Delaware case, Katz v. Bregman, 471 A.2d 1274 (Del. Ch. 1981), and a Wisconsin case Sterman v. Hornbeck, 156 Wis. 2d 556 (Wis. Ct. App. 1990). Her reliance on these authorities is significantly misplaced.

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[16] In her motion for summary judgment, Barasch attempts to distinguish Resnick by arguing that the corporation in Resnick "retained ownership of the land and the buildings." 540 N.Y.S.2d at 504. While that is true, it is clearly irrelevant; the Resnick Court did not address (let alone rely on) the value of those "retained assets," and, in fact, ***expressly stated*** that "the reason [that the transaction did not trigger appraisal rights], quite simply, is that these transactions did not result in a liquidation, in whole or in part, *of the camp business* operated by the respondent ..." – the very business the corporation had transferred to its newly formed wholly-owned subsidiary. Ibid. (emphasis added). No amount of desperate hand-waving can obscure the Appellate Division's clearly articulated reasoning, which is directly on-point in the case at bar.

[17] The correctness of this precedent is perhaps most apparent from Barasch's cynical attempt to use the Taxco Contribution as a basis to seek appraisal. It is undisputed that the Taxco Contribution had ***literally no effect*** on the operation of Williams Oldco's business or Barasch's rights as a shareholder. Cohen Aff. ¶¶ 36-41. The ***only*** effect of the Taxco Contribution was to divide Cohen, Freedman and Roos' collective share of Williams Oldco's profits equally among them, rather than by percent interest in Williams Oldco. Ibid. Neither Williams Oldco's business nor Barasch's interest in that business was any different the day after the Taxco Contribution than it was the day before the Taxco Contribution. Ibid. And yet Barasch asserts that ***this*** transaction ought to trigger the application of a statute she affirmatively argues was enacted as a means of preventing minority shareholders from being "dragged along into a drastically changed enterprise." MB at 8, quoting Eisenberg, The Legal Roles of Shareholders and Management In Modern Corporate Decision Making, 57 CALIF. L. REV. 1, 80 (1969).

For instance, even were Delaware case law applicable in this action (and it is not), the Delaware Chancery Court, in Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 (Del. Ch. 2004), acknowledged that the decision in Katz "appear[ed] to deviate from the statutory language in a marked way." 858 A.2d at 378 n. 53 (describing Katz as a "striking" deviation). As the Hollinger court confirmed, the Katz decision must be understood as arising out of – and limited to – its particular context. 858 A.2d at 385 n.77 (describing Katz as "[the] ***only*** case finding assets worth less than 60% of a company's value to be 'substantially all' the company's assets, and doing so when sale at issue came on heels of other substantial asset sales and where the assets to be sold had been the company's only income-producing facility during the previous four years") (emphasis added). Synthesizing Delaware's case law, the Hollinger court then went on to explain that such limited asset sales could only be considered sales of "substantially all" of the corporation's assets where "the record [] reveal[s] great doubt about the viability of the business that would remain, primarily because the remaining operating assets were not profitable," 858 A.2d at 385, and, finally, noted that, where, as with Williams Oldco, the corporation retains a substantial interest in a "viable, ongoing component of the corporation, the sale is not subject to [Delaware's appraisal rights statute]" (ibid.).

And if anything, Barasch's Wisconsin case is even worse for her position. As the court in Sterman explained, the critical question facing the court on an appraisal proceeding is whether the sale "serves to destroy the fundamental purpose for which the corporation was organized." 156 Wis. 2d 565. Thus, where the corporation in Sterman sold its entire ongoing business, corporate name, and goodwill, and retained only promissory notes and miscellaneous vehicles, the relative value of the promissory notes was irrelevant, because the sale ended the corporation's existence as an ongoing business. Ibid. Needless to say, both of these cases stand in stark contrast to the transaction in issue here. Simply put, even under the authorities cited by Barasch, she is not entitled to appraisal rights.

B. Barasch's Waiver and Estoppel Arguments Cannot Salvage Her Claims With Respect to Her Shares in Williams Oldco

Perhaps recognizing that the law of appraisal does not favor her, Barasch argues that Williams Oldco ought to be estopped from denying her a right to an appraisal and/or has waived its right to argue she was not entitled to an appraisal. Indeed, given the law and facts as set forth above, that is the only basis on which Barasch can be seeking an appraisal of her shares in Williams Oldco. But under the facts developed in discovery, these arguments, too, fail to provide a basis for granting Barasch appraisal rights.

(1) Barasch cannot establish the elements of estoppel

As the Court of Appeals has explained, estoppel:

> is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought

Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 7 N.Y.3d 96, 106 (2006), quoting Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 184 (1982).

Thus, in order to establish estoppel, Barasch must demonstrate: (1) conduct by Williams Oldco that is equivalent to an affirmative misrepresentation or a concealment of material facts or that was designed to give Barasch the impression that Williams Oldco would not contest her right to appraisal; (2) that Williams Oldco intended or expected Barasch to act on that conduct; (3) Williams Oldco's actual or constructive knowledge of the real facts; and (4) that Barasch in fact detrimentally relied on Williams Oldco's conduct. Fundamental Portfolio Advisors, 7 N.Y.3d at 106-107 (in the absence of detrimental reliance, "an essential element of estoppel is lacking") (internal quotation omitted); Lynn v. Lynn, 302 N.Y. 193, 205 (1951) (reversing Appellate Division ruling and holding there could be no estoppel where plaintiff

provided no evidence of reliance and failed to even allege it); Fuchs v. N.Y. Blood Center, Inc., 275 A.D.2d 240, 41 (1st Dep't 2000) ("The availability of [equitable estoppel] arises when a party, while knowing the true facts all along, makes a false representation or conceals a material fact with the intention that the other party will act thereon"); BWA Corp. v. Alltrans Exp. U.S.A., Inc., 112 A.D.2d 850, 853 (1st Dep't 1985) (discussing elements of estoppel). Barasch cannot meet these requirements for three independent and dispositive reasons.

First, Williams Oldco did not make any incorrect representations to her about her appraisal rights in Williams Oldco. The Williams Oldco Notice did ***not*** recite that Barasch would have appraisal rights. To the contrary: while the language of the Satellite Notices stated that dissenting shareholders would have appraisal rights, Williams specifically deleted that language from the Williams Oldco Notice – a fact Barasch's counsel noticed and questioned. See Wang Aff. Ex. 19. Nor does the language of the Purchase Agreement save her claim; the language she cites was not a representation to her at all. Thus, Williams Oldco did not make any false statement or engage in any conduct that could be a predicate for an estoppel claim.

Second, even if Williams Oldco had made a misrepresentation, Williams Oldco had no intent to deceive Barasch or to induce Barasch to engage in any action or inaction based on her receipt of the Williams Oldco Notice or the Purchase Agreement.[18] Siegel Aff. ¶¶7-10. Absent an intent to deceive, Barasch cannot estop Williams Oldco from now raising objections to her request for an appraisal. See Werking v. Amity Estates, 2 N.Y.2d 43, 53 (1956) (to apply estoppel "the person sought to be estopped must [have done] some act or ma[de] some admission *with an intention of influencing the conduct of another*") (quotation omitted, emphasis added)

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[18] Self-evidently, Williams did not include a reference in the Purchase Agreement to Barasch's potential exercise of appraisal rights as part of some scheme to later provide her the agreement as a means of deceiving her. In any event, while Barasch notes that the Purchase Agreement itself was delivered to her counsel prior to her dissent, ***Barasch never alleges that, prior to her dissent, either she or her counsel noticed the language she now relies on***. Absent any evidence that she noticed the cited language in advance of dissenting, that language in the Purchase Agreement is irrelevant to any estoppel claim.

(Dombrowski v. Samaritan Hosp., 47 A.D.3d 80, 83 (3d Dep't 2007) (plaintiffs could not estop defendants from asserting statute of limitations where plaintiffs "offer[ed] no evidence of an intent to deceive or any affirmative misrepresentation"), MB at 17-18 (acknowledging that intent to deceive and induce reliance is an element of estoppel).

Third, even without any of the foregoing, Barasch cannot prevail on her estoppel theory for the simple reason that she ***admits*** that she did not detrimentally rely on Williams Oldco's supposed misrepresentation. Indeed, although Barasch's counsel submits an affidavit asserting, under penalty of perjury, that Barasch "reli[ed] upon Respondents' notices and their representation in the Purchase Agreement" when she "elected to exercise her appraisal rights and not to block the Transaction," Affirmation of John H. Reichman ¶ 24, a "fact" to which he is obviously incompetent to testify,[19] his client, under oath at her deposition, stated just the opposite – repeatedly testifying that she was in favor of the transaction and, critically, that the thought of acting to prevent it from going forward ***never crossed her mind***:

> Q: At any point, Ms. Barasch, did you consider trying to stop the transaction all together?
>
> A: No.
>
> Q: You wouldn't have wanted to do that, would you?
>
> A: No.
>
> Q: Because that would not have been in your interest to do that?
>
> A: No.

Barasch Dep. at 212:14-23.[20] That fact, alone, precludes Barasch from relying on estoppel.

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[19] It need hardly be said that an attorney's hearsay affirmation as to his client's supposed mental state cannot create an issue of fact precluding summary judgment. Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980) (attorney affirmation as to facts not within his personal knowledge not sufficient to create issue of fact).

[20] This circumstance dispositively distinguishes this case from In re McKay v. Teleprompter Corp., 19 A.D.2d 815 (1st Dep't 1963). In McKay, the court found that the plaintiffs could have solicited proxies in an attempt to oppose the transaction at issue in that case, but had not done so in reliance on the corporation's assertion that dissenting shareholders would have appraisal rights, and, on that basis, estopped the corporation from contesting the shareholders' entitlement to an appraisal. 19 A.D.2d at 815.

(2) Barasch cannot establish waiver

Barasch's waiver argument is similarly unavailing. Waiver is "the voluntary relinquishment of a known right . . . [and] must be made with both knowledge of the right's existence and an intention to relinquish the right." N.Y. Jur. 2d Estoppel, Ratification and Waiver, § 74 (2011). Waiver is an extraordinary remedy and may not be "lightly presumed." Gilbert Frank Corp. v. Fed. Ins. Co., 70 N.Y.2d 966, 968 (1988); Cibao Corp. v. Royal Indem. Co., 205 A.D.2d 658 (2d Dep't 1994) (same). Rather, the courts look for ***unequivocal*** conduct undeniably signaling an intent to waive the right in question. Silverman v. Silverman, 304 A.D.2d 41, 46 (1st Dep't 2003) (a waiver "must be clear, unequivocal and deliberate").

Here, the claim fails for two reasons. First, Williams Oldco did not engage in "clear, unequivocal" conduct waiving its right to object to Barasch's claim of appraisal rights in her shares of Williams Oldco. Indeed, Williams Oldco's conduct – including Howard Herman's indication that Williams Oldco might contest her appraisal rights; the deletion of the reference to appraisal rights from the Williams Oldco Notice and the non-inclusion of the appraisal statute therewith; and the drafting of the Taxco operating documents to account for the possibility that Barasch would remain a shareholder – eviscerates any such claim.[21]

Second, waiver requires the ***intentional*** relinquishment of a ***known*** right; if the party alleged to have waived a right did not actually know that it had the right in question, there can be no waiver:

[21] Barasch's argument that Williams somehow waived its objections by "not treating her like a shareholder" after she dissented, MB at 21, is specious. Section 623(e) of the BCL provides that, upon purporting to dissent, a shareholder – even one who is not in fact entitled to appraisal rights – "cease[s] to have any of the rights of a shareholder" unless and until "a court shall determine that [she] is not entitled to receive payment for [her] shares," at which point Barasch would be "reinstated to all [her] rights as a shareholder." N.Y. B.C.L. § 623(e)(2011). Applying this language, the court in Rudel v. Eberhard Faber Pencil Co., 146 NN.Y.S.2d 498 (Sup. Ct., Special Term, Kings County 1955) held that a corporation was free to deny dividends to dissenting shareholders. Similarly in Sandfield v. Goldstein, 308 N.Y.S.2d 25 (3d Dep't 1970), the Appellate Division noted that a shareholder who asserted a right to appraisal could not share in the benefits of the transaction. In other words, in "not treating Barasch as a shareholder," Williams acted precisely as prescribed by the statute. Self-evidently, that cannot be a basis for a waiver argument. Should the Court grant Williams Oldco's motion, Barasch will return to her status as a shareholder and be paid her proportionate share of the proceeds of the transaction.

> A waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. … In the present case *no waiver was effected because the plaintiff had no knowledge of the right he is charged with having knowingly and intentionally relinquished.*

Werking, 2 N.Y.2d at 52 (quotation omitted, emphasis added). See also MB at 20 ("waiver is the intentional abandonment of a known right"). In her motion for summary judgment, and her statement of undisputed facts in support thereof, however, Barasch affirmatively argues that Williams Oldco and its attorneys believed that she ***was*** entitled to appraisal rights – in other words, that Williams Oldco did ***not*** know that it had a right to contest her claim to appraisal rights. MB at 2 ("Respondents … recognized that the Transaction … trigger[ed] Petitioner's Appraisal Rights [sic]"). Accordingly, on Barasch's own theory, Williams Oldco did not have sufficient knowledge of its right to contest Barasch's appraisal claim for *any* conduct by Williams Oldco to constitute a waiver. In any event, the undisputed evidence is that Williams Oldco did not intend to waive its right to object to her dissent. Siegel Aff. ¶ 11.

For both those reasons, the waiver argument fails to raise triable issues of fact.

POINT III

BARASCH HAS NO RIGHT TO AN APPRAISAL OF HER SHARES IN THE SATELLITE ENTITIES

Barasch similarly has no right to seek appraisal of her shares in the Satellite Entities – and certainly is not entitled to summary judgment on that issue. The Business Corporation Law expressly provides that the shareholders of the surviving corporation in a merger may not dissent. N.Y. BCL § 910(a)(1)(A)(ii) (2011). And, although the statute does not explicitly deny dissenter's rights to shareholders, like Barasch, who have identical shareholdings in both the surviving corporation and the dissolving corporation, the clear rationale of the statute – that a shareholder in the entity that continues to do business should not be heard to complain that he never intended to be a shareholder of that enterprise – implicitly prohibits appraisal rights

in this case. It simply makes no sense to suggest that Barasch could have appraisal rights in entities that, in all practical respects, she would continue to own even after being paid the fair value of her ownership interests. Allowing such a result would elevate form over substance.[22]

POINT IV

BARASCH'S REQUEST FOR ATTORNEYS' FEES AND AN IMMEDIATE PAYMENT MUST BE DENIED

Finally, the Court must deny Barasch's request for attorneys' fees and an immediate payment of 80% of the supposed fair value of her shares. As shown above, Barasch does not have any appraisal rights, and thus the authorities she cites for the proposition that attorneys' fees are appropriate or that an immediate payment is due are entirely inapposite.

In any event, even were the Court to grant summary judgment in Barasch's favor on all issues, an award of attorneys' fees would be clearly inappropriate. First, the Court cannot award attorneys' fees on the ground that Williams failed to offer Barasch 80% of the value of Williams or initiate a special proceeding. The appraisal rights statute acknowledges that corporations have a right to dispute a shareholder's assertion that they are entitled to appraisal rights. N.Y. B.C.L. § 623(h) (2011). It would be an absurd result if doing so *per se* triggered an obligation to pay attorneys' fees.

Similarly, it would self-evidently be premature to award fees on the supposed basis that the value of Williams materially exceeds the value identified by the corporation – the Court has not yet determined what the value of Williams is. Indeed, Barasch has not sought summary judgment on issues of value. While the Court may later determine that attorneys' fees

[22] In denying Respondents' motion to dismiss on this issue, the Court observed that it "is not clear" how Barasch would, through her ownership in Williams Oldco, retain an "identical interest" in the Satellites after the mergers, a matter the Court believed "raise[d] issues of fact which are not appropriately decided on a motion addressed to the sufficiency of the pleadings." Wang Aff. Ex. 20 at 10-11. Now that evidence of the full mechanics of the transactions is before the Court and it is clear that Barasch did retain an identical interest in the Satellites, Respondents maintain that there is sufficient undisputed evidence to resolve the issue in favor of Respondents.

are warranted based on what it determines is the appropriate value, the suggestion that the Court may issue such an award now is risible.

That leaves "bad faith." First, even were the Court to rule in Barasch's favor on the merits of this motion – and it should not – the authorities cited herein make it quite clear that Williams has maintained its position in this litigation in good faith and reliance on well settled principles of law. Indeed, it is Barasch who urges the Court to ignore a century of well-established precedent in favor of her thoughts as to what the statute requires.

Second, Barasch's recitation of the conduct supporting a finding of bad faith is, essentially, an "everything but the kitchen sink" review of every imagined slight and hackneyed complaint she can find. Thus, she points to Williams' "failure to inform her of the LOI until August" and "failure to provide transaction documents," MB at 22, without even attempting to explain why those things might be relevant to appraisal rights. She contends that Williams showed *bad faith* by "failing to advise Petitioner in writing that the asset transfer and merger had been approved as required by BCL Section 623(b)," ibid., even though she was physically present at the shareholders' meeting and well aware that the transaction had been approved. Barasch then "doubles down" on her argument that a corporation's dispute of a shareholder's entitlement to appraisal rights creates a *per se* entitlement to attorneys' fees, arguing that the self-same "failures" to initiate a special proceeding or pay 80% of the value is evidence of bad faith. MB at 22. This is not bad faith, and it provides no basis for an award of attorneys' fees.

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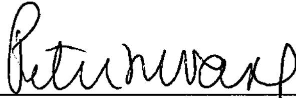
CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court (i) deny Barasch's motion for partial summary judgment; and (ii) grant Williams Oldco's cross-motion for summary judgment.

Dated: March 22, 2011
New York, New York

FOLEY & LARDNER LLP



Peter N. Wang, Esq.
Jeremy L. Wallison, Esq.
Akiva M. Cohen, Esq.
90 Park Avenue
New York, NY 10016
Telephone: 212-682-7474
Fax: 212-687-2329

Attorneys for Respondents