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

07602341

In the matter of the Determination
of the Value of Shares of
Harlem River Yard Ventures, Inc. (now,
Harlem River Yard Ventures II, Inc.)

* * *

Hunts Point Terminal Produce
Cooperative Association Inc.,

Petitioner,

FILED
JUL 16 2007
COUNTY CLERK'S OFFICE
NEW YORK

NOTICE OF PETITION
Index No. ________

v.

Harlem River Yard Ventures, Inc.,
Harlem River Yard Ventures II, Inc., and
Francesco Galesi,

Respondents.

PLEASE TAKE NOTICE that upon the annexed Petition of Hunts Point Terminal Produce Cooperative Association Inc., by their undersigned attorneys, and upon the proceedings herein, the undersigned will move the court, at the Motion Submission Part, Room 130, at the Courthouse located at 60 Centre Street, New York, New York, on September 13, 2007, at 9:30 a.m., (a) for an order pursuant to N.Y. Bus. Corp. Law § 623 granting leave to take pretrial discovery, and (b) as soon thereafter as counsel may be heard after discovery and a trial of disputed facts, and further submissions, for an order pursuant to N.Y. Bus. Corp. Law § 623 determining the fair value of the shares of Harlem River Yard Ventures, Inc. (now, Harlem River Yard Ventures II, Inc.) (the "Company") owned by Petitioner and requiring payment of such fair value to Petitioner for such shares, (c) an order for such other and further relief as is sought in the annexed Petition and (d) such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that any answer and other responsive papers, including any notice of cross-motion, if any, pursuant to CPLR 2214(b), are required to be served, with any supporting papers, upon the undersigned at least seven days before the return date of this Petition, or as otherwise agreed upon by the parties or provided by the court.

Venue of this proceeding is based on the residence of one or more of the parties in the County of New York.

Dated: July 16, 2007

Dechert LLP

By: ______________________
Robert J. Jossen
Adam B. Rowland
30 Rockefeller Plaza
New, York, New York 10112
212-698-3500

Counsel for Petitioner Hunts Point Terminal Produce Cooperative Association Inc.

TO:

Harlem River Yard Ventures, Inc., and
Harlem River Yard Ventures II, Inc.
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New York, New York 10022

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c/o Gersten Savage LLP
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Hunts Point Terminal Produce
Cooperative Association Inc.,

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v.

Harlem River Yard Ventures, Inc.,
Harlem River Yard Ventures II, Inc., and
Francesco Galesi,

Respondents.

Petition for Determination of Fair Value of Shares
<u>Pursuant to N.Y. Bus. Corp. L. § 623 and Related Relief</u>

Petitioner Hunts Point Terminal Produce Cooperative Association Inc. ("Petitioner"), for its petition for judicial determination of the fair value of shares pursuant to N.Y. Bus. Corp. L. § 623 ("Section 623") and for related relief, with respect to Harlem River Yard Ventures, Inc., and its successor Harlem River Yard Ventures II, Inc. (collectively, the "Company" or "HRYV"), and as against the above-captioned respondents ("Respondents"), alleges on knowledge as to its own conduct and on information and belief as to all other matters, as follows:

INTRODUCTION

1. Petitioner has been a 5% shareholder of the Company since its inception, more than 15 years ago. However, Petitioner's shares are now being taken involuntarily through a squeeze-out merger orchestrated by Respondent Francesco Galesi, a sophisticated real estate magnate, and his closely held group of companies and employees, who own and control the balance of the Company's shares.

2. Respondent Galesi has caused the Company to pay no dividends during the past 15 years; siphoned to himself substantial monies and value from the Company; sought to induce Petitioner to give up its shares voluntarily based on an original claimed value that was grossly understated; and has squeezed out Petitioner before the long-term value of the Company could be fully realized. The Company is now seeking to pay Petitioner less for its shares than the "fair value" required under New York law.

Petitioner Seeks A Full Remedy

3. Petitioner brings this proceeding to secure a full remedy:

a. Section 623 entitles Petitioner, after a full review of all pertinent considerations through pretrial discovery and a trial, to have a judicial determination of the "fair value" of its shares.

b. In addition, as permitted by New York law in a Section 623 proceeding, Petitioner asserts related claims for an accounting and breaches of fiduciary duty to ensure that the "fair value" being paid to Petitioner includes Petitioner's proportionate share of any and all monies belonging to the Company, including monies wrongfully siphoned from the Company.

c. Discovery is necessary and appropriate in this proceeding to fully and fairly evaluate the assertions in the Company's *unaudited* financial statements and the appraisals prepared by the Company's valuation expert based on assumptions and information given by Respondents *without independent verification*, and on matters affecting the value of Petitioner's shares that the Company's appraisals *do not address*. Examples of subjects for discovery are reviewed in this Petition, below. Petitioner previously has requested that the Company supply information to aid an evaluation, but the Company has provided only partial information to date. Petitioner seeks additional documentation, and an opportunity to examine persons with knowledge of the facts and the Company's expert.

PARTIES

4. Petitioner Hunts Point Terminal Produce Cooperative Association Inc. is a New York corporation. Petitioner operates the Hunts Point Market in New York; its shareholders include national and local companies that sell produce at the Hunts Point Market.

5. Respondents Harlem River Yard Ventures, Inc. (the "Old Company" or "HRYV I") and Harlem River Yard Venture II, Inc. (the "New Company" or HRYV II") (collectively, the "Company" or "HRYV") are New York corporations. HRYV II is the successor corporation to HRYV I, pursuant to a squeeze-out merger transaction that has brought about this Petition. HRYV I's business is now conducted through HRYV II. HRYV II filed incorporation papers with the Secretary of State specifying its office address in New York County.

6. Respondent Francesco Galesi ("Galesi") resides in New York County. According to the Company, at all relevant times, Galesi personally has owned more than 80% of HRYV's voting shares, and he and five Galesi family trusts collectively have owned 87.4% of all voting and non-voting shares of the Company. Galesi has served as one of HRYV I's three directors and as HRYV's President. Galesi has held himself out as sophisticated in real estate and business ventures, and as personally active and knowledgeable concerning HRYV's operations and plans.

7. Respondent Galesi and the Company have acted through a closely held group of entities and individuals:

a. Galesi Group ("Galesi Group") is an unincorporated business in the control of Galesi. It describes its business operations in a website under the name "Galesi Group," which identifies Galesi as its "Chief Executive Officer" and "Principal," and identifies a network of entities owned by Galesi and persons employed by such entities that it claims are part of the Galesi Group.

b. Galesi Management Corporation ("GMC") is a New York corporation. GMC is owned, controlled and operated by Galesi as part of the Galesi Group. The Company used GMC for certain management services and paid monies to GMC.

c. Rotterdam Ventures Inc. ("RVI") is a New York corporation. RVI is owned, controlled and operated by Galesi as part of the Galesi Group. The Company sent substantial rental income and other monies to be held by RVI in a cash management account.

d. Scotia Holdings, Inc. ("Scotia"), is a New York corporation formed in 2002. In 2004, the Company acquired all shares of Scotia. Scotia is a wholly owned subsidiary of the Company.

e. Anthony M. Riccio, Jr., ("Riccio") resides in New York. Riccio is a former government official. He joined the Galesi Group in 1990, and has provided services to and acted on behalf of Galesi and Galesi Group entities for the past 17 years. Since 1990, Riccio has served as the Company's sole purported full-time managerial employee (other than a few security guards and personal assistants working out of a trailer at the Company's property). Riccio has served as one of the Company's three directors and as its Senior Vice President. According to the Galesi Group website, Galesi also has caused Riccio to work on non-Company matters, including overseeing Galesi's port construction and related upland distribution infrastructure and facilities. According to the Company, Riccio owns approximately 4.5% of the Company's stock (9.8 shares).

f. David M. Buicko ("Buicko") resides in New York. Buicko is a certified public accountant. He joined the Galesi Group in 1982, and he has provided services to and acted on behalf of Galesi and Galesi Group entities for the past 25 years. Galesi has designated Buicko to be the Galesi Group's Chief Operating Officer, and also GMC's Chief Financial Officer (formerly), Chief Operating Officer (currently) and President (currently). In addition to his role in the Galesi Group, Buicko has served as the trustee of Galesi's five family trusts, which the Company claims own more than 40% of the Company's shares (95 shares). The Company claims that Buicko owns 2.5% of its shares (5.4 shares). Buicko has served as one of the Company's three directors and its Executive Vice President.

g. Steven Porter ("Porter") resides in New York. Porter is an attorney admitted to the New York bar. He is also a business executive. He joined the Galesi Group in 1990, and he has provided services to and acted on behalf of Galesi and Galesi Group entities for the past 17 years. Porter has served as a Senior Vice President and as Corporate Counsel for both the Galesi Group and GMC. The Company claims that Porter owns 1% of its shares (2.2 shares). Porter purportedly has provided legal and non-legal services on behalf of the Company.

h. Gerald J. Hennigan ("Hennigan") resides in New York. He is a certified public accountant. He joined the Galesi Group in 1984, and he has provided services to and acted on behalf of Galesi and Galesi Group entities for the past 23 years. Galesi has designated Hennigan to serve, at various times, as the Galesi Group's Assistant Corporate Controller, Controller, Assistant Vice President, Vice President and Chief Financial Officer. Hennigan has served as a Vice President of the Company.

FACTS GIVING RISE TO THE PETITION

The Company and Its Shareholders

8. In or about 1989, Harlem River Yard Ventures, Inc., was formed, as its name suggests, to hold, revitalize and profit from a large piece of commercial/industrial real estate known as the Harlem River Yard.

9. At the outset of the venture, the Harlem River Yard was an underutilized largely fallow tract of land. But, like other similar tracts, it held substantial value: the property was large – approximately 100 acres – in a prime location at the edge of the Bronx, overlooking Manhattan, where major bridges, highways, railways and waterways converge. The New York City government sought out a private entity to develop the property. It agreed to provide the Company with a lease to use 100 acres for approximately 100 years at a highly advantageous rent, and added substantial tax and other economic incentives. The Company thus had a rare opportunity to find substantial commercial or industrial sub-tenants and other uses for a large piece of undeveloped land, and to generate long-term rental income and financial benefits for the Company and its shareholders over the course of a century.

10. Respondent Galesi used Petitioner's assistance to gain the opportunity to pursue the venture. When the venture took shape, Galesi provided Petitioner with 10 shares of the Company's common stock (the "Shares"), which then constituted 5% of the Company's shares. (The Company now claims that, over time, Petitioner's number of shares remained unchanged, but that its percentage ownership was reduced slightly from 5% to 4.6%. Petitioner never approved any dilution of its shares and, despite Petitioner's requests, the Company has not provided Petitioner with any transactional documents explaining how this claimed dilution was accomplished legitimately.)

11. Petitioner is the only "non-Galesi" shareholder. According to the Company, apart from the Shares owned by Petitioner, all other Company shares were originally owned by Galesi, and are now owned by Galesi and his family trusts (87.4%) and, to a lesser extent, three Galesi subordinates, Riccio (4.5%), Buicko (2.5%) and Porter (1%). A portion of the Company's shares are voting shares. Galesi has kept absolute voting control of the Company by retaining personal ownership of more than 80% of the voting shares.

12. Galesi and his group at all times have controlled the Company's day-to-day operations, records, and finances. Petitioner has held shares as a passive long-term owner. Petitioner is not party to a shareholders agreement, or any agreement under which Petitioner obligated itself to provide funds to the Company or to operate the Company.

13. As a shareholder, Petitioner was fully entitled to share the value of the Company and any dividends payable to the shareholders on an equal footing with Galesi and the Company's other shareholders, in proportion to its share ownership.

14. In the more than 15 years of the Company's existence, Galesi caused the Company not to declare or pay any dividends in any year. Accordingly, Petitioner assumed and

expected that the value would build up within the Company, thereby increasing the value of its Shares.

15. As recently as 2007, after holding its Shares for more than 15 years, Petitioner still desired to continue to hold its Shares for the long-term, with the expectation that this long-term investment would yield to it 5% of the long-term value of the Company's real estate assets and income, as a form of "annuity" that would grow at least through the current term of the lease of the Property (i.e., 2092).

16. Because Petitioner was a passive shareholder who expected that the Company would yield substantial dividends and value in the long term, Petitioner placed special trust and reliance in Galesi, consistent with his fiduciary duties as director, officer, and majority shareholder, to manage the Company's business and finances with due care and loyalty, and to maximize the value of the Company and its real estate assets for the benefit of all shareholders.

17. As set forth below, not only have Respondents minimized the value of the Company for purposes of the squeeze-out merger of Petitioner's interests, Respondent Galesi has violated his duties of due care and loyalty.

Procedural Background

18. In March 2007, the Company gave Petitioner a purported Plan of Merger under N.Y. Bus. Corp. L. § 905 ("Plan of Merger"), advising that the Company and Respondent Galesi were moving forward with a squeeze-out merger, such that, upon consummation of the merger transaction, the Petitioner would no longer be a shareholder.

19. The Plan of Merger stated that, in accordance with law, the Company would pay Petitioner the fair value for its Shares, which it then claimed had been most recently valued as $481,010. The Plan of Merger stated that this dollar amount had been established by an appraisal prepared by the Company, using a valuation expert (the "Company Expert"), dated

May 26, 2006 ("Company Appraisal I"). Petitioner previously had questioned and challenged Company Appraisal I, its assumptions, methodology and conclusions, and requested detailed information so as to prudently evaluate the appraisal which, in large part, the Company refused to provide.

20. On or about April 2, 2007, Petitioner timely elected to dissent and filed with the Company a notice to such effect in compliance with N.Y. Bus. Corp. L. § 623 ("Notice of Dissent"). Petitioner filed the Notice of Dissent with the Company within 20 days after the Plan of Merger was given to Petitioner. The Notice of Election contained notice of Petitioner's name and address, the number and classes of shares as to which it dissented and a demand for payment of the fair value of its Shares. Petitioner dissented as to all of the shares as to which it had a right to dissent, held by it of record, and that it owned beneficially. The Notice of Dissent was timely and proper in form under the provisions of BCL Section 623 (a)-(d). Petitioner also submitted its Shares to the Company pursuant to BCL Section 623.

21. BCL Section 623(g) obligated the Company to offer to pay Petitioner the Company's claimed "fair value" for Petitioner's Shares. In its offer, dated April 27, 2007 (the "Offer"), the Company notified the Petitioner that the Company had updated the "fair value" amount that it had previously given in the Plan of Merger, and the amount of its claimed "fair value" was now $902,660 (nearly twice the "fair value" amount of $481,010 stated in the Plan of Merger document six weeks earlier). The new claimed "fair value" purportedly was supported by the same Company Expert who had prepared Company Appraisal I and had now altered his original valuation.

22. BCL Section 623 required the Company to provide, with its Offer, an advance payment to Petitioner equal to 80% of its Offer and a recent balance sheet and profit and loss

statement. The Company did not comply with these requirements in a timely manner. The Company ultimately provided the advance and certain financial documents, albeit late, and only after demand.

23. The Company did not immediately provide Petitioner with a copy of its financial statement for 2006 or its revised appraisal ("Company Appraisal II"). Although these documents were dated, respectively, March 9 and April 5, 2007, and were requested repeatedly by Petitioner (including in the April 2 Notice of Dissent), they were not provided to Petitioner until May 17 and 22, 2007, respectively. This was not until the 30-day period for consideration of the April 27 Offer allotted by BCL Section 623 had nearly expired.

24. Petitioner did not accept the Offer. Petitioner notified the Company that Petitioner had decided that a court should, after an opportunity for pretrial discovery, determine the fair value of Petitioner's Shares, as provided by BCL Section 623.

25. The Company did not file a petition to initiate the court determination of the fair value of the Shares. Thereafter, the Company and Petitioner agreed that Petitioner would initiate the proceedings and both consented to have pretrial discovery before any determination of the fair value of the Shares by the Court. Accordingly, Petitioner files this Petition under BCL Section 623, seeking, after a period of pretrial discovery and trial of disputed facts, a court determination of the fair value of its Shares.

The Company's valuations are inadequate and unreliable, and require scrutiny through discovery before a hearing

26. During the second half of 2006 and first part of 2007, the Company and Respondents sought to persuade Petitioner to accept payment for its Shares based on Company Appraisal I – asserting a "fair value" of $481,010.

27. Petitioner questioned and challenged that number, and the assumptions, methods and conclusions of Company Appraisal I.

28. Based on the limited information provided by the Company, the number appeared radically understated. If Petitioner owned 5% of the Company's shares, a value of $480,000 for its shares implied a total value of the Company of $9.6 million. But the Company had already received approximately $30 million in income from tenants in the past, had current long-term tenants paying $4 million per year, had a third expected tenant under negotiation that would pay $2 million per year, had further income from government use of portions of its property of $5 million, had an expected future payment of $1-2 million for a temporary easement, and had more than 60 acres of additional undeveloped real estate in a prime location overlooking Manhattan. The valuation amount, even before extensive investigation, was not credible.

29. Petitioner made repeated requests to the Company for back-up information and details to evaluate Company Appraisal I and the claimed "fair value."

30. The Company and Galesi declined to provide significant requested information. This created further concern that incorrect information and assumptions were being used.

31. During the approximately 10-month period from Company Appraisal I (dated May 26, 2006) through the Plan of Merger (dated in March 2007), the Company, Galesi and Company Expert did not disclose that the claimed "fair value" in Company Appraisal I was ***radically incorrect or obsolete***. The claimed value was not updated and disclosed to Petitioner until it was a certainty that Petitioner was proceeding to court.

32. The Company and Galesi then abandoned Company Appraisal I, revealed new information, changed assumptions, and with the assistance of the Company Expert, presented Company Appraisal II to support a new "fair value" of $902,660. They claimed that unexpected

changes at the Company in the 10 months since Company Appraisal I had nearly doubled the Company's value.

33. The Company, Galesi and Company Expert did not explain why these alleged radical changes at the Company were not revealed earlier while the Company sought to persuade Petitioner to relinquish its shares based on Company Appraisal I.

34. The radical change in the claimed "fair value" suggests that the Company, Galesi and Company Expert are not reliable or credible in their assessments of "fair value".

35. The Company Appraisals assert that they rely on assumptions and financial statements provided by the Company, but the Company Expert itself acknowledges that they are *not audited* and that there can be "no guarantee [of] the information's reliability." Company Appraisal II (pp. 41-42). The Company Expert acknowledges that, while a publicly traded company's audited financial statements are "normally reliable" (because of the comfort afforded by securities regulations and independent auditors), in this instance, the information is controlled by a majority shareholder in a privately held corporation and "[t]he Company did not engage an independent source to prepare reviewed or audited financial statements." Id.

36. The Company, Galesi and Company Expert created reason for distrust. They failed to disclose or support the new claimed "fair value" with documentation in the ten months between Company Appraisal I and Company Appraisal II, or to disclose significant documentation of the changes at the time of or immediately after the completion of Company Appraisal II.

37. After Petitioner notified the Company that Petitioners planned to seek attorneys' fees for such bad faith conduct, as provided by New York statute, the Company and Galesi began to provide more requested back-up documentation to evaluate.

38. However, the Company still continues to withhold documentation sought in Petitioner's prior requests, including information that is necessary and usual for a valuation analysis. This information is important for Petitioner's own independent valuation.

<u>Company Appraisal II contains significant shortcomings that generate a "fair value" that is materially understated</u>

39. Company Appraisal II materially understates the "fair value" of Petitioner's Shares. Its assumptions, omissions and methods appear to be engineered to generate an understated value. This much is already evident, even though Petitioner lacks complete and appropriate information to fully evaluate Company Appraisal II prior to pretrial discovery. Examples are reviewed below, subject to further information that will be developed through discovery and at a hearing.

A. <u>Real estate holdings inappropriately valued by the Company at $0.</u>

40. Company Appraisal II neglects to assign any value whatsoever to a large portion of the Company's large real estate holdings.

41. The Company's largest asset is real estate consists of approximately 107 acres of commercial/industrial property at a prime location overlooking Manhattan (the "Property"). The Company owns 8 of the acres and holds the balance under a lease from the government on highly favorable terms for approximately a century, through 2092. Shortly before 2000, the Company sub-let 30 acres of the Property to two tenants under long-term agreements (the New York Post, 1999-2092; and Waste Management, Inc., 1997-2076), which generate rent payments to the Company of approximately $4 million per year (already totaling more than $33 million through the time of the merger). After these tenants became established and uncertainties of 9/11 dissipated, the Company resumed marketing other portions of the Property with success. In 2006-07, the Company sub-let a third site of 10.2 acres under a long term agreement (Federal

Express), with a payment schedule that escalates to more than $2 million per year. Company Appraisal I valued the site as a non-operating asset (using its expected income, discounted by 50% due to the Company Expert's view that it had only a 50% chance of the planned tenant ripening). The Company's Site Plan designates a fourth site of 12.5 acres for development (once considered for use by Home Depot) (the "Fourth Site"). This accounts for approximately half the Property's 107 acres. Of the remaining undeveloped property, a small portion of the property has been given back to government use, generating a payment of $5 million in 2001. The Company is working on an agreement under which the government will pay another $1-2 million for an easement pertaining to approximately 2 acres.

42. The balance of the Property (approximately 50 acres) and the Fourth Site (approximately 12.5 acres) are given absolutely no value in Company Appraisal I or II:

- ***The 12.5 acre Fourth Site.*** Company Appraisal II gives the Fourth Site a value of $0. Company Appraisal II is silent on the Company's plans for this site at the time of the squeeze-out merger, and does not even identify this site with particularity. Now that the Federal Express transaction is under way for the third site, the Fourth Site reasonably should be expected to be sub-let next. On March 12, 2007 (two days before the Plan of Merger, and approximately three weeks before Company Appraisal II), an article reported a Company officer's boasts concerning the Company's successful development of the first three sites and stated that the Company was "reportedly 'in discussion' with a few interested companies" for this 12.5 acre site.[1] Either as a source of expected income or as a non-operating real estate holding, a "fair value" for Petitioner's Shares cannot

[1] J. Taylor, "Community concerned over Harlem Yards Plan," The Columbia Journalist (Mar. 12, 2007) (http://www.columbiajournalist.org/bronxbeat/2005/article.asp?subj=bronx&course=bronxbeat&id=1415).

simply ignore this significant asset and planned source of income. Indeed, it is reasonable to expect that this site will generate income that is comparable (or higher) than the Federal Express site, since the two sites are adjacent sites with comparable characteristics and the Fourth Site is 23% larger in size.

- ***The undeveloped 50 acres.*** The Property includes substantial acreage along the waterfront boundary of the Property (the "Waterfront Sites"). Company Appraisal II values the entirety of this acreage at zero dollars ($0). In addition, along the street-side boundary of the Property, a large site was once considered for use as an intermodal transportation and distribution facility ("Intermodal Site"). Company Appraisal II likewise values the Intermodal Site at zero dollars ($0). Regarding the Intermodal Site, Company Appraisal II states that it was originally designated in an agreement between the Company and the government for a planned use, but this has not materialized. Since the Company claims the original plan is stale, it can now avail itself of its contractual right to modify or deviate from the original development plans by application to the government (which Company Appraisal II also acknowledges, p. 6). At the time of the Plan of Merger, the Company's officers and directors were either pursuing such plans or had a fiduciary duty to do so.

43. The Company has not provided information on the current plans and communications concerning the Fourth Site or any of the undeveloped 50 acres, including the Waterfront Sites and Intermodal Site.

44. These extensive real estate holdings add value to the Company and cannot reasonably be assigned a value of $0. If the Company's position is that it has no plans or

expectations for generating income from this portion of the Property, such that this portion of the Property adds no value to the Company, then the Company should tender its interest in that portion of the Property back to the government or to Petitioner for $1; it has not done so.

B. The Waste Management Site's Expected Income.

45. Company Appraisal II in significant part derives a value for the Company and Petitioner's Shares based on expected future income from tenants, including expected rent from the Waste Management site. For the Waste Management site, the Company Expert assumes virtually unchanged future income, and even notes the possibility of a reduction in income. In actuality, rent payments are increasing and it reasonably should be expected that the rent payments will increase substantially under conditions known at the time of the merger. Public records reveal that, in 2004, Waste Management applied for and received a government permit to raise the quantity of waste processed at the facility from 3000 to 4000 tons per day. Waste Management thus evidently plans to increase the tons processed per day from 3000 to 4000 tons. Under the Company's sublet agreement formula, the payments are tied to the tonnage of waste processed (and, further, the additional rent per ton increases as the total number of tons increases). This substantially increases the expected rent income from Waste Management. Yet, Company Appraisal II appears to have been based on tonnage in years when Waste Management was processing in the range of 3000 tons per day (or less), not 4000 tons per day. (The Company has not provided Petitioner with any information on these matters in the time period leading up to the merger.

46. The value that Company Appraisal II attributes to the Waste Management sub-let is understated.

C. ***The Federal Express Site.***

47. In Company Appraisal I, the negotiations with Federal Express were under way. The Company Expert chose to assume a 50% probability that the transaction with Federal Express would fail, and discounted the value that this tenant would add to the Company by 50%. Accordingly, Company Appraisal I (p. 32) added $2.225 million to the pre-discounted value of the Company attributable to the planned Federal Express sub-let.

48. Company Appraisal II restated numbers. It added $8.8 million to the pre-discounted value of the Company attributable to the Federal Express sub-let. The large distinction between $2.2 million and $8.8 million – a factor of 4 times – suggests that the Company Expert was wrong with more than merely his pessimistic assumption of a 50% probability of failure.

49. The value that Company Appraisal II attributes to the Federal Express sub-let is still understated.

D. ***The Scotia Property.***

50. At the time of the Plan of Merger, the Company, through its wholly-owned subsidiary, Scotia, planned and expected to generate substantial income proceeds from a six-screen movie theatre and 33,600 square feet of office space in a 60,200 square-foot 4-story building owned and developed by Scotia in Schenectady, New York (the "Scotia Property"). The additional value of this operation should have been taken into account in valuing Petitioner's interest in the Company, whether by increased income or asset value.

51. The Schenectady Metroplex Development Authority Project (MDAP) announced the project in May 2005 and released a project summary dated in November 2005. At the time of the Plan of Merger, the building was nearly complete and reportedly expected to open for

business in May 2007. According to MDAP's Project Summary, MDAP sold the land (0.6 acres in downtown Schenectady) to Scotia for "nominal consideration." Scotia's development costs were minimized through substantial government funding, special loan terms, and funding by the movie theatre tenant. The income that Scotia can plan and expect to generate from the Scotia Property is substantial: MDAP says that the lease calls for rent payments ranging from $150,000 to $450,000 per year based on theater attendance; rent payments in excess of $160,000 per year "are distributed on a 50-50 revenue sharing basis between [MDAP] and Scotia Holdings until the [MDAP] loan is paid in full." This does not appear to include rent for the office space that Respondents were marketing at the time of the Plan of Merger, including on the Galesi Group's website.

52. Company Appraisal I (in May 2006) did not mention the appraisal of the Scotia Property (dated in March 2006), and did not even identify the property or disclose that Scotia was in the midst of a large development project (under way since November 2005, or earlier). It values Scotia as a non-operating asset worth only $200,000, without any details of the Scotia Property or project whatsoever.

53. Company Appraisal II (in April 2007) now discloses the project in considerable detail, and, with much analysis, concludes that Scotia adds only $370,000 to the Company's pre-discounted value, even though it acknowledges that a real estate appraisal of Scotia's property was prepared in March 2006, which valued the property at $7.5 million.

54. The value that Company Appraisal II attributes to Scotia is understated.

D. <u>Other factors contribute to an understated "fair value."</u>

55. In addition to ignoring sources of income and non-operating assets, Company Appraisal II "normalizes" financial information, and uses formulas, rates and discounts unfairly

and artificially to understate the total value of the Company and the computed value of Petitioner's shares. After completion of discovery of underlying facts, Petitioner will submit an expert's report to recompute the value using proper assumptions, facts, formulas, rates and discounts. The value is understated, inter alia, by the following:

a. *"Normalized" expected annual income.* Company Appraisal II uses an inappropriately low "normalized" income from which to derive the value of the Company's operating assets. Among other things, the valuation is based on a blend of lower incomes from existing tenants in past years, rather than being based appropriately on expected future income at the time of the merger. It also ignores expected income from portions of the Property that do not currently generate income, but can reasonably be expected to generate income.

b. *"Normalized" expected annual expenses.* Company Appraisal II uses inappropriately high "normalized" expenses from which to derive the value of the Company's operating assets. Among other things, Company Appraisal II acknowledges that Galesi and his group of entities have been charging the Company "management fees" that substantially exceed market rates for management services. The Company Expert normalizes the expense for "management fees" at what it deems to be the correct rate of 5% of rental income. The Company Expert does not establish that, given the low level of necessary services for the current tenants, and the substantial rents, why the percentage should not be lower. The Company Expert also does not establish why other categories of expenses that are typically covered by a management fee should not also be "normalized." Other expenses appear to duplicate what is already supposed to be covered by a management fee. The Company Expert also does not explain the erratic changes in the fee from year to year, and a dramatic increase in fees charged by Respondent Galesi's entities in recent years.

c. *Capitalization formula and rate.* Company Appraisal II (p. 32) uses inappropriate assumptions in the capitalization formula and rate that it uses to derive a value for the Company's operating assets from the "expected cash flow." Even slight changes in the formula's assumptions significantly affect the computed value of the Company's operating assets. Company Appraisal II chose assumptions that generate a significantly understated value; correcting these assumptions (or employing a different capitalization approach) will produce a more realistic value.

d. *Excess working capital.* Company Appraisal II (p. 33) does not provide any computation for the number it uses as "excess working capital" ($2.5 million), and this number appears understated. The Company has received $40 million or more income over the past years (plus government funding), and no dividends have been paid to Petitioner. Company Appraisal II does not state that the Company Expert undertook an investigation of the dissipation of this income through claimed "expenses" during past years. Company Appraisal II acknowledges at least that Respondent Galesi has caused the Company to make payments for "management fees" that greatly exceed normal market rates for such services (twice the norm in some years). Based on that assessment alone, the Company Expert should have, but apparently did not, carefully investigate the legitimacy and reasonableness of all transfers, credits and payments to the majority shareholder and entities and persons affiliated with him. The Company Expert should have determined independently all amounts inappropriately or unreasonably diverted from the Company to Respondent Galesi and his entities over the years, or not properly shown on the Company's unaudited financial statements, and build back such amounts, pro rata, into the "fair value" of Petitioner's Shares, through an addition to "excess working capital" or otherwise.

e. *Discount of 45% for taxes.* Company Appraisal II uses an inappropriately high discount of 45% for taxes. Among other considerations, this assumed tax rate is higher than the actual taxes paid in relation to the income indicated in the Company's financial statements in past years. The Company Expert does not state that he even looked at the Company's state income tax returns, or any tax credits or benefits that would reduce the Company's tax liabiity.

f. *Discount of 30% for purported "lack of marketability."* Company Appraisal II discounts the value of the Company by 30% for "lack of marketability." This discount is a disguised minority discount (prohibited by New York law), a discount already incorporated into other portions of the analysis (and thus double-counting), or a discount that, for other reasons, properly should be removed or reduced substantially. Economically, in a squeeze-out merger that Petitioner did not seek or desire, this discount prevents Petitioner from receiving its actual proportionate value of the Company's shares; instead, it shifts 30% of the pro rata value of Petitioner's Shares to the majority shareholder, Respondent Galesi. If this "discount" is accepted, it will enable a majority shareholder to cause a corporation to pay no dividends for 15 years, then compel the other shareholder to relinquish his shares involuntarily in a squeeze-out merger, and then further enrich himself by 30% of the value of the forced-out shareholder's shares. Stated differently, through this discount, the Company reduces the financial interest in a corporation held by a 5% shareholder to a 3.5% interest, and increases a 95% shareholder to a 96.5% interest.

First Claim For Relief
(BCL Section 623)

56. Petitioner repeats and realleges each of the allegations set forth above in paragraphs 1 to 55 as if fully set forth herein.

57. Petitioner complied with N.Y. Bus. Corp. L. § 623 in electing to dissent and to seek a judicial determination of the fair value of Petitioner's Shares.

58. Petitioner is entitled to an order requiring the Company to pay, in addition to the full amount of the Offer, the further amount necessary to provide Petitioner with payment of the fair value for its Shares, as fixed by the Court based on the considerations set forth in N.Y. Bus. Corp. L. § 623(h)(4), together with interest pursuant to N.Y. Bus. Corp. L. § 623(h)(6), and an award of its cost and expenses, including fees and expenses of its counsel and any expert, pursuant to N.Y. Bus. Corp. L. § 623(h)(7).

Second Claim For Relief
(Accounting)

59. Petitioner repeats and realleges each of the allegations set forth above in paragraphs 1 to 58 as if fully set forth herein.

60. Petitioner is entitled to an accounting of all income and assets of the Company and Respondent Galesi, to determine the extent to which assets and income of the Company have been diverted to Galesi, who is a fiduciary of the Company, and entities owned and under the control of Respondent Galesi.

Third Claim For Relief
(Breach of Fiduciary Duty)

61. Petitioner repeats and realleges each of the allegations set forth above in paragraphs 1 to 60.

62. Respondent Galesi is a director and officer of the Company, who owes fiduciary duties to the Company and to all of its shareholders, including Petitioner.

63. The Company Expert acknowledges that the Company's finances and business have been commingled extensively with the Galesi entities. Company Appraisal II states, for example:

> Various aspects of the Company's operations, including accounting and bookkeeping, payroll, finance, risk management, information technology, compliance, legal, human resources, purchasing, and others are managed by affiliated companies as part of the consolidated operations of the Galesi Group. …
>
> The Company participates in a consolidated cash management program, whereby cash is swept into a cash management system [and] recorded on the Company's books as a receivable from affiliate.

64. During the course of the time period set forth herein, Respondent Galesi breached his fiduciary duties, and knowingly and substantially assisted, aided and abetted by the Galesi entities, has engaged in extensive self-dealing and used a variety of devices and machinations, to dissipate and siphon off to himself substantial income and assets of the Company over the past years, including a portion of more than $40 million received from tenants or the government by the Company. Among other things, Respondent Galesi has caused the Company:

a. to deposit its income revenue and cash assets into commingled "cash management" accounts maintained by the Galesi entities, so that the Company's own financial books and records could not be used to fully monitor the use of funds;

b. to make "loans" and "advances" to the Galesi entities, who then have paid deficient interest;

c. to take "loans" and "advances" from the Galesi entities, and then to pay excessive "interest" to the Galesi entities on such loans and advances;

d. to pay excessive "guarantee fees" to Galesi.

e. to pay full-time salary to Company personnel who concurrently performed services on non-Company projects for the Galesi entities;

f. to pay the Galesi entities "management fees" and other "expenses" that normally would be covered by a management fee, in amounts exceeding normal rates for management fees and excessive for the services required; and

g. to pay Galesi entities' "expenses" and "overhead" on an allocated basis used in actuality to cover non-Company projects and operations.

65. The aforesaid conduct has injured Petitioner. By siphoning off the Company's assets and income from the Company to Respondent Galesi, Respondent Galesi not only enriched himself at the expense of the Company, but also reduced the appearance of assets and net income reported on the Company's "books," and the apparent value of the Company and its shares. Petitioner is entitled to damages, payable by Respondent Galesi, equal to any amount by which the wrongfully diverted funds have reduced the amount paid to Petitioner as the "fair value" of Petitioner's Shares, or to such other equitable relief as is necessary to restore to Petitioner the "fair value" of Petitioner's Shares.

WHEREFORE, Petitioner seeks the following relief:

a. an Order authorizing pretrial discovery in this proceeding pursuant to N.Y. Bus. Corp. L. § 623;

b. an Order, after pretrial discovery and a hearing of disputed facts, and further submissions, determining and fixing the "fair value" of Petitioner's Shares in excess of the Company's Offer of $902,660, and requiring the Company to pay Petitioner such "fair value" in accordance with N.Y. Bus. Corp. L. § 623, together with interest;

c. an Order further requiring Respondent Galesi to pay any award of additional damages as determined by the Court;

d. an Order awarding Petitioner costs, including attorneys' fees and expert costs, in accordance with N.Y. Bus. Corp. L. § 623; and

e. an Order granting such other relief as the Court deems just and proper.

Dated: July 16, 2007

DECHERT LLP

By ______________________
Robert J. Jossen
Adam B. Rowland
30 Rockefeller Plaza
New York, New York 10112
212-698-3500

Attorneys for Petitioner

Verification

I, Michael Shapiro, being duly sworn, deposes and says: I am an officer of Hunts Point Terminal Produce Cooperative Association Inc., which is incorporated in New York. The foregoing Petition is true to my knowledge, except as to matters alleged on information and belief, which I believe to be true.

Michael Shapiro

Sworn to before me this
16th day of July 2007.

Notary Public

JEFFERSON V. HOLDER
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01H05029800
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES AUGUST 05, 2007